STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

MARINEMAX, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	**OGC CASE NO. 18-0204**
	)	**DOAH CASE NO. 18-2664**
LARRY LYNN AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondents.	)	
	/	

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on March 28, 2019, submitted a Recommended Order (RO) to the Department of Environmental Protection (DEP or Department) in the above captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A. The Petitioner MarineMax, Inc. (MarineMax or Petitioner) timely filed Exceptions on April 22, 2019. The Department timely filed responses to the Petitioner's Exceptions on May 2, 2019. This matter is now before the Secretary of the Department for final agency action.

BACKGROUND

On March 8, 2018, Mr. Lynn applied for, and on March 23, 2018, DEP issued, a verification of exemption from obtaining an ERP for the installation of nine pilings off his residential property's seawall (Project). On April 13, 2018, MarineMax timely filed a Petition for Formal Administrative Hearing with DEP, challenging the issuance of verification of exemption. MarineMax, thereafter, filed a Motion to Amend Petition for Administrative Hearing, dated June 14, 2018, and the previous Administrative Law Judge (ALJ) assigned to this

Filed May 21, 2019 10:50 AM Division of Administrative Hearings

matter thereafter entered an Order Granting Petitioner's Motion to Amend Petition for Formal Administrative Hearing on June 15, 2018, accepting the Amended Petition for Formal Administrative Hearing as establishing the issues to be tried in the instant proceeding.

The ALJ conducted a final hearing on January 10, 2019, by video teleconference with locations in Tallahassee and Fort Myers, Florida. The parties offered the following exhibits into evidence, which the ALJ admitted: Joint Exhibits 1 through 7; MarineMax Exhibits P1 through P10; and DEP Exhibits DEP1 and DEP2.

MarineMax presented the testimony of Sam Lowrey, its corporate vice president of real estate; and Captain Ralph S. Robinson III, a U.S. Coast Guard-licensed boat captain, who the ALJ accepted as an expert in marine navigation. Respondents DEP and Mr. Lynn presented the testimony of Megan Mills, the environmental specialist and program administrator with DEP's South District Office, and Mr. Lynn.

The one-volume Transcript of this final hearing was filed with the Division on February 26, 2019. MarineMax, DEP and Mr. Lynn (jointly), timely filed proposed recommended orders that the ALJ considered in the preparation of his Recommended Order.

SUMMARY OF THE RECOMMENDED ORDER

Mr. Lynn has owned the real property located at 111 Placid Drive, Fort Myers, Florida, since 1994. Mr. Lynn's residential property is a corner lot with a house on it that fronts a canal on two of the four sides of his property. (RO ¶ 1).

MarineMax is a national boat dealer with approximately 65 locations throughout the United States and the British Virgin Islands. MarineMax has approximately 16 locations in Florida. MarineMax, through subsidiary companies, acquired the property at 14030 McGregor Boulevard, Fort Myers, Florida, in December 2014 (MarineMax Property). Prior to

MarineMax's acquisition, this property had been an active marina for more than 30 years. MarineMax continues to operate this property as a marina. (RO ¶¶ 2-3).

The MarineMax Property is a 26-acre contiguous parcel that runs north-south, surrounded by canals and a larger waterway that connects to the Gulf of Mexico. The "northern" parcel of the MarineMax Property is surrounded by two canals and the larger waterway that connects to the Gulf of Mexico. The "southern" parcel is a separate peninsula that, while contiguous to the northern parcel, is surrounded by a canal that it shares with the northern parcel, along with another canal that separates it from residential properties. (RO ¶ 4).

Mr. Lynn's property is located directly south of the northern parcel of the MarineMax Property, and the canal that runs east-west. As his property is a corner lot, it also fronts an eastern canal that is directly across from the southern parcel of the MarineMax Property. The eastern canal described above also serves as a border between MarineMax and a residential community that includes Mr. Lynn's residential property. (RO ¶¶ 5-6).

Mr. Lynn has moored a boat to an existing dock on the eastern canal described in paragraphs 5 and 6 for many years. (RO ¶ 7).

MarineMax holds ERPs for the business it conducts at its MarineMax Property, including the canal between the northern parcel of the MarineMax Property and Mr. Lynn's property. For example, these ERPs permit: (a) the docking of boats up to 85 feet in length with a 23-foot beam; (b) boat slips up to 70 feet in length; (c) up to 480 boats on the MarineMax Property; and (d) a boatlift and boat storage barn (located on the southern parcel). (RO ¶ 8).

The MarineMax Property also contains a fueling facility that is available for internal and public use, located on the northern parcel of the MarineMax Property, directly across the east-

west canal from Mr. Lynn's property. The prior owner of the marina constructed this fueling facility prior to 2003. (RO ¶ 9).

Request for Verification of Exemption from an ERP

Mr. Lynn testified that after MarineMax took over the property from the prior owner, he noticed larger boats moving through the canal that separates his property from the MarineMax Property. Concerned about the potential impact to his property, including his personal boat, Mr. Lynn contracted with Hickox Brothers Marine, Inc. (Hickox), to erect pilings off of his property in this canal. (RO ¶ 10).

On March 8, 2018, Hickox, on behalf of Mr. Lynn, submitted electronically a Request for Verification of Exemption from an Environmental Resource Permit to DEP. The "Project Description" stated, "INSTALL NINE 10 INCH DIAMETER PILINGS AS PER ATTACHED DRAWING FOR SAFETY OF HOMEOWNER'S BOAT." The attached drawing for this Project depicted the installation of these nine pilings 16 and 1/2 feet from Mr. Lynn's seawall, spaced 15 feet apart. (RO ¶ 11).

On March 23, 2018, DEP approved Mr. Lynn's Request for Verification of Exemption from an Environmental Resource Permit, stating that the activity, as proposed, was exempt under section 373.406(6), Florida Statutes, from the need to obtain a regulatory permit under part IV of chapter 373, Florida Statutes. The Request forVerification of Exemption from an Environmental Resource Permit stated:

> This determination is made because the activity, in consideration of its type, size, nature, location, use and operation, is expected to have only minimal or insignificant or cumulative adverse impacts on the water resources.

(RO ¶ 12).

The Verification of Exemption from an Environmental Resource Permit further stated that DEP did not require further authorization under chapter 253, Florida Statutes, to engage in proprietary review of the activity because it was not to take place on sovereign submerged lands. The Verification of Exemption from an Environmental Resource Permit also stated that DEP approved an authorization pursuant to the State Programmatic General Permit V, which precluded the need for Mr. Lynn to seek a separate permit from the U.S. Army Corps of Engineers. (RO ¶ 13).

Megan Mills, the environmental specialist and program administrator with DEP's South District Office, testified that DEP's granting of Mr. Lynn's Request for Verification of Exemption from an Environmental Resource Permit was routine, and that his Request for Verification of Exemption from an Environmental Resource Permit met the statutory criteria. (RO ¶ 14).

After DEP granted the Request for Verification of Exemption from an Environmental Resource Permit, Hickox, on behalf of Mr. Lynn, installed the nine pilings in the canal at various distances approximately 19 feet from Mr. Lynn's seawall and in the canal that divides Mr. Lynn's property from the MarineMax Property (and the fueling facility). (RO ¶ 15).

MarineMax timely challenged DEP's Verification of Exemption from an Environmental Resource Permit. (RO ¶ 16).

Impact on Water Resources

MarineMax presented the testimony of Sam Lowrey, its corporate vice president of real estate, who had detailed knowledge of the layout of the MarineMax Property. (RO ¶ 17).

Mr. Lowrey testified that the canal between the MarineMax Property and Mr. Lynn's residential property is active with boating activity, noting that MarineMax's ERP allows up to

480 vessels on-site. With the installation of the pilings, he testified that he was concerned that MarineMax customers "will be uncomfortable navigating their boats through this portion of the canal[,]" which would be detrimental to MarineMax's business. Mr. Lowery testified that he had no personal knowledge of whether MarineMax has lost any business since the installation of the pilings. (RO ¶¶ 18-19).

MarineMax also presented the testimony of Captain Ralph S. Robinson, III, who the ALJ accepted as an expert in marine navigation, without objection. Captain Robinson has been a boat captain, licensed by the U.S. Coast Guard, since 1991. He has extensive experience captaining a variety of vessels throughout the United States and the Bahamas. He is an independent contractor and works for MarineMax and other marine businesses. Captain Robinson is also a retired law enforcement officer. (RO ¶ 20).

Captain Robinson testified that he was familiar with the waterways surrounding the MarineMax Property, as he has captained boats in those waterways several times a month for the past 15 years. Captain Robinson testified that he has observed a number of boats with varying lengths and beams navigate these waterways, and particularly, the canal between the MarineMax Property and Mr. Lynn's property. Captain Robinson estimated that the beam of these boats range from eight to 22 feet. He also testified that the most common boats have a beam between eight and 10 feet. (RO ¶¶ 21-22).

Captain Robinson's first experience with the pilings in the canal occurred in April 2018, when he was captaining a 42-foot boat through the canal. He testified that an 85-foot boat was fueling on the fuel dock, and when he cleared the fueling boat and pilings, he had approximately one and a half feet on each side of his boat. He testified that "[i]t was very concerning." Captain Robinson testified that since this experience in April 2018, he calls ahead to MarineMax to

determine the number and size of boats in the portion of this canal that contains the pilings. (RO ¶¶ 23-24).

On behalf of MarineMax, in December 2018, Captain Robinson directed the recording of himself captaining a 59-foot Sea Ray boat with an approximately 15- to 16-foot beam through the canal separating the MarineMax Property and Mr. Lynn's residential property, with another boat of the same size parked at MarineMax's fueling dock. Captain Robinson testified that these two boats were typical of the boats that he would operate at the MarineMax Property and surrounding waterway. The video demonstration, and Captain Robinson's commentary, showed that when he passed through the canal between the fuel dock (with the boat docked) and Mr. Lynn's residential property (with the pilings), there was approximately four to five feet on either side of his boat. Captain Robinson stated:

> This is not an ideal situation for a boat operator. Yes, it can be done. Should it be done? Um, I wasn't happy or comfortable in this depiction.

(RO ¶¶ 25-26). Captain Robinson testified that his "personal comfort zone" of distance between a boat he captains and obstacles in the water is five or six feet. (RO ¶ 27).

Ultimately, Captain Robinson testified that he believed the pilings in the canal between the MarineMax Property and Mr. Lynn's property were a "navigational hazard." Specifically, Captain Robinson stated:

> Q: In your expert opinion, has Mr. Lynn's pilings had more than a minimal, or insignificant impact on navigation in the canal, in which they are placed?
>
> A: I believe they're a navigational hazard. The impact, to me personally, and I'm sure there's other yacht captains that move their boat through there, or a yacht owner, not a licensed captain, um, that has to take a different approach in their operation and diligence, um, taking due care that they can safely go through. It's been an impact.

> Q: Is a navigational hazard a higher standard for you as a boat captain, being more than minimal or insignificant?
>
> A: Yes. A navigational hazard is, in my opinion, something that its position could be a low bridge or something hanging off a bridge, a bridge being painted, it could be a marker, it could be a sandbar, anything that is going to cause harm to a boat by its position of normal operation that would cause injury to your boat, or harm an occupant or driver of that boat.

(RO ¶ 28).

Ms. Mills, the environmental specialist and program administrator with DEP's South District Office, testified that after MarineMax filed the instant Petition, she and another DEP employee visited Mr. Lynn's residential property. Although not qualified as an expert in marine navigation, Ms. Mills testified that, even after observing the placement of the pilings and the boating activity the day she visited, the pilings qualified for an exemption from an ERP. (RO ¶ 29).

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 the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2018); *Charlotte County v. IMC Phosphates Co.*, 18 So. 3d 1079, 1082 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61, 62 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence as to each essential element and as to its admissibility under legal rules of evidence. *See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996); *Nunez v. Nunez*, 29 So. 3d 1191, 1192 (Fla. 5th DCA 2010).

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

The ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See, e.g., Peace River/Manasota Reg'l Water Supply Authority v. IMC Phosphates Co.*, 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994*); Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So. 2d 1025, 1026-1027 (Fla. 1st DCA 1997).

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, 1012 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward County*, 746 So. 2d 1194, 1197 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1141-42 (Fla. 2d DCA 2001). However,

the agency should not label what is essentially an ultimate factual determination as a "conclusion of law" to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Prof'l Eng'rs*, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007). 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).

Agencies do not have jurisdiction, however, to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Prof'l Reg.*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Reg.*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio*, 622 So. 2d at 609.

RULINGS ON EXCEPTIONS

In reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." *See* 120.57(1)(k), Fla. Stat. (2018). However, the agency need not rule on an exception that "does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." *Id.*

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. Coal. of Fla., Inc. v. Broward County*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So. 2d 540, 542 (Fla. 4th DCA 2003). However, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction, even when exceptions are not filed. *See* § 120.57(1)(l), Fla. Stat. (2018); *Barfield,* 805 So. 2d at 1012; *Fla. Public Employee Council, v. Daniels,* 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

RULINGS ON MARINEMAX'S EXCEPTIONS

MarineMax Exception No. 1 regarding Paragraph 19

MarineMax takes exception to the findings of fact in paragraph 19 of the RO, which reads, in totality, that "Mr. Lowery testified that he had no personal knowledge of whether MarineMax has lost any business since the installation of the pilings." RO ¶ 19. MarineMax objects that there is no competent substantial evidence in the record to support this finding, and it is irrelevant to the issue of navigation. Contrary to MarineMax's exception, the ALJ's findings of fact in paragraph 19 are supported by competent substantial evidence in the form of MarineMax employee Sam Lowery's testimony. (Lowery, T. Vol. I, pp. 100-101).

MarineMax disagrees with the ALJ's findings and seeks to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280;

Conshor, Inc., 498 So. 2d at 623. For the abovementioned reasons, MarineMax's exception to paragraph 19 of the RO is rejected.

Based on the foregoing reasons, MarineMax's Exception No. 1 is denied.

MarineMax Exception No. 2 regarding Footnote 6 to Paragraph 29

MarineMax takes exception to footnote [endnote] 6 to paragraph 29 of the RO, but specifies that it does not take exception to the findings of fact in paragraph 29 to which footnote [endnote] 6 is associated. MarineMax Exception No. 2, footnote 2.

Endnote 6 to paragraph 29 of the RO reads as follows:

> Ms. Mills also explained DEP's process in concluding that Mr. Lynn's pilings project qualified for federal authorization pursuant to the State Programmatic General Permit V (SPGP). Although the parties, in their Amended Joint Pre-hearing Stipulation, agreed that the pilings are not located in sovereign submerged lands, and MarineMax and DEP agreed that the 25-percent rule with regard to encroachment in a navigable waterway as set forth in Florida Administrative Code Chapter 18-21, did not apply to this case, the undersigned finds Ms. Mill's testimony concerning SPGP authorization, which included an analysis of the 25-percent rule, to be relevant to DEP's granting of the exemption.

RO ¶ 29, endnote 6, p. 23.

MarineMax contends that endnote 6 to paragraph 29 is in fact a conclusion of law within the substantive jurisdiction of the Department; and thus, may be rejected by the Department. MarineMax contends that the ALJ was in error, when he stated that Ms. Mill's testimony concerning the federal SPGP authorization, including the 25-percent rule, was relevant to DEP's granting of its state exemption.

The Department concludes that endnote 6 to paragraph 29 of the RO contains mixed findings of fact and conclusions of law. The Department concludes that the first sentence of endnote 6 is a finding of fact that is supported by competent substantial evidence; and thus, should not be rejected. The ALJ's first sentence in endnote 6 is supported by competent

substantial evidence in the form of Megan Mill's testimony. (Mills, T. Vol. I, pp. 62-64). Therefore, the Department denies MarineMax's exception to the first sentence of endnote 6 to paragraph 29 of the RO.

However, the Department concludes that the closing to the second sentence of endnote 6 to paragraph 29 of the RO is in fact a conclusion of law over which the Department has substantive jurisdiction. 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. (2018); *Barfield,* 805 So. 2d at 1012; *Fla. Public Employee Council, v. Daniels,* 646 So. 2d 813, 816 (Fla. 1st DCA 1994). The Department disagrees with the ALJ's conclusion that Ms. Mills' testimony concerning the criteria for the federal SPGP authorization is relevant to DEP's granting of the state exemption from an ERP permit under section 373.406(6), Florida Statutes. The Department concludes that the criteria for a federal authorization -- the SPGP authorization -- are not relevant to the criteria for a state authorized ERP exemption. Thus, MarineMax's exception to the second sentence of endnote 6 to paragraph 29 of the RO is granted. The Department concludes that its legal interpretation in this Final Order is more reasonable than the interpretation in the second sentence of endnote 6 to paragraph 29 of the RO. *See* § 120.57(1)(l), Fla. Stat. (2018). The ALJ's second sentence of endnote 6 to paragraph 29 of the RO is rejected and accordingly modified in this Final Order. For the abovementioned reasons, MarineMax's exception to footnote [endnote] 6 to paragraph 29 is accepted in part and rejected in part.

Based on the foregoing reasons, MarineMax's Exception No. 2 is accepted in part, and denied in part.

MarineMax Exception No. 3 regarding Paragraph 41

MarineMax takes exception to the conclusions of law in paragraph 41 of the RO, which quote the criteria for an applicant to qualify for an exemption under Section 403.813(1)(b),

Florida Statutes. The Applicant filed a request for verification that it qualifies for the "de minimus" exemption in section 373.406(6), Florida Statutes, from the need for an ERP. The Department issued a verification that the Applicant qualified for the "de minimus" exemption in section 373.406(6), Florida Statutes, from the need to obtain an ERP for his Project to install nine pilings off his residential property's seawall. The Department's agency verification did not mention chapter 403, Florida Statutes, let alone the ERP exemptions in section 403.813(1)(b), Florida Statutes. The Department agrees that section 403.813(1)(b), Florida Statutes, has no bearing on this hearing or exemptions issued pursuant to section 373.406(6), Florida Statutes. Section 403.813(1)(b), Florida Statutes, only mentions part IV of chapter 373, because section 403.813(1)(b), Florida Statutes, contains criteria for several exemptions from the need to obtain an ERP permit, which permits are issued under part IV of chapter 373, Florida Statutes. The criteria for an exemption from an ERP permit contained in Section 403.813(1)(b), Florida Statutes, are separate and distinct from the "de minimus" exemption identified in chapter 373, Florida Statutes. The Department concludes that its legal interpretation in this Final Order is more reasonable then the ALJ's interpretation in paragraph 41 of the RO. *See* § 120.57(1)(l), Fla. Stat. (2018). For the abovementioned reasons, MarineMax's exception to paragraph 41 is accepted.

Based on the foregoing reasons, MarineMax's Exception No. 3 is adopted, and paragraph 41 of the RO is stricken.

MarineMax Exception No. 4 regarding Paragraph 42

MarineMax takes exception to the conclusions of law in paragraph 42 of the RO, which states, in pertinent part, that "[a]ccording to MarineMax, DEP's previous interpretations of

equating 'minimal or insignificant individual or cumulative impacts on the water resources' with the 'navigational hazard' standard is not entitled to deference by the undersigned, see Art. V, § 21, Fla. Const., is inconsistent with Pirtle, and would constitute an unadopted rule." RO ¶ 42. MarineMax contends that it is not, and never has been, MarineMax's position that DEP has previously equated these two standards. MarineMax contends that "[i]n fact, it is MarineMax's position that the DEP in the past has, correctly, applied these as separate standards." MarineMax Exception No. 4, pp. 8-9.

The Department concludes that paragraph 42 of the RO does not contain conclusions of law, but instead factual *statements* by the ALJ identifying MarineMax's position in this proceeding. An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2018); *Charlotte County*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. The Department finds that the first sentence of paragraph 42 of the RO is supported by competent substantial evidence; and, thus must be accepted. (Joint Prehearing Stipulation pp. 1-2; MarineMax Proposed Recommended Order, pp. 16-18). *See Gibby Family Trust v. Blueprint 2000 and Dep't of Envtl. Prot.*, DOAH Case No. 10-9292, p. 10 (Fla. DOAH March 28, 2011; DEP Dec. 26, 2011)(Joint Pre-Hearing Stipulation provided competent substantial evidence to support findings made in DOAH RO); *Hasselback v. Wentz and Dep't of Envtl. Prot.*, DOAH Case No. 07-5216)(Fla. DOAH January 28, 2010; DEP March 15, 2010).

Florida case law holds that a pretrial stipulation prescribing issues on which a case is to be tried is binding upon the parties and the court and should be strictly enforced. *See, e.g., Broche v. Cohn*, 987 So. 2d 124, 127 (Fla. 4th DCA 2008), *citing Gunn Plumbing, Inc., v. Dania*

Bank, 252 So. 2d 1, 4 (Fla. 1971), and *Lotspeich Co. v. Neogard Corp.*, 416 So. 2d 1163, 1165 (Fla. 3d DCA 1982); *cf. State Farm Fire & Cas. Co. v. Higgins*, 788 So. 2d 992, 1007 (Fla. 4th DCA 2001), *approved,* 894 So. 2d 5 (Fla. 2004)("We agree with the trial court that the original complaint filed in the negligence action was admissible against Ingalls under section 90.803(18)(b), Florida Statutes (2000), as a statement offered against a party 'of which the party has manifested an adoption or belief in its truth.'" Thus, the matters set forth in the Joint Prehearing Stipulation, entered into by the parties in this administrative proceeding, are binding upon the parties, the ALJ and the agency head. *Id.*

However, the Department finds that the second sentence of paragraph 42 of the RO is not supported by competent substantial evidence. MarineMax contends that it never stated that DEP previously equated the "minimal or insignificant individual or cumulative impacts" standard with the "navigational hazard" standard, as stated by the ALJ in Exception No. 4 of the RO. DEP agrees with MarineMax's position and found no competent substantial evidence to support the second sentence of paragraph 42. (Transcript, Joint Prehearing Stipulation pp. 1 and 10; MarineMax Proposed Recommended Order, pp. 16-17). For the abovementioned reasons, MarineMax's exception to paragraph 42 of the RO is accepted in part and rejected in part.

Based on the foregoing reasons, MarineMax's Exception No. 4 is accepted in part, and denied in part; and the second sentence of paragraph 42 of the RO is rejected in this Final Order.

MarineMax Exception No. 5 regarding Paragraph 43

MarineMax takes exception to the conclusion of law in paragraph 43 of the RO, which states that "[t]he undersigned notes that MarineMax's expert, Captain Robinson, when asked whether the pilings at issue have 'minimal or insignificant individual or cumulative impact on the water resources,' instead opined that they constitute a 'navigational hazard.'" RO ¶ 43.

MarineMax alleges that this statement was taken out of context and "leaves the RO vulnerable to the interpretation that the expert witness felt the pilings were a 'navigational hazard' but did not have 'more than a minimal or insignificant' effect on navigation." MarineMax Exception No. 43.

The Department concludes that paragraph 43 of the RO is actually a finding of fact. An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2018); *Charlotte County*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to MarineMax's exception, the ALJ's finding in paragraph 43 of the RO is supported by competent substantial evidence in the form of expert testimony from MarineMax's expert Captain Robinson. (Robinson, T. Vol. I, p. 151).

The Department is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. Since there is competent substantial evidence to support the ALJ's findings, MarineMax's exception to paragraphs 43 of the RO is rejected.

Based on the foregoing reasons, MarineMax's Exception No. 5 is denied.

MarineMax Exception No. 6 regarding Paragraph 44

MarineMax takes exception to the conclusion of law in paragraph 44 of the RO, which states that "[t]he undersigned further notes that section 403.813(1)(b)3. specifically incorporates the 'navigational hazard' prohibition as a criteri[on] for DEP to consider in determining whether an activity, such as the installation of mooring pilings, is exempt from an ERP." MarineMax contends that section 403.813(1)(b), Florida Statutes, has no applicability to this case, and should be stricken in its entirety.

As explained above in ruling on MarineMax's Exception No. 3, the Applicant filed a request that it qualify for the "de minimus" exemption in section 373.406(6), Florida Statutes, from the need for an ERP; and the Department issued a verification that the Applicant qualified for the "de minimus" exemption in section 373.406(6), Florida Statutes, from the need to obtain an ERP for his Project. The Department's agency verification did not mention chapter 403, Florida Statutes, let alone the ERP exemptions in section 403.813(1)(b), Florida Statutes. The Department agrees that section 403.813(1)(b), Florida Statutes, has no bearing on this hearing or exemptions issued pursuant to section 373.406(6), Florida Statutes. Section 403.813(1)(b), Florida Statutes, only mentions part IV of chapter 373, because section 403.813(1)(b), Florida Statutes, contains criteria for several exemptions from the need to obtain an ERP permit, which permits are issued under part IV of chapter 373, Florida Statutes.

The criteria for an exemption from an ERP permit contained in Section 403.813(1)(b), Florida Statutes, are separate and distinct from the criteria for a "de minimus" exemption identified in chapter 373, Florida Statutes. The Department concludes that its legal interpretation in this Final Order is more reasonable then the ALJ's interpretation in paragraph 44 of the RO. *See* § 120.57(1)(l), Fla. Stat. (2018). For the abovementioned reasons, MarineMax's exception to paragraph 44 of the RO is accepted.

Based on the foregoing reasons, MarineMax's Exception No. 6 is adopted, and paragraph 44 of the RO is stricken.

MarineMax Exception No. 7 regarding Paragraphs 47 and 48

MarineMax takes exception to the conclusions of law in paragraphs 47 and 48 of the RO, which distinguish the facts in the current authorization for an ERP exemption under section 373.406(6), Florida Statutes, from the facts in the case of *Pirtle v. Voss*, DOAH Case No.

13-0515 (Fla. DOAH Sept. 27, 2013; DEP Dec. 26, 2013), in which DEP denied an ERP exemption under section 373.403(6), Florida Statutes, and consent by rule to use sovereign submerged lands.

In the final sentence of paragraph 47 of the RO, describing the facts in *Pirtle v. Voss,* the ALJ stated that "[a]dditionally, the ALJ [in Pirtle] found that [the] marina owner's ability to operate his marine was substantially impaired by the pilings." RO ¶ 47. Similarly, in the final sentence of paragraph 48 of the RO, describing the facts in the current proceeding, the ALJ found "[a]dditionally, MarineMax presented no direct evidence of substantial impairment of its ability to operate its marina as a result of Mr. Lynn's pilings." RO ¶ 48. MarineMax contends that these findings in paragraphs 47 and 48 "present a legal conclusion that business or economic interests should play a role in determining whether this permit exemption was properly granted." MarineMax Exception No. 7. MarineMax contends that any conclusion that business and economic interests are protected under Part IV of Chapter 373, Florida Statutes, is erroneous.

The Department agrees that consideration of business or economic interests are not a factor in determining whether a proposed project qualifies for an ERP permit exemption. *See Vill. Of Key Biscayne v. Dep't of Envtl. Prot.*, 206 So. 3d 788, 791 (Fla. 3d DCA 2016); *Mid-Chattahoochee River Users v. Fla. Dep't of Envtl. Prot.*, 948 So. 2d 794, 797 (Fla. 1st DCA 2006). However, the Department concludes that in both *Pirtle v. Voss* and the current proceeding, the ALJs statements quoted above in paragraphs 47 and 48 of the RO were intended to identify whether the proposed pilings would impair navigability in the water body so as to impair the petitioner's ability to operate its marina. The Department concludes that paragraphs 447 and 48 contain mixed findings of fact and conclusions of law.

MarineMax concludes its exception by citing to testimony and exhibits presented at the hearing, which it claims identify "the significant deleterious effect of the pilings on navigation" in this proceeding. RO ¶ 48. MarineMax disagrees with the ALJ's findings and seeks to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. For the abovementioned reasons, MarineMax's exception to paragraphs 47 and 48 of the RO is rejected.

Based on the foregoing reasons, MarineMax's Exception No. 7 is denied.

MarineMax Exception No. 8 regarding Paragraphs 48 and 49

MarineMax takes exception to the conclusions in paragraphs 48 and 49 of the RO, which conclude that the Applicant's pilings do not constitute a navigational hazard, but "at most, an inconvenience to operators of larger boats, causing MarineMax customers to exercise caution during ingress and egress through the canal separating the MarineMax Property and Mr. Lynn's property . . . ." (RO ¶ 48). MarineMax cites to the exemption at section 373.406(6), Florida Statutes, which states that to qualify for the exemption, projects must have "minimal or insignificant individual or cumulative adverse impacts on the water resources of the district." § 373.406(6), Fla. Stat. (2018). MarineMax then concludes that when the cumulative impacts of the pilings are assessed in light of previously authorized activities, the pilings lead to more than a minimal or insignificant impact.

MarineMax disagrees with the ALJ's findings earlier in the RO, which lead to the ALJ's conclusions of law in paragraphs 48 and 49 of the RO. Consequently, MarineMax seeks to have DEP reweigh the evidence to reach a different conclusion of law. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts

therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307.

In addition, MarineMax requests that the Department consider additional findings of fact to the ones contained in the RO. For example, MarineMax finds that "[f]or a boat which is authorized to dock east of Lynn's pilings, or which needs to traverse the canal to get to a dry dock – to be completely prohibited from all navigation past Lynn's pilings for the length of time it takes for a large boat to refuel at MarineMax's fuel dock is certainly more than a minimal or insignificant effect on navigation." However, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So. 2d 1025, 1026-1027 (Fla. 1st DCA 1997).

The Department agrees with the ALJ's conclusion that the effect of the various impacts create merely an inconvenience to MarineMax and its customers. For the abovementioned reasons, MarineMax's exception to paragraphs 48 and 49 of the RO is rejected.

Based on the foregoing reasons, MarineMax's Exception No. 8 is denied.

MarineMax Exception No. 9 regarding Paragraph 49

MarineMax takes exception to the conclusion of law in paragraph 49 of the RO, in which the ALJ "concludes that Mr. Lynn's pilings do not constitute a navigational hazard, as an inconvenience does not constitute a navigational hazard." MarineMax contends that the consideration of whether a project constitutes a navigational hazard is the standard for exemptions under section 403.813(1)(b), Florida Statutes, and not the standard for the exemption under section 373.406(6), Florida Statutes.

No where in paragraph 49 of the RO, does the ALJ reference section 403.813(1)(b), Florida Statutes, as the exemption under consideration. When read in its entirety, the RO is unambiguous that the ALJ applied the exemption and criteria pursuant to section 373.406(6), Florida Statutes, and not any of the exemptions in section 403.813(1)(b), Florida Statutes. For example, paragraph 40 of the RO identifies that DEP issued the verification of qualification for an exemption from an ERP "pursuant to section 373.406(6), also known as the "de minimus" exemption." (RO ¶ 40). The ALJ then quotes the text of the de minimus exemption contained in section 373.406(6), Florida Statutes, which states in pertinent part, that "[a]ny district or the department may exempt from regulation under this part those activities that the district or department determines will have only *minimal or insignificant* individual or [cumulative] adverse impacts on the water resources of the district." (RO ¶ 40); § 373.406(6), Fla. Stat. (2018)(emphasis added). The ALJ moreover concluded in paragraph 39 of the RO that MarineMax must "prove that the pilings in question are more than a minimal impact on navigation." (RO ¶ 39). In addition, the ALJ concluded in paragraph 46 of the RO that "MarineMax did not establish, by a preponderance of the evidence, that the pilings at issue have a significant impact on navigation." (RO ¶ 46).

In conclusion, the ALJ states in paragraph 50 of the RO -- the final paragraph before the Recommendations Section -- that the Applicant "met his burden and showed, by a preponderance of the evidence, that the pilings met the criteria set forth in section 373.406(6)[, Florida Statutes]. (RO ¶ 50). The Department concludes that the ALJ was applying the minimal or insignificant standard for this exemption to the addition of pilings to a water body, concluding that the pilings constitute an inconvenience and not a navigational hazard. The ALJ was merely concluding that if the pilings constituted a navigational hazard, then the effect of the pilings would be more than

a "minimal or insignificant" impact. For the abovementioned reasons, MarineMax's exception to paragraph 49 of the RO is rejected.

Based on the foregoing reasons, MarineMax's Exception No. 9 is denied.

CONCLUSION

Having considered the applicable law in light of the rulings on the above Exceptions, and being otherwise duly advised, it is

ORDERED that:

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

B. Larry Lynn's qualification for an exemption under section 373.406(6), Florida Statutes, from an environmental resource permit is approved, and MarineMax, Inc.'s challenge to the Department's verification is dismissed.

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 21st day of May, 2019, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

NOAH VALENSTEIN
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.

Syndi Kinsey, Deputy CLERK 5/21/19 DATE

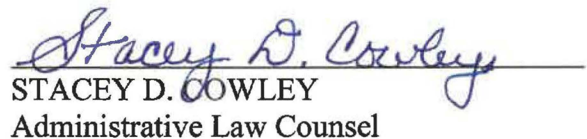
CERTIFICATE OF SERVICE

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

Richard S. Brightman, Esq. Amelia Savage, Esq. Felecia L. Kitzmiller, Esq. Hopping Green & Sams, P.A. Post Office Box 6526 Tallahassee, FL 32314 RichardB@hgslaw.com AmeliaS@hgslaw.com FeliciaK@hgslaw.com	Larry Lynn 111 Placid Drive Fort Myers, FL 33919 rockeyandpr@aol.com
Lorraine Novak, Esq. Department of Environmental Protection 3900 Commonwealth Blvd., MS 35 Tallahassee, FL 32399 Lorraine.M.Novak@FloridaDEP.gov	

this 21st day of May, 2019.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



STACEY D. COWLEY
Administrative Law Counsel

3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
Telephone 850/245-2242
email Stacey.Cowley@FloridaDEP.gov

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARINEMAX, INC.,

Petitioner,

vs. Case No. 18-2664

LARRY LYNN AND DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondents.
_______________________________/

RECOMMENDED ORDER

On January 10, 2019, Administrative Law Judge Robert J. Telfer III, of the Florida Division of Administrative Hearings (Division), conducted a duly-noticed hearing in Tallahassee and Fort Myers, Florida, by video teleconference, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2018).

APPEARANCES

For Petitioner MarineMax, Inc.:

Amelia A. Savage, Esquire
Richard S. Brightman, Esquire
Felicia L. Kitzmiller, Esquire
Hopping Green & Sams, P.A.
Post Office Box 6526
Tallahassee, Florida 32314-6526

For Respondent Larry Lynn:

Larry Kenneth Lynn, pro se
111 Placid Drive
Fort Myers, Florida 33919

Exhibit A

For Respondent Department of Environmental Protection:

Lorraine M. Novak, Esquire
Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue to determine in this matter is whether Respondent Department of Environmental Protection (DEP) properly issued its proposed verification of an Environmental Resource Permit (ERP) exemption, dated March 23, 2018, for the installation of nine pilings off of Respondent Larry Lynn's residential property, in the direction of Petitioner MarineMax, Inc.'s commercial property (MarineMax), pursuant to section 373.406(6), Florida Statutes, commonly known as the "de minimus" exemption.

PRELIMINARY STATEMENT

On March 8, 2018, Mr. Lynn applied for, and on March 23, 2018, DEP issued, a verification of exemption from obtaining an ERP for the installation of nine pilings off his residential property's seawall. On April 13, 2018, MarineMax timely filed a Petition for Formal Administrative Hearing with DEP, challenging the issuance of verification of exemption. MarineMax, thereafter, filed a Motion to Amend Petition for Administrative Hearing, dated June 14, 2018, and the previous Administrative Law Judge (ALJ) assigned to this matter thereafter entered an Order Granting Petitioner's Motion to Amend Petition for Formal

Administrative Hearing on June 15, 2018, accepting the Amended Petition for Formal Administrative Hearing as establishing the issues to be tried in the instant proceeding.

On June 18, 2018, MarineMax filed an Unopposed Motion to Continue Final Hearing. On July 3, 2018, the undersigned granted the Unopposed Motion to Continue Final Hearing and scheduled the final hearing for October 10 and 11, 2018. The parties filed a Joint Pre-hearing Stipulation on October 3, 2018. However, because of Hurricane Michael, the undersigned and parties rescheduled the final hearing for January 10, 2019. The parties submitted an Amended Joint Pre-hearing Stipulation on January 3, 2019.

Pursuant to a Second Notice of Hearing by Video Teleconference, the undersigned conducted a final hearing on January 10, 2019, by video teleconference with locations in Tallahassee and Fort Myers, Florida. The parties offered the following exhibits into evidence, which the undersigned admitted: Joint Exhibits 1 through 7; MarineMax Exhibits P1 through P10; and DEP Exhibits DEP1 and DEP2.[1/]

MarineMax presented the testimony of Sam Lowrey, its corporate vice president of real estate; and Captain Ralph S. Robinson III, a U.S. Coast Guard-licensed boat captain, who the undersigned accepted as an expert in marine navigation.

Respondents DEP and Mr. Lynn presented the testimony of Megan Mills, the environmental specialist and program administrator with DEP's South District Office, and Mr. Lynn.

The one-volume Transcript of this final hearing was filed with the Division on February 26, 2019. MarineMax, and DEP and Mr. Lynn (jointly), timely filed proposed recommended orders that the undersigned considered in the preparation of this Recommended Order.

All statutory references are to the 2018 codification of the Florida Statutes unless otherwise indicated.

FINDINGS OF FACT

1. Mr. Lynn has owned the real property located at 111 Placid Drive, Fort Myers, Florida, since 1994. Mr. Lynn's residential property is a corner lot that fronts a canal on two of the four sides of his property, and also contains his home.

2. MarineMax is a national boat dealer with approximately 65 locations throughout the United States and the British Virgin Islands. MarineMax has approximately 16 locations in Florida.

3. MarineMax, through subsidiary companies, acquired the property at 14030 McGregor Boulevard, Fort Myers, Florida, in December 2014 (MarineMax Property). Prior to MarineMax's acquisition, this property had been an active marina for more than 30 years. MarineMax continues to operate this property as a marina.

4. The MarineMax Property is a 26-acre contiguous parcel that runs north-south and that is surrounded by canals and a larger waterway that connects to the Gulf of Mexico. The "northern" parcel of the MarineMax Property is surrounded by two canals and the larger waterway that connects to the Gulf of Mexico. The "southern" parcel is a separate peninsula that, while contiguous to the northern parcel, is surrounded by a canal that it shares with the northern parcel, along with another canal that separates it from residential properties.

5. Mr. Lynn's property is located directly south of the northern parcel of the MarineMax Property, and the canal that runs east-west. As his property is a corner lot, it also fronts an eastern canal that is directly across from the southern parcel of the MarineMax Property.

6. The eastern canal described above also serves as a border between MarineMax and a residential community that includes Mr. Lynn's residential property.

7. Mr. Lynn has moored a boat to an existing dock on the eastern canal described in paragraphs 5 and 6 for many years.

8. MarineMax holds ERPs for the business it conducts at its MarineMax Property, including the canal between the northern parcel of the MarineMax Property and Mr. Lynn's property. For example, these ERPs permit: (a) the docking of boats up to 85

feet in length with a 23-foot beam; (b) boat slips up to 70 feet in length; (c) up to 480 boats on the MarineMax Property; and (d) a boatlift and boat storage barn (located on the southern parcel).

9. The MarineMax Property also contains a fueling facility that is available for internal and public use. It is located on the northern parcel of the MarineMax Property, directly across the east-west canal from Mr. Lynn's property. The prior owner of the marina constructed this fueling facility prior to 2003.

Request for Verification of Exemption from an ERP

10. Mr. Lynn testified that after MarineMax took over the property from the prior owner, he noticed larger boats moving through the canal that separates his property from the MarineMax Property. Concerned about the potential impact to his property, including his personal boat, Mr. Lynn contracted with Hickox Brothers Marine, Inc. (Hickox), to erect pilings off of his property in this canal.[2/]

11. On March 8, 2018, Hickox, on behalf of Mr. Lynn, submitted electronically a Request for Verification of Exemption from an Environmental Resource Permit to DEP. The "Project Description" stated, "INSTALL NINE 10 INCH DIAMETER PILINGS AS PER ATTACHED DRAWING FOR SAFETY OF HOMEOWNER'S BOAT." The attached drawing for this project depicted the installation of

these nine pilings 16 and 1/2 feet from Mr. Lynn’s seawall, spaced 15 feet apart.

12. On March 23, 2018, DEP approved Mr. Lynn’s Request for Verification of Exemption from an Environmental Resource Permit, stating that the activity, as proposed, was exempt under section 373.406(6) from the need to obtain a regulatory permit under part IV of chapter 373. The Request for Verification of Exemption from an Environmental Resource Permit further stated:

> This determination is made because the activity, in consideration of its type, size, nature, location, use and operation, is expected to have only minimal or insignificant or cumulative adverse impacts on the water resources.

13. The Request for Verification of Exemption from an Environmental Resource Permit further stated that DEP did not require further authorization under chapter 253, Florida Statutes, to engage in proprietary review of the activity because it was not to take place on sovereign submerged lands. The Request for Verification of Exemption from an Environmental Resource Permit also stated that DEP approved an authorization pursuant to the State Programmatic General Permit V, which precluded the need for Mr. Lynn to seek a separate permit from the U.S. Army Corps of Engineers.

14. Megan Mills, the environmental specialist and program administrator with DEP’s South District Office, testified that

DEP's granting of Mr. Lynn's Request for Verification of Exemption from an Environmental Resource Permit was routine, and that his Request for Verification of Exemption from an Environmental Resource Permit met the statutory criteria.

15. After DEP granted the Request for Verification of Exemption from an Environmental Resource Permit, Hickox, on behalf of Mr. Lynn, installed the nine pilings in the canal at various distances approximately 19 feet from Mr. Lynn's seawall and in the canal that divides Mr. Lynn's property from the MarineMax Property (and the fueling facility).[3/]

16. MarineMax timely challenged DEP's Request for Verification of Exemption from an Environmental Resource Permit.

Impact on Water Resources

17. MarineMax presented the testimony of Sam Lowrey, its corporate vice president of real estate, who had detailed knowledge of the layout of the MarineMax Property.

18. Mr. Lowrey testified that the canal between the MarineMax Property and Mr. Lynn's residential property is active with boating activity, noting that MarineMax's ERP allows up to 480 vessels on-site. With the installation of the pilings, he testified that he was concerned that MarineMax customers "will be uncomfortable navigating their boats through this portion of the canal[,]" which would be detrimental to MarineMax's business.

19. Mr. Lowery testified that he had no personal knowledge of whether MarineMax has lost any business since the installation of the pilings.

20. MarineMax also presented the testimony of Captain Ralph S. Robinson III, who the undersigned accepted as an expert in marine navigation, without objection.[4/] Captain Robinson has been a boat captain, licensed by the U.S. Coast Guard, since 1991. He has extensive experience captaining a variety of vessels throughout the United States and the Bahamas. He is an independent contractor and works for MarineMax and other marine businesses. Captain Robinson is also a retired law enforcement officer.

21. Captain Robinson testified that he was familiar with the waterways surrounding the MarineMax Property, as he has captained boats in those waterways several times a month for the past 15 years.

22. Captain Robinson testified that he has observed a number of boats with varying lengths and beams navigate these waterways, and particularly, the canal between the MarineMax Property and Mr. Lynn's property. Captain Robinson estimated that the beam of these boats range from eight to 22 feet. He also testified that the most common boats have a beam between eight and 10 feet.

23. Captain Robinson's first experience with the pilings in the canal occurred in April 2018, when he was captaining a 42-foot boat through the canal. He testified that an 85-foot boat was fueling on the fuel dock, and when he cleared the fueling boat and pilings, he had approximately one and a half feet on each side of his boat. He testified that "[i]t was very concerning."

24. Captain Robinson testified that since this experience in April 2018, he calls ahead to MarineMax to determine the number and size of boats in the portion of this canal that contains the pilings.

25. On behalf of MarineMax, in December 2018, Captain Robinson directed the recording of himself captaining a 59-foot Sea Ray boat with an approximately 15- to 16-foot beam through the canal separating the MarineMax Property and Mr. Lynn's residential property, with another boat of the same size parked at MarineMax's fueling dock.[5/] Captain Robinson testified that these two boats were typical of the boats that he would operate at the MarineMax Property and surrounding waterway.

26. The video demonstration, and Captain Robinson's commentary, showed that when he passed through the canal between the fuel dock (with the boat docked) and Mr. Lynn's residential property (with the pilings), there was approximately four to five feet on either side of his boat. Captain Robinson stated:

> This is not an ideal situation for a boat operator. Yes, it can be done. Should it be done? Um, I wasn't happy or comfortable in this depiction.

27. Captain Robinson testified that his "personal comfort zone" of distance between a boat he captains and obstacles in the water is five or six feet.

28. Ultimately, Captain Robinson testified that he believed the pilings in the canal between the MarineMax Property and Mr. Lynn's property were a "navigational hazard." Specifically, Captain Robinson stated:

> Q: In your expert opinion, has Mr. Lynn's pilings had more than a minimal, or insignificant impact on navigation in the canal, in which they are placed?
>
> A: I believe they're a navigational hazard. The impact, to me personally, and I'm sure there's other yacht captains that move their boat through there, or a yacht owner, not a licensed captain, um, that has to take a different approach in their operation and diligence, um, taking due care that they can safely go through. It's been an impact.
>
> Q: Is a navigational hazard a higher standard for you as a boat captain, being more than minimal or insignificant?
>
> A: Yes. A navigational hazard is, in my opinion, something that its position could be a low bridge or something hanging off a bridge, a bridge being painted, it could be a marker, it could be a sandbar, anything that is going to cause harm to a boat by its position of normal operation that would cause injury to your boat, or harm an occupant or driver of that boat.

29. Ms. Mills, the environmental specialist and program administrator with DEP's South District Office, testified that after MarineMax filed the instant Petition, she and another DEP employee visited Mr. Lynn's residential property. Although not qualified as an expert in marine navigation, Ms. Mills testified that, even after observing the placement of the pilings and the boating activity the day she visited, the pilings qualified for an exemption from the ERP.[6/]

CONCLUSIONS OF LAW

Jurisdiction

30. The Division has jurisdiction over the subject matter and the parties to this proceeding in accordance with sections 120.569 and 120.57(1), Florida Statutes.

Standing

31. Section 120.52(13) defines a "party," in pertinent part, as a person "whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party." Section 120.569(1) further 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."

32. In Agrico Chemical Corporation v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), the court held:

> 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.

33. Although DEP and Mr. Lynn disputed whether MarineMax has standing to bring the instant administrative law challenge in the Amended Joint Pre-hearing Statement, neither presented further argument at the final hearing, or in their Joint Proposed Recommended Order, concerning MarineMax's standing.

34. The undersigned concludes that MarineMax has standing to bring this administrative challenge. MarineMax has a substantial interest in the safe operation of boats into and out of the MarineMax Property. It has sufficiently alleged that the pilings in the canal between the MarineMax Property and Mr. Lynn's property could potentially result in a navigational hazard.

Nature of the Proceeding

35. This is a de novo proceeding, intended to formulate final agency action, and not to review action taken earlier and preliminarily. See Young v. Dep't of Cmty. Aff., 625 So. 2d 831, 833 (Fla. 1993); Hamilton Cnty. Bd. of Cnty. Comm'rs v. Dep't of Envtl. Reg., 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991); and

McDonald v. Dep’t of Banking & Fin., 587 So. 2d 569, 584 (Fla. 1st DCA 1977).

36. DEP approved Mr. Lynn’s Request for Verification of Exemption from an Environmental Resource Permit pursuant to chapter 373, Florida Statutes. Pursuant to section 120.569(2)(p), the burden of proof is as follows:

> 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 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.

37. In Pirtle v. Voss, Case No. 13-0515 (Fla. DOAH Sept. 27, 2013; Fla. DEP Dec. 26, 2013), the ALJ applied section 120.569(2)(p)’s burden-shifting requirements to an application for an exemption from an ERP to install mooring

pilings, concluding that the DEP's written determination is a licensure under chapter 373. The undersigned agrees that section 120.569(2)(p) applies to this proceeding, and conducted the final hearing in accordance with this statutory requirement.

Analysis

38. Mr. Lynn satisfied his prima facie case of entitlement to the Verification of Exemption from an Environmental Resource Permit by entering into evidence the complete electronic submission Request for Verification of Exemption from an Environmental Resource Permit, dated March 8, 2018, and DEP's written approval of his Request for Verification of Exemption from an Environmental Resource Permit, dated March 23, 2018. Additionally, Mr. Lynn and DEP presented the testimony of Mr. Lynn and Ms. Mills.

39. With Mr. Lynn having made his prima facie case, the burden of ultimate persuasion falls to MarineMax to prove its case in opposition to the approval of the Request for Verification of Exemption from an ERP by a preponderance of the competent and substantial evidence, and thereby prove that the pilings in question are more than a minimal impact on navigation.

40. DEP issued the approval of Mr. Lynn's Request for Verification of Exemption from an ERP pursuant to section 373.406(6), also known as the "de minimus" exemption, which provides:

> Any district of the department may exempt from regulation under this part those activities that the district or department determines will have only minimal or insignificant individual or adverse impacts on the water resources of the district. The district and the department are authorized to determine, on a case-by-case basis, whether a specific activity comes within this exemption. Requests to qualify for this exemption shall be submitted in writing to the district or department, and such activities shall not be commenced without a written determination from the district or department confirming that the activity qualifies for the exemption.

41. Section 403.813(1)(b), Florida Statutes, explains the criteria for an activity that is exempt from the need to obtain an ERP under part IV of chapter 373. Section 403.813(1)(b) states:

> (1) A permit is not required under this chapter, chapter 373, chapter 61-691, Laws of Florida, or chapter 25214 or chapter 25270, 1949, Laws of Florida, for activities associated with the following types of projects; however, except as otherwise provided in this subsection, this subsection does not relieve an applicant from any requirement to obtain permission to use or occupy lands owned by the Board of Trustees of the Internal Improvement Trust Fund or a water management district in its governmental or proprietary capacity or from complying with applicable local pollution control programs authorized under this chapter or

other requirements of county and municipal governments:

* * *

(b) The installation and repair of mooring pilings and dolphins associated with private docking facilities or piers and the installation of private docks, piers and recreational docking facilities, or piers and recreational docking facilities of local governmental entities when the local governmental entity's activities will not take place in any manatee habitat, any of which docks:

1. Has 500 square feet or less of over-water surface area for a dock which is located in an area designated as Outstanding Florida Waters or 1,000 square feet or less of over-water surface area for a dock which is located in an area which is not designated as Outstanding Florida Waters;

2. Is constructed on or held in place by pilings or is a floating dock which is constructed so as not to involve filling or dredging other than that necessary to install the pilings;

3. Shall not substantially impede the flow of water or create a navigational hazard;

4. Is used for recreational, noncommercial activities associated with the mooring or storage of boats and boat paraphernalia; and

5. Is the sole dock constructed pursuant to this exemption as measured along the shoreline for a distance of 65 feet, unless the parcel of land or individual lot as platted is less than 65 feet in length along the shoreline, in which case there may be one exempt dock allowed per parcel or lot.

Nothing in this paragraph shall prohibit the department from taking appropriate

> enforcement action pursuant to this chapter to abate or prohibit any activity otherwise exempt from permitting pursuant to this paragraph if the department can demonstrate that the exempted activity has caused water pollution in violation of this chapter.

42. MarineMax contends in its Proposed Recommended Order that "navigational hazard" is not the applicable standard for its challenge, and that instead, the undersigned should apply the "minimal or insignificant individual or cumulative adverse impacts on the water resources" standard enunciated in section 373.406(6). According to MarineMax, DEP's previous interpretations of equating "minimal or insignificant individual or cumulative impacts on the water resources" with the "navigational hazard" standard is not entitled to deference by the undersigned, see Art. V, § 21, Fla. Const., is inconsistent with Pirtle, and would constitute an unadopted rule.

43. The undersigned notes that MarineMax's expert, Captain Robinson, when asked whether the pilings at issue have "minimal or insignificant individual or cumulative impacts on the water resources," instead opined that they constitute a "navigational hazard."

44. The undersigned further notes that section 403.813(1)(b)3. specifically incorporates the "navigational hazard" prohibition as a criteria for DEP to

consider in determining whether an activity, such as the installation of mooring pilings, is exempt from an ERP.

45. However, the undersigned also notes that DEP's written approval of Mr. Lynn's Request for Verification of Exemption from an Environmental Resource Permit specifically states that DEP's determination is pursuant to section 373.406(6) and "is made because the activity, in consideration of its type, size, nature, location, use and operation, is expected to have only minimal or insignificant individual or cumulative adverse impacts on the water resources."

46. The undersigned concludes that MarineMax did not establish, by a preponderance of the evidence, that the pilings at issue have a significant impact on navigation. The gravamen of Captain Robinson's testimony was that the location of the pilings were not ideal, not within his "personal comfort zone," that he was not "happy or comfortable" with the pilings, and would require him, or other boat operators, to take a "different approach in their operation and diligence." Captain Robinson also opined that, when he captained the 59-foot Sea Ray boat with a 15- to 16-foot beam through the canal, with another boat of the same size parked at MarineMax's fueling dock, there was approximately four to five feet on either side of the boat, but that he would prefer five or six feet on either side.

47. Pirtle is distinguishable and does not provide support for MarineMax's position. In Pirtle, the closest distance between the T-shaped end of a dock (which operated as a marina) and the nearest mooring piling (that was the subject of an exemption from an ERP) was about eight and a half feet, meaning that only boats with a beam less than eight and a half feet could pass this point. Further, after DEP issued the authorization for exemption, it conducted a site inspection. During this site inspection, DEP employees had difficulty piloting their boat into and out of the slips on the T-shaped end of the dock, and had to be assisted by other DEP employees. Additionally, the ALJ found that marina owner's ability to operate his marina was substantially impaired by the pilings.

48. In contrast, Mr. Lynn's pilings, while being, at most, an inconvenience to operators of larger boats, causing MarineMax customers to exercise caution during ingress and egress through the canal separating the MarineMax Property and Mr. Lynn's property, and invading a distinguished and credible boat captain's "personal comfort zone," do not constitute the level of adverse impacts that the ALJ considered in Pirtle. Additionally, MarineMax presented no direct evidence of substantial impairment of its ability to operate its marina as a result of Mr. Lynn's pilings.

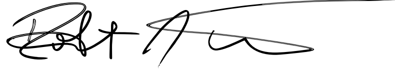
49. Further, the undersigned concludes that Mr. Lynn's pilings do not constitute a navigational hazard, as an inconvenience does not constitute a navigational hazard. See Shanosky v. Town of Ft. Myers Beach, Case No. 18-1940 (Fla. DOAH Nov. 20, 2018, Fla. DEP Jan. 2, 2019)("While it may create an inconvenience for Petitioners, or cause them to be more cautious during ingress and egress from their docks, the new dock will not create a navigational hazard."); Woolshlager v. Rockman, Case No. 06-3296 (Fla. DOAH May 7, 2007, Fla. DEP June 21, 2007)("mere inconvenience does not constitute the type of navigational hazard contemplated by the rule."); Scully v. Patterson, Case No. 05-0058 (Fla. DOAH April 14, 2005, Fla. DEP May 12, 2005).

50. The undersigned further concludes that Mr. Lynn met his burden and showed, by a preponderance of the evidence, that the pilings met the criteria set forth in section 373.406(6), and are therefore exempt from the need to obtain an ERP.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned recommends that DEP enter a final order dismissing MarineMax's challenge to the determination that Mr. Lynn's pilings qualify for an exemption from an environmental resources permit pursuant to its March 23, 2018, approval of Mr. Lynn's Request for Verification of Exemption from an Environmental Resources Permit.

DONE AND ENTERED this 28th day of March, 2019, in Tallahassee, Leon County, Florida.



ROBERT J. TELFER III
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of March, 2019.

ENDNOTES

[1/] Mr. Lynn also sought to introduce a recently conducted survey of his property at the final hearing. The undersigned declined to admit this document, as it was not disclosed to the other parties prior to the final hearing.

[2/] Mr. Lynn testified that, after preliminary discussions with representatives from MarineMax about these concerns, MarineMax erected signs in the canal to direct boats to turn around in other areas for safety purposes.

[3/] At the final hearing, Ms. Mills testified that while DEP's Verification was for installation of the pilings 16 1/2 feet off of Mr. Lynn's property, her opinion would not change if Mr. Lynn's Request for Verification of Exemption from an Environmental Resource Permit requested that the pilings be placed 19 feet off his property. Ms. Mills stated that "it's common for differences to exist between plans and reality. Things get installed slightly off based on installation techniques and site conditions." She further testified, "after reviewing the site conditions that the activity still qualifies for the exemption granted."

[4] Captain Robinson was the only expert witness to testify at the final hearing.

[5] In addition to a video recording of Captain Robinson on the boat for this presentation, Captain Robinson also utilized a drone, operated by another person, which provided an overhead video recording of this demonstration.

[6] Ms. Mills also explained DEP's process in concluding that Mr. Lynn's pilings project qualified for federal authorization pursuant to the State Programmatic General Permit V (SPGP). Although the parties, in their Amended Joint Pre-hearing Stipulation, agreed that the pilings are not located in sovereign submerged lands, and MarineMax and DEP agreed that the 25-percent rule with regard to encroachment in a navigable waterway as set forth in Florida Administrative Code Chapter 18-21, did not apply to this case, the undersigned finds Ms. Mills's testimony concerning SPGP authorization, which included an analysis of the 25-percent rule, to be relevant to DEP's granting of the exemption.

COPIES FURNISHED:

Richard S. Brightman, Esquire
Hopping, Green and Sams, P.A.
Post Office Box 6526
Tallahassee, Florida 32314
(eServed)

Larry Kenneth Lynn
111 Placid Drive
Fort Myers, Florida 33919
(eServed)

Lorraine Marie Novak, Esquire
Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399
(eServed)

Amelia A. Savage, Esquire
Hopping, Green and Sams, P.A.
Post Office Box 6526
Tallahassee, Florida 32314-6526
(eServed)

Felicia L. Kitzmiller, Esquire
Hopping Green & Sams, P.A.
Post Office Box 6526
Tallahassee, Florida 32314
(eServed)

Lea Crandall, Agency Clerk
Department of Environmental Protection
Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000
(eServed)

Noah Valenstein, Secretary
Department of Environmental Protection
Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000
(eServed)

Justin G. Wolfe, Interim General Counsel
Department of Environmental Protection
Legal Department, Suite 1051-J
Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000
(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.

RECEIVED
April 22, 2019
Dept. of Environmental Protection
Office of General Counsel

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

MARINEMAX, INC.

Petitioner,

vs. OGC Case No. 18-0204
DOAH Case No. 18-2664

LARRY LYNN AND DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondents.
_______________________________________/

MARINEMAX, INC.'S EXCEPTIONS TO THE RECOMMENDED ORDER

Pursuant to subsection 120.57(1)(k), Florida Statutes (2018), and Rule 28-106.217, *Florida Administrative Code*, Petitioner MarineMax, Inc. (MarineMax), by and through undersigned counsel, hereby respectfully files these exceptions to the Recommended Order (RO) entered by the Administrative Law Judge (ALJ) in this proceeding on March 28, 2019.

INTRODUCTION

This proceeding involves a petition challenging the Florida Department of Environmental Protection (DEP) approval of an Environmental Resource Permit exemption to Larry Lynn (Lynn) pursuant to subsection 373.406(6), Florida Statutes. The exemption was for the installation of nine pilings in a canal that runs between Lynn's property and the commercial marina operated by MarineMax. This exception to the environmental resource permitting criteria is reserved for projects that will have "only minimal or insignificant individual or cumulative adverse impacts on the water resources of the district." § 373.406(6), Fla. Stat. This is commonly referred to as the "*de minimus*" exception. MarineMax timely filed a petition challenging the exemption on the basis that the pilings had more than a minimal or insignificant effect on

navigation in the canal, and free and safe navigation of the canal is protected under the law as a water resource of the district/DEP. A hearing was held on this matter January 10, 2019[1], and the parties timely filed proposed recommended orders.

As noted in detail below, MarineMax disputes a number of conclusions of law contained in the Recommended Order in this case. MarineMax contends the ALJ improperly created a link between subsection 373.406(6), Florida Statutes, under which Lynn's exemption was granted, and the discrete categorical exemptions created in subsection 403.813(1), Florida Statutes, none of which apply to Lynn's pilings, or were cited by DEP as justification for the exemption. The ALJ further incorrectly implied that a marina petitioner must be economically harmed in order to prove the *de minimus* exemption was improperly applied by DEP. With regard to navigation, the ALJ misconstrued testimony by the MarineMax navigational expert, misapplied the navigational standard in the case, and failed to consider the *cumulative* impacts of the pilings—which, it will be shown below, have the potential to render navigation of the canal impossible for some vessels under expected, and permissible, circumstances.

---

[1] Because the Division of Administrative Hearings (DOAH) has forwarded a complete transcript of the hearing as well as the record, including exhibits, to the DEP, no transcript of the proceedings is being submitted with these exceptions. Citations to the transcript of the final hearing will be shown by a "Tr." followed by the referenced page number(s) and line number(s) e.g., Tr. 250: 12, and citations to exhibits introduced into evidence at the final hearing will be shown by the exhibit number, followed by a page number, where appropriate e.g., "MMax Ex. __." Citation to the Recommended Order will be to the paragraph number(s) and page number(s) e.g., "RO Paragraph 40, page 15."

It should be noted the transcript of the January 10 hearing is garbled in several places. Page 23 of the transcription captures a discussion between DEP counsel and the court reporter with respect to the difficulty the court reporter had in hearing the proceedings. Re-transcription of the proceedings was not possible as the court reporting service advised counsel for MarineMax the audio of the proceedings was deleted immediately following transcription. Where the transcription is nonsensical and does not accurately reflect the character of what was said, a correction based on the best recollection and notes of several hearing attendees will be provided as a parenthetical notation.

STANDARD OF REVIEW

Subsection 120.57(1)(l), Florida Statutes, provides that an agency "may not reject or modify the findings of fact" unless the agency first determines that (1) "the findings of fact were not based upon competent substantial evidence" or (2) "the proceedings on which the findings were based did not comply with essential requirements of law." As to conclusions of law, that same provision provides that "the agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction." *Id*.

An agency has the primary responsibility of interpreting statutes, rules and orders within its regulatory jurisdiction and expertise. *See*, *e.g*., *Pub. Emps. Rels. Comm'n v. Dade Cnty. Police Benevolent Ass'n*, 467 So. 2d 987, 989 (Fla. 1985); *Fla. Pub. Emp. Council 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994). 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).

MARINEMAX EXCEPTIONS

Exception 1 - The Finding of Fact at RO Paragraph 19, page 9 must be rejected because there is no competent substantial evidence in the record to support this finding, and it is irrelevant to the issue of navigation.

During the hearing, counsel for DEP asked Sam Lowrey, MarineMax Vice President of Real Estate, about whether Lynn's pilings have had a financial impact on the Fort Myers location. Lowrey declined to answer the question.

> Q: Do you know whether MarineMax has lost any business?
>
> A: That would be tough to quantify. I, um -- I can tell you that the perception, um, that we're hearing from our customers is of concern of – for the assessability (sic) of the property.

> Q: But you don't -- do you know of any specific instance where someone, a customer said --
>
> A: I don't have personal knowledge of that.

Tr. 100:10-18.

Counsel for DEP then continued to press Lowrey to disclose confidential financial information regarding the company.

> Q: Um, last year 2017, I don't know if you have Marine Max's numbers in yet, do you know whether 2017 for Marine Max in Fort Myers was a good year for profitability or not?
>
> A: Being a publicly traded company, I would refer you to our SECC filings, and you can certainly see, um, what our total company performance looks like. Um, but not on -- not to discuss on an individual store basis. I don't believe that's appropriate. (This is a mistranscription. Lowrey said, "I'm not at liberty to discuss on an individual store basis.")
>
> Q: Can you tell me if whether ReMax (sic) Fort Myers made money last year?
>
> A: No.
>
> Q: Can you tell me Marine Max lost money in Fort Myers?
>
> A: No.

Tr. 101:1-16.

Contrary to the finding of fact as stated by the ALJ (RO Paragraph 19, Page 9), Lowrey did not say he had no personal knowledge of whether MarineMax has lost business since the installation of Lynn's pilings. He testified as to general customer concerns of which he is aware and declined to answer questions regarding the MarineMax Fort Myers' specific financial status, which could improperly divulge information of a publicly-traded corporation.

Further, as will be further discussed in Exception 7, should the DEP find this fact supported by competent substantial evidence, it should be disregarded as dicta because the role

this fact plays in resolving this case is a conclusion of law over which this agency has substantial jurisdiction. Legally, this finding of fact has no proper role in the determination of this case. Significant case law finds economic interests are not protected by Chapter 373, Part IV, Florida Statutes. *See Vill. of Key Biscayne v. Dep't of Envtl. Prot.*, 206 So. 3d 788, 791 (Fla. 3d DCA 2016); *Mid-Chattahoochee River Users v. Fla. Dep't of Envtl. Prot.*, 948 So. 2d 794, 797 (Fla. 1st DCA 2006); *Save Anna Maria, Inc. v. Dep't of Transp.*, 700 So. 2d 113 (Fla. 2d DCA 1997); *Sunrise v. S. Fla. Water Mgmt. Dist.*, 615 So. 2d 746, 747 (Fla. 4th DCA 1993). The protected interest at stake in these proceedings is navigation. The financial standing of MarineMax, and any money that may have been gained or lost as a result of Lynn's pilings, is irrelevant to the issue of free and safe navigation.

Exception 2 - MarineMax takes exception to Footnote 6 found on Page 23 of the RO. The assertion that the "25 percent rule" contained within the State Programmatic General Permit authorization has any bearing on application of the *de minimus* exception of subsection 373.406(6), Florida Statutes, is erroneous and must be rejected by the DEP.

While this footnote is associated with a finding of fact (RO Paragraph 29, page 12), it is in fact a conclusion of law within the substantive jurisdiction of the agency,[2] and therefore can be reversed by the agency at its discretion. Florida courts have long held that the label affixed to a statement in a recommended order is not dispositive of whether or not the statement is a conclusion of law or a finding of fact. *See Kinney v. Dep't of State*, 501 So.2d 129 (Fla. 5th DCA 1987); *Heifetz v. Dep't of Bus. Reg.*, 475 So.2d 1277 (Fla. 1st DCA 1985). Regardless of label, an agency may reject a legal conclusion, even though the statement is placed in the portion of the recommended order captioned "findings of fact." *Sapp v. Fla. State Bd. of Nursing*, 384 So.2d 254 (Fla. 2d DCA 1980).

[2] MarineMax does not take exception to the true finding of fact this endnote is associated with at RO Paragraph 29, page 12.

The State Programmatic General Permit V allows DEP to administer permitting under Section 404 of the Clean Water Act in limited circumstances. One of the criteria for a project to be eligible for State Programmatic General Permit V is that its protrusion into the waterway is less than 25 percent of the width of the waterway. During the hearing, Megan Mills, DEP's South District Program Administrator (DEP Ex. 1), testified that she approved Lynn's exemption (Tr. 54:22-55:9), and she laid out the criteria against which each section of the exemption was evaluated.[3] Tr. 62:1-22. During that testimony, Mills stated only that the procedures for processing exemption requests as outlined in Chapter 62-330, *Florida Administrative Code*, and the "specific exemption this was found to be compliant with," subsection 373.406(6), Florida Statutes, were evaluated in determining the first section of the permit – exemption from the ERP program. *Id*. Mills went on to testify:

> But I think at the location they [Lynn's pilings] were proposed, **I don't believe a specific analysis on navigation was performed**. However, for the Federal review, um, under SPG's permit instrument, in order to qualify they would need to meet no more than the 25 percent encroachment into the water body. So it's kind of done, but **it's done for purpose of the Federal review**.

Tr. 64:17-25 (emphasis added)[4].

The ALJ's statement that "Ms. Mills's testimony concerning SPGP authorization, which included an analysis of the 25-percent rule, to be relevant to DEP's granting of the exemption," is erroneous. This conclusion of law should be overturned by the DEP, for

[3] Lynn's permit exemption was evaluated in three categories – 1) Regulatory Review to determine whether there was an applicable exemption from the ERP program; 2) Proprietary Review to determine the applicability of rules governing sovereign submerged land; and 3) SPGP Review to determine whether the project qualifies for approval by DEP, or whether a separate permit from the Army Corps of Engineers will be required.

[4] *See also* Tr. 66:8-10 where Mills states, "I can't say that navigation was specifically considered in the review of the criteria under Section 373.406."

three reasons: First, it contradicts Mills's own testimony that navigation was not considered in the granting of Lynn's regulatory exemption.[5] Second, because it infers encroachment into less than 25 percent of a waterway is *per se* "minimal or insignificant." As DEP does not have a rule defining "minimal or insignificant," much less defining it in this way, if DEP adopts this statement in its Final Order, such an application would amount to impermissible unadopted rule policy. § 120.57(1)(e)1., Fla. Stat. Third, the conclusion of law is inconsistent with the DEP's reasoning in *Pirtle v. Voss*, DOAH Case No. 13-0515 (Fla. DOAH Sept. 27, 2013; Fla. DEP Dec. 26, 2013).

Though the circumstances in *Pirtle* mirror those in this case—mooring pilings installed 20 feet off a residential dock constricted a waterway impairing operation of an adjacent marina and were found not to qualify for the granted ERP exemption under subsection 373.406(6), Florida Statutes,—neither the ALJ nor DEP equated or conflated the 25 percent rule to an evaluation of navigation under this exemption. Where agency policy interprets or describes the procedure and practice requirements of the agency, such as equating less than 25 percent encroachment on a waterbody with a "minimal or insignificant" effect on navigation, it is considered a rule that can only be changed through rulemaking. *Gabba-Leaf, LLC v. Dep't of Bus. & Prof'l Regulation, Div. of Alcoholic Bevs. & Tobacco*, 257 So. 3d 1205, 1208 (Fla. 1st DCA 2018).

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[5] By Mill's own words, DEP failed to consider navigation in initially reviewing Lynn's application for exemption. Navigation is a water resource of the district, *Pirtle v. Voss*, DOAH Case No. 13-0515 (Fla. DOAH Sept. 27, 2013; Fla. DEP Dec. 26, 2013), and by failing to consider navigation during the exemption review, DEP did not ensure there was only a "minimal or insignificant effect on water resources of the district."

<u>Exception 3</u> - MarineMax takes exception to the conclusion of law found at RO Paragraph 41, page 16 that outlines the statutory provisions for ERP exemptions under subsection 403.813(1)(b), Florida Statutes, because it is irrelevant.

Paragraph 41 should be disregarded by the DEP in its analysis of this case because subsection 403.813(b)(1), Florida Statutes, has no appropriate application to this case. Lynn's exemption was granted under subsection 373.406(6), Florida Statutes. By its own words, the subsection outlined by the ALJ in this paragraph applies only to "activities associated with the following types of projects." § 403.813(1), Fla. Stat. As was stated by Mills, Lynn's project did not qualify for any of the exemptions listed in this subsection. Tr. 63:17-24. The ALJ seems to cite this statute in grounding the following paragraph addressing the applicable standard for evaluating navigation under subsection 373.406(6), Florida States.[6] However, subsection 403.813(1)(b), Florida Statutes, has no bearing on this case or exemptions issued pursuant to subsection 373.406(6), Florida Statutes.

<u>Exception 4</u> - MarineMax takes exception to RO Paragraph 42, page 18 because it mischaracterizes the legal argument raised by MarineMax and incorrectly states that DEP has previously equated "minimal or insignificant individual or cumulative impacts on the water resources" with "navigational hazard."

Paragraph 42 of the RO states in relevant part "[a]ccording to MarineMax, DEP's previous interpretations of equating 'minimal or insignificant individual or cumulative impacts on the water resources' with the 'navigational hazard' standard is not entitled to deference by the undersigned." However, it is not—and never has been—MarineMax's position that DEP has previously equated these two standards.[7] In fact, it is MarineMax's position that the DEP in the

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[6] Exceptions to the analysis of the applicable navigation standard will follow at Exceptions 8 and 9.

[7] Paragraph II.A. of the Amended Pre- Hearing Stipulation filed on January 3, 2019 states in relevant part "MarineMax states . . . the standard for consideration of impacts is whether or not the pilings have more than a minimal or insignificant impact on navigation." Counsel for

past has, correctly, applied these as separate standards. For example, in *Pirtle v. Voss*, DOAH Case No. 13-0515, the ALJ concluded both an exemption from the ERP process under subsection 373.406(6), Florida Statutes, and an authorization to use sovereign submerged lands were inappropriately issued. In analyzing the ERP exemption, the ALJ wrote, "Pirtle proved by a preponderance of the evidence that the mooring pilings adversely impact navigation and the impact is neither minimal nor insignificant. Therefore, the pilings do not qualify for the exemption under Section 373.406(6)." Later in the *Pirtle* recommended order, the ALJ found that Rule 18-21.004(7), *Florida Administrative Code*, prohibits projects on sovereign submerged lands where they create a navigational hazard. *Id*. at 10. In analyzing the sovereign submerged lands authorization, the ALJ wrote, "Voss's mooring pilings do not qualify for a consent by rule because they create a navigational hazard." *Id*. at 11. This recommended order was adopted in full by the DEP. Therefore, it is clear that "minimal or insignificant" and "navigational hazard" are separate navigational standards.

In its Final Order, DEP should clarify that the applicable standard under subsection 373.406(6), Florida Statutes, is whether or not a project will have **more than a minimal or insignificant** impact on water resources, including navigation. While "navigational hazard" is a standard defined in case law, those definitions are unhelpful in interpreting the express standard of subsection 373.406(6), Florida Statutes, and are not applicable to this proceeding.

MarineMax included this applicable standard in her opening statement at the administrative hearing. Tr. 29:2-8. And Paragraph 46 of MarineMax's Proposed Recommended Order reiterates this position.

__Exception 5__ **- MarineMax takes exception to RO Paragraph 43, page 18 to the extent that it fails to fully and fairly capture the testimony of the expert witness and therefore may lead to an erroneous legal conclusion.**

The ALJ correctly states that the expert witness opined Lynn's pilings create a navigational hazard. However, the RO fails to account for the follow-up question by MarineMax counsel to clarify this statement, which was quoted by the ALJ in the previous finding of fact in Paragraph 28.

> Q: Is a navigational hazard a higher standard for you as a boat captain, being more than minimal or insignificant?
>
> A: Yes. A navigational hazard is, in my opinion, something that its position could be a low bridge or something hanging off a bridge, a bridge being painted, it could be a marker, it could be a sandbar, anything that is going to cause harm to a boat by its position of normal operation that would cause injury to your boat, or harm to an occupant or driver of that boat.

Tr. 151:18-152:3; RO Paragraph 28, page 11.

The omission of this follow-up exchange in the conclusion of law in Paragraph 43 leaves the RO vulnerable to the interpretation that the expert witness felt the pilings were a "navigational hazard" but did not have "more than a minimal or insignificant" effect on navigation. In fact, when one reads the entire exchange in the transcript as quoted in Paragraph 28, the expert opined the pilings created **more than** a minimal or insignificant effect on navigation, rising even to the level of a navigational hazard. In its Final Order, DEP should correct the language in Paragraph 43 so as to prevent the statement from being taken out of context to support a finding that "navigational hazard" is less stringent of a standard than having "more than a minimal or insignificant" effect on navigation.

<u>Exception 6</u> - MarineMax takes exception to RO Paragraph 44, page 18 again addressing the navigational hazard standard found in subsection 403.813(1)(b), Florida Statutes, which is not applicable to this case.

As previously discussed at length in Exception 3, subsection 403.813(1)(b), Florida Statutes, has no applicability to this case as the exemption in question was granted under subsection 373.406(6), Florida Statutes. The Final Order should strike this paragraph in its entirety.

<u>Exception 7</u> - MarineMax takes exception to RO Paragraphs 47 and 48, page 20 and the reliance on business impacts to distinguish this case from relevant precedent and argue in favor of the exemption.

The ALJ attempts to distinguish this case from *Pirtle v. Voss*, DOAH Case No. 13-0515, by stating that in *Pirtle* "the ALJ found that marina owner's ability to operate his marina was substantially impaired by the pilings." RO Paragraph 47, page 20. The ALJ goes on to write, "MarineMax presented no direct evidence of substantial impairment of its ability to operate its marina as a result of Mr. Lynn's pilings," presumably in reliance of the improper finding of fact in Paragraph 19 focusing on the economic impact to MarineMax, as opposed to the navigation concerns raised by MarineMax in this proceeding. RO Paragraph 48, page 20. This presents a legal conclusion that business or economic interests should play a role in determining whether this permit exemption was properly granted. Any such conclusion is erroneous. As it is fully discussed in Exception 1, business and economic interests are not protected under Chapter 373, Part IV, Florida Statutes. *See Vill. of Key Biscayne v. Dep't of Envtl. Prot.*, 206 So. 3d 788, 791 (Fla. 3d DCA 2016); *Mid-Chattahoochee River Users v. Fla. Dep't of Envtl. Prot.*, 948 So. 2d 794, 797 (Fla. 1st DCA 2006); *Save Anna Maria, Inc. v. Dep't of Transp.*, 700 So. 2d 113 (Fla. 2d DCA 1997); *Sunrise v. S. Fla. Water Mgmt Dist.*, 615 So. 2d 746, 747 (Fla. 4th DCA 1993).

MarineMax did not present evidence of the effect of the pilings on its business operations because such evidence is irrelevant in this specific proceeding.[8]

The protected interest at stake is free and safe navigation of the canal, and MarineMax presented substantial evidence regarding the significant deleterious effect of the pilings on navigation. Jt. Ex. 6 (demonstrating the narrowing nature of the canal that constricts in the exact location of the pilings); Jt. Ex. 3 (outlining the size and placement of boats that MarineMax has been permitted for at its facility); MMax Ex. 9 and 10 (showing the close quarters created when an average-sized boat needed to pass another vessel parked at the MarineMax fuel dock); Tr. 131:4-132 (during which marine navigation expert Captain Ralph Robinson discusses his difficulty navigating a boat through the canal where he had only a foot and a half of clearance on either side); Tr. 148:13-149:19 (during which Captain Robinson talks about needing to take extra crew on his boats when navigating past the pilings, to put out fenders and to avoid damage to the vessel, and his conversations with other boat operators regarding the navigational challenges of the pilings); Tr. 151:6-152:3 (during which Captain Robinson describes the pilings as a navigational hazard – an obstacle that "by its normal operation that would cause injury to your boat, or harm to an occupant or driver of that boat"); and Tr. 161:8-23 and 177:11-24 (in which, on cross examination, Captain Robinson testifies to a wreck involving a boat and Lynn's pilings).

[8] Regardless, the impact Lynn's pilings have had on MarineMax operations was discussed at the hearing in this case. Mr. Lowrey testified there has been an effect on the ability to operate the marina (Tr. 89:10-90:19); and Captain Ralph Robinson talked about delays and the need for sales staff to take time away from making sales to move boats to accommodate movement within the canal. (Tr. 174:3-175:25).

<u>Exception 8</u> - MarineMax takes exception to the conclusions of law at RO Paragraphs 48 and 49, pages 20-21 that state Lynn's pilings constitute only an inconvenience as this conclusion, at a minimum, fails to account for the cumulative impacts of the pilings in the canal.

Evidence was presented, and the ALJ notes, that with a 15-to-16-foot-beam boat parked at the MarineMax fueling station, a boat of the same size had four-to-five feet on either side when passing through the opening. RO Paragraph 46, page 19; MMax Exs. 9 and 10. This means that the width of the canal between Lynn's pilings and the MarineMax fuel dock is approximately 38 to 42 feet. If a large boat were parked at the fuel dock, for example one of the 85-foot-long boats with 23-foot beams that MarineMax is authorized to have on site (Jt. Ex. 3 at 31),[9] that would leave 15 to 19 feet between the side of the boat and Lynn's pilings. This is not wide enough for many of the boats that regularly use the canal to pass through. RO Paragraph 22, page 9 (stating, "Captain Robinson testified that he has observed a number of boats with varying lengths and beams navigate these waterways, and particularly, the canal between the MarineMax Property and Mr. Lynn's property. Captain Robinson estimated that the beam of these boats range from eight to 22 feet").

The above scenario creates a situation in which the canal will be completely unnavigable for at least some boats—including some that are permitted for permanent dockage to the east of Lynn's marina—when a large boat is taking on fuel at MarineMax's fuel dock.[10] For a boat—

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[9] There are no restrictions in any of MarineMax's permits regarding the size of boats that are permitted to fuel at the fuel dock (Tr. 85:15-25), and it is the reasonable expectation of MarineMax and its customers that boats kept at the marina will be able to use the fueling facilities on-site. *See* Tr. 86:1-13.

[10] During the hearing, Lowrey testified MarineMax is permitted for at least one boat slip to the east of Lynn's property that is 75 feet in length. Tr. 84:14-19; MMax Ex. 3 at 29. A boat of that length would have about a 20- or 21-foot beam. Tr. 85:1-6. Such a boat would need to pass by Lynn's pilings for ingress and egress to the larger waterway (Jt. Ex. 6), and would not be able to do so in some situations such as when a large boat is fueling on the fuel docks. This is analogous to the situation in *Pirtle*, where the ALJ observed, "The difficult and unsafe situation created by

which is authorized to dock east of Lynn's pilings, or which needs to traverse the canal to get to a dry dock—to be completely prohibited from all navigation past Lynn's pilings for the length of time it takes for a large boat to refuel at MarineMax's fuel dock is certainly more than a minimal or insignificant effect on navigation. The ALJ erred in failing to consider the size of the boats that are authorized to use the MarineMax marina, and failed to consider the MarineMax fuel docks are open for public use. The exemption at subsection 373.406(6), Florida Statutes, requires that projects have a "minimal or insignificant individual ***or cumulative*** adverse impacts on the water resources of the district" (emphasis added). According to the ERP Applicant's Handbook, cumulative impacts are assessed in light of "[p]rojects that are existing or activities regulated under Part IV, Chapter 373, F.S." Section 10.2.8(c), ERP Applicant's Handbook, Vol. 1 (June 2018). The cumulative impacts analysis "asks the question whether the proposed system (project), considered in conjunction with past, present, and future activities, would be the proverbial 'straw that breaks the camel's back.'" Section 10.2.8.1, A.H. (vol.1). In isolation, Lynn's pilings may have been "at most, an inconvenience to operators of larger boats, causing customers to exercise caution during ingress and egress;" however, when the cumulative impacts of the pilings are assessed in light of previously authorized activities, the pilings lead to, at least, more than a minimal or insignificant impact, and at most, the total elimination of navigability in the canal for some permitted vessels for significant periods of time.

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the mooring pilings would be obvious to boat owner considering whether to lease one of the south slips . . . The south slips would be unattractive to potential customers of the marina. Pirtle's ability to operate the south side of his marina is substantially impaired by Voss's pilings."

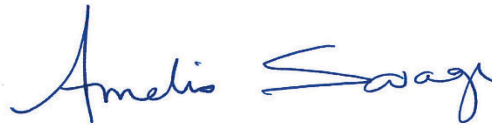
<u>Exception 9</u> - MarineMax takes exception to the conclusion of law in RO Paragraph 49, page 21 that judges Lynn's pilings against the standard of a navigational hazard.

As has previously been discussed in depth at Exceptions 3, 4, 5, and 6, navigational hazard is a standard for evaluating navigation pursuant to exemptions granted under subsection 403.813(1)(b), Florida Statutes, and in the proprietary review of sovereign submerged land uses. It is not, however, the navigational standard that applies to the exemption issued in this case under subsection 373.406(6), Florida Statutes. This statutory provision specifically uses the phrase "minimal or insignificant" as the standard by which a project's effect on navigation should be measured. The legislature could have chosen to use the navigational hazard standard for the *de minimus* exemption, but chose not to, which leads to the conclusion that these are different standards. *See e.g.*, *Maddox v. State*, 923 So. 2d 442, 446 (Fla. 2006); *McCarthan v. Dir. Or Goodwill Indust.-Suncoast*, 851 F. 3d 1076, 1079 (11th Cir. 2017).

CONCLUSION

For the reasons discussed above, the DEP should reverse the ALJ's recommended order and deny Lynn's application for exemption, and order Lynn to remove the pilings.

Respectfully submitted this 22nd day of April, 2019.



Amelia Savage (Fla. Bar No. 26967)
Email: amelias@hgslaw.com
Richard S. Brightman (Fla. Bar No. 347231)
Email: richardb@hgslaw.com
Felicia L. Kitzmiller (Fla. Bar No. 1010258)
Email: feliciak@hgslaw.com
HOPPING GREEN & SAMS, P.A.
P.O. Box 6526
Tallahassee, Florida 32314-6526
Tel: 850-222-7500; Fax: 850-224-8551

Attorneys for MarineMax, Inc.

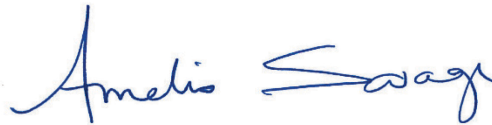
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically served on this 22nd day of April, 2019, to the following:

Lea Crandall, Clerk
lea.crandall@dep.state.fl.us
Agency_clerk@dep.state.fl.us
Office of General Counsel
Department of Environmental Protection
3900 Commonwealth Blvd.
Tallahassee, FL 32399-3000

Lorraine M Novak
Lorraine.M.Novak@dep.state.fl.us
Office of General Counsel
Department of Environmental Protection
3900 Commonwealth Blvd.
Tallahassee, FL 32399-3000

Larry Lynn
rockyandpr@aol.com
111 Placid Drive
Fort Myers, FL 33919



Attorney

RECEIVED
May 2, 2019
Dept. of Environmental Protection
Office of General Counsel

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

MARINEMAX, INC,

Petitioner,

vs. **DOAH CASE NO.: 18-2664**
OGC CASE NO.: 18-0204

LARRY LYNN and
STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondents.

_________________________________/

DEPARTMENT OF ENVIRONMENTAL PROTECTION'S RESPONSES TO PETITIONER MARINEMAX, INC.'S EXCEPTIONS TO RECOMMENDED ORDER

Respondent, State of Florida Department of Environmental Protection, (Department), pursuant to rule 28-106.217 of the Florida Administrative Code (F.A.C.) and section 120.57(1)(k) of the Florida Statutes (Fla. Stat.), hereby submits the following responses to the Exceptions to the Recommended Order filed in this proceeding by Petitioner Marinemax, Inc. on April 22, 2019, and in support thereof states as follows:

ABBREVIATIONS

Department, DEP	Department of Environmental Protection
TR	Transcript
ALJ	Administrative Law Judge

INTRODUCTION

Petitioner correctly notes the procedural history of this case. While the exemption granted by the DEP is commonly known as the "*de minimus*" exemption under 373.406(6), Fla. Stat., there was also testimony given by witnesses for all sides at the hearing, and substantial discussion in the Recommended Order ("RO"), of the effects of the pilings in question, as to whether they created

a navigational hazard or something less. The record and RO do at times cite both standards. However, it is clear from the ALJ's order that he was responding, in an abundance of caution, to all arguments and evidence presented at trial. Given the dire warnings by Petitioner about the effects of the pilings, the ALJ merely made it clear that under both standards, minimal/insignificant/cumulative adverse impacts, or navigational hazard, these pilings did not cause actual or potential problems or impacts on water traffic through this portion of the canal. Simply put, the ALJ weighed and balanced the evidence put before him, and found it wanting from the Petitioner as far as what would be sufficient to invalidate the Department's approval of an Environmental Resource Permit exemption.

Additionally, although this argument was not pursued vigorously at trial, DEP did not concede to MarineMax, Inc.'s standing. Questioning to elicit some substantial impact to MarineMax, Inc. from these pilings, went not only to the question of standing, but given MarineMax, Inc.'s expert witness' testimony regarding the pilings and how they were "concerning," questioning on and analysis by the ALJ of whether any harm at all, whether minimal on up to a full-blown navigational hazard, was entirely appropriate. The ALJ, as a finder of fact, evaluated the evidence and found nothing showing these pilings created any problems beyond temporary inconvenience, or that they caused MarineMax's expert witness to be out of his "personal comfort zone" when navigating boats through this stretch of the canal.

STANDARD OF REVIEW

Under sections 120.569 and 120.57, Fla. Stat., the ALJ is the finder of fact in a formal administrative proceeding. The ALJ has the exclusive authority "to consider all the evidence presented, resolve conflicts, judge the credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate Findings of Fact based on competent, substantial evidence."

Goin v. Comm'n on Ethics, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995) (quoting Heifetz v. Dep't of Bus. Reg., 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985)); see also, Belleau v. DEP, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997).

Section 120.57(1)(l), Fla. Stat., provides that an agency "may not reject or modify the findings of fact" unless the agency first determines that (1) "the findings of fact were not based upon competent substantial evidence" or (2) "the proceedings on which the findings were based did not comply with essential requirements of law." Therefore, ALJ findings of fact "become binding upon an agency unless it finds they are not supported by competent substantial evidence[.]" Fla. Dep't of Corr. v. Bradley, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987); see also, Charlotte Cty v. IMC Phosphates Co., 18 So. 3d 1089, 1092 (Fla. 2d DCA 2009). "Competent substantial evidence is 'such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred (or) . . . such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.'" Duval Util. Co. v. Fla. Pub. Serv. Comm'n, 380 So. 2d 1028, 1031 (Fla. 1980) (quoting De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957)); see also, Heifetz, 475 So. 2d at 1281. "The term 'competent substantial evidence' does not relate to the quality, character, convincing power, probative value or weight of the evidence." Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996). Rather, "competent substantial evidence" refers to having some supporting admissible evidence for a finding. Id.

"[F]actual issues susceptible of ordinary methods of proof that are not infused with [agency] policy considerations are the prerogative of the [ALJ] as the finder of fact." See Martuccio v. Dep't of Prof'l Regulation, Bd. of Optometry, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); Heifetz, 475 So. 2d at 1281. "[I]f there is competent substantial evidence supporting an

administrative law judge's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting the contrary finding." Lane v. Int'l Paper Co., DOAH Case No. 01-1490 (DOAH Aug. 2001); OGC Case No. 01-0582, 2001 WL 1917274, at *4 (FDEP Final Order, Oct. 8, 2001) (citing Arand Constr. Co. v. Dyer, 592 So. 2d 276, 280 (Fla. 1st DCA1991); Conshor, Inc. v. Roberts, 498 So. 2d 622 (Fla. 1st DCA 1986)). Accordingly, "the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of competent substantial evidence of record supporting the decision." Parham v. DEP, DOAH Case No. 08-2636 (DOAH Dec. 2008); OGC Case No. 080521, 2009 WL 736938, at *3 (DEP Final Order, Mar. 2009) (citing Collier Med. Ctr. v. Dep't of Health & Rehab. Servs., 462 So. 2d 83, 85 (Fla. 1st DCA 1985); Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n, 436 So. 2d 383, 389 (Fla. 5th DCA 1983)).

A state agency reviewing an ALJ's recommended order likewise has no authority to make independent and supplementary findings of fact to support conclusions of law in the agency final order. See Florida Power & Light Co. v. State of Florida, Siting Bd., 693 So. 2d 1025, 1026-27 (Fla. 1st DCA 1997); Boulton v. Morgan, 643 So. 2d 1103 (Fla. 4th DCA 1994); Manasota 88, Inc. v. Tremor, 545 So. 2d 439, 441 (Fla. 2d DCA 1989) (citing Friends of Children v. Dep't of Health and Rehab. Servs., 504 So. 2d 1345 (Fla. 1st DCA 1987)). "The agency's scope of review of the facts is limited to ascertaining whether the [ALJ's] factual findings are supported by competent substantial evidence." City of N. Port v. Consol. Minerals, Inc., 645 So. 2d 485, 487 (Fla. 2d DCA 1994).

"The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction." § 120.57(1)(l), Fla. Stat. An agency has the primary responsibility of interpreting

statutes and rules within its regulatory jurisdiction and expertise. See, e.g., Pub. Emps. Rels. Comm'n v. Dade Cnty. Police Benevolent Ass'n, 467 So. 2d 987, 989 (Fla. 1985); Fla. Pub. Emp. Council 79 v. Daniels, 646 So. 2d 813, 816 (Fla. 1st DCA 1994). As to those matters agencies are afforded substantial deference, and 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, 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

An agency's review of legal conclusions is, however, restricted to matters within the agency's field of expertise. See, e.g., G.E.L. Corp. v. DEP, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004). Agencies do not have substantive jurisdiction to reject discovery, procedural or evidentiary rulings. Barfield v. Dep't of Health, 805 So. 2d 1008, 1011-12 (Fla. 1st DCA 2001). Agencies also lack authority to modify or reject conclusions of law that apply general legal concepts typically resolved by judicial or quasi-judicial officers. See, e.g., Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140, 1142 (Fla. 2d DCA 2001).

Specific Responses to Petitioner's Exceptions.

Petitioner's Exception 1.

In Exception 1, MarineMax, Inc. takes issue with the line of questioning regarding any economic harm to MarineMax due to these pilings. Given the dire warnings by MarineMax as to the adverse impacts of these pilings, coupled with anemic or merely speculative at best evidence of such, it was appropriate for DEP to question Petitioner closely to unearth some – any, in fact – evidence of actual harm that MarineMax had suffered due to these pilings. (record cite) Additionally, Petitioner's standing was still at issue, and these questions related to whether the Petition was filed based on true navigational concerns or alternatively on economic concerns. The

ALJ responded to these arguments in his RO. It should also be noted that there were no objections to relevance during the questioning of Mr. Lowrey. For this reason, Exception 1 is fundamentally deficient, and should not even be considered.

Pursuant to section 120.57(1)(l), Fla. Stat., an agency "may not reject or modify the findings of fact" unless the agency first determines that (1) "the findings of fact were not based upon competent substantial evidence" or (2) "the proceedings on which the findings were based did not comply with essential requirements of law." Exception 1 does not meet these criteria and should be rejected.

Petitioner's Exception 2.

Exception 2 concerns the "25 percent rule" that was discussed at the hearing and in Footnote 6 on Page 23 of the RO. This rule was considered only to the extent it adds to the other directly relevant evidence. Many factors figured into DEP's decision, and to the extent that even unrelated standards were consulted, it is merely cumulative and harmless, and showed all the analysis and thought that went into the DEP's decision on this exemption decision. (record cite) There was no discussion in the body of the RO of this standard, and the footnote merely finds it "relevant to DEP's granting of the exemption."

Therefore, Exception 2 is fundamentally deficient and should not be considered.

Petitioner's Exception 3.

In his Exception 3 MarineMax, Inc. takes issue with Paragraph 41 of the RO, which recounts 403.813(1)(b), Fla Stat. as irrelevant. To be fair, witnesses for all sides referred to both this "irrelevant" 403 section as well as the 373.406(6) exemption statute. Since there was evidence including witness testimony regarding both sets of statutes, in an abundance of caution the ALJ addressed both statutes in his RO. Additionally, 403.813(1)(b), Fla. Stat. does explicitly state that

"A permit is not required under this chapter, Chapter 373,. . . for activities associated with the following types of projects. . ." Therefore, while it is true that Mr. Lynn's exemption was granted under 373.406(6), the fact that the 403.813(1)(b) provision explicitly refers to Chapter 373, means that this statute, although not the statute that the DEP used to grant the exemption, it is certainly relevant to the overall analysis in this case. Exception 3 should not be considered.

Petitioner's Exception 4

Exception 4 harkens again to the alleged confusion between the two statutory provisions in this case. Again, it is worth pointing out that while it did appear confusing at times during the trial, all parties and the ALJ agreed that the exemption at issue was granted under the Chapter 373 provision. It was the Petitioner's own expert witness, however, who opined that the pilings constituted a "navigational hazard," which the judge noted and discussed in Paragraph 43. (record cite). Petitioner seeks through this and other exceptions to obscure the fact that they could not even carry the burden of proving that the pilings created "minimal or insignificant individual or cumulative impacts on the water resources." The ALJ, in an abundance of caution, discusses both statutes, even though it is clear that he correctly understands that it is the 373 "minimal or insignificant individual or cumulative impacts" standard that controls here. The Petitioner's own witness brought up the navigational hazard issue. Having confused the issue with their own witness, Petitioner should not profit by exploiting such confusion in their exceptions. Exception 4 should be rejected.

Petitioner's Exception 5.

Exception 5 focuses on the testimony of Petitioner's expert witness, Captain Ralph Robinson. The ALJ discussed his testimony in detail, and was able to observe his demeanor and otherwise evaluate the testimony. Marinemax, Inc. seeks in this exception to have the Department

reweigh the evidence. However, it is well established that an agency reviewing a DOAH recommended order may not reweigh the evidence or substitute its judgment as to the credibility of witnesses. Belleau 695 So. 2d 1305, 1307; Maynard v. Fla. Unemployment Appeals Commission, 609 So. 2d 143, 145 (Fla. 4th DCA 1992); Rogers v. Dept. of Health, 920 So. 2d 27, 30 (Fla. 1st DCA 2006); Dunham 652 So. 2d 894 (Fla. 2d DCA 1995). An agency may not reject an ALJ's finding of fact "unless there is no competent, substantial evidence from which the finding could reasonably be inferred." Heifetz, 475 So. 2d at 1281; see also, §120.57(1)(l), Fla. Stat.

The fact is that the ALJ concluded from Captain Robinson's testimony, Megan Mills' testimony, the project design in relation to the channel and width of the waterbody, that not only was there no navigational hazard created by the pilings, in contrast to Captain Robinson's testimony, but the evidence for "more than a minimal or insignificant" effect on navigation failed as well. There was no evidence of any actual harm that had been created. At most, the witness said the pilings were "not ideal," did not make him "happy or comfortable," and were out of his "personal comfort zone." Such speculative and anemic evidence is insufficient to show that DEP was incorrect in granting the exemption. Exception 5 should be rejected.

Petitioner's Exception 6

Exception 6 is in line with Exceptions 1, 3, 4, and 5, and for the reasons outlined in DEP's responses to each of these Exceptions, should be rejected as well.

Petitioner's Exception 7.

This Exception is in line with Exception 1, and for those reasons, must also be rejected. Briefly, while "business impacts" are clearly not a standard at issue in this case, MarineMax's standing was at issue, and questions regarding the actual harm MarineMax, Inc. had befallen were

relevant to that issue. Here, the ALJ correctly determined the the motive behind filing the Petition was more economic rather than a concern over navigation. Moreover, in light of the testimony of Captain Robinson, it is no wonder that the dire warnings of harm by MarineMax, Inc. due to the pilings should be delved into to ascertain their reality. One possible way to do that was to ask questions regarding what harm MarineMax, Inc. had suffered to its business due to the pilings. This line of questioning was relevant for these reasons, and DEP should not relitigate the case and substitute its judgment for that of the ALJ on this issue.

MarineMax, Inc. seeks that the Department reweigh the evidence. However, an agency reviewing a DOAH recommended order may not reweigh the evidence or substitute its judgment as to the credibility of witnesses. Belleau, 695 So. 2d 1305, 1307; Maynard, 609 So. 2d 143, 145; Rogers, 920 So. 2d 27, 30; Dunham, 652 So. 2d 894. An agency may not reject an ALJ's finding of fact "unless there is no competent, substantial evidence from which the finding could reasonably be inferred." Heifetz, 475 So. 2d at 1281; see also, §120.57(1)(l), Fla. Stat. "[I]f there is competent substantial evidence supporting an administrative law judge's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting the contrary finding." Lane, DOAH Case No. 01-1490; Arand, 592 So. 2d 276, 280; Conshor, Inc. 498 So. 2d 622.

Petitioner's Exception 8.

In Exception 8, MarineMax, Inc. contends that the ALJ did not account for the "cumulative impacts" of the pilings on navigation on the canal. This argument must be rejected. The evidence discussed by the ALJ as to the various potential impacts of the pilings on navigational traffic on the canal is replete with examples that do not add up to an impermissible cumulative impact. The extensive discussion in this Exception of the evidence and testimony essentially asks DEP to

reweigh the evidence and substitute its judgment for that of the ALJ. The judge knew the correct standard, and read and listened to the evidence and testimony. There was also no evidence that, as the Exception asserts, where the pilings have created "a situation in which the canal will be completely unnavigable for at least some boats." There was testimony about boats needing to wait to pass when other large boats were fueling up at MarineMax, Inc., but to say that the pilings have made the canal potentially "unnavigable" is wholly unsupported. This Exception must be rejected. There is competent, substantial evidence aplenty to support Paragraph 48 of the RO.

Petitioner's Exceptions 9.

In Exception 9, MarineMax, Inc. repeats their criticism of the "navigational hazard" standard. For the reasons outlined in DEP's responses to Exceptions 3, 4, 5, and 6, this Exception must be rejected. The "navigational hazard standard" was not the standard controlling DEP's granting of the statutory exemption, but Petitioner's witness muddied the waters by referring to and discussing this standard. Clearly, the overwhelming weight of evidence, heard and considered by the ALJ, points to the conclusion that Mr. Lynn's pilings are not a navigational hazard, nor do they even cause a "minimal or insignificant impact."

CONCLUSION

For the reasons discussed above, the Department of Environmental Protection should reject MarineMax's Exceptions to the Administrative Law Judge's Recommended Order, and affirm Department of Environmental Protection's granting of the exemption request by Mr. Lynn.

Dated on this 2nd day of May 2019.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

*/s/ Lorraine M. Novak*___________________
LORRAINE M. NOVAK
Senior Assistant General Counsel
Fla. Bar. No.: 23851
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000
Telephone: (850) 245-2270
Facsimile: (850) 245-2298
Email: Lorraine.M.Novak@FloridaDEP.gov
Michelle.M.Knight@FloridaDEP.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with Lea Crandall, the agency clerk of the State of Florida Department of Environmental Protection by email at lea.crandall@dep.state.fl.us and agency_clerk@dep.state.fl.us and served via email only to Richard S. Brightman, counsel for MarineMax, Inc., at RichardB@hgslaw.com and AmeliaS@hgslaw.com and Larry Lynn at rockyandpr@aol.com, on this 2nd day of May 2019.

*/s/ Lorraine M. Novak*___________________
LORRAINE M. NOVAK
Senior Assistant General Counsel