STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MATLACHA CIVIC ASSOCIATION, INC., J. MICHAEL HANNON, KARL R. DEIGERT, YOLANDA OLSEN, ROBERT S. ZARRANZ, DEBRA HALL, MELANIE HOFF, AND JESSICA BLANKS,

Petitioners,

vs. Case No. 18-6752

CITY OF CAPE CORAL AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on April 11 and 12, 2019, and on May 10, 2019, in Cape Coral, Florida, before Francine M. Ffolkes, an Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case was whether the Respondent, City of Cape Coral (City), was entitled to an Individual Environmental Resource Permit (Permit) that would allow removal of the Chiquita Boat Lock (Lock) and associated uplands, and installation of a 165-foot linear seawall in the South Spreader Waterway in Cape Coral, Florida.

PRELIMINARY STATEMENT

On October 31, 2016, the City submitted an application for the Permit. The Department of Environmental Protection (Department) announced its intent to issue the Permit to the City on November 7, 2018.

On December 14, 2018, the Petitioners, Matlacha Civic Association, Inc. (Association), Karl Deigert, Debra Hall, Melanie Hoff, Robert S. Zarranz, Yolanda Olsen, Jessica Blanks, and Joseph Michael Hannon, timely filed a joint petition for administrative hearing. On December 21, 2018, the Department referred the petition to DOAH to conduct an evidentiary hearing and submit a recommended order.

On February 28 and March 1, 2019, the Department gave notice of revisions to the intent to issue and draft permit.

The Department filed a motion to strike and/or in limine on January 4, 2019. On January 18, 2019, the Petitioners filed their motion for entry of a partial final order. The major issue raised by those motions concerned a Consent Order dated April 19, 1977 (CO 15), between the Department of Environmental Regulation and GAC Properties, Inc. CO 15 was thereafter amended on April 27, 1979. The subject matter of this administrative proceeding was a proposed agency action to allow removal of the Lock. The Lock and South Spreader Waterway were first constructed by GAC Properties, Inc., as a result of the requirements of CO 15, as amended. On March 7, 2019, the motions were denied without prejudice.

On April 1, 2019, the Department filed an amended second motion to strike and/or in limine, to which the Petitioners responded on April 5, 2019. By Order dated April 9, 2019,

evidence and argument on certain issues were excluded from this proceeding. Those issues included potential collateral attacks on final agency actions and alleged violations of federal law. The April 9, 2019, Amended Order Limiting Issues is incorporated herein.

The parties filed their Joint Pre-hearing Stipulation on April 1, 2019, which attempted to limit the issues for the final hearing.

At the final hearing, Joint Exhibit 1 was admitted into evidence. The Petitioners offered the fact testimony of Anthony Janicki, Ph.D., Karl Deigert, Melanie Hoff, Robert S. Zarranz, Yolanda Olsen, Jessica Blanks, Michael Hannon, Frank Muto, and Jon Iglehart, and the expert testimony of David Woodhouse, Kevin Erwin, and John Cassani. The Petitioners' Exhibits 18 (a time series video), 37, 40 (top page), 43, 44, 47, 48, 62 through 68, 76 (aerial video), 77 (aerial video), 78 (frame 5), 79 (eight images), 87, 112, 114, 115, 117, 118, 129, 132, 141 (not for truth), and 152 were admitted into evidence. The City presented the fact testimony of Oliver Clarke and Jacob Schrager, and the expert testimony of Anthony Janicki, Ph.D. The City's Exhibits 1, 2, 9, and 27 were admitted into evidence. The Department presented the fact testimony of Megan Mills. The Petitioners proffered Exhibits P-R1, P-R2, and P-R3, which were denied admission into evidence by Order dated June 21, 2019.

A three-volume Transcript of the hearing was filed with DOAH on June 3, 2019. Proposed recommended orders were filed by the parties on July 3, 2019, and have been considered in the preparation of this Recommended Order. The Petitioners' motion to exceed page limit that was filed with their proposed recommended order is granted.

References to Florida Statutes are to the 2019 version, unless otherwise stated.

FINDINGS OF FACT

Based on the parties' stipulations and the evidence adduced at the final hearing, the following findings of fact are made:

The Parties

1. The Department is the administrative agency of the State of Florida statutorily charged with, among other things, protecting Florida's water resources. As part of the Department's performance of these duties, it administers and enforces the provisions of chapter 373, part IV, Florida Statutes, and the rules promulgated thereunder in the Florida Administrative Code. Pursuant to that authority, the Department determines whether to issue or deny applications for environmental resource permits.

2. The City is a Florida municipality in Lee County. The City is the applicant for the Permit allowing the removal of the Lock and installation of a seawall (Project). The Project is

located within the geographic boundary of the City. The South Spreader Waterway is a perimeter canal separating the City's canal system from shoreline wetlands to the west and south, which run the length of Matlacha Pass to the mouth of the Caloosahatchee River at San Carlos Bay.[1/]

3. The Association is a Florida non-profit corporation that was created in 1981. The Association was created to safeguard the interests of its members. The Association has approximately 150 members who reside in Matlacha and Matlacha Isles, Florida. A substantial number of its members have substantial interests in the use and enjoyment of waters adjacent to and surrounding Matlacha. The Association's members were particularly interested in protecting the water quality of the surface waters in the area.

4. Matlacha is an island community located to the northwest of Cape Coral, the South Spreader Waterway, and the Lock. Matlacha is located within Matlacha Pass Aquatic Preserve. Matlacha Pass is classified as a Class II waterbody designated for shellfish propagation or harvesting, and is an Outstanding Florida Water (OFW). See Fla. Admin. Code R. 62-02.400(17)(b)36; 62-302.700(9)(h).

5. Petitioner, Karl Deigert, is a resident and property owner in Matlacha. Mr. Deigert is the president of the Association. Mr. Deigert’s house in Matlacha is waterfront. He

holds a captain's license and has a business in which he gives sightseeing and ecological tours by boat of the waters around Matlacha. He fishes in the waters around his property and enjoys the current water quality in the area. He is concerned that removal of the Lock would have negative effects on water quality and would negatively impact the viability of his business and his enjoyment of the waters surrounding Matlacha.

6. Petitioner, Melanie Hoff, is a resident and property owner in St. James City. St. James City is located to the southwest of Cape Coral. Ms. Hoff's property is located within five nautical miles of the Lock. Ms. Hoff engages in various water sports and fishes in the waters around her property. She moved to the area, in part, for the favorable water quality. She is concerned that removal of the Lock would negatively impact water quality and her ability to use and enjoy waters in the area.

7. Petitioner, Robert S. Zarranz, is a resident and property owner in Cape Coral. Mr. Zarranz's house in Cape Coral is waterfront. He is an avid fisherman and boater. He is concerned that removal of the Lock would negatively impact water quality, and that the quality of fishing in the area would decline as a result.

8. Petitioner, Yolanda Olsen, is a resident and property owner in Cape Coral. Ms. Olsen's house in Cape Coral is

waterfront. She enjoys watersports and birdwatching in the areas around her property. She is concerned that removal of the Lock would negatively impact water quality, and that her ability to enjoy her property and the surrounding waters would suffer as a result.

9. Petitioner, Jessica Blanks, is a resident and property owner in Cape Coral. Ms. Blanks' house in Cape Coral is waterfront. She is concerned that removal of the Lock would negatively impact water quality, and that her ability to enjoy her property and the surrounding waters would suffer as a result.

10. Petitioner, Joseph Michael Hannon, is a resident and property owner in Matlacha. Mr. Hannon is a member of the Association. He enjoys boating, fishing, and kayaking in the waters surrounding Matlacha. He is concerned that removal of the Lock would negatively impact water quality, and that his ability to enjoy his property and the surrounding waters would suffer as a result.

11. Petitioner, Debra Hall, did not appear at the final hearing and no testimony was offered regarding her standing.

The Project and Vicinity

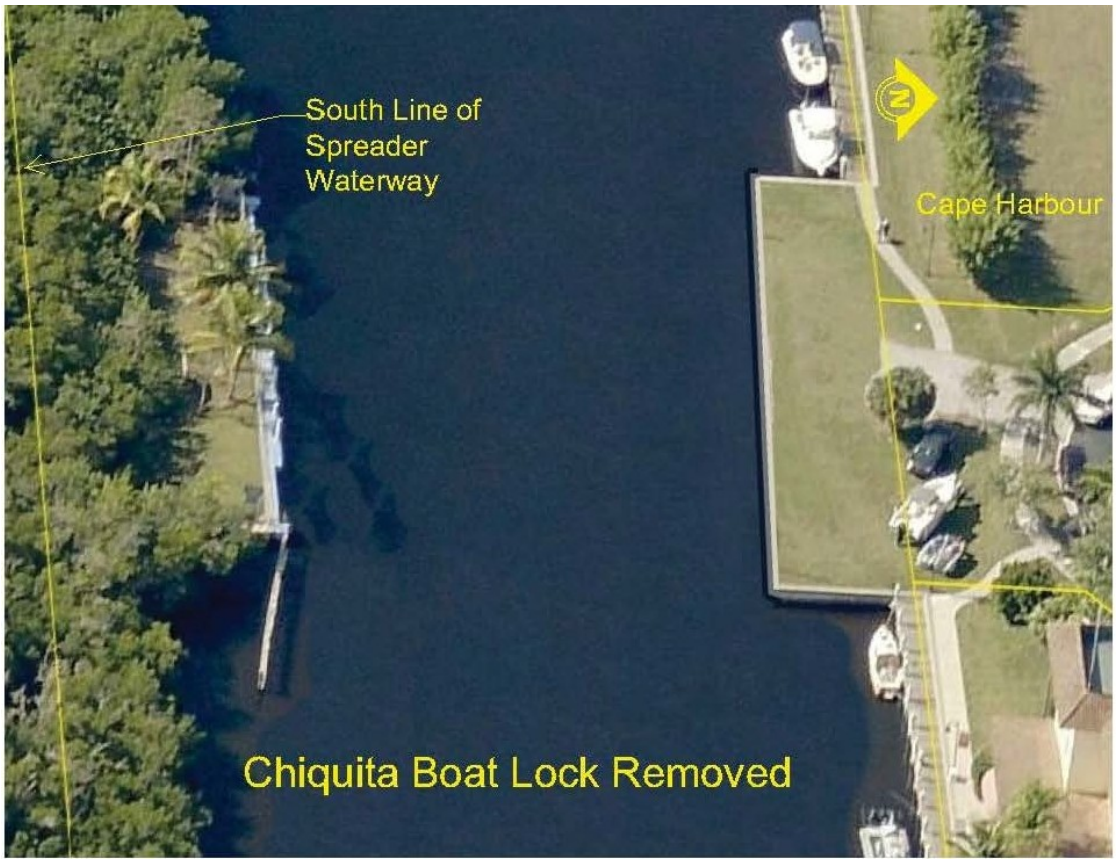
12. The Project site is 0.47 acres. At the Lock location, the South Spreader Waterway is 200 feet wide, and includes a 125-foot wide upland area secured by two seawalls, the 20-foot

wide Lock, a 32-foot wide upland area secured by one seawall, and 23 feet of mangrove wetlands.

13. The Lock is bordered to the north by property owned by Cape Harbour Marina, LLC, and bordered to the south by mangrove wetlands owned by the state of Florida. The 125-foot wide upland area and the 20-foot wide Lock form a barrier separating the South Spreader Waterway from the Caloosahatchee River. The preponderance of the competent substantial evidence established that the South Spreader Waterway behind the Lock is not tidally influenced, but would become tidally influenced upon removal of the Lock.

Joint Exhibit 1 at p. 46.

14. The City proposes to remove the Lock and one of the seawalls, reducing the 125-foot upland area to 20 feet. The proposed future condition of the area would include 125 feet of open canal directly connecting the South Spreader Waterway with the Caloosahatchee River.



Joint Exhibit 1 at p. 47.

15. The primary purpose of the Lock's removal is to alleviate safety concerns related to boater navigation. The Project's in-water construction includes demolition and removal of the existing Lock, removal of existing fill in the 125-foot upland area, removal of existing seawalls, and construction of replacement seawalls.

16. The City would employ Best Management Practices (BMPs) throughout the course of the Project, including sediment and erosion controls such as turbidity barriers. The turbidity barriers would be made of a material in which manatees could not become entangled.

17. All personnel involved with the Project would be instructed about the presence of manatees. Also, temporary signs concerning manatees would be posted prior to and during all in-water project activities.

History of the South Spreader Waterway

18. In the mid-1970's, the co-trustees of Gulf American Corporation, GAC Properties Credit, Inc., and GAC Properties, Inc., (collectively GAC) filed for after-the-fact permits from the Department's predecessor agency (DER), for the large dredge and fill work project that created the canal system in Cape Coral.

19. In 1977, DER entered into CO 15 with GAC to create the North and South Spreader Waterways and retention control systems, including barriers. The Lock was one of the barriers created in response to CO 15.

20. The Spreader Waterways were created to restore the natural hydrology of the area affected by GAC's unauthorized dredging and filling activity. The Spreader Waterways collected

and retained surface runoff waters originating from the interior of Cape Coral's canal system.

21. The South Spreader Waterway was not designed to meet water quality standards, but instead to collect surface runoff, then allow discharge of the excess waters collected over and through the mangrove wetlands located on the western and southern borders of the South Spreader Waterway.

22. This fresh water flow was designed to mimic the historic sheet flow through the coastal fringe of mangroves and salt marshes of the Caloosahatchee River and Matlacha Pass estuaries. The fresh water slowly discharged over the coastal fringe until it finally mixed with the more saline waters of the estuaries. The estuarine environments located west and south of the Lock require certain levels of salinity to remain healthy ecosystems. Restoring and achieving certain salinity ranges was important to restoring and preserving the coastal fringe.

23. In 1977 GAC finalized bankruptcy proceedings and executed CO 15. CO 15 required GAC to relinquish to the state of Florida the mangrove wetlands it owned on the western and southern borders of the South Spreader Waterway. This land grant was dedicated by a warranty deed executed in 1977 between GAC and the state of Florida.

24. The Petitioners' expert, Kevin Erwin, worked as an environmental specialist for DER prior to and during the

construction of the Spreader Waterways. Mr. Erwin was DER's main representative who worked with the GAC co-trustees to resolve the massive dredge and fill violation and design a system to restore the natural hydrology of the area.

25. Mr. Erwin testified that the Lock was designed to assist in retention of fresh water in the South Spreader Waterway. The fresh water would be retained, slowed down, and allowed to slowly sheet flow over and through the coastal fringe.

26. Mr. Erwin also testified that the South Spreader Waterway was not designed to allow direct tidal exchange with the Caloosahatchee River. In Mr. Erwin's opinion, the South Spreader Waterway appeared to be functioning today in the same manner as originally intended.

Breaches and Exchange of Waters

27. The Department's second amended notice of intent for the Project, stated that the Project was not expected to contribute to current water quality violations, because water in the South Spreader Waterway was already being exchanged with Matlacha Pass and the Caloosahatchee River through breaches and direct tidal flow. This second amended notice of intent removed all references to mitigation projects that would provide a net improvement in water quality as part of the regulatory basis for issuance of the permit. See Joint Exhibit 1 at pp. 326-333.

28. The Department's witnesses testified that waters within the South Spreader Waterway currently mix with waters of the Caloosahatchee River when the Lock remains open during incoming and slack tides. A Department permit allowed the Lock to remain open during incoming and slack tides. Department witness, Megan Mills, the permitting program administrator, testified that she could not remember the exact date that permit was issued, but that it had been "a couple years."

29. The location of breaches in the western and southern banks of the South Spreader Waterway was documented on another permit's drawings and pictures for a project titled "Cape Coral Spreader Waterway Restoration." See Cape Coral Ex. 9. Those documents located three breaches for repair and restoration identified as Breach 16A, Breach 16B, and Breach 20.

30. The modeling reports and discussion that support the City's application showed these three breaches connect to Matlacha Pass Aquatic Preserve. Breach 20 was described as a connected tidal creek. Breach 16A and 16B were described as allowing water movement between Matlacha Pass and the South Spreader Waterway only when relatively high water elevations occurred in Matlacha Pass or in the South Spreader Waterway.

31. The Department's water quality explanation of "mixing," was rather simplistic, and did not consider that the waterbody in which the Project would occur has three direct connections with

an OFW that is a Class II waters designated for shellfish propagation or harvesting. Such a consideration would require the Department to determine whether to apply the OFW permitting standards, and the Class II waters permitting criteria in section 10.2.5 of the Environmental Resource Permit Applicant's Handbook, Volume I. See Fla. Admin Code R. 62-330.302(1)(a); 62-4.242(2); and 62-302.400(17)(b)36.

32. The Caloosahatchee River, at its entrance to the South Spreader Waterway, is a Class III waters restricted for shellfish harvesting. The mouth of the Caloosahatchee River is San Carlos Bay, which is a Class II waters restricted for shellfish harvesting. There was no evidence that the Department's regulatory analysis considered that the waterbody in which the Project would occur directly connects to Class III waters that are restricted for shellfish harvesting, and is in close proximity to Class II waters that are restricted for shellfish harvesting. See Fla. Admin. Code R. 62-302.400(17)(b)36. and 62-330.302(1)(c).[2/]

Total Nitrogen

33. The City's expert, Anthony Janicki, Ph.D., testified that nitrogen concentrations in the Caloosahatchee River were higher than in the South Spreader Waterway in the years 2017 and 2018. Thus, he opined that if the Lock is removed, water from the South Spreader Waterway would not negatively impact the

Caloosahatchee River. However, the City's application was supported by an analysis, with more than a decade of monitoring data, which showed nitrogen concentration values were comparable inside the South Spreader Waterway and in the Caloosahatchee River.

34. Dr. Janicki also used the Department's Hydrologic Simulation Program – FORTRAN (HSPF) watershed model to estimate the Total Nitrogen (TN) loading that would enter the Caloosahatchee River through the Chiquita Lock. Dr. Janicki estimated that TN loading to the Caloosahatchee River, after removal of the Chiquita Lock, would amount to 30,746 pounds per year. The Caloosahatchee River is listed as impaired for nutrients and has a TN Total Maximum Daily Load (TMDL) that was set by the Department in 2009.

35. Dr. Janicki opined that removing the Lock would not result in adverse impacts to the surrounding environment. But the Petitioners obtained his concession that his opinion was dependent on the City's completion of additional water quality enhancement projects in the future as part of its obligations under the Caloosahatchee Estuary Basin Management Action Plan (BMAP) for achieving the TN TMDL.

36. Dr. Janicki additionally testified that the potential TN loading to the Caloosahatchee River did not anticipate an actual impact to the River's water quality because the TN loads

from the South Spreader Waterway were already factored into the 2009 TMDL. He essentially testified that the Lock's removal was anticipated and was factored into the model when the TMDL was established in 2009.

37. Thus, the Petitioners proved by a preponderance of the competent and substantial evidence that the Department and the City were not aligned regarding how the City's application would provide reasonable assurances of meeting applicable water quality standards.

38. The Petitioners proved by a preponderance of the competent and substantial evidence that the City relied on future projects to provide reasonable assurance that the removal of the Lock would not cause or contribute to violations of water quality standards in the Caloosahatchee River and the Matlacha Pass Aquatic Preserve.

39. The Petitioners proved by a preponderance of the competent and substantial evidence that the Department relied on a simplistic exchange of waters to determine that removal of the Lock would not cause or contribute to violations of water quality standards in the Caloosahatchee River and the Matlacha Pass Aquatic Preserve.

Water Quantity and Salinity

40. The engineering report that supports the City's application stated that when the Lock is removed, the South

Spreader Waterway behind the Lock will become tidally influenced. With the Lock removed, the volume of daily water fluxes for the South Spreader Waterway would increase from zero cubic meters per day to 63,645 cubic meters per day. At the location of Breach 20, with the Lock removed, the volume of daily water fluxes would drastically decrease from 49,644 cubic meters per day to eight cubic meters per day.

41. Dr. Janicki testified that Breach 20 was connected to a remnant tidal creek that meanders and eventually empties into an embayment. The evidence demonstrated that the embayment is Punta Blanca Bay, which is part of the Matlacha Pass Aquatic Preserve. Dr. Janicki opined that Breach 20 was an area of erosion risk and sediment transport into downstream mangroves that would be significantly reduced by removing the Lock. He explained that the reductions in flow would result in reductions in velocities through Breach 20 and in the South Spreader Waterway itself.

42. Mr. Erwin testified that Breach 20 was not a "breach."[3/] He described it as the location of a perpendicular intersection of the South Spreader Waterway with a small tidal creek, which connected to a tidal pond further back in the mangroves. Mr. Erwin testified that an "engineered sandbag concrete structure" was built at the shallow opening to limit the amount of flow into and out of this tidal creek system. But it was also designed to make sure that the tidal creek system "continued to get some

amount of water." As found above, Lock removal would drastically reduce the volume of daily water fluxes into and out of Breach 20's tidal creek system.

43. Mr. Erwin also testified that any issues with velocities or erosion would be exemplified by bed lowering, siltation, and stressed mangroves. He persuasively testified, however, that there was no such evidence of erosion and there were "a lot of real healthy mangroves."

44. Mr. Erwin opined that removal of the Lock would cause the South Spreader Waterway to go from a closed, mostly fresh water system, to a tidal saline system. He described the current salinity level in the South Spreader Waterway to be low enough to support low salinity vegetation and not high enough to support marine organisms like barnacles and oysters.

45. The City's application actually supports this opinion. Using the Environmental Fluid Dynamics Code (EFDC) model developed by Dr. Janicki for this Lock removal project, comparisons were made describing the salinity distribution within the South Spreader Waterway. The model was run with and without the Lock, for both a wet and dry year.

46. Dr. Janicki testified, and the model showed, that removal of the Lock would result in increased salinity above the Lock and decreased salinity downstream of the Lock. However, he generally opined that the distribution of salinities was well

within the normal ranges seen in this area. The City's application also concluded that the resultant salinities did not fall outside the preferred salinity ranges for seagrasses, oysters, and a wide variety of fish taxa. However, Dr. Janicki did not address specific changes in vegetation and encroachment of marine organisms that would occur with the increase in salinity within the South Spreader Waterway.

Secondary Impacts to the Mangrove Wetlands

47. Mr. Erwin testified that the mangroves located on the western and southern borders of the South Spreader Waterway are currently in very good health. He additionally testified that loss of the current fresh water hydraulic head and an increase in salinity within the South Spreader Waterway would negatively impact the health of the mangrove wetlands.

48. In addition, the City's application stated that removing the Lock would result in a drop in the water level of one to one and a half feet within the South Spreader Waterway. Mr. Erwin credibly and persuasively testified that a drop in water level of only a few inches would have negative effects on the health of mangroves, and that a drop of a foot could result in substantial mangrove die-off.

49. Mr. Erwin testified that the mangrove wetlands adjacent to the South Spreader Waterway consist of a variety of plants and algae in addition to mangroves. He described the wetlands as a

mangrove community made up of different types of mangroves, and epiphytic vegetation such as marine algae. This mangrove community provides habitat for a "wide range of invertebrates." He further testified that these plants and algae uptake and transform the nutrients that flow over and through the mangrove wetlands before they reach the receiving waters. Thus, the mangrove wetlands on the western and southern borders of the South Spreader Waterway serve to filter nutrients out of the water discharged from the Waterway before it reaches Matlacha Pass and the Caloosahatchee River.

50. Mr. Erwin's credible and persuasive testimony was contrary to the City's contention that Lock removal would not result in adverse impacts to the mangrove wetlands adjacent to the South Spreader Waterway.

51. The City and the Department failed to provide reasonable assurances that removing the Lock would not have adverse secondary impacts to the health of the mangrove wetlands community adjacent to the South Spreader Waterway.

Impacts to Fish and Wildlife, Including Endangered and Threatened Species

52. The Florida Fish and Wildlife Conservation Commission (FWC) reviewed the City's application and determined that if BMPs for in-water work were employed during construction, no significant adverse impacts on fish and wildlife were expected.

For example, temporary signs concerning manatees would be posted prior to and during all in-water project activities, and all personnel would be instructed about the presence of manatees.

53. The FWC determination only addressed direct impacts during in-water construction work. The City's application contained supporting material that identified the major change resulting from removal of the Lock that may influence fish and wildlife in the vicinity of the Project, was the opportunity for movement to or from the South Spreader Waterway canal system. Threatened and endangered species of concern in the area included the Florida manatee and the smalltooth sawfish.

54. The City's application stated that literature review showed the smalltooth sawfish and the Florida manatee utilized non-main-stem habitats, such as sea-wall lined canals, off the Caloosahatchee River. The City cited studies from 2011 and 2013, which showed that non-main-stem habitats were important thermal refuges during the winter, and part of the overall nursery area for smalltooth sawfish. The City concluded that removal of the Lock "would not be adverse, and would instead result in increased areas of useable habitat by the species."

55. However, the Petitioner's expert witness, John Cassani, who is the Calusa Waterkeeper, testified that there is a smalltooth sawfish exclusion zone downstream of the Lock. He testified that the exclusion zone is a pupping area for

smalltooth sawfish, and that rapid salinity fluctuations could negatively impact their habitat.

56. The City also concluded that any impacts to the Florida manatee would not be adverse, "and would instead result in increased areas of useable habitat by the species, as well as a reduction in risk of entrapment or crushing in a canal lock system." At the same time, the City acknowledged that "watercraft collision is a primary anthropogenic threat to manatees."

57. The City's literature review included a regional assessment by FWC's Fish and Wildlife Research Institute (FWRI) from 2006. Overall, the FWRI report concluded that the mouth of the Caloosahatchee River, at San Carlos Bay, was a "hot spot" for boat traffic coinciding with the shift and dispersal of manatees from winter refugia. The result was a "high risk of manatee-motorboat collisions." In addition, testimony adduced at the hearing from an 18-year employee of Cape Harbour Marina, Mr. Frank Muto, was that Lock removal would result in novice boaters increasing their speed, ignoring the no-wake and slow-speed zones, and presenting "a bigger hazard than the [L]ock ever has."

Boater Navigation Concerns

58. Oliver Clarke was the City’s principal engineer during the application process, and signed the application as the City's authorized agent. Mr. Clarke testified that he has witnessed

boater congestion at the Lock. He also testified that lack of boating experience and weather concerns can exacerbate the boater congestion issues at the Lock.

59. Petitioners presented the testimony of Mr. Frank Muto, the general manager of Cape Harbour Marina. Mr. Muto has been at the Cape Harbour Marina for 18 years. The marina has 78 docks on three finger piers along with transient spots. The marina is not currently subject to tidal flows and its water depth is between six and a half and seven and a half feet. He testified that they currently have at least 28 boats that maintain a draft of between four and a half and six feet of water. If the water depth got below four feet, those customers would not want to remain at the marina. Mr. Muto further testified that the Lock was in place when the marina was built, and the marina and docks were designed for an area with no tidal flow.

60. Mr. Muto also testified that he has witnessed several boating safety incidents in and around the Lock. He testified that he would attribute almost all of those incidents to novice boaters who lack knowledge of proper boating operations and locking procedures. Mr. Muto additionally testified that there is law enforcement presence at the Lock twenty-four hours a day, including FWC marine patrol and the City's marine patrol.

CONCLUSIONS OF LAW

Standing

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

62. It is well-established that to demonstrate that a person or entity has a substantial interest in the outcome of a proceeding, two things must be shown. First, there must be an injury-in-fact of sufficient immediacy to entitle one to a hearing. Second, it must be shown that the substantial injury is of a type or nature which the proceeding is designed to protect. The first has to do with the degree of the injury and the second with the nature of the injury. See Agrico Chem. Co. v. Dep't of Envtl. Reg., 406 So. 2d 478, 482 (Fla. 2d DCA 1981), rev. den., 415 So. 2d 1359 (Fla. 1982).

63. Agrico was not intended as a barrier to the participation in proceedings under chapter 120 by persons who are affected by the potential and foreseeable results of agency action. See Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1082-1083 (Fla. 2d DCA 2009)

("[S]tanding is a legal concept that requires a would-be litigant to demonstrate that he or she reasonably expects to be affected by the outcome of the proceedings, either directly or indirectly." (quoting Hayes v. Guardianship of Thompson, 952 So. 2d 498, 505 (Fla. 2006))). Rather, the intent of Agrico was to preclude parties from intervening in a proceeding where those parties' substantial interests are remote and speculative. See Vill. Park v. Dep't of Bus. Reg., 506 So. 2d 426, 433 (Fla. 1st DCA 1987).

64. In Reily Enterprises, LLC v. Florida Department of Environmental Protection, 990 So. 2d 1248 (Fla. 4th DCA 2008), the court found that a challenger to a permit, alleged to adversely affect a nearby water body, met the Agrico test for standing. The facts upon which the court found standing for the petitioner in that case were comparable to the types of concerns and issues raised by the individual Petitioners in this case. Therefore, Petitioners Karl Deigert, Melanie Hoff, Robert S. Zarranz, Yolanda Olsen, Jessica Blanks, and Joseph Michael Hannon demonstrated their individual standing. Petitioner Debra Hall did not attend the hearing and so failed to demonstrate her individual standing.

65. The Association must prove its associational standing by satisfying the three-prong test for environmental associational standing established in Friends of the Everglades,

Inc., v. Board of Trustees of the Internal Improvement Trust Fund, 595 So. 2d 186 (Fla. 1st DCA 1992). In Friends of the Everglades, the court held that an environmental organization must meet both the two-pronged test for standing of Agrico and the test for standing of associations under Florida Home Builders Association v. Department of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982)(extended to administrative proceedings under section 120.57(1), Florida Statutes, by Farmworker Rights Organization v. Department of Health and Rehabilitation Services, 417 So. 2d 753 (Fla. 1st DCA 1982)).

66. The Association proved its environmental associational standing by demonstrating: (1) that a substantial number of its members could substantially be affected by the challenged agency action; (2) that the agency action it sought to challenge was within the Association's general scope of interest and activity; and (3) that the relief it requested was of the type appropriate for it to receive on behalf of its members. See St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011). The Association's burden was not whether it has or will prevail on the merits, but rather whether it has presented sufficient proof of injury to its asserted interests within the two-prong standing test. See Bd. of Comm'rs of Jupiter Inlet Dist. v. Thibadeau, 956 So. 2d 529 (Fla. 4th DCA 2007).

Burden of Proof

67. The Petitioners challenged the issuance of an individual environmental resource permit issued under chapter 373, Florida Statutes. Therefore, section 120.569(2)(p) governed this proceeding. Under this provision, the permit applicant must present a prima facie case demonstrating entitlement to the permit. Thereafter, a third party challenging the issuance of the permit has the burden "of ultimate persuasion" and the burden "of going forward to prove the case in opposition to the . . . permit." If the third party fails to carry its burden, the applicant prevails by virtue of its prima facie case.

68. The standard of proof is a preponderance of the evidence. See § 120.57(1)(j), Fla. Stat. Section 120.569(2)(p) "clearly contemplates an abbreviated presentation of the applicant's prima facie case." Last Stand, Inc., v. Fury Mgmt., Inc., Case No. 12-2574, RO ¶89 (Fla. DOAH Dec. 31, 2012; Fla. DEP Feb. 7, 2013). The abbreviated presentation occurs because the statute outlines the information that may constitute the applicant's prima facie case, which includes the application and supporting materials on which the agency concluded that the applicant provided reasonable assurances of compliance with applicable environmental resource permitting (ERP) criteria.

69. This is also a de novo proceeding, designed to formulate final agency action, and not to review action taken

preliminarily. See Capeletti Bros. v. Dep't of Gen. Servs., 432 So. 2d 1359, 1363-1364 (Fla. 1st DCA 1983). The de novo nature of this proceeding allowed the parties to make changes to the proposed project and the draft permit after the Department had referred the matter to DOAH for adjudication. The Department filed a second amendment to the intent to issue and draft permit on March 1, 2019. This second amendment eliminated the Department's previous finding that the City demonstrated mitigation of adverse water quality impacts through its achievement of current and future project credits in the BMAP process. See Joint Exhibit 1 at pp. 329 and 330. Section 120.569(2)(a) provides that once a petition is referred to DOAH for a hearing, "[t]he referring agency shall take no further action with respect to a proceeding under s.120.57(1), except as a party litigant, as long as the division has jurisdiction over the proceeding under s.120.57(1)."

70. As a party litigant, the Department may not seek to reacquire jurisdiction over the proposed agency action but may change its position by agreement of all parties, or by offering proof in support of its new position at the hearing. See Disc Vill., Inc. v. Dep't of Corr., Case No. 92-7321, RO ¶18 (Fla. DOAH Feb. 26, 1993; Fla. DOC Apr. 6, 1993). An agency's change of position is neither proposed nor final agency action, as long as the matter remains pending at DOAH. See Red and White

Invs., Inc. v. Dep't of Transp., Case No. 90-4326, RO ¶44 (Fla. DOAH Nov. 20, 1990).

71. An agency must offer proof in support of the agency's changed position during the evidentiary proceeding, in order for the new position to provide the potential basis for a recommended or final order. See Disc Vill., Inc., RO at ¶18. Thus, the second amended intent to issue was a change of position, and not proposed agency action. The Department's changed position, therefore, was not part of the City's prima facie case as contemplated by section 120.569(2)(p). See City of W. Palm Beach v. Palm Beach Cnty., Case No. 16-1861, RO ¶136 (Fla. DOAH March 31, 2017; Fla. SFWMD May 9, 2017), rev'd. on other grounds, 253 So. 3d 623 (Fla. 4th DCA 2018).

Permitting Standard

72. Issuance of the Permit is dependent upon there being reasonable assurances that the Project will meet applicable statutory and regulatory standards. See §§ 373.413(1) and 373.414(1), Fla. Stat.

73. "Reasonable assurance" means the upfront demonstration that there is a substantial likelihood of compliance with standards, or "a substantial likelihood that the project will be successfully implemented." See Metro. Dade Cnty. v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Reasonable assurance does not require absolute guarantees that

the applicable conditions for issuance of a permit have been satisfied. Further, speculation or subjective beliefs are not sufficient to carry the burden of presenting contrary evidence or proving a lack of reasonable assurance necessary to demonstrate that a permit should not be issued. See FINR II, Inc. v. CF Indus., Inc., Case No. 11-6495 (Fla. DOAH Apr. 30, 2012; Fla. DEP June 8, 2012).

74. The City was responsible for establishing its prima facie case of entitlement to the Permit by entering into evidence the complete application files and supporting documentation and testimony, and the Department's notice of intent to issue and draft permit. The burden of ultimate persuasion was on Petitioners to prove their case in opposition to the Permit by a preponderance of the competent and substantial evidence. See Washington Cnty. v. Bay Cnty. & NW Fla. Water Mgmt. Dist., Case Nos. 10-2983, 10-2984, 10-10100 (Fla. DOAH July 26, 2012; Fla. NWFWMD Sep. 27, 2012).

75. While a petitioner bears the ultimate burden, a petitioner can prevail by illustrating the failures inherent in the applicant's proposed project. The petitioner need only show that the applicant and the agency failed to provide reasonable assurances of compliance with the required criteria, and does not need to demonstrate that the proposed project would harm the environment. See Id.

76. When the petitioner demonstrates that "specific aspects of the application are unsatisfactory," the applicant loses its presumption of entitlement to the permit. See Last Stand, Inc., v. Fury Mgmt., Inc., Case No. 12-2574, RO ¶90 (Fla. DOAH Dec. 31, 2012; Fla. DEP Feb. 7, 2013). The applicant must then present a rebuttal case refuting the petitioner's evidence and demonstrating reasonable assurance of compliance with all permit criteria and entitlement to the permit. See § 120.569(2)(p), Fla. Stat.

ERP Permit Criteria

77. In order to provide reasonable assurances that the Project will not be harmful to the water resources, the City must satisfy the conditions for issuance set forth in rules 62-330.301 and 62-330.302, and the applicable sections of Volumes I and II of the Environmental Resource Permit Applicant's Handbook.

A. Water Quality

78. Rule 62-330.301(1)(e) requires that the City provide reasonable assurance that the proposed Project:

> Will not adversely affect the quality of receiving waters such that the state water quality standards set forth in Chapters 62-4, 62-302, 62-520, and 62-550, F.A.C., including the antidegradation provisions of paragraphs 62-4.242(1)(a) and (b), F.A.C., subsections 62-4.242(2) and (3), F.A.C., and Rule 62-302.300, F.A.C., and any special standards for Outstanding Florida Waters and Outstanding National

> Resource Waters set forth in subsections 62-4.242(2) and (3), F.A.C., will be violated.

79. Petitioners proved by a preponderance of the competent and substantial evidence that the Department and the City were not aligned regarding how the City's application met applicable water quality standards. The Petitioners proved by a preponderance of the competent and substantial evidence that the City relied on future projects to provide reasonable assurance that the removal of the Lock would not cause or contribute to violations of water quality standards in the Caloosahatchee River and Matlacha Pass Aquatic Preserve.

80. Such reliance on future projects does not satisfy the required upfront demonstration that there is a substantial likelihood of compliance with standards, or "a substantial likelihood that the project will be successfully implemented." See Metro. Dade Cnty. v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Those future projects were part of the BMAP process under Section 403.067, Florida Statutes, which the Department had recognized and incorporated into its original intent to issue and draft permit. See Joint Exhibit 1 at pp. 329 and 330. The March 1, 2019, second amendment eliminated the Department's previous finding that the City demonstrated mitigation of adverse water quality impacts through its achievement of future project credits in the BMAP process.

81. Dr. Janicki tried to avoid using the "BMAP" acronym because evidence and argument related to that final agency action were excluded from this proceeding at the behest of the Department without objection from the City. However, the BMAP implements, over approximately 20 years, the 2009 TN TMDL that Dr. Janicki testified was calculated with Lock removal as a consideration. But achievement of the 2009 TN TMDL depends on the BMAP's future projects, which Dr. Janicki conceded was the basis for his water quality opinion in this proceeding.

82. The City's reliance on the BMAP process to satisfy reasonable assurance for the ERP Permit was further exemplified by this argument in its proposed recommended order:

"By operation of section 403.067(7)(b)2.i., Florida Statutes, the City is presumed to be in compliance with the TMDL requirements."

83. Section 403.067(7)(b)2.i., Florida Statutes, provides:

> A landowner, discharger, or other responsible person who is implementing applicable management strategies specified in an adopted basin management action plan may not be required by permit, enforcement action, or otherwise to implement additional management strategies, including water quality credit trading, to reduce pollutant loads to attain the pollutant reductions established pursuant to subsection (6) and shall be deemed to be in compliance with this section. (Emphasis added).

84. Thus, the presumptive fact of compliance flows from the basic fact that a "responsible person" is "implementing

applicable management strategies," i.e., actually implementing the future projects listed in the adopted BMAP. See § 90.301, Fla. Stat. The City sought to rely on the presumption of compliance but did not prove the basic factual predicate in this proceeding. See Id. Contrary to the City's position, the mere existence of the BMAP final agency action did not satisfy its burden to prove the basic fact from which the presumption of compliance flows. See § 403.067(7)(b)2.i., Fla. Stat.

85. Petitioners proved by a preponderance of the competent and substantial evidence that the Department's new position on water quality relied on a simplistic exchange of waters. The Department's water quality explanation did not consider that the waterbody in which the Project would occur has three direct connections with an OFW that is a Class II waterbody designated for shellfish propagation or harvesting, i.e. Matlacha Pass Aquatic Preserve. Such a consideration would require the Department to determine whether to apply the OFW permitting standards, and the Class II waters permitting criteria in section 10.2.5 of the Environmental Resource Permit Applicant's Handbook, Volume I. See Fla. Admin Code R. 62-330.302(1)(a); 62-4.242(2); and 62-302.400(17)(b)36.

86. Section 10.2.5 of the Environmental Resource Permit Applicant's Handbook, Volume I, provides:

> The special value and importance of shellfish harvesting waters to Florida's economy as existing or potential sites of commercial and recreational shellfish harvesting and as a nursery area for fish and shellfish is recognized by the Agencies. In accordance with section 10.1.1(d), above, the Agency shall deny a permit for a regulated activity located:
>
> * * *
>
> (c) In any class of waters where the location of the activity is adjacent or in close proximity to Class II waters, unless the applicant submits a plan or proposes a procedure that demonstrates that the regulated activity will not have a negative effect on the Class II waters and will not result in violations of water quality standards in the Class II waters. (Emphasis added).

87. There was no evidence that the Department's regulatory analysis considered that the waterbody in which the Project would occur directly connects to Class III waters that are restricted for shellfish harvesting, i.e. Caloosahatchee River and San Carlos Bay; and is in close proximity to Class II waters that are restricted for shellfish harvesting, i.e., Matlacha Pass Aquatic Preserve. See Fla. Admin. Code R. 62-302.400(17)(b)36. and 62-330.302(1)(c). This omission, by itself, is a mandatory basis for denial of the Permit.

B. Water Quantity

88. Rules 62-330.301(1)(a) and (c) require that the City provide reasonable assurance that the proposed Project will not

cause adverse water quantity impacts to receiving waters and adjacent lands; and will not cause adverse impacts to existing surface water storage and conveyance capabilities.

89. The preponderance of the competent substantial evidence demonstrated that the volume of flow through Breach 20, an adjacent tidal creek connected to Matlacha Pass, will drastically decrease. Mr. Erwin testified that Breach 20 was designed to maintain water flow to this adjacent tidal creek system. He also persuasively testified that there was no evidence of erosion at Breach 20, and there were currently "a lot of real healthy mangroves."

90. Since the City's position was that the decrease in flow volume and in velocity at Breach 20 would cure a perceived "erosion" problem, any potential adverse impacts to the tidal creek system and mangrove wetlands were not addressed. The undersigned's reasonable inferences from the record evidence are that the flow in the adjacent tidal creek system will be adversely impacted, and those "healthy mangroves" will also be adversely impacted. See Heifetz v. Dep't of Bus. Reg., 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985)("It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence.");

Berry v. Dep't of Envtl. Reg., 530 So. 2d 1019, 1022 (Fla. 4th DCA 1988)("[T]he agency may reject the findings of the hearing officer only when there is no competent substantial evidence from which the finding could reasonably be inferred." (citations omitted)).

C. Secondary Impacts

91. Rule 62-330.301(1)(f) requires that the City provide reasonable assurance that the proposed Project will not cause adverse secondary impacts to the water resources.

92. Section 10.2.7 of the Environmental Resource Permit Applicant's Handbook, Volume 1, provides that an applicant must provide reasonable assurance regarding secondary impacts. Those secondary impacts are regulated in the same manner as direct impacts and are analyzed using the same criteria.

93. The preponderance of the competent and substantial evidence proved that the City failed to provide reasonable assurance that the secondary impacts from construction, alteration, and intended or reasonably expected uses of the Project, will not cause or contribute to violations of water quality standards, or adverse impacts to the functions of wetlands or other surface waters as described in section 10.2.2 of the Environmental Resource Permit Applicant's Handbook, Volume 1.

94. Section 10.2.2 of the Environmental Resource Permit Applicant's Handbook, Volume 1, requires that an applicant must provide reasonable assurance that a regulated activity will not impact the values of wetland and other surface water functions so as to cause adverse impacts to: (a) the abundance and diversity of fish, wildlife and listed species; and (b) the habitat of fish, wildlife, and listed species. Section 10.2.2.3 requires the Department to assess impacts on the values of functions by reviewing the ecologic condition, hydrologic connections, uniqueness, location, and fish and wildlife utilization of the wetland or other surface water.

95. Mr. Erwin's credible and persuasive testimony regarding adverse secondary impacts to the ecological health of the mangrove ecosystem adjacent to the South Spreader Waterway was in stark contrast to the City's contention that Lock removal was not expected to result in impacts to those mangrove wetlands.[4/]

96. The credible and persuasive evidence demonstrated that Lock removal would adversely affect the smalltooth sawfish and its nursery habitat. The credible and persuasive evidence also demonstrated that Lock removal would increase the already high risk of manatee-motorboat collisions by inviting manatees into the South Spreader Waterway, a non-main-stem refuge, where novice boaters would present "a bigger hazard than the [L]ock ever has."[5/]

97. The preponderance of the competent substantial evidence demonstrated that the City failed to provide reasonable assurances that the Project will not impact the values of wetland and other surface water functions.

D. Public Interest Test

98. Section 373.414(1)(a), Florida Statutes, requires that in determining whether a proposed project is not contrary to the public interest or is clearly in the public interest, the Department "shall consider and balance" seven factors. All seven factors are collectively considered to determine whether, on balance, a proposed project satisfies the public interest test. See 1800 Atlantic Developers v. Dep't of Envtl. Reg., 552 So. 2d 946, 953, 957 (Fla. 1st DCA 1989), rev. den., 562 So. 2d 345 (Fla. 1990); Last Stand, Inc. v. Fury Mgmt., Inc., Case No. 12-2574 (Fla. DOAH Dec. 31, 2012; Fla. DEP Feb. 7, 2013).

99. The seven factors are also found in rule 62-330.302, and provide:

> (1) In addition to the conditions in rule 62-330.301, F.A.C., to obtain an individual or conceptual approval permit under this chapter, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, repair, removal, and abandonment of a project:
>
> (a) Located in, on, or over wetlands or other surface waters will not be contrary to

> the public interest, or if such activities significantly degrade or are within an Outstanding Florida Water, are clearly in the public interest, as determined by balancing the following criteria as set forth in sections 10.2.3 through 10.2.3.7 of Volume I:
>
> 1. Whether the activities will adversely affect the public health, safety, or welfare or the property of others;
>
> 2. Whether the activities will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
>
> 3. Whether the activities will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
>
> 4. Whether the activities will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
>
> 5. Whether the activities will be of a temporary or permanent nature;
>
> 6. Whether the activities will adversely affect or will enhance significant historical and archaeological resources under the provisions of section 267.061, F.S.; and
>
> 7. The current condition and relative value of functions being performed by areas affected by the proposed activities.

100. As found above, the Department's exchange of waters position failed to consider the three direct connections to the Matlacha Pass Aquatic Preserve OFW. This is also important, not just for the water quality analysis, but for the public interest

test. If the direct or secondary impacts of the Project are in, or significantly degrade an OFW, then the Project must be "clearly in the public interest," to obtain approval. Either review requires the Department to consider and balance the seven factors in rule 62-330.302(1)(a).

101. Factors one and three of the public interest test, address whether the Project will cause adverse impacts, not whether adverse impacts are currently occurring and will be cured by the Project. Also, factor one does not include a consideration of non-environmental issues.

102. The preponderance of the evidence supports a finding that the City's claims of navigational public safety concerns have less to do with navigational hazards, and more to do with inexperienced and impatient boaters. Even so, the direct impact of Lock removal will be to increase navigational access from the Caloosahatchee River to the South Spreader Waterway.

103. In addition, the preponderance of the evidence also supports a finding under factor one that there will be adverse secondary impacts to the property of Cape Harbour Marina.

104. Based on the above findings and conclusions, the Project will adversely affect the public interest factors associated with wetlands, fish and wildlife, and their habitat (factors two, four, and seven). Because the Project will be of a permanent nature, factor five of the public interest test falls

on the negative side of the balancing test. Factor six is neutral.

105. The adverse secondary impacts that fall under factors one, two, four, five, and seven outweigh any perceived benefits under factors one and three. Therefore, after balancing the public interest factors, it is concluded that the Project fails the public interest balancing test and should not be approved. Under either review, the Project is contrary to the public interest, and is not clearly in the public interest.

CO 15 and Res Judicata/Collateral Estoppel

106. Petitioners have maintained throughout this proceeding, the legal position that the doctrines of res judicata and collateral estoppel precluded the Department from considering the City's application to remove the Lock.

107. The doctrine of res judicata stands for the principle that once "a cause of action has been decided by a court of competent jurisdiction," the same issue cannot be re-litigated by the same parties so long as the judgment stands unreversed. See Selim v. Pan American Airways Corp., 889 So. 2d 149, 153 (Fla. 4th DCA 2004). The related doctrine of collateral estoppel prevents identical parties from re-litigating identical issues that have been determined in a prior litigation. See Burns v. DaimlerChrysler Corp., 914 So. 2d 451, 453 (Fla. 4th DCA 2005)("Collateral estoppel bars a claim only when the issues have

been fully litigated and decided in a court of competent jurisdiction.").

108. Res judicata applies when four identities are met: (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality in the person for or against whom the claim is made. See Topps v. State, 865 So. 2d 1253, 1255 (Fla. 2004) (citing McGregor v. Provident Trust Co. of Philadelphia, 162 So. 323, 328 (Fla. 1935)). Thus, before res judicata becomes applicable, there must have been a final judgement on the merits in a former suit. Id.

109. In this case, CO 15, as amended, and the 1977 warranty deed to the state of Florida were not final judgments after adjudication on the merits, for purposes of the doctrine of res judicata. Petitioners argued that res judicata applied because CO 15 as amended was a binding contract involving the same parties, the same ecosystem, the same science, and the same laws. However, even assuming a binding contract, it did not arise from an adjudication that led to a final judgment on the merits. See Hicks v. Hoagland, 953 So. 2d 695, 698 (Fla. 5th DCA 2007)("For res judicata to apply, there must exist in the prior litigation a 'clear-cut former adjudication' on the merits.").

110. Even if, CO 15, as amended, was settlement of an enforcement action by DER against GAC, contrary to the

Petitioners' claim, the parties were not the same. The parties to CO 15, as amended, were GAC and DER. The parties to the warranty deed were GAC and the state of Florida. Even if the former DER constitutes the same party as the Department, the City and the Petitioners were not parties to CO 15, as amended. See Palm AFC Holdings v. Palm Beach Cnty., 807 So. 2d 703 (Fla. 4th DCA 2002)(holding that the identity of parties test is not met because the prior decision was between appellants and Palm Beach County while this decision is between appellants and Minto Communities).

111. Furthermore, the causes of action were not identical. The test for whether the causes of action are identical is whether the essential elements or facts necessary to maintain the suit are the same. See Leahy v. Batmasian, 960 So. 2d 14 (Fla. 4th DCA 2007). This case involved a third party challenge to the Department's notice of intent to issue the Permit for Lock removal. CO 15, as amended, involved resolving GAC's massive dredge and fill violation as described by Mr. Erwin during the hearing. The facts, issues, and causes of action were not the same. See Id.

112. In conclusion, the doctrines of res judicata and collateral estoppel did not apply to preclude the Department from considering the City's application to remove the Lock. Most importantly, there was no prior proceeding that led to a final

judgment on the merits, which is required to invoke the doctrines in the first place. In addition, the elements were not met with regard to the identity of parties, causes of action, facts, and issues.

Attorney's Fees

113. In their proposed recommended order, Petitioners sought an award of attorney's fees and costs under section 120.595(1)(d). Petitioners argued that the City and the Department participated in this proceeding, initiated by Petitioners' challenge, for an "improper purpose," as that term is defined in section 120.595(1)(e).

114. Section 120.595(1)(e) defines "improper purpose" as "participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity."

115. Although the findings and conclusions of this Recommended Order are not favorable to the City and the Department, no "improper purpose" under section 120.595(1)(e) is found. Simply losing a case at trial is insufficient to establish a frivolous purpose in the non-prevailing party, let alone an improper purpose. See Schwartz v. W-K Partners, 530 So. 2d 456, 458 (Fla. 5th DCA 1988)(For an award of attorney's fees, the trial court must make a finding that there

was a complete absence of a justiciable issue raised by the losing party.).

Summary

116. Petitioners met their ultimate burden of persuasion to prove that the Project does not comply with all applicable permitting criteria. The City failed to demonstrate its compliance with all applicable permitting criteria and its entitlement to the Permit.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is,

RECOMMENDED that:

1. The Department of Environmental Protection enter a final order denying Individual Environmental Resource Permit Number 244816-005 to the City of Cape Coral for removal of the Chiquita Boat Lock.

2. The final order deny Petitioners' request for an award of attorney's fees and costs.

DONE AND ENTERED this 12th day of December, 2019, in Tallahassee, Leon County, Florida.

FRANCINE M. FFOLKES
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of December, 2019.

ENDNOTES

[1/] References throughout this proceeding to the "estuary" or the "Caloosahatchee estuary" include the Matlacha Pass, Caloosahatchee River, and San Carlos Bay. "[I]t's all one piece basically." Janicki, Tr. p. 846, lines 8-13.

[2/] Id.

[3/] Mr. Erwin defined a "breach" in two ways. First, as a natural opening that has been exacerbated by man, so that velocities are increased causing erosion, bed lowering and widening. Second, a section actually dug out by man that allows water to flow in an unnatural manner into adjacent wetlands. Erwin, Tr. p. 557, lines 13-25.

[4/] The decision to accept one expert's testimony over that of another expert, is a matter within the sound discretion of the administrative law judge (ALJ) and cannot be altered absent a complete lack of competent substantial evidence from which the finding could be reasonably inferred. See Collier Med. Ctr. v. State, Dep't of HRS, 462 So. 2d 83, 85 (Fla. 1st DCA 1985). The sufficiency of the facts required to form the opinion of an expert must normally reside with the expert, and any purported deficiencies in such facts relate to the weight of the evidence,

a matter also exclusively within the province of the ALJ as the trier of the facts. See Gershanik v. Dep't of Prof'l Reg., 458 So.2d 302, 305 (Fla. 3rd DCA 1984), rev. den. 462 So. 2d 1106 (Fla. 1985).

[5/] It is the case law of Florida that if there is competent substantial evidence to support the ALJ's findings, then it is irrelevant that there may also be competent substantial evidence to support a contrary finding. See Arand Constr. Co. v. Dyer, 592 So. 2d 276, 280 (Fla. 1st DCA 1991). The appellate courts of Florida have also observed that the evidence presented at an administrative hearing may support two inconsistent findings and have concluded that, in such cases, "it is the hearing officer's role to decide the issue one way or the other." Heifetz, 475 So. 2d at 1281.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.