

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT V. KRIEGEL,

Petitioner,

vs.

Case No. 13-0686

MAHOGANY MILL OWNERS
ASSOCIATION, INC., AND
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.

BRYAN BAARS,

Petitioner,

vs.

Case No. 13-0687

MAHOGANY MILL OWNERS
ASSOCIATION, INC., AND
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.

MIKE BEARD,

Petitioner,

vs.

Case No. 13-0774

MAHOGANY MILL OWNERS
ASSOCIATION, INC., AND
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.

ED AND KAY RANKIN,

Petitioner,

vs.

Case No. 13-0775

MAHOGANY MILL OWNERS
ASSOCIATION, INC., AND
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.

RECOMMENDED ORDER

These consolidated cases were heard by David M. Maloney, Administrative Law Judge with the Division of Administrative Hearings ("DOAH"), on April 3, 2013, in Pensacola, Florida.

APPEARANCES

For Petitioners: Robert Kriegel, pro se
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Pensacola, Florida 32507

Bryan Baars, pro se
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Pensacola, Florida 32503

Ed Rankin, pro se
Mahogany Mill Homeowners Association
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For Mahogany Mill Owners Association, Inc.:

William J. Dunaway, Esquire
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STATEMENT OF THE ISSUES

Whether Petitioners Kay Rankin and Mike Beard have standing?

Whether the project by Mahogany Mill Owners Association, Inc. ("Mahogany Mill"), to remove two existing finger piers and construct three new finger piers and two boat lifts (the "Project") is exempt from the need to obtain an Environmental Resource Permit ("ERP") from the Department of Environmental Protection (the "Department")?

Whether the Project qualifies for authorization from the Board of Trustees of the Internal Improvement Fund (the "Board of Trustees") to use sovereign submerged lands?

PRELIMINARY STATEMENT

On October 5, 2012, Mahogany Mill, through a firm with which it had contracted for environmental consulting services, Wetland Sciences, Inc. ("Wetland Sciences"), submitted an application to the Department.

The application sought to have the Project declared exempt from permitting and to obtain an authorization to use sovereign lands held in trust by the Board of Trustees. On October 24, 2012, the Department issued a letter to Mahogany Mill, LLC,

c/o Robert Montgomery, an owner of one of the bays of the original group building used by Mahogany Mill. The letter announces the Department's determination that the Project is exempt from regulatory review. The letter also consents to the construction and use of the Project on submerged lands owned by the state on behalf of the Board of Trustees. The letter, therefore, is both an exemption letter that constitutes action by the Department and a letter of consent that constitutes proprietary action by the State of Florida.

On February 14, 2013, a Notice of Determination of Qualification for Exemption was published in the Escambia Sun-Press to provide notice to persons whose substantial interests may be affected by the Department's action and an opportunity to file a petition for an administrative hearing. On the same day, the Department received a letter from Robert V. Kriegel, mailed February 11, 2013, in which Mr. Kriegel identified himself as "Petitioner" and requested "that the department conclude that respondent is not entitled to the use of the exemption for the existing construction and proposed usage (24' power boat) and that these structures be removed and any usage of these structures ceased." The Department treated the letter as a petition for hearing and referred the matter to DOAH in a "Request for Assignment of Administrative Law Judge and Notice of

Preservation of Rights." The request was filed at DOAH on February 20, 2013, and assigned Case No. 13-0686.

By February 28, 2013, three other letters followed that were similar to Mr. Kriegel's: one from Bryan Baars, a second from Ed and Kay Rankin, and a third from Mike Beard. All three were treated as requests for hearing by the Department and referred to DOAH. Mr. Baars' request was assigned Case No. 13-0687; Mr. Beard's request was assigned Case No. 13-0774; and Ed and Kay Rankins' request was assigned Case No. 13-0775. The three cases were consolidated with Case No. 13-0686.

On March 15, 2013, Mahogany Mill, LLC, filed a motion for Mahogany Mill Owners Association, Inc., to be substituted as the Respondent in the case. No objection was filed, and the motion was granted at the onset of the hearing which took place on April 3, 2013.

At the commencement of the hearing, Carol Simpson, a non-attorney, made an ore tenus request for authorization to represent Petitioner Beard at the hearing. The Department objected to Ms. Simpson's appearance as a qualified representative. The objection was sustained.

Mahogany Mill presented the testimony of four witnesses: Robert Montgomery; Jason Taylor, an environmental specialist with Wetland Sciences; Captain Benjamin Tyrone Cranford, accepted as an expert in marine navigation; and James W. Veal, an architect

who owns property adjacent to the Project. Mahogany Mill offered 22 exhibits, marked as Mahogany Mill Exhibits 1-21 and 5A. All were admitted.

The Department presented the testimony of three witnesses: Susan Radford, an Environmental Specialist III with the Department; Randy Webb, accepted as an expert in marine navigation; and on rebuttal, Mike Lunn, a fact witness. The Department offered three exhibits, marked as Department Exhibits 1, 3, and 6. All were admitted.

Petitioner Kriegel testified as an expert on his own behalf and was accepted as an expert in environmental permitting, resource permitting, sailboat handling and navigation, and powerboat handling and navigation. He also presented the testimony of Carol Simpson who was accepted as an expert in sailboat handling and navigation. Petitioner Kriegel offered one exhibit, marked as Kriegel Exhibit 1. It was admitted into evidence. Petitioner Baars testified on his own behalf as an expert in "handling of sailboats and navigation." Hr'g Tr. 196, Apr. 3, 2013. Petitioner Ed Rankin testified on behalf of himself and Kay Rankin.

The Transcript of the hearing was filed with DOAH on April 18, 2013. The parties were given ten days after the filing of the transcript to file proposed recommended orders. On April 24, 2013, Mr. Baars filed "Petitioner's Proposed

Recommended Order," which was signed by Messrs. Kriegel, Baars, and Rankin. The Department and Mahogany Mill filed separate proposed orders on Monday, April 29, 2013. All proposed recommended orders are deemed filed in a timely manner and have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Mahogany Mill Pond and the Channel

1. Located in Pensacola, Florida, Mahogany Mill Pond is connected by a channel (the "Channel") to Chico Bayou. The bayou provides passage to Pensacola Bay and the bay, in turn, is adjacent to the Gulf of Mexico.

2. Prior to the dredging of the Channel in the 1950s to connect the pond and the bayou, the pond was used to store logs as part of a logging operation. After the dredging activity, the storage of logs in the pond ceased. The pond began to serve as a hold for sailboats and over the decades since, the Channel has been used by sailboats and powerboats alike to make their way to the bayou and onward to the bay and the open waters of the Gulf.

3. Currently, Mahogany Mill Pond is "one of the few places left in Pensacola where you can have hurricane hold for deep water sailboats." Hr'g Tr. 231. "Hurricane holds" are safe places to moor a vessel in times of tropical storms and where, in the words of Petitioner Rankin, "you can get your sailboat out of the weather." Id.

4. The petitioners in these four consolidated cases all own deep draft sailboats which they moor in Mahogany Mill Pond.

5. The Channel is bordered to the south by a spit of land that juts into the bayou. The spit is approximately 600 feet long, and its vegetation line (estimated to be the mean high water line by an environmental consulting business) is roughly 60 feet from the Project. The tip of the spit is opposed in the bayou by the Palm Harbor Marina. The marina is a busy one with nearly every one of its slips occupied, as shown by photographic evidence. The marina is about the same distance from the spit as the Project is from the spit. There are shoals in the area and they exist between the spit and the Project.

6. Whether an excursion originates in the pond or the Channel, boaters seeking egress to the bayou, the bay and the Gulf must make their way through the Channel alongside the spit, and around its tip in the vicinity of the marina, an area that includes shoals. Likewise from the bay or bayou, any boat headed for the Channel or the pond must make its way through the narrow area of the marina across from the spit, around the spit, and through the shoals in and near the Channel so as to not run aground.

7. Despite a "quiescent environment with a little bit of intertidal flow" (Hr'g Tr. 149), the Channel requires dredging "probably every 10 years," id., to maintain its navigability. It

has been dredged "a couple of times in the . . . 20 years," id.,
Petitioner Kriegel has lived in the area.

8. The last time the Channel was dredged was six or seven years ago. To the best of Petitioner Rankin's memory, the cost was about \$16,000. Dredging costs are borne by the members of the local homeowners association.

9. The Channel's shallowness in some spots is a navigation concern for sailboats and contributes to the Petitioners' assessment of the Channel as "narrow" and "constricted."

10. Despite shallowness and the presence of the shoals, as well as the tight configuration created by the spit, the Project's presence in the Channel does not create a navigation hazard for powerboats that have two engines. This is due to the ability of powerboats to maintain position during a maneuver. As explained by Petitioner Kriegel, "[A]s a result of [having two engines], you can push one side of the boat forward and pull the other side of the boat backwards and pivot the boat without making any headway." Hr'g Tr. 152. A powerboat's ability to maintain position aids maneuverability, particularly in constricted waterways. Sailboats, on the other hand, cannot maintain position while they turn. In order for a sailboat to execute a turn while under sail, it must be moving through the water largely because their keels create lateral resistance. When not under sail, sailboats are typically not able to maintain

position while turning because they are usually equipped with only one engine.

11. A structure in a constricted waterway may be an obvious navigational hazard to any boat or it may be a hazard to some boats but not others. More to the point, a structure that extends into a waterway can be a navigational hazard to a sailboat because of the sailboat's inability to maintain position during a turn while at the same time it is not a hazard for a powerboat that enjoys superior maneuverability based on its capability to hold position during a pivot.

The Parties

12. Petitioners Kriegel, Baars, Ed and Kay Rankin, and Beard are individual citizens who reside in Escambia County. They all own property in the vicinity of Mahogany Mill Pond, and they all moor their deep draft sailboats in the hurricane hold that is Mahogany Mill Pond. Each has extensive experience navigating the pond, the Channel, Chico Bayou, Pensacola Bay, and the open waters of the Gulf of Mexico.

13. Mahogany Mill is a Florida homeowners association. It has been substituted in this proceeding as a respondent in the place of Mahogany Mill, LLC, the entity on whose behalf the application for the Project was submitted.

14. The Department is the agency of the State of Florida that administers the provisions of section 403.813(1)(b), Florida

Statutes (2012),^{1/} and Florida Administrative Code Rule 62-346.051(5) (a) (which relates to exemptions from environmental resource permitting in Northwest Florida) and, on behalf of the Board of Trustees of the Internal Improvement Fund, if a project is shown to qualify for an exemption from permitting, to authorize the use of sovereign submerged lands pursuant to Florida Administrative Code Rule 18-21.005(1) (b), including compliance with rule 18-21.004(7) (g).

The Application and the Pre-construction Mooring Pilings

15. The Application for the Project was submitted under cover of a letter from Wetland Sciences with a date of October 5, 2012. The letter lists the applicant as "Mahogany Mill LLC, c/o Robert Montgomery." In the body of the letter, it states that the Application was submitted "on behalf of Mr. Robert Montgomery." Mahogany Mill Ex. 1.

16. The October 5, 2012, letter is signed by Jason Taylor. Wetland Sciences employs Mr. Taylor as an environmental specialist. Mr. Taylor holds a four-year degree from the University of West Florida and has been employed by Wetland Sciences since 2004. During that time, he has been engaged in marine permitting and has participated in the permitting of several hundred projects.

17. In conducting the permitting of the Project, Mr. Taylor interacted with both DEP personnel and personnel from the county.

In the discussions, Mr. Taylor was careful to address compliance with any regulations related to the Project's water-ward extension. His main concern was with the County Code because it is slightly more stringent than DEP regulations. He informed Mr. Montgomery that a variance from the county might be necessary but that proved not to be the case. "[W]e could actually construct [the Project] . . . as long as it stayed within the same footprint as what was currently there, which extended . . . 24 feet . . . into the water body." Hr'g Tr. 89-90.

18. The "Plan View of Existing Site Conditions" drawn by Mr. Taylor and submitted as an attachment to the Application (see page 2 of 6 attached to Mahogany Mill Ex. 1) shows that at the time of the submission the Project site encompassed two existing mooring piles (the "Preconstruction Mooring Pilings") and two finger piers. The Preconstruction Mooring Pilings served as bow or stern lines for smaller vessels that would dock alongside the two finger piers.

19. The finger piers extended approximately 12 feet offshore. In contrast, the Preconstruction Mooring Pilings were at a point that extended twice as far into the Channel, i.e., 24.0 feet offshore. In Mr. Taylor's opinion, the water-ward extent of the location of the Preconstruction Mooring Pilings justified a 24-foot extension of the Project into the waterway.

20. Some of the exhibits attached to the Application were scaled from an aerial. Others were supported by measurements taken by Mr. Taylor in the field. The location of the Preconstruction Mooring Pilings 24 feet offshore were among the locations supported by field measurements taken by Mr. Taylor at the site of the Project.

The Project

21. The Project is shown in the application to consist of two 24-foot by three-foot finger piers (the "Outside Piers") and a third finger pier between the other two (the "Middle Pier"). Like the Outside Piers, the Middle Pier extends 24 feet into the Channel, but it is six feet wide (twice as wide as the Outside Piers). Two uncovered boat lifts, 12 feet wide each, are also part of the Project. The points of the boat lifts that extend the farthest from shore are within the utmost extension of the piers, that is, within 24 feet from the shore (the identical distance from shore as the Preconstruction Mooring Pilings). As described in the application (the "information submitted to the Department"), there is no part of the Project that extends beyond 24 feet from the shore, i.e., where the Preconstruction Mooring Pilings stood at the time of the application's submission.

22. The width of the Project (from the corners of the Outer Piers) alongside the Channel is 36 feet. The distances to an "APPROXIMATE CENTER THREAD OF CHANNEL" (see the estimation in the

"Close-Up Plan View of Proposed Activity," page 5 of 6 attached to the Application, DEP Ex. 2) are 20.5 feet from one Outside Pier, 18.1 feet from the Middle Pier, and 16.0 feet from the other Outside Pier.

23. The total area of submerged lands preempted by the Project is 288.0 square feet. At the shore (where there is a seawall), the Project lies within 49.6 linear feet of shoreline owned by the applicant.

24. The Project is on the side of the Channel across from the spit. The Project's side would be starboard of a sailboat returning to the pond from the bayou. It is also the side for a boat headed toward the pond that a vessel would be obligated to keep under boating "rules of the road" to avoid collisions or scrapes with a boat coming from the direction of the pond headed out of the Channel.

The Veal Dock

25. Next to the Project is a dock and boat lift owned by James Warren Veal (the "Veal Dock").

26. Mr. Veal has a 21-foot Cobia powerboat that he keeps on a boat lift supported by the Veal Dock. His boat, equipped with an outboard motor and moored in the boat lift of the Veal Dock, was shown in Mahogany Mill Exhibit 21 "to be sticking out a few inches more," Hr'g Tr. 110, than the stern and engine of Mr. Montgomery's boat while docked at the Project. At the time

Mr. Montgomery's boat was photographed to produce Mahogany Mill Exhibit 21, it's stern extended "[r]oughly, ball park, a foot and a half," Hr'g Tr. 109, past the piling. The boat's engine extended another foot and a half toward the center thread of the Channel.

27. When docked at the Veal Dock, Mr. Veal's boat (including the outboard motor off its stern) at its water-ward-most extension is referred to as a "limiting point" (see Hr'g Tr. 191), by the Petitioners. Extending farther out into the Channel than any other structure, boat or engine (including the Project) on the Project's side of the Channel, the limiting point created by a boat in the Veal Dock is what a sailboat swinging around the spit into the Channel must avoid in order to enjoy safe passage in the Channel.

The Letter of Exemption
and State-owned Submerged Land Authorization

28. The Letter of Exemption locates the Project both by Parcel ID Number, as shown in local government records, and at the street address of 1263 Mahogany Mill in Pensacola, Florida. Its description of the Project is consistent with the description in the Application. See DEP Ex. 1.

29. The Letter of Exemption verifies that the Project is exempt from regulatory review:

Based on the information submitted, the
Department has determined that the

construction of the boatlifts and finger piers, [sic] is exempt, [sic] under paragraph 62-346.0512(5)(a), F.A.C., from the need to obtain a regulatory permit.

Therefore, the Department grants an exemption for the proposed activity under paragraph 62-346.051(5)(a), F.A.C., and Section 403.813(1)(b), F.S.

Id.

30. The Department's Letter of Exemption also authorizes the use of state-owned submerged lands for the Project by virtue of the Department's status as staff to the Board of Trustees:

The Department has reviewed the activity . . . and has determined that the activity qualifies for a Letter of Consent under rule 18-21.005(1)9(c)2., F.A.C.[,] and section 253.77 of the Florida Statutes to construct and use the activity on the specified sovereign submerged lands, as long as the work performed is located within the boundaries as described herein and is consistent with [certain] terms and conditions

Id., page 2 of 5 (the letter of consent incorporated in the Letter of Exemption).

31. The Letter of Exemption (with the letter of consent incorporated) was issued on October 24, 2012.

Statutes and Rules

a. Regulatory Exemption

32. Section 403.813(1) provides, inter alia, that a permit is not required for activities associated with "[t]he installation . . . of private docks, piers and recreational

docking facilities . . . [provided they] . . . [s]hall not impede the flow of water or create a navigational hazard."

§ 403.813(1)(b)3., Fla. Stat. (emphasis added).

33. The statute is implemented by rule 62-346.051. Among the activities listed in the rule that do not require an ERP are "the installation . . . of private docks, piers and recreational docking facilities . . . in accordance with Section 403.813(1)(b), F.S., [and its requirement that they not impede the flow of water or create a navigational hazard]." Fla. Admin. Code R. 62-346.051(5).

b. State-owned Submerged Lands Authorization

34. Section 253.77, Florida Statutes, prohibits a person from the use of sovereign or other lands of the state until the person has the required the form of consent authorizing the proposed use.

35. Rule 18-21.005 implements section 253.77. The form of authorization required for the Project is a "Letter of Consent." See Fla. Admin. Code R. 18-21.005(1)(c)4. In addition, rule 18-21.004(7) imposes general conditions for authorizations including obtaining the necessary letters of consent. Among the other conditions are that "[s]tructures or activities shall not create a navigational hazard." Fla. Admin. Code R. 18-21.004(7)(g).

Good Faith Efforts at Compliance

36. Mr. Montgomery and Mahogany Mill made deliberate and careful effort to comply with the applicable statutes and rules prior to the issuance of the Letter of Exemption. They hired a consulting firm with appropriate expertise in the permitting of docks. Their consultant worked with the county and the Department.

37. Based on the information submitted with the application and the Department's preliminary review, it is no surprise that the Department found the Project qualified for a Letter of Exemption under the statutes and rules that provided an exemption from regulatory review and that authorized the use of state-owned lands. This is especially true given the care taken by Mr. Montgomery and his environmental consultant in seeking the exemption and in light of the Project's extension into the Channel at a point no more than the Preconstruction Mooring Pilings, i.e., 24.0 feet.

Installation

38. Without delay, Mr. Montgomery "contracted with a marine contractor to install the improvements [authorized by the Letter of Exemption]." Hr'g Tr. 69.

39. The Project was constructed and its installation was completed in December 2012.

40. Mr. Montgomery and Mahogany Mill heard no objection from any party while the Project was under construction. There were no objections voiced in the month or so afterward.

41. The first objection was made known to Mahogany Mill when Mr. Kriegel visited Mr. Montgomery in mid-February 2013.

The Challenges

42. Mr. Kriegel was out of town when the Project was installed. He did not see the Project until mid-to-late February aboard his sailboat when he "had great difficulty in getting [the boat] back in [his] slip [in Mahogany Mill Pond]." Hr'g Tr. 169.

43. Following his experience navigating the Channel in February 2013, Mr. Kriegel met with Mr. Montgomery. From Mr. Kriegel's perspective, the meeting was to no avail. The four petitions challenging the Letter of Exemption and the letter of consent were filed shortly thereafter.

The Hearing

a. Mahogany Mill's Prima Facie Case

44. As the applicant for the exemption and the consent to use state-owned submerged lands, Mahogany Mill provided evidence that the Project is not a navigational hazard to powerboats. The evidence included a video of Mr. Montgomery on board a 38-foot powerboat (see Hr'g Tr. 44) smoothly navigating its way from the bayou around the spit, into the Channel and to the Project. The powerboat was piloted by Captain Ben Cranford, who has 12 years

of experience navigating vessels through the area, including into Mahogany Mill Pond from the Channel. When asked at hearing about navigating the Channel while being videotaped, Captain Cranford replied, "I'm not having any [difficulty], at all." Hr'g Tr. 46.

45. After the presentation by the Applicant of a prima facie case of compliance and immediately following the supportive case of the Department, Petitioners presented their cases.

Petitioners' Cases

46. The evidence presented by Petitioners established that sailboats have far less maneuverability than powerboats as a result of a number of factors. Inability to maintain position during a turn is one of them. Sailboats may be less maneuverable than powerboats because of hull and keel design as well, even when equipped with an outboard motor which typically has a single propeller. Sailboat maneuverability limitations may be exacerbated, moreover, by wind and other conditions, particularly in the summer when the prevailing direction of the winds tend to push off a sailboat.

47. Mr. Kriegel related difficulty the three to four times since the construction of the Project that he has navigated a return to the pond in his sailboat. On those occasions, he brought his boat in under "better than ideal conditions" (Hr'g Tr. 171), due in part to facilitation of the sailboat's turns by a north breeze, the wind that typically prevails in winter time.

On one day, he brought the boat in twice on a relatively high tide, another favorable condition. He "had to make two efforts to do it because [he] ran aground . . . the first time. And the second time [he] almost hit the structure." Id.

48. Mr. Baars owns a deep draft sailboat that is "45'3", which includes . . . a Bowsprit." Hr'g Tr. 197. A bowsprit is a spar that extends forward from a vessel's prow to which the stays of the foremast are fastened.

49. As of the date of the hearing, Mr. Baars had not attempted egress or ingress since the Project was installed. But he summed up his worry about the Project when Mr. Kriegel asked him on cross examination whether he thought he could safely navigate around the structure, "I'm concerned, other than trying to test it, I would not know. I mean, as I look down from my dock . . . it doesn't look too good." Hr'g Tr. 213.

50. Like Mr. Kriegel, Mr. Baars has never collided with structures in the Channel but "came very close to the previous structures . . . [and safety] was always a concern when [he] came around the spit." Hr'g Tr. 221. Mr. Baars sailboat has also run aground in the Channel because of prevailing conditions that made maneuvering difficult.

51. In his testimony, Mr. Rankin recollected that when the seawall was installed by a previous owner in 2001, the application showed eight pilings, all of which were "12-foot

out." Hr'g Tr. 226. He has "bounced off and shoved off one of those pilings [the Preconstruction Mooring Pilings] before, getting around the corner." Hr'g Tr. 227. Mr. Rankin described his experience in navigating from the bayou through the Channel headed for the pond:

. . . I've come in there, around that spit, at low tide, and run aground because the pass is so narrow you have to back up and find it. In the process of finding it, you sometimes have to power over it and that means you back up as far as you can and go full tip wide up to jump it. And in [the] process you're aiming straight for the problems of the piers where they are now. And I'm not saying I can't do it. I'm just saying . . . I'm afraid I'm going to hit it someday. It's that tight. It's that difficult.

* * *

So all of it [the shallowness, the shoals, the spit, the difficulty in maneuvering sailboats, the structures in the Channel], you've got to be moving. If you get stuck, then you have to cut -- you dredge that area and they dredged it as close to . . . the end of the spit. So it's very, cutting that corner, you're aiming straight at those docks or Mr. Veal's dock. And if I have to be powering over it, by the time I get over the hump, which is the end of the spit, then I have to turn. I can't be turning over the hump.

* * *

But I have pushed off -- my wife has pushed off one of the pilings.

Hr'g Tr. 228-230.

52. Ms. Simpson has navigated the deep draft sailboat owned by Petitioner Beard through the Channel numerous times over the past 20 years. She raced sailboats and participated in regattas so often that she "started racing sailboats in the women's regattas, where [she] captained and helmed [her] own boats." Hr'g Tr. 242. Compared to the three Petitioners who testified and the sailing population in the area, she and Petitioner Beard sail their boats and "come . . . into Mahogany Mill Pond, probably more often than anybody else." Hr'g Tr. 244.

53. Ms. Simpson echoed the concerns of the three Petitioners who testified. She expressed her fears of a collision with the Project in the future based on difficulty in navigating the Channel prior to the Project's installation. Then there were only the two Preconstruction Mooring Pilings present 24 feet from shore as opposed to the Project that is now 24 feet offshore with a width of 36 feet:

And like everybody else . . . we use Jim Veal's slip . . . we have to go in almost south of him . . . so you get the boat in. And once we pass the spit, we . . . do a sharp turn and come up . . . if there's any type of weather at all . . . you've got to keep the boat moving . . . there [have] been numerous occasions when the wind was heavy . . . that we will come so close to the pilings out there that I actually was on the bow of the boat pushing it away

* * *

. . . if there's a wind blowing . . . you have to be coming so fast to keep it up and then you have to make sure that you can make that run and keep it under control. And like I said, I've pushed off from [the pilings].

Hr'g Tr. 244-6.

54. Mrs. Simpson's concerns were not limited to the Project. Boats with engines attached to their sterns docked at the Project can extend out further than the Project: "[N]ow there's been another . . . 4 feet added on to [the Project] because . . . everybody [who] builds a dock wants a boat bigger than the dock is." Hr'g Tr. 247. The three Petitioners shared the concern about the additional extension into a Channel of boats and engines beyond the 24 feet of the Project's extension. Ms. Simpson reiterated, "If there's any wind at all, [the Project and boats docked at it] are going to cause major problems." Hr'g Tr. 248.

55. As the three Petitioners who testified, Ms. Simpson has never collided in a sailboat with the Preconstruction Mooring Pilings. At the time of hearing, Petitioner Beard had been in the Bahamas with his sailboat since October 2012 and had not returned. Ms. Simpson, therefore, had not yet contended with the Project or any boats docked there in navigating the Channel.

56. Ms. Simpson, however, did observe Mr. Kriegel attempt to navigate his sailboat through the Channel clear of the

Project. He ran aground trying to avoid both the spit and the structures. Ms. Simpson detailed potential consequences:

. . . [S]ailboats running aground, it's not a good thing . . . you have got your keels and . . . instruments on the bottom close to your rudder . . . you run a sailboat aground, you take the bottom paint off and you hit whatever else is down there . . . then you have to put it in power drive to get it back off . . . you can do quite a bit of damage to a boat when you run it aground, especially a sailboat.

Hr'g Tr. 259.

Potential Solution

57. Mr. Kriegel referred to a turning basin in the area of the Palm Harbor Marina. The turning basin is where Petitioners headed for the pond in their sailboats commence the swing around the spit taking into consideration the limiting point of the Veal Dock in order to avoid collisions with structures (or docked boats) that extend into the Channel.

58. A potential solution to the difficulties encountered by navigators of sailboats in the Channel is to dredge the turning basin. If the turning basin were wide and deep enough, sailboats would have more opportunity to enter the Channel straight on rather than having to swing around the spit when entering.

59. Some boats headed for the pond are able to make the necessary turn inside the turning basin now. Mike Lunn lives at Mahogany Mill Pond. When he looks out the sliding glass door at

his house he has a clear view of the Project and the turning basin. From what he has usually seen, boats "turn around in [the] basin a little bit." Hr'g Tr. 266. He doesn't ever seem them "cut like that," id., in the swing described by Petitioners. Whether he was referring to sailboats or just powerboats is not entirely clear, but he testified with regard to Petitioners and the entry into the Channel they described, "that's what y'all are saying but that's not what I see." Id.

60. In testimony that followed Mr. Lunn's, Mr. Kriegel explained that it is hard to judge when and where to make turns in the basin because of the narrowness of the Channel. There is no doubt, however, that navigation would be improved with dredging of the turning basin to make it deeper and wider even if it did not entirely cure the navigational problems described by all of Petitioners and Ms. Simpson. As Mr. Kriegel offered on cross-examination by Mr. Dunaway:

Now, if the turning radius were expanded, if the turning basin were dredged out, if the boats had more room to maneuver, some of [the navigational problems getting to the pond from the bayou] could be improved, yes.

Hr'g Tr. 166. Whether dredging the turning basin is an attainable solution was not confirmed. Mr. Kriegel testified, "I'm not sure . . . everybody would like to see it dredged out." Hr'g Tr. 167.

CONCLUSIONS OF LAW

a. Jurisdiction

61. The Division of Administrative Hearings has jurisdiction over the subject matter of this case and the parties. §§ 120.569 and 120.57, Fla. Stat.

b. Standing

62. Petitioners Kriegel, Baars, and Ed Rankin & Kay Rankin proved that their substantial interests could reasonably be affected by the Project. They demonstrated that they have standing to bring their respective petitions. Palm Beach Cnty. Evtl. Coal. v. Fla. Dep't of Evtl. Prot., 14 So. 3d 1076 (Fla. 4th DCA 2009).

63. The evidence offered by the three testifying Petitioners and Ms. Simpson proved that Petitioner Beard's substantial interests could reasonably be affected by the Project as well.

c. Burden and Standard of Proof

64. As the party seeking the exemption, Mahogany Mill bears the burden of proving by a preponderance of the evidence that it has clearly established entitlement. See Lardas v. Dep't of Evtl. Prot., Case No. 05-0458 (Fla. DOAH Aug. 24, 2005; Fla. DEP Oct. 21, 2005).

d. Statutes and Rules at Issue

65. To qualify for an exemption for the Project under section 403.813(1)(b), Florida Statutes, Mahogany Mill was required to demonstrate that the Project will meet the qualifications in the statute including that a project will not "create a navigational hazard." § 403.813(1)(b), Fla. Stat. See also Fla. Admin. Code R. 62-346.051(5)(a).

66. Qualification for the regulatory exemption under section 403.813(1)(b) entitles Mahogany Mill to an authorization to use state-owned submerged lands. See Fla. Admin. Code R. 18-21.005(1)(b) and 18-21.004(7)(g).

e. Entitlement to Exemption and Authorization

67. Mahogany Mill demonstrated by a preponderance of evidence that the Project "will not create a navigational hazard." This conclusion is based on the evidence that the Project does not extend into the Channel more than 24.0 feet offshore, the same extension into the Channel of the Preconstruction Mooring Pilings with which no vessel was shown to have ever collided with in the many trips taken by Petitioners in and out of the Channel.

68. The conclusion that Mahogany Mill is entitled to the regulatory exemption and the proprietary authorization does not mean that the concerns of the Petitioners have no foundation. The configuration of the Channel, the spit, the Palm Harbor

Marina, and the shoals in the area presents navigational challenges particularly to deep draft sailboats seeking ingress to Mahogany Mill Pond under certain weather conditions.

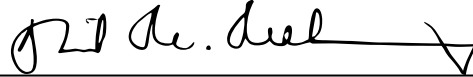
69. Nonetheless, the preponderance of the evidence clearly establishes that the Project is no more of a navigational hazard than the Preconstruction Mooring Pilings. Thus, it does not "create" a navigational hazard. There is a potential solution, moreover, to the difficulties in entering the Channel posed by Petitioners. The solution was presented by the Department through the rebuttal testimony of Mr. Lunn; that is, turning in the turning basin just before entering the Channel when heading for the pond. Dredging of the turning basin would likely enhance the chances of success.

RECOMMENDATION

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

RECOMMENDED that that the Department of Environmental Protection issue a final order determining that Mahogany Mill Owners Association, Inc.'s Project qualifies for an exemption from the need to obtain an Environmental Resource Permit under section 403.813(1)(b) and qualifies for authorization to use sovereign submerged lands under rule 18-21.005(1)(b).

DONE AND ENTERED this 11th day of June, 2013, in
Tallahassee, Leon County, Florida.



DAVID M. MALONEY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of June, 2013.

ENDNOTE

1/ References to statutes are to Florida Statutes (2012) unless
otherwise noted.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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