

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JACQUELINE M. LANE,)	
)	
Petitioner,)	
)	
vs.)	Case No. 01-1490
)	
INTERNATIONAL PAPER COMPANY and)	
DEPARTMENT OF ENVIRONMENTAL)	
PROTECTION,)	
)	
Respondents.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Charles A. Stampelos, held a final hearing in the above-styled case on June 19 and 20, 2001, in Pensacola, Florida.

APPEARANCES

For Petitioner: Jacqueline M. Lane, pro se
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Pensacola, Florida 32506

For Department of Environmental Protection:

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For International Paper Company:

Terry Cole, Esquire
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STATEMENT OF THE ISSUES

The first issue is whether Petitioner, Jacqueline M. Lane (Lane) has standing. The second issue is whether International Paper Company (IP) provided reasonable assurances it has the ability to meet the conditions of the existing industrial wastewater permit for the wastewater treatment facility at the paper mill in Cantonment, Florida, pursuant to Rule 62-620.340(3), Florida Administrative Code. A final issue is whether Lane litigated this matter for an improper purpose.

PRELIMINARY STATEMENT

On or about April 4, 2001, Lane filed with the Florida Department of Environmental Protection (Department or DEP) a "Petition for Formal Administrative Proceeding Challenging Florida Department of Environmental Protection's Agency Action Granting the Transfer of Combined EPA and State Permit FL 0002526" (Petition). The Petition challenged the Department's proposed transfer of permit number FL0002526-002-IWF/MT (permit) and related documents, from Champion International Corporation,

Inc. (Champion) to IP. The permit authorizes operation of the industrial wastewater treatment facility (facility) at the paper mill in Cantonment, Florida.

The Department transferred Lane's Petition to the Division of Administrative Hearings (Division) for the assignment of an Administrative Law Judge to conduct all necessary proceedings pursuant to Sections 120.57(1) and 120.569(2)(c), Florida Statutes (2000), and to submit a recommended order to the Department. A final hearing was scheduled for June 19 and 20, 2001, in Pensacola, Florida.

On April 30, 2001, IP filed a Motion to Dismiss the Petition, and in the alternative, requested Lane to file a more definite statement and identify the water quality standards violated by IP. Lane filed a Response. The Motion to Dismiss was denied. However, Lane was permitted to file a more definite statement "reciting specific violations which Lane believes can be attributed to IP and any other specific violations which can be attributed to Champion."

On May 18, 2001, Lane supplemented her Petition by filing a document titled "Petitioner Lane's Response to Administrative Law Judge's Order for a More Definite Statement on IP's Specific Violations of Their Permit Since January 1, 2001." Lane's Response alleged IP violations, citing to provisions of the

Florida Administrative Code, and incorporated by reference the allegations set forth in paragraph four (4) of her Response.

On June 8, 2001, IP filed a Motion in Limine, requesting an order to limit the issues at the final hearing to consideration of IP's ability to comply with the "four corners" of the terms and conditions in the permitting documents listed in the Motion in Limine at paragraph 5. The parties disagreed on the scope of the permitting terms and conditions. The Department supported the Motion.

Lane filed a Response and had "no objection to limiting the proceeding to the permit terms contained within the four documents that IP listed in paragraph 5 and Exhibits A through D." Lane believed that consideration should also be given to compliance with the Temporary Operating Permit and the Consent Order issued therewith. Further, Lane contended that "IP is supposed to meet Water Quality Criteria given in F.A.C. 62-302.500 and 62-302.530" Lane also discussed the relevancy of various portions of the permitting documents. Lane argued, in part, that "Champion never came into compliance with the permit in question, and neither has IP" and that, pursuant to Rule 62-620.340, Florida Administrative Code, the "permit can not be transferred until [IP] complies with the terms of the

permit." Essentially, Lane wanted "to prove that IP is not meeting the terms of the permit and related documents"

After oral argument, the Motion in Limine was granted and the evidence "was limited solely to the ability of IP to comply with the conditions within the four corners of the existing permit and related documents."

On June 14, 2002, IP filed a Motion requesting a summary recommended order, recommending dismissal of Lane's Petition for lack of standing. On June 25, 2001, Lane filed a Response.

The final hearing was held June 19 and 20, 2001, and commenced with argument on IP's Motion for Summary Recommended Order and Lane's Response. IP and the Department contended the transfer of the permit would not result in any injury to Lane, as she repeatedly stated in her pre-hearing deposition. Lane asserted her "harm" was the Department's continuing failure to enforce conditions in the existing permit. See also paragraph 3 of Lane's Response to IP's Motion for Summary Recommended Order, filed June 25, 2001. The undersigned deferred ruling on this Motion until the issuance of this Recommended Order.

During the final hearing, the Respondents offered the testimony of two witnesses. The Department called William A. Evans (Northwest District Industrial Wastewater and Underground Injection Control Permitting Supervisor and expert in

environmental engineering). IP called Kyle Moore (IP Environmental Supervisor and expert in environmental engineering). The Department introduced eight exhibits, all admitted into evidence.

Lane offered the testimony of eight witnesses, James Lane (professor), Erica Mitchell (Northwest District Enforcement Coordinator), Franklin Matthew Dimitroff (Northwest District Environmental Specialist II), Bobby Cooley (former Northwest District Director), Donald Ray (DEP Environmental Specialist II and expert in freshwater stream ecology), William A. Evans (recalled), Kyle Moore (recalled), and herself (expert in marine biology). Lane identified ten exhibits; seven were admitted (1-3, 5, and 7-9), two were not offered (4 and 6), and one (10) was rejected.

The two volumes of the final hearing Transcripts were filed with the Division on July 5, 2001. All parties filed Proposed Recommended Orders and IP filed a Motion for Reasonable Attorney's Fees and Costs pursuant to Section 120.595(1), Florida Statutes (2000).

FINDINGS OF FACT

Based on the evidence and testimony of the witnesses presented and the entire record in this proceeding, the following facts are found:

The Parties

1. The Department is charged with the responsibility for determining whether to approve the Application for transfer of permit number FL0002562-002-IWF/MT from Champion to IP.

2. IP is a corporation authorized to do business in the State of Florida. IP operates a bleach kraft fine paper mill in Cantonment, Florida, formerly operated by Champion.

3. Lane is a citizen of the State of Florida who lives on Perdido Bay.

Application for Transfer of Industrial Wastewater Permit Number FL0002526-002-IWF/MT

4. In June 2000, IP notified the Department it was acquiring Champion as a wholly owned subsidiary. IP took over operation of the facility in Cantonment on January 1, 2001. At that time, the companies had fully merged.

5. On January 19, 2001, IP timely submitted an Application for Transfer of a Wastewater Facility or Activity Permit (Application) and advised the Department that "the permittee name for the pulp and paper mill in Cantonment, Florida[,] has been changed from 'Champion International Corporation, Inc.' to 'International Paper Company.'" Several wastewater permit-related documents were submitted to the Department as part of this name change.

6. The Department processed IP's Application to transfer the facility's permit pursuant to Rule 62-620.340(3), Florida Administrative Code. "The parties agree that this matter is controlled by Rules 62-4.120 and 62-620.340, F.A.C., regarding the transfer of the permit. The parties [did not agree] upon what conditions of the combined permits are applicable to determine whether the Department has received 'reasonable assurances that the conditions of the permit will be met.' Rule 62-620.340(3), F.A.C."

7. Rule 62-620.340(3), Florida Administrative Code, provides: "The Department shall allow the transfer under subsection (2) of this section unless it determines that the proposed permittee cannot provide reasonable assurance that conditions of the permit will be met. The determination shall be limited solely to the ability of the proposed permittee to comply with the conditions of the existing permit, and it shall not consider the adequacy of these permit conditions."

(Emphasis added).

8. This proceeding does not involve an enforcement action or consideration of whether the wastewater permit, and related documents, should be renewed. Champion's renewal application is under consideration by the Department.

9. The parties agree that the documents described in Findings of Fact 10-19, infra, set forth the conditions of the permit number FL0002526-002-IWF/MT at this time. These documents are listed below:

November 15, 1995, DEP Order (combining
the NPDES permit and the State-
issued wastewater permit)
April 22, 1996, DEP Letter (clarifying
November 15, 1995, Order regarding
1983 NPDES Permit)
January 3, 1983, EPA NPDES Permit
December 13, 1989, DER Temporary
Operating Permit
December 1, 1989, DER Consent Order
December 12, 1989, DER Variance

The Permit(s), Consent Order, Variances, and Related Permit Documents

10. Before May 1, 1995, in order to operate the wastewater treatment facility at the mill in Cantonment, both state and federal permits were required. The Department or its predecessor agency, the Department of Environmental Regulation (DER), issued state permits pursuant to Sections 403.08 and 403.088, Florida Statutes, and applicable rules. The United States Environmental Protection Agency (EPA) issued federal National Pollutant Discharge Elimination System (NPDES) permits pursuant to 40 Code of Federal Regulation Section 124.15. As a result of EPA's delegation of its NPDES authority to the Department in 1995, only one permit is now required.

11. The 1995 Memorandum of Agreement between EPA and the Department does not allow the Department to modify a permit that has been administratively continued. Modifications to permit limits have to be made through the permit renewal process.

12. On or about January 3, 1983, the EPA issued a NPDES permit to St. Regis Paper Company, authorizing discharge from the facility, located at the paper mill in Cantonment to the receiving waters named Eleven Mile Creek (creek). This NPDES permit contains the federal permit conditions applicable at this time. (EPA has since used the facility as a benchmark model to develop effluent guidelines for its new cluster rule.)

13. On December 1, 1989, the DER entered into a Consent Order with Champion International Corporation. This Consent Order was issued as a result of Recommended and Final Orders issued in Perdido Bay Environmental Association, Inc. et al. v. Champion International Corporation and Florida Department of Environmental Regulation, 12 F.A.L.R. 126 (DER Nov. 14, 1989).

14. This Consent Order allowed the continued operation of the facility. As a compliance requirement, a study report was required to include "an evaluation of technologies and treatment alternatives . . . to determine the most environmentally sound and practicable means to correct identified water quality violations caused by Champion." The studies required by the

Consent Order are needed to pinpoint sources of pollutants in the creek and Perdido Bay (bay).

15. The Consent Order has no expiration date although it is tied to the temporary operating permit (TOP) which had an expiration date of December 1, 1994. Extensive studies have been submitted to the Department pursuant to paragraph 14.A. of the Consent Order, which are necessary to trigger "the final compliance plan." This has been an ongoing process since the Consent Order and TOP were issued.

16. The conditions in the Consent Order and TOP apply at this time. Various discharge limitations and monitoring requirements are set forth in the TOP.

17. On December 13, 1989, DER issued a TOP, Number IT17-156163, to the facility, which was issued in conjunction with the Consent Order. The TOP expressly relies on the Consent Order for authorization. It contains the effective state permit conditions at this time.

18. On December 8, 1989, DER issued a Variance from water quality standards for color (transparency), iron, zinc, and the general water quality criterion for specific conductance. The standards in the Variance are part of the TOP and are effective at this time. The mill no longer needs the Variance for iron

and zinc. As to those parameters, it currently operates at lower levels than under the Variance.

19. On November 15, 1995, the Department combined the state and federal operating permits into a single permit identified as Wastewater Permit Number FL0002526-002-IWF/MT.

20. The TOP and NPDES permit were administratively continued when renewal applications were filed.

21. The Department will transfer to IP the permit documents described in Finding of Fact 9, supra. The Department will also transfer the pending permit renewal applications filed by Champion.

Wastewater Treatment Facility at the Paper Mill in Cantonment, Florida

22. In the past, Champion owned and operated a 1400-ton per day bleach and kraft pulp and paper mill in Cantonment. The operation is now conducted by IP. The paper mill treats its effluent from industrial activities at an on-site wastewater treatment facility (facility). Stormwater that falls on the industrial portion of the mill is also processed through the facility.

23. The mill is required to and takes monthly samples from the creek for a few parameters, e.g., DO and pH, to provide data to the Department for use in developing possible changes to effluent limitations in a final compliance plan.

24. There is an installed structure that continuously measures the flow of the effluent at the end of the facility's treatment system. This point, i.e., where the flow is measured, is called the Parshall Flume which is the compliance point for the facility. The effluent at Parshall Flume is automatically sampled each day, analyzed, and reported on a monthly basis to the Department. The analyses are reviewed and compared to the effluent limitations for a particular permit.

25. The treated effluent is discharged from the Parshall Flume through a pipe to natural wetlands. In this wetland area, the treated effluent combines with several streams, non-processed stormwater, and runoff from land south and west of the facility. Runoff from residential areas and areas west of the mill, including the City of Cantonment, also flows into this area. The IP mill is not the only source of discharge into this area.

26. After passing through the natural wetlands, the treated effluent runs through a pipe that discharges into the creek from below the surface. This point is about a half-mile from the facility. It is called the "boil" because the water from the pipe boils up into the creek. The "boil" is not a compliance point. On occasion, a Department inspector has taken

water samples at the boil. Each time, his sampling has shown water quality standards were met at the boil.

27. At the boil, the water flowing into the creek from the pipe contains treated effluent and drainage from areas not associated with the mill. From the boil, the creek flows a distance of fourteen miles to Perdido Bay (the bay).

28. At the boil, there is also stormwater runoff and drainage from residential areas flowing into the creek in addition to the water from the pipe. Along the sides of the creek to the bay is a large drainage basin, which includes agricultural and residential runoff that flows into the creek. The boil, which is non-processed stormwater of the creek, could be contaminated from non-IP sources.

29. Sources of pollutants in the bay include residential and agricultural stormwater runoff, Perdido River, and the creek. The Escambia County Utility Authority (ECUA) also has a treatment plant that has a discharge into the bay. Saltwater intrusion and runoff from development are additional sources of pollutants in the bay.

30. Lane takes samples at the boil and most recently in May and June of 2001. Her measurement of dissolved oxygen (DO) was approximately 2.6 and for specific conductance, between 1600 and 2000. Lane also samples the water at a bridge (279A) two

miles down the creek from the boil. Lane testified regarding bacteriological quality at the boil or further down stream, that fecal coliforms, including the bacteria Klebsiella, were present.

31. Lane is not a certified sampler. She does not have the required quality control/quality assurance program. Lane does not know the Department requirements to sample dissolved oxygen. She could not describe an approved standard for such sampling.

Surface Water Quality Standards

32. Unless otherwise provided through relief mechanisms, discharges into surface waters must meet the minimum water quality standards set forth in Rules 62-302, Florida Administrative Code. Relief mechanisms include variances, consent orders, and temporary operating permits.

33. The Department has issued variances, consent orders, and temporary operating permits to allow permit holders time to respond to changes in water quality standards and related regulations that reflect changes in understanding of environmental impacts to water bodies.

Permit Conditions

34. The permit conditions do not require compliance with all the water quality criteria in Chapter 62-302, Florida

Administrative Code, for water quality parameters. The Department has not yet agreed on "final treatment solutions" it can require under the Consent Order. See, e.g., Finding of Fact 49.

35. Specific deviations from the surface water quality standards in Chapter 62-302, Florida Administrative Code, are authorized by the Consent Order, TOP, variance, and NPDES permit.

36. The specific effluent discharge limitations in the TOP and NPDES permit, are for BOD₅, TSS, iron, specific conductance, pH, and zinc. (The reference to condition 12 in paragraph 25 of the TOP has not been amended.) Several of the effluent limitations (e.g., specific conductance) were granted by the Variance.

37. Paragraph 26 of the TOP specifies the monitoring and frequency requirements for the monitoring at the Parshall Flume. This monitoring information can be used by the Department to pinpoint sources of pollutants in the creek and in order to establish numerical, water-quality based effluent limitations for those sources.

38. General Condition 5 of the TOP does not per se impose on the mill the duty to meet all water quality standards in Chapter 62-302, Florida Administrative Code. The TOP authorizes

"a certain amount of pollution" and "certain relief." The TOP further established a "compliance schedule" for Champion to study the impacts of the discharge. However, the Department rules allow for reopening of the TOP and changing the permit conditions to reflect new evidence causing a concern regarding pollution. Here, the Department has not reopened the TOP.

39. The permit, including the TOP and Consent Order, allows the mill a period of time to come into compliance with all minimum water quality standards. When a final permit is eventually issued, the facility will have to meet these standards absent some express relief mechanism at that time.

IP Provided Reasonable Assurances of Its Ability to Meet Permit Conditions

40. The Department employee who reviewed IP's Application to transfer the permit is an expert in environmental engineering. At the time he reviewed the Application, he was familiar with the existing permit conditions. As part of his review, he ascertained whether IP was satisfying the conditions of the permit and determined it was.

41. The Department reviewed IP's annual report and other corporate brochures as part of its processing of the transfer Application. Information in these documents revealed IP has obtained other Federal-type NPDES permits for other companies at several other facilities.

42. The Department was familiar with IP's local management at the Cantonment facility when it processed the transfer Application. IP brings considerable "capability and talent" to the mill. The Department performed inspections during the last six (6) months and was familiar with the facility and wastewater system.

43. IP is an international company with greater financial resources than Champion. It has approximately \$30 billion in annual sales. Champion, in comparison, generated about \$5 billion a year. It is clear that that the operation of the mill and the facility would have less capital and financial support without IP.

44. Since June 2000, IP has worked with the Department in a continuation of the Department's concept of relocating the facility's discharge to wetlands. The plan considers removal of the facility's treated effluent from the creek to wetlands on IP's land and effectively eliminates it as a point source discharge and removes the discharge from the creek.

45. IP will have a greater ability than Champion to meet permit conditions due to greater financial sources, technical staff, and resources. IP's management is committed to resolving water quality issues like specific conductance and is willing to resolve outstanding water quality issues in the bay and creek.

46. In the view of the former Northwest District Director who worked on water quality issues at the facility for twelve years ending March 31, 2001, the current plan to discharge to wetlands will be implemented and allow compliance with all water quality standards. He also opines that IP has the ability to comply with water quality standards under the plan to discharge to wetlands.

47. In the Department's view, IP has provided reasonable assurances that it has the ability to meet the existing conditions of the permit sought to be transferred.

IP Complies with Permit Conditions as Evidence of Ability

48. According to the Department's expert, Mr. William A. Evans, a professional engineer with a Master's degree in civil engineering and an expert in environmental engineering, there have been no verifiable violations of permit conditions and no exceedances since January 2000, before IP took over operations of the mill. On the other hand, Mr. Evans, in reviewing a discharge monitoring report for IP for April 2001, advised, during cross-examination, that there appeared to be "an apparent violation, exceedance of the permit" for specific conductance pursuant to the 1500 micromhons per centimeter limit in the EPA's version of the permit. However, the Variance, which is part of the Application, was granted "because there is no

practicable means known or available for the adequate control of the pollution involved," i.e., specific conductance. The Department applies the limit of 2500 micromhos per centimeter set forth in the Variance for specific conductance, which is a reasonable interpretation of the permit documents. When the permit documents, including the Variance are read in this light, IP is in compliance with this limit.

49. IP is in compliance with the Consent Order, NPDES permit, and Variance. In making this finding, the undersigned is mindful of Lane's arguments and facts presented. The issue here is not black or white; violation or no violation. As noted by Mr. Evans:

This permit is recognized since '89 is [sic] not meeting water quality standards. It has all these documents because it doesn't. And they're still working under those. And the Department agrees with Ms. Lane that they are not meeting water quality standards in the creek. And we're working under these documents to make improvements.

And so is Champion and so is IP. But they are not, in our opinion, violating the conditions of the permit. There [sic] are complying with studying it, meeting the interim limits that are set forth in the permit. And that is what the Statutes require when a facility can not meet all the standards of a permit.

The Department, while considering the renewal application, has not approved it yet because they have not received reasonable

assurances that new permit conditions can be met. Champion, and now IP, are facing the continuing challenge of satisfying, among other requirements, water quality standards, which takes time, money, and know-how. The Department rightly believes that IP can best meet this challenge.

50. The Department's review of the monthly monitoring reports submitted by the mill since Champion was purchased reveals the facility has complied with permit conditions. The most recent monthly report was submitted May 23, 2001, and includes data through April 2001. During inspections at the facility since June 2000, the Department found no violations of permit conditions.

51. The mill, under IP's operation, has not exceeded the fecal coliform conditions of its permit. The mill has no significant contribution to fecal coliform in the creek because it treats its own domestic sewage and meets the fecal coliform limit at the compliance point. Runoff along the creek from agricultural and domestic sources could contribute to fecal and total coliform in the creek.

52. The Department enforces the "more stringent" pH condition in the 1989 TOP and Variance which is controlling over the less stringent standard in the 1983 NPDES permit. The pH limit in the NPDES permit is 6.0-9.0.

53. The Department reasonably interprets the freshwater stream pH rule to mean enforcement is not required if the permittee meets the range in the rule (6.0-8.5), more stringent than the 9.0 limit in the NPDES permit. The facility's pH data satisfies this range. If the Department were to enforce a limit of 6.5, instead of 8.5, IP has the ability to meet the lower limit by installing one of several available technologies to control the pH levels. IP's current proposal includes one of these technologies.

54. The biological integrity provision in the Consent Order requires studies on biological components of the creek and pH impacts this condition.

Permit Conditions Affecting the Creek and Bay

55. The permit does not require the facility to meet all the minimum surface water quality standards of Chapter 62-302, Florida Administrative Code, in the creek and bay. That is because of the relief mechanisms in the Consent Order, TOP, NPDES permit, and Variance.

56. The Consent Order provides a time frame for the facility to come into compliance with water quality standards in the creek and bay.

57. In terms of the Consent Order, the Department considers IP to be at the paragraph 14.A. step of the compliance

schedule since the Department has not yet "resolved or agreed on the final corrective action required under this [C]onsent [O]rder." The Department considers the facility to be in compliance with permit conditions because it is "working under a complying [sic] schedule and an order or a temporary operating permit." See Finding of Fact 49.

58. As long as IP is meeting the "interim limits that are set forth in the permit," it is not violating conditions of the permit.

59. The Department is aware of water quality exceedances from the standards in the creek and bay caused by the mill. This data was reported in the "fifth year surveys." This information serves as a basis for making improvements and finding "a new solution for the effluent as required by the consent order." See Finding of Fact 49.

Proposal for Joint Project with ECUA

60. IP and the ECUA are working with the Department on a plan that would result in the discharge of IP's treated effluent to wetlands, thereby removing the effluent from the creek. IP's financial capability, size, and technical human resources make this plan feasible.

61. IP will propose a plan to satisfy the Consent Order which consists of three parts: upgrading IP's industrial

wastewater treatment facility; allowing ECUA to locate an advanced domestic wastewater treatment plant on its land; and disposing the treated effluent from both facilities to wetlands on IP's land through a pipeline.

62. The proposed plan to discharge the facility's treated effluent to wetlands is a suitable solution that will allow the mill to meet minimum water quality standards.

63. Lane has no objection to the plan to discharge to wetlands. It will resolve all her water quality issues. She believes the plan, similar to a prior plan, is "feasible."

Standing and Improper Purpose

64. Lane admits the Department is not making any changes to existing permit conditions before transferring it to IP.

65. Lane agrees that changing the name on the permit from Champion to IP has no adverse affect on her.

66. Lane brought this proceeding because she is dissatisfied with the manner in which the Department is enforcing conditions in the facility's permit. According to Lane, "They haven't done their duty."

67. Her main complaints are with the Department's failure to enforce the permit conditions and the lack of a permit that makes the permit holder comply with Florida law. Lane feels that Champion violated permit conditions in the past, and IP is

currently violating permit conditions and, as a result, the permit should not be transferred because a decision to transfer is an implicit finding of compliance. In this light, Lane argues that past performance can be an indication of future ability or lack thereof.

68. Lane acknowledges that in order to add conditions to the existing permit, the Department must provide notice to the mill and give it a chance to meet the proposed conditions. She further admits the Department has not provided such notice.

69. Lane proved that the environmental situation attending Champion's, and now IP's, operation of the mill and the wastewater facility has been and is less than optimum and in need of positive changes. The Department agrees and so does IP.

70. Lane's personal observations of the condition of the creek and bay are documented. However, Lane did not prove that she will suffer an "injury in fact" if the permit and related documents are transferred to IP. Lane is not otherwise substantially affected by the Department's decision to approve the transfer. Lane's evidence did not rebut IP and the Department's proof that IP has the ability to comply with the permit conditions. The preponderance of the evidence shows that the environment in and around the mill and the facility has a

better opportunity for improvement if IP takes control of the mill and facility.

71. On the other hand, based on this record, Lane did not bring this case for an improper purpose.

CONCLUSIONS OF LAW

72. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding, pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2000).

73. The Department is the state agency charged with establishing a permit system for the operation of installations that may be a source of water pollution, pursuant to Sections 403.061(14), 403.087, 403.088, and 403.0885, Florida Statutes (2000).

74. IP, as the permit applicant, has the burden of proving by a preponderance of the evidence that it provided reasonable assurances of its ability to meet the conditions of industrial wastewater permit number, FL0002526-002-IWF/MT.

Lane Lacks Standing to Challenge the Department's Transfer of the Permit

75. Lane stated in her Petition challenging the Department's proposed transfer of the permit to IP that she was filing it pursuant to Sections 120.569 and 120.57, Florida Statutes. These statutes provide standing in this proceeding

only if Lane's "substantial interests" are being determined by the Department in the proceeding. Section 120.569(1), Florida Statutes (2000). Lane has the burden of showing, as a matter of fact, that she will be substantially and adversely affected if the Department transfers the permit for the facility to IP. The purpose of this standing requirement is . . . "to ensure that a party has a 'sufficient interest in the outcome of the litigation which warrants the court's entertaining it' and to assure that a party has a personal stake in the outcome so [s]he will adequately represent the interest [s]he asserts." Gregory v. Indian River County, 610 So. 2d 547, 554 (Fla. 1st DCA 1992)(citation omitted).

76. To demonstrate that the Department's proposed transfer of the permit will affect her "substantial interest," Lane must present facts showing the degree and nature of her alleged interest in the agency action. Lane must show she "will suffer injury in fact which is of sufficient immediacy to entitle [her] to a section 120.57 [fact-finding hearing and that her] substantial injury is of a type or nature which the proceeding is designed to protect." Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), rev. denied, 415 So. 2d 1359 (Fla. 1982) and 415 So. 2d 1361 (Fla. 1982).

77. In order to properly apply the test set forth in Agrico, "both the type and nature of the injury asserted, and the purpose and scope of the administrative proceeding" must be analyzed. Friends of the Everglades, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 595 So. 2d 186, 189 (Fla. 1st DCA 1992). "The nature of the injury which is required to demonstrate standing will be determined by the statute which defines the scope or nature of the proceeding." Id.

78. At hearing, Lane admitted the Department is not making any changes to existing permit conditions before transferring it to IP. Lane agreed that changing the name on the permit from Champion to IP will have no adverse affect on her. Lane brought this proceeding because she is dissatisfied with the manner in which the Department is enforcing conditions in the facility's permit. However, Lane did not prove that she has suffered an "injury in fact" should the permit, and related documents, be transferred to IP.

79. In view of the above, Lane lacks standing to challenge the Department's transfer of the permit to IP.

IP Provided Reasonable Assurances of Its Ability to Meet Permit Conditions

80. The parties agree the relevant test for the transfer of the permit in this case is set forth in Rule 62-620.340(3),

Florida Administrative Code, and allows the transfer of an industrial wastewater discharge permit if the proposed permittee provides reasonable assurances it has the ability to meet the conditions of the existing permit. See Findings of Fact 6-7. This is the same substantive test contained in the general rule for the transfer of permits, Rule 62-4.120(4), Florida Administrative Code ("ability of the new permittee to comply with the conditions of the existing permit").

81. IP proved by a preponderance of the evidence that it has the ability to meet the permit conditions as the Department construes them. IP is an international company with annual sales of about \$30 billion. It operates other mills with NPDES permits. The Department is familiar with the management at the mill. That management is committed to meeting permit conditions and resolving water quality issues the facility's discharge may present. IP brings human, financial, and technical resources to the mill that were previously unavailable. The Department has worked with IP personnel since June 2000, and thereby observed the mill's continued support of the Department's concept to relocate the facility's treated effluent to wetlands on IP's property.

82. The Department has also observed IP's cooperation with ECUA on the plan to relocate the discharges of IP's facility and

ECUA's proposed treatment facility to wetlands. In the Department's view, this is a feasible project that will allow full compliance by these facilities with the water quality standards in Chapter 62-302, Florida Administrative Code.

83. In view of the above, IP has established by a preponderance of the evidence reasonable assurances of its ability to comply with existing permit conditions of the facility.

IP Complies with Existing Permit Conditions

84. In view of the evidence submitted at hearing, IP is complying with permit conditions as the Department reasonably construes them at this time. In the Department's view, there have been no exceedances of permit conditions since IP took over operations of the mill in January 2001. According to expert testimony presented by the Respondents, IP is in compliance with the Consent Order, TOP, NPDES permit, and Variance. The monthly monitoring reports and periodic inspections by the Department show the facility's effluent has complied with permit limitations since IP purchased the mill as a wholly owned subsidiary.

85. The Consent Order provides a time frame for the facility to come into compliance with water quality standards in Eleven Mile Creek and Perdido Bay. The Department considers IP

to be meeting the compliance schedule in that order. The Department has not yet "resolved or agreed on the final corrective action" for water quality issues in the Consent Order. In the Department's view, IP is meeting the interim limits in the permit.

Litigation Costs and Attorney's Fees Should Not Be Assessed Against Lane

86. Pursuant to Section 120.595(1)(b) and (c), Florida Statutes (2000), an award of litigation costs, including reasonable attorney's fees, may be awarded in a Section 120.57(1) proceeding if the administrative law judge finds the nonprevailing party participated for an "improper purpose" within the meaning of Section 120.569(2)(e).

87. The definition of "improper purpose" in Section 120.569(2)(e), Florida Statutes (2000), includes a "frivolous purpose or needless increase in the cost of litigation." See also Section 120.595(1)(e)(1.), Florida Statutes (2000). A frivolous purpose has been judicially defined as "one which is of little significance or importance in the context of the goal of administrative proceedings." Mercedes Lighting and Electrical Supply, Inc. v. State, Department of General Services, 560 So. 2d 272, 278 (Fla. 1st DCA 1990).

88. Whether an improper purpose exists is a question of fact determined by the administrative law judge's review of the

record presented by the parties. Burke v. Harbor Estates Associates, Inc., 591 So. 2d 1034, 1037 (Fla. 1st DCA 1991). See also Mercedes Lighting, 560 So. 2d at 278 (The determination of improper purpose is based on the record, not a party's subjective intent.).

89. In this proceeding, Lane stated her purposes at hearing. See Findings of Fact 64-70. However, and overlooked by IP, Lane has consistently argued that Champion has in the past, and IP, is currently violating the current permit conditions. See, e.g., Transcript, Volume I, page 14 ("... the law says yes, you are providing reasonable assurance that the conditions of the permit are being met and that is where I am being injured because they are not—they are not meeting those conditions in the permit. And I will continue to be injured until they write a permit that does make this company come into compliance with the rules of Florida.") Lane also asserted that IP did not have the ability to comply with the permit conditions.

90. Lane offered evidence in support of her position. There are problems with the water quality of the creek and bay and perhaps these can be solved in the future. However, Lane's evidence did not sufficiently disprove that IP has the ability to comply with the permit conditions. This does not

mean, however, that Lane proceeded with an improper purpose and no such improper purpose is found.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that a final order be rendered as follows:

1. Lane lacks standing to challenge the transfer of industrial wastewater permit number FL0002526-002-IWF/MT to IP because Lane did not prove that her substantial interests were being determined by the Department's transfer of the permit from Champion to IP;

2. IP provided reasonable assurances it has the ability to comply with the conditions of industrial wastewater permit number FL0002526-002-IWF/MT;

3. IP has complied with the conditions of industrial wastewater permit number FL0002526-002-IWF/MT, as the Department construes those conditions, since assuming control of the mill on January 1, 2001; and

4. Lane did not participate in this administrative proceeding for an improper purpose.

DONE AND ENTERED this 24th day of August, 2001, in
Tallahassee, Leon County, Florida.

CHARLES A. STAMPELOS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of August, 2001.

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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.