STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN H. PHIPPS BROADCASTING STATIONS, INC., JOHN H. PHIPPS, JOHN E. PHIPPS, and COLIN S. PHIPPS, Petitioners, vs. FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION, Respondent.	)	CASE NO. 79-216RP

FINAL ORDER

This cause came on for final hearing before the undersigned Hearing Officer beginning on March 19, 1979 in Tallahassee, Florida, and concluding on April 4, 1979. The parties filed briefs on April 30, 1979, Reply Briefs on May 14, 1979, and Petitioner filed a Supplemental Reply Brief on July 3, 1979.

APPEARANCES

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For Respondent: William P. White, Esquire
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This is an action pursuant to Section 120.54(4), Florida Statutes, wherein Petitioners seek an administrative determination of the invalidity of certain proposed rules of the Respondent. The petition seeks to have declared invalid sections 17-3.041, 17-4.242(1), and 17-4.248 of the proposed rules. There is no challenge to the procedural sufficiency of the rule adoption process in this cause.

Having considered all testimony, evidence, and argument of counsel the Hearing Officer finds as follows:

FINDINGS OF FACT

1. Petitioner, John H. Phipps Broadcasting Stations, Inc., owns approximately 10,600 acres of land bordering on Lake Jackson. The corporation owns roughly seventy percent of the waterfront property around Lake Jackson. The corporation's land is used for agriculture.

2. Less than ten percent of the land is used in a minor grain operation involving the interspersion of cover via several small grain fields. Most of these grain fields are in self-contained basins creating no erosion or runoff problems. These fields are conducive to the propagation of wildlife, particularly quail and deer. The grain produced by these fields is used, at least in part, in the corporation's cattle operation.

3. Approximately twenty-five percent of the corporation's land is used in a cattle breeding operation involving three to five hundred head of cattle. No feed lot operation is involved. The cattle are in pastures, the majority of which are bounded by the waters of Lake Jackson. The corporation fences to and into the water because of the fluctuating level of Lake Jackson and the necessity to contain their cattle. This practice has been ongoing for more than twenty-nine years. The corporation presently has no permits of an environmental nature in connection with the cattle operation. The testimony by Petitioner's witnesses is that the pasture cattle operation is very conducive to good water quality because it captures runoff and allows it to percolate.

4. The remainder of the corporation's land is used in a timber operation which includes controlled burning to help contain erosion.

5. Witnesses for Petitioner corporation testified that the water quality of Lake Jackson bordering the corporation's land is excellent. A high priority of the agricultural operation of the corporation is the maintenance of good water quality in Lake Jackson. Activities are not permitted on the corporation's land that degrade the water quality of the lake. Attempts are made to keep runoff from the lake. The evidence indicates that there are no discharges of water from the corporation's lands into Lake Jackson other than natural runoff.

6. The testimony presented by Petitioner corporation at the final hearing was that the corporation intends to continue using the property as it is presently used and has no tentative plans for a different use of the property.

7. Petitioner, Colin S. Phipps, owns approximately 1,000 acres bordering in part on Lake Jackson. He is also president of John H. Phipps Broadcasting Stations, Inc. Colin S. Phipps rents his acreage and shooting rights to an individual who farms the acreage. He testified that nothing was done on the property that presently requires permits from the Department of Environmental Regulation.

8. John H. Phipps and John E. Phipps personally own parcels of land bordering on Lake Jackson. The three individual petitioners in this cause are officers of the corporate Petitioner.

9. No evidence was presented to show activities on behalf of the petitioners on their property other than that set forth above. Further, it was the position of the petitioners that they did not foresee a change in the activities presently occurring on their property. It was their position that they had no tentative future plans for the property. They did indicate that they did not know what the future might bring.

10. An experienced and qualified appraiser appeared on behalf of petitioners and testified that he had read the rules being challenged in this cause, was familiar with the subject property, and that in his opinion the vagueness of the proposed rules would dramatically and adversely affect the

value of Petitioners' land. There are several problems with this opinion testimony. The witness did not testify that he had appraised the property. Rather, he testified that he was very familiar with the property. Thus, his testimony on the value of the land is speculation, albeit knowledgeable speculation, rather than the considered expert opinion of an appraiser. Further, the witness' opinion was based on his reading as a layman of the proposed rules and his speculation of their effect on the real estate market in which the subject lands might be offered for sale. The Hearing Officer found that the witness was a qualified appraiser with experience in appraising the economic impact of environmental regulations on waterfront property. Nevertheless, his interpretation of the proposed rules carries with it no aura of correctness for he is not, and, perhaps as all of us, cannot be, an expert in the interpretation of rules. The rules must speak for themselves and the witness can only speculate on the effect of different interpretations which might be given the rules. Therefore, the Hearing Officer concludes that the opinion of the witness is so speculative that his testimony is incompetent to support findings of fact as to the effect of the proposed regulations on the market value of Petitioners' real property.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over this cause.

12. There being no challenge to the procedural sufficiency of the rule adoption process, the procedural requirements set forth in Chapter 120, Florida Statutes, for the adoption of a rule are deemed to have been met.

13. Section 120.54(4), Florida Statutes, provides that "[a]ny substantially affected person. . ." may seek to have a rule determined an invalid exercise of delegated legislative authority. The same section also requires that the petition ". . .state with particularity facts sufficient to show the person challenging the proposed rule would be substantially affected by it. . ." Thus, in any rule challenge a necessary forerunner to the determination of the invalidity or validity of a proposed rule is the determination of standing on behalf of the petitioner challenging the proposed rule. When standing is resisted, as it has been here by Respondent, the burden is upon the challenger, Petitioners here, to prove standing. State of Florida Department of Health and Rehabilitative Services v. Alice P., 367 So.2d 1045 (Fla. 1st DCA 1979). The Florida law on the question of standing in a rule challenge proceeding such as this one, has been settled by the court in Florida Department of Offender Rehabilitation v. Jerry, 353 So.2d 1230 (Fla. 1st DCA 1978). In Jerry the court stated that a petitioner in a rule challenge proceeding under Section 120.56, Florida Statutes, must show injury which is accompanied by continuing, present adverse effects. In that case, dealing with the loss of gain time and disciplinary confinement of a prisoner in the state penal system, the court noted that Jerry's prospects of future injury rested on the likelihood that he would again be subjected to disciplinary confinement because of future infractions. The court noted that "whether this will occur, however, is a matter of speculation and conjecture and we will not presume that Jerry, who having once committed an assault while in custody, will do so again. To so presume would result only in illusory speculation which is hardly supportive of issues of 'sufficient immediacy and reality' necessary to confer standing." Florida Department of Offender Rehabilitation v. Jerry, supra.

14. While Jerry involved a Section 120.56, Florida Statutes challenge to an existing rule, the same court, a little over a year later, in State of

Florida Department of Health and Rehabilitative Services v. Alice P., supra, found that the test for standing to challenge an existing rule articulated in Jerry is the same test for standing to challenge a proposed rule. The court noted in Alice P., that in a Section 120.54, Florida Statutes challenge to the validity of a proposed rule

> . . .the legislature quite properly and logically provided that a challenger who surely cannot show that he 'is' affected by the proposed rule because it has not yet even come into existence, must show that he 'would be' substantially affected by it. There is no difference between the immediacy and reality necessary to confer standing whether the proceeding is to challenge an existing rule or a proposed rule.

15. Thus we can see that the burden is upon Petitioners to demonstrate that they would sustain some direct injury accompanied by continuing present adverse effects should the proposed rules challenged be adopted. There must be an immediacy and reality to this direct injury sufficient to meet the test of standing articulated by the court in Florida Department of Offender Rehabilitation v. Jerry, Supra, and State of Florida Department of Health and Rehabilitative Services v. Alice P., supra.

16. There are four Petitioners in this cause -- one corporate Petitioner and three individuals. From the evidence presented it appears that the corporate Petitioner is largely, if not completely, a family corporation with major ownership interest held by the three individual Petitioners. The record must be examined to determine whether standing has been proven for each Petitioner.

17. The evidence establishes that each individual Petitioner is an officer of the corporate Petitioner. However, Such a position of trust is not sufficient in and of itself to convey standing to the individual Petitioners by conferring upon them the interest of the corporate Petitioner. With regard to John H. Phipps and John E. Phipps as individuals, the evidence in this proceeding establishes only that they own an undetermined amount of property on Lake Jackson. The evidence does not establish their use of the property or activities on the property other than that of residence. In order to decide standing it is necessary that the requirements of the three proposed rules challenged herein (discussed below) be contrasted against the interest of the Petitioner. The interest of Petitioners John H. Phipps and John E. Phipps shown here is the simple fact of land ownership and little more. This interest contrasted against the proposed rules fails to show that those Petitioners will sustain or will be immediately in danger of sustaining some direct injury as a result of the proposed rules should they be adopted. They therefore lack standing to pursue this action.

18. The evidence establishes that the third individual Petitioner, Colin S. Phipps, owns approximately 1,000 acres of land adjacent to Lake Jackson. Apparently that entire property is rented to someone who farms it and also rents the shooting rights. Again, the evidence does not establish any activities or interests on the part of the Petitioner, Colin S. Phipps, sufficient to show that he will sustain or will immediately be in danger of sustaining some direct injury as a result of the challenged rules. Thus he also has failed to prove standing.

19. The evidence establishes that the corporate Petitioner in this action owns approximately 10,600 acres of land bordering on Lake Jackson, including a significant portion of the waterfront property around Lake Jackson. The corporation uses the land for an agricultural operation to include a minor grain operation, a cattle breeding operation, and timber. The evidence establishes that the corporation feels a responsibility to maintain good water quality in Lake Jackson and has as a priority of its operation the maintenance of good water quality in Lake Jackson. Activities are not permitted on behalf of the corporation that degrade the water quality of the lake. It is these activities as set forth in Paragraph 1 herein which need to be contrasted against the requirements of the challenged proposed rules to determine if they will cause the corporate Petitioner to sustain, or be in immediate danger of sustaining, some direct injury as a result of their adoption.

20. The first of the proposed rules challenged is 17-3.041 entitled Special Protection, Outstanding Florida Waters. That rule states that "it shall be the Department policy to afford the highest protection to Outstanding Florida Waters. . ." The rule then lists the waters denominated Outstanding Florida Waters and in that list are included waters in aquatic preserves created under the provisions of Chapter 258, Florida Statutes. Subsection 258.39(26), Florida Statutes creates the Lake Jackson Aquatic Preserve. Aquatic preserve is defined as ". . .an exceptional area of submerged lands and its associated waters set aside for being maintained essentially in its natural or existing condition." 258.37(1), Florida Statutes. Pertinent to this proceeding proposed rule 17-3.041 imposes no requirements in and of itself, but rather states the Department policy to afford the highest protection to Outstanding Florida Waters and lists those waters.

21. The second proposed rule challenged is 17-4.242(1) entitled Outstanding Florida Waters. In pertinent part that rule states that

> [N]o Department permit or water quality certification shall be issued for any stationary installation which significantly degrades, . . .or is within Outstanding Florida Waters unless the applicant affirmatly (sic) demonstrates that: . . .the proposed activity or discharge is clearly in the public interest; and . . .the existing ambient water quality within Outstanding Florida Waters will not be lowered. . ."

This proposed rule imposes the requirement that no department permit or water quality certification may issue for a stationary installation if that installation significantly degrades an Outstanding Florida Water unless the two exceptional criteria are met. In contrasting these requirements to the activities of the Petitioners, particularly the corporate Petitioner, the proposed rule would have no effect on the Petitioners unless they sought or were required to seek a department permit for water quality certification for a stationary installation which allegedly would significantly degrade Lake Jackson as an Outstanding Florida Water. The proposed rule does not, by itself, require the issuance of any permit, but rather is an attempt to define additional requirements for the issuance of permits dealing with stationary installations that significantly degrade the waters of an Outstanding Florida Water.

22. The third rule being challenged is proposed rule 17-4.248 entitled Storm Water. The heart of that rule as it applies to this proceeding is found in Section (3) of the proposed rule. Subsection (3)(a) requires that existing discharges of storm waters shall be subject to the licensing requirements of the Department where the Department determines the discharge is causing violations of water quality standards in waters of the state. Subsection (3)(c) prohibits construction of new storm water discharge systems except pursuant to a valid license issued pursuant to Section (3) of the proposed rule. "Existing storm-water discharges" and "new stormwater discharges" as those phrases are used in the proposed rule refers to discharges from stationary installations. Proposed Rule 17-4.248(2)(a) and (b). "Installation" is defined by statute as ". . .Any structure, equipment, facility, or appurtenances thereto, or operation which may emit air or water contaminants in quantities prohibited by rules of the Department". Section 403.031(8), Florida Statutes. "Stationary Installations" are elsewhere specifically referred to by Chapter 403, Florida Statutes, though not specifically defined by statute. Section (4) of the proposed rule, entitled Exemptions, in subsection (b) provides that the rule

> "shall not apply to discharges of storm-water which migrates into waters of the state solely by diffuse flow:
> 1. over the natural contours of the land covered by vegetation or soil; or
> 2. over artificial contours of land covered with soil or vegetation and used for agricultural, silvicultural or residential purposes."

23. This third proposed rule being challenged by Petitioners specifically imposes the requirement of a permit or license for certain stationary installations discharging stormwaters when the Department determines that the discharge is causing violations of water quality standards in waters of the state. If the waters of the state into which this storm-water was discharged by a stationary installation also happened to be an Outstanding Florida Water it would be necessary to also consider the requirements found in proposed rule 17-4.242(1) and the policy enunciated in proposed rule 17-2.041.

24. Now, contrasting the requirements as discussed above of the three proposed rules challenged against the activities of the Petitioners as proven by the evidence in this cause, there must appear some direct injury or the immediate threat of direct injury accompanied by continuing adverse effect in order to find the Petitioners have standing to pursue this action. Assuming that the cattle operation, grain operation and timber operation of the corporate Petitioner are each stationary installations, as that term is used in Proposed Rule 17-4.248, the evidence presented by Petitioners shows that there are no discharges of water from the installations into Lake Jackson other than natural runoff and that the water quality adjacent to Petitioner's land is excellent. The proposed rule requires a license only when it appears that the discharge is causing a violation of water quality standards. No evidence has been presented which would tend to indicate that Petitioners might reasonably apprehend that their discharges will violate water quality standards thus necessitating a license pursuant to the proposed rule. Petitioners argue that the challenged rules are so unclear and vague as to the water quality standard to be applied to Lake Jackson that the Department might impose some standard so stringent that Petitioners would be deemed in violation. That the Department would so interpret the proposed rules is speculation and conjecture on the part of Petitioners. Coupling this conjecture with Petitioners' statement that they do

not intentionally discharge pollution into the waters of Lake Jackson, that only natural runoff occurs and that the water quality adjacent to Petitioners' land is excellent, Petitioners have simply failed to demonstrate issues of sufficient immediacy and reality necessary to confer standing. This is reinforced by (4) of Proposed Rule 17-4.248 wherein are exempted from the licensing requirements of the proposed rule discharges of stormwater over natural contours of the land covered by vegetation or soil or over artificial contours of land covered with soil or vegetation and used for agricultural, silvicultural or residential purposes. This exemption would seem clearly to apply to the activities of Petitioners. Petitioners have failed to demonstrate the direct injury or immediate threat of direct injury that is requisite for standing.

25. If, at some future time the Respondent should take action against the Petitioners for some alleged violation of the challenged rules, Petitioners have adequate remedies to protect their rights. They may contest the action itself in a 120.57, F.S., proceeding and challenge the subject rules in a 120.56, F.S., action. In the interim they could seek a declaratory statement pursuant to 120.565, F.S., to discover how the Respondent would apply the subject rules to some specific future activity of Petitioners on their land.

26. Petitioners argue that the proposed rules are so vague and uncertain that they impair Petitioners' property rights. Lest it be thought that some less stringent test of standing should be applied because of the alleged infringement of property rights in land, the subject of the Jerry opinion should be remembered. There the Court dealt not with property rights, but rather with that right perhaps most basic, personal liberty.

ORDER

In consideration of the foregoing, it is therefore

ORDERED:

The Petitioners have failed to demonstrate standing to pursue this action and the Petition is therefore Dismissed.

DONE and ORDERED this 15th day of February, 1980, in Tallahassee, Florida.

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