

4-21-03

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

FILED
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DIVISION OF
ADMINISTRATIVE
HEARINGS

AT

LOUIS A. GERACE, et al.,
Petitioners,
vs.
S.M.G., INC. and DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
Respondents.

OGC CASE NO. 02-1158
DOAH CASE NOS.: 02-3639 -- 02-3640
02-3817 -- 02-3819
02-3823 -- 02-3827
02-3829 -- 02-3836
02-3838 -- 02-3839
02-3860 -- 02-3863
02-3865 -- 02-3875
02-3877 -- 02-3880

CAS-CLOS

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 these consolidated administrative proceedings. A copy of the Recommended Order is attached hereto as Exhibit A. The Recommended Order indicates that copies were served upon the Qualified Personal Representative for the Petitioners, Louis A. Gerace, et al. ("Petitioners"), and upon counsel for the Respondents, S.M.G., Inc. ("SMG"), and DEP. Exceptions to the Recommended Order were subsequently filed on behalf of the Petitioners. The matter is now before the Secretary of DEP for final agency action.

BACKGROUND

On May 23, 2001, SMG submitted an application with DEP for a permit to construct an air curtain incinerator in Citrus County, Florida ("Construction Permit"). On July 9, 2001, DEP gave notice of its intent to issue the Construction Permit to SMG.

Notice of the proposed agency action was published in the Citrus Times on July 19, 2001. No petitions challenging this proposed agency action by DEP were filed within 14 days of publication of the notice and the Construction Permit became final on or about August 6, 2001. The Construction Permit authorized SMG to construct and test operate a McPherson Systems, Inc. Model M30E air curtain destructor (incinerator) with underfire air at a natural non-Title V facility.¹

In November of 2001, SMG constructed the incinerator on approximately 500 acres of land located on the east side of State Route 495 north of the City of Crystal River. On June 19, 2002, DEP gave notice of its intent to issue a permit to SMG for the operation of this air curtain incinerator ("Operating Permit"). On August 15, 2002, DEP issued a notice of permit amendment to the previously issued Operating Permit in order to incorporate certain solid waste management provisions ("Amended Operating Permit"). In August of 2002, the Petitioners filed separate, but virtually identical, petitions with DEP challenging the issuance to SMG of the Construction Permit and the Operating Permit. In September of 2002, the Petitioners filed a second set of individual petitions challenging DEP's issuance of the Amended Operating Permit to SMG.

While these petitions were pending before DEP, SMG filed motions to dismiss both the original petitions and the second round of petitions. DEP subsequently referred the petitions and motions to DOAH, and Administrative Law Judge Charles A. Stampelos ("ALJ") was assigned to preside over the consolidated permit challenges filed by the Petitioners. There then ensued a series of procedural events in these consolidated DOAH proceedings resulting in various prehearing rulings by the ALJ.

¹ The only materials that may be burned in an air curtain incinerator are "wood wastes consisting of trees, logs, large brush, stumps relatively free of soil, unbagged leaves and yard trash, tree surgeon debris, and clean dry lumber such as pallets." Rule 62-296.401(7)(e), F.A.C.

The prehearing rulings of the ALJ included orders granting SMG's original motions to dismiss without prejudice, granting SMG's motion to relinquish jurisdiction to DEP the portion of the amended petition filed by the Petitioners challenging the Construction Permit, and granting SMG's motion to dismiss the portion of the amended petition challenging the Amended Operating Permit. However, the ALJ denied SMG's motion to dismiss the portion of the amended petition challenging issuance by DEP of the original Operating Permit. A DOAH final hearing limited to the Petitioners' challenges to the issuance of the incinerator Operating Permit was held by the ALJ in Crystal River on February 27-28, 2003. The ALJ issued his Recommended Order in these proceedings on April 21, 2003.

RECOMMENDED ORDER

The ALJ concluded in his Recommended Order that SMG demonstrated at the final hearing that the subject incinerator has been operated in compliance with the terms and conditions of the Construction Permit and the Operating Permit. The ALJ further concluded that SMG provided reasonable assurance that the continued operation of the incinerator will not violate any DEP rules or standards. The ALJ recommended that a final order be entered issuing the Operating Permit, as amended.

RULINGS ON THE PETITIONERS' EXCEPTIONS TO RECOMMENDED ORDER

Introductory General Statements

The front page and first paragraph of the second page of the Exceptions consist primarily of critical comments by the Petitioners' Qualified Representative concerning the purported inadequacy of DEP's rules and procedures, the conduct of the DOAH proceedings by the ALJ, and the operation of the air curtain incinerator by SMG.

However, these general allegations do not refer to any enumerated findings of fact or conclusions of law in the Recommended Order to which the Petitioners specifically take exception. Moreover, these general allegations do not contain citations to any designated statutory or rule criteria or standards which the Petitioners claim have been (or will be) violated by the operation of SMG's air curtain incinerator. Accordingly, these generic Exceptions are denied.

Exception A

The basic contention raised in the Petitioners' Exception A is that they did not receive adequate notice of DEP's intent to issue the Construction Permit to SMG. However, the Petitioners concede in this Exception that a copy of the notice of the intent to issue the Construction Permit to SMG was published in the Citrus Times on July 19, 2001, as stated by the ALJ in his Finding of Fact No. 6. The Petitioners do not contend that the Citrus Times fails to comply with the "newspaper of general circulation in the county where the activity is to take place" criteria of Rule 62-110.106(2), Florida Administrative Code ("F.A.C."). Instead, the Petitioners allege that they never saw the notice of intent to issue the Construction Permit as published in the Citrus Times. The Petitioners also allege that they were not "directly" notified by DEP of its intent to issue this Construction Permit. These allegations, even if true, would not entitle the Petitioners to any relief in these proceedings.

The basic purpose of the rule requirement of publication of a copy of a notice of intent to issue a DEP permit in a newspaper of general circulation in the county where the proposed activity is to be conducted is to authorize "constructive service" of notice of such proposed agency action to persons whose substantial interests may be affected.

See, e.g., § 50.031, Fla. Statutes ("Fla. Stat."). These Exceptions do not cite to any statutes or rules arguably requiring DEP to provide the Petitioners with "direct" notice by personal service of a copy of the intent to issue the Construct Permit to SMG in lieu of, or in addition to, constructive service through newspaper publication. Furthermore, the Petitioners' contention that they were entitled to receive "direct" notice of DEP's intent to issue the Construction Permit would render meaningless the newspaper publication requirements of Rules 62-110.106(2) and 62-110.106(7), F.A.C.

The Petitioners also claim that the incinerator construction and operation activities "were not immediately apparent" due to the site's "final location away from established roadways." Nevertheless, the purported remoteness of the site of an activity permitted by DEP does not render the newspaper publication provisions of Rules 62-110.106(2) and 62-110.106(7), F.A.C., inapplicable or inadequate.

In view of the above rulings, the Petitioners' Exception A is denied.

Exception B

In this Exception, the Petitioners object to the ALJ's order dismissing portions of their Amended Petition because the ALJ cited to case law originating in 1983 and 1991 and relied upon a statute enacted by the Legislature in 1989. The Petitioners do not contend that the cited cases have been overruled or that the statutory provisions relied upon by the ALJ have been repealed or substantially modified. Rather, the Petitioners simply "wonder why laws and rules are not updated." This general point of inquiry by the Petitioners does not warrant rejection or modification of the ALJ's Recommended Order. Exception B is thus denied.

Exception C

In Exception C, the Petitioners object to the ALJ's findings and conclusions rejecting the Petitioners' claims that Operating Permit should be denied due to "objectionable" odors allegedly resulting from the operation of SMG's air curtain incinerator facility. The ALJ found that "[c]redible evidence established that SMG meets or exceeds the requirements in the construction permit to reduce smoke, dust, and odor, and these requirements are carried over to the operating permit." (Finding of Fact No. 97) The ALJ also concluded that the "Petitioners did not adequately rebut the evidence presented by SMG and the Department that SMG has given reasonable assurance that its air curtain incinerator will operate and not cause objectionable odors." (Conclusion of Law No. 127)

Pursuant to Florida statutory law, an agency reviewing a DOAH recommended order has limited authority to reject or modify an administrative law judge's findings of fact. Section 120.57(1)(l), Fla. Stat., states in part that an "agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law."

There is substantial competent evidence of record in these proceedings supporting the ALJ's finding that SMG will meet permit requirements relating to reduction of odors, and his related conclusion that SMG has given reasonable assurance that its air curtain incinerator will not cause objectionable odors. This competent substantial evidence includes the cumulative expert testimony at the DOAH

final hearing of environmental engineer, Byron Nelson, and DEP air permitting engineer, James McDonald. I also conclude that the DOAH proceedings conducted by the ALJ comply with essential requirements of law. Consequently, Exception C is denied.

Exception D

The Petitioners' final Exception objects to the ALJ's legal conclusions that noise levels of air curtain incinerators are not regulated by DEP, and that claims of excessive noise are not legally sufficient to warrant denial of the Operating Permit. (Conclusion of Law No. 124) DEP does have statutory authority under the Florida Air and Water Pollution Control Act to establish "standards for the abatement of excessive and unnecessary noise." See § 403.061(11), Fla. Stat. However, the ALJ is correct in his conclusion that no noise standards have been established by DEP to date in connection with this agency's regulation of air curtain incinerators. Accordingly, Petitioners' Exception D is denied.

It is therefore ORDERED:

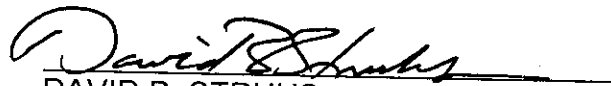
- A. The Recommended Order (Ex. A) is adopted in its entirety and incorporated by reference into this Final Order.
- B. The ALJ's prehearing order dismissing, as untimely, the portion of the Amended Petition challenging the Construction Permit is adopted.
- C. The ALJ's prehearing order dismissing, for lack of disputed issues of material fact, the Petitioners' challenges to the Amended Operating Permit is also adopted.
- D. The portion of the Amended Petition challenging the issuance by DEP of the original Operating Permit is denied on its merits.

E. The Department is directed to ISSUE to SMG Operating Permit No. 0170360-002-AO; FDEP Project No. 003, subject to the terms and conditions set forth in the permit document attached to the Notice of Permit Issuance executed by the Southwest District Office on June 19, 2002, as amended on August 15, 2002.

Any party to this proceeding has the right to seek judicial review of this 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 DEP clerk in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the DEP clerk.

DONE AND ORDERED this 4 day of June, 2003, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION


DAVID B. STRUHS
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.


CLERK DATE 6/4/03

CERTIFICATE OF SERVICE

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

Morris Harvey
8055 North Dacca Terrace
Dunnellon, FL 34433

Denise VanNess, Esquire
VanNess & VanNess, P.A.
1205 North Meeting Tree Boulevard
Crystal River, FL 34429

Susan L. Stephens, Esquire
Holland & Knight, LLP
315 South Calhoun Street
Suite 600
Tallahassee, FL 32301


Ann Cole, Clerk and
Charles A. Stampelos, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

W. Douglas Beason, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 5TH day of June, 2003.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



J. TERRELL WILLIAMS
Assistant General Counsel

3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
Telephone 850/245-2242