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STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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DIVISION OF ADMINISTRATIVE HEARINGS

AP

BOARD OF COMMISSIONERS OF JUPITER INLET DISTRICT, Petitioner, and JEFFREY AND ANDREA CAMERON and DOUG BOGUE, Intervenors, vs. PAUL THIBADEAU AND DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondents.	)	OGC CASE NO. 03-1292 DOAH CASE NO. 03-4099 REM Closed

CONSOLIDATED FINAL ORDER

The Division of Administrative Hearings ("DOAH") submitted a Recommended Order ("RO") to the Department of Environmental Protection ("DEP") in this formal administrative proceeding. Copies were served upon counsel for the Petitioner, Board of Commissioners of Jupiter Inlet District (the "District"); the Intervenors, Jeffrey Cameron, Andrea Cameron, and Doug Bogue (collectively "Intervenors"); and the Co-Respondent, Paul Thibadeau ("Applicant"). A copy of the Recommended Order is attached hereto as Exhibit A.

The District and the Intervernors filed Joint Exceptions to the Recommended Order,[1] and Exceptions to the Recommended Order were also filed on behalf of the Applicant and DEP. DEP subsequently filed Responses to the District's Exceptions.

[1] However, this document, entitled "Petitioner's and Intervenor's Joint Exceptions to Recommended Order," was signed only by co-counsel for the Petitioner.

The matter is now before the Secretary of DEP for final agency action.

BACKGROUND

The Applicant is the owner of residential real property located at 129 River Road in Palm Beach County, Florida (the "Property"). The Property is adjacent to the southern shore of the Central Embayment of the Loxahatchee River, a Class III waterbody and an Outstanding Florida Water and Aquatic Preserve. The Intervenors own residential property along the Loxahatchee River west of the Applicant's Property.

On August 14, 2002, DEP received from the Applicant a letter notifying the agency of the Applicant's intent to use a noticed general permit to install a single-family dock extending into the Loxahatchee River from the northwest side of his Property (the "Project"). The Project, as subsequently revised by the Applicant, consists of a proposed 900 square-foot dock comprised of a three-foot by 250-foot access walkway, a six-foot by 25-foot terminal structure, and two eight-foot by 30-foot boat slips -- one a wetslip and the other a boatlift. The Applicant currently owns an existing dock on the east side of his property, and he has agreed that this existing dock shall be removed prior to the commencement of construction of the dock Project at issue in this case

On February 6, 2003, DEP issued a letter to the Applicant notifying him that his revised dock Project met the requirements for a noticed general environmental resource permit (NGP") granted pursuant to Rule 62-341.427, F. A. C. Rule 62-341.427(1)(a) grants a NGP to any person to construct a single-family pier not accommodating the mooring of more than two boats, not exceeding 2,000 square feet in size, and meeting certain other requirements. DEP also advised the Applicant that this February 6 letter served as authorization from the Board of Trustees of the Internal Improvement Trust

Fund ("Trustees") to use the sovereign submerged lands underlying the Loxahatchee River to perform the proposed Project.[2]

In June of 2003, the District filed with DEP a Petition Requesting Formal Proceedings. This petition was transmitted to DOAH and Administrative Law Judge, Robert E. Meale ("ALJ"), was assigned to conduct a formal administrative hearing in the case. The District subsequently filed amended petitions in December of 2003, and June of 2004, and the Intervenors filed their Petition to Intervene in May of 2004.

A final hearing was scheduled in this case for June 16-17, 2004. However, at the commencement of the final hearing, the parties negotiated a settlement agreement, and the ALJ abated the case at the parties' request until August 31, 2004. On August 24, 2004, the Applicant filed a Motion to Reschedule Final Hearing due to the rejection of the settlement agreement by the District's board. A rescheduled final hearing was held by the ALJ in West Palm Beach on November 8-11, 2004,[3] and April 25-27, 2004.[4]

RECOMMENDED ORDER

The Recommended Order now on administrative review was submitted by the ALJ on July 25, 2005. The ALJ concluded, among other things, that the Applicant's revised dock Project meets all the requirements for a NGP, will not significantly impede navigation, and will not unreasonably infringe upon the riparian rights of the Intervenors. The ALJ ultimately recommended that the NGP be granted. The ALJ also

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2 DEP acts as staff to the Trustees, and DEP has been delegated the authority to grant certain authorizations to use sovereign submerged lands, title to which is vested in the Trustees. See §§ 253.002, and 253.77, Fla. Stat.; and Rule 18-21.0051, F.A.C.

3 The transcript of this proceeding is designated herein as Tr. "A."

4 The transcript of this proceeding is designated herein as Tr. "B."

recommended that the Letter of Consent to use sovereign submerged lands be granted to the Applicant subject to the following two conditions:

1. A prohibition against the mooring of any boat to the slip for any period of time, if the boat requires more than two feet of water with its engine in normal operation condition and the boat operating at idle or slow speed; and

2. The removal of Applicant's existing dock prior to the construction of the proposed dock structures at issue in this proceeding.

STANDARDS OF REVIEW OF RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency may not reject or modify findings of fact in a recommended order, "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." An agency may not reweigh the evidence, attempt to resolve conflicts therein, or judge the credibility of witnesses. Such evidentiary matters are within the province of the ALJ, as the "fact-finder" in this formal administrative proceeding. See, e.g., Dunham v. Highlands County School Board, 652 So. 2d 894 (Fla. 2d. DCA 1995); Florida Dep't of Corrections v. Bradley, 510 So. 2d 1122 (Fla. 1st DCA 1987).

Section 120.57(1)(l), Florida Statutes, further provides that an agency may modify or reject those conclusions of law in a recommended order over which it has "substantive jurisdiction." The related Florida case law holds that an agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. Public Employees Relations Comm'n v. Dade County Police Benevolent Ass'n, 467 So. 2d 987, 989 (Fla. 1985); Florida Public Employees Council, 79 v.

Daniels, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

Great deference should be given to such agency interpretations of statutes and rules within their regulatory jurisdiction, and such interpretations should not be overturned unless "clearly erroneous." Department of Envtl. Regulation v. Goldring, 477 So. 2d 532, 534 (Fla. 1985). Furthermore, these agency interpretations of their own statutes and rules do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. Suddath Van Lines, Inc. v. Dept. of Environmental Protection, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

RULINGS ON THE EXCEPTIONS OF DEP AND THE APPLICANT

The Exceptions to Recommended Order filed on behalf of DEP and the Applicant are substantially the same. Both Exceptions object to the ALJ's Conclusion of Law No. 50 and his related recommendation that the grant of the Letter of Consent to the Applicant should contain an additional condition prohibiting the mooring of any boat at the proposed new dock, if the boat requires more than two feet of water with its engine in normal operation position and the boat operating at idle or low speed. DEP's Exceptions also object to the ALJ's related legal conclusion in the last sentence of numbered paragraph 64 that the "Letter of Consent must be so conditioned."

In his Conclusion of Law 64, the ALJ interprets Rule 18-20.004(5)(a)3, Florida Administrative Code ("F.A.C.") (stating that the design of a docking facility in an Aquatic Preserve "shall consider the number, lengths, drafts and types of vessels allowed to use the facility") to constitute a prohibition in this case of the mooring at the Applicant's proposed dock facility of any boats requiring more than two feet of water depth with their

engines at idle or slow speed. In its Exceptions, however, DEP disagrees with this rule interpretation of the ALJ.

DEP's Exceptions correctly acknowledge that this agency does have the authority pursuant to Chapters 18-20 and 18-21, F.A.C., to limit the draft of a vessel to be moored at a proposed dock facility in an Aquatic Preserve under appropriate circumstances. See Rules 18-20.004(5)(a)(3), 18-20.004(5)(b)(8), and 18-21.004(7)(d), F.A.C. DEP also construes the cited rule provisions of Chapters 20 and 21, F.A.C., to mean that it is only appropriate to limit vessel drafts in cases where there are factual findings that vessels with certain draft depths would cause harm to resources at a proposed dock facility or other structure. Both DEP and the Applicant assert that there are no findings of fact by the ALJ in this case that any environmental resources at the site of the Applicant's proposed new dock facility would be harmed by the mooring of boats requiring more than two feet of water depth with their engines at idle or slow speed.

The ALJ did find in paragraph 28 of the RO that "[t]he [proposed dock] platform covers submerged bottom that is uncolonized by sea grass, and given its coarse sand and shell hash, as well as the water depths and water clarity, this bottom is unlikely ever to be colonized by seagrass." However, the ALJ, while characterizing them as "conclusions of law," also made mixed findings of fact and conclusions of law which support his recommendation that a vessel-size-limit be imposed in this case by an additional condition to the Letter of Consent. In paragraphs 63 and 64 of the RO, the ALJ states that "DEP has already obtained design modifications that eliminate or reduce adverse impacts of a biological, scientific, or aesthetic nature. ...Here, the work of DEP

and Applicant's consultants has been based on accommodating a vessel that requires two feet of water with the engine down and operating at idle or slow speed."

On administrative review, an agency is not bound by the labels affixed by an administrative law judge designating various portions of a recommended order as "findings of fact" or "conclusions of law." See, e.g., Battaglia Properties v. Land and Water Adjudicatory Comm'n, 629 So.2d 161, 168 (Fla. 5th DCA 1993). Thus, the ALJ's failure to properly label some of the challenged findings of fact or conclusions of law is harmless error. There is competent substantial record evidence in this case supporting the ALJ's premise that, at least in part, the dock modifications designed "to eliminate or reduce adverse impacts" to this aquatic preserve specifically addressed such impacts which could otherwise be caused specifically by a vessel "that requires two feet of water with the engine down and operating at idle or slow speed." (See testimony of Kathryn Tunnell, Tr. "A" Vol. I, pp. 172-74.)

The Loxahatchee River site of the Applicant's proposed dock is classified as an Outstanding Florida Water ("OFW") and has also been designated an Aquatic Preserve. See Rule 62-302.700(9)(h)24, F.A.C., and § 258.39(10), Fla. Stat. As an OFW, the Loxahatchee River is "worthy of special protection" because of its natural attributes, and is entitled to "the highest protection" against degradation of its waters. Rules 62-302.200(17) and 62-302.700(1), F.A.C. As an Aquatic Preserve, the Loxahatchee River is to be "preserved in an essentially natural or existing condition . . . for the enjoyment of future generations." Rule 18-20.001(2), F.A.C.

In view of the special environmental protection accorded to the Loxahatchee River as an OFW and Aquatic Preserve, I concur with the ALJ's interpretation of Rule

18-20.004(5)(a)3, F.A.C., as set forth in paragraphs 50 and 64 of the RO. I thus adopt the ALJ's related recommendation that the Letter of Consent contain an additional condition prohibiting the mooring at the Applicant's proposed dock facility in the Loxahatchee River of any boat requiring more than two feet of water depth with its engine in normal operation and the boat operating at idle or slow speed.[5] Accordingly, the Exceptions of DEP and the Applicant are denied.

RULINGS ON THE PETITIONER'S AND INTERVENORS' JOINT EXCEPTIONS TO RECOMMENDED ORDER

A. Exceptions to Findings of Fact

Exception 1: Water Depth and Seagrasses Near Existing Dock

In Exception 1, the Petitioner objects to findings of fact contained in paragraph 5 of the RO regarding the depth of water and existence of seagrasses near the Applicant's existing dock. I conclude that these challenged factual findings of the ALJ are supported by competent, substantial record evidence. (See Tunnell testimony, Tr. "A" Vol. I, p. 212; testimony of Paul Thibadeau, Tr. "A" Vol. II, pp. 291-92; testimony of Bruce Jerkin, Tr. "A" Vol. III, p. 574.) Consequently, the Petitioner's Exception 1 to Findings of Fact is denied.

Exception 2: Proposed Dock Depicted in Original Application

In Exception 2 , the Petitioner objects to the ALJ's description in paragraph 7 of the RO to the dock as originally proposed in the application. The Petitioner contends that "it is erroneous to the extent that it in any way...attempts to depict dimensions of the proposed dock that is being permitted...." I reject this contention because it is

[5] It is settled that this agency has authority to enter a final order containing additional permit conditions suggested by a DOAH administrative law judge in a recommended order. See, e.g., The Conservancy, Inc. v. Dep't of Envtl. Regulation, 580 So. 2d 772, 774 (Fla. 1st DCA 1991); Hopwood v. Dep't of Envtl. Regulation, 402 So. 2d 1296 (Fla. 1st DCA 1981).

unambiguous that the "diagram" and "application" containing the dock description referred to in paragraph 7 pertained only to the Applicant's original application--and not to the Applicant's Revised Application (see RO ¶11). The Petitioner's Exception 2 to Findings of Fact is thus denied.

Exception 3: Access Provided by Alternative Dock Proposals

During the hearing, the Petitioner proposed alternative locations for locating the Applicant's dock. In Exception 3, the Petitioner excepts to the ALJ's findings in paragraph 14 of the RO that the alternative dock location "F" proposed by the Petitioner "provides Applicant with little better access than he has at present;" that the length of the eastern route from "F" runs "over 600 feet;" and that the eastern side of the Applicant's property is more exposed to currents than the west side of the cove, so that navigating with the engine trimmed partly up would be more difficult. These findings are supported by competent, substantial evidence and are adopted. (See testimony of Edward Albado, Tr. "B", Vol. I, p. 227; testimony of Randall Armstrong, Tr. "B," Vol. III, p. 428, Vol. IV, pp. 568-69; testimony of Timothy Rach, Tr. "B", Vol. V, pp. 612-13.) Therefore, Petitioner's Exception 3 to Findings of Fact is denied.

Exceptions 4 and 5: Contested Riparian Rights Line and 25-Foot Setback Requirement

In Exceptions 4 and 5, the Petitioner takes exception to the ALJ's factual determination in paragraphs 25 and 26 that reasonable assurances have been provided that the 25-foot setback requirement contained in Rule 18-21.004(3)(d), F.A.C, has been met. I would note at the outset that it is not clear that this issue is properly before DEP at this administrative review stage of the proceeding.

The standing of the Petitioner and the Intervenors to raise the riparian rights issue was challenged during the DOAH proceeding; however, the ALJ did not make a specific ruling on this question in the RO. Rather, the ALJ ruled only that the "District and Intervenors have standing in this case," based upon the District's "broad navigational and at least limited environmental responsibilities throughout the Central Embayment," and upon the Intervenors' status as owners of property in the same cove in which the proposed dock will be located. (RO ¶ 35.) Consistent with this conclusion of law, the Second Amended Petition reflects that the Petitioner's interest is asserted with respect to its maintenance and management activities in the Loxahatchee River. However, the 25-foot setback requirement does not necessarily relate to these interests. (See Tr. "A," Vol. I, p. 138.) It is therefore unclear that the Petitioner has standing to object to the ALJ's factual and legal determinations related to the riparian rights issue.

Additionally, to the extent that the Intervenors' exceptions may have been asserted in the "Joint Exceptions to Recommended Order,"[6] it is similarly not clear that they have standing to raise any issues not presented in the Petitioner's Second Amended Petition. See Environmental Confederation of Southwest Florida, Inc. v. IMC Phosphates, Inc., 857 So. 2d 207, 211 (Fla. 1st DCA 2003) ("Intervention is a dependent remedy in the sense that an intervenor may not inject a new issue into the case.") (citing Nat'l Wildlife Fed'n Inc. v. Glisson, 531 So. 2d 996 (Fla. 1st DCA 1988); (see also Tr. "A," Vol. 1, pp. 150-52.)

However, even if this 25-foot setback issue were properly before me for consideration, I would conclude that the Petitioner's Exceptions are not well-founded. First, Petitioner takes exception to the ALJ's statement, in paragraph 25, that "the task

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[6] See note 1, supra.

in this case is not to draw riparian lines, but to determine whether the proposed dock or platform is within 25 feet of another landowner's riparian line," asserting that this is really conclusion of law which is incorrect, because this assessment may not be made where, as here, a riparian rights line is contested. As a preliminary matter, I conclude that this statement, while labeled a "finding of fact" by the ALJ, is more properly characterized as a conclusion of law. However, such erroneous designation by the ALJ is harmless. See Battaglia, 629 So. 2d at 168.

In any event, no matter how characterized, the statements of the ALJ in paragraphs 25 and 26 of the RO are consistent with applicable law. Rule 18-21.004, F.A.C. (prescribing the "management policies, standards, and criteria to be used in determining whether to approve, approve with conditions or modifications, or deny all requests for activities on sovereignty submerged lands"), contains restrictions regarding potential impairment of riparian rights. Rule 18-21.004(3)(d) provides, in pertinent part, that--unless an enumerated exception applies (such as where the Board determines that locating any portion of the structure within the setback area is necessary to avoid or minimize adverse impacts to natural resources)--the proposed dock structure "must be set back a minimum of 25 feet inside the applicant's riparian rights lines." I thus adopt the ALJ's statement set forth in the first sentence of paragraph 25 as a correct conclusion of law.

The Petitioner correctly asserts that a contested riparian line may only be determined through judicial determination. However, this legal position is not contrary to any portion of the RO on administrative review. In fact, as noted above, the ALJ expressly recognized in his RO that "the task in this case is not to draw riparian lines."

This observation of the ALJ is consistent with the established principle that an administrative proceeding is not the proper forum to resolve disputes related to real property interests. See, e.g., Buckley v. Department of Health and Rehab. Servs., 516 So. 2d 1008, 1009 (Fla. 1st DCA 1988). The circuit courts of this state have exclusive jurisdiction over "all actions involving titles or boundaries or right of possession of real property". See Art. V, Sec. 20(c)(3), Fla. Const.; Section 26.012(2)(g), Florida Statutes.

Further, contrary to Petitioner's legal argument, it does not follow that a NGP may not be approved where a contested riparian line has not been finally resolved by such judicial determination. Rather, it is only necessary for the Applicant to provide reasonable assurances that the proposed dock will be located within the required twenty-five foot setback (if no exceptions apply), and that--as provided by rule 18-21.004(3)(a) and rule 18-21.004(7)(f)--the structure will not "unreasonably infringe upon" or "unreasonably interfere with" traditional common law riparian rights of upland owners, as defined in Section 253.141, Florida Statutes." See Braid v. Rosasco, 21 F.A.L.R. 4340 (Fla. DEP 1999) (recognizing that, where a riparian rights line is disputed, an applicant's submission of "some reasonable surveyor's depiction of the property line," coupled with standard conditions to the consent of use regarding later judicial determination of the line, provides reasonable assurance that a proposed dock and its use complies with Rule 18-21.004(3)). Indeed, Rule 18-21.004(7)(f) specifically requires that authorized structures be modified in conformance with a court's decision if a court of competent jurisdiction subsequently determines that riparian rights have been unlawfully affected.

Applying these principles here, the record reflects that the Applicant submitted to DEP a signed and sealed addendum to survey, showing the riparian line. (See Applicant's Exhibit 66; see also Applicant Exhibit 63; Rach testimony, Tr. "B", Vol. V, p. 598.) At the final hearing, Timothy Rach testified that the proposed dock would meet the 25-foot setback from the riparian line shown on that drawing. (See Rach testimony, Tr. "B", Vol. V, p. 603.) To the extent that there was contrary evidence in the record, it was the ALJ's province to resolve such conflicts. See Belleau v. Dep't of Envtl. Protection, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); Heifetz v. Dep't of Business Regulation, 475 So. 2d 1277,1281 (Fla. 1st DCA 1985).

Additionally, the Applicant testified at the final hearing to his agreement with the conditions in the letter of consent (1) that he indemnity, defend and hold harmless the Board and the state of Florida from all claims, actions, lawsuits and demands arising out of the letter of consent; and (2) that, if any part of the structure(s) consented to were determined by a final adjudication issued by a court of competent jurisdiction to encroach on or interfere with adjacent riparian rights, he would remove the interference or encroachment. (See testimony of Paul Thibadeau, Tr. "A,", Vol. II, pp. 329-30.) Without purporting to resolve the underlying riparian rights dispute, I find that these cumulative facts of record provide reasonable assurances that the 25-foot setback requirement of Rule 18-21.004(3)(d) has been met, as determined by the ALJ in paragraphs 25 and 26 of the RO. (See also testimony of Kathryn Tunnell, Tr. "A," Vol. I, pp. 120, 128.) Based on the foregoing rulings, the Petitioner's Exceptions 4 and 5 to Findings of Fact are denied.

Exceptions 6, 7, 8 and 9: Cumulative Impacts Analysis

Exception 6: In Exception 6, the Petitioner takes exception to the ALJ's statement in Finding of Fact 30 that, in conducting a cumulative impact analysis in this case, "the length of the dock is subordinate to the depth of the water to be reached by the dock." Rule 18-20.006l, F.A.C., sets forth with particularity certain factors to be considered in a cumulative impacts analysis of a proposed project located in an Aquatic Preserve. The ALJ's statement in paragraph 30 of the RO regarding such analysis as applied to this case is not, as Petitioner contends, more appropriately a conclusion of law. Rather, it appears to be an observation based on specific facts reflected in competent, substantial record testimony in this case. (See, e.g., Rach testimony, Tr. "B", Vol. V, pp. 617-21). Again, to the extent that there was contrary record evidence, it was the ALJ's prerogative to resolve such conflicts. See Belleau, 695 So. 2d at 1307; Heifetz, 475 So. 2d at 1281.

I thus find that the ALJ's observation in paragraph 30 of the RO that, in assessing cumulative impacts in this case, "the length of the dock is subordinate to the depth of the water to be reached by the dock" is a finding based on the particular circumstances of this case, which is supported by competent substantial record evidence. Moreover, to the extent that paragraph 30 could be properly characterized as containing mixed statements of fact and law, I conclude that any legal conclusions of the ALJ therein are not contrary to Rule 18-20.006l, F.A.C. Consequently, the Petitioner's Exception 6 to Findings of Fact is denied.

Exception 7: In Exception 7, the Petitioner correctly draws attention to what appears to be a scrivener's error in paragraph 31 of the RO. From the Responses filed

to this Exception, it appears that all parties are in agreement, based on uncontradicted record evidence, that the statement, "the proposed dock would extend to water whose depth is –3.5 feet NGVD" should properly read "the proposed dock would extend to water whose depth is –3.5 feet MLW." When this apparent scrivener's error is corrected, the statement is supported by competent, substantial record evidence. (See DEP Exhibits 9, 18; Petitioner's Exhibit 62.) Accordingly, I grant Petitioner's Exception 7 to the limited extent it seeks to change "NGVD" to "MLW" in the referenced sentence, and the RO shall be modified to reflect this correction.

In addition, the same scrivener's error is apparent in the ALJ's subsequent statement in paragraph 31 that "a close examination of District Exhibit 62 reveals numerous examples of docks or platforms terminating in –3.5 or even –4.0 NGVD...." District Exhibit 62 reflects the depths of various docks at "mean low water." Therefore, the last sentence of paragraph 31 of the RO is similarly modified to replace "NGVD" with "MLW." With these two corrections of scrivener's errors, the ALJ's Finding of Fact 31 is supported by competent, substantial record evidence. Accordingly, the remainder of Petitioner's Exception 7 to Findings of Fact is denied.

Exception 8: In Exception 8, the Petitioner challenges the ALJ's statement in paragraph 32 of the RO that "[t]he most relevant concern for a cumulative impacts analysis is the potential for the construction of docks where no docks presently exist and the number of such docks that would need to extend 250+ feet to reach water depths comparable to those reached by the proposed dock and platform." The Petitioner asserts that this is an erroneous statement of law, "ignoring the cumulative impacts of construction of second docks and the construction of longer and deeper

docks."

The ALJ's unchallenged Finding of Fact 5 references the Applicant's agreement during the DOAH proceeding to remove his existing dock prior to the construction of the new dock facility. This Final Order thus adopts the ALJ's related recommendation on page 38 of the RO that the Letter of Consent contain an additional condition that the Applicant's existing dock be removed "prior to the construction of the new dock and platform." Since this Final Order will not authorize the construction of a second dock by the Applicant at a site where a dock already exists, the portion of the Petitioner's Exception 8 dealing with "second docks' is denied as moot.

With respect to the Petitioner's assertions regarding "construction of longer and deeper docks," the ALJ found in paragraph 30 of the RO that there are only two other existing docks on the southern shoreline of the Central Embayment of the Loxahatchee River that "would equal or exceed in length the length of the [Applicant's] proposed dock." There are no findings by the ALJ that would support a legal conclusion that the cumulative effect of the Applicant's proposed dock and the existing two docks of equal or longer length would "result in major impairments to the resources of the preserve" in violation of Rule 18-20.006, F.A.C.

Furthermore, there are no factual findings in the RO on review of any pending applications for such longer and deeper docks within the Aquatic Preserve that are presently under consideration by DEP or the South Florida Water Management District. I agree with the ALJ's observation that the cumulative impacts of possible future applications for construction of docks in the Central Embayment Area of the Aquatic Preserve that would be longer and deeper than the Applicant's proposed dock "are too

speculative to assess" in this case. Accordingly, the Petitioner's Exception 8 to Findings of Fact is denied.

Exception 9: In Exception 9, the Petitioner challenges the ALJ's statement in paragraph 33 of the RO that "the elimination of 335 square feet of shallow-water dock and the possible recolonization of seagrass, including threatened Johnson's seagrass, mitigate any cumulative impacts ['to resources, such as seagrass, or recreational uses, such as boating and swimming, from an authorization to build the proposed dock and platform'] and limit or even eliminate the precedential value [in the form of 'some additional pressure to construct docks to one-foot deeper water than has historically limited docks'] of permitting decisions in this case." The Petitioner asserts that this statement of the ALJ fails to consider other relevant factors under Rule 18-20.006, F.A.C., in conducting his cumulative impacts analysis. The Petitioner further asserts that there is no evidence in the record that sea grasses will be created, enhanced or restored, based on the removal of the existing dock."

Nevertheless, paragraph 33 of the RO contains a finding by the ALJ that the "record does not support findings of significant adverse cumulative impacts from this proposed activity." This key finding of the ALJ is adopted in this Final Order. I thus conclude that there are no adverse cumulative impacts in this case that would evoke the "mitigation" provisions of Rule 18-20.006(7), F.A.C. I thus deem the ALJ's statements in the last sentence of paragraph 33 suggesting that removal of the Applicant's existing dock would "mitigate any cumulative impacts" to be dicta in this case, which is not adopted in this Final Order. Consequently, the portion of the Petitioner's Exception 9 objecting to the removal of the Applicant's existing dock being viewed by the ALJ as

mitigation compensating for adverse cumulative impacts is denied as moot.

In addition, the ALJ's mixed factual and legal statement in paragraph 62 of the RO that "DEP has already obtained design modifications that eliminate or reduce adverse impacts of a biological, scientific, or aesthetic nature" addresses other aspects involved in the mitigation of adverse impacts in this case. This statement is discussed more fully in analyzing Petitioner's Exceptions to Conclusions of Law, below.

The Petitioner further contends that the ALJ erred by not ruling that the Applicant's proposed dock facility would violate its Management Plan for the Aquatic Preserve, which requires that only docks necessary for reasonable ingress and egress be built. This contention is rejected. The requirement that a consent of use of sovereign submerged lands located in an Aquatic Preserve be limited to the construction and maintenance of private docking facilities for "reasonable ingress and egress" of riparian owners is codified in Rule 18-20.004(1)(e)5, F.A.C. The ALJ concluded in paragraph 50 that the Applicant has met all of the general requirements for the Letter of Consent, with the two additional conditions recommended on page 38 of the RO. This legal conclusion is supported by DEP's Letter of Consent dated February 6, 2003, which was admitted into evidence at the final hearing. (See also Tunnell testimony, Tr. "A," Vol. I, pp. 180-88.) Accordingly, Petitioner's Exception 9 to Findings of Fact is denied in its entirety.[7]

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[7] Since the ALJ does not state in paragraph 33 "that multiple docks can be built on the property pursuant to multiple forms of authorization," Petitioner's challenge directed to that issue will be addressed infra.

B. Exceptions to Conclusions of Law

Exception 10: Multiple Docks

In Exception No. 10, the Petitioner excepts to the ALJ's conclusions in the second and third sentences of paragraph 43 of the RO suggesting that "the point of [the NGP] rule is to limit landowners to one NGP-authorized pier per parcel." This Final Order adopts the recommendation of the ALJ (and agreement of the Applicant) that the Letter of Consent contain an additional Condition that the Applicant's existing dock be removed "prior to the construction of the new dock and platform." I thus agree with the conclusion of the ALJ in the last sentence of paragraph 43 that the issue of whether the NGP rule in question only authorizes a single family dock per parcel is now moot. Therefore, I decline to adopt the second and third sentences of paragraph 43 as being dicta, and Petitioner's Exception 10 is denied as moot.

Exception 11: DEP's Authority to Consider the Revised Application for Consent of Use

In Exception 11, the Petitioner takes exception to the ALJ's legal conclusion in paragraph 47 of the RO that the "record does not establish any of the conditions that would require DEP to defer consideration of the Revised Application to the Board of Trustees." The Petitioner asserts in this Exception that "the record clearly establishes heightened public concern."

As a preliminary matter, I note that this issue was not specifically pled in the petitions, nor identified in this manner as an issue in the parties' prehearing stipulation. However, in the event the appellate court were to subsequently rule that this issue has been properly raised, I concur with and adopt the ALJ's interpretation and application of the provisions of Rule 18-21.0051(4), F.A.C., based on the particular facts of this case.

Rule 18-21.0051(4), F.A.C., prescribes that the "delegations set forth in subsection (2) are not applicable to a specific application for a request to use sovereign submerged lands under Chapter 253 or 258, F.S., where one or more members of the Board, the Department or the appropriate water management district determines that such application is reasonably expected to result in a heightened public concern, because of its potential effect on the environment, natural resources, or controversial nature or location." Here, as the ALJ determined, the record does not establish any of the requisite elements for such finding of "heightened public concern."

First, NGP Rule 62-341.427, F.A.C., creates a presumption that single-family piers like that proposed by the Applicant -- which do not exceed 2, 000 square feet in size, with walkways not exceeding four feet in width, accommodating the mooring of no more than two watercrafts, and meeting other designated requirements --"have been determined to have *minimal impacts to the water resources of the District, both individually and cumulatively,* when conducted in compliance with the terms and conditions of the general permit." See Rule 62-341.201(1), F.A.C. (Emphasis supplied). Moreover, while the Petitioner argues that "heightened public concern" is established by testimony "regarding other alignments and potential impacts to seagrasses, wildlife and other natural resources," there is substantial, competent record evidence to support the ALJ's conclusion that the "record does not establish any of the conditions that would require DEP to defer consideration of the Revised Application to the Board of Trustees."

In addition, the ALJ's conclusion of no record basis for a heightened public concern argument is supported by unchallenged factual findings and other legal

conclusions in the RO on review. (See, e.g., Findings of Fact, RO ¶¶ 12-13, 27-29, regarding elimination, minimization, or non-existence of adverse environmental impacts; Conclusion of Law, RO ¶ 51, reflecting that the "Applicant has undertaken the design modifications necessary to eliminate and minimize adverse impacts on fish and wildlife habitat," and that the "proposed activities likewise minimize the destruction of seagrass and mangroves on sovereign land.") Thus, there is nothing in the record which either establishes that a member of the Board or its staff (DEP) has determined that this application should be characterized as one of "heightened public concern," or provides the requisite factual basis for such determination. In the absence of any findings in the RO or record evidence of such heightened public concern determination, Petitioner's Exception 11 is denied.

Exception 12: 25-Foot Setback Requirement

In Exception 12, the Petitioner takes exception to the ALJ's legal conclusion in paragraph 54 of the RO that no riparian rights line (pertaining either to landowners to the west of the Applicant, or to the Applicant himself) which equitably accounts for an extension of property lines into the water and the orientation of the channel "would come within 25 feet of the proposed platform or dock." The issue of the Applicant's compliance with the 25-foot setback requirement of Rule 18-21.004(3)(d), F.A.C. was considered in detail in the above rulings denying the Petitioner's Exceptions 4 and 5, which are incorporated by reference herein.

I would again note that it is unclear from the record that the Petitioner has standing to raise this riparian rights line setback issue in this case. However, in the event the appellate court were to subsequently rule that the Petitioner does have such

standing, I concur with and adopt the ALJ's interpretation and application of the provisions of Rule 18-21.004(3)(d) based on the particular facts of this case. Accordingly, the Petitioner's Exception 12 is denied.

Exception 13: Navigational Hazard

In Exception 13, the Petitioner takes exception to the ALJ's legal conclusion in paragraph 55 of the RO that, "[a]s noted above, the proposed activities do not constitute a navigational hazard." I conclude that this legal conclusion of the ALJ is amply supported by his related unchallenged factual findings in paragraph 20 of the RO. I also find that the said paragraphs 20 and 55 are supported by substantial, competent record evidence of record. (See Tunnell testimony, Tr. "A," Vol. 1, pp. 99-100, 107; Rach testimony, T. "B," Vol. V, p. 601.) Accordingly, Petitioner's Exception 13 is denied.

Exception 14: Width of the Waterbody

In Exception 14, the Petitioner states that it takes exception to the ALJ's legal conclusion in paragraph 56 of the RO that "the proposed dock does not extend more than the lesser of 500 feet or 20 percent of the width of the waterbody," as required by Rule 18-20.004(5)(a)1, F.A.C. However, the challenged legal conclusion of the ALJ is actually contained in paragraph 62 of the RO. The Petitioner's reference to paragraph 56[8] is presumably a scrivener's error and will be treated as such.

The essence of Petitioner's contention is that, based on asserted navigational concerns, the "waterbody" in this case should have been defined as a local channel existing between the Applicant's shore and the mangrove island located to the west of

[8] In paragraph 56, the ALJ determines that the proposed dock and terminal platform satisfy the 10:1 rule. However, that rule--contained in Rule 18-21.004(4)(b) Florida Administrative Code (reflecting conditions for private, residential multi-family docks)--is inapplicable to private, residential single-family docks. Accordingly, the first sentence of paragraph 56 is not adopted, as dicta.

the line of projection from the terminus of Applicant's proposed dock. The ALJ concluded, however, that the "potential problem posed by the mangrove island is avoided because the line of the dock, if extended across the Central Embayment, does not cross any part of the mangrove island." I view this legal conclusion of the ALJ to be a correct application of the methodology employed by the DEP staff in this case, as explicated at the final hearing. (See Tunnell testimony, Tr. "A," Vol. 1, p. 107, 171; Rach testimony, Tr. "B," Vol. V, pp. 624-26.) As noted above, DEP's agency interpretation of this rule within its regulatory jurisdiction is entitled to great deference and should not be overturned unless "clearly erroneous." Goldring, 477 So. 2d at 534.

In addition, as the ALJ also correctly observed in paragraph 62, "other rules addressing navigation require functional analysis;" whereas the twenty percent / 500 foot limitation applies even where additional dock length would "not pose navigational hazards." I am of the view that this conclusion of the ALJ is a reasonable and permissible interpretation of the "20 percent / 500 foot" provisions of Rule 18-20.004(5)(a)(1). The Petitioner's Exception 14 is thus denied.

Exception 15: Infringement of Riparian Rights Purportedly Related to Sandbar Use

In Exception 15, the Petitioner takes exception to the ALJ's legal conclusion in paragraph 61 of the RO that "the proposed activities will not unreasonably infringe on the riparian rights of upland riparian owners adjacent to sovereign submerged lands." I would again note that it is unclear from the record that the Petitioner has standing to raise any "riparian rights" issues in this case. I would also observe that the Petitioner's arguments in this Exception, discussing the potential impact of the proposed dock on "recreational users" of the sandbar and surrounding waters, far exceed the scope of the

ALJ's Conclusion of Law 61, which is limited to the issue of potential infringement on the "riparian rights of upland riparian owners adjacent to sovereign submerged lands."

In any event, I find this challenged legal conclusion in paragraph 61 to be supported by the ALJ's unchallenged findings in paragraph 27 that, even though the proposed new dock would divide a nearby sandbar into two sections, its impact on swimmers, sunbathers, canoers, and kayakers using this sandbar and surrounding waters "is unclear." I decline to reject the ALJ's legal conclusion of no unreasonable infringement on the riparian rights of nearby upland riparian owners based on such speculative adverse impacts to their use of the sandbar and surrounding waters resulting from the construction and operation of the new dock structure.

In view of the above rulings, the Petitioner's Exception 15 is denied.

Exception 16: Dock Design Modifications to Minimize Adverse Impacts

In Exception 16, the Petitioner challenges the ALJ's statement in paragraph 63 of the RO that "DEP has already obtained design modifications that eliminate or reduce adverse impacts of a biological, scientific or aesthetic nature." As discussed in the above rulings denying the Exceptions of DEP and the Applicant, this statement of the ALJ in paragraph 63 appears to be one of mixed facts and law, which is amply supported by unchallenged findings of fact in the RO supported by competent substantial record evidence. (See RO, paragraphs 6-12; and testimony of Kathryn Tunnell, Tr. "A," Vol. I, pp. 107, 120-25, 172-79.) I also conclude that the portion of this statement in paragraph 63 which implicates the provisions of Rule 18-20.001(2), F.A.C., is a permissible rule interpretation. The Petitioners Exception 16 is therefore denied.

Exceptions 17 and 18: Cumulative Impacts

In Exceptions 17 and 18, the Petitioner challenges the ALJ's conclusion in paragraph 66 of the RO that "the record fails to establish that the Letter of Consent will authorize new depths for docks or platforms in the Central Embayment or extensive cumulative impacts to natural resources." The Petitioner first suggests that approval of the Applicant's proposed dock would allow "all boat owners in the central embayment to construct a dock three times longer [than] the average existing dock so that they [can] wharf out to a depth one foot deeper than the majority of currently existing docks." However, the Petitioner does not cite to any testimony or other evidence of record arguably supporting this assertion, and it is rejected as being speculative.

Second, the Petitioner asserts that "the cumulative impacts of the proposed dock have not been reduced sufficient to satisfy the requirements of [Rule 18-20.006, Florida Administrative Code]." However, the competent substantial evidence in this case supports the ALJ's challenged conclusion in paragraph 66, "the record fails to establish that the Letter of Consent will authorize ...extensive cumulative impacts to natural resources." (See Tunnell testimony, Tr. "A," Vol. 1, p. 180).

I would again point out that the adoption of NGP Rule 62-341.427, F.A.C., creates a presumption that single-family piers like that proposed by the Applicant, which do not exceed 2,000 square feet in size, with walkways not exceeding four feet in width, accommodating the mooring of no more than two watercrafts, and meeting other designated requirements, "have been determined to have minimal impacts to the water resources of the District, both individually and cumulatively, when conducted in

compliance with the terms and conditions of the general permit. See Rule 62-341.201(1), F.A.C. The Petitioner's Exceptions 17 and 18 are therefore denied.

CONCLUSION

The dock project initially proposed by the Applicant was 1,240 square feet in size, consisting of a pier 270 feet long and four feet wide, connected to a 160 square foot terminal platform. However, in response to concerns of DEP staff, the Applicant subsequently agreed to changes reducing the size of the pier to 250 feet in length and three feet in width, reducing the size of the terminal platform to 150 square feet, and reducing the overall size of the dock facility to 900 square feet. Consequently, the dock project approved by DEP staff in February of 2003, is less than half the size of the maximum 2,000 square foot dock structure authorized by Rule 62-341.427, F.A.C. In addition, the first 200 feet of the dock pier approved by the DEP staff is more elevated and narrower than initially proposed by the Applicant or required by Rules 18-20.004(5) and Rule 62-341.427.

In light of the above rulings, I conclude that this reduced and improved dock project of the Applicant, with the two additional conditions recommended by the ALJ, complies with all applicable proprietary and regulatory provisions, is not contrary to the public interest, and should be approved.

It is therefore ORDERED:

A. With the minor modifications made in the above rulings, the attached Recommended Order (Exhibit A) is adopted and incorporated by reference herein.

B. If the Applicant's dock structure is constructed and operated as described in its Revised Application and in compliance with the terms of DEP's letter dated February

6, 2003, and the General and Specific conditions attached thereto, it is determined to be entitled to rely on the Noticed General Environmental Resource Permit granted by Rule 62-341.427, F.A.C.

C. The Applicant is granted a Consent of Use of Sovereign Submerged lands in File No. 50-0202952 for the proposed dock structure described in this Final Order, subject to the General Consent Conditions attached to the DEP letter addressed to the Applicant dated February 6, 2003, and subject to the following additional conditions:

1. No construction of the new dock structure will be commenced until the Applicant has given DEP written notice of complete removal of his existing dock structure located on the eastern side of his property.

2. No boat or other watercraft shall be moored at the new dock facility if such boat or other watercraft requires more than two feet of water depth with the engine down and operating at idle or slow speed.

D. This Final Order does not constitute authorization of compliance with State Programmatic General Permit requirements. A request for this federal authorization should be directed to the U.S. Army Corps of Engineers (Jacksonville District).

DONE AND ORDERED this 7th day of September, 2005, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Colleen M. Castille

COLLEEN M. CASTILLE
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.

Kay Buchanan 9/7/05
CLERK DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by United States Postal Service to:

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Robert E. Meale, Administrative Law Judge
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and by hand delivery to:

Toni Sturtevant, Esquire
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Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 7th day of September, 2005.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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