STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

PETER J. MENTEN, AS TRUSTEE OF THE FAMILY TRUST CREATED UNDER THE 2012 QUALIFIED PERSONAL RESIDENCE TRUST OF DEBORAH MENTEN, DATED DECEMBER 20, 2012, AND DEBORAH MENTEN, AS TRUSTEE OF THE FAMILY TRUST CREATED UNDER THE 2012 QUALIFIED PERSONAL RESIDENCE TRUSTOF PETER J. MENTEN, DATED DECEMBER 20, 2012,	)	
Petitioners,	)	
and	)	
JOHN AND DENICE KELLY,	)	
Intervenor,	)	
v.	)	**OGC CASE NO. 22-2082**
	)	**DOAH CASE NO. 22-2437**
GALERIE BIJAN, INC.; KATAYOUN ABAE; AND FLORIDA DEPARMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents.	)	
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PETER J. MENTEN, AS TRUSTEE OF THE FAMILY TRUST CREATED UNDER THE 2012 QUALIFIED PERSONAL RESIDENCE TRUST OF DEBORAH MENTEN, DATED DECEMBER 20, 2012, AND DEBORAH MENTEN, AS TRUSTEE OF THE FAMILY TRUST CREATED UNDER THE 2012 QUALIFIED PERSONAL RESIDENCE TRUST OF PETER J. MENTEN, DATED DECEMBER 20, 2012,	)	
Petitioners,	)	
and	)	
JOHN AND DENICE KELLY,	)	
Intervenor,	)	
v.	)	**OGC CASE NO. 22-2277**
	)	**DOAH CASE NO. 22-2491**
GALERIE BIJAN, INC., AND FLORIDA DEPARMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents.	)	
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FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on February 26, 2024, 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 March 12, 2024, the Petitioners, Peter J. Menten, as Trustee of the Family Trust created under the 2012 Qualified Personal Residence Trust of Deborah Menten, dated December 20, 2012 (Deborah Menten Trust), and Deborah Menten, as Trustee of the Family Trust created under the 2012 Qualified Personal Residence Trust of Peter J. Menten, dated December 20, 2012

(Peter Menten Trust) (collectively the Petitioners), and the Intervenors, John Kelly and Denice Kelly (collectively the Intervenors or the Kellys) timely filed exceptions to the RO. Also on March 12, 2024, the Respondents, Galerie Bijan, Inc. and Katayoun Abae (Abae) timely filed exceptions to the RO. On March 22, 2024, the Respondents Abae, and her closely held corporation, Galerie Bijan, Inc., (collectively the Respondents) timely filed responses to the Petitioners' exceptions to the RO. On March 22, 2024, DEP timely filed responses to the Petitioners' and Intervenors' exceptions. On March 22, 2024, the Petitioners and Intervenors timely filed responses to the Respondents' exceptions to the RO.

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

BACKGROUND

The Department incorporates by reference the Preliminary Statement on pages 3 through 8 of the Recommended Order, as if fully set forth herein.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the following actions be taken:

1. In DOAH Case No. 22-2437, the Florida Department of Environmental Protection issue a final order approving issuance of the Consolidated Environmental Resource Permit and State-owned Submerged Lands Authorization, Permit No. 06-0335119-001, as extended by the Extension Modification, with the condition that the permittee remove a portion of the south end of the Dock Extension of sufficient length to meet the ten-foot setback requirement from the common riparian line between Respondents' riparian area and Petitioners' riparian area.

[1] The Secretary of the Department is delegated the authority from the Board of Trustees of the Internal Improvement Trust Fund to review and take final agency action on applications to use sovereignty submerged lands when the application involves an activity for which the Department has permitting responsibility. *See* Fla. Admin. Code R. 18-21.0051(2)(2023).

2. In DOAH Case No. 22-2491, the Florida Department of Environmental Protection issue a final order approving the transfer of Permit No. 06-0335119 to Respondent, Galerie Bijan, Inc.

These recommendations resulted from the ALJ's conclusion that the Applicant provided reasonable assurances for issuance of the Consolidated Environmental Resource Permit and State-owned Submerged Lands Authorization, Permit No. 06-0335119-001, and the extension modification. The recommendation to add a condition that the permittee remove a portion of the south end of the Dock Extension resulted from the ALJ's conclusion that the setback waiver submitted by the owners of the upland property to the south of the Respondents' property was invalid because it was not signed by the trustee of one of the trusts that owned an undivided one-half interest in the affected riparian upland. The ALJ's recommendation to approve transfer resulted from the conclusion that the transfer of the permit was valid.

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).

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).

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* § 120.57(1)(l), Fla. Stat. (2023); *see also 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). The Department is charged with enforcing and interpreting chapters 253, 373 and 403 of the Florida Statutes. As a result, DEP has substantive jurisdiction over interpretation of the statutory provisions in chapters 253, 373 and 403, 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).

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*.

RULINGS ON PETITIONERS' AND INTERVENORS' EXCEPTIONS

Petitioners' and Intervenors' Exception No. 1 to RO Paragraph Nos. 28, 45, 87, 121, 126, 130, 132, 133, 147 and Footnote No. 6

The Petitioners and Intervenors take exception to RO paragraph nos. 28, 45, 87, 121, 126, 130, 132, 133, 147 and footnote no. 6. Specifically, they take exception to the ALJ's statements that the 1331 Setback Waiver remains in effect and is binding on the Intervenors, who purchased the 1331 Property from the 1331 Trust.

For the same reasons identified in the Department's rulings below on the Petitioners' and Intervenors' exception nos. 2 through 11, the Department denies this exception.

Petitioners' and Intervenors' Exception No. 2 to RO Paragraph No. 126 and Footnote 6

The Petitioners and Intervenors take exception to RO paragraph no. 126 and footnote 6. The Petitioners and Intervenors take exception to "**FN 6** that the 1331 Setback Waiver was validly executed." Petitioners' and Intervenors' exceptions at p. 4. The ALJ concludes in Footnote 6 of the RO that "the 1331 Setback Waiver was validly executed by the then-trustee of the 1331 Land Trust." RO footnote 6.

Paragraph 126 of the RO provides in its entirety:

> 126. The 1331 Setback Waiver meets the requirement, in rule 18-21.004(3)(d), that it be obtained from the "affected adjacent upland riparian owner." The 1331 Land Trust owned the entire fee title interest in the upland property at 1331 East Lake Drive, and, thus, was *the* affected riparian upland owner at the time. Saavedra, as trustee of the 1331 Land Trust, was authorized to execute, and did execute, the 1331 Setback Waiver, in accordance with rule 18-21.004(3)(d), on behalf of that trust.

RO ¶ 126.

In 2015, a setback waiver form was signed by Damaso Saavedra, as trustee of the 1331 Revocable Trust, which at the time it was executed, owned the upland riparian property located at 1331 East Lake Drive adjacent to the Respondents' property. Contrary to the Petitioners' and Intervenors' exception, the ALJ's findings in RO paragraph nos. 126 and footnote 6 are supported by competent substantial evidence. (Exhibit No. DEP-1A Bates at p. 90; Exhibit No. DEP-2A, Bates at pp. 456-487, 525-551; ALJ Sellers, T. Vol. 3, p. 622).

To the extent the Petitioners and Intervenors seek to have the Department reweigh the evidence, 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.

Since the ALJ's findings in paragraph no. 126 and footnote 6 are supported by competent substantial evidence, the Department may not reject the ALJ's findings in this paragraph.

Based on the foregoing reasons, the Petitioners' and Intervenors' exception to RO paragraph no. 126 and footnote 6 is denied.

Petitioners' and Intervenors' Exception Nos. 3 and 4 to RO Paragraph Nos. 28, 87 and 132

The Petitioners and Intervenors take exception to RO paragraph nos. 28, 87 and 132, alleging that each paragraph is a conclusion of law improperly characterized as a finding of fact. They contend that "there is no express or implied statute or rule stating that a riparian owner *cannot* revoke a LOC [letter of concurrence]." They further contend that a successor upland riparian owner has the authority to revoke a letter of concurrence authorizing a setback waiver even when the letter of concurrence was executed by a predecessor in interest. Moreover, they contend that by operation of law when Mr. Menten timely challenged the Consolidated ERP, his challenge to the Consolidated ERP acted as a withdrawal of his prior signature for the setback waiver.

Paragraph nos. 28, 87 and 132 of the RO, provide in their entirety:

> 28. The plain terms of the Menten Trusts Setback Waiver, *if* validly executed pursuant to the requirements of Florida Administrative Code rule 18-21.004(3)(d), would authorize the Dock Extension to be located in Respondents' riparian area, within the ten-foot setback from the common riparian line between Respondents' Property and the Menten Trusts Property. Likewise, the plain terms of the 1331 Setback Waiver, *if* validly executed pursuant to the applicable rule requirements, would authorize the dock Extension to be located in Respondents' riparian area, within the ten-foot setback from the common riparian line between the Respondents' Property and the Kelly Property.
>
> 87. As discussed below, *the 1331 Setback Waiver*, which was executed by the then-trustee of the 1331 Land Trust in compliance with rule 18-21.004(3)(d), *remains in effect*, and operates to waive the ten-foot setback requirement with respect to the common riparian line separating Respondents' riparian area from the Kellys' riparian area. Accordingly, the competent, substantial evidence shows

> that the Dock Extension does not adversely affect the Kelly Property. (emphasis added).
>
> 132. However, *there is no express or implied statute or rule authorizing, or providing a process for, a successor riparian owner to revoke a letter of concurrence that was executed by a predecessor in interest*, and complies with the applicable requirement that it (the letter of concurrence) be executed by the owner of the affected adjacent upland riparian property. (emphasis added).

RO ¶¶ 28, 87, 132 (emphasis added).

The Petitioners and Intervenors cite to two DOAH cases in support of their argument that "a validly executed waiver may be withdrawn and revoked by the affected adjacent upland riparian owner who timely files a Petition for Administrative Hearing." Petitioners' and Intervenors' Exceptions at p. 7. However, neither case stands for this proposition. First, they cite to a pleading filed by Department counsel titled "Notice of Change in Agency Position" as agency precedence for authorizing revocation of a letter of concurrence that grants a setback waiver to an adjacent upland riparian owner. However, this case, *Tapia v. Donovan* (DOAH Case No. 18-2282) was ultimately withdrawn by the Petitioner without a DOAH hearing, filing of Proposed Recommended Orders, issuance of a DOAH Recommended Order, or issuance of a Department of Environmental Protection Final Order. As a result, the *Tapia* case has absolutely no substantive value.

Second, the Petitioners and Intervenors cite to a final order that actually states the opposite of their proposition that "waivers or letters of concurrence can be revoked if the permit or approval is timely challenged." *See Mandel v. Pardi*, DOAH Case No. 21-3205 (Fla. Div. of Admin. Hearings June 16, 2023) (Fla. Dep't of Envtl. Prot. July 28, 2023) (Paragraph 39 of the Mandel DOAH RO provided that "there is nothing in the statutes or rules governing DEP, including the Applicants' Handbook, to allow for the revocation of a facially valid Letter of

Concurrence, particularly when the structure for which it was granted has been completed.") *adopted* in DEP's Final Order in OGC Case No. 21-1003.

The Petitioners and Intervenors fail to offer any express or implied statute or rule authorizing, or providing a process for, a successor riparian owner to revoke a letter of concurrence that was executed by a predecessor in interest. Accordingly, their exception to RO paragraph nos. 28, 87 and 132 is denied.

Petitioners' and Intervenors' Exception No. 5 to RO Footnote No. 20

The Petitioners and Intervenors take exception to RO footnote no. 20 to RO paragraph no. 132, alleging this footnote is not supported by competent, substantial evidence.

Footnote 20 to RO paragraph no. 132 provides in its entirety:

> 20. Furthermore, as DEP cogently points out, if a subsequent riparian property owner were able to renounce or revoke a letter of concurrence that had been executed by a previous owner in conformance with rule 18-21.004(3)(d), and, thus, was in effect, docking facilities throughout the state of Florida would be subject to being modified or removed whenever ownership of the adjacent riparian upland property changed – as happens with great frequency in Florida.

RO Footnote No. 20.

This footnote is not a finding of fact essential to resolution of the case; rather, it is the restatement of the policy argument made by the Department with which the ALJ agreed. The ALJ merely pointed out an absurdity that would result from the Petitioners' and Intervenors' interpretation of rule 18-21.004(3)(d).

Based on the foregoing reason, the Petitioners' and Intervenors' exception to RO footnote no. 20 is denied.

Petitioners' and Intervenors' Exception No. 6 to RO Paragraph No. 130

The Petitioners and Intervenors take exception to RO paragraph no. 130 contending that "[i]t improperly concludes that the Kellys *would not have standing to challenge the Consolidated*

ERP during its original construction phase (i.e., 2015-2020) after they purchased the property in 2019." (emphasis added). Petitioners' and Intervenors' Exceptions at p. 12.

However, Petitioners and Intervenors misstate the ALJ's finding, which provided that "the Kellys' lack of knowledge about the *1331 Setback Waiver* is immaterial . . . [and] has no bearing now – on whether the Dock Extension had obtained the necessary riparian setback waiver from the owner of the 1331 East Lake Drive property." (emphasis added). (RO ¶ 130). The ALJ further provided that "Mr. Kelly acknowledged that had [hypothetically] Respondents constructed the Dock Extension after they purchased the property in 2019 and before the Consolidated ERP expiration date of October 2020, *the Kellys would not have legal standing to challenge the 1331 Setback Waiver*." (emphasis added). (RO ¶ 130).

Contrary to the Petitioners' and Intervenors' exception, the ALJ's findings in paragraph no. 130 are supported by competent substantial evidence. (John Kelly, T. Vol. 7, pp. 1419-21). To the extent the Petitioners and Intervenors seek to have the Department reweigh the evidence, 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. Since the ALJ's findings in paragraph no. 130 are supported by competent substantial evidence, the Department may not reject the ALJ's findings in this paragraph.

Based on the foregoing reasons, the Petitioners' and Intervenors' exception to RO paragraph no. 130 is denied.

Petitioners' and Intervenors' Exception No. 7 to RO Paragraph No. 171 and Footnote 17

The Petitioners and Intervenors' take exception to RO paragraph no. 171 and footnote no. 17. Specifically, they contend that RO paragraph no. 171 and footnote no. 17 are conclusions of law that a set back waiver is required for the Petitioners' jet ski platform. Paragraph no. 171 of

the RO and footnote no. 17 are not conclusions of law, but rather are findings of fact that the Petitioners' hardship was attributable to their jet ski platform.

The ALJ's findings in paragraph no 171 and footnote 17 are supported by competent substantial evidence (Deborah Menten, T. Vol. 6, p. 1286). The Department 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. Since the ALJ's findings in paragraph no. 171 and footnote 17 are supported by competent substantial evidence, the Department may not reject the ALJ's findings in this paragraph. The question of whether a waiver is applicable has no bearing on the ultimate finding that the jet ski platform attributed to the Petitioners' hardship.

Based on the foregoing reasons, the Petitioners' and Intervenors' exception to RO paragraph no. 171 and footnote 17 is denied.

Petitioners' and Intervenors' Exception No. 8 to RO Paragraph Nos. 207 through 211

The Petitioners and Intervenors take exception to the conclusions of law in RO paragraph nos. 207, 208, 209, 210 and 211 that the emergency tolling provisions in Section 252.363, Florida Statutes, apply to the Letters of Consent (Letter of Consent or LOC) at issue. The Department's review of legal conclusions in a recommended order is restricted to matters within the agency's field of expertise. *See* § 120.57(1)(l), Fla. Stat. (2023); *see also 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 Petitioners and Intervenors are correct that the Department does not have substantive jurisdiction (substantive expertise) over Part I of Chapter 252, Florida Statutes, which applies primarily to the Division of Emergency Management. However, in Section 252.363, the Legislature expressly references "[p]ermits issued by the Department of Environmental Protection . . . pursuant to part IV of chapter 373." The Department clearly has

substantive jurisdiction over the question of its legal propriety to issue, deny, and modify these permits.

Paragraph 208 of the RO provides the legal explanation for how the Letters of Consent are tolled under the emergency tolling provisions of Section 252.363, Florida Statutes. Paragraph 208 provides in its entirety:

> 208. An LOC authorizing the use of sovereignty submerged lands is a component of a consolidated ERP issued pursuant to section 373.427, and, thus, is part of a permit "issued by [DEP] . . . *pursuant to part IV of chapter 373*." § 252.363(1)(a), Fla. Stat. (emphasis added). This determination is reinforced by section 373.427(1), which provides that if an administrative proceeding pursuant to sections 120.569 and 120.57 is timely requested, "the case shall be conducted as a *single consolidated administrative proceeding*." § 373.427(1), Fla. Stat. (emphasis added).

RO ¶ 208.

The Department concurs with the ALJ's conclusions of law in RO paragraph nos. 207, 208, 209, 210 and 211, because the Respondents' permit was a *consolidated* environmental resource permit and BOT authorization. As a *consolidated* environmental resource permit and BOT authorization, both forms of authorization – i.e., the ERP and BOT authorization with its associated Letters of Consent – qualified for the tolling and extension under section 252.363, Florida Statutes. The two authorizations are inextricably intertwined by law. *See* § 373.427(1), Fla. Stat.; Fla. Admin. Code R. 18-21.00401; and Fla. Admin. Code R. 62-330.075.

Based on the foregoing reasons, the Petitioners' and Intervenors' exception to RO paragraph nos. 207, 208, 209, 210 and 211 is denied.

Petitioners' and Intervenors' Exception No. 9 to RO Paragraph Nos. 59, 189, 202 and 213

The Petitioners and Intervenors take exception to RO paragraph nos. 59, 189, 202 and 213, based upon their disagreement with the ALJ's application of the tolling provisions in section 252.363, Florida Statutes, to the 2015 version of the consolidated ERP rules to this case.

Paragraph nos. 59, 189, 202 and 213 of the RO, provide in their entirety:

> 59. Pursuant to section 252.363(2), the laws and administrative rules in effect at the time the Consolidated ERP was issued – i.e., the laws and rules in effect in 2015 – apply in Case No. 22-2437. [Ultimate finding in RO's section titled "III. Tolling and Extension of the Consolidated ERP"].
>
> 189. As found above, and further discussed below, pursuant to section 252.363, the versions of the applicable Florida Statutes and Florida Administrative Code rules in effect in 2015 govern issuance of the Consolidated ERP, as modified by the Extension Modification. [Under "Conclusions of Law" section of the RO].
>
> 202. In sum, Petitioners timely challenged DEP's agency actions issuing the Consolidated Approval, issuing the Extension Modification, and issuing the Transfer Modification. [Under RO section titled "III. Petitioners and Intervenors' Timely Challenged DEP's Agency Actions"].
>
> 213. As found above, pursuant to section 252.363(2), the version of chapter 373 and chapters 62-330 and 18-21 that were in effect in 2015 govern the Consolidated ERP, as extended by the Extension Modification, in these proceedings. [Under RO section titled "IV. The Consolidated ERP was Tolled and Extended under Section 252.363"].

RO ¶¶ 59, 189, 202 and 213.

RO paragraph no. 59 is a conclusion of law. The clear language of section 252.363(2), Florida Statutes, identifies which version of the Florida Statutes and agency rules shall apply when a permit or other authorization is tolled by the emergency provisions of section 252.363. Section 252.363(2) of the Florida Statutes provides:

> (2) A permit or other authorization that is extended **shall be governed by the laws, administrative rules**, and ordinances **in effect when the permit was issued**, unless any party or the issuing authority demonstrates that operating under those laws, administrative rules, or ordinances will create an immediate threat to the public health or safety.

§ 252.363(2), Fla. Stat. (2023) (emphasis added). The 2015 version of the consolidated ERP rules and Chapter 18-21 were "in effect when the permit was issued" and thus govern the extension of the Consolidated ERP.

It appears that the Petitioners and Intervenors did not intend to object to RO paragraph no. 202 in their exception no. 9. The text of exception no. 9 only mentions RO paragraphs 59, 189 and 213. Only the section's title – "Exception No. 9 to RO Paragraphs 59, 189, 202 and 213" – mentions RO paragraph no. 202. Moreover, RO paragraphs 59, 189, and 213 each address the tolling provisions of section 252.363 of the Florida Statutes, while RO paragraph 202 concludes that the Petitioners timely challenged DEP's agency actions at issue. Because the Petitioners' and Intervenors' exception to RO paragraph no. 202 fails to identify any portion of paragraph no. 202 that should be rejected as required by section 120.57(1)(k) of the Florida Statutes, the exception to paragraph no. 202 must be denied. *See* § 120.57((1)(k), Fla. Stat. (2022). Alternatively, the Department shall treat the reference to RO paragraph no. 202 in the title as a typographical error.

Based on the foregoing reasons, the Petitioners' and Intervenors' exception to RO paragraph nos. 59, 189, 202 and 213 is denied.

Petitioners' and Intervenors' Exception No. 10 to RO Paragraph Nos. 72-74 and 98-99

The Petitioners and Intervenors take exception to RO paragraph nos. 72, 73, 74, 98 and 99, based upon their disagreement with the ALJ's application of the tolling provisions in section 252.363, Florida Statutes, which, as explained above, applies the 2015 version of the consolidated ERP and BOT rules to this case.

Paragraph nos. 72, 73, 74, 98 and 99 of the RO, provide:

> 72. As a *marginal dock* located over water, the Dock Extension does not, and will not, create an impoundment or otherwise have any adverse water quality impacts.
>
> 73. As a *marginal dock* located over water, the Dock Extension does not, and will not, cause adverse flooding to on-site or off-site property.
>
> 74. As a *marginal dock* located over water, the Dock Extension will not cause adverse impacts to existing surface water storage and conveyance capabilities.

> 98. Because the Dock Extension simply *extends the existing marginal dock*, rather than creating a new, separate dock, it is part of the existing marginal dock, *and therefore is still a "marginal dock*," as that term is defined in rule 18-21.002(35).
>
> 99. Because the *Dock Extension is a marginal dock*, the ten-foot riparian setback applicable to marginal docks applies to the Dock Extension, unless waived by the affected adjacent upland riparian owners.

RO ¶¶ 72, 73, 74, 98 and 99 (emphasis added).

The Petitioners and Intervenors more specifically object to the ALJ's underlying conclusion that the Respondents' Dock Extension is a marginal dock. The ALJ's rationale for this conclusion is explained in footnote 14 to RO paragraph no. 98. The Petitioners and Intervenors do not object to the specific findings in paragraphs 72, 73, 74, 98 and 99.

The Department concludes that RO paragraph nos. 72, 73, 74, 98 and 99 are mixed findings of fact and conclusions of law. The Department concurs with the ALJ's conclusion in these paragraphs and in footnote 14 that the Respondents' Dock Extension is a marginal dock based on application of the 2015 version of Florida Administrative Code Chapter 18-21. Specifically, as explained in detail above, the Department concurs with the ALJ's underlying conclusion that the tolling provisions of section 252.363, Florida Statutes, apply to the Consolidated ERP and BOT authorization, including the letter of consent, issued by the Department under Chapter 373, Part IV of the Florida Statutes. Also as explained above, the clear language of section 252.363(2), Florida Statutes, identifies which version of the Florida Statutes and agency rules shall apply when a permit or other authorization is tolled by the emergency provisions of section 252.363. Section 252.363(2) of the Florida Statutes provides:

> (2) A permit or other authorization that is extended **shall be governed by the laws, administrative rules**, and ordinances **in effect when the permit was issued**, unless any party or the issuing authority demonstrates that operating under those laws, administrative rules, or ordinances will create an immediate threat to the public health or safety.

§ 252.363(2), Fla. Stat. (2023) (emphasis added). The 2015 version of the consolidated ERP rules and Chapter 18-21 were "in effect when the permit was issued" and thus govern the extension of the Consolidated ERP.

Based on the foregoing reasons, the Petitioners' and Intervenors' exception to RO paragraph nos. 72, 73, 74, 98 and 99 is denied.

Petitioners' and Intervenors' Exception No. 11 to RO Paragraph Nos. 102 through 108

The Petitioners and Intervenors take exception to RO paragraph nos. 102, 103, 104, 105, 106, 107 and 108, alleging that the findings are not supported by competent substantial evidence to support the ALJ's conclusion that the Respondents' Dock Extension meets the requirements for approval of a Letter of Consent as a minimum-size marginal dock.

Contrary to the Petitioners' and Intervenors' exception, the ALJ's findings in RO paragraph nos. 102, 103, 104, 105, 106, 107 and 108 are supported by competent substantial evidence. (Walters, T. Vol. 10, pp. 1795-96; Chappell, T. Vol. 13, pp. 2214-15 (RO ¶ 102); (Minick, T. Vol. 4, pp. 960-61; Medellin, T. Vol. 2, p. 272-73 (RO ¶ 103); (Chappell, T. Vol. 13, p. 2129-31, 2136) (RO ¶ 104); (Minick, T. Vol. 3, p. 604 (RO ¶ 105); (Minick, T. Vol. 3, pp. 598-99, 601-602, 604, 605; Exhibit DEP 1A, Bates at pp. 119-20 (RO ¶ 106); (Chappell, T. Vol. 13, pp. 2140, 2156-57, 2170-71 (RO ¶ 107); (Minick, T. Vol. 4, pp. 648-650, 788-90 (RO ¶ 108)). To the extent the Petitioners and Intervenors seek to have the Department reweigh the evidence, 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. Since the ALJ's findings in paragraph nos. 102, 103, 104, 105, 106, 107 and 108 are supported by competent substantial evidence, the Department may not reject the ALJ's findings in this paragraph.

Based on the foregoing reasons, the Petitioners' and Intervenors' exception to RO paragraph nos. 102, 103, 104, 105, 106, 107 and 108 is denied.

RULINGS ON KATAYOUN ABAE AND GALEIE BIJAN, INC.'S EXCEPTIONS

The Respondents' Exception to RO Paragraph No. 118

The Respondents take exception to RO paragraph no. 118, which states:

> 118. However, the competent substantial evidence establishes that the Menten Setback Waiver did not have the effect of waiving the ten-foot riparian line setback established in rule 18-21.004(3)(d).

RO ¶ 118. The Respondent contends there is no evidence to support this finding. Contrary to the Petitioners' exception, however, the ALJ's finding that the Menten Setback Waiver did not have the effect of waiving the ten-foot riparian line setback is supported by competent substantial evidence. (Menten, T. Vol. 6, pp. 1205-1207; DEP Exhibit 1A, Bates at p. 93).

Based on the foregoing reasons, the Respondents' exception to RO paragraph no. 118 is denied.

The Respondents' Exception to RO Paragraph No. 119

The Respondents take exception to the second and third sentences of RO finding of fact no. 119, which provides:

> 119. As discussed above, the Menten Trusts Property is owned by the Peter Menten Trust and the Deborah Menten Trust, each of which owns an undivided one-half interest in property. *The Menten Setback Waiver was executed only by Peter Menten, as trustee of the Deborah Menten Trust, and was not executed by Deborah Menten, as trustee of the Peter Menten Trust. Only Deborah Menten—not Peter Menten—was authorized to waive the riparian setback requirement on behalf of the Peter Menten Trust.*

RO ¶ 119 (emphasis added).

The Respondents contend the second sentence is not supported by competent substantial evidence and the conclusion of law in the third sentence is incorrect. The Respondent is

incorrect. The finding that Deborah Menten did not execute a setback waiver on behalf of the Peter Menten Trust is supported by competent substantial evidence. (Menten, T. Vol. 6, pp. 1205-1207; DEP Exhibit 1A, Bates at p. 93). Moreover, the conclusion of law that only Deborah Menten – i.e., the trustee of the Peter Menten Trust – was the only party authorized to waive the riparian setback requirement on behalf of the Peter Menten Trust is supported by the underlying facts and the plain language of the Trust (including the portions cited in Respondent's exceptions).

Based on the foregoing reasons, the Respondents' exception to RO paragraph no. 119 is denied.

The Respondents' Exception to RO Paragraph Nos. 122, 123, 124 and 278

The Respondents take exception to the ALJ's underlying conclusion that Florida Administrative Code Rule 18-21.004(3)(d) requires all joint owners of an upland property to collectively waive the riparian setback requirement (as opposed to granting the power to any one of multiple joint-owners to waive the setback). The thread of this conclusion runs throughout paragraphs 122, 123, 124 and 278 of the RO.

Respondents' reading of Rule 18-21.004(3)(d) to grant the power to any one of multiple joint-owners to waive the setback requirement would not only lead to an absurd result (i.e., depriving lawful joint-owners of the ability to retain the setback when other joint-owners wish to waive it), but it is also incompatible with the plain language of Rule 18-21.004(3)(d). In the case of joint ownership, the joint owners collectively make up "the" owner. Rule 18-21.004(3)(d) expressly requires "the" owner (i.e., all of the whole) to waive the setback, not "an" owner (i.e., one of the whole).

Based on the foregoing reasons, the Respondents' exceptions to RO paragraph nos. 122, 123, 124 and 278 are denied.

The Respondents' Exception to RO Paragraph Nos. 196 through 199 Regarding the Conclusion that Tolling Was Not Automatic

The Respondents takes exception to paragraphs 196-199 of the RO, which contain mixed conclusions of law and findings of fact. The Respondents contend that the ALJ erroneously concluded that Section 252.363, Florida Statutes, places an onus on the Department "to determine – i.e., *make factual decisions* – whether the requirements for tolling and extension of the Consolidated ERP were met." (RO ¶ 196); *see also* (RO ¶¶ 197-199). The Respondents allege the extension is "self-executing" in that it applies as a matter of law and the Department does not have the discretion to grant or deny the extension. Section 252.363 states in its entirety that:

> (1)(a) The declaration of a state of emergency issued by the Governor for a natural emergency tolls the period remaining to exercise the rights under a permit or other authorization for the duration of the emergency declaration. Further, the emergency declaration extends the period remaining to exercise the rights under a permit or other authorization for 24 months in addition to the tolled period. The extended period to exercise the rights under a permit or other authorization may not exceed 48 months in total in the event of multiple natural emergencies for which the Governor declares a state of emergency. The tolling and extension of permits and other authorizations under this paragraph shall apply retroactively to September 28, 2022. This paragraph applies to the following:
>
> 1. The expiration of a development order issued by a local government.
>
> 2. The expiration of a building permit.
>
> 3. The expiration of a permit issued by the Department of Environmental Protection or a water management district pursuant to part IV of chapter 373.
>
> 4. Permits issued by the Department of Environmental Protection or a water management district pursuant to part II of chapter 373 for land subject to a development agreement under ss. 163.3220-163.3243 in which the permittee and the developer are the same or a related entity.
>
> 5. The buildout date of a development of regional impact, including any extension of a buildout date that was previously granted as specified in s. 380.06(7)(c).
>
> 6. The expiration of a development permit or development agreement authorized by Florida Statutes, including those authorized under the Florida Local

Government Development Agreement Act, or issued by a local government or other governmental agency.

(b) Within 90 days after the termination of the emergency declaration, the holder of the permit or other authorization shall notify the issuing authority of the intent to exercise the tolling and extension granted under paragraph (a). The notice must be in writing and identify the specific permit or other authorization qualifying for extension.

(c) If the permit or other authorization for a phased construction project is extended, the commencement and completion dates for any required mitigation are extended such that the mitigation activities occur in the same timeframe relative to the phase as originally permitted.

(d) This subsection does not apply to:

1. A permit or other authorization for a building, improvement, or development located outside the geographic area for which the declaration of a state of emergency applies.

2. A permit or other authorization under any programmatic or regional general permit issued by the Army Corps of Engineers.

3. The holder of a permit or other authorization who is determined by the authorizing agency to be in significant noncompliance with the conditions of the permit or other authorization through the issuance of a warning letter or notice of violation, the initiation of formal enforcement, or an equivalent action.

4. A permit or other authorization that is subject to a court order specifying an expiration date or buildout date that would be in conflict with the extensions granted in this section.

(2) A permit or other authorization that is extended shall be governed by the laws, administrative rules, and ordinances in effect when the permit was issued, unless any party or the issuing authority demonstrates that operating under those laws, administrative rules, or ordinances will create an immediate threat to the public health or safety.

(3) This section does not restrict a county or municipality from requiring property to be maintained and secured in a safe and sanitary condition in compliance with applicable laws, administrative rules, or ordinances.

§ 252.363, Fla. Stat. (2023).

The ALJ cited multiple cases that hold an agency's fact-based decision as to whether a statutory permitting exemption applies is an agency determination subject to further review via an administrative proceeding. (RO ¶ 198) (*citing Friends of the Hatchineha, Inc. v. Dep't of Envtl. Regulation*, 580 So. 2d 267 (Fla. 1st DCA 1991), *Town of Palm Beach v. Dep't of Natural Resources*, 577 So. 2d 1383 (Fla. 4th DCA 1991) and *State ex rel. Dep't of Gen. Servs. v. Willis*, 344 So. 2d 580 (Fla. 1st DCA 1977)). The Respondent does not cite any conflicting case law or

explain why the holdings of the cases would not extend to the Department's fact-based decision concerning the extension provided by section 252.363.

Regardless, as explained by the ALJ in paragraph 199, the Department issued an order modifying the Consolidated ERP permit to reflect the extended permit. This order was based on a fact-based determination (e.g., that the tolling and extensions notification was timely submitted and that the permit holder is not in significant noncompliance with the conditions of the permit). It is well settled that such determinations are challengeable in an administrative proceeding upon their maturation into agency action. *See, e.g., Willis,* 344 So. 2d at 584-85.

The Respondents are correct that the Department does not have substantive jurisdiction (i.e., substantive expertise) over Part I of Chapter 252, Florida Statutes, which applies primarily to the Division of Emergency Management. However, in Section 252.363, the Legislature expressly references "[p]ermits issued by the Department of Environmental Protection . . . pursuant to part IV of chapter 373." The Department clearly has substantive jurisdiction over the question of its legal propriety to issue, deny, and modify these permits. Thus, to the extent the Respondents seek the Department to rescind its determination to modify the permit by granting the extension, the exception is denied. The Department acted within its lawful authority. To the extent the Respondents merely seek an advisory opinion disagreeing with the ALJ's conclusion that the Department had the onus "to determine – i.e., *make factual decisions* – whether the requirements for tolling and extension of the Consolidated ERP were met" under section 252.363; and whether the petitioners had the right to challenge that decision in an administrative proceeding under chapter 120, Florida Statutes, the exception is likewise rejected.

Based on the foregoing reasons, the Respondents' exception to RO paragraph nos. 196, 197, 198 and 199 is denied.

The Respondents' Exception to RO Paragraph No. 280

The Respondents take exception to the ALJ's conclusion in paragraph no. 280 of the RO that the ten-foot setback requirement in Florida Administrative Code Rule 18-21.004(3)(d) "may be met, in this de novo proceeding, by the inclusion of a condition in the Consolidated ERP requiring Respondents to remove a sufficient length at the southern end of the Dock Extension to meet the ten-foot setback from the common riparian line." (RO ¶ 280). This exception presupposes that its preceding exceptions are correct, however, as explained above, they are not. Thus, this exception is likewise rejected. The ALJ correctly concluded that a portion of the dock must be removed for the Respondents to satisfy the ten-foot setback.

Based on the foregoing reasons, the Respondents' exception to RO paragraph no. 280 is denied.

CONCLUSION

Having considered the applicable law in light of the rulings on the above Exceptions, and being otherwise duly advised, it is

ORDERED that:

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

B. The Consolidated Environmental Resource Permit and State-owned Submerged Lands Authorization, Permit No. 06-0335119-001, as extended by the Extension Modification, with the condition that the permittee remove a portion of the south end of the Dock Extension of sufficient length to meet the ten-foot setback requirement from the common riparian line between Respondents' riparian area and Petitioners' riparian area, and subject to the general and specific condition set forth therein is APPROVED; and

C. The transfer of Permit No. 06-0335119 to Respondent, Galerie Bijan, Inc, subject to any general and specific conditions set forth therein, is APPROVED.

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 11th day of April, 2024, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Digitally signed by Shawn Hamilton
Date: 2024.04.11 14:46:44 -04'00'

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.

Syndie Kinsey Digitally signed by Syndie Kinsey
Date: 2024.04.11 14:54:56 -04'00'

CLERK DATE

CERTIFICATE OF SERVICE

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

Luna E. Phillips, Esquire Deborah K. Madden, Esquire Gunster, Yoakley & Stewart, P.A. 450 East Las Olas Boulevard, Suite 1400 Fort Lauderdale, Florida 33301 lphillips@gunster.com dkmadden@gunster.com	Susan Roeder Martin, Esquire Stephen Luis Conteaguero, Esquire Nason, Yeager, Gerson, Harris & Fumero, P.A. 750 Park of Commerce Boulevard, Suite 210 Boca Raton, Florida 33487 smartin@nasonyeager.com sconteaguero@nasonyeager.com
Kelley F. Corbari, Esquire Kathryn E.D. Lewis, Esquire Department of Environmental Protection 3900 Commonwealth Boulevard, Mail Stop 35 Tallahassee, Florida 32399 kelley.corbari@floridadep.gov kathryn.lewis@floridadep.gov	

this 11th day of April, 2024.

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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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PETER J. MENTEN, AS TRUSTEE OF THE FAMILY TRUST CREATED UNDER THE 2012 QUALIFIED PERSONAL RESIDENCE TRUST OF DEBORAH MENTEN, DATED DECEMBER 20, 2012, AND DEBORAH MENTEN, AS TRUSTEE OF THE FAMILY TRUST CREATED UNDER THE 2012 QUALIFIED PERSONAL RESIDENCE TRUST OF PETER J. MENTEN, DATED DECEMBER 20, 2012,

Petitioners,

and

JOHN AND DENICE KELLY,

Intervenor,

vs. Case No. 22-2437

GALERIE BIJAN, INC.; KATAYOUN ABAE; AND FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

Exhibit A

PETER J. MENTEN, AS TRUSTEE OF THE FAMILY TRUST CREATED UNDER THE 2012 QUALIFIED PERSONAL RESIDENCE TRUST OF DEBORAH MENTEN, DATED DECEMBER 20, 2012, AND DEBORAH MENTEN, AS TRUSTEE OF THE FAMILY TRUST CREATED UNDER THE 2012 QUALIFIED PERSONAL RESIDENCE TRUST OF PETER J. MENTEN, DATED DECEMBER 20, 2012,

Petitioners,

and

JOHN AND DENICE KELLY,

Intervenor,

vs. Case No. 22-2491

GALERIE BIJAN, INC., AND FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

RECOMMENDED ORDER

Pursuant to notice, a hearing in these consolidated cases, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2023),[1] was held by Administrative Law Judge ("ALJ") Cathy M. Sellers of the Division of Administrative Hearings ("DOAH"), in person in Fort Lauderdale, Florida, and by Zoom conference, on February 27 and 28, March 1 through 3, June 7, July 31 through August 2, and August 21, 2023.

[1] All references to chapter 120, Florida Statutes, are to the 2023 codification. Except as otherwise stated herein, references to chapter 373, Florida Statutes, and Florida Administrative Code chapters 18-21 and 62-330 are to the versions in effect in 2015.

APPEARANCES

For Petitioners and Intervenor:

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

For Respondents Katayoun Abae and Galerie Bijan, Inc:

Susan Roeder Martin, Esquire
Stephen Luis Conteaguero, Esquire
Nason, Yeager, Gerson, Harris & Fumero, P.A.
750 Park of Commerce Boulevard, Suite 210
Boca Raton, Florida 33487

For Respondent Florida Department of Environmental Protection:

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

STATEMENT OF THE ISSUES

The issues in these consolidated cases are: (1) whether the term of Permit No. 06-0335119-001 was tolled and extended pursuant to section 252.363(1), Florida Statutes (2021); (2) whether Permit No. 06-0335119-001 was validly transferred from Katayoun Abae to Galerie Bijan, Inc.; and (3) whether the single family residential dock at issue in this proceeding, authorized by Permit No. 06-0335119-001, qualifies for issuance of an environmental resource permit and letter of consent.

PRELIMINARY STATEMENT

On October 8, 2015, Respondent Florida Department of Environmental Protection (hereafter, "DEP"), issued Permit No. 06-0355119-001, a Consolidated Environmental Resource Permit and Recommended Intent to

Grant State-owned Submerged Lands Authorization ("Consolidated ERP") to Respondent Katayoun Abae ("Abae"). The Consolidated ERP consists of an environmental resource permit ("Dock ERP") authorizing the construction of an extension ("Dock Extension") of an existing single-family residential marginal dock, and recommended intent to grant sovereignty submerged lands use authorization in the form of a letter of consent, authorizing the use of sovereignty submerged lands for the Dock Extension.

No notice of agency action providing a clear point of entry to challenge DEP's proposed agency action issuing the Consolidated ERP was provided, pursuant to Florida Administrative Code Rule 62-110.106, to Petitioners Peter J. Menten, as Trustee of the Deborah Menten Trust, and Deborah Menten, as Trustee of the Peter J. Menten Trust ("Petitioners"); or to Damaso Saavedra, as trustee of the 1331 East Lake Drive Land Trust ("1331 Land Trust"), which, at that time, held title to the upland riparian property at 1331 East Lake Drive. Thus, neither Petitioners nor Saavedra challenged the issuance of the Consolidated ERP at that time.

As found below, in 2019, John and Denice Kelly purchased the real property at 1331 East Lake Drive, which was placed in the 1331 East Lake Drive Revocable Trust, with Louis Hamby, III, as trustee, and John and Denice Kelly as beneficiaries. Hamby was an original petitioner in these proceedings. He has since withdrawn as trustee of the 1331 Revocable Trust, and that trust no longer exists.

The Dock Extension was not constructed during the five-year term of the Consolidated ERP, which had an expiration date of October 7, 2020. On August 6, 2021, Abae, along with her closely-held corporation, Respondent Galerie Bijan, Inc. ("Galerie Bijan"), notified DEP, through her consultant, the Chappell Group ("Chappell"), of Abae's intent to toll and extend the term

of the permit construction phase of the Consolidated ERP, pursuant to section 252.363(1)(a), a provision that allows the tolling and extension of permits during a declared state of emergency.

On September 8, 2021, DEP issued a letter, styled "Modification of File No.: 06-03355119-001-EI" ("Extension Modification"), tolling the term of the Consolidated ERP and extending its expiration date to July 25, 2022. No notice of agency action providing a clear point of entry to challenge the Extension Modification, pursuant to rule 62-110.106(2), was provided to Petitioners. Thus, neither Petitioners nor Hamby challenged the issuance of the Extension Modification at that time.[2]

Petitioners and Hamby first received notice of the issuance of the Consolidated ERP and the Extension Modification on or about June 8, 2022, when construction of the Dock Extension commenced. On June 17, 2022, they requested, and were granted, an extension of time to file a challenge to the Consolidated ERP and Extension Modification until July 17, 2022. On June 28, 2022, Petitioners and Hamby timely filed a petition, and on July 12, 2022, they filed the Amended Verified Complaint and Petition for Administrative Hearing ("Amended Petition"), challenging issuance of the Consolidated ERP and the Extension Modification. The Amended Petition was referred to DOAH on August 15, 2022, and was assigned Case No. 22-2437.

On July 15, 2022, DEP transferred the Consolidated ERP, as modified by the Extension Modification, to Galerie Bijan. This agency action is hereafter referred to as the "Transfer Modification." On July 29, 2022, Petitioners and Hamby filed a petition ("Transfer Modification Petition"), challenging the Transfer Modification. The Transfer Modification Petition was referred to

[2] As further discussed below, DEP's issuance of the Extension Modification constituted agency action challengeable under sections 120.569 and 120.57(1).

DOAH on August 19, 2022, and was assigned Case No. 22-2491. Pursuant to the Order of Consolidation issued on August 31, 2022, Case Nos. 22-2437 and 22-2491 were consolidated for purposes of conducting the final hearing and issuing this Recommended Order.

The final hearing initially was scheduled for December 5 through 7, 2022, but was continued to February 27 through March 3, 2023. The hearing was held on February 27 through March 3, 2023, but did not conclude, so was continued and rescheduled for June 7 and 8, 2023. The hearing was conducted on June 7, 2023, but did not conclude, so was continued and rescheduled for July 25 through 27, July 31 through August 4, and August 21, 2023. Thereafter, pursuant to the parties' request, the undersigned cancelled the July 25 through 27, 2023, hearing dates, and the hearing was conducted on July 31 through August 2, and August 21, 2023. The hearing, which was held over a total period of ten days, concluded on August 21, 2023.

At the final hearing, Respondents Abae and Galerie Bijan presented the testimony of Dr. Mick Abae, Katayoun Abae, Deborah Menten, Peter Menten, Paul Davis, Donald Medellin, Dane Fleming, and Tyler Chappell. The following exhibits were admitted into evidence on behalf of Respondents Abae and Galerie Bijan: Respondents' Exhibits R-1 through R-3, R-5, R-6, R-10, R-11, R-17, R-31, R-35, R-38, R-61 through R-63, R-69, and Respondents' Joint Exhibit RJ-1. Pursuant to the Order Granting, in Part, Motion in Limine to Exclude Additional Exhibits and Granting Motion in Limine to Exclude Testimony ("Order in Limine") issued by the undersigned on July 17, 2023, the undersigned excluded certain exhibits and witness testimony that Respondents Abae and Galerie Bijan untimely disclosed months after the disclosure deadlines set forth in the Order of Pre-hearing Instructions, which was issued on August 31, 2022, and the Order

Rescheduling Hearing, which was issued on November 22, 2022. The Order in Limine recognized Respondents' legal entitlement, pursuant to section 90.104, Florida Statutes, to make a written offer of proof (i.e., proffer) regarding the excluded evidence. Respondents Abae and Galerie Bijan filed the Notice of Respondents Galerie Bijan, Inc., and Katayoun Abae's Proffer on November 3, 2023.

Respondent DEP presented the testimony of Allyson Minnick, Deborah Menten, and Peter Menten. The following exhibits were admitted on behalf of DEP: Joint Exhibit 1, DEP 1A through 1C, DEP 2A, DEP 3A, DEP 4A and 4B, DEP 6A, DEP 8A, and Respondents' R-6.

Petitioners and Intervenor presented the testimony of John Kelly, Denice Kelly, Michael Graham, Dr. Mick Abae, Katayoun Abae, Peter Menten, Deborah Menten, and Sandra Walters. The following exhibits were admitted into evidence on behalf of Petitioners and Intervenor: PET-1501, PET-1502, PET-1504, PET-1508, PET-1509.A, PET-1510.A, PET-1512, PET-1513, PET-1518, PET-1519, PET-1523, PET-1526, PET-1526.01, PET-1530 through PET-1534, PET-1538, PET-1540, PET-1542, PET-1543, PET-1545, PET-1546, PET-1551.01, PET-1554, PET-1595, PET-1597, PET-1599.02 through PET-1599.05, PET-1617, PET-1638, PET-1639, PET-1600.03, PET-1600.05 through PET-1600.13, PET-1600.16, PET-1600.18, PET-1612, PET-1628, PET-1632, PET-1635, PET-1636, PET-1640, Respondents' Joint Exhibit RJ-1, and DEP Exhibit 19.5.

The final volume of the 13-volume, 2266-page Transcript was filed at DOAH on September 1, 2023. The parties initially were given ten days, until September 11, 2023, to file their proposed recommended orders ("PROs"). Thereafter, the timeframe for filing the PROs was extended to October 20, 2023, and then to November 3, 2023. The parties timely filed their PROs on

November 3, 2023, and DEP subsequently filed an Amended Proposed Recommended Order ("Amended PRO") on November 6, 2023. The PROs, including DEP's Amended PRO, have been duly considered in preparing this Recommended Order.

FINDINGS OF FACT

I. The Parties

Petitioners

1. Petitioners are Peter J. Menten, as Trustee of the Family Trust created under the 2012 Qualified Personal Residence Trust of Deborah Menten, dated December 20, 2012; and Deborah Menten, as Trustee of the Family Trust created under the 2012 Qualified Personal Residence Trust of Peter J. Menten, dated December 20, 2012. Hereafter, these trusts are collectively referred to as the "Menten Trusts," as appropriate, and are individually referred to as the "Peter Menten Trust" and the "Deborah Menten Trust," as appropriate. Peter Menten and Deborah Menten are collectively referred herein to as the "Mentens," as appropriate. Neither Peter Menten nor Deborah Menten, in their individual capacity, is a petitioner in these proceedings.

2. The Peter Menten Trust and the Deborah Menten Trust are the owners of the real property ("Menten Trusts Property") located at 1415 East Lake Drive, Fort Lauderdale, Florida. Each of these trusts is the owner of an undivided one-half interest in the Menten Trusts Property.

Intervenor

3. Intervenor, John and Denice Kelly, a married couple (hereafter, "Intervenor" or "Kellys," as appropriate), currently own the real property located at 1331 East Lake Drive, Fort Lauderdale, Florida (the "Kelly Property," as appropriate).

4. At the time the Consolidated ERP was issued in 2015, the 1331 Land Trust owned the real property at 1331 East Lake Drive, and Damaso Saavedra was the trustee of that trust.

5. When the Amended Petition and the Transfer Modification Petition were filed in July and December 2022, respectively, the 1331 Revocable Trust owned the real property at 1331 East Lake Drive.[3] Louis L. Hamby, III, as trustee of the 1331 Revocable Trust, was an original petitioner in these consolidated proceedings on behalf of that trust, of which the Kellys were the beneficiaries.

6. While the final hearing was pending, Hamby withdrew as the trustee of the 1331 Revocable Trust, due to tragic personal circumstances, and transferred the title to the real property at 1331 East Lake Drive to the Kellys. At that time, the 1331 Revocable Trust ceased to exist.

7. The Kellys took title to the real property located at 1331 East Lake Drive by warranty deed from Hamby, dated May 3, 2023. As a married couple, the Kellys each hold title to an undivided one-half interest in the Kelly Property by a tenancy of the entireties. Notably, the warranty deed from Hamby states: "[t]his deed conveys title from the trustee of a trust to the beneficiaries of the trust and thus the beneficial ownership of the subject property remains unchanged."

8. Pursuant to the Order Granting Petitioners' Motion to Intervene, issued on June 2, 2023, the Kellys were granted party status as an intervenor in these proceedings.

Respondents

9. Respondent DEP[4] is the state agency charged under chapter 373, Florida Statutes, and Florida Administrative Code Chapter 62-330, with

[3] The 1331 Revocable Trust took title to the real property at 1331 East Lake Drive in December 2019.

[4] For brevity and clarity, DEP is hereafter referred to as "DEP," rather than "Respondent," even though it is a party respondent, in order to distinguish it from Respondents Abae and Galerie Bijan, who are collectively referred to as "Respondents."

administering the environmental resource permitting program in Florida. Additionally, pursuant to chapter 253, Florida Statutes, the Board of Trustees of the Internal Improvement Trust Fund ("Board of Trustees"), which holds title to state-owned lands, has delegated DEP the authority to administer the use of sovereignty submerged lands under Florida Administrative Code Chapter 18-21. Pursuant to this statutory and rule authority, DEP issued the Consolidated ERP, the Extension Modification, and the Transfer Modification, which have been challenged by Petitioners and Intervenor in these consolidated proceedings.

10. Respondent Katayoun Abae acquired the real property located at 1401 East Lake Drive, Fort Lauderdale, Florida ("Respondents' Property"), in 2004. As noted below, Abae was the applicant for, and the permittee of, the Consolidated ERP when it was issued on October 8, 2015.

11. In December 2018, Abae transferred title to the Respondents' Property to Respondent Galerie Bijan. Abae is the president and a shareholder of Galerie Bijan.

12. On or about August 6, 2021, Abae and Galerie Bijan, through Chappell, contacted DEP by email, requesting an extension of the Consolidated ERP permit construction phase expiration date. As noted above, on or about September 8, 2021, DEP issued the Extension Modification to Abae, the permittee of the Consolidated ERP, and to Galerie Bijan.

13. On or about July 15, 2022, DEP issued the Transfer Modification, transferring the Consolidated ERP, as modified by the Extension Modification, to Galerie Bijan.

14. Galerie Bijan is the current permittee of the Consolidated ERP, as modified by the Extension Modification and the Transfer Modification.

II. Description and Procedural History of the Dock Extension

15. Respondents' Property is located at 1401 East Lake Drive, riparian to Sylvan Lake (also known as Lake Sylvia), a Class III water body that is not designated an aquatic preserve or an Outstanding Florida Water.

Sylvan Lake provides deep water access to the Intracoastal Waterway and accommodates large vessels. Many vessels moored and navigating in Sylvan Lake exceed 60 feet in length.

16. Respondents' Property has an approximately 100-foot-long riparian shoreline on Sylvan Lake.

17. Respondents' Property is located immediately adjacent to, and north of, the Menten Trusts Property, and immediately adjacent to, and south of, the Kelly Property.

18. Both the Menten Trusts Property and the Kelly Property are riparian to Sylvan Lake, and both of these properties have existing docks that were constructed prior to construction of the Dock Extension.

19. Respondents' Property and the Menten Trusts Property share a common riparian line that separates the riparian area that inures to Respondents' Property and the riparian area that inures to the Menten Trusts Property.

20. The Respondents' Property and the Kelly Property share a common rights riparian line that separates Respondents' riparian area and the riparian area that inures to the Kelly Property.

21. On or about May 13, 2015, Abae, through Chappell, filed the application for the Consolidated ERP for the Dock Extension with DEP.

22. The application for the Consolidated ERP was submitted on the Joint Authorization for Individual and Conceptual Environmental Resource Permit/Authorization to Use State-Owned Submerged Lands/Federal Dredge and Fill Permit, Form No. 62-330.060(1), as required by rule, and included the requisite certification, signed by Abae, attesting that the information contained in the application was correct, and that she owned a sufficient interest in the upland riparian property at 1401 East Lake Drive. The application also included, among other things, the requisite seagrass and benthic surveys conducted during the growing season.

23. As part of the application for the Consolidated ERP, Abae submitted two executed Letter of Concurrence for Setback Waiver forms (also referred to as the "setback waiver forms," as appropriate).

24. One setback waiver form was executed only by Peter J. Menten ("Menten Trusts Setback Waiver"), who signed the form as the "owner" of the adjacent upland riparian property located at 1415 East Lake Drive.

25. Notably, no setback waiver form was executed by Deborah Menten on behalf of the Peter Menten Trust, which is the owner of an undivided one-half interest in the Menten Trusts Property.

26. The other setback waiver form was signed by Damaso Saavedra, who executed the form as the trustee of the 1331 Revocable Trust, which, at that time, owned the adjacent upland riparian property located at 1331 East Lake Drive (hereafter, the "1331 Setback Waiver").

27. Each of these setback waivers states, in pertinent part:

> I hereby state that I am the owner of the adjacent upland riparian property located to the [north or south, as applicable] of the facility or activity proposed to be constructed and conducted by **Katayoun Abae**, as shown in the above referenced file (and on the attached drawing). **I understand that the subject project will be located entirely within the applicant's riparian rights area, and I do not object to the proposed structure or activity being located within the area required as a setback distance from the common riparian line, as required by Chapter 18-21.004(3), F.A.C.** This file shows the structure will be located entirely within the applicant's riparian rights area and within **0.0** feet of the common riparian line between our parcels.

28. The plain terms of the Menten Trusts Setback Waiver, *if* validly executed pursuant to the requirements of Florida Administrative Code rule 18-21.004(3)(d), would authorize the Dock Extension to be located in Respondents' riparian area, within the ten-foot setback from the common

riparian line between Respondents' Property and the Menten Trusts Property.[5] Likewise, the plain terms of the 1331 Setback Waiver, *if* validly executed pursuant to the applicable rule requirements, would authorize the Dock Extension to be located in Respondents' riparian area, within the ten-foot setback from the common riparian line between the Respondents' Property and the Kelly Property.[6]

29. On October 8, 2015, DEP issued the Consolidated ERP, authorizing Abae to construct a 100-foot by 11.5-foot (i.e., a 1,150-square-foot) concrete dock marginal extension adjacent to, and immediately waterward of, an existing 880-square-foot concrete marginal dock along the Respondents' Property's riparian shoreline.

30. The Dock Extension is designed, and was approved, to accommodate a 60-foot vessel with a maximum draft of 3.5 feet.

31. The Consolidated ERP grants authorization, in the form of a letter of consent (hereafter, the "Dock LOC"), to use sovereignty submerged lands riparian to Respondents' Property for the purpose of constructing and operating the Dock Extension.

32. As issued, the permit construction phase of the Consolidated ERP had an original expiration date of October 7, 2020.

33. No actual or constructive written notice of issuance of the Consolidated ERP containing a clear point of entry to challenge the

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[5] As will be discussed in greater detail, rule 18-21.004(3)(d) generally requires that docking structures be set back 25 feet from the riparian line, or, for a marginal dock authorized by the Consolidated ERP, ten feet from the riparian line. These setbacks may be waived by adjacent riparian owners, as provided in that rule.

[6] Note, this paragraph does *not* find or conclude that the setback waivers—both of which are part of the application for the Consolidated ERP of the Dock Extension at issue—were executed in compliance with the plain language of rule 18-21.004(3)(d), and, therefore, in effect. As further discussed below, the Menten Trusts Setback Waiver does *not* meet the letter of concurrence requirements in that rule, because it was executed by the trustee of only *one* of the two trusts that own the Menten Trusts Property, and was not executed by the trustee of the *other* trust that owns the Menten Trusts Property. As also discussed below, the 1331 Setback Waiver *was* validly executed by the then-trustee of the 1331 Land Trust, which was the only owner of the property at 1331 East Lake Drive.

Consolidated ERP was ever provided to Peter Menten, as trustee of the Deborah Menten Trust; to Deborah Menten as trustee of the Peter Menten Trust; or to Damaso Saavedra, as trustee of the 1331 Land Trust.

34. Abae transferred the Respondents' Property to Galerie Bijan on December 28, 2018.

35. Due to personal circumstances and the Covid-19 pandemic, Abae was unable to construct the Dock Extension by October 7, 2020.[7]

36. In July 2021, Abae, as president and shareholder of Galerie Bijan, applied for a new Consolidated ERP for the Dock Extension. That application subsequently was withdrawn, and is not at issue in these proceedings.

37. On August 6, 2021, Chappell, on behalf of Abae and Galerie Bijan, notified DEP of Abae's intent to toll and extend the term of the Consolidated ERP permit construction phase under the Governor's declaration of emergency due to Covid-19, Executive Order ("EO") No. 20-52 ("EO No. 20-52").

38. On September 8, 2021, DEP issued the Extension Modification, tolling the term of the Consolidated ERP and extending its permit construction phase expiration date to July 25, 2022.

39. At the time DEP was notified of Abae's intent to toll and extend the Consolidated ERP, and at the time the Extension Modification issued, the Consolidated ERP had not yet been transferred to Galerie Bijan, so Abae was still the permittee of the Consolidated ERP.

40. Respondents commenced construction of the Dock Extension on or about June 8, 2022, and construction of the Dock Extension was completed on or about July 22, 2022, within the extended term of the permit construction phase of the Consolidated ERP.

[7] As found in, and pursuant to, Executive Order No. 20-52, issued in March 2020, most Florida government offices and all but the most essential businesses were closed for varying amounts of time due to the Covid-19 pandemic. In response, the Governor and executive branch agencies issued a series of declarations of emergency by order.

41. On July 15, 2022, DEP issued the Transfer Modification, transferring the Consolidated ERP from Abae to Galerie Bijan.

42. DEP performed a post-construction inspection of the Dock Extension and determined that it complied with the terms and conditions of the Consolidated ERP. Additionally, Respondents submitted an as-built survey depicting the Dock Extension which confirmed that it (the Dock Extension) was constructed in compliance with the terms and conditions of the Consolidated ERP.

43. As constructed along the riparian shoreline of Respondents' Property, the Dock Extension is approximately 97.84 feet long.

44. Respondents' entire dock, which collectively consists of the Dock Extension plus the existing marginal dock, extends approximately 21.41 feet waterward from the two-foot-wide seawall at the north end, and 21.49 feet waterward from the seawall at the south end.[8]

45. The Dock Extension is constructed wholly within Respondents' riparian area. It is constructed approximately 1.02 feet to 1.44 feet from the common riparian lines between Respondents' riparian area and the Kellys' riparian area, and approximately 1.5 feet to 1.79 feet from the common riparian line between Respondents' riparian area and the Petitioners' riparian area. The Dock Extension is set back farther from the common riparian lines than the distances waived in the 1331 Setback Waiver and the Menten Trust Setback Waiver, both of which concurred to a 0.0 foot setback from the common riparian line.

[8] As further discussed below, Respondents' entire dock extends no further waterward than the Kellys' dock.

III. Tolling and Extension of the Consolidated ERP

46. Section 252.363, Florida Statutes (2021),[9] operates to toll and extend the term of specified permits, including permits issued by DEP or a water management district pursuant to part IV of chapter 373.

47. In order for a holder of a permit to toll and extend a permit under section 252.363(1), the Governor must have declared a state of emergency for a natural emergency.

48. Pertinent to these proceedings, on March 9, 2020, Governor DeSantis issued EO No. 20-52, declaring a state of emergency in the state of Florida due to the Covid-19 pandemic.[10] EO No. 20-52 subsequently was extended by several executive orders issued by the Governor. On April 27, 2021, Governor DeSantis issued EO No. 21-94, extending the state of emergency for another 60 days. EO No. 21-94 expired on June 26, 2021, and was not renewed.

49. Pursuant to section 252.363(1)(b), the 90-day period for a permit holder to notify the agency of the holder's intent to exercise the tolling and extension provided under section 253.363(1)(a) commenced on June 27, 2021. That 90-day period expired on or about September 24, 2021.

50. On or about August 6, 2021, Chappell, on behalf of Abae and Galerie Bijan, timely notified DEP, by email, of Abae's intent, as the permittee of the Consolidated ERP, to exercise the tolling and extension of the permit construction phase expiration date, pursuant to section 252.363(1)(a).

51. Upon receiving this notification, DEP determined, pursuant to the plain language of section 253.363, that the Consolidated ERP met the statutory requirements to qualify for the tolling and extension.

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[9] The 2021 version of chapter 252, including section 252.363, which was in effect at the time Abae requested the tolling and extension of the term of the Consolidated ERP permit construction phase, applies to these proceedings.

[10] The term "natural emergency" is defined in section 252.34(8) as an emergency caused by a natural event, including *but not limited to*, a hurricane, a storm, a flood, severe wave action, a drought, or an earthquake. § 252.24(8), Fla. Stat. (emphasis added). A "public health emergency," as defined in section 252.34(11), expressly includes natural emergencies.

52. Among these requirements was that the holder of the permit notify the agency of its intent to toll and extend the expiration date of the permit construction phase, pursuant to section 252.363(1)(b).

53. Abae was the permittee—i.e., the holder—of the Consolidated ERP at the time Chappell notified DEP of her intent to exercise the tolling and extension provision set forth in section 252.363(1). Accordingly, the statutory requirement in section 252.363(1)(b) that the "holder" of the permit notify DEP regarding his/her/their intent to toll and extend the permit, was met.[11]

54. Additionally, in order for the tolling and extension provision to apply, the holder of the permit cannot be in significant noncompliance with the conditions of the permit, as indicated through issuance of a warning letter, notice of violation, or initiation of formal enforcement, as provided in section 252.363(1)(d)3.

55. DEP determined that Abae was not in significant noncompliance with the conditions of the Consolidated ERP.

56. By letter dated September 8, 2021, and styled "Modification of File No.: 06-0335119-001-EI"—i.e., the Extension Modification—DEP tolled and extended the term of the permit construction phase of the Consolidated ERP to July 25, 2022.

57. Abae and Galerie Bijan were unable to invoke the tolling and extension provisions of section 252.363 before October 7, 2020, because, pursuant to the Governor's executive orders, the state of emergency declaration regarding the Covid-19 pandemic was still in effect at that time. Per the plain language of section 252.363(2)(b), only after the emergency declaration was terminated, on June 26, 2021, did the 90-day notification period commence. As found above, Abae and Galerie Bijan timely notified DEP, within 90 days after the termination of the emergency declaration, of

[11] It is immaterial that the notification was also submitted on behalf of Galerie Bijan, which was not the permittee of the Consolidated ERP when Abae and Galerie Bijan notified DEP regarding the tolling and extension. The salient point is that Abae, the permittee—i.e., holder—notified the agency, as required by section 252.363(1)(b).

Abae's intent to toll and extend the expiration date of the permit construction phase of the Consolidated ERP.

58. Accordingly, it is determined that, pursuant to section 252.363, the permit construction phase expiration of the Consolidated ERP was tolled, such that it did not expire on October 7, 2020, and was extended, pursuant to the Extension Modification, through July 25, 2022.

59. Pursuant to section 252.363(2), the laws and administrative rules in effect at the time the Consolidated ERP was issued—i.e., the laws and rules in effect in 2015—apply in Case No. 22-2437.[12]

IV. No Clear Point of Entry was Provided to Challenge DEP's Agency Actions

60. As noted above, when the Consolidated ERP was issued in October 2015, Abae did not publish, or otherwise provide Petitioners and Saavedra written notice of issuance of the Consolidated ERP meeting the requirements of section 120.569(1) and rule 62-110.106(7). Thus, neither Petitioners nor Saavedra received a clear point of entry under these statutory and rule provisions, for purposes of commencing, and closing, the 14-day period, established in rule 62-110.106(3), for challenging the Consolidated ERP.

61. Likewise, when DEP issued the Extension Modification on September 8, 2021, Respondents did not publish, or otherwise provide, written notice of issuance of the Extension Modification meeting the requirements of section 120.569(1) and rule 62-110.106(7) to Petitioners and Hamby, who was trustee of the 1331 Revocable Trust at the time. Thus, Petitioners and Hamby did not receive a clear point of entry under these

[12] As discussed below, the laws and administrative rules currently in effect apply to the challenge to the Transfer Modification, Case No. 22-2491, because that modification was issued in July 2022, and, thus, was not the subject of Abae's notification of intent to exercise the tolling and extension provision.

statutory and rule provisions, for purposes of commencing and closing the 14-day period for challenging the Extension Modification.[13]

62. As noted above, Petitioners and Hamby first received notice of issuance of the Consolidated ERP, as modified by the Extension Modification, when construction of the Dock Extension commenced on or about June 8, 2022.

63. On June 17, 2022, Petitioners and Hamby requested, and were granted, an extension of time, until July 17, 2022, to file a petition challenging DEP's agency actions issuing the Consolidated ERP and Extension Modification.

64. On June 28, 2022, Petitioners and Hamby timely filed a petition with DEP, challenging these agency actions. Thereafter, on July 12, 2022, Petitioners filed their Amended Petition with DEP, challenging these agency actions.

65. While the Amended Petition was pending at DEP, and before it was referred to DOAH, DEP took agency action, on July 15, 2022, to issue the Transfer Modification, which transferred the Consolidated ERP, as modified by the Extension Modification, to Galerie Bijan. Once again, neither Abae nor Galerie Bijan published, or otherwise provided, written notice of issuance of the Transfer Modification, pursuant to section 120.569(1) and rule 62-110.106(7). Thus, neither Petitioners nor Hamby received written notice of agency action containing a clear point of entry under these statutory and rule provisions for purposes of commencing and closing the period for challenging the Transfer Modification.

66. Petitioners and Hamby received notice of DEP's agency action issuing the Transfer Modification on July 27, 2022, when their counsel checked DEP's Oculus website.

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[13] As further discussed below, DEP's determination that the Consolidated ERP met the requirements for tolling and extension under section 252.363, as memorialized in its letter modifying the Consolidated ERP, to extend the expiration date to July 25, 2022, was agency action challengeable in these proceedings under sections 120.569 and 120.57(1).

67. Two days later, on July 29, 2022, Petitioners and Hamby filed their Transfer Petition with DEP, challenging DEP's agency action in transferring the Consolidated ERP, as modified by the Extension Modification, to Galerie Bijan. Accordingly, Petitioners and Hamby timely challenged the Permit Transfer Modification.

V. The Dock Extension Meets the Requirements for Issuance of the ERP

68. The Dock Extension is a private, single-family residential dock that consists of a concrete platform located over water, supported by concrete pilings driven into the sand-mud substrate.

69. As described and depicted in the application for the Consolidated ERP and supporting evidence, no fueling station, sewage pump-out equipment, or other source of contaminants or pollution was proposed to be, or is located, on the Dock Extension. Additionally, consistent with specific condition no. 12 of the Consolidated ERP, no liveaboards currently, or will, occupy the boat slip on the Dock Extension.

70. The Dock Extension is located in a part of Sylvan Lake in which there are no mangroves, seagrasses, or other significant submerged aquatic vegetation, or significant benthic communities present.

71. As part of the Consolidated ERP application, Abae submitted seagrass and benthic surveys performed during the growing season. These surveys and other photographic and testimonial evidence confirm the lack of submerged or emergent resources at the Dock Extension site. Accordingly, the Dock Extension does not shade any seagrasses or emergent wetland vegetation.

72. As a marginal dock located over water, the Dock Extension does not, and will not, create an impoundment or otherwise have any adverse water quantity impacts.

73. As a marginal dock located over water, the Dock Extension does not, and will not, cause adverse flooding to on-site or off-site property.

74. As a marginal dock located over water, the Dock Extension will not cause adverse impacts to existing surface water storage and conveyance capabilities.

75. The Dock Extension also will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface water. There are no seagrasses or other significant benthic resources at the Dock Extension site. The surveys and photographic evidence showed the presence of oysters and encrusting algae on the pilings supporting the dock extension, which create a net positive effect on resources available to support fish and wildlife in the area. Moreover, although manatees occasion the area, no evidence was presented showing that the Dock Extension has, or will have, any adverse impacts on them or their habitat.

76. The Dock Extension will not adversely affect the quality of receiving waters—in this case, the surface waters of Sylvan Lake, which is not an Outstanding Florida Water or Outstanding Natural Resource Water—such that applicable state water quality standards will be violated. As noted above, no fueling or sewage pump-out equipment is installed on, or will be used on, the Dock Extension, and no liveaboards will moor at the Dock Extension.

77. The Dock Extension also will not cause adverse secondary impacts to water resources. To that point, the competent, substantial, and credible evidence establishes that the water depth at the end of the Dock Extension is sufficient to moor a 60-foot, 3.5-foot-draft vessel while meeting the requirement that a minimum of one foot of clearance between the deepest draft of the vessel and the top of the submerged bottom be maintained. In any event, it is noted that the one-foot clearance requirement must be met in all circumstances, regardless of the size of the vessel moored at the end of the Dock.

78. The Dock Extension will not have any impacts, including adverse impacts, on the maintenance of surface or ground water levels or surface flows.

79. The Dock Extension will not have any impacts, including adverse impacts, to any work of a water management district.

80. The Dock Extension, as proposed and constructed, functions as a boat slip that also accommodates fishing, swimming, and other in-water recreational uses.

81. The Dock Extension has been constructed and is functional for its intended uses, evidencing that Respondents had, and have, the financial, legal, and administrative capability to ensure the Dock Extension was constructed, and will be used, in accordance with the terms and conditions of the Consolidated ERP.

82. Additionally, the competent, substantial, and persuasive evidence shows that the Dock Extension, as constructed and operated, is not contrary to the public interest, pursuant to the public interest test codified in section 373.414 and rule 62-330.302.

83. Specifically, the competent substantial evidence establishes that the Dock Extension will not have any adverse effects on the public health and safety. It is of similar size and waterward extent as numerous other docks in Sylvan Lake, including the Kellys' dock, and does not unreasonably infringe on navigation, or constitute a navigational obstruction or hazard.

84. The competent substantial evidence also establishes that the Dock Extension, as permitted and constructed, does not adversely affect the property of others.

85. As further discussed below, the Dock Extension does not unreasonably interfere with Petitioners' or Intervenor's traditional, common law riparian rights. The competent substantial evidence does not show that the Dock Extension unreasonably interferes with their ability to navigate into and out of the boat slips riparian to their upland property, nor does it unreasonably

interfere with their riparian rights of fishing, swimming, or unobstructed view to the center of the water body.

86. As discussed below, the Menten Setback Waiver is not effective to waive the requirement that the Dock Extension be set back ten feet from the common riparian line separating Respondents' and Petitioners' riparian areas. However, as further discussed below, requiring Respondents to remove a length of the Dock Extension at the southern end sufficient to comply with the ten-foot setback requirement would bring the Dock Extension into full compliance with rule 18-21.004(3)(d). With this modification, the Dock Extension will not have any adverse effects on the Menten Trusts Property, in compliance with rule 62-330.302(1)(a)1. To that point, Mrs. Menten conceded that the only reason Petitioners have challenged the Consolidated ERP is because the Dock Extension encroaches into the ten-foot riparian setback from the common riparian line.

87. As discussed below, the 1331 Setback Waiver, which was executed by the then-trustee of the 1331 Land Trust in compliance with rule 18-21.004(3)(d), remains in effect, and operates to waive the ten-foot setback requirement with respect to the common riparian line separating Respondents' riparian area from the Kellys' riparian area. Accordingly, the competent, substantial evidence shows that the Dock Extension does not adversely affect the Kelly Property.

88. The competent substantial evidence establishes that there are no mangroves, seagrasses, or other significant submerged or emergent aquatic vegetation, and no significant benthic communities at the Dock Extension site. Thus, the Dock Extension will not adversely affect the conservation of fish and wildlife, including threatened and endangered species, or their habitats. In fact, as found above, oysters and encrusting algae growing on the pilings supporting the dock extension may have a net positive effect on resources available to support fish and wildlife in the area. Also discussed

above, no evidence was presented showing that the Dock Extension has, or will have, any adverse impacts on manatees or their habitat.

89. The competent substantial evidence shows that the Dock Extension does not adversely affect navigation or the flow of water, or cause harmful erosion or shoaling. To that point, the Dock Extension is supported by concrete pilings that do not impede the flow of water, or cause erosion or shoaling. Furthermore, although the presence of the Dock Extension no longer allows Petitioners to navigate their 72-foot Merritt directly across Respondents' riparian area close to the shore to access the boat slip on their dock, the competent substantial evidence establishes that Petitioners still are able to ingress to, and egress from, their boat slip and access the navigational channel in Sylvan Lake. Thus, the Dock Extension does not unreasonably interfere with, or adversely impact, their navigation. Further to that point, it is again noted that Mrs. Menten acknowledged that, without the encroachment into the ten-foot riparian setback, Petitioners would not have challenged the Consolidated ERP. This concession further evidences that the Dock Extension does not adversely affect Petitioners' ability to navigate their 72-foot Merritt.

90. With respect to Petitioners' ability to navigate from their jet ski platform—which also is installed within the ten-foot riparian setback—due to the Dock Extension, removal of a sufficient length of the southern end of the Dock Extension to create a ten-foot setback from the common riparian line, as recommended herein, will address this issue.

91. Because there are no significant ecological resources, such as seagrasses, mangroves, or significant benthic communities at, and in the immediate vicinity of, the Dock Extension site, the Dock Extension will not adversely affect the fishing or recreational values or marine productivity in the vicinity. In fact, as previously noted, the concrete pilings supporting the Dock Extension platform function as a substrate for encrusting organisms

such as oysters and algae, which may have a positive effect on fishing and marine productivity in the immediate vicinity of the Dock Extension.

92. The Dock Extension is permitted and constructed as a permanent activity, comparable in nature to other docks in Sylvan Lake.

93. The Consolidated ERP application and supporting evidence did not show the presence of any historical or archaeological resources at or near the Dock Extension site, and no evidence to the contrary was presented. Accordingly, the Dock Extension will not adversely affect significant historical and archaeological resources.

94. The Dock Extension is located in Sylvan Lake, a water body having a heavily-armored and developed shoreline, and accommodating extensive boat traffic. As such, the water is relatively turbid, with some light penetration. The seagrass surveys, benthic survey, and other related evidence shows that there are no seagrasses or significant benthic resources present at the Dock Extension site. The Dock Extension will not adversely affect the current conditions and relative value of the functions performed by the conditions and resources at the site, and, in fact, the concrete pilings, which support oysters and other encrusting organisms, may have a net positive effect on the conditions and relative value of the functions attendant to the site.

95. Finally, the competent substantial evidence does not establish that the Dock Extension will have unacceptable cumulative impacts on wetlands and other surface waters. No evidence to the contrary was presented.

96. In sum, the competent, substantial, and persuasive evidence establishes that the Dock Extension, as permitted and constructed, meets the applicable statutory and rule requirements for issuance of the ERP component of the Consolidated ERP.

VI. <u>The Dock Extension Meets the Requirements for Approval of Dock LOC Minimum-Size Marginal Dock</u>

97. The Dock Extension, as designed and permitted, is an extension of an existing private single-family residential dock designed and constructed to

provide Respondents reasonable access to the water for water-dependent activities, such as navigating, fishing, and swimming.

98. Because the Dock Extension simply extends the existing marginal dock, rather than creating a new, separate dock, it is part of the existing marginal dock, and, therefore is still a "marginal dock," as that term is defined in rule 18-21.002(35).[14]

99. Because the Dock Extension is a marginal dock, the ten-foot riparian setback applicable to marginal docks applies to the Dock Extension, unless waived by the affected adjacent upland riparian owners.[15]

100. Abae intends to moor a 60-foot deep water vessel with a 3.5-foot draft at the Respondents' dock. Specifically, the Abaes intend to construct and operate a marginal dock similar in size to the Kellys' marginal dock, in order to accommodate a vessel of sufficient size to enable them to enjoy the surrounding waters, including engaging in scuba diving.

101. To be able to moor a vessel of that size and draft on their riparian shoreline, it is necessary for Respondents to extend their existing marginal dock waterward, via the Dock Extension, to the point where there is sufficient depth for the deepest draft of the vessel to meet the one-foot bottom clearance requirement.

102. The competent, substantial, and persuasive evidence establishes that a 60-foot vessel having a 3.5-foot draft is comparable in size to, or even somewhat smaller than, the size of the average vessel that moors and navigates in Sylvan Lake.

103 The majority of docks in Sylvan Lake are marginal docks constructed adjacent to seawalls along the riparian shoreline.

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[14] "Marginal dock" is defined in the 2015 version of chapter 18-21, applicable here, as "a dock placed immediately adjacent and parallel to the shoreline or a seawall, bulkhead, or revetment."

[15] The effect of the 1331 Setback Waiver and the Menten Setback Waiver on the applicability of the ten-foot riparian setback in rule 18-21.004(3)(d) is discussed below.

104. To this point, shortly before Abae applied for the Consolidated ERP, owners of three riparian properties to the north of Respondents' Property had applied for, and were issued, DEP permits to extend marginal docks along the riparian shoreline. These docks are located on the riparian shoreline of the Malich, Malisi, and Kelly properties. In each of these cases, the riparian property owner extended an existing marginal dock to a width, length, total square footage, and waterward extent comparable to that of the Dock Extension.

105. In sum, the competent, substantial, and persuasive evidence establishes that, with the addition of the Dock Extension to the existing marginal dock, Respondents' entire dock is comparable, both in size and in waterward extent, to many other DEP-approved docks in Sylvan Lake, including the Kellys' dock at the immediately adjacent riparian property.

106. Accordingly, the competent substantial evidence establishes that, with the addition of the Dock Extension, Respondents' entire dock constitutes a minimum-size dock, as defined in rule 18-21.002(39).

107. Specifically, the evidence shows that Respondents' entire dock, with the Dock Extension, is the smallest size necessary to provide Respondents reasonable access to the water for navigating a vessel of comparable size and draft to many other vessels moored and navigating in Sylvan Lake, including the vessels owned by Petitioners and Intervenor.

108. With the addition of the Dock Extension to the existing marginal dock, Respondents are able to engage in navigation, fishing, and swimming, consistent with the immediate area's physical and natural characteristics and customary recreational and navigational practices, and docks and piers previously authorized in Sylvan Lake under chapter 18-21.

Effect of Dock Extension on Petitioners' and Intervenor's Riparian Rights

Petitioners' Riparian Rights

109. Mrs. Menten testified on behalf of Petitioners regarding the alleged effects of the Dock Extension on Petitioners' riparian rights.

110. She testified that the Dock Extension interferes with Petitioners' ability to easily navigate a 72-foot Merritt yacht[16] in and out of the boat slip on their dock. To that point, both Mrs. Menten and Michael Graham, who serves as captain of the Merritt, testified that before the Dock Extension was constructed, Graham navigated the yacht through Respondents' riparian area, where the Dock Extension now exists, and that this direct route made ingress and egress from Petitioners' boat slip easier. Now, with addition of the Dock Extension, it is necessary for Graham to approach the Mentens' boat slip from further out in Lake Sylvan, forcing him to engage the yacht's bow thrusters, motoring gear, and port motor, in order to "pivot" the Merritt in and out of the slip. According to Graham, this makes navigating the Merritt into and out of the boat slip, and into the navigational channel, more challenging.

111. However, the testimony of both Graham and Mrs. Menten established that, in fact, the Merritt is not prevented by the Dock Extension from being able to ingress to, and egress from, the boat slip, or navigate in Sylvan Lake.

112. Mrs. Menten also testified that the construction of the Dock Extension within the riparian setback interferes with their ability to use their jet skis, which can be moored on a floating jet ski platform and mooring piles that Petitioners have installed—notably, within the riparian setback on their side of the common riparian line.[17]

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[16] The Merritt is owned by Sawgrass Ford, Inc., an automobile dealership that is owned by members of the Menten family.

[17] Persuasive evidence was not presented showing that Petitioners obtained the required letter of concurrence under rule 18-21.004(3) from Respondents or their predecessors in interest, in order to lawfully install the jet ski platform within the ten-foot riparian setback on Petitioners' side of the common riparian line. Thus, to the extent the jet skis cannot be removed from the platform for use, that hardship is at least partially attributable to the fact that Petitioners placed their jet ski platform within the riparian setback, facing the Dock Extension and almost immediately adjacent to the common riparian line.

113. However, the competent substantial evidence shows that the Dock Extension, as approved and constructed, does not create a navigational hazard or otherwise unreasonably interfere with mooring or navigation of the Pisces IV, or any other vessel lawfully moored in, or navigating within, Sylvan Lake. Petitioners are still able to navigate the 72-foot Merritt in and out of their boat slip, albeit perhaps requiring more effort than before Respondents constructed the Dock Extension.

114. Further, Petitioners do not have a riparian right to navigate within *Respondents'* riparian area superior to that of Respondents' right to wharf out in their own riparian area, in order to reach water depths sufficient for mooring and navigating their vessel. *See Tewksbury v. City of Deerfield Beach*, 763 So. 2d 1071 (Fla. 4th DCA 1999)(riparian rights, which inure to the riparian owner, include the right to wharf out to navigability).

115. On questioning, Mrs. Menten acknowledged that the Dock Extension does not obstruct the Mentens' view of the center of Sylvan Lake; does not interfere with their ability to fish off of their dock; and does not otherwise interfere with their ability to use and enjoy Sylvan Lake within their riparian area.

116. In fact, she acknowledged that had Respondents not constructed the Dock Extension within the ten-foot riparian setback, Petitioners would not have challenged issuance of the Consolidated ERP in these proceedings.

117. In sum, the competent, substantial evidence establishes that the Dock Extension, as permitted and constructed, does not unreasonably interfere with Petitioners' riparian rights to navigation, swimming, fishing, and an unobstructed view of the center of the water body.

118. However, the competent substantial evidence establishes that the Menten Setback Waiver did not have the effect of waiving the ten-foot riparian line setback established in rule 18-21.004(3)(d).

119. As discussed above, the Menten Trusts Property is owned by the Peter Menten Trust and the Deborah Menten Trust, *each* of which owns an

undivided one-half interest in property. The Menten Setback Waiver was executed only by Peter Menten, as trustee of the Deborah Menten Trust, and was not executed by Deborah Menten, as trustee of the Peter Menten Trust. Only Deborah Menten—not Peter Menten—was authorized to waive the riparian setback requirement on behalf of the Peter Menten Trust.

120. Thus, the Menten Setback Waiver was executed by only one of the two affected adjacent upland riparian owners, and was not executed by the other owner.

121. The plain language of rule 18-21.004(3)(d) requires that the affected adjacent upland riparian owner grant a letter of concurrence waiving the riparian setback requirement.

122. Here, the Peter Menten Trust—which is the fee title owner of an undivided one-half interest in the Menten Trusts Property—did not execute the Menten Setback Waiver, as required by rule 18-21.004(3)(d). Thus, the Menten Setback Waiver does not operate to waive the riparian setback with respect to the Menten Trusts Property.

123. Accordingly, Respondents are required to meet the ten-foot riparian setback from the common riparian line separating their riparian area from Petitioners' riparian area.

124. As discussed in greater detail in the Conclusions of Law and Recommendation, in order for the Dock Extension to meet the ten-foot riparian line setback requirement in rule 18-21.004(3)(d), so that the letter of consent for the Dock Extension can be approved, it is recommended that a condition be included in the Consolidated ERP requiring Respondents to remove a sufficient length of the southern end of the Dock Extension to meet the ten-foot setback from the common riparian line separating Petitioners' riparian area from Respondents' riparian area.[18] With that modification the

[18] *See, e.g., Defenders of Crooked Lake v. Howard & Dep't of Env't Prot.*, Case No. 17-5328 (Fla. DOAH July 5, 2018), *modified*, Case No. 17-0792 (Fla. DEP Aug. 16, 2018)(permit conditions recommended in recommended order were adopted by DEP in final order issuing consolidated ERP).

Dock Extension will be in full compliance with the riparian line setback in rule 18-21.004(3)(d).

Intervenor's Riparian Rights

125. In 2015, Respondents obtained the 1331 Setback Waiver from Damaso Saavedra, as trustee of the 1331 Land Trust, which, at the time, owned the riparian property at 1331 East Lake Drive.

126. The 1331 Setback Waiver meets the requirement, in rule 18-21.004(3)(d), that it be obtained from the "affected adjacent upland riparian owner." The 1331 Land Trust owned the entire fee title interest in the upland property at 1331 East Lake Drive, and, thus, was *the* affected riparian upland owner at that time.[19] Saavedra, as trustee of the 1331 Land Trust, was authorized to execute, and did execute, the 1331 Setback Waiver, in accordance with rule 18-21.004(3)(d), on behalf of that trust.

127. As noted above, the Kellys purchased the real property at 1331 East Lake Drive in 2019, and placed it in the 1331 Revocable Trust, with Hamby as the trustee.

128. At that time, the Consolidated ERP for the Dock Extension had been issued, but the Dock Extension had not yet been constructed.

129. John Kelly testified that a chain of title search was performed before the 1331 Revocable Trust purchased the property, and that neither the existence of the Consolidated ERP for the Dock Extension, nor the 1331 Setback Waiver, were indicated in that search. As such, when the Kellys purchased the property, neither Hamby nor the Kellys were aware that such an approval existed. Mr. Kelly testified that the previous owner of the 1331 East Lake Drive property did not inform him regarding the setback waiver that had been executed in 2015 by Damaso Saavedra, as trustee of the 1331 East Lake Drive Land Trust. However, the effect of any deficiency in the Kellys' abstract of title or seller's disclosure is not a legal basis for

[19] By contrast, the upland riparian property at 1415 East Lake Drive has two owners, and only one of them waived the riparian line setback requirement.

denying Respondents' riparian right to wharf out to navigability if all applicable regulatory requirements are met.

130. Furthermore, the Kellys' lack of knowledge about the 1331 Setback Waiver is immaterial. Had circumstances not prevented Abae from constructing the Dock Extension within the original five-year term of the permit, the Kellys' lack of knowledge would have had no bearing then—just as it has no bearing now—on whether the Dock Extension had obtained the necessary riparian setback waiver from the owner of the 1331 East Lake Drive property. To that point, Mr. Kelly acknowledged that had Respondents constructed the Dock Extension after they purchased the property in 2019 and before the Consolidated ERP expiration date of October 2020, the Kellys would not have legal standing to challenge the 1331 Setback Waiver.

131. The Kellys became aware of the existence of the Consolidated ERP when construction of the Dock Extension commenced in June 2022. As current owners of the riparian property at 1331 East Lake Drive, they now contend that they are renouncing or revoking the 1331 Setback Waiver.

132. However, there is no express or implied statute or rule authorizing, or providing a process for, a successor riparian owner to revoke a letter of concurrence that was executed by a predecessor in interest, and complies with the applicable requirement that it (the letter of concurrence) be executed by the owner of the affected adjacent upland riparian property.[20]

133. Accordingly, it is determined that the 1331 Setback Waiver remains in effect, and has the effect of waiving the ten-foot setback from the common riparian line separating the Kellys' riparian area from Respondents' riparian area.

[20] Furthermore, as DEP cogently points out, if a subsequent riparian property owner were able to renounce or revoke a letter of concurrence that had been executed by a previous owner in conformance with rule 18-21.004(3)(d), and, thus, was is in effect, docking facilities throughout the state of Florida would be subject to being modified or removed whenever ownership of the adjacent riparian upland property changed—as happens with great frequency in Florida.

134. Mr. Kelly acknowledged, and the competent, substantial evidence shows, that the Dock Extension, as constructed, "is out into Sylvan Lake as far as our [the Kellys'] dock is." He also acknowledged that the Dock Extension is approximately the same height as the Kellys' dock. Mrs. Kelly testified that the Dock Extension may, in fact, be slightly lower in height than the Kellys' dock.

135. Mr. Kelly further acknowledged, and the competent substantial evidence shows, that the dock on the Kelly Property is constructed within the riparian setback area between the Kelly Property and Respondents' Property, and that it also is almost immediately adjacent to the common riparian line.

136. Mr. Kelly testified that the lack of an extended dock at 1401 East Lake Drive was a significant factor in the Kellys' decision to purchase the real property at 1331 East Lake Drive. As he put it, "the reason we bought the property at 1331 was because to the south we didn't have a dock extended out to the same distance that our dock is."

137. He also testified that the Dock Extension interferes with the Kellys' use and enjoyment of their riparian property because they no longer can look directly down at marine life, swim, or fish in the area riparian to the Respondents' Property, since that area is now covered with the concrete Dock Extension. He further testified that the Abaes' intent to moor a 60-foot vessel at the Dock Extension will exacerbate what he characterized as his riparian right to view marine life and fish, albeit within Respondents' riparian area.

138. However, the Kellys do not possess riparian rights to engage in these activities within *Respondents'* riparian area. *See* § 253.141, Fla. Stat. (2015)(riparian rights inure to the owner of the riparian land).

139. No credible or persuasive evidence was presented showing that the Dock Extension, and its authorized use to moor a 60-feet-long, 3.5-foot-draft vessel, in any way interferes with the Kellys' ability to enjoy boating, view marine life, or engage in fishing or swimming *within their own riparian area*.

140. Mr. Kelly also testified that from the Kellys' family room, they can see pilings with lights on the Dock Extension, which interferes with their use and enjoyment of their property.

141. However, the riparian right of view is to an unobstructed view of the center of the water body. It does not encompass lateral incursions into the field of view to the center of the water body. *See O'Donnell v. Atlantic Dry Dock Corp.*, Case No. 04-2240 (Fla. DOAH May 23, 2005; Fla. DEP Sept. 6, 2005)(lateral encroachment on field of view that does not obstruct the view to the center of the water body does not unreasonably interfere with the riparian right of view to the center of the water body). Thus, to the extent that Respondents' lights on the Dock Extension constitute a lateral "incursion" on the Kellys' view of Sylvan Lake, that "incursion" is not an infringement on a protected riparian right.

142. Mr. Kelly also acknowledged that the Kellys can still fish and swim within their own riparian area in front of their dock; that the Dock Extension does not obstruct or otherwise interfere with their view of Sylvan Lake westward, to the center of the water body; and that the Dock Extension does not interfere with the exercise of their riparian rights on their side of the common riparian line.

143. Denice Kelly testified that the Dock Extension "takes away from some of our view" to the south, where the Dock Extension is located. As she put it, "the lights they have put on their end of their dock, and it's on the side next to our fence, are very bright and they shine into our family room."

144. However, she also acknowledged that the Kellys' view to the south also is partially obstructed by their own fence, which is located between their property and Respondents' property.

145. She also acknowledged that the Kellys' view straight west to the center of Sylvan Lake is not obstructed by the Dock Extension, and is "the same view" that they (the Kellys) had before the Dock Extension was constructed.

146. In sum, the competent, substantial, and persuasive evidence establishes that the Dock Extension does not unreasonably interfere with the Kellys' riparian rights to navigation, swimming, fishing, or an unobstructed view of the center of the water body.

147. Accordingly, it is determined that the Dock Extension, as approved and constructed, does not unreasonably interfere with, or infringe on the Kellys' traditional, common law riparian rights, and, that, pursuant to the 1331 Setback Waiver, it does not violate the ten-foot riparian setback requirement in rule 18-21.004(3)(d).

The Resource Management Requirements are Met

148. The Dock Extension, as approved and constructed, meets all applicable resource management requirements in rule 18-21.004(2).

149. Specifically, the competent, substantial evidence establishes that the Dock Extension, as constructed and operated for fishing, swimming, and mooring of a 60-foot vessel having a 3.5-foot draft will not detract from, or interfere with, the use of sovereignty lands in Sylvan Lake for traditional recreational uses such as fishing, boating, and swimming; and will not detract from or interfere with the propagation of fish and wildlife.

150. Nor will the Dock Extension, as permitted and constructed, result in any significant adverse impacts to sovereignty submerged lands and associated resources.

151. The competent substantial evidence establishes that there is no submerged or wetland vegetation present at the waterward end of the Dock Extension, where a vessel would moor, ingress, and egress. Therefore, the Dock Extension will not result in any cutting, removal, or destruction of such vegetation.

152. Additionally, the competent, substantial, and persuasive evidence establishes that the Dock Extension was designed, and has been approved and constructed, to ensure there are no adverse impacts on fish and wildlife habitat, including endangered and threatened species habitat.

153. To this point, the seagrass surveys and benthic survey performed during the growing season, along with accompanying photographic evidence, showed no submerged or wetland vegetation and no significant benthic communities where the Dock Extension is located and where vessels will be moored. As such, there will be no shading of submerged or emergent wetland vegetation. Additionally, the ingress, egress, and mooring of vessels at the waterward end of the Dock Extension will not adversely impact fish, wildlife, or threatened or endangered species and their habitat.

154. No concerns were expressed by the Florida Fish and Wildlife Conservation Commission, the U.S. Army Corps of Engineers, or the National Oceanic and Atmospheric Administration regarding any potential impacts of the Dock Extension on threatened or endangered species, or fish and wildlife. This further supports the determination that the Dock Extension will not cause, or result in, adverse impacts to submerged resources, fish and wildlife, or threatened and endangered species and their habitat.

155. No evidence was presented that any cultural or historical resources are present at the Dock Extension site, or that any such resources would be adversely affected by the Dock Extension.

The Dock Extension is Not Contrary to the Public Interest

156. As further discussed below, because the Dock Extension, as approved and constructed, meets all applicable requirements in chapter 18-21, with the exception of compliance with the ten-foot riparian setback from the common riparian line adjacent to Petitioners' riparian area—which, as discussed above, is capable of being resolved by removal of a sufficient length of Dock Extension to meet the ten-foot setback requirement—the Dock Extension meets the requirement that it be not contrary to the public interest. With that modification, the Dock Extension meets all applicable standards and requirements in chapter 18-21, and, therefore, is not contrary to the public interest. *See Castoro v. Palmer*, Case Nos. 96-0736 and 96-5879 (Fla. DOAH Sept. 1, 1998; Fla. DEP Oct. 19, 1998)(concluding that in order to

demonstrate that a proposed activity is "not contrary to the public interest," it is unnecessary to show that the activity is affirmatively "in the public interest").

All Requirements for Approval of the Dock LOC are Met

157. In sum, the competent, substantial, and persuasive evidence shows that the Dock Extension, if modified to meet the ten-foot riparian setback requirement from the common riparian line separating Respondents' riparian area from Petitioners' riparian area, meets the applicable requirements in chapter 18-21 for approval of the Dock LOC.

VII. Transfer of the Consolidated ERP

158. As found above, Abae conveyed title to the Respondents' Property to Galerie Bijan on December 28, 2018.

159. On July 6, 2022, Abae filed a completed and executed the Request to Transfer Environmental Resource and/or State 404 Program Permit, Form 62-330.340(3) ("Permit Transfer Form") with DEP, requesting to transfer the Consolidated ERP, as modified by the Extension Modification, to Galerie Bijan.

160. The quit-claim deed transferring the title of the Respondents' Property from Abae to Galerie Bijan was submitted with the Permit Transfer Form, evidencing that Galerie Bijan has sufficient interest in the riparian upland to be the permittee of the Consolidated ERP, including the Dock LOC, as modified by the Extension Modification.

161. On July 18, 2022, DEP issued the Transfer Modification, transferring the Consolidated ERP, as modified by the Extension Modification, to Galerie Bijan. The Transfer Modification expressly stated that the transfer of the Consolidated ERP did not alter the expiration date of July 25, 2022, or the general, specific, and monitoring conditions in that permit.

162. Galerie Bijan is the current permittee of the Consolidated ERP, as modified by the Extension Modification and the Transfer Modification.

VIII. Petitioners' and Intervenor's Interests

Petitioners' and Intervenor's Alleged Interests

163. Petitioners allege, in the Amended Petition and the Transfer Modification Petition, that the Dock Extension interferes with their riparian rights, specifically because it is constructed within the ten-foot setback to the common riparian line, in violation of rule 18-21.004(3)(d).

164. Additionally, Petitioners allege that they are suffering injury because the Dock Extension unreasonably interferes with the riparian rights of the Menten Trusts Property, and each of the Mentens, as beneficiaries of the respective Menten Trusts.

165. Similarly, Hamby, as trustee of the 1331 Revocable Trust, alleged that the 1331 Revocable Trust, and its beneficiaries, the Kellys, were injured because the Dock Extension unreasonably interferes with the riparian rights of the 1331 Revocable Trust property, and the Kellys, as beneficiaries of the 1331 Revocable Trust.

166. Specifically, Hamby alleged that the Dock Extension encroaches into the ten-foot setback from the common riparian line between the Respondents' Property and the 1331 Revocable Trust Property, without Respondents Abae or Galerie Bijan having obtained concurrence for such encroachment, as required by rule 18-21.004(3)(d).

167. The Kellys, who now own the property located at 1331 East Lake Drive, assert the same injury to their riparian rights as was asserted by Hamby, as trustee of the 1331 Revocable Trust, in the Amended Petition and Transfer Modification Petition.

Evidence Regarding Mentens' Standing

168. At the final hearing, Mrs. Menten and Mr. Graham testified that the Dock Extension interferes with the Mentens' ability to navigate the 72-foot Merritt in and out of the boat slip on their dock.

169. However, as found above, that testimony established that Dock Extension does not prevent, obstruct, or unreasonably interfere with the ingress, egress, or navigation of the Merritt in Sylvan Lake.

170. Mrs. Menten also testified that Dock Extension, as constructed in the riparian setback, interferes with the Mentens' ability to use their jet skis, which can be moored on a floating jet ski platform and mooring piles that Petitioners have installed within the setback from the common riparian line.

171. However, as discussed above, that hardship is at least partly attributable to Petitioners having installed the jet ski platform almost immediately adjacent to the common riparian line.

172. Mrs. Menten also acknowledged that the Dock Extension does not obstruct the view from Petitioners' riparian property to the center of Sylvan Lake; does not interfere with their ability to fish from their dock; and does not otherwise interfere with their ability to use and enjoy Sylvan Lake within their riparian area.

173. She also acknowledged that, had Respondents not constructed the Dock Extension within the ten-foot riparian setback, Petitioners would not have challenged issuance of the Consolidated ERP, Extension Modification, or Transfer Modification.

Evidence Regarding Kellys' Standing

174. The Kellys also contend that the Dock Extension interferes with their riparian rights, specifically because it is constructed within the ten-foot setback to the common riparian line, in violation of rule 18-21.004(3)(d).

175. The Kellys testified that the Dock Extension interferes with the use and enjoyment of their riparian property because they no longer can look at marine life, swim, or fish in the area riparian to the Respondents' Property, and that such injury will be further exacerbated by mooring a 60-foot vessel at the waterward end of the Dock Extension.

176. However, no credible or persuasive evidence was presented showing that the Dock Extension, and its authorized use for mooring a 60-foot vessel,

interferes with the Kellys' ability to enjoy boating, view marine life, and engage in fishing and swimming within their *own* riparian area.

177. The Kellys also testified that the lights on pilings on the Dock Extension intrude on their view of Sylvan Lake, and, thus interfere with the use and enjoyment of their property. However, as discussed above, this does not amount to unreasonable interference with the Kellys' riparian right to an unobstructed view to the center of the water body. To that point, Mrs. Kelly acknowledged that the Kellys' view straight west to the center of Sylvan Lake is not obstructed by the Dock Extension, and is "the same view" that they had before the Dock Extension was constructed.

178. The competent, substantial, and persuasive evidence showed that the Kellys remain able to fish and swim within their own riparian area in front of their dock; that the Dock Extension does not obstruct or otherwise interfere with their view of Sylvan Lake westward to the center of the water body; and that it does not interfere with their riparian rights on their side of the common riparian line.

179. In sum, the competent, substantial, and persuasive evidence establishes that the Dock Extension does not unreasonably interfere with the Kellys' riparian rights to navigation, swimming, fishing, or an unobstructed view of the center of the water body.

CONCLUSIONS OF LAW

I. Jurisdiction

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

II. De Novo Proceeding, Standard of Proof, and Burdens of Proof

181. These consolidated proceedings conducted pursuant to sections 120.569 and 120.57(1) are de novo proceedings, the purpose of which is to formulate agency action, not review agency decisions made earlier and preliminarily. *Fla. Dep't of Trans. v. J.W.C. Co.,* 396 So. 2d 778, 785 (Fla. 1st

DCA 1981)(quoting *McDonald v. Dep't of Banking & Fin.*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

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

183. Section 120.569(2)(p) governs the allocation of the respective burdens of going forward with the evidence and ultimate burdens of proof in these proceedings. That statute states, in pertinent part:

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

184. The ERP component of the Consolidated ERP at issue in this proceeding is governed by chapter 373. Thus, under section 120.569(2)(p), Respondents had the initial burden of going forward to demonstrate their case of prima facie entitlement to the Consolidated ERP. Respondents met this burden by entering into evidence the application for the Consolidated

ERP, the Consolidated Notice of Intent, and other evidence at the final hearing showing their entitlement to the Consolidated ERP. Pursuant to section 120.569(2)(p), the ultimate burden of proof then shifted to Petitioners and Intervenor to prove, by a preponderance of the evidence, that the Dock Extension does not meet the requirements of section 373.414 and implementing rules, such that the Consolidated ERP should be denied.

185. As further discussed below, Respondents have demonstrated, by a preponderance of the competent, substantial, and persuasive evidence, that the Dock Extension meets the requirements in section 373.414 and all applicable rules codified in chapter 62-330 and the incorporated Environmental Resource Permit Applicant's Handbook, Volume I ("Volume I").

186. Thus, Petitioners and Intervenor failed to carry their burden to show that the Dock Extension does not meet the applicable statutory and rule requirements for issuance of the ERP component of the Consolidated ERP.

187. Chapter 253 is not among the statutes subject to the shifting burden of proof established in section 120.569(2)(p). Thus, Respondents, as the applicants for issuance of the Dock LOC component of the Consolidated ERP, bear the ultimate burden to prove entitlement to the Dock pursuant to chapter 253 and the applicable rules codified in chapter 18-21.

188. As further discussed below, Respondents have demonstrated, by a preponderance of the competent, substantial, and persuasive evidence, that the Dock Extension meets the applicable requirements in chapter 18-21 for issuance of the Dock LOC portion of the Consolidated ERP.

189. As found above, and further discussed below, pursuant to section 252.363, the versions of the applicable Florida Statutes and Florida Administrative Code rules in effect in 2015 govern issuance of the Consolidated ERP, as modified by the Extension Modification.

190. As further discussed below, the Transfer Modification is governed by the current version of the rules governing transfers of permits.

191. Respondents met their burden to show, by the preponderance of the competent, substantial, and persuasive evidence, that the applicable requirements of rule 62-330 are met such that the Transfer Modification should be issued.

III. Petitioners and Intervenor Timely Challenged DEP's Agency Actions

192. Respondents did not publish or otherwise provide notice to Petitioners in 2015, when the 2015 Consolidated ERP was issued, or in 2021, when the Extension Modification was issued. When Petitioners and Hamby received actual notice of these agency actions by observing the commencement of construction of the Dock Extension in June 2022, they timely challenged these agency actions. *See Capeletti v. State, Dep't of Transp.*, 362 So. 2d 346 (Fla. 1st DCA 1978)(failure to provide a written clear point of entry, as provided by statute or rule, to challenge agency action results in that agency action being preliminary only, and the persons whose substantial interests are determined or affected may challenge that action at any time until they have received such written clear point of entry, and either challenged the agency action or waived the right to such challenge). *See also Wentworth v. Dep't of Env't Prot.*, 771 So. 2d 1279 (Fla.4th DCA 2000)(dock permittee's failure to provide notice and a clear point of entry to challenge the permit resulted in neighbors being able to challenge the permit even after construction of the dock had commenced).

193. On this point, Respondents contend that the Kellys' intervention into these proceedings is untimely. First, Florida Administrative Code Rule 28-106.205, governing intervention into administrative proceedings, provides that motions to intervene must be filed at least 20 days before the final hearing, *except for good cause*. For the reasons discussed at length in the Order Granting Motion to Intervene issued on June 2, 2023, the undersigned determined that good cause existed to allow the Kellys to intervene to protect their interests as the adjacent upland riparian owners.

194. Furthermore, the Kellys' interests asserted in these proceedings are the *exact same interests* asserted by Hamby, as the trustee of the 1331 Revocable Trust, who challenged the Consolidated ERP, Extension Modification, and Transfer Modification on behalf of the Kellys, as beneficiaries of the 1331 Revocable Trust. Thus, the Kellys' participation comports with established Florida case law holding that intervenors into administrative proceedings may not raise new issues. *See Env't Confederation of Sw. Fla., Inc. v. IMC Phosphates, Inc.*, 857 So. 2d 207, 210-11 (Fla. 1st DCA 2003); *Nat'l Wildlife Fed'n v. Glisson*, 531 So. 2d 996 (Fla. 1st DCA 1988)(intervenor may not inject new issue into a case). *See also Humana of Fla., Inc. v. Dep't of HRS*, 500 So. 2d 186 (Fla. 1st DCA 1986). Respondents did not allege, or prove by evidence at the final hearing, any concrete, real circumstances demonstrating that they would be prejudiced by allowing the Kellys to participate to assert the exact same interests that Hamby asserted in the Amended Petition and Transfer Petition.

195. Also related to this point, DEP and Respondents contend that DEP's issuance of the Extension Modification pursuant to section 252.363 was not agency action because the tolling and extension "automatically" attaches, by operation of law, to a permit or other approval once the holder of the permit or other approval notifies DEP of his/her/its intent to exercise the tolling and extension granted under section 252.363(1)(a). This position ignores two key points.

196. The first is that DEP had to determine—i.e., *make factual decisions*—whether the requirements for tolling and extension of the Consolidated ERP were met. These included determining whether the holder of the permit, as opposed to another person or entity, requested the tolling and extension; whether the tolling and extension notification was timely submitted within 90 days after termination of the emergency declaration; and whether the holder permit "is in significant noncompliance with the conditions of the permit."

197. Stated another way, once the permit holder notifies the agency of its intent to exercise the tolling and extension provision, the agency must determine *whether* the permit and permit holder meet the statutory requirements. The agency's decision that the permit holder qualifies for the statutory tolling and extension provisions constitutes an agency decision—i.e., action agency.[21]

198. *Friends of the Hatchineha, Inc. v. Department of Environmental Regulation*, 580 So. 2d 267 (Fla. 1st DCA 1991), is on point. At issue in *Friends* was whether a determination by DEP's predecessor agency, the Department of Environmental Regulation ("DER"), that an activity (in that case, building a driveway through DER-jurisdictional wetlands) qualified for a statutory exemption from permitting. DER argued (as DEP does here) that because the activity met the criteria for the statutory exemption, the statute was "self-executing"—i.e., the exemption automatically applied by operation of law—and, therefore, DER did not take agency action in determining that the exemption applied. The court rejected that argument, in part relying on *Town of Palm Beach v. Department of Natural Resources*, 577 So. 2d 1383 (Fla. 4th DCA 1991), in which the court noted that the process of deciding whether a statutory exemption applies necessarily is a fact-based determination, and, therefore, constitutes agency action challengeable in a proceeding under section 120.57(1) by persons whose substantial interests are determined or reasonably may be affected. *See State ex rel. Dep't of Gen. Servs. v. Willis*, 344 So. 2d 580 (Fla. 1st DCA 1977)(agency decision-making matures into agency action, as a rule or an order, that is challengeable in an administrative proceeding).

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[21] Consider the scenario in which a person or entity notifies the agency that it intends to exercise the tolling and extension provision in section 252.363(1), and the agency determines, and notifies the person or entity in writing, that said person or entity does *not* qualify for the tolling and extension. It cannot be seriously contended that such a decision on DEP's part would *not* constitute a decision that determines the person's or entity's substantial interest—i.e., constitutes agency action—that could be challenged under section 120.57(1).

199. Second, the extension of the permit construction phase deadline modifies the Consolidated ERP, which is an order. The modification of the Consolidated ERP, which changes a condition of that order, itself constitutes an order, which, by definition, is agency action. *See* § 120.52(2), Fla. Stat. ("agency action means the whole or part of a rule or order, or the equivalent"); *see Gen. Dev. Utils., Inc. v. Fla. Dep't of Env't Regul.*, 417 So. 2d 1068, 1070 (Fla. 1st DCA 1982)(agency letter which made a determination, reduced it to writing, and disseminated it to the affected party constituted agency action challengeable in a hearing under section 120.57(1)).

200. For these reasons, the Extension Modification issued on September 8, 2021, constitutes agency action that is subject to challenge, and that has been timely challenged, in these proceedings.

201. Petitioners' challenge to the Transfer Modification was also timely filed with DEP.

202. In sum, Petitioners timely challenged DEP's agency actions issuing the Consolidated Approval, issuing the Extension Modification, and issuing the Transfer Modification.

IV. <u>The Consolidated ERP was Tolled and Extended under Section 252.363</u>

203. Section 252.363, titled "Tolling and extension of permits and other authorizations," states, in pertinent part:

> (1) (a) The declaration of a state of emergency issued by the Governor for a natural emergency tolls the period remaining to exercise the rights under a permit or other authorization for the duration of the emergency declaration. Further, the emergency declaration extends the period remaining to exercise the rights under a permit or other authorization for 6 months in addition to the tolled period. This paragraph applies to the following:
>
> * * *

> 3. The expiration of a permit issued by the Department of Environmental Protection or a water management district pursuant to part IV of chapter 373.
>
> * * *
>
> (b) Within 90 days after the termination of the emergency declaration, the holder of the permit or other authorization shall notify the issuing authority of the intent to exercise the tolling and extension granted under paragraph (a). The notice must be in writing and identify the specific permit or other authorization qualifying for extension.
>
> * * *
>
> (d) This subsection does not apply to:
>
> * * *
>
> 3. The holder of a permit or other authorization who is determined by the authorizing agency to be in significant noncompliance with the conditions of the permit or other authorization through the issuance of a warning letter or notice of violation, the initiation of formal enforcement, or an equivalent action.
>
> * * *
>
> (2) A permit or other authorization that is extended shall be governed by the laws, administrative rules, and ordinances in effect when the permit was issued, unless any party or the issuing authority demonstrates that operating under those laws, administrative rules, or ordinances will create an immediate threat to the public health or safety.

204. Abae, as the permit holder of the Consolidated ERP, along with Galerie Bijan, timely notified DEP of the intent to exercise the tolling and

extension, pursuant to section 252.363, to toll the five-year term of the Consolidated ERP construction phase permit and extend its term.

205. DEP verified that Abae, as the permittee—i.e., holder—of the Consolidated ERP submitted the notification, and confirmed that Abae was not in substantial noncompliance with the conditions of the Consolidated ERP.

206. Having made these determinations, DEP issued the September 8, 2021, Extension Modification, verifying applicability of the tolling and extension statute to the Consolidated ERP, and extending the construction phase permit expiration to July 25, 2022.

207. Contrary to Petitioners' and Intervenor's contention, the tolling and extension statute applies to the Dock LOC component, as well as the Dock ERP component, of the Consolidated ERP.

208. An LOC authorizing the use of sovereignty submerged lands is a component of a consolidated ERP issued pursuant to section 373.427, and, thus, is part of a permit "issued by [DEP] … *pursuant to part IV of chapter 373*." § 252.363(1)(a), Fla. Stat. (emphasis added). This determination is reinforced by section 373.427(1), which provides that if an administrative proceeding pursuant to sections 120.569 and 120.57 is timely requested, "the case shall be conducted as a *single consolidated administrative proceeding*." § 373.427(1), Fla. Stat. (emphasis added).

209. Thus, pursuant to the plain language of section 252.363(1)(a) and (c), a letter of consent is one of the enumerated types of authorizations that qualifies for the tolling and extension under section 252.363.[22]

[22] A letter of consent authorized as part of a consolidated environmental permit is not a separate, stand-alone sovereignty lands approval issued pursuant to chapter 253—which, per the plain terms of section 252.363(1), would not qualify for the tolling and extension. To illustrate, section 253.03(13) establishes a completely separate process for review and approval of applications to use state-owned submerged lands that are not part of a consolidated ERP issued under section 373.427 or rule 18-21.00401.

210. Furthermore, rule 18-21.00401, which establishes the requirements and procedures for concurrent review of activities that require both an ERP and sovereignty submerged lands approval, lists section 373.427 as the rulemaking authority and specific statutory authority for that rule. This further supports the conclusion that when a letter of consent is part of a consolidated ERP, it (the letter of consent) is issued *pursuant to* chapter 373, Part IV.

211. Thus, contending that a letter of consent approved in a consolidated ERP issued pursuant to section 373.427 is not part of that permit requires a strained reading of that statute that disregards the *consolidated* nature of that approval, which is issued *pursuant to part IV of chapter 373*.

212. Consistent with the plain language of section 252.363, it is determined that the Dock LOC, which was authorized as part of the Consolidated ERP, did not expire.[23] *See Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)(when the language of a statute is clear, the statute must be given its plain and obvious meaning).

213. As found above, pursuant to section 252.363(2), the versions of chapter 373 and chapters 62-330 and 18-21 that were in effect in 2015 govern the Consolidated ERP, as extended by the Extension Modification, in these proceedings.

V. The Dock Extension Meets the Requirements for Issuance of the ERP Component of the Consolidated ERP

214. The ERP component of the Consolidated ERP must meet the requirements of section 373.414 and chapter 62-330, including applicable incorporated provisions of the Applicant's Handbook, Volume I.

215. An applicant for an ERP must provide reasonable assurance that the authorized activity will meet the applicable statutory and rule requirements.

[23] It is further noted that, under any circumstances, letters of consent, unlike other types of sovereignty submerged lands authorizations such as leases and easements, do not contain expiration dates, and, thus, do not expire per provision of statute or rule.

216. The "reasonable assurance" standard requires the applicant to demonstrate the "substantial likelihood" that the proposed project will be successfully implemented and will not cause pollution in contravention of DEP rules. It does not require absolute guarantees that the project will not violate applicable requirements under any and all circumstances. To that point, the reasonable assurance standard does not require the applicant to eliminate all contrary possibilities, no matter how remote, or to address impacts that are theoretical or not reasonably likely to occur. *See Save Anna Maria, Inc. v. Dep't of Transp.*, 700 So. 2d 113, 117 (Fla. 2d DCA 1997); *see also Metro. Dade Cnty. v. Coscan Fla., Inc.*, 609 So. 2d 644, 648 (Fla. 3d DCA 1992); *McCormick v. City of Jacksonville*, Case No. 88-2283 (Fla. DOAH Oct. 16, 1989; Fla. DER Jan. 22, 1990).

217. Respondents have provided reasonable assurance that all applicable requirements in the 2015 versions of section 373.414 and chapter 62-330 are met for issuance of the Dock ERP component of the Consolidated ERP.

218. Section 373.414 states, in pertinent part:

> (1) As part of an applicant's demonstration that an activity regulated under this part will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district, the governing board or the department shall require the applicant to provide reasonable assurance that state water quality standards applicable to waters as defined in s. 403.031(13) will not be violated and reasonable assurance that such activity in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), is not contrary to the public interest.
>
> * * *
>
> (a) In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), and is regulated under this part, is not contrary to the public interest or is clearly in the public interest, the governing board

> or the department shall consider and balance the following criteria:
>
> 1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
>
> 2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
>
> 3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
>
> 4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
>
> 5. Whether the activity will be of a temporary or permanent nature;
>
> 6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and
>
> 7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

219. Based on the findings previously discussed herein, it is concluded that the Dock Extension, as permitted and constructed, meets all applicable requirements of section 373.414, and, thus, is not contrary to the public interest.

220. Rules implementing the statutory requirements for issuance of ERPs are codified in rules 62-330.301 and 62-330.302 and Volume I.

221. Rule 62-330.301, titled "Conditions for Issuance of Individual and Conceptual Approval Permits," as pertinent, states:

(1) To obtain an individual or conceptual approval permit, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of the projects regulated under this chapter:

(a) Will not cause adverse water quantity impacts to receiving waters and adjacent lands;

(b) Will not cause adverse flooding to on-site or off-site property;

(c) Will not cause adverse impacts to existing surface water storage and conveyance capabilities;

(d) Will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters;

(e) Will not adversely affect the quality of receiving waters such that the state water quality standards set forth in Chapters 62-4, 62- 302, 62-520, and 62-550, F.A.C., including the antidegradation provisions of paragraphs 62-4.242(1)(a) and (b), F.A.C., subsections 62- 4.242(2) and (3), F.A.C., and Rule 62-302.300, F.A.C., and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters set forth in subsections 62-4.242(2) and (3), F.A.C., will be violated;

(f) Will not cause adverse secondary impacts to the water resources. In addition to the criteria in this subsection and in subsection 62-330.301(2), F.A.C., in accordance with Section 373.4132, F.S., an applicant proposing the construction, alteration, operation, maintenance, abandonment, or removal of a dry storage facility for 10 or more vessels that is functionally associated with a boat launching area must also provide reasonable assurance that the facility, taking into consideration any secondary impacts, will meet the provisions of paragraph 62-330.302(1)(a), F.A.C., including the potential adverse impacts to manatees;

> (g) Will not adversely impact the maintenance of surface or ground water levels or surface water flows established pursuant to Section 373.042, F.S.;
>
> (h) Will not cause adverse impacts to a Work of the District established pursuant to Section 373.086, F.S.;
>
> (i) Will be capable, based on generally accepted engineering and scientific principles, of performing and functioning as proposed;
>
> (j) Will be conducted by a person with the financial, legal and administrative capability of ensuring that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued[.]

222. Pursuant to the findings of fact set forth above, it is concluded that the Dock Extension, as permitted and constructed, meets all applicable requirements of rule 62-330.301 for issuance of the ERP component of the Consolidated ERP.

223. Rule 62-330.302, titled "Additional Conditions for Issuance of Individual and Conceptual Approval Permits," states, in pertinent part:

> (1) In addition to the conditions in Rule 62-330.301, F.A.C., to obtain an individual or conceptual approval permit under this chapter, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, repair, removal, and abandonment of a project:
>
> (a) Located in, on, or over wetlands or other surface waters will not be contrary to the public interest, or if such activities significantly degrade or are within an Outstanding Florida Water, are clearly in the public interest, as determined by balancing the following criteria as set forth in sections 10.2.3 through 10.2.3.7 of Volume I:
>
> 1. Whether the activities will adversely affect the public health, safety, or welfare or the property of others,

> 2. Whether the activities will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats,
>
> 3. Whether the activities will adversely affect navigation or the flow of water or cause harmful erosion or shoaling,
>
> 4. Whether the activities will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity,
> 5. Whether the activities will be of a temporary or permanent nature,
>
> 6. Whether the activities will adversely affect or will enhance significant historical and archaeological resources under the provisions of Section 267.061, F.S.; and,
>
> 7. The current condition and relative value of functions being performed by areas affected by the proposed activities. (b) Will not cause unacceptable cumulative impacts upon wetlands and other surface waters as set forth in sections 10.2.8 through 10.2.8.2 of Volume I.
>
> (b) Will not cause unacceptable cumulative impacts upon wetlands and other surface waters as set forth in sections 10.2.8 through 10.2.8.2 of
> Volume I.

224. Pursuant to the findings of fact set forth above, it is concluded that the Dock Extension, as permitted and constructed, meets all applicable requirements of rule 62-330.302 for issuance of the ERP component of the Consolidated ERP.

VII. Dock Extension Meets the Requirements for Approval of the Dock LOC

A. Minimum-Size Marginal Dock

225. Rule 18-21.003(35) defines a "marginal dock" as a "dock placed immediately adjacent and parallel to the shoreline or seawall, bulkhead or revetment."

226. Based on the evidence discussed above, it is concluded that the Dock Extension is a marginal dock under the version of chapter 18-21 in effect in 2015.

227. Rule 18-21.003(39), in pertinent part, defines a "minimum-size dock or pier" as "a dock or pier that is the smallest size necessary to provide reasonable access to the water for navigating, fishing, or swimming based on consideration of the immediate area's physical and natural characteristics, customary recreational and navigational practices, and docks and piers previously authorized under this chapter."

228. As discussed above, the competent, substantial, and persuasive evidence establishes that Dock Extension, along with the existing marginal dock, is the smallest size necessary to provide Respondents reasonable access to the water for mooring and navigating a 60-foot vessel having a 3.5-foot draft, due to insufficient water depths at the waterward edge of the existing marginal dock.

229. Moreover, the determination that the Dock Extension, added to the original dock, is a minimum-size dock considers the customary navigational practices in Sylvan Lake, which entail the mooring and navigating of comparably large vessels—including the 72-foot Merritt used by the Mentens and moored at their dock, and the Kellys' vessel, which they moor at their comparably-sized marginal dock.

230. Petitioners and Intervenor contend that Respondents' existing 880-square-foot dock is the minimum size necessary to enable Respondents to have reasonable access to the water for navigation, fishing, and swimming.

This position disregards that determining whether a dock is "minimum-sized" under rule 18-21.003(39) necessarily entails consideration of customary recreational and navigational practices, and previously-approved docks and piers.

231. The competent, substantial, and persuasive evidence establishes that numerous other marginal docks of comparable size—including the Kellys' dock—historically and recently have been approved in Sylvan Lake, and that these docks accommodate the mooring and navigation of large vessels comparable in size, or larger, than the vessel the Abaes intend to moor at the Dock Extension for use to navigate in Sylvan Lake and surrounding waters.

232. For these reasons, and based on the evidence, extensively discussed above, it is concluded that the Dock Extension is a minimum-size dock under the version of rule 18-21.003(39) in effect in 2015.

B. Compliance with Management Policies, Standards, and Criteria

233. Rule 18-21.004 establishes the management policies, standards, and criteria for determining whether to approve, approve with conditions, or deny requests to conduct activities on sovereignty submerged lands.

General Proprietary Requirements

234. Rule 18-21.004(1), which establishes the general proprietary requirements, states, in pertinent part:

> (1) General Proprietary.
>
> (a) For approval, all activities on sovereignty lands must be not contrary to the public interest, except for sales which must be in the public interest.
>
> (b) All leases, easements, deeds or other forms of approval for sovereignty land activities shall contain such terms, conditions, or restrictions as deemed necessary to protect and manage sovereignty lands.
>
> * * *

> (g) Activities on sovereignty lands shall be limited to water dependent activities only unless the board determines that it is in the public interest to allow an exception as determined by a case by case evaluation.

Not Contrary to the Public Interest

235. Based on the competent, substantial, and persuasive evidence, discussed above, it is concluded that the Dock Extension is not contrary to the public interest, as required by rule 18-21.004(1)(a).

236. Specifically, all applicable requirements of rule 18-21.004 are met, with the exception of the requirement in rule 18-21.004(3)(d) that the Dock Extension be set back ten feet from the common riparian line separating Respondents' riparian area from Petitioners' riparian area. With the incorporation of a condition requiring that Respondents remove a sufficient length of the Dock Extension to meet the ten-foot setback requirement, it is concluded that the Dock Extension is not contrary to the public interest.

237. This conclusion is consistent with established case law interpreting the "not contrary to the public interest" standard, which holds that it is not necessary for an applicant for sovereignty submerged lands use authorization to show that the activity is affirmatively "in the public interest," as that term is defined in rule 21-18.003(51). Rather, it is sufficient that the applicant show that there are few, if any demonstrable, environmental, social, and economic costs of the proposed activity. *Castoro v. Palmer*, Case Nos. 96-0736 and 96-5879 (Fla. DOAH Sept. 1, 1998; Fla. DEP Oct. 19, 1998).

238. Furthermore, case law interpreting the public interest test in rule 18-21.004(1)(a) applicable to sovereignty submerged lands use approvals holds that when proposed activities meet the applicable standards and requirements in chapter 18-21, those activities are presumed to be not contrary to the public interest. *See City of Jacksonville v. Dames Point Work Boats, LLC,* Case No. 18-5246 (Fla. DOAH Mar. 1, 2019), *modified in part*,

Case No. 18-1151 (Fla. DEP Apr. 12, 2019); *Spinrad v. Guerro and Dep't of Env't Prot.*, Case No. 13-2254 (Fla. DOAH July 25, 2014), *modified in part*, Case No. 13-0858 (Fla. DEP Sept. 8, 2014); *Haskett v. Rosati and Dep't of Env't Prot.*, Case No. 13-0465 (Fla. DOAH July 31, 2013), *modified in part*, Case No. 13-0040 (Fla. DEP Oct. 29, 2013).

239. Here, the competent, substantial, and persuasive evidence establishes that, with the removal of a portion of the Dock Extension at the southern end sufficient to meet the ten-foot riparian line setback requirement, there are no demonstrable environmental, social, and economic costs of the proposed activity.

240. Respondents demonstrated that, with the exception of the ten-foot riparian setback from the southern common riparian line—which will be addressed in the Recommendation that a permit condition be included in the final Consolidated ERP requiring that a sufficient length at the southern end of the Dock Extension be removed to meet this setback requirement—all applicable requirements of chapter 18-21 are met.

241. In sum, Petitioners and Intervenor did not present persuasive evidence showing that the Dock Extension, subject to the Recommendation herein, does not meet the applicable requirements of chapter 18-21. Thus, they failed to rebut the presumption, established in case law, that the Dock Extension, as proposed to be modified, is not contrary to the public interest.

242. Accordingly, it is concluded that the Dock Extension, as recommended to be modified, is not contrary to the public interest.

Conditions in Consolidated ERP Protect and Manage Sovereignty Submerged Lands

243. Rule 18-21.003(1)(b) requires all forms of approval for activities on sovereignty lands to contain such terms, conditions, and restrictions as deemed necessary to protect and manage sovereignty lands.

244. The Consolidated ERP contains a general condition which states that the sovereignty submerged lands on which the Dock Extension is constructed

may only be used for the specified activity—here, to construct and operate the Dock Extension for the purpose of providing Respondents reasonable access to the water for the water dependent activities of ingress, egress, boating, fishing, and swimming.

245. The Consolidated ERP also includes a general condition requiring the Dock Extension to be constructed and used to avoid and minimize adverse impacts to resources. The seagrass surveys, benthic surveys, and other related evidence regarding the environmental conditions at the Dock Extension site show that there are no significant environmental or other resources that will be adversely impacted by the dock.

246. The Consolidated ERP also contains a condition requiring that the construction, use, and operation of the Dock Extension not adversely affect endangered or threatened species, or species of special concern, as listed in specified rules.

247. Here, the evidence showed that the waters in the vicinity of the Dock Extension are frequented by manatees—as are the waters adjacent to the Kellys' and Mentens' docks. However, no credible or persuasive evidence was presented showing that the Dock Extension, as proposed to be used for boating, fishing, and swimming, will adversely impact manatees.

248. The Consolidated ERP also contains a general condition prohibiting the Dock from unreasonably interfering with riparian rights. The competent, substantial, and persuasive evidence establishes that the Dock Extension does not, and will not, unreasonably interfere with Petitioners' and Intervenor's riparian rights—which, per section 253.141, inure to their *own* riparian areas—to engage in the traditional activities of navigation, fishing, and swimming.

249. As discussed herein, the competent substantial evidence establishes that the Dock Extension encroaches into the ten-foot riparian setback from the common riparian line separating Respondents' riparian area from Petitioners' riparian area, contrary to rule 18-21.004(3)(d). Accordingly, it is

recommended that a condition be added to the Consolidated ERP, requiring removal of part of the Dock Extension sufficient to meet the requirement that the Dock Extension be set back ten feet from the common riparian line separating Respondents' riparian area from Petitioners' riparian area.

250. The Consolidated ERP also contains a general condition prohibiting the Dock Extension from creating a navigational hazard. There was no competent, substantial, or persuasive evidence presented that the Dock Extension creates a navigational hazard. To that point, the evidence shows the Dock Extension is comparable in size and waterward extent to numerous other marginal docks in Sylvan Lake, including the Kellys' dock, which also was approved by DEP.

251. Additionally, the Consolidated ERP contains specific conditions to protect and manage sovereignty lands and related resources.

252. Among these are the requirement, in specific condition No. 10 of the Consolidated ERP, that vessels utilizing the Dock Extension maintain a minimum of one foot clearance between the deepest draft of the vessel with the engine in the down position and the top of the submerged bottom, in order to preclude bottom scouring or prop dredging. As discussed herein, the Dock Extension was constructed specifically to enable Respondents to moor a 60-foot long, 3.5-foot draft vessel, while meeting the requirement to maintain the one foot of clearance above the bottom at all times. The Dock Extension is constructed, and will be operated, to meet this one-foot clearance requirement.

253. The Consolidated ERP also contains conditions to protect manatees during in-water work, and conditions governing construction and operation of the Dock Extension to protect the smalltooth sawfish and sea turtles.

254. These conditions of the Consolidated ERP are sufficient to protect and manage sovereignty lands authorized to be used by the Dock Extension.

The Dock Extension is Used for Water Dependent Activities

255. The competent, substantial, and persuasive evidence establishes that the Dock Extension is used for the water dependent activities of ingress and egress, boating, swimming, and fishing.

256. Accordingly, it is concluded that the Dock Extension, and the activities it supports, meet the water-dependency requirement in rule 18-21.004(1)(d).

Resource Management Standards and Requirements

257. Rule 18-21.004(2) establishes the resource management standards and requirements for use of sovereignty submerged lands. This rule states, in pertinent part:

> (2) Resource Management.
>
> (a) All sovereignty lands shall be considered single use lands and shall be managed primarily for the maintenance of essentially natural conditions, propagation of fish and wildlife, and traditional recreational uses such as fishing, boating, and swimming. Compatible secondary purposes and uses which will not detract from or interfere with the primary purpose may be allowed.
>
> (b) Activities which would result in significant adverse impacts to sovereignty lands and associated resources shall not be approved unless there is no reasonable alternative and adequate mitigation is proposed.
>
> (c) The Department of Environmental Protection biological assessments and reports by other agencies with related statutory, management, or regulatory authority may be considered in evaluating specific requests to use sovereignty lands. Any such reports sent to the department in a timely manner shall be considered.
>
> (d) Activities shall be designed to minimize or eliminate any cutting, removal, or destruction of

> wetland vegetation (as listed in chapter 62-340, F.A.C.) on sovereignty lands.
>
> * * *
>
> (i) Activities on sovereignty lands shall be designed to minimize or eliminate adverse impacts on fish and wildlife habitat, and other natural or cultural resources. Special attention and consideration shall be given to endangered and threatened species habitat.

258. The competent, substantial, and persuasive evidence establishes that no significant benthic communities, seagrasses, or other biological resources exist at the location of the Dock Extension.

259. Seagrass surveys performed by Chappell in 2015 and 2021 showed no seagrasses present at the Dock Extension site.

260. The benthic surveys performed at the Dock Extension site, along with other evidence presented, show the presence of a turbid water column, a sand-mud substrate supporting small amounts of filamentous algae and burrows of sub-benthic organisms, and a few fish. The surveys also showed oysters and algae growing on the concrete pilings that support the Dock Extension. Rip-rap added below the Dock Extension provides additional habitat for the growth of encrusting organisms, including oysters and algae.

261. Testimony was presented to the effect that seagrass grows "near" the location of the Dock Extension, and that if not shaded by a dock exceeding 1,000 square feet in length, seagrass "could conceivably" establish on the substrate at the Dock Extension site. However, the competent, substantial, and persuasive evidence shows that no seagrass is currently growing on the substrate at the location of the Dock Extension—nor did it grow on the substrate in Respondents' riparian area when only the 880-square-foot dock existed there, likely indicating that the Dock Extension site is not favorable "potential" habitat for seagrass growth. In any event, the resource management rules do not require that "potential" habitat be avoided.

262. Additionally, the benthic surveys and other competent, substantial, and persuasive evidence showed no emergent grasses or other wetland vegetation present at the Dock Extension site.

263. The benthic surveys and other competent, substantial, and persuasive evidence also showed that the Dock Extension, as permitted and constructed, has no adverse impacts on fish and wildlife habitat, including threatened and endangered species and their habitat.

264. Furthermore, as found above, none of the other agencies having statutory, management, or regulatory authority over biological resources, including fish, wildlife, and threatened and endangered species, provided comments to DEP cautioning about, or suggesting conditions to address, adverse impacts fish and wildlife, including threatened and endangered species or their habitat.[24]

265. Accordingly, for the reasons discussed herein, it is concluded that the Dock Extension, as permitted in the Consolidated Approval, and as constructed, meets the applicable resource management standards and requirements in rule 18-21.004(2).

Riparian Rights

266. Rule 18-21.004(3) establishes requirements regarding the implementation and protection of riparian rights. This rule states, in pertinent part:

> (a) None of the provisions of this rule shall be implemented in a manner that would unreasonably infringe upon the traditional, common law riparian rights, as defined in section 253.141, F.S., of upland property owners adjacent to sovereignty submerged lands.
>
> (b) Satisfactory evidence of sufficient upland interest is required for activities on sovereignty

[24] This is unsurprising, given that the Dock Extension is located in area having no significant environmental resources, and in a water body having an extensively-armored shoreline and heavy boat traffic.

> submerged lands riparian to uplands, unless otherwise specified in this chapter. Public utilities and state and other governmental agencies proposing activities such as utility lines, roads or bridges must obtain satisfactory evidence of sufficient upland interest prior to beginning construction, but need not provide such evidence as part of any required application. Satisfactory evidence of sufficient upland interest is not required for activities on sovereignty submerged lands that are not riparian to uplands, or when a governmental entity conducts restoration and enhancement activities, provided that such activities do not unreasonably infringe on riparian rights.
>
> (c) All structures and other activities must be designed and conducted in a manner that will not unreasonably restrict or infringe upon the riparian rights of adjacent upland riparian owners.
>
> (d) Except as provided herein, all structures, including mooring pilings, breakwaters, jetties and groins, and activities must be set back a minimum of 25 feet inside the applicant's riparian lines. Marginal docks, however, must be set back a minimum of 10 feet. Exceptions to the setbacks are: … when a letter of concurrence is obtained from the affected adjacent upland riparian owner[.]

267. The competent, substantial, and persuasive evidence establishes that the Dock Extension does not unreasonably infringe on Petitioners' and Intervenor's common law riparian rights of ingress, egress, boating, fishing, and swimming, as defined in section 253.141.

268. Moreover, the Dock Extension does not interfere with Petitioners' or Intervenor's riparian right to an unobstructed view of the center of the water body. In fact, Mrs. Menten and Mrs. Kelly both conceded that the Dock Extension does not obstruct their views to the west, to the center of the water body. *See O'Donnell v. Atlantic Dry Dock Corp.*, Case No. 04-2240 (Fla. DOAH May 23, 2005; Fla. DEP Sept. 6, 2005)(lateral encroachment on line-

of-sight to the channel and center of the water body constituted an "annoyance" which did not rise to the level of a unreasonable interference with, or obstruction of, a riparian owner's view of the channel or center of the water body); *Castoro*, Case Nos. 96-0736 and 96-5879 (Fla. DOAH Sept. 1, 1998; Fla. DEP Oct. 19, 1998)(while a 227-foot-long dock with terminal platform and boat lift would have "some impact" on an adjacent riparian owner's view of the water body, it did not interfere with the view of the center of the water body such that it constituted an unreasonable infringement on the riparian right of unobstructed view).

269. Accordingly, it is concluded that the Dock Extension meets the requirements of rule 18-21.004(3)(a) and (c) that the structure not unreasonably restrict or infringe on the riparian rights of Petitioners and Intervenor.

270. At the time Abae applied for, and was issued the Consolidated Approval, she was the fee simple owner of the riparian upland property at 1401 East Lake Drive, and, thus, had a sufficient upland interest for issuance of the Consolidated ERP, including the Dock LOC.

271. Galerie Bijan is now the fee simple owner of the riparian upland property at 1401 East Lake Drive, and, thus, has a sufficient upland interest to be the permittee of the Consolidated ERP, including the Dock LOC component of that permit.

272. Accordingly, it is concluded that the Dock Extension meets the requirement of rule 18-21.004(3)(b), that the holder of the sovereignty land use approval have sufficient upland interest in the riparian lands on which that use will occur.

273. As discussed above, in 2015, Respondents obtained the 1331 Setback Waiver from Damaso Saavedra, as trustee of the 1331 Land Trust, which was then the owner of the upland riparian property at 1331 East Lake Drive. For the reasons discussed above, the 1331 Setback Waiver met the requirement that it be "obtained from the affected upland riparian owner." Also, as

discussed above, there is no provision in authorizing a subsequent owner of riparian property to revoke or renounce a setback waiver that was executed by the upland riparian owner in compliance with rule 18-21.004(3)(d).

274. Accordingly, it is concluded that Respondents obtained the setback waiver from Saavedra, pursuant to the requirements of rule 18-21.004(3)(d), and that the setback waiver remains in effect, and waives the ten-foot setback from the common riparian line separating Respondents' riparian area and the Kelly's riparian area.

275. As discussed above, in 2015, Respondents obtained a setback waiver from Peter Menten, as the purported "owner" of the riparian upland property at 1415 East Lake Drive.

276. However, as evidenced by the warranty deed for the upland riparian property at 1415 East Lake Drive, the Peter Menten Trust and the Deborah Menten Trust both own the property.[25]

277. Peter Menten, as trustee of the Deborah Menten Trust, was empowered to execute, and did execute, the Menten Setback Waiver, on behalf of the Deborah Menten Trust.

278. However, Deborah Menten, as trustee of the Peter Menten Trust—which is the owner of an undivided one-half interest in the affected riparian upland—did not execute the Menten Setback Waiver. As such, the Menten Setback Waiver does not comply with the requirement in rule 18-21.004(3)(d), that it be obtained from the affected adjacent upland riparian owner.

279. Accordingly, the Menten Setback Waiver is not in effect, and does not operate, to waive the ten-foot riparian setback from the common riparian line separating Petitioners' riparian area from Respondents' riparian area.

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[25] This is a de novo proceeding, the purpose of which is to formulate agency action, not review agency action taken earlier and preliminarily. As part of its review of the Consolidated ERP application, DEP may have relied on the Broward County Property Appraiser's description of the property as "owned" by Peter Menten. However, in these de novo proceedings, evidence, in the form of a warranty deed, has been admitted showing that the real property at 1415 East Lake Drive is, in fact, owned by two owners, the Peter Menten Trust and the Deborah Menten Trust—neither of which are Peter Menten in his individual capacity.

280. The issue of the setback waiver may be met, in this de novo proceeding, by the inclusion of a condition in the Consolidated ERP requiring Respondents to remove a sufficient length at the southern end of the Dock Extension to meet the ten-foot setback from the common riparian line.

281. With that modification, the Dock Extension meets all applicable requirements in rule 18-21.004(3) for approval of the Dock LOC as part of the Consolidated ERP.

282. In sum, subject to the Recommendation, set forth below, that the Consolidated ERP be modified to include a condition requiring the removal of a sufficient length of the Dock Extension to create a ten-foot setback from the southern common riparian line separating Respondents' riparian area and Petitioners' riparian area, the Dock Extension complies with all applicable requirements in chapter 18-21 for issuance of the LOC component of the Consolidated ERP.

V. Transfer of the Consolidated ERP Meets the Applicable Requirements

283. As found above, Abae transferred the Consolidated ERP to Galerie Bijan in July 2022, pursuant to the Transfer Modification, which was issued by DEP on July 15, 2022.

284. The Transfer Modification was not part of the Consolidated ERP at the time the expiration date of the Consolidated ERP was tolled and extended, in September 2021. Accordingly, unlike the Consolidated ERP, as modified to extend the expiration date, the Transfer Modification is governed by the current version of rule 62-330.340. *See Lavernia v. Dep't of Pro. Regul., Bd. of Med.*, 616 So. 2d 53, 53-54 (Fla. 1st DCA 1993)(in Florida, the general rule is that the law in effect at the time of issuance of a permit governs).

285. Rule 62-330.340 governs the transfer of ERPs, including consolidated ERPs issued pursuant to section 373.427.

286. Rule 62-330.340 states, in pertinent part:

> (2) [A] permittee shall notify the Agency electronically or in writing within 30 days of any

change in ownership or control of any portion of the real property upon which an activity is permitted under this chapter or Chapter 62-342, F.A.C. A person who obtains an interest in or control of such real property shall:

(a) Request transfer of the permit to become the new permittee or modification of the permit to become a co-permittee[.]

* * *

(3) The person requesting transfer of the permit shall submit to the Agency a completed Form 62-330.340(1), "Request to Transfer Environmental Resource and/or State 404 Program Permit," incorporated by reference herein (December 22, 2020)(https://www.flrules.org/Gateway/reference.asp?No=Ref-12039),[26] a copy of which may be obtained from the Agency, as described in subsection 62-330.010(5), F.A.C., together with the permit modification fee prescribed by the Agency as set forth in Rule 62-330.071, F.A.C. A proposed new permittee shall demonstrate that it has sufficient real property interest in or control over the land consistent with subsection 62-330.060(3), F.A.C.

(a) The Request to Transfer Environmental Resource and/or State 404 Program Permit shall be processed in the same manner as a minor modification as provided in subsection 62-330.315(2), F.A.C.

* * *

(4) Upon receipt of the completed Request to Transfer Environmental Resource and/or State 404 Program Permit form and applicable processing fee, the Agency shall approve the permit transfer

[26] Form 62-330.340(1), as adopted by rule in 2020, did not state the effective date. In December 2022, DEP adopted a technical change to the form to add the effective date. There were no other changes to Form 62-330.340(1) made in 2022, so that the version of this form that transferred the Consolidated Approval from Abae to Galerie Bijan contained all of the information required under the 2020 version of the form.

> unless it determines that the proposed permittee or co-permittee has failed to provide reasonable assurances that it qualifies to be a permittee or that it can meet the permit conditions.
>
> * * *
>
> (b) Failure of the permittee to notify the Agency in writing within 30 days of a change in ownership or control shall not, by itself, render a permit invalid.
>
> * * *
>
> (6) Upon transfer of a permit, the new permittee shall comply with all terms and conditions of the permit.

287. As found above, Abae, as the permittee requesting transfer of the permit, submitted the Permit Transfer Form to DEP as required by rule 62-330.340(3)(a).

288. Although Abae did not file the Permit Transfer Form with DEP within 30 days of having transferred the real property at 1401 East Lake Drive to Galerie Bijan, pursuant to rule 62-330.340(4)(b), that is not a basis, by itself, to render the Consolidated ERP invalid.

289. Furthermore, because this is a de novo proceeding, the salient consideration is that Abae did follow the applicable process and requirements in rule 62-330.340 for transferring the Consolidated ERP to Galerie Bijan, which is now the permittee.

290. The competent, substantial, and persuasive evidence establishes that Galerie Bijan, as the current permittee, is in compliance with all terms and conditions of the Consolidated ERP.

291. Based on the foregoing, it is concluded that all applicable requirements for issuance of the Transfer Modification were met such that the Transfer Modification should be issued.[27]

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[27] For the reasons discussed above, the current version of rule 62-330.340 applies to the Transfer Modification. However, there were no significant amendments to that rule between

VIII. Petitioners' and Intervenor's Standing

292. As persons asserting party status to challenge the proposed agency action in this proceeding, Petitioners have the burden to demonstrate their standing to initiate and maintain this proceeding. *Palm Beach Cnty. Env't Coal. v. Dep't of Env't Prot.*, 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009); *Agrico Chem. Co. v. Dep't of Env't Regul.*, 406 So. 2d 478, 482 (Fla. 1st DCA 1981).

Substantial Interests

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

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

Id. at 482.

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

295. Since *Agrico*, courts have further clarified that standing to initiate an administrative proceeding is not dependent on proving that the proposed

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2015 and today, so that the Transfer Modification also complies with the 2015 version of the rule governing transfers of ERPs.

agency action would violate the law applicable to the proceeding. In other words, it is not necessary that the person prevail on the merits in an administrative challenge under section 120.57(1) to have standing as a party to initiate and maintain that challenge. As one court explained:

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

Palm Beach Cnty. Env't Coal., 14 So. 3d at 1078 (citing *Peace River/Manasota Reg'l Water Supply Auth.*, 18 So. 3d 1079, 1084 (Fla. 2d DCA 2009). *See St. Johns Riverkeeper, Inc. v. St. Johns River Water Mmgt. Dist.*, 54 So. 3d 1051 (Fla. 5th DCA 2011); *see also Reily Enters., LLC v. Dep't of Env't Prot.,* 990 So. 2d 1248 (Fla. 4th DCA 2008).

296. Thus, to have standing, it is sufficient for a person challenging proposed issuance of a permit or other agency approval to show that his or her substantial interests "*could reasonably be affected* by the activit[y]." *Peace River/Manasota Reg'l Water Supply Auth.*, 14 So. 3d at 1084 (emphasis added). This, in turn, depends on the challenger offering evidence to prove that he or she *could* reasonably be injured. *Id.*; *see Angelo's Aggregate Materials, Ltd. v. Dep't of Env't Prot.*, Case Nos. 09-1543, 09-1544, 09-1545, and 09-1546 (Fla. DOAH June 28, 2013; Fla. DEP Sept. 16, 2013).

297. Based on the foregoing standards, it is concluded that Petitioners and Intervenor, as parties whose substantial interests could reasonably be affected by the Dock Extension, have standing to initiate and maintain their challenges to the issuance of the Consolidated ERP, the Extension Modification, and the Transfer Modification.

298. Specifically, Petitioners and Intervenor each own riparian property on Sylvan Lake, immediately adjacent to Respondents' Property. Petitioners and Intervenor alleged, and presented evidence, that the Dock Extension could interfere with their riparian rights of ingress, egress, and navigation; fishing; swimming; and unobstructed view of the center of the water body, all of which are injuries protected under section 253.141 and chapter 18-21.

299. Petitioners and Intervenor have not prevailed in their allegations that the Dock Extension will unreasonably interfere with their riparian rights. However, because they presented evidence that the Dock Extension *could* reasonably and foreseeably injure their interests protected by the statutes and rules applicable to these proceedings, they have standing as persons whose substantial interests are affected by the agency actions at issue in these proceedings.

300. Three additional points bear discussion.

301. The first addresses Respondents' contention that Petitioners, the Peter Menten Trust and the Deborah Menten Trust, lack standing to assert the interests of the trusts' beneficiaries, i.e., Deborah Menten and Peter Menten, respectively, and that the Mentens should have challenged the agency actions in their individual capacities.

302. This position ignores that, pursuant to the plain language of section 253.141(1), riparian rights inure to the *owner of the riparian land*—here, the Menten Trusts—and are inseparable from the riparian land. Accordingly, the Menten Trusts were the proper parties to assert injury to riparian rights alleged to be caused by the Dock Extension.

303. Additionally, case law in Florida holds that "it is generally the trustee, as legal title holder to the property, rather than a beneficiary, that is the real party in interest with authority to bring an action on behalf of the trust." *Roller v. Collins*, 373 So. 3d 35, 40 (Fla. 5th DCA 2023); *see Abromats v. Abromats*, 2016 WL 4917153, at *13 (S.D. Fla. Sept. 15, 2016)(under

Florida law, if rights inure to property held in trust, the trustee is tasked with taking action to protect those rights).

304. Accordingly, it is concluded that the Menten Trusts, rather than beneficiaries Peter and Deborah Menten, were the proper entities to challenge the proposed agency actions at issue in these proceedings.

305. Second, for the same reasons, Hamby, as trustee of the 1331 Revocable Trust when the challenges to the agency actions were filed, was the proper party to challenge those actions on behalf of the Kellys, as beneficiaries to that trust. When Hamby withdrew as trustee and conveyed the real property at 1331 East Lake Drive to the Kellys, the 1331 Revocable Trust ceased to exist under the merger doctrine, which operates by law to terminate a trust if the legal and equitable interests in the trust are held by the same person. *See Hansen v. Bothe*, 10 So. 3d 213, 216 (Fla. 2d DCA 2002). Accordingly, Respondents' argument that Hamby could have transferred the 1331 Revocable Trust to the Kellys lacks merit under Florida law, and, therefore, is rejected as a basis to prevent the Kellys, as owners of the riparian real property immediately adjacent to Respondents' property and the Dock Extension, from participating as parties to this proceeding.

306. Third, pursuant to the Transfer Modification, Galerie Bijan is the current permittee of the Consolidated ERP, as modified by the Extension Modification. Because Galerie Bijan is the permittee that constructed the Dock Extension and is now legally responsible for all aspects of the construction and operation of the Dock Extension, including compliance with all operational conditions of the Consolidated Approval, it is necessary for Petitioners and Intervenor to have challenged the transfer of the Consolidated ERP to Galerie Bijan. *See Gasparini v. Pordomingo*, 972 So. 2d 1053, 1054 (a corporation is a separate legal entity, distinct from the persons comprising them; absent circumstances warranting piercing the corporate veil, shareholders cannot be held responsible for a corporation's compliance, or failure to comply, with the law).

307. Respondents have contended that the transfer of the Consolidated ERP is "a change of name only." This position disregards that Galerie Bijan, *as the current permittee*, has the legal obligation to comply with the conditions of the Consolidated ERP, some—such as failure to have sufficient water depth to moor a vessel having a 3.5-foot draft, and alleged ongoing interference with riparian rights—of which Petitioners and Intervenor contend will not be met during the *operation* of the Dock Extension. Accordingly, DEP's and Respondents' position that Petitioners and Intervenor lack standing to challenge the Transfer Modification is rejected.

308. In conclusion, notwithstanding that Petitioners and Intervenor have not prevailed on the merits of their challenges to the agency actions at issue in these proceedings, it is determined that Petitioners and Intervenor have standing, as parties whose substantial interests reasonably could be affected by the proposed agency actions, to challenge those actions.

Standing by Provision of Rule

309. Petitioners and Intervenor also have party status—i.e., standing—as "any other person who, as a matter of … provision of agency regulation, is entitled to participate in whole or in part in the proceeding." § 120.52(13)(b), Fla. Stat.

310. Specifically, as adjacent upland riparian property owners, they have the legally-protected interest in compliance, by an adjacent activity, with the riparian line setback requirements established in rule 18-21.004(3).

311. In *Boca Raton Mausoleum, Inc. v. State, Department of Banking & Finance,* 511 So. 2d 1060, 1064, the court recognized that standing in a permitting proceeding may be based on a claim that the statute or rule contemplates protection of the interest alleged to be injured. The court explained: "an agency's rule … consistent with the statutory regulatory purpose, define or identify those persons who have a right to party status." *Id.* at 1065.

312. Consistent with section 253.141, rule 18-21.004(3)(d) creates the right, inuring to adjacent affected upland riparian owners, that structures and activities be set back a specified number of feet from the common riparian line.

313. Petitioners and the Kellys have alleged and presented evidence, as a basis for standing, that the Dock Extension encroaches on their legal right for the Dock Extension to be set back from the riparian line, on the basis that they did not grant valid letters of concurrence to Respondents to construct and operate the Dock Extension within the riparian setback.

314. Regardless of whether Petitioners and Intervenors prevail on these claims—and, as found and concluded above, Petitioners have prevailed on this claim, while Intervenor has not—rule 18-21.004(3) affords a separate basis for both parties' standing in these proceedings.

315. For these reasons, it is determined that both Petitioners and Intervenor have standing in these proceedings challenging issuance of the Consolidated ERP, Permit Extension Modification, and Transfer Modification.

IX. Attorney's Fees

316. In the lengthy course of these consolidated proceedings, the parties filed various motions for specified relief, several of which requested an award of attorney's fees and costs, under section 120.569(2)(e), on the ground that the opposing party or parties filed pleadings, motions, and other papers for improper purposes, such as to harass or cause unnecessary delay, or for a frivolous purpose or to needlessly increase the cost of litigation.

317. Having reviewed the pleadings, motions, and responses in opposition filed throughout these pending proceedings, it is determined that none of the parties participated in these proceedings for improper purposes.

318. Accordingly, all motions for an award of attorney's fees and costs are denied.

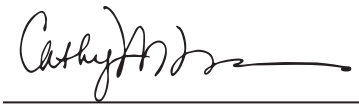
RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that:

1. In Case No. 22-2437, the Florida Department of Environmental Protection issue a final order approving the issuance of Consolidated Environmental Resource Permit and State-owned Submerged Lands Authorization, Permit No. 06-0335119-001, as extended by the Extension Modification, with the condition that the permittee remove a portion of the south end of the Dock Extension of sufficient length to meet the ten-foot setback requirement from the common riparian line between Respondents' riparian area and Petitioners' riparian area.

2. In Case No. 22-2491, the Florida Department of Environmental Protection issue a final order approving the transfer of Permit No. 06-0335119 to Respondent, Galerie Bijan, Inc.

DONE AND ENTERED this 26th day of February, 2024, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of February, 2024.

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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.