FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

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October 29, 2013

Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

Re: Diane Haskett and Bryan Fleming vs. Thomas Rosati & DEP
DOAH Case No.: 13-0465
OGC Case No.: 13-0040

Dear Clerk:

Attached for filing are the following documents:

1. Agency Final Order
2. Thomas Rosati's Exceptions to the Recommended Order
3. DEP's Exceptions to the Recommended Order
4. Petitioners' Exceptions to the Recommended Order
5. DEP's Response to Petitioners' Exceptions to the Recommended Order
6. Petitioners' Response to Thomas Rosati's Exceptions to the Recommended Order
7. Petitioners' Response to DEP's Exceptions to the Recommended Order
8. Thomas Rosati's Notice of Adopting DEP's Response to Petitioners' Exceptions

If you have any questions, please do not hesitate to contact me at 245-2212 or lea.crandall@dep.state.fl.us.

Sincerely,

Lea Crandall

Lea Crandall
Agency Clerk

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

DIANE HASKETT AND BRYAN FLEMING,	)	
	)	
Petitioners,	)	
	)	
vs.	)	**OGC CASE NO. 13-0040**
	)	**DOAH CASE NO. 13-0465**
THOMAS ROSATI AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondents.	)	
	)	

FINAL ORDER

An Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH"), on July 31, 2013, 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 as Exhibit A. Copies of the RO were sent to counsel for the Petitioners, Diane Haskett and Bryan Fleming ("Petitioners"), and counsel for the co-Respondents, Thomas Rosati ("Rosati") and the Department. On August 14, 2013, all parties filed Exceptions to the Recommended Order. On August 23 and 26, 2013, respectively, the Petitioners responded to the Respondent Rosati's and the Department's Exceptions. The Department responded to the Petitioners' Exceptions on August 23; and on August 29, the Respondent Rosati filed a notice of adopting the Department's response. This matter is now on administrative review before the Secretary of the Department for final agency action.

BACKGROUND

On September 19, 2012, the Department acknowledged that the Respondent Rosati qualified to use a Noticed General Permit[1] and met the criteria to obtain a Letter of Consent to use sovereign submerged lands ("Letter of Consent")[2] for a dock in the St. Lucie River (DEP File No. 43-0191995-003). The Respondent Rosati arranged for publication of a "Notice of General Permit" in the October 30, 2012, edition of The Stuart News. On January 23, 2013, the Petitioners filed a petition for hearing with the Department to challenge the authorizations. The Department referred the petition to DOAH to conduct an evidentiary hearing and issue a recommended order.

At the final hearing, evidence was first taken on the issue of whether the petition for hearing was timely. After hearing the evidence, the ALJ made a preliminary ruling that the petition was timely and, therefore, the hearing proceeded on the merits of the case. The hearing transcript of the final hearing was filed with DOAH. The parties submitted proposed recommended orders and the ALJ subsequently issued the RO.

SUMMARY OF THE RECOMMENDED ORDER

In the RO the ALJ recommended that the Department enter a Final Order determining that the Respondent Rosati qualifies for the Noticed General Permit, and denying the Letter of Consent to use sovereignty submerged lands. (RO at page 22).

Notice Regarding the General Permit

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[1] "General Permit for Certain Piers and Associated Structures." Fla. Admin. Code R. 62-330.427.

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

The ALJ found that the Respondent Rosati arranged for publication of a "Notice of General Permit" in the October 30, 2012, edition of The Stuart News. The notice was in the exact form suggested by the Department in its September 19, 2012, letter to Rosati. The notice reads in pertinent part:

> STATE OF FLORIDA
> DEPARTMENT OF ENVIRONMENTAL PROTECTION
> NOTICE OF GENERAL PERMIT
>
> The Department of Environmental Protection gives notice that the project to remove an existing dock, and relocate and construct a new dock with an access walkway measuring 4 ft. by 392 ft. and ending in an 8 ft. by 20 ft. terminal platform, including two associated 12 ft. by 12 ft. boatlifts (total 1,728 sq. ft. structure, total 2016 sq. ft. preempted area), has been determined to qualify for a noticed general permit.

(RO ¶ 7). The ALJ found that this is the form of publication regularly used by the Department to notify the general public that the Department has determined that a proposed project qualifies for a Noticed General Permit and a Letter of Consent. (RO ¶ 8). The ALJ further found that the Petitioners did not see the newspaper publication. The ALJ found that the Petitioner Fleming first became aware of the Rosati dock when he saw it being constructed on January 13, 2013. He went to the Department's offices and inquired about the dock. The Petitioners then filed their petition for hearing on January 23, 2013, ten days after receiving actual notice of the Department's agency action on the Rosati dock. (RO ¶¶ 10, 11).

The ALJ concluded that the publication in The Stuart News constituted constructive notice to the Petitioners of the Department's action on the Noticed General Permit. Thus, the Petitioners waived their right to petition for an administrative hearing to challenge the Noticed General Permit when they failed to file their petition for hearing

within twenty-one days of the publication. *See* Fla. Admin. Code R. 62-110.106(3)(b). (RO ¶ 41).

Notice Regarding the Letter of Consent

The ALJ found that the newspaper publication did not name the Board of Trustees or mention the Letter of Consent. Thus, the ALJ concluded that a publication that neither identifies the authorizing agency or the action that was taken is not adequate notice of agency action. The ALJ further concluded that failing to mention that Rosati had been authorized by Letter of Consent to use sovereignty submerged lands, an authorization governed by different statutes and rules, was too fundamental an omission for the newspaper notice to be legally sufficient to bar injured persons from contesting the authorization. (RO ¶¶ 42, 43).

The ALJ noted that the Petitioners contended they were entitled to written notice of the proposed dock because the dock required a sovereign submerged lands lease from the Board of Trustees and written notice of the issuance of such a lease must be provided by mail to persons owning property within 500 feet. The ALJ concluded, however, that showing that a proposed project is ineligible for a Letter of Consent does not transform the Letter of Consent that was issued into a submerged lands lease. The ALJ further concluded that the Board of Trustees did not intend to issue a submerged lands lease to Rosati and, therefore, the Petitioners were not entitled to written notice by mail of a submerged lands lease. (RO ¶ 47).

Compliance with Letter of Consent Criteria

The ALJ concluded that Rule 18-21.005(1)(c)2., Florida Administrative Code ("F.A.C") provides that a Letter of Consent is available for private residential single-

family dock and existing and proposed structures that cumulatively preempt no more than 10 square feet of sovereignty submerged land for each foot of the applicant's "riparian shoreline on the affected waterbody." (RO ¶ 54). The ALJ noted the Petitioners contention that using only the length of Rosati's shoreline on the St. Lucie River, about 125 feet, the Rosati dock exceeded the rule criterion for a Letter of Consent. The Department used the total of Rosati's shoreline along Danforth Creek and the St. Lucie River, about 400 feet, to determine that the proposed dock met this limit and was eligible for a Letter of Consent. (RO ¶ 54). The ALJ concluded, however, that this rule interpretation by the Department was not shown to be reasonable and did not justify use of a Letter of Consent for the Rosati dock. (RO ¶ 55).

The ALJ also concluded that rule 18-21.005(1)(c)2, F.A.C., provides that a Letter of Consent can be issued for a "minimum-size private residential single-family dock or pier" as defined in rule 18-21.003(39):

> "Minimum-size dock or pier" means a dock or pier that is the smallest size necessary to provide reasonable access to the water for navigating, fishing, or swimming based on consideration of the immediate area's physical and natural characteristics, customary recreational and navigational practices, and docks and piers previously authorized under this chapter. The term minimum-size dock or pier shall also include a dock or pier constructed in conformance with the exemption criteria in Section 403.813(1)(b), F.S. or in conformance with the private residential single-family dock criteria in subsection 18-20.004(5), F.A.C. (Emphasis added).

The ALJ determined that Rosati did not demonstrate that his dock was the smallest size necessary to provide him reasonable access to the water for navigating, fishing, or swimming. The ALJ also concluded that the Rosati dock was not constructed in conformance with the exemption criteria in section 403.813(1)(b), because that section

requires that the dock have no more than 1,000 square feet of over-water surface area. The ALJ determined, however, that the dock meets the alternative definition of minimum-size dock as one that is constructed in conformance with the criteria in rule 18-20.004(5), F.A.C. Thus, the ALJ concluded that a Letter of Consent was the appropriate form of authorization for the proposed dock. (RO ¶¶ 56, 57).

The ALJ found that Danforth Creek flows into the St. Lucie River near the southeast corner of the Rosati property. At this confluence there is a shoal or sandbar that most likely formed by sediment deposition. (RO ¶ 17). The ALJ found that the shoal restricted navigation in and out of Danforth Creek, and navigation is impossible at low tides, except in a canoe, kayak, or other vessel drawing only a few inches of water. (RO ¶ 19). The ALJ found that the most reliable route between Danforth Creek and the River was a narrow channel only 2 to 3 feet deep at high tide, which ran close to Rosati's eastern shoreline (the "deeper channel"). (RO ¶ 20). The ALJ further found that for many years, the Petitioner Fleming regularly used the "deeper channel" to take his 23-foot Penn Yan motorboat, with a draft of about 18 inches, from Danforth Creek into the St. Lucie River and back. The ALJ also found that when using the "deeper channel", the Petitioner Fleming could navigate in and out of Danforth Creek every day on the high tides. (RO ¶ 21).

The ALJ noted that rule 18-21.004, F.A.C., provides a list of management policies, standards, and criteria for determining whether to issue a Letter of Consent for a private, residential, single-family dock. Subsection (1)(a) of the rule requires that activities on sovereignty submerged lands not be contrary to the public interest. The ALJ found that the Rosati dock, by blocking public access to the "deeper channel,"

permanently eliminated navigation by the general boating public in and out of Danforth Creek with vessels that previously were able to do so. Thus, the ALJ concluded that this was a significant impairment to navigation in the area, and contrary to the public interest in violation of rule 18-21.004(1)(a), F.A.C. (RO ¶ 58).

The ALJ found that the Letter of Consent did not contain terms or conditions that would provide alternative access to Danforth Creek of equal depth so that public navigation was not significantly impaired. The ALJ concluded, therefore, that the Letter of Consent violated rule 18-21.004(1)(b), F.A.C., which requires terms and conditions that protect sovereignty submerged lands. (RO ¶ 67). In addition the ALJ found that Rosati did not show that it was impossible to provide the general public and the riparian landowners on Danforth Creek a route of equal depth in and out of Danforth Creek. The ALJ concluded that the Rosati dock was not constructed in a manner which avoids or minimizes adverse impacts to sovereignty submerged lands and, therefore, the dock violated rule 18-21.004(7), F.A.C.

STANDARDS OF REVIEW OF 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 an 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. (2012); *Charlotte Cty. v. IMC Phosphates Co.*, 18 So.3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So.2d 61 (Fla. 1st DCA 2007).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See,*

e.g., Rogers v. Dep't of Health, 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.,* 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cty. Sch. Bd.,* 652 So.2d 894 (Fla. 2d DCA 1995). 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).

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 Barfield v. Dep't of Health,* 805 So.2d 1008 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward Cty.*, 746 So.2d 1194 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140 (Fla. 2d DCA 2001). An agency's review of the legal conclusions in a recommended order is restricted to those that concern matters within the agency's field of expertise. *See, e.g., Charlotte Cty. v. IMC Phosphates Co.*, 18 So.3d 1089 (Fla. 2d DCA 2009); *G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So.2d 1257, 1264 (Fla. 5th DCA 2004). An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. *See, e.g., Pub. Employees Relations Comm'n v. Dade Cty. Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994). Considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See, e.g., Falk v. Beard*, 614 So.2d 1086, 1089 (Fla. 1993); *Dep't of Envtl. Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only

reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.,* 668 So.2d 209, 212 (Fla. 1st DCA 1996).

RULINGS ON EXCEPTIONS

A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward Cty.*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.,* 847 So.2d 540, 542 (Fla. 4th DCA 2003). 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. (2013); *Barfield v. Dep't of Health*, 805 So.2d 1008 (Fla. 1st DCA 2001); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

PETITIONERS' EXCEPTIONS

Exception Number 1: Page 2, Preliminary Statement

In this technical exception, the Petitioners point to an apparent clerical error in the RO's Preliminary Statement. The RO states that the petition for hearing was filed with the Department on January 23, 2012. The record shows however, that the petition for hearing was filed on January 23, *2013.* Therefore, the Petitioners' Exception Number 1 is granted.

Exception Number 2: Page 11, Paragraph #40

The Petitioners take exception to the second sentence in paragraph 40, where the ALJ concluded that the Petitioners' substantial interest "has been affected by the

Department's action and, therefore, they have standing to initiate this proceeding." The Petitioners contend that "[t]he evidence established that the Petitioners were *adversely* affected by Mr. Rosati's dock and the Department's action." The Petitioners suggest that the word *adversely* should be inserted into the ALJ's conclusion in the second sentence of paragraph 40.

The Petitioners do not argue that the ALJ applied an incorrect legal standard to determine their standing in paragraph 40. In fact, the Petitioners seek to change the standard, making it more restrictive. The applicable standard is well established and does not include use of the term *adversely.* To show standing in this type of administrative proceeding, the Petitioners must demonstrate that their substantial environmental interests (1) will suffer injury in fact which is of sufficient immediacy to entitle them to a hearing under Sections 120.569 and 120.57, Florida Statutes, and Rule 28-106.201, Florida Administrative Code, and (2) the injury is of a type or nature which the administrative proceeding is designed to protect. *See, e.g., Agrico Chemical Co. v. Dep't of Envtl. Reg.,* 406 So. 2d 478, 482 (Fla. 2d DCA 1981); *St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.,* 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011); *Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.,* 18 So.3d 1079, 1082 (Fla. 2d DCA 2009)("if standing is challenged during an administrative hearing, the petitioner must offer evidence to prove that its substantial rights *could* be affected by the agency's action.").

The ALJ found that the Petitioners have a "substantial interest," which "interest has been affected by the Department's action." (RO ¶ 40). To the extent that the Petitioners' exception appears to also argue that the Department should reweigh the

evidence, this would be improper. Such evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See, e.g., Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003).

Therefore, based on the foregoing reasons, the Petitioners' Exception Number 2 is denied.

Exception Number 3: Page 13, Paragraph #47

The Petitioners take exception to paragraph 47, where the ALJ concluded that:

> Petitioners alternatively contend they were entitled to written notice of the proposed dock because the dock required a sovereign submerged lands lease from the Board of Trustees and written notice of the issuance of such a lease must be provided by mail to persons owning property within 500 feet. *Showing that a proposed project is ineligible for a Letter of Consent does not transform the Letter of Consent that was issued into a submerged lands lease. The Board of Trustees did not intend to issue a submerged lands lease to Rosati and, therefore, Petitioners were not entitled to written notice by mail of a submerged lands lease.(Emphasis added).*

The Petitioners assert that the last two sentences of paragraph 47 should be replaced with contrary legal conclusions and read:

> *Mr. Rosati's project does not qualify for a letter of consent because the dock preempts more than 10 square feet of sovereignty submerged land for each linear foot of the affected waterbody, the St. Lucie River. Mr. Rosati was required to obtain a lease from the Board of Trustees. Rule 18-21.005(1)(c)2., and Rule 18-21.005(1)(d), F.A.C. The notice published in the newspaper was inadequate to create a point of entry for the Petitioners who own property within 500 feet of the project. The Petitioners were entitled to receive written notice of the agency action by mail.*

The Petitioners assert that the project required a submerged lands lease "since the dock exceeded the 10:1 ratio set forth in Rule 18-21.005(1)(c)2., F.A.C." *See* Petitioners' Exceptions at pages 2-3.

Contrary to the Petitioners' assertion, the ALJ correctly concluded in paragraph 56, that "rule 18-21.005(1)(c)2. states that a Letter of Consent can be issued for a 'minimum-size private residential single-family dock or pier' as defined in rule 18-21.003(39). . ." (RO ¶ 56). The ALJ further concluded in paragraph 57 that the proposed dock met the definition of minimum-size dock in the rule and "a Letter of Consent is the appropriate form of authorization for the proposed dock." *See also* Ruling on Exception Number 4.

It is well established that the form of authorization granted by the Board of Trustees shall be "the least amount of interest in the sovereignty submerged land necessary for the activity." Fla. Admin. Code. R. 18-21.005(1). In addition, the Board of Trustees is not authorized to transform an application for one form of authorization (e.g., a Letter of Consent) into another form of authorization (e.g., a lease). *See, e.g., DeCarion v.* Martinez, 537 So.2d 1083 (Fla. 1st DCA 1989). The ALJ's conclusions in paragraphs 56 and 57 are adopted in this Final Order. *See Pub. Employees Relations Comm'n v. Dade Cty. Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985)(An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise).

Therefore, based on the foregoing reasons, the Petitioners' Exception Number 3 is denied.

Exception Number 4: Page 17, Paragraph #57

The Petitioners take exception to paragraph 57 by arguing that the ALJ's conclusions in the last two sentences should be replaced with a contrary legal conclusion. In paragraph 57 the ALJ determined that:

> Rosati did not demonstrate that his dock is the smallest size necessary to provide Rosati reasonable access to the water for navigating, fishing, or swimming. Nor was the Rosati dock constructed in conformance with the exemption criteria in section 403.813(1)(b), because that section requires that the dock have no more than 1,000 square feet of over-water surface area. *However, the dock meets the alternative definition of minimum-size dock as one that is constructed in conformance with the criteria in rule 18-20.004(5). Therefore, a Letter of Consent is the appropriate form of authorization for the proposed dock. That still leaves for determination the question whether Rosati is entitled to a Letter of Consent. (Emphasis added).*

The Petitioners argue that the last two sentences of paragraph 57 "should be deleted" and replaced with:

> *The Department erroneously asserts that the dock meets an "alternative" definition of minimum-size dock as one that is constructed in conformance with the criteria in Rule 18-20.004(5). The design specifications in Rule 18-20.004(5) are maximum design standards and additional criteria – not "alternative" design criteria for docks. Mr. Rosati's dock is not the minimum-size dock in that it is not the smallest size dock necessary to provide reasonable access to the water for navigation based on considerations of the immediate area's physical and natural characteristics.*

Contrary to the Petitioners' argument, the rule definition of "minimum-size dock or pier" was correctly applied to the proposed dock. (RO ¶¶ 56, 57). Rule 18-21.003(39) states:

> "Minimum-size dock or pier" means a dock or pier that is the smallest size necessary to provide reasonable access to the water for navigating, fishing, or swimming based on consideration of the immediate area's physical and natural characteristics, customary recreational and navigational practices, and docks and piers previously authorized under this chapter. <u>The term minimum-size dock or pier shall also include a dock or pier constructed</u> in conformance with the exemption criteria in Section 403.813(1)(b), F.S. or <u>in conformance with the private residential single-family dock criteria in subsection 18-20.004(5), F.A.C.</u> (Emphasis added).

While the design criteria of Rule 18-20.004(5), F.A.C., may be maximum design criteria for docks within aquatic preserves, the definition in Rule 18-21.003(39) provides that a dock not exceeding those criteria is a "minimum-size dock." The ALJ's conclusions in paragraphs 56 and 57 are adopted in this Final Order. *See Pub. Employees Relations Comm'n v. Dade Cty. Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985)(An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise).

Therefore, based on the foregoing reasons, the Petitioners' Exception Number 4 is denied.

Exception Number 5: Page 21, Paragraph #65

The Petitioners take exception to paragraph 65, where the ALJ concluded that the "Petitioners did not prove that their traditional, common law riparian rights are affected by the Rosati dock." (RO ¶ 65). The Petitioners argue that since the Rosati dock prevents their access from Danforth Creek to the St. Lucie River and Atlantic Ocean, their "riparian rights" have been adversely affected. *See* Petitioners' Exceptions at pages 5-6. The Petitioners are landowners of property adjacent to Danforth Creek, but do not own property adjacent to the St. Lucie River. *See* Fleming, Tr. pp. 319-320; RO ¶¶ 4, 6. It is not disputed that the Rosati dock is located in the St. Lucie River. *See* RO ¶¶ 23-28.

A riparian landowner's right of navigation is associated with the waterbody adjacent to his shoreline. *See Ferry Pass Inspectors' and Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n,* 57 Fla. 399, 402 (Fla. 1909). The Petitioners

have no "riparian rights" in the St. Lucie River. *See Mickel v. Norton*, 69 So.3d 1081 (Fla. 2d DCA 2011) *citing, at 1081, Broward v. Mabry*, 58 Fla. 398, 50 So. 826, 830 (1909)("Those who own land extending to ordinary high-water mark of navigable waters are riparian holders who, by implication of law, and in addition to the rights of navigation, commerce, fishing, boating, etc., common to the public, have in general certain special rights in the use of waters *opposite* their holdings; among them being the right of access from the water to the riparian land and perhaps other easements allowed by law.").

Therefore, based on the foregoing, the Petitioners' Exception Number 5 is denied.

RESPONDENTS' EXCEPTIONS

Notice Regarding the Letter of Consent

Respondents' Exception No. 1

The Respondents Rosati and DEP take exception to the ALJ's mixed findings and conclusions in paragraphs 42, 43, 44, and 45 of the RO, where the ALJ determined that the newspaper notice was not legally sufficient. The ALJ also concluded in unchallenged paragraphs 48, 49, and 50, that the October 30, 2012, publication in The Stuart News ("Published Notice") did not constitute notice of granting the Letter of Consent and should not terminate the rights of affected persons who do not file a petition for hearing within 21 days.[3] To the extent that challenged paragraphs 42, 43,

[3] A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward Cty.*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So.2d 540, 542 (Fla. 4th DCA 2003).

44, 45 (and unchallenged paragraphs 48, 49, and 50) contain findings of fact, such findings are supported by competent substantial record evidence. (Rosati Ex. 7C). *See, e.g., Strickland v. Fla. A & M Univ.*, 799 So.2d 276, 278-80 (Fla. 1st DCA 2001)(An agency abused its discretion when it improperly rejected an ALJ's findings).

The ALJ found that the dock general permit and the letter of consent were issued September 19, 2012, in a single agency determination letter (RO ¶ 7; Rosati Ex. 7B); and that the Published Notice is the form regularly used by the DEP to inform the general public of projects with both a general permit and letter of consent (RO ¶ 8). The ALJ concluded, however, that the Published Notice was not sufficient to constitute notice of the letter of consent because it did not specifically identify the Department's action of authorizing a Letter of Consent. (RO ¶ 43). The Respondents argue that the ALJ's conclusion is an erroneous interpretation of the Department's rule prescribing the required contents of any published agency notice. *See* Fla. Admin. Code R. 62-110.106(7)(c) and (d).

Contrary to the Respondents argument, however, the Department's rule requires that a notice shall contain "[a] statement of the Department's intended action." Fla. Admin. Code R. 62-110.106(7)(c)3. The ALJ's factual finding that the Published Notice failed to mention "that Rosati had been authorized by Letter of Consent," is supported by competent substantial record evidence. (Rosati Ex. 7C). *See, e.g., Strickland v. Fla. A & M Univ.*, 799 So.2d 276, 278-80 (Fla. 1st DCA 2001).

Since the Public Notice did not comply with the requirements of the Department's notice rule, it did not constitute sufficient notice of agency action to terminate the rights of affected persons who did not file a petition for hearing within

twenty-one days of publication. *See* Fla. Admin. Code R. 62-110.106(3)(b)("Failure to file a petition within the application time period after [published notice] shall constitute a waiver of any right to request an administrative proceeding . . ."). Consequently, the Petitioners were required to file a petition within twenty-one days of receiving actual notice of the Letter of Consent. The ALJ found that the Petitioners received actual notice when "Fleming . . . saw [the dock] being constructed on January 13, 2013," and the petition for hearing was filed on "January 23, 2013, 10 days after receiving actual notice." (RO ¶¶ 10 and 11). The ALJ's conclusions in paragraphs 42, 43, 44, and 45; and in unchallenged paragraphs 48, 48, and 50, are adopted in this Final Order. *See* § 120.57(1)(l), Fla. Stat. (2013).

Therefore, based on the foregoing the Respondents' Exceptions to paragraphs 42, 43, 44, and 45, are denied.

Entitlement to Letter of Consent

Respondents' Exception No. 2 and DEP's Exception Nos. 2 and 3

The Respondents Rosati and DEP take exception to the ALJ's conclusions in paragraphs 58, 67, and 68 of the RO. In these paragraphs the ALJ ultimately concluded that the Rosati dock is contrary to the public interest under the provisions of Rule 18-21.004, F.A.C., because it significantly impairs navigation in the area by permanently eliminating "navigation by the general boating public in and out of Danforth Creek by vessels that previously were able to do so." (RO ¶¶ 58, 61). The ALJ concluded that the Letter of Consent "does not contain terms or conditions that would provide alternative access to Danforth Creek of equal depth" in violation of Rule 18-21.004(1)(b), F.A.C. (RO ¶ 67). The ALJ further concluded that "Rosati did not show

that it was impossible to provide the general public and the riparian landowners on Danforth Creek a route of equal depth in and out of Danforth Creek" in violation of Rule 18-21.004(7)(d), F.A.C. (RO ¶ 68).

Chapter 18-21, F.A.C., contains the general standards and criteria governing the use of sovereignty submerged lands. Rule 18-21.004, F.A.C., establishes the management policies, standards, and criteria which shall be used in determining with to approve . . . or deny all requests for activities on sovereignty submerged lands. As the ALJ noted, Rule 18-21.004(1)(a), F.A.C., requires that activities on sovereignty submerged lands not be contrary to the public interest. (RO ¶ 58). These proprietary rules in chapter 18-21, F.A.C., authorize the private use of portions of sovereignty lands under navigable waters when not contrary to the public interest. *See Hayes v. Bowman,* 91 So.2d 795 (Fla.1957); *Yonge v. Askew,* 293 So.2d 395 (Fla. 1st DCA 1974); *Krieter v. Chiles,* 595 So.2d 111 (Fla. 3d DCA 1992), *rev. denied,* 601 So.2d 552 (Fla.1992), *cert. denied,* 506 U.S. 916, 113 S.Ct. 325, 121 L.Ed.2d 244 (1992). When structures, such as docks, meet the standards and criteria governing dock construction prescribed in the proprietary rules, they are presumed to be not contrary to the public interest. *See, e.g., Bd. of Comm. of Jupiter Inlet District v. Thibadeau,* Case No. 03-4099 (Fla. DOAH July 25, 2005; Fla. DEP September 7, 2005); *Trump Plaza of the Palm Beaches v. Palm Beach Cty.,* Case No. 08-4752 (Fla. DOAH September 24, 2009; Fla. DEP November 9, 2009). The presumption can be rebutted with evidence showing that on balance, the demonstrable environmental, social, and economic costs exceed the demonstrable environmental, social, and economic benefits accruing to the public at large. *See* Fla. Admin. Code. R. 18-21.003(51), F.A.C. (definition for "Public interest"). Such showings,

however, are limited to the standards and criteria prescribed in the proprietary rules. In this case, there are no criteria in Rule 18-21.004, F.A.C., addressing "significant impairment to navigation" based on maintaining access by a certain vessel size or providing an alternative access route of equal depth. (RO ¶¶ 58, 67, 68). The ALJ concluded in paragraph 62 that the dock does not create a navigation hazard, which is a general consent condition in Rule 18-21.004(7)(g), F.A.C., and the only criterion in the rule chapter 18-21, F.A.C., specifically directed to navigation.

In paragraph 60 of the RO, the ALJ concluded that a previous Department final order in the case of *Brooks v. Crum,* Case No. 06-2312 (Fla. DOAH Dec. 22, 2006; Fla. DEP Feb. 6, 2007), stood for the proposition that boaters can insist on a preferred access route when the proffered alternative route is not of equal depth. (RO ¶ 60). Contrary to the ALJ's conclusion in paragraph 60,[4] the Department's final order in *Brooks v. Crum*, does not stand for the proposition that boaters can insist on their preferred route when the alternative route is not of equal depth. In *Brooks v. Crum* the alternative route to the creek had was found to have a depth "sufficient to navigate in and out without damaging the submerged resources." *Id.* at ¶ 36. The final order did not contain any findings that the alternative route was of "equal depth" or needed to be of "equal depth" in order to satisfy the applicable rule criteria. *Id.*

The ALJ mistakenly relies on the proposition put forth in paragraph 60 that boaters can insist on a preferred access route when the proffered alternative route is

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[4] 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, however, even when exceptions are not filed. See § 120.57(1)(l), Fla. Stat. (2013); *Barfield v. Dep't of Health*, 805 So.2d 1008 (Fla. 1st DCA 2001); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

not of equal depth, when further concluding that the Letter of Consent should contain a condition "that would provide alternative access to Danforth Creek of equal depth." (RO ¶ 67). The ALJ's mistaken reliance on the proposition in paragraph 60 continues when he concludes that Rosati was required to "show that it was impossible to provide the general public and the riparian landowners on Danforth Creek a route of equal depth in and out of Danforth Creek." (RO ¶ 68). Thus, the ALJ's conclusions in paragraphs 58, 60, 67 and 68 are rejected and are not adopted in this Final Order. *See* § 120.57(1)(l), Fla. Stat. (2013). The Department's interpretation of Rule 18-21.004, F.A.C., is more reasonable than that of the ALJ. *See Id.*[5]

The Respondent Rosati also takes exception to the ALJ's findings in paragraph 61. Although labeled as a Conclusion of Law, paragraph 61 contains factual findings and inferences from the evidence. Paragraph 61 is supported by competent substantial record evidence. (King, Tr. p. 152; Fleming, Tr. pp. 304, 317; Nero, Tr. pp. 276-277). Thus, the Respondent Rosati's Exception to paragraph 61 is denied.

Therefore, based on the foregoing reasons, the Respondents Exceptions to paragraphs 58, 67, and 68, are granted.

DEP's Exception No. 4

The Department takes exception to the ALJ's recommendation on page 22 of the RO, where the ALJ recommends that the Respondent Rosati qualifies for the Noticed

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[5] The determination of whether the proposed activity on sovereignty submerged lands is contrary to the public interest, is ultimately a decision of the Board of Trustees, not the ALJ. *See Lineburger v. Prospect Marathon Coquina,* Case No. 07-3757 (Fla. DOAH March 21, 2008; Fla. DEP August 4, 2008). The Secretary of the Department is delegated authority from the Board to "take final agency action on applications to use sovereign submerged lands" when the application involves an activity for which the Department "has permitting responsibility." Fla. Admin. Code R. 18-21.0051.

General Permit, but recommends denial of the Letter of Consent. The Department argues that to acknowledge the Noticed General Permit but deny the Letter of Consent would place the applicant in "an untenable position." The Department, however, does not cite any legal authority that would prevent the ALJ from making such a recommendation. In addition, based on the rulings above, which reject the ALJ's recommendation to deny the Letter of Consent, the Department's argument is moot. Therefore, based on the foregoing reasons, the Department's exception to the ALJ's recommendation is denied.

CONCLUSION

The Respondent Rosati qualified for the Noticed General Permit. The publication in The Stuart News constituted constructive notice to the Petitioners of the Department's action on the Noticed General Permit. Thus, the Petitioners waived their right to petition for an administrative hearing to challenge the Noticed General Permit when they did not file the petition for hearing within twenty-one days of the publication date.

The publication, however, did not constitute constructive notice to the Petitioners of the Department's action on the Letter of Consent. Thus, the ALJ considered on the merits, the Petitioners' challenge to the Letter of Consent. The Respondent Rosati's dock qualified for the Letter of Consent under Rule 18-21.005(1)(c)2, F.A.C., as a minimum-size dock that does not create a navigation hazard. The ALJ's recommendation to deny the Letter of Consent on the basis of an unreasonable interpretation of the proprietary rules is not adopted in this Final Order.

Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the RO, and in light of the above rulings on the Exceptions and responses,

It is ORDERED:

A. The ALJ's Recommended Order (Exhibit A), as modified by the above rulings, is adopted and incorporated by reference herein.

B. The Petitioners' challenge to the Department's action acknowledging that the Respondent Thomas Rosati qualified to use a Noticed General Permit in File No. 43-0191995-003 is DISMISSED.

C. The Respondent Thomas Rosati's application for a letter of consent in File No. 43-0191995-003 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 filing a Notice of Appeal pursuant to Rules 9.110 and 9.190, 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 29th day of October, 2013, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

HERSCHEL T. VINYARD JR.
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
CLERK

10/29/13
DATE

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Final Order was furnished by electronic mail to:

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and by electronic filing to:

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this 29th day of October, 2013.

STATE OF FLORIDA DEPARTMENT
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