

**STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**CRACKER CREEK CANOEING, LLC,
THE SWEETWATER COALITION OF
VOLUSIA COUNTY, INC., DEREK
LAMONTAGNE, and KAT PARO,**

Petitioners,

v.

**OGC CASE NO.: 22-2509
DOAH CASE NO.: 24-4282**

**VALERIE STEINHARDT and STATE
OF FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,**

Respondents.

_____ /

FINAL ORDER

On October 9, 2025, an administrative law judge (ALJ) with the Division of Administrative Hearings (DOAH) issued a Recommended Order (*see* Exhibit A) in these proceedings. Petitioners had challenged an individual Environmental Resource Permit (ERP) combined with a letter of consent (the Consolidated Permit). The Consolidated Permit authorizes construction and operation of a dock in Spruce Creek, a Class III Outstanding Florida Water (OFW). The ALJ recommended that the Department of Environmental Protection (the Department) issue the Consolidated Permit as final agency action.

Application Background and Procedural History

Respondent Valerie Steinhardt and her husband, Richard Steinhardt, jointly own a residential lot along Spruce Creek. The Steinhardts built a dock extending into the creek, then filed a self-certification with the Department which represented that the dock occupied less than 500 square feet over surface waters (the maximum limit of an ERP exemption). The Department

inspected the dock and advised the owners that the dock occupied approximately 850 square feet over surface waters and wetlands and thus, the exemption would not apply to their dock.

Valerie Steinhardt filed a notice with the Department of her intent to rely upon a general permit, which the Department treated as an application for an individual permit. The Department issued the Consolidated Permit, and Petitioners filed a timely challenge. The ALJ conducted a four-day formal hearing and has issued the Recommended Order recommending issuance of the Consolidated Permit with no changes. Petitioners have filed timely exceptions to the Recommended Order.

The Recommended Order fully describes the proceedings before DOAH. A transcript of the proceedings is in the record and was available to the ALJ when she prepared the Recommended Order. References to Florida Statutes are to Florida Statutes (2025).

Petitioner's exceptions are addressed below.

Exception 1: Footnote 10 and Paragraph 46.

In Footnote 10 of the Recommended Order, the ALJ observed that Teyann Duclos, one of the Department's witnesses, testified as a fact and expert witness. Petitioners contend that Duclos was not listed or "called" as an expert witness, and disputes paragraph 46 and footnote 10 in the Recommended Order. However, the record supports the ALJ's description of Duclos testimony; at least some of the direct examination [T. III 303-306] appears to call for expert testimony based upon Duclos' education and work experience, as elicited at the beginning of Duclos' direct examination. [T. III 280-281].¹ Because competent, substantial evidence supports the ALJ's characterization of Duclos' testimony, the Department cannot reject the finding in footnote 10. §

¹ It is unnecessary for a party to proffer a witness as an expert before eliciting an expert opinion. *Smith v. State*, 7 So. 3d 473, 496 (Fla. 2009), citing Charles W. Ehrhardt, Florida Evidence § 702.1, at 687 (2007 ed.).

120.57(1)(l), Fla. Stat. (“The agency may not reject or modify the findings of fact 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 upon competent substantial evidence . . .”)

Petitioners also ask that the Department reject the findings in paragraph 46, citing section 90.701(2) of the Florida Evidence Code for the proposition that a non-expert witness such as Duclos cannot testify on opinions requiring special knowledge. However, the Department is only authorized to reject conclusions of law over which it has substantive jurisdiction, i.e., issues within the Department’s area of expertise. *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1142 (Fla. 2d DCA 2001), citing § 120.57(1)(l), Fla. Stat. The Department lacks substantive jurisdiction over decisions on procedural and evidentiary rulings by the ALJ, such as the admissibility of evidence or a party’s potential violation of a prehearing order. *Id.*; *Barfield v. Dep’t of Health*, 805 So. 2d 1008, 1011 (Fla. 1st DCA 2001). If the Department had such jurisdiction, it would appear that Petitioners waived any objection to Duclos’ testimony because they did not make a specific, contemporaneous objection on the grounds now asserted in their exception. *Cf. Moore-Bryant v. State*, 386 So. 3d 567, 572 (Fla. 4th DCA 2024) (“An objection to speculation does not preserve an improper opinion testimony argument.”), citing *Chavers v. State*, 964 So. 2d 790, 793 (Fla. 4th DCA 2007). For these reasons, Exception 1 is rejected.

Exception 2

Petitioners object to the ALJ’s finding that the dock in question is a single-family dock and asked that the “fact” be removed from several paragraphs. This finding is supported by competent substantial evidence [T. III 297]; for that reason, the exception is rejected. § 120.57(1)(l), Fla. Stat.

Exceptions 3 and 4

In these exceptions, Petitioners contest the credibility of evidence on the use of materials for the dock and the “wrapping” of the dock with polyethylene materials. However, the ALJ has exclusive authority to make findings on the credibility of witnesses and other evidence. *E.g.*, *Castro v. Dep't of Health*, No. 1D2023-1550, 2025 WL 3084564, at *4 (Fla. 1st DCA Nov. 5, 2025). For that reason, the exception is rejected.

Exception 5

In this exception, Petitioner points out testimony that might support alternative findings of fact but does not argue or suggest that any findings are unsupported by competent substantial evidence. As such, this exception is rejected. § 120.57(1)(l), Fla. Stat.

Exception 6

In this exception, Petitioners contend that the applicant failed to comply with their discovery requests. Petitioners do not point to any ruling by the ALJ on those discovery issues. In any case, the Department lacks substantive jurisdiction over decisions on procedural rulings by the ALJ, or on similar rulings typically resolved by judicial or quasi-judicial officers. *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1142 (Fla. 2d DCA 2001). *Barfield v. Dep't of Health*, 805 So. 2d 1008, 1011 (Fla. 1st DCA 2001). For that reason, the exception is rejected.

Exception 7

In this exception, Petitioner requests new and additional findings of fact. The Department lacks authority to make new, substituted, or supplemental findings of fact. § 120.57(1)(l), Fla. Stat.; *Gross v. Dep't of Health*, 819 So. 2d 997, 1005 (Fla. 5th DCA 2002); *Lawnwood Med. Ctr.*,

Inc. v. Agency for Health Care Admin., 678 So. 2d 421, 425 (Fla. 1st DCA 1996). For that reason, the exception is rejected.

Exception 8

In this exception, Petitioners take exception to the ALJ's ruling on a motion in limine. Again, because the Department lacks substantive jurisdiction over the ALJ's procedural rulings, this exception is rejected.

Exceptions 9 and 10

In these exceptions, Petitioners present argument on the weight of evidence regarding construction methods and ask for supplemental findings based on their reference to conflicting evidence. Petitioners do not contend that the findings are unsupported by competent substantial evidence. Again, because the Department lacks authority to rule on the credibility of evidence or to make new and additional findings of fact, this exception is rejected.

Exceptions 11, 12, and 13

In these exceptions, Petitioners present argument on the weight of evidence regarding findings on the Department's review of the permit application. The Department cannot re-weigh the evidence or make alternative inferences from evidence in the record. *Gross v. Dep't of Health*, 819 So. 2d 997, 1005 (Fla. 5th DCA 2002); *Prysi v. Dep't of Health*, 823 So. 2d 823, 825 (Fla. 1st DCA 2002). For this reason, and because the Department lacks authority to make new and supplemental findings of fact, this exception is rejected.

Exception 14

In this exception, Petitioners appear to argue that the ALJ should have made additional findings in paragraph 33 regarding the hypothetical scenarios where the dock would, or would

not, qualify for a statutory exemption. Again, because the Department lacks authority to make new and supplemental findings of fact, the exception is rejected.

Exception 15

In this exception, Petitioners argue about the admissibility and credibility of one witness's testimony. This exception must be rejected because, again, the Department lacks authority to set aside the ALJ's rulings on the admissibility of evidence or to re-evaluate the credibility of evidence.

Exception 16

In this exception, Petitioners appear to ask for new and supplemental findings on the likelihood that Petitioners will submit appropriate as-built drawings, together with new and supplemental findings on the characteristics of the dock. It is the responsibility of the ALJ, not the Department, to draw inferences from the evidence. *Prysi v. Dep't of Health*, 823 So. 2d 823, 825 (Fla. 1st DCA 2002). Again, the Department lacks authority to make new and additional findings of fact. For these reasons, the exception must be rejected.

Exceptions 17 and 18

In these exceptions, Petitioners contest the credibility of evidence for certain findings and refer to evidence that might support a different set of findings. Because the Department cannot re-weigh the evidence or make new and additional findings, this exception is rejected.

Exception 19

In this exception, Petitioners raise the same issue as presented in Exception 1. For the same reasons, the exception is rejected.

Exceptions 20-23

In these exceptions, Petitioners challenge the credibility of testimony, refer to evidence that might support different findings, and appear to argue that the ALJ improperly accepted non-expert opinion testimony. In the challenged findings, the ALJ makes reasonable inferences from the record based upon record evidence, such as exhibits depicting the structure of the dock. The Department cannot re-weigh the evidence, make new and supplemental findings of fact, reverse the ALJ's rulings on the admissibility of evidence, or draw new inferences from the admitted evidence. For these reasons, the exception is rejected.

Exception 24

In this exception, Petitioners contest the ALJ's rulings on the admissibility of evidence. Again, rulings of that kind are not within the substantive jurisdiction of the Department. Petitioners also question the credibility of testimony supporting a finding in paragraph 56. Again, the Department cannot re-weigh the evidence. For these reasons, the exception is rejected.

Exception 25

In this exception, Petitioners again contest the credibility of evidence supporting a finding. Because the Department cannot re-weigh the evidence, the exception is rejected.

Exception 26

In this exception, Petitioners appear to argue that the ALJ should have made different findings of fact in a number of paragraphs within the Recommended Order. Petitioners offer no cogent explanation or legal argument for this exception. Petitioners do not contend that any finding is not supported by competent substantial evidence. Because the Department cannot make new and supplemental findings, the exception is rejected.

Exception 27

In this exception, Petitioners arguably contest the sufficiency of evidence on a finding regarding the need to wrap dock pilings with protective materials. Because the finding is based on competent substantial evidence [R. III 328-329] and a reasonable inference from the same evidence (*see Prysi v. Dep't of Health*, 823 So. 2d 823, 825 (Fla. 1st DCA 2002)), the exception is rejected.

Exception 28

In this exception, Petitioners challenge the sufficiency of evidence to support a finding that the dock is not a part of a larger plan of development, as well as the ALJ's findings on expected boat traffic from the dock. Competent substantial evidence supports the findings that the dock is not a part of a larger plan of development and that the dock accommodates only two vessels. [T. III 297]. For that reason, the exception is rejected.

Exception 29 and 30

In these exceptions, Petitioners offer alternative findings regarding the effects of the dock on bird species and general ecological resources. Petitioners also take exception to the ALJ's rulings on the admissibility of evidence. Because the Department cannot make new and supplemental findings and because evidentiary rulings are not within the Department's substantive jurisdiction, the exception is rejected.

Exception 31

In this exception, Petitioners contest the ALJ's rulings on the admissibility of evidence. Petitioners also refer to testimony which might support alternative findings. Because evidentiary rulings are not within the Department's substantive jurisdiction and because the Department cannot make new and substituted findings, the exception is rejected.

Exception 32

In this exception, Petitioners challenge the ALJ's inference regarding evidence in the record, namely the relative magnitude of deviations between plans and the structure as built. Because it is the responsibility of the ALJ to make inferences from the evidence, the exception is rejected.

Exception 33

In this exception, Petitioners challenge a conclusion of law, namely the ALJ's general description of the "clearly in the public interest" standard in section 373.414(1), Florida Statutes. Here, in footnote 14 of the Recommended Order, the ALJ makes a concise and accurate description of the standard. Petitioners offer no cogent argument to the contrary and provide no other authority for the Department to reject that conclusion. For this reason, the exception is rejected.

Exceptions 34-38

In these exceptions, Petitioners argue that the Department should restate the ALJ's findings based upon alternative inferences that could be drawn from the evidence, together with findings that might be drawn from disputed direct evidence on certain issues. Because it is the responsibility of the ALJ to make inferences from the record, and because the Department cannot make new and supplemental findings, the exception is rejected.

Exception 39

In this exception, Petitioners argue that the Department should set aside the ultimate finding that the structure will not cause adverse impacts. Petitioners do not contest the sufficiency of evidence for that finding, or the sufficiency of evidence to support other findings

supporting that ultimate finding. Because the Department cannot make new and supplemental findings, the exception is rejected.

Exception 40

In this exception, Petitioners challenge the general credibility of evidence to support the ALJ's ultimate findings in paragraph 123 and argue that their presentation of evidence was more persuasive. Petitioners do not identify any specific instance where a finding is unsupported by competent substantial evidence. Because the Department cannot re-weigh the evidence, the exception is rejected.

Exception 41

In this exception, Petitioners reiterate their argument from Exception 33, which is rejected for the same reasons. In addition, Petitioners appear to express dissatisfaction with the ALJ's application of the public interest test. However, Petitioners offer no legal authorities or cogent argument to support their argument that the ALJ misinterpreted a regulatory standard. Because Petitioners do not identify any statutory basis for the Department to reject the findings and conclusions of law in the challenged paragraphs, the exception is rejected.

Exception 42

In this exception, Petitioners again refer to evidence in the record which might, if accepted, lead to an alternative finding. Because the Department cannot re-weigh the evidence or make new and supplemental findings, the exception is rejected.

Exception 43

In this exception, Petitioners appear to argue that evidence outside the record would support a finding that other members of its organization own property riparian to Spruce Creek. However, findings must be based exclusively on record evidence, as well as any matters

officially recognized. § 120.57(1)(j), Fla. Stat. There is no suggestion that an alternate finding might be supported by any official recognition. Petitioners also contest what they believe the findings in paragraph 43 would imply. However, there is no statutory authority for the Department to reject a finding based upon what a finding might imply. For these reasons, the exception is rejected.

Exceptions 44-46

In these exceptions, Petitioners again refer to evidence in the record which might, if accepted, lead to alternative findings. Because the Department cannot re-weigh the evidence or make new and supplemental findings, the exception is rejected.

Exception 47

In this exception, Petitioners argue about the credibility of expert testimony. However, the Department cannot re-weigh the evidence. Petitioners also argue that the applicant did not comply with a discovery request. Petitioners do not point to any ruling by the ALJ on those discovery issues. Again, the Department lacks substantive jurisdiction over decisions on procedural rulings by the ALJ, or on similar rulings typically resolved by judicial or quasi-judicial officers. For these reasons, the exception is rejected.

Exception 48

In this exception, Petitioners appear to challenge the ALJ's inferences regarding the relative magnitude of adverse impacts from the dock. Again, it is the ALJ's exclusive responsibility to make inferences from the record. For that reason, the exception is rejected.

Exception 49

In this final exception, Petitioners again contest what they believe a finding might imply. Again, because the Department lacks authority to reject a finding based on what it might imply. The exception is rejected.

CONCLUSION

Having considered the applicable law and the Recommended Order, and otherwise being duly advised, it is ORDERED:

A. The Recommended Order is adopted and incorporated herein by reference, in its entirety.

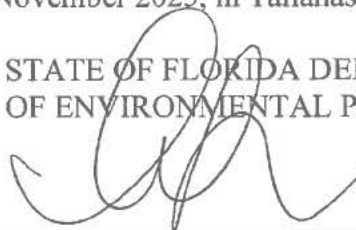
B. The Consolidated Permit is GRANTED.

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; or by electronic mail to Agency_Clerk@dep.state.fl.us 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 21 day of November 2025, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



ALEXIS A. LAMBERT

Secretary

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

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

Lea Crandall

Digitally signed by Lea Crandall
Date: 2025.11.21 12:57:45 -05'00'

Clerk

November 21, 2025

Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent by electronic mail to the following on this 21 day of November 2025.

Derek Lamontagne 933 Geiger Drive Port Orange, FL 32127 lamontagne@gmail.com <i>Qualified Representative for Petitioners</i>	Valerie Steinhardt, pro se 1781 Taylor Road Port Orange, FL 32128 valeriesteinhardt@yahoo.com firefight-n@hotmail.com
Patrick Reynolds Assistant Deputy General Counsel Kathryn E. Lewis Assistant Deputy General Counsel Department of Environmental Protection Office of General Counsel 3900 Commonwealth Boulevard, MS 35 Tallahassee, FL 32399-3000 Patrick.Reynolds@FloridaDEP.gov Kathryn.Lewis@FloridaDEP.gov Lateshee.M.Daniels@FloridaDEP.gov <i>Counsel for State of Florida Department of Environmental Protection</i>	

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

/s/ Jeffrey Brown

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**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

CRACKER CREEK CANOEING, LLC,
THE SWEETWATER COALITION OF
VOLUSIA COUNTY, INC., DEREK
LAMONTAGNE, AND KAT PARO,

Petitioners,

vs.

Case No. 24-4284

VALERIE STEINHARDT AND
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.

_____ /

RECOMMENDED ORDER

A hearing was held in this proceeding, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2025),¹ by Zoom Conference before Administrative Law Judge Cathy M. Sellers, on April 16 and 17, and June 2, 3, and 11, 2025.

APPEARANCES

For Petitioners: Derek LaMontagne, Qualified Representative
 993 Geiger Drive
 Port Orange, Florida 32127

For Respondent Valerie Steinhardt:

Valerie Steinhardt, pro se
1781 Taylor Road
Port Orange, Florida 32128

¹ All references to Florida Statutes are to the 2025 version unless otherwise stated. All references to Florida Administrative Code rules are to the version in effect at the time this Recommended Order is issued. *See Lavernia v. Dep't of Pro. Regul.*, 616 So. 2d 53 (Fla. 1st DCA 1993)(law in effect when the agency takes final action on a licensure application applies.)

For Respondent Department of Environmental Protection:

Kathryn Lewis, Esquire
Jay Patrick Reynolds, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard, Mail Stop 35
Tallahassee, Florida 32399-3900

STATEMENT OF THE ISSUE

Whether Respondent Valerie Steinhardt ("Steinhardt") is entitled to issuance of Permit No. 400951-002-EI (hereafter, "Consolidated Permit") authorizing construction and operation of a single-family residential dock (hereafter, the "Dock") located at 1781 Taylor Road, Port Orange, Florida 32128.

PRELIMINARY STATEMENT

On August 12, 2022, Respondent Department of Environmental Protection ("DEP") took proposed agency action to issue the Consolidated Permit, which consists of an individual environmental resource permit ("ERP") and a letter of consent ("LOC") authorizing construction and operation of the Dock. On December 6, 2022, Petitioners Cracker Creek Canoeing, LLC; the Sweetwater Coalition of Volusia County, Inc.; Derek LaMontagne; Kat Paro; and Elizabeth Seymour² filed their First Amended Petition for Formal Administrative Proceedings ("Amended Petition") with DEP. On November 15, 2024, DEP referred this proceeding to the Division of Administrative Hearings ("DOAH") for assignment of an Administrative Law Judge to conduct an administrative proceeding pursuant to sections 120.569 and 120.57(1).

On April 3, 2025, DEP filed Respondent, The Department of Environmental Protection's, Motion to Strike, or in the Alternative, Motion to

² Elizabeth Seymour was removed as a party to this proceeding on December 18, 2024.

Limit Issues at Hearing. On April 10, 2025, Petitioners filed Petitioners' Response to Motion to Strike or, in the Alternative, Motion to Limit Issues at Hearing. On April 15, 2025, the undersigned issued the Order Granting Motion to Limit Issues at Hearing ("Order in Limine"), granting DEP's request to limit the issues to be determined at the hearing. The Order in Limine explained the scope of this proceeding and expressly excluded, as beyond the scope of this proceeding, presentation and admission of evidence regarding the following paragraphs of the Amended Petition: paragraphs 9, 11, 12, 27, and 28, on the basis that these paragraphs allege matters regarding inconsistency and/or noncompliance with Volusia County land clearing regulations, designated resource conservation areas, violations of local zoning ordinances, failure to obtain Volusia County permits, clearing and destruction of vegetation within a Volusia County conservation easement, inconsistency or lack of compliance with Volusia County dock permitting requirements, and lack of compliance with Volusia County notice requirements and public participation opportunities; paragraphs 19, 28, 45, 48, 49, 55, and 56, on the basis that these paragraphs allege matters related to clearing, burning on, and development of uplands, and allege concerns regarding impacts to the value of intact forest and scrub habitat, and gopher tortoise habitat; paragraph 62, regarding the lack of due process, removal of filtration forests, and impacts to natural areas; paragraphs 16, 17, 18, and 51, regarding the applicability of Florida Administrative Code Rule 40C-41, basin action management plans, total maximum daily local requirements, and the Applicant's Handbook Volume II; paragraph 10, regarding dock noncompliance with previously filed self-certification forms; paragraph 23, regarding personal attacks on Petitioners; paragraph 24, regarding financial and personal costs Petitioners have incurred for having reported alleged violations of certain state and local laws and rules; and paragraph 54, regarding applicability of Applicant's Handbook Volume II. The Order in Limine advised Petitioners' of their right, pursuant to section 90.104, Florida

Statutes, to file a written offer of proof ("proffer") addressing the evidence excluded under the Order in Limine. Additionally, during, and at the close of, the final hearing, the undersigned further advised Petitioners of their right to file a written proffer after the hearing concluded, and the procedure and timeframe for doing so.

The final hearing initially was scheduled for January 28 and 29, 2025, but was continued and rescheduled for April 16 and 17, 2025. The hearing was held on April 16 and 17, 2025, but did not conclude, so was continued and rescheduled for June 2 and 3, 2025. The hearing was held on June 2 and 3, 2025, but did not conclude, so was rescheduled for June 11, 2025. The hearing was conducted, and concluded, on June 11, 2025.

Joint Exhibits 1 through 15 were admitted into evidence pursuant to the parties' stipulation. Steinhardt testified on her own behalf, and presented Respondents' Exhibits 11 and 13, which were admitted into evidence. DEP presented the testimony of Jason Seyfert, Richard Steinhardt, and Teayann Duclos, and presented Respondents' Exhibits 5, 7, 16, 17, and 21 through 23, which were admitted into evidence. Petitioners presented the testimony of John Baker, Jill Williams, David Hartgrove, Katherine ("Kat") Paro, Derek LaMontagne, and Alex Zelenski. Petitioners' Exhibits 107 through 110; 114; 124 (page nos. 147 and 148); 212; 215; 220; 232; 235; 270; 277; 278; 299-20 through 299-22; 302; 303; 304f; 310; 335b; 407 through 414; 422a through 422d; 426b5; 426c2 through 426c4; 427; 429p; 509; 519; 649a through 649c; and 821 were admitted into evidence.³

³ All of the parties' exhibits that were admitted into evidence are noted in the exhibit portal as "admitted." All exhibits that are *not* noted as "admitted" in the exhibit portal either were tendered and not admitted into evidence, or not tendered for admission into evidence.

The complete eleven-volume, 1,398-page Transcript was filed at DOAH on August 4, 2025, and the parties were given until September 3, 2025, to file their proposed recommended orders ("PROs"). On September 2, 2025, the parties filed an Unopposed Motion for Extension, which was granted, giving the parties an additional six days in which to file their PROs. The parties timely filed their PROs on September 9, 2025,⁴ and the undersigned has given the PROs due consideration in preparing this Recommended Order.

FINDINGS OF FACT

I. Parties

1. Petitioner Cracker Creek Canoeing, LLC (hereafter, "CCC") is a privately-owned, for-profit business located on the northern bank of Spruce Creek, at 1795 Taylor Road, Port Orange, Florida. CCC provides access to Spruce Creek by renting kayaks and canoes; providing eco-tours of Spruce Creek via pontoon boat; providing a location for public launching of non-motorized watercraft; and providing educational programs focusing on the history and ecology of Spruce Creek. CCC has been in operation since 2006.

2. Petitioner Sweetwater Coalition of Volusia County, Inc. (hereafter, "SCVC") is a Florida not-for-profit corporation whose stated mission is to preserve and protect the quality of life in Volusia County by advocating against construction projects that significantly affect the natural environment.

3. Petitioner Derek LaMontagne has been a Volusia County resident for more than 25 years, and is a long-time advocate for protection of the Spruce Creek water body. He is co-president of SCVC.

4. Petitioner Kat Paro is an advocate for the Florida environment, including Spruce Creek, and is a member of SCVC.

⁴ Petitioners also timely filed Petitioners' Proffer regarding the excluded evidence. The Proffer will accompany the record in this proceeding, but has not been considered in preparing this Recommended Order.

5. Respondent DEP is the administrative agency of the State of Florida, statutorily empowered to protect Florida's air and water resources. DEP administers and enforces chapter 373, part IV, Florida Statutes, and the implementing rules codified at Title 62, Florida Administrative Code, regarding activities in surface waters of the state. Additionally, pursuant to section 253.002, Florida Statutes, DEP serves as staff to the Board of Trustees of the Internal Improvement Trust Fund, which, pursuant to section 253.03, holds title to sovereignty submerged lands under navigable water bodies in the state, as defined in Florida Administrative Code Rule 18-21.003(67).

6. Respondent Steinhardt is the applicant for the Consolidated Permit for the Dock. She owns the real property located at 1781 Taylor Road, Port Orange, Florida (hereafter, "Property") with her husband, Richard Steinhardt.

II. The Dock

A. Description of the Dock

7. The Dock is a private single-family residential dock located on the riparian shoreline of the Property. The Dock is not open to, or used by, the public; any multifamily residential development; or any commercial entity.

8. Steinhardt uses the Dock for recreational purposes, including boating and fishing.

9. The Dock is located on the northern shoreline of, and in, Spruce Creek, a Class III Outstanding Florida Water ("OFW"), in Volusia County, Florida.

10. The Dock preempts approximately 895 square feet of sovereignty submerged lands under Spruce Creek.

11. Steinhardt's riparian shoreline is approximately 230 feet long. The Dock is set back approximately 52 feet from the eastern property line and approximately 132 feet from the western property. Accordingly, the Dock is set back at least 25 feet from the each of the Property's riparian lines.

12. The Dock is constructed of marine-grade wood. It consists of a four-foot-wide access walkway, with stairs, leading from the upland to the "H"-shaped terminal platform. The terminal platform consists of two walkway docks, each approximately four feet wide, and two boat slips, each slightly less than nine feet wide. The boat slip located on the east side of the terminal platform is approximately 13 feet long, and is uncovered. The boat slip located on the west side of the terminal platform is approximately 36 feet long, and is covered by a platform roof that also functions as a sundeck.

13. The Dock's access walkway and terminal platform are supported by wooden pilings. All of the in-water pilings are wrapped with marine-approved high-density polyethylene ("HDPE") piling wrap to prevent pollutants in the treated wood from leaching into the water.

14. Depending on the tide, the Dock extends between 17 and 19 feet from the Property's riparian shoreline into Spruce Creek.

15. Spruce Creek is approximately 115 feet wide, from shoreline to shoreline, at the portion of the water body where the Dock is located.

16. The total delineated wetland area on the Property is approximately 0.11 acres.

17. No submerged or emergent aquatic vegetation, or other benthic resources, are present in and under the surface water of Spruce Creek where the Dock is located.

18. The water depth from the surface to the submerged bottom is slightly over five feet deep in the eastern boat slip, and slightly over seven feet deep in the western boat slip.

19. The Dock has handrails along the walkway to ensure that mooring does not occur in areas shallow enough to cause submerged bottom damage due to propeller dredging or scouring.

20. When the Dock was constructed and when the Consolidated Permit subsequently was issued, no conservation easement was in effect on any portion of the Property, including the wetlands bordering Spruce Creek.

B. Background and Consolidated Permit Issuance

21. This proceeding concerns issuance of a consolidated ERP and LOC, which provides sovereignty submerged lands proprietary approval for the Dock, which was constructed, and was operating, before Steinhardt sought the required regulatory permit and proprietary approval. As discussed in greater detail below, once DEP notified Steinhardt that the Dock did not qualify for the statutory permitting exemption in section 403.813(1)(b), Florida Statutes, Steinhardt applied for a permit for the Dock.

22. Other than installing the in-water pilings, Richard Steinhardt built the Dock himself. The in-water pilings were installed with assistance from a person who works in the dock construction business.

23. Turbidity curtains were used during construction of the Dock to prevent the spread of turbidity in the water, and silt fences were used to prevent soil disturbed by construction of the upland portion of the Dock from entering the water.

24. As noted above, the Dock is constructed of marine-grade wood, and the in-water pilings are wrapped with marine-approved HDPE piling wrap to prevent pollutants from leaching into the water.

25. On March 3, 2021, Steinhardt filed a Self-Certification for a Project at a Private, Residential, Single-Family Dock, certifying that the Dock, as constructed, occupied no more than 500 square feet over surface waters and wetlands, and, therefore, met the requirements for a regulatory permitting exemption under section 403.813(1)(b) and Florida Administrative Code Chapter 62-330, and also met the requirements for proprietary approval under chapter 253 and Florida Administrative Code Chapter 18-21.

26. After receiving a complaint, DEP conducted a compliance inspection of the Dock on May 25, 2022, and determined that it exceeded the 500-square-foot size limit to qualify for the statutory permitting exemption in section 403.813(1)(b). At that site inspection, DEP determined that the Dock was

approximately 875.6 square feet in size over surface waters and wetlands, and, therefore, did not qualify for the permitting exemption.

27. On July 12, 2022, DEP issued a compliance assistance offer ("CAO"),⁵ with an accompanying standard inspection report to Steinhardt, informing her that an inspection had been conducted and that potential non-compliance with the requirements of chapter 403 and rule 62-330.020(2)(a) was noted. Specifically, the inspection report noted that the portion of the Dock located in surface waters and wetlands totaled 875.62 square feet of surface area, which exceeds the 500-square-foot size permitting exemption threshold applicable to private docks located in an OFW.

28. In an effort to resolve the non-compliance, the CAO advised Steinhardt to provide certain information within 15 days. The CAO recommended that Steinhardt either apply for and obtain a permit,⁶ or make modifications to the Dock that would enable it to qualify for the statutory permitting exemption. The CAO further advised that failure to pursue one of those options may result in enforcement action being taken. The CAO did not constitute, or contain, a stop-work order or cease and desist letter.

29. In response to the CAO, on July 13, 2022, Steinhardt submitted a Notice of Intent to Use an Environmental Resource General Permit ("General Permit Intent Notice"). The submittal included a description of the Dock; a delineation of the wetlands on the riparian shoreline of the Property; and plans for the Dock prepared by Steinhardt's engineering consultant, depicting the detailed design, dimensions, materials, and location of the Dock.

30. Because the Dock already was constructed, DEP determined that an operation permit was required, so the Dock did not qualify for a general permit. Accordingly, DEP treated the General Permit Intent Notice as an

⁵ A CAO constitutes an informal means of resolving noncompliance matters before the agency institutes formal enforcement proceedings.

⁶ Permits issued to bring non-compliant unpermitted structures into compliance with permitting requirements are informally referred to as after-the-fact permits.

application for an individual ERP and evaluated the Dock for compliance with the individual ERP permitting requirements and the requirements for obtaining an LOC.

31. DEP determined that the Dock met the requirements for issuance of an individual ERP and LOC, and issued the Consolidated Permit on August 12, 2022.⁷

32. Petitioners timely challenged issuance of the Consolidated Permit.

III. Compliance with ERP Permitting Requirements

A. Site Inspections of the Dock

33. Because the area of the Dock is less than 1,000 square feet over surface waters and wetlands, it would have qualified for the statutory exemption from permitting had it been constructed in a water body not designated as an OFW.

34. However, as discussed above, because the Dock is located in an OFW and exceeds the 500-square-foot threshold to qualify for the statutory permitting exemption, an ERP is required for construction and operation of the Dock.

35. Because the Dock already is constructed, DEP reviewed the General Permit Notice of Intent pursuant to the statutory and rule provisions applicable to an individual ERP.

36. DEP conducted an after-the-fact evaluation of construction of the Dock, as depicted in the General Permit Intent Notice, to determine whether the Dock complied with the applicable statutory and rule requirements regarding construction activities in surface waters and wetlands.

37. DEP also evaluated the Dock, as operated, to determine whether it meets the applicable requirements regarding its current and future operation.

⁷ As noted above, a Consolidated Permit consists of an individual ERP issued pursuant to chapter 373, part IV, and implementing rules, and the appropriate proprietary approval issued pursuant to chapter 253 and chapter 18-21.

38. Jason Seyfert, an environmental administrator who supervises environmental resource permitting in DEP's Central District Office, conducted a site inspection of the Dock in November 2024, to verify that the structure met the applicable permitting requirements and was constructed in accordance with the information provided in the General Permit Intent Notice.

39. During this inspection, Seyfert measured the Dock and determined that rather than occupying 875.62 square feet over surface waters and wetlands, as represented in the General Permit Intent Notice, the Dock actually occupies approximately 895 square feet over surface waters and wetlands. This is approximately 20 square feet larger than represented in the General Permit Intent Notice and determined by DEP during its May 25, 2022, compliance inspection. Seyfert testified that this discrepancy is minor and does not disqualify the Dock from being permitted.

40. If DEP issues the Consolidated Permit,⁸ Steinhardt is required, by rule 62-330.310(3) and by General Condition No. 6 of the Consolidated Permit, to file as-built plans for the Dock, depicting the structure as actually constructed. At that point, the Consolidated Permit will be corrected to accurately state that that the Dock occupies 895 square feet over surface waters and wetlands, and any other minor deviations between the construction plans and the Dock, as built,⁹ also will be corrected.

41. As previously noted, the water depths from the surface to the submerged bottom are, respectively, slightly over five feet in the eastern slip

⁸ This permit challenge had the effect of rendering the Consolidated Permit proposed agency action only. Pursuant to section 120.57(1), following conclusion of the final hearing and issuance of this Recommended Order, DEP will take final agency by issuance of a final order, which will either issue or deny the Consolidated Permit.

⁹ Other minor deviations between the Dock plans submitted as part of the General Permit Intent Notice and the constructed Dock include the location of the "H" section of the catwalk on the terminal platform, and the existence of a roof (which doubles as the sundeck) over only one of the slips. These discrepancies do not affect the Dock's environmental impact or permissibility under chapter 373, part IV, and chapter 62-330.

and slightly over seven feet in the western slip. These depths are sufficient to prevent propeller dredging and scouring of the submerged bottom, in compliance with Specific Condition No. 10 of the Consolidated Permit.

42. The Dock's access walkway and terminal platform are supported by pilings. As noted above, all of the in-water pilings are wrapped with marine-approved HDPE to prevent pollutants from leaching into the water.

43. Some pilings supporting the Dock were driven into wetland areas on the Property. However, the competent, credible evidence shows that construction of the Dock did not, and operation of the Dock does not, adversely impact any wetland vegetation or other wetland resources.

44. To ensure there are no adverse impacts to wetlands from any future construction activities, Specific Condition No. 6, regarding construction activities, prohibits impacts to wetland vegetation and submerged aquatic vegetation.

45. Teayann Duclos,¹⁰ an environmental manager in DEP's Central District office, reviewed the Consolidated Permit and accompanying Technical Staff Report ("TSR") regarding whether the Dock meets the applicable requirements for issuance of the ERP and the LOC. Additionally, she personally conducted two site inspections of the Dock, the most recent in November 2024.

46. Based on her site inspections and her review of the General Permit Intent Notice and accompanying TSR, Duclos testified that the Dock, as constructed and operated, meets the applicable ERP requirements.

B. The Dock Meets the Requirements of Rule 62-330.301(1)

No Adverse Impact to Water Quantity, Storage and Conveyance, or Flooding

47. As found above, the Dock is a piling-supported structure around which water can and does flow. As such, the Dock does not impound, store, or impede the flow of surface waters. Therefore, it does not, and will not, cause

¹⁰ Duclos, who is a biologist and environmental scientist, testified as a fact and expert witness.

adverse water quantity impacts to surface waters, wetlands, or adjacent lands.

48. Additionally, the planks comprising the Dock have spaces between them that allow rainfall to freely drain between them, so the Dock does not create an impervious surface that causes a discharge or otherwise affects the flow, of rainfall and other sources of water.

49. Because the Dock will not have any impact on the quantity or flow of water, it does not cause erosion or shoaling, and does not adversely affect the hydroperiod, water storage, or conveyance capabilities of surface waters and wetlands.

50. Additionally, because the Dock does not create an impervious surface that discharges or diverts the flow of water, it will not cause adverse flooding, either on the Property or offsite.

51. Accordingly, the Dock meets the requirements of rule 62-330.301(1)(a), (b), and (c).

No Adverse Impacts to Value of Wetland and Surface Waters Functions

52. As discussed above, the construction and operation of the Dock did not, and will not, affect wetland vegetation.

53. To that point, there is no submerged or emergent aquatic vegetation, benthic communities, or other similar wetland resources at the Dock location. Therefore, the Dock will not adversely affect these resources.

54. Additionally, as discussed above, the Dock planks have spaces between them, so to the extent that wetland aquatic vegetation may grow beneath the Dock, light penetrates the Dock such that any wetland or aquatic vegetation growing there would not be adversely affected by shading from the Dock.

55. Accordingly, it is determined that the Dock does not, and will not, adversely impact the values of functions provided to fish and wildlife by surface waters and wetlands, in compliance with rule 62-330.301(1)(d).

No Adverse Water Quality Impacts

56. The competent, credible evidence establishes that construction of the Dock did not degrade or otherwise adversely affect water quality in Spruce Creek.

57. As discussed above, turbidity curtains were installed during Dock construction to prevent the creation and spread of turbidity from in-water construction activities.

58. Additionally, silt fences were installed to prevent soil disturbed by construction activities associated with the upland portion of the Dock from flowing into the wetlands and surface waters of Spruce Creek.

59. The Consolidated Permit contains conditions to ensure that operation of the Dock does not violate water quality standards or degrade the water quality in Spruce Creek.

60. With respect to custodial maintenance of the Dock, Specific Condition No. 10 requires the use of best management practices ("BMPs"), such as placing a floating turbidity curtain during maintenance activities, and keeping the curtain in place until maintenance activities are completed and turbidity levels have returned to background levels.

61. Specific Condition No. 14 prohibits the placement of excess lumber, scrap wood, trash, garbage, and other potential sources of pollutants in wetlands or surface waters of the State.

62. Additionally, Specific Condition No. 13 prohibits the repair or refueling of construction equipment in wetlands or surface waters of the State.

63. No fueling or fuel storage facilities, boat repair facilities, or fish cleaning stations are located on the Dock, and Specific Condition No. 4 expressly prohibits such facilities and activities on the Dock.

64. Similarly, the discharge of trash, human or animal waste, garbage, fuel, fish cleaning waste, and other pollutants from the Dock, and from vessels mooring at the Dock, is prohibited.

65. As previously found, all in-water pilings supporting the Dock are wrapped with marine-approved HDPE to prevent pollutants from leaching into the water. No competent evidence was presented establishing that the non-wrapped pilings supporting the upland portion of the Dock may, or do, leach pollutants into the water. Therefore, such pilings do not need to be wrapped, and the Consolidated Permit does not impose such a requirement.

66. As previously discussed, the water depths in both boat slips on the Dock are sufficient to avoid bottom dredging and scouring by propellers, which would create turbidity.

67. As found above, handrails are installed on the Dock, and they must be maintained in order to prevent turbidity and damage to wetlands due to watercraft mooring in shallow areas adjacent to the Dock.

68. Collectively, these measures provide reasonable assurance that the Dock, as constructed and operated, did not, and will not, violate state water quality standards or degrade water quality in Spruce Creek.

69. Accordingly, it is determined that the Dock has not, and will not, adversely affect or degrade the water quality in Spruce Creek, in compliance with rule 62-330.301(1)(e).

No Adverse Secondary Impacts

70. As discussed above, the Dock is a private, single-family residential docking facility that accommodates two vessels. It is not part of a larger docking facility that serves multiple residences, or a commercial facility that provides or accommodates the launching of numerous vessels into Spruce Creek. As such, there are no very closely linked or causally related facilities, the impacts of which must be considered in determining whether the Dock has adverse secondary impacts.

71. No competent, substantial, or credible evidence was presented showing that the Dock would have any adverse impacts on aquatic or wetland-dependent species, including species listed as threatened or endangered.

72. Additionally, no competent, substantial, or credible evidence was presented showing that the Dock would have any adverse impacts on value of adjacent uplands for use by aquatic and wetland-dependent species.

73. As further discussed below, no competent, substantial, or credible evidence was presented showing that the Dock would have any adverse impacts on historical or archaeological resources.

74. As discussed above, construction and operation of the Dock has not, and will not, cause or contribute to, water quality violations.

75. Additionally, as discussed above, construction and operation of the Dock has not, and will not, adversely impact the functions of wetlands and surface waters.

76. The Dock, as currently constructed, is the subject of this proceeding. No competent or credible evidence was presented showing that any expansion of the Dock is proposed or planned at this juncture. Accordingly, any impacts from an expansion of the Dock are hypothetical and speculative, so, per the Applicant's Handbook,¹¹ are not to be considered in determining whether an activity results in secondary impacts.

77. In sum, the competent, substantial, and credible evidence shows that the Dock does not, and will not, have any adverse secondary impacts to water resources. Therefore, the Dock meets the requirements of rule 62-330.301(1)(f).

No Adverse Impacts to Works of a District

78. The evidence did not show the presence of any works of any water management district that would be affected by the Dock.¹² Accordingly, the Dock complies with the requirement, in rule 62-330.301(1)(h), that the activity not adversely affect works of a water management district.

¹¹ Applicant's Handbook, Vol. I, § 10.2.7.

¹² TSR, Joint Ex. 6, p. 2857. *See Last Stand, Inc. v. Fury Mgmt., Inc.*, Case No. 12-2574, Recommended Order at ¶ 91 (Fla. DOAH Dec. 31, 2012; Fla. DEP Feb. 7, 2013)(documents establishing prima facie case of entitlement to permit do not constitute hearsay in proceedings subject to section 120.569(2)(p)).

Capable of Performing and Functioning as Proposed

79. As discussed above, the Dock, as constructed, has a slightly different configuration than that depicted in the plans submitted as part of the General Permit Intent Notice.

80. That different configuration notwithstanding, the Dock is constructed, and is being operated, as a private, single-family residential dock having two boat slips. The Dock, which was constructed, and has been in operation since 2021, is capable of, and is, performing and functioning as a private, single-family residential dock in accordance with generally accepted engineering and scientific principles.¹³

81. If the Consolidated Permit is issued, Steinhardt will be required, within a specified period of time, to submit as-built plans that accurately depict the Dock, as constructed.

82. Accordingly, the Dock complies with rule 62-330.301(1)(i).

Financial, Legal, and Administrative Capability

83. As discussed above, Steinhardt owns the Property jointly with her husband, Richard Steinhardt. Richard Steinhardt constructed the Dock to completion, and it has been in operation since 2021.

84. The Dock is located within the riparian area that inures to the Property, and serves the Steinhardts' single family residence.

85. There is no statutory or rule requirement that a financial surety instrument be provided for a private, single-family residential dock.

86. The Consolidated Permit contains conditions requiring Steinhardt to operate and maintain the Dock as permitted. If Steinhardt fails to do so, DEP is authorized to pursue legal enforcement action to require the Dock to be operated and maintained in accordance with the conditions in the Consolidated Permit.

87. Accordingly, the Dock meets the requirements of rule 62-330.301(1)(j).

¹³ See note 12, *supra*.

Compliance with Applicable Special Basin Criteria

88. The Dock is located within the Halifax River Cumulative Impact Basin.

89. As discussed above, the competent substantial evidence establishes that the Dock will not adversely affect water quality in Spruce Creek, which is a tributary of the Halifax River.

90. Additionally, as discussed above, the Dock, as constructed and operated, does not, and will not, adversely affect fish, wildlife, listed species, or their habitats.

91. Accordingly, the Dock, as constructed and operated, meets applicable basin requirements, pursuant to rule 62-330.301(1)(j).

B. The Dock Meets the Clearly in the Public Interest Standard

92. Because the Dock is located in an OFW, Steinhardt must provide reasonable assurance that the Dock is "clearly in the public interest," a determination that is made based on consideration of seven statutory criteria, which also have been codified in rule. § 373.414(1), Fla. Stat.; Fla. Admin. Code R. 62-330.302(1).¹⁴

93. Based on the competent, substantial, and credible evidence, the following findings are made regarding the public interest criteria.

Does Not Adversely Affect Public Health, Safety, and Welfare or Property

94. As discussed above, the Dock has not, and will not, cause or contribute to violations of water quality standards or degrade water quality in Spruce Creek. The Consolidated Permit contains conditions, discussed above, which expressly prohibit the storage on, and discharge from, the Dock of human or animal waste, garbage, scrap wood, fuel, fish cleaning remains, and other pollutants that may cause water quality violations.

¹⁴ As further discussed below, the "clearly in the public interest" standard does not require an applicant to demonstrate a need for a project or a net public benefit from the project. Rather, this standard requires the applicant to provide greater assurances, under the circumstances specific to the project, that the project will comply with the applicable permitting requirements.

95. Also as discussed above, the Dock will not adversely affect water quantity; create discharges of water onto offsite properties or into Spruce Creek; cause onsite or offsite flooding; or adversely affect the hydroperiod, water storage, or conveyance capabilities of surface waters and wetlands.

96. Spruce Creek is a Class III water body that is not approved for shellfish harvesting. Therefore, the Dock will not have any adverse impacts on waters approved for shellfish harvesting.

97. As found above, the Dock is set back approximately 52 feet from the property line between Steinhardt's Property and the adjacent property immediately to the east, and approximately 132 feet from the property line between Steinhardt's Property and the adjacent property immediately to the west. Therefore, the Dock will not adversely affect the riparian rights inuring to neighboring properties.

98. Accordingly, the Dock does not, and will not, adversely affect the public health, safety, or welfare, or the property of others.

No Adverse Impacts to Fish, Wildlife, Listed Species, or Their Habitats

99. The competent, credible evidence establishes that no critical habitat for federally listed species exists at the location of the Dock.

100. Additionally, the Florida Fish and Wildlife Conservation Commission, in its review and comment on the application for the Consolidated Permit, stated that due to the Dock's small size, no adverse impacts to manatees are expected to occur, so that a full review of the Dock's impacts, pursuant to the Volusia County Manatee Protection Plan, was not warranted.

101. The competent, credible evidence further establishes that the Dock will not result in adverse impacts to bird species or their habitat. To that point, no evidence was presented that any bird nesting or breeding areas were, or will be, affected by the Dock.

102. Additionally, as previously noted, the Dock did not, and does not, impact wetland vegetation, and no submerged or emergent aquatic

vegetation or other benthic resources are present in, and under, the surface water of Spruce Creek where the Dock is located. Therefore, the Dock does not, and will not, adversely affect fish or wildlife, or their habitat.

103. Moreover, Specific Condition No. 8 of the Consolidated Permit expressly prohibits any construction or operation activity associated with the Dock from causing any adverse impact to, or take of state listed species and other regulated fish and wildlife species.

104. Accordingly, it is determined that the Dock does not, and will not, adversely affect the value of functions provided to fish, wildlife, and listed species by surface waters and wetlands, and, thus, will not adversely affect the conservation of fish and wildlife, including threatened or endangered species, or their habitat.

Does Not Adversely Affect Navigation

105. As discussed above, and further discussed below, the Dock is located within the Property's riparian area, and is set back well over 25 feet from the Property's riparian lines, so will not adversely impact the navigation rights attendant to neighboring properties.

106. Additionally, as found above, Spruce Creek is approximately 115 feet wide, from shoreline to shoreline, at the location of the Dock. The Dock extends, at most, 19 feet from the northern shoreline into Spruce Creek. Thus, vessels navigating the portion of Spruce Creek where the Dock is located have at least 96 feet of open water between the shorelines in which to navigate.

107. Thus, the competent, credible evidence established that the Dock, as constructed and operated, does not adversely affect navigation in Spruce Creek.

108. To this point, the competent, credible evidence established that Petitioner CCC's 40-foot pontoon boat did not have difficulty navigating past the Dock in Spruce Creek.

109. Petitioners contended that if trees were to fall in the water, the presence of the Dock would impede navigation around those fallen trees. However, this contention is hypothetical and speculative, and, as such, does not constitute competent substantial evidence that the Dock will adversely affect navigation in Spruce Creek.

110. Similarly, Petitioners testified that storm damage to the Dock may result in debris and structural hazards that would impede navigation in Spruce Creek. Again, this contention is speculative, so does not constitute competent substantial evidence that the Dock does, or will, adversely affect navigation in Spruce Creek.

111. In any event, the Consolidated Permit contains conditions that require Steinhardt to operate and maintain the Dock such that it does not violate any applicable statutes or rules, including those prohibiting adverse impacts to navigation.

Does Not Adversely Affect Water Flow or Cause Erosion

112. As found above, the Dock does not impound, store, or impede the flow of surface water, and does not create an impervious surface that causes a discharge, or otherwise affects the flow, of rainfall and other sources of water.

113. Therefore, the Dock does not, and will not, cause erosion or shoaling; adversely affect the hydroperiod, water storage, or conveyance capabilities of surface waters and wetlands; or cause adverse flooding on the Property or offsite.

Is a Permanent Activity

114. The Dock is a permanent activity. However, because the evidence shows that the Dock does not have adverse environmental impacts, its permanent nature does not militate against issuance of the Consolidated Permit.

Does Not Adversely Affect Historical or Archaeological Resources

115. The Department of State, Division of Historical Resources ("DHR"), reviewed the self-certification/application for the Dock, and determined that

its construction and operation would not, and will not adversely affect archaeological and historical resources.

116. Furthermore, the competent and credible evidence established that the Property, and, therefore the Dock, are not part of the Gamble Place Historic District or any other designated federal, state, or local historic property. Additionally, neither the Property nor the Dock, are located at, or on, any sites having historical and/or archaeological resources.

117. In order to protect prehistoric or historic artifacts and resources, General Condition No. 14 of the Consolidated Permit requires that all activities at the Dock cease, and that DHS be contacted, if prehistoric or historic artifacts, including human remains, are encountered at any time at the Dock location.

118. In sum, the competent, substantial, and credible evidence establishes that the Dock has not, and will not, adversely affect historical and archaeological resources, as required by rule 62-330.302(1)(a)6.

No Unacceptable Cumulative Impacts to Surface Waters and Wetlands

119. The Dock is a private, single-family residential docking facility that is owned, and exclusively used by, the Steinhardts. It is not part of a larger plan of development, and is not connected, or in any way related, to other docking facilities in Spruce Creek.

120. Additionally, the competent substantial evidence establishes that the construction and operation of the Dock has not, and will not, adversely impact surface waters and wetlands.

121. Accordingly, it is determined that the Dock will not cause, or result in, adverse cumulative impacts to wetlands and surface waters.

Entitlement to the ERP

122. Pursuant to section 120.569(2)(p), Steinhardt presented a prima facie case of entitlement to the ERP component of the Consolidated Permit by entering the Consolidated Permit and supporting information into evidence.

123. Additionally, DEP and Steinhardt presented competent, substantial, credible, and persuasive evidence establishing that the Dock meets the applicable requirements in section 373.414 and rules 62-330.301 and 62-330.302 for issuance of the ERP component of the Consolidated Permit.

124. As discussed below, Petitioners failed to carry their burden under section 120.569(2)(p) to demonstrate that the Dock does not meet the applicable statutory and rule requirements, so that the ERP should not be issued.

IV. Compliance with Applicable Proprietary Approval Requirements

125. The Dock is constructed on sovereignty submerged lands below the mean high water line of Spruce Creek. Therefore, proprietary approval for use of those submerged lands is required, pursuant to section 253.03 and chapter 18-21.

126. The Dock is a private, single-family residential dock that preempts approximately 895 square feet of sovereignty submerged lands. As found above, the Property has a riparian shoreline of approximately 230 linear feet along Spruce Creek. Because the Dock preempts less than ten square feet for every linear foot of riparian shoreline on the Property, a letter of consent is the required form of proprietary approval for the Dock. Fla. Admin. Code R. 18-21.005(1)(c)2.

127. As further discussed below, the "not contrary to the public interest" standard codified in rule 18-21.004(1)(a), which must be met in order to obtain proprietary approval to use sovereignty submerged land, does not require an applicant to affirmatively provide a net positive public benefit. Rather, as further discussed below, this standard requires the applicant to demonstrate, by competent substantial evidence, that the proposed activity meets all statutory and regulatory requirements applicable to the activity.

128. Steinhardt holds fee title ownership to the Property, which constitutes the riparian upland for the Dock. As such, she holds a sufficient upland interest, as required by rules 18-21.004(1)(b) and 18-21.004(2)(b), to

apply and obtain proprietary approval to use sovereignty submerged lands for the Dock.

129. The Dock is constructed and operated for water-dependent activities, such as fishing, boating, and swimming, in compliance with rule 18-21.004(1)(g).

130. The Dock has been constructed, and is operated, to enable the Steinhardts to engage in traditional recreational uses such as fishing, swimming, and boating, consistent with rule 18-21.004(2)(a).

131. As discussed above, the competent, substantial, and credible evidence shows that the construction and use of the Dock did not, and will not, result in the cutting, removal, or destruction of wetland vegetation, in compliance with rule 18-21.004(2)(b).

132. The competent, substantial, and credible evidence also shows that the Dock is designed, and is being operated, to avoid and minimize adverse impacts to fish and wildlife and their habitat, including threatened and endangered species and their habitat. Accordingly, the Dock complies with rule 18-21.004(2)(i).

133. The Dock is located within the Property's riparian area, and is set back more than 25 feet from the Property's riparian rights lines. Accordingly, the Dock meets the requirements of rule 18-21.004(3)(a) and (d), regarding the avoidance of unreasonable infringement on the traditional common law riparian rights of adjacent riparian upland property owners.

134. Further to that point, Petitioners did not present evidence showing that the Dock affected—much less unreasonably infringed on—riparian rights inuring to Petitioner CCC, which is the only petitioner in this proceeding that owns property riparian to Spruce Creek. As discussed above, the Dock does not interfere with CCC's navigation of its pontoon boat, and the testimony regarding potential interference with navigation from debris if the Dock were damaged in a storm (or otherwise) is purely speculative, and,

thus, does not constitute competent substantial evidence upon which findings can be based.

135. In sum, the evidence establishes that the Dock meets the applicable requirements in rules 18-21.004 and 18-21.005 for issuance of the LOC, pursuant to rule 18-21.007.

V. Petitioners' Challenge to Issuance of Consolidated Permit

136. One of Petitioners' main contentions in this proceeding is that the Dock was constructed without a permit.

137. There is no dispute that Steinhardt originally constructed and operated the Dock without a permit. Once she was notified that the Dock violated the requirement to obtain a permit because it exceeded the size threshold to qualify for the statutory exemption, she applied for a permit to construct and operate the Dock. Although the Dock would have qualified for coverage under a general permit (which is a permit by rule), because it was constructed without having obtained a permit, DEP evaluated the Dock under the more stringent individual ERP requirements, and determined that the Dock met those requirements.

138. As discussed above, to the extent that the Dock, as constructed, is slightly larger than that depicted in the plans submitted as part of the General Permit Intent Notice, if the Consolidated Permit is issued as a result of this proceeding, Steinhardt will be required, within a specified period, to submit as-built Dock plans to reflect the actual size of the Dock, as authorized.

139. Accordingly, there is no basis in fact or law to deny issuance of the Consolidated Permit because Steinhardt originally failed to obtain the required permit for the Dock, or that the Dock, as constructed, is slightly larger than depicted in the application for the Consolidated Permit.

Testimony of John Baker

140. John Baker testified on behalf of Petitioners regarding the relatively pristine environmental conditions at Spruce Creek; the designation of Spruce

Creek as an OFW; the biodiversity of the flora and fauna in the Spruce Creek ecosystem; and the presence of listed species that use and inhabit Spruce Creek and its surrounding habitat.

141. However, he did not present credible or persuasive evidence specifically showing that that Dock adversely affects the biodiversity of flora and fauna in Spruce Creek; adversely affects listed species and their habitat; or adversely affects or degrades the water quality in Spruce Creek.

142. He also testified regarding the presence of archaeological sites along the banks of Spruce Creek. However, he did not testify, or provide any competent evidence, showing that any archaeological resources are present on the Property, or that the Dock adversely affects archaeological resources. Further, to the extent any such resources are discovered at the location of the Dock, Steinhardt is required, pursuant to the Consolidated Permit, to avoid all such resources and contact DHS regarding the presence of such resources.

143. Baker also testified regarding the existence and description of what he characterized as a "trench" on upland property near the Property and Dock. However, not only is the trench not part of the activity at issue in this proceeding, but Petitioners presented no competent or persuasive evidence showing that the trench is located on the Property; that the Steinhardts constructed the trench; or that such construction violates any statutes and rules applicable to this proceeding. Accordingly, Baker's testimony regarding the trench is irrelevant to whether the Consolidated Permit for the Dock should be issued.

144. Baker further opined that "no individual residential dock is clearly in the public interest." However, he was not accepted as an expert witness qualified to render opinions regarding specialized matters in this proceeding. As such, his testimony in this regard constitutes lay witness testimony regarding a matter involving specialized knowledge that is properly the subject of expert testimony. *See* § 90.701(2), Fla. Stat. (lay witness opinion regarding a matter involving specialized knowledge does not constitute

competent evidence). Moreover, even if Baker had been accepted as an expert, the question whether the Dock meets the "clearly in the public interest" standard is a legal conclusion¹⁵ within the ALJ's purview in this proceeding. For these reasons, Baker's testimony regarding whether the Dock meets the "clearly in the public interest" standard for issuance of the ERP is not afforded weight.

Testimony of David Hartgrove

145. David Hartgrove was accepted, and testified, as an expert in bird species in the Spruce Creek area.

146. He testified that his "main concern" is that the Dock was constructed without a permit.

147. However, as discussed above, Steinhardt filed an application to construct and operate the Dock, albeit after the Dock was constructed. As discussed above, the fact that the Dock originally did not qualify for the statutory permit exemption, and, therefore, was constructed without a required permit is not, by itself, a reason to deny the Consolidated Permit. DEP required Steinhardt to apply for a permit; evaluated the General Permit Intent Notice under the individual ERP permitting requirements; and determined that the Dock meets the applicable statutory and rule requirements for issuance of the Consolidated Permit. Petitioners disputed that proposed issuance, and this de novo proceeding is being conducted specifically to determine, anew, whether the Dock meets the applicable requirements for issuance of the Consolidated Permit.

148. Hartgrove also testified regarding the presence of the trench on the property immediately adjacent to the Property. For the reasons discussed above, that testimony is irrelevant to whether the Dock meets the applicable requirements for issuance of the Consolidated Permit.

¹⁵ See *Palm Beach Cnty. v. Town of Palm Beach*, 426 So. 2d 1063, 1070 (Fla. 4th DCA 1983)("[I]t is not the function of [an] expert witness to draw legal conclusions.").

149. Hartgrove testified regarding the presence of numerous bird species, including threatened species and species of special concern, in the Spruce Creek ecosystem. He further testified that because the Dock impacted wetlands, it necessarily would interfere with or diminish food sources, such as fish and frogs, for bird species, and, therefore, adversely affect bird species.

150. However, he did not present any testimony or other evidence (nor did he rely on any other evidence provided by Petitioners) establishing that the Dock adversely affected wetlands or surface waters. As such, his testimony regarding impacts to birds' food sources was based on assumptions that are not supported by the greater weight of the competent substantial evidence in the record.

151. Hartgrove further testified that the health of bird populations in Volusia County is in decline, and Respondents did not dispute that testimony. However, he failed to provide any testimony or other evidence specifically linking the construction and operation of the Dock to the decline of bird populations, either at the Dock site or in Volusia County, in general.

152. He also testified that, in general, DEP reviews projects on an individual basis, rather than considering the cumulative impacts of such projects on wildlife, including birds, and that this is a flaw in DEP's review process.

153. However, his testimony is directly contradicted by competent, substantial, and credible evidence, consisting of the TSR, showing that DEP, did, in fact, consider the Dock's cumulative impact in conjunction with other similar impacts in the Halifax River Basin, and that DEP determined the Dock would not result in adverse cumulative impacts.

Testimony of Alex Zelenski

154. Alex Zelenski was accepted, and testified, as an expert in geographic information systems ("GIS"); environmental permitting; resilience; aquatic ecosystems; dock impacts; the Dock, Consolidated Permit, and supporting

documentation¹⁶; hydrological connections; wetlands; and conservation, as listed in his resume, which was accepted into evidence.

155. Zelenski's primary concern centered on the Dock's alleged direct and secondary impacts to surface waters and wetlands, and the lack of mitigation provided to offset such impacts.

156. To this point, he opined that the TSR's determination that the Dock did not impact wetlands was "a false statement." In support of this opinion, he assumed that wetland vegetation had been cleared or impacted in constructing the Dock. This assumption was based on his "desk top" review, using GIS information to analyze the wetland delineation for the Property provided as part of the General Permit Intent Notice. He acknowledged that he had not visited the Dock site for purposes of verifying the Dock's on-the-ground impact on wetlands and surface waters.

157. Zelenski further testified, generally, that "you're losing vegetation, you're disturbing the soil, you're shading the area, you're kind of offsetting the wildlife's ability to use that area." In presenting such testimony, he assumed that any impact due to the Dock constituted a "negative" impact for which mitigation is required.

158. However, he did not present any specific factual evidence establishing that wetland vegetation was, in fact, impacted by construction of the Dock, or that such vegetation continues to be impacted by shading from the Dock. Rather, as noted above, for purposes of his opinion, he assumed that such impacts occurred, and are continuing to occur.

159. However, as discussed above, the competent, substantial, and credible evidence established that there is no wetland, submerged, or emergent aquatic vegetation present at the footprint of the Dock. Thus, the

¹⁶ The undersigned has interpreted this listed area of expertise to consist of Zelenski's opinion regarding whether the Dock, as designed, constructed, and operated, meets the applicable statutory and rule requirements for issuance of the Consolidated Permit.

evidence establishes that the Dock did not, and does not, impact wetland vegetation or aquatic vegetation.

160. Moreover, even if wetlands were, in fact, impacted by the Dock and/or the Dock pilings, Zelenski failed to present competent, substantial, and persuasive evidence establishing that such impacts were adverse—rather than merely de minimis—such that mitigation would be required under section 373.414 and rules 62-330.301 and 62-330.302.

161. Zelenski also failed to present specific evidence showing that the Dock interferes with the ability of wildlife to traverse and use the upland, wetland, and submerged areas where the Dock is located. Again, he assumed, based on the Dock's location on the shoreline of Spruce Creek, that it adversely affects wildlife.

162. Regarding the HDPE placed around the Dock pilings, Zelenski testified that, "while the wrapping may be preventing some form or kind of wood leachate, the wrapping in itself is a contaminant in our waterway that I would prefer not to be there." However, he did not present any credible or persuasive evidence substantiating his opinion that the use of HDPE wrap—which is a standard BMP frequently imposed in ERPs for docking facilities to prevent water quality degradation—would break down in the water column to the extent that it would violate water quality standards or degrade water quality in Spruce Creek.

163. In any case, Specific Condition No. 11 requires the project to comply with applicable state water quality standards, and the Consolidated Permit expressly states that "[f]ailure to comply with these conditions ... shall be grounds for [DEP] to revoke the permit and authorization and to take appropriate enforcement action." Pursuant to this condition, Steinhardt is required to ensure that the operation of the Dock, including the use of the HDPE piling wrap, does not violate water quality standards.

164. Zelenski opined that the Consolidated Permit should not be issued "because there's no mitigation. And because there's no mitigation in an

outstanding Florida waterway, it can't be clearly in the public interest because we have lost something here, and we don't know what we lost because we don't have that evaluation."

165. However, again, he failed to present non-speculative evidence showing that the Dock adversely impacted wetlands and surface waters, such that mitigation is required under section 373.414, and rules 62-330.301 and 62-330.302.

Cracker Creek Canoeing

166. As found above, CCC is a privately owned, for-profit business located on the northern bank of Spruce Creek, at 1795 Taylor Road, Port Orange, Florida. CCC's business entails renting kayaks and canoes; providing eco-tours of Spruce Creek via a 40-foot-long, motorized pontoon boat; providing a location for public launching of non-motorized watercraft; and providing educational programs focusing on the history and ecology of Spruce Creek.

167. Jill Williams, the owner of CCC, testified regarding CCC's interests in this proceeding.

168. Specifically, Williams testified that the Dock would interfere with navigation of CCC's pontoon vessel and other vessels that CCC rents to the public for use in Spruce Creek. Because the Dock extends into Spruce Creek, navigation is a cognizable interest in this proceeding.

169. However, as found above, the competent, substantial, and credible evidence establishes that the Dock does not interfere with navigation, including navigation by CCC and its patrons, at this location in Spruce Creek. To that point, Williams acknowledged that, to date, the Dock had not interfered with the navigation of CCC's 40-foot pontoon boat or other vessels in Spruce Creek.

170. Williams also testified that if a storm were to damage the Dock, debris from the Dock may obstruct Spruce Creek, thereby interfering with navigation. By way of example, she cited other examples of docks along Spruce Creek that had been damaged by storms, and which she surmised

were a source of debris that interfered with navigation. However, her testimony in this regard was hypothetical and speculative, and, thus, does not constitute competent substantial evidence that the Dock will interfere with navigation on Spruce Creek.

171. Additionally, Williams testified regarding the natural beauty and rich ecosystem in and along Spruce Creek; the existence of archaeological resources in the vicinity; and the alleged negative impacts of the Dock on her business.

172. However, to the extent Williams opined regarding the alleged impacts of the Dock on fish; wildlife, and threatened and endangered species, including manatees; and their habitat, this testimony constitutes impermissible lay witness opinion testimony, and, as such, is not afforded weight in this proceeding.

173. Williams also opined that the Dock does not meet the "clearly in the public interest" standard. However, for the reasons discussed above, her testimony in this regard is not competent evidence, and, therefore, has not been assigned weight in determining whether the Dock meets the applicable legal standard for issuance of the Consolidated Permit.

174. Williams also testified about the trench located on the property immediately adjacent to the Steinhardt Property. For the reasons discussed above, this testimony is irrelevant to the issues in this proceeding, and, therefore, has not been assigned weight in this proceeding.

Derek LaMontagne

175. Derek LaMontagne has been a resident of Volusia County for over 25 years and is a longtime advocate for Spruce Creek. As found above, he is co-President of SCVC.

176. LaMontagne enjoys hiking, biking, recreation, citizen science, kayaking, and wildlife observation and photography in and around Spruce Creek and its tributaries, and their adjacent natural areas.

177. He contended that the Dock, as authorized by the Consolidated Permit, will, and does, adversely affect his use and enjoyment of Spruce Creek, and his pursuit of those activities in and around Spruce Creek and its tributaries. Specifically, he testified that Dock is located on "the most important spot, like in our area. Like, it's this corridor. It's right on the bank of the creek. It's near these nature preserves.... [I]t couldn't be more important to not do it that way."

178. Regarding the Dock's impacts, he testified that some of the Dock's pilings are in wetlands, so that the Dock has impacted wetlands, so mitigation is required for the Dock to be permitted. As he put it, "you always get secondary impacts when you have primary impacts. And we know there are primary impacts."

179. However, as noted above, and further discussed below, section 373.414 and rules 62-330.301 or 62-330.302 only require adverse wetland impacts to be mitigated. Accordingly, if—as is the case here—an impact to a wetland is de minimis, mitigation is not required to offset that minimal impact.

180. LaMontagne further testified that the Dock is significantly larger than other docks in the immediate vicinity. As he put it, "there's like no other dock around there, really, that's as big."

181. However, photographs admitted into evidence¹⁷ show that numerous private single-family residential docks have been constructed, and are in operation, in and along Spruce Creek, including in areas relatively proximate to the Property and the Dock. While many of these docks range in area from 500 to 600 square feet over surface waters and wetlands, the dock closest to Steinhardt's is between 600 and 700 square feet in area over surface waters and wetlands, and at least two of the docks exceed 800 square feet in area over surface waters and wetlands.

¹⁷ Respondent's Exhibit 17.

182. He also testified, based on his personal observations, that manatees are present in Spruce Creek and that they feed on vegetation, which generally grows along the creek's edge. He testified that the presence of a dock, including the Dock at issue in this proceeding, on the shoreline of the creek interferes with manatees' access to food sources, and, consequently, drive them into the middle of the creek, where they are more likely to be hit by boats.

183. While those circumstances may exist at other docks in Spruce Creek—although LaMontagne did not specifically identify any such docks—here, the competent, substantial, and credible evidence establishes that there is no submerged or emergent aquatic vegetation at the location of the Dock. Accordingly, the Dock has no impact on manatees' access to food sources. Thus, using Petitioners' logic, the Dock does not have the effect of driving manatees into the center of the creek, where they are more likely to be hit by boats.

184. LaMontagne also testified regarding the existence of archaeological resources, such as shell middens, in the Spruce Creek area, including at/on Old Kings Road. However, he did not present any evidence showing that any archaeological or historical resources exist at the specific location of the Dock or on the Property. As discussed above, General Condition No. 14 of the Consolidated ERP expressly requires that if such resources are discovered at the site, all subsurface activities must cease and DHS must be contacted regarding the presence of such resources.

185. LaMontagne also noted discrepancies between the Dock, as approved in the Consolidated Permit, and as actually constructed. However, as discussed above, if DEP enters a final order determining that the Consolidated Permit should be issued, Steinhardt will be required to file, within a specified timeframe, as-built plans that accurately depict the Dock, as constructed, and those plans will be incorporated into the Consolidated Permit when it is issued.

186. LaMontagne presented photographs of the Dock during a high water event, showing the partially submerged terminal platform, and, on that basis, testified that all of the Dock pilings should be wrapped with HDPE,¹⁸ As he put it, "ALL of the wood of the dock structure is exposed to Spruce Creek," so having only some of the pilings wrapped "will not do anything to stop chemicals leaching out of the rest of the wood, including that of the decking and walkway."

187. As the parties asserting the affirmative of this issue—i.e., that during high water events, the unwrapped wood pilings will leach pollutants into the environment such that water quality standards will be violated and the water quality in Spruce Creek degraded—Petitioners have the ultimate burden to demonstrate, by competent substantial evidence, that this scenario will, in fact, occur. Apart from LaMontagne's speculative testimony, Petitioners did not present other competent, credible evidence to support this contention.

188. LaMontagne also testified regarding the trench on the adjacent property. As discussed above, the trench is not part of the activity at issue in this proceeding, so this testimony is not relevant to this proceeding. In any event, as discussed above, no evidence was presented showing that the trench was located on the Property, that Steinhardt constructed the trench, or that constructing the trench violated any statutes or rules pertinent to this proceeding.

Sweetwater Coalition of Volusia County

189. LaMontagne, co-President and corporate representative of SCVC, testified regarding SCVC's standing to challenge the Consolidated Permit.

190. SCVC has been incorporated as a Florida not-for-profit corporation since 2018. It has more than 30 members, and its stated purpose is to preserve and protect the quality of life in the Volusia County area by

¹⁸ Notably, this testimony is inconsistent with Zelenski's testimony that using HDPE piling wrap will result in water quality violations due to degradation of the HDPE.

advocating against construction projects that significantly impact the natural environment. Specifically, SCVC opposes land modifications and developments that negatively affect Spruce Creek and its tributaries, canals, and ditches, and negatively affect forests and wetlands in Volusia County. SCVC particularly opposes rapid development in the Spruce Creek watershed and unpermitted or not-in-compliance docks in Spruce Creek.

191. A substantial number of SCVC's members enjoy hiking, biking, fishing, recreation, citizen science and water quality monitoring, canoeing, kayaking and nature photography in and around Spruce Creek and nearby areas.

192. SCVC contends, and LaMontagne testified, that the Dock interferes with, and jeopardizes, these recreational pursuits and the use and enjoyment of Spruce Creek by SCVC's members.

Kat Paro

193. Kat Paro was a resident of Volusia County when the Amended Petition was filed in December 2022. She moved out of state after the Amended Petition was filed, but remains a member of SCVC. She testified that she wants, and intends to, move back to the Volusia County area in the future.

194. She is an artist by profession.

195. She testified, credibly, that even though she currently lives out of state, she continues to engage in volunteer environmental advocacy to protect Spruce Creek, and actively supports SCVC.

196. While Paro lived in Volusia County, she frequently engaged in kayaking, hiking, biking, and wildlife observation in and around Spruce Creek. She testified, credibly, that she hopes, and intends, to move back to Volusia County, at which point, she will resume her recreational activities in Spruce Creek.

197. She also testified regarding the degradation of water quality in Spruce Creek caused by degradation of the HDPE pile wrapping used on the

Dock. However, Paro is a lay witness who was not qualified as an expert witness regarding plastics, their degradation, or their effects on water quality. Accordingly, for the reasons discussed above, her testimony on this topic is not afforded weight in this proceeding.

198. Similarly, to the extent Paro opined regarding the Dock's construction and operation impacts on fish, wildlife, fishing value, and water quality, she was not tendered or accepted as an expert witness qualified to testify regarding such topics, which entail specialized knowledge. As such, her opinion regarding these topics constitutes impermissible lay witness testimony, and, therefore, is not afforded weight in this proceeding.

199. Regarding the existence of historical and archaeological resources at the Dock site, she testified, "I know that there, you know, are probably some ancient middens in there somewhere." However, she failed to present any specific information showing that there are any historical or archaeological resources at the Dock site, or that the Dock has any impacts on such resources.

200. As discussed above, the evidence established that such resources are not present at the Dock site. Moreover, to the extent such resources may be discovered in the future, the Consolidated Permit requires Steinhardt to cease any activity that may affect such resources and contact DHS.

Petitioners Failed to Carry Their Ultimate Burden of Persuasion

201. In sum, it is determined that Petitioners did not sustain their burden to demonstrate, by the greater weight of the competent substantial evidence, that the Dock does not meet the applicable statutory and rule requirements for issuance of the Consolidated Permit.

CONCLUSIONS OF LAW

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

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

203. This is a de novo proceeding, the purpose of which is to formulate agency action, not review agency action taken earlier and preliminarily. *Fla. Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778, 785 (Fla. 1st DCA 1981); see *Capeletti v. Dep't of Transp.*, 362 So. 2d 346, 348-49 (Fla. 1st DCA 1978).

204. Section 120.569(2)(p), which applies to this proceeding, states, in pertinent part:

For any proceeding arising under chapter 373, ... 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.

205. Pursuant to section 120.569(2)(p), a third-party challenger bears the ultimate burden of persuasion to prove its case in opposition to issuance of the chapter 373 permit—in this case, the ERP portion of the Consolidated Permit for the Dock.

206. Here, Steinhardt presented a prima facie case of entitlement to the ERP for the Dock, pursuant to section 120.569(2)(p), by entering the

Application, the Consolidated Permit, and supporting information into evidence at the final hearing.

207. Under section 120.569(2)(p), the burden of ultimate persuasion is on Petitioners to prove that the Dock does not meet requirements for issuance of the ERP portion of the Consolidated Permit. If they fail to meet that burden, Steinhardt prevails by virtue of her prima facie case, and is entitled to issuance of the ERP. *Washington Cnty. v. Bay Cnty.*, Case Nos. 10-2983, 10-2984, 10-10100 (Fla. DOAH July 26, 2012; NFWFMD Sept. 27, 2012).

208. The LOC for the Dock is governed by chapter 253, which is not among the statutes listed in section 120.569(2)(p) to which the shifted burden of proof applies.

209. Accordingly, as the applicant for the LOC, Steinhardt bears the ultimate burden of proof, by a preponderance of the evidence, to demonstrate entitlement to issuance of the LOC. *See J.W.C. Co.*, 396 So. 2d at 790 (applicant for agency approval bears ultimate burden of persuasion).

210. The standard of proof applicable to this proceeding is a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

II. Applicable Statutes and Rules

A. Environmental Resource Permitting Requirements

Reasonable Assurance Standard

211. To be entitled to an ERP, the applicant must provide reasonable assurance that it meets all applicable statutory and rule requirements for issuance of the permit. *See* § 373.414, Fla. Stat.; Fla. Admin. Code R. 62-330.301(1) and 62-330.302(1).

212. The reasonable assurance standard means "a substantial likelihood that the project will be successfully implemented." *Metro. Dade Cnty. v. Coscan Fla., Inc.*, 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Reasonable assurance does not require absolute guarantees that the proposed activity will not violate applicable requirements under any and all circumstances. *St. Johns River Water Mgmt. Dist. v. Cece*, 369 So. 3d 730, 735 (Fla. 5th DCA

2023). Furthermore, 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 id.* Thus, speculation or subjective beliefs are not sufficient to carry the burden of presenting contrary evidence or proving a lack of reasonable assurance necessary to demonstrate that a permit should not be issued. *FINR II, Inc. v. CF Indus., Inc.*, Case No. 11-6495 (Fla. DOAH Apr. 30, 2012; Fla. DEP June 8, 2012).

213. With respect to determining whether a proposed activity in surface waters or wetlands would adversely affect the public health, safety, or welfare, or property of others, the focus is solely on environmental hazards or injuries that may result from the proposed activity. *See Miller v. Dep't of Env't. Regul.*, 504 So. 2d 1325, 1327-28 (Fla. 1st DCA 1987)(given scope of DER's regulatory jurisdiction, statutory reference to property of others has no logical meaning outside of environmental context); *see also Save Anna Maria, Inc. v. Dep't of Transp.*, 700 So. 2d 113, 116 (Fla. 2d DCA 1997)(review of public interest criteria is limited to environmental impacts).

Clearly in the Public Interest Standard

214. Because the Dock is in an OFW, Steinhardt is required to provide reasonable assurance that the Dock meets the "clearly in the public interest" standard. § 373.414(1), Fla. Stat.

215. Providing reasonable assurance that a proposed activity is clearly in the public interest does not require a demonstration of the need for, or net public benefit from, the activity. *See 1800 Atlantic Developers v. Dep't of Env't Regul.*, 552 So. 2d 946, 957 (Fla. 1st DCA 1989). Rather, this standard requires greater assurances that all applicable statutory and rule requirements for permit issuance are met, particularly with respect to the potential harm to environmental resources that may be caused by the activity. *See WWALS Watershed Coal, Inc. v. Sabal Trail Transmission, LLC*, Case No. 15-4975 (Fla. DOAH Dec. 11, 2015; Fla. DEP Jan. 15, 2016).

Whether the assurances provided by the applicant are reasonable for purposes of meeting the "clearly in the public interest" standard depends on the circumstances specific to the proposed activity. *See Angelo's Aggregate Materials, Ltd. v. Dep't of Env't Prot.*, Case No. 09-1543 (Fla. DOAH June 28, 2013; Fla. DEP Sept. 16, 2013).

Statutory and Rule Requirements for ERP

216. Section 373.414, which governs issuance of the ERP, 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 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. However, if such an activity significantly degrades or is within an Outstanding Florida Water, as provided by department rule, the applicant must provide reasonable assurance that the proposed activity will be clearly in 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.

(b) If the applicant is unable to otherwise meet the criteria set forth in this subsection, the governing board or the department, in deciding to grant or deny a permit, must consider measures proposed by or acceptable to the applicant to mitigate adverse effects that may be caused by the regulated activity.

§ 373.414(1)(a), (b), Fla. Stat.

217. DEP has adopted rules to implement this statute. Rule 62-330.301(1), titled "Conditions for Issuance of Individual and Conceptual Approval Permits," states, in pertinent part:

(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:

* * *

- (b) Will not cause adverse water quantity impacts to receiving waters and adjacent lands;
- (c) Will not cause adverse flooding to on-site or off-site property;
- (d) Will not cause adverse impacts to existing surface water storage and conveyance capabilities;
- (e) Will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters;
- (f) 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;
- (g) 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;
- (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; and
- (k) Will comply with any applicable special basin or geographic area criteria[.]

218. Additionally, 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.

(2) When determining whether an applicant has provided reasonable assurances that the permitting standard of this chapter will be met, the Agency shall consider the applicant's violation of any rules adopted pursuant to Sections 403.91 through 409.929, F.S. (1984 Supp.), as amended, or Part IV, Chapter 373, F.S., and efforts undertaken by the applicant to resolve these violations.

219. The Applicant's Handbook, Volume I, has been adopted by rule through incorporation by reference. Fla. Admin. Code R. 62-330.010(4)(a). Part III of the Applicant's Handbook, titled "Environmental," sets forth the following provisions, in pertinent part, that are relevant to this proceeding.

10.1.1 Environmental Conditions for Issuance

The Agency addresses the conservation of these beneficial functions in the permitting process by requiring applicants to provide reasonable assurances that the following conditions for issuance of permits, set forth in Rules 62-330.301 (Conditions for Issuance) and 62-330.302 (Additional Conditions

for Issuance), F.A.C., are met. Applicants must provide reasonable assurance that:

(a) A regulated activity will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters [paragraph 62-330.301(1)(d), F.A.C.];

(b) A regulated activity located in, on, or over wetlands or other surface waters will not be contrary to the public interest, or if such an activity significantly degrades or is within an Outstanding Florida Water, that the regulated activity will be clearly in the public interest [subsection 62-330.302(1), F.A.C.];

(c) A regulated activity will not adversely affect the quality of receiving waters such that the water quality standards set forth in Chapters 62-4, 62-302, 62-520, and 62-550, F.A.C., including any antidegradation provisions of paragraphs 62-4.242(1)(a) and (b), subsections 62-4.242(2) and (3), 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 [paragraph 62-330.301(1)(e), F.A.C.];

* * *

(f) A regulated activity will not cause adverse secondary impacts to the water resources [paragraph 62-330.301(1)(f), F.A.C.]; and

(g) A regulated activity will not cause unacceptable cumulative impacts upon wetlands and other surface waters [paragraph 62-330.302(1)(b), F.A.C.].

10.2.1 Elimination or Reduction of Impacts

Protection of wetlands and other surface waters is preferred to destruction and mitigation due to the temporal loss of ecological value and uncertainty regarding the ability to recreate certain functions

associated with these features. The following factors are considered in determining whether an application will be approved by the Agency: the degree of impact to wetland and other surface water functions caused by a proposed activity; whether the impact to these functions can be mitigated; and the practicability of design modifications for the site that could eliminate or reduce impacts to these functions, including alignment alternatives for a proposed linear system. ... To receive Agency approval, an activity cannot cause a net adverse impact on wetland functions and other surface water functions that is not offset by mitigation.

10.2.2 Fish, Wildlife, Listed Species and their Habitats

Pursuant to section 10.1.1(a), above, an applicant must provide reasonable assurances that a regulated activity will not impact the values of wetland and other surface water functions so as to cause adverse impacts to:

- (a) The abundance and diversity of fish, wildlife, listed species, and the bald eagle (*Haliaeetus leucocephalus*), which is protected under the Bald and Golden Eagle Protection Act, 16 U.S.C. 668-668d (April 30, 2004); a copy of the Act is in Appendix F; and
- (b) The habitat of fish, wildlife, and listed species.

In evaluating whether an applicant has provided reasonable assurances under these provisions, de minimis effects shall not be considered adverse for the purposes of this section.

As part of the assessment of the impacts of regulated activities upon fish and wildlife, the Agency will provide a copy of all notices of applications for individual (including conceptual approval) permits that propose regulated activities in, on, or over wetlands or other surface waters to the Florida Fish and Wildlife Conservation Commission (FWC) for

review and comment, in accordance with Section 20.331(10), F.S. In addition, Agency staff may solicit comments from the FWC regarding other applications to assist in the assessment of potential impacts to fish and wildlife and their habitats, particularly with regard to listed species.

* * *

10.2.3 Public Interest Test

In determining whether a regulated activity located in, on, or over wetlands or other surface waters is not contrary to the public interest, or if such an activity significantly degrades or is within an Outstanding Florida Water, that the regulated activity is clearly in the public interest, the Agency shall consider and balance, and an applicant must address, the following criteria:

- (a) Whether the regulated activity will adversely affect the public health, safety, or welfare or the property of others (subparagraph 62-330.302(1)(a)1, F.A.C.);
- (b) Whether the regulated activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats (subparagraph 62-330.302(1)(a)2, F.A.C.);
- (c) Whether the regulated activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling (subparagraph 62-330.302(1)(a)3, F.A.C.);
- (d) Whether the regulated activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity (subparagraph 62-330.302(1)(a)4, F.A.C.);
- (e) Whether the regulated activity will be of a temporary or permanent nature (subparagraph 62-330.302(1)(a)5, F.A.C.);

(f) Whether the regulated activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of Section 267.061, F.S. (subparagraph 62-330.302(1)(a)6, F.A.C.); and

(g) The current condition and relative value of functions being performed by areas affected by the proposed regulated activity (subparagraph 62-330.302(1)(a)7, F.A.C.).

10.2.3.1 Public Health, Safety, or Welfare or the Property of Others

In reviewing and balancing the criterion regarding public health, safety, welfare and the property of others in section 10.2.3(a), above, the Agency will evaluate whether the regulated activity located in, on, or over wetlands or other surface waters will cause:

(a) An environmental hazard to public health or safety or improvement to public health or safety with respect to environmental issues.

* * *

(c) Flooding or alleviate existing flooding on the property of others.

(d) Environmental impacts to the property of others. ... The Agency will not consider impacts to property values.

10.2.3.2 Fish and Wildlife and their Habitats

The Agency's public interest review of that portion of a proposed activity in, on, or over wetlands and other surface waters for impacts to "the conservation of fish and wildlife, including endangered or threatened species, or their habitats" is encompassed within the required review of the entire activity under section 10.2.2, above. An

applicant must always provide the reasonable assurances required under section 10.2.2, above.

10.2.3.3 Navigation, Water Flow, Erosion and Shoaling

In reviewing and balancing the criterion on navigation, erosion and shoaling in section 10.2.3(c), above, the Agency will evaluate whether the regulated activity located in, on or over wetlands or other surface waters will:

(a) Significantly impede navigability or enhance navigability. The Agency will consider the current navigational uses of the surface waters and will not speculate on uses that may occur in the future. ... Applicants proposing to construct docks ... that extend into surface waters must address the continued navigability of these waters.

(b) Cause or alleviate harmful erosion or shoaling. ... Compliance with erosion control best management practices referenced in Part IV of this Volume, will be an important consideration in addressing this criterion. Each permit will have a general condition that requires applicants to utilize appropriate erosion control practices and to correct any adverse erosion or shoaling resulting from the regulated activities.

(c) Significantly impact or enhance water flow.

10.2.3.4 Fisheries, Recreation, Marine Productivity

In reviewing and balancing the criterion regarding fishing or recreational values and marine productivity in section 10.2.3(d), above, the Agency will evaluate whether the regulated activity in, on, or over wetlands or other surface waters will cause:

(a) Adverse effects to sport or commercial fisheries or marine productivity. Examples of activities that may adversely affect fisheries or marine

productivity are the elimination or degradation of fish nursery habitat, change in ambient water temperature, change in normal salinity regime, reduction in detrital export, change in nutrient levels, or other adverse effects on populations of native aquatic organisms.

(b) Adverse effects or improvements to existing recreational uses of a wetland or other surface water. Wetlands and other surface waters may provide recreational uses such as boating, fishing, swimming, waterskiing, hunting, and birdwatching. An example of potential adverse effects to recreational uses is the construction of a traversing work, such as a road crossing a waterway, which could impact the current use of the waterway for boating.

10.2.3.5 Temporary or Permanent Nature

When evaluating the other criteria in section 10.2.3, above, the Agency will consider the frequency and duration of the impacts caused by the proposed activity. Temporary impacts will be considered less harmful than permanent impacts of the same nature and extent.

10.2.3.6 Historical and Archaeological Resources

In reviewing and balancing the criterion regarding historical and archaeological resources in section 10.2.3(f), above, the Agency will evaluate whether the regulated activity located in, on, or over wetlands or other surface waters will impact significant historical or archaeological resources. The applicant must map the location of and characterize the significance of any known historical or archaeological resources that may be affected by the regulated activity located in, on or over wetlands or other surface waters. The Agency will provide copies of all individual (including conceptual approval) permit applications to the Division of Historical Resources of the Department of State and

solicit its comments regarding whether the regulated activity may adversely affect significant historical and archaeological resources. The applicant will be required to perform an archaeological survey and to develop and implement a plan as necessary to demarcate and protect the significant historical or archaeological resources, if such resources are reasonably expected to be impacted by the regulated activity.

10.2.3.7 Current Condition and Relative Value of Functions

When evaluating other criteria in section 10.2.3, above, the Agency will consider the current condition and relative value of the functions performed by wetlands and other surface waters affected by the proposed regulated activity. Wetlands and other surface waters that have had their hydrology, water quality, or vegetative composition permanently impacted due to past legal alterations or occurrences, such as infestation with exotic species, usually provide lower habitat value to fish and wildlife. However, if the wetland or other surface water is currently degraded, but is still providing some beneficial functions, consideration will be given to whether the regulated activity will further reduce or eliminate those functions. The Agency will also evaluate the predicted ability of the wetlands or other surface waters to maintain their current functions as part of the proposed activity once it is developed. Where previous impacts to a wetland or other surface water are temporary in nature, consideration will be given to the inherent functions of these areas relative to seasonal hydrologic changes, and expected vegetative regeneration and projected habitat functions if the use of the subject property were to remain unchanged. When evaluating impacts to mitigation sites that have not reached success pursuant to section 10.3.6, below, the Agency shall consider the functions that the mitigation site was intended to offset, and any additional delay or reduction in offsetting those functions that may be caused by

impacting the mitigation site. Previous construction or alteration undertaken in violation of Chapter 373, F.S., or Agency rule, order or permit will not be considered as having diminished the condition and relative value of a wetland or other surface water.

10.2.4 Water Quality

Pursuant to section 10.1.1(c), above, an applicant must provide reasonable assurance that the regulated activity will not cause or contribute to violations of water quality standards in areas where water quality standards apply.

Reasonable assurances regarding water quality must be provided both for the short term and the long term, addressing the proposed construction, alteration, operation, [and] maintenance[.]

10.2.4.1 Short Term Water Quality Considerations

The applicant must address the short term water quality impacts of a proposed activity, including:

(a) Providing and maintaining turbidity barriers or similar devices for the duration of dewatering and other construction activities in or adjacent to wetlands or other surface waters;

* * *

(f) Preventing any other discharge or release of pollutants during construction or alteration that will cause or contribute to water quality standards being violated.

10.2.4.2 Long Term Water Quality Considerations

The applicant must address the long term water quality impacts of a proposed activity, including:

* * *

(b) Long term erosion, siltation or propeller dredging that will cause turbidity violations.

(c) Prevention of any discharge or release of pollutants from the activity that will cause water quality standards to be violated.

* * *

10.2.7 Secondary Impacts

Pursuant to section 10.1.1(f), above, an applicant must provide reasonable assurances that a regulated activity will not cause adverse secondary impacts to the water resource, as described in sections (a) through (d), below. Aquatic or wetland dependent fish and wildlife are an integral part of the water resources that the Agency is authorized to protect under Part IV, Chapter 373, F.S.

Aquatic or wetland dependent species that are listed species are particularly in need of protection, as are: the bald eagle (*Haliaeetus leucocephalus*), which is protected under the Bald and Golden Eagle Protection Act (16 U.S.C. 668-668d) and Rule 68A-16.002, F.A.C.

A proposed activity shall be reviewed under this criterion by evaluating the impacts to: wetland and surface water functions identified in section 10.2.2, above, water quality, upland habitat for bald eagles and aquatic or wetland dependent listed species, and historical and archaeological resources. *De minimis* or remotely related secondary impacts will not be considered.

This secondary impact criterion consists of the following four parts:

(a) An applicant shall provide reasonable assurance that the secondary impacts from construction, alteration, and intended or reasonably expected uses of a proposed activity will not cause or contribute to violations of water quality standards or adverse

impacts to the functions of wetlands or other surface waters as described in section 10.2.2.

* * *

(b) An applicant shall provide reasonable assurance that the construction, alteration, and intended or reasonably expected uses of a proposed activity will not adversely impact the ecological value of uplands for bald eagles, and aquatic or wetland dependent listed animal species for enabling existing nesting or denning by these species, but not including:

1. Areas needed for foraging; or
2. Wildlife corridors, except for those limited areas of uplands necessary for ingress and egress to the nest or den site from the wetland or other surface water.

A list of aquatic or wetland dependent listed species and species having special protection that use upland habitats for nesting and denning may be found at <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/documents/listed-wildlife-species-are>.

In evaluating whether a proposed activity will adversely impact the ecological value of uplands to the bald eagle and aquatic or wetland dependent listed species, the Agencies shall consider comments received from the Florida Fish and Wildlife Conservation Commission (FWC), the U.S. Fish and Wildlife Service, the applicant, and the public (for comments related to this section). Permitting guidelines within management plans, recovery plans, habitat and conservation guidelines, scientific literature, and technical assistance documents such as the "*Florida Wildlife Conservation Guide*" (myfwc.com/conservation/value/fwcg/) also will be considered.

Compliance with the U.S. Fish and Wildlife Service (USFWS) *Habitat Management Guidelines for the*

Wood Stork in the Southeast Region (January 1990), available at: [http:// www.fws.gov/northflorida/WoodStorks/Documents/19900100_gd_Wood-stork-habitat-guidelines-1990.pdf](http://www.fws.gov/northflorida/WoodStorks/Documents/19900100_gd_Wood-stork-habitat-guidelines-1990.pdf), and reproduced in Appendix G, will provide reasonable assurance that the proposed activity will not adversely impact upland habitat functions described in paragraph (b) for the wood stork.

Secondary impacts to the functions of wetlands or uplands for nesting of bald eagles (*Haliaeetus leucocephalus*) will not be considered adverse if the applicant holds a valid authorization from the USFWS pursuant to paragraph 68A-16.002(1), F.A.C., for the same activities proposed by the applicant under Part IV of Chapter 373, F.S., or if the applicant demonstrates compliance with the USFWS *National Bald Eagle Management Guidelines* (May 2007) available at: <https://www.fws.gov/northeast/ecologicalservices/pdf/NationalBaldEagleManagementGuidelines.pdf>, and reproduced in Appendix H.

* * *

(c) In addition to evaluating the impacts in the area of any dredging and filling in, on, or over wetlands or other surface waters, and as part of the balancing review under section 10.2.3, above, the Agency will consider any other associated activities that are very closely linked and causally related to any proposed dredging or filling that have the potential to cause impacts to significant historical and archaeological resources.

(d) An applicant shall provide reasonable assurance that the following future activities will not result in water quality violations or adverse impacts to the functions of wetlands or other surface waters as described in section 10.2.2, above:

1. Additional phases or expansion of the proposed activity for which plans have been submitted to the Agency or other governmental agencies; and

2. On-site and off-site activities regulated under Part IV, Chapter 373, F.S., or activities described in Section 403.813(1), F.S., that are very closely linked and causally related to the proposed activity.

As part of this review, the Agency will also consider the impacts of the intended or reasonably expected uses of the future activities on water quality and wetland and other surface water functions.

In conducting the analysis under section (d)2, above, the Agency will consider those future projects or activities that would not occur but for the proposed activity, including where the proposed activity would be considered a waste of resources should the future project or activities not be permitted.

Where practicable, proposed activities shall be designed in a fashion that does not necessitate future impacts to wetland and other surface water functions. Activity expansions and future activity phases will be considered in the secondary impact analysis. If the Agency determines that future phases of an activity involve impacts that do not appear to meet permitting criteria, the current application shall be denied unless the applicant can provide reasonable assurance that those future phases can comply with permitting criteria. One way for applicants to establish that future phases or system expansions do not have adverse secondary impacts is for the applicant to obtain a conceptual approval permit for the entire project.

10.2.8 Cumulative Impacts

Pursuant to section 10.1.1(g), above, an applicant must provide reasonable assurance that a regulated activity will not cause unacceptable cumulative impacts upon wetlands and other surface waters within the same drainage basin as the regulated activity for which a permit is sought. The impact on wetlands and other surface waters shall be reviewed by evaluating the impacts to water quality as set forth in section 10.1.1(c), above, and by evaluating

the impacts to functions identified in section 10.2.2, above.

220. Based on the foregoing Findings of Fact, and statutory and rule provisions, it is determined that the Dock meets all applicable requirements for issuance of the ERP, including the "clearly in the public interest" standard, as determined through considering and balancing the factors in section 373.414(1)(a), as implemented in rules 62-330.301 and 62-330.302 and the Applicant's Handbook.

221. Further to this point, pursuant to the plain language of section 373.414, pertinent provisions of rules 62-330.301 and 62-330.302, and the foregoing provisions of the Applicant's Handbook, mitigation is only required to offset adverse impacts that would render the proposed activity not permissible. Here, the competent substantial evidence showed that wetland impacts caused by placement of some pilings of the Dock in areas delineated as wetlands were de minimis, rather than adverse. Under the applicable law, mitigation is not required to offset de minimis impacts to wetlands. Petitioners' contention that in order for the Consolidated Permit to be issued, mitigation is required to offset the wetland impacts of the Dock is not supported by the facts—which were established by competent substantial evidence in this proceeding—or the applicable law.

The Dock Meets the Applicable ERP Requirements

222. Pursuant to the foregoing Findings of Fact and applicable provisions of statute and rule, it is concluded that the Dock meets all applicable ERP statutory and rule requirements for issuance of the Consolidated Permit.

223. As such, Petitioners failed to carry their ultimate burden to prove, by a preponderance of the evidence, that the Dock does not meet the ERP requirements for issuance of the Consolidated Permit.

B. Letter of Consent Requirements

224. Title to sovereignty submerged lands is vested in the Board of Trustees pursuant to section 253.001. To manage the state's sovereignty submerged lands, the Board of Trustees has adopted chapter 18-21.

225. Rule 18-21.003 defines the following terms pertinent to this proceeding:

(22) "Dock" means a fixed or floating structure, including access walkways, terminal platforms, catwalks, mooring pilings, lifts, davits and other associated water-dependent structures, used for mooring and accessing vessels.

* * *

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

* * *

(51) "Private residential single-family dock or pier" means a dock or pier used for private recreational or leisure purposes that is located on a single-family riparian parcel or that is shared by two adjacent single-family riparian owners if located on their common riparian rights line.

* * *

(54) "Public interest" means demonstrable environmental, social, and economic benefits which would accrue to the public at large as a result of a proposed action, and which would clearly exceed all demonstrable environmental, social, and economic costs of the proposed action. In determining the public interest in a request for use, sale, lease, or transfer of interest in sovereignty lands or severance of materials from sovereignty lands, the board shall consider the ultimate project and purpose to be

served by said use, sale, lease, or transfer of lands or materials.

* * *

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

* * *

(67) "Sovereignty submerged lands" means those lands including but not limited to, tidal lands, islands, sand bars, shallow banks, and lands waterward of the ordinary or mean high water line, beneath navigable fresh water or beneath tidally-influenced waters, to which the State of Florida acquired title on March 3, 1845, by virtue of statehood, and which have not been heretofore conveyed or alienated. For the purposes of this chapter sovereignty submerged lands shall include all submerged lands title to which is held by the Board.

226. Rule 18-21.004, which establishes the management policies, standards, and criteria regarding requests for activities on sovereignty submerged lands, 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 only be limited to water dependent activities and minimal

secondary non-water dependent uses pursuant to Section 253.03(15), F.S.

(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.

* * *

(3) Riparian Rights.

(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 submerged lands riparian to uplands, unless otherwise specified in this chapter.

(c) All structures and other activities must be designed and conducted in a manner that will not unreasonably restrict or infringe upon the riparian rights of adjacent upland riparian owners.

(d) Except as provided herein, all structures, including mooring pilings, breakwaters, jetties and groins, and activities must be set back a minimum of 25 feet inside the applicant's riparian rights lines.

* * *

(7) General Conditions for Authorizations. All authorizations granted by rule or in writing under

Rule 18-21.005, F.A.C., except those for geophysical testing, shall be subject to the general conditions as set forth in paragraphs (a) through (j) below. The general conditions shall be part of all authorizations under this chapter, shall be binding upon the grantee, and shall be enforceable under Chapter 253 or 258, Part II, F.S.

* * *

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

* * *

(i) Structures shall be maintained in a functional condition and shall be repaired or removed if they become dilapidated to such an extent that they are no longer functional. This shall not be construed to prohibit the repair or replacement subject to the provisions of Rule 18-21.005, F.A.C., within one year, of a structure damaged in a discrete event such as a storm, flood, accident, or fire.

227. The Dock meets the foregoing pertinent statutory and rule requirements for issuance of the LOC for use of the sovereignty submerged lands.

228. To meet the "not contrary to the public interest" standard required by rule 18-21.004(1)(a) for issuance of proprietary approval, it is not necessary that the applicant show that the activity is affirmatively in the "public interest," as that term is defined in rule 18-21.003(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, 96-5879 (Fla. DOAH Sept. 1, 1998; Fla. DEP Oct. 19, 1998). Case law interpreting the "not contrary to the public interest" standard holds that when proposed structures or activities meet the applicable standards and requirements in chapter 18-21, those structures or activities are presumed to be not contrary to the public interest. *See Spinrad*

v. Guerrero and Dep't of Env't Prot., Case No. 13-2254 (Fla. DOAH July 25, 2014, *modified in part* (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*, Fla. DEP Oct. 29, 2013).

229. Here, Petitioners did not provide competent, substantial, or credible evidence showing that the Dock fails to meet the applicable requirements for the LOC. Accordingly, it is concluded that the Dock meets the "not contrary to the public interest" standard for issuance of the LOC.

230. Based on the preponderance of the competent substantial evidence, it is determined that the Dock meets all applicable standards and requirements in chapter 18-21 for issuance of the LOC.

231. Finally, it bears mention that, pursuant to section 253.141, riparian rights inure to the Property. Section 253.141(1) states, in pertinent part:

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

232. By virtue of owning the Property, Steinhardt is legally entitled to exercise the riparian rights that inure to the Property. As expressly stated in the statute, those rights are ingress and egress, boating, bathing, fishing, and such others as defined by law. With respect to the latter category, common law riparian rights include the right of navigation. *Hayes v. Bowman*, 91 So. 2d 795 (Fla. 1957). The right of navigation necessarily includes the right to construct and operate a dock to access navigable waters. *Belvedere Dev. Corp.*

v. Dep't of Transp., 476 So. 2d 649 (Fla. 1985); *Shore Vill. Prop. Owners' Ass'n v. Dep't of Env't Prot.*, 824 So. 2d 208, 211 (Fla. 4th DCA 2002).

233. Pursuant to this statutory and case law, Steinhardt, by virtue of being owner of the Property, which is riparian to Spruce Creek, has the right to construct and operate a dock on sovereignty submerged land to access the navigable waters of Spruce Creek, subject to meeting the applicable requirements of chapter 18-21. As found and concluded above, the Dock meets all applicable requirements in chapter 18-21 for issuance of the LOC.

234. In sum, based on the foregoing Findings of Fact, it is concluded that the Dock will meet all applicable requirements of chapter 253 and chapter 18-21, including the requirement that it not be contrary to the public interest. Accordingly, it is concluded that Steinhardt is entitled to issuance of the LOC for the Dock.

Conclusion Regarding Issuance of Consolidated Approval

235. Based on the foregoing, it is concluded that the Dock meets all applicable statutory and rule requirements for issuance of the Consolidated Permit.

III. Petitioners' Standing

236. Section 120.569(1) provides, in pertinent part, that "[t]he provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency."

237. Section 120.52(13) defines a "party," in pertinent part, as a person "whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party."

238. Standing under chapter 120 is guided by the two-pronged test established in the seminal case of *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). In that case, the court held that, in order to demonstrate a substantial interest in the outcome of a proceeding, for purposes of having standing in that proceeding, the person must show that: (1) he will suffer an injury in fact of sufficient

immediacy to entitle him to a section 120.57 hearing, and (2) his substantial injury is of a type or nature that 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.

239. *Agrico* was not intended as a barrier to the participation in proceedings under chapter 120 by persons who are affected by the potential and foreseeable results of agency action. Rather, "[t]he intent of *Agrico* was to preclude parties from intervening in a proceeding where those parties' substantial interests are totally unrelated to the issues that are to be resolved in the administrative proceedings." *Mid-Chattahoochee River Users v. Fla. 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)).

240. More recent case law has refined the *Agrico* standing test, clarifying that:

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. v. Fla. Dep't of Env't Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009)(citing *Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1083 (Fla. 2d DCA 2009). See *St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.*, 54 So. 3d 1051, 1055 (Fla. 5th DCA 2011); see also *Reily Enters., LLC v. Dep't of Env't Prot.*, 990 So. 2d 1248 (Fla. 4th DCA 2008).

241. The individual Petitioners—CCC, LaMontagne, and Paro—alleged standing based on, and testified regarding, the detrimental effect of the Dock on their use and enjoyment of Spruce Creek and its resources for navigation

and a range of recreational activities, including kayaking, canoeing, bird watching, fishing, and photography.

242. The evidence adduced at the final hearing establishes that the Dock does not, and will not, adversely affect navigation on Spruce Creek, nor does it, or will it, adversely affect fish, wildlife, birds, recreational activities, or any other of Petitioners' asserted interests that are protected by section 373.414, rules 62-330.301 and 62-330.302, and the Applicant's Handbook.

243. Nonetheless, the individual Petitioners have alleged and demonstrated that they use and enjoy Spruce Creek to an extent sufficient to meet the injury-in-fact requirement for standing in this proceeding, notwithstanding that they have not prevailed on the merits of their challenge to issuance of the Consolidated Permit for the Dock.

244. The "zone of interest" requirement for Petitioners' standing in this proceeding is also satisfied. This proceeding, which is brought under section 373.414 and the implementing rules, is designed to protect against injury to water quality and quantity, navigation, recreational activities, fish, wildlife, and a range of other natural resource values that Petitioners alleged would be injured by the Dock. Again, although Petitioners did not demonstrate that the Dock has, and will, cause the alleged injuries, their failure to prevail on the merits of their challenge is immaterial to their standing. *Peace River/Manasota Reg'l Water Supply Auth.*, 18 So. 3d at 1084.

245. Petitioner SCVC has alleged standing as an association acting on behalf of the interests of its members. In order to have standing to challenge the Consolidated Permit, SCVC must meet the associational standing test first articulated in *Florida Home Builders Association v. Department of Labor and Employment Security*, 412 So. 2d 351 (Fla. 1982), and subsequently extended to section 120.57 proceedings in *Farmworker Rights Organization, Inc. v. Department of Health and Rehabilitative Services*, 417 So. 2d 753 (Fla. 1st DCA 1982). Under the associational standing test, SCVC must show that a substantial number, although not necessarily a majority, of its members'

substantial interests will be affected by the agency action; that the subject matter of the proceedings is within the association's general scope and purpose; and that the relief requested is of the type appropriate for the association to receive on behalf of its members.

246. The evidence presented at hearing was sufficient to establish that a substantial number of SCVC's members use and enjoy Spruce Creek for boating, fishing, and other recreational and natural resource-related activities that they have contended—albeit, unsuccessfully—are injured by the Dock, and that their alleged interests in these activities fall within the zone of interest of section 373.414 and implementing rules.

247. SCVC also satisfied the second prong of the associational standing test. The Dock's effects on the recreational and natural resources of Spruce Creek are the subject matter of this proceeding, and SCVC presented evidence, through LaMontagne, establishing that its organizational purpose and the scope of its activities include advocating for protection of the recreational and natural resources of Spruce Creek.

248. SCVC also meets the third prong of the associational standing test. The relief SCVC seeks is denial of the Consolidated Permit. That type of relief is appropriate for SCVC to seek on behalf of its members in this administrative proceeding. *See O'Connell v. Fla. Dep't of Cmty. Affs.*, 874 So. 2d 673, 677 n.3 (Fla. 4th DCA 2004)(an association may seek relief on behalf of its members where neither the claim asserted, nor the relief requested, requires the participation of individual members in the proceeding).

249. Although SCVC has not ultimately shown, in these proceedings, that the construction and operation of the Dock will result in the alleged injuries, its failure to prevail on the merits is immaterial to its standing. *Peace River/Manasota Reg'l Water Supply Auth.*, 18 So. 3d at 1084. Accordingly, it is determined that SCVC has demonstrated that it has standing, on behalf of its members, to challenge DEP's issuance of the Consolidated Permit.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that DEP enter a final order granting the Consolidated Permit.

DONE AND ENTERED this 8th day of October, 2025, in Tallahassee, Leon County, Florida.


Cathy M. Sellers

CATHY M. SELLERS
Administrative Law Judge
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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.