STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

DOLPHIN BAY OWNERS ASSOCIATION, INC. and RUTH A. WHITE	)	
Petitioners,	)	
v.	)	**OGC Case No.: 24-0242**
	)	**DOAH Case No.: 24-1870**
HARBOURAGE MARINA, LLC, and STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents.	)	

/

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on February 27, 2025, submitted a Recommended Order (RO) to the Department of Environmental Protection (DEP or Department) in the above-captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A.

On March 14, 2025, Harbourage Marina, LLC (Harbourage Marina) filed exceptions to the RO. On March 19, 2025, Dolphin Bay Owners Association, Inc. (DBOA) and Ruth White (White), collectively known as the Petitioners, filed responses to Harbourage Marina's exceptions.

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

BACKGROUND

On February 6, 2024, DEP issued Harbourage Marina a Notice of Intent to Issue Environmental Resource Permit (NOI) in File No. 0422327-001-EI/03 (the Project), proposing to issue an environmental resource permit (ERP) to construct a 35-slip addition to an existing

79-slip, upland cut marina for a total of 114 in-water slips in North Bay, a Class II Florida waterbody and a prohibited shellfish harvesting area in Panama City Beach, Bay County, Florida. The proposed Project will consist of the following structures: an eight (8) foot by 236 foot access dock, a five (5) foot by 93 foot terminal platform, nine (9) two (2) foot by 14 foot finger piers, a two (2) foot by 26 foot finger pier, a two (2) foot by 40 foot finger pier, a 785 square foot triangular infill area, and four (4) two (2) foot by 15 foot finger piers. The proposed structures will be approximately 3,642 square feet. (NOI, pp. 1-2).

On October 22, 2024, Harbourage Marina filed Respondent's Motion for Attorneys' Fees and Costs, contending the Petitioners participated in this proceeding for an improper purpose, as defined under sections 120.595(1)(e)1. and 120.569(2)(e), Florida Statutes. On January 29, 2025, Petitioners filed Petitioners' Response in Opposition to Respondent's Motion for Attorneys' Fees and Costs, disputing Harbourage Marina's contention that Petitioners participated in this proceeding for an improper purpose under section 120.595(1), and that Petitioners' counsel signed pleadings, motions, or other papers for an improper purpose under section 120.569(2)(g), Florida Statutes.

The DOAH final hearing was conducted on November 5, 6 and 7, 2024. Harbourage Marina presented the testimony of Bruce Kilpatrick, Bethany Womack, and Robert Zales. Harbourage Marina Exhibits APP-1 through APP-3, APP-9, APP-15, and APP-16 were admitted into evidence. DEP presented the testimony of Martha Cole, William Webster, and Justin Scott. DEP Exhibits DEP-2, DEP-3, DEP-6, DEP-13, and DEP-21 were admitted into evidence. The Petitioners presented the testimony of William Woods, Petitioner White, and William "Ken" Jones. Petitioners' Exhibits PET-3, PET-11, PET-15, PET-18, PET-19, PET-22, PET-25, and

PET 26 were admitted into evidence. In addition, Joint Exhibits JE-1 (all subparts) and JE-2 were admitted into evidence.

A three-volume transcript of the final hearing was filed with DOAH on December 3, 2024. At the close of the final hearing, the parties agreed to file their proposed recommended orders (PROs) by January 24, 2025. In response to a motion, the ALJ extended the time to file the PROs to January 29, 2025. The parties timely filed their PROs on January 29, 2025.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department enter a final order approving the issuance of Environmental Resource Permit No. 0422327-001-EI/03 to the Respondent Harbourage Marina.

In doing so, the ALJ concluded that Harbourage Marina provided reasonable assurance that the Project meets all applicable requirements in section 373.414(1)(a) and (b) of the Florida Statutes, rules 62-330.301 and 62-330.302 of the Florida Rules of Administrative Code, and the applicable provisions of the ERP Applicant's Handbook. (RO ¶ 126). Moreover, the ALJ determined and concluded that the Petitioners did not participate in this proceeding for an improper purpose under section 120.595(1), Florida Statutes, and that Petitioners' counsel did not sign pleadings, motions, or other papers for an improper purpose under section 120.569(2)(e), Florida Statutes. (RO p. 4, n.2; RO ¶ 149).

STANDARD OF REVIEW FOR DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat.

(2024); *Charlotte Cnty. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1082 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61, 62 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence as to each essential element and as to its admissibility under legal rules of evidence. *See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996); *Nunez v. Nunez*, 29 So. 3d 1191, 1192 (Fla. 5th DCA 2010).

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

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

fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So. 2d 1025, 1026-27 (Fla. 1st DCA 1997).

If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded, and the item treated as though it were really a conclusion of law. *See, e.g., Battaglia Properties v. Fla. Land & Water Adjudicatory Comm'n*, 629 So. 2d 161, 168 (Fla. 5th DCA 1994). However, the agency should not label what is essentially an ultimate factual determination as a "conclusion of law" to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Pro. Eng'rs*, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See* § 120.57(1)(l), Fla. Stat. (2024); *see also Barfield v. Dep't of Health*, 805 So. 2d 1008, 1012 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward Cnty.*, 746 So. 2d 1194, 1197 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1141-42 (Fla. 2d DCA 2001). The Department is charged with enforcing and interpreting chapters 373 and 403 of the Florida Statutes. As a result, DEP has substantive jurisdiction over interpretation of the statutory provisions in chapters 373 and 403, Florida Statutes, and the Department's rules adopted to implement these statutes.

Agencies do not have jurisdiction, however, to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Pro. Regul.*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of*

Bus. Regul., 475 So. 2d 1277, 1281-82 (Fla. 1st DCA 1985). Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio*, 622 So. 2d at 609.

RULINGS ON EXCEPTIONS

Parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker,* 677 So. 2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing,* 954 So. 2d 77, 81 (Fla. 5th DCA 2007); *Dep't of Corr. v. Bradley*, 510 So. 2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Env't Coal. of Fla., Inc. v. Broward Cnty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. Ctr., Inc. v. State of Fla., Agency for Health Care Admin.,* 847 So. 2d 540, 542 (Fla. 4th DCA 2003). However, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction, even when exceptions are not filed. *See* § 120.57(1)(l), Fla. Stat. (2024); *Barfield,* 805 So. 2d at 1012; *Fla. Pub. Emp. Council, v. Daniels,* 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

In reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." *See* § 120.57(1)(k), Fla. Stat. (2024). The agency, however, need not rule on an exception that "does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." *Id.*

RULINGS ON RESPONDENT HARBOURAGE MARINA, LLC'S EXCEPTIONS

Respondent Harbourage Marina's Exceptions to RO Paragraph Nos. 149 and 150

Respondent Harbourage Marina takes exception to RO paragraph nos. 149 and 150, in which the ALJ denied its motion for attorneys' fees and costs "conclud[ing] that Petitioners did not participate in this proceeding for an improper purpose under section 120.595(1) and 120.569(2)(e)" of the Florida Statutes. (RO ¶¶ 149, 150).

Harbourage Marina acknowledged "[t]he ALJ correctly identified the relevant statutes and legal standard" applicable to determine whether Petitioners participated in this proceeding for an improper purpose. (Harbourage Marina's exceptions, ¶ 4). However, Harbourage Marina contends that the "ALJ erred by failing to consider any proceedings occurring prior to the trial itself . . . ." (Harbourage Marina's exceptions, ¶ 5). In its conclusion, Harbourage Marina requests that the Department award its attorneys' fees and costs in this proceeding. Alternatively, Harbourage requests that "the Agency remand this matter back to the ALJ for consideration of all evidence relating to improper purpose." (Harbourage Marina's exceptions, p. 5).

Harbourage Marina's exceptions fail as a matter of law because the determination of whether a party participated in a hearing for an "improper purpose" is a factual inquiry within the jurisdiction of the ALJ, not the Department. *Diaz v. Northwest Fla. Water Mgmt. Dist.*, 355 So. 3d 972, 974 (1st DCA 2023); *Burke v. Harbor Estates Ass'n, Inc.*, 591 So. 2d 1034, 1037 (Fla. 1st DCA 1991). Moreover, a legal determination regarding whether a party is entitled to attorneys' fees and costs is not within the Department's regulatory expertise or substantive jurisdiction. *Spinrad v. Guerrero and Dep't of Env't Prot.*, DOAH Case No. 13-2254 (Fla. DEP Sept. 8, 2014; Fla. DOAH July 25, 2014) (citing *Tuten v. Dep't of Env't Prot.*, DOAH Case No. 06-0186 (Fla. DEP Oct. 16, 2006; Fla. DOAH Aug. 11, 2006) and *G.E.L. Corp. v. Dep't of Env't*

Prot., 875 So. 2d 1257, 1263 (Fla. 5th DCA 2004) (concluding that DEP did not have substantive jurisdiction under section 120.595 of the Florida Statutes over the issue of attorney's fees)). Therefore, the Department lacks the authority to overturn the ALJ's conclusion that the Petitioners did not participate in this proceeding for an "improper purpose" under section 120.595, Florida Statutes.

Moreover, contrary to Harbourage Marina's exceptions, the ALJ's findings in RO paragraph nos. 149 and 150 are supported by competent substantial evidence; and thus, must be accepted by the Department. Specifically, the Petitioners testified as to their legitimate reasons for filing the Petition. (Woods, T. Vol. II, p. 208; White, T. Vol. II, p. 247). The Petitioners also provided expert testimony in support of the issues addressed at the final hearing. (T. Vol. II, pp. 297-339; T. Vol. III, pp. 348-99).

Harbourage Marina seeks to have the Department overrule the ALJ's evidentiary findings of fact regarding whether the Petitioners pursued this proceeding for an "improper purpose." In so doing, Harbourage Marina seeks to have the Department reweigh the evidence. However, the Department may not reweigh the evidence presented at the final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896.

Alternatively, Harbourage Marina requests that the Department remand the matter of awarding attorneys' fees and costs in this proceeding back to the ALJ "for consideration of all evidence relating to improper purpose." (Harbourage Marina's exceptions, p. 5). However, the Department is also without authority to remand the case back to the ALJ because a remand is only appropriate when an order does not contain sufficient factual findings for the Department to enter a final order. See, *e.g., Dep't of Env't Prot. v. Dep't of Mgmt. Servs.,* 667 So. 2d 369, 370

(Fla. 1st DCA 1995) (affirming the correctness of a remand when clarifications concerning an ALJ's findings were necessary to discern whether they were supported by competent substantial evidence); *Collier Dev. Corp. v. State, Dep't of Env't Regul.*, 592 So. 2d 1107, 1108-09 (Fla. 2d DCA 1991) (affirming a remand when an ALJ's failure to consider a water quality study precluded the Department from rendering a decision to either approve or deny a permit). Here, the order is clear. The findings of fact and conclusions of law are wholly sufficient for the Department to render a coherent final order.

Based on the foregoing reasons, Harbourage Marina's exceptions to RO paragraph nos. 149 and 150 are denied.

CONCLUSION

Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the Recommended Order, and being otherwise duly advised, it is ORDERED that:

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

B. The Environmental Resource Permit No. 0422327-001-EI/03 to Harbourage Marina, LLC for the construction and operation of 35 additional boat slips and the related structures in Harbourage Marina 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 of the Office of

General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 11th day of April 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: 2025.04.11 13:34:05 -04'00'

Clerk

April 11, 2025
Date

CERTIFICATE OF SERVICE

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

Gary K. Hunter Jr., Esquire Robert C. Volpe, Esquire Valerie L. Chartier, Esquire Hogancamp, Holtzman, Vogel, Baren, Torchinsky & Josefiak, PLLC 119 S. Monroe Street, Suite 500 Tallahassee, FL 32031 ghunter@holtzmanvogel.com rvolpe@holtzmanvogel.com vchartier@holtzmanvogel.com	Kathryn Lewis, Esquire Department of Environmental Protection Office of General Counsel 3900 Commonwealth Boulevard Mail Station 35 Tallahassee, FL 32399-3000 Kathryn.Lewis@FloridaDEP.gov Jacqueline.Gardner@FloridaDEP.gov DEP.Defense@FloridaDEP.gov
Julia Maddalena, Esquire Hand Arrendall Harrison Sale, LLC 304 Magnolia Avenue Panama City Beach, FL 32413 jmaddalena@handfirm.com	

on this 11th day of April 2025.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Stacey D. Cowley

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DOLPHIN BAY OWNERS ASSOCIATION, INC., AND RUTH A. WHITE,

Petitioners,

vs. Case No. 24-1870

HARBOURAGE MARINA, LLC, AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

RECOMMENDED ORDER

Pursuant to sections 120.569 and 120.57(1), Florida Statutes (2024), a hearing was held before Administrative Law Judge ("ALJ") Cathy M Sellers, on November 5 and 6, 2025, in Panama City, Florida, and by Zoom Conference on November 7, 2024.

APPEARANCES

For Petitioners: Gary V. Perko, Esquire
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Florida Department of Environmental Protection
3900 Commonwealth Boulevard, Mail Station 35
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

Whether Respondent Harbourage Marina, LLC, is entitled to issuance of an environmental resource permit to expand the Harbourage Marina docking facility.

PRELIMINARY STATEMENT

On or about February 6, 2024, Respondent Florida Department of Environmental Protection ("DEP") issued the Notice of Intent to Issue Environmental Resource Permit ("NOI") in File No. 0422327-001-EI/03, proposing to issue an environmental resource permit ("ERP") for the construction of additional boat slips in the Harbourage Marina ("Marina"), an existing upland-cut marina owned by Harbourage Marina, LLC ("Harbourage"), located in Panama City Beach, Florida. Harbourage published the NOI, which provided a 21-day period in which to challenge the ERP. Following the receipt from DEP of two extensions of time in which to file an administrative challenge to issuance of the ERP, Petitioners Dolphin Bay Owners Association, Inc. ("DBOA"), and Ruth A. White timely challenged the proposed issuance of the ERP on April 10, 2024.

On or about May 17, 2024, DEP referred the matter to the Division of Administrative Hearings ("DOAH") for assignment of an ALJ to conduct an evidentiary hearing, pursuant to sections 120.569 and 120.57(1), on Petitioners' challenge to the ERP. Harbourage filed a Motion to Dismiss Petition for Formal Administrative Hearing ("Motion to Dismiss") on

May 8, 2024, and Petitioners filed Petitioners' Response in Opposition to Respondent Harbourage Marina, LLC's, Motion to Dismiss Petition for Formal Administrative Hearing ("Response in Opposition") on May 15, 2024. Following a hearing on the Motion to Dismiss and Response in Opposition, the undersigned issued an Order Denying Motion to Dismiss on June 12, 2024, which, among other things, expressly excluded, as beyond the scope of the ERP challenge under section 373.414, Florida Statutes, and applicable administrative rules, adjudication of the parties' respective rights under certain agreements, declarations of covenants and restrictions, and other contracts between the parties.

On October 11, 2024, DEP and Harbourage filed Respondents' Joint Motion to Strike Witness, or in the Alternative, Limit Petitioners['] Expert Witness, Larry "Keith" Carroll's, Testimony ("Motion to Strike"). On October 18, 2024, Petitioners filed Petitioners' Response in Opposition to Respondents' Joint Motion to Strike, or in the Alternative, Limit Petitioners' Expert Witness, Larry "Keith" Carroll's, Testimony ("Response"). Following a hearing on the Motion to Strike and Response, the undersigned issued the Order on Motion to Strike Witness, or, in the Alternative, Limit Petitioner's Expert Witness's Testimony ("Order on Motion to Strike") on October 24, 2024, striking the proposed testimony of Petitioner's expert witness Larry "Keith" Carroll, regarding "any encumbrances, liens, or other issues that may cloud Harbourage's title to the Marina" and "whether Harbourage has sufficient legal title to the Marina sufficient to obtain the requested permit for the Marina expansion."[1] The Order on Motion to Strike informed the parties that, pursuant to section 90.104, Florida Statutes (2024),

[1] The Order on Motion to Strike explained that pursuant to the plain language of article V, section 5(b) of the Florida Constitution and section 26.012(2)(g), Florida Statutes, the circuit courts of the State of Florida have exclusive original jurisdiction over matters involving title to real property. The undersigned further noted that such matters already are pending before courts of competent jurisdiction.

Petitioners were entitled, during the pendency of this matter at DOAH, to make a written offer of proof regarding the matters to which Mr. Carroll would have testified at the final hearing. On January 29, 2025, Petitioners filed Petitioners' Notice of Proffer.

On October 22, 2024, Harbourage filed Respondent's Motion for Attorneys' Fees and Costs ("Fees and Costs Motion"), contending that Petitioners participated in this proceeding for an improper purpose, as defined under sections 120.595(1)(e)1. and 120.569(2)(e). On January 29, 2025, Petitioner filed Petitioners' Response in Opposition to Respondent's Motion for Attorneys' Fees and Costs ("Response to Fees and Costs Motion"), disputing Harbourage's contention that Petitioners participated in this proceeding for an improper purpose under section 120.595(1), and that Petitioners' counsel signed pleadings, motions, or other papers for an improper purpose under section 120.569(2)(g).[2]

The final hearing in this proceeding was scheduled for, and conducted on, November 5 and 6, 2024, in Panama City, Florida, and on November 7, 2024, by Zoom Conference. Harbourage presented the testimony of Bruce Kilpatrick, Bethany Womack, and Robert Zales, and Harbourage Exhibits APP-1 through APP-3, APP-9, APP-15, and APP-16 were admitted into evidence. DEP presented the testimony of Martha Cole, William Webster, and Justin Scott, and DEP Exhibits DEP-2, DEP-3, DEP-6, DEP-13, and DEP-21 were admitted into evidence. Petitioners presented the testimony of William Woods, Petitioner White, and William "Ken" Jones, and Petitioners' Exhibits PET-3, PET-11, PET-15, PET-18, PET-19, PET-22 (Bates pages 402 through 405), PET-25, and PET-26 were admitted into

[2] As discussed below, the undersigned has determined and concluded that Petitioners did not participate in this proceeding for an improper purpose pursuant to section 120.595(1), and that Petitioners' counsel did not sign pleadings, motions, or other papers for an improper purpose pursuant to section 120.569(2)(e).

evidence. Additionally, Joint Exhibits JE-1 (all subparts) and JE-2 were admitted into evidence.

The three-volume Transcript of the final hearing was filed at DOAH on December 3, 2024. At the close of the final hearing, the parties agreed to a deadline of January 24, 2024, on which to file their proposed recommended orders ("PROs"). Subsequently, pursuant to motion, the PRO filing deadline was extended to January 29, 2024. The parties timely filed their PROs on January 29, 2025, and the undersigned has given them due consideration in preparing this Recommended Order.

FINDINGS OF FACT

I. The Parties

1. Respondent DEP is an agency of the state, as defined in section 120.52(1)(b), having regulatory jurisdiction over the proposed marina expansion (hereafter, the "Project"), pursuant to chapter 403, Florida Statutes; chapter 373, part IV; and the rules adopted to implement these statutes.

2. Respondent Harbourage is the owner of record of the real property upland of, and immediately adjacent to, the Harbourage Marina, located at 800 Dolphin Harbour Drive, Panama City Beach, Florida 32407.[3] Harbourage is the applicant for the ERP at issue in this proceeding.

3. Petitioner DBOA serves as the homeowners association for the Dolphin Bay community, whose approximately 200 members consist of owners of real property within the gated Dolphin Bay subdivision, which consists of 133 lots and residences constructed on those lots. DBOA operates in accordance with

[3] This property is further described as Parcel ID No. 27343-583-00, in Section 28, Township 2 South, Range 15 West, in Bay County, Florida, at 30°11'46.4" North Latitude, 85°45'20.8" West Longitude.

chapter 720, Florida Statutes (2024), to protect and advocate for the common interests of its members.

4. Petitioner Ruth A. White is the fee simple owner of real property located at 6411 Dolphin Shores Drive, Panama City Beach, Bay County, Florida, within the Dolphin Bay subdivision. This property, which is located approximately half a mile from the Marina, is riparian to Saint Andrew Bay/North Bay.[4] White also is the fee simple owner of Slip No. 6, which includes the underlying submerged land beneath the slip, in the Marina.

II. Existing Marina and Proposed Project

5. The Project, described below, is proposed to be constructed and operated within the Harbourage Marina ("Marina"), an existing upland-cut marina[5] located at 800 Dolphin Harbour Drive, Panama City Beach, Bay County, Florida.

6. The "Marina" consists of the existing marina basin and the associated in-water docks and boat slips in the existing marina, as well as the adjacent upland real property owned by Harbourage, on which a boat ramp and a sewage pumpout facility are located.

7. Currently, there are 79 existing boat slips in the Marina.

8. Of these, Harbourage owns 52 slips with associated docking, and the remaining 27 slips are owned by entities other than Harbourage. Harbourage rents the existing 52 slips it owns to members of the Harbourage Yacht Club,

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[4] The NOI refers to the waterbody adjacent to the Marina as "North Bay." During the final hearing, the witnesses repeatedly referred to the immediately adjacent waterbody as "Saint Andrews Bay" (to which Saint Andrew Bay apparently is colloquially referred). According to Google Maps (2025), "North Bay" is the waterbody that constitutes the northeasterly fork off Saint Andrew Bay. *See* § 90.2035)(1)(a), Fla. Stat. (2024)(authorizing judicial notice, and, therefore, official recognition, pursuant to section 120.57(1)(j) and Florida Administrative Code Rule 28-106.213(6), to be taken of a map "taken from a widely accepted web mapping service, if such map indicates the date on which the information was created.") For purposes of this Recommended Order, the name "Saint Andrew Bay" refers to the waterbody adjacent to the Marina and, thus, the Project.

[5] An ERP to construct and operate the Marina was issued in 1997 to SunTech, the developer of the Dolphin Bay subdivision. That ERP was not tendered or admitted into evidence in this proceeding.

Inc. ("HYC"). Of the 27 slips owned by entities other than Harbourage, 12 are owned by Dolphin Bay subdivision lot owners and 15 are owned by HYC members who do not own lots in the Dolphin Bay subdivision. DBOA does not own any existing slips in the Marina, nor will it own any slips comprising the Project.

9. HYC, a separate legal entity from Harbourage, manages the Marina. It does not own any submerged or upland real property at the Marina. It charges assessments to its members to fund the management of the Marina.

10. The Marina basin has an average depth of approximately -5.5 feet elevation. The depth of the water in the Marina is approximately -6.21 feet elevation at mean high water, and approximately -5.01 feet elevation at mean low water.

11. The Marina, and, thus, the Project, is not located on sovereignty submerged lands. Therefore, State of Florida propriety approval, pursuant to chapter 253, Florida Statutes, and Florida Administrative Code Chapter 18-21, is not required for the Project.

12. As mentioned above, the Marina has a sewage pumpout station located on the upland immediately adjacent to the Marina Basin. The waste from the pumpout station is discharged directly into the municipal central sewer system. The credible evidence establishes that, to date, there have been no sewage leaks or spills from the pumpout station. The Project does not propose any changes to the existing pumpout station, which will continue to exist and operate at the Marina.

13. No fueling facilities exist, or are proposed to be constructed or operated, at the Marina.

14. Liveaboards are not currently permitted at the Marina, and they will not be permitted to occupy the slips comprising the Project.

15. When Harbourage purchased the Marina, it made substantial improvements to the Marina facilities, including spending approximately $50,000 for structural repairs and maintenance.

16. The Project consists of the addition of 35 boat slips and associated dock structures within the Marina basin. Specifically, the Project consists of the construction and operation of the following structures: an 8-foot-by-236-foot access dock; a 5-foot-by-93-foot terminal platform; nine 2-foot-by-14-foot finger piers; a 2-foot-by-26-foot finger pier; a 2-foot-by-40 foot finger pier; a 785-square foot triangular infill platform; and four 2-foot-by-15-foot finger piers. The proposed structures will occupy an area of approximately 3,642 square feet. The new boat slips are proposed to be numbered 77 through 83; 84 through 95; 96A, 96B, and 96C; and 97 through 108.

17. The Project does not entail dredging within or outside of the Marina basin.

18. The new boat slips, including the submerged land under the slips, will be owned by Harbourage. Harbourage's corporate representative, Kilpatrick, testified that Harbourage may sell some of the new slips.

19. The proposed expansion of the Marina would result in a total of 114 boat slips in the Marina basin.

20. The Marina is adjacent to, and opens into, Saint Andrew Bay/North Bay, a Class II waterbody; shellfish harvesting is prohibited, pursuant to Florida Administrative Code Rule 62-302.400(17)(b). Neither Saint Andrew Bay nor North Bay are aquatic preserves or Outstanding Florida Waters.

III. Petitioners' Challenge to the ERP for the Project[6]

21. Petitioners allege that Harbourage has not demonstrated that the Project is not contrary to the public interest, under section 373.414(1) and rules 62-330.301 and 62-330.302.

22. Specifically, Petitioners contend that Harbourage has failed to provide reasonable assurance that the Project will not adversely affect the public

[6] Petitioners alleged other grounds, in their Petition for Formal Administrative Hearing, for challenging the ERP at issue in this proceeding. However, pursuant to the Joint Pre-hearing Stipulation, several of these grounds have been eliminated by the parties' stipulation, so that these are the remaining challenge grounds.

health, safety, or welfare of others, due to an increased number of boats and increased boat traffic in the Marina, resulting in "deteriorating conditions at the Marina," in violation of section 373.414(1)(a)1., rule 62-330.302(1)(a)1., and Applicant's Handbook, Volume I,[7] sections 10.2.3(a) and 10.2.3.1.

23. Petitioners also assert that Harbourage has failed to provide reasonable assurance that the Project will not adversely affect recreational values in the vicinity of the activity, in violation of section 373.414(1)(a)4., rule 62-330.302(1)(a)4., and A.H. sections 10.2.3.(d) and 10.2.3.4.

24. Petitioners contend that the Project will adversely affect navigation in, and in the vicinity of, the Marina, in violation of section 373.414(1)(a)3., rule 62-330.302(1)(a)3., and A.H. section 10.2.3.3.

25. Petitioners also contend that the Project does not meet the requirements of A.H. section 10.2.4.3, which establishes additional water quality considerations applicable to docking facilities, in order to provide reasonable assurance that the facility will not violate state water quality standards, as prohibited by section 373.414(1) and rule 62-330.301(1)(e).

26. The parties stipulated that Harbourage provided reasonable assurance with respect to the following ERP permitting requirements: the Project will not cause adverse impacts to the conservation of fish or wildlife and their habitats, pursuant to section 373.414(1)(a)2. and rule 62-330.302(1)(a)2.; the Project will not adversely affect fishing or marine productivity in the vicinity of the activity, pursuant to section 373.414(1)(a)4. and rule 62-330.302(1)(a)4.; the Project will not adversely affect historical or archaeological resources, pursuant to section 373.414(1)(a)6. and rule 62-330.302(1)(a)6.; and the Project is of a permanent nature, pursuant to section 373.414(1)(a)5. and rule 62-330.302(1)(a)5.

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[7] Hereafter, for brevity, the Applicant's Handbook, Volume I, is referred to as "A.H." when a specific provision is cited. DEP and the water management districts developed and codified the Applicant's Handbook to help persons understand the rules, procedures, standards, and criteria that apply to the ERP program under chapter 373, part V. The Applicant's Handbook elaborates on, and explains, statutory and rule provisions regarding the ERP program.

IV. Findings Regarding Challenged Issues

Adverse Effect on Public Health, Safety, or Welfare or Property of Others

27. William Woods serves as the vice president and treasurer of DBOA. He testified on behalf of DBOA regarding the interests of its members in this proceeding.

28. DBOA owns the roadways and common areas of the Dolphin Bay subdivision.[8] As found above, it does not currently own any existing slips in the Marina, and will not own any of the slips comprising the Project.

29. Woods testified that the members of DBOA are "very concerned that if this marina is expanded, what they will be left with is an overcrowded, badly-maintained, polluted marina in the middle of their community."

30. White is the owner of a lot and residence in the Dolphin Bay subdivision, located approximately one-quarter mile away from the Marina. She is the owner of a boat slip in the Marina.

31. Woods and White testified regarding concerns about deteriorating conditions of docks and seawalls at the existing Marina. However, they both acknowledged that Harbourage had undertaken repairs to address these conditions. To this point, as found above, when Harbourage purchased the Marina, it made substantial improvements to the Marina facilities, including spending approximately $50,000 for structural repairs and maintenance. The credible evidence establishes that the docks, seawalls, and bulkheads at the Marina are being repaired and maintained, and are not at risk of collapse.

32. To the extent that Woods, on behalf of DBOA's members, and White, as a slip owner, expressed concern about the structures constituting the Project falling into disrepair in the future, they did not present any evidence showing that Harbourage would not maintain and repair the structures comprising the Project.

[8] In this proceeding, DBOA is asserting associational standing to protect the substantial interests of its members. To the extent that DBOA asserted that its substantial interests as the entity that owns roadways and common areas in the Dolphin Bay subdivision are affected by the Project, those interests are not cognizable in this proceeding.

33. Woods testified that residents of the Dolphin Bay subdivision who are members of DBOA but who do not own a boat slip in the Marina use the Marina's boat ramp to launch their vessels and navigate within the Marina. However, it is undisputed that these DBOA members do not have a property interest in the Marina or Project, and no evidence was presented showing that these DBOA members' property in the Dolphin Bay subdivision will be adversely affected by the Project.[9]

34. White testified, as a slip owner, regarding her concerns that the Project would adversely affect her use of her boat slip by increasing vessel traffic within the marina, thus interfering with the navigation of her boat in the Marina basin and in the channel that provides Marina access to and from Saint Andrew Bay (hereafter, "Access Channel" or "Channel"). However, as discussed below, the competent, substantial, and persuasive evidence establishes that the Project will not adversely affect navigation, either in the Marina basin or in the Access Channel.

35. In sum, the competent, substantial, credible, and persuasive evidence establishes that the Project will not adversely affect DBOA's members' or White's property interests that are cognizable in this proceeding.

Adverse Effect on Recreational Values

36. Woods, on behalf of DBOA's members, and White, in her capacity as a party, testified that they are concerned that the Project will adversely affect recreational values.

37. Woods testified that DBOA's members who use the Marina are concerned that the Project will adversely affect their recreational interests in boating due to additional vessels using the Marina and Access Channel,

[9] As noted above, evidence regarding the Project's impacts on roadways, parking, and traffic volume in the Dolphin Bay subdivision was excluded as beyond the scope of this proceeding, which is limited to considering the environmental impacts of the Project as specifically provided in the applicable statutes and rules. To the extent the Project may affect DBOA members' interest in navigation—which, pursuant to section 373.414 and rule 62-330.301—is cognizable in this proceeding, this issue is addressed below.

which, in turn, will adversely affect navigation in the Marina and in the Access Channel.

38. White testified that her recreational interest in boating in the Marina and Access Channel will be adversely affected for the same reason.

39. However, as discussed above, and further discussed below, the competent, substantial, and persuasive evidence does not establish that the Project will adversely affect navigation in the Marina or Access Channel. Thus, the evidence does not establish that the Project will adversely affect Petitioners' recreational interests in boating.

40. White also testified that she enjoyed such recreational activities as fishing, watching dolphins, and shelling on a small island in Saint Andrew Bay, and is concerned that the Project, through increased boat traffic and resulting navigation impacts, as well as water pollution due to gas and oil associated with vessels, will adversely affect her interests in these recreational activities.

41. However, she did not present competent or persuasive evidence that the Project would adversely affect these interests.

42. Rather, as discussed below, the competent, substantial, and persuasive evidence establishes that the Project will not adversely affect navigation, and will not cause or contribute to violations of water quality standards.

43. Accordingly, it is found that the Project will not adversely affect recreational values in the vicinity of the Project.

Adverse Effect on Navigation

44. Captain Robert Zales, who was accepted as an expert in boating and navigation, testified on behalf of Harbourage regarding the Project's effect on navigation in the Marina, the Access Channel, and Saint Andrew Bay.

45. To formulate his opinion regarding the Project's potential impact on navigation, Zales reviewed the site layout plan for the proposed Project and conducted a site visit to the Marina.

46. As found above, the water depth within the Marina averages -5.5 feet and ranges between approximately -5.01 feet at mean low water and -6.21 feet at mean high water. Given these depths, Zales opined that the water depths in the Marina basin are sufficient to enable the largest vessels docking in the Marina—which are 50- to 60-feet in length and have four- to five-foot drafts—to safely navigate within the basin. No dredging or filling is proposed as part of the Project, so that the Project will not affect the depth of water in the Marina.

47. Zales further opined that even with the addition of the 35 new slips, there is, and will be, sufficient space in the Marina basin for vessels, including the largest vessels docked in the Marina, to safely maneuver and navigate within, and into/out of, the Marina.

48. This opinion was confirmed by Martha Cole, the DEP environmental specialist who reviewed Harbourage's application for the ERP for the Project. Cole testified that the existing docking and slip structures, as well as those that will be installed as part of the Project, are of sufficient size and are sufficiently spaced to enable vessels to safely navigate past the slips and docking structures and past one another in the Marina basin. Based on her extensive experience in reviewing marina projects, she determined, and testified, that the Project will not adversely affect navigation within the Marina.

49. The Access Channel is not included within the geographic boundaries of the Project. Harbourage does not own or lease the submerged lands under the Access Channel, and it is not proposing to dredge the Channel or to otherwise alter any aspect of the Channel.

50. Zales opined that the existing Marina does not, and the Project will not, adversely affect navigation in the Access Channel. To this point, he opined that recreational boaters using the Access Channel to traverse to and from the Marina will be able to do so safely, provided they know how to

operate a vessel and how to navigate using channel markers—as is the case in navigating in any waterbody.

51. Further to this point, he testified, credibly, that it is highly unlikely that additional boat traffic generated by the Project will create a navigational hazard in the Access Channel.

52. The ERP contains a condition requiring a minimum 12-inch clearance between the deepest draft of vessels using the Marina, with motor in the down position, and the top of the submerged bottom at mean low water. Zales noted this condition has the practical effect of limiting the size of vessels that can moor in the Marina.

53. White testified regarding her concerns that increased boat traffic from the Project will adversely affect navigation of her boat in the Marina and the Access Channel. To this point, she testified that she knew that other boat owners using the Access Channel had been involved in boat collisions and groundings in the Channel, and she expressed concern that additional vessels using the Channel would result in more collisions and more groundings.

54. However, she acknowledged that she is not an expert in navigation and that she does not navigate her own boat, which is instead navigated by her son[10] in the Marina, Access Channel, and Saint Andrew Bay. She further acknowledged that her concerns regarding vessel groundings in the Access Channel were related to the placement of channel markers and the depth of the Channel. However, the evidence shows that the location of the channel markers in, and depth of, the Channel will not be affected by the Project.

55. In sum, the competent, substantial, credible, and persuasive evidence establishes that the Project will not adversely affect navigation in the Marina, Access Channel, or Saint Andrew Bay.

[10] According to White, her son is an experienced navigator. He did not testify at the final hearing.

56. No evidence was presented showing that the Project will adversely affect the flow of water or cause harmful erosion or shoaling.

Water Quality and Hydrographic Analysis

57. As with the other aspects of their challenge to the ERP, Petitioners bear the ultimate burden to demonstrate, by the preponderance of the competent substantial evidence, that Harbourage has not provided reasonable assurance that the Project will not cause or contribute to violations of state water quality standards.[11]

58. As found above, the Marina is located adjacent to, and discharges into, a channel leading to Saint Andrew Bay, a Class II waterbody. Therefore, the Class II water quality standards apply to the Project.

59. This case entails two water quality-related issues: (1) whether the installation and use of the structures comprising the Project will cause or contribute to violations of water quality standards; and (2) whether the hydrographic analysis presented by Respondents is adequate to demonstrate, and demonstrates, that the Project meets the requirements of A.H. section 10.2.4.3 for purposes of providing reasonable assurance that the Project will not violate state water quality standards.

(1) Existing Water Quality and Measures to Prevent Causation or Contribution to Water Quality Violations

60. Water quality data collected in the Marina basin show existing exceedances of the applicable state water quality standards for copper, zinc, and lead.

61. The existing elevated copper level in the Marina likely is attributable to dock pilings treated with the wood preservative chromated copper arsenate ("CCA"), which leaches out of the pilings into the water column. Wrapping CCA-treated pilings is an effective measure to prevent CCA from leaching

[11] Harbourage is not required to improve existing water quality or correct existing water quality violations; it is only to provide reasonable assurance that the Project will not cause new water quality violations or contribute to existing water quality violations.

into the water column and causing or contributing to violation of the water quality standard for copper.

62. To prevent the Project from contributing to the existing violation of the water quality standard for copper, the ERP contains a condition requiring, for the life of the Project, that all pilings associated with the Project be wrapped within impermeable plastic or PVC sleeves having a specified minimum thickness and extending from 2 feet above the mean high water line down into the substrate a minimum of 6 inches.

63. No substantial evidence was presented showing that paint from moored vessels caused the copper exceedance in the Marina.

64. Zinc and lead co-occur as water quality constituents. In a marina environment, these constituents can enter the water column via corrosion of zinc-treated seawall fasteners or metal parts on vessels.

65. To help ensure that lead and zinc do not accumulate in a marina, DEP requires docking facilities to meet certain flushing requirements. Here, DEP determined that, based on the flushing time of the Marina, discussed below, the Project would not contribute to the existing exceedances of the zinc and lead water quality standards.

66. The ERP contains a condition requiring the placement and maintenance of weighted turbidity screens with skirts that extend to within one foot of the bottom, around active construction areas for the duration of construction. Additional conditions to prevent water quality violations during construction include the requirements to use specified best management practices for erosion control; perform daily inspection and maintenance of erosion control structures; perform remedial actions to address any siltation, sedimentation, or erosion outside the limits of authorized activities, and report any such violations to DEP within 24 hours; and install grass seed or sod on exposed slopes and soil areas within 48 hours of completion of final grade.

67. The ERP also contains a condition requiring a minimum 12-inch clearance between the deepest draft of vessels, with motor in the down position, and the top of the submerged bottom at mean low water will help reduce the turbidity of the water in the Marina basin, thereby helping to prevent water quality violations.

68. The Marina has a sewage pumpout station in place, which helps prevent water quality violations due to sewage pollution. No competent substantial evidence was presented showing that the sewage pumpout station was nonfunctional or had experienced any spills. The sewage pumpout station will continue to operate and will serve the additional vessels occupying the slips comprising the Project.

69. The Project does not propose to add any impervious surface areas to the upland areas surrounding the Marina basin, so will not increase or otherwise affect stormwater discharge into surface waters.

70. Woods and White testified that, on occasion, they had observed oil and/or gas sheen on the surface of the water in the Marina. However, no evidence was presented showing that these occurrences were frequent or that they resulted in water quality violations in the Marina.

71. Furthermore, to the extent oil and/or gas may have been discharged into the water in the Marina, such discharge is in the existing Marina basin. No evidence was presented showing that vessels moored in the slips comprising the Project will discharge oil and/or gas into the water, or that, to the extent such discharge may occur, it would cause or contribute to state water quality standard violations.

72. Furthermore, in any event, no fueling facility is proposed as part of the Project.

73. In sum, the competent, substantial, and persuasive evidence shows that the Project will not cause new violations of state water quality standards, nor will it contribute to existing violations of state water quality standards.

(2) Hydrographic Analysis

74. Because the Project will contain more than ten slips, pursuant to A.H. 10.2.4.3, hydrographic information or a hydrographic study is required to be provided.

75. As part of DEP's review of the ERP application for the Project, Justin Scott, the State Hydrographic Engineer, performed a hydrographic analysis of the Marina, as required by A.H. section 10.2.4.3. In his role as the State Hydrographic Engineer, Scott's responsibilities include performing independent verification of information and analyses submitted by ERP applicants to determine whether a proposed project meets the applicable hydrographic information rule requirements.

76. As found above, no dredging or other change to the width, depth, or other physical configuration of the Marina is proposed as part of the Project. Therefore, the Project will not change the Marina's existing hydrodynamic characteristics.

77. To determine the flushing time of the Marina, Scott used data regarding water flow rates in the Marina basin that were included in the dye dilution study performed by Dr. Sean McGlynn ("McGlynn Study") on behalf of Harbourage. Using the fixed-point data included in the McGlynn Study, Scott determined how long it would take a particle of dye, as a simulated pollutant particle, to travel from a fixed point in the Marina to the next fixed point in the Marina, with the points being approximately 600 feet apart.[12]

78. Scott also reviewed tidal information from the closest National Oceanic and Atmospheric Administration ("NOAA") tidal station for the port of Panama City, Florida, approximately two miles from the Marina. As

[12] Scott also noted that a culvert located in a canal bisects the opening of the Marina. He explained that water flowing from the culvert would increase flushing time of the Marina. Notwithstanding, he did not consider the effect of this water flow in determining flushing time for the Marina; thus, his estimate of the flushing time for the Marina is conservative.

further discussed below, he did not consider the effect of the tides, which are semi-diurnal at this location, in determining the Marina flushing time.

79. Per A.H. section 10.2.4.3(b), flushing time is the time required to reduce the concentration of a conservative pollutant to ten percent of its original concentration.

80. Using the information regarding the Marina basin area and depth provided by Harbourage, Scott used a residence time calculation to determine flushing time of the Marina.

81. Specifically, Scott divided the calculated Marina volume by the calculated flow rate in the Marina.

82. To calculate the Marina volume, Scott used the estimated area of the Marina multiplied by -6.5 feet, which was derived by adding a safety factor of an additional -1 foot to the -5.5-foot average depth of the Marina.[13]

83. He then determined the flow rate at the narrowest point in the Marina, which would provide the most conservative—i.e., slowest—flow rate in the Marina.

84. Dividing the calculated volume of the Marina by the calculated flow rate at the narrowest point in the Marina yields a 52-hour flushing time for the Marina.

85. This is less than the 96-hour[14]—i.e., four-day—flushing time that, per A.H. section 10.2.4.3, provides reasonable assurance that there will be sufficient flushing of a docking facility to ensure that pollutants do not accumulate to the extent that they violate state water quality standards.

86. Scott specifically chose not to use a tidal prism model because that methodology requires consideration of a recirculation factor, which could not be determined from the information provided by Harbourage. He also did not

[13] Scott explained that the deeper the water, the longer it would take for the Marina to flush.

[14] Section 10.2.4.3(b) references a four-day flushing time, which is equivalent to 96 hours. Because Scott and Jones referred to a 96-hour flushing time in their testimony, that figure is used in the Findings of Fact in this Recommended Order.

use a tidal prism model because that methodology would require him to assume certain other factors and conditions that were not supported by the data provided by Harbourage.

87. When asked why he did not require Harbourage to provide additional hydrodynamic information beyond that contained in the McGlynn Study, Scott testified, credibly and persuasively, that the physical configuration of the Marina does not create a complex hydrodynamic scenario requiring more data or a more complex hydrodynamic study to determine flushing time. He further noted that the Project does not entail dredging or the installation of breakwaters or other physical barriers that would impede flushing of the Marina. He testified that, in his professional judgment, the data in the McGlynn Study was accurate. Therefore, he was able to calculate the Marina flushing time using information provided in the McGlynn Study, without resorting to methodologies that were unsupported by the data in that study.

88. Ken Jones, a civil engineer with a master's degree in physical oceanography, testified on behalf of Petitioners regarding the Marina hydrographics and projected flushing time.

89. Jones characterized the Marina basin as "quiescent." He noted that it is an inland-cut marina located at the end of a 900-foot-long channel off Saint Andrew Bay. He characterized marinas having such features as "very … difficult to flush," due to the lack of water sources other than tidal input.

90. He concurred with Scott's calculation of the water flow velocity in the Marina as being approximately 40 feet per hour, which is "basically the same" as the .01 feet per second that he calculated, and which is similar to the flow rate stated in the McGlynn Study.

91. However, he opined that the residence time methodology employed by Scott to calculate flushing time was too simplistic to accurately determine the flushing time for the Marina. To that point, Jones testified that Scott's calculated flushing time of 52 hours did not consider the influence of tides on the flushing time of the Marina.

92. Jones used a tidal prism methodology that considered tidal influences, including that during flood tide, water would be pushed back into the Marina. According to Jones, tidal influences on the water flow in the Marina and other factors would result in a 104-hour or longer flushing time for the Marina.

93. On cross-examination, Jones acknowledged that the tidal data he had considered in calculating a 104-hour flushing time was taken from a NOAA tidal station approximately six miles from the Marina site. The credible evidence showed that tidal data from the NOAA tidal station that Scott referenced, which is only two miles from the Marina, is more representative of tidal conditions at the Marina.

94. Jones further acknowledged, on cross-examination, that he performed his calculations regarding flushing time of the Marina "not to prove or disprove that the Marina flushed. I did them to give some framework that you would start to use … if you were actually going to do a hydrographic study, which, to my knowledge, has not been done here."

95. His assumption that a hydrographic study for the Marina had not been previously performed was based on his not being able to find such a study in DEP's permitting database. However, he acknowledged that a hydrographic study would have been required under the applicable permitting rules in effect in 1997, when the original ERP to construct the Marina was issued.[15]

96. In sum, it was Jones's view that the information provided in the McGlynn report, as used by Scott to calculate the flushing time of the Marina, was not sufficient to constitute a "hydrographic study" for purposes of A.H. section 10.4.2.3. He acknowledged that he did not perform a hydrographic study of the Marina.

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[15] To this point, the Project only entails the addition of 35 boat slips and associated dock structure in the existing Marina basin. Harbourage is only required to provide reasonable assurance that the Project will not cause or contribute to violations of state water quality standards.

97. On rebuttal, Scott testified, credibly, that the tides at the Marina are semi-diurnal, and that the effect of the flood tide was, in fact, considered in the fixed-point determination of the water flow velocity in the Marina.

98. Scott also credibly and persuasively refuted Jones's testimony that his (Scott's) calculated flushing time was incorrect because only a small percentage of the dye injected to trace water flow in the Marina had passed the second fixed-point sonde by 23 hours after injection. As Scott put it, "in many cases, the pollutant will leave [the Marina] out at the east corner or leave out of this other location, so … suggesting that the pollutant is only going to cross in this one specific location … it's tough for me to believe." He further testified that if the dye were, in fact, recirculating in the Marina, concentrations would periodically increase at the first fixed-point sonde; however, no such increases were observed in the data in the McGlynn Study.

99. Scott reiterated that he did not use a tidal prism method to calculate the flushing time of the Marina because that would require him to assume a specific recirculation factor, with which he was not comfortable, because the McGlynn Study did not include information that would enable him to calculate such a factor with any degree of confidence.

100. To that point, he reiterated that, given that the Marina and the Project do not present a complex hydrodynamic scenario, the data in the McGlynn Study was sufficient to enable him to understand "what's happening in the basin" such that he could accurately calculate the flushing time of the Marina. As he explained, "I wouldn't request a more complex model because they're not doing anything that would be suggestive of anything that would change the hydrodynamic conditions at the site."[16]

101. Scott further explained that even though he did not use tidal data in determining flushing time of the Marina, the fact that the tides at the Marina are semi-diurnal improves flushing at the Marina. Additionally,

[16] To this point, Jones concurred that the Project did not entail dredging or installation of any structures which would change the existing hydrodynamic conditions at the Marina.

although he did not consider water velocity from the culvert bisecting the mouth of the Marina in calculating residence time, he noted that the velocity of water flowing from the culvert would increase flushing time. While not included in his residence time calculation, these factors gave him additional confidence that the Project, as well as the existing Marina, would meet the 96-hour flushing time standard codified in A.H. section 10.2.4.3.

102. Scott further noted that neither A.H. section 10.2.4.3 nor any other applicable rules require that a specific methodology or calculation be used to determine flushing time.

103. Upon fully considering the competing expert testimony and other evidence, it is found, as a matter of ultimate fact, that Harbourage demonstrated both that the Project meets the requirements of A.H. section 10.4.2.3 with respect to the sufficiency of the hydrographic information used to determine flushing time, and that the Project meets the 96-hour—i.e., four-day—flushing time standard in A.H. section 10.2.4.3.

Findings of Ultimate Fact

104. For the reasons discussed above, Petitioners failed to meet their burden to prove, by a preponderance of the competent substantial evidence, that the Project will adversely affect the public health, safety, or welfare or property of others; adversely affect navigation or the flow of water or cause harmful shoaling; or adversely affect recreational values in the vicinity of the activity.

105. Accordingly, based on the foregoing Findings of Fact, it is found, as a matter of ultimate fact, that Harbourage provided reasonable assurance that the Project will not adversely affect the public health, safety, or welfare or the property of others; will not adversely affect navigation or the flow of water or cause harmful shoaling; and will not adversely affect recreational values in the vicinity of the activity.

106. Petitioners also failed to meet their burden to prove, by a preponderance of the competent substantial evidence, that the Project will violate state water quality standards.

107. For the reasons discussed above, it is found, as a matter of ultimate fact, that the Project will not cause or contribute to violations of state water quality standards. Specifically, as discussed above, to ensure that the structures comprising the Project will not cause or contribute to violations of state water quality standards, Harbourage will install and maintain impermeable plastic or PVC sleeves on the pilings installed in the Project, for the lifetime of the Project. Therefore, because the Project will not cause or contribute to violations of state water quality standards, Harbourage is not required to provide mitigation to improve existing water quality in the Marina.

108. Additionally, Petitioners did not meet their burden to prove, by a preponderance of the competent substantial evidence, that Project did not provide a hydrographic study showing that the Marina basin, including the Project, will meet the 96-hour (i.e., four-day) flushing time standard codified in A.H. section 10.2.4.3.

109. For the reasons discussed above, it is found, as a matter of ultimate fact, that Harbourage provided sufficient hydrographic information to meet the requirement, in A.H. section 10.4.2.3, to document the flushing time of the Marina, including the Project.

110. Additionally, for the reasons discussed above, it found that the Project will meet the flushing time standard in A.H. section 10.2.4.3, which provides reasonable assurance that the Project will not result in the accumulation of pollutants that will cause or contribute to violations of state water quality standards.

CONCLUSIONS OF LAW

Jurisdiction, Burden of Proof, and Standard of Proof

111. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding, pursuant to sections 120.569 and 120.57(1).

112. This is a de novo proceeding, the purpose of which is to formulate agency action, not review agency action taken earlier and preliminarily. *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).

113. 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.

114. Under section 120.569(2)(p), if a third-party challenger fails to carry its burden to prove that the applicant does not meet requirements for issuance of the permit, the applicant prevails by virtue of its prima facie case.

Washington Cnty. v. Bay Cnty., Case Nos. 10-2983, 10-2984, 10-10100 (Fla. DOAH July 26, 2012; NWFWMD Sept. 27, 2012).

115. Pursuant to section 120.569(2)(p), Harbourage presented a prima facie case of entitlement to the ERP for the Project by entering into evidence the Application, the NOI, and supporting information.

116. Pursuant to section 120.569(2)(p), Petitioners bear the burden of ultimate persuasion to prove their case in opposition to issuance of the ERP for the Project.

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

Applicable Statutory and Rule Requirements

118. The version of the applicable statutes and rules in effect at the time of the agency's final agency action govern this proceeding. *See Lavernia v. Dep't of Pro. Regul., Bd. of Med.*, 616 So. 2d 53, 54 (Fla. 1st DCA 1993)(law in effect at the time of final agency licensure decision governs).

119. To be entitled to issuance of an ERP, an 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). The reasonable assurance standard 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). This 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.* To this end, proof of reasonable assurance cannot be defeated solely by speculation or subjective concerns. *Id.*, *FINR II, Inc. v. CF Indus., Inc.,* Case No. 11-6495 (Fla. DOAH Apr. 30, 2012; Fla. DEP June 8, 2012).

120. Furthermore, 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 Envtl. 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).

121. Section 373.414, Florida Statutes (2024), which is the statute governing the issuance of an 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;

* * *

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[.]

* * *

(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. Such measures may include, but are not limited to, onsite mitigation, offsite mitigation, offsite regional mitigation, and the purchase of mitigation credits from mitigation banks permitted under s. 373.4136. It is the responsibility of the applicant to choose the form of mitigation. The mitigation must offset the adverse effects caused by the regulated activity.

* * *

3. If the applicant is unable to meet water quality standards because existing ambient water quality does not meet standards, the governing board or the department must consider mitigation measures proposed by or acceptable to the applicant that cause net improvement of the water quality in the receiving body of water for those parameters which do not meet standards.

122. Rule 62-330.301, 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:

* * *

> (e) Will not adversely affect the quality of receiving waters such that the state water quality standards set forth in Chapters 62-4, 62-302, 62-520, and 62-550, F.A.C., including the antidegradation provisions of paragraphs 62-4.242(1)(a) and (b), F.A.C., subsections 62-4.242(2) and (3), F.A.C., and Rule 62-302.300, F.A.C., and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters set forth in subsections 62-4.242(2) and (3), F.A.C., will be violated[.]
>
> * * *
>
> (3) In instances where an applicant is unable to meet state water quality standards because existing ambient water quality does not meet standards and the system will contribute to this existing condition, the applicant must implement mitigation measures that are proposed by, or acceptable to, the applicant that will cause net improvement of the water quality in the receiving waters for those parameters that do not meet standards. The applicant shall demonstrate such net improvement whereby the pollutant loads discharged from the post-development condition for the proposed project shall be demonstrated to be less than those discharged based on the project's pre-development condition.

123. Rule 62-330.302, titled "Additional Conditions for Issuance of Individual and Conceptual Permits," sets forth requirements for issuance of an ERP. This rule states, in pertinent part:

> (1) [T]o obtain an individual … permit under this chapter, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, repair, removal, or abandonment of a project:
>
> (a) Located in, on, or over wetlands or other surface waters will not be contrary to 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 [of the Environmental Resource Permit Applicant's Handbook ("Applicant's Handbook")]:

> 1. Whether the activities will adversely affect the public health, safety, or welfare or the property of others;
>
> * * *
>
> 3. Whether the activities will adversely affect navigation or the flow of water or cause harmful erosion or shoaling; [and]
>
> 4. Whether the activities will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity[.]

124. 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 requirements applicable to this proceeding:

> 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. Each applicant must identify potential environmental public health or safety issues resulting from their project. Examples of these issues include: mosquito control; proper disposal of solid, hazardous, domestic or industrial waste; aids to navigation; hurricane preparedness or cleanup; environmental remediation, enhancement or restoration; and similar environmentally related issues.
>
> * * *

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, maintenance, removal and abandonment of the project. The following requirements are in addition to the water quality requirements found in sections 8.2.3 and 8.3 through 8.5 above.

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;

(b) Stabilizing newly created slopes or surfaces in or adjacent to wetlands and other surface waters to prevent erosion and turbidity;

(c) Providing proper construction access for barges, boats and equipment to ensure that propeller dredging and rutting from vehicular traffic does not occur;

(d) Maintaining construction equipment to ensure that oils, greases, gasoline, or other pollutants are not released into wetlands or other surface waters;

(e) Controlling the discharge from spoil disposal sites; and

(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

(a) The potential of a constructed or altered water body to cause or contribute to violations of water quality standards due to its depth or configuration. For example, the depth of water bodies must be designed to ensure proper mixing so that the water quality standard for dissolved oxygen will not be violated in the lower levels of the water body, but the depth should not be so shallow that the bottom sediments are frequently resuspended by boat activity. Water bodies must be configured to prevent the creation of debris traps or stagnant areas that could result in violations of water quality standards.

(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.

10.2.4.3 Additional Water Quality Considerations for Docking Facilities

Docking facilities, due to their nature, provide potential sources of pollutants to wetlands and other surface waters. If the proposed work has the potential to adversely affect water quality, an applicant proposing the construction, expansion or alteration of a docking facility must address the following factors to provide the required reasonable assurance that water quality standards will not be violated:

(a) Hydrographic information or studies shall be required for docking facilities of greater than ten boat slips, unless hydrographic information or studies previously conducted in the vicinity of the

facility provide reasonable assurance that the conditions of the water body and the nature of the proposed activity do not warrant the need for new information or studies. Hydrographic information or studies also may be required for docking facilities of fewer than ten slips, dependent upon the site specific features described in section 10.2.4.3(b), below. In all cases, the design of the hydrographic study, and its complexity, will be dependent upon the specific project design and the specific features of the project site.

(b) The purpose of the hydrographic information or studies is to document the flushing time (the time required to reduce the concentration of a conservative pollutant to ten percent of its original concentration) of the water at the docking facility. This information is used to determine the likelihood that the facility will accumulate pollutants to the extent that water quality violations will occur. Generally, a flushing time of less than or equal to four days is the maximum that is desirable for docking facilities. However, the evaluation of the maximum desirable flushing time also takes into consideration the size (number of slips) and configuration of the proposed docking facility; the amplitude and periodicity of the tide; the geometry of the subject water body; the circulation and flushing of the water body; the quality of the waters at the project site; the type and nature of the docking facility; the services provided at the docking facility; and the number and type of other sources of water pollution in the area.

(c) The level and type of hydrographic information or studies that will be required for the proposed docking facility will be determined based upon an analysis of site specific characteristics. As compared to sites that flush in less than four days, sites where the flushing time is greater than four days generally will require additional, more complex levels of hydrographic studies or information to determine whether water quality standards can be expected to be violated by the facility. The degree and

complexity of the hydrographic study will be dependent upon the types of considerations listed in section 10.2.4.3(b), above, including the potential for the facility, based on its design and location, to add pollutants to the receiving waters. Types of information that can be required include site-specific measurements of: waterway geometry, tidal amplitude, the periodicity of forces that drive water movement at the site, and water tracer studies that document specific circulation patterns.

(d) The applicant shall document, through hydrographic information or studies, that pollutants leaving the site of the docking facility will be adequately dispersed in the receiving water body so as to not cause or contribute to violations of water quality standards based on circulation patterns and flushing characteristics of the receiving water body.

(e) In all cases, the hydrographic studies shall be designed to document the hydrographic characteristics of the project site and surrounding waters. All hydrographic studies must be based on the factors described in sections (a) through (d), above. An applicant should consult with the Agency prior to conducting such a study.

(f) In accordance with Chapters 62-761 and 62-762, F.A.C., applicants are advised that fueling facilities must have secondary containment equipment and shall be located and operated so that the potential for spills or discharges to surface waters and wetlands is minimized.

(g) The disposal of domestic wastes from boat heads, particularly from liveaboard vessels, must be addressed to prevent improper disposal into wetlands or other surface waters. A liveaboard vessel shall be defined as a vessel docked at the facility that is inhabited by a person or persons for any five consecutive days or a total of ten days within a 30-day period.

(h) The disposal of solid waste, such as garbage and fish cleaning debris, must be addressed to prevent disposal into wetlands or other surface waters.

(i) Pollutant leaching characteristics of materials such as treated pilings and anti-fouling paints used on the hulls of vessels must be addressed to ensure that any pollutants that leach from the structures and vessels will not cause violations of water quality standards given the flushing at the site and the type, number and concentration of the likely sources of pollutants.

10.2.4.5 Where Ambient Water Quality Does Not Meet Standards

If the site of the proposed activity currently does not meet water quality standards, the applicant must demonstrate compliance with the water quality standards by meeting the provisions in sections 10.2.4.1, 10.2.4.2, and 10.2.4.3, above, as applicable, and for the parameters that do not meet water quality standards, the applicant must demonstrate that the proposed activity will not contribute to the existing violation. If the proposed activity will contribute to the existing violation, mitigation may be proposed as described in section 10.3.1.4, below.

125. The following water quality provisions, referenced in A.H. section 10.2.4., above, also apply in this proceeding.

8.2.3 Activities Discharging into Waters That Do Not Meet Standards

In instances where an applicant is unable to meet water quality standards because existing ambient water quality does not meet standards, and the proposed activity will cause or contribute to this existing condition, mitigation for water quality impacts can consist of water quality enhancement that achieves a net improvement. In these cases, the applicant must propose and agree to implement mitigation measures that will cause net improvement of the water quality in the receiving

> waters for those contributed parameters that do not meet water quality standards.
>
> 8.5 State Water Quality Standards
>
> 8.5.1 Surface Water Quality Standards
>
> State surface water quality standards are set forth in Chapters 62-4 and 62-302, F.A.C., including the antidegradation provisions of paragraphs 62-4.242(1)(a) and (b), 62-4.242(2) and (3), F.A.C., and Rule 62-302.300, F.A.C.

Conclusions Regarding Reasonable Assurance Provided by Harbourage

126. Based on the foregoing Findings of Fact, it is concluded that Harbourage provided reasonable assurance that the Project meets all applicable requirements in section 373.414(1)(a) and (b), rules 62-330.301 and 62-330.302, and the above-referenced provisions of the Applicant's Handbook.

127. Accordingly, it is concluded that Harbourage is entitled to issuance of the ERP for the Project.

Petitioners' Standing

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

129. For a person to establish that his/her substantial interests will be affected by proposed agency action for purposes of having standing as a party to an administrative proceeding, he or she must demonstrate the following: (1) he/she will suffer an injury in fact of sufficient immediacy to entitle him/her to a hearing under section 120.57, and (2) the substantial injury is of a type or nature which the proceeding is designed to protect. *Ameristeel Corp. v. Clark*, 691 So. 2d 473, 477 (Fla. 1997); *Agrico Chem. Co. v. Dep't of Envtl. Regul.*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). The first aspect of the

substantial interest test deals with the degree of injury, and the second deals with the nature of the injury. *Ameristeel Corp.*, 691 So. 2d at 477.

130. For the alleged injury to be sufficiently immediate for purposes of constituting a substantial interest, it must entail an interest that "*could* reasonably be affected" by the proposed agency action. *Peace River/Manasota Reg'l Water Supp. Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1084 (Fla. 2d DCA 2009)(emphasis in original).

131. Importantly, standing to participate as a party to a proceeding under sections 120.569 and 120.57 is not dependent on whether the party prevails on the merits of its challenge.

132. As discussed above, White alleged, and testified, regarding her concerns that the Project would adversely affect the safe navigation of her vessel in the Marina and Access Channel; that the Project would have adverse impacts on her property—specifically, her boat slip in the existing Marina; and that the Project would adversely affect her recreational interests in boating and related activities in Saint Andrew Bay. Although she ultimately did not demonstrate that the Project would, in fact, result in the alleged injuries to those interests, her alleged injuries are of the type that could reasonably have been affected by the Project, had she been correct in her allegations. Additionally, her alleged injuries are protected by this proceeding, pursuant to section 373.414, rules 62-330.301 and 62-330.302, and the above-referenced provisions of the Applicant's Handbook. Accordingly, it is concluded that White has standing to participate as a party to this proceeding, pursuant to section 120.52(13)(b).

133. DBOA alleged that the Project would result in adverse impacts to its members' property; would adversely affect its members' navigation in the Marina and Access Channel; and would adversely affect recreation by its members.

134. For the reasons discussed above, DBOA did not prove that these alleged injuries would occur as a result of the Project. However, as discussed

above, DBOA's standing to participate as a party to this proceeding is not dependent on having prevailed on the merits of its challenge.

135. For DBOA to have standing as an association representing the interests of its members, it must allege and demonstrate, by competent substantial evidence presented at the hearing, that a substantial number of its members' substantial interests could reasonably be affected by the proposed agency action; that the subject matter of the proceeding is within the general scope of the association's interest and activity; and that the relief sought is of the type appropriate for an association to receive on behalf of its members. *St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt.*, 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011).

136. With respect to the first prong of the associational standing test, "substantial number" does not necessarily mean a majority. *Fla. Home Builders Ass'n v. Dep't of Labor and Emp. Sec.*, 412 So. 2d 351, 353 (Fla. 1982). Rather, it has been described as "a relatively sizeable percentage of the membership[,] … enough injured members to have a good reason to prosecute their collective claim properly and fully." *Fla. Ass'n of Med. Equip. Servs. v. Ag. for Health Care Admin.*, Case No. 02-1400 (Fla. DOAH Oct. 18, 2002), at ¶¶ 44, 46, Case No. AHCA-02 (Fla. AHCA Dec. 30, 2002)(rejected in part on other grounds).

137. Here, not only are the DBOA members who own slips in the Marina potentially affected by the Project, but the DBOA members who use the boat ramp to launch their vessels into the Marina to access Saint Andrew Bay also are potentially affected. On consideration, it is concluded that DBOA established that a sufficient number of its members' legally cognizable interests could reasonably have been affected by the Project such that DBOA had "good reason to prosecute their collective claim properly and fully." According, it is concluded that DBOA alleged, and demonstrated, that "substantial number" of its members' substantial interests could reasonably

have been affected by the Project, had DBOA been correct regarding its alleged injuries.

138. With respect to the second prong of the associational standing test, Woods testified that DBOA's interest is in "advocat[ing] for our community." To that point, he testified that this purpose would include addressing DBOA's members' concern regarding the Project's impacts on water quality, flushing capability, navigation, recreational activities, and condition of the Marina. The subject matter of this proceeding, which is whether Harbourage is entitled to an ERP for the Project, is within the general scope of DBOA's stated interest and activity. Accordingly, the second prong of the associational standing test is met.

139. DBOA has requested that the ERP at issue in this proceeding be denied. That relief is of the type appropriate for DBOA to receive on behalf of its members. Therefore, DBOA meets the third prong of the associational standing.

140. Accordingly, it is concluded that DBOA has standing to participate as a party to this proceeding on behalf of its members, pursuant to section 120.52(13)(b).

Attorneys Fees' and Costs

141. On October 22, 2024, Harbourage filed a Motion for Attorneys' Fees and Costs, alleging that Petitioners challenged the Project for an improper purpose—specifically, to delay construction of the Project.

142. Petitioners filed Petitioners' Response in Opposition to Respondent's Motion for Attorneys' Fees and Costs on January 29, 2025.

143. Section 120.569(2)(e) states, in pertinent part:

> (e) All pleadings, motions, or other papers filed in the proceeding must be signed by the party, the party's attorney, or the party's qualified representative. The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any

> improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the presiding officer shall impose upon the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

144. Section 120.595(1), which governs attorney's fees awards in challenges to agency action in proceedings under section 120.57(1), states, in pertinent part:

> (b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.
>
> (c) In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection. In making such determination, the administrative law judge shall consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.

> (d) In any proceeding in which the administrative law judge determines that a party participated in the proceeding for an improper purpose, the recommended order shall so designate and shall determine the award of costs and attorney's fees.
>
> (e) For the purpose of this subsection:
>
> 1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity.
>
> * * *
>
> 3. "Nonprevailing adverse party" means a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding. In the event that a proceeding results in any substantial modification or condition intended to resolve the matters raised in a party's petition, it shall be determined that the party having raised the issue addressed is not a nonprevailing adverse party. The recommended order shall state whether the change is substantial for purposes of this subsection. In no event shall the term "nonprevailing party" or "prevailing party" be deemed to include any party that has intervened in a previously existing proceeding to support the position of an agency. § 120.595(1), Fla. Stat. (emphasis added).

145. Upon fully considering the evidence and argument presented in this proceeding, it is concluded that Petitioners did not participate in this proceeding for an improper purpose.

146. A finding of improper purpose cannot stand if a reasonably clear justification can be shown for the filing of the paper. *Procacci Com. Realty,*

Inc. v. Dep't of HRS, 690 So. 2d 603, 608 (Fla. 1st DCA 1997), citing *Mercedes Lighting & Elec. Supply v. State, Dep't of Gen. Servs.*, 560 So. 2d 272, 277 (Fla. 1st DCA 1990).

147. *Burke v. Harbor Estates Associates, Inc.*, 591 So. 2d 1034 (Fla. 1st DCA 1991), is particularly instructive regarding what constitutes participation in a section 120.57(1) proceeding for an "improper purpose." In *Burke*, a property owners' association challenged the agency's proposed issuance of a permit to construct a bridge. Following a hearing under section 120.57(1), the hearing officer recommended that the permit be issued and determined that the property owners association had challenged the permit for an improper purpose.[17]

148. The basis of the hearing officer's recommendation in *Burke* was that the petitioner consistently demonstrated lack of knowledge of the applicable law and the scope of the proceeding; failed to present any evidence to prove facts necessary to sustain its allegations; did not offer any expert testimony to support its allegations of environmental harm caused by the activity; did not offer any factual evidence relevant or material to its claims; and did not present evidence material to whether the activity met the applicable requirements for issuance. Under those circumstances, the hearing officer determined that the petitioner's obvious motivation in challenging the permit was for a frivolous purpose—primarily to cause unnecessary delay and needlessly increase the cost of approval of the activity.[18]

149. By contrast, here, Petitioners have vigorously prosecuted their challenge to the ERP for the Project, presenting factual evidence, including expert testimony, regarding their allegations of environmental harm to their interests in this proceeding. Although they have not ultimately prevailed on

[17] Burke sought attorney's fees under section 120.59(6), the predecessor statute to section 120.595(1). *See* ch. 96-159, §§ 24, 25, Laws of Fla.

[18] In *Burke*, the agency, in its Final Order, rejected the hearing officer's determination that the challengers had participated in the proceeding for an improper purpose. The court reversed, holding that such a determination was within the province of the trier of fact.

the merits of their challenge, it cannot be concluded that Petitioners participated in this proceeding to harass Harbourage, cause unnecessary delay, for a frivolous purpose, or to needlessly increase the cost of permitting the Project. Thus, it is concluded that Petitioners did not participate in this proceeding for an improper purpose under sections 120.595(1) and 120.569(2)(e).

150. Accordingly, Harbourage's Motion for Attorneys' Fees and Costs is denied.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is Recommended that the Department of Environmental Protection enter a final order approving the issuance of Environmental Resource Permit No. 0422327-001-EI/03.

DONE AND ENTERED this 27th day of February, 2025, in Tallahassee, Leon County, Florida.

CATHY M. SELLERS
Administrative Law Judge
DOAH Tallahassee Office

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Filed with the Clerk of the
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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.