

**ENVIRONMENTAL PROTECTION COMMISSION
OF HILLSBOROUGH COUNTY**

JAMES ANDERSON,

Appellant,

vs.

EPC Case No. 22-EPC-015

**JOEL JUREN 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, the assigned Hearing Officer submitted a Recommended Order (RO) to the Environmental Protection Commission of Hillsborough County (EPC) on July 27, 2023. The Recommended Order is attached as Exhibit 1. Appellant Anderson filed “Exceptions to Recommended Order” on August 7, 2023. Appellee Juren and Appellee EPC filed a “Joint Response to Appellant James Anderson’s Exceptions to Recommended Order” on August 17, 2023. On September 21, 2023, this matter came before the Commission of the EPC to hear arguments and review of the RO, the Exceptions, the Response to the Exceptions, and its associated hearing record and to take action on the RO.

BACKGROUND

1. Appellee Juren applied to the EPC for a Miscellaneous Activities In Wetlands (MAIW) Authorization #75762 (Permit) for the purpose of nuisance vegetation control and the

creation of a swim and open water access area located along the shoreline of the property located at 10510 Sedgebrook Drive, Riverview, Hillsborough County, Florida (Property). On December 1, 2022, the EPC Executive Director issued the Permit pursuant to the EPC's Wetlands Rule, Chapter 1-11, Rules of the EPC (Chapter 1-11) and the Basis of Review for Authorization of Activities Pursuant to Chapter 1-11 – Wetlands (Basis of Review or BOR). The Permit authorized the use of herbicides to control vegetation, among other removal techniques, and contained various other conditions.

2. On January 13, 2023, the Appellant filed an Appeal pursuant to Section 1-2.30, Rules of the EPC, challenging the use of herbicides in the Permit for the control of vegetation, among other arguments. On May 17, 2023, the Appellant filed an Amended Notice of Appeal (Appeal).

3. In the RO, the Hearing Officer made findings of fact, conclusions of law, and recommended the Commission authorize issuance of the Permit.

4. As detailed above, Appellant Anderson filed exceptions to the RO pursuant to Section 1-2.35, Rules of the EPC, which allows the parties to argue exceptions and responses to the exceptions to the EPC Commission sitting as a quasi-judicial body. The Commission heard the parties' arguments on September 21, 2023.

STANDARDS OF REVIEW FOR RECOMMENDED ORDERS

5. Pursuant to Chapter 1-2, the Commission shall review the RO and issue a Final Order. Sections 1-2.35(d), (e) and (f), Rules of the EPC, state as follows:

(d) If exceptions are timely filed, they shall be heard by the Commission on reasonable notice. In such proceeding to review exceptions the Commission may hear argument from all parties on issues reasonably raised by the exceptions. Each party shall have ten minutes to argue their

exceptions and respond to another party's exceptions, unless the Commission approves a different time limit. Material questions of fact necessary to final application of the laws and rules, will be referred back to the Hearing Officer for review.

(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.

6. 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.

7. 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). If there is competent substantial evidence to support the ALJ's finding of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. Arand Constr. Co. v Dyer, 592 So. 2d 276, 280 (Fla. 1st DCA 1991).

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).

8. 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). 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

9. Appellant Anderson filed exceptions to the following Findings of Fact in the RO: Numbers 6, 18, 20, 22, 23, 25, 26, 30, and 31 and argued that the Appellant has contrary or better testimony that should have been utilized. For each Finding of Fact disputed by the Appellant there is competent substantial evidence to support the findings as detailed by the Hearing Officer in the RO. 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*, 920 So. 2d at 30. If there is competent substantial evidence to support the ALJ’s finding of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See e.g., Arand Constr. Co.*, 592 So. 2d at 280. Based on the foregoing reasons, the Commission denies all the exceptions to the Findings of Facts listed above.

10. The Appellant also argues that Finding of Fact No. 19 should be modified to include expert testimony from Ms. Chayet regarding the presence of significant habitat for state listed threatened or endangered species near the pond. The Appellant did not include this issue in his Appeal. The Hearing Officer sustained an objection by the EPC and rejected Appellant’s effort to interject that issue at the evidentiary hearing. (Transcript pages 149 – 152) Agencies do not have jurisdiction to modify or reject rulings on the admissibility of evidence. *See Martuccio v. Dep’t of Professional Regulation*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep’t of Business Regulation*, 475 So. 2d 1277, 1281-82 (Fla. 1st DCA 1985). Based on the foregoing reason, the Commission denies the exception to Finding of Fact No. 19.

11. No party submitted an exception to Finding of Fact No. 3, but the Commission identified an error as to the Folio Number of Appellant Anderson's property. The correct Folio Number is 076838-9284, as identified on Appellee EPC's Exhibit #3 introduced in the evidentiary hearing.

CONCLUSIONS OF LAW

12. Appellant Anderson filed exceptions to the following conclusions of law in the RO: Numbers 22, 23, 24, 25, 26, 29, and 31.

13. The Hearing Officer's Conclusions of Law in paragraphs 22, 23 and 24 of the Recommended Order state the following:

22. There is no specific law or rule that requires an applicant to utilize a specific *method* of Vegetation Control treatment for the creation or maintenance of a Swim and Open Water Access area under Basis of Review Section 5.2.2.

23. There is no specific law or rule that requires an applicant to utilize a specific *method* of Nuisance Vegetation Control treatment for the control of nuisance vegetation under Basis of Review Section 5.2.1.

24. EPC rules do not establish a hierarchy, preference, or requirement to utilize one method of vegetation control over another method, but they do require specific conditions and limitations to address reasonable assurance that the activities that qualify under a Section 1-11.10, no matter which method is sought by the applicant, satisfies all other applicable EPC rules.

The Appellant argues that the EPC rules require the use of hand removal, not herbicides, for nuisance vegetation control. The EPC rules in question, Chapter 1-11 and BOR, do not explicitly state an applicant must use any particular method of vegetation control. Moreover, the above Conclusions of Law do not conflict with or nullify applicable provisions of law. The Commission heard the arguments of the parties and determined that the Hearing Officer's

Conclusions of Law are reasonable interpretations of the law. Based on the foregoing reasons, the Commission denies the exceptions to Conclusions of Law Nos. 22, 23 and 24.

14. Conclusions of Law Nos. 25, 29 and 31, state the following:

25. The minimization of wetland impacts, as required by Section 1-11-09(c), is achieved through both the qualifying criteria for a MAIW permit and the addition of specific conditions. In the instance of herbicide treatment under the MAIW Permit, the specific conditions are found in Conditions 14 and 15 and generally include the requirements to: (1) use herbicides approved by the EPA for aquatic systems; (2) be used in accordance with labelling instructions; and (3) to make a reasonable effort to notify potential users of the treated waters and identify the types of herbicides and length of any use restrictions imposed by the label.

29. The Appellee Juren and Appellee EPC presented reasonable assurances that the Wetland Impact Approval complied with Chapter 1-11, Rules of the EPC, in that they presented competent, substantial evidence, through expert witness testimony, that the Nuisance Vegetation Control and the Swim and Open Water Access proposed impacts satisfy the applicable rules for authorization. Therefore, the burden shifted to the Appellant to present “contrary evidence of equivalent quality” that the MAIW Permit did not comply with EPC’s rules. Florida Dept. of Transp. v. J.W.C. Co., Inc., 396 So.2d at 789.

31. The Appellant failed to meet his burden of providing contrary evidence of equivalent quality to that presented by the Appellees. The preponderance of the evidence in this matter supports the conclusion that the MAIW Permit allowing herbicide treatment complies with Chapter 1-11, Rules of the EPC.

The Appellant argues the EPC and Appellee Juren failed to provide reasonable assurance that impacts to wetlands or other surface waters are minimized to the greatest extent practicable. The Commission has deemed by regulation that the control of nuisance vegetation under Section 1-11.09(1)(c) and 1-11.10(1)(b) is a category of activity where the adverse impact is of “nominal consequence.” As long as the MAIW criteria are met and reasonable conditions are included, it is presumed that the activity’s impact will be of nominal consequence. The Hearing Officer upon hearing the expert testimony of the EPC witnesses correctly concluded that the proposed activity

and the numerous conditions in the Permit address the minimization rule requirement of Section 1-11.09(1)(c). Moreover, as discussed above, the EPC rules do not mandate a specific methodology of vegetation control. The Hearing Officer correctly concluded based on the testimony provided, other evidence accepted in the record, and the conditions in the Permit that the Appellees have demonstrated reasonable assurance that the activity will comply with the rules of the Commission, as required by Section 1-11.06, Rules of the EPC.

The applicant's burden is "one of reasonable assurances, not absolute guarantees." Manasota-88, Inc., v. Agrico Chemical, 12 F.A.L.R. 1319, 1325 (DER 1990). The reasonable assurances must deal with reasonably foreseeable contingencies. A permit applicant is not required by Florida law to provide an "absolute guarantee" that a proposed project will not have any adverse impacts. Ginnie Spring, Inc. et al. v. Craig Watson, et al., 1999 Fla. Div. Adm. Hear. LEXIS 5830 (DEP 1999).

Based on the foregoing reasons, the Commission denies the exceptions to Conclusions of Law Nos. 25, 29 and 31.

15. The Appellant filed an exception to Conclusion of Law No. 26 arguing that the Hearing Officer should not have relied on a dictionary definition to assist her in concluding that a fact witness observation of a pair of sandhill cranes with colts near the pond does not on its face demonstrate that the pond provides significant habitat for state listed threatened or endangered species. The EPC rules do not have a specific definition for "significant habitat," just limited examples of how an animal may use significant habitat ("roosting, nesting or denning areas"). The Hearing Officer's interpretation of significant habitat as applied in Conclusion of Law No. 26 is a reasonable interpretation of Subsection 1-11.10(3)(a), Rules of the EPC. The conclusion does not conflict with or nullify the applicable rules.

Based on the foregoing reason, the Commission denies the exception to Conclusion of Law No. 26.

16. Nonetheless, the Commission makes the additional conclusion of law regarding the matter of the significant habitat. The Commission supplements Conclusion of Law No. 26 (no language is removed from the Hearing Officer's conclusion), as follows:

Moreover, the Appellant did not include in his Amended Appeal that the Permit should not be issued due to presence of significant habitat for state listed threatened or endangered species. On May 17, 2023, the parties also entered into a Joint Prehearing Stipulation (JPHS) that identified the disputed issues of fact and law that were to be addressed and litigated at the final evidentiary hearing on June 2, 2023. The Appellant attempted to introduce and argue the presence of significant habitat at the evidentiary hearing. The Hearing Officer sustained an objection by the EPC and rejected Appellant's effort to interject that issue at the evidentiary hearing. The raising of new substantive issues so late in the administrative hearing process is prejudicial. Furthermore, Florida law finds that a stipulation that limits the issues to be tried "amounts to a binding waiver and elimination of all issues not included." Delgado v. Agency for Health Care Administration, 237 So. 2d 432 (Fla. 1st DCA 2018). "Pretrial stipulations prescribing the issues on which a case is to be tried are binding upon the parties and the court, and should be strictly enforced." Lotspeich Co. v. Neogard Corp., 416 So. 2d 1163, 1165 (Fla. 3d DCA 1982) citing Gunn Plumbing, Inc. v. Dania Bank, 252 So. 2d 1 (Fla.1971). Therefore, the allegation of the presence of significant habitat is moot.

17. The Permit meets the laws and rules of the EPC Act, Chapter 1-11, and the Basis of Review.

SCRIVENER'S ERROR IDENTIFIED IN THE RECOMMENDED ORDER

18. The Commission also identifies a scrivener's error in Finding of Fact No. 3 but does not modify or reverse the finding of fact. Specifically, in Finding of Fact No. 3, the reference to "east" should be "west."

CONCLUSION

Having considered the applicable laws and standards of review in light of the Findings of Fact and Conclusions of Law set forth in the Recommended Order, hearing the arguments of the parties, being otherwise duly advised, and in accordance with the vote of the Environmental Protection Commission of Hillsborough County on September 21, 2023, it is

ORDERED that:

- A. The Recommended Order is adopted in its entirety, except as modified by the above rulings regarding Finding of Fact No. 3 and Conclusion of Law No. 26, and is incorporated by reference herein; and
- B. The Recommended Order's "Recommendation" section is affirmed. The Permit is approved and expires three years from execution of this Final Order.

JUDICIAL REVIEW

Any party to this order has the right to seek judicial review of this order in accordance with Section 9 of the Hillsborough County Environmental Protection Act, Chapter 84-446, as amended, Laws of Florida, and the Administrative Procedure Act, Chapter 120, part III, Florida Statutes, 1961. Judicial review shall be done within the time and manner prescribed by the Florida Appellate Rules. Pursuant to Fla. R. App. P. 9.110, jurisdiction of the court shall be invoked by filing a notice with the clerk of the Environmental Protection Commission of Hillsborough County (EPC), EPC Legal Department, 3629 Queen Palm Dr., Tampa, FL 33619, and by filing the notice accompanied by the applicable filing fee with the Second District Court of Appeal within 30 days

from the date this order is filed with the clerk of the EPC.

DONE and ORDERED this 25th day of September 2023, in Hillsborough County, Florida.

ENVIRONMENTAL PROTECTION
COMMISSION OF HILLSBOROUGH COUNTY

Joshua Wostal

Commissioner Joshua Wostal, Chair

FILED ON THIS DATE PURSUANT TO SECTION 9.020, FLORIDA RULES OF APPELLATE PROCEDURE WITH THE DESIGNATED AGENCY CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Jeannette Figari

AGENCY CLERK

09/25/2023

DATE

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was sent via electronic mail to **Joel Juren** (Appellee) at mrbjuren@gmail.com ; **Jane Graham** (counsel for Appellant) at jane@sunshinecitylaw.com and jane@jcgrahamlaw.com ; and **T. Andrew Zodrow, Esq.** at zodrowa@epchc.org and **Ruth “Beth” Le, Esq.** at leb@epchc.org (Co-Counsel for Appellee EPC) on this 25th day of September 2023.

ENVIRONMENTAL PROTECTION
COMMISSION OF HILLSBOROUGH COUNTY

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EXHIBIT 1

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

JAMES ANDERSON,

Appellant,

vs.

EPC Case No. 22-EPC-015

**JOEL JUREN and
ENVIRONMENTAL PROTECTION
COMMISSION OF HILLSBOROUGH COUNTY,**

Appellees.

**RECOMMENDED ORDER
WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Upon due notice, on June 2, 2023, a final hearing in the above-captioned matter was held in Tampa, Florida, by Patricia A Petruff, Esquire, assigned Hearing Officer for the Environmental Protection Commission of Hillsborough County (hereinafter "EPC"), on the Appellant James Anderson's (hereinafter "Appellant") Amended Notice of Appeal of the Miscellaneous Activities In Wetlands (MAIW Application) executed by the EPC Executive Director (hereinafter "Executive Director") on December 1, 2022 authorizing the applicant Joel Juren (hereinafter "Appellee Juren") to impact wetlands in Hillsborough County. The basis of the appeal was that the Permit did not comply with the requirements of Section 1.11, Rules of the EPC; specifically that the use of herbicides did not result in the least environmentally adverse impacts nor did it minimize wetland and surface water impacts to the greatest extent possible.

APPEARANCES

For Appellant: Jane Graham, Esq.
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For EPC Executive Director: T. Andrew Zodrow, Esq.
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For Joel Juren: Pro Se
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STATEMENT OF THE ISSUE

This case involves the application for and subsequent issuance of Miscellaneous Activities In Wetlands Authorization #75762 (hereinafter “MAIW Permit”) for the purpose of nuisance vegetation control and the creation of a swim and open water access area located along the shoreline of the property located at 10510 Sedgebrook Drive, Riverview, Hillsborough County, Florida (hereinafter “Property”). The EPC reviewed the application under Chapter 1-11, Rules of the EPC (Wetlands Rule) and the Basis of Review for Authorization of Activities Pursuant to Chapter 1-11 – Wetlands (“Basis of Review” or “BOR”) referenced within Section 1-11.06(2), Rules of the EPC. Pursuant to Section 1-11.10(1), Rules of the EPC, nuisance vegetation removal and herbaceous vegetation removal for minor swim access areas not exceeding 25 feet of shoreline qualify as activities that are deemed of nominal consequence to a wetland and are eligible to be permitted as a “Miscellaneous Activities In Wetlands” Authorization. On December 1, 2022, the EPC Executive Director issued the MAIW Permit pursuant to Sections 1-11.10(1)(b) and 1-11.10(1)(c), Rules of the EPC. An initial/original Notice of Appeal was submitted by the Appellant on January 13, 2023. Subsequently, the Appellant, by and through his counsel, filed a motion to amend the appeal which was granted and on May 15, 2023 the

Appellant, submitted an Amended Notice of Appeal (hereinafter “Amended Appeal”). The question raised in the Amended Appeal was whether the authorized method of treatment in the MAIW Permit, the use of herbicides for vegetation control, complies with Section 1-11.09(1)(c), Rules of the EPC.

PRELIMINARY STATEMENT

On December 1, 2022, the EPC Executive Director issued the MAIW Permit pursuant to Sections 1-11.10(1)(b) and 1-11.10(1)(c), Rules of the EPC. The MAIW Permit authorized the use of herbicides to control vegetation for the purpose of nuisance vegetation removal and for the creation of a 25-foot Swim and Open Water access area on the pond. On January 13, 2023, the Appellant filed an appeal of the issuance of the MAIW Permit. On May 15, 2023, the Appellant filed an Amended Appeal pursuant to EPC Rule 1-2.30 (b) challenging the use of herbicides in the MAIW Permit for the control of vegetation. EPC filed a Motion for Summary Recommended Order which was denied on June 2, 2023. An evidentiary hearing was heard on June 2, 2023.

The EPC ordered a transcript of the final hearing and the parties were given fifteen (15) days from the date of filing of the transcript in which to file proposed recommended orders and argument. Transcript Page Numbers 261-262 [hereinafter (Tr. p 261-262)]. The transcript was provided to the parties on July 3, 2023. The transcript was provided by the EPC to the Hearing Officer on July 4, 2023. By agreement of the parties, the due date for proposed recommended orders was established as July 19, 2023. All parties submitted their proposed recommended orders on July 19, 2023 as required.

WITNESSES AND EXPERTISE

Appellee EPC called Dessa Clock who was accepted as an expert in the application of the EPC's wetland regulations, specifically Chapter 1-11 and the Basis of Review for purposes of miscellaneous activities in wetlands permitting (Tr. p 31, lines 20-25, p 33, lines 13-14) and Chantelle Lee who was accepted as an expert in the application of the EPC's wetland regulations, specifically Chapter 1-11 and the Basis of Review for purposes of miscellaneous activities in wetlands permitting (Tr. p 67, lines 7-12, p 69, lines 25-26, p 70, lines 1-7). Appellee EPC also called the applicant Joel Juren as a fact witness. The applicant Joel Juren also made a statement as a witness for himself. The Appellant called Deborah Chayet who was accepted as an expert witness in botany and nuisance plant management and removal. (Tr. p 147, lines 22-25) and the Appellant James Anderson as a fact witness.

EXHIBITS

JOINT EXHIBITS OF THE PARTIES:

1. Judicial Notice Documents
 - a. Special Act, Chapter 84-446, Laws of Florida, as amended by Chapter 87 495.
 - b. EPC Administrative Procedures Rule Chapter 1-2, current version August 9, 2012.
 - c. EPC Wetlands Rule Chapter 1-11, current version July 17, 2008.
 - d. EPC Basis of Review for Authorization of Activities Pursuant to Chapter 1-11 – Wetlands, current version May 20, 2022.
 - e. EPC Final Order Medero v. EPC, January 28, 2013
 - f. EPC Final Order Ogden v. Truex and EPC, June 22, 2015
 - g. EPC Final Order Vance v. Vath and EPC, August 8, 2015
 - h. EPC Final Order Criollo v. Johnsen and EPC, April 19, 2021
2. Miscellaneous Activities in Wetlands Permit (MAIW Permit) dated December 1, 2022

APPELLANT'S EXHIBITS:

1. File Worksheet
2. Contract with Solitude Lake Management
3. Email dated July 15
4. October 5th letter
5. Resume – Debbie Chayet

6. Photo of Flood Control Structure
7. Photograph of Rhexia
8. Photograph of Giant Bulrush
9. Photograph of Sagitaria
10. Photograph of Dogfennel
11. Photograph of Mock Bishopweed
12. Photograph of Hydrocotyle
13. Photograph of Elephant's Foot
14. Photograph of Water Oak
15. Photograph of Hempvine
16. Photograph of Four Spotted Pennant
17. Photograph of fragrant water lily and pewter grass
18. Photograph of flock of Black-bellied Whistling Ducks
19. Photograph of Phyla Nodiflora
20. Photograph of Sandhill Cranes
21. Photograph of Sandhill Cranes
22. Photograph
23. SWFWMD ERP Plans – “Boyette Springs Section B, Unit 19
24. Composite of Photos
25. Findings Report and articles – Debbie Chayet
26. EPC Plans historical (Boyette Springs Master Drainage Plan)

APPELLEE EPC's EXHIBITS:

1. Resume – Chantelle Lee
2. Resume – Dessa Clock
3. Aerial of Property
4. MAIW Application #75762
 - a. Application submitted September 23, 2022
 - b. 75401_ Site Inspection Notes and Photos – Used for 75762
 - c. 75762_ Site Photos
 - d. Request for Additional Information
 - e. 75762_ Revised Site Plan
 - f. File Worksheet

APPELLEE JUREN'S EXHIBITS

1. Abstract of Article
2. Information from EPA website about pesticide registration

FINDINGS OF FACT

1. Appellee EPC is a local environmental regulatory agency authorized to enforce the Hillsborough County Environmental Protection Act, Chapter 84-446, Laws of Florida (“EPC Act”), and the rules promulgated thereunder, including specifically the EPC Wetland Rule Chapter 1-11, in Hillsborough County Florida. (Joint Pre-hearing Stipulation of the parties dated May 17, 2023, hereinafter JPFS, page 6)

2. Appellee Juren owns the Property, more specifically identified as Folio #076836-7916, with physical address of 10510 Sedgebrook Drive, Riverview, FL 33659. (JPFS, page 8, Joint Exhibit 2, Tr. p 108, lines 23-24)

3. Appellant Anderson owns upland property located east of the Property, identified as Folio #076838-5150, with a physical address of 10514 Sedgebrook Drive, Riverview, FL 33659 (hereinafter “Appellant Property”). (JPFS, page 8, Tr. p 239, lines 3-4)

4. Both Appellant Anderson’s property and Appellee Juren’s property as well as other lots in the subdivision are located adjacent to and border on a pond.

5. On September 23, 2022, Appellee Juren submitted a Miscellaneous Activities In Wetlands permit application (hereinafter “MAIW Application”) for nuisance vegetation control and swim and open water access activities at the Property. (JPFS, page 8, Appellee EPC Exhibit 4, Tr. p 72, line 15)

6. In reviewing the MAIW Application EPC expert Chantelle Lee reviewed the history of the project site and history of the folio parcel number along with a review of aerial imagery of the property (Tr. p 73).

7. The MAIW application review confirmed jurisdictional wetlands are onsite (Tr. p 74, lines 2-9).

8. EPC expert Chantelle Lee observed in August of 2022 that nuisance and/or exotic vegetation exists on the shoreline of the Property owned by Appellee Juren. (JPHS, page 8, Joint Exhibit 2, Tr. p 77, lines 1-5)

9. The MAIW Application proposed two types of wetland impacts that involve “clearing” of wetlands: 1) 25-ft wide Swim and Open Water Access; and 2) Nuisance Vegetation Control: removal and maintenance of wetland vegetation. (JPHS, page 8, Joint Exhibit 2)

10. The MAIW Application was reviewed by EPC staff and the MAIW Permit for the above described activities was issued on December 1, 2022. (JPHS, page 8, Joint Exhibit 2)

11. Condition #1 of the MAIW Permit states “[i]n areas outside of the 25-foot wide swim and open water access corridor, only those plant species listed in the table above are authorized for removal.” The “table above” lists the following: “Vines, Torpedo grass, Peruvian primrose willow, Dogfennel, and Cuban bulrush.” (JPHS, page 8, Joint Exhibit 2)

12. Vines, Torpedo grass, Peruvian primrose willow, Dogfennel, and Cuban bulrush are listed as nuisance vegetation and qualify for removal from wetlands under Section 1-11.10(1)(b), Rules of the EPC. (Tr. p 76, lines 21-25, p77, lines 1-5)

13. The MAIW Permit allows the method of vegetation control to be hand removal, hand tools and/or herbicides. (Joint Exhibit 2)

14. The Appellant’s arguments are limited to the proposed use of herbicide treatments and not related to hand removal or hand tools for the control of vegetation. (JPHS, page 9)

15. The MAIW Permit requires re-planting in the nuisance vegetation control area to ensure erosion control and to ensure that native vegetation revegetates in the area. (Joint Exhibit 2, Tr. p 77, Lines 9-14)

16. To ensure there are no offsite impacts, Condition #18 of the MAIW Permit states “The work performed under this authorization shall not be conducted on any property, other than that owned by the Applicant, without the prior written approval of that property owner. (JPHS, page 8, Joint Exhibit 2, Tr. p 49, Lines 6-15, Tr. p 84, lines 1-22)

17. The location of the Swim and Open Water Access area on the Property is not disputed. (JPHS, page 8)

18. Although Appellant’s expert Chayet testified that prior unpermitted spraying in the pond may have resulted in bio accumulation in the pond, no evidence, such as analysis of soil samples, was provided to substantiate this position.

19. At the hearing, Mr. Anderson testified that a pair of sandhill cranes with colts were observed utilizing the pond.

20. The conditions in the MAIW Permit, specifically1, 4-19, and 21, ensure that the impacts are minimized to the greatest extent practicable under Section 1-11.09(1)(c), Rules of the EPC. (Tr. p 37-38, 77-78)

21. For the Swim and Open Water Access portion of the MAIW Permit, that 25-foot size is dictated by rule, however, EPC staff ensured that the area would be located in the appropriate and best location on the Property. (Tr. p 78, lines 8-22)

22. The conditions in the MAIW Permit ensure that the impacts are conducted, located, designed and/or constructed so that they cause the least environmentally adverse impacts under Section 1-11.09(1)(c), Rules of the EPC. (Tr. p 78-79)

23. Specifically, MAIW Permit condition 14 provides that:

“[a]ll herbicide proposed for use must be approved for use in aquatic systems by the Environmental Protection Agency (EPA), and must be applied in accordance with the label directions. If herbicides are proposed for use in removing nuisance species, care

must be taken so that only the target nuisance species are treated. If native non-nuisance species are removed or destroyed by this treatment, replanting of these species will be required in addition to the replanting required in this permit. Any re-planting of unauthorized native non-nuisance species that were removed must be completed within 30 days of the unauthorized destruction/removal or within 30 days of written request of the EPC. Other conditions may be requested to ensure re-planting success.” (Joint Exhibit 2)

24. In addition, Condition 15 provides that “[t]he Applicant shall make a reasonable effort to notify potential users of the treated waters listing the types of herbicides and length of any use restrictions imposed by the label. Prior notification shall be accomplished by notices distributed to residents or signs posted access point(s) near the authorized area.” (Joint Exhibit 2, Tr. p 45, lines 24-25, p 76, lines 1-13)

25. Permit conditions, including but not limited to Numbers 14 and 15, provide reasonable assurance that any impacts from the use of herbicide treatment are minimized to the greatest extent practicable. (Joint Exhibit 2, Tr. p 77-78, 83)

26. EPC expert Chantelle Lee conducted a cumulative impact study under Section 1-11.09(2), Rules of the EPC, for the Nuisance Vegetation Control, however, an in depth cumulative impact consideration is not required when considering the cumulative impacts of proposed development, ie., nuisance vegetation removal, in combination with other nuisance vegetation removal which have been or may be proposed in the same drainage basin results is an overall benefit to the environment. This is because nuisance vegetation removal is encouraged and native plants are required to be re-planted resulting in a benefit to the wetland. The subject Nuisance Vegetation Control satisfies the cumulative impact analysis. (Tr. p 34-35, p 76, lines 1-11)

27. In addition, the specific size limitation of 25-feet for the Swim and Open Water Access addresses the cumulative impact consideration under Section 1-11.09(2), Rules of the

EPC as the rule specifically identifies a size allowance for *all* waterfront property owners. (Tr. p 76, lines 1-11)

28. Although not raised in the Amended Appeal, EPC staff ensured that the MAIW Permit satisfied all conditions in Section 1-11.10(3), Rules of the EPC. (Tr. p 79-81)

29. EPC staff rely on the U.S. Environmental Protection Agency (EPA) for determining what herbicides can be safely applied to aquatic systems. EPC staff also rely on the EPA's labelling instructions to ensure there are no offsite impacts and to ensure wetland impacts are minimized. (Tr. p 39, 48-49, 59, 84-85)

30. In the expert witness Chantelle Lee's opinion and to a reasonable degree of certainty, the MAIW Permit, along with the conditions contained therein, provide reasonable assurance that herbicide treatment is minimized and will be conducted in a manner that causes the least environmentally adverse impacts. (Tr. p 85-86)

31. In the expert witness Chantelle Lee's opinion and to a reasonable degree of certainty, the MAIW Permit along with the conditions contained therein, for the nuisance vegetation control and the swim and open water access activities provide reasonable assurance that the activity will comply with the Commission rules including Chapter 1-11 and the Basis of Review. (Tr. p 86)

CONCLUSIONS OF LAW

1. The Hearing Officer has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 9 of the Hillsborough County Environmental Protection Act, Chapter 84-446, Laws of Florida, as amended (EPC Act), and Section 1-2.30, Rules of the EPC.

2. Appellee EPC is a local regulatory agency authorized to enforce the EPC Act and the Rules promulgated thereunder, including specifically the EPC Wetland Rule Chapter 1-11, in Hillsborough County, Florida.

3. Pursuant to Section 1-2.33(d), Rules of the EPC, this administrative hearing is conducted as a *de novo* proceeding.

4. Because an administrative proceeding “is intended to formulate final agency action and not to review action taken earlier and preliminarily, the hearing officer may consider changes or other circumstances external to the application.” Hamilton County v. Florida Department of Environmental Regulation, 587 So.2d 1378 (Fla. 1st DCA 1991); Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.3d 778 (Fla. 1st DCA 1981) and McDonald v. Department of Banking and Finance, 346 So.2d 569, 584 (Fla. 1st DCA 1977). Similarly, an administrative proceeding pursuant to Part IV of the EPC Administrative Rule Chapter 1-2 is intended to formulate final agency action and is also conducted *de novo*. Thus, the Hearing Officer may consider evidence supporting the application and the MAIW Permit that was submitted at hearing, even if not included in the application, and may recommend changes or modifications to the proposed final agency action.

5. Pursuant to Section 9 of the EPC Act, any person aggrieved by an action of the Executive Director has the right to appeal that decision to the Commission, which consists of the duly elected members of the Hillsborough County Board of County Commissioners. In addition, Section 1-2.30, Rules of the EPC, states that any person who has received a written decision of the Executive Director *pursuant to* the EPC Act (meaning that the person is specifically entitled to notice pursuant to the EPC Act) and any person whose interests protected by the EPC Act are

adversely affected by an action or decision of the Executive Director, may obtain administrative review of the basis for the action or decision by appealing to the Commission.

6. The EPC's Wetland Rule 1-11.05 requires written authorization from the Executive Director to impact jurisdictional wetlands in Hillsborough County.

7. Development in wetlands is defined as "any manmade change to real property, including but not limited to dredging, filling, grading, paving, excavating, *clearing*, timbering, ditching or draining." (emphasis added) Section 1-11.01(2)(b), Rules of the EPC.

8. As identified in Section 1-11.02(2)(b), the Nuisance Vegetation Control and the Swim and Open Water Access constitute "clearing" in wetlands and thus are defined as "proposed development" under Section 1-11.09(2), Rules of the EPC.

9. Section 1-11.06(1), Rules of the EPC states "[u]pon request to the Executive Director or authorized agent to review a proposed development within wetlands or other surface water, an applicant must demonstrate reasonable assurance that the activity will comply with the adopted rules of the [EPC]."

10. Section 1-11.06(2), Rules of the EPC states "[t]he Executive Director will review any application for wetland and other surface water impacts based on the standards in this rule and those provided in the currently adopted Basis of Review for Authorization of Activities Pursuant to Chapter 1-11 – Wetlands [Basis of Review]."

11. Pursuant to Section 1-11.07, Rules of the EPC, wetland impacts will be authorized when the impact is necessary for reasonable use of the property *and* only if the environmental benefits provided by the affected wetland are adequately protected by specified conditions and time limitations which would be imposed upon approval of the development.

12. Section 1-11.09(1)(c), Rules of the EPC provides the following:

[o]nly development under the following circumstances shall be determined to provide adequate protection of the environmental benefits: and . . . (c) Where the adverse impact is of nominal consequence to the wetland or other surface water, as defined by Section 62-340.600, F.A.C., the impact will be reviewed as a “Miscellaneous Activities in Wetlands” under Section 1-11.10. Wetland or other surface water impacts under this authorization shall be minimized to the greatest extent practicable, unless defined herein by size, and shall be conducted, located, designed and/or constructed so that they cause the least environmentally adverse impacts.

13. Section 1-11.09(2), Rules of the EPC requires that a consideration “shall be made of cumulative impacts of proposed development to the wetland system in combination with other developments which have been or may be proposed in the same drainage basin.”

14. Section 1-11.10, Rules of the EPC addresses those wetland impacts that are of “nominal consequence to wetlands” and qualify for a “Miscellaneous Activities in Wetlands Authorization” and identifies other conditions for approval.

15. Section 1-11.10(1)(b), Rules of the EPC identifies nuisance and exotic vegetation removal in wetlands (Nuisance Vegetation Control) as a nominal consequence and thus qualifies under a MAIW permit. The rule further states “[p]hased removal of the vegetation or replanting with wetland desirable species may be necessary to ensure erosion control and / or to ensure the area is adequately re-vegetated.”

16. Section 1-11.10(1)(c), Rules of the EPC also identifies “herbaceous vegetation removal for minor swim access areas not to exceed 25 feet of shoreline” (Swim and Open Water Access) as a nominal consequence and thus qualifies for a MAIW permit.

17. Section 1-11.10(2), Rules of the EPC states “[d]evelopment activities in wetlands that qualify under this section [Nuisance Vegetation Control and Swim and Open Water Access] do not need to satisfy the reasonable use requirement in section 1-11.07 or mitigation under section 1-11.08.”

18. Section 1-11.10(3), Rules of the EPC provides three general conditions for these MAIW permits but no dispute was raised on these three issues in the Amended Appeal.

19. Sections 5.2.1 and 5.2.2 of the Basis of Review further address both Nuisance Vegetation Control and Swim and Open Water Access that were approved in the MAIW Permit.

20. Section 5.2.1 of the Basis of Review titled “Nuisance Vegetation Control” states:

The EPC encourages property owners to remove or control nuisance and exotic plant species from wetlands and other surface waters on their property. An application listing the proposed activities must be submitted for review and approval by the EPC staff. The application must list the plant species proposed for removal or control and the method to be used. Re-planting with native species shall be required where necessary to ensure adequate erosion control and to encourage native re-vegetation.

21. Section 5.2.2, Basis of Review titled “Swim and Open Water Access” provides that a “maximum 25-foot wide vegetation clearing zone may be maintained from the shoreline to open water for swim access, open water access, and construction/location of facilities. Native tree species removal is prohibited under this section.”

22. There is no specific law or rule that requires an applicant to utilize a specific *method* of Vegetation Control treatment for the creation or maintenance of a Swim and Open Water Access area under Basis of Review Section 5.2.2.

23. There is no specific law or rule that requires an applicant to utilize a specific *method* of Nuisance Vegetation Control treatment for the control of nuisance vegetation under Basis of Review Section 5.2.1.

24. EPC rules do not establish a hierarchy, preference, or requirement to utilize one method of vegetation control over another method, but they do require specific conditions and limitations to address reasonable assurance that the activities that qualify under a Section 1-

11.10, no matter which method is sought by the applicant, satisfies all other applicable EPC rules.

25. The minimization of wetland impacts, as required by Section 1-11-09(c), is achieved through both the qualifying criteria for a MAIW permit and the addition of specific conditions. In the instance of herbicide treatment under the MAIW Permit, the specific conditions are found in Conditions 14 and 15 and generally include the requirements to: (1) use herbicides approved by the EPA for aquatic systems; (2) be used in accordance with labelling instructions; and (3) to make a reasonable effort to notify potential users of the treated waters and identify the types of herbicides and length of any use restrictions imposed by the label.

26. The observation of a pair of sandhill cranes with colts utilizing the pond does not on its face demonstrate that the pond provides a “significance habitat” for state listed threatened or endangered species. The adjective “significant” is defined in Oxford Learner’s dictionary as “large or important” or “to have an effect or to be noticed”. A definition of “significant habitat” from www.lawinsider.com’s dictionary provides a concise definition. That definition states as follows:

“Significant habitat means areas with one or more of the following attributes: comparatively high wildlife density; high wildlife species diversity; important wildlife nesting or breeding areas; wildlife seasonal ranges or refuge areas along migratory routes; important movement corridors for wildlife; and limited availability or high vulnerability. These areas typically contain some feature that is particularly attractive to wildlife which in most instances is water. To be considered a significant habitat, the area must be of sufficient size or functionally linked to another significant habitat or critical habitat to allow continued functioning of the area at the level described in this definition considering existing and proposed developments of noncritical areas in the vicinity.”

27. If a regulatory agency gives notice of intent to grant a permit application, the applicant has the initial burden at a formal administrative hearing of going forward with the

presentation of a prima facie case of the applicant's entitlement to a permit. Once a prima facie case is made, the burden of going forward shifts to the party objecting to the action to present competent substantial evidence, consistent with the allegations of the petition, that the applicant is not entitled to the permit. Unless the objector presents "contrary evidence of equivalent quality" to that presented by the applicant and agency, the permit must be approved. Rules 1-2.33(d), Rules of the EPC; Florida Dept. of Transp. V. J.W.C. Co. Inc., 396 So. 2d at 789-790.

28. The applicant's burden is "one of reasonable assurances, not absolute guarantees." Manasota-88, Inc., v. Agrico Chemical, 12 F.A.L.R. 1319, 1325 (DER 1990). The reasonable assurances must deal with reasonably foreseeable contingencies. A permit applicant is not required by Florida law to provide an "absolute guarantee" that a proposed project will not have any adverse impacts. Ginnie Spring, Inc. et al. v. Craig Watson, et al., 1999 Fla. Div. Adm. Hear. LEXIS 5830 (DEP 1999); Save our Suwannee, Inc. v. Robert Piechocki and Dept. of Env. Protection, 18 F.A.L.R. 1467, 1472 (Fla. DEP 1996); Powell v. U.S. Navy and Dept. of Env. Protection, 15 F.A.L.R. 3386, 3394 (Fla. DEP 1993). The necessary reasonable assurance in a particular case that a proposed project will comply with applicable rules is a mixed question of fact and law that must be made, in the final analysis, by the EPC. See, e.g., Sierra Club, et al v. Department of Env. Protection, et al, 18 F.A.L.R. 2257, 2260 (Fla. DEP 1996); Save Our Suwannee, Inc. vs. Piechocki and Dept. of Env. Protection, 18 F.A.L.R. 1467, 1471 (Fla. DEP 1996); VQH Development, Inc. v. Dept. of Environmental Protection, et al, 15 F.A.L.R. 3407, 3438 (Fla. DEP 1993); Barringer, et al v. E. Speer and Associates, Inc., and Department of Environmental Regulation, 14 F.A.L.R. 3660, 3667 n. 8 (Fla. DER 1992).

29. The Appellee Juren and Appellee EPC presented reasonable assurances that the Wetland Impact Approval complied with Chapter 1-11, Rules of the EPC, in that they presented

competent, substantial evidence, through expert witness testimony, that the Nuisance Vegetation Control and the Swim and Open Water Access proposed impacts satisfy the applicable rules for authorization. Therefore, the burden shifted to the Appellant to present “contrary evidence of equivalent quality” that the MAIW Permit did not comply with EPC’s rules. Florida Dept. of Transp. v. J.W.C. Co., Inc., 396 So.2d at 789.

30. No third party, merely by filing petition seeking administrative hearing after an agency has indicated its intent to issue permit, should be permitted to require an applicant to completely prove anew all items in application down to last detail. Florida Dept. of Transp. V. J.W.C. Co. Inc., 396 So.2d at 780. A “[p]arty seeking administrative hearing after DER has indicated intent to issue permit must identify areas of controversy and allege **factual basis** for contention that facts relied upon by applicant fall short of carrying reasonable assurances burden case upon the applicant.” Id. (emphasis added).

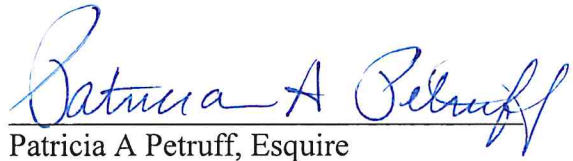
31. The Appellant failed to meet his burden of providing contrary evidence of equivalent quality to that presented by the Appellees. The preponderance of the evidence in this matter supports the conclusion that the MAIW Permit allowing herbicide treatment complies with Chapter 1-11, Rules of the EPC.

RECOMMENDATION

Based upon the foregoing findings of facts and conclusions of law it is RECOMMENDED that the EPC enter a Final Order upholding the December 1, 2022 MAIW Permit.

Respectfully submitted,

Dated: July 27, 2023



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