

2024, in Tallahassee, Florida. Prop Wash presented the testimony of Ronald Carroll and Bethany Womack. DEP presented the testimony of Whitney Bretana, an environmental specialist with DEP. DEP Exhibits 1 through 68 were admitted in evidence. The Petitioner testified on his own behalf, and presented the testimony of James Dake, a neighboring property owner. Petitioner's Exhibits 1 through 9 and 13 through 15 were admitted in evidence. The parties were given until November 8, 2024, to file their Proposed Recommended Orders (PROs). The parties timely filed their PROs.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department enter a final order issuing the Consolidated Environmental Resource Permit No. 0415071-001-EI/03 to Prop Wash Enterprises, Inc. In doing so, the ALJ concluded that Prop Wash demonstrated, by the preponderance of the evidence, that it provided DEP with reasonable assurances that the proposed Project meets the applicable standards in section 373.414, Florida Statutes, and Florida Administrative Code Rule 62-330.301. (RO ¶¶ 70, 73-77). The ALJ further concluded that the Petitioner presented no evidence to substantiate his allegation that the Letter of Consent and Lease to use sovereign submerged lands should not be issued and thereby waived his challenge to those authorizations. (RO FN 1 on p. 2).

STANDARD OF REVIEW FOR DOAH RECOMMENDED ORDERS

The case law of Florida holds that 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); *Fla. Dep't of Corr. v. Bradley*, 510 So. 2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to any findings of fact the parties "[have] thereby

expressed [their] 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, even when exceptions are not filed, 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. *See* § 120.57(1)(l), Fla. Stat. (2022); *Barfield v. Dep’t of Health*, 805 So. 2d 1008, 1012 (Fla. 1st DCA 2001); *Fla. Public Emp. Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

In this case, no party filed any exceptions to the RO objecting to the ALJ’s findings, conclusions of law, recommendations, or to the DOAH hearing procedures. The Department concurs with the ALJ’s legal conclusions and recommendations.

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 in its entirety and incorporated by reference herein.

B. The Consolidated Environmental Resource Permit No. 0415071-001-EI/03, including the Letter of Consent and Lease to use sovereign submerged lands, to Prop Wash Enterprises, Inc., subject to the general and specific conditions set forth therein, is APPROVED.

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of

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

DONE AND ORDERED this 10th day of January 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: 2025.01.10 13:59:46 -05'00'

Clerk

January 10 2025

Date

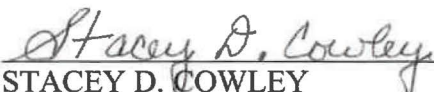
CERTIFICATE OF SERVICE

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

Stephen Ellis Syfrett, Esquire Williams & Syfrett, PLLC 502 Harmon Avenue Panama City, Florida 32401 stephen@wsgfirm.com adam@wsgfirm.com	Carson S. Zimmer, Esquire Richard P. Gillis, Esquire 3900 Commonwealth Boulevard Mail Station 35 Tallahassee, Florida 32399-3000 Carson.Zimmer@FloridaDEP.gov Richard.Gillis@FloridaDEP.gov Adrienne.Kidder@FloridaDEP.gov Jacqueline.Gardner@FloridaDEP.gov DEP.Defense@FloridaDEP.gov
Ed Steinmeyer, Esquire Matthew D. McDonald, Esquire Steinmeyer Fiveash, LLP 2282 Killearn Center Boulevard Tallahassee, Florida 32309-3576 eas@steinmeyerfiveash.com mdm@steinmeyerfiveash.com	

this 10th day of January 2025.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION


STACEY D. COWLEY
Administrative Law Counsel

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

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

RICHARD RIGBY,

Petitioner,

vs.

Case No. 24-1679

PROP WASH ENTERPRISES, INC., and
STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondents.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held on September 10, 2024, in Tallahassee, Florida, before Suzanne Van Wyk, a designated Administrative Law Judge of the Division of Administrative Hearings (“the Division”).

APPEARANCES

For Petitioner: Stephen Ellis Syfrett, Esquire
Williams & Syfrett, PLLC
502 Harmon Avenue
Panama City, Florida 32401

For Respondent Prop Wash Enterprises:

Edwin A. Steinmeyer, Esquire
Steinmeyer Fiveash, LLP
2282 Killearn Center Boulevard, Suite C
Tallahassee, Florida 32309

For Respondent Florida Department of Environmental Protection:

Carson Zimmer, Esquire
Richard P. Gillis, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard, Mail Station 35
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUES

Whether Environmental Resource Permit No. 0415071-001-EI/03 (“the ERP”), noticed to be issued to Respondent, Prop Wash Enterprises (“Respondent” or “Prop Wash”), by the Department of Environmental Protection (“DEP”), meets the requirements of Part IV of chapter 373, Florida Statutes (2023), and Florida Administrative Code Rule 62-330; and whether Petitioner has standing to bring this action.¹

PRELIMINARY STATEMENT

On March 27, 2024, DEP filed a notice of intent (“NOI”) to issue the ERP to Prop Wash to construct a 28-slip commercial marina, 14 with boat lifts; a fish cleaning station; and a 256-foot linear seawall faced with riprap (“the Project”), on Prop Wash’s property located at 236 McKenzie Avenue in Panama City, Florida. The NOI also provided notice of intent to grant a letter of consent and a lease to use sovereign submerged lands owned by the Board of Trustees of the Internal Improvement Trust Fund (“Board of Trustees”) for the Project. The ERP recognizes that the Project will occur in Class III waters, the Massalina Bayou (“the Bayou”), an Unclassified Shellfish Harvesting Area.

On April 19, 2024, Petitioner, Richard Rigby, filed a Petition with DEP challenging the ERP. DEP referred the Petition to the Division on May 3, 2024, which was assigned to the undersigned to conduct a disputed fact-finding hearing on the Petition.

¹ Although Petitioner included in his Petition an allegation that the Letter of Consent and submerged land lease should not be issued, and stated in the Pre-hearing Stipulation that he “opposes the issuance of a sovereign submerged lands lease [(Lease)],” Petitioner failed to present any evidence challenging the Lease at the final hearing. Thus, Petitioner waived his challenge to the Lease.

The final hearing was scheduled to be held on September 10 and 11, 2024, in Tallahassee at the offices of the Division. The final hearing convened as scheduled. By stipulation of the parties, DEP's entire permitting file for the ERP, which included information sufficient to support the Lease, was admitted in evidence as DEP Exhibits 1 through 68.

Prop Wash offered the testimony of its owner and chief operating officer, Ronald Carroll; and Bethany Womack, its environmental consultant for the Project.

DEP offered the testimony of Whitney Bretana, an environmental specialist with DEP's Division of Submerged Lands and Environmental Resource Permitting.

The Petitioner testified on his own behalf, and offered the testimony of James Dake, a neighboring property owner. Petitioner's Exhibits 1 through 9 and 13 through 15 were admitted in evidence.

A two-volume Transcript of the final hearing was filed on October 8, 2024. At the request of the parties, the undersigned extended the deadline for the parties to file proposed recommended orders, first to November 1, 2024, and a second time to November 8, 2024. The parties timely filed Proposed Recommended Orders, which have been considered by the undersigned in preparing this Recommended Order.

FINDINGS OF FACT

The Parties and Standing

1. DEP is an administrative agency of the State of Florida having the power and duty to protect Florida's air and water resources and to administer and enforce the provisions of chapter 373, Part IV, and the rules promulgated

thereunder in rule 62-330. Pursuant to this authority, DEP determines whether to issue or deny applications for ERPs.

2. The Board of Trustees holds title to the state's sovereign submerged lands. DEP serves as staff to the Board of Trustees in processing applications for submerged land leases.

3. Prop Wash is a Florida for-profit corporation with a principal address of 324 East Beach Drive, Suite 800, in Panama City, Florida. Prop Wash is the owner of the Project site adjacent to the sovereign submerged lands, and is the applicant for the ERP and Lease.

4. Petitioner is a resident of Panama City whose residence is located across the Bayou to the east of the Project. Petitioner testified that his property is approximately 250 feet across the Bayou from the Project.

5. Petitioner enjoys watching several species of birds that fish and roost in and along the Bayou, including osprey, egrets, brown pelicans, and cranes. He also enjoys watching dolphin and manatees that occasionally swim in the Bayou. Petitioner owns a sailboat with a 17-foot beam, which he keeps docked at his residence on the Bayou. From his property, he must navigate through the "neck" of the Bayou and under a drawbridge at East Beach Street to access St. Andrews Bay.

6. Neither DEP nor Prop Wash challenged Petitioner's standing to bring the instant challenge. Although the parties included Petitioner's standing as a disputed issue of law in the Pre-hearing Stipulation, DEP conceded Petitioner's standing in its Proposed Recommended Order, and Prop Wash indicated in its Proposed Recommended Order that it was not contesting Petitioner's standing.

The ERP Application

7. On January 17, 2022, Prop Wash applied to DEP for the ERP and authorization to use sovereign submerged lands for construction of a dock with two associated finger piers for 28 boat slips—14 with boat lifts, and

21 covered with “quanset-hut style” roofs; a fish-cleaning station; a boat ramp; and a 256-linear foot seawall faced with riprap (“the Application”).

8. On January 19, 2022, DEP notified several state agencies of the Application and gave them 30 days to provide comments, including the Florida Fish and Wildlife Conservation Commission (“FWC”), the Department of State, Division of Historical Resources (“DHR”), the Department of Agriculture and Consumer Services (“DACS”), and the Department of Economic Opportunity (“DEO”).

9. On February 3, 2022, DHR submitted comments on the Application, and requested that a condition be included in the ERP regarding inadvertent discoveries, which DEP included in the ERP.

10. On February 9, 2022, FWC commented on the Application and submitted recommended permit conditions, which DEP incorporated into the ERP.

11. Neither DACS nor DEO commented on the Application.

12. On February 16, 2022, DEP issued a Request for Additional Information (“RAI”) to Prop Wash, much of which pertained to the proposed boat ramp and proposed dredging associated therewith. Other information sought included confirmation of the total square footage of new impervious surface (which related to whether stormwater treatment would be required), revised drawings, preferred methods for shoreline stabilization, the fish-cleaning station, data required for the hydrographic study, and information necessary for propriety review for the submerged land lease.

13. Prop Wash maintained communications with DEP throughout preparation of its responses to the RAI and completed its response thereto on March 7, 2024.

14. The proposed boat ramp and associated dredging of the submerged lands were removed in the final Project drawings in February 2024, and are not part of the current Application.

15. On August 25, 2023, DEP mailed notice of the Application to property owners within 500 feet of the proposed submerged land lease boundary, pursuant to section 253.115, Florida Statutes, and Florida Administrative Code Rule 18-21.005(3).

16. In response to the notice, Petitioner corresponded with DEP, beginning on or about August 28, 2023, in opposition to the proposed activities. DEP responded to Mr. Rigby about the concerns he raised.

17. In response to a concern Mr. Rigby raised regarding unauthorized clearing on the uplands associated with the Project, DEP conducted a second site visit on September 6, 2023. DEP found no evidence of clearing on the site.

18. DEP issued the ERP on March 27, 2024.

19. Prop Wash published notice of the ERP in the Panama City News Herald on April 3, 2024.

20. On April 5, 2024, Petitioner requested, and DEP granted, a 14-day extension of time to file a petition challenging the ERP.

21. Petitioner timely filed the Petition on April 19, 2024.

Petitioner's Challenges

22. Petitioner alleges that the Project will: (1) adversely impact the value of functions provided to fish and wildlife and listed species by surface waters; (2) likely result in increased erosion; (3) adversely affect navigation; (4) negatively impact water quality; and (5) cause unacceptable cumulative impacts.²

Impact on fish and wildlife

23. The ERP Applicant's Handbook requires DEP to provide to FWC a copy of all ERP permits that propose regulated activities "in, on, or over wetlands or other surface waters" for review and comment. ERP Applicant's

² Petitioner also included the length of the proposed seawall as a disputed fact in the pre-hearing stipulation. However, that "issue" was neither included in his Petition, nor addressed at the final hearing.

Handbook, Vol. 1, Section 10.2.2. As per this requirement, DEP submitted the Application to FWC, and FWC identified manatees as the only species that may be affected by the Project. Further, FWC recommended conditions be included in the ERP to protect manatees, which DEP incorporated into the ERP.

24. Subsequently, Petitioner provided comments to DEP alleging that other species were present in the Project area, including ospreys, egrets, and brown pelicans, which would be harmed by the Project. DEP forwarded Petitioner's concerns to FWC, but FWC did not provide additional comments.

25. Petitioner submitted no evidence, other than his own speculation, as to how the Project might adversely impact these bird species. Petitioner submitted photographs of Great White Egrets in a tree or trees located on the Project site, and speculated that they would be harmed by the Project. Similarly, he submitted photographs of osprey in the Bayou, and brown pelicans sitting on pilings at a nearby abandoned dock, again speculating that these species would be negatively impacted by the Project.

26. Prop Wash environmental consultant, Bethany Womack, conducted a site visit and found no nests of any bird species on the Project site. Furthermore, FWC, in its comments on the Application, did not include any concern with impacts to any bird species from the Project.

27. Petitioner alleged that clearing of trees on the Project site would adversely affect these bird species. However, tree clearing on the upland site is outside of the scope of the ERP. The ERP is limited to activities on or over surface waters and wetlands, neither of which are present on the uplands.

28. Petitioner's challenge also alleges the presence of oyster beds in the Project area and negative impacts to those resources.

29. Prop Wash conducted an in-water survey of the Project area, which was submitted with its Application. Ms. Womack personally snorkeled the Project site and found only a mud and silt bottom, along with storm debris, in the site area. Ms. Womack testified that no seagrasses, oyster beds, or other

submerged resources were present in the submerged Project area.

Ms. Womack's testimony is accepted as credible and persuasive.

30. Petitioner speculated that oyster beds were present in the submerged site area based on (1) his observation that oyster beds are present under the dock on his property opposite the subject Project site; and (2) his observation of oysters clinging to a buoy rope attached to a boat close to the Project site. Petitioner provided no direct evidence of the presence of oysters or oyster beds within the Project site.

31. Petitioner also criticized Ms. Womack's in-water study for failing to include the entirety of the submerged Project site. Ms. Womack snorkeled the submerged site in a transect pattern "down to a minus 6" elevation, but suspended the study for the portions in deeper water—between minus 6 and minus 9—because the visibility was too poor to support sea grass growth. Ms. Womack admitted on cross-examination that she could not definitively rule out the presence of oyster beds in the deeper water portions of the site.

32. Petitioner's speculation, and Ms. Womack's inability to "rule out" the presence of oyster beds, falls short of direct evidence of the presence of oyster beds located within the Project site, and is insufficient for the undersigned to infer the presence of any particular resource.

Erosion

33. The ERP includes safeguards to protect against erosion, including the requirement that riprap be installed along the seawall, boat slips maintain appropriate depths, and best management practices are followed during construction.

34. Petitioner presented no competent evidence that the Project is likely to result in erosion.

35. The competent, substantial evidence supports a finding that the seawall required by the ERP will suspend existing erosion of the shoreline, and that the riprap will prevent both shoaling and erosion in the Bayou.

Navigation

36. In issuing the ERP, DEP relied upon signed, sealed engineering drawings showing that the Project extends, at the point closest to the navigational channel of the Bayou, 69 feet from the centerline of the navigational channel. The ERP also requires the installation of reflectors and lights to aid in navigation.

37. Petitioner contends that the Project will extend into the commonly-used navigational channel and cause a navigational hazard.

38. Petitioner testified that the navigational channel in the Bayou is approximately 100-feet wide, essentially extending to within seven feet of the shore on either side of the Bayou. Petitioner did not present any expert testimony or other evidence to support his opinion of the width of the channel, other than his estimations.³

39. The competent, substantial evidence supports a finding that the navigational channel is 50 feet wide, that the Project will extend no more than 69 feet from the centerline of the navigational channel, or 44 feet from the edge of the channel, allowing ample space for navigation.

Water Quality

40. The Bayou is a Class III waterbody with poor water quality. The Bayou is a spill-prone area for a nearby City lift station. All parties agree that the Bayou is “dirty” and they would not want to swim there.

41. Petitioner testified that he was “not sure to what extent” the Project would impact water quality proximate to his home. The only evidence Petitioner presented on the issue was the testimony of his neighbor, James Dake, speculating that the Project would further impair water quality in the Bayou by boaters conducting bilge-pumping and fish-cleaning, as well as leaching of anti-fouling paint from boats docked at the Project site.

³ Petitioner believes the navigational channel must be wider than 50 feet because his own boat is 17-feet wide, and the next largest boat in the Bayou is 18-feet wide, which means both could not navigate through a 50-foot channel easily (assuming one is leaving the Bayou and the other is returning at the same time).

Neither Petitioner nor Mr. Dake is a water-quality expert.

42. Prop Wash entered into evidence a detailed water-quality assessment conducted by a professional environmental laboratory, which was reviewed and approved by a professional geologist with DEP, in evaluating the Project's impact on water quality. The assessment included a hydrographic study with both a fixed-point and moving-point dye test, which showed that any potential pollutant would be dispersed to 10 percent of its original concentration within 48 hours. Further, current water flow rates at the Project site would move any potential pollutant across and out of the site in less than an hour.

43. DEP also included mandatory conditions to protect water quality, including wrapping the dock pilings to prevent leaching of contaminants from treated wood, providing a publicly-available sewage pump-out at the marina, and providing filters and waste receptacles for the fish-cleaning station. The ERP also prohibits overboard discharges from any vessels utilizing the slips. Further the Lease would prohibit hull cleaning to protect water quality.

44. Based on the studies and other evidence, DEP found that the Project would not cause a violation of any state water quality standards.

Cumulative Impacts

45. Petitioner raised concerns with the cumulative impacts of the Project on the Bayou, including water quality and crowding.

46. In evaluating the Application, DEP looked at other activities in the area, including existing commercial and residential docks and marinas to determine if addition of the Project would have an adverse cumulative impact. Whitney Bretana, DEP environmental processor and environmental specialist III, conducted the review of the Application. Ms. Bretana testified that there are over 100 boat slips in the Bayou, and in her professional opinion, the addition of 28 slips is not going to greatly increase boating or boating impacts in the area.

47. Ms. Bretana further testified that the Project, in total, would not have an adverse cumulative impact on the area of the Bayou.

48. Ms. Bretana's testimony is accepted as credible and persuasive.

Public Notice

49. Petitioner alleges that incorrect information utilized in the NOI for the ERP renders the public notice invalid.

50. On August 25, 2023, DEP mailed notice of the Application to property owners within 500 feet of the Project. Petitioner's property is within 500 feet of the Project and he received the mailed notice.

51. The mailed notice included a description of the proposed activities, a link to the online public application file, contact information for the DEP employee processing the application, and surveys signed and sealed by a registered land surveyor depicting the area of the Marina and showing measured distances for the slips.

52. Petitioner directed multiple correspondences to DEP beginning on or about August 28, 2023, in opposition to the Marina.

53. On April 3, 2024, Prop Wash published the NOI in the Panama City News Herald.

54. A typographical error appears once in the 40-page Permit showing that the Marina extends 167 feet from the shoreline when in actuality the Marina extends further. The notice mailed August 25, 2023, did not contain the error and included signed and sealed surveys completed by a registered land surveyor showing the Project with distance measurements of the slips.

55. Petitioner received actual notice of DEP's public notice and an accurate description of the Project. Petitioner participated as a member of the public during DEP's review of the Application, contacting DEP numerous times with his concerns and complaints.

CONCLUSIONS OF LAW

Jurisdiction

56. The Division has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

Standing

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

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

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

Id. at 482; see also *St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.*, 54 So. 3d 1051 (Fla. 5th DCA 2011); *Palm Beach Cnty. Env’t. Coal. v. Fla. Dep’t of Env’t. Prot.*, 14 So. 3d 1076 (Fla. 4th DCA 2009); *Mid-Chattahoochee River Users v. Fla. Dep’t of Env’t. Prot.*, 948 So. 2d 794, 797 (Fla. 1st DCA 2006).

59. The standing requirement established by *Agrico* has been refined, and now stands for the proposition that standing to initiate an administrative proceeding is not dependent on proving that the proposed agency action

would violate applicable law. Instead, standing requires proof that the petitioner has a substantial interest and that the interest reasonably could be affected by the proposed agency action. Whether the effect would constitute a violation of applicable law is a separate question.

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

Palm Beach Cnty. Env’t Coal., 14 So. 3d at 1078 (citing *Peace River/Manasota Reg’l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1083 (Fla. 2d DCA 2009); and *Hamilton Cnty. Bd. of Cnty. Comm’rs v. State, Dep’t of Env’t Regul.*, 587 So. 2d 1378 (Fla. 1st DCA 1991)); *see also St. Johns Riverkeeper, Inc.*, 54 So. 3d at 1055 (“Ultimately, the ALJ’s conclusion adopted by the Governing Board that there was no proof of harm or that the harm would be offset went to the merits of the challenge, not to standing.”).

60. Petitioner alleges standing based on his concern with loss of enjoyment of boating activities due to overcrowding in the Bayou, navigational hazards created by the Project, as well as a loss of enjoyment of observing fish, manatees, birds, and other wildlife in and around the Bayou due to reduced water quality.

61. Petitioner alleged and offered proof of an “injury in fact which is of sufficient immediacy to entitle [him] to a section 120.57 hearing.” Petitioner satisfied the first prong of the *Agrico* test by alleging that his interests in boating and observing wildlife in the Bayou could be negatively impacted by the Project.

62. As a result of the facts illustrated by Petitioner’s testimony, there is sufficient evidence to demonstrate that, if the alleged adverse impacts of the

Project on the Bayou had been proven, those impacts would have adversely affected Petitioner.

63. Petitioner also met the second prong of the *Agrico* test as this proceeding is designed to ensure that the Project would not adversely affect the public interests that are the subject of chapter 373 and the rules adopted thereunder, including the conservation of fish and wildlife or their habitats, and navigation in the vicinity of the Project.

Notice

64. The preponderance of the evidence established that the NOI was legally sufficient and that Petitioner was not prejudiced by the error therein.

Nature of the Proceeding

65. This is a de novo proceeding “intended to formulate final agency action and not to review action taken earlier and preliminarily.” *Young v. Dep’t of Cnty. Aff.*, 625 So. 2d 831, 833 (Fla. 1993); *Hamilton Cnty.*, 587 So. 2d at 1387; *McDonald v. Dep’t of Banking & Fin.*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

Standard and Burden of Proof

66. The standard of proof is a preponderance of the evidence.

§ 120.57(1)(j), Fla. Stat.⁴

67. Section 120.569(2)(p) provides that:

For any proceeding arising under chapter 373, chapter 378, or chapter 403, if a nonapplicant petitions as a third party to challenge an agency’s issuance of a license, permit, or conceptual approval, the order of presentation in the proceeding is for the permit applicant to present a prima facie case demonstrating entitlement to the license, permit, or conceptual approval, followed by the agency. This demonstration may be made by entering into

⁴ As indicated previously, Petitioner presented no evidence to contravene the issuance of the Lease. The Application, on the other hand, contained considerable competent substantial evidence in support of the Lease. Thus, even if the issue had not been waived by abandonment of the issue at hearing, Prop Wash met its burden of proving entitlement by a preponderance of the evidence.

evidence the application and relevant material submitted to the agency in support of the application, and the agency's staff report or notice of intent to approve the permit, license, or conceptual approval. Subsequent to the presentation of the applicant's prima facie case and any direct evidence submitted by the agency, the petitioner initiating the action challenging the issuance of the permit, license, or conceptual approval has the burden of ultimate persuasion and has the burden of going forward to prove the case in opposition to the license, permit, or conceptual approval through the presentation of competent and substantial evidence.

68. Prop Wash made a prima facie case of entitlement to the ERP by entering into evidence the complete application files and supporting documentation and the NOI. Having made a prima facie case, the burden of ultimate persuasion is on Petitioner to prove his case in opposition to the ERP by a preponderance of the competent and substantial evidence, and thereby prove that Prop Wash failed to provide reasonable assurance that the Project was not contrary to the public interest.

Reasonable Assurance Standard

69. Reasonable assurance means “a substantial likelihood that the project will be successfully implemented.” *Metro. Dade Cnty. v. Coscan Fla., Inc.*, 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Reasonable assurance does not require absolute guarantees that the applicable conditions for issuance of a permit have been satisfied. Furthermore, speculation or subjective beliefs are not sufficient to carry the burden of presenting contrary evidence or proving a lack of reasonable assurance necessary to demonstrate that a permit should not be issued. *FINR II, Inc. v. CF Indus., Inc.*, Case No. 11-6495 (Fla. DOAH Apr. 30, 2012; Fla. DEP June 8, 2012).

Public Interest Test

70. Section 373.414(1) provides, in pertinent part, that:

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, ... [DEP] shall require the applicant to provide ... reasonable assurance that such activity in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), is not contrary to the public interest

(a) In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), and is regulated under this part, is not contrary to the public interest ... [DEP] shall consider and balance the following criteria:

* * *

2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling[.]

71. The public interest test is a balancing test; and, as such, not every element must weigh in favor of the public interest in order for the test to be passed. *See Great Am. Life Ins. Co., Inc. v. The Buccaneer Comm. Unit A*, Case No. 18-1174 (Fla. DOAH Jan. 10, 2019; Fla. DEP Feb. 25, 2019).

72. Rule 62-330.301 provides, in pertinent part, as follows:

(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:

* * *

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

(e) Will not adversely affect the quality of receiving waters such that the state water quality standards ... will be violated[.]

73. In this proceeding, Petitioner presented no evidence, let alone competent substantial evidence, that the Project would cause state water quality standards to be violated. DEP's evidence established that the Project would not lead to a violation of any state water quality standard, and that the ERP contains many requirements to protect water quality in the Bayou from potential impacts.

74. Prop Wash demonstrated, by the preponderance of the evidence, that it has given reasonable assurance that the ERP will not adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats, as required by section 373.414(1)(a)2. Petitioner's criticism of the in-water survey of the Bayou bottom at the Project site does not overcome the reasonableness of the conclusion that there are no oyster beds present within the Project site.

75. Prop Wash demonstrated that the ERP will not adversely affect navigation or the flow of water or cause harmful erosion or shoaling, as required by section 373.414(1)(a)3.

76. In considering all the factors implicated by the Petition, it is concluded that Prop Wash's proposed Project is not contrary to the public interest. Petitioner has not sustained his ultimate burden to the contrary.

Conclusion

77. Applying the standards of reasonable assurance to the Findings of Fact in this case, it is concluded that the ERP meets the applicable standards in section 373.414 and rule 62-330.301.

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: issuing Environmental Resource Permit No. 0415071-001-EI/03 to Prop Wash.

DONE AND ENTERED this 2nd day of December, 2024, in Tallahassee, Leon County, Florida.

A handwritten signature in cursive script that reads "Suzanne Van Wyk".

SUZANNE VAN WYK
Administrative Law Judge
DOAH Tallahassee Office

Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, Florida 32301-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of December, 2024.

COPIES FURNISHED:

Edwin A. Steinmeyer, Esquire
(eServed)

Carson Zimmer, Esquire
(eServed)

Ron Carroll
(Address of Record)

Stephen Ellis Syfrett, Esquire
(eServed)

Richard P. Gillis, Esquire
(eServed)

Lea Crandall, Agency Clerk
(eServed)

Justin G. Wolfe, General Counsel
(eServed)

Shawn Hamilton, Secretary
(eServed)

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.