STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

BARRY ROBERTS AND GLORIA MEREDITH TRUST,		
Petitioner,		
v.	**OGC CASE NO.**	**19-1865**
	DOAH CASE NO.	**20-2473**
JULIA FONDRIEST AND STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,		
Respondents.		
SHERRI CRILLY,		
Petitioner,		
v.	**OGC CASE NO.**	**20-0071**
	DOAH CASE NO.	**20-2474**
JULIA FONDRIEST AND STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,		
Respondents.		
JENNIFER DEMARIA,		
Petitioner,		
v.	**OGC CASE NO.**	**20-0004**
	DOAH CASE NO.	**20-2535**
JULIA FONDRIEST AND STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,		
Respondents.		

CONSOLIDATD FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on February 18, 2021, 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. Petitioners, the Barry Roberts and Gloria Meredith Trust (the Trust), Sherri Crilly (Crilly), and Jennifer DeMaria (DeMaria) (collectively the Petitioners, or individually, the Trust, Crilly, or DeMaria) timely filed exceptions on March 4, 2021. The Respondents Julie Fondriest (Fondriest or Respondent) and DEP timely filed a joint response to the Petitioners' exceptions on March 10, 2021.

This matter is now before the Secretary of the Department for final agency action. [1]

BACKGROUND

On December 10, 2019, DEP issued an environmental resource general permit and sovereignty submerged lands letter of consent to Respondent Julia Fondriest, approving an 800-square-foot dock from which to launch non-motorized vessels (2019 Approval). Pursuant to extensions of time, Petitioners the Trust filed a petition for administrative hearing on January 30, 2020; Petitioner DeMaria filed a Verified Petition for Formal Administrative Hearing on January 31, 2020; and Petitioner Crilly filed a Verified Petition for Formal Administrative Hearing on February 27, 2020. The petitions were referred to DOAH on May 26, 2020, and respectively assigned Case Nos. 20-2473, 20-2535, and 20-2474. On June 4, 2020, the ALJ consolidated the cases for hearing and issuance of her RO.

[1] The Secretary of the Department is delegated the authority to review and take final agency action on applications to use sovereignty submerged lands when the application involves an activity for which the Department has permitting responsibility. *See* Fla. Admin. Code R. 18-21.0051(2)(2020).

The ALJ scheduled the final hearing for July 9 and 10, 2020, in Key West, Florida. Due to the COVID-19 pandemic and the parties request for a continuance, the ALJ continued the hearing until September 14 and 15, 2020, to be conducted by Zoom Conference.

On September 8, 2020, DEP filed a motion for continuance to enable DEP to conduct a re-review of the project for compliance with the aquatic preserve statutes and rules.

On September 11, 2020, Fondriest filed a revised application with DEP, requesting to reduce the size of the proposed structure to under 500 square feet (the Dock); a verification of exemption from an ERP permit under section 403.813(1)(b), Florida Statutes,[2] and Florida Administrative Code Rule 62-330.015(5)(b); and authorization to use sovereignty submerged lands in accordance with chapters 253 and 258, Florida Statutes, and chapters 18-20 and 18-21 of the Florida Administrative Code.

On October 9, 2020, the Trust, DeMaria and Crilly filed amended Petitions.

DOAH held the final hearing on October 19, 22, and 29, and November 10, 2020, by Zoom Conference. Respondent Fondriest presented the testimony of Hans Wilson and Sandra Walters. DEP presented the testimony of Nicole Charnock and Megan Mills. Petitioners presented the testimony of Sherri Crilly, Barry Roberts, Michael Czerwinski, Gloria Meredith, Julia Fondriest, Jennifer DeMaria, and Harry Appel.

The parties timely filed proposed recommended orders on November 30, 2020. The ALJ gave due consideration to the proposed recommended orders in preparing the RO.

[2] The Petitioners stipulated that the Dock qualified for the permitting exemption under section 403.813(1)(b) of the Florida Statutes.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department issue a final order granting Respondent Fondriest's application for a Letter of Consent to Use Sovereignty Submerged Lands and verifying that the Dock is exempt from the requirement to obtain an environmental resource permit pursuant to section 403.813(1)(b), Florida Statutes. (RO at p. 55). In doing so, the ALJ found that the Dock will meet the applicable requirements of chapters 18-20 and 18-21 of the Florida Administrative Code. (RO ¶¶ 230, 256). The ALJ concluded that the applicant, Julia Fondriest, demonstrated by competent, substantial evidence that the proposed Dock meets the applicable statutory and rule standards and requirements to authorize a private residential single-family dock in an RPA 3 area of an aquatic preserve.

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2020); *Charlotte Cnty. v. IMC Phosphates Co*., 18 So. 3d 1079, 1082 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61, 62 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence as to each essential element and as to its admissibility under legal rules of evidence. *See e.g*., *Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996); *Nunez v. Nunez*, 29 So. 3d 1191, 1192 (Fla. 5th DCA 2010).

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

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

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield v. Dep't of Health*, 805 So. 2d 1008, 1012 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward Cnty.*, 746 So. 2d 1194, 1197 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1141-142 (Fla. 2d DCA 2001). If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded and the

item treated as though it were actually a conclusion of law. *See, e.g*., Battaglia Properties v. Fla. Land and Water Adjudicatory Comm'n, 629 So. 2d 161, 168 (Fla. 5th DCA 1994). However, the agency should not label what is essentially an ultimate factual determination as a "conclusion of law" to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Prof'l Eng'rs*, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g*., *Suddath Van Lines, Inc. v. Dep't of Env't. Prot*., 668 So. 2d 209, 212 (Fla. 1st DCA 1996). The Department is charged with enforcing and interpreting chapter 373, Florida Statutes, and chapters 253 and 258, Florida Statutes, on behalf of the Board of Trustees. As a result, DEP has substantive jurisdiction over interpretation of these statutes and the Department's rules adopted to implement these statutes.

Agencies do not have jurisdiction, however, to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Prof'l Regulation*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281-82 (Fla. 1st DCA 1985). Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio*, 622 So. 2d at 609.

RULINGS ON EXCEPTIONS

In reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." *See* § 120.57(1)(k), Fla. Stat. (2020). The

agency, however, need not rule on an exception that "does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." *Id.*

A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Env't. Coal. of Fla., Inc. v. Broward Cnty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. Ctr., Inc. v. State of Fla., Agency for Health Care Admin*., 847 So. 2d 540, 542 (Fla. 4th DCA 2003). However, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction, even when exceptions are not filed. *See* § 120.57(1)(l), Fla. Stat. (2020); *Barfield,* 805 So. 2d at 1012; *Fla. Pub. Emp. Council, v. Daniels,* 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

RULINGS ON THE PETITIONERS' EXCEPTIONS

The Department will address the Petitioners' exceptions to paragraphs from the Recommended Order in the order presented in the exceptions.

Petitioners' Exception to Paragraphs 73-78 and 226-230.

The Petitioners take exception to the findings of fact in paragraphs 73-78 and the mixed findings of fact and conclusions of law in paragraphs 226-230 of the RO that relate to the ALJ's finding that the Dock is located within a Resource Protection Area 3 as defined in rule 18-20.003 of the Florida Administrative Code.

Rule 18-20.003 defines three categories of Resource Protection Areas (RPA) for the purpose of imposing restrictions and conditions on the use of sovereign submerged lands within aquatic preserves:

> (54) "Resource Protection Area (RPA) 1" – Areas within the aquatic preserve which have **resources of the highest quality** and condition for that area. These resources may include, but are not limited to corals; marine grassbeds; mangrove swamps; salt-water marsh; oyster bars; archaeological and historical sites; endangered or threatened species habitat; and colonial water bird nesting sites.
> (55) "Resource Protection Area 2" – Areas within the aquatic preserves which are in transition with either declining resource protection area 1 resources or new pioneering resources within resource protection area 3.
> (56) "Resource Protection Area 3" – Areas within the aquatic preserve that are characterized by the **absence of any significant** natural resource attributes.

Fla. Admin. Code R. 18-20.003(54)–(56)(2020) (emphasis added).

The Petitioners take exception to the ALJ's finding that the Dock is located in an RPA 3, contending that the ALJ should have found that the Dock is located in an RPA 1. The Petitioners also allege that the "ALJ improperly adds words that are not in the Rule, (i.e., 'significant' habitat), to the FAC Rule definition in Findings 73-78 and Conclusions of Law 226 and 230 . . . The definition of RPA 1 in the Rule does not use the words(sic) 'significant' nor does it require endangered species habitat to be 'significant' on a statewide basis to qualify as an RPA 1." Petitioners Exceptions at p. 2. The Petitioners contend that the Dock must be classified as an RPA 1, because the ALJ acknowledged in paragraph 64 of the RO that two types of endangered sea turtles use the beach above the mean high water line (MHWL) along Long Beach Drive for nesting at a relatively low nesting density.

The Petitioners' analysis is flawed and not consistent with chapter 18-20's definitions of RPA 1, RPA 2 and RPA 3. Contrary to the Petitioner's exception, the ALJ did not add words that are not in the rule. Instead, the ALJ used the term "significant" as it appears in the definition of RPA 3 areas. As defined in rule 18-20.003(54), and recited above, RPA 1 areas are defined to have "**resources of the highest quality**. . . ." Fla. Admin. Code R. 18-20.003(54)(2020) (emphasis added). Conversely, rule 18-20.003(56) defines RPA 3 areas as ones that have "the

absence of any significant natural resources attributes." Fla. Admin. Code R. 18-20.003(56) (2020) (emphasis added).

The Petitioners appear to take exception to the finding in paragraph 73 that "although sea turtles nest on the beach along Long Beach Drive, this area does not constitute significant sea turtle nesting habitat, and there is no significant food source for adult or juvenile sea turtles in the vicinity of the Dock." RO ¶ 73. Contrary to the Petitioners' exception, the ALJ's findings in paragraph 73 are supported by competent substantial evidence. (Walters, T. Vol. 6, pp. 913-14, 914-15).

The Petitioners appear to take exception to the findings in paragraph 74 that "The biological resource assessments also showed that no transitioning resources are present at the location, or in the vicinity, of the Dock. . . . Thus, the evidence shows that the Dock will not be located in an RPA 2." RO ¶ 74. Contrary to the Petitioners' exception, the ALJ's findings in paragraph 74 are supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 234, 247-48).

The Petitioners take exception to the findings in paragraph 75 of the RO, which reads in its entirety that "Because there are no significant natural resource attributes or transitioning resources in the footprint and the immediate vicinity of the Dock, it is determined that the Dock will be located in an RPA 3." RO ¶ 75. Contrary to the Petitioners' exception, the ALJ's findings in paragraph 75 are supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 244-47; Carnock, T. Vol. 3, pp. 349-50; Mills, Vol. 3, pp. 396-398).

The Petitioners' title to this section identifies that they take exception to the findings in paragraph 76; however, their exception does not reference any facts or concepts in paragraph 76 of the RO. An agency need not rule on an exception that does not identify the legal basis for the

exception. § 120.57(1)(k), Fla. Stat. (2020). This alone is a sufficient basis to reject the Petitioners' exception to paragraph 76 of the RO.

The Petitioners take exception to the findings in paragraph 77 of the RO, which reads in its entirety that "These rules make clear that determining whether an activity will be located in an RPA 1, 2, or 3 necessarily entails a site-specific resource assessment to determine the type and quality of habitat, and the conditions present, at that specific site." RO ¶ 77. Contrary to the Petitioners' exception, the ALJ's findings in paragraph 77 are supported by competent substantial evidence. (Mill, T. Vol. 3, p. 389). Moreover, their exception does not reference any facts in paragraph 77 of the RO. An agency need not rule on an exception that does not identify the legal basis for the exception. § 120.57(1)(k), Fla. Stat. (2020). This alone is a sufficient basis to reject the Petitioners' exception to paragraph 77 of the RO.

The Petitioners take exception to the findings in paragraph 78 of the RO, which reads in its entirety that "As discussed above, the site-specific biological assessments conducted show that the Dock will be located in an RPA 3, and Petitioners did not present any site-specific evidence to rebut that classification." RO ¶ 78. The Department concludes that paragraph 78 of the RO contains mixed findings of fact and conclusions of law. Contrary to the Petitioners' exception, the ALJ's findings in paragraph 78 are supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 234-35; Mills T. Vol. 3, pp. 392: 3-5, 395-98, Joint Ex. 1, Bates p. 2979-82). Moreover, the Department concurs with the ALJ's application of her findings to the definitions of RPA 1, RPA 2 and RPA 3 located in rule 18-20.003.

The Petitioners take exception to the conclusion of law in paragraph 226 of the RO, which concludes that the proposed Dock will meet all applicable standards and requirements in

rule 18-20.004. RO ¶ 226. The Department concludes that paragraph 226 of the RO is a mixed statement of law and fact.

The Petitioners disagree with the ALJ's findings and conclusion that the Dock will meet all applicable rule requirements in rule 18-20.004 and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623. Contrary to the Petitioners' exception, the ALJ's findings in support of conclusion of law paragraph 226 are supported by competent substantial evidence. (Mills, T. Vol. 3, pp. 385, 389-95). The Department also concurs with the ALJ's conclusion of law that based on the findings in the RO, the proposed Dock will meet all applicable rule requirements in rule 18-20.004.

The Petitioners take exception to the conclusion of law in paragraph 230 of the RO, which concludes that the proposed Dock will meet all applicable requirements of chapter 18-20. The Department concludes that paragraph 230 of the RO is a mixed statement of law and fact.

The Petitioners disagree with the ALJ's findings and conclusion that the Dock will meet all applicable requirements in chapter 18-20 and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting

a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623. Contrary to the Petitioners' exception, the ALJ's findings in support of conclusion of law paragraph 230 are supported by competent substantial evidence. (Wilson, T. Vol. 1, pp. 126-56; Mills, Vol. 3, p. 385, 434). The Department also concurs with the ALJ's conclusion that based on the foregoing findings in the RO, the proposed Dock will meet all applicable rule requirements in chapter 18-20, Florida Administrative Code.

The Petitioners disagree with the ALJ's findings in paragraphs 73-78, and 226-230 of the RO, and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraphs 73-78 and 226-230 is denied.

Petitioners' Exception to Paragraph 70.

The Petitioners take exception to the findings of fact in paragraph 70 of the RO. Paragraph 70 merely summarizes the definition of RPA 1 as quoted above. Paragraph 70 of the RO reads, in its entirety:

> 70. The RPA 1 classification applies to areas within an aquatic preserve that have resources of the highest quality and condition. Areas classified as RPA 1 are characterized by the presence of corals, marine grassbeds, mangrove swamps, salt marshes, oyster bars, threatened or endangered species habitat, colonial water bird nesting sites, and archaeological and historical sites.

RO ¶ 70. While contained within the Findings of Fact section of the RO, paragraph 70 of the RO is a recitation of the RPA 1 definition in rule 18-20.003(54); and thus, is in reality a conclusion of law consistent with the definition of RPA 1 in rule 18-20.003(56) of the Florida Administrative Code.

Based on the foregoing reasons, the Petitioners' exception to paragraph 70 is denied.

Petitioners' Exception to Paragraphs 73-78.

The Petitioners reiterate their exception to the findings of fact in paragraphs 73-78 of the RO that relate to the ALJ's finding that the Dock is located within a Resource Protection Area 3 as defined in rule 18-20.003 of the Florida Administrative Code.

As explained above, the Petitioners take exception to the ALJ's finding that the Dock is located in an RPA 3, contending that the ALJ should have found that the Dock is located in an RPA 1. Contrary to the Petitioners' exception, the ALJ's findings in paragraph 78 are supported by competent substantial evidence. *See* the Departments identification of the competent substantial evidence identified above in response to the Petitioners' initial exception to the findings of fact in paragraphs 73-78 of the RO.

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraphs 73-78 is denied.

Petitioners' Exception to Paragraph 75, footnote 7.

The Petitioners take exception to the findings of fact in footnote 7 to paragraph 75 of the RO. Footnote 7 to paragraph 75 of the RO reads, in its entirety:

> 7. Some portions of the CBAP do contain seagrass beds, offshore coral patch reefs, and mangrove swamp communities, and provide habitat for protected species, including the Key Deer and colonial water birds, and, thus, merit an RPA 1 classification. By contrast, none of these habitats and conditions are present at the location, or in the vicinity, of the Dock.

RO ¶ 70, footnote 7.

Contrary to the Petitioners' exception, the ALJ's findings in footnote 7 to paragraph 75 are supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 244-47; Carnock, T. Vol. 3, pp. 349-50; Mills, Vol. 3, pp. 396-398).

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraph 75, footnote 7 is denied.

Petitioners' Exception to Paragraph 66.

The Petitioners take exception to the findings of fact in paragraph 66 of the RO, which reads, in its entirety: "No competent, credible evidence was presented showing that significant sea turtle food sources are present in the footprint, or immediate vicinity, of the Dock." RO ¶ 66.

Contrary to the Petitioners' exception, the ALJ's findings in paragraph 66 of the RO are supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 913-15).

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraph 66 is denied.

Petitioners' Exception to Paragraphs 63 and 67.

The Petitioners take exception to the findings in paragraph 63 of the RO that the proposed Dock will not affect the ability of the Key Deer to traverse and forage on the beach. The Petitioners also take exception to the findings in paragraph 67 of the RO that the proposed Dock will not adversely affect the habitat value of the beach on Fondriest's property for nesting sea turtles and their hatchlings.

The Petitioners present other record evidence, including the Federal Endangered Species Act that is not applicable to issuance of this state authorization, and request the Department to reweigh the evidence. Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraphs 63 are supported by competent substantial evidence. (Wilson, T. Vol. 1, pp. 116-17; Walters, T. Vol. 2, pp. 295-98). In addition, the ALJ's findings of fact in paragraph 67 are supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 218-19).

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraphs 63 and 67 is denied.

Petitioners' Exception to Paragraphs 56 and 101.

The Petitioners take exception to the findings in paragraphs 56 and 101 of the RO that the Dock site does not contain hard bottom communities. Contrary to the Petitioners' exception, these findings are supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 248, 314-15).

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraphs 56 and 101 is denied.

Petitioners' Exception to Paragraph 74.

The Petitioners appear to take exception to the findings in paragraph 74 of the RO that no transitioning resources are located at the Dock site or within its vicinity. Contrary to the Petitioners' exception, this finding is supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 248-49).

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraph 74 is denied.

Petitioners' Exception to Paragraphs 55-56.

The Petitioners take exception to the findings in paragraph 55 regarding low dissolved oxygen levels and the existence of specific marine life that indicate poor water quality in the location and surrounding vicinity of the Dock. Contrary to the Petitioners' exception, this finding is supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 248, 314-315).

Petitioners also take exception to the findings in paragraph 56 that "that there are no resources of significant value in the footprint, or immediate vicinity, of the Dock. Contrary to the Petitioners' exception, this finding is supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 248; Charnock, T. Vol. 3, pp. 349-50).

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraphs 55-56 is denied.

Petitioners' Exception to Paragraphs 64, 66 and 73.

The Petitioners take exception to the findings of fact in paragraphs 64, 66 and 73 of the RO. Paragraph 64 of the RO reads in its entirety:

> 64. The competent, credible evidence establishes that the Loggerhead Sea Turtle and Green Sea Turtle, both of which are listed as endangered species, use the beach above the MHWL along Long Beach Drive, including the beach on Fondriest's property above the MHWL, for nesting. The FFWCC has determined, through its Florida Sea Turtle Nesting Beach Monitoring Program, that the shore along Long Beach Drive has a relatively low nesting density – i.e., within the lower 25% of nesting density values – for both of these sea turtle species.

RO ¶ 64.

The Petitioners' object to the ALJ's finding that Long Beach is a low nesting density beach for the endangered Loggerhead Sea Turtle and the Green Sea Turtle, citing to their own expert's testimony. Petitioner's Exceptions at pp. 10-11. The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraph 64 are supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 288-90).

The Petitioners also take exception to the findings of fact in paragraph 66 of the RO, which reads, in its entirety: "No competent, credible evidence was presented showing that significant sea turtle food sources are present in the footprint, or immediate vicinity, of the Dock." RO ¶ 66. The Petitioners again cite to their own expert testimony. Contrary to the Petitioners' exception, the ALJ's findings in paragraph 66 of the RO are supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 913-14, 914-15).

The Petitioners appear to take exception to the finding in paragraph 73 that "although sea turtles nest on the beach along Long Beach Drive, this area does not constitute significant sea turtle nesting habitat, and there is no significant food source for adult or juvenile sea turtles in the vicinity of the Dock," contending that the Dock area should be classified as an RPA 1 area. RO ¶ 73. Contrary to the Petitioners' exception, the ALJ's findings in paragraph 73 are supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 268-90; Walters, T. Vol., pp. 913-14, 914-15).

In the Petitioners' exceptions to all three paragraphs, they disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraphs 64, 66 and 73 is denied.

Petitioners' Exception to Paragraph 5.

The Petitioners take exception to the findings in paragraph 5 of the RO, which reads in its entirety: "Appel owns two other upland properties located on Long Beach Drive, neither of which is located immediately adjacent to Fondriest's property." RO ¶ 5. The Petitioners' claim that DeMaria and Appel own the property located at 1997 Long Beach Drive but Appel does not "own two other upland properties located on Long Beach Drive." (emphasis added).

The Department has been unable to locate competent substantial evidence to support the RO's finding in paragraph 5 that Appel owns three upland properties on Long Beach Drive.

Based on the foregoing reasons, the Petitioners' exception to paragraph 5 is granted.

Petitioners' Exception to Paragraph 7.

The Petitioners take exception to the findings in paragraph 7 of the RO, which reads in its entirety: "As stated above, on December 10, 2019, DEP issued a regulatory general permit and letter of consent to Fondriest, approving the 2019 Approval, which was then proposed as an 800-square-foot structure for use as a pier for non-motorized vessels." RO ¶ 7.

The Petitioners contend that the finding should read: "On December 10, 2019, the Department erroneously issued applicant Julia Fondriest ("Fondriest") a General Permit and Letter of Consent for construction of an 800 square foot swim platform." Petitioners' Exceptions at p. 12. Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraph 7 are supported by competent substantial evidence. (Joint Ex. 1, Bates pp. 2965- 2978).

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

to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623. Moreover, an agency has no authority to make independent or supplemental findings of fact to those contained in the RO. *See, e.g*., *North Port, Fla.*, 645 So. 2d at 487*; Fla. Power & Light Co.*, 693 So. 2d at 1026-1027.

Based on the foregoing reasons, the Petitioners' exception to paragraph 7 is denied.

Petitioners' Exception to Paragraph 12.

The Petitioners take exception to the finding of fact in paragraph 12 of the RO, which reads in its entirety: "DEP's agency action proposing to approve the Dock supersedes all prior DEP agency action with respect to the Dock, and constitutes the proposed agency action at issue in these proceedings." RO ¶ 12. The Petitioners contend that DEP was prohibited from issuing "a Notice of Proposed Changes to Agency Action while the action was pending at DOAH without relinquishing jurisdiction from DOAH back to DEP," citing to section 120.569(2)(a) of the Florida Statutes. Petitioners Exceptions p. 12.

The Department concludes that paragraph 12 of the RO is, in reality, a conclusion of law and rejects the Petitioners' conclusion that DOAH must relinquish jurisdiction back to DEP for DEP to modify its agency action, i.e., the ERP/BOT authorization in this case. Subsection 120.57(1) of the Florida Statutes, titled "Additional Procedures Applicable to Hearings Involving Disputed Issues of Material Fact," reads in pertinent part that "All proceedings conducted under this subsection shall be de novo." § 120.57(1)(k), Fla. Stat. (2020) (emphasis added).

The current case is a de novo proceeding under subsection 120.57(1), Florida Statutes intended to formulate final agency action. *See Fla. Dep't of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d 778, 786-787 (Fla. 1st DCA 1981); *Capeletti Bros., Inc. v. Dep't of Gen. Servs.*, 432 So. 2d

1359, 1363 (Fla. 1st DCA 1983). The First District Court of Appeal in *McDonald v. Department of Banking and Finance* articulated that "Section 120.57 proceedings are intended to formulate final agency action, not to review action taken earlier and preliminarily." *McDonald v. Dep't of Banking and Finance*, 346 So. 2d 569, 584 (Fla. 1st. DCA 1977).

Based on the foregoing reasons, the Petitioners' exception to paragraph 12 is denied.

Petitioners' Exception to Paragraph 20.

The Petitioners take exception to the finding in paragraph 20 of the RO that "The berm is frequently overtopped by water during high tides and storms." RO ¶ 20. Contrary to the Petitioners' exception, the ALJ's finding of fact in paragraph 20 is supported by competent substantial evidence. (Wilson, T. Vol. pp. 85-6; Walters, T. Vol. 2, pp. 319-20; Fondriest Ex. No. 325, Bates 4429). The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraph 20 is denied.

Petitioners' Exception to Paragraph 21.

The Petitioners take exception to the finding in paragraph 21 of the RO that the beach is disturbed by sea turtle monitors. The Department has been unable to locate competent substantial evidence to support the RO's finding in paragraph 21 that the beach is disturbed by sea turtle monitors.

Based on the foregoing reasons, the Petitioners' exception to paragraph 21 is granted.

Petitioners' Exception to Paragraph 30.

The Petitioners take exception to the findings of fact in paragraph 30 of the RO, which reads in its entirety: "The Dock will be used solely for the water-dependent activities of launching vessels and swimming." RO ¶ 30. Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraph 30 are supported by competent substantial evidence. (Fondriest, T. Vol. 5, pp. 765-66; Joint Ex. 1, Bates p. 2995).

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraph 30 is denied.

Petitioners' Exception to Paragraph 36.

The Petitioners take exception to the finding in paragraph 36 of the RO that competent credible evidence establishes that the five foot elevation of the Dock above the mean high water line will provide sufficient clearance for sea turtle monitor to pass under the dock as they traverse the beach. Contrary to the Petitioners' exception, the ALJ's finding of fact in paragraph 36 is supported by competent substantial evidence. (Wilson, T. Vol. 1, pp. 116-17; Walters, T. Vol. 2, pp. 301-02; Fondriest Ex. No. 325, Bates 4429). The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to

reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraph 36 is denied.

Petitioners' Exception to Paragraph 39.

The Petitioners take exception to the finding of fact in paragraph 39 of the RO that reads "the Dock will be of sufficient height to enable persons using non-motorized watercraft to pass under it." RO ¶ 39. Contrary to the Petitioners' exception, the ALJ's finding of fact in paragraph 39 is supported by competent substantial evidence. (Wilson, T. Vol. 1, pp 117-18; Fondriest Ex. No. 325, Bates 4429).

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraph 39 is denied.

Petitioners' Exception to Paragraph 40.

The Petitioners take exception to the finding of fact in paragraph 40 of the RO that reads "The credible, persuasive evidence establishes that in a storm, the decking and stringers on the

Dock will be washed off the pilings and will not become windborne projectiles." RO ¶ 40. Contrary to the Petitioners' exception, the ALJ's finding of fact in paragraph 40 is supported by competent substantial evidence. (Wilson, T. Vol. 1, p. 169).

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraph 40 is denied.

Petitioners' Exception to Paragraphs 43-44.

The Petitioners take exception to the finding of fact in paragraph 43 of the RO that reads "because the Dock will be constructed in an open waterbody, the noise generated by piling installation is anticipated to be insignificant." RO ¶ 43. Contrary to the Petitioners' exception, the ALJ's finding of fact in paragraph 43 is supported by competent substantial evidence. (Wilson T. Vol. 1, pp. 149-55).

Moreover, the Petitioners exception to paragraphs 43-44 does not object to any finding in paragraph 44 that reads in its entirety: "Construction of the Dock may only be conducted outside of sea turtle nesting season, which runs from April 15 to October 31." RO ¶ 44. An agency need not rule on an exception that does not identify the legal basis for the exception. § 120.57(1)(k), Fla. Stat. (2020). This alone is a sufficient basis to reject the Petitioners' exception to paragraph 44 of the RO. Moreover, contrary to the Petitioners' exception, the ALJ's finding of fact in

paragraph 44 is supported by competent substantial evidence. (Walters T. Vol. 2, p. 215, Fondriest Ex. No. 323, Bates 4503).

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraphs 43-44 is denied.

Petitioners' Exception to Paragraph 53.

The Petitioners take exception to the findings of fact in paragraph 53 of the RO that reads in its entirety: "Much of the shoreline along Long Beach Drive below the MHWL, including that along Fondriest's property, consists of bare, hard rock. The water is extremely shallow, and the bare rock is exposed at low tide" RO ¶ 53. Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraph 53 are supported by competent substantial evidence. (Mills, T, Vol. 3, pp. 387-88; Fondriest Ex. No. 323, Bates 4489).

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial

evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraph 53 is denied.

Petitioners' Exception to Paragraph 55.

The Petitioners take exception to the findings of fact in paragraph 55 of the RO, present other record evidence and request the Department to reweigh the evidence. The Petitioners object to the ALJ's finding that the Dock area contains low dissolved oxygen levels which indicates poor water quality. Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraph 55 are supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 248, 314-15).

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraph 55 is denied.

Petitioners' Exception to Paragraph 56.

The Petitioners take exception to the findings of fact in paragraph 56 of the RO, present other record evidence and request the Department to reweigh the evidence. Specifically, the Petitioners take exception to the findings regarding the lack of significant aquatic resources in the footprint and immediate vicinity of the Dock. Based on the findings in this paragraph of the

RO, the ALJ concluded that "the competent, credible evidence shows that there are no aquatic resources of any significant value in the footprint, or immediate vicinity, of the Dock." RO ¶ 56. Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraph 56 are supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 244-47; Carnock, T. Vol. 3, pp. 349-50, 396, 398; Fondriest Ex. No. 323, Bates 4492).

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraph 56 is denied.

Petitioners' Exception to Paragraph 57.

The Petitioners take exception to the findings of fact in paragraph 57 of the RO, citing to other record evidence referenced in their earlier exceptions, and request the Department reweigh the evidence. Specifically, the Petitioners allege that the finding in paragraph 57 that "a small seagrass bed is located near the terminal platform" contradicts the findings in paragraphs 54, 56, and 60. Contrary to the Petitioners' exception, the finding in paragraph 57 is consistent with the findings in paragraphs 54, 56, and 60 of the RO. Paragraph 54 does not mention seagrass resources at all; paragraph 56 finds "there are <u>no aquatic resources of any significant value in the</u> footprint, or <u>immediate vicinity</u>, of the Dock" (emphasis added); and paragraph 60 finds that none of the resources discussed "exist in the footprint, <u>or immediate vicinity</u> of the Dock." RO

¶¶ 54,56 60. (Emphasis added). Ultimately, the ALJ found that while a "small seagrass bed is located near the terminal platform of the Dock, the small seagrass bed is not in the "immediate vicinity" of the Dock. Moreover, the ALJ's findings of fact in paragraph 57 are supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 248, 314-15; Fondriest Ex. No. 323, Bates 4492).

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraph 57 is denied.

Petitioners' Exception to Paragraph 58.

The Petitioners allege that they take exception to findings of fact in paragraph 58 of the RO, which reads, in its entirety:

> 58. The evidence establishes that the area waterward of the MHWL along Long Beach Drive generally supports a rich aquatic community. Fish and aquatic invertebrates inhabit the water in the vicinity, and numerous bird species use the area waterward of the MHWL, including that bordering Fondriest's property, as feeding and foraging habitat.

RO ¶ 58.

While the Petitioners' allege they take exception to the findings of fact in paragraph 58; they do not dispute any of the findings in paragraph 58. Instead, they allege that the findings in

paragraph 58 help support their position that the Dock area should be classified as an RPA 1 instead of an RPA 3.

The Petitioners' exception fails to articulate an exception to the findings in paragraph 58 of the RO. An agency need not rule on an exception that does not identify the legal basis for the exception. § 120.57(1)(k), Fla. Stat. (2020). This alone is a sufficient basis to reject the Petitioners' exception to paragraph 98 of the RO.

Based on the foregoing reasons, the Petitioners' exception to paragraph 58 is denied.

Petitioners' Exception to Paragraphs 59-61.

The Petitioners take exception to the finding of fact in paragraph 59 of the RO, present other record evidence from their expert and request that the Department reweigh the evidence. Specifically, the Petitioners take exception to the finding in paragraph 59 that reads "no non-speculative evidence was presented to show that the construction, presence, and use of the Dock will result in adverse effects to this aquatic community. . . ." RO ¶ 59. While not clear, the Petitioners may have also intended to take exception to the finding in paragraph 60 of the RO that reads "the competent credible evidence shows that none of these resources exist in the footprint, or immediate vicinity, of the Dock, and conditions have been imposed in the letter of consent to ensure that the construction and use of the Dock will not adversely affect these resources." RO ¶ 60. Moreover, the Petitioners' expert witness testimony in this exception did not contain testimony that the construction, presence or use of the Dock will result in adverse effects to this aquatic community. The Petitioners merely recited their expert's testimony about the presence of birdlife, juvenile lobster and several other species in the region. Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraphs 59 and 60 are supported by

competent substantial evidence. (Wilson, T. Vol. 1, pp. 154; Walters, T. Vol. 2, pp. 212, 218-19, 227, 248, 330-31; Charnock, T. Vol. 3, pp. 349-50).

The Petitioners exception to paragraphs 59, 60, and 61 did not identify any finding in paragraph 61 of the RO to which they had an exception. An agency need not rule on an exception that does not identify the legal basis for the exception. § 120.57(1)(k), Fla. Stat. (2020). This alone is a sufficient basis to reject the Petitioners' exception to paragraph 61 of the RO.

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraphs 59-61 is denied.

Petitioners' Exception to Paragraph 63.

The Petitioners take exception to the findings of fact in paragraph 63 of the RO, present other record evidence and request the Department to reweigh the evidence. Specifically, the Petitioners take exception to the ALJ's finding that "[no] credible evidence was presented showing that the Dock would adversely affect the ability of Key Deer to traverse and forage on the beach on, or adjacent to, Fondriest's property." RO ¶ 63. The ALJ found that the height of the Dock is sufficient to allow Key Deer to pass underneath without being impeded or trapped. Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraph 63 are supported

by competent substantial evidence. (Walters, T. Vol. 2, pp. 297-98; Fondriest Ex. No. 325, Bates 4429).

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraph 63 is denied.

Petitioners' Exception to Paragraph 64.

The Petitioners take exception to the findings of fact in paragraph 64 of the RO, which reads in its entirety:

> 64. The competent, credible evidence establishes that the Loggerhead Sea Turtle and Green Sea Turtle, both of which are listed as endangered species, use the beach above the MHWL along Long Beach Drive, including the beach on Fondriest's property above the MHWL, for nesting. The FFWCC has determined, through its Florida Sea Turtle Nesting Beach Monitoring Program, that the shore along Long Beach Drive has a relatively low nesting density – i.e., within the lower 25% of nesting density values – for both of these sea turtle species.

RO ¶ 64.

The Petitioners do not contend that the findings in this paragraph are not supported by competent substantial evidence. Instead, they contend "it is important not to ignore the nesting beaches for any species of listed turtles in the Keys. . . ." Petitioner's Exceptions p. 21.

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final

hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623. Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraph 64 are supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 288-90; Fondriest Ex. 323, Bates p. 4517-4519).

Based on the foregoing reasons, the Petitioners' exception to paragraph 64 is denied.

Petitioners' Exception to Paragraph 67.

The Petitioners take exception to the findings of fact in paragraph 67 of the RO, present other record evidence and request the Department to reweigh the evidence. Specifically, the Petitioners take exception to the finding that "[t]he competent, credible evidence does not show that the Dock will adversely affect the habitat value of the beach on Fondriest's property for sea turtle nesting, or that it will otherwise adversely affect nesting sea turtles and hatchlings." RO ¶ 67. Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraph 67 are supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 218-19).

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraph 67 is denied.

Petitioners' Exception to Paragraph 70.

The Petitioners take exception to the findings of fact in paragraph 70 of the RO. Paragraph 70 merely summarizes the definition of RPA 1 as quoted above. Paragraph 70 of the RO reads, in its entirety:

> 70. The RPA 1 classification applies to areas within an aquatic preserve that have resources of the highest quality and condition. Areas classified as RPA 1 are characterized by the presence of corals, marine grassbeds, mangrove swamps, salt marshes, oyster bars, threatened or endangered species habitat, colonial water bird nesting sites, and archaeological and historical sites.

RO ¶ 70. While contained within the Findings of Fact section of the RO, paragraph 70 of the RO is a recitation of the RPA 1 definition in rule 18-20.003(54); and thus, is in reality a conclusion of law consistent with the definition of RPA 1 in rule 18-20.003(56) of the Florida Administrative Code.

Based on the foregoing reasons, the Petitioners' exception to paragraph 70 is denied.

Petitioners' Exception to Paragraph 72.

The Petitioners take exception to the findings of fact in paragraph 72 of the RO. Paragraph 72 of the RO merely summarizes the definition of RPA 2 as quoted above. Paragraph 72 of the RO reads, in its entirety: "72. The RPA 2 classification applies to areas within an aquatic preserve that are in transition, either having declining RPA 1 resources, or new pioneering resource within an RPA 3." RO ¶ 72. While contained within the Findings of Fact section of the RO, paragraph 72 of the RO is a recitation of the definition for the term RPA 2; and thus, is in reality a conclusion of law that is consistent with the definition of RPA 2 in rule 18-20.003(57) of the Florida Administrative Code.

Based on the foregoing reasons, the Petitioners' exception to paragraph 72 is denied.

Petitioners' Exception to Paragraph 73.

The Petitioners appears to take exception to the finding in paragraph 73 that "although sea turtles nest on the beach along Long Beach Drive, this area does not constitute significant sea turtle nesting habitat, and there is no significant food source for adult or juvenile sea turtles in the vicinity of the Dock," contending that the Dock area should be classified as an RPA 1 area. RO ¶ 73. Contrary to the Petitioners' exception, the ALJ's findings in paragraph 73 are supported by competent substantial evidence. (Charnock, T. Vol. 3, pp. 344-46).

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraph 73 is denied.

Petitioners' Exception to Paragraph 74.

The Petitioners take exception to the finding of fact in paragraph 74 of the RO that Hurricane Irma struck the Long Beach Drive area in Florida in 2013. The Petitioners request that paragraph 74 be corrected to read that Hurricane Irma hit Florida in 2017, and not 2013. The Department concludes that the exception merely requests correction of a scrivener's error. Moreover, the exception is supported by competent substantial evidence from one of Fondriest's experts. (Wilson, T. Vol. 1, p. 83, 171).

Based on the foregoing reasons, the Petitioners' exception to paragraph 74 is granted.

Petitioners' Exception to Paragraph 75, Footnote 7.

The Petitioners reiterate their exception to the findings of fact in footnote 7 to paragraph 75 of the RO. Footnote 7 to paragraph 75 of the RO reads, in its entirety:

> 7. Some portions of the CBAP do contain seagrass beds, offshore coral patch reefs, and mangrove swamp communities, and provide habitat for protected species, including the Key Deer and colonial water birds, and, thus, merit an RPA 1 classification. By contrast, none of these habitats and conditions are present at the location, or in the vicinity, of the Dock.

RO ¶ 70, footnote 7.

Contrary to the Petitioners' exception, the ALJ's findings in footnote 7 to paragraph 75 are supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 244-47; Carnock, T. Vol. 3, pp. 349-50, 396, 398).

The Petitioners disagree with the ALJ's findings, cite to their own expert's testimony and portions of the Coupon Bight Aquatic Preserve Management Plan, and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to footnote 7 for paragraph 75 is denied.

Petitioners' Exception to Paragraph 78.

The Petitioners take exception to the findings in paragraph 78 of the RO, which reads in its entirety that "As discussed above, the site-specific biological assessments conducted show

that the Dock will be located in an RPA 3, and Petitioners did not present any site-specific evidence to rebut that classification." RO ¶ 78. The Department concludes that paragraph 78 of the RO contains mixed findings of fact and conclusions of law. Contrary to the Petitioners' exception, the ALJ's findings in paragraph 78 are supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 234-35; Mills T. Vol. p. 392: 3-5, 395-98). Moreover, the Department concurs with the ALJ's application of her findings to the definitions of RPA 1, RPA 2 and RPA 3 located in rule 18-20.003.

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraph 78 is denied.

Petitioners' Exception to Paragraphs 80-85.

The Petitioners take exception to the findings of fact in paragraphs 80-85 of the RO, present other record evidence from their expert and request the Department to reweigh the evidence. Specifically, the Petitioners take exception to the ALJ's summary of the cumulative impact analysis of Fondriest's expert witness, Sandra Walters, set forth in paragraphs 80-85 of the RO. The Petitioners do not allege that there is not competent substantial evidence to support expert Walters' testimony; the Petitioners' merely prefer their expert's testimony. The ALJ's

findings of fact in paragraphs 80-85 are supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 269-70, 271-77).

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraphs 80-85 is denied.

Petitioners' Exception to Paragraph 92.

The Petitioners take exception to the finding of fact in paragraph 92 of the RO that Monroe County issued a permit authorizing construction of the Dock, which "[e]vidences that the Dock is permissible under the Monroe County comprehensive plan." RO ¶ 92. Contrary to the Petitioners' exception, the ALJ's findings in paragraph 92 are supported by competent substantial evidence. (Fondriest's Ex. No. 303; Fondriest Ex. No. 323, Bates 4516).

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraph 92 is denied.

Petitioners' Exception to Paragraph 93.

The Petitioners take exception to the findings of fact in paragraph 93 of the RO, present other record evidence and request the Department to reweigh the evidence. Specifically, the Petitioners take exception to the findings regarding the lack of significant biological resources in the footprint or the immediate vicinity of the Dock. Based on the findings in this paragraph of the RO, the ALJ concluded that "[thus], the Dock will not cause the loss of beneficial biologic functions that would adversely impact the quality or utility of the CBAP." RO ¶ 93. Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraph 93 are supported by competent substantial evidence. (Wilson, T. Vol. 1, pp. 154; Walters, T. Vol. 2, pp. 212, 218-19, 227, 248, 330-31; Charnock, T. Vol. 3, pp. 349-50).

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraph 93 is denied.

Petitioners' Exception to Paragraph 98.

The Petitioners take exception to the findings of fact in paragraph 98 of the RO. As with most of the Petitioners' exceptions, they do not allege the findings of fact are not based on competent substantial evidence. Moreover, the Petitioners' exception is vague and fails to cite to

any record to support its claims. The Petitioners' exception fails to articulate an exception to the findings in the paragraph; but instead contains a rant against the Department's aquatic preserve management plan, which reads: "apparently the 'case by case' basis is zero review, zero surveys, zero maintenance, zero oversight, zero inspections, but rather streamlining of all the docks on Long Beach, none of which meet their own criteria, but for 1 dock." Petitioners' Exceptions at p. 30.

An agency need not rule on an exception that does not identify the legal basis for the exception. § 120.57(1)(k), Fla. Stat. (2020). This alone is a sufficient basis to reject the Petitioners' exception to paragraph 98 of the RO.

Based on the foregoing reasons, the Petitioners' exception to paragraph 98 is denied.

Petitioners' Exception to Paragraph 100.

The Petitioners take exception to the findings of fact in paragraph 100 of the RO. As with most of the Petitioners' exceptions, they do not allege the findings of fact are not based on competent substantial evidence. Moreover, the Petitioners' exception fails to articulate an exception to the findings in paragraph 100 of the RO. An agency need not rule on an exception that does not identify the legal basis for the exception. § 120.57(1)(k), Fla. Stat. (2020). This alone is a sufficient basis to reject the Petitioners' exception to paragraph 98 of the RO.

While extremely unclear, the Petitioners appear to seek to have DEP add more evidence to this paragraph by citing extensively to their own expert's testimony. However, an agency has no authority to make independent or supplemental findings of fact to those contained in the RO. *See, e.g.*, *North Port, Fla.*, 645 So. 2d at 487*; Fla. Power & Light Co.*, 693 So. 2d at 1026-1027.

Based on the foregoing reasons, the Petitioners' exception to paragraph 100 is denied.

Petitioners' Exception to Paragraphs 102 and 104.

The Petitioners take exception to the findings of fact in paragraphs 102 and 104 of the RO, which read in their entirety:

> 102. Furthermore, private single-family residential docks are expressly identified as an allowable use in the Management Area. SF/1.
>
> . . .
>
> 104. Based on the foregoing, it is determined that the Dock is consistent with the CBAP Management Plan. 8
>
> _____
>
> 8. Rule 18-20.004(7) states, in pertinent part: "[t]he aquatic preserve management plans shall be used by [DEP] to preserve and restore the distinctive characteristics identified by the inventories for each aquatic preserve. The management plans for each aquatic preserve are available *for guidance purposes only*." Fla. Admin. Code R. 18-20.004(7)(emphasis added). Thus, to the extent a rule provision in chapter 18-20 conflicts with an aquatic preserve management plan, the rule controls. *See Decarion v. Martinez*, 537 So. 2d 1083, 1084 (Fla. 1st DCA 1989)(an agency must follow its own rules).

RO ¶¶ 102, 104 (including footnote 8).

The Petitioners disagree with the ALJ's finding in paragraph 102 of the RO and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623. Contrary to the Petitioners' exception, the ALJ's finding of fact in paragraph 102 is supported by competent substantial evidence. (Mills, T. Vol., p. 933-34).

The Petitioners also take exception to paragraph 104 of the RO, alleging that the proposed Dock is not consistent with the CBAP Management Plan's Minimum Criteria for Allowable Uses that requires the terminal platform for a private residential dock to access a

minimum of -4 feet depth at MLW. The Department concurs with the ALJ's conclusion of law set forth in footnote 8 to paragraph 104 that rule 18-20.004(7) states that aquatic management plans are available for guidance purposes only. To the extent that a rule provision in chapter 18-20 conflicts with the CBAP Management Plan, the rule controls. Contrary to the Petitioners' exception, the ALJ's finding of fact in paragraph 104 that the Dock is consistent with the Coupon Bight Aquatic Preserve Management Plan is supported by competent substantial evidence. (Walters, T. Vol. 6, pp. 933-34).

Based on the foregoing reasons, the Petitioners' exception to paragraphs 102 and 104 is denied.

Petitioners' Exception to Paragraph 117.

The Petitioners take exception to the findings in paragraph 117 of the RO, which reads in its entirety: "Appel owns two other parcels on Long Beach Drive, neither of which is located immediately adjacent to Fondriest's property."

The Petitioners disagree with the ALJ's finding in paragraph 117 of the RO and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623. Contrary to the Petitioners' exception, the ALJ's finding of fact in paragraph 117 is supported by competent substantial evidence. (Fondriest Ex. No. 323, Bates 4477).

Based on the foregoing reasons, the Petitioners' exception to paragraph 117 is denied.

Petitioners' Exception to Paragraph 145.

The Petitioners take exception to the findings of fact in paragraph 145 of the RO, present other record evidence and request the Department to reweigh the evidence. Specifically, the Petitioners take exception to the finding that the Dock will not cause adverse impacts to the aquatic preserve. Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraph 145 are supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 302-303).

The Petitioners disagree with the ALJ's finding and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraph 145 is denied.

Petitioners' Exception to Paragraphs 156-59.

The Petitioners take exception to the findings of fact in paragraphs 156-59 of the RO, present other record testimony from the hearing and request the Department to reweigh the evidence. Specifically, the Petitioners take exception to the ALJ's mixed findings of fact and conclusions of law regarding how the Dock will meet the public interest requirements in chapters 18-21 and 18-20 of the Florida Administrative Code. The Petitioners do not allege there is no competent substantial evidence to support paragraphs 156-59; instead, the Petitioners present their own personal opinions regarding why the Dock will be contrary to the public interest. The

ALJ's findings of fact in paragraphs 156-59 are supported by competent substantial evidence. (Charnock, T. Vol. 3, pp. 389-95).

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

In paragraph 156 of the RO, the ALJ quotes the definition of "public interest" in rule 18-21.003(53). In paragraph 157 of the RO, the ALJ quotes language in rule 18-21.004(1) that specifies activities on sovereignty lands must be "not contrary to the public interest." In addition, in paragraph 158 of the RO, the ALJ quotes from article X, section 22 of the Florida Constitution, which concludes that "Private use of portions of such [sovereignty] lands may be authorized by law, but only when not contrary to the public interest." Fla. Const., art. X, §11. The Department has no authority to reject the quotation of applicable rule or constitutional language and concurs that these legal quotations are accurate.

Paragraph 159 of the RO reads in its entirety: "Chapters 253 and 258, and the implementing rules codified in chapters 18-20 and 18-21, authorize the use of sovereignty submerged lands for private residential single-family docks when not contrary to the public interest." RO ¶ 158.

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify a judge's conclusions of law and interpretations of administrative rules "over which it has substantive

jurisdiction." S*ee* § 120.57(1)(l), Fla. Stat. (2020); *MacPherson v. Sch. Bd. of Monroe Cnty*, 505 So. 2d 682, 683 (Fla. 3d DCA 1987); *Siess v. Dep't of Health & Rehab. Servs.*, 468 So. 2d 478, 478 (Fla. 2d DCA 1985); *Alles v. Dep't of Prof'l Regulation*, 423 So. 2d 624, 626 (Fla. 5th DCA 1982). If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded and the item treated as though it were actually a conclusion of law. *See, e.g., Battaglia Properties,* 629 So. 2d at 168.

On behalf of the Board of Trustees, the Department administers and enforces the provisions of chapters 253 and 258, Florida Statutes, and the implementing rules codified in chapters 18-20 and 18-21, Florida Administrative Code, including those applicable to aquatic preserves. As a result, the Department may modify the ALJ's conclusions of law regarding the above cited administrative rules.

The Department seeks to clarify the public interest test for chapter 18-20 set forth in paragraph 159 of the RO. Chapter 18-20 provides additional requirements to the requirements in chapter 18-21 to authorize use of sovereign submerged lands in Florida Aquatic Preserves. Rule 18-20.004(1)(b) reads, in pertinent part: "(b) There shall be no further sale, lease or transfer of sovereignty lands except when such sale, lease or transfer is in the public interest. . . ." Fla. Admin. Code R. 18-20.004(1)(b)(2020). Rule 18-20.003(68) defines transfer as follows: "(68) 'Transfer' means the act of the Board by which any interest in lands, including easements, other than sale or lease, is conveyed." Fla. Admin. Code R. 18-20.003(68)(2020). Rule 18-20.004(4)(c) reads, in pertinent part: "For the purpose of this rule, a private residential, single-family docking facility which meets all the requirements of subsection 18-20.004(5), F.A.C., shall be deemed to meet the public interest requirements of paragraph 18-20.004(1)(b), F.A.C." Fla. Admin. Code. R. 18-20.004(4)(c). Thus, the public interest test for the Dock in the

Coupon Bight Aquatic Preserve is deemed to be met provided the Dock meets all the requirements of rule 18-20.004(5) of the Florida Administrative Code.

Conclusion of law paragraph 226 of the RO concludes "that the Dock, as proposed to be constructed and used subject to the conditions imposed in the letter of consent, will meet all applicable standards and requirements in rule 18-20.004, including the aquatic preserves public interest requirement established in rule 18-20.004(4)(c)." As a result, the ALJ found that the Dock meets all the requirements of rule 18-20.004(5) and was thus deemed to meet the "in the public interest" test for activities conducted in aquatic preserves.

The Department's interpretation of the public interest test for aquatic preserves is as or more reasonable than that set forth in paragraph 159 of the RO. Moreover, the Department's clarification is consistent with the ALJ's interpretation of the public interest test for aquatic preserves set forth in paragraphs 224 and 226, including the footnote to paragraph 226 of the RO. *See* § 120.57(1)(l), Fla. Stat. (2020). The ALJ's conclusions in paragraph 159 of the RO are accordingly modified in this Final Order to reflect that the public interest test for activities in aquatic preserves is whether the activity is "in the public interest."

Based on the foregoing reasons, the Petitioners' exception to paragraphs 156-59 is denied. However, the public interest test for aquatic preserves in paragraph 159 is modified as set forth above.

Petitioners' Exception to Paragraphs 36 and 161.

The Petitioners take exception to the finding of fact in paragraph 36 that the sea turtle monitors will have sufficient clearance to pass under the Dock as they traverse the beach and the finding in paragraph 161 of the RO that reads "the competent, persuasive evidence established that Petitioners will be able to duck under the Dock, or walk around the end of the terminal

platform where the water is relatively shallow." RO ¶ 161. Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraph 36 are supported by competent substantial evidence. (Wilson, T. Vol. 1, pp. 98, 113, 116-17, 208-09; Walters, T. Vol. 2, pp. 301-02; Fondriest Ex. No. 325, Bates 4429).

Moreover, the ALJ noted that "Petitioners did not cite any statutory or rule provisions affording completely unencumbered access, by the general public, to all sovereignty submerged lands." RO ¶ 161. In footnote 10 to paragraph 161 of the RO, the ALJ also noted that "A key purpose of chapters 18-20 and 18-21 is to establish standards for approval of private uses of sovereignty submerged lands which may, to a certain extent, hinder the general public's access to those sovereignty lands. *See* Fla. Admin. Code R. 18-21.004 (2020). Thus, the public's access to sovereignty lands is not without limitations.

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraphs 36 and 161 is denied.

Petitioners' Exception to Paragraphs 162-65.

The Petitioners take exception to the ultimate findings of fact in paragraphs 162-65 of the RO, present other record evidence from their expert and request the Department to reweigh the

evidence. Specifically, the Petitioners take exception to the ALJ's summary of the cumulative impact analysis of Fondriest's expert witness, Sandra Walters, set forth in paragraphs 162-65 of the RO. The Petitioners do not allege that there is no competent substantial evidence to support expert Walters' testimony; the Petitioners merely prefer their expert's testimony. The ALJ's findings of fact in paragraphs 162-65 are supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 269-80, 280-81, 283-84, 284-85; Fondriest Ex. Nos. 303, 323).

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraphs 162-165 is denied.

Petitioners' Exception to Paragraph 195.

The Petitioners take exception to the findings of fact in paragraph 195 of the RO, present other record evidence and request the Department to reweigh the evidence. Specifically, the Petitioners take exception to the finding that the Dock will not interfere with the public easement for traditional uses of sandy beaches, as provided in section 161.141, Florida Statutes, because the sandy beach areas on Long Beach Drive are privately owned. Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraph 195 are supported by competent substantial evidence. (Wilson, T. Vol. 1, pp. 116-17; Walters, T. Vol. 2, pp. 301-02; Crilly, T. Vol. 3, pp.

444-45, 456; Roberts, T. Vol. 3, p. 508; Czerwinski, T. Vol. 5, p. 759: 11-15; Appel, T. Vol. 6, pp. 875-76).

The Petitioners disagree with the ALJ's findings and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioners' exception to paragraph 195 is denied.

Petitioners' Exception to Paragraphs 226 and 230.

The Petitioners take exception to the conclusions of law in paragraphs 226 and 230 of the RO, which read, in their entirety:

> 226. For the reasons addressed above, it is concluded that the Dock, as proposed to be constructed and used subject to the conditions imposed in the letter of consent, will meet all applicable standards and requirements in rule 18-20.004, including the aquatic preserves public interest requirement established in rule 18-20.004(4)(c).
>
> . . .
>
> 230. Based on the foregoing, it is concluded that the Dock will meet all applicable requirements of chapter 18-20 such that Fondriest is entitled to issuance of a letter of consent authorizing the construction and operation of the Dock.

RO ¶ 226. The Petitioners contend in their exception to paragraph 226 that the proposed single-family Dock will not meet the public interest requirement for activities conducted in aquatic preserves. Petitioners' Exceptions at p. 44.

Rule 18-20.004(4)(c) reads, in pertinent part: "For the purpose of this rule, a private residential, single-family docking facility which meets all the requirements of subsection 18-20.004(5), F.A.C., shall be deemed to meet the public interest requirements of paragraph 18-20.004(1)(b), F.A.C." Fla. Admin. Code. R. 18-20.004(4)(c)(2020). Accordingly, the public interest test for the Dock in the Coupon Bight Aquatic Preserve is deemed to be met provided the Dock meets all the requirements of rule 18-20.004(5) of the Florida Administrative Code.

Paragraph 226 of the RO concludes that based on the findings above "the Dock, as proposed to be constructed and used subject to the conditions imposed in the letter of consent, will meet all applicable standards and requirements in rule 18-20.004, including the aquatic preserves public interest requirement established in rule 18-20.004(4)(c)." RO ¶ 226. The ALJ's findings of fact in support of conclusion of law paragraph 226 are supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 225-226). Because the ALJ in paragraph 226 of the RO concluded that the proposed Dock meets all the requirements of rule 18-20.004(5), the Dock is deemed to meet the public interest test for activities conducted in aquatic preserves. *See* Fla. Admin. Code. R. 18-20.004(4)(c)(2020).

The Petitioners appear to take exception to the conclusions of law in paragraph 230 that the Dock will meet all applicable requirements of chapter 18-20. Paragraph 230 of the RO concludes that based on the foregoing findings "it is concluded that the Dock will meet all applicable requirements of chapter 18-20 such that Fondriest is entitled to issuance of a letter of consent authorizing the construction and operation of the Dock." RO ¶ 230. Contrary to the Petitioner's exception, the ALJ's findings in support of conclusion of law paragraph 230 are supported by competent substantial evidence. (Wilson, T. Vol. 1, pp. 126-56; Walters, T. Vol. 2, pp. 225-26; Mills, T. Vol. 3, pp. 385, 434).

The Petitioners appear to base this exception on their conclusion that the Dock is located in an RPA 1 and not an RPA 3. The Department concurs with the ALJ's interpretation of the RPA 1, RPA 2, and RPA 3 categories in aquatic preserves, and the ALJ's conclusion that the Dock will meet all applicable requirements of chapter 18-20.

Based on the foregoing reasons, the Petitioners' exception to paragraphs 226 and 230 is denied.

Petitioners' Exception to Paragraph 226.

The Petitioners take exception to the conclusions of law in paragraph 226 of the RO, which reads, in its entirety:

> 226. For the reasons addressed above, it is concluded that the Dock, as proposed to be constructed and used subject to the conditions imposed in the letter of consent, will meet all applicable standards and requirements in rule 18-20.004, including the aquatic preserves public interest requirement established in rule 18-20.004(4)(c).

RO ¶ 226. The Petitioners contend that the proposed single-family Dock will not meet the public interest requirement for activities conducted in aquatic preserves. Petitioners' Exceptions at p. 44. For the reasons recited in response to the Petitioners' exception immediately above, the Department rejects the Petitioner's exception to paragraph 226 of the RO.

Based on the foregoing reasons, the Petitioners' exception to paragraph 226 is denied.

Petitioners' Exception to Paragraph 229.

The Petitioners take exception to conclusion of law paragraph 229 of the RO, which reads in its entirety: "For the reasons discussed in detail above, it is concluded that the Dock will not result in adverse cumulative impacts to the resources of the CBAP." RO ¶ 229. The Department concludes that paragraph 229 of the RO is a mixed statement of law and fact.

The Petitioners disagree with the ALJ's findings and conclusion that the Dock will not result in adverse impacts to the resources of the aquatic preserve and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623. Contrary to the Petitioners' exception, the ALJ's findings in paragraph 229 are supported by competent substantial evidence. (Walters, T. Vol. 2, pp. 268-287, 142, 921-22).

Based on the foregoing reasons, the Petitioners' exception to paragraph 229 is denied.

Petitioners' Exception to Paragraph 230.

The Petitioners take exception to conclusion of law paragraph 230 of the RO, which reads in its entirety: "Based on the foregoing, it is concluded that the Dock will meet all applicable requirements of chapter 18-20 such that Fondriest is entitled to issuance of a letter of consent authorizing the construction and operation of the Dock." RO ¶ 230. The Department concludes that paragraph 230 of the RO is a mixed statement of law and fact.

The Petitioners disagree with the ALJ's findings and conclusion that the Dock will meet all the applicable requirements of chapter 18-20 and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting

a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

The Petitioners take exception to the conclusion of law in paragraph 230 that the Dock will meet all applicable requirements of chapter 18-20. Paragraph 230 of the RO concludes that based on the foregoing findings "it is concluded that the Dock will meet all applicable requirements of chapter 18-20 such that Fondriest is entitled to issuance of a letter of consent authorizing the construction and operation of the Dock." RO ¶ 230. Contrary to the Petitioner's exception, the ALJ's findings in support of conclusion of law paragraph 230 are supported by competent substantial evidence. (Wilson, T. Vol. 1, pp. 126-56; Walters, T. Vol. 2, pp. 225-26; Mills, T. Vol. 3, pp. 385, 434).

Based on the foregoing reasons, the Petitioners' exception to paragraph 230 is denied.

Petitioners' Exception to Paragraph 253.

The Petitioners take exception to conclusion of law paragraph 253 of the RO, which reads in its entirety: "For the reasons discussed herein, it is concluded that the Dock, as proposed to be constructed and used, subject to the conditions imposed in the letter of consent, will meet all applicable standards and requirements of rule 18-21.004." RO ¶ 253. The Department concludes that paragraph 253 of the RO is a mixed statement of law and fact.

The Petitioners disagree with the ALJ's findings and conclusion that the Dock will meet all the applicable requirements of rule 18-21.004 and seek to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting

a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623. Contrary to the Petitioner's exception, the ALJ's findings in support of conclusion of law paragraph 253 are supported by competent substantial evidence. (Wilson, T. Vol. 1, pp. 126-56; Walters, T. Vol. 2, pp. 225-26; Mills, Vol. 3, p. 385-88, 434).

Based on the foregoing reasons, the Petitioners' exception to paragraph 253 is denied.

Petitioners' Exception to Paragraph 288.

The Petitioners take exception to conclusion of law paragraph 288 of the RO, which reads in its entirety: "In sum, it is concluded that the Dock will meet all applicable statutory and rule standards and requirements for issuance of the Dock Approval." RO ¶ 288.

If the reviewing agency modifies or rejects a conclusion of law set out in the ALJ's recommended order, it must state with particularity the reasons for the modification or rejection, and must find that its substituted conclusion of law "is as or more reasonable than that which was rejected or modified." § 120.57(1)(l), Fla. Stat. (2020). The Petitioners failed to identify any legal basis for its exception to the conclusion of law in paragraph 288 of the RO and failed to offer a substitute legal conclusion that is "as or more reasonable" than that which it proposes be rejected. § 120.57(1)(l), Fla. Stat. (2020). Instead, the Petitioners summarily reject the ALJ's conclusion of law in paragraph 288 without providing any legal basis for the exception or citation to the record. *See* § 120.57(1)(j) and (k), Fla. Stat. (2020).

Based on the foregoing reasons, the Petitioners' exception to paragraph 288 is denied.

Petitioners' Exception to the RO's History of the Case.

The Petitioners take exception to the ALJ's history of the case on pages three through five of the RO, identified in the RO as the "Preliminary Statement." (RO at pp. 3-5). The Petitioners' exception to the ALJ's Preliminary Statement is improper and must be denied,

because parties may only file an exception to findings of fact and conclusions of law. Fla. Admin. Code R. 28-106.217 (2020).

Moreover, the Petitioners do not allege there is no competent substantial evidence to support the statements in the Preliminary Statement of the RO; instead, the Petitioners contend that the ALJ left out details that should have been included in the Preliminary Statement. However, an agency has no authority to make independent or supplemental findings of fact to those contained in the RO. *See, e.g*., *North Port, Fla.*, 645 So. 2d at 487*; Fla. Power & Light Co.*, 693 So. 2d at 1026-1027.

Based on the foregoing reasons, the Petitioners' exception to the Preliminary Statement in the RO is denied.

Petitioners' Exception to the ALJ's Ruling to Exclude Certain Evidence.

The Petitioners take exception to the ALJ's ruling that their expert's resource protection area survey and report were excluded from the hearing, because they were filed untimely. The Petitioners acknowledge that they untimely filed these expert documents, and they were filed the next business day. In accordance with rule 28-106.104(3), "[a]ny document received by the office of the agency clerk before 5:00 p.m. shall be filed as of that day but any document received after 5:00 p.m. shall be filed as of 8:00 a.m. on the next regular business day." Fla. Admin. Code R. 28-106.104(3) (2020). The ALJ excluded these exhibits in accordance with the above cited rule contained in the Uniform Rules of Procedures that regulate DOAH, and which rules are located on DOAH's website.

Moreover, the Department does not have jurisdiction to reject the ALJ's rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy

considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio*, 622 So. 2d at 609; *Heifetz*, 475 So. 2d at 1281-82.

Based on the foregoing reasons, the Petitioners' exception to the ALJ's ruling to exclude certain of the Petitioners' exhibits is denied.

CONCLUSION

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

ORDERED that:

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

B. A Letter of Consent to Use Sovereignty Submerged Lands is GRANTED to Julia Fondriest to construct and operate the proposed Dock at 1953 Long Beach Drive in Big Pine Key, Florida; and

C. The Department verifies that Julia Fondriest's proposed Dock is exempt from the requirement to obtain an environmental resource permit pursuant to section 403.813(1)(b), Florida Statutes.

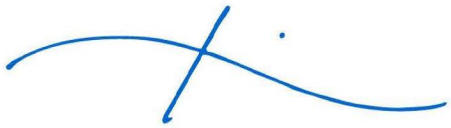
JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the

appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 5th day of April, 2021, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



NOAH VALENSTEIN
Secretary

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

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

Lea Crandall
CLERK

April 5, 2021
DATE

CERTIFICATE OF SERVICE

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

Ralf G. Brookes, Esquire Ralf Brookes Attorney 1217 East Cape Coral Parkway, Suite 107 Cape Coral, FL 33904 ralfbrookes@gmail.com ralf@ralfbrookesattorney.com	Luna E. Phillips, Esquire Deborah K. Madden, Esquire Gunster, Yoakley & Stewart, P.A. 450 East Las Olas Boulevard, Suite 1400 Fort Lauderdale, FL 33301 lphillips@gunster.com dkmadden@gunster.com
Paul J. Polito, Esquire Department of Environmental Protection 3900 Commonwealth Boulevard, MS 35 Tallahassee, FL 32399-3000 paul.polito@FloridaDep.gov michelle.m.knight@FloridaDep.gov	

this 5th day of April. 2021.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Stacey D. Cowley

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

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BARRY ROBERTS AND GLORIA MEREDITH TRUST,

Petitioners,

vs. Case No. 20-2473

JULIA FONDRIEST AND STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

SHERRI CRILLY,

Petitioner,

vs. Case No. 20-2474

JULIA FONDRIEST AND STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

JENNIFER DEMARIA,

Petitioner,

vs. Case No. 20-2535

JULIA FONDRIEST AND THE STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in these consolidated proceedings pursuant to sections 120.569 and 120.57(1), Florida Statutes (2020),[1] before Administrative Law Judge ("ALJ") Cathy M. Sellers of the Division of Administrative Hearings ("DOAH") on October 19, 22, and 29, and November 10, 2020.

APPEARANCES

For Petitioners:

Ralf Gunars Brookes, Esquire
Ralf Brookes Attorney
1217 East Cape Coral Parkway, Suite 107
Cape Coral, Florida 33904

For Respondent Fondriest:

Luna E. Phillips, Esquire
Deborah K. Madden, Esquire
Gunster, Yoakley & Stewart, P.A.
450 East Law Olas Boulevard, Suite 1400
Fort Lauderdale, Florida 33301

For Respondent 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 in these consolidated proceedings is whether the proposed single-family residential dock meets the requirements for a letter of consent for use of sovereignty submerged lands pursuant to chapters 253 and 258, Florida Statutes, and Florida Administrative Code Chapters 18-20 and 18-21, such that the Consolidated

Regulatory Exemption and Letter of Consent for Department of Environmental Protection File No. 0319584-003EE, as amended on September 30, 2020, should be granted.

PRELIMINARY STATEMENT

On December 10, 2019, Respondent Department of Environmental Protection ("DEP"), issued a regulatory general permit and sovereignty submerged lands letter of consent to Respondent, Julia Fondriest ("Fondriest"), approving an 800-square-foot dock from which to launch non-motorized vessels ("2019 Approval"). Pursuant to extensions of time, Petitioner Barry Roberts and Gloria Meredith Trust ("Trust") filed a petition for administrative hearing on January 30, 2020; Petitioner Jennifer DeMaria filed a Verified Petition for Formal Administrative Hearing on January 31, 2020; and Petitioner Sherri Crilly ("Crilly") filed a Verified Petition for Formal Administrative Hearing on February 27, 2020. The petitions were referred to DOAH on May 26, 2020, and respectively were assigned Case Nos. 20-2473, 20-2535, and 20-2474. On June 4, 2020, the cases were consolidated for hearing and issuance of this Recommended Order.

The final hearing originally was scheduled for July 9 and 10, 2020, in Key West, Florida. However, due to the Covid-19 pandemic and the parties' need for additional time to conduct discovery, the final hearing was continued until September 14 and 15, 2020, and rescheduled to be conducted by Zoom Conference.

On September 8, 2020, DEP filed Respondent Florida Department of Environmental Protection's Motion for Continuance, Response to Petitioners' Corrected Motion to Amend by Interlineation Reference, and Request for Status Conference, requesting that the final hearing be continued, to enable DEP to conduct a review of the project for compliance with the aquatic preserves statute and rules.

[1] All references to Florida Statutes are to the 2020 version, which is in effect at the time of issuance of this Recommended Order.

On September 11, 2020, Fondriest filed a revised application with DEP, requesting to reduce the size of the proposed structure to 500 square feet; a verification of exemption from permitting, pursuant to Florida Administrative Code Rule 62-330.015(5)(b) and section 403.813(1)(b), Florida Statutes; and authorization, pursuant to chapters 253 and 258, and chapters 18-20 and 18-21, to use sovereignty submerged lands.

On September 30, 2020, DEP issued Florida Department of Environmental Protection's Notice of Proposed Changes to Agency Action ("Dock Approval"), verifying the regulatory exemption and authorizing the use, by a letter of consent, of sovereignty submerged lands for the dock (hereafter, "Dock"). DEP's action proposing to issue the Dock Approval supersedes all previous DEP agency action for the project, and constitutes the proposed agency action at issue in these proceedings.

On October 9, 2020, the Trust filed Petitioner Barry Roberts and Gloria Meredith Trust Amendment to Petition. Also, on October 9, 2020, Petitioners DeMaria and Crilly filed an Amended Petition for Formal Administrative Hearing and Petition to Intervene in Related Cases; this Petition included a request, by Harry Appel, to intervene in Case No. 20-2474.

The final hearing was held on October 19, 22, and 29, and November 10, 2020, by Zoom Conference. Fondriest presented the testimony of Hans Wilson and Sandra Walters, and Fondriest's Exhibits RF-301 through RF-308, RF-310 through RF-315, RF-317, RF-323 through RF-326, RF-329, RF-330, RF-332 through RF-335, RF-343A, RF-353 through RF-356, RF-358, RF-367, and RF-371 (Bates pages 4116 through 4118) through RF-373 were admitted into evidence without objection. DEP presented the testimony of Nicole Charnock and Megan Mills. Petitioners presented the testimony of Sherri Crilly, Barry Roberts, Michael Czerwinski, Gloria Meredith, Julia Fondriest, Jennifer DeMaria, and Harry Appel. Petitioners' Exhibits P-214, P-224, P-231, P-270, P-275, and P-277 were admitted into evidence without objection,

and Petitioners' Exhibits P-125, P-136 through P-162, P-164, P-165, P-168 through P-170, P-173 through P-176, P-183 through P-190, P-193, P-198, P-222, P-232, P-265 through P-269, P-271 through P-273, P-276, P-278, and P-A were admitted into evidence over objection. The parties stipulated to the admission of Joint Exhibit JE-001. Official recognition was taken of the 1999 and 2019 versions of chapter 18-20.

The six-volume Transcript of the final hearing was filed with DOAH on November 16, 2020. The parties were given until November 30, 2020, to file proposed recommended orders. The parties timely filed their proposed recommended orders on November 30, 2020. The undersigned has given due consideration to the proposed recommended orders in preparing this Recommended Order.

FINDINGS OF FACT

I. The Parties

1. DEP is the state agency charged with regulating specified activities in state jurisdictional surface waters, pursuant to chapter 373, part IV, Florida Statutes. Additionally, DEP is charged with performing all staff duties and functions for the Board of Trustees of the Internal Improvement Trust Fund ("Trustees" or "Board") related to the administration of state-owned lands pursuant to chapter 253, including sovereignty submerged lands in aquatic preserves, pursuant to chapter 258. In this case, DEP is responsible for reviewing the application for the dock and issuing the Dock Approval that has been challenged in these proceedings.

2. Fondriest owns the upland property riparian to the sovereignty submerged lands on which the Dock is proposed to be, at 1953 Long Beach Drive, Big Pine Key, Florida. She is the applicant for the Dock Approval that has been challenged in these proceedings.

3. The Trust owns the upland property located at 1975 Long Beach Drive, Big Pine Key, Florida. This property is located immediately adjacent to, and west of, Fondriest's property.

4. DeMaria and Appel own the upland property located at 1997 Long Beach Drive, Big Pine Key. This property is located two parcels west of Fondriest's property.

5. Appel owns two other upland properties located on Long Beach Drive, neither of which is located immediately adjacent to Fondriest's property.

6. Crilly is the holder of a marine turtle permit issued by the Florida Fish and Wildlife Conservation Commission ("FFWCC"), and she volunteers as a sea turtle monitor for the Long Beach Drive area of Big Pine Key.

II. History of the Dock Approval and Notice of Agency Action

7. As stated above, on December 10, 2019, DEP issued a regulatory general permit and letter of consent to Fondriest, approving the 2019 Approval, which was then proposed as an 800-square-foot structure for use as a pier for non-motorized vessels.

8. There was no evidence presented that Petitioners received a clear point of entry to challenge DEP's proposed agency action issued on December 10, 2019, either through receipt of written notice by mail, or constructively through publication of notice of the proposed agency action in a newspaper or other publication medium.

9. The Trust filed a Petition for Administrative Hearing on January 30, 2020; DeMaria filed a Verified Petition for Formal Administrative Hearing on January 31, 2020; and Crilly filed a Verified Petition for Formal Administrative Hearing on February 27, 2020.

10. On September 11, 2020, Fondriest filed a revised application with DEP, reducing the size of the Dock to 500 square feet; requesting a verification of exemption from permitting, pursuant to rule 62-330.015(5)(b) and section 403.813(1)(b)[2]; and requesting authorization, pursuant to chapters 253 and 258, and chapters 18-20 and 18-21, to use sovereignty submerged lands.

11. On September 30, 2020, DEP issued Florida Department of Environmental Protection's Notice of Proposed Changes to Agency Action—i.e., the "Dock Approval"—

[2] Because the Dock will have less than 500 square feet of over-water surface area, it is exempt, pursuant to section 403.813(1)(b). from permitting under chapters 373 or 403. Petitioners have stipulated that the Dock qualifies for the permitting exemption under section 403.813(1)(b).

verifying the regulatory exemption and authorizing the use of the sovereignty submerged lands by a letter of consent.[3]

12. DEP's agency action proposing to approve the Dock supersedes all prior DEP agency action with respect to the Dock, and constitutes the proposed agency action at issue in these proceedings.

III. Long Beach Drive and the Surrounding Area

13. Fondriest's property is located on Long Beach Drive, Big Pine Key, in Monroe County.

14. Long Beach Drive is located on a spit of land comprising the southern and westernmost part of Big Pine Key.

15. The south side of Long Beach Drive, where Fondriest's, the Trust's, and DeMaria's and Appel's properties are located, borders the Straits of Florida.[4]

16. Thus, Fondriest's, the Trust's, and DeMaria's and Appel's properties are riparian to sovereignty submerged lands underlying the Straits of Florida.

17. The land along Long Beach Drive is platted and has been developed for residential and commercial uses.

18. The Long Beach Drive area of Big Pine Key is located within the Coupon Bight Aquatic Preserve ("CBAP"), an Outstanding Florida Water and aquatic preserve consisting of approximately 6,000 acres of bays, mangrove forests, seagrass beds, and offshore patch coral reefs.

19. The Long Beach Drive area, including Fondriest's property, is characterized by a rocky shore, with some narrow sandy beaches.

20. The shore accumulates a significant amount of weed wrack consisting of seaweed, seagrass, and other debris. A beach berm created by wave and tide action

[3] The Dock Approval states that the Dock does not qualify for the federal State Programmatic General Permit for section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act. Separate federal approval for the Dock has been issued by the Army Corps of Engineers, and Monroe County has issued a Building–Floodplain–Development Permit for the Dock.

[4] All references to the shore or shoreline along Long Beach Drive refer to the shore or shoreline abutting the Straits of Florida.

exists along much of the shore. The berm is frequently overtopped by water during high tides and storms.

21. The beach is disturbed due to frequent use by residents and sea turtle monitors. Among the activities that take place on the beach are kayak launching, beach walking, beach cleaning and restoration, vegetation planting, and sea turtle nest monitoring.

22. Several docks already exist along the shore on Long Beach Drive.

23. The longshore current along the shore at Long Beach Drive flows, and transports sand from, east to west.

24. The existing mangroves, jetties, and points along the Long Beach Drive shoreline trap sand and cause accretion of updrift beaches and starvation of downdrift beaches.

25. The competent, credible evidence establishes that the docks along the shoreline on Long Beach Drive do not significantly contribute to beach accretion, starvation, or erosion in the area.

IV. The Proposed Dock

26. The Dock is a private residential single-family dock associated with Fondriest's single-family residence at 1953 Long Beach Drive. It will not be used for commercial purposes or residential habitation, and there are no boat houses, boat lifts, or other enclosures proposed or approved as part of the Dock.

27. As approved, the Dock will occupy 498 square feet, consisting of a 142-foot-long by 3-foot-wide access dock and a 12-foot-long by 6-foot-wide (i.e., 72-square-foot) terminal platform, and extending a total length of 154 feet.

28. The access dock will be constructed with pressure-treated lumber planks spaced half-an-inch apart, to allow light penetration. The supporting pilings are comprised of PVC-encased aluminum, spaced approximately 9 feet, 5 inches apart. The PVC casing will help protect the piles from corrosion, thus helping to protect water quality.

29. The terminal platform, which also will be supported by PVC-encased aluminum pilings, will consist of fiberglass grating, which allows sunlight penetration

in order to prevent shading of seagrasses and other benthic resources.[5] The top of the terminal platform is designed to be a minimum height of five feet above the mean high water line ("MHWL"). Handrails will be constructed along each side of the dock for its entire length, to prevent vessel mooring in adjacent shallow areas, thus helping protect against damage to benthic resources.

30. The Dock will be used solely for the water-dependent activities of launching vessels and swimming.

31. Only non-motorized vessels, such as kayaks, canoes, and paddleboards, may be launched from the Dock, and then only when there is a minimum depth of 0.5 feet (six inches, or half-a-foot) of water at the terminal platform.[6]

32. Additionally, the terminal platform must include signs of at least one-square-foot each placed on each side of the platform, stating "no mooring of motorized vessels allowed."

33. A ladder is proposed to be located on one side of the terminal platform to provide access to the water for swimming or kayak launching, and the Dock Approval imposes a requirement that the ladder cannot be located over seagrass or hard bottom benthic communities.

34. Although some turbidity in the water column may be generated by launching kayaks or other non-motorized watercraft from the terminal platform, the turbidity would be temporary and would not exceed that currently generated by dragging or hauling a kayak or other vessel from the shore across the substrate, to access sufficient water depth for launching.

35. To prevent potential trapping, under the Dock, of sea turtles and other animals, such as Key Deer, an enclosure consisting of barriers one inch apart must be constructed beneath the portion of the Dock's landward access ramp having less than three feet of clearance above grade.

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[5] This is a standard construction material frequently used for docks in Florida. As further discussed below, the benthic survey performed for the area comprising the footprint of the Dock showed that no seagrass beds or other significant benthic resources are present.

[6] The 0.5-foot water depth is keyed to the mean low water datum. At mean high water, the water depth at the terminal platform is approximately 1.2 feet.

36. The competent, credible evidence establishes that the rest of the Dock will be elevated approximately five feet above the MHWL, so will be of sufficient height to allow animals to pass under without being trapped or impeded, and will provide sufficient clearance for sea turtle monitors to pass under as they traverse the beach.

37. The competent, credible evidence also shows that the Dock will not impede the flow of water. The design is such that there are no structures on, or beneath, the Dock that will act as dams to prevent, or otherwise affect, the flow of water under and around the Dock.

38. The water depth at the end of the terminal dock is 0.5 feet at mean low water, and 1.2 feet at mean high water. The Dock does not extend out to a depth of four feet of water.

39. The competent, credible evidence establishes that the Dock will not interfere with navigation. The water depth between the shore and the end of the Dock's terminal platform is too shallow to accommodate motorized watercraft, and the Dock will be of sufficient height to enable persons using non-motorized watercraft to pass under it.

40. The Dock will be constructed to meet the 2017 Southern Building Code, so will be able to resist 180-mile-per-hour, three-second wind gusts. The credible, persuasive evidence establishes that in a storm, the decking and stringers on the Dock will be washed off the pilings and will not become windborne projectiles.

41. The Dock pilings will be imbedded into the substrate to a minimum depth of five feet, using a vibration hammer, rather than drilling and punching the pilings into the substrate. Using a vibration hammer will generate less turbidity in the water column than using the drill-and-punch installation technique, and turbidity curtains must be erected and maintained around the construction footprint to control turbidity and protect water quality.

42. Additionally, the pilings will be installed using a spud barge elevated above the substrate, which also will help reduce turbidity during construction. Any turbidity generated during construction will be temporary.

43. Installing the dock pilings using a vibration hammer also will generate less noise than the drill-and-punch technique. The Jacksonville Office of the National Marine Fisheries Service has issued a biological opinion stating that the vibration hammer installation technique "may affect/is not likely to affect" certain species listed as endangered, threatened, or of special concern. Additionally, because the Dock will be constructed in an open waterbody, the noise generated by piling installation is anticipated to be insignificant.

44. Construction of the Dock may only be conducted outside of sea turtle nesting season, which runs from April 15 to October 31.

45. Dock construction activities also must meet the requirements and standards established by the United States Fish and Wildlife Service to protect manatees, sea turtle species, the Smalltooth Sawfish, and the Eastern Indigo Snake.

46. The 2011 Standard Manatee Construction Conditions for In-Water Work require vessels to navigate at slow speeds; manatee awareness signs to be posted; and construction to stop if a manatee is spotted within 50 feet of the construction site. In any event, manatees are unlikely to be present in the vicinity of the Dock, due to the very shallow water.

47. The sea turtle and Smalltooth Sawfish construction conditions require vessels to operate at idle speeds in the vicinity of the project; turbidity curtains to be erected and maintained; and construction to be stopped if individuals of these species are observed within 50 feet of the construction site.

48. The Eastern Indigo Snake, an upland species, is unlikely to be present at the Dock construction site. To prevent harm to individuals of this species, the letter of consent requires that educational materials be distributed to the construction crew and educational signs be placed at the construction site.

49. No permanent exterior lighting is authorized for the Dock. This will prevent the Dock from attracting sea turtles and other marine species that are drawn to light.

50. No turning basins, access channels, or wave break devices are proposed to be constructed for or used by the Dock.

51. Fondriest's property has approximately 100 linear feet of riparian shoreline. There are no other docks existing on the shoreline along Long Beach Drive for at least 65 linear feet in either direction.

52. The Dock will be constructed perpendicular to the shoreline, and will be located in Fondriest's riparian area, set back more than 40 feet from each riparian line demarcating her riparian area. Thus, the Dock will be located well outside the 25-foot setback from each riparian line.

V. Biological and Other Resources in the Vicinity of the Dock

53. Much of the shoreline along Long Beach Drive below the MHWL, including that along Fondriest's property, consists of bare, hard rock. The water is extremely shallow, and the bare rock is exposed at low tide.

54. Site assessments conducted in 2020 at the location and in the vicinity of the Dock, show that limestone caprock, loose rubble, and some deeper depressions in the rock exist in the footprint of the Dock. The substrate consists of hard, highly uneven rock, with pools of tannin-stained water.

55. Water pooled in the rock depressions is heated at low tide and, due to rotting vegetation, is nutrient-rich. The dissolved oxygen levels are very low, rendering the pools incapable of supporting substantial marine life other than cyanobacteria and filamentous algae, both of which indicate poor water quality.

56. Some algae species are attached to the limestone caprock in the footprint and immediate vicinity of the Dock. However, recent biological resource assessments show that no seagrass beds, corals, or other hard bottom communities exist in the footprint of the Dock. Thus, the competent, credible evidence shows that there are no aquatic resources of any significant value in the footprint, or immediate vicinity, of the Dock.

57. A small seagrass bed is located near the terminal platform. The letter of consent requires avoidance of this seagrass bed during construction and use of the Dock. Additionally, as discussed above, turbidity curtains must be installed to prevent turbidity and siltation of this seagrass bed during construction.

58. The evidence establishes that the area waterward of the MHWL along Long Beach Drive generally supports a rich aquatic community. Fish and aquatic

invertebrates inhabit the water in the vicinity, and numerous bird species use the area waterward of the MHWL, including that bordering Fondriest's property, as feeding and foraging habitat.

59. However, no non-speculative evidence was presented to show that the construction, presence, and use of the Dock will result in adverse effects to this aquatic community, or to any plant or animal species in this aquatic community.

60. Additionally, the competent, credible evidence shows that none of these resources exist in the footprint, or immediate vicinity, of the Dock, and conditions have been imposed in the letter of consent to ensure that the construction and use of the Dock will not adversely affect these resources.

61. To the extent that the vibration hammer installation of the pilings will result in noise that may cause fish, birds, and other animals to leave the area, that effect will be temporary and will cease when piling installation is completed. Although some benthic or attached species, such as seahorses, may be unable to leave the area, so may be subjected to noise stress, no persuasive, non-speculative evidence was presented showing that these species inhabit the area in the vicinity of the Dock. Thus, any alleged harm to these species is speculative.

62. Because the Dock may only be used for nonmotorized vessels such as kayaks and canoes, use of the Dock will not generate noise or otherwise adversely affect the aquatic habitat waterward of the MHWL along Long Beach Drive.

63. The Key Deer is listed as an endangered species. Key Deer traverse and forage along the shore at Long Beach Drive. No credible evidence was presented showing that the Dock would adversely affect the ability of Key Deer to traverse and forage on the beach on, or adjacent to, Fondriest's property. As discussed above, the Dock will be elevated waterward of the MHWL to approximately five feet above grade. The evidence showed that this height is sufficient to allow Key Deer to pass underneath without being impeded or trapped. No credible evidence was presented showing that the three-foot wide access ramp would interfere with Key Deer foraging or traversing along the beach.

64. The competent, credible evidence establishes that the Loggerhead Sea Turtle and Green Sea Turtle, both of which are listed as endangered species, use the beach above the MHWL along Long Beach Drive, including the beach on Fondriest's property above the MHWL, for nesting. The FFWCC has determined, through its Florida Sea Turtle Nesting Beach Monitoring Program, that the shore along Long Beach Drive has a relatively low nesting density—i.e., within the lower 25% of nesting density values—for both of these sea turtle species.

65. The evidence establishes that the Hawksbill Sea Turtle, Kemp's Ridley Sea Turtle, and Leatherback Sea Turtle do not use the beach along the Long Beach Drive shoreline for nesting.

66. No competent, credible evidence was presented showing that significant sea turtle food sources are present in the footprint, or immediate vicinity, of the Dock.

67. The competent, credible evidence does not show that the Dock will adversely affect the habitat value of the beach on Fondriest's property for sea turtle nesting, or that it will otherwise adversely affect nesting sea turtles and hatchlings. As previously discussed, an enclosure will be constructed under the access ramp to prevent nesting sea turtles and hatchlings from becoming trapped under the Dock.

68. The competent, credible evidence establishes that the Dock will not adversely affect other protected species, including the Lower Keys Marsh Rabbit, the Keys Rice Rat, or the Mole Skink—none of which inhabit or use the marine/beach habitat present along the shore at Long Beach Drive. To this point, no evidence was presented showing that these species are, or ever have been, present on the beach at Long Beach Drive. Thus, no evidence was presented showing that the Dock adversely affect these species.

VI. <u>The Dock will be Located in a Resource Protection Area 3</u>

69. Areas within aquatic preserves are classified as Resource Protection Area ("RPA") 1, 2, or 3, for purposes of imposing restrictions and conditions on the use of sovereignty submerged lands, to protect discrete areas having high quality and transitioning habitat.

70. The RPA 1 classification applies to areas within an aquatic preserve that have resources of the highest quality and condition. Areas classified as RPA 1 are characterized by the presence of corals, marine grassbeds, mangrove swamps, salt marshes, oyster bars, threatened or endangered species habitat, colonial water bird nesting sites, and archaeological and historical sites.

71. The RPA 3 classification applies to areas within an aquatic preserve that are characterized by the absence of any significant natural resource attributes.

72. The RPA 2 classification applies to areas within an aquatic preserve that are in transition, either having declining RPA 1 resources, or new pioneering resources within an RPA 3.

73. Recent biological resource assessments conducted at the location of, and in the immediate vicinity of, the Dock show that no mangrove swamps, salt marshes, oyster bars, archaeological or historical resources, or colonial water bird nesting sites are present. As discussed above, although sea turtles nest on the beach along Long Beach Drive, this area does not constitute significant sea turtle nesting habitat, and there is no significant food source for adult or juvenile sea turtles in the vicinity of the Dock. Thus, the evidence shows that the Dock will not be located in an RPA 1.

74. The biological resource assessments also showed that no transitioning resources are present at the location, or in the vicinity, of the Dock. The competent, credible evidence showed that current natural resource conditions at the site are the same as those that historically existed before Hurricane Irma struck the Long Beach Drive area in 2013. Thus, the evidence shows that the Dock will not be located in an RPA 2.

75. Because there are no significant natural resource attributes or transitioning resources in the footprint and the immediate vicinity of the Dock, it is determined that the Dock will be located in an RPA 3.[7]

[7] Some portions of the CBAP do contain seagrass beds, offshore coral patch reefs, and mangrove swamp communities, and provide habitat for protected species, including the Key Deer and colonial water birds, and, thus, merit an RPA 1 classification. By contrast, none of these habitats and conditions are present at the location, or in the vicinity, of the Dock.

76. The definitions of RPA 1, 2, and 3 in rules 18-20.003(54), (55), and (56), respectively, refer to "*areas within* aquatic preserves" which contain specified resources types and quality. Fla. Admin. Code R. 18-20.004(54) through (56)(emphasis added). Additionally, rule 18-20.004(1)(a) provides that in determining whether to approve or deny a request to conduct an activity in an aquatic preserve, the Trustees will evaluate each request on a "*case-by-case basis*." *See* Fla. Admin. Code R. 18-20.004(1)(a)(emphasis added).

77. These rules make clear that determining whether an activity will be located in an RPA 1, 2, or 3 necessarily entails a site-specific resource assessment to determine the type and quality of habitat, and the conditions present, at that specific site.

78. As discussed above, the site-specific biological assessments conducted show that the Dock will be located in an RPA 3, and Petitioners did not present any site-specific evidence to rebut that classification.

VII. Cumulative Impacts Analysis

79. In determining whether an activity proposed in an aquatic preserve may be approved, an analysis must be performed to determine the projected cumulative impacts of the activity. This analysis focuses on determining the impact of the proposed activity, combined with that of similar existing activities and similar activities currently under consideration for approval. *See* Fla. Admin. Code R. 18-20.006.

80. A cumulative impacts analysis performed by Fondriest's expert witness, Sandra Walters, showed that the Dock, in conjunction with similar existing docks and all other applications for docks that could be proposed for approval, will not result in adverse cumulative impacts to the aquatic resources in the CBAP.

81. Walters's cumulative impacts analysis took into account both the acreage and linear footage of parcels within the CBAP for which a dock similar to the one at issue in this proceeding could be approved for construction.

82. In performing a cumulative impacts analysis using linear feet of shoreline, Walters calculated a total of 19,357 feet, or 22.6 miles, of shoreline in the CBAP. Of this linear footage, approximately 7,500 linear feet of shoreline along Long Beach

Drive and approximately 1,200 linear feet of shoreline along the ocean side of the Cook's Island portion of the CBAP are developable, for purposes of having the potential to be developed for a minimum-sized single-family residential dock similar to that proposed in this case. Walters's estimate is conservative, in that it included, as developable linear shoreline footage, parcels that likely could not be developed due to rate of growth, conservation easement, or other land use or environmental restrictions.

83. Walters's linear footage analysis showed that approximately 5.7% of the entire CBAP shoreline possibly could be developed for construction of a perpendicular dock. Assuming that each of these docks is four feet wide—which is a valid assumption, using the four-foot maximum access dock width permitted under the aquatic preserves rules—a total of .23% of the shoreline would be impacted if a perpendicular dock was developed on each eligible parcel. Walters opined, credibly and persuasively, that this impact to the resources in the CBAP would be de minimis.

84. In performing a cumulative impacts analysis on an acreage basis, Walters calculated that if a minimum-size single-family residential dock were developed on each of the 68 total developable lots within the CBAP, a total area of approximately 34,000 square feet, or approximately .013% of the acreage in the CBAP, would experience impacts similar to those created by the Dock. Walter credibly and persuasively opined that this impact to the resources in the CBAP would be de minimis.

85. Walters used a conservative approach—i.e., projecting a realistic "worst case" scenario—in performing the cumulative impacts analysis. Specifically, she considered all parcels for which a minimum-size single-family residential dock reasonably could be proposed for approval in the future, rather than limiting her consideration of cumulative impacts to only those currently proposed for approval by the listed agencies. Additionally, she included impacts of similar dock projects for parcels that likely would not qualify for dock approval due to development restrictions. Thus, the cumulative impacts that Walters projected in her analysis are likely greater than the

actual cumulative impacts of similar dock projects that reasonably can be anticipated to be developed in the area in the future.

86. Petitioners presented the testimony of Michael Czerwinski regarding the cumulative impacts analysis required under the aquatic preserves rule for approval of an activity in an aquatic preserve.

87. Czerwinski's analysis projected the potential cumulative impacts if *every* parcel along Long Beach Drive were developed with a minimum-size single-family residential dock, including the parcels on which development restrictions have been imposed such that they would not be eligible to be developed for a single-family residential dock. Based on this assumption, Czerwinski opined that such "buildout" along Long Beach Drive would result in a "cascading" or "nibbling" effect on the resources in the CBAP, and that there would be adverse impacts on sea turtle nesting habitat.

88. Additionally, based on the unsupported assumption of maximum "buildout" of a single-family residential dock on *every* parcel along Long Beach Drive, Czerwinski projected that the resources within the entire CBAP would be adversely affected as a result of the cumulative impacts from approval of the Dock.

89. Czerwinski's cumulative impacts analysis did not take into account the numerous parcels in the CBAP, including several on Long Beach Drive, that are unable to be developed for single-family residential docks due to conservation easements and local land development restrictions. As such, his analysis considered impacts which could not reasonably be expected to result in the Long Beach Drive area from approval of the Dock.

90. Additionally, based on the unreasonable assumption of maximum dock buildout on every parcel on Long Beach Drive, Czerwinski projected adverse impacts to the *entire* CBAP as a result of the Dock. This analysis again failed to take into account that numerous parcels within the boundaries of the CBAP that are not located in the Long Beach Drive area also are under development restrictions that will prevent the construction of docks on those parcels.

91. Czerwinski's analysis did not comply with the provisions of rule 18-20.005(1) and (3), which expressly limit the consideration of impacts to only those *likely* to affect the preserve and which *reasonably* could be expected to result from the proposed activity. For these reasons, Czerwinski's testimony regarding cumulative impacts as a result of the Dock was not credible or persuasive.

92. As discussed above, Monroe County has issued a permit authorizing the construction of the Dock. This evidences that the Dock is permissible under the Monroe County local comprehensive plan. Additionally, as discussed in detail below, the Dock is an allowable use that is consistent with the CBAP Management Plan ("Management Plan").

93. As previously discussed, the competent, credible evidence establishes that there are no significant biological resources in the footprint, or in the immediate vicinity, of the Dock. Thus, the Dock will not cause the loss of beneficial biologic functions that would adversely impact the quality or utility of the CBAP.

94. As previously discussed, the competent, credible evidence establishes that the Dock will not cause the loss of the beneficial hydrologic functions, either in the immediate vicinity of the Dock, or in the CBAP. As discussed above, the Dock will be a minimum-size single-family residential dock that will not adversely affect the quantity or flow of water.

95. Accordingly, it is determined that the Dock will not have adverse cumulative impacts on the CBAP.

VIII. Consistency with the CBAP Management Plan

96. The Management Plan expressly identifies single-family private residential docks as an allowable use within CBAP, and specifies the standards that such docks must meet.

97. Specifically, a dock may not extent waterward of the MHWL more than 500 feet or 20% of the width of the waterbody; must be designed to ensure maximum light penetration; the terminal platform may not be more than 160 square feet in area; and the access dock may not be wider than four feet. As discussed above, the Dock will comply with these standards.

98. The Management Plan also delineates "management areas" within the CBAP, and describes resources and allowable uses within the different management areas. The Management Plan states that final determinations of allowable uses within a particular management plan are made by agency staff on a case-by-case basis.

99. The sovereignty submerged lands along Long Beach Drive, out to a distance of 500 feet from shore, are designated as "Management Area SF/1." The sovereignty submerged lands bordering Fondriest's property are included within the Management Area SF/1.

100. The resources included in Management Area SF/1 *generally* include grass beds, fringing mangroves, coral banks, coral heads, and hardbottom communities.

101. However, as discussed above, the site-specific biological resource assessment surveys conducted on the sovereignty submerged lands bordering Fondriest's property showed that none of these resources are present at, or in the vicinity of, the Dock site.

102. Furthermore, private single-family residential docks are expressly identified as an allowable use in the Management Area SF/1.

103. Long Beach Drive is not a pristine, undeveloped shoreline. There are residences and some commercial uses along Long Beach Drive, with accessory uses such as seawalls, revetments, and private docks. The Dock is consistent with these existing uses and with the aesthetics of the shoreline on Long Beach Drive.

104. Based on the foregoing, it is determined that the Dock is consistent with the CBAP Management Plan.[8]

IX. Petitioners' Interests and Timeliness of Crilly's Petition

The Trust's Interests

105. The Trust owns a parcel of real property located at 1975 Long Beach Drive, immediately adjacent to, and west of, Fondriest's property.

106. Barry Roberts and Gloria Meredith are the trustees of the Trust.

[8] Rule 18-20.004(7) states, in pertinent part: "[t]he aquatic preserve management plans shall be used by [DEP] to preserve and restore the distinctive characteristics identified by the inventories for each aquatic preserve. The management plans for each aquatic preserve are available *for guidance purposes only*." Fla. Admin. Code R. 18-20.004(7)(emphasis added). Thus, to the extent a rule provision in chapter 18-20 conflicts with an aquatic preserve management plan, the rule controls. *See Decarion v. Martinez*, 537 So.2d 1083, 1084 (Fla. 1st DCA 1989)(an agency must follow its own rules).

107. Neither Roberts nor Meredith, in their individual capacity, is a petitioner in these proceedings.

108. Meredith testified that she and Roberts purchased the property at 1975 Long Beach Drive because of its location and the natural resources in the area, including the tide pool habitat in the rock depressions along the shore, and the animals that forage along, and inhabit, the shore.

109. Meredith testified that she and Roberts both have a keen personal interest in, and use and enjoy, the natural resources along the shore at Long Beach Drive. They engage in bird watching; nature photography; kayaking; and observing nature, including Key Deer, birds, nesting sea turtles, and fish and invertebrates inhabiting tide pools in the rock depressions along the shore.

110. After Meredith and Roberts purchased the property, they placed it in the Trust in order to preserve it, and its value as a residential property, for their children and grandchildren to enjoy in the future.

111. Meredith and Roberts, as trustees of the Trust, have significant concerns about the aesthetic impact the Dock will have on the Trust property, particularly its impact on the view of the beach and the sunrise over the water.

112. Meredith expressed her personal concern regarding the Dock's impacts on the biological resources at, and in the vicinity of, the Dock, and she also expressed concern that the Dock would interfere with her ability to safely walk along the shoreline.

113. She testified that she was concerned that approval of the Dock would constitute a precedent, resulting in the construction of more docks and piers which would adversely affect the natural resources and the beauty of the beach.

114. Meredith conceded that the Dock will be located within Fondriest's riparian area, will be set back more than 25 feet from the common riparian line, and will not cross the common riparian line into the Trust's riparian area.

DeMaria's and Appel's Interests

115. DeMaria is an original Petitioner in Case No. 20-2474, which is part of these consolidated proceedings, and Appel has moved to intervene and become a party to that case.

116. DeMaria and Appel own the Deer Run eco-lodge bed and breakfast ("Deer Run") located at 1997 Long Beach Drive, immediately west of the property owned by the Trust. The Deer Run property is not located immediately adjacent to Fondriest's property.

117. Appel owns two other parcels on Long Beach Drive, neither of which is located immediately adjacent to Fondriest's property.

118. DeMaria testified that she and Appel purchased the Deer Run property because they were attracted to the unspoiled natural environment along Long Beach Drive.

119. Deer Run attracts guests from around the world, who are drawn to the natural environment. These guests engage in nature photography and in-water recreational activities, such as kayaking, paddle boarding, and windsurfing; and they use and enjoy the natural resources and aesthetics of the area.

120. DeMaria and Appel both testified that the presence of a long dock in close proximity to Deer Run would interfere with the view of the water and sunrise from Deer Run, and would significantly detract from the natural beauty and aesthetics of the environment at, and in the immediate vicinity of, Deer Run. Both testified that the presence of the Dock would render Deer Run a less attractive destination for guests.

121. DeMaria testified that the presence of the Dock would interfere with her personal view of the water and the sunrise over the water; her ability to walk along shoreline below the MHWL; and her personal use and enjoyment of the natural beauty and aesthetics of the area.

122. DeMaria also volunteers as a sea turtle nest monitor under the authority of Crilly's marine turtle permit. She expressed concerns similar to those expressed by Crilly—specifically, that the existence of the Dock would interfere with her ability to safely traverse the shoreline below the MHWL on Long Beach Drive to perform her sea turtle monitoring activities.

123. Appel echoed DeMaria's concerns regarding the alleged injury to Deer Run's ecotourism business as a result of the Dock.

124. He also testified that the presence of the Dock on Fondriest's property would injure his personal use and enjoyment of the natural beauty and aesthetics of the Long Beach Drive area.

125. Appel also serves as a volunteer sea turtle monitor, and, in connection with that activity, traverses the shoreline along Long Beach Drive. He testified that the presence of the Dock would interfere with his ability to safely traverse the shoreline below the MHWL to conduct sea turtle monitoring activities.

126. Appel also testified regarding the potential for the Dock to be damaged in storms, resulting in flying and floating debris that may damage his properties and the natural resources in the area.

Crilly's Interests and Timeliness of Petition

127. Crilly is the holder of a marine turtle permit issued by FFWCC, authorizing her to monitor sea turtle nesting along the beach at Long Beach Drive. Other volunteer sea turtle nest monitors work with Crilly under the authority of her permit.

128. Crilly and her team of sea turtle monitors walk the beach daily during sea turtle nesting season. Crilly's responsibilities under the marine turtle permit include monitoring sea turtle nesting and false crawls; collecting data on the number of hatchlings that emerge from each sea turtle nest; and collecting data on sea turtle nesting mortality. The data are provided to the FFWCC for use in sea turtle research.

129. Crilly testified that the Dock will impede her ability and that of her team to safely traverse along the shore below the MHWL to perform the sea turtle monitoring duties authorized under her permit.

130. Specifically, Crilly testified that because the property above the MHWL is private, she must walk along the shoreline below the MHWL. The rock is slippery with numerous depressions, and traversing under the Dock would be treacherous. She testified that "I personally would not crawl under a dock and, therefore, I would not ask any of my volunteers on my team to crawl under a dock."

131. According to Crilly, if she and her sea turtle nest monitoring team are unable to traverse the shoreline where the Dock will be located, they will be required to retrace their steps to the roadway on Long Beach Drive, walk down the road to a

public access point, walk down to the beach, and walk back to the Dock, significantly increasing the time and effort to conduct their sea turtle monitoring activities.

132. Crilly testified that she "learned of" DEP's approval of the Dock on December 30, 2019.

133. No evidence was presented regarding whether, or how, Crilly received notice of the 2019 Approval sufficient to provide a clear point of entry for purposes of commencing the time for her to challenge that proposed agency action.

134. Crilly filed her Petition challenging the 2019 Approval on February 27, 2020.

135. When DEP issued the Dock Approval on September 30, 2020, superseding the 2019 Approval, Crilly already had filed her Petition at DEP, and the Petition had been referred to DOAH.

IX. Findings of Ultimate Fact Regarding Compliance with Applicable Rules

136. The term "dock" is defined in chapters 18-20 and 18-21.

137. Chapter 18-20, applicable to aquatic preserves, defines a dock as "a fixed or floating structure, including moorings, used for the purpose of berthing buoyant vessels either temporarily or indefinitely." Fla. Admin. Code R. 18-20.003(19).

138. Chapter 18-21, which generally governs approvals to use sovereignty submerged lands, defines a dock as "a fixed or floating structure, including access walkways, terminal platforms, catwalks, mooring pilings, lifts, davits and other associated water-dependent structures, used for mooring and accessing vessels." Fla. Admin. Code R. 18-21.003(22).

139. The Dock meets the definition of "dock" in both rules.[9] As discussed above, the Dock Approval limits mooring to non-motorized vessels, and Fondriest, a riparian owner, will use the Dock to access the water for the water-dependent activities of kayaking, paddle-boarding, and other water-dependent activities such as swimming, snorkeling, and fishing, consistent with rule 18-20.004(1)(e)5.

[9] The Dock is not a "pier," which is defined as "a structure in, or, or over sovereignty lands which is used by the *public* primarily for fishing or swimming." Fla. Admin. Code R. 18-20.003(41)(emphasis added). As discussed above, the Dock is a private single-family residential dock that will be constructed on sovereignty submerged lands waterward of Fondriest's property. It will not be open to, or used by, the public for fishing or swimming.

140. As previously discussed, the Dock meets the 500-square-foot threshold for purposes of exemption from regulatory permitting, pursuant to section 403.813(1)(b).

141. The evidence also establishes that the Dock is a "minimum-size" dock, as defined in rule 18-21.002(39). Specifically, the Dock's area has been reduced to the smallest size possible that will provide Fondriest reasonable access to the water for kayak launching.

142. The Dock's reduced size also will minimize impacts to resources at, and in the vicinity of, the Dock. Thus, the Dock has been designed to minimize any adverse impacts to fish and wildlife and threatened and endangered species habitat, as required by rules 18-21.004(2)(b) and (i), and 18-21.004(7)(d).

Compliance with Aquatic Preserve Management Policies, Standards, and Criteria

143. Rule 18-20.004 establishes the policies, standards, and requirements for approval of uses of sovereignty submerged lands in aquatic preserves.

144. As discussed above, the Dock extends a total of 154 feet waterward from the MHWL. This is substantially less than the allowable 500-foot maximum extent from the MHWL, and also is substantially less than 20% of the width of the Straits of Florida, which spans from the Florida Keys to Cuba. Thus, the Dock is consistent with rule 18-20.004(5)(a)1.

145. The competent, credible evidence establishes that the Dock will not be located in an area of significant biological, scientific, historic, or aesthetic value. However, even if such resources were present, the Dock would not cause adverse impacts due to its specific design features and the use of best management practices during construction. As discussed above, the Dock will minimize shading by reduction of the width of the access dock from four feet to three feet; by elevation of both the access dock and the terminal platform five feet above mean high water; and by the use of light-penetrable grating for the terminal platform.

146. The Dock is designed to ensure that vessel use will not cause harm to site-specific resources, as required by rule 18-20.004(5)(a)3. The types of vessels that may use the Dock are limited to non-motorized vessels, and the letter of consent is

conditioned to allow vessel launching only when there is a minimum depth of 0.5 feet of water at the terminal platform.

147. As previously discussed, the evidence establishes that the Dock will be located in an RPA 3. Nonetheless, the Dock will comply with design standards applicable to docks in an RPA 1 or RPA 2. Specifically, the Dock will be constructed of wooden planking less than eight inches wide, spaced half an inch apart after shrinkage; will be elevated five feet above the MHWL; and will have a terminal platform consisting of light-penetrable grating to minimize shading.

148. As previously discussed, the terminal platform will have a total area of 72 square feet—well below the 160-square foot maximum size allowed in aquatic preserves under rule 18-20.004(5)(b)6.

149. The Dock extends out from the shoreline to a depth of approximately -0.5 ft at mean low water. Thus, Dock meets the requirement that it may not extend out from the shoreline further than to a maximum water depth of -4 feet at mean low water. Fla. Admin. Code R. 18-20.004(5)(b)3.

Consistency with Coupon Bight Aquatic Preserve Management Plan

150. Rule 18-20.004(7), which addresses management plans for aquatic preserves, states, in pertinent part: "[t]he aquatic preserve management plans shall be used by the Department to preserve and restore the distinctive characteristics identified by the inventories for each aquatic preserve."

151. Rule 18-20.004(3)(a) states, in pertinent part: "all proposed activities in aquatic preserves having management plans adopted by the Board must demonstrate that such activities are consistent with the management plan."

152. For the reasons discussed in detail above, it is determined that the Dock is consistent with the Management Plan, and, thus, complies with rule 18-20.004(3)(a).

Public Interest Demonstration

153. Chapters 18-20 and 18-21 both require an analysis to determine whether an activity proposed to be conducted on sovereignty submerged lands meets an applicable public interest test.

154. Rule 18-20.004(1)(b), the aquatic preserve rule's public interest test, states, in pertinent part: "[t]here shall be no further sale, lease or transfer of sovereignty lands except when such sale, lease or transfer is in the public interest (see subsection 18-20.004(2), F.A.C., Public Interest Assessment Criteria)." However, with respect to private residential single-family docks, rule 18-20.004(4)(c) states, in pertinent part: "[f]or the purpose of this rule, a private, residential single-family docking facility which meets all the requirements of subsection 18-20.004(5), F.A.C., *shall be deemed to meet the public interest requirements of paragraph 18-20.004(1)(b), F.A.C.*" Fla. Admin. Code R. 18-20.004(1)(b)(emphasis added).

155. As discussed herein, the Dock meets all applicable requirements in rule 18-20.004(5). Accordingly, the Dock meets the aquatic preserves public interest test in chapter 18-20.

156. The Dock also meets the public interest test codified in chapter 18-21. Rule 18-21.003(53) defines "public interest" as "demonstrable environmental, social and economic benefits which would accrue to the public at large as a result of the proposed action, and which would clearly exceed all demonstrable environmental, social, and economic costs of the proposed action."

157. Rule 18-21.004(1) states: "[f]or approval, all activities on sovereignty lands must be *not contrary to the public interest*, except for sales which must be in the public interest." Fla. Admin. Code R. 18-21.004(1)(emphasis added). In this case, the Dock provides recreational water access to the riparian owner, and, as discussed extensively, will not have any adverse impacts on sovereignty lands, aquatic resources, or listed species. Thus, it is determined that the Dock is not contrary to the public interest, as defined in chapter 18-21.

158. Petitioners assert that the Dock is inconsistent with article X, section 11 of the Florida Constitution, which states:

> Sovereignty lands. – The title to lands under navigable waters, within the boundaries of the states, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest.

Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.

Fla. Const., art. X, §11 (emphasis added).

159. Chapters 253 and 258, and the implementing rules codified in chapters 18-20 and 18-21, authorize the use of sovereignty submerged lands for private residential single-family docks when not contrary to the public interest.

160. As discussed above, the Dock is not contrary to the public interest under chapters 18-20 and 18-21. Thus, the use of sovereignty submerged lands for the Dock is consistent with article X, section 11 of the Florida Constitution.

161. Petitioners raised, as a public interest concern, their ability to walk below the MHWL along the shoreline on Long Beach Drive. The evidence shows that the Dock will, within its narrow footprint, present a minor hindrance to Petitioners' ability to walk unimpeded along the shoreline below the MHWL. However, the competent, persuasive evidence established that Petitioners will be able to duck under the Dock, or walk around the end of the terminal platform, where the water is relatively shallow. Importantly, Petitioners did not cite any statutory or rule provisions affording completely unencumbered access, by the general public, to all sovereignty submerged lands.[10]

Cumulative Impacts

162. Rule 18-20.006 requires that an activity proposed in an aquatic preserve be evaluated for its cumulative impact on the aquatic preserve's natural system.

163. As extensively discussed above, Fondriest's expert, Walters, conducted a comprehensive cumulative impacts analysis that addressed all pertinent considerations in rule 18-20.006, and she concluded that the Dock will not have any

[10] A key purpose of chapters 18-20 and 18-21 is to establish standards for approval of private uses of sovereignty submerged lands which may, to a certain extent, hinder the general public's access to those sovereignty lands. *See* Fla. Admin. Code R. 18-21.004 ("[t]he 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"); and Fla. Admin. Code R. 18-20.004 ([t]he following management policies, standards, and criteria are supplemental to chapter 18-21 . . . and shall be uses in determining whether to approve, approve with conditions or modifications, or deny all requests for activities on sovereignty submerged lands in aquatic preserves.")

adverse cumulative impacts on the CBAP as a whole, or on any significant biologic, hydrologic, or other resources within the CBAP.

164. As discussed above, Walters's analysis was comprehensive; her testimony was credible and persuasive; and her conclusion that the Dock will not result in adverse cumulative impacts to the CBAP, or to any resources within the CBAP, was rule-based, and considered all pertinent factual information.

165. Based on the foregoing, it is determined that the Dock will not cause adverse cumulative impacts to the CBAP, or to any resources within the CBAP, as required by rule 18-20.006.

Minimization of Adverse Impacts to Sovereignty Submerged Lands and Resources

166. Rule 18-21.004(2)(b) states, in pertinent part, that activities that would result in significant adverse impacts to sovereignty lands and associated resources may not be approved.

167. As discussed above, the evidence establishes that there are no significant natural resources present at the location, or in the vicinity, of the Dock. Thus, the Dock will not have adverse impacts on such resources or on sovereignty submerged lands.

168. Nonetheless, numerous protective measures have been imposed as conditions to the letter of consent, to minimize the potential for adverse water quality impacts and to protect aquatic resources.

169. Based on the foregoing, it is determined that the Dock will meet the resource impact minimization requirements in rules 18-20.004(5)(a)1. and 18-21.004(2).

Measures to Avoid and Minimize Adverse Impacts to Listed Species and Habitat

170. 18-21.004(7)(e) requires that "construction, use, or operation of the structure or activity shall not adversely affect any species which is endangered, threatened[,] or of special concern, as listed in rules 68A-27.003, 68A-27.004[,] and 68A-27.005."

171. DEP consulted with FFWCC on the Dock application, to determine its potential impacts to species listed as endangered, threatened, or of special concern. As discussed above, FFWCC provided recommendations to minimize the Dock's potential

impacts to several listed species, and those recommendations have been imposed as conditions to the letter of consent.

172. As discussed above, the Dock will implement numerous measures to ensure that construction and use will not adversely affect manatees, sea turtle species, the Smalltooth Sawfish, and the Eastern Indigo Snake.

173. As discussed above, Key Deer forage on and traverse the shore along Long Beach Drive. The competent, credible evidence establishes that the Dock will not impose any substantial barrier to the Key Deer's use of the shore on Fondriest's property, and will not otherwise adversely affect the Key Deer. Also, as discussed above, the competent, credible evidence establishes that due to the lack of suitable habitat, other protected species, such as the Lower Keys Marsh Rabbit, Keys Rice Rat, and Florida Keys Mole Skink are unlikely to inhabit, or otherwise be present at or near, the Dock site. Thus, it is determined that the Dock will not have any adverse impacts on these species.

174. Based on the foregoing, it is determined that the Dock will not have adverse impacts to listed species and their habitat.

Riparian Rights

175. Chapters 18-20 and 18-21 require that the riparian rights of owners of upland riparian property adjacent to an activity seeking approval to use sovereignty submerged lands be protected.

176. Rule 18-20.004(4) states, in pertinent part: "[n]one of the provisions of this rule shall be implemented in a manner that would unreasonably infringe upon the traditional, common law and statutory riparian rights of upland property owners adjacent to sovereignty lands."

177. Rule 18-21.004(3) states, in pertinent part:

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

> (b) Satisfactory evidence of sufficient upland interest is required for activities on sovereignty submerged lands riparian to the uplands.
>
> (c) All structures and other activities must be designed and conducted in a manner that will not unreasonably restrict or infringe upon the riparian rights of adjacent upland riparian owners.
>
> (d) [A]ll structures, including mooring pilings, breakwaters, jetties and groins, and activities must be set back a minimum of 25 feet inside the applicant's riparian line. Exceptions to the setbacks are private residential single-family docks associated with a parcel that has a shoreline frontage of less than 65 feet, where portions of such structures are located between riparian less than 65 feet apart.

178. Pursuant to rule 18-21.003(63), "satisfactory upland interest" means owning the riparian uplands or having some other possessory or use interest, as specified in the rule.

179. Section 253.141(1) defines riparian rights as follows:

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

180. Fondriest owns the upland property riparian to the sovereignty submerged lands on which the Dock is proposed to be located, and Petitioners stipulated that she has a satisfactory upland interest for purposes of rule 18-21.004(3).

181. The Trust owns upland property bordering the Straits of Florida; thus, riparian rights inure to the Trust property, pursuant to section 253.141.

182. As previously discussed, the evidence establishes that the Dock will be set back over 40 feet from the common riparian line between Fondriest's property and the Trust's property. To this point, Meredith acknowledged that the Dock would be set back more than 25 feet from the common riparian line, and will not intrude into the Trust's riparian area.

183. No evidence was presented showing that the Dock would unreasonably interfere with the Trust's traditional riparian rights of navigation, boating, swimming, or fishing within its riparian area.

184. Meredith testified that the Dock would obstruct the view of the waterbody, the shore, and the sunrise over the water, from the Trust property. She appeared to assert these interests on behalf of the Trust and herself.

185. However, as more fully discussed below, under Florida law, the riparian right to an "unobstructed" view does not entail a view completely free of any infringement or restriction by structures or activities appurtenant to neighboring riparian properties. Rather, the right to an "unobstructed" view means that a riparian owner is entitled to a direct, unobstructed view *of the channel of the waterbody* and a direct means of ingress and egress to the channel. No evidence was presented that the Dock—which will be constructed perpendicular to the shoreline within Fondriest's riparian area—would obstruct the Trust's or Meredith's view of the channel of the Straits of Florida.

186. Additionally, as previously discussed, the Trust presented no evidence to show that the presence of the Dock in Fondriest's riparian area would interfere with the Trust's direct ingress and egress to and from the channel of the Straits of Florida.

187. Accordingly, it is determined that the Dock will not unreasonably infringe on the Trust's riparian rights.

188. Similarly, it is determined that the Dock will not unreasonably infringe on the riparian rights incident to the Deer Run property, or to Appel's properties on Long Beach Drive. To this point, Demaria and Appel did not present any evidence showing

that the Dock will obstruct their view of the channel of the Straits of Florida, either from the Deer Run property, or from Appel's properties.

189. DeMaria and Appel also failed to present evidence showing that the Dock would interfere with direct ingress and egress to and from the channel of the Straits of Florida, either from the Deer Run property or from Appel's properties.

190. Accordingly, it is determined that, consistent with section 253.141 and rule 18-21.004(3), the Dock will not unreasonably infringe on the riparian rights of the Trust or of DeMaria and Appel.

General Requirements for Authorization to Use Sovereignty Submerged Lands

191. As discussed above, the Dock will be constructed and used in a manner that will avoid and minimize adverse impacts to sovereignty submerged lands and resources, consistent with rule 18-21.004(7)(d).

192. The competent, credible evidence also demonstrates that the construction and use of the Dock will not adversely affect listed species, consistent with rule 18-21.004(7)(e).

193. As discussed above, the Dock will not unreasonably interfere with the riparian rights of the Petitioners, consistent with rule 18-21.004(7)(f).

194. Additionally, the Dock will not constitute a navigational hazard, consistent with rule 18-21.004(7)(g). Due to the shallow water in the footprint and in the vicinity of the Dock, navigation in the area is typically by kayak or canoe. The competent, credible evidence shows that the Dock will not impede navigation of these types of vessels.

195. Because the sandy beach areas on Long Beach Drive are in private ownership, the Dock will not interfere with the public easement for traditional uses of sandy beaches, as provided in section 161.141, Florida Statutes; thus, the Dock is consistent with rule 18-21.004(7)(h).

196. Also, as discussed above, the Dock will be constructed, operated, and maintained solely for the water-dependent uses of launching non-motorized vessels and swimming, consistent with rule 18-21.004(7)(j).

CONCLUSIONS OF LAW

I. Jurisdiction, Burden of Proof, and Standard of Proof

197. DOAH has jurisdiction over the parties to, and subject matter of, these proceedings. §§ 120.569 and 120.57(1), Fla. Stat.

198. These proceedings constitute a challenge to issuance, by the Trustees, of a letter of consent, pursuant to chapters 253 and 258, to allow the use of sovereignty submerged lands within an aquatic preserve. Fondriest, as the applicant, bears the burden of proof to demonstrate her entitlement to the letter of consent. *See Dep't of Transp. v. J.W.C. Co.*, 376 So. 2d 778 (Fla. 1st DCA 1981).

199. The applicable standard of proof in these proceedings is the preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

II. Applicable Statutes and Rules

A. Applicable Statutes

200. Section 253.03(7)(a), authorizes the Trustees to administer and manage sovereignty submerged lands. This statute states, in pertinent part:

> The Board of Trustees of the Internal Improvement Trust Fund is hereby authorized and directed to administer all state-owned lands and shall be responsible for the creation of an overall and comprehensive plan of development concerning the acquisition, management, and disposition of state-owned lands so as to ensure maximum benefit and use. The Board of Trustees of the Internal Improvement Trust Fund has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this act.

§ 253.03(7)(a), Fla. Stat.

201. Section 258.36 states the legislative intent that state-owned submerged lands in areas which have exceptional biological, aesthetic, and scientific value, as described in the statute, be set aside forever as aquatic preserves or sanctuaries for the benefit of future generations.

202. Section 258.43(1) authorizes the Trustees to adopt rules to regulate human activity in designated aquatic preserves in such a manner as not to unreasonably

interfere with lawful and traditional public uses of the preserve, such as sport and commercial fishing, boating, and swimming.

203. Section 403.813 states, in pertinent part:

> (1) A permit is not required under this chapter [(chapter 403)], [or] chapter 373[.] . . . [H]owever, except as otherwise provided in this subsection, this subsection does not relieve an applicant from any requirement to obtain permission to use or occupy lands owned by the Board of Trustees of the Internal Improvement Trust Fund . . . :
>
> * * *
>
> (b) The installation . . . of private docks, piers, and recreational docking facilities . . . , any of which docks:
>
> 1. Has 500 square feet or less of over-water surface area for a dock located in an area designated as Outstanding Florida Waters [.]
>
> 2. Is constructed on or held in place by pilings or is a floating dock constructed so as not to involve filling or dredging other than that necessary to install the pilings;
>
> 3. May not substantially impede the flow of water or create a navigational hazard;
>
> 4. Is used for recreational, noncommercial activities associated with the mooring or storage of boats and boat paraphernalia; and
>
> 5. Is the sole dock constructed pursuant to this exemption as measured along the shoreline for a distance of 65 feet, unless the parcel of land or individual lot as platted is less than 65 feet in length along the shoreline, in which case one exempt dock may be allowed per parcel or lot.

204. In this case, Fondriest applied for approval to use sovereignty submerged lands for the purpose of constructing a private residential single-family dock that will enable her to access water of sufficient depth to launch kayaks and other non-motorized vessels.

205. As discussed above, the Dock meets all applicable statutory requirements for issuance of a letter of consent[11] authorizing construction and use, subject to conditions that have been imposed to protect any biological or aesthetic resources at the location, and in the vicinity, of the Dock.

B. Applicable Rules

1. Chapter 18-20

206. The Trustees have adopted chapter 18-20 to implement the aquatic preserves program established in chapter 258.

Rule 18-20.001 - Intent

207. Rule 18-20.001 codifies the Trustees' statement of intent regarding management of aquatic preserves.

208. All sovereignty lands within a preserve shall be managed primarily for the maintenance of essentially natural conditions, the propagation of fish and wildlife, and public recreation, including hunting and fishing where deemed appropriate by the Trustees and the managing agency. Fla. Admin. Code R. 18-20.001(1).

209. Rule 18-20.001(3) states, in pertinent part:

> The preserves shall be administered and managed in accordance with the following goals:
>
> (a) To preserve, protect, and enhance these exceptional areas of sovereignty submerged lands by reasonable regulation of human activity within the preserves through the development and implementation of a comprehensive management program;
>
> (b) To protect and enhance the waters of the preserves so that the public may continue to enjoy the traditional recreational uses of those waters such as swimming, boating, and fishing;
>
> * * *
>
> (e) To encourage the protection, enhancement or restoration of the biological, aesthetic, or scientific values of the

[11] Additionally, as previously discussed, the Dock qualifies for an exemption from regulatory permitting, pursuant to section 403.813(1)(b). Petitioners have stipulated that the Dock qualifies for this exemption.

> preserves, including but not limited to the modification of existing manmade conditions toward their natural condition, and discourage activities which would degrade the aesthetic, biological, or scientific values, or the quality, or utility of a preserve, when reviewing applications, or when developing and implementing management plans for the preserves;
>
> (f) To preserve, promote, and utilize indigenous life forms and habitats, including but not limited to: sponges, soft coral, hard corals, submerged grasses, mangroves, salt water marshes, fresh water marshes, mud flats, estuarine, aquatic, and marine reptiles, game and non-game fish species, estuarine, aquatic and marine invertebrates, estuarine, aquatic and marine mammals, birds, shellfish and mollusks;
>
> * * *
>
> (h) To maintain those beneficial hydrologic and biologic functions, the benefits of which accrue to the public at large.

Rule 18-20.003 - Definitions

210. A "dock" is defined as a "fixed or floating structure, including moorings, used to the purpose of berthing buoyant vessels either temporarily or indefinitely." Fla. Admin. Code R. 18-20.003(19).

211. A "private residential single-family dock" is a dock which is used for private, recreational or leisure purposes for a single-family residence, cottage, or other such single dwelling unit and which is designed to moor no more than two boats. *See* Fla. Admin. Code R. 18-20.003(44).

212. The term "public interest" means demonstrable environmental, social, and economic benefits which would accrue to the public at large as a result of a proposed action, and which would clearly exceed all demonstrable environmental, social, and economic costs of the proposed action. In determining the public interest in a request for use or other transfer of interest in sovereignty lands, the Trustees must consider the project and purpose to be served by said use or other transfer of interest in sovereignty lands. *See* Fla. Admin. Code. R. 18-20.003(46).

213. A "Resource Protection Area (RPA) 1" means an area within an aquatic preserve which has resources of the highest quality and condition for that area. These resources may include, but are not limited to corals; marine grassbeds; mangrove swamps; salt-water marsh; oyster bars; archaeological and historical sites; endangered or threatened species habitat; and colonial water bird nesting sites. *See* Fla. Admin. Code R. 18-20.003(54).

214. A "Resource Protection Area 2" is an area within an aquatic preserve which is in transition, with either declining RPA 1 resources, or new pioneering resources within an RPA 3. *See* Fla. Admin. Code R. 18-20.003(55).

215. A "Resource Protection Area 3" is an area within an aquatic preserve that is characterized by the absence of any significant natural resource attributes. Fla. Admin. Code R. 18-20.003(56).

216. The term "sovereignty lands" means lands including, but not limited to tidal lands, islands, sandbars, shallow banks, and lands waterward of the ordinary or mean high water line, to which the State of Florida acquired title on March 3, 1845, by virtue of statehood, and of which it has not since divested its title interest. For the purposes of this rule, sovereignty lands include all submerged lands within the boundaries of an aquatic preserve for which title is held by the Trustees. *See* Fla. Admin. Code R. 18-20.003(65).

217. A "terminal platform" means the part of a dock that is connected to the access walkway, is located at the terminus of the facility, and is designed to secure and load or unload a vessel or conduct other water dependent activities. *See* Fla. Admin. Code R. 18-20.003(67).

218. A "water dependent activity" means an activity which can only be conducted on, in, over, or adjacent to, water areas, because the activity requires direct access to the waterbody or sovereignty lands for recreation and where the use of the water or sovereignty lands is an integral part of the activity. *See* Fla. Admin. Code R. 18-20.003(72).

Rule 18-20.004 - Management Policies, Standards and Criteria

219. Rule 18-20.004 establishes the policies, standards, and requirements applicable to determining whether to approve proposed activities on sovereignty submerged lands within an aquatic preserve.

220. Rule 18-20.004(1)(b) states: "[t]here shall be no further sale, lease or transfer of sovereignty lands except when such sale, lease or transfer is in the public interest (see subsection 18-20.004(2), F.A.C., Public Interest Assessment Criteria)."

221. A lease, easement, or consent of use may be authorized only for the following activities: ". . . [c]reation or maintenance of private docking facilities for reasonable ingress and egress of riparian owners[.]" Fla. Admin. Code R. 18-20.004(1)(e)5.

222. Pursuant to rule 18-20.004(1)(f), for activities listed in subparagraphs 18-20.004(1)(e)1. through 10., the activity must be designed so that the structure to be built in, on, or over sovereignty lands is limited to that necessary to conduct water dependent activities.

223. An applicant for approval of an activity proposed in an aquatic preserve that has a management plan adopted by the Trustees must demonstrate that the activity is consistent with the management plan. *See* Fla. Admin. Code. R. 18-20.004(3)(a).

224. Rule 18-20.004(4), regarding riparian rights within an aquatic preserve, states:

> (a) None of the provisions of this rule shall be implemented in a manner that would unreasonably infringe upon the traditional, common law and statutory riparian rights of upland riparian property owners adjacent to sovereignty lands.
>
> (b) The evaluation and determination of the reasonable riparian rights of ingress and egress for private, residential multi-slip docks shall be based upon the number of linear feet of riparian shoreline.
>
> (c) For the purpose of this rule, a private residential, single-family docking facility which meets all the requirements of subsection 18-20.004(5), F.A.C., shall be deemed to meet the public interest requirements of paragraph 18-20.004(1)(b), F.A.C. However, the applicants for such docking facilities

must apply for such consent and must meet all of the requirements and standards of this rule chapter.

225. Rule 18-20.004(5) establishes the standards and requirements for approval of docking facilities, including private residential single-family docks, in aquatic preserves. The rule states, in pertinent part:

> (a) All docking facilities, whether for private residential single-family docks, private residential multi-slip docks, or commercial, industrial, or other revenue generating/income related docks or public docks or piers, shall be subject to all of the following standards and criteria.
>
> 1. No dock shall extend waterward of the mean or ordinary high water line more than 500 feet or 20 percent of the width of the waterbody at that particular location, whichever is less.
>
> 2. Certain docks fall within areas of significant biological, scientific, historic, or aesthetic value and require special management considerations. The Board shall require design modifications based on site specific conditions to minimize adverse impacts to these resources, such as relocating docks to avoid vegetation or altering configurations to minimize shading.
>
> 3. Docking facilities shall be designed to ensure that vessel use will not cause harm to site specific resources. The design shall consider the number, lengths, drafts, and types of vessels allowed to use the facility.
>
> 4. In a Resource Protection Area 1 or 2, any wood planking used to construct the walkway surface of a facility shall be no more than eight inches wide and spaced no less than one-half inch apart after shrinkage. Walkway surfaces constructed of material other than wood shall be designed to provide light penetration which meets or exceeds the light penetration provided by wood construction.
>
> 5. In a Resource Protection Area 1 or 2, the main access dock shall be elevated a minimum of five (5) feet above mean or ordinary high water.
>
> 6. Existing docking facilities constructed in conformance with previously applicable rules of the Board and in

conformance with applicable rules of the Department are authorized to be maintained for continued use subject to the current requirements of chapter 18-21, F.A.C. Should more than 50 percent of a nonconforming structure fall into a state of disrepair or be destroyed as a result of any natural or manmade force, the entire structure shall be brought into full compliance with the current rules of the Board. This shall not be construed to prevent routine repair.

(b) Private residential single-family docks shall conform to all of the following specific design standards and criteria.

1. Any main access dock shall be limited to a maximum width of four (4) feet.

2. The dock decking design and construction will ensure maximum light penetration, with full consideration of safety and practicality.

3. The dock will extend out from the shoreline no further than to a maximum depth of minus four (-4) feet (mean low water).

4. When the water depth is minus four (-4) feet (mean low water) at an existing bulkhead the maximum dock length from the bulkhead shall be 25 feet, subject to modifications accommodating shoreline vegetation overhang.

5. Wave break devices, when requested by the applicant, shall be designed to allow for maximum water circulation and shall be built in such a manner as to be part of the dock structure.

6. Terminal platform size shall be no more than 160 square feet.

7. If a terminal platform terminates in a Resource Protection Area 1 or 2, the platform shall be elevated to a minimum height of five (5) feet above mean or ordinary high water. Up to 25 percent of the surface area of the terminal platform shall be authorized at a lower elevation to facilitate access between the terminal platform and the waters of the preserve or a vessel.

> 8. Docking facilities in a Resource Protection Area 1 or 2 shall only be authorized in locations having adequate existing water depths in the boat mooring, turning basin, access channels, and other such areas which will accommodate the proposed boat use in order to ensure that a minimum of one-foot clearance is provided between the deepest draft of a vessel and the top of any submerged resources at mean or ordinary low water; and,
>
> 9. Dredging to obtain navigable water depths in conjunction with private residential, single-family dock applications is strongly discouraged.
>
> * * *
>
> (7) The aquatic preserve management plans shall be used by the Department to preserve and restore the distinctive characteristics identified by the inventories for each aquatic preserve. The management plans for each aquatic preserve are available for guidance purposes only at the following Internet website address: https://floridadep.gov/rcp/rcp/content/site-management-plans.

226. For the reasons addressed above, it is concluded that the Dock, as proposed to be constructed and used subject to the conditions imposed in the letter of consent, will meet all applicable standards and requirements in rule 18-20.004, including the aquatic preserves public interest requirement established in rule 18-20.004(4)(c).[12]

Rule 18-20.006 - Cumulative Impacts

[12] Petitioners contend that because the Dock is proposed to be located in an aquatic preserve and Outstanding Florida Water, Fondriest must demonstrate that the Dock is "clearly in the public interest." This contention is misplaced. First, section 258.42(1)(a) and rule 18-20.004(2), which establish the public interest test applicable to activities in aquatic preserves, require a demonstration that an activity is "in the public interest," not "*clearly* in the public interest." § 258.42(1)(a), Fla. Stat.; Fla. Admin. Code R. 18-20.004(2)(a)3 (emphasis added). Additionally, the "clearly in the public interest standard" applicable to activities in Outstanding Florida Waters is a *regulatory permitting* standard established in rules 62-4.242 and 62-302.300. Because the Dock is exempt from regulatory permitting, pursuant to section 403.813(1)(b), it is not required to obtain an environmental resource permit or any other regulatory permit. Accordingly, the "clearly in the public interest" standard does not apply to the Dock. Furthermore, even if the Dock were subject to regulatory permitting—which it is not—the "clearly in the public interest" standard applies only when a proposed activity will degrade water quality in an Outstanding Florida Water. Here, Petitioners presented no evidence showing that the proposed Dock would have any adverse impacts whatsoever on water quality in the surface waters of

227. Rule 18-20.006 addresses the factors pertinent to evaluating an application in an aquatic preserve to determine whether it will result in an adverse cumulative impact to the resources of the aquatic preserve.

228. The rule states:

> In evaluating applications for activities within the preserves or which may impact the preserves, the Board recognizes that, while a particular alteration of the preserve may constitute a minor change, the cumulative effect of numerous such changes often results in major impairments to the resources of the preserve. Therefore, the particular site for which the activity is proposed shall be evaluated with the recognition that the activity may, in conjunction with other activities, adversely affect the preserve which is part of a complete and interrelated system. The impact of a proposed activity shall be considered in light of its cumulative impact on the preserve's natural system. The evaluation of an activity shall include:
>
> (1) The number and extent of similar human actions within the preserve which have previously affected or are likely to affect the preserve;
>
> (2) The similar activities within the preserve which are currently under consideration by the department and the water management districts;
>
> (3) Direct and indirect effects upon the preserve and adjacent preserves, if applicable, which may reasonably be expected to result from the activity;
>
> (4) The extent to which the activity is consistent with management plans for the preserve, when developed;
>
> (5) The extent to which the activity is permissible within the preserve in accordance with comprehensive plans adopted by affected local governments, pursuant to section 163.3161, F.S., and other applicable plans adopted by local, state, and federal governmental agencies;

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the CBAP. For these reasons, the "clearly in the public interest" standard does not apply to approval of the Dock.

> (6) The extent to which the loss of beneficial hydrologic and biologic functions would adversely impact the quality or utility of the preserve; and,
>
> (7) The extent to which mitigation measures may compensate for adverse impacts.

229. For the reasons discussed in detail, above, it is concluded that the Dock will not result in adverse cumulative impacts to the resources of the CBAP.

230. Based on the foregoing, it is concluded that the Dock will meet all applicable requirements of chapter 18-20 such that Fondriest is entitled to issuance of a letter of consent authorizing the construction and operation of the Dock.

2. Chapter 18-21

231. The Trustees have adopted Chapter 18-21 to implement the administrative and management functions regarding sovereignty submerged lands, pursuant to chapter 253.

Rule 18-21.003 - Definitions

232. The term "activity" means any use of sovereignty lands which requires approval of the Trustees for a letter of consent or other form of authorization, and includes the construction of docks on sovereignty lands. *See* Fla. Admin. Code R. 18-21.003(2).

233. An "applicant" is "any person making application for a lease, sale, or other form of conveyance of an interest in sovereignty lands or any other necessary form of governmental approval for an activity on sovereignty lands." Fla. Admin. Code R. 18-21.003(3).

234. A "[d]ock" means a "fixed or floating structure, including access walkways, terminal platforms, catwalks, mooring pilings, lifts, davits and other associated water-dependent structures, used for mooring and accessing vessels." Fla. Admin. Code R. 18-21.003(13).

235. A "letter of consent" is a "nonpossessory interest in sovereignty submerged lands created by an approval which authorizes the applicant to erect specific structures or conduct specific activities on such sovereignty submerged lands." Fla. Admin. Code R. 18-21.003(33).

236. A "minimum-size dock" is a dock "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." The term "minimum-size dock" also includes a dock "constructed in conformance with the exemption criteria in section 403.813(1)(b), or in conformance with the private residential single-family dock criteria in subsection 18-20.004(5)." *See* Fla. Admin. Code R. 18-21.003(39).

237. The term "private residential single-family dock" includes a dock used for private recreational or leisure purposes that is located on a single-family riparian parcel. *See* Fla. Admin. Code R. 18-21.003(50).

238. For purposes of chapter 18-21, "[p]ublic interest" means "demonstrable environmental, social, and economic benefits which would accrue to the public at large as a result of a proposed action, and which would clearly exceed all demonstrable environmental, social, and economic costs of the proposed action." Fla. Admin. Code R. 18-21.003(53).

239. "Satisfactory evidence of sufficient upland interest" is demonstrated by documentation, including a warranty deed or other document, that clearly demonstrates that the holder has control and interest in the riparian uplands adjacent to the project area and the riparian rights necessary to conduct the proposed activity. *See* Fla. Admin. Code R. 18-21.003(63).

240. A "water dependent activity" is one which can only be conducted on, in, over, or adjacent to water because the activity requires direct access to the waterbody or sovereign submerged lands for specified activities, including recreational activities, where the use of the water or sovereign submerged lands is an integral part of the activity. *See* Fla. Admin. Code R. 18-21.003(75).

Rule 18-21.004 - Management Policies, Standards, and Criteria

241. For approval to use sovereignty submerged lands for a proposed activity, the activity must be not contrary to the public interest. Fla. Admin. Code R. 18-21.004(1)(a).

242. All forms of approval for activities on sovereignty lands must contain terms, conditions, or restrictions, as deemed necessary, to protect and manage those sovereignty lands. *See* Fla. Admin. Code R. 18-21.004(1)(b).

243. Activities on sovereignty submerged lands are limited to only water dependent activities and minimal secondary non-water dependent uses, except as otherwise provided by rule. Fla. Admin. Code R. 18-21.004(1)(g).

244. All sovereignty submerged lands are considered single-use lands which are to be managed primarily for the maintenance of essentially natural conditions, propagation of fish and wildlife, and traditional recreational uses such as fishing, boating, and swimming. Fla. Admin. Code R. 18-21.004(2)(a).

245. Activities must be designed to eliminate any cutting, removal, or destruction of wetland vegetation, as listed in Florida Administrative Code Chapter 62-340, on sovereignty lands. Fla. Admin. Code R. 18-21.004(2)(d).

246. Activities on sovereignty lands must be designed to minimize or eliminate adverse impacts on fish and wildlife habitat, and other natural or cultural resources. Fla. Admin. Code R. 18-21.004(2)(i).

247. To be approved, proposed activities cannot unreasonably infringe upon the traditional, common law riparian rights, as defined in section 253.141, of upland property owners adjacent to sovereignty submerged lands. Fla. Admin. Code R. 18-21.004(3)(a).

248. All structures and other activities must be designed and conducted in a manner that will not unreasonably restrict on infringe upon the riparian rights of adjacent upland riparian owners. Fla. Admin. Code R. 18-21.004(3)(c).

249. Except as otherwise provided by rule, all structures must be set back a minimum of 25 feet inside the applicant's riparian rights line. Fla. Admin. Code R. 18-21.004(3)(d).

250. Riparian rights are rights appurtenant to, and inseparable from, riparian land that borders on navigable waters. § 253.414, Fla. Stat.; *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909). At common law, riparian rights include the rights of navigation, fishing, boating, and commerce. *Hayes v. Bowman*, 91 So. 2d 795 (Fla. 1957). The

right of navigation includes the right to construct and operate a dock to access navigable waters. *5F, LLC v. Dresing*, 142 So. 3d 936, 947 (Fla. 2d DCA 2014); *Cartish v. Soper*, 157 So. 2d 150, 153-54 (Fla. 2d DCA 1963).

251. Common law riparian rights also include the right to an unobstructed view. In *Hayes*, the court specifically defined this right as a direct, unobstructed view *of the channel*, and prescribed the rule that "in any given case, the riparian rights of the upland owner must be preserved over an area as near as practicable' *in the direction of the [c]hannel* so as to distribute equally the submerged lands between the upland and the channel." *Hayes*, 91 So. 2d at 801 (emphasis added). The court in *Hayes* further explained that the right to a particular object of view (there, the "bright, white tower of Stetson Law School"; here, the sunrise over the water) is not a protected riparian right. Later case law holds that the interference with view "must be more than a mere annoyance; it must *substantially and materially obstruct* the riparian landowner's view *of the channel*." *Lee v. Kiesel*, 705 So. 2d 1013, 1015 (Fla. 2d DCA 1998)(emphasis added). Administrative cases have followed this rule. In *O'Donnell v. Atlantic Dry Dock Corp.*, Case No. 04-2240 (Fla. DOAH May 23, 2005; Fla. DEP Sept. 6, 2005), the ALJ determined that challengers to the proposed expansion of a dry dock operation on neighboring riparian property did not have a special riparian right to an unobstructed view of the sunset, and that while the lateral encroachment on the challengers' line-of-sight of the channel would constitute an annoyance, it did not rise to the level of a substantial and material interference or obstruction of, the challengers' view of the channel. *Id*. at ¶ 119. *See Defenders of Crooked Lake v. Howard*, Case No. 17-5328 (Fla. DOAH Jul. 5, 2018), *modified in part*, Case No. 17-0972 (determining that a private residential single-family dock which did not obstruct neighbors' view of the center of a lake did not constitute a substantial and material interference with the riparian right to an unobstructed view).

252. As discussed above, the Dock will be constructed perpendicular to the shoreline on Fondriest's property and will not cross, or otherwise obstruct, the Trust's and DeMaria's/Appel's direct view of the channel of the waterbody, which in this case is the Straits of Florida. Further, although the Trust and DeMaria/Appel strongly

oppose the Dock on the basis that it will significantly detract from their view of the sunrise over the water, case law instructs that there is no riparian right to a particular object of view. *See Hayes*, 91 So. 2d at 801. Accordingly, it is determined that the Dock will not unreasonably infringe on or unreasonably restrict the Trust's or DeMaria's/Appel's qualified right to an unobstructed view of the water.

253. For the reasons discussed herein, it is concluded that the Dock, as proposed to be constructed and used, subject to the conditions imposed in the letter of consent, will meet all applicable standards and requirements of rule 18-21.004.

Rule 18-21.005 - Forms of Authorization

254. A letter of consent is a form of written authorization for certain proposed activities on sovereignty submerged lands. Types of activities that qualify for a letter of consent include one minimum-size private single-family dock per parcel, and activities that are exempt from permitting under section 403.813(1)(b). See Fla. Admin. Code R. 18-21.005(1)(c)1.

255. As found above, the Dock is a minimum-size private single-family residential dock that is exempt from permitting under section 404.813(1)(b). Accordingly, the Dock qualifies for a letter of consent as the form of authorization to use sovereignty submerged lands.

256. Based on the foregoing, it is concluded that the Dock will meet all applicable requirements of chapter 18-21 such that Fondriest is entitled to issuance of a letter of consent authorizing the construction and operation of the Dock.

III. Petitioners' Standing and Timeliness of Crilly Petition

Standing Case Law

257. As persons asserting party status to challenge the proposed agency action at issue in this proceeding—which, as discussed above, is the proposed approval of the Dock as issued on September 30, 2020—Petitioners have the burden to demonstrate their standing to initiate and maintain these proceedings. *Palm Beach Cty. Envtl. Coal. v. Dep't of Envtl. Prot.*, 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009); *Agrico Chem. Co. v. Dep't of Envtl. Reg.*, 406 So. 2d 478, 482 (Fla. 1st DCA 1981).

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

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

Id. at 482.

259. Since *Agrico*, courts have clarified that standing to initiate an administrative proceeding is not dependent on proving that the proposed agency action would violate the law applicable to the proceeding. In other words, it is not necessary that the person prevail on the merits in an administrative challenge under section 120.57(1) to have standing as a party to initiate and maintain that challenge. *See St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.,* 54 So. 3d 1051 (Fla. 5th DCA 2011); *see also Reily Enters., LLC v. Dep't of Envtl. Prot.*, 990 So. 2d 1248 (Fla. 4th DCA 2008). As one court explained:

> Standing is a "forward-looking concept" and "cannot disappear" based on the ultimate outcome of the proceeding . . . . When standing is challenged during an administrative hearing, the petitioner must offer proof of the elements of standing, and it is sufficient that the petitioner demonstrate by such proof that his substantial interests "could reasonably be affected by . . . [the] proposed activities."

Palm Beach Cty. Envtl. Coal., 14 So. 3d at 1078.

260. Thus, for purposes of demonstrating a sufficient injury in fact to support standing in an administrative proceeding, it is sufficient for a party challenging proposed issuance of a permit or other agency approval to show that his or her substantial interests "*could reasonably be affected* by the [proposed] activit[y]." *Peace River/Manasota Reg'l Water Supply Auth.*, 14 So. 3d at 1084 (emphasis added). This, in turn, depends on the challenger offering evidence to prove that he or she *could be* injured. *Id.*; *see Angelo's Aggregate Materials, Ltd. v. Dep't of Envtl. Prot.*, Case Nos.

09-1543, 09-1544, 09-1545, 09-1546 (Fla. DOAH June 28, 2013; Fla. DEP Sept. 16, 2013).

261. Since *Agrico*, courts have held that was not intended as a barrier to participation in proceedings under chapter 120 by persons who are affected by the potential and foreseeable results of agency action. Rather, "[t]he intent of *Agrico* was to preclude parties from intervening in a proceeding where those parties' substantial interests are *totally unrelated* to the issues that are to be resolved in the administrative proceeding." *Mid-Chattahoochee River Users v. Dep't of Envtl. Prot.*, 948 So. 2d 794, 797 (Fla. 1st DCA 2006)(emphasis added), citing *Gregory v. Indian River Cty.*, 610 So. 2d 547, 554 (Fla. 1st DCA 1992).

262. It is well-established that economic injury is not protected by proceedings under sections 120.569 and 120.57, unless the permitting or licensing statute and/or rules contemplate consideration of such interest. *Mid-Chattahoochee River Users*, 948 So. 2d at 797 (Fla. 1st DCA 2006)(economic injury not within zone of interest of environmental wetland permitting statute); *City of Sunrise v. S. Fla. Water Mgmt. Dist.*, 615 So. 2d 746, 747 (Fla. 4th DCA 1993)(economic injury not within zone of interest of environmental water use permitting statute); *Agrico*, 406 So. 2d at 482 (economic injury not within zone of interest of environmental air quality permitting statute).

263. Further, a party's standing to initiate and participate as a party to a proceeding under sections 120.569 and 120.57 is not dependent on the party prevailing on the merits of the proceeding. *Peace River/Manasota Water Supp. Auth. V. IMC Phosphates Co.*, 18 So. 3d 1079, 1083 (Fla. 2d DCA 2009)(standing depends on the nature of the alleged injury and scope of the proceeding, rather than the elements or merits of the underlying claims*); see Reily Enters., LLC v. Fla. Dep't of Envtl. Prot.*, 990 So. 2d 1248, 1251 (Fla. 4th DCA 2008)(rejecting the argument that a party must prevail on the merits of the underlying claims to have standing as a party to a proceeding under sections 120.569 and 120.57).

Trust's Standing

264. Meredith testified regarding several injuries allegedly sustained by her, Roberts, and the Trust, which will result from the construction, location, and use of the Dock.

265. Since neither Meredith nor Roberts are individual petitioners in these proceedings, the alleged injuries to their *personal* use and enjoyment of the natural resources along the shore and below the MHWL, and any alleged injury to their *personal* right to an unobstructed view, are not cognizable in these proceedings.

266. Meredith testified that as trustees, she and Roberts were concerned about the loss of value of the Trust due to the Dock. Although on cross-examination, she confirmed that they were concerned about the effect of the Dock on the "value" of the Trust property, the context of her testimony made clear that the "value" to which she referred was the long-term value of the Trust property as a place for her children and grandchildren to be able to use and enjoy the natural resources and aesthetics of the area,[13] rather than to the value of the Trust property as a real estate asset.

267. Meredith also testified regarding the Dock's impact on the riparian right to an unobstructed view that inures to the Trust property. As discussed above, the Trust has not shown that the Dock will obstruct the view, from the Trust property, of the channel of the Straits of Florida.

268. Although Petitioners have not prevailed on the merits of their challenge, the Trust alleged injuries to the natural resource, aesthetic values, and riparian rights that reasonably may be expected as a result of the Dock, and these interests are protected by chapters 253 and 258, and chapters 18-20 and 18-21.

269. Accordingly, it is concluded that the Trust has standing as a party in these proceedings.

[13] Section 258.36 expressly recognizes the value of aquatic preserves in preserving biological and aesthetic resources "for the benefit of future generations."

DeMaria's and Appel's Interests

270. DeMaria is a Petitioner in Case No. 20-2535, and Appel has moved to intervene and become a party to that case. They allege that the Dock will injure their interests in several ways.

271. First, as discussed above, DeMaria and Appel own the Deer Run eco-lodge which is located on a riparian parcel immediately to the west of the Trust property. They purchased the property because of the unspoiled natural environment in the area. They allege that the Dock will interfere with the view of the water and sunrise, and will significantly detract from the natural beauty and aesthetics of the environment at, and in the immediate vicinity of, Deer Run. They allege that the presence of the Dock will render Deer Run less attractive as an ecotourism destination, thus causing them to lose clientele, which will cause them to suffer economic injury.

272. Additionally, DeMaria and Appel alleged and testified that the Dock will detract from their personal use and enjoyment of the natural resources and aesthetics of the area, and will interfere with their unobstructed view of the water and the sunset.

273. DeMaria and Appel volunteer also as sea turtle nest monitors. Like Crilly, they contend that the presence of the Dock will interfere with their ability to perform sea turtle monitoring activities. Neither DeMaria nor Appel currently hold a marine turtle permit from FFWCC; however, both of them engage in data collection regarding sea turtles, and that data is ultimately reported to FFWCC.

274. The alleged economic injury due to loss of business at the Deer Run eco-lodge is not an interest protected under chapters 258 or 258, or chapters 18-20 or 18-21. Pursuant to the foregoing case law, this alleged injury is not a basis for conferring standing to DeMaria and Appel in these proceedings. *See Mid-Chattahoochee River Users*, 948 So. 2d at 797; *Agrico*, 406 So. 2d at 182; *City of Sunrise*, 615 So. 2d at 747.

275. Additionally, any alleged property damage and injury resulting from storm-related destruction of the Dock is not within the scope of chapters 253 or 258, or chapters 18-20 or 18-21.

276. However, other injuries that DeMaria and Appel allege are within the zone of interest of these proceedings, which are brought pursuant to chapters 253 and 258, and chapters 18-20 and 18-21.

277. As discussed above, alleged personal injuries to the use and enjoyment of the natural resources and aesthetics of the Long Beach Drive area fall within the scope of interests protected by chapter 258, the purpose of which is to designate areas of significant biological, aesthetic, and scientific value as aquatic preserves, and to protect the resources within those preserves.

278. Additionally, for the reasons discussed above, their sea turtle monitoring activities also are protected under chapter 18-20. Although neither DeMaria nor Appel are marine turtle permit holders, they nonetheless are authorized, under the authority of a marine turtle permit, to monitor, collect, and report sea turtle monitoring data for scientific research purposes.

279. DeMaria and Appel also allege infringement on their riparian right to an unobstructed view of the water. For the reasons discussed above, DeMaria and Appel have not prevailed on their claim that the Dock will unreasonably infringe on this riparian right in violation of chapter 253 and chapter 18-21; however, they have alleged an infringement on that right, which is protected under these proceedings.

280. For these reasons, it is concluded that DeMaria and Appel have standing in these proceedings to challenge the Dock Approval.

281. Appel has demonstrated standing to intervene and participate as a party in Case No. 20-2474. Accordingly, his request to intervene and participate as a party to that case is granted.[14]

[14] Florida Administrative Code Rule 28-106.205, regarding intervention in pending administrative proceedings, provides that motions for leave to intervene must be filed at least 20 days before the final hearing unless good cause is shown. Here, Appel's request to intervene was filed in the form of an amended petition challenging the Dock Approval in Case No. 20-2474. Given that this proceeding remained pending at DOAH while DEP reviewed a revised application and took new agency action to issue the Dock Approval—notwithstanding that section 120.569(2)(a) states "[t]he referring agency shall take no further action with respect to a proceeding under s. 120.57(1), except as a party litigant, as long as [DOAH] has jurisdiction over the proceeding under s. 120.57(1)"—the undersigned determines that good cause exists to allow Appel to intervene less than 20 days before the final hearing and become a party to Case No. 20-2474.

Crilly's Standing and Timeliness of Petition

282. Crilly is the holder of an FFWCC-issued marine turtle permit for the Long Beach Drive area. Pursuant to this permit, Crilly is authorized to engage in sea turtle nesting monitoring to collect information for use in sea turtle research conducted by FFWCC. As discussed above, Crilly walks the beach during sea turtle nesting season, monitoring and collecting sea turtle nesting and hatchling data. She has alleged that the presence of the Dock will physically interfere with her ability to engage in sea turtle monitoring and data collection under her marine turtle permit.

283. Chapter 18-20 protects the interests that Crilly asserts will be injured by the Dock. Specifically, rule 18-20.001(3)(e) expressly contemplates protection of the scientific value of aquatic preserves. Crilly's sea turtle monitoring activities, which she conducts pursuant to a marine turtle permit issued by FFWCC for the purpose of collecting and reporting sea turtle monitoring data, constitute scientific investigation activities that are protected under the aquatic preserves rule.

284. Crilly alleges reasonably expected injury to interests protected under rule chapter 18-21. Thus, it is concluded that Crilly has standing in these proceedings.

285. It is further concluded that Crilly timely filed her Petition challenging the Dock. As found above, Crilly testified at the final hearing that she "learned of" DEP's approval of the Dock, as originally proposed, on December 30, 2019.

286. No evidence was presented showing that Crilly received a legally sufficient clear point of entry to challenge the 2019 Approval—whether on December 10 or 30, 2019, or at any time thereafter, for that matter—such that her Petition, which was filed at DEP on February 27, 2020, was untimely. It is well-established that notice of agency action which does not inform the affected person of his or her right to request a hearing, the time limits for doing so, and the applicable agency rules stating the procedure for doing so, is insufficient to provide a clear point of entry for purposes of commencing the timeframe for filing a petition challenging the proposed agency action. A party seeking to establish waiver based on the passage of time must show that the person affected by the agency action received notice sufficient to commence the running of the time period within which the agency action must be challenged.

City of St. Cloud v. Dep't of Envtl. Reg., 490 So. 2d 1356, 1358 (Fla. 5th DCA 1986); *Manasota-88 v. State, Dep't of Envtl. Reg.*, 417 So. 2d 846, 847 (Fla. 1st DCA 1982). As discussed above, no evidence regarding Crilly's receipt of a clear point of entry was presented. Accordingly, it is concluded that Crilly timely filed her Petition challenging the 2019 Approval.

287. Moreover, in any event, DEP's notice of changed agency action in the form of the Dock Approval, which is the agency action at issue in this proceeding, was issued on September 30, 2020. By that time, Crilly already had filed her Petition at DEP and the Petition had been referred to DOAH. Although the size of the Dock was modified in the Dock Approval, Crilly's Petition alleges injuries that reasonably are expected to result from the Dock, as approved by Dock Approval. Accordingly, it is concluded that Crilly's Petition challenging the Dock Approval was timely filed.

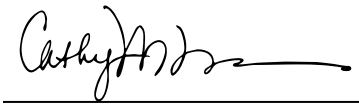
IV. Conclusion

288. In sum, it is concluded that the Dock will meet all applicable statutory and rule standards and requirements for issuance of the Dock Approval.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Environmental Protection issue a Final Order granting Respondent Julia Fondriest's application for a Letter of Consent to Use Sovereignty Submerged Lands and verifying that the Dock is exempt from the requirement to obtain a regulatory permit, pursuant to section 403.813(1)(b).

DONE AND ENTERED this 18th day of February, 2021, in Tallahassee, Leon County, Florida.



CATHY M. SELLERS
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

Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of February, 2021.

COPIES FURNISHED:

Julia Fondriest
Doug Scheele
Lifetime Dock & Lumber, Inc.
24536 Overseas Highway
Summerland Key, Florida 33042

Luna E. Phillips, Esquire
Gunster, Yoakley & Stewart, P.A.
Suite 1400
450 East Las Olas Boulevard
Fort Lauderdale, Florida 33301

Deborah K. Madden, Esquire
Gunster, Yoakley & Stewart, P.A.
Suite 1400
450 East Las Olas Boulevard
Fort Lauderdale, Florida 33301

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

Ralf Gunars Brookes, Esquire
Ralf Brookes Attorney
Suite 107
1217 East Cape Coral Parkway
Cape Coral, Florida 33904

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

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.