

**BEFORE THE ENVIRONMENTAL PROTECTION COMMISSION OF
HILLSBOROUGH COUNTY**

**EVELYN ROMANO, WARREN DIXON
and ANDREA BRABOY,**

Appellants,

vs.

EPC CASE NO. LEPC09-005

**CITY OF TAMPA, DEPARTMENT OF
PUBLIC WORKS, and ENVIRONMENTAL
PROTECTION COMMISSION OF
HILLSBOROUGH COUNTY,**

Respondents.

FINAL ORDER

On February 19, 2010, Hearing Officer John Voelpel, Esq., appointed by the Environmental Protection Commission of Hillsborough County (Commission), submitted to the Commission, and all other parties to this matter, a Recommended Order. On April 15, 2010, this matter came before the Commission for the purpose of considering the parties' exceptions to the Recommended Order. At the April 15, 2010 public hearing the Commission remanded the case to the Hearing Officer. On May 18, 2010, the Commission issued a Remand Order described below. On January 27, 2011, the Commission heard additional argument regarding the Recommended Order, and states as follows:

BACKGROUND

1. On January 2, 2008, the Executive Director issued a Wetland Impact Approval and Mitigation Agreement authorizing wetland impacts for the proposed construction, by the Respondent City of Tampa, of a road and bridge over Interstate 75 referred to as the “New Tampa Boulevard Extension.” The Appellants filed a challenge pursuant to Section 9 of the EPC enabling act, Chapter 84-446, Laws of Florida, as amended, (hereinafter “EPC Act”) challenging the Executive Director’s approval. The Appellants Warren Dixon and Andrea Braboy were dismissed from the administrative case. A final hearing on the matter was held on January 7, 2010.

3. The Hearing Officer submitted a Recommended Order on February 19, 2010, wherein the Hearing Officer recommended dismissing the Appellant’s appeal based on lack of standing to challenge the Wetland Impact Approval and Mitigation Agreement and supported the Executive Director’s decision on the merits of the case.

4. In accordance with section 1-2.35, Rules of the Commission, a final order hearing was held before the Environmental Protection Commission on April 15, 2010, wherein oral argument was presented by all parties.

5. On April 15, 2010, the Commission remanded the matter back to the Hearing Officer. On May 18, 2010, the Commission issued a Remand Order that stated that the purpose of the remand was to make additional Findings of Fact and Conclusions of Law to determine whether the public notice requirements of the Commission were complied with in issuance of the Wetland Permit and whether consideration of public health, safety, and welfare issues were correctly considered by the Executive Director in the issuance of the Wetland Permit.

6. On November 15, 2010, after the parties had submitted memoranda of law, the Hearing Officer issued a Recommended Order After Remand finding the public notice requirements of the Commission were complied with in issuance of the Wetland Permit and public health, safety, and welfare issues were correctly considered by the Executive Director in the issuance of the Wetland Permit.

7. On November 29, 2010, the Appellant filed Exceptions to the Recommended Order After Remand. On December 9, 2010, the Respondent City of Tampa and the Executive Director filed a Joint Response to the exceptions filed by the Appellant.

8. On January 27, 2011, having considered the Recommended Order and the Recommended Order After Remand entered by the Hearing Officer, the exceptions filed by the Appellant, and the responses to the exceptions filed by the Respondents, the oral argument presented by all the parties, and being otherwise fully advised on the premises:

IT IS ORDERED that

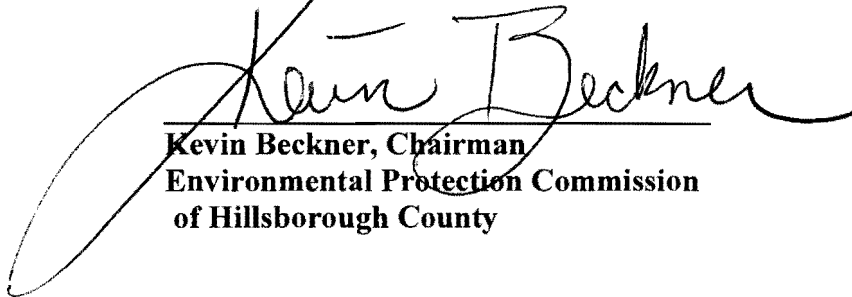
The Hearing Officer's Recommended Order of February 19, 2010, as amended by the Recommended Order After Remand dated November 15, 2010, each attached hereto, is adopted in its entirety. Furthermore, the Appellant's exceptions dated March 1, 2010 and November 29, 2010 are hereby rejected.

NOTICE OF RIGHTS

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 II, 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 within 30 days from the date of the final administrative decision becoming an order of the Commission.

DONE and ORDERED this 3rd day of February, 2011.



**Kevin Beckner, Chairman
Environmental Protection Commission
of Hillsborough County**

To:
Andrew Zodrow, Esq.
Attorney for Respondent EPC Executive Director

Warren Dixon, Esq.
Attorney for Appellant Evelyn Romano

Douglas Manson, Esq. and Michael Wynn, Esq.
Attorneys for Respondent City of Tampa

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

**EVELYN ROMANO and WARREN DIXON and
ANDREA BRABOY,
Appellants**

EPC#: LEPC09-005

vs.

**CITY OF TAMPA, DEPARTMENT OF PUBLIC WORKS
and ENVIRONMENTAL PROTECTION COMMISSION
OF HILLSBOROUGH COUNTY,
Respondents.**

RECOMMENDED ORDER

The hearing in this appeal was held on January 7, 2010, in Tampa, Florida, before John Voelpel, the assigned Hearing Officer of the Environmental Protection Commission of Hillsborough County (hereinafter the "EPC"). The Appellant in this appeal is Evelyn Romano. On the motion of the City of Tampa (hereinafter "Tampa") as supported by the Executive Director of the EPC (hereinafter the "Executive Director"), Warren Dixon and Andrea Braboy were dismissed as appellants pursuant to an order entered in this appeal on September 28, 2009, and pursuant to affirming orders entered in this appeal on October 14, 2009.

APPEARANCES:

For the Appellant: C. Warren Dixon III, Esq.
16006 Burnham Way
Tampa, FL 33647

For Tampa: Douglas Manson, Esq.
Michael Wynn, Esq.
Manson Law Group, P.A.
1101 W. Swann Ave.
Tampa, Florida 33606

For the EPC
Executive Director: T. Andrew Zodrow, Esq.
Environmental Protection Commission of
Hillsborough County
3629 Queen Palm Dr.
Tampa, FL 33619

STATEMENT OF THE ISSUES:

The issues to be determined in this appeal are (1) whether the Appellant’s Notice of Appeal was timely filed; (2) whether the Appellant has standing to challenge the January 2, 2008, EPC Wetland Impact Approval and Mitigation Agreement (hereinafter the “Wetland Permit”) (Exhibit 1); and (3) if Appellant does have legal standing to challenge the Wetland Permit, then the issue is whether Tampa has provided reasonable assurance that the "proposed impact to the wetland is necessary for the reasonable use of the Applicant's property" under the EPC enabling law at Chapter 84-446, Laws of Florida, as amended (hereinafter the “EPC Act”) (Exhibit 3), under Chapter 1-11 Wetlands (Exhibit 4) of the rules

promulgated by the EPC (hereinafter the "EPC Rules") pursuant to the authority of the EPC Act, and under Chapter III of the adopted Basis of Review for Authorization of Activities Pursuant to Chapter 1-11–Wetlands (hereinafter the "BOR") (Exhibit 5).

PRELIMINARY STATEMENT:

On January 2, 2008, the Executive Director issued the Wetland Permit to Tampa approving an estimated 2.2 acres of wetland impact for the construction of the New Tampa Boulevard Extension (hereinafter the "NTBE") which begins at the current western dead end of New Tampa Boulevard in New Tampa and bridges over Interstate 75 to the dead end of Commerce Boulevard. The Wetland Permit included the findings that (1) the "proposed impact to the wetland is necessary for the reasonable use of the Applicant's property" and (2) the mitigation plan "would provide adequate protection of the environmental benefits" of the wetland under the requirements under EPC Rules, Sections 1-11.08 and 1-11.09(1)(b).

On April 27, 2009, Appellants Evelyn Romano, Warren Dixon and Andrea Braboy, filed a Notice of Appeal pursuant to EPC Rules, Section 1-2.30 (b) challenging the Wetland Permit. The parties engaged in discovery that concluded with depositions in November and December of 2009. On August 31, 2009, Tampa filed motions to dismiss all three appellants. On September 1, 2009, the Executive

Director filed a Notice of Partial Joinder to Tampa's motions to dismiss Appellants Warren Dixon and Andrea Braboy. All parties filed memoranda of law prior to the September 24, 2009, hearing held on Tampa's motions and on other motions filed in this appeal. In addition to affidavits filed by appellants Warren Dixon and Andrea Braboy, all parties provided oral argument at that hearing. On September 28, 2009, the Hearing Officer issued his Decision and Order that granted Tampa's motions to dismiss Warren Dixon and Andrea Braboy. Tampa's motion to dismiss Appellant Romano was denied.

On September 29, 2009, Appellants Warren Dixon and Andrea Braboy filed Requests for Rehearing on Dismissal of Notice of Appeal and with those requests filed their motions for leave to amend the Notice of Appeal. On that same date, Appellant Romano filed her Request for Rehearing and also moved to amend the pleadings. On October 14, 2009, the Hearing Officer issued Decisions and Orders that denied those Requests and Motions. The parties filed their Joint Prehearing Statement (hereinafter the "Stipulation"; Hearing Officer's Pleadings Clip No. 67) on December 8, 2009.

Motions in Limine were filed by the Appellant and Tampa. All parties again had the opportunity to file memoranda of law and all parties provided oral argument at the December 22, 2009, hearing held on those motions. On December 28, 2009 the Hearing Officer issued Decisions and Orders that denied the

Appellant's motion and granted, in part, Tampa's motion. On January 4, 2010, Appellant filed a Motion for Reconsideration of Decision on Rule 1-11.09(1). The Hearing Officer denied that motion on the record before the beginning of the hearing (Tr. 6-10).

The hearing on this appeal was held on January 7, 2010. At the hearing, Tampa presented the expert testimony of Stephen W. Daignault, P.E. and the Executive Director presented the expert testimony of Michael S. Thompson. The Appellant called Richard D. Garrity, Ph.D. and Stephen W. Daignault, P.E. as hostile witnesses and presented their testimony. The Appellant presented the testimony of Evelyn Romano and Benjamin M. Adams. The Appellant also offered Andrea Braboy as an expert witness. However, both Tampa and the Executive Director objected to that testimony as expert testimony and those objections were sustained. Ms. Braboy then presented lay testimony.

The transcript of the hearing (hereinafter the "Tr.") was filed on January 25, 2010 and all parties submitted Proposed Findings of Facts and Conclusions of Law on February 8, 2010.

STATEMENT OF THE POSITIONS OF THE PARTIES:

APPELLANT :

The Appellant contends that she has standing because she has current use and enjoyment of the wetlands that will be impacted and is in imminent danger of losing that use and enjoyment as soon as the construction of the NTBE begins. The Appellant further contends that the harm that will occur to her is of the nature that Chapter 84-446 and the Rules of the Environmental Protection Commission are designed to prevent and that she will no longer have that use and enjoyment after the NTBE impacts the wetlands.

The Appellant contends that Tampa and the Executive Director have failed to meet the requirements of the EPC Act and EPC Rules, Sections 1-11.07 and 1-11.09 that wetlands impact be permitted only when the taking of the wetland is for a reasonable use; and that the decisions made regarding the wetlands be made in the interests of public health, safety, and welfare. The Appellant contends that the needs statements provided by Tampa in its application for the Wetland Permit for the NTBE are not true and do not meet the interests of public health, safety and welfare; and, therefore, the use of the wetlands is not a reasonable use. Appellants also argue that Tampa did not consider alternatives to the NTBE that would have met Tampa's needs without impact on the wetlands at issue.

Further, the Appellant contends that the National Environmental Policy Act (42 USCA §4321 et seq.) (hereinafter “NEPA”) was violated by the deliberate subdividing of the East-West Connector project into separate components to avoid conducting environmental studies for the entire route of the Connector (which has included the bridge and the widening of New Tampa Boulevard for over a decade).

RESPONDENTS:

It is the position of Tampa and the Executive Director that Tampa has provided reasonable assurances that the proposed wetland impacts meet the rule criteria under the EPC Wetland Rule, EPC Rules, Chapter 1-11 because reasonable use of land for the NTBE bridge and associated roadway cannot be accomplished without affecting the wetlands and the necessary wetland impacts have been minimized on the property by avoidance and minimization through the alignment of the road. The road is necessary because for several decades, the area has experienced tremendous growth primarily as a result of numerous residential developments. The construction of a bridge over I-75 on the subject property has been a part of the Hillsborough County Metropolitan Planning Organization (hereinafter the “MPO”) Long Range Transportation Plan (hereinafter the “MPO Plan”) since 1985 through to the present and is considered to be an integral part of Hillsborough County's future transportation system. This designation establishes the NTBE as the only reasonable use of the land. The land was dedicated to Tampa

for the specific purpose of being used for a bridge crossing over 1-75. It is the position of Tampa and the Executive Director that Tampa has provided reasonable assurances that its application for the Wetland Permit has met all applicable EPC statute and rule criteria for issuance.

The Respondents further contend that the Appellant does not have legal standing to bring this administrative appeal. The Wetland Permit does not authorize any activity that would impact the Appellant's environmental interests. The Appellant is not "aggrieved" or "adversely affected" by the Wetland Permit as required by Section 9 of the EPC Act and by EPC Rules, Section 1-2.30(a) in order to have standing to appeal the Executive Director's decision to issue the Wetland Permit.

WITNESSES:

Tampa: Stephen W. Daignault, P.E. (expert witness) – Tr. 34-78.

Executive Director: Michael S. Thompson (expert witness) – Tr. 79-128.

Appellant: Stephen W. Daignault, P.E. (hostile witness) – Tr. 146-167.

Richard D. Garrity, Ph.D. (hostile witness) – Tr. 129-146.

Evelyn Romano – Tr. 168-209.

Andrea A. Braboy – Tr. 210-266, 277-281.

Benjamin M. Adams – Tr. 266-277.

FINDINGS OF FACT:

1. The EPC is a local environmental regulatory agency authorized to enforce the Hillsborough County Environmental Protection Act, Chapter 84-446, Laws of Florida, as amended (herein the "EPC Act"), and the rules promulgated thereunder (herein the "EPC Rules"), including specifically the EPC Wetland Rule, Chapter 1-11, in Hillsborough County, Florida. (Stipulation, p.9).
2. On March 28, 2005, Tampa applied for an EPC authorization to impact an estimated 2.2 acres of jurisdictional wetland in Hillsborough County, Florida. (Stipulation, p.9).
3. The subject wetland impact is for the construction of a bridge to extend existing New Tampa Boulevard from its current terminus just east of Interstate 75 to Commerce Park Boulevard at its current terminus just west of Interstate 75. (Stipulation, p.9; Exhibit 2A, p. 10 of 79 (hereinafter "Exhibit 2A, p.10"))).
4. The construction project referenced in paragraph 3 above is known as the New Tampa Boulevard Extension roadway and bridge (herein the "NTBE") and is a total of approximately 0.7 miles long. (Stipulation, p. 9; Exhibit 2A, p.10).

5. The March 28, 2005, Tampa application states in part: "Over the years the area of New Tampa, located in the City of Tampa, has experienced significant development that has impacted the existing roadway system for this portion of Hillsborough County, Florida. ... Due to concerns regarding the existing and projected traffic conditions for the New Tampa area, the City of Tampa is planning to extend New Tampa Boulevard from its existing terminus east of Interstate 75 (I-75), westward over the interstate and resulting in a connection with Commerce Park Boulevard." (Exhibit 2M, p. 1).
6. The buildable area on the property on which the NTBE is proposed to be constructed is very limited based on the length and width of the property. (Exhibit 2A, p.10; Tr. 97).
7. The 2.2 acres of jurisdictional wetland property impacted under the Wetland Permit is located in the New Tampa area of Hillsborough County on both sides of Interstate 75 as depicted in Tampa's application for the Wetland Permit (Stipulation, p.9; Exhibit 2A, p.10) and include what have been identified in Tampa's application as Wetland 1/1A (hereinafter "Wetland 1/1A") on the east side of Interstate 75 and Wetlands 2A, 3, 5 and 7 on the west side of Interstate 75 (Exhibit 2A, p.10).
8. The impact of the NTBE on Wetland 1/1A on the east side of Interstate 75 is

- approximately 0.62 acres. (Exhibits 2HH; 2A, p. 14 of 79).
9. The remaining impact of the NTBE on Wetlands 2A, 3, 5 and 7 on the west side of Interstate 75 is approximately 1.56 acres. (Exhibits 2HH; 2A, p. 14 of 79).
 10. Tampa has reduced the wetland impacts to the minimum amount necessary. (Tr. 56– 57).
 11. A portion of Wetland 1/1A within the footprint of the proposed NTBE was previously mitigated as part of the West Meadows subdivision development where the Appellant resides. (Tr. 94-95, 168).
 12. On September 4, 2007, the Executive Director issued a conceptual approval that found that the NTBE was necessary for the reasonable use of the subject parcel therefore authorizing the wetland impacts proposed conditioned upon entry of a final wetland impact approval and mitigation agreement. (Stipulation, p.9-10)
 13. On January 2, 2008, the Executive Director issued the Wetland Permit authorizing the 2.2 acres of permanent wetland impact. (Stipulation, p.10).
 14. The Wetland Permit included the Executive Director's recommendation that Tampa "publish at its own expense the following notice of this agency action in a newspaper of daily circulation in Hillsborough County, Florida, so as to provide constructive notice to potentially aggrieved parties." (Exhibit 1, p.2).

15. On March 7, 2009, Appellant Evelyn Romano filed a letter with EPC requesting an extension of time to file a Notice of Appeal. (Stipulation, p.10).
16. On March 23, 2009, the General Counsel for EPC entered an order granting the request for extension of time to file a Notice of Appeal on the Wetland Permit until April 30, 2009. (Stipulation, p.10).
17. On April 27, 2009, the Appellant filed an administrative appeal of the Wetland Permit. (Stipulation, p.10).
18. On May 1, 2009, Tampa published public notice of the Wetland Permit approval in the Tampa Tribune, a newspaper of general circulation.
19. Tampa has projected that the NTBE will increase traffic volumes on New Tampa Boulevard from 4117 vehicles per day (Exhibit 13, page 1, numbered in original as page 2) to between 28,000 to 34,000 vehicles per day in 2025 (Exhibit 2M, chart, last page; Tr. 127).

Standing:

20. The Appellant resides at 19117 White Wing Place, Tampa, Hillsborough County, Florida in West Meadows subdivision which is east of Interstate 75. (Stipulation, p.10; Tr. 168-169).

21. The Appellant lives approximately 1.5 miles from the site of the proposed Wetland 1/1A impact for the construction of the NTBE. (Stipulation, p.10; Tr. 168-169).
22. The Appellant has been an environmentalist all of her life. (Tr. 169-171).
23. No evidence of the Appellant's membership in environmental organizations or other similar environmental activities was presented at the hearing. (Tr. 168-209).
24. The Appellant presented lay testimony about the possibilities of future harm to wildlife; of future pollution; of future adverse impact on public health, safety and welfare; of future noise; of future nuisances; and of other future impacts of the NTBE; however, no expert testimony was offered to substantiate these possibilities.
25. The Appellant's recreational activities include running (about 5 to 6 miles), distance walking (about 7 to 8 miles) or bicycling almost daily. (Tr.169-171).
26. The Appellant only recreates in the vicinity of Wetland 1/1A along Meadow Pine Drive and Duquense Drive and does not use or encounter the remainder of the NTBE impacted wetlands. (Exhibit 2A, p.10; Tr. 168-171, 198-200).
27. In part, the Appellant's exposure to Wetland 1/1A consists of her viewing that wetland between the houses of other property owners on Duquesne

Drive in order to see trees in the wetlands. (Tr. 199-201, 208). None of Wetland 1/1A that the Appellant observes while looking between houses will be cleared for construction of the NTBE. (Exhibit 9 and 2B - see New Tampa Boulevard Wetlands Map; Tr. 93, 105-106, 205).

28. The only exposure of the Appellant to that portion of Wetland 1/1A that will be impacted by the NTBE consists of her viewing the current west end of New Tampa Boulevard. This part of Wetland 1/1A, where construction will occur, has already been cleared due to the previous installation of a water main on the site proposed for the NTBE. (Exhibit 9 and 2B - see New Tampa Boulevard Wetlands Map; Tr. 93, 105-106, 205). This exposure is similar to the exposure of anyone driving, walking, running or bicycling past the current west end of New Tampa Boulevard. (Tr. 199-201, 208).
29. The opportunity for public comment was offered just prior to the close of the hearing and none was presented. (Tr. 283-284).

Reasonable Assurance of Reasonable Use:

30. The Wetland Permit included the finding that (1) the “proposed impact to the wetland is necessary for the reasonable use of the Applicant’s property” and (2) the mitigation plan “would provide adequate protection of the environmental benefits” of the wetland, meaning the proposed mitigation

satisfied the requirements under EPC Rules, Sections 1-11.08 and 1-11.09(1)(b). (Stipulation, p. 10; Exhibit 1, p.2).

31. The Appellant only challenged whether the proposed impact to the wetland is necessary for the reasonable use of Tampa's property. (Stipulation, p. 10; Tr. 27).
32. The Appellant did not challenge the mitigation calculation submitted by Tampa in its application for the Wetland Permit under the State Uniform Mitigation Assessment Method (Rules 62-345.200-900, F.A.C.) (hereinafter "UMAM") adopted by reference by the EPC Rules, Section 1-11.08(1). (Stipulation, p.11; Tr. 58:14-18).
33. As part of a development agreement between Atlantic Gulf and Tampa, Atlantic Gulf dedicated the property proposed for construction of the NTBE to Tampa. (Exhibit 2QQ. p. 7-8, ¶ 4; Tr. 53– 54).
34. Other development agreements between developers and Tampa provided that impact fees would be paid by the developers and could be used to build or expand roads, including construction of the NTBE. (Exhibit 2QQ; Tr. 55).
35. The development and density of West Meadows subdivision was dependent upon the construction of the NTBE. (Tr. 151).
36. The Hillsborough County Metropolitan Planning Organization's (herein the "MPO") 2025 Long Range Transportation Plan (herein the "MPO Plan")

includes the NTBE in the same location as proposed by Tampa in its application for the Wetland Permit. (Stipulation, page 11; Exhibit 7 – see map 5-2; Tr. 50).

37. The Florida Department of Transportation (hereinafter the “FDOT”) considers the NTBE to be an integral part of Hillsborough County’s future transportation system. (Exhibit 2KKK).

38. The EPC Act and the EPC Rules require the Executive Director to determine reasonable use on the basis of information provided by the applicant; the applicant is required to “demonstrate reasonable assurance” (EPC Rules, Section 1-11.06) that “reasonable use of the land cannot be accomplished without affecting the wetland, and only if the environmental benefits provided by the affected wetland are adequately protected ...” (EPC Rules, Section 1-11.07).

39. The Executive Director relies upon the information submitted by the applicant and then assesses that information to determine whether reasonable assurance has been demonstrated by the applicant; in the issuance of the Wetland Permit, the Executive Director determined that reasonable assurance had been demonstrated on the basis of the extensive application submitted by Tampa (Exhibit 2A through 2QQQ; Tr. 104).

40. Tampa and the Executive Director both rely on the MPO and FDOT for transportation planning, including, whether or not to construct roads and their placement. (Tr. 49-53, 98, 145).
41. Tampa has obtained the required approvals and/or permits from Southwest Florida Water Management District, Army Corp of Engineers, and FDOT that are necessary to proceed with construction of the NTBE. (Exhibits 2N, 2S, & 2PP; Tr. 59).
42. The NTBE is fully funded and Tampa intends to proceed with construction of the NTBE. (Tr. 55, 59-60).
43. The NTBE is a reasonably foreseeable, non-speculative land use which is suitable for the subject parcel of property, and which is compatible with adjacent land uses. (Tr. 59-60, 93).
44. The EPC only considers public health and safety issues in the context of determining whether an impact is necessary for the protection of the public health and safety (i.e. – allowing a road to be constructed in a more linear fashion, even though it impacts a wetland, because curving the road to miss the wetland would endanger motorists) (Tr. 99-100, 109, 110, 115, 135).
45. All parties in this appeal stipulated that the final hearing to be held in this appeal is a de novo proceeding. (Tr. 15, 16, 19, 26).

46. The property on which the NTBE is to be constructed is identified as a road right-a-way. (Tr. 94).
47. The existing development on the parcel includes utilities along the road right-a-way and it is convenient to co-locate utilities and roads. (Tr. 93-94, 105-106).
48. A portion of the preexisting wetland, Wetland 1/1A, has already been permitted and impacted in anticipation of the construction of the road. (Exhibit 9, Tr. 94-97, 105-106).
49. Commerce Park Blvd. and New Tampa Blvd. are currently dead end roads located at the proposed terminal ends of the NTBE which will connect the two roadways as originally planned. (Exhibit 2A, p.10; Exhibit 7, map 5-2; Tr. 40, 42, 95-97).
50. Based on the special circumstances of the property identified in the above paragraphs, the wetland impacts for the NTBE are necessary for reasonable use of the property. (Tr. 104).
51. The Executive Director relied on the pertinent information and special circumstances affecting the development of the parcel of property which included the history of the property as proposed for a road right-a-way in finding the wetland impacts are necessary for reasonable use of the property. (Tr. 97, 98).

52. Tampa demonstrated reasonable assurances that the reasonable use of the land included in its March 28, 2005, application cannot be accomplished without affecting the involved wetlands as approved in the Wetland Permit.

CONCLUSIONS OF LAW:

53. The assigned Hearing Officer has jurisdiction over the parties to, and the subject matter of, this proceeding pursuant to Section 9 of the EPC Act and pursuant to EPC Rules, Section 1-2.30.

54. The Hearing Officer's scope of review under Section 9 of the EPC Act is stated in Section 6 of that act which states "The hearing officer shall hear appeals of actions or decisions of the environmental director and determine all factual disputes relating to compliance with this act and rules and regulations promulgated pursuant to" the EPC Act.

55. The EPC is the local regulatory agency authorized to enforce the EPC Act and the EPC Rules, including specifically the EPC Wetland Rule, EPC Rules, Chapter 1-11, in Hillsborough County, Florida.

Timeliness:

56. The Appellant's Notice of Appeal was timely; in this appeal Henry v. State Dept. of Administration, 431 So.2d 677, 680 (Fla. 1st DCA 1983), SWS Partnership v. Florida Dept. of Corrections, 567 So.2d 1048, 1050

(Fla. 5th DCA 1990) and Wentworth v. State Dept. of Environmental Protection, 771 So.2d 1279, 1281 (Fla. 4th DCA 2000) control the implementation of Section 9 of the EPC Act and EPC Rules, Section 1-2.30.

Standing:

57. To demonstrate legal standing to challenge a decision of the Executive Director, an appellant must show that (1), pursuant to Section 9 of the EPC Act, she/he is aggrieved by the action or decision complained of, and (2), pursuant to EPC Rules, Section 1-2.30(a), she/he is a person whose interests, that are protected by the EPC Act, are adversely affected by that action or decision.

58. Therefore, to demonstrate standing, a party must show she/he will be aggrieved or adversely impacted by the decision of the Executive Director. EPC Rules, Section 1-2.30(c)(1) requires the appeal to include a statement of “how the Appellant will be aggrieved or how his or her interests will be adversely affected by the Executive Director’s determination”.

59. Although there are no final orders of the EPC that clearly define “aggrieved” or “adversely affected” in terms of who may challenge EPC final agency action, the EPC’s Final Order in the Jozsi v. Winterroth and EPC, (EPC Final Order, October 1, 2007) (which adopted the Recommended

Order dated May 31, 2007, in toto) held that in order to obtain standing to challenge an environmental decision or permit, a third party appellant must show (1) that the appellant will suffer injury in fact which is of sufficient immediacy to entitle the appellant to a hearing under the appropriate law, in this matter Section 9 of the EPC Act, and (2) that the injury is of a type or nature which the proceeding is designed to protect. Friends of Matanzas v. Department of Environmental Protection, 729 So.2d 437, 439 (Fla. 5th DCA 1999) and Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981).

60. The first prong of the test as cited in Jozsi addresses the degree of injury and the second prong addresses the nature of the injury. Id. at 482. In addition, the party alleging injury must show that the interest adversely affected exceeds in degree the general interest in community good shared by all persons. City of Ft. Myers v. Splitt, 988 So.2d 28, 31-32 (Fla. 2d DCA 2008).

61. Under the first prong of the standing test, the Appellant must show that she will suffer injury in fact which is of sufficient immediacy to entitle her to a hearing. The Appellant lives 1.5 miles from Wetland 1/1A and observes this property by looking in between the houses of other property owners while

she runs, walks, or bikes. No clearing or construction will occur in this part of Wetland 1/1A.

62. The only impact that Appellant will see is the portion of Wetland 1/1A at the present dead end of New Tampa Boulevard which was previously mitigated for under the West Meadows subdivision development agreement and has already been cleared due to the installation of the water line on the property. In addition, this impact will be no different for the Appellant than for the general community.

63. The Appellant has failed to provide any evidence that she will suffer an injury in fact of sufficient immediacy from the implementation of the Wetland Permit. Appellant's speculation that she will suffer "harm" by the impacts because she runs, walks or bikes in the vicinity of the wetlands does not constitute an injury in fact of sufficient immediacy to entitle Appellant to a hearing. Jozsi v. Winterroth and EPC, (EPC Final Order October 1, 2007); Ameristeel Corp. v. Clark, 691 So.2d 473, 477-478 (Fla. 1997); International Jai-Alai Players Association v. Florida Pari-Mutuel Commission, 561 So.2d 1224, 1225 (Fla. 3rd DCA 1990); Florida Society of Ophthalmology v. State Board of Optometry, 532 So.2d 1279, 1285 (Fla. 1st DCA 1988); and Village Park Mobile Homes Association, Inc. v. Department of Business Regulation, 506 So.2d 426, 434 (Fla. 1st DCA 1987).

64. Under the second prong of the standing test applied in Jozsi, the injury must be of a type or nature that the proceeding is designed to protect. The Appellant is not an owner of property which is adjacent to the impacted wetlands. The only alleged injury is the lack of the view of a partially cleared utility corridor that will now have a road leading through the parcel. The view will not substantially change for the Appellant or the community other than the change from a cleared utility corridor to a road.
65. This administrative proceeding is unable to protect the Appellant from such an injury because it is not an injury that the EPC Act is designed to protect. Under the second prong of the standing test applied in Jozsi, the Appellant has failed to allege an injury that is of the type or nature that the proceeding is designed to protect. Jozsi, EPC Final Order October 1, 2007; Ameristeel Corporation, 691 So.2d at 477-78; and Agrico Chemical Co., 406 So.2d at 482.
66. Appellant is not an owner of property adjacent to the impacted wetlands and has no interest that would exceed in degree the general interest in community good shared by all persons. Although property owners adjacent to a proposed development could have standing, even a group of concerned citizens with a general interest would not. Florida Rock Properties v. Keyser, 709 So.2d 175, 177 (Fla. 5th DCA 1998) (quoting Southwest Ranches

Homeowners Ass'n, Inc. v. Broward County, 502 So.2d 931, 934 (Fla. 4th DCA 1987). In Florida Rock, the plaintiff, who did not live adjacent to the involved wetlands but who had a proven lengthy history of environmental activities, was found to be without standing because there was no specific injury other than that the county would not be “as bucolic as it once was.” Id. The court concluded that the property owner was a citizen with an interest in the environment and nothing more. Id. While the Appellant may enjoy outdoor activities and have a concern for the environment, Appellant has not shown that her interest would exceed the general interest in community good shared by all persons.

67. Based on the facts and law, Appellant lacks standing to bring this appeal.

68. Even if the Appellant had standing to bring this appeal, the appeal fails on the merits.

Reasonable Assurance of Compliance with the EPC Rules:

69. The EPC's Wetland Rule at EPC Rules, Section 1-11.05 requires written authorization from the Executive Director to impact jurisdictional wetlands in Hillsborough County to conduct development activities identified in the EPC Rules, Section 1-11.02(2)(a).

70. The standard of review for authorization from the EPC for wetland impacts in Hillsborough County is whether the applicant “demonstrated reasonable

assurance that the activity will comply with the adopted rules of the Commission.” (EPC Rules, Section 1-11.06). The criteria for authorization by the EPC of wetland impacts in Hillsborough County is whether the wetland impact is necessary for reasonable use of the property as provided by EPC Rules, Section 1-11.07, and whether the environmental benefits provided by the wetland are adequately protected. This standard of review states (1) "authorization may be given to conduct proposed development affecting wetlands only if reasonable use of the land cannot be accomplished without affecting the wetland", and (2) "only if the environmental benefits provided by the affected wetland are adequately protected by specific conditions and time limitations which would be imposed upon approval of development". The EPC definition of "reasonable use" and the guidelines for its application in EPC wetland permitting are set forth in the BOR (pursuant to EPC Rules, Section 1-11.06) at Chapter III, 3.1.1, 3.2.1 and 3.2.2.

71. Under Section 3.1.1 of the BOR, an applicant must reduce the wetland impacts to the minimum amount necessary. The wetland impacts approved in the Wetland Permit have been reduced to the minimum amount necessary.
72. The existing development on, and the current use of the property identified in the above findings (utilities on the proposed road right-a-way, wetland impacts already approved and mitigated, connection of two dead end roads,

and history of the parcel) support the conclusion that the wetland impacts on Wetland 1/1A (and also Wetlands 2A, 3, 5 and 7) are necessary for reasonable use of the property. (BOR Section 3.2.1(c)).

73. The long and narrow buildable area of the parcel dedicated to Tampa specifically for construction of the NTBE is not suitable for other uses. These and the other facts identified in the above findings support the conclusion the wetland impacts are necessary for reasonable use of the property. (BOR Section 3.2.1(d)).

74. The other pertinent information affecting the development of the parcel identified in the above findings (MPO Plan designation and FDOT's opinion that the NTBE is an integral part of Hillsborough County's transportation plan) supports the conclusion the wetland impacts are necessary for reasonable use of the property. (BOR Section 3.2.1(k)).

75. Chapter III of the BOR supports the finding that the proposed wetland impacts are necessary for reasonable use of the property and that those impacts were appropriately authorized by the Executive Director under EPC Rules, Section 1-11.07.

76. The Appellant stipulated that she is not challenging the mitigation plan or its calculation under the UMAM that was submitted by Tampa in its application for the Wetland Permit and included in that permit. Tampa

submitted its mitigation plan in fulfillment of EPC Rules, Section 1-11.09(1)(b) and, therefore, in fulfillment of the requirement of "adequate protection" under EPC Rules, Section 1-11.07. The Appellant argues that compliance with all subrules (1)(a) through (1)(e) of EPC Rules, Section 1-11.09 are required to show adequate protection. However, because those subrules are separated by the word "or," they are alternative means of demonstrating adequate protection.

77. Therefore, Tampa has met the second part of the EPC Rule 1-11.07 test by providing "adequate protection" of environmental benefits through its mitigation plan that is included in the Wetland Permit.

78. 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 and requires the presentation of 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. EPC

Rules, Section 1-2.33(d); Florida Dept. of Transp. v. J.W.C. Co. Inc., 396 So. 2d 278, 789-790 (Fla. 1st DCA 1981).

79. Tampa and the Executive Director presented reasonable assurances that the Wetland Permit complied with EPC Rules, Chapter 1-11 in that they presented competent, substantial evidence, through expert witness testimony, that the wetland impacts were necessary for reasonable use of the property, and that the proposed mitigation for those impacts was appropriate. Therefore, the burden shifted to the Appellant to present “contrary evidence of equivalent quality” that the Wetland Permit did not comply with the EPC Rules. Florida Dept. of Transp. v. J.W.C. Co., Inc., 396 So.2d at 789.

80. The Appellant failed to meet her burden of providing contrary evidence of equivalent quality to that presented by Tampa and the Executive Director. The Appellant presented lay opinion testimony related to traffic congestion, traffic accidents, school bus routes, and emergency vehicle response time which are outside the scope of the EPC Act, the EPC Rules and the standard of review for approval of a wetland permit. Further, lay opinion on expert matters is generally not probative or admissible. §90.701 Fla. Stat. (2009); Kolp v. State, 932 So.2d 1283, 1284 (Fla. 4th DCA 2006). Also, compliance — with NEPA and consideration of alternatives are outside the above scope. In

addition, the Appellant's burden cannot be met by mere speculation of what might happen.

81. The preponderance of the evidence in this appeal supports the conclusion that the Wetland Permit complies with EPC Rules, Chapter 1-11.

82. Tampa demonstrated reasonable assurances of compliance with EPC Rules, Chapter 1-11 Wetlands, including, but not limited to, that the use of the land referenced in Tampa's March 28, 2005, application cannot be accomplished without affecting the involved wetlands as approved in the Wetland Permit.

Consequences of Appellant's Notice of Appeal:

83. 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, 1387-1388 (Fla. 1st DCA 1991); Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d at 787; 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 Rules, Chapter 1-2 is intended to formulate final agency action and is also conducted *de novo*. All of the parties to this matter have stipulated that the final hearing was a *de novo* proceeding. Thus, the hearing

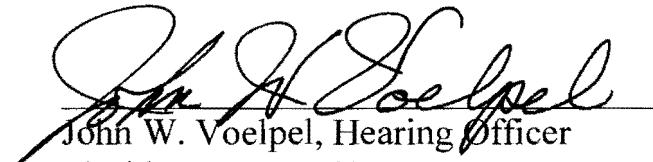
officer may consider evidence supporting the application that was submitted at hearing, even if not included in the application, and may recommend changes or modifications to the proposed final agency action.

84. Further, the Wetland Permit provided for an expiration date of March 4, 2010, a time period of two years and two months from the original date of issuance. (Exhibit 1). Due to the de novo nature of the final hearing, the final agency action was rendered a *proposed agency action* when the petition was filed by the Appellant. The request for hearing filed by the Appellant commenced a de novo proceeding which is “to formulate final agency action not review action taken earlier and preliminarily.” See McDonald v. Department of Banking and Finance, 346 So.2d 569 at 584; (Tr. 14). Therefore, the Wetland Permit is as if it had never issued, and, consequently, upon issuance in this proceeding of a Final Order sustaining the Wetland Permit, that permit should be effective for a period of two years and two months from the date of the EPC’s Final Order. Counsel for the Executive Director acknowledges that the EPC’s Final Order should extend the expiration date. (Tr. 20-21).

Based upon the foregoing findings of facts and conclusions of law, it is recommended that:

- A. The EPC enter a Final Order dismissing the Notice of Appeal of Appellant Romano based on the lack of standing, and
- B. The EPC, in its Final Order dismissing this appeal, issue the Wetland Impact Approval and Mitigation Agreement involved in this appeal for a time period of two years and two months after the date of the Final Order.

DONE AND ENTERED this 19th day of February, 2010, in Lithia, Hillsborough County, Florida.


John W. Voelpel, Hearing Officer
Florida Bar No. 54348
John W. Voelpel, P.A.
6021 Audubon Manor Blvd.
Lithia, FL 33547-5025
813-643-4411
Fax 813-643-5511
johnwvoelpelpa@aol.com

COPIES FURNISHED:

Commissioner Al Higginbotham
Chairman, Hillsborough County Environmental
Protection Commission
c/o Richard T. Tschantz, Esq.
3629 Queen Palm Dr.
Tampa, FL 33619
Attorney for the Hillsborough County
Environmental Protection Commission

C. Warren Dixon III, Esq.
Counsel for Appellant
16006 Burnham Way
Tampa, FL 33647
Attorney for Appellant
CWD3Law@verizon.net

Douglas Manson, Esq.
Michael Winn, Esq.
Manson Law Group, P.A.
1101 W. Swann Ave.
Tampa, FL 33606
Attorneys for the
City of Tampa
dmanson@floridah2olaw.com

T. Andrew Zodrow, Esq.
3629 Queen Palm Dr.
Tampa, FL 33619
Attorney for the Executive Director
of the Environmental
Protection Commission of
Hillsborough County
zodrow@epchc.org

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

Pursuant to Section 9 of the Hillsborough County Environmental Protection Act, Chapter 84-446, Laws of Florida, as amended, and pursuant to EPC Rules, Section 1-2.35, all parties have the right to submit written exceptions within 10 calendar days from the date of this Recommended Order. Exceptions are limited as provided in EPC Rules, Section 1-2.35(a). Also as provided in EPC Rules, Section 1-2.35(a), any exceptions shall be filed with, and served on, the Chair of the Hillsborough County Environmental Protection Commission with copies to each of the other Commissioners and to each of the parties. As further provided in EPC Rules, Section 1-2.35(b), any party may file and serve, as provided in the prior sentence, responses to another party's exceptions within 10 calendar days from the date the exceptions were filed and served.

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

**EVELYN ROMANO and WARREN DIXON and
ANDREA BRABOY,**
Appellants

EPC#:LEPC09-005

vs.

**CITY OF TAMPA, DEPARTMENT OF PUBLIC WORKS
and ENVIRONMENTAL PROTECTION COMMISSION
OF HILLSBOROUGH COUNTY,**
Respondents.

RECOMMENDED ORDER AFTER REMAND

On May 18, 2010, the Hillsborough County Environmental Protection Commission (hereinafter the "EPC") issued its Remand Order in the above-captioned appeal for the following limited purposes:

- "1. To make additional Findings of Fact and Conclusions of Law to determine whether the public notice requirements of the EPC were complied with in the issuance of the wetland impact authorization to the City of Tampa, and
- "2. To make additional Findings of Fact and Conclusions of Law to determine whether consideration of the public health, safety and welfare issues were correctly considered in the issuance of the wetland impact authorization."

The referenced "wetland impact authorization [issued] to the City of Tampa" is the January 2, 2008, Wetland Impact Approval and Mitigation Agreement (hereinafter the "Wetland Permit") that was issued by the Executive Director of the EPC (hereinafter the "Executive Director") on that date to the City of Tampa (hereinafter "Tampa") and that is at issue in this appeal.

All parties filed Memoranda of Law and Reply Memoranda of Law on July 16, 2010, and on July 30, 2010, respectively. On August 18, 2010, a hearing on the record was held for argument on the law involved in the above two remanded issues. The transcript of the August 18,

2010, hearing is referenced herein as "August 2010, Tr. __." ¹ The law involved is (1) the EPC enabling law at Chapter 84-446, Laws of Florida, as amended (hereinafter the "EPC Act") , (2) the rules adopted by the EPC pursuant to the EPC Act (hereinafter the "EPC Rules") including, but not limited to EPC Rules, Chapter 1-11-Wetlands, (3) the adopted Basis of Review for Authorization of Activities Pursuant to Chapter 1-11-Wetlands (hereinafter the "BOR"), and (4) any other law that any party believed relevant.

In addition, because the EPC Act does not seem to address remand, because the EPC Rules are unclear in a number of respects about remand, because this remand seems to be the first remand by the EPC, because circumstances of first impression should be addressed with care, and because there was disagreement among the parties at the August 18, 2010, hearing about remand procedure and remand authority, all parties filed Memoranda of Law and Reply Memoranda of Law on September 16, 2010, and October 7, 2010, respectively to ensure a response to the EPC Remand Order that is faithful to the EPC Act, the EPC Rules, and, as appropriate, to Florida administrative law generally.

APPEARANCES:

The appearances in the remand proceedings have been the same as they were for the January 7, 2010, evidentiary hearing held in this appeal. The appearances are as follows:

For the Appellant: C. Warren Dixon III, Esq.
 16006 Burnham Way
 Tampa, FL 33647

For Tampa: Douglas Manson, Esq.
 Michael Wynn, Esq.
 Manson Law Group, P.A.
 1101 W. Swann Ave.
 Tampa, Florida 33606

¹ The transcript of the January 7, 2010, evidentiary hearing is referenced herein as "Tr. __" as it was in the Recommended Order dated February 19, 2010, and filed in this appeal.

For the Executive Director: T. Andrew Zodrow, Esq.
Environmental Protection Commission of
Hillsborough County
3629 Queen Palm Dr.
Tampa, FL 33619

STATEMENT OF THE ISSUES:

Florida law provides that administrative bodies such as the EPC speak as an official body through their records such as the EPC's Remand Order (Penn v. Pensacola-Escambia Governmental Center Authority, 311 So.2d 97, 101 (Fla.1975); Beck v. Littlefield, 68 So.2d 889, 892 (Fla. 1953)). Consequently, this remand is limited to the two issues recited above as set forth in the EPC's May 18, 2010, Remand Order.

Public Hearing Issue:

First Remand Order issue: The EPC asked for (1) "additional Findings of Fact and Conclusions of Law to determine whether the public notice requirements of the EPC were complied with in the issuance" of the Wetland Permit to Tampa. At the August 18, 2010, hearing held in this appeal, all parties agreed that there were no mandatory public notice requirements for issuance of the Wetland Permit in the EPC Act, in the EPC Rules or elsewhere (August 2010, Tr. 5-8). In any event, the Appellant had an evidentiary hearing held on January 7, 2010. Also, Tampa issued its voluntary public notice on May 1, 2009.² Therefore, Finding of Fact No.18 and Conclusion of Law No. 56 in the Recommended Order filed in this appeal on February 19, 2010, are revised accordingly.

² It is recommended that the EPC consider rule-making to require public notice in situations similar to the review, and issuance, of the Wetland Permit.

Public Health, Safety and Welfare Issue:

Second Remand Order issue: The EPC's Remand Order asked for "additional Findings of Fact and Conclusions of Law to determine whether consideration of the public health, safety and welfare issues were correctly considered in the issuance" of the Wetland Permit. Consideration of the public health, safety and welfare issues were correctly considered by the Executive Director in the issuance of the Wetland Permit and remain correctly considered. A brief discussion of the police power of the Florida Legislature and of the delegation of legislative power to administrative agencies could be helpful and, therefore, follows.

Police Power of the Legislature: The Appellant argues that the EPC Act in Section 2 "incorporates consideration of public health, safety and welfare as an overarching requirement in EPC decision making" (Appellant's Memorandum of Law on Remand, July 16, 2010, Hearing Officer's Pleadings Clip # 103, p.2). The Appellant argues that EPC Act, Section 21 reinforces its contention. Further, the Appellant argues:

It is the Appellant's contention that the preceding provisions of the Enabling Act itself, as clearly stated in the legislative intent and reflected in individual provisions, establish the overarching nature of the public health, safety and welfare concerns such that they must be considered when applying any other criteria in the [EPC] Act or in the EPC Rules created under the authority of the [EPC] Act

(Id. at 20). Appellant also argues that "Unless it is to protect the public health, safety and welfare, the rest of the statute and the Rules promulgated under them have no reason to exist."

(Id. at 17). This last statement is correct and is true of most all acts created by the Florida Legislature, but the Appellant is incorrect about any overarching requirement of consideration of public health, safety and welfare for permits issued under EPC Rules, Chapter 1-11 or other EPC Rules.

Most, or at least many, of the statutes created by the Florida Legislature (and by other state legislatures as well) are founded on the "police power" of the state which involves the legislative obligation "to protect the public health, safety and welfare." The United States Supreme Court states in Buchanan v. Warley, 245 US 60, 74 (1917) that "[t]he authority of the state *to pass laws* in the exercise of the police power, having for their object the promotion of the public health, safety and welfare is very broad as has been affirmed in numerous and recent decisions of this court." (Emphasis added). That Court also stated that the exercise of that power embraces "*nearly all legislation* of a local character." (Emphasis added). The Florida Supreme Court has also commented on the importance of the police power and the need to protect the public health, safety and welfare. In Eelbeck Milling Co. v. Mayo, 86 So.2d 438, 439 (Fla. 1956), that Court stated:

It is well settled, of course, that to avoid infringement of constitutional rights and liberties, sections 1 and 12, Declaration of Rights, Fla.Const., F.S.A., and Fourteenth Amendment, U.S.Const., "the exercise of police power (must be) confined to those acts which may reasonably be construed as expedient at least for the protection of public safety, public welfare, public morals, or public health." Sweat v. Turpentine & Rosin Factors, Inc., ..., 150 So. 617, 618 [Fla. 1933].

In Eelbeck, where the Court held the contested item of legislation invalid, the Court noted that the involved legislative act had failed to include an "express legislative finding of the public necessity" (Id. at 439) - the need to protect the public safety, welfare, morals or health.

In recognition of the need to recite the use of the police power, the public health, safety and welfare or police power language found in Section 2 of the EPC Act is also found in many other Florida statutes; for example, in Section 403.021 of the Florida Air and Water Pollution Control Act (Section 403.021, F.S.) which governs the Florida Department of Environmental Protection, and in Section 334.035 of the Florida Transportation Code (Section 334.035, F.S.) which governs the Florida Department of Transportation. Both of these sections of the Florida statutes (and many other Florida statutes) reference the statutes' genesis by including the

legislature's police power through a reference to the need to protect the public health, safety and welfare. The Florida Supreme Court has stated in Holley v. Adams, 238 So.2d 401, 407 (Fla. 1970) that the "[p]olice power is the sovereign right of the State to *enact laws* for the protection of lives, health, morals, comfort and [g]eneral welfare." (Emphasis added).

Delegation of Power by the Legislature: However, because of the constitutional concept of the separation of powers of the three branches of government in Florida (and elsewhere in the United States), the Florida Legislature can only delegate its legislative power if it specifies within each statute the narrow scope of the statute and also, within each statute, requires that a statutorily created administrative body, like the EPC, adopt rules within that narrow scope to administer that narrow delegation.

Therefore, the "overarching purpose" of the EPC Act which is found in EPC Act, Section 2 is not the broad and general language of the public health, safety and welfare which, in fact, is the responsibility and domain of the Florida Legislature, but is the "reasonable control and regulation of activities which are causing or may reasonably be expected to cause pollution or contamination of air, water, soil and property, or cause excessive and unnecessary noise" As stated by Judge Marstiller in State v. Cutwright, 41 So.3d 389, 391-92 (Fla. 1st DCA 2010):

The Legislature expressed its *overarching intent* in enacting the Florida Career Offender Registration Act as follows:

'The Legislature finds that certain career offenders, by virtue of their histories of offenses, present a threat to the public and to communities. The Legislature finds that requiring these career offenders to register for the purpose of tracking these career offenders and that providing for notifying the public and a community of the presence of a career offender are important aids to law enforcement agencies, the public, and communities *The Legislature intends to require the registration of career offenders and to authorize law enforcement agencies to notify the public and communities of the presence of a career offender.*"

§ 775.26, Fla. Stat. (2009).

(Emphasis added). Thus, the overarching purpose of the Career Offender Registration Act is the requirement that career offenders register, and not indefinite, vague language about protecting the public and communities. In Askew v. Cross Key Waterways, 372 So.2d 913, 924 (Fla. 1978), the Court held certain legislative provisions unconstitutional because the Legislature had failed to provide adequate standards in its legislation to guide the administrative agency in implementing that legislation. The Court stated:

Flexibility by an administrative agency to administer a legislatively articulated policy is essential to meet the complexities of our modern society, but flexibility in administration of a legislative program is essentially different from reposing in an administrative body the power to establish fundamental policy.

In the EPC Act, the protection of the public health, safety and welfare is recognition of the fundamental policy of the legislature which cannot be delegated to the EPC while the legislatively articulated policy, which is delegated, is the "reasonable control and regulation of activities which are causing or may reasonably be expected to cause pollution or contamination or cause excessive or unnecessary noise" In addition, the "Declaration of Intent" found in EPC Rules, Section 1-1.02 is consistent with the Legislature's purpose for the EPC of "reasonable control and regulation."

As further confirmation of this concept, in Grove Isle, Ltd. v. State of Florida Department of Environmental Regulation, 454 So.2d 571 (Fla. 1st DCA 1984), the Court considered the validity of the Department of Environmental Regulation (herein "DER") rule that provided that in certain circumstances a permit could not be issued in "Outstanding Florida Waters" unless the applicant "affirmatively demonstrates that: 2. The proposed activity ... is clearly in the public interest; and" (Id. at 572). The Court reviewed the following section of the act as possibly justifying that rule.

The department and its agents shall have general control and supervision over underground water, lakes, streams, canals, ditches, and coastal waters under the jurisdiction of the state *insofar as their pollution may* affect the public health or

impair the interest of the public or persons lawfully using them. (emphasis added [in original])

(Id. at 575). In finding that the "DER, in adopting an undefined 'public interest' requirement in Rule 17-4.242, ... exceeded its statutory authority" (Id. at 575), the Court stated that, based on the above statutory section, "[c]learly, this statute limits DER's consideration of the public interest to pollution. Rule 17-4.242 does not so limit DER's consideration of the public interest." (Id. at 574). The Court finally stated that "[w]e ... hold that Rule 17-4.242 is an invalid exercise of delegated legislative authority to the extent it requires an applicant to meet a 'public interest' requirement prior to the issuance of a ... permit" (Id. at 575).

Just like the limitation in Grove Isle, the Florida Legislature, in Section 2 of the EPC Act, has limited the EPC's consideration of the public interest (and the included public health, safety and welfare) to pollution, contamination and noise.

In Miller v. Department of Environmental Regulation, 504 So.2d 1325, 1327 (Fla. 1st DCA 1987), the appellant contended that "DER erred in construing [its statutory authority] *against* extending its authority to consider non-environmental impacts on 'property of others.'" (Emphasis added). The Court upheld DER's construction which was *against* consideration of non-environmental impacts.

Consequently, an administrative body only has the narrow power granted by the Legislature and may not expand its own jurisdiction.

Legislative Delegation through the EPC Act Requires Rulemaking: Further, the Legislature, in creating the EPC, specified the process for implementing the Section 2 mandate of "reasonable control and regulation" of pollution, contamination and noise. That process is found in EPC Act, Section 5 in the Legislature's mandate that the EPC "adopt, revise and amend ... appropriate rules and regulations reasonably necessary for the implementation and effective enforcement, administration and interpretation of the provisions of this act" That process is further

provided in Section 11 of the EPC Act by authorizing rules and regulations requiring permits such as the Wetland Permit. Consequently, to implement the EPC Act, the Legislature requires the adoption of rules and regulations which then become the criteria for, among other things, the issuance of permits such as the Wetland Permit.

The EPC Rules, Chapter 1-11 (which was adopted after hearing and notice) protect the public health, safety and welfare by specifically establishing the criteria for the permitting of development activity within wetlands. Therefore, if an applicant such as Tampa satisfies the requirements of EPC Rules, Chapter 1-11, then a permit such as the Wetland Permit must issue. Based on the substantial competent evidence provided at the January 7, 2010, hearing held in this appeal, Tampa has satisfied those requirements.

Interpretation of the EPC's Rules: The Appellant argues that one permitting criterion found in EPC Rules, Chapter 1-11, specifically EPC Rules, Section 1-11.09(1)(d) (that mentions public interest (which arguably includes public safety, health and welfare)(hereinafter "Subsection (1)(d)"), should have been, and should be, applicable to the issuance of the Wetland Permit. The Appellant also argues that Section 3.2.1 j.) in Chapter III of the BOR (hereinafter "Subsection 3.2.1 j.)") that explicitly mentions public health, safety and welfare should be applicable to the issuance of the Wetland Permit.³ Based on the language of both of those provisions as adopted by the EPC, neither were nor could be applicable to the issuance of the Wetland Permit.

Subsection (1)(d) is one of the five methods that the EPC requires for demonstration of "adequate protection" as further required by EPC Rules, Section 1-11.07.⁴ The EPC has made these five methods alternative methods through EPC's use of the adopted disjunctive word "or"

³ The BOR was adopted by the EPC in July 2008, after the issuance of the Wetland Permit. Consequently, for that reason alone, an argument exists for the inapplicability of Subsection 3.2.1 j.) to the issuance of the Wetland Permit. However, even if that subrule had been adopted prior to the issuance of the Wetland Permit, the language of that subrule would have precluded its applicability to the issuance of the Wetland Permit.

⁴ These five methods could not all be applicable to a given wetland impact application. For example, all applications will not involve impacts of minimal consequence as covered by EPC Rules, Section 1-11.09(1)(c).

which is found after the fourth and penultimate of these alternative methods (which is Subsection (1)(d)). Tampa satisfied the "adequate protection" requirement through use of EPC Rules, Section 1-11.09(1)(b) which requires "an acceptable and appropriate mitigation plan" under the Florida Uniform Mitigation Assessment Method adopted by the EPC by reference in EPC Rules, Section 1-11.08. The Appellant has specifically stated that she is not contesting the acceptability of Tampa's mitigation plan but argues that the use of Subsection (1)(d) should have been required even though (1) the EPC used of the disjunctive word "or" after that subsection, and (2) Tampa used EPC Rule, Section 1-11.09(1)(b) to satisfy the "adequate protection" requirement. The Appellant though has provided no applicable law in support of her argument. In fact, Florida law requires the disjunctive interpretation of the word "or" where there are alternative obligations or provisions (Clines v. State, 912 So.2d 550, 556-558 (Fla. 2005)("We have long recognized that the word 'or,' when it is used in a statute, is generally to be construed in the disjunctive.' Telophase Soc'y of Fla., Inc. v. State Bd. of Funeral Dirs. & Embalmers, 334 So.2d 563, 566 (Fla. 1976)"). Consequently, Subsection (1)(d) was not an EPC requirement for the issuance of the Wetland Permit and could not be without further rulemaking proceedings by the EPC.

The Appellant also argues that the Executive Director should have applied BOR Subsection 3.2.1 j.) which specifically references "public health, safety and welfare." The BOR is referenced in EPC Rules, Section 1-11.06(2). BOR Section 3.2.1 addresses the "reasonable use of the land" which is a requirement of EPC Rules, Section 1-11.07. BOR Section 3.2.1 provides a definition of "reasonable use" and provides 11 factors that "may be considered" in determining whether "the impact is necessary for reasonable use" of the involved property. Subsection 3.2.1 j.) states "[w]hether the impact is necessary for the protection of public health and safety" Testimony provided at the January 7, 2010, hearing related that this subsection would not have been, and would not be, considered in the issuance of the Wetland Permit because the involved impact is not affirmatively necessary for that protection (Tr. 99-100, 109, 110, 115, 135).

The EPC's permissive word "may" does not mandate the use of any of the 11 factors, any of which, in fact, may or may not apply to a given parcel of property. In addition, the EPC included as the final sentence of Section 3.2.1 of the BOR the following: "The EPC recognizes that each property in Hillsborough County is unique and that any one or more of these factors in itself will not necessarily constitute reasonable use." Still the Appellant argues that Subsection 3.2.1 j.) should impact the issuance of the Wetland Permit. The Appellant again has provided no applicable law in support of her argument.

The EPC's use of the word "may" must reasonably be interpreted as permissive. The BOR uses the word "shall" at least 25 times and uses the word "may" at least 12 times. The EPC recognized that the word "shall" indicated a requirement while the word "may" was permissive.

Therefore, neither of the two possible EPC permitting criteria that specifically mention "public interest" or "public health, safety and welfare" applied or would apply to the issuance of the Wetland Permit. Nor could they, without further notice and hearing activities that, at least, would change the word "or" to some conjunctive concept for Subsection (1)(d) and would change the permissive word "may" of BOR Chapter III, Section 3.2.1 to some mandatory concept for Subsection 3.2.1 j.).

Finally, the Appellant argues that the EPC Act in Section 21 (entitled "Construction of Act") requires the use of Subsection (1)(d) and BOR Subsection 3.2.1 j.) in the issuance of the Wetland Permit. While the EPC Act in Section 21 provides that the EPC Act "shall be liberally construed in order to effectively carry out the purposes of this act in the interest of public health, safety and general welfare,"⁵ it is, again, general police power language that is not capable of changing the EPC's disjunctive word "or" in Subsection (1)(d) to some conjunctive concept nor

⁵ Again, similar language is included in other Florida statutes; as an example the "Water Resources Restoration and Preservation Act" (which is a section of the Florida Air and Water Pollution Control Act) in Section 403.0615(4) (403.0615(4), F.S.) states: "The provisions of this act are for the benefit of the public and shall be liberally construed to accomplish the purposes set forth in this act."

is it capable of changing the EPC's permissive word "may" in BOR Chapter III, Section 3.2.1 to some mandatory concept for Subsection 3.2.1 j.). Again, to accomplish those changes further notice and hearing activities by the EPC would be necessary.

Consequently, consideration of "the public health, safety and welfare issues" were, and are yet, correctly considered in the issuance of the Wetland Permit (1) because the "public health, safety and welfare" language found in the EPC Act in Section 2 indicates that the Legislature was using its police power to provide that protection through the EPC Act mandate of reasonable control and regulation of pollution, contamination and noise, (2) because EPC's Rules implement the Legislature's purpose of "reasonable control and regulation," (3) because neither EPC Rules, Section 1-11.09(1)(d) nor BOR Chapter III, Section 3.2.1 j.) applied or would apply to the issuance of the Wetland Permit, and (4) because Tampa met the requirements of EPC Rules, Chapter 1-11-Wetlands which, through their adoption, protect the public health, safety and welfare.

Therefore, Finding of Fact No. 44 and Conclusions of Law Nos. 75, 76, 80 and 81 in the Recommended Order filed in this appeal on February 19, 2010, are revised accordingly. Also, Finding of Fact No. 1 is revised for informational purposes.

The determinations requested by the EPC in its Remand Order having been made, the following changes are made to the Findings of Fact and Conclusions of Law in the Recommended Order dated February 19, 2010. That Recommended Order in all other respects remains unchanged.

FINDINGS OF FACT

* * *

1. The EPC is a local environmental regulatory agency authorized to enforce the Hillsborough County Environmental Protection Act, Chapter 84-446, Laws of Florida, as amended (herein the "EPC Act"), and the rules adopted thereunder (herein the "EPC Rules"), including specifically EPC Rules, Chapter 1-11-Wetland Rule, in Hillsborough County, Florida. (Joint Prehearing Stipulation (hereinafter the "Stipulation"), Hearing Officer's Pleadings Clip # 67, 9). The EPC Act and the EPC Rules are found online at <http://epchc.org>.

* * *

18. On May 1, 2008, Tampa voluntarily published the first public notice of the application for, and issuance of, the Wetland Permit in the Tampa Tribune, a newspaper of general circulation. A hearing on the record was held in this appeal on August 18, 2010. The transcript of that hearing is referenced herein as the "August 2010, Tr. ___." As agreed by all parties to this appeal at that hearing (August 2010, Tr. 5-8), there was no mandatory requirement in the EPC Act or in the EPC's Rules for public notice (1) of the receipt or review of Tampa's application for the Wetland Permit, or (2) of the issuance of the Wetland Permit.⁶

* * *

⁶ It is recommended that the EPC consider rule-making to require public notice in situations similar to the review, and issuance, of the Wetland Permit.

44. The EPC only considers public health and safety issues in the context of determining whether an impact is necessary for the protection of the public health and safety (i.e. – allowing a road to be constructed in a more linear fashion, even though it impacts a wetland, because curving the road to miss the wetland would endanger motorists) (Tr. 99-100, 109, 110, 115, 135). This consideration is authorized under the "Basis of Review for Authorization of Activities Pursuant to Chapter 1-11-Wetlands" (herein the "BOR") that was adopted by the EPC in July 2008 and is referenced in EPC Rules, Section 1-11-06(2). BOR Chapter III, Section 3.2.1 j.), which is a permissive consideration, states "whether the impact is necessary for the protection of the public health and safety; and" As also explained in Conclusion of Law No. 76, BOR Chapter III, Section 3.2.1 j.) was not, and would not be, applicable to the issuance of the Wetland Permit. As further, explained in Conclusion of Law No. 76, EPC Rules, Section 1-11.9(1)(d) which includes "public interest" in its language was not, and would not be, applicable to the issuance of the Wetland Permit.

* * *

CONCLUSIONS OF LAW

* * *

56. The Appellant's Notice of Appeal was timely; Henry v. State Dept. of Administration, 431 So.2d 677, 680 (Fla. 1st DCA 1983), SWS Partnership v. Florida Dept. of Corrections, 567 So.2d 1048, 1050 (Fla. 5th DCA 1990) and Wentworth v. State Dept. of Environmental Protection, 771 So.2d 1279, 1281 (Fla. 4th DCA 2000) control the implementation of Section 9 of the EPC Act and EPC Rules, Section 1-2.30. As agreed by all parties to this appeal (August 2010, Tr.5-8), there was, and is, no mandatory requirement in the EPC Act or in the EPC's Rules

for public notice (1) of the receipt or review of Tampa's application for the Wetland Permit, or (2) of the issuance of the Wetland Permit. Therefore, the point of entry for appeal of the issuance of the Wetland Permit remained open for 20 days following the receipt by the Appellant of actual notice of that issuance (EPC Rules, Section 1-2.30(b)) (a minor extension of that time period was requested and was granted by the Executive Director (see, Findings of Fact Nos. 15&16)).

* * *

75. While the BOR was adopted in July 2008 (after the Wetland Permit was issued), based on Conclusions of Law 72, 73 and 74 above, Chapter III of the BOR supports the finding that the proposed wetland impacts are necessary for reasonable use of the property and that those impacts were appropriately authorized by the Executive Director under EPC Rules, Section 1-11.07.

76. The Appellant stipulated that she is not challenging the mitigation plan or its calculation under the UMAM that was submitted by Tampa in its application for the Wetland Permit and that is included in that permit. Tampa submitted its mitigation plan in fulfillment of EPC Rules, Section 1-11.09(1)(b) and, therefore, in fulfillment of the requirement of "adequate protection" under EPC Rules, Section 1-11.07. The Appellant argues that, in addition, compliance with EPC Rules, Section 1-11.09(1)(d), is required to show adequate protection. EPC Rules, Section 1-11.09(1) states in relevant part:

1-11.09 ADEQUATE PROTECTION

(1) Only development under the following circumstances shall be determined to provide adequate protection of the environmental benefits [under EPC Rules, Section 1-11.07]:

- (a) Where the adverse impact is of a temporary nature ... ;
- (b) Where an acceptable and appropriate mitigation plan, pursuant to section 1-11.08, will adequately protect the environmental benefits provided by the affected wetland;
- (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., ... ;

- (d) Where the adverse impact is offset by the benefit of the development to the public, such that it is clearly in the public interest and an acceptable mitigation plan is proposed. Examples may include, in appropriate circumstances, the construction of public roads or other public works; *or*
- (e) Where adverse impact can be prevented by appropriate precautions

(Emphasis added). Because EPC Rules, Sections 1-11.09(1)(a) through (1)(e) are separated by the disjunctive word "or," they are alternative methods of demonstrating "adequate protection" (Clines v. State, 912 So.2d 550, 556-558 (Fla. 2005); Telophase Society of Florida, Inc. v. State Board of Funeral Directors, 334 So.2d 563, 566 (Fla. 1976); Pompano Horse Club v. State, 111 So. 801, 805 (Fla. 1927)). Further, the five subsections could not all apply to a given wetland; for example, not all impacts are of a temporary nature as is covered in EPC Rules, Section 1-11.09(1)(c). Also, based on the language of EPC Rules, Section 1-11.09(1), those subsections are discretionary with the applicant as long as the applicant complies with the one method chosen. Because Tampa complied with EPC Rules, Section 1-11.09(1)(b), EPC Rules, Section 1-11.09(1)(d) was not, and would not be, applicable to the issuance of the Wetland Permit.

The Appellant also argues that BOR Chapter III, Section 3.2.1 j.) should have applied to the issuance of the Wetland Permit. That provision (which, again, was adopted by the EPC in July 2008) is part of BOR, Chapter III, Section 3.2.1 which states in relevant part:

3.2 Guidelines for determining reasonable use pursuant to Section 1-11.07:

3.2.1 "Reasonable use of the land." For purposes of this Basis of Review and the EPC Wetland Rule, "reasonable use" *shall* mean an actual, present use or activity on a parcel of real property or such reasonably foreseeable, nonspeculative land uses which are suitable for the subject parcel of property, and which are compatible with adjacent land uses. Reasonable use of the property does not mean the highest and best use of the property. *In determining whether the impact is necessary for reasonable use of a parcel of property the following factors may be considered:*

a.) The current zoning of the parcel of property ... ;

...

c.) Existing development on or use of the property (including the applicable zoning, permitting and subdivision history of that parcel);

d.) The buildable area of a parcel as shown by a survey or drawing of the parcel of property (to scale) accurately depicting the location of the wetland or other surface water including the minimum setbacks required by any applicable municipal or

Hillsborough County codes, or homeowners' association or deed restrictions adopted prior to the adoption of the EPC Wetland Rule;

...

j.) Whether the impact is necessary for the protection of public health and safety; and

k.) Any other pertinent information or special circumstances affecting the development of the parcel of property, including but not limited to, any unusual topography and fill requirements, or unique engineering requirements.

The EPC recognizes that each property in Hillsborough County is unique and that any one or more of these factors in itself will not necessarily constitute reasonable use.

(Emphasis added). Based on the permissive "may" and the last sentence, these subsections are all permissive and could not all apply to a given application. Moreover, neither Tampa nor the Executive Secretary could have relied on this provision in the BOR in regard to the issuance of the Wetland Permit because it was not yet adopted, but, in any event, based on testimony (Tr. 99-100, 109, 110, 115, 135), BOR Chapter III, Section 3.2.1 j.) was not, and would not be, a criterion involved in the issuance of the Wetland Permit because the NTBE is not viewed as necessary for the indicated protection. In addition, the word "shall" appears in the BOR at least 25 times while the word "may" appears at least 15 times; the EPC recognized the difference.

* * *

80. The Appellant failed to meet her burden of providing contrary evidence of equivalent quality to that presented by Tampa and the Executive Director. The Appellant presented lay opinion testimony related to traffic congestion, traffic accidents, school bus routes, and emergency vehicle response time which are outside the pollution, contamination and noise scope of the EPC Act (found in Section 2 of that act), the EPC rules, and the standard of review for approval of the Wetland Permit which is set forth in EPC Rules, Chapter 1-11-Wetlands. Further, lay opinion on expert matters is generally not probative or admissible. §90.701 Fla. Stat. (2009); Kolp v. State, 932 So.2d 1283, 1284 (Fla. 4th DCA 2006). Also, compliance with the National Environmental

Policy Act (42 USCA 4321 et seq.) is outside the above scope. In any event, the Appellant's burden cannot be met by mere speculation of what might happen.

Generally, the Appellant argues that the EPC Act, in Sections 2 and 21, establishes "the overarching nature of the public health, safety and welfare concerns such that they must be considered when applying *any other criteria* in the [EPC Act] or in the EPC rules created under the authority of the [EPC Act]" (Emphasis added) (Appellants' Memorandum of Law on Remand, July 16, 2010, Hearing Officers Pleading Clip #103, 2). The Appellant misunderstands the narrow legislative authority delegated by the Florida Legislature to the EPC through Section 2 of the EPC Act. That Section states in relevant part;

SECTION 2. DECLARATION OF LEGISLATIVE INTENT.

The Legislature finds and declares that the reasonable control and regulation of activities which are causing or may reasonably be expected to cause pollution or contamination of air, water, soil and property, or cause excessive and unnecessary noise may be necessary for the protection and preservation of the public health, safety, and welfare. ...

The Legislature's delegation of legislative authority to the EPC is restricted to the "reasonable control and regulation of activities which are causing or may reasonably be expected to cause pollution or contamination of air, water, soil and property, or cause excessive and unnecessary noise" (EPC Act, §2). However, the Appellant argues, for example, that the EPC must consider traffic concerns over the "6.5 mile travel corridor created by the NTBE" (Appellants' Memorandum of Law on Remand, July 16, 2010, Hearing Officers Pleading Clip #103, 22-23, 30). The Appellant is, therefore, asking the EPC to unlawfully extend its legislatively delegated authority concerning wetlands beyond the pollution or contamination of water (see, EPC Rules, Section 1-11.1 for the specific intent of EPC Rules, Chapter 1-11-Wetlands) to consider non-environmental impacts such as traffic matters (which are, of course, delegated by the Florida Legislature to other agencies). (Miller v. State of Florida, Department of Environmental Regulation, 504 So.2d 1325,1327 (Fla. 1st DCA 1987)(upheld the DER's refusal to extend its

delegated authority to non-environmental impacts); see also, Askew v. Cross Key Waterways, 372 So.2d 913, 924 (Fla. 1979); Eelbeck Milling Co. v. Mayo, 86 So.2d 438, 439 (Fla. 1956); State v. Cutwright, 41 So.3d 389, 391-92 (Fla. 1st DCA 2010), Grove Isle, Ltd. v. Florida Department of Environmental Regulation, 454 So.2d 571, 572, 574-75 (Fla. 1st DCA 1984). Further, the courts have held that review of any "public interest" rule criteria such as found in EPC Rules, Section 1-11.09(1)(d) is limited to environmental impact (Save Anna Maria, Inc. v. Dept. of Transportation, 700 So.2d 113, 116 (Fla. 2d DCA 1997); Miller v. State of Florida, Department of Environmental Regulation, supra). The EPC must remain within the narrow limits of its legislatively delegated authority and cannot unlawfully attempt to extend that authority.

The Appellant also argues that the NTBE will create a nuisance. However, the definition of nuisance in Section 3.8 of the EPC Act requires a presently occurring emission, discharge, or placement; use or acts that cause or materially contribute to an emission, discharge or placement.

The EPC Act states:

"Nuisance" includes *the use* of any property, facilities, equipment, processes, products, or compounds, or the commission of *any acts, that cause or materially contribute to:*

- a. The emission into the outdoor air of dust, fumes, gas, mist, odor, smoke, vapor, or noise, or any combination thereof,
- b. The discharge into any of the waters of the county of any organic or inorganic matter or deleterious substances or chemical compounds or thermal energy, or any effluent containing the foregoing,
- c. The placement in or upon any soils of the county or the maintenance of any accumulation in or upon any soils of the county of any organic or inorganic matter, garbage, rubbish, refuse, or other solid or semi-solid material of a deleterious nature
- d. Any violation of the provisions of the act which becomes detrimental to health or threatens danger to the safety of persons or property,

(Emphasis added). The Appellant can only speculate that the NTBE may, when possibly constructed, create a nuisance. However, constructed roads are not generically considered nuisances. Actually, the design and approval of the NTBE cannot be an actionable nuisance because it is the result of a discretionary or planning decision and not an operational decision

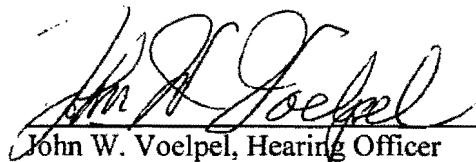
under the four part test summarized in Rumbaugh v. Tampa, 403 So.2d 1139, 1141-1143 (Fla. 2nd DCA 1981) and adopted by the Florida Supreme Court in Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979) and discussed by that Court in Trianon Park Condominium Assn. v. City of Hialeah, 468 So.2d 912 (Fla. 1985). Concerning the design of roads, the Supreme Court in Dept. of Transportation v. Neilson, 419 So.2d 1073 (Fla. 1983) applied Commercial Carrier and held that "the decision to build a road or roads with a particular alignment [is a] judgmental planning-level [function] and absolute immunity attaches." (Id. at 1073). In any event, the Appellant only speculates.

* * *

81. The preponderance of the evidence in this appeal supports the conclusion that the Wetland Permit complies with the EPC Act and EPC Rules, Chapter 1-11-Wetlands.

* * *

DONE AND ENTERED this 15th day of November, 2010, in Lithia, Hillsborough County, Florida.



John W. Voelpel, Hearing Officer
Florida Bar No. 54348
John W. Voelpel, P.A.
6021 Audubon Manor Blvd.
Lithia, FL 33547-5025
813-643-4411
Fax 813-643-5511
johnwvoelpelpa@aol.com

COPIES FURNISHED:

Commissioner Al Higginbotham
Chairman, Hillsborough County Environmental
Protection Commission
c/o Richard T. Tschantz, Esq.
3629 Queen Palm Dr.
Tampa, FL 33619
Attorney for the Hillsborough County
Environmental Protection Commission

C. Warren Dixon III, Esq.
Counsel for Appellant
16006 Burnham Way
Tampa, FL 33647
Attorney for Appellant
CWD3Law@verizon.net

Douglas Manson, Esq.
Michael Winn, Esq.
Manson Law Group, P.A.
1101 W. Swann Ave.
Tampa, FL 33606
Attorneys for the
City of Tampa
dmanson@floridah2olaw.com

T. Andrew Zodrow, Esq.
3629 Queen Palm Dr.
Tampa, FL 33619
Attorney for the Executive Director
of the Environmental Protection
Commission of
Hillsborough County
zodrow@epchc.org

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

Pursuant to Section 9 of the Hillsborough County Environmental Protection Act, Chapter 84-446, Laws of Florida, as amended, and pursuant to EPC Rules, Section 1-2.35, all parties have the right to submit written exceptions within 10 calendar days from the date of this Recommended Order. Exceptions are limited as provided in EPC Rules, Section 1-2.35(a). Also as provided in EPC Rules, Section 1-2.35(a), any exceptions shall be filed with, and served on, the Chair of the Hillsborough County Environmental Protection Commission with copies to each of the other Commissioners and to each of the parties. As further provided in EPC Rules, Section 1-2.35(b), any party may file and serve, as provided in the prior sentence, responses to another party's exceptions within 10 calendar days from the date the exceptions were filed and served.

C. Warren Dixon III
Attorney At Law
16006 Burnham Way
Tampa, FL 33647
(813) 558-0252

November 29, 2010

Commissioner Al Higginbotham
Chairman, Hillsborough County Environmental Protection Commission
c/o Richard T. Tschantz, Esq.
General Counsel
3629 Queen Palm Drive
Tampa, FL 33619

Re: EVELYN ROMANO AND WARREN DIXON AND ANDREA BRABOY V. CITY OF
TAMPA, DEPARTMENT OF PUBLIC WORKS AND ENVIRONMENTAL PROTECTION
COMMISSION OF HILLSBOROUGH COUNTY, EPC No. LEPC09-005

Dear Chairman Higginbotham:

Enclosed are the Appellant's Exceptions to the Amended Recommended Order on Remand in
the referenced case, for inclusion in the file to be provided to you by Mr. Tschantz.

Sincerely,

A handwritten signature in black ink, appearing to read "C. W. Dixon III". The signature is stylized with a large, looped "D" and a horizontal line extending to the right.

C. Warren Dixon III

Copies: Commissioners Rose Ferlita, Ken Hagan, Kevin White, Jim Norman, Kevin Beckner
and Mark Sharpe

Copies provided via email to:
Douglas Manson, Esq.
T. Andrew Zodrow, Esq.
John W. Voelpel, Esq.