

**ENVIRONMENTAL PROTECTION COMMISSION
OF HILLSBOROUGH COUNTY**

MANUEL CRIOLLO and TAMMY CRIOLLO,

Appellants,

vs.

EPC Case No. 20-EPC-015

**PEDER JOHNSEN and
ENVIRONMENTAL PROTECTION COMMISSION
OF HILLSBOROUGH COUNTY**

Appellees.

FINAL ORDER

In accordance with Chapter 84-446, as amended, Laws of Florida (EPC Act) and Chapter 1-2, Rules of the EPC, a hearing was held on February 18, 2021 for the Joint Motion to Dismiss and Motion for Summary Order and the assigned Hearing Officer submitted her Recommended Order (RO) to the Environmental Protection Commission of Hillsborough County (EPC) on March 15, 2021. The Recommended Order is attached as Exhibit 1. No exceptions were filed by either party. On April 15, 2021, this matter came before the Commissioners of the EPC for review and issuance of a final order.

BACKGROUND

1. Pursuant to the *Amended and Restated Interlocal agreement between the Tampa Port Authority (TPA) and the EPC* dated June 23, 2009 (TPA Delegation Agreement) the EPC was delegated the TPA's authority to process dock permit applications in accordance with the Chapter 95-488 (TPA Enabling Act) and the TPA's Submerged Lands Management (SLM) Rules.

2. On November 5, 2020, the EPC Executive Director granted the Appellee SJW Group, LLC's application for a Minor Work Permit 69410 (Permit) for the construction of a pier on jurisdictional lands (submerged lands) at 2216 S. Occident Street, Tampa, Florida (Property), which is adjacent to Appellants' property

3. The Appellants filed an appeal challenging the issuance of the permit. Shannon LaFrance was assigned as the Hearing Office to the case. An evidentiary hearing was scheduled for April 28, 2021.

4. Appellees SJW and EPC filed a Joint Motion to Dismiss and Motion for Summary Order on January 20, 2021. A motion hearing was held on February 18, 2021, via electronic video platform, to formulate final agency action on the Appellee SJW's application for marine construction activities in jurisdictional waters.

5. The Hearing Officer subsequently issued a Recommended Order (RO) on March 15, 2021 and transferred the case to the Commission to render a Final Order.

6. The Hearing Officer recommended the Commission to authorize issuance of the Permit.

7. On March 26, 2021, Appellee SJW filed a Motion for Substitution of Parties pursuant to Rule 1.260(c), Florida Rules of Civil Procedure requesting the Commission substitute Peder Johnsen in place of SJW. The Commission Counsel, on behalf of the Commission, issued an Order granting SJW's Motion for Substitution of Parties. Peder Johnsen is reflected as Appellee in this Final Order.

STANDARDS OF REVIEW FOR RECOMMENDED ORDERS

8. Pursuant to sections 1-2.35(c), (e) and (f), Rules of the EPC:

(c) If no exceptions are timely filed, the Commission shall adopt the Hearing Officer's findings of fact, and shall make appropriate conclusions of law, and render a Final Order.

(e) The Commission may reject, reverse or modify a finding of fact only if it finds that the fact is not supported by substantial competent evidence in the record.

(f) The Commission shall affirm, reverse, or modify the Hearing Officer's findings of fact, make appropriate conclusions of law, and promptly render a written Final Order thereon, provided that the Commission shall not take any action which conflicts with or nullifies any provision of the EPC Act or the rules enacted pursuant to said act.

9. The EPC local regulatory programs are not subject to Chapter 120, Florida Statutes (Administrative Procedures Act), but for purposes of EPC administrative hearings Chapter 120 jurisprudence is persuasive at a minimum.

10. The agency reviewing the RO may not reject or modify the findings of fact of a hearing officer unless they are not supported by substantial competent evidence in the record. Section 1-2.35, Rules of the EPC and Charlotte County v. IMC Phosphates Co., 18 So. 3d 1089 (Fla. 2d DCA 2009). The term “competent substantial evidence” does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, competent substantial evidence refers to the existence of some evidence (quantity) as to each essential element and as to its admissibility under legal rules of evidence. *See e.g.*, Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm’n, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996).

A reviewing agency may not reweigh the evidence presented at a final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See e.g.*, Rogers v. Dep’t of Health, 920 So. 2d 27, 30 (Fla. 1st DCA 2005); Belleau v. Dep’t of Env’tl. Prot., 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); Dunham v. Highlands County Sch. Bd., 652 So. 2d 894 (Fla. 2d. DCA 1995). These evidentiary-related matters are within the province of the hearing officer, as the “fact-finder” in these administrative proceedings. *See e.g.*, Tedder v. Fla. Parole Comm’n, 842 So. 2d 1022, 1025 (Fla. 1st DCA 2003); Heifetz v. Dep’t of Bus. Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Also, the hearing officer’s decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See e.g.*, Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co., 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); Collier Med. Ctr. v. State Dep’t of Health and Rehabilitative Services, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); Fla. Chapter of Sierra Club v. Orlando Utils. Comm’n, 436 So. 2d 383, 389 (Fla. 5th DCA 1983).

A reviewing agency thus has no authority to evaluate the quantity and quality of the evidence presented at an administrative hearing, beyond making a determination that the evidence is competent and substantial. *See, e.g.*, Brogan v. Carter, 671 So. 2d 822, 823 (Fla. 1st DCA 1996). However, scrivener’s errors may be amended when the record reflects accurately. Britt v. Department of Professional Regulation, 492 So. 2d 697, 699 (Fla. 1st DCA 1986).

11. An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So. 2d 987 (Fla. 1985). However, a hearing officer reviewing an administrative action must interpret such statute or rule de novo and may not afford deference

to agency interpretations. FLA. CONST. Art. 5 § 21. Additionally, a “District Court of Appeal reviews an agency's conclusions of law de novo and reviews the record to determine whether competent substantial evidence supports the agency's decision[.]” G.R. v. Agency for Persons with Disabilities, 45 Fla. L Weekly D 2684 (Fla. 3d DCA 2020) *unpublished*. Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are “permissible” ones. Suddath Van Lines, Inc. v. Department of Environmental Protection, 668 So. 2d 209 (Fla. 1st DCA 1996).

FINDINGS OF FACT

12. No exceptions were filed challenging the validity of the Hearing Officer’s findings of fact in the Recommended Order. In accordance with section 1-2.35(c), Rules of the EPC, the Commission shall adopt the hearing Officer’s findings of fact, with correction to the two scrivener’s errors below, because the findings of fact are supported by competent substantial evidence and no exceptions were timely filed.

13. **Scrivener’s error.** A scrivener’s error is contained in Paragraph 2 of the RO and is revised as follows: “TPA has regulatory authority over the waters proposed for the access pier and is the permitting agency for the work proposed. TPA has delegated Minor Work Permit authority and administration of Minor Work Permitting to the EPC pursuant to an Interlocal Agreement under **Section 8** of the EPC Act.”

14. **Scrivener’s error.** A scrivener’s error is contained in Paragraph 3 of the RO and is revised as follows: “The pleadings and evidence include the original and revised permit applications; the Notice of Intent to Issue Minor Work Permit, No. **69410**, dated November 5, 2020; the Notice of Appeal dated January 3, 2021; the SJW and EPC Motion; and the Appellants response dated January 29, 2021 (hereinafter "Response"). The aforesaid documents constitute Record provided with this Recommended Order.”

CONCLUSIONS OF LAW

15. No exceptions were filed challenging the validity of the Hearing Officer’s conclusions of law in the Recommended Order. The conclusions of law do not conflict with or nullify applicable provisions of law.

16. The Permit meets the standards of the EPC Act, Chapter 1-11 (Rules of the EPC), Tampa Port Authority's Enabling Act, and Submerged Lands Management Rules.

In accordance with the vote of the Environmental Protection Commission of Hillsborough County on April 15, 2021, it is

ORDERED that:

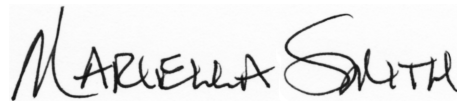
- A. The Findings of Fact and Conclusions of Law in the Recommended Order (Exhibit 1) are adopted in their entirety with correction of the scrivener's errors in Paragraph 2 and 3 of the Findings of Fact.
- B. The Recommended Order's "Recommendation" section is **AFFIRMED** and the Notice of Intent to Issue Minor Work Permit 69410 is **APPROVED**.

NOTICE OF RIGHTS

Any party to this order has the right to seek judicial review of this Final Order in accordance with Section 9 of the EPC Act and the Administrative Procedure Act, Chapter 120, part III, Florida Statutes, 1961 by filing a notice of appeal under rule 9.110 of the Florida Rules of Appellate Procedure with the clerk of the Environmental Protection Commission, EPC Legal Department, 3629 Queen Palm Dr., Tampa, FL 33619, and by filing a notice of appeal accompanied by the applicable filing fee with the Second District Court of Appeal. The notice of appeal must be filed within 30 days from the date this order.

DONE and ORDERED this 19th day of April, 2021, in Hillsborough County, Florida.

ENVIRONMENTAL PROTECTION
COMMISSION OF HILLSBOROUGH COUNTY



Mariella Smith, Chair

cc: Shannon LaFrance, Esq., Hearing Officer

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was sent via electronic mail to **Manuel and Tammy Criollo** (Appellants) at tcriollo@yahoo.com, **Kevin Reali, Esq.**, (Counsel for Appellee Peder Johnsen) at kreali@stearnsweaver.com, and Ricardo Muratti (Counsel for Appellee EPC) at murattir@epchc.org on this 19th day of April 2021.

ENVIRONMENTAL PROTECTION
COMMISSION OF HILLSBOROUGH COUNTY



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**BEFORE THE ASSIGNED HEARING OFFICER OF THE ENVIRONMENTAL
PROTECTION COMMISSION OF HILLSBOROUGH COUNTY**

MANUEL CRIOLLO and TAMMY CRIOLLO,

Appellants,

vs.

EPC Case No. 20-EPC-015

**SJW GROUP, LLC and
ENVIRONMENTAL PROTECTION COMMISSION
OF HILLSBOROUGH COUNTY**

Appellees.

RECOMMENDED ORDER

Upon due notice, on February 18, 2021, a hearing was held via the electronic platform Microsoft Teams, consistent with COVID-19 protocol, before Shannon Martin LaFrance, assigned Hearing Officer for the Environmental Protection Commission of Hillsborough County (hereinafter "EPC"), on the Joint Motion to Dismiss and Motion for Summary Order brought by Appellees SJW Group, LLC (hereinafter "SJW") and the EPC.

APPEARANCES

FOR APPELLANTS: Manuel and Tammy Criollo (hereinafter "Appellants"), Pro Se
4805 W. San Miguel St.
Tampa, FL 33629

FOR APPELLEES: Kevin Reali, Esq. for SJW Group, LLC
Truist Place
Stearns Weaver Wheeler
401 East Jackson St.
Suite 2100
Tampa, FL 33609

Ricardo Muratti, Esq.
Andrew Zodrow, Esq. for EPC
3629 Queen Palm Drive
Tampa, FL 33619

STATEMENT OF THE ISSUE

The primary issue in this case is whether the proposed access pier complies with the Tampa Port Authority (TPA) Submerged Lands Management (SLM) Rules. Specifically, did the Executive Director of the EPC err in issuing the Intent to Issue Minor Work Permit for Construction of an Access Pier No. 69410 to SJW pursuant to the SLM Rules Section V(A)(3)(f) because of the length of the pier and the possibility that existing mangroves, within which the pier will be built, may die sometime in the future.

PRELIMINARY STATEMENT

SJW applied to EPC on or about November 3, 2020 for a permit to construct an access pier on jurisdictional surface waters (hereinafter “Jurisdictional Lands”) adjacent to SJW’s property located in Hillsborough County, Florida at 2216 S. Occident St., Tampa, FL 33629, folio No. 120997-0000 (hereinafter “SJW Property”). The November 3, 2020 application was a revised application. The original application requested a larger dock with a lift. Appellants are adjacent property owners with property located at 4805 W. San Miguel St., Tampa, FL 33629, and share a riparian line with SJW. The action under review is the EPC Executive Director’s Notice of Intent to Issue a Minor Work Permit for Construction of an Access Pier, No. 69410, dated November 30, 2020, to SJW (hereinafter “Permit”). The Permit authorizes the construction of a 4’x19’ access pier on Jurisdictional Lands located in Hillsborough County, Florida.

The Appellants assert in their appeal dated January 3, 2021 (hereinafter “Notice of Appeal”) that EPC erred in issuing the Minor Work Permit because Appellants contend that the length of the pier exceeds the length permitted by “Section V.A.3. Resource Management Standards (a)” of the Tampa Port Authority Submerged Lands Management Rules. Appellants

further assert that should the mangroves that will surround the pier die in the future, then their navigation will be impeded. SJW and EPC assert that the applicable criteria are set forth in TPA SLMR Section V(A)(3)(f) Limited Shoreline Projects; all applicable dimensional and locational criteria for the access pier have been met; and SJW is entitled to the Permit as the upland riparian property owner.

SJW and EPC filed a Joint Motion to Dismiss and Motion for Summary Order on January 20, 2021, (hereinafter “Motion”) which was duly noticed for hearing and heard on February 18, 2021.

UNDISPUTED FACTS FOR PURPOSES OF THE REQUEST FOR SUMMARY ORDER

1. The EPC is a local environmental regulatory agency. The EPC is authorized to enforce the Hillsborough Environmental Protection Act, Chapter 84-446, Laws of Florida, as amended by Chapter 87-495, Laws of Florida (the “EPC Act”), and the rules promulgated by the EPC.

2. TPA has regulatory authority over the waters proposed for the access pier and is the permitting agency for the work proposed. TPA has delegated Minor Work Permit authority and administration of Minor Work Permitting to the EPC pursuant to an Interlocal Agreement under Section 9 of the EPC Act.

3. The pleadings and evidence include the original and revised permit applications; the Notice of Intent to Issue Minor Work Permit, No. 694410, dated November 5, 2020; the Notice of Appeal dated January 3, 2021; the SJW and EPC Motion; and the Appellants response dated January 29, 2021 (hereinafter “Response”). The aforesaid documents constitute Record provided with this Recommended Order.

4. No supporting affidavits were provided by Appellants, SJW or EPC.

5. The sole issues raised by Appellants in their Notice of Appeal are whether the EPC erred in issuing the Minor Work Permit because the length of the proposed access pier exceeds the length permitted by the TPA SLM Rules, and whether navigation will be impeded if the mangroves that will surround the access pier die in the future.

6. No amendments were made or sought to the Notice of Appeal.

7. The only fact issues that appear in the Notice of Appeal concern the navigable width of the affected waterbody and the impact on navigation if the existing mangroves die in the future.

8. After an examination of the pleadings and the evidence presented and by questioning the Appellants and counsel for SJW and EPC, it is determined that the following material facts exist without substantial controversy.

9. SJW applied for a permit to construct an access pier adjacent to SJW Property and in Jurisdictional Lands owned by TPA on or about November 3, 2020.

10. The length of the shoreline at SJW's Property is 33.5 feet.

11. The SJW Property is upland riparian property, adjacent to tidal waters in a canal.

12. Appellants own the property located at 4805 W. San Miguel St., Tampa, FL 33629 and share a riparian line with the SJW Property.

13. EPC issued a Minor Work Permit to SJW for Construction of an Access Pier, Permit Number 69410 (hereinafter "Permit").

14. The Permit authorizes the construction of a 76 square foot pier with the following dimensions: four (4) feet in width and nineteen (19) feet in length.

15. The EPC estimated the riparian lines for the SJW permit pursuant to the SLM Rules for purposes of ensuring the proposed pier is coming off the SJW Property at the appropriate angle and location only.

16. The SJW pier is to be built 90 degrees off a fixed seawall at the SJW Property, directly across from another fixed seawall on the other side of the canal.

17. The EPC and SJW agree that the width of the canal waters at the location of the SJW project is 92 feet as Appellants acknowledge in their Notice of Appeal.

18. The approved pier does not extend past the estimated riparian lines.

19. The tip of the approved access pier lies within existing mangroves.

20. The mangroves that will surround the approved pier are not dead or dying.

21. The Permit does not allow mooring of boats associated with the pier.

22. Appellants indicate in their Notice of Appeal that navigation of the Jurisdictional Lands will not be impeded by simply constructing the approved access pier.

23. There are no sworn affidavits of no objection filed in this matter as referenced in TPA SMLR V(A)(3)(f).

24. The parties agree that combining individual facilities into a single multi-slip dock or other access facility is not a practical alternative in this case.

CONCLUSIONS OF LAW

25. The Hearing Officer has jurisdiction over the parties to and subject matter of this proceeding pursuant to EPC's Enabling Act, 84-446, Laws of Florida, (Act) Section 9 and Rules of the Commission, § 1-2.32.

26. A permit applicant has the burden of proof to show entitlement to the requested permit or to show an exception allowed by the rules. Rules of the Commission, § 1-2.33(d).

27. Fact issues not raised by the Notice of Appeal shall be accepted as undisputed. Id.

28. Any party to an EPC appeal may move for summary final order whenever there is no genuine issue as to any material fact. Rules of the Commission, 1-2.32(i).

29. The Florida Rules of Civil Procedure are instructive. The Florida Rules of Civil Procedure provide that, after a review of the pleading and the summary judgment evidence, “ if there is no genuine issue as to any material fact...[then] the moving party is entitled to a judgment as a matter of law.” Fla.R.Civ.P. 1.510(c).

30. The SLM Rules provisions relied on by Appellants provide as follows:

“All structure(s) must be set back from riparian lines as follows: (a) Structures located on properties with a shoreline frontage of less than 65 feet must maintain a minimal structural setback distance of 10 feet from the riparian lines.” TPA SLM Rules Section V(A)(3)(a)(2).

“Docks or other structures must not extend more than twenty-five percent of the navigable width of the affected waterbody. Maximum structure extensions can be further restricted based upon site specific circumstances regarding navigational safety and existing structures.” TPA SLM Rules Section V(A)(3)(a)(3).

31. The TPA SLM Rules contains the following rule for “Limited Shoreline Projects” where an upland riparian parcel has less than 40 feet of shoreline as is the case here: An upland riparian parcel is permitted to construct a pier within ten (10) feet of a riparian line, without the consent of the adjacent property owners, if i) the pier is four (4) foot in width, ii) combining

individual facilities into a single multi-slip dock or other access facility is not a practical alternative; and iii) the proposal is consistent with all other standards and criteria found in the rule. TPA SLM Rules Section V(A)(3)(f).

32. The aforesaid TPA SLM Rules “Limited Shoreline Projects” provision permits a pier within ten (10) feet of a riparian line if the criteria set forth in the rule are satisfied. Id.

33. SJW’s proposed access pier satisfies the criteria set forth in the “Limited Shoreline Projects Rule” because i) SJW’s pier is only a single access pier of 4 feet in width, ii) the issue concerning combining individual facilities into a single multi-slip dock or another access facility is not applicable in this case as agreed by the parties, and iii) there is no genuine issue of material fact concerning the proposed access pier’s consistency with all other standards and criteria found in the rule, especially considering the limited fact issues raised by Appellant’s in their Notice of Appeal.

34. Appellant’s argument that the access pier exceeds the length permitted by the TPA SLM Rules is incorrect as a matter of law.

35. The ten (10) foot setback from riparian lines required by TPA SLMR Section V(A)(3)(a)(2)(a) must be harmonized with TPA SLMR Section V(A)(3)(f) because they are separate and distinct standards.

36. The “Limited Shoreline Projects” rule would be nullified if, as argued by Appellants, the EPC had to impose a ten-foot setback as set forth in their Notice of Appeal.

37. As a matter of law, TPA SLMR Section V(A)(3)(f) permits the upland riparian owner to encroach into the ten-foot setback required by TPA SLMR Section V(A)(3)(a)(2)(a) if the criteria set forth in the “Limited Shoreline Projects” rule are met.

38. Appellant's argument that the access pier is longer than permitted under the SLM Rules because of the navigable width of the canal in this case is also incorrect as a matter of law based on Ogden v. Truex and EPC, (EPC Final Order June 22, 2015).

39. The navigable width of the jurisdictional waters at the SJW Property is calculated by measuring seawall to seawall through the proposed access pier to the other side of the canal at 90 degrees off the shoreline. See id. The width is 92 feet as agreed by all parties.

40. Appellant's calculation that the permitted maximum length of the pier under TPA SLM Rules Section V(A)(3)(a)(3) is about 23 feet is correct if the agreed-upon width of 92 feet is used, and, therefore, the 19-foot length of the SJW access pier is permitted.

41. The Appellants' opinion that navigation will be impeded in the future by SJW's access pier if the mangroves that surround it die does not raise a genuine issue of material fact. See Romano v. City of Tampa and EPC, (EPC Final Order, Feb. 3, 2011). The death of the mangroves is speculative as is any alleged impact resulting from the death of the mangroves.

42. SJW's burden is one of reasonable assurances that its project will comply with the applicable rules. See Ogden v. Truex and EPC, (EPC Final Order June 22, 2015).

43. With respect to the argument that the mangroves may die in the future and present navigational issues under SLM Rules, the reasonable assurance burden concerns "reasonably foreseeable contingencies" and does not require "absolute guarantees." Id.

44. The Record provides reasonable assurance of compliance with applicable SLM Rules.

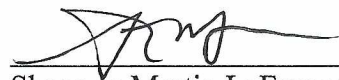
45. The pleadings and summary judgment evidence show there is no genuine issue as to any material fact and SJW and EPC are entitled to a judgment in their favor as a matter of law.

RECOMMENDATION

Based on the foregoing undisputed facts and conclusions of law it is **RECOMMENDED** that the EPC enter a Final Order upholding the Permit for the construction of an access pier on Jurisdictional Lands adjacent to SJW's Property, reflected in the Notice of Intent to Issue a Minor Work Permit for Construction of an Access Pier, No. 69410, dated November 30, 2020.

Dated: March 15, 2021

Respectfully submitted,



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