

BACKGROUND

On September 14, 2021, the Florida Department of Environmental Protection issued a Return to Compliance Letter – Exemption Verification to Bent Jorgensen. The letter documented the Department’s decision that Mr. Jorgensen’s dock and boatlift had been constructed in compliance with the exemption criteria set forth in Florida Administrative Code Rule 62-330.051(5)(c) and section 403.813(1)(i), Florida Statutes. Gorman filed a petition for administrative hearing challenging the exemption verification. DEP referred the petition to the Division of Administrative Hearings (DOAH).

The ALJ scheduled the final hearing for January 25-26, and February 9, 2022, by Zoom Conference. The Department presented the testimony of Elizabeth Sweigert. The Respondent Jorgensen presented the testimony of Gary Capristo and Captain Thomas Katz. Jorgensen’s Joint exhibits J-1 through J-15 were admitted into evidence.

Gorman presented the testimony of David Mullen, Sean Bowman, James Gorman, John Truitt, Bent Jorgensen, and himself. Mr. Gorman’s exhibits 1, 6, 8, 9, 10, 11, 15 (pp. 1, 2 [photograph but not the blueprint], and 3-5), 29, 32, 36 (p. 2), 37, 39, 46, 49, 51, 54 (Jorgensen egress video), and 55 (the “dock video” filed January 5, 2021) were admitted into evidence.

Gorman and DEP timely filed proposed recommended orders (PROs). Jorgensen filed his PRO untimely. The ALJ denied a motion to strike Jorgensen’s PRO and accepted it as timely.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department issue a final order (1) finding that the Jorgensen dock modification is not exempt from needing an environmental resource permit, and rescinding the Return to Compliance Letter – Exemption Verification; (2) requiring Jorgensen to remove or modify his dock so that it does not impede navigation to and from

Gorman's dock (unless Jorgensen qualifies for and obtains an environmental resource permit for a dock modification); and (3) imposing liability, restoration requirements, and civil penalties provided in sections 403.121, 403.141, and 373.129, Florida Statutes. (RO p. 17). In doing so, the ALJ found that Jorgensen's dock modification impedes Gorman's navigation and does not comply with the exemption criteria set forth in Florida Administrative Code Rule 62-330.051(5)(c) and section 403.813(1)(i), Florida Statutes. (RO ¶¶ 35, 49).

STANDARDS OF REVIEW FOR 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. (2021); *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, 1026-27 (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, 1141-42 (Fla. 2d DCA 2001). An agency has the primary responsibility to interpret statutes and rules within its regulatory jurisdiction and expertise. *See, e.g., Pub. Emp. Relations Comm'n v. Dade Cnty. Police Benevolent Ass'n*, 467 So. 2d 987, 989 (Fla. 1985); *Fla. Public Emp. Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

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 Pro. 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 chapters 373 and 403 of the Florida Statutes. 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 Pro. Regul.*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regul.*, 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. (2021). 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)(1), Fla. Stat. (2021); *Barfield*, 805 So. 2d at 1012; *Fla. Pub. Emp. Council, v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

RULINGS ON JORGENSEN’S EXCEPTIONS

Jorgensen’s Exception to Paragraph No. 2

Jorgensen takes exception to the ALJ’s finding in paragraph no. 2 of the RO that Gorman is “a life-long boater” and “a skilled boater.” (RO ¶ 2). Moreover, Jorgensen takes exception to the ALJ’s finding that “Gorman’s position is not due to or exacerbated by his disability.”

Jorgensen’s Exceptions, p. 4.

Jorgensen disagrees with the ALJ’s findings and seeks to have the Department reweigh the evidence. However, the Department 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 Constr. Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623.

Contrary to Jorgensen's exception to paragraph no. 2, the ALJ's findings of fact recited above are supported by competent substantial evidence. Gorman testified that he is "a life-long boater" and "a skilled boater." (Gorman, T. Vol. III, p. 331, lines 22-25; Gorman, T. Vol. III, p. 332, lines 10-14; Gorman, T. Vol. V, p. 463, lines 11-16). Moreover, the testimony supports the ALJ's finding of fact that "[n]one of the difficulties entering and leaving Mr. Gorman's dock and boat lift described in this Recommended Order are due to or exacerbated by Mr. Gorman's disability." (RO ¶ 2) (Gorman, T. Vol. V, p. 525, lines 16-25; Petitioner's Exhibits 11, 15, 32 and 39 (photos); Petitioner's Exhibit 55 (video)).

Based on the foregoing reasons, Jorgensen's exception to paragraph no. 2 is denied.

Jorgensen's Exception to Paragraph No. 4

Jorgensen takes exception to the ALJ's finding in paragraph no. 4 of the RO that Gorman "was and is committed to obtaining a triton boat for his Cape Coral home." (RO ¶ 4).

Jorgensen disagrees with the ALJ's findings and seeks to have the Department reweigh the evidence. However, the Department 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 Constr. Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623.

Contrary to Jorgensen's exception to paragraph no. 4, the ALJ's findings of fact recited above are supported by competent substantial evidence. (Gorman, T. Vol. V, p. 455).

Based on the foregoing reasons, Jorgensen's exception to paragraph no. 4 is denied.

Jorgensen's Exception to Paragraph No. 5

Jorgensen takes exception to the ALJ's finding in paragraph no. 5 of the RO that "Mr. Mullen quit using the dock and lift because of difficulties created by Mr. Jorgensen's dock expansion and lift." (RO ¶ 5).

Jorgensen disagrees with the ALJ's findings and seeks to have the Department reweigh the evidence. However, the Department 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 Constr. Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623.

Contrary to Jorgensen's exception to paragraph no. 5, the ALJ's findings of fact recited above are supported by competent substantial evidence. (Mullen, T. Vol. III, p. 255, lines 7-16; Mullen, T. Vol. III, p. 263, lines 15-25).

Based on the foregoing reasons, Jorgensen's exception to paragraph no. 5 is denied.

Jorgensen's Exception to Paragraph No. 7

Jorgensen takes exception to paragraph 7 of the RO, which provides, in its entirety:

7. The Department has the authority to regulate construction of docks in waters of the State of Florida under chapter 403, among others, and chapter 62-330.

(RO ¶ 7).

Jorgensen contends that "finding of fact 7 is an accurate statement, [but] it is misapplied by the ALJ." Jorgensen's Exceptions, p. 5. Moreover, Jorgensen contends that DEP argued that "the canal in question is not regulated by the State of Florida, but the City of Cape Coral." *Id.*

Jorgensen concludes by asserting that “DEP does not have the authority to enforce and the issue is out of the purview of this proceeding and the ALJ.” *Id.*

The ALJ articulated that the issue in this DOAH case is “[d]oes expansion of a dock, including addition of a boatlift and canopy, for Respondent, Bent Jorgensen, on a canal in Lee County, Florida, qualify for an exemption from obtaining an Environmental Resource Permit under section 403.813(1)(i), Florida Statutes (2021), and Florida Administrative Code Rule 62-330.051(5)(c)?” (RO, Statement of the Issue, p. 2).

The Department has the authority to regulate construction of docks in wetlands and other surface waters under the environmental resource permitting (ERP) program and the ERP exemptions in section 403.813, Florida Statutes. *See* § 373.414, Fla. Stat. (2021), and § 403.813(1)(i), Fla. Stat. (2021). Even Jorgensen in his exception admitted that paragraph no. 7 of the RO is an accurate statement. Jorgensen’s Exceptions, p. 5.

Under Section 120.57(1)(k), Florida Statutes, the Department need not rule on an exception that does not “include appropriate and specific citations to the record,” or that “does not identify the legal basis for the exception.” § 120.57(1)(k), Fla. Stat. (2021). *See Yon v. Town of Grand Ridge and Fla. Dep’t of Env’t Prot.* (Fla. DEP Case No. 07-0704, March 20, 2008) (Fla. DOAH Case No. 07-2414, February 8, 2008) (DEP Final Order denied exception no. 14, partly because petitioner failed to identify the legal basis for the exception and did not include appropriate and specific citations to the record). This alone is a sufficient basis to reject Jorgensen’s exception to paragraph no. 7 of the RO.

However, out of an abundance of caution and a desire for clarity, the Department will rule on this exception. Based on the totality of Jorgensen’s exceptions and the RO, Jorgensen appears to be attempting to distinguish that DEP and DOAH do not have the authority to regulate

submerged lands within an upland cut canal, nor require a Board of Trustees of the Internal Improvement Trust Fund (BOT) authorization to construct on state sovereign submerged lands. However, the ALJ agreed that BOT authorization was not required when he found that “[t]he canal [at issue] is an artificially created waterway. It is not on state sovereign submerged lands.” (RO ¶ 1).

Based on the foregoing reasons, Jorgensen’s exception to paragraph no. 7 is denied.

Jorgensen’s Exception to Paragraph No. 14

Jorgensen takes exception to the ALJ’s findings in paragraph no. 14 of the RO that provides in its entirety:

14. When Mr. Gorman talked to Mr. Capristo about changing the dock design and location, Mr. Capristo verbally attacked him. He said, ‘You are just like all the rest of the cripples. You cripples all want something done.’ He went on to say, ‘Go inside where you belong and go defecate in your pants.’ (Tr. 472).

(RO ¶ 14).

Jorgensen contends that paragraph no. 14 was “objected to during the proceeding as hearsay and irrelevant and the objection was sustained by the ALJ on the grounds of relevance. (T. 472-473).” Jorgensen’s Exceptions, p. 5.

The Department acknowledges that objections were raised to the statements made in paragraph no. 14 of the RO. However, Jorgensen misread the ALJ’s rulings. The first quote, objection, and ruling provided:

THE WITNESS: Mr. Capristo at that point told me that ‘You are just like all the rest of the cripples. You cripples all want something done. –
MR. PICA: Objection, Your Honor. . . .
THE COURT: Objection is overruled.
Go ahead and wrap up, Mr. Gorman.

The second quote, objection, and ruling provided:

THE WITNESS: Okay. And at that point he told me that – ‘Go inside where you belong and go defecate in your pants.’ And at that point, I was – *I’ve never had anybody in my entire life, and it still sits with me.*

MR. PICA: Your honor, relevance.

THE COURT: Mr. Gorman, I’m going to sustain that, *give you a chance to tell me why your reaction to Mr. Capristo’s comments are relevant to this proceeding* about whether DEP follows the statutes and rules.

. . .

THE COURT: Mr. Gorman, stop there. That’s a new fact, its not responding to the objection about the relevance of your reaction to Mr. Capristo’s alleged statement.

The objection is sustained. That brief little bit of testimony about your reaction is stricken. It’s not to say your reaction isn’t important. It’s just not relevant to this proceeding.

(Gorman, Pica, and ALJ Newton, T. Vol. V, pp. 471-73) (emphasis added).

The ALJ overruled the objection regarding Mr. Gorman’s testimony that Mr. Capristo stated “[y]ou are just like all the rest of the cripples. You cripples all want something done”; thereby letting the testimony be admitted.

The ALJ did sustain a portion of Mr. Gorman’s testimony in which he said that Mr. Capristo told him to “go defecate in your pants,” and Mr. Gorman expressed his feelings about the comment by testifying that “I’ve never had anybody in my entire life, and it still sits with me.” (ALJ Newton, T. Vol. V, p. 472). The ALJ only sustained “[t]hat brief little bit of testimony about your reaction is stricken.” (ALJ Newton, T. Vol. V. p. 473). The ALJ did not sustain Mr. Gorman’s testimony regarding what Mr. Capristo told him to do; only Mr. Gorman’s reaction to Mr. Capristo’s statement. Therefore, Mr. Gorman’s testimony regarding what Mr. Capristo told him to do was admitted and not stricken. Only Mr. Gorman’s “reaction” was stricken, based on relevancy to the case.

Paragraph no. 14 of the RO does not contain Mr. Gorman’s testimony regarding his “reaction” to Mr. Capristo’s statement, which was stricken by the ALJ based on relevancy.

Consequently, the ALJ did not sustain or reject any portion of the text in paragraph no. 14 of the RO.

Based on the foregoing reasons, Jorgensen's exception to paragraph no. 14 is denied.

Jorgensen's Exception to Paragraph No. 15

Jorgensen takes exception to the ALJ's findings in paragraph no. 15 of the RO that provides in its entirety that "Mr. Capristo did not consider the effect of his design and construction of Mr. Jorgensen's dock improvements upon Mr. Gorman's dock and his ability to use it." (RO ¶ 15).

Jorgensen disagrees with the ALJ's findings and seeks to have the Department reweigh the evidence. However, the Department 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 Constr. Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623.

Contrary to Jorgensen's exception to paragraph no. 15, the ALJ's findings of fact recited above are supported by competent substantial evidence. (Capristo, T. Vol. III, p. 311, lines 4-25 through p. 312, lines 1-7).

Based on the foregoing reasons, Jorgensen's exception to paragraph no. 15 is denied.

Jorgensen's Exception to Paragraph No. 25

Jorgensen takes exception to the ALJ's finding in paragraph no. 25 of the RO that "Mr. Jorgensen's dock and boatlift make getting a boat approximately 24 feet long in and out of Mr. Gorman's slip under power impossible." (RO ¶ 25).

Jorgensen disagrees with the ALJ's findings and seeks to have the Department reweigh the evidence. However, the Department 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 Constr. Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623.

Contrary to Jorgensen's exception to paragraph no. 25, the ALJ's findings of fact recited above are supported by competent substantial evidence. (Gorman, T. Vol. V, p. 459, lines 19-24; Gorman, Vol. V, p. 460, lines 7-10; Petitioner's Exhibit 55 (dock video)).

Based on the foregoing reasons, Jorgensen's exception to paragraph no. 25 is denied.

Jorgensen's Exception to Paragraph No. 26

Jorgensen takes exception to the ALJ's finding in paragraph no. 26 of the RO that "[t]he difficulties created by the modification of Mr. Jorgensen's dock and the addition of the lift forced [Mr. Mullen] to stop" using Mr. Gorman's boat slip. (RO ¶ 26).

Jorgensen disagrees with the ALJ's findings and seeks to have the Department reweigh the evidence. However, the Department 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 Constr. Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623.

Contrary to Jorgensen's exception to paragraph no. 26, the ALJ's findings of fact recited above are supported by competent substantial evidence. (Mullen, T. Vol. III, p. 255, lines 7-16; Mullen, T. Vol. III, p. 263, lines 12-25).

Based on the foregoing reasons, Jorgensen's exception to paragraph no. 26 is denied.

Jorgensen's Exception to Paragraph No. 28

Jorgensen takes exception to the ALJ's finding in paragraph no. 28 of the RO that Gorman's testimony was "persuasive" that Jorgensen's dock addition and lift created an impedance for Gorman. Jorgensen's exception provided in its entirety that "Respondent Jorgensen takes exception to the bolstering of testimony by the ALJ by using the word *persuasively* when referring to the testimony of Jim Gorman." Jorgensen's Exceptions, p. 6 (emphasis added).

Jorgensen disagrees with the ALJ's findings, specifically his finding that Gorman's testimony was persuasive, and seeks to have the Department reweigh the evidence. However, the Department 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 Constr. Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623.

Contrary to Jorgensen's exception to paragraph no. 28, the ALJ's findings of fact recited above are supported by competent substantial evidence, and only the ALJ may weigh the credibility of each witness' testimony and their exhibits. (Gorman, T. Vol. III, pp. 325-27; Petitioner's Exhibits 11, 15, 32, 39, 55).

Based on the foregoing reasons, Jorgensen's exception to paragraph no. 28 is denied.

Jorgensen's Exception to Paragraph No. 29

Jorgensen takes exception to paragraph no. 29 of the RO, alleging that "[f]inding of fact 29 is contrary to most of the testimony from the proceeding." Jorgensen's Exceptions, p. 10.

Paragraph no. 29 of the RO provides:

29. Entering or leaving Mr. Gorman's slip takes two or three people, one on the dock and two in the boat, using lines and poles to push and pull the boat into the water between the two docks and into or out of Mr. Gorman's slip. This maneuver subjects Mr. Gorman's boat and Mr. Jorgensen's boat to a high risk of damage each time a boat leaves or returns. It is also dangerous for the people trying to move the boat. The difficulty and risk increase when the tide is running or when the wind is blowing.

(RO ¶ 29).

Jorgensen disagrees with the ALJ's findings and seeks to have the Department reweigh the evidence. However, the Department 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 Constr. Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623.

Contrary to Jorgensen's exception to paragraph no. 29, the ALJ's findings of fact in paragraph no. 29 are supported by competent substantial evidence. (Mullen, T. Vol. III, p. 255,

lines 7-16; Mullen, T. Vol. III, p. 256, lines 2-21; Mullen, T. Vol. III, p. 263, lines 12-25; Gorman, T. Vol. III, p. 327, lines 2-8; Petitioner's Exhibit 55).

Based on the foregoing reasons, Jorgensen's exception to paragraph no. 29 is denied.

Jorgensen's Exception to Paragraph No. 32

Jorgensen's heading takes exception to *paragraph no. 32 of the RO*; however, the first sentence of exception no. 32 provides that "[r]espondent Jorgensen would *disagree with finding of fact 31* which says the Department's argument that navigation from Mr. Gorman's dock is not impeded amounts to a negative pregnant which effectively concedes that a boat the size of Mr. Jorgensen's and most others docked on the canal could not." Jorgensen's Exception no. 32 (emphasis added). Paragraph no. 32 of the RO provides that "[J]orgensen's dock and boatlift are not a minor inconvenience. They significantly impede Mr. Gorman's ability to navigate to and from his dock in a vessel the size of Mr. Jorgensen's and others customarily used by the canal-side residents." (RO ¶ 32).

Under Section 120.57(1)(k), Florida Statutes, the reviewing agency need not rule on an exception that does not "include appropriate and specific citations to the record," or that "does not identify the legal basis for the exception." § 120.57(1)(k), Fla. Stat. (2021). *See Yon v. Town of Grand Ridge and Fla. Dep't of Env't Prot.* (Fla. DEP Case No. 07-0704, March 20, 2008) (Fla. DOAH Case No. 07-2414, February 8, 2008) (DEP Final Order denied exception no. 14, partly because petitioner failed to identify the legal basis for the exception and did not include appropriate and specific citations to the record). This alone is a sufficient basis to reject Jorgensen's exception to paragraph no. 31 of the RO.

Based on the totality of Jorgensen's exceptions and the RO, Jorgensen appears to take exception to paragraph no. 31 and not paragraph no. 32 of the RO. Out of an abundance of

caution and a desire for clarity, the Department will rule on what appears to be Jorgensen's exception to paragraph no. 31 of the RO.

Jorgensen appears to take exception to the ALJ's finding in paragraph no. 31 of the RO, which provides that "[t]he Department's argument that navigation from Mr. Gorman's dock is not impeded amounts to a negative pregnant. It argues that a jet ski could easily use the dock. This effectively concedes that a boat the size of Mr. Jorgensen's and most others docked on the canal could not." (RO ¶ 31).

Jorgensen again disagrees with the ALJ's findings and seeks to have the Department reweigh the evidence. However, the Department 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 Constr. Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623.

Contrary to Jorgensen's exception to paragraph no. 31, the ALJ's findings of fact in paragraph no. 31 are supported by competent substantial evidence and inferences from such evidence. (Gorman, T. Vol. V, p. 507, lines 1-12; Gorman, T. Vol. V, p. 525, lines 16-25 through p. 526, lines 1-2).

Based on the foregoing reasons, Jorgensen's exception to paragraph no. 32 is denied.

Jorgensen's Exception to Paragraph No. 33

Jorgensen takes exception to paragraph no. 33 of the RO in which the ALJ "compares the ease of use of the Gorman dock verses the Jorgensen dock," alleging the findings show bias on the part of the ALJ. Jorgensen's Exceptions, p. 7.

Jorgensen disagrees with the ALJ's findings and seeks to have the Department reweigh the evidence. Specifically, Jorgensen alleges that paragraph no. 33 contains "an unnecessary observation to be included in a recommended order that is off point." Jorgensen's Exceptions, p. 7. However, the Department 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 Constr. Co., 592 So. 2d at 280; Conshor, Inc., 498 So. 2d at 623.*

Contrary to Jorgensen's exception to paragraph no. 33, the ALJ's findings of fact in paragraph no. 33 are supported by competent substantial evidence. (Petitioner's Exhibits 54 and 55 (dock videos)).

Based on the foregoing reasons, Jorgensen's exception to paragraph no. 33 is denied.

Jorgensen's Exception to Paragraph No. 34

Jorgensen takes exception to the ALJ's findings in paragraph no. 34 of the RO that "[t]here is ample room to cure the impedance by modifying Mr. Jorgensen's dock so that the added footage is on the side opposite Mr. Gorman's dock" and that Mr. Gorman's dock "leaves ample space for Mr. Jorgensen to maneuver his boat in and out under power." Jorgensen's Exceptions, p. 7 and RO ¶ 34.

Jorgensen disagrees with the ALJ's findings and seeks to have the Department reweigh the evidence. However, the Department 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 Constr. Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623.

Contrary to Jorgensen's exception to paragraph no. 34, the ALJ's findings of fact in paragraph no. 34 are supported by competent substantial evidence. (Gorman, T. Vol. p. 461, lines 1-4; Gorman, T. Vol. p. 462, lines 7-22).

Based on the foregoing reasons, Jorgensen's exception to paragraph no. 34 is denied.

Jorgensen's Exception to Paragraph No. 35

Jorgensen takes exception to conclusion of law paragraph no. 35, in which the ALJ provided in its entirety that "DOAH has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat." (RO ¶ 35). While Jorgensen claims he does not take exception to the ALJ's conclusion that DOAH has jurisdiction over this case, he objects that "this matter should have never proceeded to this level." Jorgensen's Exceptions, p. 8. As evidence that the case should not have "proceeded to this level," Jorgensen contends that "during the proceeding counsel for respondent Jorgensen verified that DEP witness Ms. Sweigert only reopened the matter to appease the Petitioner. (Tr. pgs. 133-134)." Jorgensen's Exceptions, p. 8.

The Department need not rule on an exception "that does not identify the legal basis for the exception. *See* 120.57(1)(k), Fla. Stat. (2021). Moreover, section 120.57(1)(l), Florida Statutes, only authorizes the Department to reject or modify an ALJ's conclusions of law "over which it has substantive jurisdiction." *See Barfield*, 805 So. 2d at 1012; *L.B. Bryan*, 746 So. 2d at 1197; *Deep Lagoon Boat Club, Ltd.*, 784 So. 2d at 1141-42. The Department's review of legal conclusions in a recommended order is restricted to those that concern matters within the

agency's field of expertise. *See, e.g., Charlotte Cnty.*, 18 So. 3d at 1082; *G.E.L. Corp.*, 875 So. 2d at 1264.

The Department does not have substantive jurisdiction over the ALJ's conclusion of law in paragraph no. 35 that DOAH has jurisdiction over the subject matter of this proceeding; and, therefore may not reject paragraph no. 35.

Based on the foregoing reasons, Jorgensen's exception to paragraph no. 35 is denied.

Jorgensen's Exception to Paragraph No. 37

Jorgensen takes exception to the ALJ's conclusion in paragraph no. 37 of the RO that Mr. Gorman's standing is not at issue in this case. Paragraph no. 37 provides in its entirety:

37. The body of the PROs of the Department and Mr. Jorgensen dispute Mr. Gorman's standing. But standing is not included in either PRO's Statement of the Issue. The pre-hearing stipulations of all parties do not identify standing as a disputed issue. *Mr. Gorman's standing is therefore not at issue. See Delgado v. Ag. for Health Care Admin.*, 237 So. 3d 432, 437 (Fla. 1st DCA 2018) (Administrative Law Judge [ALJ] must give 'full force and effect' to pre-hearing stipulation); *LPI/Key W. Assocs., Ltd. v. Beachcomber Jewelers, Inc.*, 77 So. 3d 852, 854 (Fla. 3d DCA 2012) (Pre-trial stipulation is binding and should be enforced.)

(RO ¶ 37) (emphasis added).

Jorgensen contends that "[t]o dismiss the issue [of Gorman's standing] due to a technicality would be a miscarriage of justice." Jorgensen's Exceptions, p. 8. However, Jorgensen does not provide any legal authority for this proposition, nor any legal analysis in his exception to paragraph no. 37 of the RO.

Moreover, since Mr. Gorman's claims were litigated on their merits in the DOAH hearing and are addressed in the ALJ's RO, the issue of his standing is essentially moot at this administrative stage of these proceedings. *See Hamilton Cnty. Bd. of Cnty. Commissioners v. Dep't of Env't Reg.*, 587 So. 2d 1378, 1383 (Fla. 1st DCA 1991) (concluding that the issue of Hamilton County's standing to challenge a DER permitting action was moot on appellate review

because the “issues were fully litigated in the proceedings below”); *Okaloosa Cnty. v. Dep’t of Env’t. Regul.*, ER F.A.L.R. 1992: 032, p. 6 (Fla. DER 1992) (concluding that, from a practical standpoint, the issue of Okaloosa County’s standing was moot on administrative review, because the County’s substantive claims had been litigated on their merits at the DOAH final hearing).

Based on the foregoing reasons, Jorgensen’s exception to paragraph no. 37 is denied.

Jorgensen’s Exception to Paragraph No. 38

Jorgensen takes exception to the ALJ’s conclusion in paragraph no. 38 of the RO that “[i]f standing were an issue, Mr. Gorman proved his standing.” (RO ¶ 38). Jorgensen contends that “Mr. Gorman’s issues are not ripe for consideration,” because Mr. Gorman “does not have a boat nor has [sic] people using his dock.” Jorgensen’s Exceptions, pp. 8-9.

Nevertheless, the ALJ identified the elements for standing under *Agrico Chem. Co. v. Dep’t of Env’t Regul.*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), concluding that “Mr. Gorman handily met that test.” Moreover, the ALJ concluded that “the Department’s Final Order in *Rosenblum v. Zimmet*, Case No. 06-2859 (Fla. DOAH Oct 23, 2007; Fla. DEP Dec. 11, 2007), recognizes that intent to purchase and use a 24-foot boat in the future is an interest sufficient to challenge an exemption determination for a dock.” (RO ¶ 38). The Department agrees with the ALJ’s legal interpretation summarized above.

Based on the foregoing reasons, Jorgensen’s exception to paragraph no. 38 is denied.

RULINGS ON DEP’S EXCEPTIONS

DEP’s Exception to Paragraph No. 39

DEP takes exception to paragraph no. 39 of the RO, contending that the ALJ misinterpreted section 120.569(2)(p) of the Florida Statutes regarding the order of presentation

by the parties and the shifting burden requirements. Paragraph no. 39, including footnote 3 to paragraph no. 39, of the RO provides, in pertinent part, that

39. Respondents argue that the order of presentation and shifting burden requirements of section 120.569(2)(p) apply. This is debatable since the statute's requirements apply to a third party's challenge to 'an agency's issuance of a license, permit, or conceptual approval' This case does not involve issuance of a license, permit, or conceptual approval. It involves an agency decision not to require a permit. *But the issue is immaterial. The case has been tried. The Department and Mr. Jorgensen had a full and fair opportunity to support the exemption decision. Mr. Gorman had a full and fair opportunity to demonstrate the exemption was not proper.*

Footnote 3 to RO ¶ 39: The plain language of the statute governs. *Daniels v. Fla. Dep't. of Health*, 898 So. 2d 61 (Fla. 2005); *Nicoll v. Baker*, 668 So. 2d 990-91 (Fla. 1996). The undersigned recognizes, however, that this interpretation differs from that of other DOAH orders, such as the orders in *Pirtle v. Voss*, Case No. 13-0515 (Fla. DOAH Sept. 27, 2013; Fla. DEP Dec. 26, 2013); and *MarineMax, Inc., v. Lynn*, Case No. 18-2664 (Fla. DOAH March 28, 2019)[,] *modified in part*, OGC Case No. 18-0204 (Fla. DEP May 21, 2019).

(RO ¶ 39) (emphasis added).

The ALJ concludes that "the issue [of whether the shifting burden requirements of section 120.569(2)(p) apply] is immaterial. The case has been tried. The Department and Mr. Jorgensen had a full and fair opportunity to support the exemption decision. Mr. Gorman had a full and fair opportunity to demonstrate the exemption was not proper." (RO ¶ 39). The Department concurs with the ALJ's analysis that the issue of whether the shifting burden provisions of section 120.569(2)(p), Florida Statutes, were applied is immaterial here, since the case was tried, and Mr. Jorgensen, Mr. Gorman and DEP had a full and fair opportunity to demonstrate their cases.

Based on the foregoing reasons, DEP's exception to paragraph no. 39 is denied.

DEP's Exception to Paragraph No. 42

DEP takes exception to the conclusions of law in paragraph no. 42 of the RO, contending the ALJ misinterpreted the caselaw. Specifically, DEP takes exception to the portion of paragraph no. 42 that provides “[i]ngress to and egress from a dock is subsumed in ‘navigation’ and that interference with that ingress and egress can ‘impede’ navigation.” (RO ¶ 42). DEP contends “this conclusion ignores the fact that regulatory standards and proprietary standards for navigation are different.” DEP’s Exceptions, p. 5.

The Department agrees that regulatory standards and proprietary standards for navigation are different. However, the RO does not reflect that the ALJ applied proprietary standards to this exemption from the need for an ERP. (RO ¶¶ 1, 42) (Paragraph no. 1 of the RO provides that “the canal [at issue] is an artificially created waterway. It is not on state sovereign submerged lands.”)

Moreover, DEP contends that

[t]his conclusion also ignores the fact that some private submerged landowners have the right to exclude and prevent trespass over their privately held submerged lands. *See Zimmet v. Fla. Dep’t of Env’t Prot. & Rosenblum*, DEP Final Order # 10-10729, OGC No. 09-3827 entered on June 25, 2010 (“Since the canal is excavated from uplands, the adjoining property owners have no riparian rights to the common use of the open water in the canal . . . [T]he owner of privately owned submerged bottoms can exclude others from crossing over their property boundaries.”), citing Publix Supermarkets, Inc. v. Pearson, 315 So. 2d 98 (Fla 2d DCA 1975).

DEP’s Exceptions, p. 6.

The Department acknowledges that “some private submerged landowners have the right to exclude and prevent trespass over their privately held submerged lands.” *See Zimmet v. Fla. Dep’t of Env’t Prot. & Rosenblum*, DOAH Case No. 09-6596 (Fla. DEP June 25, 2010). However, the facts in *Zimmet v. Fla. Dep’t of Env’t Prot. & Rosenblum*, DOAH Case No.

09-6596, are different from the facts in this case. The facts in the *Zimmet* case followed a circuit court judgment involving trespass. In *Zimmet*, the ALJ in the RO and the Secretary in the Final Order concluded that navigation could not be impeded, because the petitioner neighbor had no right to trespass over privately held submerged lands according to the circuit court judgment. Here, no circuit court judgment was issued establishing that the DOAH Petitioner was trespassing based on his dock's location.

Based on the foregoing reasons, DEP's exception to paragraph no. 42 is denied.

DEP's Exception to Paragraph No. 49

DEP takes exception to the portion of paragraph no. 49 of the RO that provides [t]he Department's Final Order in *Pirtle v. Voss*, Case No. 13-0515 (Fla. DOAH Sept. 27, 2013; Fla. DEP Dec. 26, 2013), also squarely supports concluding that the dock modification impedes navigation. . . . The similar facts here compel a similar conclusion. (RO ¶ 49). DEP contends that the ALJ misapplied the law in this paragraph.

The Department agrees with DEP's conclusion in its exception that "propriety standards do not apply in this case since this matter does not involve sovereign submerged lands and is therefore, a simple regulatory matter." (emphasis in original). DEP's Exceptions, p. 3. Nevertheless, the ALJ did not conclude that this dock case involved sovereign submerged lands, nor did the ALJ apply sovereign submerged lands regulations. (RO ¶¶ 1, 49). Instead, the ALJ applied the plain meaning of the term "impede" as defined in the Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/impede> (last viewed by the ALJ April 6, 2022) to this regulatory exemption. (RO ¶ 41). The RO's reference to the *Pirtle v. Voss* case was merely the ALJ pointing out a case with a similar fact pattern. Thus, the Department disagrees that the ALJ misapplied the law in this paragraph.

Based on the foregoing reasons, DEP's exception to paragraph no. 49 is denied.

DEP's Exception to Paragraph C in the Recommendation Paragraph

DEP takes exception to paragraph C in the Recommendation section of the RO, which recommends that the Department "impos[e] liability, restoration requirements, and civil penalties provided for in sections 403.121, 403.141, and 373.129. . . ."

DEP contends that the ALJ did not have jurisdiction to make such a recommendation, because "[t]his administrative matter involved a challenge by Petitioner Gorman to a Department action pursuant to sections 120.569 and 120.57, Florida Statutes, and not an enforcement action brought by the Department against Respondent Jorgensen pursuant to section 403.121, Florida Statutes." DEP's Exceptions, p. 3. DEP acknowledged that administrative penalties under section 403.121(2)-(12), Florida Statutes, would be within the province of DOAH had the hearing been a challenge to an enforcement matter. Instead, this DOAH hearing involves an administrative challenge to a permit exemption, and not an administrative challenge to an enforcement action. Moreover, no party presented evidence regarding imposition of liability, restoration requirements, or civil penalties. The Department concurs with DEP's legal analysis.

Based on the foregoing reasons, DEP's exception regarding the RO's recommendation that the Department impose liability, restoration requirements, and civil penalties is granted.

CONCLUSION

Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the Recommended Order, 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. The dock modification by Bent Jorgensen is not exempt from the need for an environmental resource permit.

C. The Return to Compliance Letter – Exemption Verification provided to Bent Jorgensen by the Department is rescinded.

D. The Department’s South District is directed to take action, including any necessary enforcement actions, consistent with this Order.

E. This Final Order is without prejudice for Respondent, Bent Jorgensen, to apply for authorization to construct a dock that is consistent with this Order, chapters 373 and 403, Florida Statutes, as applicable, chapter 62-330, Florida Administrative Code, and the corresponding ERP Applicant’s Handbook.

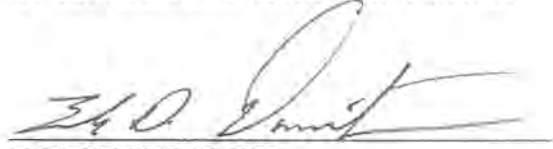
JUDICIAL REVIEW

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 7th day of July, 2022, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



SHAWN HAMILTON
Secretary

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

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



Deputy CLERK

7/7/22
DATE

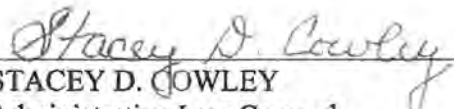
CERTIFICATE OF SERVICE

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

<p>Jeffrey J. Gorman 1237 El Dorado Parkway E Cape Coral, FL 33904 Jeffgorman67@gmail.com</p>	<p>Terry B. Cramer, Esquire Michael-Anthony Pica, Esquire Wilbur Smith, LLC Post Office Box 8 Fort Myers, FL 33902 Terry@WilburSmith.Law Michael-Anthonv@WilburSmith.Law CivilPleadings@WilburSmith.Law</p>
<p>Kathryn E.D. Lewis, Esquire Kelley F. Corbari, Esquire Department of Environmental Protection 3900 Commonwealth Blvd., M.S. 35 Tallahassee, FL 32399-3000 Kathryn.Lewis@FloridaDEP.gov Kelley.Corbari@FloridaDEP.gov Michelle.M.Knight@FloridaDEP.gov</p>	

this 7th day of July, 2022.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION


STACEY D. COWLEY
Administrative Law Counsel

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Email: Stacey.Cowley@FloridaDEP.gov

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

JEFFREY GORMAN,

Petitioner,

vs.

Case No. 21-3529

BENT JORGENSEN AND DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondents.

RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Florida Division of Administrative Hearings (DOAH), conducted the final hearing in this matter on January 25-26 and February 9, 2022, by Zoom Conference.

APPEARANCES

For Petitioner Jeffery J. Gorman:

Jeffery J. Gorman, pro se
1237 El Dorado Parkway E
Cape Coral, Florida 33904

For Respondent Bent Jorgensen:

Michael-Anthony Pica, Esquire
Wilbur Smith, LLC
Post Office Box 8
Fort Myers, Florida 33902

For Respondent Department of Environmental Protection:

Kathryn E.D. Lewis, Esquire
Kelley F. Corbari, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard, Mail Station 35
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

Does expansion of a dock, including addition of a boatlift and canopy, for Respondent, Bent Jorgensen, on a canal in Lee County, Florida, qualify for an exemption from obtaining an Environmental Resource Permit under section 403.813(1)(i), Florida Statutes (2021), and Florida Administrative Code Rule 62-330.051(5)(c)?¹

PRELIMINARY STATEMENT

On September 14, 2021, the Florida Department of Environmental Protection (Department) issued a "Return to Compliance Letter – Exemption Verification" to Respondent, Bent Jorgensen. The letter documented the Department's decision that Mr. Jorgensen's dock and boatlift had been constructed in conformance with the exemption criteria set out in Florida Administrative Code Rule 62-330.051(5)(c) and section 403.813(1)(i), Florida Statutes. The letter withdrew items of non-compliance the Department had previously identified during the June 23 and July 23, 2020, inspections. On October 4, 2021, Petitioner, Jeffrey Gorman, filed a petition challenging the Department's exemption verification. The Department referred the petition to DOAH to conduct an evidentiary hearing and issue a recommended order.

Before the hearing, the undersigned took official recognition of the City of Cape Coral's (Cape Coral), Land Development Code, sections 5.4.1, 5.4.2(B) and section 5.4.3(A)(1) and (2).

At the final hearing, the Department presented the testimony of Elizabeth Sweigert. Mr. Jorgensen presented the testimony of Gary Capristo and

¹ All references to Florida Statutes are to the 2021 codification unless noted otherwise.

Captain Thomas Katz, who was accepted as an expert. Respondents' Joint Exhibits J-1 through J-15 were admitted into evidence.

Mr. Gorman presented the testimony of David Mullen, Sean Bowman, James Gorman, John Truitt, Bent Jorgensen, and himself. Mr. Gorman's Exhibits: 1, 6, 8, 9, 10, 11, 15 (pps. 1, 2 [photograph but not the blueprint], and 3-5), 29, 32, 36 (pp. 2), 37, 39, 46, 49, 51, 54 (Jorgensen egress video), and 55 (the "dock video" filed January 5, 2021) were admitted into evidence.

The five-volume Transcript was filed March 14, 2022. Mr. Gorman and the Department timely filed Proposed Recommended Orders (PRO's). Mr. Jorgensen filed his untimely. The undersigned denied a motion to strike Mr. Jorgensen's PRO and accepted it as timely.

FINDINGS OF FACT

Parties

1. Mr. Gorman owns real property located at 1233 El Dorado Parkway East, Cape Coral, Florida. His property is directly east of property owned by Mr. Jorgensen. Both properties abut a right-of-way canal owned by Cape Coral. The canal is an artificially created waterway. It is not on state sovereign submerged lands.

2. Mr. Gorman is a life-long boater. He is an avid and skilled boater. Mr. Gorman lives on a lake in Kansas. His Kansas house has a dock. Mr. Gorman has owned and operated a 24-foot pontoon boat for 12 years. He owns a pontoon boat because its configuration allows him to roll in his wheelchair straight from the dock onto the boat. None of the difficulties entering and leaving Mr. Gorman's dock and boat lift described in this Recommended Order are due to or exacerbated by Mr. Gorman's disability.

3. Mr. Gorman moved into his Cape Coral house in June of 2019. Purchase of the house was the culmination of a two-year search for a house in Cape Coral with a

dock with a ramp instead of stairs so he could board a pontoon-type boat in his wheelchair. The dock was the reason he purchased the house on El Dorado Parkway East.

4. Mr. Gorman was and is firmly committed to obtaining a tritoon boat for his Cape Coral home. He intends to purchase a 24-foot boat, with a 150-horsepower outboard motor. With a motor mounted on the transom, the vessel length will be around 27 feet long. This is within the size range of boats owned and operated by most property owners, including Mr. Jorgenson, on the canal and operated by them in the canal.

5. At the time of the hearing, Mr. Gorman had not yet purchased a boat because of problems created by Mr. Jorgensen's dock and the time-consuming efforts to resolve the problem. But Mr. Gorman has used the dock. He let his friend David Mullen keep his boat there for six months in 2020. Mr. Mullen quit using the dock and lift because of difficulties created by Mr. Jorgensen's dock expansion and lift.

6. Mr. Jorgensen owns and sometimes uses the house and dock at 1233 El Dorado Parkway East, Cape Coral, Florida. Mr. Jorgensen is a truck driver and lives much of the year in Minnesota. His Cape Coral house shares a property line with Mr. Gorman's lot.

7. The Department has the authority to regulate construction of docks in waters of the State of Florida under chapter 403, among others, and chapter 62-330.

Self-Certification

8. Section 403.813(1)(i) provides that a "permit is not required under this chapter" or chapter 373, Florida Statutes for the "construction of private docks of 1,000 square feet or less of over-water surface area and seawalls in artificially created waterways when such construction will not violate existing water quality standards, impede navigation, or affect flood control" Rule 62-330.051(2) exempts from permitting requirements activities "in conformance with the exemptions in section 373.406, or 403.813(1), F.S." Rule 62-330.051(5)(c) provides for an exemption for "[c]onstruction of private docks or piers of 1,000 square feet or

less of over-water surface area in artificial waters in accordance with section 403.813(1)(i), and within residential canal systems legally in existence under chapter 403 or part IV of chapter 373. This includes associated structures such as roofs and boat lifts, provided the cumulative square footage of the dock or pier and all associated structures located over wetlands and other surface waters does not exceed 1,000 square feet."

9. Rule 62-330.050 establishes a procedure for review of and agency action on exemption requests. It encourages people to use any available electronic self-certification service. Self-certification enables a builder or property owner to certify that a project is exempt from permit requirements. The Department does not review or decide upon self-certification. It only becomes involved if an applicant requests verification of an exemption or an affected party like Mr. Gorman disputes the self-certification.

Construction of the Dock

10. In 2020 Mr. Jorgensen decided to expand his dock, add a boatlift, and add a canopy. He engaged Capristo Construction Company, owned by Mr. Capristo to perform the dock and boatlift work (dock modification). Mr. Jorgensen was not in Florida. He relied upon Mr. Capristo to obtain all necessary permits and certificates, as well as to perform all design and construction. That included self-certification of an exemption from the Department permit requirements for the dock modifications. On March 10, 2020, Mr. Capristo established an exemption using the self-certification process described above to obtain a permit exemption for construction of Mr. Jorgensen's dock modification.

11. Around March of 2020, Capristo Construction Company began delivering supplies for the dock modification. This was the first Mr. Gorman knew of the dock plans. Mr. Gorman asked Mr. Capristo to review his dock and submit a bid to replace some decking of Mr. Gorman's dock.

12. Mr. Capristo came over to conduct the requested review. While they were talking, Mr. Gorman expressed his concerns about how close Mr. Jorgensen's dock would be to his after the modifications. He asked about revising the design and

modifications to allow for more room between the docks. Mr. Capristo refused. He said Mr. Jorgensen had approved the design and that Mr. Jorgensen was who he worked for. Mr. Capristo repeatedly emphasized that Cape Coral ordinances did not require him to consider the impact on adjacent property owners of designing and building Mr. Jorgensen's dock.

13. Under cross-examination Mr. Capristo expressed his view this way: "I put in the dock to make it easiest for my customer [Mr. Jorgensen], to make it more useful to my customer, not useful to you, not useful to anybody else, but useful to the man who pays me. I work for the man who pays me. Let's have that understood." (Tr. 310).

14. When Mr. Gorman talked to Mr. Capristo about changing the dock design and location, Mr. Capristo verbally attacked him. He said, "You are just like all the rest of the cripples. You cripples all want something done." He went on to say, "Go inside where you belong and go defecate in your pants." (Tr. 472).

15. Mr. Capristo did not consider the effect of his design and construction of Mr. Jorgensen's dock improvements upon Mr. Gorman's dock and his ability to use it.

16. After that Mr. Gorman looked up Mr. Jorgensen's telephone number and called him to discuss the problem. Mr. Jorgensen advised he would not be down to Florida for a while. They exchanged some text messages. But there was no meaningful discussion of the dock problem.

17. This left Mr. Gorman to contact government agencies seeking relief. Representatives of Cape Coral told him they did not have jurisdiction and sent him to the Army Corps of Engineers. The Corps representatives referred him to the Department. Meanwhile Mr. Capristo completed the dock modifications.

18. Mr. Gorman contacted the Department about his concerns and submitted a complaint. Department representatives inspected Mr. Jorgensen's dock on June 23 and July 23, 2020. Environmental Specialist I, Francisco Alvaro, and Environmental Administrator, Elizabeth Sweigert, concluded that Mr. Jorgensen's dock impeded navigation and consequently did not qualify for a permit exemption.

They recommended that Mr. Jorgensen remove or modify the dock or obtain a permit. In the following months, Department employees unsuccessfully worked with Mr. Capristo and Mr. Jorgensen to facilitate compliance with the recommendation.

19. On August 17, 2020, Mr. Alvaro emailed Mr. Capristo stating again that the Jorgensen dock "impedes navigation for the dock and boatlift at the adjacent property." (Jt. Ex. 5). On September 1, 2020, Mr. Alvaro emailed Mr. Capristo again saying, "Your clients dock at 1233 El Dorado Pkwy E. is not exempt and not in compliance because it hinders navigability into and out of the adjacent dock. This is why it was determined that the dock would need to either be removed or modified in such a way that it is no longer impeding navigability." (Jt. Ex. 5).

20. A September 15, 2020, email to Mr. Capristo followed, stating, "I just wanted to remind you that we will need the updated drawings and plans showing how you propose to modify the docking structure so that it is no longer impeding navigability to the adjacent dock by this Friday, September 18, 2020." (Jt. Ex. 5).

21. The Department sent Mr. Jorgensen a warning letter on October 5, 2020, reminding him of its determination that the dock was not exempt from permitting and noting that Mr. Jorgensen had not replied to Department correspondence. The email also cautioned Mr. Jorgensen of the penalties that could be imposed for violation of Florida statutes and rules. It sent Mr. Capristo a similar letter. (Jt. Ex. 6).

22. April 19, 2021, Ms. Sweigert emailed Mr. Gorman announcing a reversal of the Department's position. Her email said:

I have discussed this case with Division staff in Tallahassee and our attorney in our Office of General Counsel. We discussed the interpretation and application of the exemption for private docks located in residential canal systems. That guidance and recommendation was presented to our District Director, Jon Iglehart. As a result, I have been directed to no longer pursue this case

and to close our file. The opinion is that this issue is a civil issue between you and your neighbor. I wish there was more that we could do to help you.

(Jt. Ex 8).

23. September 23, 2021, the Department Deputy Secretary for Regulatory Programs confirmed the decision in a letter to Mr. Gorman. The letter advises "Mr. Jorgensen's dock does not create a navigational hazard in accessing Complainant's dock from the canal per se, nor for smaller watercraft to the mooring slip." By clear implication the Deputy Secretary acknowledges that impedance of access to Mr. Gorman's dock would eliminate exemption eligibility. By reference to a "smaller watercraft", e.g., a jet ski, the letter also acknowledges Mr. Jorgensen's dock impedes access for boats the size of Mr. Jorgensen's and others that customarily use the canal and the size that Mr. Gorman will purchase if this matter is resolved favorably. Also, notably the letter refers to a "navigational hazard" when the statute refers to "impeding navigation."

Impossible to Dock

24. Mr. Jorgensen's boat when docked is 11 feet from the property line he shares with Mr. Gorman, if it extended into the canal. Mr. Gorman's dock and boatlift are 12 feet from the property line. Between Mr. Gorman's dock and Mr. Jorgensen's boat on the lift, there is only 23 feet of navigational space.

25. Mr. Jorgensen's dock and boatlift make getting a boat approximately 24 feet long in and out of Mr. Gorman's slip under power impossible. Persuasive testimony from Mr. Mullen and Mr. Bowman who have actually maneuvered a boat of approximately 24 feet in and out of Mr. Gorman's slip proves this by a preponderance of the evidence. The individuals' testimony is more credible and persuasive than Captain Katz's testimony. Mr. Mullen and Jim Gorman are experienced and skilled boaters. Video recordings and photographs support their testimony.

26. Mr. Mullen has owned and operated over ten boats since his first boat while in college. He has spent over 300 hours boating in the Cape Coral area alone. In

2020, he kept his 24-foot Hurricane deck boat at Mr. Gorman's dock using the boatlift for about six months. The difficulties created by the modification of Mr. Jorgensen's dock and the addition of the lift forced him to stop. In his words, he told Mr. Gorman, "I can't keep my boat there anymore because I can't really use it" (Tr. 262).

27. After the Jorgensen dock modification, a boater cannot bring a vessel into Mr. Gorman's dock and lift or exit it under power. Mr. Mullen testified credibly and persuasively why it takes at least two experienced people to bring a boat in and out and how it must be done without use of a motor. He said:

Well, I really -- so the last time I used my boat, this dock had been put in. And so really the way to get out was to tie a rope on the back port side really and the front and let the boat down and try to guide it out. It's very difficult when you can't walk -- you know, you can't walk 24 feet behind the boat, however long the boat is. So, you kind of had to finagle it around. I've driven bigger boats than this and I've parked in millions of slips probably, or hundreds of thousands if not. I could not pull this in myself.

(Tr. 256)

28. Jim Gorman, also an experienced and adept boat owner and operator, experienced the same difficulties when his family visited Mr. Gorman and used Mr. Mullen's 24-foot deck boat. He explained persuasively the impedance Mr. Jorgensen's dock addition and lift created.

Q. Are you familiar with docking, how to dock a boat?

A. Yes, I am.

Q. Did you use the 24-foot boat to egress out of my dock?

A. Yes, I did.

Q. Did you have any concerns, looking at my dock, egressing out of the -- with the boat?

A. Yes, I did. There was your neighbor's dock in very close proximity to yours that I felt like was a hazard to exit your boat from the dock under power.

Q. Can you describe the circumstances how – did you guys take the boat out?

A. We did. In order to safely egress the boat, we used -- we manually removed it from the slip in order to make it safely -- safely to remove it from the slip using a manual - - manpower and a series of ropes attached to the boat.

Q. So did you -- were the engines on?

A. No.

Q. And why weren't the engines being used?

A. I didn't feel it was safe to use the power of the boat because of the proximity to the neighbor's dock. Boats don't navigate on a dime, and in order to use power, you have to account for drift, wind, and other things because they're not, you know, positively tractioned the entire time you're navigating under power, whereas you can more stably navigate with hands directly on or ropes tied to a boat in and out of tight spaces.

Q. And is that how you guys egressed the boat out with ropes and manually pulling it out with everybody here?

A. Yes, that's correct.

(Tr. 325-327)

29. Entering or leaving Mr. Gorman's slip takes two or three people, one on the dock and two in the boat, using lines and poles to push and pull the boat into the water between the two docks and into or out of Mr. Gorman's slip. This maneuver subjects Mr. Gorman's boat and Mr. Jorgensen's boat to a high risk of damage each time a boat leaves or returns. It is also dangerous for the people trying to move the boat. The difficulty and risk increase when the tide is running or when the wind is blowing.

30. Testimony from experienced boaters, supported by video recordings and photographs, who had actually maneuvered a boat in and out of Mr. Gorman's slip is much more persuasive than the boastful testimony of a Captain who had not attempted the maneuver, had 25 years of experience, and declared he, and anyone with minimal skills, could easily maneuver a 35-foot vessel on to Mr. Gorman's boatlift using only the 23 feet of water between the docks. Even then, it is noteworthy that Captain Katz refers to needing to tie lines to a boat to maneuver it into Mr. Gorman's slip. Also, under cross-examination, Captain Katz admitted that he was testifying about what an expert could do, not what the average recreational boater could do. Captain Katz also did not measure the docks or the space between them. Measuring would have allowed him to calculate the geometry to determine if a boat was dock-able. He also did not view the area from Mr. Gorman's dock or view the area. Most importantly, unlike other witnesses, Captain Katz did not try to dock a boat on Mr. Gorman's lift with Mr. Jorgensen's boat on his lift.²

31. The Department's argument that navigation from Mr. Gorman's dock is not impeded amounts to a negative pregnant. It argues that a jet ski could easily use the dock. This effectively concedes that a boat the size of Mr. Jorgensen's and most others docked on the canal could not.

32. Mr. Jorgensen's dock and boatlift are not a minor inconvenience. They significantly impede Mr. Gorman's ability to navigate to and from his dock in a vessel the size of Mr. Jorgensen's and others customarily used by the canal-side residents.

33. The contrast between the video recording of Mr. Jorgensen motoring easily off his boatlift and away from his dock (P. Ex. 54, video egress) and the efforts to dock a 24-foot boat at Mr. Gorman's (dock video filed January 5, 2022) persuasively demonstrates the impedance. The 24-foot boat did not fit completely between the docks and required a person on the bow and a person on the stern to prevent the

² Lay testimony can be more persuasive than expert testimony. *Weygant v. Fort Myers Lincoln Mercury, Inc.*, 640 So. 2d 1092 (Fla. 1994).

boat from damaging either boats or docks. Mr. Jorgensen's boat was able to simply motor away from the dock.

34. There is ample room to cure the impedance by modifying Mr. Jorgensen's dock so that the added footage is on the side opposite Mr. Gorman's dock. On the other side of Mr. Jorgensen's dock there is 44 feet of water along his shoreline and an additional 12 feet along his neighbor's shoreline before reaching his neighbor's dock. This leaves ample space for Mr. Jorgensen to maneuver his boat in and out under power.

CONCLUSIONS OF LAW

35. DOAH has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

36. The Petition and Amended Notice of Hearing in this matter describe various issues. By the time of the hearing and as reflected in the PROs, whether the modification to Mr. Jorgensen's dock impedes navigation is the remaining issue. If Mr. Jorgensen's dock modification impedes navigation, Mr. Jorgensen must obtain a permit or undo the modification. If the dock modification does not impede navigation, Mr. Jorgensen is entitled to an exemption from a permit requirement as provided by section 403.813(1)(i). The various other exemptions of that statute and rule 62-330.051(5)(c), such as maximum dock size, were not the subject of evidence at hearing or argument in the proposed recommended orders.

Standing

37. The body of the PROs of the Department and Mr. Jorgensen dispute Mr. Gorman's standing. But standing is not included in either PRO's Statement of the Issue. The pre-hearing stipulations of all parties do not identify standing as a disputed issue. Mr. Gorman's standing is therefore not at issue. *See Delgado v. Ag. for Health Care Admin.*, 237 So. 3d 432, 437 (Fla. 1st DCA 2018) (Administrative Law Judge [ALJ] must give "full force and effect" to pre-hearing stipulation); *LPI/Key W. Assocs., Ltd. v. Beachcomber Jewelers, Inc.*, 77 So. 3d 852, 854 (Fla. 3d DCA 2012) (Pre-trial stipulation is binding and should be enforced.).

38. If standing were an issue, Mr. Gorman proved his standing. To demonstrate standing to contest proposed agency action a petitioner must demonstrate that its substantial interests will be affected by the proposed action. §§ 120.52(13)(b) and 120.569(1), Fla. Stat. To establish that his substantial interests will be affected, Mr. Gorman must prove (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57, Florida Statutes, hearing and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect. *Agrico Chem. Co. v. Dep't of Env't. Regul.*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). Mr. Gorman handily met that test. Respondents argue that an agency decision that deprives Mr. Gorman of the reasonable and customary use of his dock does not substantially affect him since he has not used the dock because of the deprivation. Stating the argument demonstrates its fallacy. In addition, the Department's Final Order in *Rosenblum v. Zimmet*, Case No. 06-2859 (Fla. DOAH Oct. 23, 2007; Fla. DEP Dec. 11, 2007), recognizes that intent to purchase and use a 24-foot boat in the future is an interest sufficient to challenge an exemption determination for a dock.

Burdens of Proof

39. Respondents argue that the order of presentation and shifting burden requirements of section 120.569(2)(p) apply. This is debatable since the statute's requirements apply to a third party's challenge to "an agency's issuance of a license, permit, or conceptual approval" This case does not involve issuance of a license, permit, or conceptual approval. It involves an agency decision not to require a permit.³ But the issue is immaterial. The case has been tried. The Department and Mr. Jorgensen had a full and fair opportunity to support the exemption decision. Mr. Gorman had a full and fair opportunity to demonstrate the exemption was not proper. He met his burden of proving by a preponderance of the evidence that the

³ The plain language of the statute governs. *Daniels v. Fla. Dep't. of Health*, 898 So. 2d 61 (Fla. 2005); *Nicoll v. Baker*, 668 So. 2d 990-91 (Fla. 1996). The undersigned recognizes, however, that this interpretation differs from that of other DOAH orders, such as the orders in *Pirtle v. Voss*, Case No. 13-0515 (Fla. DOAH Sept. 27, 2013; Fla. DEP Dec. 26, 2013); and *MarineMax, Inc. v. Lynn*, Case No. 18-2664 (Fla. DOAH Mar. 28, 2019) *modified in part*, OGC Case No. 18-0204 (Fla. DEP May 21, 2019).

exemption does not apply. Consequently, as a practical matter the burden shifting provisions of section 120.569(2)(p) have no effect in this case.

Impeding Navigation

40. In relevant part, section 403.813(1)(i) provides that a Department permit is not required for "[t]he construction of private docks of 1,000 square feet or less of over-water surface area and seawalls in artificially created waterways when such construction will not violate existing water quality standards, impede navigation, or affect flood control." The crux of this case is whether Mr. Jorgensen's dock modification impedes navigation, specifically navigation to and from Mr. Gorman's dock. The Department and Mr. Jorgensen use "impede navigation" and "navigational hazard" interchangeably. "Impede" and "hazard" are two different words with two different meanings. Since they are not defined by statute, they have their common dictionary meaning. *Ag. for Health Care Admin. v. Ybor Med. Injury & Accident Clinic, Inc.*, 47 Fla. L. Weekly S57 (Fla. Feb. 24, 2022).

41. "Hazard" means "a source of danger." *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/hazard> (last viewed April 6, 2022). This is consistent with Captain Katz's explanation of hazard. He said: "Hazards being any -- any foreign object in -- that would impact the hull, foul running gear, shallow waters, objects that are below the water surface that can't be seen. Those would be categorized as navigational hazards." (Tr. 207). "Impede" is a lesser thing. Impede means "to interfere with or slow the progress of." *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/impede> (last viewed April 6, 2022). The question here is not whether Mr. Jorgensen's dock modification is a source of danger. It is whether the dock modification interferes with or slows progress to and from Mr. Gorman's dock.

42. The evidence and facts were clear that the dock modification interfered with or slowed the progress of a reasonably sized vessel to and from Mr. Gorman's dock. It was more than an inconvenience. This conclusion is consistent with many orders, including several cited by the Department and Mr. Jorgensen, that recognize

ingress to and egress from a dock is subsumed in "navigation" and that interference with that ingress and egress can "impede" navigation.

43. Examination of some of the cases Respondents rely on and comparison of them to the facts found here support the conclusion that the dock modification impedes navigation. Respondents argue that *Woolshlager v. Rockman*, Case No. 06-3296 (Fla. DOAH May 7, 2007; Fla. DEP June 20, 2007), supports their position. It does not. *Woolshlager*, applying "navigational hazard," recognized that construction of a platform, two piers, and 14 mooring pilings could amount to a navigational hazard for adjoining property owners accessing their dock. In the facts of that case, the construction did not create a navigational hazard because the ALJ found that Mr. Woolshlager would have adequate ingress and egress to his dock in spite of the construction. The Recommended Order characterized the effect of Mr. Rockman's construction as an inconvenience requiring more caution. The ALJ noted that Mr. Woolshlager was observed leaving his dock. Here the evidence proved that the dock modification is not just an inconvenience. It prevents Mr. Gorman from leaving or returning to his dock under power.

44. Respondents cite *Scully v. Patterson*, Case No. 05-0058 (Fla. DOAH Apr. 14, 2005), *modified in part*, OGC Case No. 04-1799 (Fla. DEP May 12, 2005), to support their argument that Mr. Jorgensen's dock does not impede navigation. It does not support their argument. *Scully* recognized the principle that modification of an existing dock could impede navigation by interfering with a neighbor's ability to navigate in and out of the canal and around his property and his ability to moor alongside the seawall. That is the very sort of impedance at issue here. Under the facts of *Scully*, which included the very significant fact that Mr. Scully would still be able to moor under power, the proposed dock modification did not impede navigation. Unlike Mr. Scully, Mr. Gorman cannot leave or return to his dock under power. Neither could other experienced boaters.

45. *Archipelago Cmty. Ass'n., Inc. v. Raab*, Case No. 98-2430 (Fla. DOAH March 1, 2000; DEP Apr. 13, 2000), cited by Respondents, is also not helpful to Respondents' argument. The facts supporting the exemption were the near opposite

of the facts here. Notably the case also involved "hazard" to navigation, not "impedance." The description of the facts in footnote seven of the Recommended Order states:

While it is clear that the area in front of Mr. Raab's dock should be navigated with care, with due consideration for wind, tide, and the existence of other vessels in the channel, the greater weight of the evidence established that the area can be navigated safely. Mr. Raab's dock will not constitute any more of a hazard to navigation than the other structures that have existed in or along the channels of the Association for many years.

46. None of this is true for the facts here.

47. Another case relied upon by the Department does not support its position because of the significant differences between the facts found here and the facts of the case. In *Brooks v. Crum*, Case No. 06-2312 (Fla. DOAH Dec. 22, 2006), *modified in part*, (Fla. DEP Feb. 5, 2007), the determinative fact was that the proposed dock would not significantly impede navigability, and that the water depth at the mouth of a tidal creek was the factor limiting navigability, not the proposed dock. Here there is no question that the water's depth is sufficient. The impedance to navigation that prevents reasonable use of Mr. Gorman's dock is the Jorgensen dock modification.

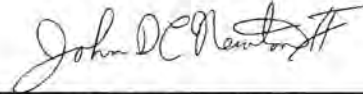
48. A Department Final Order that Respondents did not cite squarely supports the conclusion that a dock project can impede navigation for a boat a citizen intends to purchase. In *Rosenblum v. Zimmet*, Case No. 06-2859 (Fla. DOAH Oct. 23, 2007; Fla. DEP Dec. 11, 2007), the Department adopted, in its entirety, the Recommended Order holding that Mr. Zimmet's proposed construction of a 160-square-foot dock with lift would impede navigation to another dock because there would not be a reasonable amount of clearance for Mr. Rosenblum's intended boat. The fact that Mr. Rosenblum, like Mr. Gorman, intended to purchase a boat of a size common in the canal was a significant factor. The Department therefore determined that Mr. Zimmet was not entitled to a permit exemption.

49. The Department's Final Order in *Pirtle v. Voss*, Case No. 13-0515 (Fla. DOAH Sept. 27, 2013; Fla. DEP Dec. 26, 2013), also squarely supports concluding that the dock modification impedes navigation. Voss sought an exemption for installation of five mooring pilings 20 feet apart on the north side of and parallel to his dock. The Final Order concluded that "navigational hazard" included conditions adjacent to docks and boat slips. The findings of fact of the Recommended Order closely resemble the facts here. The pilings caused the skipper of a 21.5-foot Department boat to have great difficulty maneuvering into Mr. Pirtle's slips. He required help from Department employees who stood in the boat and pushed off from the pilings. Without their help, the boat would have bumped into the pilings. In windy and choppy water conditions, maneuvering a boat into Mr. Pirtle's south slips would risk boat damage and possible injury. The pilings created a hazard to navigation, not just an impedance. The similar facts here compel a similar conclusion. The Jorgensen dock modification impedes navigation and requires a permit.

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: A. Finding that the Jorgensen dock modification is not exempt from permitting and rescinding the Return to Compliance Letter – Exemption Verification; B. Requiring Respondent, Bent Jorgensen, to remove or modify his dock so that it does not impede navigation to and from the dock of Petitioner, Jeffrey Gorman, unless Mr. Jorgensen obtains a permit for the dock modification; and C. Imposing liability, restoration requirements, and civil penalties provided for in sections 403.121, 403.141, and 373.129, or other statutes as may be applicable.

DONE AND ENTERED this 12th day of April, 2022, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
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Filed with the Clerk of the
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this 12th day of April, 2022.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.