

GENERAL COUNSEL'S REPORT

May 23, 2023

Discussion: Action Item: Approval of Final Order — MHC Cortez Village, LLC v. Cortez Road Investments and Finance, Inc., and SWFWMD — DOAH Case No. 21-2491 — Environmental Resource Permit Application No. 821245 — Manatee County

On June 29, 2021, the District sent a Notice of Intended Agency Action letter to Cortez Road Investments And Finance, Inc. (Cortez Road). The letter advised Cortez Road that the District intended to approve Application Number 821245 and issue Environmental Resource Permit (ERP) Number 43032468.003 to Cortez Road, allowing the construction of a dock on a canal that borders property it owns.

On July 30, 2021, MHC Cortez Village, LLC (the Marina) served the District and Cortez Road with a Petition for Administrative Hearing (the Petition), challenging the District's intended issuance of the ERP to Cortez Road for the construction of the Dock. The District subsequently forwarded the Petition to the Division of Administrative Hearings (DOAH) to conduct a final hearing pursuant to Section 120.57(1), Florida Statutes (F.S.). On June 14 and 15, 2022, August 16 through 18, 2022, and by Zoom video conference on September 1, 2, and 13, 2022, the assigned Administrative Law Judge (ALJ), J. Bruce Culpepper, conducted a formal administrative hearing with all parties participating.

The District was represented by Deputy General Counsel, Elizabeth Fernandez and Senior Attorneys Megan Albrecht and Allison Dhand; Cortez Road was represented by Susan Martin, John Fumero, and Stephen Conteaguero of the law firm Nason, Yeager, Gerson, Harris & Fumero, P.A.; and the Marina was represented by Matthew Chait, Devon Woolard, and Daniel Nordby of Shutts & Bowen, LLP (collectively known as "the Parties"). After the conclusion of the final hearing, the Parties submitted Proposed Recommended Orders to the ALJ.

On March 7, 2023, ALJ J. Bruce Culpepper entered his Recommended Order. The ALJ recommended the District enter a Final Order granting Cortez Road's application and issue the ERP to allow construction of the dock. The ALJ found that the preponderance of the evidence demonstrated Cortez Road provided reasonable assurances in its application that constructing the dock is not contrary to the public interest and that the evidence supports the District's balancing of the criteria set forth in Section 373.414, F.S., Rule 62-330.302, Florida Administrative Code, and Applicant's Handbook Volume I, to issue the Permit to Cortez Road. The ALJ further concluded that there are no reasonably anticipated significant adverse impacts on safe navigation from the construction of the dock, and the Marina did not meet the burden of the preponderance of competent substantial evidence proving the dock is contrary to the public interest.

Pursuant to Section 120.57(1)(k), F.S. and Rule 28-106.217, F.A.C., parties to an administrative hearing may file exceptions to the ALJ's Findings of Fact and Conclusions of Law as presented in a Recommended Order. The Marina filed exceptions to the ALJ's Recommended Order containing five specific instances of exceptions, and Cortez Road submitted a response to the Marina's exceptions. Pursuant to Section 120.57(1), F.S. the District has Final Order authority in formal administrative hearings. Accordingly, District Staff from the Office of the General Counsel who were not involved in the hearing reviewed the Marina's exceptions and Cortez Road's response in order to prepare a proposed Final Order.

Pursuant to Section 120.57(1)(l), F.S., in its Final Order the District may reject or modify the conclusions of law over which it has substantive jurisdiction and may reject or modify findings of fact only when it determines that the findings were not based on competent substantial evidence after a review of the entire record. During its review of the entire record, and based in part upon the Marina's first exception, District Staff found that one sentence in Paragraph 42 of the ALJ's Recommended Order was not based on competent substantial evidence and should be stricken. Otherwise, the rest of the Marina's exceptions were denied for the reasons stated in the proposed Final Order after thorough review of the entire record.

Pursuant to Section 120.57(1)(l), F.S., the District has the ability to adopt the ALJ's Recommended Order as its Final Order. Because the ALJ's findings of fact were based on competent and substantial evidence in the record, with the exception of the stricken sentence in Paragraph 42, and the ALJ's conclusions of law were reasonable, the Recommended Order should be adopted as the District's Final Order.

Staff Recommendation:

1. Adopt the ALJ's Recommended Order as the District's Final Order, with one sentence in Paragraph 42 having been stricken.
2. Approve and sign the attached proposed Final Order that issues Environmental Resource Individual Construction Major Modification Permit No. 43032468.003 to Cortez Road Investments and Finance, Inc.

Presenter:

Jennifer Soberal, Senior Attorney, Office of General Counsel

**BEFORE THE GOVERNING BOARD OF THE
SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT**

ORDER NO. SWF

MHC CORTEZ VILLAGE, LLC,

Petitioner,

v.

DOAH Case No. 21-2491

ERP No. 43032468.003

CORTEZ ROAD INVESTMENTS AND
FINANCE, INC., and SOUTHWEST FLORIDA
WATER MANAGEMENT DISTRICT,

Respondents.

_____ /

FINAL ORDER

THIS CAUSE was heard by the Governing Board of the Southwest Florida Water Management District (“District”) pursuant to Section 120.57(1), and Chapter 373, Part IV, Florida Statutes (“Fla. Stat.”) and the rules promulgated thereunder in Chapter 62-330, Florida Administrative Code (“Fla. Admin. Code”) for the purpose of issuing a final order in the above-styled proceeding.

The case was referred by the District to the Division of Administrative Hearings (“DOAH”) upon receipt of the Petition for Administrative Hearing from Petitioner MHC Cortez Village, LLC (“Marina”) on July 31, 2021. On June 14 and 15, 2022, August 16 through 18, 2022, and by Zoom video conference on September 1, 2, and 13, 2022, the assigned Administrative Law Judge, J. Bruce Culpepper (“ALJ”), conducted a formal administrative hearing with all parties participating.

The ALJ entered a Recommended Order (“RO”) on March 7, 2023, which is attached to this final order as **Exhibit A** and incorporated by reference. In the RO, the ALJ recommended that the District render a final order granting Respondent Cortez Road Investments and Finance, Inc.’s (“Cortez Road”) application to issue Environmental Resource Individual Construction Major Modification Permit No. 43032468.003 (“Permit”) to Cortez Road for the construction of a multi-slip dock along the shoreline of a canal adjacent to residential parcels at Hunters Point in Cortez, Manatee County, Florida. The Marina filed Exceptions to the RO, attached hereto as **Exhibit B**, and Cortez Road filed a Response to Exceptions, attached hereto as **Exhibit C**.

STANDARD OF REVIEW

Section 120.57(1)(l), Fla. Stat., provides in pertinent part:

The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

§ 120.57(1)(l), Fla. Stat.

The District may not reweigh evidence and may reject the ALJ's finding of fact in the RO only if, after a thorough review of the record, no competent substantial evidence exists to support the finding or the proceedings on which the findings are based did not comply with the essential requirements of law. *Gross v. Dep't of Health*, 819 So. 2d 997, 1000-01 (Fla. 5th DCA 2002); *see also Walker v. Bd. of Prof'l Eng'rs*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006) (an agency cannot modify or substitute new findings of fact if competent substantial evidence exists to support the ALJ's findings of fact). "If the ALJ's factual findings are supported by competent, substantial evidence, the agency cannot reject them even to make alternate findings that are also supported by competent, substantial evidence." *Lantz v. Smith*, 106 So. 3d 518, 521 (Fla. 1st DCA 2013).

Competent substantial evidence is defined as "evidence that will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957) (citing *Becker v. Merrill*, 20 So. 2d 912, 915 (Fla. 1944)). The evidence must be sufficiently relevant and must be such that "a reasonable mind would accept it as adequate to support the conclusion reached." *Id.* An ALJ may rely on the testimony of one witness, even if that testimony contradicts the testimony of other witnesses. *Lantz v. Smith*, 106 So. 3d at 521. Additionally, "[c]redibility of the witnesses is a matter that is within the province of the administrative law judge, as is the weight to be given the evidence." *Stinson v. Winn*, 938 So. 2d 554, 555 (Fla. 1st DCA 2006). Further, the agency may not make independent or supplemental findings of fact on issues about which the ALJ made no findings. *Fla. Power & Light Co. v. State*, 693 So. 2d 1025, 1026-27 (Fla. 1st DCA 1997).

An agency may reject or modify an ALJ's conclusions of law and application of agency policy; however, when doing so, the agency must make a finding that its substituted conclusion of law is as or more reasonable than that which was rejected or modified. *Charlotte County v. IMC Phosphates Co.*, 18 So. 3d 1089, 1092 (Fla. 2d DCA 2009); § 120.57(1)(l), Fla. Stat.

RULINGS ON EXCEPTIONS

Pursuant to Section 120.57(1)(k), Fla. Stat., and Rule 28-106.217, Fla. Admin. Code, the parties may file exceptions to the ALJ's RO and responses to another party's exceptions. Here, the Marina timely filed Exceptions to the RO, and Cortez Road timely filed a Response to Exceptions. See Exhibits B & C.

Findings of Fact

A. Exception I – Paragraphs 42, 45, 46, 48, 58¹ I.b., 58 II.a., and 97 of RO

In its first Exception, the Marina argues there is no competent substantial evidence in the record to support the ALJ's findings of fact that there exist sufficient pullout areas in the canal for two boats to pass each other if the proposed dock project is constructed, and the ALJ erred in determining in the conclusions of law the proposed docks will not "significantly impede navigation" in the canal.

1. With regard to Paragraph 42 of the RO, the exception is granted in part and denied in part. Paragraph 42 describes the testimony given by Cortez Road's navigational expert, Captain Dane Fleming ("Captain Fleming"), who opined that there are adequate water depths, even at the lowest low tide, through the length of the canal for the boats Hunter's Point residents will moor at the dock based on his analysis of the Marina's

¹ The Marina cites to I.b. and II.a. of the RO in its first Exception, without including the paragraph number. Presumably, the Marina meant to cite paragraphs 58 I.b. and II.a. of the RO.

bathymetric survey of the canal. However, there is no evidence in the record to support the third sentence in Paragraph 42 which reads: “Using this survey, Captain Fleming relayed that the maximum depth of the Canal at mean low, low tide (“MLLT”) along Hunters Point varies between 4.5 feet and 7.3 feet.” Accordingly, this sentence shall be stricken pursuant to Section 120.57(1)(j), Fla. Stat.²

Competent substantial evidence supports the ALJ’s findings for the remainder of Paragraph 42, by way of Captain Fleming’s testimony presented at the final hearing. Fleming Tr. Vol. III, June 15, 2022, pp. 283-84, 324, 373-74, 399.

2. With regard to Paragraphs 45, 46, and 48 of the RO, the exception is denied. Competent substantial evidence supports the ALJ’s findings in Paragraphs 45, 46, and 48 by way of Captain Fleming’s testimony regarding “pinch points” on the canal where two boats can use pullout areas to safely navigate around each other, and the proposed dock project will not create a significant impediment on navigability or public safety in the canal. Fleming Tr. Vol. III, June 15, 2022, pp. 304, 312-15, 386-89, 391, 393-95, 398-99, 400-01; Fleming Tr. Vol. VII, Sept. 1, 2022, pp. 806, 811, 813, 815-20, 825, 827.

3. With regard to Paragraph 58 I.b. of the RO, the exception is denied. Competent substantial evidence supports the ALJ’s findings in Paragraph 58 I.b by way of the District’s Lead Environmental Scientist and Permit application evaluator Lauren Greenawalt’s testimony regarding “pinch points” and available pullout areas for boaters to use when passing each other on the canal and her determination that Cortez Road provided reasonable assurances that the dock project was not contrary to public interest.

² The striking of this sentence from the ALJ’s findings of fact does not affect the ALJ’s conclusions of law as the remaining findings in Paragraph 42 support the ALJ’s conclusions of law.

Competent substantial evidence also supports the ALJ's findings by way of Ms. Greenawalt's testimony that nothing in the applicable standards for permit issuance mandates that vessels must be able to pass each other, side-by-side, while on the waterway. Greenawalt Tr. Vol. I, Aug. 16, 2022, pp. 170-71, 176, 181-82, 185.

4. With regard to Paragraph 58 II.a. of the RO, the exception is denied. Competent substantial evidence supports the ALJ's findings in Paragraph 58 II.a. by way of Ms. Greenawalt's testimony that Cortez Road provided "reasonable assurances" to the District that the proposed dock will not adversely affect the public health, safety, welfare, or the property of others, the project boundaries in the permitted plans will ensure a safe boating environment, and the available pullout areas result in no significant impediment to navigation. Greenawalt Tr. Vol. I, Aug. 16, 2022, pp. 120-24, 137, 139, 142, 144, 151, 168, 179-82.

5. With regard to Paragraph 97 of the RO, the exception is denied. As explained above, competent substantial evidence supports the ALJ's findings by way of Captain Fleming's and Ms. Greenawalt's testimony that the construction of a dock along Hunters Point development will not significantly impede navigability of the canal. "Credibility of the witnesses is a matter that is within the province of the administrative law judge, as is the weight to be given the evidence." *Stinson v. Winn*, 938 So. 2d at 555. Further, an ALJ may rely on the testimony of one witness, even if that testimony contradicts testimony of other witnesses. *Lantz v. Smith*, 106 So. 3d at 521.

B. Exception II – Paragraph 97 of RO

1. The Marina further objects to Paragraph 97 of the RO and argues no competent substantial evidence supports the finding that the "pinch points" between the

Hunters Point dock and residential boatlifts are no more restrictive than the obstacles boaters currently encounter at the bridge at the mouth of the canal and alongside the mangroves on the shore of the canal just outside of the Cortez marina. This exception is denied because competent substantial evidence supports the ALJ's findings by way of Captain Fleming's testimony. Fleming Tr. Vol. III, June 15, 2022, pp. 274-80, 303-04, 312-15, 333-34, 337-38, 352, 391; Fleming Tr. Vol. VII, Sept. 1, 2022, pp. 810, 854-55.

C. Exception III – Paragraphs 24, 25, 26, 27, 28, 29, 34, 35, 36, 49, and 58 II.b. of RO

In its third Exception, the Marina argues that the ALJ failed to order a modification of the Permit to require dock design changes and navigational aids.³ The Marina further argues there is no competent substantial evidence in the record to support the ALJ's findings of fact regarding Cortez Road's design of the dock project, the size of boats Hunters Point residents will be allowed to moor at the docks, navigational aids in the canal, and the trimming of mangroves in the canal.

1. With regard to Paragraphs 24, 25, 26, 27, and 28 of the RO, the exception is denied. Competent substantial evidence supports the ALJ's findings in Paragraphs 24, 25, 26, 27, and 28 by way of testimony from Marshall Gobuty, president and corporate representative of Cortez Road, regarding the design of the dock project and that it is intended the four-foot wide dock be constructed along and as close to the shoreline as possible, and supported by eight-inch pilings positioned directly beneath the dock, without disturbing the mangrove root system along the banks of the Hunters Point property. Additionally, Cortez Road is authorized to place the pilings that support the docks into the

³ An ALJ's recommendation as to whether the Permit should be modified pertains to the relief recommended in the RO, and it does not pertain to whether competent substantial evidence supports the ALJ's findings of fact.

open gaps between the mangrove roots and trim 25 percent of the mangrove growth every year. Cortez Road has already conducted one trimming session of mangroves. It will also require Hunters Point residents to limit the length of their boats to 25 feet and to tie the boats parallel to the dock when moored. Gobuty Tr. Vol. I, June 14, 2022, pp. 142, 144, 149-55, 156-57, 159-60, 162; Gobuty Tr. Vol. II, June 14, 2022, p. 211; Gobuty Tr. Vol. VIII, Sept. 2, 2022, p. 887; see also Joint Exh. 1, Permit at Bates Nos. 193-202, permitted plans at Bates Nos. 110-18; Greenawalt Tr. Vol. I, Aug. 16, 2022, pp. 147, 148-50, 151-52, 169, and 185.

2. With regard to Paragraphs 34, 35, and 36 of the RO, the exception is denied. Competent substantial evidence supports the ALJ's findings in Paragraphs 34, 35, and 36 by way of testimony from Cortez Road's ecologist, Elizabeth Eardley, regarding the design of the dock project, which will not extend into the canal by more than nine percent of the total width of the canal and will not disturb the mangrove root system. Further, the mangroves in the project area may be trimmed, and running the dock directly over the mangroves should not impermissibly inhibit mangrove growth. Eardley Tr. Vol. IV, June 15, 2022, pp. 442-45, 448-49, 450-51, 455, 459, 465-66, 468, 469, 475, 476-77, 481; see also Greenawalt Tr. Vol. I, Aug. 16, 2022, pp. 138, 147, 166-67.

3. With regard to Paragraphs 29, 49, and 58 II.b. of the RO, the exception is denied. Competent substantial evidence supports the ALJ's findings in Paragraphs 29, 49, and 58 II.b. by way of testimony from Mr. Gobuty, Captain Fleming, and Ms. Greenawalt regarding Cortez Road's placement of navigational aids in the canal as safety measures for boaters. Cortez Road has already placed "No Wake" and manatee warning signs in the canal, a mirror near a "dogleg" of the canal, "No Trespass" signs, and signs

encouraging boaters to monitor channel 9 for boat traffic, and it intends on possibly designating the canal as one-way during specific times of day. Gobuty Tr. Vol. I, June 14, 2022, pp. 164-66; Gobuty Tr. Vol. II, June 14, 2022, p. 215; Gobuty Tr. Vol. VIII, Sept. 2, 2022, pp. 887-92; Fleming Tr. Vol. III, June 15, 2022, pp. 339-42, 356; Fleming Tr. Vol. VII, Sept. 1, 2022, pp. 800, 829, 851; Greenawalt Tr Vol. I, Aug. 16, 2022, p. 142; see also Cortez Exh. 14, photo; Joint Exh. 1, Permit at Bates No. 196, permitted plans at Bates Nos. 113 & 118.

D. Exception IV – Paragraph 34 of RO

1. The Marina's Exception as it pertains to Paragraph 34 of the RO has already been denied above. The Marina relies upon testimony from others in support of its argument that Paragraph 34 should be stricken. However, where competent substantial evidence exists in the record to support a factual finding, the agency cannot reject it even to make an alternate finding that is also supported by competent, substantial evidence. *Lantz v. Smith*, 106 So. 3d at 521. Further, an ALJ may rely on the testimony of one witness, even if that testimony contradicts testimony of other witnesses. *Id.*

E. Exception in the Marina's Conclusion – Paragraphs 96, 97,⁴ and 98 of RO

1. In the Conclusion section of the Marina's Exceptions to Recommended Order the Marina argues for the first time that Paragraphs 96 and 98 must be stricken. However, because there are no specific citations to the record in support of the Marina's argument with regard to these paragraphs, the District need not rule on the Exception. § 120.57(1)(k), Fla. Stat.

⁴ The exception pertaining to Paragraph 97 has been denied above.

2. Moreover, the as explained more fully below, competent substantial evidence supports the ALJ's findings that, by a preponderance of the evidence, Cortez Road provided reasonable assurance in its Permit application to the District that the activity it seeks to conduct (constructing a dock in the canal) is not contrary to the public interest, and issuing the Permit to Cortez Road is warranted.

Pursuant to Section 120.57(1)(l), Fla. Stat., the District hereby adopts the findings of fact as set forth in the RO, with one sentence in Paragraph 42 having been stricken, as competent substantial evidence supports the ALJ's findings.

Conclusions of Law

A. Exception I – Paragraphs 128 and 137 of RO

In Exception I, the Marina argues the ALJ erred in determining the proposed new docks will not “significantly impede navigation” in the canal, and the conclusions of law at Paragraphs 128 and 137 must be rejected because the corresponding findings of fact regarding the availability of pullout areas in the canal are not supported by competent substantial evidence. However, those findings of fact are supported by competent substantial evidence.

1. Exception I is denied. The ALJ considered competent substantial evidence by way of testimony and record evidence which support his conclusions under Section 373.414(1), Fla. Stat., that Cortez Road provided reasonable assurance to the District that the dock project is not contrary to the public interest under the applicable standards therein and in Rule 62-330.302(1), Fla. Admin. Code, and Environmental Resource Permit Applicant's Handbook Vol. I (“A. H. Vol. I”) section 10.2.3 entitled “Public Interest Test.” As further guidance for the public interest test where the project will be located in

or over surface waters, A. H. Vol. I, section 10.2.3.3 provides for the consideration of whether the project – here, the dock – will “significantly impede navigability.” While the ALJ concluded the dock project will impede boat traffic to a certain extent, competent substantial evidence and testimony further established that any impediment will not be significant. RO ¶¶ 126, 127.

B. Exception II – Paragraph 129 of RO

1. Similarly, in Paragraph 129 of the RO, the ALJ concluded that the dock project will not significantly impede navigation as the additional pinch points the dock project will create will not cause any tighter passage for boaters than the obstacles already existing on the canal. For the reasons stated above and because there is competent substantial evidence to support the findings of fact in Paragraph 97, Exception II is also denied.

C. Exception III – Paragraphs 124, 126, 130, 131, 132, 134, 135, and 137 of RO

In Exception III, the Marina argues the ALJ erred by not requiring the District to modify the Permit to require dock design changes or navigational aids, and the ALJ’s Conclusions of Law at Paragraphs 124, 126, 130, 131, 132, 134, 135, and 137⁵ should be rejected.

1. Exception III is denied. As explained above, the ALJ considered competent substantial evidence by way of testimony and record evidence which support his conclusions under Section 373.414(1), Fla. Stat., and Rule 62-330.302(1), Fla. Admin. Code, that Cortez Road provided reasonable assurance to the District that the dock project is not contrary to the public interest and, therefore, Cortez Road sufficiently

⁵ The exception pertaining to Paragraph 137 has been denied above.

established its entitlement to the Permit. Additionally, record evidence supports the ALJ's conclusion under A. H. Vol. I, section 10.2.3.3 that the dock will not "significantly impede navigability" although there will be encroachment of the dock into the canal and the dock project will impede navigability to some degree. Ultimately, the ALJ concluded that the evidence does not show the dock project will constitute an environmental hazard to public health, safety, welfare, or property. The District may not reweigh evidence where competent substantial evidence exists to support the ALJ's findings. *Gross v. Dep't of Health*, 819 So. 2d at 1000-01.

2. Further, competent substantial evidence in the record supports the ALJ's determination to issue the Permit, without modifications, because Cortez Road's proposed dock design changes and positioning of the dock would not be a substantial deviation from the approved permitted plans, and the dock, pilings, and vessels moored to the docks would still be located within the permitted project area. See Greenawalt Tr. Vol. I, Aug. 16, 2022, pp. 136-37, 150-52; Joint Exh. 1, Permit at Bates No. 196. Similarly, as explained above, mangrove trimming and "No Wake" and manatee warning signs are authorized by the Permit (Joint Exh. 1, permitted plans at Bates No. 118), and Cortez Road has already placed other navigational aids on the canal to assist boaters. In sum, the corresponding factual findings support the ALJ's conclusions of law in Exception III.

D. Exception IV – Paragraph 133 of RO

In Exception IV, the Marina argues the ALJ erred in determining in Paragraph 133 the dock project will not significantly impede navigation because the dock will extend into the canal by more than nine percent of the navigable width of the canal.

1. Exception IV is denied. In Paragraph 133, the ALJ concludes that when balancing the criteria listed in Section 373.414(1)(a)1 and 3, Fla. Stat., the District (through Ms. Greenawalt) rightly determined that it was appropriate to issue Cortez Road the Permit. Ms. Greenawalt testified how she reviewed and balanced the criteria for determining whether Cortez Road provided reasonable assurance that the dock project is not contrary to the public interest. In determining to issue the Permit, she relied upon the guidance found in A. H. Vol. I, section 10.2.3.3(a) when considering the navigability factor of the seven-factor Public Interest Test found in A. H. Vol. I, section 10.2.3. The width of the canal was one of multiple considerations regarding navigability in Ms. Greenawalt's review of the permit application and site visit to the canal. The ALJ's conclusion of law is supported by competent substantial evidence in the record, and the Marina's conclusion that the dock project will significantly impede navigation is not as reasonable or more reasonable than the ALJ's conclusion.

E. Exception V – Paragraphs 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, and 137 of RO

1. Exception V is denied. The Exceptions with regard to Paragraphs 124, 126, 128, 129, 130, 131, 132, 133, 134, 135, and 137 have already been denied above. With regard to Paragraph 125, the ALJ correctly concludes that the standard by which to assess navigability on the canal if the dock project were constructed is found in A. H. Vol. I, section 10.2.3.3(a), which requires that the District determine whether the dock project will “significantly impede navigation.” For the reasons stated above, competent substantial evidence in the record supports the ALJ's conclusion in Paragraph 127 that any impediment the dock imposes on boat traffic will not be “significant” as Cortez Road witnesses established how boats may safely maneuver past each other after the dock is

placed in the canal. Finally, for the reasons stated above regarding available pullout areas and navigational aids in the canal for boaters, competent substantial evidence in the record supports the ALJ's conclusion in Paragraph 136, pursuant to Section 373.414(1)(a)1 and 3, Fla. Stat., Rule 62-330.302(1), Fla. Admin. Code, and A. H. Vol. I section 10.2.3, that there are no reasonably anticipated "significant" adverse impacts on navigation from construction of the dock project at Hunters Point.

Pursuant to Section 120.57(1)(l), Fla. Stat., the District hereby adopts the conclusions of law as set forth in the RO.

STATEMENT OF THE ORDER

Having reviewed the ALJ's Recommended Order, the record evidence, and the applicable law, and being otherwise duly advised, **IT IS ORDERED:**

1. The ALJ's Recommended Order is hereby adopted and incorporated herein by reference, with one sentence in Paragraph 42 having been stricken; and
2. The District shall issue Environmental Resource Individual Construction Major Modification Permit No. 43032468.003 to Cortez Road Investments and Finance, Inc.

DONE AND ORDERED in Hillsborough County, Florida, by the Governing Board of the Southwest Florida Water Management District this ___ day of May, 2023.

SOUTHWEST FLORIDA WATER
MANAGEMENT DISTRICT

By: _____
Joel A. Schleicher,
Chair

Approved as to Legal Form & Content:

Jennifer A. Soberal, Senior Attorney
Office of General Counsel

Attest: _____

Print Name: _____

Filed this _____ day
of May, 2023.

(seal)

Agency Clerk

NOTICE OF RIGHTS

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Fla. Stat., by filing a Notice of Appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the District's Clerk and the appropriate District Court of Appeal accompanied by the filing fee as prescribed by law within thirty (30) days of the rendition of this Final Order.

CERTIFICATE OF SERVICE

A true and correct copy of this Final Order was served on the below-named persons by electronic mail:

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MHC CORTEZ VILLAGE, LLC,

Petitioner,

vs.

Case No. 21-2491

CORTEZ ROAD INVESTMENTS AND
FINANCE, INC., AND SOUTHWEST FLORIDA
WATER MANAGEMENT DISTRICT,

Respondents.

RECOMMENDED ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569, and 120.57(1), Florida Statutes (2022),¹ on June 14 and 15, 2022; August 16 through 18, 2022; and September 1, 2, and 13, 2022.

APPEARANCES

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¹ All statutory references are to Florida Statutes (2022), unless otherwise noted.

EXHIBIT
A

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STATEMENT OF THE ISSUE

The issue to determine is whether the Southwest Florida Water Management District should issue ERP Individual Construction Major Modification Permit Number 43032468.003, dated June 29, 2021, to Respondent Cortez Road Investments and Finance, Inc.

PRELIMINARY STATEMENT

On March 15, 2021, Respondent, Cortez Road Investments and Finance, Inc. ("Cortez Road"), applied to the Southwest Florida Water Management District (the "District") for an environmental resource permit modification in reference to a project it named "Hunters Point Dock."

On June 29, 2021, the District issued a notice of intent to approve ERP Individual Construction Major Modification Permit No. 43032468.003 (the

"Permit") to Cortez Road.² The Permit authorizes Cortez Road to construct a dock on a canal that borders property it owns in Manatee County, Florida.

On July 30, 2021, Petitioner, MHC Cortez Village, LLC (the "Marina"), timely filed a petition challenging the District's intended decision to issue the Permit. The Marina operates a commercial marina on the canal and claims that the dock will adversely affect safe navigation through the canal.

On August 16, 2021, the District referred this matter to the Division of Administrative Hearings ("DOAH") for assignment of an Administrative Law Judge ("ALJ") to conduct a chapter 120 evidentiary hearing.

The final hearing was held in-person in Tampa, Florida, on June 14 and 15, 2022, and August 16 through 18, 2022; and by Zoom video conference on September 1, 2, and 13, 2022. At the final hearing, the Marina presented the testimony of Carl "Skip" McPadden, Peter C. Peterson, III, Captain Christopher Karentz, Hannah Westervelt, Everrett Butler, Gary Bazemore, and Paul Emmanuel Kohler. Cortez Road offered the testimony of Marshall Gobuty, Adron H. Walker, Captain Dane Fleming, and Elizabeth Eardley. The Division called Cliff Ondercin and Lauren Greenawalt as witnesses.

Admitted into the evidentiary record during the final hearing was Joint Exhibit 1 (the District's complete Permit file). Also admitted were Marina Exhibits 1, 11, 14, 16 through 23, 25 through 29, 31 through 78, 84, 86, and 87; Cortez Road Exhibits 1 through 3, 6, 7 (pages 2 and 4 only), 8, 9, 12,

² The Permit authorizes a modification to a previously issued second modification of a stormwater management system approved under Environmental Resource Permit No. 43032468.002.

14, 16, 17, 20, 22, 24 through 28, 38, 40, 51, 67, 68, and 70; and District Exhibits 1 and 2.

A thirteen-volume Transcript of the final hearing was filed with DOAH on August 15, 2022; October 18, 2022; and October 24, 2022. At the close of the hearing, the undersigned requested the parties each file a post-hearing memorandum regarding the Marina's standing to initiate this action in an administrative proceeding under chapter 120, which each party provided. In addition, the parties were advised of a ten-day deadline following DOAH's receipt of the hearing transcript to file post-hearing submittals. At the hearing, the parties requested to extend the time to file their post-hearing submittals, which was granted. Following the hearing, the Marina moved for an additional three-day extension of the filing deadline, and Cortez Road requested an expansion of the page limit for post-hearing submittals, both of which were granted. All parties filed Proposed Recommended Orders, which were duly considered in preparing this Recommended Order.³

FINDINGS OF FACT

1. This administrative action reviews Cortez Road's application for an environmental resource permit to construct a dock in a waterway located in Manatee County, Florida.

The Parties and Procedural Posture:

2. The District is the administrative agency charged with the responsibility to conserve, protect, manage, and control the water resources within its geographic boundaries, and to administer and enforce chapter 373, Florida Statutes, and the rules promulgated thereunder in Florida

³ By requesting a deadline for filing post-hearing submissions beyond ten days after the filing of the hearing Transcript, the 30-day time period for filing the Recommended Order was waived. *See Fla. Admin. Code R. 28-106.216.*

Administrative Code Chapter 62-330, and the ERP Applicant's Handbook Volume I ("A. H. Vol I").

3. The District is the permitting authority in this proceeding and intends to take the proposed action to issue ERP Individual Construction Major Modification Permit No.: 43032468.003 (the "Permit") to Cortez Road.

4. Cortez Road is the applicant and proposed recipient of the Permit. Cortez Road is the owner and developer of approximately 18 acres of adjacent residential parcels located near the Gulf of Mexico in Cortez, Florida, known as Hunters Point. The Hunters Point project site is situated along the north side of Cortez Road, just east of 127th Street West, Cortez, Florida.

5. Adjacent to Hunters Point is a manmade, dredged canal (the "Canal"). The Canal is located off of Anna Maria Sound, which empties into Tampa Bay in the north and accesses the Gulf of Mexico through a southern pass. The main passage of the Canal runs along the western and northern edges of Hunters Point, then continues on to a number of upland properties. A small offshoot of the Canal extends down the eastern side of Hunters Point. As part of the Hunters Point development, Cortez Road desires to construct a continuous dock that will wrap around the full length of its western, northern, and eastern borders.

6. In order to construct the proposed dock in the Canal, on March 15, 2021, Cortez Road applied to the District for an environmental resource permit modification for the construction of a linear dock within the Canal to serve the future residents of Hunters Point.

7. On June 29, 2021, the District approved the application and granted the Permit to Cortez Road pursuant to the terms of chapter 373, chapter 62-330, and A. H. Vol I. The Permit gives Cortez Road the ability to construct a "surface water management system" (the dock) in the Canal that borders Hunters Point. The Permit specifically authorizes Cortez Road to install approximately 4,352 square feet of a new piling-supported dock structure, as

well as to replace approximately 3,631 square feet of existing piling-supported docks.

8. The Marina owns and manages a commercial marina located on the Canal, upland of Hunters Point, called Cortez Village Marina. The Marina has existed in its current configuration since at least 2008, and a marina facility has operated at its present location since at least the 1970s.

9. The Marina provides approximately 365 boat slips for customers. These slips include inside "hi-and-dry" boat slips, outside dry storage boat slips, and several in-water boat slips.

10. The Canal is the only water access from the Marina facility to Anna Maria Sound. Consequently, to reach Tampa Bay or the Gulf of Mexico by boat, Marina customers must travel down the Canal past Hunters Point.

11. The Canal begins at a concrete bridge over which runs 127th Street West in Cortez, Florida (the "Bridge"). After passing under the Bridge, the Canal proceeds inland for approximately 200 feet where it reaches the western edge of the Hunters Point property. The Canal then angles to the left into a straight, north-south stretch for approximately 750 feet. At that point, the Canal comes to a 90-degree right turn. Following this "dogleg," the Canal runs in a straight, generally easterly direction for about one-third of a mile.

12. The north-south length of the Canal, the 90-degree "dogleg," and about 250 feet of the initial east-west part of the Canal make up the western and northern borders of the Hunters Point development.

13. Across from Hunters Point along the Canal's north-south section, approximately ten single-family homes abut the Canal. About eight docks and/or boatlifts extend out into the Canal from these private homes.

14. Beyond Hunters Point, the Canal continues east past an additional eight residences on the Canal's southern shore until it reaches (and continues past) the Marina. The Marina's docks and boat storage facility are located on the southern side of the Canal about halfway down the east-west length of the Canal.

15. Cortez Road owns the submerged land beneath the Canal along its borders (the western and northern stretch of water). (This matter does not involve a permit to build on Florida sovereign submerged lands.) Cortez Road does not own the submerged land beneath the Canal beyond the eastern edge of its property.

16. The entrance to the Canal from the Bridge is the sole water access to Anna Maria Sound from any property located on the Canal.

17. As detailed below, the full width of the Canal is not navigable by boat traffic. The Canal's navigable width is limited due to shallow areas along the sides of the Canal, as well as natural mangrove growth along the Hunters Point property and the Canal's northern shore along the east-west part of the Canal.

18. The Marina challenges the Permit asserting that Cortez Road's proposed dock will create a significant navigational hazard, which will adversely affect the Marina's, as well as its customers', use of the Canal. Specifically, when constructed, the Marina argues that the dock will constrict the navigable width of the Canal thus creating a dangerous and hazardous risk of damage to property and/or persons traveling through the Canal.

Presentation of the Evidence and Factual Findings:

19. Pursuant to section 120.569(2)(p), the order of presentation during the evidentiary hearing was, first, the permit applicant (Cortez Road) was allowed to make a prima facie case demonstrating entitlement to the Permit, followed by any direct evidence from the agency (the District) supporting its application. Thereafter, the petitioner challenging the Permit (the Marina) offered evidence to prove a case in opposition to the issuance of the Permit.

A. Cortez Road's Prima Facie Case

20. To establish its prima facie case, Cortez Road first called Marshall Gobuty, President of Cortez Road. Mr. Gobuty is also a boater who has a fair level of navigational skill on Florida waterways.

21. Mr. Gobuty initially stated that Cortez Road is the developer of the Hunters Point property. He relayed that Cortez Road intends to build 86 single-family homes at Hunters Point. Mr. Gobuty explained that Hunters Point will be a carbon-free, sustainable, waterfront community comprised of net-zero homes. Mr. Gobuty represented that each home within the development, through the use of solar power and on-site battery storage technology, will operate as a "virtual power plant," producing more power than it consumes and establishing a positive carbon footprint. Mr. Gobuty hopes that Hunters Point homes will provide Florida residents with the possibility of a cleaner, healthier, and more sustainable future.

22. Mr. Gobuty conveyed that as part of the Hunters Point development, Cortez Road desires to construct a continuous dock that will wrap around the full length of its western and northern (and eastern) borders with the Canal. The proposed dock will be placed in the waterway and may be accessed from the shore by four walkways. Cortez Road intends the dock to provide a total of 49 boat slips. As designed, the dock will create 32 new parallel mooring boat slips, as well as replace several old existing docks to add an additional 17 parallel boat slips.

23. Regarding the dock's actual location in the Canal, Mr. Gobuty expressed that Cortez Road has put a lot of thought on where to position the dock. Mr. Gobuty urged that Cortez Road will take a number of steps to ensure that boaters within the local community can safely travel through the Canal.

24. Initially, Mr. Gobuty explained that the proposed dock will run in one continuous, wooden walkway along the Hunters Point development's western, northern, and eastern borders. However, Mr. Gobuty does not anticipate that the dock will be laid out in a straight line. Due to the mangrove growth along the property edges, Cortez Road will not be able to place the dock flush with the shoreline. Therefore, Cortez Road plans to adjust the course of the dock so that it "hugs" the shore. Mr. Gobuty testified

that Cortez Road intends to construct the dock as close as possible to the edge of the Hunters Point property to limit interference with boats that navigate the Canal.

25. Mr. Gobuty further stated that the dock will be four-feet wide. Mr. Gobuty represented that the dock will be supported by eight-inch pilings, which will be positioned directly beneath the dock. Therefore, the maximum width of the dock will be no greater than four feet. (During his testimony, Mr. Gobuty acknowledged that the dock design included in Cortez Road's application represented that the pilings would be placed on the outside of the decking, thereby making the dock a total of five feet, four inches wide. At the final hearing, Mr. Gobuty credibly declared that Cortez Road will modify the design so that the dock will have a maximum width of four feet.)

26. Mr. Gobuty added that a primary factor of which Cortez Road must be mindful is to not disturb the mangrove root system along the banks of the Hunters Point property. That being said, Mr. Gobuty voiced that Cortez Road is not prohibited from constructing the dock directly above the mangrove bushes. He anticipates cutting the mangroves down to approximately four feet above the waterline, then building the dock over the mangrove growth. In addition, Cortez Road is authorized to place the pilings that support the dock into open gaps between the mangrove roots. Therefore, Cortez Road intends to "stagger" the pilings below the dock so as to not harm or interfere with the existing mangrove roots.

27. Mr. Gobuty also testified that in the near future, Cortez Road anticipates pruning the mangroves along Hunters Point. Mr. Gobuty stated that Cortez Road is authorized to trim 25 percent of the mangrove growth along its property per year. Mr. Gobuty represented that Cortez Road has already completed one trimming session. He anticipates that Cortez Road will ultimately cut back approximately 75 percent of the mangrove growth above the waterline. Mr. Gobuty proclaimed that this process has made a "dramatic" difference in visibility while traveling up and down the Canal, and

will improve boaters' sightlines. He further asserted that this step will allow Cortez Road to position the dock as close to the Hunters Point shoreline as possible.

28. As stated above, Cortez Road intends the dock to accommodate a total of 49 boats, which may be tied parallel to the Canal side of the dock.

Mr. Gobuty represented that Cortez Road will ensure that the boats are no longer than 25 feet. Mr. Gobuty explained that all homesites along the Canal will be 32 feet, six inches wide. The Hunters Point homeowner association documents will require all Hunters Point residents to ensure that their boats fit within their property lines up to a maximum length of 25-feet.

29. During the hearing, Mr. Gobuty acknowledged that use of the dock by Hunters Point residents will increase boat traffic in the Canal. Therefore, he stated that Cortez Road has already taken, and intends to take, steps to ensure that travel along the Canal is "super safe." These measures include installing a number of navigational aids, including:

a. Erecting "No Wake" and manatee warning signs in the Canal along the Hunters Point property, which should prompt boaters to travel at slower speeds through the Canal;

b. Positioning mirrors near the "dogleg" at the northwest, 90-degree corner of the Canal, which should enable boaters to better observe oncoming boat traffic as they prepare to negotiate the turn;

c. Posting "No Trespassing" signs in the Canal beside the Hunters Point property to limit boat traffic. Mr. Gobuty stated that the "No Trespass" signs, which are necessary to ensure Cortez Road's ownership interests in the Canal, will have a secondary benefit of persuading boaters to exercise more caution when traveling through the Canal. Currently, Cortez Road has erected approximately 15 "No Trespass" signs in the Canal;

d. Mounting signs to encourage boaters to monitor channel 9 on their boat radios while motoring through the Canal. Mr. Gobuty reflected that using channel 9 is a "good practice"; and

e. (Possibly) designating the Canal as a one-way, directional channel during specific times, by installing stoplights over the Canal or an AVI toll system to control the direction and volume of outgoing and incoming boat traffic.

30. Addressing a separate issue, Mr. Gobuty stated that Cortez Road is the record title owner of the submerged lands beneath the Canal adjacent to its property. As such, Mr. Gobuty conveyed that Cortez Road has never authorized any homeowners along the Canal to access or use the waterway it owns. Neither has Cortez Road given the Marina or its customers specific permission to traverse the Canal. That being said, Mr. Gobuty urged that Cortez Road does not necessarily object to boaters using the Canal to access Anna Maria Sound. However, Cortez Road does intend to take steps to ensure that its property interests and rights to the Canal are protected, as well as ensure the safe use of the Canal.

31. Towards this end, Cortez Road has and may continue to pursue legal action to ensure that the private homeowners across from Hunters Point comply with Manatee County Codes in the configuration and placement of their docks in the Canal. In particular, Mr. Gobuty represented that several residential boatlifts on the north-south section of the Canal extend farther than 25 percent into the waterway. Cortez Road will seek to prevent all docks from extending into the Canal beyond 25 percent of the total width of the Canal (approximately 15 to 18 feet from the side of the Canal). Mr. Gobuty believes that such action should increase the navigable space in the Canal.

32. Cortez Road introduced Elizabeth Eardley to support its entitlement to the Permit. Ms. Eardley is an ecologist with Stantec Consulting Services, Inc. ("Stantec"), and testified as an ecology expert at the final hearing. Ms. Eardley represented that she has worked on "many, many" environmental resource permits over the last 15 years, including applications for permits to build docks.

33. Cortez Road hired Stantec to prepare its application for the Permit. Stantec drafted the construction plans for the Hunters Point dock. Ms. Eardley served as the project manager during the Permit application process and oversaw the development of the dock design. Ms. Eardley stated that she ensured that the Cortez Road application met all the criteria required by applicable law and was not contrary to public interests as directed in the relevant agency rules. The application for this project consisted of various documents and materials, including: the formal application; the proposed dock plans; proof of legal ownership; a survey report; a flushing analysis; a mangrove and seagrass report; responses to the District's Requests for Additional Information; and aerial photographs.

34. As with Mr. Gobuty, Ms. Eardley testified that Cortez Road currently contemplates constructing a four-foot wide dock that wraps around the Hunters Point shoreline in a continuous track. The dock will be supported by eight-inch pilings, which will be placed directly beneath the dock. Therefore, the total width of the dock will be no wider than four feet. Ms. Eardley further remarked that the dock will not extend into the Canal by more than nine percent of the total width of the Canal as calculated from the mangrove roots on the Hunters Point side to the seawall on the residential side. Ms. Eardley maintained that this step will ensure that the size of the dock complies with applicable law and does not significantly impede navigation.

35. Ms. Eardley added that the dock will provide a "linear dock system" for Hunters Point residents in that boats will be moored sideways, front-to-back, along the dock. As for the final position of the dock in the Canal, Ms. Eardley stated that Cortez Road intends to build the dock as close to the shoreline as possible without disturbing the existing mangrove roots.⁴ Ms. Eardley relayed that, except for a few small gaps, mangrove coverage is essentially continuous along the edge of the Hunters Point property. The

⁴ Ms. Eardley explained that mangroves are important to a coastal environment because they help stabilize the shoreline and prevent erosion.

mangrove roots themselves extend between three and 23 feet from the shoreline into the Canal. Accordingly, Cortez Road plans to adjust the specific position of the dock along the Canal relative to the location of the mangrove roots. Ms. Eardley conveyed that dock pilings can be placed within the mangrove root system as long as they do not disturb the roots. In addition, (as stated by Mr. Gobuty) the Permit will authorize Cortez Road to trim the mangrove growth above the water both horizontally and laterally. In other words, Cortez Road can cut any mangrove branches that extend into the Canal back to a vertical line equal to the outside edge of the mangrove roots. Cortez Road will also be allowed to crop the mangroves to a height of four feet above the waterline.

36. With these parameters, Ms. Eardley testified that Cortez Road intends to run the dock directly over the existing mangrove growth. She explained that covering the mangroves with the four-foot wide footprint of the dock should not impermissibly inhibit mangrove growth. Therefore, in determining the final course of the dock around Hunters Point, the dock can "meander" along the shoreline within the mangrove root system and directly over mangrove bushes in the Canal.

37. On cross examination, Ms. Eardley admitted that Stantec did not conduct a navigation analysis regarding the impact of the dock on boat traffic in the Canal. Neither did Stantec determine the navigable width of the Canal or consult with a navigation expert. Finally, in designing the dock, Stantec did not take into account whether two boats could pass each other along the Hunters Point property across from two boatlifts that extend into the Canal from the residential side. Ms. Eardley further conceded that the application for the Permit does not limit the size of the boats that may be tied to the dock (although the Hunters Point homeowner association documents do contain a length restriction for residents).

38. Cortez Road concluded its prima facie case with the testimony of Captain Dane Fleming. Captain Fleming has extensive experience operating

boats. Captain Fleming provided expert testimony regarding the safe navigation and operation of vessels on Florida waterways.

39. To prepare for his testimony, Captain Fleming visited the Canal twice. He travelled up and down the Canal numerous times by boat, as well as measured the width of the Canal at certain points.

40. Initially, Captain Fleming remarked that the navigational width of the Canal is controlled by the height and width of the Bridge at the entrance to the Canal, as well as the depth of the Canal. Captain Fleming explained that the Bridge rises approximately 12 feet above the waterline of the Canal at low tide. This fixed vertical clearance (the "air draft") circumscribes the size and model of boat that may enter the Canal. In addition, the width of the Canal beneath the Bridge is about 27 feet. However, boats may only safely use the middle 15 feet of the Canal below the Bridge due to the shallow bottom at its edges. Captain Fleming explained that, based on the tide, the bottom of the Canal beneath the Bridge generally slopes from a depth of two to three feet at the sides of the Bridge to a depth of about six to seven feet in the middle of the Canal. As a result, only one boat may safely travel beneath the Bridge at a time, and, as a corollary, two boats cannot safely pass each other under the Bridge. (Captain Fleming added that he was not aware of any requirement for a waterway in Florida to support two-way traffic along its full length.) Captain Fleming explained that a safe water depth for the type of boats that use the Canal is approximately three and one-half feet. Captain Fleming believed that most boats that use the Canal will have about a three-foot draft.⁵

41. As for the Canal itself, Captain Fleming relayed that the full width of the Canal, as it runs along the Hunters Point property, ranges from 72 to 90 feet. Specifically, along the initial north-south passage, the Canal measures approximately 72 to 82 feet from the edge of the mangrove roots on

⁵ Captain Fleming explained that the term "draft" represents the depth of the boat below the waterline, and the term "beam" refers to the width of a boat.

the Hunters Point side to a concrete seawall on the opposite, residential side. He measured the 90-degree "dogleg" at the northwest corner as approximately 90-feet wide at the angle. He found the distance between the mangroves along the east-west length of the Canal adjacent to Hunters Point at approximately 75 to 85 feet across.

42. In addition, Captain Fleming commented on a bathymetric survey of the Canal the Marina obtained in January 2022. The bathymetric survey specifically measured the depths in the Canal along the Hunters Point property. Using this survey, Captain Fleming relayed that the maximum depth of the Canal at mean low, low tide ("MLLT") along Hunters Point varies between 4.5 feet and 7.3 feet. Captain Fleming described MLLT as the lowest, low tide and the "worst" navigational situation. Based on this depth, Captain Fleming stated that currently there are adequate water depths through the length of the Canal for the boats Hunters Point residents will moor at the dock.

43. Captain Fleming also discussed three "pinch points" in the Canal that will be created between the Hunters Point dock and two boatlifts and a dock that extends from the residential side along the north-south portion of the Canal. Regarding the two boatlifts which cause the two southern "pinch points," Captain Fleming stated that the Canal currently offers approximately 28 feet, 2 inches of navigable water width between the mangrove roots on the Hunters Point property and the outside edge of the boatlifts. Captain Fleming estimates that the Hunters Point dock will extend about 13 feet out into the Canal at this location. (This measurement includes four feet of dock, plus a boat with a nine-foot beam tied to it.) Consequently, Captain Fleming found that the dock will reduce the navigable portion of the Canal at these locations to approximately 15 feet.

44. Captain Fleming stated that the residential dock at the northern "pinch point" offers slightly more width. He measured a total of 42 feet of water between an existing dock on the Hunters Point side to the dock on the

opposite side. Therefore, if a boat were tied to the Hunters Point dock (taking up about nine feet of the waterway), Captain Fleming determined that 33-feet of navigable water remained for boats to negotiate this spot. (These two docks provide a good snapshot of the navigable condition the Hunters Point dock will create. Cortez Road intends to replace the existing dock on its side with the new, permitted dock. Therefore, 33 feet is the likely width through which boats will have to maneuver at this location.)

45. Based on these measurements, Captain Fleming conceded that after Cortez Road constructs the dock, two boats may not be able to safely travel alongside each other by the three "pinch points." Therefore, if two boats approach from opposite directions between the Bridge and the northwest "dogleg," Captain Fleming advanced that boaters should use several "pull out" areas along the Canal to safely navigate around each other. Specifically, Captain Fleming explained that a boat can "pull" over to the residential side of the Canal before, after, and between the southern two boatlifts, as well as an area just north of the northern dock, and wait at idle speed while the oncoming boat traffic passes by. Captain Fleming also stated that an additional "pull out" is "absolutely" available at the "dogleg."

46. Captain Fleming declared that these "pull outs" will offer boaters "plenty of room" to avoid collisions in the Canal. He testified that he personally drove his boat through the Canal and found enough navigable water and space for boats to use these "pull out" areas, which begin about five-feet off the seawall and offer at least three feet of depth. Therefore, in consideration of the "pull out" areas, which are "absolutely" available for boaters on the Canal, Captain Fleming declared that the proposed dock will not create major navigation issues in the Canal.

47. Finally, Captain Fleming added that maneuvering through "pinch points" is not new to boaters from the Marina because they currently negotiate several tighter "pinch points" at either end of their journey to Anna Maria Sound. As mentioned above, the first location is the Bridge at the

entrance to the Canal, which offers only 15 feet of navigable width. The other "pinch points" are two areas which are found beyond the Hunters Point property on the east-west portion of the Canal. There, the Canal is hemmed in by two more residential boatlifts on the southern side of the Canal and mangroves along the northern shore. Captain Fleming determined that the first "pinch point" along this stretch offers only 21-feet of navigable waterway. The second "pinch point," which is just before the opening to the Marina, allows roughly 25 feet of width for navigation. Captain Fleming asserted that only one boat may safely pass each of these "pinch points" at a time.

48. Summarizing his (expert) opinion, Captain Fleming declared that based on his observations, a dock built along the Hunters Point development, as designed, will not be a "significant" impediment on navigability or public safety in the Canal. On the contrary, Captain Fleming declared that, by maintaining slow speeds and utilizing the available "pull outs," boats will have "plenty" of room to safely navigate the Canal.

49. Finally, Captain Fleming commented on the steps Cortez Road has, or will, take to effectively encourage and enhance safe use of the Canal. This activity consists of the navigational aids mentioned by Mr. Gobuty, including:

a. Mirrors: Captain Fleming stated that mirrors positioned at the 90-degree "dogleg" will reduce the risk of boat collision by increasing the line of sight around the bend and helping boaters maintain a lookout for oncoming boat traffic.

b. "No wake" signs: Captain Fleming urged that driving boats at a "no wake" speed enables boaters to "very easily" avoid collision.

c. Trimming mangroves: Captain Fleming acknowledged that, at the 90-degree "dogleg," mangrove growth on the Hunters Point corner will restrict vision of oncoming boat traffic. He stated, however, that trimming the mangroves back will "greatly" increase sightlines around the turn.

d. Signs to monitor channel 9: Captain Fleming asserted that use of channel 9 on the radio will enable boaters to listen for inbound or outbound boat traffic. This action will raise boaters' awareness of boats entering or exiting the Canal so that they may prepare to slow down or plan to pass.

e. One-way traffic signs in the Canal: This step would increase safe operation in the narrow channel.

B. The District's Supporting Position

50. During the final hearing, the District maintained that it correctly determined that Cortez Road is entitled to the Permit for the Hunters Point dock, and that Cortez Road's application met the conditions for permit issuance pursuant to the requirements of chapter 373, Part IV, chapter 62-330, and the accompanying A. H. Vol I. The District asserts that the activity Cortez Road seeks to conduct (constructing a dock) will not significantly impede navigation through the Canal or adversely affect the public health, safety, or welfare, or the property of others.

51. To support Cortez Road's prima facie case, the District first offered the testimony of Cliff Ondercin. Mr. Ondercin works for the District as an Environmental Manager in its environmental resource permit bureau. In his job, Mr. Ondercin reviews applications for environmental resource permits. At the final hearing, Mr. Ondercin stated that, in order to construct the dock within the water of the Canal, Cortez Road was required to seek authorization from the District.

52. For his testimony, Mr. Ondercin discussed the process the District followed when reviewing Cortez Road's application. Mr. Ondercin explained that Cortez Road's request for the Permit received multiple levels of review by District staff, who evaluated the application, as well as the design plans, drawings, surveys, reports, and other relevant information Cortez Road provided. When the District received Cortez Road's application, the District assigned it to District staff member Lauren Greenawalt to review.

53. Mr. Ondercin added that rule 62-330.302 contains the criteria that the District uses to determine whether to grant or deny an application. Mr. Ondercin explained that rule 62-330.302(1)(a) directs that, to obtain a permit from the District, the applicant must provide "reasonable assurances" that the project "will not be contrary to the public interest." Rule 62-330.302(1)(a) further identifies seven factors that District staff must consider and "balance" when determining whether issuing a permit is appropriate. This "public interest test" is also found in the A. H. Vol I, sections 10.2.3 through 10.2.3.7.

54. Mr. Ondercin relayed that, when considering the seven criteria of the "public interest test," a District evaluator will carefully review each of the seven criteria and use his or her best professional judgment to decide whether the proposed project should be approved. Mr. Ondercin remarked that a negative review of any of the governing criteria may be offset by positive reviews of the other remaining criteria.

55. Mr. Ondercin voiced that "reasonable assurances" are not absolute guarantees. Rather, an applicant must simply provide sufficient information for District staff to determine that the proposed project meets the conditions for permit issuance. He further relayed that during the evaluation process, District staff take the information in the application at face value.

56. The District next presented Lauren Greenawalt, the District's Lead Environmental Scientist, who was the primary evaluator of the Cortez Road application for the District. Ms. Greenawalt routinely reviews applications for environmental resource permits as part of her job. Ms. Greenawalt estimates that she evaluates approximately 200 permit applications a year.

57. Ms. Greenawalt initially explained that she found the application to be complete and provided all the information necessary for her to review the proposed project. Ms. Greenawalt also conducted a site visit to the Canal and examined aerial images of the project area. During her site visit, Ms. Greenawalt relied on where Cortez Road represented it would place the

dock, but did not personally measure how far the proposed dock might extend into the Canal. Ms. Greenawalt also took into account how the dock might affect the existing mangroves along the edge of the Canal.

58. Thereafter, Ms. Greenawalt applied the seven criteria delineated in the "public interest test" to Cortez Road's application. Upon completing her review, Ms. Greenawalt found that Cortez Road provided "reasonable assurances" that its dock project was not contrary to the public interest. Therefore, when balancing the criteria listed in the applicable statute and rules, she concluded that it was appropriate for the District to grant Cortez Road a permit to build a dock in the Canal. Regarding her specific analysis:

I. Whether the activity will adversely affect navigation – section 373.414(1)(a)3.; rule 62-330.302(1)(a)3.; and A. H. Vol I, section 10.2.3.3(a).

a. In evaluating the effect of the dock on boaters' navigation through the Canal, Ms. Greenawalt noted the language of A. H. Vol I, section 10.2.3.3(a), which requires the District to consider whether the activity will "significantly impede navigability." With this factor in mind, Ms. Greenawalt initially commented that the size of the vessels that use the Canal is limited by the available clearance through the Bridge at the entrance to the Canal. She stated that this fixed structure restricts the height and width of the boats that may enter or exit the Canal. Based on the Bridge's dimensions above the water and the depth of the Canal below, Ms. Greenawalt believed that only one boat at a time may safely travel past the Bridge. Ms. Greenawalt took this restriction into account when determining the impact of the proposed dock on boaters who would likely travel along the Canal. Ms. Greenawalt then concluded that the location of the dock Cortez Road intends to build will not create a "significant impediment" to boats traveling along the Hunters Point property.

b. During her testimony, Ms. Greenawalt conceded that the proposed dock could create certain areas along the north-south passage where boats may

not be able to comfortably pass each other side-by-side. Ms. Greenawalt specifically identified the three "pinch points" between the two boatlifts and the dock that jut out from the residential side of the Canal. However, Ms. Greenawalt commented that several "pull off" areas are available between these structures that boaters can use to safely negotiate around each other. Ms. Greenawalt remarked that nothing in the applicable Florida Statutes or rules mandates that vessels must be able to pass each other, side-by-side, at all points of a waterway.

II. Whether the activity will adversely affect the public health, safety, or welfare or the property of others - section 373.414(1)(a)1.; rule 62-330.302(1)(a)1.; A. H. Vol I, section 10.2.3.1(a).

a. Ms. Greenawalt likewise determined that Cortez Road provided "reasonable assurances" that the proposed dock will not adversely affect the public health, safety, welfare, or the property of others. During her review, Ms. Greenawalt received confirmation from Cortez Road that the proposed dock, and any boats moored to it, must fit within the boundaries depicted on the plans approved under the Permit. Ms. Greenawalt then concluded that the limitations on how far the dock might extend into the Canal will ensure a safe boating environment and will not threaten the personal safety or property of other boaters. She supported this conclusion by confirming that the boats currently using the Canal appear capable of safely passing each other while navigating the existing impediments. Furthermore, in locations along the Canal where boats currently cannot pass one another (such as the Bridge), areas are available in the waterway that allow one boat to proceed while the other boat pulls aside, resulting in no "significant impediment" to navigation.

b. Ms. Greenawalt also considered that the addition of various navigational aids in the Canal by Cortez Road could assist boaters.

59. In summing up her findings, Ms. Greenawalt recognized that the dock will affect navigation along the Canal in some capacity, and boaters will have

to take the dock into account while traveling on the Canal beside Hunters Point. However, she believed that Cortez Road's application sufficiently established that boats can safely travel through the Canal, including when two boats needed to pass each other alongside of the proposed dock. Consequently, she determined that the proposed dock will not "significantly impede" navigation. Therefore, when "balancing" all the required criteria, Ms. Greenawalt found that the project does not violate operable law, and Cortez Road's application meets all conditions necessary for the issuance of the Permit.

60. On cross examination, Ms. Greenawalt admitted that she has no training in boat navigation. Ms. Greenawalt also acknowledged that she does not know the size of the boats stored at the Marina. Therefore, she did not take into account the possibility that larger-sized vessels may travel through the Canal next to the Hunters Point dock. Ms. Greenawalt further stated that nothing in the Permit limits the size of the vessels that can use the dock. On the other hand, she was aware that the Hunters Point homeowner association documents restrict the size of the boats that can be moored on the dock.

61. Ms. Greenawalt further agreed that Cortez Road must ensure that the proposed dock does not disturb any mangrove roots in the Canal. Consequently, Cortez Road will not be able to position the dock flush with the shoreline. Conversely, Ms. Greenawalt repeated that Cortez Road is allowed under the Permit to trim mangrove growth in the project area. Specifically, Cortez Road may cut the mangroves back to a line parallel to the existing mangrove roots in the Canal. Cortez Road may also prune mangroves in the Canal to a height of four feet and run the proposed dock over this trimmed area. Ms. Greenawalt added that constructing docks over mangrove plants is commonly done. She also explained that mangrove roots have gaps into which pilings may be driven which will not disturb the mangrove growth.

62. Finally, regarding arguments from Cortez Road concerning whether the Marina possessed riparian rights to use the Canal, Ms. Greenawalt testified that the only property interest that the District is required to evaluate pursuant to chapter 62-330 is whether the subject property involves Florida sovereign submerged lands. (Ms. Greenawalt acknowledged that the Canal is privately owned, and therefore, is not sovereign submerged land.) Ms. Greenawalt further testified that when a waterbody is not sovereign submerged land, the District still applies the "public interest test" to determine whether to issue an environmental resource permit.

C. The Marina's Challenge to the Permit

63. In challenging the District's intended decision to issue the Permit to Cortez Road, the Marina asserts that Cortez Road's proposed dock will significantly increase and impair vessel traffic through the Canal. Specifically, the dock will decrease the (already narrow) navigable width. As a direct result, the dock will negatively affect the Marina's, as well as its customers', safe navigation through, and recreational usage of, the Canal. Consequently, granting Cortez Road a Permit to construct the dock will directly and negatively impact the Marina's ongoing operations and rights.

64. The Marina further contends that the location of the proposed dock in the Canal will create a navigational hazard for vessels attempting to travel to the Marina (and other properties along the canal). This situation will increase the risk of boating accidents and substantial injuries to persons and/or property in contravention of section 373.414(1), rule 62-330.302, and A. H. Vol I, section 10.2.3(a). As such, the Marina charges that the District should not issue the Permit to Cortez Road. As an alternative, the Marina suggests that the District modify the Permit to require Cortez Road to establish significant "pull-out" areas along the Canal to allow safe passage.

65. To support its position, the Marina called Carl "Skip" McPadden. Mr. McPadden is currently the general manager of the Marina. He has worked in this position, overseeing Marina operations, for the last seven

years. During his time with the Marina, Mr. McPadden represented that he has personally made "hundreds" of boat trips down the Canal from the Marina to Anna Maria Sound.

66. Initially, Mr. McPadden addressed the Marina's current business operations. Mr. McPadden expressed that the Marina offers "boat storage with valet boating" and boat repair. The Marina also maintains a commercial on-site service department and fuel dock. As for its boat storage, Mr. McPadden stated that Marina facilities can accommodate up to 365 boats consisting of approximately 270 boats in permitted "high-and-dry" storage, 45 temporary outside dry storage spots, and ten permanent wet slips (boats in the water). Mr. McPadden added that the Marina also has an additional 200 feet of dockage for temporary, "transient" wet storage.

67. Mr. McPadden explained that "valet" boat services include allowing Marina customers to "reserve their spot ... the marina then splashes the boat, ties it up to the dock, and has it ready and waiting for them when they get there." In addition, when customers return from boating, the Marina will secure the boat to the Marina docks and remove the boat from the water with a forklift.

68. Mr. McPadden explained that "boat repair" consists of "mainly preventative maintenance, tune-ups by employees of the Marina." Mr. McPadden relayed that as part of their on-site boat repair services, Marina technicians will often perform "sea tests" on boats. This process involves Marina employees driving the boat down the Canal and into Anna Maria Sound to diagnose mechanical issues and confirm adequate repair work. If Cortez Road is allowed to build the dock, Marina employees will be required to negotiate the restricted passage past Hunters Point during "sea tests."

69. Mr. McPadden relayed that he has seen every boat that uses the Marina. The average boat size is 26-feet long. The largest boat maintained at the Marina is 38-feet long and 11-feet wide.

70. During his testimony, Mr. McPadden expressed his concern regarding the effect of a dock along Hunters Point on the safe passage of Marina customers through the Canal. Mr. McPadden confirmed that the Canal is the only water access from the Marina to Anna Maria Sound. Therefore, to reach open water, Marina customers must journey past Hunters Point, which takes approximately three to four minutes. Mr. McPadden relayed that on a typical, busy day, the Marina will launch about 50 boats. The Marina caps the number of boats it allows to depart at 65. Therefore, at peak usage, the Canal might see 130 trips a day from Marina customers coming and going in both directions by Hunters Point. On average, over 1,000 boats may travel from the Marina to the Bridge each month.

71. Regarding the impact of the proposed dock on navigability, Mr. McPadden declared that the dock, combined with the mangroves that line the shore, will constrict the navigable width of the Canal. Mr. McPadden voiced that right now, without a dock, two boats can safely pass each other along the Hunters Point property, but only if they maneuver "very carefully." Mr. McPadden explained that certain areas in the Canal are very narrow. In addition, along the residential side of the north-south passage several boatlifts and docks extend out into the water. Further, the bottom of the Canal is "extremely shallow" in several stretches. Accordingly, Mr. McPadden stated that boaters currently use the waters in which the proposed dock is to be located to safely negotiate the Canal.

72. Mr. McPadden added that the effects of the dock will be particularly acute at two "blind" corners where existing foliage prevents boaters from seeing down the Canal past a certain point. The first turn is located just after the Bridge at the entrance to the Canal. The second turn is a 90-degree "dogleg" at the northwest corner where the Canal turns to head towards the Marina. Mr. McPadden remarked that boaters cannot see boat traffic in the Canal until they are in the process of turning the corner, and reversing direction is very difficult.

73. As a result, Mr. McPadden was very concerned about the ability of Marina customers to safely use the Canal after the proposed dock is constructed. Mr. McPadden expressed that, once the dock is put in place, due to the limited navigable width of the Canal, in order to safely travel alongside the dock, a boat entering or leaving the Canal will be forced to pull to the western side of the Canal (opposite the dock) and wait at idle speed to avoid boat congestion. Mr. McPadden expressed that the majority of Marina customers are "weekend style" or "super average" boaters. He declared that the dock will "absolutely" increase the risk of damage or harm to boaters who travel from the Marina to Anna Maria Sound.

74. The Marina also offered the testimony of Pete Peterson. Mr. Peterson is a civil engineer who works in the area of marina and waterfront structures. Mr. Peterson provided expert testimony regarding the construction and design of the proposed dock. Mr. Peterson opined that if Cortez Road builds the dock as shown in its application, there will be certain locations along the Canal in which two boats cannot safely pass one another.

75. In reaching his conclusion, Mr. Peterson relied on the American Society of Civil Engineers Manual 50, entitled *Planning and Design Guidelines for Small Craft Harbors* ("Manual 50"). Mr. Peterson described Manual 50 as the lead design guideline for permitting projects in small recreational harbors, such as the Canal.

76. Mr. Peterson initially explained that, in preparing his opinion, he reviewed the proposed plans for the Hunters Point dock from the Cortez Road application. He had also visited the Canal, as well as viewed photographs of the intended placement of the dock. Based on his engineering experience and expertise, Mr. Peterson asserted that he would not have designed the dock as proposed. Mr. Peterson expressed that his primary concern was the negative impact the dock would have on safe navigation by boat traffic through the Canal.

77. Mr. Peterson further studied the navigable width of the Canal, with and without the proposed dock, using the bathymetric survey the Marina obtained in January 2022. Mr. Peterson confirmed that the water depths noted on the survey were recorded during MLLT, meaning that the survey measured the water depth at the average lowest low water level of the Canal. In other words, the depths noted on the bathymetric survey represented the shallowest the Canal will be in a particular area.

78. Mr. Peterson explained that, due to the shallow depths along the sides of the Canal, the navigable portion of the Canal is less than its total width. Therefore, to determine where boats may feasibly travel beside the Hunters Point development, Mr. Peterson looked for a channel that featured a depth of at least three feet at MLLT and a width of three times the width of the beam of a "typical" boat that would use the Canal. In this case, Mr. Peterson assumed the dimensions of a "typical" boat would be 25 feet long with a beam/width of 9.1 feet.

79. Mr. Peterson testified that for safe two-way use of a waterway, Manual 50 recommends a clearance width of four times the beam of the boat (9.1 feet times four). This measurement accounts for the combined width of the two boats, together with one-half of the beam on either side of, and between, the boats as they pass. In other words, one boat requires a minimum of 18.2 feet to safely travel down the Canal. Two boats would need a width of 36 feet, four inches of navigable water to safely pass one another in the Canal.

80. Currently, Mr. Peterson believes that the Canal is safely navigable for passage by a single boat. Mr. Peterson stated that a channel of at least 18 feet, two inches wide runs the length of the Canal. If, however, Cortez Road is allowed to construct the proposed dock alongside its property, Mr. Peterson asserts that the navigable width would be reduced, and an unsafe condition would be created. This situation is particularly acute at the three "pinch points" along the north-south portion of the Canal.

81. To elaborate on his pronouncement, Mr. Peterson referred to the condition that will be created at the middle "pinch point" along the north-south corridor. In that location without the proposed dock, Mr. Peterson found the distance between the edge of the mangroves on the Hunters Point side to the boatlift on the residential side to be 36.7 feet. If Cortez Road is allowed to construct the dock as represented, the width of the new dock (four feet) plus the width of a boat moored to its side (9.1 feet) will reduce the available navigable corridor of the Canal to approximately 21.2 feet. Mr. Peterson urged that, based on the general guidelines upon which he relies, a width of 21 feet of water is too narrow for two boats to safely pass each other. Mr. Peterson explained that while two boats could maneuver around one another, it would be alarmingly tight. The boats would not have adequate buffer space between them. Consequently, based on his measurements, Mr. Peterson opined that the Hunters Point dock, together with the water structures currently located along the residential side of the Canal, as well as the existing mangroves, will create a significant impediment to safe navigation of the Canal.

82. Mr. Peterson further commented that Cortez Road will not be able to nestle its dock within the mangrove roots based on the dock design he reviewed. Mr. Peterson asserted that a typical 25-foot boat needs a minimum of three feet of depth to safely maneuver. Therefore, for Hunters Point residents to realistically moor their boats at the dock, the outer edge of the dock must be located in the Canal at a depth of at least three feet. Consequently, if Cortez Road places the dock too close to the edge of its property, the Canal is too shallow for boats to tie up next to it. Accordingly, Mr. Peterson believes that the dock Cortez Road hopes to build will project farther out into the Canal than Cortez Road currently anticipates.

83. On cross examination, Mr. Peterson acknowledged that the full length of the Canal currently contains areas where two boats cannot safely pass each other (the Bridge and along the east-west passage before the Marina).

Mr. Peterson also agreed that navigational aids in the Canal, such as channel markers and lights along the dock, could help safe navigation. On the other hand, he was skeptical that the mirrors Cortez Road has already placed in the Canal will prove very useful. He advised that, by the time a boater espies another boat in the reflection, both boats are too far into the navigable channel to effectively avoid an encounter.

84. Mr. Peterson also admitted that he did not evaluate whether boaters could take advantage of the "pull out" areas along the residential side of the Canal to pass (or wait to pass) other boats. He stated, however, that a workable "pull out" area for the three "pinch points" would require a water depth of at least three feet and measure approximately 75 feet long and 13.5 feet wide. Mr. Peterson remarked that such dimensions might not be readily available along the Canal. (Mr. Peterson offered that Cortez Road might create better "pull out" areas by removing 100 feet worth of dock at the southern end of the north-south passage and another 100 feet of dock just before the 90-degree "dogleg" corner.)

85. Finally, the Marina introduced Captain Christopher Karentz, a navigation expert. As part of his maritime consulting business, Captain Karentz investigates small boat accidents including collisions, groundings, and allissions (vessels striking a non-moving object such as a piling or bridge). Captain Karentz represented that his area of expertise involves safe navigation issues, which includes small vessels (25 feet in length or less) operating in narrow channels and inland waters. Pertinent to this matter, Captain Karentz often evaluates the amount of area in a waterway available for boats.

86. Captain Karentz offered his opinion regarding the safe navigation of small boat traffic through the Canal. In preparing his testimony, Captain Karentz reviewed the Cortez Road application, as well as including the bathymetric survey. He also visited the Canal and drove a boat up and down its length. He further measured the distance between the mangroves on the

Hunters Point side of the Canal to the boatlifts and docks on the residential side.

87. During his testimony, Captain Karentz remarked that generally two boats may safely pass each other through the Canal. He declared, however, that if Cortez Road is allowed to build the dock as proposed, safe passage along the Canal will be "significantly hindered," and will likely impede navigation. Captain Karentz advanced that the dock configuration, particularly with boats tied to the Canal side, will increase the risk of "adverse incidents," such as major and minor boat collisions and damage to boaters and boats that use the Canal. Captain Karentz stated that the dock will make it "near impossible" for two boats to safely pass each other in certain locations in the Canal.

88. In reaching his opinion, Captain Karentz commented that the typical 25-foot boat that currently uses the Canal has an eight to nine-foot beam (width). His rule of thumb for safely passing another boat or obstacle is to set a half-beam distance between the boats or object (about four feet of clearance). Captain Karentz also took into account the depth of the water through the Canal, as well as its navigable width. He testified that at this time, the Canal is fully navigable to a "restricted draft." In other words, Captain Karentz found the Canal "relatively narrow" when compared to other intercoastal waterways in Florida. Consequently, he remarked that only boats of a certain height (less than 12 feet above the waterline based on the Bridge); draft (less than three feet below the waterline based on the depth of the Canal); and beam (generally 9.1 feet based on the width of the Canal) can safely travel through the Canal.

89. Discussing potential hazards in the Canal, Captain Karentz commented that the width of the Bridge at the Canal entrance creates the first of several "pinch points" boaters must negotiate. Captain Karentz stated that, due to the maximum depth of the Canal under the Bridge (an average depth of 3.5 feet at low tide), only one boat may safely travel beneath the

Bridge at a time. Further, based on his personal observation, numerous rocks line the bottom of the west side of the Canal just inside the Bridge. Therefore, he concluded that boaters should enter the Canal, one at a time, and stay "centerline" through the first 200 feet of the Canal up to the southwest corner of the Hunters Point property.

90. As with the other witnesses, Captain Karentz identified three "pinch points" along the Canal's north-south track. These spots are located where the two boatlifts and a dock are positioned across from Hunters Point. Captain Karentz stated that, if Cortez Road is allowed to construct a dock along its property, these areas will require boaters to maneuver in a limited space. Captain Karentz declared that two boats cannot safely pass each other at the "pinch points." As a direct result, Captain Karentz voiced that the Cortez Road dock will cause increased boat congestion in the Canal.

91. (Captain Karentz also noted that only one boat at a time may pass through the Canal just before the Marina due to mangrove growth along the Canal's northern border. However, he believed that boaters heading away from the Marina had adequate space in the waters just outside the Marina basin to wait until the Canal was clear of boat traffic.)

92. Finally, Captain Karentz commented on the site lines at the 90-degree "dogleg" at the northwest corner of the Canal. Captain Karentz stated that the mangroves on the Hunters Point side decrease visibility around the "tight" turn, thereby reducing the distance boaters can see oncoming traffic. Consequently, boaters leaving the Marina must stay well right of the edge of the Hunters Point property so that any risk of collision is nominal. As a result, if a dock runs along the inside corner of the turn (the Hunters Point side), and boats are tied to the dock at that location, negotiating the corner will be much more difficult.

93. During his testimony, Captain Karentz also discussed the efficacy of the navigational aids Cortez Road indicated it would add to the Canal. He was not impressed. Regarding mirrors in the Canal at the northwest "dogleg,"

Captain Karentz thought they would be too small to have any practical effect and would not prove very helpful. Regarding erecting "no wake" signs in the Canal, Captain Karentz commented that, in practice, signs are generally not followed. Captain Karentz further voiced that steering is much more difficult when travelling at no-wake speed. Finally, regarding the use of channel 9, Captain Karentz doubted that prompting boaters to monitor channel 9 on their radios would have any practical benefit. He commented that, in practice, small boat operators generally do not monitor their radios.

94. On cross examination, Captain Karentz conceded that his opinion was based on the dock being located outside the mangrove roots, not over them (as Mr. Gobuty represented was Cortez Road's new plan). Captain Karentz agreed that trimming the mangroves and placing the dock over the mangrove roots would help with the sightline and provide boats more room to maneuver. He also assumed that the dock would run in a straight line down the Canal, and did not consider that the dock may "hug" the shoreline.

95. Captain Karentz further admitted that boats may be able to use "barely adequate" "pull out" areas on the residential side of the Canal to allow other boats to pass. However, he did not feel that such a maneuver was reasonable and was dependent on the boater's driving skill. Captain Karentz added that backing up in a boat is difficult in narrow confines.

Ultimate Findings of Fact:

96. Based on the evidence and testimony presented at the final hearing, the undersigned finds that Respondents (Cortez Road and the District) presented competent substantial evidence establishing Cortez Road's entitlement to the Permit. Conversely, the Marina did not meet its burden of demonstrating that the District should not issue the Permit to Cortez Road.

97. Notably, the testimony of Captain Fleming (for Cortez Road) and Ms. Greenawalt (for the District) was credible and is credited. Both witnesses persuasively established that the construction of a dock along the Hunters Point development will not "significantly impede" navigability of the Canal.

Ms. Greenawalt best framed the analysis by acknowledging that the dock, and any boats moored thereto, will undeniably affect navigation through the Canal to some extent. The evidence clearly shows that boaters will have to be mindful of a reduced navigable width when traveling alongside Hunters Point, particularly when crossing the three "pinch points" on the north-south channel. However, Captain Fleming convincingly explained that after the dock is built, the Canal will still contain sufficient space for boaters to safely travel between the Bridge and the Marina. This space will be found in several "pull out" areas on either side of each "pinch point." Captain Fleming effectively described how boaters may use the "pull out" areas to safely navigate past each other. In addition, Captain Fleming offered the additional observation that the three newly-created "pinch points" between the Hunters Point dock and the residential boatlifts are no more restrictive than the obstacles boaters currently encounter at the Bridge at the mouth of the Canal, as well as alongside the mangroves on the shore of the Canal just outside of the Marina.

98. Therefore, in light of the evidence in the record, the preponderance of the evidence demonstrates that Cortez Road provided reasonable assurances in its application that the activity it seeks to conduct (constructing a dock in the Canal) is not contrary to the public interest. Accordingly, the evidence supports the District's determination that, when balancing the criteria set forth in section 373.414, rule 62-330.302, and A. H. Vol I, issuing the Permit to Cortez Road is warranted.

CONCLUSIONS OF LAW

99. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.⁶

100. Petitioner's challenge to the Permit was conducted pursuant to section 120.569(2)(p) to determine whether Cortez Road's application met the conditions for permit issuance pursuant to section 373.414, rule 62-330.302, and the accompanying A. H. Vol I.

101. Section 120.569(2)(p) states (in pertinent part):

For any proceeding arising under chapter 373, ... if a nonapplicant petitions as a third party to challenge an agency's issuance of a license, permit, or conceptual approval, the order of presentation in the proceeding is for the permit applicant to present a prima facie case demonstrating entitlement to the license, permit, or conceptual approval, followed by the agency. This demonstration may be made by entering into evidence the application and relevant material submitted to the agency in support of the application, and the agency's staff report or notice of intent to approve the permit, license, or conceptual approval. Subsequent to the presentation of the applicant's prima facie case and any direct evidence submitted by the agency, the petitioner initiating the action challenging the issuance of the license, permit, or conceptual

⁶ The Marina also alleged that the proposed project will "adversely impact [the Marina's] existing riparian rights of ingress and egress" on the Canal and will "adversely impact [the Marina's] established riparian rights of safe ingress and egress and access to the intercoastal navigation channel."

At the final hearing, the District objected to any issue of the Marina's riparian rights being litigated in this chapter 120 proceeding on the basis that the Marina's riparian rights to use the Canal are not part of the criteria the District considered in determining whether to grant the Permit to Cortez Road. The District maintains that any issue regarding the Marina's riparian rights is beyond the jurisdiction of DOAH and must be litigated in circuit court pursuant to section 26.012(2)(g), Florida Statutes, unlike the environmental resource permit program under chapter 62-330. The undersigned agrees with the District that the issue of the Marina's riparian rights is not germane to the issue presented in this permit challenge, and the findings of fact and conclusions of law in this Recommended Order so reflect.

approval has the burden of ultimate persuasion and has the burden of going forward to prove the case in opposition to the license, permit, or conceptual approval through the presentation of competent and substantial evidence. The permit applicant and agency may on rebuttal present any evidence relevant to demonstrating that the application meets the conditions for issuance.

In short, section 120.569(2)(p) directs the applicant (Cortez Road) to present a prima facie case demonstrating entitlement to the Permit, as supported by the agency (the District). Thereafter, the third-party challenger (the Marina) has the burden "of ultimate persuasion" and the burden "of going forward to prove the case in opposition to the ... permit." Accordingly, if the Marina fails to carry its ultimate burden, Cortez Road prevails in this dispute by virtue of establishing its prima facie case.

102. The evidentiary hearing is a de novo proceeding, intended to formulate final agency action and not to review action taken earlier and preliminarily. § 120.57(1)(k), Fla. Stat.; *Young v. Dep't of Cmty. Aff.*, 625 So. 2d 831, 833 (Fla. 1993); and *Hamilton Cnty. Bd. of Cnty. Comm'rs v. Dep't of Env't Regul.*, 587 So. 2d 1378, 1387 (Fla. 1st DCA 1977).

103. The standard of proof is by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

104. The District is authorized to permit the construction, alteration, operation, maintenance, repair, removal, and abandonment of any surface water management system, and to permit any construction activity that would affect wetlands, alter surface water flows, or contribute to water pollution. Ch. 373, Part IV, Fla. Stat. Pursuant to this statutory authority, the District implemented chapter 62-330 and A. H. Vol I.

105. Section 373.414 provides that, when determining whether a proposed activity in surface waters should be approved, the applicant must provide "reasonable assurances" that state water quality standards will not be

violated and that such activity "is not contrary to the public interest."

Specifically, section 373.414(1) states, in pertinent part:

As part of an applicant's demonstration that an activity regulated under this part will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district, the [District] shall require the applicant to provide reasonable assurance that state water quality standards applicable to waters as defined in s. 403.031(13) will not be violated and reasonable assurance that such activity in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), is not contrary to the public interest.

"Reasonable assurance" has been applied to mean "a substantial likelihood that the project will be successfully implemented." *Metro. Dade Cnty. v. Coscan Florida, Inc.*, 609 So. 2d 644, 648 (Fla. 3d DCA 1992); and *Bluefield Ranch Mitigation Bank Tr. v. S. Fla. Water Mgmt. Dist.*, 263 So. 2d 125, 129 (Fla. 4th DCA 2018).

106. Regarding an agency's decision upon receiving an application, section 373.414(1)(a) states:

In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), and is regulated under this part, is not contrary to the public interest, ... the governing board or the department shall consider and balance the following criteria:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
5. Whether the activity will be of a temporary or permanent nature;
6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and
7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

107. Pursuant to its rulemaking authority, the Florida Department of Environmental Protection adopted chapter 62-330, which establishes the standards applicable to this proceeding. §§ 373.043 and 373.113, Fla. Stat. Rule 62-330.302(1) repeats the "public interest test" from section 373.414(1)(a) and provides, in pertinent part:

[T]o 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, ... as determined by balancing the following criteria as set forth in sections 10.2.3 through 10.2.3.7 of [A. H. Vol 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.

108. A. H. Vol I has been adopted as a rule for use by the Department of Environmental Protection and the state's five water management districts. *See* § 373.414(1)(a)9., Fla. Stat. A. H. Vol I is incorporated by reference in rule 62-330.010(4) and is used in conjunction with chapter 62-330. A. H. Vol I was developed "to help persons understand the rules, procedures, standards, and criteria that apply to the environmental resource permit (ERP) program under Part IV of Chapter 373 of the Florida Statutes (F.S)." A. H. Vol I, section 1.0.

109. A. H. Vol I, Part III, addresses the conditions for issuance of permits under rule 62-330.302 and chapter 373. A. H. Vol I., section 10.2.3, entitled "Public Interest Test," sets forth guidance for rule 62-330.302(1)(a) reciting the seven criteria from section 373.414(1)(a), and provides, in pertinent part that:

In determining whether a regulated activity located in, on, or over wetlands or other surface waters is not contrary to the public interest, ... the Agency

shall consider and balance, and an applicant must address, the following criteria:

(a) Whether the regulated activity will adversely affect the public health, safety, or welfare or the property of others (subparagraph 62-330.302(1)(a)1, F.A.C.);

* * *

(c) Whether the regulated activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling (subparagraph 62-330.302(1)(a)3, F.A.C.).

110. As additional instruction pertinent to the Permit at issue, A. H. Vol I, section 10.2.3.1, provides:

In reviewing and balancing the criterion regarding public health, safety, welfare and the property of others in section 10.2.3(a), above, the Agency will evaluate whether the regulated activity located in, on, or over wetlands or other surface waters will cause:

(a) An environmental hazard to public health or safety or improvement to public health or safety with respect to environmental issues. Each applicant must identify potential environmental public health or safety issues resulting from their project. ... For example, the installation of navigational aids may improve public safety and may reduce impacts to public resources;

* * *

(d) Environmental impacts to the property of others. For example, construction of a ditch that lowers the water table such that off-site wetlands or other surface waters would be partly or fully drained would be an environmental impact to the property of others. The Agency will not consider impacts to property values.

111. A. H. Vol I, section 10.2.3.3, provides:

In reviewing and balancing the criterion on navigation, erosion and shoaling in section 10.2.3(c), above, the Agency will evaluate whether the regulated activity located in, on or over wetlands or other surface waters will:

(a) Significantly impede navigability or enhance navigability. The Agency will consider the current navigational uses of the surface waters and will not speculate on uses that may occur in the future. ... Applicants proposing to construct docks, piers and other works that extend into surface waters must address the continued navigability of these waters. An encroachment into a marked or customarily used navigation channel is an example of a significant impediment to navigability. ... The addition of navigational aids may be beneficial to navigation.

112. In brief, the applicable statute and rules require the District to review whether the applicant has provided "reasonable assurances" that the proposed project is not contrary to the public interest. To reach this decision, the Division is to "consider and balance" seven enumerated criteria. All seven factors are collectively considered to determine whether the project satisfies the "public interest test." *See, e.g., 1800 Atl. Developers v. Dep't of Env't Regul.*, 552 So. 2d 946, 954, 957 (Fla. 1st DCA 1989).

A. The Marina Has Standing to Protest the Intended Permit Award:

113. As an initial procedural matter, Cortez Village challenges the Marina's standing to contest the District's decision to issue the Permit. Standing is a jurisdictional, threshold issue in a chapter 120 proceeding. Generally, standing is not dependent on the merits of a party's case, but is rather the equivalent of assessing subject-matter jurisdiction. *Abbott Labs. v. Mylan Pharm., Inc.*, 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009), and *Delgado v. Ag. for Health Care Admin.*, 237 So. 3d 432, 438 (Fla. 1st DCA 2018).

114. To determine standing in a hearing conducted under sections 120.569 and 120.57(1), section 120.569(1) states that "[t]he provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency." In like manner, section 120.52(13) defines a "party" as a person "whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party."⁷

115. The decision whether a party's "substantial interests" will be affected by agency action is guided by the two-pronged test established in *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), which holds:

[B]efore one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect.

116. Further, standing to initiate a section 120.57 action is not dependent on proving that the proposed agency action violates applicable law. Instead, standing only requires proof that a petitioner has a substantial interest, and that the interest reasonably could be affected by the proposed agency action. Standing is a "'forward-looking concept' and 'cannot 'disappear' based on the ultimate outcome of the proceeding. ... When standing is challenged during

⁷ During the final hearing, Cortez Road strenuously asserted that the Canal and its waters are private property owned by Cortez Road. Consequently, the Canal is not navigable at law, and the Marina has no legal right to operate boats thereon. Therefore, Cortez Road vigorously argues that, because the Marina has no right to navigate the Canal, it does not possess a "substantial interest" which will give it standing to pursue this matter in an administrative forum.

However, as stated in footnote 6 above, the undersigned did not determine the Marina's riparian rights to use the Canal as part of this chapter 120 proceeding. Instead, the undersigned reviewed the District's intended decision to grant the Permit under chapter 373 pursuant to DOAH's role in the formulation of final agency action. Section 373.414 does not require the District to determine whether a body of water is "navigable at law" prior to issuing the Permit.

an administrative hearing, the petitioner must offer proof of the elements of standing, and it is sufficient that the petitioner demonstrate by such proof that his substantial interests 'could reasonably be affected by ... [the] proposed activities.'" *Palm Beach Cnty. Env't Coal. v. Florida Dept. of Env't Prot.*, 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009); *see also St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt.*, 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011) ("if standing is challenged during an administrative hearing, the petitioner must offer evidence to prove that its substantial rights *could* be affected by the agency's action" (citing *Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1084 (Fla. 2d DCA 2009)). Whether a petitioner is ultimately successful in its administrative challenge does not prevent the petitioner from possessing the requisite standing to pursue an administrative action. *See Bluefield*, 263 So. 3d at 130 ("Whether [the challenger] will be successful on the merits is irrelevant to our [standing] inquiry."); and *St. Johns Riverkeeper*, 54 So. 3d at 1055 ("Ultimately, the ALJ's conclusion ... that there was no proof of harm or that the harm would be offset went to the merits of the challenge, not to standing.").

117. In framing its opposition to the Permit, the Marina asserts that it will be substantially affected by Cortez Road's proposed activity due to the fact that a dock constructed in the Canal along the Hunters Point property will create a navigational hazard adversely affecting the Marina's use of the Canal. Specifically, in both its Petition as well as during the final hearing,

the Marina alleges that Cortez Road's construction of the dock will (among other complaints):⁸

- a. negatively impact ongoing operations of the Marina;
- b. adversely affect the Marina's safe navigation through the Canal to and from the Marina facilities; and
- c. create a navigational hazard for vessels attempting to access the Marina.

118. Based on the evidence introduced during the final hearing, the Marina produced sufficient evidence to establish standing to challenge the issuance of the Permit in a chapter 120 proceeding. Regarding the first prong of the *Agrico* test, the injury-in-fact standard "is met by a showing that the petitioner has sustained actual or immediate threatened injury at the time the petition was filed, and '[t]he injury or threat of injury must be both real and immediate, not conjectural or hypothetical.'" *S. Broward Hosp. Dist. v. Ag. for Health Care Admin.*, 141 So. 3d 678, 683 (Fla. 1st DCA 2014), citing *Vill. Park Mobile Home Ass'n v. Dep't of Bus. & Pro. Regul.*, 506 So. 2d 426, 433 (Fla. 1st DCA 1987).

119. The Marina satisfied this first element by demonstrating that its current business operations "could" be adversely affected by the construction

⁸ The Marina also asserted a number of complaints that will not serve to establish standing to challenge an environmental resource permit in a chapter 120 proceeding. These include allegations that the dock will negatively impact the Marina's profitability and the value of its ownership interests. Florida courts have routinely held that chapter 373 is not meant to protect a business's profits or losses or prevent potential economic injuries. *See Bluefield*, 263 So. 3d at 128 ("It is well established that mere economic interests ... are insufficient to establish standing."); *Mid-Chattahoochee River Users v. Fla. Dep't of Env't Prot.*, 948 So. 2d 794, 797 (Fla. 1st DCA 2006) (Appellant's economic injury was not the type of injury that the permitting proceeding under chapter 373 was designed to protect.); and *Agrico*, 406 So. 2d at 482 (Petitioners lacked standing because their "high degree of potential economic injury" was not the type of harm that chapters 373 and 403, Florida Statutes, were designed to protect.)

Similarly, the Marina's charge that the dock will not be in the public interests and will adversely affect "potential future client vessels" does not establish standing to challenge the Permit. *See Bluefield*, 263 So. 3d at 128 ("It is well established that ... the general interests of citizens are insufficient to establish standing."); and *Fla. Chapter of the Sierra Club v. Suwannee Am. Cement Co., Inc.*, 802 So. 2d 520, 522–23 (Fla. 1st DCA 2001) (A claim "based upon a generalized interest in the environment" is insufficient to establish standing.)

of the proposed dock in the Canal. During the final hearing, Mr. McPadden credibly explained that, as part of the Marina's routine maintenance and repair services, Marina employees "sea test" customer boats by driving them from its upstream facilities down the Canal and past Hunters Point. Mr. McPadden cogently expressed his concern that the planned location of the dock in the water bordering the Hunters Point property will negatively impact the Marina's ability to safely use the Canal. Mr. McPadden's testimony was supported by Captain Karentz who opined that the proposed dock will impair safe navigability of the Canal because it will restrict space in the Canal for two boats to safely pass each other, resulting in an increased risk of boat collisions and damage.

120. Reviewing the second prong of the *Agrico* test, the "nature of the injury which is required to demonstrate standing will be determined by the statute which defines the scope or nature of the proceeding." *Friends of the Everglades, Inc. v. Bd. of Trs. of the Int. Imp. Tr. Fund*, 595 So. 2d 186, 189 (Fla. 1st DCA 1992).

121. In determining whether the District should issue an environmental resource permit for the proposed activity, chapter 373 specifically tasks the Division to consider and balance certain criteria, including whether the activity will adversely affect: 1) the public health, safety, or welfare or the property of others (section 373.414(1)(a)1.); and 2) navigation (section 373.414(1)(a)3.). In initiating this proceeding, the Marina specifically alleged that the dock Cortez Road seeks to construct will threaten the safety of its employees and customers who navigation through the Canal. As stated above, Mr. McPadden and Captain Karentz testified during the final hearing supporting this allegation.

122. The Marina's concerns over the impact of the potential dock on safe navigation through the Canal are precisely the type or nature of injuries the District is to consider during an administrative review of the Permit. Accordingly, the Marina's complaint in this matter falls squarely within the

interests that chapter 373, and the rules adopted thereunder, is designed to protect.

123. Therefore, the Marina presented competent substantial evidence establishing its standing to challenge the District's intended decision to grant the Permit to Cortez Road. Based on testimony that the proposed dock "could" adversely impact the Marina's use of the Canal to perform its business operations (traveling through the Canal to conduct "sea trials"), the Marina sufficiently demonstrated that its "substantial interests" under section 120.569(1) are affected in this matter. Accordingly, the Marina has standing to protest the District's award of the Permit in this chapter 120 administrative proceeding.

B. The District Appropriately Determined that Cortez Road Should be Issued the Permit:

124. Turning to the Permit at hand, the undersigned finds that Cortez Road provided "reasonable assurances" to the District (and in this hearing) that the proposed activity (construction of the dock in the Canal) "will not be contrary to the public interest." Thereafter, based on the competent substantial evidence in the record, the District appropriately determined that, when balancing the seven criteria listed in section 373.414(1)(a) (as well as rule 62-330.302(1)(a) and A. H. Vol I, sections 10.2.3 through 10.2.3.7), Cortez Road's application meets the conditions necessary for issuance of the Permit.

125. Specifically, the Marina's principal target of contention is that the dock will impermissibly affect the ability of boats to safely travel on the Canal along the Hunters Point property. As expressed in A. H. Vol I, section 10.2.3.3(a), the standard by which to assess the validity of the Marina's complaint is whether the dock will "significantly impede navigability."

126. Based on the evidence and testimony presented at the final hearing, Cortez Road sufficiently established its entitlement to the Permit. As an initial consideration, all Cortez Road (and District) witnesses recognize that

the dock will "impede" boat traffic to a certain extent. The testimony, along with the Canal maps, surveys, and photographs, reveals that the dock will most assuredly reduce the navigable water width between Hunters Point and the boatlifts, docks, and mangrove growth on the residential side of the Canal. The evidence shows that the dock must be positioned so as to provide at least three feet of water on its Canalside to reasonably accommodate the boats that will moor against it. Therefore, the outside edge of the dock, as designed, will be located in the Canal along the outer border of the existing mangrove roots. Consequently, the dock, as well as the boats that will be tied to it, will encroach into the customarily used navigation channel through the Canal. In some places, this encroachment will limit safe travel to only one boat at a time. In particular, the navigable width between the southern two "pinch points" will be narrowed from approximately 28 feet to 15 feet.

127. Nevertheless, the evidence further establishes that any impediment the dock imposes on boat traffic will not be "significant." The undersigned finds that the Cortez Road witnesses credibly and persuasively explained how boats may safely maneuver past each other after the dock is placed in the Canal. All witnesses agree that, following construction of the dock, boats will still be able to freely travel through the Canal one at a time. The proposed dock will not interfere with or prevent a single boater from traversing from the Bridge to an upland property. An issue will arise, however, when boats approach each other from opposite directions as they pass Hunters Point.

128. Addressing this point, Captain Fleming convincingly testified how boaters will be able to use "pull out" areas along the Canal to safely navigate around each other. Captain Fleming capably described how a boat can "pull" into gaps before, after, and between the two boatlifts on the residential side of the Canal, as well as an area just beside the northern dock, and wait for oncoming boat traffic to pass. Captain Fleming effectively conveyed how the "pull outs" will offer boaters "plenty of room" to avoid collisions in the Canal.

129. Lastly, Captain Fleming offered a crucial detail for consideration when he testified that, currently, all boats that travel from the Bridge to the Marina are familiar with, and must account for, areas in the Canal where only one boat may safely traverse at a time. The evidence shows that the dock will not reduce the safe navigational width of the waterway any more than the Bridge at the entrance to the Canal, which is 15 feet wide, or the narrow bottleneck just before the Marina where mangrove growth restricts safe movement to one boat at a time. The fact that the "pinch points" the Hunters Point dock will create will not cause any tighter passage than those already existing on the Canal further supports the finding that the proposed location of the dock will not cause a "significant" impediment to boats navigating the Canal.

130. Supplementing Captain Fleming's testimony, Ms. Eardley added that Cortez Road will take affirmative steps to reduce the impact of the dock on boat traffic. These measures include positioning the dock as close to the shoreline as allowable. Ms. Eardley comprehensively explained how Cortez Road envisions running the dock in and over the mangrove roots (without disturbing them). In addition, Ms. Eardley detailed how Cortez Road will cap the width of the dock and supporting pilings to four feet. Ms. Eardley capably conveyed how, by using these design goals, Cortez Road will endeavor to locate the dock as far out of the navigable channel as possible.

131. Finally, Mr. Gobuty announced a number of navigational aids that Cortez Road will place in the Canal, including signs to advise boaters to travel at minimal speed, and mirrors to assist boaters to see oncoming boat traffic. In addition, Mr. Gobuty testified that Cortez Road is committed to trimming the mangrove growth along Hunters Point as far back as is permissible. In response to this plan, both Mr. Peterson and Captain Karentz conceded that the navigational aids, as well as the trimming of the mangroves, can help safe navigation through the Canal.

132. In light of the above testimony, the preponderance of the evidence in the record supports the District's determination that Cortez Road's application provided sufficient "reasonable assurances" that its project will not significantly impede navigability along the Canal and will not be contrary to the public interest. In similar fashion, the District properly concluded that, when considering the criteria listed in section 373.414(1)(a)1.-7., on balance, the evidence establishes that the proposed project is not contrary to the public interest.

133. Ms. Greenawalt, who testified for the District, effectively explained how she reviewed and approved the Cortez Road application. As directed in A. H. Vol I, section 10.2.3.3, Ms. Greenawalt considered the current navigational use of the Canal, including the need for boaters to account for the limited passage through the Bridge, as well as the existing mangrove growth in the waters. Ms. Greenawalt also personally visited the Canal and examined the project area. Ms. Greenawalt credibly reported how, following her evaluation, she concluded that the anticipated encroachment of the dock into the Canal (less than nine percent of the total waterway) will not prevent safe and reliable navigation by Marina employees or members of the public between the Marina and Anna Maria Sound. Accordingly, when balancing the criteria listed in the applicable statute and rules, in particular section 373.414(1)(a)1. and 3., the District (through Ms. Greenawalt) rightly determined that it was appropriate to grant Cortez Road a permit to build the dock in the Canal.

134. Conversely, the Marina failed to meet its "burden of ultimate persuasion" of proving, by a preponderance of the evidence, that Cortez Road failed to provide reasonable assurances that the standards for issuance of the Permit were met. The Marina's challenge to the Permit asserted that Cortez Road's application fails to satisfy the criteria set forth in section 373.414(1)(a)1. and 3. by adversely affecting the public health, safety, welfare, or property of others and by creating a navigational hazard that will

"significantly impede navigability" through the Canal. However, the competent substantial evidence in the record is insufficient to conclude that the proposed dock will violate any of the public interest criteria under section 373.414(1)(a) and the rules implemented thereunder.

135. As stated above, it is uncontroverted that the placement of the dock in the Canal will affect navigation to some degree. (Both Ms. Greenawalt and Captain Fleming concede this point.) However, the evidence was insufficient to conclude that the dock will constitute an environmental hazard to public health, safety, welfare, or property. Similarly, the evidence and testimony do not show that the construction of the dock will cause more than a mere inconvenience to boaters similar to what they already face at the Bridge, much less result in a significant impediment to navigation.

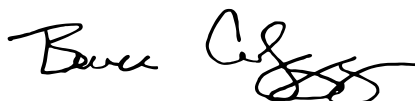
136. On the contrary, the credible and persuasive evidence presented during the hearing, including expert testimony, firmly establishes that any impact of the dock on boat traffic through the Canal can be safely and reliably minimized by the use of the "pull out" areas. In addition, Cortez Road convincingly represented that it will install and maintain a number of "navigational aids" along the Canal, which will improve the ability of boaters to safely travel past the dock. Consequently, there are no reasonably anticipated "significant" adverse impacts on safe navigation from the construction of the dock in the waters along Hunters Point.

137. Thus, for the reasons set forth herein, Petitioner failed to meet its burden of proving, by a preponderance of competent and substantial evidence, that the proposed dock is contrary to the public interest. Instead, the undersigned concludes that the proposed dock meets the standards established in section 373.414, rule 62-330.302, and A. H. Vol I, section 10.2.3.3, and the District should issue the Permit to Cortez Road.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Southwest Florida Water Management District enter a final order granting Cortez Road's application for the Permit to build a dock in the Canal and issue ERP Individual Construction Major Modification Permit No.: 43032468.003.

DONE AND ENTERED this 7th day of March, 2023, in Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
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Filed with the Clerk of the
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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.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MHC CORTEZ VILLAGE, L.L.C.,

Petitioner,

v.

DOAH Case No.: 21-2491

CORTEZ ROAD INVESTMENTS AND
FINANCE, INC.

and

SOUTHWEST FLORIDA WATER
MANAGEMENT DISTRICT,

Respondents.

_____ /

PETITIONER’S EXCEPTIONS TO RECOMMENDED ORDER

Pursuant to Florida Administrative Code Section 28-106.217, Petitioner MHC Cortez Village, L.L.C. (“MHC”) hereby submits its *Exceptions* to the Administrative Law Judge’s March 7, 2023 *Recommended Order*.¹

Introduction

On June 29, 2021, the District issued Environmental Resource Individual Construction Major Modification Permit No. 43032468.003 (the “Permit”) to Respondent Cortez Road Investments and Finance, Inc. (“Cortez Road”) for construction of a new continuous dock with thirty-two (32) parallel mooring boat slips, and replacement of existing docks for an additional seventeen (17) new parallel slips, totaling forty-nine (49) boat slips (the “Proposed New Dock”). The Proposed New Dock will be inside a narrow and shallow canal that begins at Anna Maria Sound and extends along Cortez Road’s Hunters Point development site and past MHC’s commercial marina (the “Canal”).

MHC challenged the Permit because that the Proposed New Dock will significantly

¹ References to the Recommended Order are abbreviated as RO.



decrease the Canal's navigable width, thus adversely impacting navigation, creating a navigational hazard to the vessels moored at or visiting the Marina (and other properties along the Canal), and increasing the risk of boating accidents and substantial injury to property and/or persons. Following a final hearing, the Administrative Law Judge entered a *Recommended Order* providing that the Permit be issued to Cortez Road without modification.

The *Recommended Order* ignores considerable dispositive evidence that undermines the Findings of Fact and Conclusions of Law. Instead, the *Recommended Order* includes findings of fact that the District must reject because those findings are not based upon competent substantial record evidence. Further, the *Recommended Order's* findings adopting the conclusions of Cortez Road's experts Liz Eardley and Dane Fleming are unsupported by record evidence. Additionally, although the *Recommended Order* relies heavily on Cortez Road's testimony concerning undocumented alterations to the Proposed New Dock design made during these proceedings, and navigational aids installed during the final hearing or anticipated to be installed, the *Recommended Order* requires no modification to the Permit that would require Cortez Road to implement and maintain those design changes or navigational aids.

The ALJ's factual findings that are unsupported by competent substantial evidence also lead to flawed conclusions of law. For the reasons discussed below, the District's Final Order should reject the most crucial conclusions of the *Recommended Order* in favor of the more reasonable substituted conclusions of law presented by MHC.

Standard of Review

Under Section 120.57, Florida Statutes, the District may adopt the *Recommended Order* in its entirety or may, under certain circumstances, modify or reject findings of fact and conclusions of law. Fla. Stat. § 120.57(1)(l). The District's final order must include an explicit ruling on each

exception. *Id.*

The District may not reject or modify any finding of fact “unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.” Fla. Stat § 120.57(1)(l). “Competent substantial evidence” is evidence that is “sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.” *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). “If the administrative law judge's findings are supported by competent substantial evidence, the agency cannot reject them even to make alternate findings that are also supported by competent substantial evidence.” *Resnick v. Flagler Cty. Sch. Bd.*, 46 So. 3d 1110, 1113 (Fla. 5th DCA 2010).

An agency may reject or modify conclusions of law over which it has substantive jurisdiction and, when doing so, must state with particularity its reasons for rejecting or modifying the conclusion of law and make a finding that its substituted conclusion is as or more reasonable than that which was rejected or modified. Fla. Stat. § 120.57(1)(l); *Barfield v. Dep’t of Health*, 805 So. 2d 1008 (Fla. 1st DCA 2001).

Argument

I. There is no competent substantial evidence that the Canal currently has room for boat pullouts, let alone pullouts with the Proposed New Dock in place.

MHC takes exception to *Recommended Order* paragraphs 42, 45, 46, 48, I.b., II.a., 97, 128, and 137. In forming his conclusion that the Proposed New Dock will not “significantly impede navigation,” the ALJ found that boaters will be able to use existing “pullout” areas along the non-project side of the Canal to safely navigate where two boats would otherwise be unable to pass each other. These findings of fact are not supported by competent substantial evidence in

the record, so the District must strike them and reject the corresponding conclusions of law in paragraphs 128 and 137.

Cortez Road's navigational expert, Dane Fleming, testified that while two boats can currently pass each other in the Canal, with the Proposed New Dock, there will be areas where two boats would *not* be able to pass. June 15, 2022 Tr., Vol. III 289:18-20, 280:9-11, 332:22-333:1, 333:11-22. When addressing the navigability of the Canal, Mr. Fleming opined, and the ALJ found, that a water depth of three feet is insufficient for boats in the Canal to travel and that a minimum depth of three-and-one-half feet is necessary. RO ¶ 40. Additionally, the Permit requires that a vessel maintain a minimum of 12 inches above the bottom of the Canal. *See* Joint Ex. 1 at 000027, 000152. August 16, 2022 Tr. Vol I 125:4-14, 129:22-130:2, 131:6-22.

Mr. Fleming opined that to alleviate the problem of two boats not being able to pass, boats can pull off to the non-Project side to allow an oncoming boat to pass. *Id.* at 332:24-333:10, 398:18-399:15. Yet Mr. Fleming did not take depth measurements of the Canal at any of the purported pullout areas. *Id.* at 395:19-20.² Cortez Road introduced no evidence of the water depths on the non-Project side of the Canal.

MHC's expert performed a bathymetric survey of the Canal that shows the varying depth of the Canal throughout. *See* MHC Ex. 16. Mr. Fleming did not dispute the survey findings. June 15, 2022 Tr. Vol. III 373:22-24. The bathymetric survey divides the Canal into cross-sections (T1 through T8). *See* August 17, 2022 Tr. Vol. III at 385:4-20, 386:8-12; MHC Ex. 16 at Sheets 5 and 6. The cross-sections are depicted as "T#" for the Hunters Point side and "T#" for the

² The *Recommended Order* states that Mr. Fleming, using MHC's expert's bathymetric survey, "relayed that the maximum depth of the Canal at mean low, low tide along Hunters Point varies between 4.5 feet and 7.3 feet." RO ¶ 42. There is no testimony in the record of Mr. Fleming to this effect. Indeed, that purported testimony is undermined by the bathymetric survey itself. Thus, paragraph 42 should be stricken.

non-Project side. *Id.* at 387:4-7.

Using the three and one half feet minimum depth that the ALJ concluded boats need to navigate the Canal, the survey conclusively establishes that there is insufficient depth between the existing residential docks on the non-Project side of the Canal for those areas to serve as pullout areas. The depth of the non-Project side of Canal south of the existing residential dock between T3' and T4' is at most 3.2 feet deep. *See* MHC Ex. 16, Sheet 5. Based on Mr. Fleming's testimony and the ALJ's conclusion, this area is not deep enough to serve as a pullout area because it is not deep enough for a boat to navigate at all. Similarly, the depth of the non-Project side of the Canal north of the existing residential docks, between T3' and T4', is less than 2.7 feet deep. *Id.* The depth between the next two northern residential docks is at most 2.8 feet deep. *Id.*

There is also no record evidence that the purported existing pullout areas on the non-Project side are sufficiently long to accommodate the boats typically in the Canal. 260:23-261:10. MHC's marina stores vessels with an average length of 26 feet and up to 38 feet. August 17, 2022 Tr. Vol. III at 246:14-18. MHC expert Pete Peterson, an engineer specializing in marina, waterfront structures, and dock design, testified that a sufficient and safe pullout area should be at least 75 feet long to accommodate the average size vessel travelling in the Canal. *Id.* at 425:15-25. MHC's safe navigation expert, Captain Chris Karentz, testified that a pullout area must be of sufficient length to allow a boat to float and continue to maneuver as boats float and drift because boats cannot completely stop. August 18, 2022 Tr., Vol. V at 548:2-9.

Given the traffic in the Canal, and the fact that the Marina typically launches 65 boats in a day and that Cortez Road intends to add up to 49 additional boats to the Canal, it is substantially likely that with the Proposed New Dock constructed, at least two boats will each

need to simultaneously use the same pullout area. Therefore, an adequate pullout area should be at least 100 feet long to accommodate two boats and provide limited maneuvering space. *See* August 18, 2022 Tr., Vol. V at 548:10-21.

There is no competent substantial record evidence of the length of the purported existing pullout areas that Mr. Fleming claims exist. Therefore, the District should strike the findings of fact in paragraphs 45, 46, 48, II.a., 97. Without these facts, there is no basis to conclude that the Proposed New Dock will not “significantly impede navigation” and the District must, in turn, reject the Conclusions of Law at paragraphs 128 and 137.

The record evidence shows that the best way to mitigate the impediments to navigation created by the Proposed New Dock is to remove 100 feet of dock where the Proposed New Dock is planned to begin and another 100 feet of dock just west of the 90-degree turn, as depicted in MHC Ex. 42. August 18, 2022 Tr., Vol. V 545:2-548:16, 631:25-5. MHC agrees with the ALJ’s conclusion that the “impact of the dock on boat traffic through the Canal can be safely and reliably minimized” by the use of pullout areas. Yet such pullout areas do not presently exist, so the District should modify the Conclusions of Law, and modify the Permit, to require the removal of 100 feet of the Proposed New Dock starting at the point closest to the Bridge and another 100 feet just west of the 90-degree turn, as shown on MHC Ex. 42.

II. The bridge at one end of the Canal, and mangroves near the Marina at the other end, do not limit two-way navigation in the rest of the Canal.

The ALJ concluded that the Proposed New Dock will not limit the navigable width of the Canal any more than the bridge at the Canal entrance, or the mangroves outside of the Marina, do. RO ¶ 97, 129. In short, that does not make sense. As Mr. Fleming agreed, the bridge does not affect boat movement once a boat is in the Canal or limit the number of boats in the Canal. June 15, 2022 Tr., Vol. III 363:21-24 *Id.* at 363:18-20.

The *Recommended Order*'s reliance on the supposed limiting effects of the bridge and Marina-adjacent mangroves is unsupported by the record evidence. Although the *Recommended Order* concludes that there is a "bottleneck" outside the Marina, the ALJ, based on the testimony of Capt. Karentz, acknowledges in the *Recommended Order* that boaters heading away from the Marina "had adequate space in the waters just outside the Marina basin to wait until the Canal was clear of boat traffic." RO, ¶ 91. Similarly, beyond the bridge is Anna Maria Sound, where a boat can easily wait for traffic to pass before entering the Canal. August 18, 2022 Tr., Vol. V 494:10-23. Once a boater enters the Canal under the bridge, there is no open space in which a boat can drift and wait for the Canal to clear, other than at the other end of the Canal, adjacent to and in the Marina's basin. *See* Cortez Road Exhibit 28. It does not follow that narrow points at either end of the Canal (one of which is not narrow anyway) do not dictate whether there are open areas on the rest of the Canal for boats to wait out traffic. Therefore, there is no competent substantial record evidence supporting paragraphs 97 and 129 and the District should strike them.

III. The *Recommended Order* fails to order a modification to the Permit to require the alleged dock design changes or navigational aids.

In concluding that Cortez Road provided reasonable assurances that the Proposed New Dock will not significantly impede navigation, the ALJ relied on Cortez Road's testimony that: (i) Cortez Road would redesign the Proposed New Dock from what was permitted to reduce the encroachment into the Canal; (ii) the size of boats allowed to moor at the Proposed New Dock would be limited to 25 feet; (iii) Cortez Road will place certain "navigational aids" in the Canal; and (iv) Cortez Road "anticipates" trimming back mangrove canopies.

Despite relying on Cortez Road's stated intention to implement these changes, the *Recommended Order* does not require any of them, allowing Cortez Road to simply disregard

them. The result is that the *Recommended Order* allows Cortez Road to construct the Proposed New Dock as permitted, despite concluding that these design changes and other actions would alleviate the issue that is the subject of these proceedings. As a result, and as explained below, MHC takes exception to the Findings of Fact at paragraphs 24, 25, 26, 27, 28, 29, 34, 35, 36, 49, and II.b., and Conclusions of Law at paragraphs 124, 126, 130, 131, 132, 134, and 137.

A. There is no competent substantial record evidence of a new dock design.

Cortez Road submitted the *Application* to the District for an environmental resource permit to construct the Proposed New Dock, comprised of a new continuous dock consisting of approximately 4,352 square feet of new, additional piling-supported docking structures to provide thirty-two (32) parallel mooring boat slips, and replacement of existing docks for an additional seventeen (17) new parallel slips, totaling forty-nine (49) boat slips. Joint Ex. 1B at 000015, 37.

As shown on the plans attached to the *Application* (the “Application Plans”) and stated in the *Application*, the planks of the Proposed New Dock are four-feet wide, with eight-inch pilings on either side, outside of the planks, for a total dock width of five feet, four inches. *See* Joint Ex. 1KK at 000335. The *Application* further provides that the Proposed New Dock would be constructed waterward of the mangrove roots on the Project-side of the Canal, such that the pilings are further into the Canal and the slips are not flush against the shoreline. Joint Ex. 1B at 000017, 25; August 16, 2022 Tr., Vol. I 148:11-13; RO ¶ 24.

At the Final Hearing, Mr. Gobuty testified that Cortez Road now plans to construct the Proposed New Dock with the pilings positioned underneath the planks so the “dock will have a maximum width of four feet” and the ALJ made a factual finding based on this testimony alone. RO ¶ 25. The record contains no evidence of any dock plans with such a design and the

Recommended Order does not require this modification. Critically, Mr. Gobuty also testified that the layout of the Proposed New Dock was altered such that the Proposed New Dock would consist of separate slips as opposed to being a continuous structure. June 14, 2022 Tr. Vol. I 150:17-151:2. The ALJ did not, however, make a finding that the Proposed New Dock layout was altered from its initial continuous/single-slip design. RO ¶¶ 5, 22. Mr. Gobuty's testimony cannot be sufficient for one dock alteration but not another. Because the finding of fact in paragraph 25 is unsupported by credible competent substantial evidence, the District must strike it. Alternatively, the Final Order should require Cortez Road to construct the Proposed New Dock with the pilings located underneath the planks.

Further, the ALJ made a finding of fact that Cortez Road is authorized to and will place the pilings within the mangrove root system. RO ¶¶ 26, 35, 36. That too contradicts the Application and Permit. *See* Joint Ex. 1 at 000017, 24, 31, 193, and 335. There is, therefore, no competent substantial evidence supporting these findings either, and the *Recommended Order* likewise does not allow for the pilings to be within the mangrove root system. Nor can it, as placing the pilings within the mangrove root system would violate the Army Corps. of Engineers permit for the Proposed New Dock, which *requires* the dock pilings be waterward of the mangrove roots. September 2, 2022 Tr., Vol. VIII 974:3-4, 23-975:5. Cortez Road's expert witness, Ms. Eardley, who was also the Project lead for Cortez Road on the *Application*, testified that the dock plans submitted with the *Application* are accurate in that no pilings are to be placed within the mangrove root system. June 15, 2022 Tr., Vol. IV 493:25-494:2. Accordingly, the District must strike paragraphs 26, 35, and 36.

In turn, the District must reject the Conclusions of Law at paragraphs 124, 126, 130, 131, 132, 134, 135, and 137 that Cortez Road provided sufficient reasonable assurances that the

Proposed New Dock will not significantly impede navigability along the Canal and will not be contrary to the public interest and that MHC did not meet its burden. The only conclusion from the record evidence is that the Proposed New Dock must be constructed waterward of the mangrove root system, encroaching into the Canal, further limiting its navigable width and preventing two boats from safely passing in the Canal, and thus significantly impeding navigability. This conclusion is as reasonable, or more reasonable, than the conclusion in the *Recommended Order*.

B. The Proposed New Dock may be built more waterward than shown in the Application.

In approving the Permit as issued, the ALJ found that Cortez Road “intends to construct the [Proposed New Dock] as close as possible to the edge of the Hunters Point property.” RO ¶ 24; *see also* ¶ 34-35. The Permit, however, contains no such limitation, meaning that Cortez Road would be able to construct the Proposed New Dock *more* waterward than what the *Application Plans* show. *Id.* at 75:22-76:2, 76:5-9, 148:15-18.

At the time she reviewed the *Application* on behalf of the District, Ms. Greenawalt believed that the Proposed New Dock could not be moved further waterward than as represented in the *Application Plans*. *Id.* at 148:15-25. In re-reading the *Application* during her testimony at the Final Hearing, Ms. Greenawalt became aware and conceded that the Permit specifically allows Cortez Road to construct the Proposed New Dock such that it can extend into approximately the middle of the Canal. *Id.* at 150:20-151:10. Ms. Greenawalt thus testified that she would revise the Permit to provide that the pilings can only be shifted parallel to the shoreline and cannot be placed further waterward than as depicted in the plans. *Id.* at 189:20-190:11.

Additionally, MHC presented uncontroverted evidence that the Proposed New Dock

could not be built where shown in the *Application* because the water is too shallow for boats to moor, and instead would need to be more waterward. August 17, 2022 Tr. Vol. III at 371:2-8, 372:9-13; MHC Exs. 16 and 17 at Figures 7 and 9.

Because the competent substantial evidence establishes that Cortez Road must construct the Proposed New Dock more waterward to enable a 25-foot boat to moor, and the Permit specifically allows Cortez Road to do so, the District must strike paragraphs 24, 34, and 35. The District must also reject the Conclusions of Law at paragraphs 124, 126, 130, 131, 132, 134, 135, and 137 that Cortez Road provided sufficient reasonable assurances that the Proposed New Dock will not significantly impede navigability along the Canal and will not be contrary to the public interest. As submitted by MHC, the Proposed New Dock will significantly impede navigability along the Canal and will be contrary to the public interest. This conclusion is as reasonable, or more reasonable, than the conclusion in the *Recommended Order*.

C. Nothing prevents Cortez Road from allowing boats larger than 25 feet to moor at the Proposed New Dock.

The ALJ made a finding of fact that the boats mooring up to the Proposed New Dock will be a “maximum length of 25-feet.” RO ¶ 28. The Permit contains no such restriction. June 15, 2022 Tr., Vol. IV 522:20-23. Nor does the Proposed New Dock as described in the *Application*. June 15, 2022 Tr., Vol. IV 524:6-11. The *Recommend Order* likewise imposes no such restriction.

At the time of the *Application*, Cortez Road imposed no restriction on the size of boats allowed to be moored at the Proposed New Dock. June 14, 2022 Tr., Vol. II 193:11-23, MHC Ex. 11. More than a year after the Permit was issued, after the *Petition* was filed, and shortly before the start of the Final Hearing, Cortez Road prepared a revised *Draft Declaration of Covenants, Conditions and Restrictions for Hunters Point* to limit the length of vessels utilizing

the Proposed New Dock to 25 feet. Cortez Road Ex. 20, ¶ 1.09 at Cortez000207; June 15, 2022 Tr., Vol. IV 511:6-18. Yet Mr. Gobuty acknowledged that the Declaration can always be amended to allow larger boats. Sept. 2, 2022 Tr., Vol. VIII 930:9-14.

Because Cortez Road is not restricted in the length of boats moored at the Proposed New Dock, paragraph 28 should be stricken. The District must reject the Conclusions of Law at paragraphs 124, 126, 130, 131, 132, 134, 135, and 137 that Cortez Road provided sufficient reasonable assurances that the Proposed New Dock will not significantly impede navigability along the Canal and will not be contrary to the public interest. As submitted by MHC, larger boats have wider beams and allowing larger boats to moor at the Proposed New Dock will further reduce the navigable width of the Canal, thereby significantly impeding navigability of the Canal and will be contrary to the public interest. This conclusion is as reasonable, or more reasonable, than the conclusion in the *Recommended Order*. Even if the Final Order imposes a restriction on the length of boats able to moor at the Proposed New Dock, such modification does not mitigate the significant impediment to navigation caused by the Proposed New Dock.

D. The Recommended Order does not require Cortez Road to maintain any of its “navigational aids.”

In concluding that Cortez Road provided reasonable assurances that the Proposed New Dock will not significantly impact navigation, the ALJ relied on certain purported “navigational aids” Cortez Road installed or intended to install in the Canal. RO ¶ 131. These include:

- “No wake” and manatee signs.
- Position mirrors at the 90-degree corner of the Canal.
- Posting “No Trespassing” signs.
- Signs encouraging boaters to monitor channel 9 from their boats.
- “(Possibly) designating the Canal as a one-way directional channel,” installing stoplights or an AVI toll system to control boat traffic.

RO ¶ 29.

As an initial matter, the Permit and *Recommended Order* do not require that Cortez Road install any “navigational aids.” Thus, Cortez Road could remove or not install any of the purported aids.

Despite this, the competent substantial record evidence shows that the signs and mirrors will have no positive effect on navigation in the Canal. With respect to the speed at which boats travel in the Canal, Capt. Karentz testified that, due to the current limited navigational width of the Canal, boaters already travel at no-wake speed. August 18, 2022 Tr., Vol. V 588:17-24. With respect to the manatee signs added to the Canal, Mr. Fleming testified that a manatee sign merely informs a boater to proceed “at a slow speed.” June 15, 2022 Tr., Vol. III 340:1-4.

As for directing boaters to use radio Channel 9 while in the Canal, Capt. Karentz testified that Channel 9 is typically used by commercial vessels, and small boat operators do not use the radio to discuss crossing, passing, and/or overtaking situations. August 18, 2022 Tr., Vol. V 540:10-541:15. There is also no requirement in Florida that a boat even have a radio. August 18, 2022 Tr., Vol. V 584:6-12. No trespassing signs similarly do not aid the safe navigation of the Canal. The only boaters utilizing the Canal are the property owners along the Canal or the Marina customers; there is no record evidence of any commercial establishment existing along the Canal and the Canal does not open to another waterway at the end opposite of the Bridge. RO ¶¶ 5, 8, 10.

Similarly, the mirrors do not aid navigation. Mr. Fleming conceded that use of navigational mirrors in waterways is not common. June 15, 2022 Tr., Vol. III 341:3-5. Capt. Karentz stated that a boater has to get very close to the mirror and almost stop to see what the mirror reflects, at which time the boats are already too far in the Canal to mitigate any risk created by the Proposed New Dock. August 18, 2022 Tr., Vol. V 514:22-516:3, 516:12-16.

MHC's marina manager Mr. McPadden also testified that "the mirrors are non-functional" because "you can't see anything in those mirrors." June 15, 2022 Tr., Vol. III 276:1-8.

Mr. Peterson testified that a true navigational aid is something that would delineate the navigational portions of the waterway, *i.e.*, that identifies non-navigable/shallow portions of a waterway. August 17, 2022 Tr. Vol. III at 427:20. Cortez Road offered no evidence of any such aid.

The District should therefore strike the finding at paragraph 49 and reject the Conclusions of Law at paragraphs 124, 126, 130, 131, 132, 134, 135, and 137 that these "navigational aids" provide sufficient reasonable assurances that the Proposed New Dock will not significantly impede navigability along the Canal and will not be contrary to the public interest. As submitted by MHC, the "navigational aids" have no positive effect on the navigability of the Canal. This conclusion is as reasonable, or more reasonable, than the conclusion in the *Recommended Order*.

E. The Permit does not allow Cortez Road to trim the mangroves to increase the navigable width of the Canal.

In paragraph 27 of the *Recommended Order*, the ALJ finds that "Cortez Road anticipates pruning the mangroves along Hunters Point" and "anticipates [it] will ultimately cut back approximately 75 percent of the mangrove growth" thereby increasing the visibility of the Canal and allowing the Proposed New Dock to be as close to the shoreline as possible. First, the Permit does not allow Cortez Road to trim the canopies of the mangroves any further landward than the mangrove roots. August 16, 2022 Tr., Vol. I 147:7-12; *see also* Joint Ex. 1C at 000017. Thus, the navigable width of the Canal is unaffected by any trimming of the mangroves, as a boat cannot travel over the mangrove roots. August 18, 2022 Tr., Vol. V 607:18-608:4. Thus, the District should strike paragraph 27. Second, the Permit does not require Cortez Road to trim back the mangrove canopies, nor does the *Recommended Order*.

To the extent the ALJ made a Conclusion of Law that Cortez Road provided reasonable assurances that the Proposed New Dock will not significantly impede navigability along the Canal and will not be contrary to the public interest based on the “anticipated,” but not required, mangrove trimming, the record evidence does not support that conclusion. *See* RO ¶ 131-132. As submitted by MHC, the potential trimming of the mangrove canopies has no positive effect on the navigability of the Canal. This conclusion is as reasonable, or more reasonable, than the conclusion in the *Recommended Order*.

IV. The record evidence establishes that the Proposed New Dock will encroach much more than 9 percent of the navigable width of the Canal.

The ALJ found that the Proposed New Dock “will not extend into the Canal by more than nine percent of the total width of the Canal.” RO ¶ 34. In turn, the ALJ concluded that “the District (through Ms. Greenawalt) rightly determined that it was appropriate to grant Cortez Road a permit to build the dock in the Canal.” RO ¶ 133. MHC takes exception to these paragraphs.

As an initial matter, the ALJ found that the “full width of the Canal is not navigable by boat” due to “shallow areas along the sides of the Canal, as well as natural growth along the Hunters Point property and the Canal’s northern shore along the east west part of the Canal.” RO ¶ 17. The record evidence also establishes that there are eight docks, some of which have boatlifts extending from the dock, on the non-Project side that extend into the canal, further limiting the navigable width. RO ¶ 13. Despite acknowledging the limited navigable width of the Canal, the ALJ ignores the fact that, in determining the under-9% figure, Ms. Eardley measured from the waterward side of the mangrove roots on the Project side to the seawall on the non-Project side, failing to consider the non-Project side Docks, vegetation, or any other existing feature that would restrict navigation. June 15, 2022 Tr., Vol. IV at 449:8-11, 500:8-22, 502:5-8.

Put differently, the 9-percent figure has no bearing on the *navigable* width of the Canal.

The *Recommended Order* inexplicably ignores the testimony of MHC's experts Gary Bazemore and Mr. Peterson that the Proposed New Dock must be constructed waterward of the mangrove root system to allow for sufficient water depths. Mr. Bazemore, with the assistance of Mr. Peterson, prepared the aforementioned bathymetric survey. August 17, 2022 Tr. Vol. III at 379:2-16, 385:4-20, 386:8-12; MHC Ex. 16. The cross-sections shown therein on Sheet 6 of the bathymetric survey depict the navigable width (*i.e.*, water deeper than 3 feet) of those sections in the Canal. *Id.* at 387:15-388:5.

Based on the limited navigable width of the Canal, Mr. Peterson concluded that the Proposed New Dock "goes against all guidelines for dock design and layout for several reasons, most notably for safe navigation." August 17, 2022 Tr. Vol. III at 350:8-15, 378:9-12. In reaching his conclusion, Mr. Peterson relied on the American Society of Civil Engineers ("ASCE") Manual 50, titled *Planning and Design Guidelines for Small Craft Harbors*. August 17, 2022 Tr. Vol. III at 354:6-14. Manual 50 is the lead design guideline for the design and permitting in small recreational harbors, such as the Canal. *Id.* at 354:6-14, 356:14-18. Manual 50 provides that the width of a fairway or channel be at least four times the beam of the average vessel utilizing that fairway. August 17, 2022 Tr. Vol. III at 355:8-13; *see also* MHC Ex. 17 at Figure 6, MHC-000711.

Mr. Peterson determined that the average length of boat at Cortez Marina is 25 feet and the average beam for a 25 foot boat is 9.1 feet. August 17, 2022 Tr. Vol. III at 357:21-358:1, MHC Ex. 17 at Figure 6. Based on this data, Mr. Peterson prepared the four plans showing the Canal in its current condition (Plan 1); with the Proposed New Dock, a fixed lift, and a 9.1-foot beam boat on the Canal (Plan 2); with the Proposed New Dock and a 25-foot long boat moored

there and a 9.1-foot beam boat on the Canal (Plan 3); and with the Proposed New Dock and a 25-foot long boat moored there and two 9.1-foot beam boats attempting to pass each other on the Canal (Plan 4). *See* MHC Ex. 17 at Plans 1-4; August 17, 2022 Tr. Vol. III at 359:23-631:2, 363:7-13, 366:19-22. In its current condition, at the “Representative Section” that Mr. Peterson examined, there is 36.7 feet between the existing non-Project side dock shown in Cortez Road’s plans and the edge of the mangrove roots on the Project side. *See* MHC Ex. 17 at Plan 1. Mr. Peterson concluded that if the Proposed New Dock is built and there is a 25-foot boat moored there, there will not be enough room for two boats to safely pass, as there would be only 21.2 feet of navigable fairway. August 17, 2022 Tr. Vol. III at 363:22-364:6 and 366:2-15; MHC Ex. 17 at Plans 1-4.

In emphasizing the importance of adequate water depths, Mr. Peterson provided illustrations of the conditions in his Sections 1-4 at a frontal view showing what the operator of a vessel in the Canal sees. August 17, 2022 Tr. Vol. III at 367:11-14; MHC Ex. 17 at Sections 1-4. Figure 7 of Mr. Peterson’s depth illustrations depicts the Proposed New Dock as shown in the *Application*. August 17, 2022 Tr. Vol. III at 370:20-371:1; MHC Ex. 17 at Figure 7. Mr. Peterson concluded that the Proposed New Dock could not be built where shown in the *Application* because the water is too shallow; it would have to be built further waterward. August 17, 2022 Tr. Vol. III at 371:2-8, 372:9-13; MHC Ex. 17 at Figure 7. In Figure 9, Mr. Peterson depicts where the Proposed New Dock would need to be constructed due to depth restrictions, and it is well beyond 9-percent of the *navigable* width of the Canal. In Figure 10, Mr. Peterson shows where the Proposed New Dock would need to be constructed due to depth restrictions and marks the two-way required fairway distance pursuant to Manual 50, which extends past some of the non-Project side docks and, in some areas, outside of the Canal altogether. August 17, 2022

Tr. Vol. III at 376:13-22; MHC Ex. 17 at Figure 10.

Based on the foregoing, the District should strike paragraph 34 and paragraph 133 of the *Recommended Order*. As submitted by MHC, the Proposed New Dock will extend into the Canal by more than nine percent of the navigable width of the Canal and therefore will significantly impede navigation. This conclusion is as reasonable, or more reasonable, than the conclusion in the *Recommended Order*.

V. The record evidence establishes that the Proposed New Dock will create a significant impediment to navigation.

MHC takes exception to the Conclusions of Law at paragraphs 124 through 137 because Cortez Road did not introduce competent or substantial evidence that it provided reasonable assurances that the Proposed New Dock would not be contrary to the public interest because it will adversely affect the public health, safety, or welfare or the property of others through creation of unsafe conditions in the Canal and will significantly impede navigation of the Canal.

It is undisputed that the Proposed New Dock will encroach into the Canal. RO ¶ 126; August 16, 2022 Tr., Vol. I 85:11-14 and 160:18-21. Chapter 373's permitting process, and Rule 62-330, requires evaluation of whether a permit applicant's proposed activities are not contrary to the public interest. Fla. Stat. § 373.414(1). Section 10.2.3 of the *Environmental Resource Permit Applicant's Handbook Volume I* (the "Handbook") provides further guidance on how to apply the public interest test under Rule 62-330.302. August 16, 2022 Tr., Vol. I 37:9-38:4. With respect to whether the activity will adversely affect navigation, the *Handbook* requires the reviewing agency to evaluate whether the activity will "significantly impede navigability" and, in doing so, the agency is required to consider "the current navigational uses of the surface waters." A.H. § 10.2.3.3(a).

It is undisputed that neither Cortez Road nor the District evaluated or considered the

current navigational uses of the Canal. June 15, 2022 Tr., Vol. IV 510:1-2, 506:11-13, 524:17-21, 525:18-23, 526:9-10, 503:3-4; and August 16, 2022 Tr., Vol. I at 155:20-25, 157:16-19, 177:4-178:9. While preparing the *Application*, Ms. Eardley did not attempt to determine the size of boats stored at Cortez Marina. June 15, 2022 Tr., Vol. IV 506:11-13. Nor did Ms. Eardley determine the average or typical number of boats on the Canal on various days of the week, times of day, or times of year. *Id.* at 524:17-21. In connection with the *Application*, Cortez Road made no assessment of whether two boats could pass each other if the Proposed New Dock were constructed. Ms. Eardley testified:

Q: Keeping with the stream of the navigation study that you didn't do, in connection with that, on behalf of the applicant, you did no assessment of whether two boats of any particular size would be able to pass each other simultaneously with the docks built and boats moored to those docks; correct?

A: That would all be part of the navigational study, and that was not performed.

Id. at 525:18-23, 526:9-10.

Ms. Eardley, acting on behalf of Cortez Road, did not evaluate the navigability of the Canal at all. *Id.* at 503:3-4. In evaluating the Permit, the District's Ms. Greenawalt relied solely on what Cortez Road represented in its *Application* and did not otherwise evaluate the navigation of the Canal. August 16, 2022 Tr., Vol. I at 138:12-15, 155:20-25, 177:4-178:9. Ms. Greenawalt did not determine the size of boats stored at Cortez Marina or determine the depths of the Canal on the non-Project side of the Canal. *Id.* at 157:16-19. After Ms. Greenawalt's review, Mr. Ondercin performed a secondary review, but did not: (i) review the *Application* in detail; (ii) request any additional information from Cortez Road; (iii) determine the length of boats stored at Cortez Marina; or (iv) visit the Project site. *Id.* at 74:15-75:3, 75:7-9, 81:13-16, 83:4-9.

The failure to evaluate the navigability of the Canal at all renders the Permit improper.

See Riverwalk Association., Inc. et al, v. The Yachting Arcade, Inc., and Dep't of Env't'l Reg., 1985 WL 26158, DOAH Case. No. 85-0721 (DOAH Aug. 7, 1985; DER Sep. 16, 1985). *Riverwalk* concerned an application to construct a 530-foot long dock in a narrow canal. *Id.* The petitioner challenged *Riverwalk's* permit, in part, on the grounds that it would create an impediment to navigation. *Id.* Like the District here, the Department of Environmental Regulation made no attempt to determine the *navigable* width of the channel upon which the dock was located. *Id.* at n. 2. Based on those facts, the administrative law judge found that the applicant failed to provide reasonable assurances that no adverse effect on navigation would occur. *Id.* at *5.

Here, because the Proposed New Dock encroaches into the Canal, and the *Handbook* provides that an encroachment is a “significant impediment to navigability,” the Proposed New Dock is established as a significant impediment to navigability and therefore does “adversely affect navigation.” Fla. Stat. § 373.414(1)(a) 3, 62-330.302(1)(a)3., A.H. § 10.2.3.3(a). Cortez Road provided no assurances, let alone reasonable assurances, that the Proposed New Dock would not “adversely affect navigation” prior to the District’s issuing the Permit or at the final hearing. As such, the District must reject paragraphs 124 through 137.

MHC presented competent substantial evidence that the Proposed New Dock will significantly impede navigation of the Canal. The record includes MHC’s expert’s unrebutted bathymetric survey that establishes that there is not adequate depth on the non-Project side of the Canal to allow boats to pull off to the side to avoid an oncoming vessel. *See* MHC Ex. 16. As discussed above, MHC also presented Mr. Peterson’s testimony that if the Proposed New Dock is built, if two boats attempt to pass in the Canal, these boats will collide. *See* MHC Ex. 17 at Plans 3 and 4. Mr. Peterson’s diagrams illustrate the limited navigational width of the Canal at its

current condition. *See* MHC Ex. 17. These diagrams also show that Cortez Road must construct the Proposed New Dock more waterward than represented in the *Application*, which the Permit specifically allows, and which would even further reduce the navigational width of the Canal. *Id.*

Further, Ms. Greenawalt of the District agreed that if two boats cannot pass each other with the Proposed New Dock built where two boats can currently pass, then “that significantly impedes navigation.” August 16, 2022 Tr. Vol. I 176:4-9. Thus, the Proposed New Dock will significantly affect the continued navigability of the Canal, as two boats will no longer be able to pass each other and there will be an increased risk of collisions, allisions, groundings, and personal injury. *See Pirtle v. Voss*, Case No 13-0515 (Fla. DOAH Sept. 27, 2013; Fla. DEP Dec. 26, 2013) (holding that mooring pilings created a potential for damage to boats and injury to boaters and thus were a navigational hazard adversely impacting navigation). Cortez Road’s post-*Application*, post-Permit issuance, and post-*Petition* attempts at mitigation efforts do not alleviate the significant impediment to navigation created by the Proposed New Dock. This conclusion is as reasonable, or more reasonable, than the conclusions in the *Recommended Order*.

Conclusion

Based upon the foregoing, the District must strike the Ultimate Findings of Fact at paragraphs 96 through 98 and reject the Conclusions of Law at paragraphs 124 through 137. The competent substantial evidence establishes that the Proposed New Dock will impact safe navigability of the Canal because there will not be sufficient room in the Canal for two boats to safely pass each other, resulting in an increase in the risk of boat collisions in the Canal for Cortez Marina’s employees who use the Canal for sea tests, Cortez Marina’s customers, as well as any other boaters within the Canal. Cortez Road has not introduced competent or substantial

evidence that it provided reasonable assurances that the Proposed New Dock will not adversely affect the public health, safety, or welfare or the property of others, pursuant to Rule 62-330.302(1)(a)1., F.A.C. Specifically, the existing “pullout” areas are not of adequate depth or length to serve as pullout areas. As discussed above, Mr. McPadden, Mr. Peterson, and Capt. Karentz all agreed that the Proposed New Dock would significantly hinder safe navigation and increase the risk of major and minor boat incidents in the Canal. The competent substantial record evidence demonstrates that the Proposed New Dock will adversely affect the public health, safety, or welfare or the property of others and will adversely affect navigation.

SHUTTS & BOWEN LLP

Counsel for Petitioner

525 Okeechobee Boulevard, Suite 1100

West Palm Beach, FL 33401

Telephone: (561) 835-8500

Facsimile: (561) 650-8530

By: /s/ Matthew R. Chait

Matthew R. Chait

Florida Bar No.: 17657

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Daniel Nordby

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dnordby@shutts.com

Devon A. Woolard

Florida Bar No.: 112780

dwoolard@shutts.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by electronic mail to the following on March 22, 2023:

<p>Megan Albrecht, Esq. Elizabeth Fernandez, Esq. Southwest Florida Water Management District 7601 U.S. Highway 301 North Tampa, FL 33637 megan.albrecht@the District.state.fl.us Elizabeth.fernandez@the District.state.fl.us Teri.stearns@the District.state.fl.us) <i>Counsel for Respondent Southwest Florida Water Management District</i></p>	<p>William Galvano, Esq. Kyle Grimes, Esq. Grimes, Hawkins, Gladfelter & Galvano, P.L. 1023 Manatee Ave. West Bradenton, FL 34205 bgalvano@grimesgalvano.com kgrimes@grimesgalvano.com kmorrissey@grimesgalvano.com <i>Counsel for Respondent Cortez Road Investments and Finance, Inc.</i></p>
<p>John J. Fumero, Esq. Susan Roeder Martin, Esq. Stephen Conteaguero, Esq. Nason Yeager Gerson Harris & Fumero 750 Park of Commerce Blvd., Suite 210 Boca Raton, FL 33487 jfumero@nasonyeager.com smartin@nasonyeager.com sconteaguero@nasonyeager.com <i>Counsel for Respondent Cortez Road Investments and Finance, Inc.</i></p>	

/s/ Matthew R. Chait

**STATE OF FLORIDA
BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS**

MHC Cortez Village, L.L.C.

Petitioner,

CASE NO.: 21-2491

v.

Cortez Road Investments and Finance, Inc. and
Southwest Florida Water Management District,

Respondents.

RESPONSE TO EXCEPTIONS

Cortez Road Investment and Finance (Cortez Road) files this response to Petitioner MHC Cortez Village, LLC Exceptions filed on March 22, 2023.

STANDARD OF REVIEW FOR EXCEPTIONS

The Florida Legislature set forth the standard of review for exceptions requesting the rejection of findings of fact. Subsection 120.57(1)(l), Fla. Stat. states:

The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

It is the Administrative Law Judge's (ALJ) role is to consider all of the evidence presented, resolve conflicts, determine credibility, weigh evidence, and make ultimate findings of fact. *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). This is not the role of the District when it rules on exceptions.

MHC's exceptions argue that its testimony and evidence support different findings. However, even if the evidence presented supported two inconsistent findings, it is the ALJ's role to decide the issues and judge which evidence and testimony is more credible.



The District cannot reject the ALJ's finding of fact unless there is no competent, substantial evidence from which the finding can reasonably be inferred. *Boyd v. Dep't of Revenue*, 682 So. 2d 1117 (Fla. 4th DCA 1996); *Holmes v. Turlington*, 480 So. 2d 150 (Fla. 1st DCA 1985). Therefore, MHC's contention that other evidence should have controlled the ALJ's findings, does not support the rejection of the ALJ's findings of fact.

MHC argues in its exceptions that its evidence presented at the hearing supports an alternative narrative for factual findings and that the weight of evidence backs different factual findings. MHC basically argues in its exceptions that its witnesses' testimony and evidence should have been relied upon by the ALJ rather than that of Cortez Road and District staff. However, the District does not have authority to reweigh the evidence, judge the credibility of witnesses, or interpret evidence to fit the conclusion desired by MHC. *Heifetz*, 475 So. 2d at 128; *Stinson v. Winn*, 938 So. 2d 554, 555 (Fla. 1st DCA 2006) ("Credibility of the witnesses is a matter that is within the province of the [presiding officer], as is the weight to be given the evidence.").

Also, MHC argues that the District should make additional findings of fact based on its witnesses' testimony and evidence. It is improper for an agency to make supplemental findings of fact on an issue when a presiding officer made no findings. In *Florida Power & Light Co. v. State*, 693 So. 2d 1025, 1026 (Fla. 1st DCA 1997), the First District Court of Appeal stated:

It is not proper for the agency to make supplemental findings of fact on an issue about which the hearing officer made no findings. *See Friends of Children v. Florida Dep't of Health and Rehabilitative Services*, 504 So.2d 1345, 1348 (Fla. 1st DCA 1987) (improper for department to make supplementary findings of fact to support its conclusion; appropriate remedy when entity charged with finding facts fails to perform that duty is to remand for the hearing officer to do so); *see also Boulton v. Morgan*, 643 So.2d 1103, 1105 (Fla. 4th DCA 1994). *Id.* at 1026, 1027.

The District cannot grant MHC's request to add additional findings of fact.

RESPONSE TO EXCEPTION ONE

MHC takes exception to the finding in paragraph 137:

137. Thus, for the reasons set forth herein, Petitioner failed to meet its burden of proving, by a preponderance of competent and substantial evidence, that the proposed dock is contrary to the public interest. Instead, the undersigned concludes that the proposed dock meets the standards established in section 373.414, rule 62-330.302, and A. H. Vol I, section 10.2.3.3, and the District should issue the Permit to Cortez Road.

Under the public interest test, the District must consider and balance impediments to navigation with the 6 other factors of the public interest test. Section 10.2.3.3, A.H.I states that the standard is whether the activities will “significantly impede or enhance navigation.”

MHC asks the District to reweigh the evidence, to give more weight to testimony and exhibits offered by MHC. It argues that the ALJ should have made supplemental and different findings based on its bathymetric survey.

Submittal of a bathymetric survey is not a necessary requirement in ERP rules. MHC argues that the pull out areas should be longer and deeper and that the ALJ fails to make findings regarding the depth and exact length of the pull-outs. ERP rules do not contain dimensional criteria for pull-outs.

The ALJ heard the testimony of all the witnesses and simply did not agree with MHC’s preferred dimensions. As discussed above, the District cannot issue supplemental findings of fact.

MHC argues on page 4 that its bathymetric survey should be given greater weight than Captain Fleming’s testimony. However, the decision on the weight given to evidence and testimony over that of another, is solely within the purview of the ALJ. It cannot be overturned unless there is no competent and substantial evidence to support it.

The ALJ's findings regarding the use of pullouts in Exception 1 is supported by F.H. T. Vol I, p. 182, 183; F.H. T. Vol III, p. 395, p. 396, p. 398-399, p. 400-401, F.H. T. Vol VII, p. 802, p. 811, p. 813, p. 815 - 826 of the transcript. This exception must therefore be rejected.

RESPONSE TO EXCEPTION II

In Exception II, MHC disagrees that the bridge and other "pinch points" are existing limiting factors on the use of the canal.

The testimony on limiting factors and pinch points is supported by competent and substantial testimony on the following pages of the transcript:

(F.H. T. Vol. III, p. 274-280; p. 304; 6-12, p. 311; 17-24, p. 312-315; p. 352; 1-6, p. 386-388; p. 391; 9-15, p. 394-395; p. 398; 18-20, p. 400; 2-4.

(F.H. T. Vol. VII, p. 810; p. 854-857)

Since these findings of fact are supported by competent and substantial evidence, Exception II must be rejected.

RESPONSE TO EXCEPTION III

In Exception III, MHC again argues about what is not in the order. MHC argues that the ALJ should have recommended that Cortez Road be ordered to modify its permit application. Again, as discussed above, this is not a proper exception. Since MHC argues that the order fails to require modifications, there is no finding of fact or conclusion of law to reject.

Further, if the District believes modifications to the permit are necessary, it is free to require those modifications in the final order.

More specifically in exception III, MHC further argues that the size of the vessels at Hunters Point is not limited. However, the transcript provides competent and substantial evidence regarding several different types of limiting factors affecting vessel size on pages: F.H. T. Vol I, p. 156, p. 158, p. 159; Vol III, p.276-277, as well as on those pages previously referenced above

in the Response to Exception II regarding already existing limiting factors to vessel size such as the air-draft of the sole bridge to the Canal, as well as several existing “pinch points”.

There is also competent and substantial evidence to support the fact that homeowners’ vessels at Hunters Point will be limited by the lot size, as well as limited to 25-feet by the proposed Homeowners Association documents. Exhibit Cortez-20. Therefore, the portion of Exception III referring to boat lengths must therefore be rejected.

MHC argues that there is no evidence that Cortez Road will place navigational aids in the canal. However, Exhibits 14 and 15 are photographs of the navigational aids that were already installed in the canal prior to the conclusion of the final hearing. Therefore, there is competent and substantial evidence to support findings on navigation aids. The portion of Exception III referring to navigational aids must therefore be rejected. (F.H. T. Vol, I, p. 164; 3-19)

MHC also argues that there is no evidence on mangrove trimming. The photographs in Exhibits MHC-55, MHC-47, Cortez-2 and Cortez-3 show that the mangroves were already trimmed by 25% pursuant to an exemption. Mr. Gobuty also credibly testified on pages F.H. T. Vol. I, p. 160, p. 162; F.H. T. Vol II, p. 212; F.H. T. Vol VIII, p. 887, p. 901, p. 950, p. 951, p. 953, regarding mangrove trimming. There is competent and substantial evidence to support findings of fact on mangrove trimming. The portion of Exception III referring to mangrove trimming must therefore be rejected.

MHC also argues that the permit does not allow Cortez Road to trim the mangroves. Again, it is improperly arguing about what the order does not discuss. An authorization in the permit for mangrove trimming is not required because trimming is done pursuant to an exemption, as discussed in the above permit citations. F.H. T. Vol VIII, p. 994,

RESPONSE TO EXCEPTION IV

MHC disagrees with the findings of fact that conclude that the new docks will not extend into the canal by more than 9 percent. Again, MHC incorrectly sets forth an exception arguing that the ALJ should not have relied on the testimony of the Respondents. The exception must be rejected because the transcript contains competent and substantial evidence to support these findings of fact on pages: F.H. T. Vol. IV, p. 448; 17-21, p. 449; p. 450; p. 451; p. 454; p. 455; 18-21, p. 467; p. 468; p. 469; and Joint Exhibit 1DD bate-stamped 282.

RESPONSE TO EXCEPTION V

Subsection 120.57(1)(l), Fla. Stat. sets forth the standard for the rejection of conclusions of law.

...The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact....

MHC fails to set forth any alleged error of law. Instead, MHC takes exceptions to conclusions of law because it states they are not based on competent and substantial evidence. Rather than arguing an error in the application of the law by the ALJ, MHC again merely reargues the facts. MHC also argues again that the ALJ should have considered other information.

Exception V must be rejected since it fails to set forth any error of law and only reargues the facts.

WHEREFORE, Cortez Road requests that MHC's exceptions be rejected.

Respectfully submitted on this 30th day of March, 2023

/s/ Susan Roeder Martin

Susan Roeder Martin, Esquire

John J. Fumero, Esquire

Florida Bar No.: 716596

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of March, 2023, a true and correct copy of the foregoing has been served electronically to the following: **Matthew R. Chait, Esquire, Devon A. Woolard, Esq.** and **Daniel Nordby, Esq.**, via email (mchait@shutts.com; chamilton@shutts.com; dwoolard@shutts.com; and dnordby@shutts.com); **Megan Albrecht, Allison K. Dhand** and **Elizabeth Fernandez** (Megan.Albrecht@swfwmd.state.fl.us; elizabeth.fernandez@swfwmd.state.fl.us and Teri.stearns@swfwmd.state.fl.us) and by facsimile upon the District Agency Clerk at the Southwest Florida Water Management District's Tampa Service Office at (813) 367-9788

/s/ Susan R. Martin

Susan R. Martin, Esq



Southwest Florida Water Management District

2379 Broad Street, Brooksville, Florida 34604-6899
(352) 796-7211 or 1-800-423-1476 (FL only)
SUNCOM 628-4150 TDD only 1-800-231-6103 (FL only)
On the Internet at: WaterMatters.org

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(863) 534-1448 or
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Sarasota, Florida 34240-9770
(941) 377-3722 or
1-800-320-3503 (FL only)

Tampa Service Office
7601 Highway 301 North
Tampa, Florida 33637-6759
(813) 985-7481 or
1-800-836-0797 (FL only)

June 29, 2021

Cortez Road Investments and Finance, Inc
Attn: Marshall Gobuty
35 Watergate Drive, Suite 806
Sarasota, FL 34236

Subject: **Notice of Intended Agency Action - Approval
ERP Individual Construction Major Modification**

Project Name: Hunter's Point Dock
App ID/Permit No: 821245 / 43032468.003
County: Manatee
Sec/Twp/Rge: S03/T35S/R16E

Dear Permittee(s):

The Southwest Florida Water Management District (District) has completed its review of the application for Environmental Resource Permit modification. Based upon a review of the information you have submitted, the District hereby gives notice of its intended approval of the application.

The File of Record associated with this application can be viewed at <http://www18.swfwmd.state.fl.us/erp/erp/search/ERPSearch.aspx> and is also available for inspection Monday through Friday, except for District holidays, from 8:00 a.m. through 5:00 p.m. at the District's Tampa Service Office, 7601 U.S. Highway 301 North, Tampa, Florida 33637.

If you have any questions or concerns regarding the application or any other information, please contact the Environmental Resource Permit Bureau in the Tampa Service Office.

Sincerely,

David Kramer, P.E.
Bureau Chief
Environmental Resource Permit Bureau
Regulation Division

cc: Stantec / Attn: Elizabeth Eardley
Richard Sellers, P.E., Stantec Consulting Services, Inc.



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June 29, 2021

Cortez Road Investments and Finance, Inc
Attn: Marshall Gobuty
35 Watergate Drive, Suite 806
Sarasota, FL 34236

Subject: **Notice of Agency Action - Approval
ERP Individual Construction Major Modification**

Project Name: Hunter's Point Dock
App ID/Permit No: 821245 / 43032468.003
County: Manatee
Sec/Twp/Rge: S03/T35S/R16E

Dear Permittee(s):

The Southwest Florida Water Management District (District) is in receipt of your application for the Environmental Resource Permit modification. Based upon a review of the information you submitted, the application is approved.

Please refer to the attached Notice of Rights to determine any legal rights you may have concerning the District's agency action on the permit application described in this letter.

If approved construction plans are part of the permit, construction must be in accordance with these plans. These drawings are available for viewing or downloading through the District's Application and Permit Search Tools located at www.WaterMatters.org/permits.

The District's action in this matter only becomes closed to future legal challenges from members of the public if such persons have been properly notified of the District's action and no person objects to the District's action within the prescribed period of time following the notification. The District does not publish notices of agency action. If you wish to limit the time within which a person who does not receive actual written notice from the District may request an administrative hearing regarding this action, you are strongly encouraged to publish, at your own expense, a notice of agency action in the legal advertisement section of a newspaper of general circulation in the county or counties where the activity will occur. Publishing notice of agency action will close the window for filing a petition for hearing. Legal requirements and instructions for publishing notices of agency action, as well as a noticing form that can be used, are available from the District's website at www.WaterMatters.org/permits/noticing. If you publish notice of agency action, a copy of the affidavit of publication provided by the newspaper should be sent to the District's Tampa Service Office for retention in this permit's File of Record.

If you have any questions or concerns regarding your permit or any other information, please contact the Environmental Resource Permit Bureau in the Tampa Service Office.

Sincerely,

David Kramer, P.E.
Bureau Chief
Environmental Resource Permit Bureau
Regulation Division

Enclosures: Approved Permit w/Conditions Attached
 [As-Built Certification and Request for Conversion to Operation Phase](#)
 Notice of Authorization to Commence Construction
 Notice of Rights

cc: Stantec / Attn: Elizabeth Eardley
 Richard Sellers, P.E., Stantec Consulting Services, Inc.

**SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT
ENVIRONMENTAL RESOURCE
INDIVIDUAL CONSTRUCTION MAJOR MODIFICATION
PERMIT NO. 43032468.003**

EXPIRATION DATE: June 29, 2026

PERMIT ISSUE DATE: June 29, 2021

This permit is issued under the provisions of Chapter 373, Florida Statutes, (F.S.), and the Rules contained in Chapter 62-330, Florida Administrative Code, (F.A.C.). The permit authorizes the Permittee to proceed with the construction of a surface water management system in accordance with the information outlined herein and shown by the application, approved drawings, plans, specifications, and other documents, attached hereto and kept on file at the Southwest Florida Water Management District (District). Unless otherwise stated by permit specific condition, permit issuance constitutes certification of compliance with state water quality standards under Section 401 of the Clean Water Act, 33 U.S.C. 1341. All construction, operation and maintenance of the surface water management system authorized by this permit shall occur in compliance with Florida Statutes and Administrative Code and the conditions of this permit.

PROJECT NAME: Hunter's Point Dock

GRANTED TO: Cortez Road Investments and Finance, Inc
Attn: Marshall Gobuty
35 Watergate Drive, Suite 806
Sarasota, FL 34236

OTHER PERMITTEES: N/A

ABSTRACT: This permit authorization is for the modification of a stormwater management system approved under Environmental Resource Permit (ERP) No. 43032468.002, serving a 1.87-acre residential dock project. The proposed activities include installation of approximately 4,352 square feet of new piling-supported docking structure and the replacement of approximately 3,631 square feet of existing piling-supported docking structure, which will provide 32 parallel mooring boat slips in addition to the 17 existing slips. The slips will serve residents and guests of Hunters Point Resort and Marina. Formal water quality treatment and attenuation are not required for runoff from this area. This Permit Modification No. 43032468.003, amends the previously issued Permit No. 43032468.002 and adds conditions. Specific Condition No. 22 from Permit No. 43032468.002 will be replaced with Specific Condition No. 9 below. The project site is located along the north side of Cortez Road, approximately 0.1 mile east of 127th Street West, in Manatee County.

OP. & MAIN. ENTITY: Hunters Point Homeowners' Association, Inc.

OTHER OP. & MAIN. ENTITY: N/A

COUNTY: Manatee

SEC/TWP/RGE: S03/T35S/R16E

**TOTAL ACRES OWNED
OR UNDER CONTROL:**

17.73

PROJECT SIZE: 1.87 Acres

LAND USE: Residential

DATE APPLICATION FILED: March 15, 2021

AMENDED DATE: N/A

I. Water Quantity/Quality

Water Quality/Quantity Comments: Water quality treatment and quantity attenuation are not required for the proposed dock construction activities. The plans and calculations reflect the North American Vertical Datum of 1988 (NAVD 88).

A mixing zone is not required.

A variance is not required.

II. 100-Year Floodplain

Encroachment (Acre-Feet of fill)	Compensation (Acre-Feet of excavation)	Compensation Type	Encroachment Result* (feet)
0.00	0.00	No Encroachment	N/A

Floodplain Comments: The project proposes no fill placement within a known 100-year riverine floodplain or depression storage areas associated with 100-year riverine floodplain.

*Depth of change in flood stage (level) over existing receiving water stage resulting from floodplain encroachment caused by a project that claims Minimal Impact type of compensation.

III. Environmental Considerations

Wetland/Other Surface Water Information

Wetland/Other Surface Water Name	Total Acres	Not Impacted Acres	Permanent Impacts		Temporary Impacts	
			Acres	Functional Loss*	Acres	Functional Loss*
Mangrove Fringe	0.01	0.00	0.01	0.00	0.00	0.00
Canal	0.17	0.00	0.17	0.00	0.00	0.00
Total:	0.18	0.00	0.18	0.00	0.00	0.00

* For impacts that do not require mitigation, their functional loss is not included.

Wetland/Other Surface Water Comments:

There are 0.01 acre of wetlands (FLUCCS 612) and 0.17 acre of surface waters (FLUCCS 510) located within the project area. Permanent filling and shading impacts to 0.01 acre of wetlands and 0.17 acre of surface waters will occur for construction of the docking structure.

Mitigation Information

Mitigation Comments:

Mitigation will not be required for permanent filling and shading impacts 0.01 acre of wetlands and 0.17 acre of surface waters pursuant to Subsection 10.2.2 of the ERP Applicant’s Handbook Vol. I. Under this Section, wetland mitigation is not required for impacts that have been determined to be de minimis to fish, wildlife and listed species.

Specific Conditions

1. If the ownership of the project area covered by the subject permit is divided, with someone other than the Permittee becoming the owner of part of the project area, this permit may be terminated, unless the terms of the permit are modified by the District or the permit is transferred pursuant to Rule 40D-1.6105, F.A.C. In such situations, each land owner shall obtain a permit (which may be a modification of this permit) for the land owned by that person. This condition shall not apply to the division and sale of lots or units in residential subdivisions or condominiums.
2. The Permittee shall retain the design professional registered or licensed in Florida, to conduct on-site observations of construction and assist with the as-built certification requirements of this project. The Permittee shall inform the District in writing of the name, address and phone number of the design professional so employed. This information shall be submitted prior to construction.
3. The Permittee shall comply with the following conditions intended to protect manatees from direct project effects:
 - a. All personnel associated with the project shall be instructed about the presence of manatees and manatee speed zones, and the need to avoid collisions with and injury to manatees. The Permittee shall advise all construction personnel that there are civil and criminal penalties for harming, harassing, or killing manatees which are protected under the Marine Mammal Protection Act, the Endangered Species Act, and the Florida Manatee Sanctuary Act.
 - b. All vessels associated with the construction project shall operate at "Idle Speed/No Wake" at all times while in the immediate area and while in water where the draft of the vessel provides less than a 4-foot clearance from the bottom. All vessels will follow routes of deep water whenever possible.
 - c. Siltation or turbidity barriers shall be made of material in which manatees cannot become entangled, shall be properly secured, and shall be regularly monitored to avoid manatee entanglement or entrapment. Barriers must not impede manatee movement.
 - d. All on-site project personnel are responsible for observing water-related activities for the presence of manatee(s). All in-water operations, including vessels, must be shutdown if a manatee(s) comes within 50 feet of the operation. Activities will not resume until the manatee(s) has moved beyond the 50-foot radius of the project operation, or until 30 minutes elapses if the manatee(s) has not reappeared within 50 feet of the operation. Animals must not be herded away or harassed into leaving.
 - e. Any collision with or injury to a manatee shall be reported immediately to the Florida Fish and Wildlife Conservation Commission (FWC) Hotline at 1-888-404-3922. Collision and/or injury should also be reported to the U.S. Fish and Wildlife Service in Jacksonville (1-904-731-3336) for north Florida or Vero Beach (1-772-562-3909) for south Florida and to FWC at ImperiledSpecies@myFWC.com.
 - f. Temporary signs concerning manatees shall be posted prior to and during all in-water project activities. All signs shall be removed by the Permittee upon completion of the project. Temporary signs that have already been approved for this use by the FWC must be used. One sign which reads *Caution: Boaters* must be posted. A second sign measuring at least 8 1/2 by 11 " explaining the requirements for "Idle Speed/No Wake" and the shut down of in-water operations must be posted in a location prominently visible to all personnel engaged in water-related activities. These signs can be viewed at MyFWC.com/manatee. Questions concerning these signs can be sent to the email address listed above.
4. This Permit Modification No. 43032468.003, amends the previously issued Permit No. 43032468.002, and replaces Specific Condition No. 22 with Specific Condition No. 9 herein, and adds conditions. All other original permit conditions remain in effect.
5. The Permitted Plan Set for this project includes the set received by the District on May 24, 2021.
6. The following shall be properly abandoned and/or removed in accordance with the applicable regulations:

- a. Any existing wells in the path of construction shall be properly plugged and abandoned by a licensed well contractor.
 - b. Any existing septic tanks on site shall be abandoned at the beginning of construction.
 - c. Any existing fuel storage tanks and fuel pumps shall be removed at the beginning of construction.
7. Each phase or independent portion of the permitted system must be completed in accordance with the permitted plans and permit conditions prior to the occupation of the site or operation of site infrastructure located within the area served by that portion or phase of the system. Each phase or independent portion of the system must be completed in accordance with the permitted plans and permit conditions prior to transfer of responsibility for operation and maintenance of that phase or portion of the system to a local government or other responsible entity.
 8. This permit is valid only for the specific processes, operations and designs indicated on the approved drawings or exhibits submitted in support of the permit application. Any substantial deviation from the approved drawings, exhibits, specifications or permit conditions, including construction within the total land area but outside the approved project area(s), may constitute grounds for revocation or enforcement action by the District, unless a modification has been applied for and approved. Examples of substantial deviations include excavation of ponds, ditches or sump areas deeper than shown on the approved plans.
 9. The docking facility is limited to the mooring of 49 vessels with the slips defined on the approved permit drawings.
 10. The handrails and "no mooring" signs shown on the approved permit drawings shall be maintained for the life of the facility.
 11. The Permittee shall install permanent manatee educational signs, which shall be maintained for the life of the facility, no later than 60 days after construction commencement. The number and types of signs, as well as the on-site locations shall be approved by FWC staff prior to installation. A proposal for FWC sign approval shall be submitted to ImperiledSpecies@MyFWC.com in accordance with information provided at <http://www.myfwc.com/wildlifehabitats/managed/manatee/education-for-marinas/>. Signs shall be replaced in accordance with FWC guidance by the Permittee if outdated, damaged or faded.

GENERAL CONDITIONS

1. The general conditions attached hereto as Exhibit "A" are hereby incorporated into this permit by reference and the Permittee shall comply with them.

David Kramer, P.E.

Authorized Signature

EXHIBIT A

GENERAL CONDITIONS:

- 1 The following general conditions are binding on all individual permits issued under this chapter, except where the conditions are not applicable to the authorized activity, or where the conditions must be modified to accommodate, project-specific conditions.
 - a. All activities shall be implemented following the plans, specifications and performance criteria approved by this permit. Any deviations must be authorized in a permit modification in accordance with Rule 62-330.315, F.A.C., or the permit may be revoked and the permittee may be subject to enforcement action.
 - b. A complete copy of this permit shall be kept at the work site of the permitted activity during the construction phase, and shall be available for review at the work site upon request by the Agency staff. The permittee shall require the contractor to review the complete permit prior to beginning construction.
 - c. Activities shall be conducted in a manner that does not cause or contribute to violations of state water quality standards. Performance-based erosion and sediment control best management practices shall be installed immediately prior to, and be maintained during and after construction as needed, to prevent adverse impacts to the water resources and adjacent lands. Such practices shall be in accordance with the *State of Florida Erosion and Sediment Control Designer and Reviewer Manual (Florida Department of Environmental Protection and Florida Department of Transportation June 2007)*, and the *Florida Stormwater Erosion and Sedimentation Control Inspector's Manual (Florida Department of Environmental Protection, Nonpoint Source Management Section, Tallahassee, Florida, July 2008)*, which are both incorporated by reference in subparagraph 62-330.050(8)(b)5, F.A.C., unless a project-specific erosion and sediment control plan is approved or other water quality control measures are required as part of the permit.
 - d. At least 48 hours prior to beginning the authorized activities, the permittee shall submit to the Agency a fully executed Form 62-330.350(1), "Construction Commencement Notice,"[effective date], incorporated by reference herein (<http://www.flrules.org/Gateway/reference.asp?No=Ref-02505>), indicating the expected start and completion dates. A copy of this form may be obtained from the Agency, as described in subsection 62-330.010(5),F.A.C. However, for activities involving more than one acre of construction that also require a NPDES stormwater construction general permit, submittal of the Notice of Intent to Use Generic Permit for Stormwater Discharge from Large and Small Construction Activities, DEP Form 62-621.300(4)(b), shall also serve as notice of commencement of construction under this chapter and, in such a case, submittal of Form 62-330.350(1) is not required.
 - e. Unless the permit is transferred under Rule 62-330.340, F.A.C., or transferred to an operating entity under Rule 62-330.310, F.A.C., the permittee is liable to comply with the plans, terms and conditions of the permit for the life of the project or activity.
 - f. Within 30 days after completing construction of the entire project, or any independent portion of the project, the permittee shall provide the following to the Agency, as applicable:
 1. For an individual, private single-family residential dwelling unit, duplex, triplex, or quadruplex - "Construction Completion and Inspection Certification for Activities Associated with a Private Single-Family Dwelling Unit" [Form 62-330.310(3)]; or
 2. For all other activities - "As-Built Certification and Request for Conversion to Operation Phase" [Form 62-330.310(1)].
 3. If available, an Agency website that fulfills this certification requirement may be used in lieu of the form.
 - g. If the final operation and maintenance entity is a third party:

1. Prior to sales of any lot or unit served by the activity and within one year of permit issuance, or within 30 days of as- built certification, whichever comes first, the permittee shall submit, as applicable, a copy of the operation and maintenance documents (see sections 12.3 thru 12.3.4 of Volume I) as filed with the Department of State, Division of Corporations and a copy of any easement, plat, or deed restriction needed to operate or maintain the project, as recorded with the Clerk of the Court in the County in which the activity is located.
 2. Within 30 days of submittal of the as- built certification, the permittee shall submit "Request for Transfer of Environmental Resource Permit to the Perpetual Operation and Maintenance Entity" [Form 62-330.310 (2)] to transfer the permit to the operation and maintenance entity, along with the documentation requested in the form. If available, an Agency website that fulfills this transfer requirement may be used in lieu of the form.
- h. The permittee shall notify the Agency in writing of changes required by any other regulatory agency that require changes to the permitted activity, and any required modification of this permit must be obtained prior to implementing the changes.
- i. This permit does not:
1. Convey to the permittee any property rights or privileges, or any other rights or privileges other than those specified herein or in Chapter 62-330, F.A.C.;
 2. Convey to the permittee or create in the permittee any interest in real property;
 3. Relieve the permittee from the need to obtain and comply with any other required federal, state, and local authorization, law, rule, or ordinance; or
 4. Authorize any entrance upon or work on property that is not owned, held in easement, or controlled by the permittee.
- j. Prior to conducting any activities on state-owned submerged lands or other lands of the state, title to which is vested in the Board of Trustees of the Internal Improvement Trust Fund, the permittee must receive all necessary approvals and authorizations under Chapters 253 and 258, F.S. Written authorization that requires formal execution by the Board of Trustees of the Internal Improvement Trust Fund shall not be considered received until it has been fully executed.
- k. The permittee shall hold and save the Agency harmless from any and all damages, claims, or liabilities that may arise by reason of the construction, alteration, operation, maintenance, removal, abandonment or use of any project authorized by the permit.
- l. The permittee shall notify the Agency in writing:
1. Immediately if any previously submitted information is discovered to be inaccurate; and
 2. Within 30 days of any conveyance or division of ownership or control of the property or the system, other than conveyance via a long-term lease, and the new owner shall request transfer of the permit in accordance with Rule 62-330.340, F.A.C. This does not apply to the sale of lots or units in residential or commercial subdivisions or condominiums where the stormwater management system has been completed and converted to the operation phase.
- m. Upon reasonable notice to the permittee, Agency staff with proper identification shall have permission to enter, inspect, sample and test the project or activities to ensure conformity with the plans and specifications authorized in the permit.
- n. If any prehistoric or historic artifacts, such as pottery or ceramics, stone tools or metal implements, dugout canoes, or any other physical remains that could be associated with Native American cultures, or early colonial or American settlement are encountered at any time within the project site area, work involving

subsurface disturbance in the immediate vicinity of such discoveries shall cease. The permittee or other designee shall contact the Florida Department of State, Division of Historical Resources, Compliance and Review Section, at (850) 245-6333 or (800) 847-7278, as well as the appropriate permitting agency office. Such subsurface work shall not resume without verbal or written authorization from the Division of Historical Resources. If unmarked human remains are encountered, all work shall stop immediately and notification shall be provided in accordance with Section 872.05, F.S. (2012).

- o. Any delineation of the extent of a wetland or other surface water submitted as part of the permit application, including plans or other supporting documentation, shall not be considered binding unless a specific condition of this permit or a formal determination under Rule 62-330.201, F.A.C., provides otherwise.
 - p. The permittee shall provide routine maintenance of all components of the stormwater management system to remove trapped sediments and debris. Removed materials shall be disposed of in a landfill or other uplands in a manner that does not require a permit under Chapter 62-330, F.A.C., or cause violations of state water quality standards.
 - q. This permit is issued based on the applicant's submitted information that reasonably demonstrates that adverse water resource-related impacts will not be caused by the completed permit activity. If any adverse impacts result, the Agency will require the permittee to eliminate the cause, obtain any necessary permit modification, and take any necessary corrective actions to resolve the adverse impacts.
 - r. A Recorded Notice of Environmental Resource Permit may be recorded in the county public records in accordance with Rule 62-330.090(7), F.A.C. Such notice is not an encumbrance upon the property.
2. In addition to those general conditions in subsection (1) above, the Agency shall impose any additional project-specific special conditions necessary to assure the permitted activities will not be harmful to the water resources, as set forth in Rules 62-330.301 and 62-330.302, F.A.C., Volumes I and II, as applicable, and the rules incorporated by reference in this chapter.

SOUTHWEST FLORIDA
WATER MANAGEMENT DISTRICT

**NOTICE OF
AUTHORIZATION
TO COMMENCE CONSTRUCTION**

Hunter's Point Dock

PROJECT NAME

Residential

PROJECT TYPE

Manatee

COUNTY

S03/T35S/R16E

SEC(S)/TWP(S)/RGE(S)

Cortez Road Investments and Finance, Inc

PERMITTEE

See permit for additional permittees

APPLICATION ID/PERMIT NO: 821245 / 43032468.003

DATE ISSUED: June 29, 2021



David Kramer, P.E.

Issuing Authority

**THIS NOTICE SHOULD BE CONSPICUOUSLY
DISPLAYED AT THE SITE OF THE WORK**

Notice of Rights

ADMINISTRATIVE HEARING

1. You or any person whose substantial interests are or may be affected by the District's intended or proposed action may request an administrative hearing on that action by filing a written petition in accordance with Sections 120.569 and 120.57, Florida Statutes (F.S.), Uniform Rules of Procedure Chapter 28-106, Florida Administrative Code (F.A.C.) and District Rule 40D-1.1010, F.A.C. Unless otherwise provided by law, a petition for administrative hearing must be filed with (received by) the District within 21 days of receipt of written notice of agency action. "Written notice" means either actual written notice, or newspaper publication of notice, that the District has taken or intends to take agency action. "Receipt of written notice" is deemed to be the fifth day after the date on which actual notice is deposited in the United States mail, if notice is mailed to you, or the date that actual notice is issued, if sent to you by electronic mail or delivered to you, or the date that notice is published in a newspaper, for those persons to whom the District does not provide actual notice.
2. Pursuant to Subsection 373.427(2)(c), F.S., for notices of intended or proposed agency action on a consolidated application for an environmental resource permit and use of state-owned submerged lands concurrently reviewed by the District, a petition for administrative hearing must be filed with (received by) the District within 14 days of receipt of written notice.
3. Pursuant to Rule 62-532.430, F.A.C., for notices of intent to deny a well construction permit, a petition for administrative hearing must be filed with (received by) the District within 30 days of receipt of written notice of intent to deny.
4. Any person who receives written notice of an agency decision and who fails to file a written request for a hearing within 21 days of receipt or other period as required by law waives the right to request a hearing on such matters.
5. Mediation pursuant to Section 120.573, F.S., to settle an administrative dispute regarding District intended or proposed action is not available prior to the filing of a petition for hearing.
6. A request or petition for administrative hearing must comply with the requirements set forth in Chapter 28-106, F.A.C. A request or petition for a hearing must: (1) explain how the substantial interests of each person requesting the hearing will be affected by the District's intended action or proposed action, (2) state all material facts disputed by the person requesting the hearing or state that there are no material facts in dispute, and (3) otherwise comply with Rules 28-106.201 and 28-106.301, F.A.C. Chapter 28-106, F.A.C. can be viewed at www.flrules.org or at the District's website at www.WaterMatters.org/permits/rules.
7. A petition for administrative hearing is deemed filed upon receipt of the complete petition by the District Agency Clerk at the District's Tampa Service Office during normal business hours, which are 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding District holidays. Filings with the District Agency Clerk may be made by mail, hand-delivery or facsimile transfer (fax). The District does not accept petitions for administrative hearing by electronic mail. Mailed filings must be addressed to, and hand-delivered filings must be delivered to, the Agency Clerk, Southwest Florida Water Management District, 7601 Highway 301 North, Tampa, FL 33637-6759. Faxed filings must be transmitted to the District Agency Clerk at (813) 367-9776. Any petition not received during normal business hours shall be filed as of 8:00 a.m. on the next business day. The District's acceptance of faxed petitions for filing is subject to certain conditions set forth in the District's Statement of Agency Organization and Operation, available for viewing at www.WaterMatters.org/about.

JUDICIAL REVIEW

1. Pursuant to Sections 120.60(3) and 120.68, F.S., a party who is adversely affected by District action may seek judicial review of the District's action. Judicial review shall be sought in the Fifth District Court of Appeal or in the appellate district where a party resides or as otherwise provided by law.
2. All proceedings shall be instituted by filing an original notice of appeal with the District Agency Clerk within 30 days after the rendition of the order being appealed, and a copy of the notice of appeal, accompanied by any filing fees prescribed by law, with the clerk of the court, in accordance with Rules 9.110 and 9.190 of the Florida Rules of Appellate Procedure (Fla. R. App. P.). Pursuant to Fla. R. App. P. 9.020(h), an order is rendered when a signed written order is filed with the clerk of the lower tribunal.