STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

A. WAYNE LUJAN,	)	**OGC CASE NOS. 19-1732**
	)	**19-1733**
Petitioner,	)	**19-1734**
	)	**19-1735**
v.	)	**19-1736**
	)	
	)	**DOAH CASE NOS. 20-0659**
DEPARTMENT OF ECONOMIC OPPORTUNITY AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	**20-0660**
	)	**20-0661**
	)	**20-0662**
	)	**20-0663**
Respondents.	)	
_____/		

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on April 14, 2021, submitted a Recommended Order (RO) to the Department of Environmental Protection (DEP or Department) in the above-captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A. No party filed exceptions to the ALJ's RO. This matter is now before the Secretary of the Department for final agency action.

BACKGROUND

On July 26, 2018, A. Wayne Lujan (Petitioner) applied for five environmental resource permits (ERPs) to place fill in wetlands and submerged lands on Lots 34, 35, 37, 39, and 40 (the Project) of the Key Haven Tenth Addition plat dated September 1966 in Monroe County. The applications also requested to remove the entire mangrove fringe and install vertical seawalls on each of the subject lots. The lots are located in the waters of the Gulf of Mexico and unnamed wetlands in the landward extent of the Gulf of Mexico, a Class III waterbody, an

Outstanding Florida Water (OFW), and an area of Monroe County designated as an Area of Critical State Concern (ACSC).

DEP issued four requests for additional information (RAI) to the Petitioner on August 24, 2018, November 21, 2018, February 8, 2019, and May 8, 2019. DEP's fourth RAI raised the same concerns as the first, second, and third RAIs, and stated that seven of the 19 specific items were not addressed by the Petitioner. DEP denied the Petitioner's five ERP permit applications on October 25, 2019. Petitioner timely filed five petitions for administrative hearing on December 13, 2019, which were referred to DOAH for final hearing.

DEP's five notices of denial each stated that the following changes to the Project might enable DEP to grant the Petitioner an ERP permit: (1) an appropriate mitigation plan to adequately offset the direct, secondary, and cumulative impacts; (2) supporting information to demonstrate that the proposed stormwater management system is designed in accordance with the Applicant's Handbook, Volumes I and II; (3) supporting information to demonstrate that the proposed activities are consistent with part IV of rule 62-312, Florida Administrative Code [1]; (4) a demonstration that the activities are clearly in the public interest; and (5) resolution of the issues identified by the Department of Economic Opportunity in its consistency objection letter dated August 24, 2018, and revised by letters dated November 26, 2018, and February 8, 2019.

Because of a federal consistency objection raised by the Department of Economic Opportunity (DEO) regarding inconsistencies with the regulations governing the Florida Keys ACSC, DEO was made a co-respondent. *See* § 373.428, Fla. Stat. (2020) ("[a]n agency which

[1] Part IV of rule 62-312, Florida Administrative Code, contains additional DEP rule requirements applicable to ERP permit applications located in Outstanding Florida Waters within Monroe County. This part of rule 62-312 continues to apply to ERP applications to this date.

submits a determination of inconsistency to the permitting agency shall be an indispensable party to any administrative or judicial proceeding in which such determination is an issue."); *see also* § 380.23(2)(a), Fla. Stat. (2020).

In advance of the final hearing, DOAH consolidated the five DOAH cases into DOAH Case No. 20-0659. DEP and DEO filed a Motion to Strike, or in the Alternative, Motion in Limine, to strike portions of the petitions that raised issues concerning inverse condemnation. On July 29, 2020, the ALJ granted this motion.

DOAH held the final hearing on these permit applications on October 13 and 14, 2020, by Zoom video conference. At the final hearing, Petitioner presented the testimony of Edward A. Swakon (Swakon), a civil engineer and owner of EAS Engineering, Inc., accepted as an expert; and Howard Nelson (Nelson), an attorney and participant in drafting the responses to DEP's RAIs during the application review process. DEP presented the testimony of Megan Mills (Mills), the permitting program administrator, accepted as an expert. DEO presented the testimony of Barbara Powell (Powell), the regional planning administrator for the ACSC program, accepted as an expert. Joint Exhibits J-1 through J-88 were admitted into evidence.

On November 2, 2020, the parties requested an extension until November 20, 2020, to file their proposed recommended orders, which the ALJ granted. The parties filed their proposed recommended orders (PROs) on November 20 and 23, 2020; and the ALJ carefully considered the PROs in preparing her RO.

This matter is now before the Secretary of the Department for final agency action.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department issue a final order denying the Petitioner's five ERP applications for Key Haven Lots 34, 35, 37, 39 and 40. (RO at p. 33). In

doing so, the ALJ found that the permit applications did not satisfy most of the conditions for issuance under rule 62-330.301, Florida Administrative Code. (RO ¶ 69). Specifically, the ALJ found that the applicant failed to provide adequate assurances regarding the following potential impacts: flooding to on-site or off-site property, adverse water quantity impacts to receiving waters and adjacent lands, adverse water quality impacts to receiving waters (RO ¶ 70); harmful erosion and shoaling (RO ¶ 77); and cumulative impacts to wetlands and other surface waters (RO ¶ 79). Moreover, the ALJ found that the Project would cause the following adverse impacts: secondary impacts to the water resources and adverse impacts to surface water conveyance, neither of which would be adequately offset by appropriate mitigation (RO ¶ 72); adverse effects to the public health, safety, or welfare, or the property of others, because the side of Floral Avenue adjacent to the Petitioner's lots has no stormwater management or treatment system, the lack of which would direct the stormwater into the mangrove fringe and contiguous OFW (RO ¶ 74); adverse effects to the conservation of fish and wildlife, or their habitat, which would not be adequately offset by appropriate mitigation (RO ¶ 75); and adverse effects to marine productivity and the relative value of functions being performed by the impacted areas. (RO ¶ 76). The ALJ concluded that the Petitioner applicant did not provide reasonable assurance that the Project would meet the ERP conditions for issuance, the additional criteria of part IV of chapter 62-312, Florida Administrative Code, and section 380.0552, Florida Statutes, regarding protection of the Florida Keys as an ACSC. (RO ¶ 115). Moreover, the ALJ concluded that the Project is not consistent with the federally approved Florida Coastal Management Program (FCMP), which includes part II of chapter 163, and part II of chapter 380, Florida Statutes. (RO ¶ 115). *See also* RO ¶ 4.

CONCLUSION

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker,* 677 So. 2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing,* 954 So. 2d 77, 81 (Fla. 5th DCA 2007); *Fla. Dep't of Corr. v. Bradley,* 510 So. 2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to any findings of fact the parties "[have] thereby expressed [their] agreement with, or at least waived any objection to, those findings of fact." *Env't Coal. of Fla., Inc. v. Broward Cnty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So. 2d 540, 542 (Fla. 4th DCA 2003). However, even when exceptions are not filed, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction. *See* § 120.57(1)(l), Fla. Stat. (2020); *Barfield v. Dep't of Health,* 805 So. 2d 1008, 1012 (Fla. 1st DCA 2001); *Fla. Public Emp. Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

No party filed any exceptions to the RO objecting to the ALJ's findings, conclusions of law, recommendations, or to the DOAH hearing procedures. The Department concurs with the ALJ's legal conclusions and recommendations, with one exception. The Department rejects as unnecessary dictum the last sentence of the RO's conclusion of law paragraph 113, which should not be incorporated in this Final Order.[2] *Dep't of Env't Prot. v. Thomas Kerper and All Salvaged Auto Parts, Inc.*, DOAH Case No. 02-3907 (Fla. DOAH December 19, 2003; DEP March 15,

[2] In accordance with section 120.57(1)(l), Florida Statutes, the Department finds that the treatment of conclusion of law 113 as dictum is more reasonable than adopting the ALJ's unnecessary legal conclusion.

2004). As noted in section 380.23, Florida Statutes, when DEO makes a federal inconsistency determination, DEP cannot override DEO's determination. However, in this case, when DEO did not issue a final order regarding its inconsistency determination, part II of chapter 380 might not prohibit the Department from overriding DEO's preliminary federal inconsistency determination.

Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the RO, and being otherwise duly advised, it is

ORDERED that:

A. The Recommended Order (Exhibit A) is adopted and incorporated by reference with one exception; the last sentence of the RO's conclusion of law paragraph 113 is deemed to be unnecessary dictum and not adopted;

B. The environmental resource permit applications for Key Haven Lot 34 (DEP File No. 365144-001), Key Haven Lot 35 (DEP File No. 365142-001), Key Haven Lot 37 (DEP File No. 365142-001), Key Haven Lot 39 (DEP File No. 365131-010), and Key Haven Lot 40 (DEP File No. 365127-001) (collectively identified as the Project) are DENIED.

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the

appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 8th day of July, 2021, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

SHAWN HAMILTON
Interim Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Syndie Kinsey Digitally signed by Syndie Kinsey Date: 2021.07.08 11:22:22 -04'00'

CLERK DATE

CERTIFICATE OF SERVICE

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

S. William Moore, Esq. Moore, Bowman & Reese, P.A. 551 N. Cattlemen Road Suite 100 Sarasota, Florida 34232 bmoore@mbrfirm.com ksasse@mbrfirm.com	Valerie A. Wright, Esq. Brandon W. White, Esq. Department of Economic Opportunity 107 East Madison Street Caldwell Bldg., Mail Station 110 Tallahassee, Florida 32399-4128 Valerie.Wright@deo.myflorida.com Brandon.White@deo.myflorida.com DEO.eservice@deo.myflorida.com
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this 8th day of July, 2021.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

A. WAYNE LUJAN,

Petitioner,

vs.

DEPARTMENT OF ECONOMIC OPPORTUNITY AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

Case Nos. 20-0659
20-0660
20-0661
20-0662
20-0663

RECOMMENDED ORDER

A duly-noticed hearing was held in this consolidated proceeding before the Honorable Francine M. Ffolkes, an Administrative Law Judge with the Division of Administrative Hearings (DOAH), on October 13 and 14, 2020, via Zoom video conference.

APPEARANCES

For Petitioner, A. Wayne Lujan:

S. William Moore, Esquire
Moore Bowman & Reese, P.A.
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Sarasota, Florida 34232

For Respondent, Department of Environmental Protection:

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3900 Commonwealth Boulevard, Mail Station 35
Tallahassee, Florida 32399

For Respondent, Department of Economic Opportunity:

Jon F. Morris, Esquire
Brandon W. White, Esquire
107 East Madison Street, Mail Station 110
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue to be decided in these cases is whether Petitioner, A. Wayne Lujan (Petitioner), was entitled to issuance of five environmental resource permits (ERPs) that Respondent, Department of Environmental Protection (DEP), intended to deny as stated in notices of denial dated October 25, 2019.

PRELIMINARY STATEMENT

On July 26, 2018, Petitioner applied for five ERPs to place fill in wetlands and submerged lands on Lots 34, 35, 37, 39, and 40 (Subject Lots) of the Key Haven Tenth Addition plat dated September 1966 in Monroe County (County). The applications also requested to remove all of the mangrove fringe and install vertical seawalls on each of the Subject Lots. The Subject Lots are located in the waters of the Gulf of Mexico and unnamed wetlands in the landward extent of the Gulf of Mexico, a Class III waterbody, an Outstanding Florida Water (OFW), and an area of the County designated as an Area of Critical State Concern (ACSC). DEP issued notices of denial on October 25, 2019. Petitioner timely filed five petitions for administrative hearing on December 13, 2019, which were referred to DOAH for final hearing.[1]

Because of a federal consistency objection raised by the Department of Economic Opportunity (DEO) regarding inconsistencies with the regulations

[1] The applications were substantially similar and processed together by DEP. DOAH Case No. 20-0659 involved the application for Lot 34, ERP No. 365144-001. DOAH Case No. 20-0660 involved the application for Lot 35, ERP No. 365142-001. DOAH Case No. 20-0661 involved the application for Lot 37, ERP No. 365136-001. DOAH Case No. 20-0662 involved the application for Lot 39, ERP No. 365131-001. DOAH Case No. 20-0663 involved the application for Lot 40, ERP No. 365127-001.

governing the Florida Keys ACSC, DEO was made a co-respondent. *See* § 373.428, Fla. Stat. (2020)("[a]n agency which submits a determination of inconsistency to the permitting agency shall be an indispensable party to any administrative or judicial proceeding in which such determination is an issue."); *see also* § 380.23(2)(a), Fla. Stat. (2020).

In advance of the final hearing, the five DOAH cases were consolidated into DOAH Case No. 20-0659. DEP and DEO filed a Motion to Strike, or in the Alternative, Motion in Limine (Motion), to strike portions of the petitions that raised issues concerning inverse condemnation. On July 29, 2020, the undersigned granted the Motion.

The parties filed an Amended Joint Pre-hearing Stipulation that included stipulated facts and issues of law on which there was agreement. The Amended Joint Pre-Hearing Stipulation identified the following issues of fact that remained for disposition:

> 1. Whether the Applicant demonstrated reasonable assurance that the direct, secondary, and cumulative impacts of the proposed Project are adequately offset by the proposed mitigation.
>
> 2. Whether the Applicant demonstrated reasonable assurance that the use of vertical seawalls faced with riprap meets the requirements of Rule 62-312.440.
>
> 3. Whether the proposed Project is part of a "common plan of development" or "larger plan of other commercial or residential development" as defined in Section 2.0 of the Applicant's Handbook, Volume I, and therefore not exempt from providing a stormwater management system to serve the Project.
>
> 4. Whether the Applicant demonstrated reasonable assurance that Project is clearly in the public interest pursuant to Rule 62-330.302.

5. Whether the Applicant demonstrated reasonable assurance that the Project meets the applicable statutory and rule criteria for issuance of permits.

The parties identified the following issues of law as necessary for resolution:

1. Whether the proposed Project is clearly in the public interest.

2. Whether the Applicant met the applicable criteria set out in the relevant rules and statutes for issuance of permits.

3. Whether the Petitioner's permit applications are consistent and in compliance with the enforceable policies administered by the Department of Economic Opportunity, set forth in Part I, Chapter 380, Florida Statutes. Specifically, whether the permit applications are consistent with the Principles for Guiding Development in the Florida Keys Area of Critical State Concern, contained within Section 380.0552(7), Florida Statutes.

4. Whether the permit applications are consistent with the following Principles for Guiding Development:

(a) Strengthening local government capabilities for managing land use and development so that local government is able to achieve these objectives without continuing the area of critical state concern designation;

(b) Protecting shoreline and marine resources, including mangroves, coral reef formations, seagrass beds, wetlands, fish and wildlife, and their habitat;

(e) Limiting the adverse impacts of development on the quality of water throughout the Florida Keys; and

(n) Protecting the public health, safety, and welfare of the citizens of the Florida Keys and maintaining the Florida Keys as a unique Florida resource.

5. Whether the permit applications are consistent with the Monroe County Comprehensive Plan and Land Development Regulations, specifically, Comprehensive Plan Policy 102.1.1, 101.5.25, 203.1.1, 204.2.2, 204.2.3, 204.2.4, and 212.5.3, and Land Development Regulations 118-4, 118-10(e), 118-12(k)(2), 122-4(b)(5), 130-157, and 130-162.

At the final hearing, Petitioner presented the testimony of Edward A. Swakon (Swakon), a civil engineer and owner of EAS Engineering, Inc., accepted as an expert; and Howard Nelson (Nelson), an attorney and participant in drafting the responses to DEP's Requests for Additional Information (RAI) during the application review process. DEP presented the testimony of Megan Mills (Mills), the permitting program administrator, accepted as an expert. DEO presented the testimony of Barbara Powell (Powell), the regional planning administrator for the ACSC program, accepted as an expert. Joint Exhibits J-1 through J-88 were admitted into evidence.

The three-volume Transcript of the final hearing was filed with DOAH on October 28, 2020. On November 2, 2020, the parties requested an extension until November 20, 2020, to file their proposed recommended orders, which was granted. The parties timely filed their proposed recommended orders, which were carefully considered in the preparation of this Recommended Order.

References to the Florida Statutes are to the 2020 version unless otherwise stated. References to Florida Administrative Code rules are to the version in effect at the time of issuance of this Recommended Order.[2]

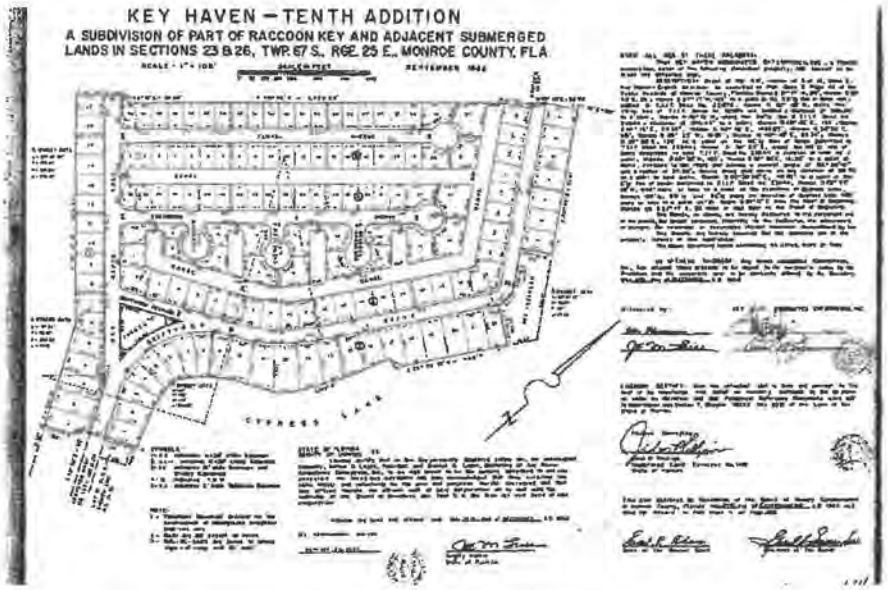
[2] *See Lavernia v. Dep't of Prof'l Reg.*, 616 So. 2d 53 (Fla. 1st DCA 1993)(reflecting that the law in effect at the time the agency takes final action on a licensure application applies). As a practical matter, in this case, the statutory and rule provisions pertinent to this case did not substantively change between the date the application was filed and the date of issuance of this Recommended Order.

FINDINGS OF FACT

The following Findings of Fact are based on the stipulations of the parties and the evidence adduced at the final hearing.

Parties and Background

1. Petitioner Lujan is the president and a director of Kay Haven Associated Enterprises, Inc. (Key Haven), that owns the five parcels, which are the subject matter of this hearing. Although Key Haven owns numerous lots, it chose to submit ERP applications for the Subject Lots within the Key Haven Tenth Addition plat dated September 1966 (Plat). *See* Joint Exhibit 84.



Joint Exhibit 84

2. The Subject Lots are located in an unincorporated part of the County on the northwestern edge of a body of land lying north of State Road A1A, identified on the Plat as Raccoon Key. The Subject Lots are approximately half a mile east of the city limits of Key West, Florida. The Subject Lots are all characterized by a small upland portion adjacent to Floral Avenue. The majority of the Subject Lots transition into a mangrove fringe of varying depth and submerged lands containing marine seagrasses and sponges. *See* Joint Exhibits 81 and 82.

Joint Exhibit 81

Joint Exhibit 82

3. DEP is the administrative agency of the state having the power and duty to protect Florida's air and water resources, and to administer and enforce the

provisions of part II of chapter 380, part IV of chapter 373, and chapter 403, Florida Statutes. DEP also administers the provisions of Florida Administrative Code chapters 62-312 and 62-330 regarding activities in wetlands and other surface waters of the state.

4. DEO is the state land planning agency and reviews certain permit applications for consistency with its statutory responsibilities under the Florida Coastal Management Program (FCMP), which includes part II of chapter 163, and part I of chapter 380, Florida Statutes. Relevant to this proceeding, DEO exercises authority over the ACSC program. *See* § 380.05, Fla. Stat.

5. On July 26, 2018, Petitioner filed five applications for ERPs with DEP. Although certain details within each application differed, the applications all sought to authorize construction of a seawall in the waters of the Gulf of Mexico and in unnamed wetlands within the landward extent of the Gulf of Mexico, a Class III OFW, to remove the entirety of the existing mangrove fringe, and to place fill within wetlands and other surface waters for the construction of single-family residences (Project).

6. The minor differences in each application relate to the length of the seawall and the amount of fill necessary for each lot. Although some testimony was provided concerning the differences, no party argued that the differences were material to the determinations necessary in this proceeding. Accordingly, the factual and legal analysis for the Subject Lots and ERP applications were addressed without distinction herein.

7. DEP forwarded a copy of the applications to DEO for its recommendation. On August 24, 2018, DEO issued objections to approval of the permits citing inconsistency with the Florida Keys ACSC Principles for Guiding Development (PGDs) in section 380.0552(7). DEO also objected based on inconsistencies between the Project and the Monroe County Comprehensive Plan (Comp Plan) and Land Development Code (LDC), which implement the PGDs.

8. DEP's first RAI dated August 24, 2018, included DEO's objections. The first RAI notified Petitioner that DEP had concerns with the Project that included:

(1) installation of the vertical seawall; (2) placement of fill within an OFW; (3) direct impacts to marine seagrass bed community without adequate mitigation; and (4) failure to provide stormwater management plans since the Project was a common plan of development. The first RAI contained 19 specific requests for additional information.

9. On October 23, 2018, Petitioner responded to DEP's first RAI by submitting slightly revised plans. The revised Project proposed less of a vertical seawall footprint by adding rip-rap to the side seawalls as a means of containing fill. Petitioner's responses to the 19 specific requests for information can generally be categorized as follows: (1) elimination of some vertical seawalls, but not the ones on the waterward edge of the Subject Lots; (2) no change in the placement of fill; (3) Petitioner would attempt to find appropriate compensatory mitigation for the seagrass impacts; and (4) Petitioner did not consider the Project to be a common plan of development. Regarding DEO's objections, Petitioner stated that "[w]e acknowledge that the project has been forwarded to FWC [Florida Fish and Wildlife Conservation Commission] and DEO and that additional comments and information may be requested by those agencies in order to fully evaluate the application." Petitioner did not substantively address DEO's objections.

10. DEP issued a second RAI on November 21, 2018. DEO again objected in a letter dated November 26, 2018. DEP's second RAI raised the same concerns as the first RAI and acknowledged that four of the 19 specific items were adequately addressed.

11. On January 11, 2019, Petitioner responded to DEP's second RAI by again submitting slightly revised site plans. However, the Project remained generally unchanged, with a proposed vertical seawall on the waterward edge of the lots, rip-rap along the sides, removal of the entire mangrove fringe, and fill of the entire lots eliminating the existing marine seagrasses.

12. DEP issued a third RAI to Petitioner on February 8, 2019. DEO reiterated its objections by letter dated February 8, 2019. The third RAI raised the same

concerns as the first and second RAIs, although DEP acknowledged that six of the 19 specific items were adequately addressed.

13. By letter dated April 8, 2019, Petitioner responded to DEP's third RAI. The response again proposed slightly altered site plans from the January 2019 submissions. Petitioner essentially stated that mitigation opportunities were scarce, but had contacted the County and was looking into derelict vessel removal. However, the proposed Project remained generally unchanged, with a proposed vertical seawall on the waterward edge of the lots, rip-rap along the sides, removal of the entire mangrove fringe, and fill of the entire lots eliminating the existing marine seagrasses.

14. As it relates to DEO's objections, Petitioner responded that "[a]fter review of the comments outlined in the [DEO] revised letter, it seems that the DEO objections are related to compliance with the provision[s] of the [Monroe] County [Comp Plan]. We will deal with those issues at the time of local permitting." Petitioner again failed to substantively address DEO's objections.

15. DEP issued its final RAI on May 8, 2019. DEO again objected by letter dated May 6, 2019. This final RAI raised the same concerns as the first, second, and third RAIs. DEP stated that seven of the 19 specific items were not addressed by Petitioner, and that failure to provide a complete response to the prior RAI may result in denial of the ERP applications.

16. On August 29, 2019, Petitioner responded to DEP's final RAI by once again submitting slightly revised plans, and additional information concerning mitigation proposals. However, the Project did not change and Petitioner again failed to substantively address DEO's objections.

17. DEO's objection letter identified that the ERP applications were inconsistent with the Florida Keys ACSC PGDs, seven Comp Plan policies, and six regulatory provisions of the County's LDC.

18. DEP denied the ERP applications on October 25, 2019. The grounds for denial reiterated the issues not addressed by Petitioner's RAI responses. Specifically: (1) the failure of the Project to provide reasonable assurances

concerning direct, secondary, and cumulative impacts to the marine seagrass bed community; (2) continued reliance upon construction of a vertical seawall; (3) failure to provide stormwater management information necessary given the determination that the Project constituted a common plan of development; (4) inconsistency with the FCMP as identified by DEO in its objection letters; and (5) failure to provide reasonable assurances that the Project was clearly in the public interest.

Direct Impacts

19. The Project proposed to entirely fill the Subject Lots, contain the fill with vertical seawalls and rip-rap, and construct pile-supported single-family residences.

20. The Project would remove the entire mangrove fringe that aerials and site inspections show is a healthy mix of red, black, and white mangroves along with some green buttonwood. The shallow, open surface waters are dominated by marine seagrasses that vary in density.

21. Petitioner did not make any design modifications to the Project that sought to reduce or eliminate direct impacts to the mangrove fringe and marine seagrasses.

22. Petitioner's resource inventory was done using GIS aerial photography so that the aerial benthic resource surveys submitted to DEP were not ground-truthed. DEP staff conducted physical site inspections and ground-truthing inspections that included swimming in the open surface waters. DEP staff found significant marine seagrasses and sponges that were not mentioned in Petitioner's resource surveys.

23. Depending on the lot, the Project would fill approximately 6,000 square feet of wetlands and other surface waters, i.e., 900 to 2,500 square feet of mangrove habitat and 4,000 to 4,800 square feet of marine seagrass bed habitat.

24. The seawalls depicted in the final version of Petitioner's site plans were "vertical seawalls" because the rip-rap would not face the seawalls to the mean high water line (MHWL). The rip-rap would be placed on submerged resources

inside the property lines of the Subject Lots. Also, Petitioner's final plans did not include the mooring of vessels.

25. Vertical seawalls are prohibited in the OFW of the County. Petitioner did not affirmatively demonstrate that fill or shoreline stabilization could be accomplished by using native vegetation instead of vertical seawalls.

Secondary Impacts

26. DEP's expert witness, Ms. Mills, testified that Petitioner's ERP applications did not identify any potential secondary impacts. Ms. Mills testified that the expected secondary impacts from the Project included stormwater runoff, shading, and erosion or shoaling.

27. Although the Project plans showed that stormwater would be collected and directed to Floral Avenue, DEP's investigation established that there is no stormwater management system on the side of Floral Avenue abutting the Subject Lots. Thus, the collected and directed stormwater would end up flowing back into the mangrove fringe and surface waters at the lot locations that were not proposed for development, e.g., Lots 36 and 38.

28. The proposed single-family homes are piling-supported structures. Ms. Mills testified that the piling-supported structure would cause shading of the immediate adjacent resources on either side. She identified potential shading impacts to the resources of the undeveloped Lots 36 and 38.

29. In addition, Ms. Mills identified potential erosion or shoaling impacts to the undeveloped Lots 36, 38, and unnamed lots to the left of Lot 40 since they would be surrounded by developed fill on either side. Although Mr. Swakon testified that tidal velocity is low in this area, other aspects, such as effects from wind-driven circulation, were not adequately addressed.

Mitigation

30. Petitioner was required to propose mitigation to offset remaining direct and secondary impacts after going through a reduction and elimination exercise. However, Petitioner did not propose any revisions to the Project to reduce or eliminate the direct and secondary impacts identified above.

31. Ms. Mills explained that appropriate mitigation usually provides benefits to the same type of ecological community as the one being impacted.

32. Petitioner's ultimate mitigation proposal was to purchase saltwater credit at a mitigation bank, the Florida Power and Light Everglades Mitigation Bank (FPL EMB). The FPL EMB is located on the mainland of Florida approximately a hundred miles away from the Subject Lots. Ms. Mills testified that saltwater credit would be appropriate to offset and replace the same ecological function of mangroves, but not to offset the submerged benthic communities that would be impacted by the Project.

33. Mr. Swakon testified that calculation of the amount of mitigation credits included a multiplier to address secondary and cumulative impacts, the out-of-kind mitigation, and the dissimilarities in the communities. However, Ms. Mills persuasively testified that the proposed multiplier was not sufficient to justify the three aspects of impact that needed to be offset. Whether to justify dissimilarities between the ecological communities, secondary and cumulative impacts, or the distance of the mitigation site from the Project, the multiplier was not sufficient.

Cumulative Impacts

34. The Project is not within a recognized cumulative impact basin of the South Florida Water Management District (SFWMD) for mitigation of impacts purposes. Accordingly, Ms. Mills testified that the plain language of a cumulative impacts analysis is considered. Contiguous lots to the Subject Lots owned by Petitioner could be developed through similar requests in the future. Also, each ERP application's cumulative impact analysis would consider the other four ERP applications as in-house examples of potential future projects.

Common Plan of Development

35. Petitioner contested DEP's conclusion that the Project was a common plan of development subject to section 2.0 of the Applicant's Handbook Volume 1 and associated stormwater management requirements.

36. The Project would facilitate the advancement of land uses such as multiple residences, a residential subdivision, or phased site development. The Project

comprised a total land area divided into multiple lots or parcels that are under common ownership or control. In total, Petitioner owns 648 lots under common ownership within the Key Haven Tenth and Eleventh Addition.

37. The Subject Lots are all part of a residential subdivision. Thus, the preponderance of the evidence demonstrated that the Project was a common plan of development.

38. For this common plan of development, Petitioner's proposed stormwater management consisted of a cap on the proposed seawalls directing stormwater to swales on each lot. The swales would then direct stormwater to Floral Avenue with no additional treatment or management. During site inspections, DEP staff did not find any evidence of stormwater management along Floral Avenue.

Seawalls and Rip-rap

39. The seawalls depicted in the final version of Petitioner's ERP applications would be vertical seawalls because the rip-rap facing the seawall did not come above the MHWL. In addition, the final plans did not include the mooring of vessels.

40. As found above, the Project would place fill, seawalls, and rip-rap on marine seagrasses and sponges. Petitioner failed to affirmatively demonstrate that native vegetation was not sufficient to prevent erosion.

41. The evidence established that Petitioner did not apply for any waiver or variance of applicable ERP rule criteria.

FCMP Consistency

42. The evidence demonstrated that Petitioner refused to address DEO's objections based on a mistaken view of the criteria governing ERP applications in the County and the Florida Keys ACSC. Relevant to this proceeding, DEO exercises authority over the ACSC program. *See* § 380.05, Fla. Stat.; *see also* § 380.23(6), Fla. Stat. (Each agency charged with implementing statutes and rules that are part of the FCMP, shall be afforded an opportunity to provide DEP with

its comments and determination regarding consistency of the activity with those statutes and rules.).

43. Section 380.05(16) prohibits persons from undertaking any development within the Florida Keys ACSC, except in accordance with the PGDs. Thus DEO, as the administrator of the ACSC program, reviewed the ERP applications for consistency with applicable regulatory requirements.

44. DEO issued objections to approval of the permits citing inconsistency with the Florida Keys ACSC PGDs; and inconsistencies between the Project and the County's Comp Plan and LDC which implement the PGDs.

45. DEO identified that the Project would be inconsistent with four PGDs. DEO's expert witness, Ms. Powell, testified that the Project was inconsistent with the PGD, which provides for strengthening local government capabilities for managing land use and development so that the local government is able to achieve these objectives without continuing the ACSC designation. *See* § 380.0552(7)(a), Fla. Stat. Ms. Powell persuasively testified that the ERP applications were inconsistent with this PGD because the Project would impair the local government's ability to have the ACSC designation removed. Allowing development inconsistent with its regulations would hurt the local government's ability to pursue de-designation. No evidence was presented by Petitioner that the Project would be consistent with this PGD.

46. The second PGD cited by DEO provides for protecting shoreline and marine resources, including mangroves, coral reef formations, seagrass beds, wetlands, fish and wildlife, and their habitat. *See* § 380.0552(7)(b), Fla. Stat. It was undisputed that the Project would result in total removal of the mangrove and buttonwood fringe on each lot and 100% destruction of existing submerged marine resources. No evidence was presented by Petitioner that the Project would be consistent with this PGD.

47. The third PGD cited by DEO provides for limiting the adverse impacts of development on the quality of water throughout the Florida Keys. *See* § 380.0552(7)(e), Fla. Stat. Ms. Powell testified that degradation to nearshore water

quality from prior dredge and fill activity was one of the reasons for the designation of the Florida Keys as an ACSC. Additionally, as further discussed below, the Project would be inconsistent with the County's Comp Plan policies and LDC regulations that further the goal of protecting the quality of water throughout the Florida Keys ACSC. No evidence was presented by Petitioner that the Project would be consistent with this PGD.

48. The fourth PGD cited by DEO provides for protecting the public health, safety, and welfare of the citizens of the Florida Keys, and maintaining the Florida Keys as a unique Florida resource. *See* § 380.0552(7)(n), Fla. Stat. As further discussed below, the Project would be inconsistent with the County's Comp Plan and LDC regulations that prohibit the use of structural fill within velocity zones. No evidence was presented by Petitioner that the Project would be consistent with this PGD.

49. Ms. Powell testified that DEO considered the remaining statutory PGDs, and determined they were not particularly applicable to these ERP applications.

50. In accordance with its duties, DEO had also reviewed and approved the County's Comp Plan and LDC as consistent with the statutory PGDs. DEO identified that the Project would be inconsistent with seven Comp Plan policies. They are Policies 102.1.1, 101.5.25, 203.1.1, 204.2.2, 204.2.3, 204.2.4, and 212.5.3.

51. Policy 102.1.1 provides:

> The County shall protect submerged lands and wetlands. The open space requirement shall be one hundred (100) percent of the following types of wetlands:
>
> 1. submerged lands
> 2. mangroves
> 3. salt ponds
> 4. fresh water wetlands
> 5. fresh water ponds
> 6. undisturbed salt marsh and buttonwood wetlands
>
> Allocated density (dwelling units per acre) shall be assigned to freshwater wetlands and undisturbed salt marsh and buttonwood wetlands only for use as transferable development rights (TDRs) away from these

habitats. Submerged lands, salt ponds, freshwater ponds, and mangroves shall not be assigned any density or intensity.

52. Policy 101.5.25 provides that "[t]he allocated densities for submerged lands, salt ponds, freshwater ponds, and mangroves shall be 0 and the maximum net density bonuses shall not be available."

53. Policy 203.1.1 provides that "[t]he open space requirement for mangrove wetlands shall be one hundred (100) percent. No fill or structures shall be permitted in mangrove wetlands except for elevated, pile-supported walkways, docks, piers and utility pilings."

54. Policy 204.2.2 provides:

> To protect submerged lands and wetlands, the open space requirement shall be 100 percent of the following types of wetlands:
> 1. submerged lands;
> 2. mangroves;
> 3. salt ponds;
> 4. freshwater wetlands;
> 5. freshwater ponds; and
> 6. undisturbed salt marsh and buttonwood wetlands.
> Allocated density (dwelling units per acre) shall be assigned to freshwater wetlands and undisturbed salt marsh and buttonwood wetland only for use as transferable development rights away from these habitats. Submerged lands, salt ponds, freshwater ponds and mangroves shall not be assigned any density or intensity. Within one (1) year after the adoption of the 2030 Comprehensive Plan, the County shall revise the LDC to include a prohibition of development in salt ponds.

55. Policy 204.2.3 provides:

> No structures shall be permitted in submerged lands, mangroves, salt ponds, or wetlands, except for elevated, pile-supported walkways, docks, piers, and utility pilings. No fill shall be permitted in submerged lands, mangroves, salt ponds, or wetlands except:
> 1. as specifically allowed by Objective 212.5 and subsequent Policies;
> 2. to fill a manmade excavated water body, such as a

canal, boat ramp, or swimming pool if the Director of Environmental Resources determines that such filling will not have a significant adverse impact on marine or wetland communities; or
3. as needed for shoreline stabilization or beach renourishment projects with a valid public purpose that furthers the goals of the Monroe County Comprehensive Plan, as determined by the County.

56. Policy 204.2.4 provides:

> No fill or structures shall be permitted in mangroves or wetlands except as allowed by Policy 204.2.3 (as amended) and for bridges extending over mangroves or wetlands that are required to provide automobile or pedestrian access to dwelling units located on upland areas within the same property for which there is no alternative means of access. Such bridges shall be elevated on pilings such that the natural movement of water, including volume, rate, and direction of flow shall not be disrupted or altered. Upland areas shall include disturbed wetlands that have been lawfully converted into uplands through filling.

57. Policy 212.5.3 provides:

> Bulkheads, seawalls or other hardened vertical shoreline structures shall be permitted on residential canals and altered shorelines only in the following situations:
>
> 1. to replace an existing deteriorated bulkhead or seawall; or
> 2. to stabilize a severely eroding shoreline area.

58. DEO's expert witness, Ms. Powell, persuasively testified that the Project was inconsistent with all seven policies, because it did not protect the submerged lands and wetlands, did not provide for 100% open space within the submerged lands and wetlands, and provided for the construction of a seawall not excepted from the general prohibition.

59. Petitioner did not present any evidence that the Project was consistent with the cited policies. Instead, Petitioner's witness, Mr. Nelson, testified that he felt certain County regulations would militate in favor of allowing the development.

The main factor cited by Mr. Nelson was that the Subject Lots were designated as Tier III parcels under the County's LDC. However, designation of a parcel as Tier III did not conflict with the policies cited by DEO. The more credible and persuasive evidence concerning the Project's compliance with the Comp Plan policies was provided by Ms. Powell, who concluded that the Project was not consistent with those policies.

60. DEO identified that the Project would be inconsistent with six sections of the County's LDC regulations. Those are sections 118-4, 118-10(e), 118-12(k)(2), 122-4(b)(5), 130-157, and 130-162. The LDC regulations are more specific methods for implementing the Comp Plan policies outlined above.

61. Section 118-4 provides:

> No development activities, except as provided for in this chapter, are permitted in submerged lands, mangroves, salt ponds, freshwater wetlands, freshwater ponds, or in undisturbed salt marsh and buttonwood wetlands; the open space requirement is 100 percent.
> Allocated density (dwelling units per acre) shall be assigned to freshwater wetlands and undisturbed salt marsh and buttonwood wetlands only for use as transferable development rights away from these habitats. Submerged lands, salt ponds, freshwater ponds and mangroves shall not be assigned any density or intensity.

62. Section 118-10(e), in relevant part, provides:

> (e) Mangroves, wetlands, and submerged lands. All structures developed, used or occupied on land classified as mangroves, wetlands or submerged lands (all types and all levels of quality) shall be designed, located and constructed such that:
>
> (1) *Generally*. Only docks and docking facilities, boat ramps, walkways, water access walkways, water observation platforms, boat shelters, nonenclosed gazebos, riprap, seawalls, bulkheads, and utility pilings shall be permitted on or over mangroves, wetlands, and submerged lands, subject to the specific restrictions of this subsection. Trimming and/or removal of mangroves
> shall meet Florida Department of Environmental

Protection requirements.

* * *

(4) *Placement of fill.* No fill shall be permitted in any mangroves, wetlands, or submerged lands except:

a. As specifically allowed by this Section or by Section 118-12(k) (Bulkheads, Seawalls, Riprap) and 118-12(l) (Boat Ramps);

b. To fill a manmade, excavated water body such as a canal, boat ramp, boat slip, boat basin or swimming pool if the County Biologist determines that such filling will not have a significant adverse impact on marine or wetland communities;

c. As needed for shoreline stabilization or beach renourishment projects with a valid public purpose that furthers the goals of the Monroe County Comprehensive Plan, as determined by the County Biologist;

d. For bridges extending over salt marsh and/or buttonwood association wetlands that are required to provide automobile or pedestrian access to lawfully established dwelling units located on upland areas within the same property for which there is no alternate means of access. Such bridges shall be elevated on pilings so that the natural movement of water, including volume, rate and direction of flow shall not be disrupted or altered; or

e. As approved for Disturbed Salt Marsh and Buttonwood Association Wetlands with appropriate mitigation as defined by the wetland regulations of subsection (e)(6) of this Section.

63. Section 118-12(k)(2) provides:

(2) Vertical type seawalls or bulkheads shall be permitted only to stabilize severely eroding shorelines and only on manmade canals, channels, or basins. Such seawalls or bulkheads shall be permitted only if native vegetation and/or riprap and filter cloth is not a feasible means to control erosion. No new seawalls, bulkheads, or other hardened vertical structures shall be permitted on open

water.

64. Section 122-4(b)(5), in relevant part, provides:

> *Coastal high-hazard areas (V zones).* Within the areas of special flood hazard are areas designated as coastal high-hazard areas, which have special flood hazards associated with wave wash. The following provisions shall apply in these areas:
>
> * * *
>
> e. There shall be no fill used as structural support.

65. Section 130-157, Maximum Permanent Residential Density and Minimum Required Open Space, provides at note (a):

> (a) The allocated densities for submerged lands, salt ponds, freshwater ponds, and mangroves shall be 0 and the maximum net density bonuses shall not be available.

66. Section 130-162, Maximum Densities for Hotel/Motel, Campground, Recreational Vehicle, Seasonal and Institutional Residential Uses, and Minimum Open Space, proves at note (a):

> (a) The allocated densities for submerged lands, salt ponds, freshwater ponds, and mangroves shall be 0 and the maximum net density bonuses shall not be available.

67. Ms. Powell persuasively testified that the Project was not consistent with the County's LDC regulations in sections 118-4, 118-10(e), 118-12(k)(2), 122-4(b)(5), 130-157, and 130-162. The Project was inconsistent with the cited LDC regulations because it sought to construct seawall in submerged land, fill portions of the lots subject to a 100% open space requirement, remove the entirety of the existing mangrove fringe, impair 100% of the marine seagrass resources within the Subject Lots, and utilize structural fill within a Federal Emergency Management Agency (FEMA) designated Velocity Zone.

68. The preponderance of the evidence demonstrated that the Project did not meet the criteria of part IV of chapter 62-312 and section 380.0552. The testimony also demonstrated that Petitioner did not apply for a variance or waiver of the County's LDC regulations.

Conditions for Issuance

69. Petitioner generally argued that the five applications provided reasonable assurance for issuance of individual ERPs. However, the persuasive and credible evidence established that the Project did not satisfy a majority of the conditions for issuance under rule 62-330.301.

70. Petitioner failed to provide adequate information regarding stormwater management, the impacts of runoff to Floral Avenue, and runoff flowing back into the Gulf of Mexico OFW. This failure resulted in a lack of reasonable assurance that the Project would not cause adverse flooding to on-site or off-site property; would not cause adverse water quantity impacts to receiving waters and adjacent lands; and would not adversely affect the quality of receiving waters.

71. The preponderance of the evidence demonstrated that the Project would adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters. Those functions would be 100% impacted and the impacts would not be adequately offset by appropriate mitigation.

72. As found above, the Project would cause adverse secondary impacts to the water resources, adverse impacts to surface water conveyance, and the adverse impacts would not be adequately offset by appropriate mitigation.

Additional Conditions for Issuance

73. Petitioner generally contended that the five applications provided reasonable assurance that the Project was clearly in the public interest under rule 62-330.302. However, the persuasive and credible evidence established that the Project did not satisfy a majority of the applicable additional conditions for issuance.

74. The Project would adversely affect the public health, safety, or welfare or the property of others because Petitioner failed to provide adequate information regarding stormwater management. DEP's site inspection found no stormwater management or treatment system on the side of Floral Avenue adjacent to the Subject Lots. Thus, the collected and directed stormwater would end up flowing back into the mangrove fringe and the OFW.

75. The preponderance of the evidence demonstrated that the Project would adversely affect the conservation of fish and wildlife, or their habitat, as a result of the 100% impact to benthic communities, which would not be adequately offset by appropriate mitigation.

76. The preponderance of the evidence demonstrated that the Project would adversely affect marine productivity, the current condition, and the relative value of functions being performed by the impacted areas. Also, the Project would be permanent in nature.

77. The preponderance of the evidence demonstrated that Petitioner failed to provide reasonable assurance that there would not be harmful erosion or shoaling.

78. The Project would not adversely affect or enhance any significant historical and archaeological resources.

79. The Project would not be within a recognized cumulative impact basin of the SFWMD for mitigation of impacts purposes. Contiguous lots to the Subject Lots owned by Petitioner could be developed through similar requests in the future. Each ERP application's cumulative impact analysis would consider the other four ERP applications as in-house examples of potential future projects. Thus, Petitioner did not provide reasonable assurance that each ERP application would not cause unacceptable cumulative impacts upon wetlands and other surface waters.

CONCLUSIONS OF LAW

Jurisdiction and Scope of Proceeding

80. DOAH has jurisdiction over the parties and the subject matter of this

consolidated proceeding under sections 120.569 and 120.57(1), Florida Statutes.

81. This is a *de novo* proceeding under section 120.57, intended to formulate final agency action, not to review action taken earlier and preliminarily. *See Dep't of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d 778, 785 (Fla. 1st DCA 1981)(quoting *McDonald v. Dep't of Banking and Fin.*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977)).

Standard and Burden of Proof

82. The standard of proof in this case is a preponderance of the evidence. *See* § 120.57(1)(j), Fla. Stat.

83. Since this consolidated proceeding was not initiated by a third party nonapplicant under section 120.569(2)(p), Petitioner has the burden to prove entitlement to issuance of the ERPs by a preponderance of the evidence. *See Dep't of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d at 790. Petitioner must do so by affirmatively providing reasonable assurance that the Project will meet all applicable statutory and regulatory criteria.

84. "Reasonable assurance" means "a substantial likelihood that the project will be successfully implemented." *See Metro. Dade Cty. v. Coscan Fla., Inc.*, 609 So. 2d 644, 648 (Fla. 3d DCA 1992); *Save Anna Maria, Inc. v. Dep't of Transp.*, 700 So. 2d 113, 117 (Fla. 2d DCA 1997).

85. Petitioner failed to provide affirmative reasonable assurance. Thus, Petitioner did not carry his burden of proving entitlement to issuance of the ERPs.

Conditions for Issuance

86. The conditions for issuance of individual and conceptual approval ERPs are enumerated in rule 62-330.301, which provides:

> (1) To obtain an individual or conceptual approval permit, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of the projects regulated under this chapter:
>
> (a) Will not cause adverse water quantity impacts to receiving waters and adjacent lands;

(b) Will not cause adverse flooding to on-site or off-site property;

(c) Will not cause adverse impacts to existing surface water storage and conveyance capabilities;

(d) Will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters;

(e) Will not adversely affect the quality of receiving waters such that the state water quality standards set forth in Chapters 62-4, 62-302, 62-520, and 62-550, Fla. Admin. Code, including the antidegradation provisions of paragraphs 62-4.242(1)(a) and (b), Fla. Admin. Code, subsections 62-4.242(2) and (3), Fla. Admin. Code, and Rule 62-302.300, Fla. Admin. Code, and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters set forth in subsections 62-4.242(2) and (3), Fla. Admin. Code, will be violated;

(f) Will not cause adverse secondary impacts to the water resources.

(g) Will not adversely impact the maintenance of surface or ground water levels or surface water flows established pursuant to section 373.042, Fla. Stat.;

(h) Will not cause adverse impacts to a Work of the District established pursuant to section 373.086, Fla. Stat.;

(i) Will be capable, based on generally accepted engineering and scientific principles, of performing and functioning as proposed;

(j) Will be conducted by a person with the financial, legal and administrative capability of ensuring that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued; and,

(k) Will comply with any applicable special basin or geographic area criteria established...

87. Petitioner argued that the five applications provided reasonable assurance for issuance of individual ERPs. However, the preponderance of the evidence established that the Project did not satisfy the applicable conditions for issuance under rule 62-330.301. *See also* §§ 373.413(1) and 373.414(1), Fla. Stat.

Additional Conditions for Issuance

88. The additional conditions for issuance of individual and conceptual approval ERPs are enumerated in rule 62-330.302, which, in relevant part, provides:

> (1) In addition to the conditions in Rule 62-330.301, Fla. Admin. Code, to obtain an individual or conceptual approval permit under this chapter, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, repair, removal, and abandonment of a project:
>
> (a) Located in, on, or over wetlands or other surface waters will not be contrary to the public interest, or if such activities significantly degrade or are within an Outstanding Florida Water, are clearly in the public interest, as determined by balancing the following criteria as set forth in sections 10.2.3 through 10.2.3.7 of Volume I.
>
> 1. Whether the activities will adversely affect the public health, safety, or welfare or the property of others,
>
> 2. Whether the activities will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats,
>
> 3. Whether the activities will adversely affect navigation or the flow of water or cause harmful erosion or shoaling,
>
> 4. Whether the activities will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity,
>
> 5. Whether the activities will be of a temporary or permanent nature,

> 6. Whether the activities will adversely affect or will enhance significant historical and archaeological resources under the provisions of section 267.061, Fla. Stat.; and,
>
> 7. The current condition and relative value of functions being performed by areas affected by the proposed activities.
>
> (b) Will not cause unacceptable cumulative impacts upon wetlands and other surface waters as set forth in sections 10.2.8 through 10.2.8.2 of Volume I. . .

89. Petitioner generally contended that the five applications provided reasonable assurance that the Project was clearly in the public interest under rule 62-330.302. However, the preponderance of the evidence established that the Project did not satisfy all applicable additional conditions for issuance. *See also* §§ 373.413(1) and 373.414(1), Fla. Stat.

Common Plan of Development and Stormwater Management

90. Section 2.0(a)16., Applicant's Handbook, Volume I, defines a "Common plan of development or sale" or "larger plan of other commercial or residential development" as:

> [A]ny activity that facilitates the advancement of land use (such as multiple residences, a residential subdivision, or phased site development) on the subject property, or that comprises a total land area divided into multiple lots, parcels, tracts, tiers, blocks, sites, or units, if such areas are under common ownership or control. This includes any activity on contiguous real property that comprises a total land area divided into parcels, tracts, tiers, blocks, sites, or units, and is served by a common road or road network or common stormwater management systems within that land area. Areas of land that are divided by public or private roads are considered contiguous if such areas are under common ownership or control.

91. The preponderance of the evidence demonstrated that the Project constitutes a common plan of development or a larger plan of residential development. Although Petitioner submitted multiple individual applications,

those applications were processed together and comprised five lots owned by Petitioner. Further, the Project advances the use of land in a residential subdivision, rather than simply being unimproved submerged bottoms. Lastly, the Subject Lots and adjacent lots are part of a phased site plan for the Key Haven Tenth Addition.

92. Single-family residential projects that are part of a "larger common plan of development or sale," are not exempt from meeting the ERP criteria for construction, operation, or maintenance of stormwater management facilities in order to obtain individual permits. The Project did not contain adequate information to provide reasonable assurance regarding sufficient capacity and treatment capability of a stormwater management system for this common plan of development. *See* § 403.813(1)(q)2., Fla. Stat.

93. Assuming arguendo that the Project was not a common plan of development, Petitioner failed to provide reasonable assurance that the proposed stormwater management is sufficient to prevent violations of water quantity and water quality criteria. The preponderance of the evidence demonstrated that Petitioner failed to provide any information relating to whether there was an existing stormwater treatment facility managed by the County to serve a common plan of development or single-family residences. *Id.*

Part IV of chapter 62-312

94. Part IV of chapter 62-312 pertains to the OFWs within the County. The rule criteria are "in addition to all other applicable [DEP] rules relating to [ERP] . . . under Part IV of Chapter 373, F.S." *See* Fla. Admin. Code R. 62-312.400(1). These additional rule criteria are also intended to be consistent with the PGDs set forth in section 380.0552(7).

95. Rule 62-312.410(1)(a), "General Criteria" for activities within OFW in Monroe County. The rule provides, in relevant part:

> (1) Subject to the provisions of the mitigation section of this part (Rule 62-312.450, F.A.C.), no [ERP] . . . shall be issued for any activity in [OFW] in Monroe County if such activity:

> (a) Alone or in combination with other activities damages the viability of . . . a sponge bed community . . . or marine . . . seagrass bed community. . . . For purposes of this Part a marine seagrass bed community means an area dominated by the listed biota having an aerial extent of at least 100 square feet. This paragraph does not imply that the [DEP] cannot restrict the impact on smaller areas for such species based on other [DEP] rules.

96. Rule 62-312.410(2) provides, in relevant part: "[s]ubject to the provisions of the mitigation section of this part (Rule 62-312.450, F.A.C.), no permit shall be issued for the placement of fill in [OFW] in Monroe County unless expressly authorized by this rule or unless the Department determines that under applicable rules a permit may be issued . . ."

97. Rule 62-312.450 provides:

> Notwithstanding any of the prohibitions contained in this rule, the [DEP] shall consider mitigation pursuant to Section 373.414(1)(b), F.S., and applicable [DEP] rules to determine whether the project may otherwise be permittable. In any application for mitigation, the applicant shall demonstrate before issuance of any permit for the construction of the intended project that the proposed mitigation will be effective. Mitigation shall not be permitted where it appears after due considerations that construction of the intended project will cause irreplaceable damage to the site.

98. Section 373.414(1)(b), in relevant part, provides:

> ...the [DEP], in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects that may be caused by the regulated activity. Such measures may include, but are not limited to, onsite mitigation, offsite mitigation, offsite regional mitigation, and the purchase of mitigation credits from mitigation banks . . . It shall be the responsibility of the applicant to choose the form of mitigation. The mitigation must offset the adverse effects caused by the regulated activity.

99. The preponderance of the evidence established that Petitioner did not demonstrate the mitigation proposal would offset the adverse impacts and would be effective before issuance of the permit.

100. The evidence established that the Project would impact more than 100 square feet of marine seagrass bed communities on each lot and that the Project would cause irreplaceable damage to the sites.

101. Rule 62-312.440(1)(a) provides in general that vertical seawalls, as defined by chapter 62-330, shall not be permitted within the OFW in the County.

102. Section 2.0(a)113 of the Applicant's Handbook, Volume I, adopted by chapter 62-330, defines a vertical seawall as a "seawall the waterward face of which is at a slope steeper than 75 degrees to the horizontal. A seawall with a sloping riprap covering the waterward face to the [MHWL] shall not be considered a vertical seawall."

103. The preponderance of the evidence established that the rip-rap waterward of the proposed seawalls of the Project would not come to the MHWL. Thus, the proposed seawalls would in fact be vertical seawalls.

104. The exception in section 403.813(1)(e) for restoration of seawalls at their previous locations would not apply here, where there are no existing seawalls on the Subject Lots. The Subject Lots are submerged lands with natural vegetation along the shoreline.

105. The exception in section 373.414(5)(b) for vertical seawalls when they are necessary to provide access to a watercraft would not apply here, where no mooring or access for watercrafts was included in the final Project plans.

106. In addition, rule 62-312.440(1)(b) provides:

> (b) Native aquatic vegetation shall be used for shore line stabilization, except at sites where an applicant can affirmatively demonstrate that the use of vegetation, including the existing undisturbed vegetation onsite, will not prevent erosion. The Department may allow the use of rip rap and other sloping revetments provided that:
>
> 1. No dredging and/or filling will be authorized other than that necessary for safe and efficient installation of

the revetment,

2. Filter cloth underliners shall be used for all revetments,

3. The slope of the revetment shall be no steeper than 2 Horizontal:1 Vertical,

4. No revetment shall be placed over or within a sea grass bed community; and,

5. Only rocks two feet in diameter or larger shall be used as the outer layer of a rip rap revetment.

107. The preponderance of the evidence demonstrated that rip-rap revetment would be placed over or in seagrass bed communities on each of the Subject Lots.

108. Petitioner failed to provide reasonable assurance that the Project would meet the additional requirements of Part IV of chapter 62-312.

FCMP Consistency

109. Because of the federal consistency objections raised by DEO regarding inconsistencies with the regulations governing the Florida Keys ACSC, DEO was made a co-respondent in this consolidated proceeding. *See* § 373.428, Fla. Stat. (2020)("[a]n agency which submits a determination of inconsistency to the permitting agency shall be an indispensable party to any administrative or judicial proceeding in which such determination is an issue; shall be responsible for defending its determination in such proceedings."); *see also* § 380.23(2)(a), Fla. Stat.

110. Under section 380.23(1), where certain permits and projects are subject to federal consistency review and require an ERP, issuance of the ERP automatically constitutes state concurrence that the ERP is consistent with the FCMP, which is the applicable "federally approved program." Further, when the ERP is denied, the denial automatically constitutes the state's finding that the proposed activity is not consistent with the FCMP.

111. The Project is subject to consistency review because it would also be a federally permitted activity "affecting land or water uses . . .in . . . the jurisdiction of [a] local government[s] required to develop a coastal zone protection element as provided in s. 380.24." *See* § 380.23(3)(c), Fla. Stat.

112. Under section 380.23(2), where there is no state agency with sole jurisdiction, DEP shall be responsible for the consistency determination. However, DEP shall not make a determination that the Project is consistent, if any other state agency with significant analogous responsibility makes a determination of inconsistency.

113. In this case, DEO has significant analogous responsibility as the state planning agency. Under section 380.23(6), DEO is the agency authorized to review and comment on consistency because it is charged with the implementation of statutes and rules included in the FCMP. Therefore, DEP is precluded from making a determination that the Project is consistent with the FCMP over DEO's determination of inconsistency.

114. The preponderance of the evidence in Findings of Fact 42 through 68 above demonstrated that DEO successfully defended its inconsistency determination.

Conclusions

115. The preponderance of the evidence demonstrated that Petitioner did not provide affirmative reasonable assurance that the Project would meet the ERP conditions for issuance, additional conditions for issuance, the additional criteria of part IV of chapter 62-312 and section 380.0552. The testimony also demonstrated that Petitioner did not apply for a variance or waiver of any ERP criteria.

116. DEO successfully defended its objections to approval of the ERPs because of inconsistency with the Florida Keys ACSC PGDs, including the Comp Plan policies and LDC regulations that implement them. Therefore, the Project is not consistent with the federally approved FCMP. The testimony also demonstrated that Petitioner did not apply for a variance or waiver of any applicable Florida Keys ACSC PGD, or any applicable Monroe County Comp Plan policy or LDC regulation.

RECOMMENDATION

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

RECOMMENDED that DEP enter a final order denying Petitioner's five ERP applications.

DONE AND ENTERED this 14th day of April, 2021, in Tallahassee, Leon County, Florida.

FRANCINE M. FFOLKES
Administrative Law Judge
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Division of Administrative Hearings
this 14th day of April, 2021.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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