

**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),<sup>1</sup> on June 14 and 15, 2022; August 16 through 18, 2022; and September 1, 2, and 13, 2022.

APPEARANCES

For Petitioner:     Matthew Chait, Esquire  
                          Devon A. Woolard, Esquire  
                          Shutts & Bowen LLP  
                          525 Okeechobee Boulevard, Suite 1100  
                          West Palm Beach, Florida 33401

                          Daniel Nordby, Esquire  
                          Shutts & Bowen LLP  
                          215 South Monroe Street, Suite 804  
                          Tallahassee, Florida 32301

---

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

For Cortez Road Investments and Finance, Inc.:

Susan Roeder Martin, Esquire  
John J. Fumero, Esquire  
Stephen L. Conteaguero, Esquire  
Nason Yeager Gerson Harris & Fumero, P.A.  
750 Park of Commerce Boulevard, Suite 210  
Boca Raton, Florida 33487

For Southwest Florida Water Management District:

Megan Albrecht, Esquire  
Allison K. Dhand, Esquire  
Elizabeth M. Fernandez, Esquire  
Southwest Florida Water Management District  
7601 US Highway 301 North  
Tampa, Florida 33637

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.<sup>2</sup> 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,

---

<sup>2</sup> 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.<sup>3</sup>

#### 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

---

<sup>3</sup> 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.<sup>4</sup> Ms. Eardley relayed that, except for a few small gaps, mangrove coverage is essentially continuous along the edge of the Hunters Point property. The

---

<sup>4</sup> 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.<sup>5</sup>

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

---

<sup>5</sup> 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.<sup>6</sup>

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

---

<sup>6</sup> 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."<sup>7</sup>

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

---

<sup>7</sup> 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):<sup>8</sup>

- 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

---

<sup>8</sup> 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.

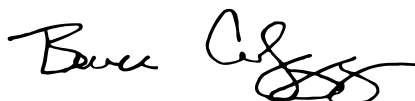
136. On the contrary, the credible and persuasive evidence presented during the hearing, including expert testimony, firmly establishes that any impact of the dock on boat traffic through the Canal can be safely and reliably minimized by the use of the "pull out" areas. In addition, Cortez Road convincingly 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  
(850) 488-9675  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 7th day of March, 2023.

COPIES FURNISHED:

Megan Albrecht, Esquire  
(eServed)

Christopher Hamilton, Esquire  
(eServed)

Matthew Chait, Esquire  
(eServed)

Deborah A. Getzoff, Esquire  
(eServed)

William S. Galvano, Esquire  
(eServed)

Kyle W. Grimes, Esquire  
(eServed)

Allison K. Dhand, Esquire  
(eServed)

John J. Fumero, Esquire  
(eServed)

Daniel Hernandez, Esquire  
(eServed)

Elizabeth M. Fernandez, Esquire  
(eServed)

Devon A. Woolard, Esquire  
(eServed)

Daniel Elden Nordby, Esquire  
(eServed)

Susan Roeder Martin, Esquire  
(eServed)

Stephen Luis Conteaguero, Esquire  
(eServed)

Brian J. Armstrong, Executive Director  
(Address of Record)

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.