

7-24-2000

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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DIVISION OF
ADMINISTRATIVE
HEARINGS

Closed

SAVE OUR BAYS AND CANALS, INC.)
)
Petitioner,)
)
vs.)
)
TAMPA BAY WATER and DEPARTMENT)
OF ENVIRONMENTAL PROTECTION,)
)
Respondents,)
)
and)
)
SOUTHWEST FLORIDA WATER)
MANAGEMENT DISTRICT,)
)
Intervenor.)

OGC CASE NO.: 00-0935
DOAH CASE NO.: 00-2010 *REN*

FINAL ORDER

An Administrative Law Judge with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order to the Department of Environmental Protection ("DEP") in this formal administrative proceeding. A copy of the Recommended Order is attached hereto as "Exhibit A." The Recommended Order indicates that copies were served upon counsel for Petitioner, Save Our Bays and Canals ("SOBC"), Respondent, Tampa Bay Water ("TBW"), and Intervenor, Southwest Florida Water Management District ("SWFWMD"). No Exceptions to the Recommended Order were filed by any of the parties. The matter is now before the Secretary of DEP for final agency action.

BACKGROUND

TBW is a wholesale public water supply utility created in June of 1998. TBW is the successor entity to the former West Coast Regional Water Supply Authority. The purpose of TBW is to use group resources to find regional solutions to the problems of water supply in Hillsborough, Pasco, and Pinellas counties. Over two million persons in the three-county area rely on TBW for their drinking water. TBW annually adopts a New Water Plan summarizing proposed drinking water production facilities. One of the projects included in TBW's June 2000 New Water Plan is the Tampa Bay Regional Surface Water Treatment Plant ("SWTP"). The proposed location of the SWTP is a 433-acre site in central Hillsborough County. The SWTP is projected to have a peak daily surface water treatment capacity of 60 million gallons.

In connection with the SWTP construction project, TBW filed a petition with DEP seeking a variance from the requirements of Rule 62-555.520(4)(c) & (d), Florida Administrative Code. These rule provisions require public water system construction applications to contain detailed drawings and complete specifications. On March 28, 2000, DEP's Division of Water Resource Management entered an order approving TBW's variance request. In April of 2000, an "Application for a Public Drinking Water Construction Permit" for the SWTP was filed with the Hillsborough County Health Department on behalf of TBW.¹

SOBC is a not-for-profit Florida corporation formed for the stated purposes of "public education and advancement of water quality of Tampa Bay, its tributaries, its

¹ As authorized by § 403.862(1)(c), F.S., DEP has delegated to the Hillsborough County Health Department the authority to issue permits for the construction, modification, or expansion of public drinking water treatment plants located in Hillsborough County. See Rule 62-113.100(1)(d), F.A.C.

estuaries, and its canals." On May 1, 2000, SOBC filed a petition challenging DEP's action granting TBW's variance request. DEP forwarded SOBC's petition to DOAH for a formal administrative proceeding. SOBC subsequently filed a verified amended petition alleging, among other things, that submittal of a complete set of project drawings and specifications with the SWTP construction application is necessary to assure the ability of the proposed facility to comply with state drinking water standards.

DOAH PROCEEDING

DOAH Administrative Law Judge, Robert E. Meale ("ALJ"), was assigned to preside over the proceeding initiated by SOBC's petition. SWFWMD's subsequent petition to intervene in the administrative proceeding was granted by the ALJ. The ALJ held a final hearing in the case on July 7 and 10-12, 2000. Various witnesses testified on behalf of the respective parties at the final hearing, and a number of joint exhibits were admitted into evidence. The ALJ entered a Recommended Order on July 24, 2000. The Recommended Order includes findings and conclusions of the ALJ that:

1. SOBC lacks standing under §§§ 120.569, 120.57(1), and 403.412(5), Florida Statutes, to challenge the Department's action approving TBW's variance request.
2. TBW established that the variance serves the purposes of the underlying statute, § 403.861, which purposes are to "protect the public health, safety, and welfare."
3. TBW established that it faced a "substantial hardship" within the purview of § 120.542(2), Florida Statutes, if the variance was not granted.
4. SOBC had neither initiated this administrative proceeding nor filed any pleadings herein for an "improper purpose" under § 120.595(1) or § 120.569(2)(e), Florida Statutes.

The ALJ ultimately recommended that DEP enter a final order granting the variance, but denying TBW's request for an award of attorney's fees and costs to be paid by SOBC.

RULING ON JOINT MOTION TO EXPEDITE ENTRY OF FINAL ORDER

A Joint Motion to Expedite Entry of Final Order ("Motion") was filed on behalf of TBW and SWFWMD on August 7, 2000.² The Motion refers to the ALJ's unchallenged findings in the Recommended Order of the environmental, financial, and legal factors creating an urgency for bringing the SWTP online as soon as possible. The Motion also refers to the ALJ's significant factual finding of the critical nature of the timing of "acceptance testing" of the SWTP during the highest flows of the Hillsborough River, which usually occur in September of each year. No response in opposition to the Motion was filed by SOBC or DEP. I conclude that the Motion demonstrates good cause for granting the request of TBW and SWFWMD that entry of the agency final order be expedited in this case.

CONCLUSION

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of administrative law judges by filing exceptions to the DOAH recommended orders. See Couch v. Commission on Ethics, 617 So.2d 1119, 1124 (Fla. 5th DCA 1993); Florida Dept. of Corrections v. Bradley, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). The ALJ's Recommended Order in this case rejects all of SOBC's legal contentions and even concludes that SOBC lacks standing to challenge DEP's issuance of the requested variance. Nevertheless, no Exceptions were filed by SOBC

² DEP has 90 days after the submittal of a DOAH recommended order to enter a final order approving or denying a contested application for a variance. See § 120.569(2)(l), F.S.

challenging any of the ALJ's factual findings, legal conclusions, or his ultimate recommendation that a final order be entered granting the variance.

Having considered the Recommended Order and other matters of record and having reviewed the applicable law, I concur with the ALJ's conclusion that TBW's variance request should be granted based on the "substantial hardship" provisions of § 120.542(2), Florida Statutes. It is therefore ORDERED:

A. The Joint Motion to Expedite Entry of Final Order is granted.

B. The ALJ's Recommended Order is adopted in its entirety and incorporated by reference herein.

C. TBW's petition for a variance from the requirements of Rule 62-555.520(c) and (d), Florida Administrative Code, is GRANTED, subject to the conditions set forth in the "Final Order Granting Petition for Variance" (OGC File No. 00-0140) entered by DEP's Division of Water Resource Management on March 28, 2000.

D. TBW's Motion for Attorney's Fees and Costs is DENIED, as required by the provisions of § 120.595(1)(b), Florida Statutes.³

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of DEP in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35,

³ Section 120.595(1)(b), F.S., only authorizes the award of attorney's fees and costs in an agency final order "where the nonprevailing party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose." In this case, the Recommended Order includes a determination by the ALJ that "TBW failed to prove any improper purpose by Petitioner associated with the filing of any pleading or participation in this case."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by United States Postal Service to:

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Cape Coral, FL 33904

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Ann Cole, Clerk and
Robert E. Meale, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Cynthia Christen, Esq.
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 19th day of August, 2000.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



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