STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

MANSOOR "JOHN" GHANEIE,		
Petitioner,		
v.	**OGC CASE NO.**	**22-0408**
	DOAH CASE NO.	**22-1564**
ANDY ESTATES, LLC, AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,		
Respondents.		
KEVIN TRACY,		
Petitioner,		
v.	**OGC CASE NO.**	**22-0410**
	DOAH CASE NO.	**22-1565**
ANDY ESTATES, LLC, AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,		
Respondents.		
MANSOOR "JOHN" GHANEIE AND KEVIN TRACY,		
Petitioners,		
v.	**OGC CASE NO.**	**22-2665**
	DOAH CASE NOs.	**23-0433**
		23-0434
ANDY ESTATES, LLC, AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,		
Respondents.		

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on August 15, 2023, 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.

On August 28, 2023, the Petitioners Mansoor "John" Ghaneie (Mr. Ghaneie) and Kevin Tracy (Mr. Tracy) filed separate requests to extend the time to file their exceptions to the ALJ's RO until after Hurricane Idalia passed and the Governor lifted his Emergency Order declaring a State of Emergency. That same day, August 28, 2023, the Department denied both Mr. Ghaneie's and Mr. Tracy's requests for an extension of time, because the Governor's Emergency Order did not cover the geographical area in which Mr. Ghaneie and Mr. Tracy reside. Mr. Ghaneie and Mr. Tracy both timely filed exceptions by e-mail with the Department on August 30, 2023, which exceptions were officially filed on September 1, 2023, because the Department's offices in Tallahassee were closed August 30th and 31st due to Hurricane Idalia.

DEP filed responses to Mr. Ghaneie's and Mr. Tracy's exceptions on September 12, 2023. Andy Estates, LLC, (Andy Estates) filed responses to Mr. Ghaneie and Mr. Tracy's exceptions on September 12, 2023. On September 12, 2023, DEP filed a single motion to enlarge the time to file responses to exceptions to the RO and to consider DEP's responses timely filed. While good cause was shown to accept both parties' responses to the exceptions as timely, the responses did not inform any of the Department's rulings to the exceptions below.

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

BACKGROUND

On March 1, 2022, DEP issued a Notice of Intent (NOI) to issue a consolidated Environmental Resource Permit (ERP) and Letter of Consent for Use of Sovereignty Submerged Lands (Letter of Consent) to Andy Estates, giving preliminary approval to a 692 square-foot

private, multi-family dock (Project) in the Banana River Aquatic Preserve, Merritt Island, Brevard County (DEP File No. 37980-005-EI).

Pursuant to an extension of time granted by DEP, Petitioner Mr. Ghaneie filed a timely petition for an administrative hearing on April 8, 2022, and Petitioner Mr. Tracy filed a petition on April 13, 2022, challenging the above referenced agency action by DEP. The Department referred the cases to DOAH to conduct a formal hearing, where the cases were consolidated and scheduled for hearing.

On September 9, 2022, DEP filed a Motion to Strike, or, in the Alternative, Motion in Limine. The ALJ granted the motion in limine on September 19, 2022. The Order held that (1) the question of the location of riparian boundaries was not a matter for DOAH to resolve in a permitting proceeding, though Petitioners would be allowed to argue that the construction of the dock would infringe upon their riparian rights, and (2) issues related to parking, additional traffic on the roadway, the possible increase in police presence due to use of the proposed dock, and the applicability of the Americans with Disabilities Act and/or the Florida Building Code to the dock's construction were beyond the purview of a DEP permitting case and therefore would not be considered at the final hearing. (RO at pp. 3-4).

On November 17, 2022, DEP issued an order related to the subject Project granting Andy Estates a variance from Section 10.2.5(a)4[1] of the ERP Applicant's Handbook and provided Petitioners with notice of the variance. On November 17, 2022, DEP filed a motion to continue the final hearing, which was scheduled within the twenty-one-day period for Petitioners to file a

[1] In Class II waters approved for shellfish harvesting, "prior to the mooring of any vessel at the dock, there shall be existing structures with toilet facilities located on the uplands. . . ." Environmental Resource Permit Applicant's Handbook, Vol. I, Section 10.2.5(a)4, incorporated by reference in rule 62-330.010(4)(a), Florida Administrative Code.

petition challenging issuance of the variance. DEP's motion requested a continuance so that any challenges to the variance could be consolidated with the current challenge to the Project for Andy Estates' dock. The ALJ granted the continuance on November 18, 2022.

On December 27, 2022, pursuant to an extension of time granted by DEP, the Petitioners Ghaneie and Tracy jointly file a petition for an administrative hearing challenging the variance. Petitioner Tracy also individually filed a petition challenging the variance. DEP referred the variance petitions to DOAH on February 3, 2023. The joined petitions were consolidated with the related DOAH cases challenging the Project for Andy Estates' dock.

The final hearing was held on March 27 through 31, 2023, and May 25 through 26, 2023. Andy Estates presented the testimony of Heather Przybylski, David Purkerson, Robert Miller, Josephine Quiroz, and Katrina Seib. Andy Estates' Exhibit Nos. 17, 29 through 37, 39, 44, 45, and 49 through 57 were admitted into evidence.

DEP presented the testimony of Richard Malloy, Carter Cook, and Reggie Phillips. DEP Exhibit Nos. 1 through 14, 17, 20, and 21 were admitted into evidence.

Mr. Ghaneie testified on his own behalf and presented the testimony of Scott Woolam, and Daniel Mestayer. Mr. Ghaneie's Exhibit Nos. 1 through 3, 4 (pages 58 through 71 only), and 5 through 23 were accepted into evidence.

Mr. Tracy testified on his own behalf and presented the testimony of Lisa Laur, Megan Leslie, Sarah Mercer, Katrina Seib, Richard Malloy, and Reggie Phillips. Mr. Tracy's Exhibit Nos. 1 through 3, 8, 9, 11, 13 through 15, 17, 19, 21 through 23, 30 through 32, 35, 37 through 39, 41, 43, 45, 48 through 51, 57, 60, 61, 63, and 64 were admitted into evidence.

At the final hearing, Mr. Tracy offered testimony regarding Andy Estates' compliance with rule 18-20.003(42), Florida Administrative Code, defining the "preempted area" of

sovereign submerged lands from which traditional public uses have been, or would be, excluded to any extent by an activity, and with section 12.3.4 of the Applicant's Handbook, relating to the requirements for homeowners' associations and similar bodies to act as operation and maintenance entities. DEP objected on the ground that Mr. Tracy did not plead these issues in his petition and no discovery was taken as to these issues. The ALJ reserved ruling on this objection. Upon review, the ALJ found in the RO that Mr. Tracy's petition is silent as to these topics and nothing in the record would support a finding that these issues were tried by consent. The ALJ disregarded Mr. Tracy's testimony as to these provisions in writing his Recommended Order. (RO at p. 6).

In accordance with section 120.57, Florida Statutes, DEP accurately and completely preserved all the testimony at hearing by a contracted court reporter; however, no party ordered or filed a hearing transcript with DOAH or the Department. (RO at p. 6). Andy Estates, DEP, Mr. Ghaneie, and Mr. Tracy each timely filed proposed recommended orders (PROs) with DOAH on June 15, 2023, in accordance with the granting of an extension of time to file the PROs.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department enter a final order to approve the consolidated Environmental Resource Permit and Letter of Consent authorizing Andy Estates to build a proposed 692 square-foot private, multi-family dock in the Banana River Aquatic Preserve (DEP File No. 37980-005-EI) (RO at p. 44). In doing so, the ALJ found that the proposed dock will meet the requirements for chapters 253, 258 and 373, Florida Statutes, the applicable rule provisions in chapters 18-20, 18-21 and 62-330, Florida Administrative Code, and the applicable provisions of the Applicant's Handbook. The ALJ concluded that the

Petitioners did not meet their burden of proof in opposition to the ERP, and that Andy Estates met its burden of proof for the Letter of Consent and the variance. (RO ¶ 129). Moreover, the ALJ found that Andy Estates is not required to obtain a variance from Section 10.2.5(a)4 of the Applicant's Handbook, even though it met the requirements for this variance.

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. (2023); *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 Envtl. 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). 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 & 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 Envtl. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996). The Department is charged with enforcing and interpreting chapters 253, 258 and 373 of the Florida Statutes. As a result, DEP has substantive jurisdiction over interpretation of the statutory provisions in chapters 253, 258 and 373, Florida 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. 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

Parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker,* 677 So. 2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing,* 954 So. 2d 77, 81 (Fla. 5th DCA 2007); *Dep't of Corr. v. Bradley*, 510 So. 2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. 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. (2023); *Barfield,* 805 So. 2d at 1012; *Fla. Pub. Emp. Council, v. Daniels,* 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

Finally, 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. (2023). 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.

The First District Court of Appeals in *Department of Corrections v. Bradley* held that

> in administrative proceedings where a hearing is held before a hearing officer and a recommended order is submitted to the agency for consideration and issuance of a final order, *a party which is unwilling to accept the finding of facts made in the recommended order must ensure that the agency has before it a record of the hearing prior to the time the final order is issued* and must alert the agency to any perceived defects in the hearing procedures or the hearing officer's fact findings. Failure to do so, in cases where the agency accepts the hearing officer's findings of fact, will result in exclusion of the transcript from the record, will bar an appellant from presenting a version of the facts different from that recited in the final order, and will preclude any argument on appeal that the agency erred in accepting the facts as set forth in the recommended order.

Dep't of Corr., 510 So. 2d at 1124 (emphasis added); *see also, Rabren v. Dep't of Prof'l Regulation*, 568 So. 2d 1283, 1290 (Fla. 1st DCA 1990).

I. RULINGS ON MR. GHANEIE'S EXCEPTIONS

A. Mr. Ghaneie's Exceptions to Portions of the Recommended Order's Preliminary Statement and the Findings of Fact

Mr. Ghaneie takes exception to portions, or all, of four paragraphs in the Preliminary Statement of the RO, alleging the findings of fact are incorrect. Specifically, he takes exception to the fourth paragraph on pages 3 through 4 of the RO, the fourth paragraph on page 5 of the RO, and the first and second paragraph on page 6 of the RO.

Mr. Ghaneie takes exception moreover to portions, or all, of the findings of fact in RO paragraph nos. 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, footnote 15 to paragraph 60, and in Exception No. 23 to all of the RO's paragraphs related to DEP's order granting Andy Estates a variance from Section 10.2.5(a)4 of the Applicant's Handbook (RO paragraph nos. 64 through 82), alleging these findings are incorrect.

In reviewing a recommended order and any written exceptions, an agency need not rule on an exception that "does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." § 120.57(1)(k), Fla. Stat. (2023). As explained below, Mr. Ghaneie offers no citations to the record to support the above-referenced exceptions.

A party who objects to a finding of fact made in a recommended order must ensure that the agency has before it a record of the hearing. However, no transcript was filed by any party in this case. Without a hearing transcript, none of an ALJ's findings of fact may be rejected in the Department's final order based on lack of competent substantial evidence because the Department is unable to "review the entire record" for such evidence. *Cf.* § 120.57(1)(k), Fla. Stat. (2023) (providing that "an agency need not rule on an exception . . . that does not include appropriate and specific citations to the record."); *see Dep't of Corr.*, 510 So. 2d at 1124;

Rabren, 568 So. 2d at 1290; *Pope v. Ray*, DOAH Case No. 03-3981 (Fla. Dep't of Envtl. Prot. April 15, 2004) (Fla. Div. of Admin. Hearings March 2, 2004).

Based on the foregoing reasons, Mr. Ghaneie's Exceptions to the RO's Preliminary Statement and to RO paragraph nos. 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, footnote 15 to paragraph no. 60, and paragraph nos. 64 through 82 are denied.

B. Mr. Ghaneie's Exceptions to Portions of the Recommended Order's Conclusions of Law

1.a. Mr. Ghaneie's Exception No. 24 to Paragraph Nos. 83-128 of the RO

Mr. Ghaneie may intend to file an exception to every single conclusion of law in the RO (paragraph nos. 83-129) or may intend to file an exception only to conclusion of law paragraph no. 129. Mr. Ghaneie's exception no. 24 is unclear on this point.

In reviewing a recommended order and any written exceptions, an agency need not rule on an exception that "does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." § 120.57(1)(k), Fla. Stat. (2023). Mr. Ghaneie's potential exceptions to the RO's entire conclusions of law do not identify the legal basis for the exceptions to every single conclusion of law, and thus are denied.

Mr. Ghaneie does, however, provide an explanation to his exception to RO paragraph no. 121 (erroneously identified as paragraph no. 128). [2] Mr. Ghaneie objects to the ALJ's evidentiary ruling that Dr. Scott's submerged aquatic vegetation (SAV) survey was inadmissible, based on DEP's hearsay objection. The Department does not have jurisdiction to modify or reject an ALJ's rulings on the admissibility of evidence. *See Martuccio,* 622 So. 2d at 609; *Heifetz,* 475

[2] Mr. Ghaneie's exception no. 24 identifies the paragraph of the RO as paragraph no. 128; however, the exception discusses the topic in paragraph no. 121. As a result, the Department has identified the exception as an exception to paragraph no. 121 and not 128, since the paragraph number appears to be a typographical error.

So. 2d at 1281-82. 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.

Based on the foregoing reasons, Mr. Ghaneie's exception to the ALJ's ruling to exclude Dr. Scott's SAV survey is denied.

1.b. Mr. Ghaneie's Exception No. 24 – "Additional" Commentary and Objections

Mr. Ghaneie included two pages of "additional" commentary and objections to the ALJ's conclusions of law. Ghaneie's exceptions, pp. 34-36. He contends that the ALJ relied on the Respondents' "made-up interpretation" of which personal watercraft constitute a "vessel." Specifically, Mr. Ghaneie provided that

> [t]his Recommended Order and this Judge has without justifications [sic], decided to just remove the word "Vessel" from the requirements that protects [sic] the Aquatic Preserve Class II Water which would eliminate the need for a must [sic] needed toilet facility upland this proposed dock and eliminates [sic] the must [sic] needed 12" clearance that is required from the top of the resources to the lowest part of these vessels, proposed kayaks, and paddleboards.

Ghaneie's exceptions, p. 35.

The bottom of Section 10.2.5(a) of the Applicant's Handbook, Vol. I, provides that kayaks and paddleboards are not considered "vessels," because this section of the Applicant's Handbook limits the definition of "vessel" to sailboats and motorized boats.[3] Since a kayak and paddleboard do not meet the definition of a "vessel," the proposed dock does not trigger the need for a toilet on Andy Estates' uplands adjacent to the sovereign submerged lands or a twelve-inch clearance between the top of the resources and the lowest part of the kayaks and paddleboards.

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[3] The Applicant's Handbook provides in Section 10.2.5(a) that "[s]olely for purposes of this subsection, the term 'vessel' shall include all sailboats and motorized boats of any type other than personal watercraft as defined in Section 327.02, F.S., whether moored in the water or stored on the dock, in a boat lift, or on a floating vessel platform." Applicant's Handbook, Vol. I, Section 10.2.5(a), incorporated by reference in rule 62-330.010(4)(a), Florida Administrative Code.

2. Mr. Ghaneie's Exception No. 25 to the Conclusion and Recommendation

Mr. Ghaneie takes exception to the Conclusion (paragraph no. 129) and Recommendation of the RO, alleging that he was denied due process, because the ALJ prohibited him from presenting what he identified as "critical material evidence" and "overlooked the requirements of the Application [sic] Handbook, Florida Statutes, rules, and regulations . . . ." Ghaneie's exceptions, exception no. 25. Mr. Ghaneie contends he is entitled to a new hearing where the survey and other material and facts can be presented to the Court.

The Department does not have jurisdiction to modify or reject an ALJ's rulings on the admissibility of evidence. *See Martuccio*, 622 So. 2d at 609; *Heifetz*, 475 So. 2d at 1281-82.

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield*, 805 So. 2d at 1012; *L.B. Bryan & Co.*, 746 So. 2d at 1197; *Deep Lagoon Boat Club, Ltd.,* 784 So. 2d at 1141-42. 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, the Department has substantive jurisdiction over interpretation of these statutes and the Department's rules adopted to implement these statutes. Based on the above, the Department does not have jurisdiction to interpret whether Mr. Ghaneie has been denied due process of law, because this legal concept is not within the Department's substantive jurisdiction. *Cf. Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1143 (Fla. 2d DCA 2001)(DEP lacked substantive jurisdiction to reject ALJ's conclusion of law on the applicability of *res judicata* (i.e., administrative finality)).

Based on the foregoing reasons, Mr. Ghaneie's exception to paragraph no. 129 and the Recommendation of the RO is denied. Moreover, Mr. Ghaneie's conclusion that he is entitled to a new hearing is also denied for the foregoing reasons.

II. RULINGS ON MR. TRACY'S EXCEPTIONS

A. Mr. Tracy's Exceptions to Portions of the Recommended Order's Preliminary Statement and the Findings of Fact

Mr. Tracy takes exception to portions, or all, of five paragraphs in the Preliminary Statement of the RO, alleging the findings of fact are incorrect. Specifically, he takes exception to the first, second, and fourth paragraph (two exceptions) on page 4 of the RO and the first paragraph on page 6 of the RO.

Mr. Tracy takes exception moreover to portions, or all, of the findings of fact in RO paragraph nos. 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 38, 40, 41, 44, 45, 46, 50, 55, 58, 59, 60, footnote 15 to paragraph no. 60, 61, 62, 63, 65, footnote 16 to paragraph no. 66, 68, footnote 17 to paragraph no. 68, 69, 70, 71, 72, 73, 74, 76, 77, 78, 79, 80, 81, and 82, alleging these findings are incorrect.

In reviewing a recommended order and any written exceptions, an agency need not rule on an exception that "does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." § 120.57(1)(k), Fla. Stat. (2023).

A party who objects to a finding of fact made in a recommended order must ensure that the agency has before it a record of the hearing. However, no transcript was filed by any party in this case. Without a hearing transcript, none of an ALJ's findings of fact may be rejected in the Department's final order based on lack of competent substantial evidence, because the Department is unable to "review the entire record" for such evidence. *Cf.* § 120.57(1)(k), Fla. Stat. (2023) (providing that "an agency need not rule on an exception . . . that does not include

appropriate and specific citations to the record."); *see Dep't of Corr.*, 510 So. 2d at 1124; *Rabren*, 568 So. 2d at 1290; *Pope v. Ray*, DOAH Case No. 03-3981 (Fla. Dep't of Envtl. Prot. April 15, 2004) (Fla. Div. of Admin. Hearings March 2, 2004).

Based on the foregoing reasons, Mr. Tracy's Exceptions to the RO's Preliminary Statement and to RO paragraph nos. 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 38, 40, 41, 44, 45, 46, 50, 55, 58, 59, 60, footnote 15 to paragraph no. 60, 61, 62, 63, 65, footnote 16 to paragraph no. 66, 68, footnote 17 to paragraph no. 68, 69, 70, 71, 72, 73, 74, 76, 77, 78, 79, 80, 81, and 82 are denied.

B. Mr. Tracy's Exceptions to Portions of the Recommended Order's Conclusions of Law

Mr. Tracy takes exception to portions, or all, of the conclusions of law in RO paragraph nos. 91, 92, 93, 94, 96, 97, 98, 100, 103, 104, 106, 107, 110, 115, 116, 118, 120, 121, 122, 123, 126, 127, 128, 129, and the RO's Recommendation on pp. 67-68.

In reviewing a recommended order and any written exceptions, an agency need not rule on an exception that "does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." § 120.57(1)(k), Fla. Stat. (2023). Mr. Tracy did not provide a legal basis for any of his exceptions to the RO's conclusions of law. Instead, he merely provided irrelevant commentary and disagreed with the conclusions of law without providing a legal basis for his exceptions. Moreover, Mr. Tracy did not object to any legal conclusion of law, but instead objected to the underlying facts in the RO that support the RO's conclusions of law.

Specifically, Mr. Tracy's exceptions to the RO's conclusions of law are summarized below with additional bases for denial of each exception.

Mr. Tracy's Exception to Paragraph No. 91 of the RO

Mr. Tracy takes exception to paragraph no. 91 of the RO, which provides, in pertinent part:

> 91. An authorization to use sovereignty submerged lands is governed by chapter 253 and is not a "license, permit, or conceptual approval" under chapters 373, 378, or 403, Florida Statutes. Therefore, the modified burden of proof established in section 120.569(2)(p) does not apply to the Letter of Consent. Thus, Andy Estates bears the burden of demonstrating, by a preponderance of the evidence, entitlement to use sovereignty submerged lands. (citations omitted).

RO ¶ 91.

Mr. Tracy's exception provides in its entirety that "Mr. Myers and his family are not entitled to use the Submerged Lands to build a multi-family dock." Tracy's exceptions, p. 47. The exception does not identify any legal basis for his exception. Moreover, the exception does not object to any portion of paragraph 91 of the RO, and thus cannot be granted. Lastly, the exception does not apply at all to the legal analysis in RO paragraph no. 91, which examines whether the modified burden of proof applies to a BOT Letter of Consent.

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 91 of the RO is denied.

Mr. Tracy's Exception to Paragraph No. 92 of the RO

Mr. Tracy takes exception to paragraph no. 92 of the RO, which provides in its entirety: "92. Issuance of the dock permit depends on the provision of reasonable assurance that the activities authorized will meet applicable standards." RO ¶ 92.

Mr. Tracy's exception to paragraph no. 92 of the RO alleges in its entirety: "The general concept of 'Reasonable Assurance' was discussed in depth at the hearing, yet no general definition is being provided here." Tracy's exceptions, p. 47. However, the RO provides a detailed definition of "reasonable assurance" in paragraph no. 93, so Mr. Tracy's exception is

moot. Moreover, Mr. Tracy appears to request that the Department add supplemental findings. However, the Department does not have authority to make supplemental findings of fact. *See e.g., North Port, Fla.*, 645 So. 2d at 487; *Fla. Power & Light Co.*, 693 So. 2d at 1026-27.

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 92 of the RO is denied.

Mr. Tracy's Exception to Paragraph No. 93 of the RO

Mr. Tracy takes exception to paragraph no. 93 of the RO, which provides a detailed definition of "reasonable assurance" with citation to caselaw. Mr. Tracy's exception to paragraph no. 93 appears to focus on the RO's statement that "[r]easonable assurance means 'a substantial likelihood that the project will be *successfully implemented.*'" (emphasis added)(RO ¶ 93).

Mr. Tracy contends that"[t]he definition above for Reasonable Assurance applies to implementation only" and that "there is no *Reasonable Assurance* that the Dock will be maintained in perpetuity." Tracy's exceptions, p. 48 (emphasis in original).

Mr. Tracy's exception to paragraph no. 93 of the RO does not identify any legal basis to modify the conclusion of law therein. Moreover Mr. Tracy's exception to paragraph no. 93 appears to be a misinterpretation that paragraph no. 93 concludes that Andy Estates has not provided reasonable assurances for the ongoing maintenance requirements associated with the proposed Project. However, paragraph no. 93 in no way limits the reasonable assurance standard to the construction phase of the Project; it merely provides a detailed definition for reasonable assurances.

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 93 of the RO is denied.

Mr. Tracy's Exception to Paragraph No. 94 of the RO

Mr. Tracy takes exception to paragraph no. 94 of the RO, which provides, in its entirety, that "[a]n applicant must demonstrate that an activity in Outstanding Florida Waters regulated under chapter 373 will not be harmful to water resources in the state by providing reasonable assurance that the activity in, on, or over surface waters is clearly within the public interest. § 373.414(1), Fla. Stat." RO ¶ 94.

Mr. Tracy takes exception to paragraph no. 94 of the RO, concluding that off-site mitigation of impacts to mangroves is clearly not in the public interest for the adjacent property owners. Mr. Tracy's exception to paragraph no. 94 of the RO does not identify any legal basis to modify the conclusion of law therein. Moreover, paragraph no. 94 does not conclude that the proposed Project has meet the public interest test; it merely provides an explanation that an activity in an Outstanding Florida Water must be clearly in the public interest.

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 94 of the RO is denied.

Mr. Tracy's Exception to Paragraph No. 96 of the RO

Mr. Tracy takes exception to paragraph no. 96 of the RO, which only quotes a portion of section 373.414(1)(b), Florida Statutes, which provides that "the department, in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects," including, but not limited to, offsite mitigation. § 373.414(1)(b), Fla. Stat. (2023).

Mr. Tracy's exception provides, in its entirety, that "[o]ffsite mitigation is not the same from a public interest perspective as other local mitigation efforts which would include planting

additional mangroves to provide the protection reduced by impacting the mangroves present." Tracy's exceptions, p. 50.

Mr. Tracy's exception to paragraph no. 96 of the RO does not identify any legal basis to modify the conclusion of law therein. Paragraph no. 96 merely quotes a portion of section 373.414(1)(b), Florida Statutes. The statutory language speaks for itself. *MW Horticulture Recycling Facility, Inc. v. Dep't of Envtl. Prot.*, DOAH Case No. 19-5636 (Fla. Dep't of Envtl. Prot. Dec. 15, 2020)(Fla. Div. of Admin. Hearings Sept. 17, 2020)(The petitioners have no legal basis to take exception to a mere quotation from the Department's rules).

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 96 of the RO is denied.

Mr. Tracy's Exception to Paragraph No. 97 of the RO

Mr. Tracy takes exception to paragraph no. 97 of the RO, which concludes that Andy Estates provided reasonable assurance that the proposed dock will not adversely affect the public health, safety, or welfare of the property of others, thus meeting the criteria in section 373.414(1)(a)1., Florida Statutes. Mr. Tracy's exception to paragraph no. 97 of the RO merely provides findings of fact that disagree with findings underlying the ALJ's conclusion of law in paragraph no. 97 of the RO.

A party who objects to a finding of fact made in a recommended order must ensure that the agency has before it a record of the hearing. However, no transcript was filed by any party in this case. Without a hearing transcript, none of an ALJ's findings of fact may be rejected in the Department's final order based on lack of competent substantial evidence, because the Department is unable to "review the entire record" for such evidence. *Cf.* § 120.57(1)(k), Fla. Stat. (2023) (providing that "an agency need not rule on an exception . . . that does not include

appropriate and specific citations to the record."); *see Dep't of Corr.*, 510 So. 2d at 1124; *Rabren*, 568 So. 2d at 1290; *Pope v. Ray*, DOAH Case No. 03-3981 (Fla. Dep't of Envtl. Prot. April 15, 2004) (Fla. Div. of Admin. Hearings March 2, 2004).

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 97 of the RO is denied.

Mr. Tracy's Exception to Paragraph No. 98 of the RO

Mr. Tracy takes exception to paragraph no. 98 of the RO, which provides, in its entirety, that "[a]s to the criterion stated in section 373.414(1)(a)2., there will be unavoidable impacts to the mangroves in the wetlands, but Andy Estates has purchased mitigation credits from a mitigation bank to offset those impacts, as allowed by section 373.414(1)(b)." RO ¶ 98.

Mr. Tracy's exception to paragraph no. 98 of the RO does not identify any legal basis for his exception. He merely contends that while a letter of agreement with the mitigation bank was provided, the purchase was not confirmed. This statement does not provide a basis to overturn paragraph no. 98 of the RO.

Assuming arguendo that this exception requests the Department to reweigh the evidence underlying paragraph no. 98, this exception must also be denied. A reviewing agency may not reweigh the evidence presented at a DOAH final hearing. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. Moreover, a party who objects to a finding of fact made in a recommended order must ensure that the agency has a record of the hearing. However, no transcript was filed in this case. Without a hearing transcript, none of an ALJ's findings of fact may be rejected in the Department's final order based on lack of competent substantial evidence, because the Department is unable to "review the entire record" for such evidence. *Cf.* § 120.57(1)(k), Fla. Stat. (2023) (providing that "an agency need not rule

on an exception . . . that does not include appropriate and specific citations to the record."); *see Dep't of Corr.*, 510 So. 2d at 1124; *Rabren*, 568 So. 2d at 1290; *Pope v. Ray*, DOAH Case No. 03-3981 (Fla. Dep't of Envtl. Prot. April 15, 2004) (Fla. Div. of Admin. Hearings March 2, 2004).

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 98 of the RO is denied.

Mr. Tracy's Exception to Paragraph No. 100 of the RO

Mr. Tracy takes exception to paragraph no. 100 of the RO, which provides, in its entirety, that "[a]s to the criterion stated in section 373.414(1)(a)4., the dock will have no adverse effect on fishing or marine productivity and will enhance recreational values by providing a place to launch kayaks and paddleboards and a vantage point for Andy Estates members to watch Cape Canaveral rocket launches." RO ¶ 100. Mr. Tracy's exception, provides, in its entirety, that "[r]ocket launches are often at night. Let's sip a glass of wine too. Where is the restroom?" Tracy's exceptions, p. 52. This exception is merely satirical commentary that does not identify a basis to reject the ALJ's conclusion of law.

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 100 of the RO is denied.

Mr. Tracy's Exception to Paragraph No. 103 of the RO

Mr. Tracy takes exception to paragraph no. 103 of the RO, which provides, in its entirety, that "[a]s to the criterion stated in section 373.414(1)(a)7., the proposed dock is similar in size to other docks in the area, and the plan for its construction is consistent with similar projects." RO ¶ 103.

Mr. Tracy's exception to paragraph no. 103 of the RO does not identify any legal basis for his exception. Instead, he merely contends that the findings of fact upon which this conclusion of law is based are incorrect. Tracy's exceptions, p. 52.

Assuming arguendo that this exception requests the Department to reweigh the evidence underlying paragraph no. 103, this exception must also be denied. A reviewing agency may not reweigh the evidence presented at a DOAH final hearing. *See, e.g.*, *Rogers,* 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. Moreover, a party who objects to a finding of fact made in a recommended order must ensure that the agency has a record of the hearing. However, no transcript was filed in this case. Without a hearing transcript, none of an ALJ's findings of fact may be rejected in the Department's final order based on lack of competent substantial evidence, because the Department is unable to "review the entire record" for such evidence. *Cf.* § 120.57(1)(k), Fla. Stat. (2023) (providing that "an agency need not rule on an exception . . . that does not include appropriate and specific citations to the record."); *see Dep't of Corr.*, 510 So. 2d at 1124; *Rabren*, 568 So. 2d at 1290; *Pope v. Ray*, DOAH Case No. 03-3981 (Fla. Dep't of Envtl. Prot. April 15, 2004) (Fla. Div. of Admin. Hearings March 2, 2004).

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 103 of the RO is denied.

Mr. Tracy's Exception to Paragraph No. 104 of the RO

Mr. Tracy takes exception to paragraph no. 104 of the RO, which provides, in its entirety:

> 104. In summary, Andy Estates provided reasonable assurance to DEP that the project will be constructed in a manner that is clearly in the public interest by providing reasonable and achievable plans for the construction of the dock, by considering and mitigating impacts to resources, and seeking approval only for watercraft that is environmentally benign.

RO ¶ 104.

Mr. Tracy's exception to paragraph no. 104 of the RO does not identify any legal basis for his exception. He merely disagrees with the ALJ's conclusion that use of kayaks and paddle boards at this location will be "environmentally benign." Tracy's exceptions, p. 53.

Assuming arguendo that this exception requests the Department to reweigh the evidence underlying paragraph no. 104, this exception must also be denied. A reviewing agency may not reweigh the evidence presented at a DOAH final hearing. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. Moreover, a party who objects to a finding of fact made in a recommended order must ensure that the agency has a record of the hearing. However, no transcript was filed in this case. Without a hearing transcript, none of an ALJ's findings of fact may be rejected in the Department's final order based on lack of competent substantial evidence, because the Department is unable to "review the entire record" for such evidence. *Cf.* § 120.57(1)(k), Fla. Stat. (2023) (providing that "an agency need not rule on an exception . . . that does not include appropriate and specific citations to the record."); *see Dep't of Corr.*, 510 So. 2d at 1124; *Rabren*, 568 So. 2d at 1290; *Pope v. Ray*, DOAH Case No. 03-3981 (Fla. Dep't of Envtl. Prot. April 15, 2004) (Fla. Div. of Admin. Hearings March 2, 2004).

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 104 of the RO is denied.

Mr. Tracy's Exception to Paragraph No. 106 of the RO

Mr. Tracy takes exception to paragraph no. 106 of the RO, which provides, in its entirety:

> 106. At Finding of Fact 6, above, the relevant language from section 10.2.5(a)4 of the Applicant's Handbook is set forth. For the reasons set forth at Findings of Fact 65 through 70 above, it is concluded that Andy Estates was not required to provide toilet facilities on the uplands or guarantee a minimum of one-foot

clearance between the deepest draft of any vessel and the SAVs in the area because kayaks and paddleboards are not properly considered "vessels" for purposes of section 10.2.5(a)4 of the Applicant's Handbook.

RO ¶ 106.

This exception merely disagrees with the ALJ's conclusion of law that kayaks and paddleboards are not considered "vessels" for purposes of section 10.2.5(a) of the Applicant's Handbook. The bottom of Section 10.2.5(a) of the Applicant's Handbook, Vol. I, provides that kayaks and paddleboards are not considered "vessels," because this section of the Applicant's Handbook limits the definition of "vessel" to sailboats and motorized boats. [4] Since a kayak and paddleboard do not meet the definition of a vessel in Section 10.2.5(a) of the Applicant's Handbook, the proposed dock does not trigger the requirement for a toilet on Andy Estates' uplands adjacent to the sovereign submerged lands or a twelve-inch clearance between the top of the resources and the lowest part of the kayaks and paddleboards.

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 106 of the RO is denied.

Mr. Tracy's Exception to Paragraph No. 107 of the RO

Mr. Tracy takes exception to paragraph no. 107 of the RO, which provides, in its entirety, that "[e]ven if kayaks and paddleboards were considered 'vessels,' Andy Estates' Ordinary Low Water Line Survey confirmed that the draft of the kayaks and paddleboards would provide one foot of clearance between the draft of any kayak or paddleboard and the submerged resources." RO ¶ 107.

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[4] The Applicant's Handbook provides in Section 10.2.5(a) that "[s]olely for purposes of this subsection, the term 'vessel' shall include all sailboats and motorized boats of any type other than personal watercraft as defined in Section 327.02, F.S., whether moored in the water or stored on the dock, in a boat lift, or on a floating vessel platform." Applicant's Handbook, Vol. I, Section 10.2.5(a), incorporated by reference in rule 62-330.010(4)(a), Florida Administrative Code.

Mr. Tracy's exception to paragraph no. 107 of the RO does not identify any legal basis for his exception. Instead, he merely contends that the Department's Ordinary Low Water Line Survey is not credible. Tracy's exceptions, p. 54.

Assuming arguendo that this exception requests the Department to reweigh the evidence underlying paragraph no. 107, this exception must also be denied. A reviewing agency may not reweigh the evidence presented at a DOAH final hearing. *See, e.g.*, *Rogers,* 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. Moreover, a party who objects to a finding of fact made in a recommended order must ensure that the agency has a record of the hearing. However, no transcript was filed in this case. Without a hearing transcript, none of an ALJ's findings of fact may be rejected in the Department's final order based on lack of competent substantial evidence, because the Department is unable to "review the entire record" for such evidence. *Cf.* § 120.57(1)(k), Fla. Stat. (2023) (providing that "an agency need not rule on an exception . . . that does not include appropriate and specific citations to the record."); s*ee Dep't of Corr.*, 510 So. 2d at 1124; *Rabren*, 568 So. 2d at 1290; *Pope v. Ray*, DOAH Case No. 03-3981 (Fla. Dep't of Envtl. Prot. April 15, 2004) (Fla. Div. of Admin. Hearings March 2, 2004).

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 107 of the RO is denied.

Mr. Tracy's Exception to Paragraph No. 110 of the RO

Mr. Tracy takes exception to paragraph no. 110 of the RO that *only* quotes pertinent portions of rule 18-21.004, Florida Administrative Code. Specifically, subsection 18-21.004(4) provides the "Standards and Criteria for Private Residential Multi-family Docks and Piers." Fla. Admin. Code R. 18-21.004(4)(2023).

Mr. Tracy's exception to paragraph no. 110 of the RO does not identify any legal basis for his exception. Instead, Mr. Tracy cites to his version of the hearing testimony.

Moreover, paragraph 110 of the RO only quotes portions of rule 18-20.004, Florida Administrative Code, with no conclusions or commentary. The rule language speaks for itself and does not provide a legal basis to be rejected. *MW Horticulture Recycling Facility, Inc. v. Dep't of Envtl. Prot.*, DOAH Case No. 19-5636 (Fla. Dep't of Envtl. Prot. Dec. 15, 2020)(Fla. Div. of Admin. Hearings Sept. 17, 2020)(The petitioners have no legal basis to take exception to a mere quotation from the Department's rules).

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 110 of the RO is denied.

Mr. Tracy's Exception to Paragraph No. 115 of the RO

Mr. Tracy takes exception to paragraph no. 115 of the RO, which *only* quotes the pertinent rule criteria to qualify for a Letter of Consent to use sovereignty submerged lands. *See* Fla. Admin. Code R. 18-21.005(1) (2023).

Paragraph 115 of the RO only quotes portions of rule 18-20.005(1), Florida Administrative Code, with no conclusions or commentary. The rule language speaks for itself and does not provide a legal basis to be rejected. *MW Horticulture Recycling Facility, Inc. v. Dep't of Envtl. Prot.*, DOAH Case No. 19-5636 (Fla. Dep't of Envtl. Prot. Dec. 15, 2020)(Fla. Div. of Admin. Hearings Sept. 17, 2020)(The petitioners have no legal basis to take exception to a mere quotation from the Department's rules).

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 115 of the RO is denied.

Mr. Tracy's Exception to Paragraph No. 116 of the RO

Mr. Tracy takes exception to paragraph no. 116 of the RO, which concludes that "[i]n accordance with rule 18-21.005(1), the Letter of Consent is the appropriate authorization," because the dock meets the 10 to 1 preemption requirement identified in rule 18-21.005(1), Florida Administrative Code. (RO ¶ 116). Rule 18-21.005(1), Florida Administrative Code, provides that a Letter of Consent is the appropriate form of authorization from the BOT where a private single-family or multi-family dock preempts "no more than 10 square feet of sovereignty submerged land for each linear foot of the applicant's riparian shoreline. . . ." (RO ¶ 116); Fla. Admin. Code R. 18-21.005(1)(2023).

The Department concludes that paragraph 116 of the RO contains mixed conclusions of law and findings of fact upon which the conclusions of law are based. The ALJ found that the testimony of DEP's witnesses Cook and Malloy were credible. Moreover, the ALJ found that the "shoreline is approximately 61 feet; [and,] the dock preempts 584 square feet of sovereign submerged lands." RO ¶ 116.

In reviewing a recommended order and any written exceptions, an agency need not rule on an exception that "does not include appropriate and specific citations to the record." § 120.57(1)(k), Fla. Stat. (2023).

A party who objects to a finding of fact made in a recommended order must ensure that the agency has a record of the hearing. However, no transcript was filed in this case. Without a hearing transcript, none of an ALJ's findings of fact may be rejected in the Department's final order based on lack of competent substantial evidence, because the Department is unable to "review the entire record" for such evidence. *Cf.* § 120.57(1)(k), Fla. Stat. (2023) (providing that "an agency need not rule on an exception . . . that does not include appropriate and specific

citations to the record."); s*ee Dep't of Corr.*, 510 So. 2d at 1124; *Rabren*, 568 So. 2d at 1290; *Pope v. Ray*, DOAH Case No. 03-3981 (Fla. Dep't of Envtl. Prot. April 15, 2004) (Fla. Div. of Admin. Hearings March 2, 2004).

For the foregoing reasons, the Department may not deny the ALJs finding that the testimony of DEP's witnesses Cook and Malloy were credible, and his finding that the "shoreline is approximately 61 feet; [and,] the dock preempts 584 square feet of sovereign submerged lands." RO ¶ 116.

Mr. Tracy's exception concludes, in its entirety, that "[t]his application fails the 10:1 preemption requirement for the reasons already specified." Tracy's exceptions, p. 60. Assuming arguendo that Mr. Tracy intends to refer to his exception to RO paragraph no. 115, Mr. Tracy contended in paragraph no. 115 that a "temporary mooring area" must be included in the square footage of sovereign submerged lands preempted by the proposed dock. The Department concurs with the ALJ's mixed findings of fact and conclusion of law that 584 square feet of sovereign submerged lands will be preempted by the proposed area and does not include a "temporary mooring area." The Department also concurs with the ALJ's legal conclusion that a Letter of Consent is the appropriate BOT form of authorization in accordance with rule 18-21.005(1), Florida Administrative Code.

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 116 of the RO is denied.

Mr. Tracy's Exception to Paragraph No. 118 of the RO

Mr. Tracy takes exception to paragraph no. 118 of the RO, which concludes that "[t]he following definitions found in rule 18-20.003 are applicable:" (1) Resource Protection Area 1, (2) Resource Protection Area 2, and (3) Resource Protection Area 3. RO ¶ 118.

Mr. Tracy's exception to paragraph no. 118 of the RO does not identify any legal basis for his exception. His exception contends that the proposed dock will not be constructed in a Resource Protection Area 3, which is "characterized by the absence of any *significant* natural resource attributes." Fla. Admin. Code R. 18-20.003(56)(2023). However, paragraph 118 of the RO merely provides that the definitions for Resource Protection Areas 1, 2 and 3 in rule 18-20.003 of the Florida Administrative Code are applicable. This paragraph does not identify which Resource Protection Area applies to the proposed dock. Again, the rule language speaks for itself.

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 118 of the RO is denied.

Mr. Tracy's Exception to Paragraph No. 120 of the RO

Mr. Tracy takes exception to paragraph no. 120 of the RO, which provides, in its entirety:

> 120. No evidence was presented at hearing showing that the terminal platform area presented "pioneering" growth of resources. Testimony at the hearing established that there were, at most, "minimal" resources present. Neither of the SAV surveys submitted by Andy Estates showed more than five percent coverage of resources on the submerged bottom. This was anecdotally confirmed by Ms. Cook during her March 2023 site visit when she found minimal resources in the area of the terminal platform.

RO ¶ 120.

The Department concludes that paragraph no. 120 of the RO contains mixed findings of fact and conclusions of law.

While Mr. Tracy's exception appears to disagree with the ALJ's findings of fact in paragraph no. 120, the standard to overturn an ALJ's finding of fact is whether the ALJ's finding is supported by competent, substantial evidence. Without a hearing transcript, none of an ALJ's findings of fact may be rejected in the Department's final order based on lack of competent

substantial evidence, because the Department is unable to "review the entire record" for such evidence. *Cf.* § 120.57(1)(k), Fla. Stat. (2023) (providing that "an agency need not rule on an exception . . . that does not include appropriate and specific citations to the record."); s*ee Dep't of Corr.*, 510 So. 2d at 1124; *Rabren*, 568 So. 2d at 1290; *Pope v. Ray*, DOAH Case No. 03-3981 (Fla. Dep't of Envtl. Prot. April 15, 2004) (Fla. Div. of Admin. Hearings March 2, 2004).

Moreover, Mr. Tracy's exception to paragraph no. 120 of the RO does not identify any legal basis for his exception. His exception ironically appears to support the ALJ's conclusions in paragraph no. 120 that minimal resources were found in the area of the terminal platform when Mr. Tracy's exception provided that "Ms. Cook stated more accurately that there were ZERO resources . . . ." Tracy's exceptions, p. 61.

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 120 of the RO is denied.

Mr. Tracy's Exception to Paragraph No. 121 of the RO

Mr. Tracy takes exception to paragraph no. 121 of the RO, which provides, in its entirety:

> 121. Mr. Ghaneie offered an SAV survey that had been performed by Dr. Timothy Scott of Consolidated Environmental Engineering on March 3, 2023. However, Mr. Ghaneie did not list Dr. Scott as a witness. DEP objected to admission of Dr. Scott's survey on hearsay grounds. The objection was sustained and the exhibit was not admitted. Petitioners offered no admissible evidence from a qualified and disclosed expert who had physically been to the site.

RO ¶ 121.

Mr. Tracy objects to the ALJ's evidentiary ruling that Dr. Scott's SAV survey was inadmissible, based on DEP's hearsay objection. The Department does not have jurisdiction to modify or reject an ALJ's rulings on the admissibility of evidence. *See Martuccio*, 622 So. 2d at 609, *Heifetz*, 475 So. 2d at 1281-82. 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.

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 121 of the RO is denied.

Mr. Tracy's Exception to Paragraph No. 122 of the RO

Mr. Tracy takes exception to paragraph no. 122 of the RO, which provides, in its entirety, that "[t]he competent and substantial evidence offered at the final hearing established that the area at the proposed terminal platform is consistent with a Resource Protection Area 3." RO ¶ 122.

The Department concludes that paragraph no. 122 of the RO contains mixed findings of fact and conclusions of law.

The standard to overturn an ALJ's finding of fact is whether the ALJ's finding is supported by competent, substantial evidence. Without a hearing transcript, none of an ALJ's findings of fact may be rejected in the Department's final order based on lack of competent substantial evidence, because the Department is unable to "review the entire record" for such evidence. *Cf.* § 120.57(1)(k), Fla. Stat. (2023) (providing that "an agency need not rule on an exception . . . that does not include appropriate and specific citations to the record."); *see Dep't of Corr.*, 510 So. 2d at 1124; *Rabren*, 568 So. 2d at 1290; *Pope v. Ray*, DOAH Case No. 03-3981 (Fla. Dep't of Envtl. Prot. April 15, 2004) (Fla. Div. of Admin. Hearings March 2, 2004).

Moreover, Mr. Tracy's exception to paragraph no. 122 of the RO does not identify any legal basis for his exception. His exception merely disagrees with the ALJ's conclusion of law that the area at the proposed terminal platform is consistent with a Resource Protection Area 3 as defined in rule 18-20.003(56), Florida Administrative Code

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 122 of the RO is denied.

Mr. Tracy's Exception to Paragraph No. 123 of the RO

Mr. Tracy takes exception to paragraph no. 123 of the RO, which *only* quotes pertinent portions of rule 18-20.004, Florida Administrative Code, that pertain to the "Standards and Criteria for Docking Facilities."

Mr. Tracy's exception to paragraph no. 123 of the RO does not identify any legal basis for this exception. Instead, Mr. Tracy disagrees with the ALJ's conclusion of law in a previous paragraph of the RO that the terminal platform terminates in a Resource Protection Area 3. However, paragraph 123 of the RO only quotes portions of rule 18-20.004, Florida Administrative Code, and nothing more. Again, the rule language speaks for itself. *MW Horticulture Recycling Facility, Inc. v. Dep't of Envtl. Prot.*, DOAH Case No. 19-5636 (Fla. Dep't of Envtl. Prot. Dec. 15, 2020)(Fla. Div. of Admin. Hearings Sept. 17, 2020)(The petitioners have no legal basis to take exception to a mere quotation from the Department's rules).

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 123 of the RO is denied.

Mr. Tracy's Exception to Paragraph No. 125 of the RO

Mr. Tracy takes exception to paragraph no. 125 of the RO, which provides, in its entirety:

> 125. DEP reasonably determined that the conditions at the terminal platform established it as a Resource Protection Area 3. Andy Estates' SAV surveys confirmed this determination by showing that there was five percent or less coverage of submerged resources at the terminal platform. Despite the classification of the area as a Resource Protection Area 3, Andy Estates designed its dock to be elevated five feet above the high-water line, meeting the rule requirements for sites designated as Resource Protection Areas 1 or 2.

RO ¶ 125.

Mr. Tracy disagrees with the ALJ's statement that Andy Estates' SAV surveys confirmed that the conditions at the dock's terminal platform established the area as a Resource Protection Area 3. He contends that five percent or less coverage of submerged resources does not qualify the area as a Resource Protection Area 3. However, the definition of Resource Protection Area 3 in rule 18-20.003(56) defines such areas as "characterized by the absence of any *significant* natural resource attributes." Fla. Admin. Code R. 18-20.003(56)(2023) (emphasis added). Based on the definition, a Resource Protection Area 3 is not required to be "absent of any" natural resource attributes, as argued by Mr. Tracy. Tracy's exceptions, p. 64. Instead, the area must lack any "significant" natural resource attributes.

In addition, Mr. Tracy objects to the ALJ's evidentiary ruling that Dr. Scott's SAV survey was inadmissible. The Department does not have jurisdiction to modify or reject an ALJ's rulings on the admissibility of evidence. *See Martuccio,* 622 So. 2d at 609; *Heifetz,* 475 So. 2d at 1281-82. 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.

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 125 of the RO is denied.

Mr. Tracy's Exception to Paragraph No. 126 of the RO

Mr. Tracy takes exception to paragraph no. 126 of the RO, which *only* quotes pertinent portions of section 120.542, Florida Statutes, that provides the criteria for issuance of a variance from an agency's rule requirements but does not reach a conclusion of law regarding this case.

Mr. Tracy's exception to paragraph no. 126 of the RO does not identify any legal basis for his exception. Instead, Mr. Tracy concludes that the Andy Estates' homeowners are not

"similarly situated" to single family homeowners in the area. However, paragraph 126 of the RO only quotes portions of section 120.542, Florida Statutes, and nothing more. The statutory language speaks for itself. *See MW Horticulture Recycling Facility, Inc. v. Dep't of Envtl. Prot.*, DOAH Case No. 19-5636 (Fla. Dep't of Envtl. Prot. Dec. 15, 2020)(Fla. Div. of Admin. Hearings Sept. 17, 2020)(The petitioners have no legal basis to take exception to a mere quotation from the Department's rules).

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 126 of the RO is denied.

Mr. Tracy's Exception to Paragraph No. 127 of the RO

Mr. Tracy takes exception to paragraph no. 127 of the RO, which provides, in its entirety:

> 127. As found above, Andy Estates was not required to provide toilet facilities on the uplands adjacent to its proposed dock and therefore was not required to obtain a variance from the requirements of Section 10.2.5(a)4 of the Applicant's Handbook. As also found above, if a variance were required, Andy Estates established its entitlement to a variance.

RO ¶ 127.

Mr. Tracy's exception to paragraph no. 127 of the RO does not identify any legal basis for his exception. He merely disagrees with the ALJ's conclusions of law in paragraph 127 of the RO.

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 127 of the RO is denied.

Mr. Tracy's Exception to Paragraph No. 128 of the RO

Mr. Tracy takes exception to paragraph no. 128 of the RO, which concludes that Andy Estates "demonstrated that denial of their riparian right to a dock would violate the principles of

fairness. . . . [and thus] Andy Estates satisfied the requirements of section 120.542(2) and should be granted the variance if DEP's final order determines it is required." RO ¶ 128.

Mr. Tracy's exception to paragraph no. 128 of the RO does not identify any legal basis for his exception. Moreover, Mr. Tracy's exception to paragraph no. 128 of the RO merely provides findings of fact that disagree with findings underlying the ALJ's conclusion of law in paragraph 128 of the RO.

Assuming arguendo that this exception requests the Department to reweigh the evidence underlying paragraph no. 128, this exception must also be denied. A reviewing agency may not reweigh the evidence presented at a DOAH final hearing. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. Moreover, a party who objects to a finding of fact made in a recommended order must ensure that the agency has a record of the hearing. However, no transcript was filed in this case. Without a hearing transcript, none of an ALJ's findings of fact may be rejected in the Department's final order based on lack of competent substantial evidence, because the Department is unable to "review the entire record" for such evidence. *Cf.* § 120.57(1)(k), Fla. Stat. (2023) (providing that "an agency need not rule on an exception . . . that does not include appropriate and specific citations to the record."); s*ee Dep't of Corr.*, 510 So. 2d at 1124; *Rabren*, 568 So. 2d at 1290; *Pope v. Ray*, DOAH Case No. 03-3981 (Fla. Dep't of Envtl. Prot. April 15, 2004) (Fla. Div. of Admin. Hearings March 2, 2004).

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 128 of the RO is denied.

Mr. Tracy's Exception to Paragraph No. 129 of the RO

Mr. Tracy takes exception to paragraph no. 129 of the RO, which provides, in its entirety:

> 129. The proposed dock will meet all applicable statutory and rule standards and requirements for issuance of the ERP and Letter of Consent. The variance is not required for the proposed activity to be permittable, but Andy Estates nonetheless satisfied the statutory requirements for a variance. Neither Petitioner met his burden of proof in opposition to the ERP, and Andy Estates met its burden of proof for the Letter of Consent and the variance.

RO ¶ 129.

Mr. Tracy's exception to paragraph no. 129 of the RO does not identify any legal basis for his exception. He merely disagrees with the ALJ's conclusions of law in paragraph 129 of the RO. Specifically, Mr. Tracy provides that "Andy Estates and Mr. Myers et.al. do not qualify for a multi-family dock permit and they should not be granted a variance for not having a close-by restroom on the uplands. . . ." Tracy's exceptions, p. 67.

Based on the foregoing reasons, Mr. Tracy's exception to paragraph no. 129 of the RO is denied.

Mr. Tracy's Exception to the RO's Recommendation

Mr. Tracy takes exception to the RO's Recommendation that the Department issue a final order granting Andy Estates a Consolidated Environmental Resource Permit and Letter of Consent to use state-owned lands to build the proposed dock and, if necessary, grant Andy Estates a variance from section 10.2.5(a)4 of the Applicant's Handbook.

Mr. Tracy's exception to the RO's Recommendation does not identify any legal basis for his exception. He merely disagrees with the ALJ's recommendation.

Based on the foregoing reasons, Mr. Tracy's exception to the RO's Recommendation is denied.

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 is incorporated by reference herein.

B. Andy Estates, LLC's, Consolidated Environmental Resource Permit and Letter of Consent for Use of Sovereignty Submerged Lands (DEP Permit File No. 37980-005-EI) is GRANTED.

C. While the Department finds that Andy Estates, LLC, met all the requirements under section 120.542, Florida Statutes, for a variance from section 10.2.5(a)4 of the Applicant's Handbook, Volume I, the Department denies the request for a variance, because the variance is not required for the proposed activity to be permittable.

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 26th day of September 2023, 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

9/26/23
DATE

CERTIFICATE OF SERVICE

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

Mansoor "John" Ghaneie 100 Crispin Street Merritt Island, FL 32952 riserconstruct@gmail.com	Kevin Tracy 5705 South Tropical Trail Merritt Island, FL 32952 kevintracy@aol.com
W. Nathan Meloon, Esq. John M. Frazier, Jr., Esq. Scott D. Widerman, Esq. Widerman Malek, PL 1990 West New Haven Avenue Second Floor Melbourne, FL 32904 NMeloon@USLegalTeam.com JFrazier@USLegalTeam.com Julie@USLegalTeam.com Scott@USLegalTeam.com ESkiles@USLegalTeam.com Jessica@USLegalTeam.com	Cameron W. Bertron, Esq. Ronald W. Hoenstine III, Esq. Department of Environmental Protection Office of General Counsel 3900 Commonwealth Blvd., MS 35 Tallahassee, FL 32399-3000 Cameron.Bertron@FloridaDEP.gov Ronnie.W.Hoenstine@FloridaDEP.gov Lateshee.M.Daniels@FloridaDEP.gov

this 26th day of September 2023.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Stacey D. Cowley

STACEY D. COWLEY
Administrative Law Counsel

3900 Commonwealth Blvd., M.S. 35
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email Stacey.Cowley@FloridaDEP.gov

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MANSOOR "JOHN" GHANEIE,

Petitioner,

vs. Case No. 22-1564

ANDY ESTATES, LLC AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

KEVIN TRACY,

Petitioner,

vs. Case Nos. 22-1565
23-0434

ANDY ESTATES, LLC AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

MANSOOR "JOHN" GHANEIE AND KEVIN TRACY,

Petitioners,

vs. Case No. 23-0433

ANDY ESTATES, LLC AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in these cases on March 27 through 31 and May 25 and 26, 2023, via Zoom teleconference,

before Lawrence P. Stevenson, a duly-designated Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner Mansoor "John" Ghaneie:

Mansoor "John" Ghaneie, pro se
100 Crispin Street
Merritt Island, Florida 32952

For Petitioner Kevin Tracy:

Kevin Tracy, pro se
5705 South Tropical Trail
Merritt Island, Florida 32952

For Respondent Andy Estates, LLC:

W. Nathan Meloon, Esquire
John M. Frazier, Esquire
Widerman Malek, PL
1990 West New Haven Avenue, Second Floor
Melbourne, Florida 32904

For Respondent Department of Environmental Protection:

Cameron Bertron, Esquire
Ronald Woodrow Hoenstine, Esquire
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

The issues are: whether the multi-family residential dock proposed by Respondent, Andy Estates, LLC ("Andy Estates"), meets the requirements for an Environmental Resource Permit ("ERP") and Letter of Consent for Use of Sovereignty Submerged Lands ("Letter of Consent"); and whether the variance from Section 10.2.5(a)4 of the Environmental Resource Permit Applicant's Handbook, Volume I ("Applicant's Handbook"), granted to Andy

Estates by the Department of Environmental Protection ("DEP") was necessary and/or should be approved.

PRELIMINARY STATEMENT

On March 1, 2022, DEP issued a Notice of Intent ("NOI") to issue a consolidated ERP and Letter of Consent to Andy Estates, giving preliminary approval to a 692 square-foot private, multi-family dock in the Banana River Aquatic Preserve (DEP File No. 37980-005-EI).

Pursuant to an extension of time granted by DEP, Petitioner, Mansoor "John" Ghaneie, filed a Petition for Administrative Hearing on April 8, 2022, and Petitioner, Kevin Tracy, filed a Petition for Administrative Hearing on April 13, 2022.

On May 25, 2022, DEP referred the cases to DOAH for the assignment of an ALJ and the conduct of formal hearings. Mr. Ghaneie's case was assigned Case No. 22-1564. Mr. Tracy's case was assigned Case No. 22-1565. By Orders dated June 6, 2022, the cases were consolidated and set for hearing on September 26 through 30, 2022.

On September 9, 2022, DEP filed a Motion to Strike, or, in the Alternative, Motion in Limine. On September 19, 2022, an Order Granting Motion in Limine was entered. The Order held that the question of the location of riparian boundaries was not a matter for DOAH to resolve in a permitting proceeding, though Petitioners would be allowed to argue that the construction of the dock would infringe upon their riparian rights. The Order also held that issues related to parking, additional traffic on the roadway, the possible increase in police presence due to use of the proposed dock, and the applicability of the Americans with Disabilities Act and/or the Florida

Building Code to the dock's construction were beyond the purview of a DEP permitting case and therefore would not be considered at the final hearing.

On September 26, 2022, an Order was entered granting motions to continue the final hearing filed by DEP and both Petitioners, based on the impending landfall of Hurricane Ian. The hearing was rescheduled for November 28 through December 3, 2022.

On November 17, 2022, DEP issued an order granting to Andy Estates a variance from Section 10.2.5.(a)4 of the Applicant's Handbook and provided Petitioners with notice of the variance. Also, on November 17, 2022, DEP filed a motion to continue the final hearing, which was scheduled within the twenty-one-day period for Petitioners to file a petition contesting the variance. DEP requested a continuance so that any variance challenges could efficiently be consolidated with the current proceedings. The request for continuance was granted by Order dated November 18, 2022.

On December 27, 2022, pursuant to extensions of time granted by DEP, Petitioners Ghaneie and Tracy jointly filed a Petition for Administrative Hearing challenging the variance, and Petitioner Tracy individually filed a Petitioner for Administrative Hearing challenging the variance. DEP referred the cases to DOAH on February 3, 2023. The joined petition was assigned Case No. 23-0433 and Mr. Tracy's was assigned Case No. 23-0434. Over the objection of Petitioners, these cases were consolidated with Case Nos. 22-1564 and 22-1565 for hearing.

The final hearing was rescheduled for March 27 through 31, 2023. The hearing was convened on those dates but was not completed. Two additional hearing dates were scheduled for May 25 and 26, 2023, when the hearing was completed.

At the hearing, Andy Estates presented the testimony of: Heather Przybylski, a member of Andy Estates; David Purkerson, an environmental consultant with Atlantic Environmental of Florida, LLC, who was accepted as an expert in dock permitting; Robert Miller, a member of Andy Estates; Josephine Quiroz, former registered agent for Andy Estates; and Katrina Seib, the current registered agent for Andy Estates. Andy Estates' Exhibits 17, 29 through 37, 39, 44, 45, and 49 through 57 were admitted into evidence.

DEP presented the testimony of: Richard Malloy, a Senior Program Analyst in DEP's Division of State Lands, who was accepted as an expert in surveying and boundary issues; Carter Cook, the DEP employee who processed Andy Estates' permit application; and Reggie Phillips, a Program Administrator in DEP's Central District who authored the order granting the variance to Andy Estates. DEP's Exhibits 1 through 14, 17, 20, and 21 were admitted into evidence.

Mr. Ghaneie testified on his own behalf and presented the testimony of: Scott Woolam, Chief of Survey and Mapping in DEP's Division of State Lands; and of Dr. Daniel Mestayer, a Senior Scientist with Consolidated Environmental Engineering, LLC, who was accepted as an expert in environmental engineering. Mr. Ghaneie's Exhibits 1 through 3, 4 (pages 58 through 71 only), and 5 through 23 were accepted into evidence.

Mr. Tracy testified on his own behalf and presented the testimony of: Lisa Laur, Megan Leslie, and Sarah Mercer, who are all members of Andy Estates; Ms. Seib; Mr. Malloy; and Mr. Phillips. Mr. Tracy's Exhibits 1 through 3, 8, 9, 11, 13 through 15, 17, 19, 21 through 23, 30 through 32, 35, 37 through 39, 41, 43, 45, 48 through 51, 57, 60, 61, 63, and 64 were admitted into evidence.

At the final hearing, Mr. Tracy offered testimony regarding Andy Estates' compliance with Florida Administrative Code Rule 18-20.003(42), defining the "preempted area" of sovereign submerged lands from which traditional public uses have been, or would be, excluded to any extent by an activity, and with section 12.3.4 of the Applicant's Handbook, relating to the requirements for homeowners' associations and similar bodies to act as operation and maintenance entities. DEP objected on the ground that Mr. Tracy did not plead these issues in his Petition for Administrative Hearing and no discovery was taken as to these issues. The undersigned reserved ruling on the objection. Upon review, the undersigned finds that Mr. Tracy's petition is indeed silent as to these topics and that nothing in the record would support a finding that these issues were tried by consent. DEP's objection was well taken. Mr. Tracy's testimony as to these provisions has been disregarded.

No transcript of the seven-day final hearing was ordered. Mr. Ghaneie's motion for an extension of the time for filing proposed recommended orders was granted by Order dated May 31, 2023. In accordance with the Order granting the extension, the parties timely filed their Proposed Recommended Orders on June 15, 2023.

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

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

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. DEP is also charged with performing all staff duties and functions for the Board of Trustees of the Internal Improvement Trust Fund ("Board of Trustees") related to the administration of state-owned lands pursuant to chapter 253, Florida Statutes, including sovereignty submerged lands in aquatic preserves, pursuant to chapter 258, Florida Statutes. In this case, DEP is responsible for reviewing the application for the dock and issuing the ERP, Letter of Consent, and variance that have been challenged in these proceedings.

2. Andy Estates is the owner of real property located at Parcel ID 26-37-06-02-A, Crispin Street, Merritt Island, Florida 32952 ("Tract A"), in Brevard County, Florida. Tract A is the upland property riparian to the location of the proposed dock. Andy Estates is the applicant for the proposed dock project. Andy Estates comprises the owners of lots in the Andy Estates subdivision on Merritt Island. The ten members of Andy Estates own landlocked lots, i.e., they have no direct access to the Banana River to the east or the Indian River to the west. Andy Estates was organized in 2006 with the stated purpose of acquiring, improving, and maintaining Tract A for the benefit of its members, principally to give them access to the Banana River.

3. Mr. Ghaneie owns the neighboring property directly to the north of Tract A, at 100 Crispin Street, Merritt Island, Florida. Mr. Ghaneie's property is across South Tropical Trail from the Banana River, giving Mr. Ghaneie direct access to the river.

4. Mr. Tracy owns the neighboring property directly to the south of Tract A, at 5701 South Tropical Trail, Merritt Island, Florida. Mr. Tracy's property also has direct access to the Banana River.

History of Proposed Projects at the Site

5. On September 9, 2019, Andy Estates applied for a consolidated ERP and sovereign submerged lands authorization (DEP File No. 379980-001-EI), proposing a private multi-family dock with one temporary mooring area adjacent to Tract A. The application included mitigation for unavoidable impacts to mangroves that the dock's construction would cause.

6. In response to a February 14, 2020 Request for Additional Information ("RAI") from DEP, Andy Estates, on March 10, 2020, filed a request for variance from the requirements of section 10.2.5(a)4 of the Applicant's Handbook, which provides:

> The special value and importance of shellfish harvesting waters to Florida's economy as existing or potential sites of commercial and recreational shellfish harvesting and as a nursery area for fish and shellfish is recognized by the Agencies. In accordance with **section 10.1.1(d), above**,[1] the Agency shall deny a permit for a regulated activity located:
>
> > (a) In Class II or Class III waters, as designated in Chapter 62-302, F.A.C., that are classified by the Department of Agriculture and Consumer Services (DACS) as "approved," "restricted," "conditionally approved," or "conditionally restricted" for shellfish harvesting. However, the Agency may issue permits or certifications in such waters for: environmental restoration or enhancement; maintenance dredging of navigational channels; the construction of shoreline protection structures; the installation of transmission and distribution lines for carrying potable water, electricity or communication cables in rights-of-way previously used for such lines; or clam and

[1] Section 10.1.1(d) provides that an applicant must provide reasonable assurance that a regulated activity located in, adjacent to, or in close proximity to Class II waters or in waters classified by DACS as approved, restricted, conditionally approved, or conditionally restricted for shellfish harvesting will comply with the criteria of section 10.2.5.

> oyster culture. This provision also shall not apply to docking facilities that meet all of the following criteria:
>
> * * *
>
> 4. Prior to the mooring of any vessel at the dock, there shall be existing structures with toilet facilities located on the uplands;
>
> * * *
>
> 6. A minimum of one foot clearance must be maintained between the deepest draft of any vessel (including the vessel propulsion unit) moored in the water at the dock and the top of any submerged resources (which includes rooted aquatic macrophyte communities, attached macro-marine algae communities, sponge beds, coral communities, and oyster communities) in the mooring location, as measured at mean low water. The height of rooted aquatic macrophyte communities, attached macro-marine algae communities shall be measured as they exist during the growing season (April through September) ….
>
> * * *
>
> Solely for purposes of this subsection, the term "vessel" shall include all sailboats and motorized boats of any type other than personal watercraft as defined in Section 327.02, F.S., whether moored in the water or stored on the dock, in a boat lift, or on a floating vessel platform.

7. DEP sent a total of two RAIs as to the ERP application and one RAI for the variance, to which Andy Estates submitted responses. On May 26, 2020, DEP entered an order granting the petition for variance. On June 11, 2020, Andy Estates withdrew its ERP application. On September 22, 2020, Andy

Estates withdrew its variance petition, with a statement that it would resubmit the variance request after a new application was submitted.

8. On November 23, 2020, Andy Estates submitted a second application for an ERP (DEP File No. 379980-003-EI). This time, Andy Estates proposed construction of a pier within the same footprint as the dock proposed in the first application. The pier would eliminate the temporary mooring area proposed in the first application.[2]

9. Andy Estates applied for a variance on December 2, 2020, again requesting relief from the requirement for toilet facilities upland of the proposed pier.

10. On or about December 13, 2020, Mr. Ghaneie and Mr. Tracy submitted a joint letter in opposition to the Andy Estates project. Mr. Ghaneie and Mr. Tracy had been submitting comments to DEP staff via email since May 2019, prior to the formal submission of the first ERP application by Andy Estates.[3]

11. On December 18, 2020, DEP completed a site visit to Tract A. On December 22, 2020, DEP sent an RAI to Andy Estates. On December 28, 2020, Mr. Ghaneie and Mr. Tracy filed a joint Petition for Administrative Hearing challenging the variance application. On January 13, 2021, DEP issued a final order dismissing the Petition for Administrative Hearing as premature because DEP had yet to act on the variance application.

12. On January 20, 2021, Andy Estates withdrew the December 2, 2020 variance application.

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[2] The pier would have provided Andy Estates' members with a vantage point from which to view rocket launches from nearby Cape Canaveral. It is expected that the proposed dock currently under review will serve the same purpose, in addition to providing a launch for kayaks and paddleboards.

[3] Mr. Ghaneie and Mr. Tracy went to some pains at the final hearing to emphasize that they were working separately, each presenting his own case, but the record makes it clear they have been coordinating and, in some instances, jointly submitting documents since the beginning of the Andy Estates dock project. Whether they were working together made little substantive difference to the case, but it seemed to matter to them that they not be considered as a unit.

13. On May 21, 2021, after having been granted an extension in the response time, Andy Estates submitted its responses to the December 22, 2020 RAI. Further technical clarifications were submitted on June 10, 2021. Mr. Ghaneie and/or Mr. Tracy submitted objections and comments to each filing made by Andy Estates.

14. On July 15, 2021, DEP issued a consolidated notice of intent to issue the ERP and a Letter of Consent to use sovereign submerged lands. Notice of the intent to issue was published in Florida Today newspaper on July 20, 2021.

15. On July 29, 2021, Mr. Ghaneie filed a Petition for Administrative Hearing contesting the proposed issuance of the ERP and Letter of Consent. On August 11, 2021, Mr. Tracy filed a Petition for Administrative Hearing contesting the proposed issuance of the ERP and Letter of Consent. Both petitions were forwarded to DOAH on September 10, 2021. Mr. Ghaneie's petition was assigned Case No. 21-2738. Mr. Tracy's petition was assigned Case No. 21-2737. The cases were consolidated for hearing on October 1, 2021.

16. On December 3, 2021, Andy Estates submitted to DEP its formal request to withdraw its application in DEP File No. 379980-003-EI.[4] On December 6, 2021, DEP filed a Motion to Relinquish Jurisdiction at DOAH. On December 14, 2021, an Order Closing Files and Relinquishing Jurisdiction was entered, closing the files of DOAH in the consolidated cases.

17. On January 18, 2022, Andy Estates again applied for an individual permit to construct a dock (DEP File No. 379980-005-EI). This third application by Andy Estates is the one at issue in the instant cases.

[4] This withdrawal appears to have been based on an informal opinion from DEP counsel to Andy Estates that rule 18-20.004(1)(e) does not contemplate private piers as permissible activities on sovereignty lands in aquatic preserves. The rule allows *commercial/industrial* piers but limits private activities to "private *docking* facilities for reasonable ingress and egress of riparian owners." (emphasis added). Andy Estates therefore withdrew its application for a pier and submitted a new application for a dock.

18. On February 3, 2022, DEP requested that Andy Estates resubmit the mitigation documentation and the seagrass survey from the prior application. Andy Estates resubmitted the mitigation documentation and seagrass survey on February 4, 2022. DEP considered the application complete at that time.

19. On March 1, 2022, DEP issued the NOI. Mr. Ghaneie submitted a Petition for Administrative Hearing challenging the NOI on April 8, 2022. Mr. Tracy filed a Petition for Administrative Hearing challenging the same on April 13, 2022. These petitions are the subject of these proceedings as to the ERP and Letter of Consent.

20. On October 3, 2022, Andy Estates submitted a Petition for Variance from Section 10.2.5(a)4 of the Applicant's Handbook, again seeking a variance from the portion of the rule requiring toilet facilities on the uplands of Class II waters. DEP granted the Petition for Variance on November 17, 2022. Mr. Ghaneie and Mr. Tracy timely filed Petitions challenging DEP's granting of the variance. These Petitions were forwarded to DOAH on February 3, 2023, and consolidated for hearing with the petitions challenging the proposed ERP and Letter of Consent.

The Current Application

21. No dock currently exists on Tract A. There is an existing drainage culvert on the property. Andy Estates provided assurances that the drainage culvert would not in any way be impeded, restricted, or otherwise altered by the proposed dock. Petitioners offered no evidence to the contrary.[5]

22. The proposed ERP and Letter of Consent issued in DEP File No. 379980-005-EI authorized Andy Estates to construct and operate a 692 square-foot private multi-family dock with one temporary wet slip exclusively for the ingress and egress of kayaks and paddleboards within the

[5] Petitioners contend that Tract A was "dedicated" to serve exclusively as the storm drainage culvert for the Andy Estates subdivision more than 30 years ago but provided no evidence that any legal restriction was placed on the property's use for additional purposes.

Banana River Aquatic Preserve. The footprint of the dock would preempt 584 square feet of sovereign submerged lands.

23. The Banana River Aquatic Preserve is an Outstanding Florida Waterbody, a Class II Waterbody, and a Conditionally Approved Shellfish Harvesting Area. The Banana River is a non-tidal waterbody. Richard Malloy, DEP's expert as to surveying and boundary issues, testified that for a non-tidal waterbody, the appropriate boundary between private uplands and state-owned land is the ordinary high-water line. In the general vicinity of the project site, the water level is relatively stable, supporting the finding that it is a non-tidal waterbody.

24. Tract A, where the dock will be located, has 61.4 feet of linear shoreline.

25. As proposed, the dock will preempt fewer than 10 square feet of sovereignty submerged land for each linear foot of Tract A's riparian shoreline.

26. The proposed dock will be limited to kayaks and paddleboards, short-term recreational craft that impact the environment less than motorized vessels, which can cause prop dredging to resources on the submerged bottom. The only mooring proposed is one temporary wet slip for the ingress and egress of kayaks and paddleboards.

27. Andy Estates identified the typical kayaks and paddleboards to be launched from the dock as ten feet long, with a two-inch draft.[6] The application confirmed that the kayaks and paddleboards will have at least one foot of clearance at mean low water.

28. The access walkway of the dock over sovereign submerged lands will be 584 square feet. The access walkway will be elevated five feet above the

[6] Andy Estates residents Heather Przybylski, Josephine Quiroz, and Robert Miller each testified that their kayaks and paddleboards have approximately a two-inch draft.

wetlands and ordinary high water.[7] The width of the access walkway will be two feet and ten inches.[8] The dock will use composite decking with the boards spaced one half-inch apart to allow as much light as possible to penetrate through to the water. Each composite deck board will be no more than eight inches wide.

29. The pilings of the dock will be wrapped in polyethylene one foot below the substrate and one foot above the ordinary high water line. During construction, Andy Estates will use a floating turbidity barrier to minimize impacts to the surrounding resources. The dock will be built waterward from the shore, a few pilings at a time, to minimize impacts to submerged aquatic vegetation ("SAV") or estuarine and/or mangrove wetlands. There will be no changes to the existing slope or grade of the shoreline at the project location. No new impervious surface will be installed.

30. The terminal platform of the proposed dock will be 108 square feet. The larger, landward 72-square-foot portion of the terminal platform will be elevated five feet above ordinary high water.[9] The smaller, 36-square-foot

[7] Petitioners challenged the validity of the figures submitted by Andy Estates due to the terminology employed. Andy Estates' application referenced "mean high" and "mean low" water instead of "ordinary high" and "ordinary low." "Mean" is technically used when the water body in question is tidal. The Banana River is non-tidal, meaning that Andy Estates should have used the term "ordinary." However, experts David Purkerson and Richard Malloy each testified that environmental professionals often use the terms interchangeably with a common understanding of the information being communicated. Based on their testimony, it is found that Andy Estates' error was harmless in terms of DEP's ability to evaluate the application.

[8] The unusual narrowness of the walkway is in the interest of minimizing impacts to the mangroves as well as conserving square footage in such a way as to allow the terminal platform of the dock to extend beyond the affected mangroves and into clear water. David Purkerson, Andy Estates' environmental consultant, testified that the width of the dock was not a concern to him from a permitting standpoint; there is no minimum width, only a maximum width of four feet. Petitioners' claim that the walkway will violate the Americans with Disabilities Act was found to be outside of DEP's jurisdiction and thus beyond the scope of this proceeding.

[9] Petitioners contested the ordinary high water measurements in the application but they provided no documentary evidence to challenge the measurements.

portion will be three feet above ordinary high water and function as a mooring area for kayaks and paddleboards.

31. There will be 765 square feet of unavoidable impacts to mangrove wetlands as part of the proposed project. The affected mangroves will not be destroyed, but will be trimmed back to accommodate the dock's walkway. To satisfy mitigation requirements, Andy Estates has purchased adequate mitigation credits (.01 acre of forested marine wetland credit) from the Webster Creek Mitigation Bank.

32. Andy Estates submitted two SAV surveys during the application process. The first SAV survey was conducted on April 29, 2021, as part of DEP File No. 379980-003-EI, the pier application. This survey showed submerged resources throughout the survey area. *Caulerpa prolifera* and *Halodule wrightii* each covered between 1% and 5% of the river bottom. The area where the terminal platform/mooring area will be located had minimal coverage of SAV.

33. The second SAV survey, completed in November 2021 and submitted as part of the current application, depicted no measurable amount of submerged aquatic resources at the location of the proposed terminal platform/mooring area, and 1% to 5% coverage each of *Caulerpa prolifera* and *Halodule wrightii* near the mangrove island, which the proposed dock will impact.

34. On March 16, 2023, DEP Environmental Consultant[10] Carter Cook conducted a site visit to verify the water depths around the proposed terminal platform/mooring area. Ms. Cook testified that she observed "minimal resources" on the submerged bottom at the time of the visit, though she conceded that she was not performing an SAV survey.[11]

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[10] Despite the somewhat misleading job title, Ms. Cook is a DEP employee.

[11] Petitioners made much of the fact that Ms. Cook took her measurements outside the SAV growing season of April through September prescribed in section 10.2.5(a)6 of the Applicant's Handbook. As noted above, Ms. Cook conceded that she was not making an SAV survey.

35. In connection with Andy Estates' first application, DEP File No. 379980-001-EI, DEP requested that the Florida Department of Agriculture and Consumer Services ("FDACS") determine the extent of shellfish harvesting in the area. FDACS reported that the project area was located in the conditionally approved waters of the South Banana River shellfish harvesting area, that construction of the project was not expected to adversely impact water quality in the shellfish harvesting area, and that the construction of the dock as proposed would not require re-classification or temporary closing of the closest shellfish harvesting area. DEP Program Administrator Reggie Phillips testified that he contacted FDACS in early 2023 and received confirmation that FDACS's opinion had not changed.

36. As noted above, the dock will cover 692 square feet over wetlands and other surface waters. The dock will extend 193 linear feet from the shoreline, which is consistent with surrounding docks in the area.

37. The dock will not be located within or near any federal or marked navigation channel.

38. The signed and sealed survey submitted by Andy Estates showed that the dock will be located within Tract A's riparian lines and will be set back at least 25 feet from those riparian lines.

39. The draft permit contains specific conditions that prohibit discharge/dumping of trash, human or animal waste, fuel, and other hazardous or toxic chemicals from the dock.

40. As described above, the proposed dock is a piling-supported structure to be elevated five feet above the ordinary high-water line and wetlands. There will be no dredging or filling of wetlands or other surface waters besides the installation of the pilings.

41. No adverse impacts to the conservation of fish, wildlife, and their habitats are expected to occur during or after construction of the dock. The

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Andy Estates' initial SAV survey was conducted on April 29, 2021, within the growing season.

Florida Fish and Wildlife Conservation Commission ("FWC") provided comments that no threated or endangered species would be affected other than the Florida manatee. FWC recommended that its "Standard Manatee Conditions for In-Water Work (2011)" be incorporated as conditions of the permit to satisfy sections 379.2431(2) and 373.414(1)(a)2., Florida Statutes. DEP included these conditions in the draft permit.

42. The construction associated with the proposed dock will be temporary in nature; the dock itself will be permanent. As noted above, Andy Estates will provide turbidity barriers and use prescribed construction methods to minimize the impacts to surrounding resources while the dock is built.

43. DEP submitted the application to the Department of State, Division of Historical Resources, which did not provide any comments about significant historical resources in the area. The draft permit contains standard conditions regarding Andy Estates' obligations should any historical resources be discovered at the project site.

44. Andy Estates submitted an Ordinary Low Water Level Survey to DEP that showed ordinary low water depths between 14 and 15 inches at the location of the terminal platform. On her March 16, 2023 site visit, Ms. Cook measured water depths of approximately 20 inches at the terminal platform location. To make the depth verifications, Ms. Cook used a PVC pipe marked with measurements in inches, which is standard practice. She credibly testified that the PVC pipe was calibrated to be accurate within an eighth of an inch.

45. Petitioners challenged the quality of Ms. Cook's measurements and the instrument she used, but did not demonstrate that her method was unreliable or that her measurements were inaccurate. Petitioners' witness, Daniel Mestayer, accepted as an expert in environmental engineering, testified that DEP's measurements were within industry standards.

46. Andy Estates provided a reasonable survey depicting the location of the riparian lines adjacent to its upland property. As discussed by

Mr. Malloy, who is a professional land surveyor within the Division of State Lands with more than 30 years' experience, the waterbody configuration of the Banana River in this location and the direction of other docks in the vicinity support the survey's determination.

47. Florida Administrative Code Rule 18-21.003(65) provides:

> (65) "Satisfactory evidence of sufficient upland interest" shall be demonstrated by documentation, such as a warranty deed; a certificate of title issued by a clerk of the court; a lease; an easement; or condominium, homeowners or similar association documents that clearly demonstrate 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. Other forms of documentation shall be accepted if they clearly demonstrate 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.

48. Rule 18-21.004 provides management policies, standards, and criteria to be used in determining whether to approve requests for activities in sovereignty submerged lands. Rule 18-21.004(1)(d) provides, in relevant part:

> (1) General Proprietary.
>
> * * *
>
> (d) For construction of docks and piers when satisfactory evidence of sufficient upland interest is not fee simple title, the applicant's interest must cover the entire shoreline of the adjacent upland fee simple parcel[12] or 65 feet, whichever is less.

49. Andy Estates became the upland riparian owner of Tract A by the conveyance of a quitclaim deed from James E. Myers on December 12, 2006. Petitioners argue that, because Andy Estates did not take ownership of

[12] Petitioners' repeated argument that "the adjacent upland fee simple parcel" refers in this instance to *their* properties, and therefore gives them veto power over the project if Andy Estates cannot establish fee simple ownership, is rejected. *See* Conclusion of Law 113, below.

Tract A by means of a warranty deed, it does not have the requisite fee simple ownership to establish sufficient upland interest over the shoreline of the adjacent upland parcel.

50. Mr. Malloy testified that Andy Estates had provided evidence of sufficient upland interest by showing a chain of title tracing back to a warranty deed. Andy Estates provided an unbroken chain of title to Tract A dating back to a warranty deed from Pearl Crispin to Bernard Floto, dated March 21, 1979. Therefore, the subsequent chain of quitclaim transfers each conveyed the same interest conveyed by the 1979 warranty deed.[13] Andy Estates' chain of title was accompanied by a $10,000 title insurance policy.

51. The 1979 warranty deed conveyed the property to Mr. Floto "as trustee" but did not identify the trust. Similarly, a quitclaim deed from Mr. Floto to R. David Thomas, dated September 3, 1980, names Mr. Thomas "as Trustee" without identifying the trust. Petitioners argued that these deeds created an ambiguity in the chain of title.

52. Section 689.07, Florida Statutes, provides, in relevant part:

> (1) Every deed or conveyance of real estate heretofore or hereafter made or executed in which the words "trustee" or "as trustee" are added to the name of the grantee, and in which no beneficiaries are named, the nature and purposes of the trust, if any, are not set forth, and the trust is not identified by title or date, shall grant and is hereby declared to have granted a fee simple estate with full power and authority in and to the grantee in such deed to sell, convey, and grant and encumber both the legal and beneficial interest in the real estate conveyed, unless a contrary intention shall appear in the deed or conveyance….

[13] Petitioners struggled to understand that a quitclaim deed transfers all of the grantor's ownership interest in the property. If the grantor owns fee simple title at the time the quitclaim deed is executed, then the quitclaim deed transfers fee simple ownership to the grantee. *See, e.g., Layne v. Layne*, 74 So. 3d 161, 164 (Fla. 1st DCA 2011).

53. Thus, contrary to Petitioners' contention, the naming of Mr. Floto and Mr. Thomas as "trustees," without any information as to the nature of the trusts involved, served to convey fee simple ownership of Tract A.

54. On March 12, 2020, Andy Estates executed a "general warranty deed" that named Andy Estates as both the grantor and grantee, apparently in an effort to answer Petitioners' criticism of the quitclaim deed by converting it to a warranty deed. DEP correctly treated this deed as a nullity. The operative deed is the 2006 quitclaim conveyance from Mr. Myers to Andy Estates.

55. Petitioners offered no evidence to contest the validity of the chain of title, nor did they offer testimony from a qualified expert to refute Mr. Malloy's credible testimony that Andy Estates had provided evidence of sufficient upland interest.

56. Petitioners point to a reservation in the 2006 quitclaim deed from Mr. Myers to Andy Estates as nullifying the latter's claim to fee simple ownership of Tract A. The reservation was as follows:

> Grantor reserves for himself, his children, and his grandchildren, a reasonable, non-exclusive right of way over the foregoing tract of property for access to and from S.R. 3 [South Tropical Trail] to the Banana River. This reservation shall include the right to use any dock or other facility that Grantee or Grantee's assigns may construct over, on or to the described property, in the same manner as any other party granted an easement over the same property; provided, no assessment, contribution or other charge shall be required from Grantor, his children or grandchildren using the property under this Reservation.

57. Mr. Myers is not a member of Andy Estates and has had little if any contact with the current Andy Estates members.

58. Petitioners argue that this reservation means that less than fee simple title passed from Mr. Myers to Andy Estates. This argument is without merit. The reservation operates as an express easement. An express easement is a

contract creating a right of use, not an estate in the land. *See, e.g., Bransccombe v. Jupiter Harbor, LLC*, 76 So. 3d 942, 947 (Fla. 4th DCA 2011). It does not affect Andy Estates' ability to sell the property. The easement requirement would simply pass to the new owner.[14] Petitioners are also incorrect in asserting that, as a matter of law, the easement is ineffectual unless it is recorded. *Citgo Petroleum Corp. v. Fla. E. Coast Ry. Co.*, 706 So. 2d 383, 385-86 (Fla. 4th DCA 1998)(pre-existing, unrecorded easement is effective against new owner of property unless the new owner was without notice).

59. Petitioners argued that the reservation means that the project does not meet the definition of "private residential multi-family dock or pier" found at rule 18-21.003(50):

> "Private residential multi-family dock or pier" means a dock or pier on a common riparian parcel or area that is intended to be used for private recreational or leisure purposes by persons or groups of persons with real property interest in a multi-family residential dwelling such as a duplex, a condominium, or attached single-family residences or a residential development such as a residential or mobile home subdivision.

60. Petitioners reason that because Mr. Myers and his family are not "persons or groups of persons with real property interest" in the Andy Estates subdivision, their inclusion in the list of persons authorized to use the dock renders the definition inapplicable and therefore invalidates Andy Estates' application for an ERP. The undersigned finds this argument unpersuasive. The definition seems intended to distinguish a private residential multi-family dock from a single-family dock or a marina. It cannot be read to

[14] Mr. Ghaneie called Scott Woolam, DEP's Bureau Chief of Survey and Mapping, as a witness. Mr. Woolam confirmed that one can be a fee simple owner of a property that carries an encumbrance such as an easement.

strictly limit use of the private dock to persons with a real property interest in the subdivision, such that residents could not invite friends and family to use the dock for recreational or leisure purposes.[15] The persons or groups of persons with real property interest *control* access to the dock; they are not powerless to allow other persons to use it. Andy Estates, the owner of Tract A and comprising persons with real property interest in a residential subdivision, had the authority to grant the easement giving the Myers family access to the dock. Petitioners' proposed reading of the definition is unreasonable.

61. The ownership question aside, Petitioners objected that the reservation of rights opens the use of the dock to "hundreds" of people in the future, given that Mr. Myers and all of his descendants are now entitled to use it. However, the reservation does not give the right to use the dock to all of Mr. Meyer's descendants in perpetuity. It is limited to Mr. Myers, his children, and his grandchildren.

62. In a letter dated October 14, 2020, Mr. Myers informed DEP that the number of individuals covered by the reservation currently stood at seven: Mr. Myers and his spouse, his two children and their spouses, and one grandchild. He further wrote:

> My spouse and I live in Merritt Island for only 7 months of the year. My children and their families all currently live in California and only visit occasionally. Our Florida condominium is approximately 8 miles from Tract "A" and has a boardwalk with access to the river so it would be rare that any of us would actually use the dock at Tract "A".

[15] As to this point, it should be noted that the definition of "private residential single-family dock or pier" at rule 18-21.003(51) references only the location of the dock or pier, not the persons for whom its use is intended. If Petitioners' reading were correct, use of a multi-family dock would be strictly limited to persons with a real property interest in a residence, whereas a single-family dock would have no limitations whatever as to who could use it. This inconsistency points to the unreasonableness of Petitioners' reading of the definition.

63. Petitioners offered nothing beyond their own speculation regarding the hundreds of people they expect to swarm the dock. Their objection on this point is without substance.

The Variance

64. As noted above, section 10.2.5(a)4 of the Applicant's Handbook requires a toilet facility on the uplands where activities take place in Class II waters conditionally approved for shellfish harvesting.

65. As to the question of the variance from the toilet facility requirement, DEP argues in the first instance that no variance is necessary because kayaks and paddleboards are not "vessels," as that term is used in section 10.2.5(a)(4) of the Applicant's Handbook, set forth at Finding of Fact 6 above.

66. In particular, DEP points to the language of exception set forth at the end of section 10.2.5(a)4 of the Applicant's Handbook:

> Solely for purposes of this subsection, the term "vessel" shall include all sailboats and motorized boats of any type other than personal watercraft as defined in Section 327.02, F.S.,[16] whether moored in the water or stored on the dock, in a boat lift, or on a floating vessel platform.

67. DEP argues that the quoted language limits the definition of "vessel" to sailboats and motorized boats. DEP's reading is not conclusive on its face. Another plausible reading of the language is that, while it includes sailboats and motorized boats, it does not *exclude* other vessels such as kayaks and paddleboards from the definition of "vessel" that triggers the requirement for toilet facilities.

[16] Section 327.02(37), Florida Statutes, defines "personal watercraft" to mean "a vessel less than 16 feet in length which uses an inboard motor powering a water jet pump as its primary source of motive power and which is designed to be operated by a person sitting, standing, or kneeling on the vessel, rather than in the conventional manner of sitting or standing inside the vessel." This definition is inapplicable to kayaks and paddleboards.

68. DEP points out that kayaks and paddleboards do not require use of a sail or motor.[17] Motorized vessels can lead to prop dredging, and liveaboard vessels such as some sailboats carry a greater chance of polluting waterways. Unlike most motorized vessels and sailboats, kayaks and paddleboards accommodate only one or two people and have fewer environmental impacts.

69. Most tellingly, DEP points to the fact that the quoted language exempts personal watercraft operated by means of an inboard motor powering a water jet pump, i.e., jet skis. It would make little sense for jet skis to be exempt from the definition of "vessel" but for kayaks and paddleboards to fall within the definition. Even Mr. Tracy conceded that personal watercraft pose a greater risk of harm to aquatic resources than do kayaks and paddleboards.

70. The undersigned is persuaded that DEP's reading of section 10.2.5(a)4 of the Applicant's Handbook is correct and that kayaks and paddleboards are not considered "vessels" for purposes of this section. Therefore, Andy Estates is not required to provide toilet facilities on the uplands adjacent to the proposed dock. Andy Estates is also not required to demonstrate the minimum one-foot clearance required by section 10.2.5(a)6 of the Applicant's Handbook, as that provision applies only to "vessels."

71. Employing the proverbial "abundance of caution" in light of Petitioners' repeated objections, Andy Estates applied for a variance from the toilet facility requirement on October 3, 2022. For the reasons stated below, Andy Estates' application would satisfy the variance requirements.

72. In support of its variance application, Andy Estates pointed out that all the docks in the surrounding area are located on the east side of South Tropical Trail. All upland toilet facilities belonging to other dock owners in

[17] Petitioners averred that nothing in the definitions or terms of the proposed permit would prevent Andy Estates members from attaching motors to their kayaks or paddleboards and thereby defeat the presumed limitations of the permit. Petitioners presented no evidence that anyone at Andy Estates intends to use motors on their kayaks or paddleboards. At the hearing, Andy Estates stipulated to a permit condition that a sign be posted on the dock stating that boats with motors are not allowed to moor there.

the area are on the west side of South Tropical Trail. Every dock owner with a dock on South Tropical Trail, including Mr. Ghaneie, must cross the street to use their upland toilet facilities.

73. Andy Estates established that Tract A is too small to accommodate construction of a toilet facility on its uplands.

74. All the members of Andy Estates who will regularly use the dock have toilet facilities at their homes on the west side of South Tropical Trail, a short distance from Tract A. Andy Estates argued to DEP that it would constitute a violation of the principles of fairness to require Andy Estates to construct toilet facilities on-site when all the other owners of docks in the area have toilets on the west side of South Tropical Trail.

75. Andy Estates pointed out that users of the dock will be limited to members of Andy Estates who possess homes with appropriate toilet facilities. Plans for the dock include a locking gate, the key or combination to which would be controlled by the Andy Estates homeowners.

76. After reviewing the variance application, DEP sent an RAI to Andy Estates on November 2, 2022. The RAI asked Andy Estates for the following information:

> To demonstrate that the variance would serve the purposes of the underlying rule, Section 10.2.5(a)(4), Applicant's Handbook Volume I, the Petitioner shall provide access to existing toilet facilities nearby the dock to James Meyers [sic], his children, and his grandchildren, in accordance with the Quit-Claim Deed between James Meyers [sic] (Grantor) and Petitioner (Grantee) recorded December 12, 2006, in Brevard County, Florida.

77. On November 7, 2022, Andy Estates, through its counsel, responded with confirmation that all of its members had agreed to provide access to their toilet facilities to James Myers, his children, and his grandchildren.

78. At the hearing, several members of Andy Estates testified to confirm their commitment to allow Mr. Myers and his family to visit their homes and

use their toilets should that ever be necessary. One of the members, Heather Przybylski, testified that there is a bathroom in her backyard pool house that is always unlocked and that Mr. Myers would be welcome to use even if she were not at home. Other members naturally spoke about needing notice from Mr. Myers that he was coming to use the dock and might need their facilities, but otherwise placed no conditions on their commitment.

79. By order dated November 17, 2022, DEP granted the variance. The order stated the following reasons why the variance will meet the purpose of the underlying statute:

> The proposed project area, located in the South Banana River, is designated as "Conditionally Approved" by the Department of Agriculture and Consumer Services (DACS); therefore, ERP application 0379980-005-EI for the proposed dock is subject to the requirements of Section 10.2.5(a)(4), Applicant's Handbook Volume I, in accordance with Chapter 62-330.302(1)(c), F.A.C. The purpose of the rule is met, as all authorized users of the proposed mooring area have toilet facilities located in their independently owned upland parcels, or have been granted permission by upload toilet facility owner(s) to use their toilet facilities, which are all located approximately one-quarter of a mile or less from the proposed structure.
>
> The Petitioner demonstrated that the purpose of the underlying statute has been achieved by limiting the use of mooring vessels at the proposed dock to only those members of Andy Estates, LLC, who own homes with toilet facilities located on their uplands, and to James Meyers [sic], his children, and his grandchildren, who have a reservation in the deed allowing them access to any dock emanating from the property. The owner of the one undeveloped lot in Andy Estates, Lot 17, has a property restrictive covenant recorded with Brevard County to preclude use of the slip at the proposed dock until a Certificate of Occupancy is issued for Lot 17.

80. The order stated the following reasons why the principles of fairness would be violated by literal application of the rule:

> Petitioner requests a variance or waiver of the strict application of Rule 62-330.302(1)(c), F.AC., because applying the rules for permit application would be unfair, would create an unintended result and would violate the principles of fairness.
>
> The Petitioner demonstrated that literal application of the rule would affect the Petitioner in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.
>
> The ownership of Parcel ID 26-37-06-02-A is unique in that the waterfront parcel is owned by nearby property owners of Andy Estates, LLC, all of whom (except Lot 17) own residences within approximately one-quarter mile of Parcel ID 26-37-06-02-A which contain toilet facilities. Further, the parcel is not configured in a way which would reasonably allow the construction of an independent toilet facility. The majority of the docks in this region along S. Tropical Trail, all within the same "Conditionally Approved" waters for shellfish harvesting, also have docks on the east side of S. Tropical Trail, with their homes located on the west side of the roadway.

81. If it were necessary, the variance would be a reasonable application of the variance criteria to the facts presented. The residents of Andy Estates and their guests should have no problem walking across South Tropical Trail to use the toilets in the residents' homes. In the unlikely event that Mr. Myers and his family decide to use the dock, the Andy Estates members have agreed to open their doors to them.

82. In their challenge to the variance, Petitioners offered only opinion and speculation. They opined that a quarter mile is too far, that crossing South Tropical Trail is dangerous, and that people will inevitably urinate and defecate in the Banana River rather than walk to their houses to use the

bathroom. They again referenced, with no explanation or support, the "hundreds of additional persons" who will somehow use this private dock. Petitioners' speculation on these points is not credited and, in any event, points toward a possible enforcement issue rather than a problem with the initial permit.

CONCLUSIONS OF LAW

Jurisdiction

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

Standing

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

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

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

Id. at 482; *see also St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.*, 54 So. 3d 1051 (Fla. 5th DCA 2011); *Palm Beach Cnty. Env't. Coal. v.*

Fla. Dep't of Env't. Prot., 14 So. 3d 1076 (Fla. 4th DCA 2009); *Mid-Chattahoochee River Users v. Fla. Dep't of Env't. Prot.*, 948 So. 2d 794, 797 (Fla. 1st DCA 2006).

86. As adjacent owners, Mr. Ghaneie and Mr. Tracy have established the potential for injury-in-fact which is of sufficient immediacy to establish their standing to a section 120.57 hearing.

Nature of the Proceeding

87. This is a de novo proceeding, intended to formulate final agency action and not to review action taken earlier and preliminarily. *Young v. Dep't of Cmty. Aff.*, 625 So. 2d 831, 833 (Fla. 1993); *Hamilton Cnty. Bd. of Cnty. Comm'rs v. Dep't of Env't. Regul.*, 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991); *McDonald v. Dep't of Banking & Fin.*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

Standard and Burden of Proof

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

89. Section 120.569(2)(p) provides:

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

> and has the burden of going forward to prove the case in opposition to the license, permit, or conceptual approval through the presentation of competent and substantial evidence.

90. Andy Estates made a prima facie case of entitlement to the general permit by entering into evidence the complete application files and supporting documentation and DEP's notice. Andy Estates having made a prima facie case, the burden of ultimate persuasion shifts to Mr. Ghaneie and Mr. Tracy to prove their cases in opposition to the general permit by a preponderance of the competent and substantial evidence, and thereby prove that Andy Estates failed to provide reasonable assurance that the standards for issuance of the general permit were met.

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

Reasonable Assurance Standard

92. Issuance of the dock permit depends on the provision of reasonable assurance that the activities authorized will meet applicable standards.

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

lack of reasonable assurance necessary to demonstrate that a permit should not be issued. *FINR II, Inc. v. CF Indus., Inc.*, Case No. 11-6495 (Fla. DOAH Apr. 30, 2012; Fla. DEP June 8, 2012).

Public Interest Test

94. An applicant must demonstrate that an activity in Outstanding Florida Waters regulated under chapter 373 will not be harmful to water resources in the state by providing reasonable assurance that the activity in, on, or over surface waters is clearly within the public interest. § 373.414(1), Fla. Stat.

95. Section 373.414(1)(a) sets forth the factors that DEP employs to determine whether a permit applicant has demonstrated reasonable assurance:

> (a) In determining whether an activity, which is in, on, or over surface waters… and is regulated under this part, is not contrary to the public interest or is clearly in the public interest, the governing board or the department shall consider and balance the following criteria:
>
> 1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
>
> 2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
>
> 3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
>
> 4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
>
> 5. Whether the activity will be of a temporary or permanent nature;

> 6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and
>
> 7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

96. Section 373.414(1)(b) provides:

> If the applicant is unable to otherwise meet the criteria set forth in this subsection, the governing board or the department, in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects that may be caused by the regulated activity. Such measures may include, but are not limited to, onsite mitigation, offsite mitigation, offsite regional mitigation, and the purchase of mitigation credits from mitigation banks permitted under s. 373.4136. It shall be the responsibility of the applicant to choose the form of mitigation. The mitigation must offset the adverse effects caused by the regulated activity….

97. As to the criterion stated in section 373.414(1)(a)1., Andy Estates provided reasonable assurance that the activity will not adversely affect the public health, safety, or welfare or the property of others. The construction and design of the proposed dock is designed to minimize impacts to resources. It includes the use of turbidity barriers, the elevation of the dock over the water line, and a narrow walkway and well-spaced deck boards to allow light penetration. The permit will limit Andy Estates to the use of kayaks and paddleboards to minimize impacts to submerged resources.

98. As to the criterion stated in section 373.414(1)(a)2., there will be unavoidable impacts to the mangroves in the wetlands, but Andy Estates has purchased mitigation credits from a mitigation bank to offset those impacts, as allowed by section 373.414(1)(b).

99. As to the criterion stated in section 373.414(1)(a)3., the dock will extend fewer than 200 feet into the Banana River, will not extend further waterward than surrounding docks in the area, thus having no effect on navigation, and will not be located in any federally marked navigation channel. There will be no adverse effect on navigation and no erosion or shoaling that could be attributed to the dock's effect on water flow.

100. As to the criterion stated in section 373.414(1)(a)4., the dock will have no adverse effect on fishing or marine productivity and will enhance recreational values by providing a place to launch kayaks and paddleboards and a vantage point for Andy Estates members to watch Cape Canaveral rocket launches.

101. As to the criterion stated in section 373.414(1)(a)5., the dock is intended to be a permanent structure, but the construction activities will be temporary.

102. As to the criterion stated in section 373.414(1)(a)6., the Department of State, Division of Historical Resources, found no significant historical resources in the area. The draft permit contains standard conditions regarding Andy Estates' obligations should any historical resources be discovered.

103. As to the criterion stated in section 373.414(1)(a)7., the proposed dock is similar in size to other docks in the area, and the plan for its construction is consistent with similar projects.

104. In summary, Andy Estates provided reasonable assurance to DEP that the project will be constructed in a manner that is clearly in the public interest by providing reasonable and achievable plans for the construction of the dock, by considering and mitigating impacts to resources, and seeking approval only for watercraft that is environmentally benign.

Applicant's Handbook

105. The Applicant's Handbook has been adopted as a rule for use by DEP and the state's five water management districts. Fla. Admin. Code R. 62-

330.010(4). At section 1.0, the Applicant's Handbook states that it was developed "to help persons understand the rules, procedures, standards, and criteria that apply to the environmental resource permit (ERP) program under Part IV of Chapter 373 of the Florida Statutes (F.S.)."

106. At Finding of Fact 6, above, the relevant language from section 10.2.5(a)4 of the Applicant's Handbook is set forth. For the reasons set forth at Findings of Fact 65 through 70 above, it is concluded that Andy Estates was not required to provide toilet facilities on the uplands or guarantee a minimum of one-foot clearance between the deepest draft of any vessel and the SAVs in the area because kayaks and paddleboards are not properly considered "vessels" for purposes of section 10.2.5(a)4 of the Applicant's Handbook.

107. Even if kayaks and paddleboards were considered "vessels," Andy Estates' Ordinary Low Water Line Survey confirmed that the draft of the kayaks and paddleboards would provide one foot of clearance between the draft of any kayak or paddleboard and the submerged resources.

Florida Administrative Code Chapter 18-21

108. Chapter 18-21 "implement[s] the administrative and management responsibilities of … the Department of Environmental Protection…regarding sovereignty submerged lands. Responsibility for environmental permitting of activities and water quality protection on sovereignty and other lands is vested with the Department." Fla. Admin. Code R. 18-21.002(1).

109. Rule 18-21.003 sets forth the definitions for chapter 18-21. The following definitions are pertinent to this discussion:

> (34) "Letter of consent" means a nonpossessory interest in sovereignty submerged lands created by an approval which allows the applicant the right to erect specific structures or conduct specific activities on said lands.
>
> * * *

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

* * *

(48) "Preempted area" means the area of sovereignty submerged lands from which any traditional public uses have been or will be excluded by an activity, such as the area occupied by docks, piers, and other structures….

* * *

(50) "Private residential multi-family dock or pier" means a dock or pier on a common riparian parcel or area that is intended to be used for private recreational or leisure purposes by persons or groups of persons with real property interest in a multi-family residential dwelling such as a duplex, a condominium, or attached single-family residences or a residential development such as a residential or mobile home subdivision.

* * *

(63) "Riparian rights" means those rights incident to lands bordering upon navigable waters, as recognized by the courts and common law.

* * *

(65) "Satisfactory evidence of sufficient upland interest" shall be demonstrated by documentation, such as a warranty deed; a certificate of title issued by a clerk of the court; a lease; an easement; or condominium, homeowners or similar association documents that clearly demonstrate 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….

110. Rule 18-21.004 provides, in relevant part:

(1) General Proprietary

* * *

(b) All leases, easements, deeds or other forms of approval for sovereignty land activities shall contain such terms, conditions, or restrictions as deemed necessary to protect and manage sovereignty lands.

* * *

(d) For construction of docks and piers when satisfactory evidence of sufficient upland interest is not fee simple title, the applicant's interest must cover the entire shoreline of the adjacent upland fee simple parcel or 65 feet, whichever is less….

* * *

(3) Riparian Rights.

* * *

(b) Satisfactory evidence of sufficient upland interest is required for activities on sovereignty submerged lands riparian to uplands, unless otherwise specified in this chapter….

* * *

(d) Except as provided herein, all structures, including mooring pilings, breakwaters, jetties and

> groins, and activities must be set back a minimum of 25 feet inside the applicant's riparian rights lines.... Exceptions to the setbacks are: private residential single-family docks or piers associated with a parcel that has a shoreline frontage of less than 65 feet, where portions of such structures are located between riparian lines less than 65 feet apart…
>
> * * *
>
> (4) Standards and Criteria for Private Residential Multi-family Docks and Piers.
>
> (a) Private residential multi-family docks with one or two wetslips shall conform to the provisions of Rules 18-21.004 and 18-21.005, F.A.C., applicable to private residential single-family docks....

111. Andy Estates provided reasonable assurance that it has sufficient upland interest to build the dock. Andy Estates became the upland riparian owner of Tract A in 2006 by way of a quitclaim deed from James Myers. The chain of title established that the quitclaim deed transferred fee simple title to Andy Estates, giving it sufficient upland interest and the necessary riparian rights to build a dock on the adjacent submerged lands.

112. The reservation to James Myers and his family to use the dock did not diminish Andy Estates' fee simple title. The reservation provides an easement to Mr. Myers, his children, and his grandchildren to use any dock that is built on the parcel.

113. Petitioners argue that the language of rule 18-21.004(1)(d) as to the "adjacent upland fee simple parcel" prohibits Andy Estates from qualifying for state lands authorization for the dock unless Andy Estates gets consent from Petitioners. Because Andy Estates is the fee simple owner of the adjacent upland, this provision does not apply. Assuming arguendo that Andy Estates' interest is less than fee simple, Petitioners' argument depends on a misreading of the term "adjacent" to mean *their* upland properties. The use of

"adjacent" in this subsection refers to the uplands adjacent to the *sovereign submerged waterbody*, not the upland parcels on either side.[18]

114. As set forth in the Findings of Fact, competent and substantial evidence establishes that the dock at issue is a private residential multi-family dock with one temporary slip for launching kayaks and paddleboards. The shoreline frontage of the parcel is less than 65 feet. Though the dock is multi-family, rule 18-21.004(4)(a) provides that the standards for private residential single-family docks apply because only one wetslip is authorized. Because this project is treated as a single-family dock, Andy Estates is exempt from the 25-foot setback requirement of rule 18-21.004(3)(d). In any event, the proposed dock is designed to fit within a 25-foot setback of its riparian lines. Under any reading of the relevant rules, the Andy Estates dock satisfies their criteria.

115. Rule 18-21.005(1) provides, in relevant part:

> (1) The appropriate form of authorization, for activities that meet the applicable rules and statutes of the Board, shall be determined based on consideration of all of the provisions of this rule. It is the intent of the Board that the form of authorization shall grant the least amount of interest in the sovereignty submerged land necessary for the activity….
>
> * * *
>
> (c) Letter of Consent. Written authorization is required for each of the following activities. These authorizations shall be subject to the payment of any applicable severance fees.
>
> * * *

[18] This rule provision would apply when someone other than an upland fee simple owner is seeking to build a dock on the submerged lands adjacent to the upland property. In such a case, the non-fee simple title holder must have a property interest that covers the lesser of the entire shoreline of the upland parcel or 65 feet of the shoreline in order to obtain state lands authorization.

> 2. Private residential single-family or multi-family docks, piers, boat ramps, and similar existing and proposed activities that cumulatively preempt no more than 10 square feet of sovereignty submerged land for each linear foot of the applicant's riparian shoreline, along sovereignty submerged land on the affected waterbody within a single plan of development (see "preempted area" definition in Rule 18-21.003, F.A.C.).

116. A Letter of Consent is the appropriate form of authorization from the Board of Trustees where the proposed project consists of one "minimum-size" private residential single-family dock as defined by rule 18-21.003(40) or where a private single-family or multi-family dock preempts "no more than 10 square feet of sovereignty submerged land for each linear foot of the applicant's riparian shoreline… ." A "minimum-size" dock is, by definition, the smallest size necessary to provide reasonable access for engaging in recreational activities compared to similar structures in the area and with consideration for the area's physical and natural characteristics. The credible testimony of Ms. Cook and Mr. Malloy established that Andy Estates' proposed project fits both the "minimum-size" definition of rule 18-21.003(40) and the square footage preemption requirement of rule 18-21.005(1)(c)2. Andy Estates ensured that the footprint of the dock would be as small as possible to achieve the purpose of launching kayaks and paddleboards beyond the impacted mangroves. The shoreline is approximately 61 feet; the dock preempts 584 square feet of sovereign submerged lands. In accordance with rule 18-21.005(1), the Letter of Consent is the appropriate authorization.

Florida Administrative Code Chapter 18-20

117. Chapter 18-20 governs the management and maintenance of the aquatic preserves described in chapter 258 and is applicable here because the proposed dock will be built in the Banana River Aquatic Preserve.

118. The following definitions found in rule 18-20.003 are applicable:

> (54) "Resource Protection Area (RPA) 1" – Areas within the aquatic preserves 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.

119. Competent and substantial evidence established that the location of the terminal platform does not meet the definition of a Resource Protection Area 1 or 2. The SAV surveys submitted by Andy Estates did not indicate the presence of any resources of the "highest quality and condition" around the terminal platform. The surveys did not show corals, marsh, oyster bars, archeological and historical sites, or endangered or threatened species habitat. In response to comments from FWC, the permit was conditioned to satisfy statutory requirements for manatees. Comments from FDACS confirmed that there were no shellfish harvesting areas nearby that would require closure or re-classification due to construction of the dock.

120. No evidence was presented at hearing showing that the terminal platform area presented "pioneering" growth of resources. Testimony at the hearing established that there were, at most, "minimal" resources present. Neither of the SAV surveys submitted by Andy Estates showed more than five percent coverage of resources on the submerged bottom. This was

anecdotally confirmed by Ms. Cook during her March 2023 site visit when she found minimal resources in the area of the terminal platform.

121. Mr. Ghaneie offered an SAV survey that had been performed by Dr. Timothy Scott of Consolidated Environmental Engineering on March 3, 2023. However, Mr. Ghaneie did not list Dr. Scott as a witness. DEP objected to admission of Dr. Scott's survey on hearsay grounds. The objection was sustained and the exhibit was not admitted. Petitioners offered no admissible evidence from a qualified and disclosed expert who had physically been to the site.

122. The competent and substantial evidence offered at the final hearing established that the area at the proposed terminal platform is consistent with a Resource Protection Area 3.

123. Rule 18-20.004 provides, as follows, in relevant part:

> The following management policies, standards and criteria are supplemental to Chapter 18-21, F.A.C. (Sovereignty Submerged Lands Management), and shall be used in determining whether to approve, approve with conditions or modifications, or deny all requests for activities on sovereignty lands in aquatic preserves.
>
> * * *
>
> (5) STANDARDS AND CRITERIA FOR DOCKING FACILITIES.
>
> * * *
>
> (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.

* * *

> 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….

124. Competent and substantial evidence established that the proposed dock meets the requirements of rule 18-20.004. The width of the dock will be less than the maximum four feet. The dock is designed to allow as much light penetration as possible by using half-inch spacing between deck boards and eight-inch wide boards. The size of the terminal platform is 106 square feet, well within the limit of the rule.

125. DEP reasonably determined that the conditions at the terminal platform established it as a Resource Protection Area 3. Andy Estates' SAV surveys confirmed this determination by showing that there was five percent or less coverage of submerged resources at the terminal platform. Despite the classification of the area as a Resource Protection Area 3, Andy Estates designed its dock to be elevated five feet above the high-water line, meeting the rule requirements for sites designated as Resource Protection Areas 1 or 2.

Standard for Variances

126. Section 120.542 provides relief to an applicant subjected to "unreasonable, unfair, and unintended results" by "strict application of uniformly applicable rule requirements." § 120.542(1), Fla. Stat. Such relief is in the form of a variance or waiver from a given rule. Section 120.542(2) provides:

> (2) Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

127. As found above, Andy Estates was not required to provide toilet facilities on the uplands adjacent to its proposed dock and therefore was not required to obtain a variance from the requirements of Section 10.2.5(a)4 of the Applicant's Handbook. As also found above, if a variance were required, Andy Estates established its entitlement to a variance.

128. Andy Estates demonstrated that denial of their riparian right to a dock would violate the principles of fairness. All of the docks in the area, including the dock owned by Mr. Ghaneie, are on the east side of Tropical Trail, across the street from all of the upland toilet facilities on the west side of Tropical Trail. All dock users are similarly situated to the Andy Estates members in having to cross the street to use their upland toilet facilities. Andy Estates demonstrated that application of the rule would create a substantial hardship because the size of the upland parcel where the dock will be located is too small to construct permanent toilet facilities. Andy Estates showed that it could achieve the underlying purpose of the statute because its members have toilet facilities across the street and would not be using the Banana River as a public restroom. All members of Andy Estates have offered to make restroom facilities available to Mr. Myers and his family

should they ever use the dock. Andy Estates satisfied the requirements of section 120.542(2) and should be granted the variance if DEP's final order determines it is required.

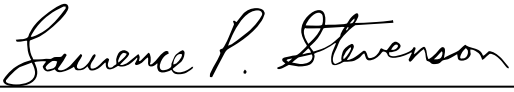
Conclusion

129. The proposed dock will meet all applicable statutory and rule standards and requirements for issuance of the ERP and Letter of Consent. The variance is not required for the proposed activity to be permittable, but Andy Estates nonetheless satisfied the statutory requirements for a variance. Neither Petitioner met his burden of proof in opposition to the ERP, and Andy Estates met its burden of proof for the Letter of Consent and the variance.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Environmental Protection issue a final order granting Respondent, Andy Estates, LLC, a Consolidated Environmental Resource Permit and Letter of Consent to Use State-Owned Lands to build a dock and, if necessary, grant Andy Estates a variance from section 10.2.5(a)4 of the Applicant's Handbook.

DONE AND ENTERED this 15th day of August, 2023, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of August, 2023.

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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.