STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARINE INDUSTRIES ASSOCIATION OF
PALM BEACH COUNTY, INC.,

Petitioner,

vs. Case No. 21-1662RP

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION,

Respondent.
_____/

FINAL ORDER

A final hearing was conducted in this case on July 16, 2021, in Tallahassee, Florida, before E. Gary Early, an administrative law judge with the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue for disposition in this case is whether the proposed amendment of rule 68D-21.001(3)(e)4.a. (Proposed Rule) enlarges, modifies, or contravenes the specific provisions of the law implemented and, therefore, constitutes an invalid exercise of delegated legislative authority, as defined in section 120.52(8)(c), Florida Statutes.

PRELIMINARY STATEMENT

On May 21, 2021, Petitioner, Marine Industries Association of Palm Beach County, Inc. (Association or Petitioner), filed a Petition for Administrative Determination of Invalidity of Proposed Rule 68D-21.001, Florida Administrative Code (Petition).

The final hearing was scheduled for July 16, 2021. The parties filed their Joint Pre-hearing Stipulation on July 13, 2021, in which they stipulated to 10 facts that would require no proof at hearing. Those facts have been incorporated herein. The Joint Pre-hearing Stipulation also identified, as an issue of law for determination, "[w]hether the Commission's proposed rule … enlarges, modifies, or contravenes the specific provisions of section 327.46(1)(b)1.a., Florida Statutes, that it implements, and, therefore, constitutes an invalid exercise of delegated legislative authority."

The final hearing was held on July 16, 2021, as scheduled. At the commencement of the hearing, the Florida Fish and Wildlife Conservation Commission (Commission) raised the issue of the ripeness of Petitioner's challenge to the Proposed Rule on the ground that no local government had, as yet, implemented the Proposed Rule to request and be granted a no-wake zone around a "launching or landing facility" as newly described. That issue is addressed in the Conclusions of Law.

Petitioner's Exhibits 1 through 21, and Respondent's Exhibits 1 through 6 were received in evidence. Petitioner's Exhibit 1 is the deposition transcript of the Commission's representative, Major Robert Rowe, and was offered, without objection, to minimize the necessity of extensive examination at the hearing. Respondent's Exhibit 20 is an Affidavit of Michael Kennedy, a member of Petitioner and chair of its boating and legislative issues committee, who provided, without objection, a sworn statement in lieu of live testimony in support of Petitioner's standing. Both the deposition of Major Rowe, and the Affidavit of Mr. Kennedy were accepted and given weight as though presented live at the hearing.

Respondent and Petitioner each listed Major Rowe as a witness, and he was called to the stand and questioned by both. No other witnesses were called.

The one-volume Transcript of the final hearing was filed on August 9, 2021. The parties, having requested 20 days from the filing of the transcript within which to file post-hearing submittals, both filed their Proposed Final Orders on August 30, 2021, which have been considered in the preparation of this Final Order. References to statutes are to Florida Statutes (2020), unless otherwise noted.

FINDINGS OF FACT

Stipulated Facts

1. The Petition in this case was filed on May 21, 2021, within 10 days of the Commission's final public hearing held on May 12, 2021, concerning the Proposed Rule.

2. The Petition in this case was also filed within 20 days of the Commission's notice of proposed change published on May 19, 2021, concerning the Proposed Rule.

3. The Proposed Rule interprets "other launching or landing facility" in section 327.46(1)(b)1.a., Florida Statutes, to include launching or landing facilities intended for hand-launched, non-motorized watercraft like kayaks or paddleboards, including mats placed on the ground similar to the following:

4. The Proposed Rule interprets "other launching or landing facility" in section 327.46(1)(b)1.a., to include designated unimproved areas intended for hand-launched, non-motorized watercraft like kayaks or paddleboards in parks that have permanently installed public parking and restrooms.

5. The portion of the Proposed Rule interpreting "other launching or landing facility" in section 327.46(1)(b)1.a., to include designated unimproved areas intended for hand-launched, non-motorized watercraft like kayaks or paddleboards in parks that have permanently installed public parking and restrooms would potentially have the effect of allowing for establishment of more idle-speed, no wake boating-restricted areas, around areas used primarily or solely for non-motorized watercraft.

6. The Association is a not-for-profit organization created to promote and protect the sound growth of the marine industry in Palm Beach County for

the benefit and education of its members, the community, and the environment.

7. The Association also regularly advocates at the state and local level on issues of importance to its members, including opposing legislation and rules that negatively impact boating, such as unreasonable boating restrictions.

8. A substantial number of the Association's members, including individual boaters and marine sector businesses, utilize waterways in Palm Beach County.

9. The Intracoastal Waterway, within Palm Beach County, is traversed frequently by many of the Association's members for business and pleasure.

10. The Association's members, as boaters, are regulated by the Commission and its rules regarding boating, including boating-restricted areas.

The Proposed Rule

11. The full text of the Proposed Rule, as set forth in the Notice of Change published in the Florida Administrative Register, Vol. 47, No. 97, May 19, 2021, is as follows:

NOTICE OF CHANGE

Notice is hereby given that the following changes have been made to the proposed rule in accordance with subparagraph 120.54(3)(d)1., F.S., published in Vol. 47 No. 10, January 15, 2021 issue of the Florida Administrative Register.

68D-21.001 Requirements for Applications.

(1) through (2) No change.

(3) Each application must include:

(a) through (d) No change.

(e) One or more scaled drawings no larger than 8 1/2 inches by 11 inches, reproducible in black and white on standard office photocopying equipment which clearly show the following:

1. through 3. No change.

4. The location of any of the following within a proposed boating-restricted area or used as a basis for establishing a boating restricted area, identified with a label or legend as to whether or not it is available for use by the general public:

a. Any boat ramp, hoist, marine railway, or other launching or landing facility. For purposes of this Chapter, and in interpreting s. 327.46, F.S., a "launching or landing facility" shall be any improvement built or installed upon land that facilitates the transitioning of a vessel ~~transitioning~~ from ~~the~~ land to ~~the~~ water or from water to land ~~and vice versa~~. A "launching or landing facility" shall also include an unimproved vessel launching or landing area if such area is located within a state, county or municipal park, and the park includes both permanently installed public restrooms and public parking, and the unimproved vessel

launching or landing area is identified and designated for such use by the park. A "launching or landing facility" shall not include any amenity built or placed near or adjacent to the water which does not facilitate the transitioning of a vessel ~~transitioning~~ from ~~the~~ land to water, or from water to land, or an unimproved vessel launching or landing area that does not meet the requirements provided herein.

b. through d. No change.

5. through 7. No change.

(f) through (k) No change.

(4) through (5) No change.

Rulemaking Authority 327.04, 327.302, 327.46 FS. Law Implemented 327.302, 327.46 FS. History–New 10-6-10, Amended _____.

12. The Proposed Rule implements section 327.46(1)(b)1.a., which allows counties and municipalities to establish idle speed, no wake, boating-restricted areas to extend 500 feet in each direction around "any boat ramp, hoist, marine railway, *or other launching or landing facility* available for use by the general boating public." (emphasis added).

13. The Commission's goal in developing the Proposed Rule was to provide a clear interpretation of a launching or landing facility. In establishing its definition, the Commission went "back and forth" with municipalities and counties that were applying for restricted boating zones, and to "get them on board with what [the Commission's] legal interpretation was of a 'facility.'"

14. The second sentence of the Proposed Rule defines "other launching or landing facility" as "any improvement, built or installed upon land, regardless of its location, that facilitates the launching or landing of vessels." The amendment of that second sentence is essentially cosmetic, making little substantive change to the meaning or scope of the existing rule.

15. The third sentence of the Proposed Rule, which is entirely new, defines "other launching or landing facility" to also include "an unimproved vessel launching or landing area" located in a public park with permanent public restrooms and public parking. The Commission does not require unimproved areas to have any physical indicia of their suitability for launching or landing, as long as they are "designated" for such use. With regard to unimproved vessel launching or landing areas, the Commission has taken the

position that the public park itself is the "facility," rather than any area designed to facilitate launching or landing.

Issues for Disposition

16. Section 120.56(2)(a) provides that "the agency has the burden to prove by a preponderance of the evidence that the Proposed Rule is not an invalid exercise of delegated legislative authority as to the objections raised."

17. The "objections raised," as identified in the Joint Pre-hearing Stipulation, are those that remain for disposition in this proceeding, with issues not preserved having been waived. *See Palm Beach Polo Holdings, Inc. v. Broward Marine, Inc.*, 174 So. 3d 1037 (Fla. 4th DCA 2015).

18. As set forth in the Joint Prehearing Stipulation, the following are at issue:

> a. The meaning of "vessel" and "boat" as used in the Florida Constitution and Chapter 327, Florida Statutes.
>
> b. The meaning of "any boat ramp, hoist, marine railway, or other launching or landing facility available for use by the general boating public . . . ." as used in section 327.46(1)(b)1.a., Florida Statutes.
>
> c. Whether the Commission's proposed rule section 68D-21.001(3)(e)4.a. of the Florida Administrative Code enlarges, modifies, or contravenes the specific provisions of section 327.46(1)(b)1.a., Florida Statutes, that it implements and therefore constitutes an invalid exercise of delegated legislative authority.

19. The Proposed Rule, on its face, does not directly include or exclude hand-launched, non-motorized watercraft, such as canoes, kayaks, or paddleboards, from the class of vessels for which launching or landing facilities are intended. However, the Commission stipulated that the

Proposed Rule interprets "other launching or landing facility" in section 327.46(1)(b)1.a., to include areas intended for hand-launched, non-motorized watercraft. Thus, the issue of the interpretation of whether "hand-launched, non-motorized watercraft like kayaks or paddleboards" are "vessels" has, thus, been placed squarely at issue.

Facts Adduced at Hearing

Vessels

20. Watercraft excluded from registration and payment of fees include "[a] non-motor-powered vessel less than 16 feet in length or a non-motor-powered canoe, kayak, racing shell, or rowing scull, regardless of length." § 328.48(2)(d), Fla. Stat.

21. By statute, a non-motorized vessel less than 16 feet in length is not taxed or subject to registration unless a motor is placed on it.

22. Major Rowe testified that "[a] boat is a vessel, not all vessels are boats." He further expressed the Commission's interpretation of the term "vessel" as being "all manner of water craft that's capable of being used as transportation upon the waters of the state."

23. Canoes, kayaks, paddleboards, small sailboats, and similar manually or wind-powered watercraft are capable of being used as transportation upon the waters of the state.

Launching or Landing Facility

24. The reason for designating a no-wake or idle-speed zone within 500 feet of a launching or landing facility is because operators who are launching vessels may be in a vulnerable position while launching and loading the craft. The Commission wants to make sure "there's not excessive wake that could come by and knock them down or, you know, pinch them between the vessel and the trailer or depending on what -- how they're

loading in, so that's what that idle speed is for is to make it safe for them to launch and load the vessel."

a. An improvement built or installed upon land

25. Section 327.46(1)(b)1.a. lists three specific types of facilities that warrant the establishment of boating-restricted areas within 500 feet.

26. The first listed facility is a boat ramp. A boat ramp is, as described by Major Rowe:

> an improved surface, mostly it is for launching motorized vessels in the state. You know, you can think of a concrete boat ramp and they vary in size from a single lane to multiple lane facilities. There is an organization called the State Organization of Boating Access that has standards for building those types of boat ramps, and [the Commission] follow[s] that when we do those boating access projects. So that's what a boat ramp is.

27. A hoist is a vessel launch that is regulated by the Commission. Petitioner's Exhibit 18 was acknowledged to be representative of a boat hoist, which is a device that lifts a boat from the water.

28. A marine railway is "a railway that's along the water front; it has facilities for loading and unloading of cargo, usually from ships." The photograph received as Petitioner's Exhibit 19 demonstrates that a marine railway is also used for launching and landing vessels.

29. The common element of the three statutorily listed facilities is that they are constructed for the specific purpose of functioning as a boat launching and landing facility, that they involve a degree of construction or installation, and that they are fixed and permanent.

30. One reason for the establishment of vessel restrictions around such facilities is that, with a hoist or a trailered boat that is too large to carry by hand, wakes from vessels may throw the boat off the trailer, run it into the trailer, damage the vessel, or injure people.

31. The Proposed Rule encompasses an interpretation of launching or landing facility that is facially consistent with the statutorily listed facilities, i.e. "any *improvement built or installed* upon land." That description would encompass fixed structures installed on land to facilitate the transitioning of vessels, such as the structure for hand-launched vessels depicted in Respondent's Exhibit 2.

32. Where the Commission has veered away from fixed, permanent structures similar to those listed by the Legislature, its position is that even the slightest amount of shoreline work makes a facility "improved" if it has the effect of making it easier to launch a vessel.

33. The Commission construes the Proposed Rule to include general shoreline stabilization that also creates an opening for launching vessels to be an "improvement built or installed upon land." Furthermore, a "Mobi-Mat," which is a durable fabric mat placed on the shoreline, would potentially be an improvement built or installed upon land sufficient to constitute a launching or landing facility. When shown a photograph of a Mobi-Mat (Petitioner's Exhibit 7; *see also* Respondent's Exhibit 6), Major Rowe acknowledged that such are *designed* for wheelchair and public access to the water. However, he indicated that "you could use that material and *designate it* as a launch for the launching of canoes, kayaks, non-motorized vessels, and then it would become a facility ... [but] a walk-way into the water that's not designated as a boat launch wouldn't become a facility, and it would just be a walk-way into the water." The same rationale was expressed for concrete steps with a handrail leading to the water (Respondent's Exhibit 5). Though there was nothing by their appearance to suggest that the concrete steps served any purpose other than normal pedestrian access, Major Rowe testified that it would, upon "designation," be considered to be "an improvement that is there for the purpose of launching a kayak [or] stand-up paddle board."

34. If any structure used to provide shoreline stabilization or facilitate pedestrian access to the water is, as asserted by the Commission, sufficient to constitute a launching and landing facility, there would have been no purpose for the Legislature to provide examples of the types of facilities that would warrant the creation of a boating-restricted area. Pedestrian stairs, stabilizing timbers, and wheelchair and public access matting bear no resemblance to, and are not in the same class of legislatively listed boat ramps, hoists, and marine railways used to serve "the boating public."

b. <u>An unimproved area in a public park</u>

35. The third sentence of the Proposed Rule covers unimproved launches intended to be specific to non-motorized or human-powered vessels. Major Rowe indicated that such might include "an unimproved ramp, it can be a dirt surface as well. We call those primitive boat ramps." In a park, in which "there may be a piece of sand and nothing else," he propounded that "a patch of dirt is the best launching surface to launch these types of [hand-launched] crafts."

36. The Commission's purpose in including parks as a "facility" was that there is often *no* "improvement" to constitute a launching or landing facility available to the general boating public. In such instances, "the park becomes the improvement." Thus, in public parks with no improvements, the Commission determined that "a place to park your car that you use to transport the vessel to the park is ... facilitating the launch."

37. Even when there is no improvement to constitute a launching or landing facility, "because the statute stipulated a facility, [the Commission was] *trying to broaden that* in a way that would make it clear what would qualify as a facility and what would not." To implement that goal, the municipal or county park is considered to be the launching or landing facility, and "[t]hat's what [the Commission is] hanging our hat on."

38. It is not the purpose of rulemaking to extend or broaden the reach of delegated legislative authority. There is absolutely no similarity between boat ramps, hoists, and marine railways, and a bare patch of earth or break in shoreline vegetation, regardless of the presence of nearby parking lots or restrooms. Public parks have no inherent association with boat launching. The Commission's effort to "broaden" the meaning of a "launching or landing facility available for use by the general boating public" to include essentially any patch of earth at a public park, whether recognizable as a launch or not, so long as a sign is posted "designating" it as such, goes well beyond any reasonable construction of section 327.46. There must be some relationship between the rule and its enabling legislation. Here, there is none.

CONCLUSIONS OF LAW

Jurisdiction

39. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties to this proceeding. § 120.56(1) and (2), Fla. Stat.

Standing

40. Section 120.56(1)(a) provides that "any person substantially affected by ... a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority."

41. In order to demonstrate that a person is "substantially affected," that person must establish "a real and sufficiently immediate injury in fact" and that the interest involved is within the "zone of interest to be protected or regulated." *See Ward v. Bd. of Trs. of the Int. Imp. Trust Fund*, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995).

42. Associations have standing to bring a rule challenge when:

> a substantial number of [the association's] members, although not necessarily a majority, are "substantially affected" by the challenged rule. Further, the subject matter of the rule must be within the association's general scope of interest and activity, and the relief requested must be the type appropriate for a trade association to receive on behalf of its members.

Fla. Home Builders Ass'n v. Dep't of Labor and Emp. Sec., 412 So. 2d 351, 353-54 (Fla. 1982); *see also NAACP, Inc. v. Bd. of Regents*, 863 So. 2d 294, 298 (Fla. 2003).

43. As stipulated and set forth in Findings of Fact 6 through 10, Petitioner is a not-for-profit organization created to promote and protect the sound growth of the marine industry in Palm Beach County for the benefit and education of its members, the community, and the environment. Petitioner regularly advocates at the state and local level on issues of importance to its members, including opposing legislation and rules that negatively impact boating, such as unreasonable boating restrictions. A substantial number of Petitioner's members, including individual boaters and marine sector businesses, utilize and traverse waterways in Palm Beach County for business and pleasure.

44. If allowed to become effective, Petitioner and its members would be governed by the effect of the Proposed Rule allowing municipal and county governments, including those in Palm Beach County, to establish, as a matter of right, boating regulations and restrictions within 500 feet of any vessel launching or landing facility described under the Proposed Rule, and, therefore, each is substantially affected in a manner and degree sufficient to confer administrative standing in this case. *See, e.g.*, *Abbott Labs. v. Mylan Pharms. Inc.*, 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009); *Dep't of Prof'l Reg., Bd. of Dentistry v. Fla. Dental Hygienist Ass'n*, 612 So. 2d 646, 651 (Fla. 1st DCA 1993); *see also Cole Vision Corp. v. Dep't of Bus. & Prof'l Reg., Bd. of*

Optometry, 688 So. 2d 404, 407 (Fla. 1st DCA 1997)(recognizing that "a less demanding standard applies in a rule challenge proceeding than in an action at law, and that the standard differs from the 'substantial interest' standard of a licensure proceeding").

45. Based on the record of this proceeding, Petitioner meets the standards for associational standing.

Burden of Proof

46. In its challenge to the Proposed Rule, Petitioner has the burden to prove, by a preponderance of the evidence, that it is substantially affected by the Proposed Rule, and the Commission then has the burden of proving by a preponderance of the evidence that the Proposed Rule is not an invalid exercise of delegated legislative authority as to the objections raised. § 120.56(2)(a), Fla. Stat.

47. The preponderance of the evidence standard "is defined as 'the greater weight of the evidence,' Black's Law Dictionary 1201 (7th ed. 1999), or evidence that 'more likely than not' tends to prove a certain proposition." *Gross v. Lyons*, 763 So. 2d 276, 279 n.1 (Fla. 2000); *see also Haines v. Dep't of Child. & Fams.*, 983 So. 2d 602, 606 (Fla. 5th DCA 2008).

48. Petitioner met its burden of demonstrating that it is substantially affected by the Proposed Rule.

49. When a substantially affected person seeks a determination of the invalidity of a proposed rule pursuant to section 120.56(2), the proposed rule is not presumed to be valid or invalid. § 120.56(2)(c), Fla. Stat.

Ripeness

50. The Commission has asserted that this case is not "ripe" because no boating-restricted area has been proposed or approved pursuant to the Proposed Rule.

51. Section 120.56(1)(a) provides that:

> Any person substantially affected by ... a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

52. Section 120.56(2)(a) further provides:

> A petition alleging the invalidity of a proposed rule shall be filed within 21 days after the date of publication of the notice required by s. 120.54(3)(a). ... The petitioner has the burden to prove by a preponderance of the evidence that the petitioner would be substantially affected by the proposed rule. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised.

53. Proposed rules, by their very nature, have not been implemented. Rather, the only question is whether Petitioner has standing to challenge the Proposed Rule, i.e., whether Petitioner and its members will be substantially affected by the rule. There is no requirement that any action has already been taken under the Proposed Rule.

54. It has long been established that

> The APA does not withhold judicial review of a new rule until an affected party at its peril violates the rule and thereby induces agency proceedings under Section 120.57 to punish for offending conduct. One who is prospectively affected by an adopted rule may challenge it administratively as "an invalid exercise of delegated legislative authority," obtain a ruling by a DOAH hearing officer, and promptly seek judicial review of that "final agency action."

4245 Corp., Mother's Lounge, Inc. v. Div. of Bev., 348 So. 2d 934, 936 (Fla. 1st DCA 1977).

55. Here, there is no dispute that the Proposed Rule would be applicable to waterways in Palm Beach County. The Association's testimony that the

Proposed Rule "will have drastic and unintended consequences on the Association's members in and around Palm Beach County and across the state by needlessly increasing boating restricted zones" was uncontested.

56. Based on the foregoing and the record in this case, the Commission's attempt to inject an element of "ripeness" as a defense to this rule challenge proceeding is rejected.

Rulemaking Standards

57. As set forth in the Joint Pre-hearing Stipulation, Petitioner argues that the Proposed Rule "enlarges, modifies, or contravenes the specific provisions of section 327.46(1)(b)1.a., Florida Statutes, that it implements." Section 120.52(8) defines an "invalid exercise of delegated legislative authority." The provision at issue in this proceeding is as follows:

> (8) "Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> * * *
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1. ...

Ejusdem Generis

58. As applied to the term "other launching or landing facilities" which follows the three legislatively listed examples, it is well established that:

> the statutory and constitutional construction principle of *ejusdem generis* - which is a Latin term for "of the same kind" - is instructive on this issue. Distilled to its essence, this rule provides that where general words or phrases follow an enumeration of specific words or phrases, "the general words are construed as applying to the

> same kind or class as those that are specifically mentioned." (citations omitted).

In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Certain Medical Conditions, 132 So. 3d 786, 801 (Fla. 2014). As further explained by the Supreme Court, "the canon of *ejusdem generis* itself is predicated upon the concept that a general category following an enumeration of specific words or phrases should be construed 'similarly' to those that are specifically mentioned." *Id.* at 802. *See also State v. Hearns*, 961 So. 2d 211, 219 (Fla. 2007) ("[W]hen a general phrase follows a list of specifics, the general phrase will be interpreted to include only items of the same type as those listed.").

59. Here, the general language "or other launching or landing facility" follows the specific enumeration of "boat ramp, hoist, [and] marine railway."

60. As set forth in the Findings of Fact herein, pedestrian stairs, stabilizing timbers, wheelchair and public access matting, and unimproved patches of sand are not facilities similar to or of the same class as boat ramps, hoists, or marine railways. If the Legislature had intended any place at which one could carry a kayak to the water's edge to be a launching or landing facility, it would not have prefaced that term with examples of substantial, permanent, fixed structures constructed for the specific purpose of launching and landing boats.

Statutory Authority for the Proposed Rules

61. The statutory provisions cited by the Commission as rulemaking authority for the Proposed Rule are sections 327.04, 327.302, and 327.46.

62. Section 327.04 provides that the Commission "has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this chapter conferring powers or duties upon it."

63. Section 327.302 provides that the Commission "shall prepare and, upon request, supply … forms for [boating] accident reports as required in this chapter."

64. Section 327.46 provides, in pertinent part, that:

> (1) Boating-restricted areas, including, but not limited to, restrictions of vessel speeds and vessel traffic, may be established on the waters of this state for any purpose necessary to protect the safety of the public if such restrictions are necessary based on boating accidents, visibility, hazardous currents or water levels, vessel traffic congestion, or other navigational hazards or to protect seagrasses on privately owned submerged lands.
>
> (a) The commission may establish boating-restricted areas by rule pursuant to chapter 120.
>
> (b) Municipalities and counties have the authority to establish the following boating-restricted areas by ordinance:
>
> 1. An ordinance establishing an idle speed, no wake boating-restricted area, if the area is:
>
> a. Within 500 feet of any boat ramp, hoist, marine railway, or other launching or landing facility available for use by the general boating public on waterways more than 300 feet in width or within 300 feet of any boat ramp, hoist, marine railway, or other launching or landing facility available for use by the general boating public on waterways not exceeding 300 feet in width. ...

65. The statutory provisions cited by the Commission as the law implemented by the Proposed Rule are the same sections of 327.302 and 327.46.[1]

[1] How the accident-reporting forms established by section 327.302 either authorize or are implemented by the boat launching and landing facility provisions of the Proposed Rule was not explained.

Vessels

66. Section 327.02(46) defines a "vessel" as "synonymous with boat as referenced in s. 1(b), Art. VII of the State Constitution and includes every description of watercraft, barge, and airboat, other than a seaplane on the water, used or capable of being used as a means of transportation on water."

67. Article VII, section 1(b), Florida Constitution, provides that "boats ... as defined by law, shall be subject to a license tax for their operation in the amounts and for the purposes prescribed by law."

68. Vessel registration constitutes the state operating license. § 327.02(41), Fla. Stat.

69. The Legislature has exempted certain forms of watercraft from registration and payment of fees to county tax collectors. Such watercraft include "[a] non-motor-powered vessel less than 16 feet in length or a non-motor-powered canoe, kayak, racing shell, or rowing scull, regardless of length." § 328.48(2)(d), Fla. Stat.

70. Watercraft exempted from registration remain legislatively defined as "vessels" for purposes of the Florida Vessel Safety Law, chapter 327, Florida Statutes. *See* § 327.02(5) ("'Canoe' means a light, narrow *vessel* with curved sides and with both ends pointed") and (39) ("'Racing shell,' 'rowing scull,' or 'racing kayak' means a manually propelled *vessel*.").

71. The Second District Court of Appeal, in an analogous analysis of whether a vessel under chapter 327 must be registered as such under chapter 328, as implied by Article VII, section 1(b) of the Florida Constitution, determined that section 327.02(39) "has consistently included the phrase 'used or capable of being used for transportation on water.' Consequently, it is the vessel's use for transportation on water that is necessary to establishing that a person was operating a vessel... ." *State v. Davis*, 110 So. 3d 27, 31 (Fla. 2d DCA 2013). After reviewing the legislative histories of both chapter 327 and chapter 328, the Court held that:

> Rather than defining vessel as a boat which is subject to a license tax, the legislature defined it as being "synonymous with boat." § 327.02(39). We note too that the legislature did not define vessel as being synonymous with boat as defined in the constitution, but merely as referenced. *Id.* A synonym is "a word having the same or nearly the same meaning as another in the same language." *Webster's New World Dictionary & Thesaurus* 623 (1996). Construing the manner in which the legislature defined vessel (i.e., by deleting any explicit reference to a boat's registration and instead citing to the reference in the constitution) along with the fact that the legislature created an entirely separate chapter to address registration requirements, we interpret the constitutional reference in section 327.02(39) to provide merely an example of what constitutes a vessel. That is, we find that the legislature intended for vessel to be defined as having nearly the same meaning as boat as referenced in the constitution. Had the legislature intended for a vessel to be defined by its registration requirements, the legislature would not have deleted the explicit reference to registration requirements. ... [T]he reference to section (1)(b) of article VII in section 327.02(39) - which is merely a general definition applicable to all of chapter 327 - is merely to provide an example of what constitutes a vessel.

Id. at 31-32.

72. For the reasons set forth herein, it is concluded that a "vessel" as defined in chapter 327 is not limited to vessels subject to registration and payment of fees for operation. Rather, the term applies to all watercraft "used or capable of being used for transportation on water," which may include canoes, kayaks, sailboats less than 16 feet in length, and other manually propelled watercraft regardless of length. Thus, a "launching or landing facility" is not limited based on the size or class of vessels served.

Other launching or landing facility

73. Since the Proposed Rule is authorized by and implements section 327.46(1), a county or municipality may establish a no-wake, slow-speed zone "[w]ithin 500 feet of any boat ramp, hoist, marine railway, or other launching or landing facility." The primary issue in this case is what type of "other launching or landing facility available to the general boating public" falls within the description of such provided in section 327.46(1)(b)1.a.

a. An improvement built or installed upon land

74. The first two sentences of the Proposed Rule would, if adopted, provide that an application for approval of an ordinance establishing a boating-restricted area include the location of "[a]ny boat ramp, hoist, marine railway, or other launching or landing facility. … [which] shall be any improvement built or installed upon land that facilitates the transitioning of a vessel from land to water or from water to land."

75. Evidence of facilities considered by the Commission to meet that Proposed Rule standard included photographs of structures and facilities, some of which were recognizable as launching or landing facilities, and some which were not.

76. As set forth in the Findings of Fact, and applying the doctrine of *ejusdem generis*, improved structures built or installed on land that are similar in nature to boat ramps, hoists, and marine railways are those that would be a reasonable implementation of the statutory definition by the Proposed Rule.

77. Pedestrian stairs, stabilizing timbers, and wheelchair and public access matting, as depicted by the photographs in evidence, bear no resemblance to, and are not in the same class of facilities listed by the Legislature. Therefore, inclusion of those types of structures in the Proposed Rule warranting Commission approval of an ordinance establishing an idle speed, no-wake, boating-restricted area, enlarges, modifies, or contravenes

the specific provisions of section 327.46(1)(b)1.a. and constitutes an invalid exercise of delegated legislative authority. The suitability of types of "launching and landing facilities," other than those described and depicted herein, will remain for disposition in subsequent proceedings after Commission action on applications for approval of boating-restricted areas.

b. An unimproved area in a public park

78. The third sentence of the Proposed Rule would allow any unimproved area at a waterfront public park to be considered a launching or landing facility, as long as the park has permanent restrooms and public parking, and the public entity posts a sign that designates the park as a launching or landing facility. In such instances, the public park itself is the "launching or landing facility." That broad construction is simply not supported by the statute.

79. As set forth in the Findings of Fact, and applying the doctrine of *ejusdem generis*, launching or landing facilities must share some degree of similarity to legislatively listed, permanent, and improved boat ramps, hoists, and marine railways. Patches of dirt, breaks in shoreline vegetation, and unimproved "primitive landings" share no common attributes of the statutorily listed examples. There is nothing in a public park, even those with parking and restrooms, that inherently facilitates launching or landing vessels, or that bears any similarity to the statutorily listed facilities. Therefore, inclusion of parks as "launching or landing facilities" warranting Commission approval of an ordinance establishing an idle speed, no-wake boating-restricted area, enlarges, modifies, or contravenes the specific provisions of section 327.46(1)(b)1.a. and constitutes an invalid exercise of delegated legislative authority.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

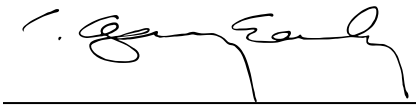
A. The definition of "vessel" is not limited to watercraft subject to registration and payment of fees for operation, but applies to all watercraft "used or capable of being used for transportation on water," which may include non-motor-powered vessels less than 16 feet in length, or non-motor-powered canoes, kayaks, racing shells, or rowing sculls, regardless of length.

B. A facility that meets the standard as an "other launching or landing facility" must be similar in nature to a boat ramp, hoist, or marine railway. Pedestrian stairs, stabilizing timbers, and wheelchair and public access matting are not similar in nature to a boat ramp, hoist, or marine railway, and their inclusion as "other launching or landing facilities" in Proposed Rule 68D-21.001(3)(e)4.a. enlarges, modifies, or contravenes the specific provisions of section 327.46(1)(b)1.a., and, therefore, constitutes an invalid exercise of delegated legislative authority.

C. Proposed Rule 68D-21.001(3)(e)4.a., which defines a "launching or landing facility" as including "an unimproved vessel launching or landing area if such area is located within a state, county, or municipal park, and the park includes both permanently installed public restrooms and public parking, and the unimproved vessel launching or landing area is identified and designated for such use by the park" enlarges, modifies, or contravenes the specific provisions of section 327.46(1)(b)1.a., and, therefore, constitutes an invalid exercise of delegated legislative authority.

D. Jurisdiction is retained for the purpose of determining reasonable attorney's fees and costs pursuant to section 120.595(2), and whether the Commission's actions were substantially justified or special circumstances exist which would make the award unjust. Any motion to determine fees and costs shall be filed within 60 days of the issuance of this Final Order.

DONE AND ORDERED this 20th day of September, 2021, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.