5-4-04

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DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA
DEPARTMENT OF ENIRONMENTAL PROTECTION

BUTLER CHAIN CONCERNED CITIZENS, INC.,	
Petitioner,	AT
vs.	**OGC CASE NO.: 02-1727**
	DOAH CASE NO.: 03-2471
DEPARTMENT OF ENVIRONMENTAL PROTECTION and WINDERMERE BOTANICAL GARDEN, L.P.,	REVA-C106
Respondents,	

FINAL ORDER

An administrative law judge with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order to the Department of Environmental Protection ("DEP" or "Department") 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 the Petitioner, Butler Chain of Concerned Citizens, Inc., ("BCCC"), and the Respondent, Windermere Botanical Garden, L.P. ("WBG"). BCCC filed Petitioner's Exceptions to Recommended Order, and DEP filed a Response to Petitioner's Exceptions, in which WBC joined. The matter is now before the Secretary of DEP for final agency action.

BACKGROUND

This case involves an administrative challenge by BCCC to a Consent Agreement entered into between DEP and WBG. The case arose from a project undertaken by WBC to remove aquatic weeds and muck from a triangular-shaped cove adjacent to Lake Butler in Orange County, Florida. Lake Butler is an Outstanding Florida Water, and consequently, more stringent

standards apply to projects that could affect the lake. WBC applied for and received a permit from DEP's Bureau of Invasive Plant Management ("BIPM") to remove nuisance and non-native aquatic plants from the cove. The BIPM permit required WBG to replant the cove with 60,000 submerged and emergent aquatic plants. In addition, WBG availed itself of the muck removal exemption in §403.813(2)(r), Florida Statutes (2001), which at the time authorized WBG to remove up to three feet of organic material in conjunction with the work done under the BIPM permit.[1] In order to dewater the cove and isolate it from the rest of Lake Butler, WBG built a berm across the cove's mouth and installed a double turbidity curtain between the lake and berm. WBG did not obtain the required ERP permit and authorization to use state lands prior to installing the berm and turbidity curtains, which is a violation of rules and statutes administered by DEP.

For several years prior to the completion of the cove project, the Lake Butler area had experienced a severe drought, which lowered the level of the lake about four feet below its normal level of 99.5 feet above sea level. The drought ended with a period of heavy rainfall in the second half of 2002 when the level of the lake rose to over 100 feet above sea level. The completion of the project and the deluge was coincident with a drop in the water quality of Lake Butler in two significant regards. Initially, the usually crystal clear waters of the lake became turbid; and then, when phosphorus levels in the lake dramatically increased, the lake suffered an algae bloom in the fall of that year.

The violations of the ERP and state lands rules and statutes were handled by DEP's Central District office, which has delegated authority from the Secretary to settle such violations. The Central District does not have delegated authority to settle violations of the BIMP permit,

[1] At the hearing, the parties disagreed about what the exemption allowed, although the disagreement is irrelevant to this proceeding. The exemption was subsequently changed through amendment to the statute, §403.813(2)(u), Florida Statutes (2002).

however. The Central District determined that the ERP and state lands violations should be settled through a consent agreement by allowing the project to continue to completion and the payment of a civil penalty of $8,600.00 and costs and expenses of $350.00. The civil penalty was offset with the production by WBG of a video documentary costing at least $13,425.00.

BCCC is an organization comprised of people in the Lake Butler area who are concerned with the environment in Lake Butler. BCCC believes the WBG project was responsible for a loss of wildlife habitat and at least partly responsible for the impacts to the water quality of Lake Butler. BCCC challenged the Consent Agreement alleging, among other things, that the corrective actions agreed to by DEP did not adequately address the violations. BCCC wants DEP to require that the cove be restored to a shallower system with a gently sloping littoral zone. DEP forwarded BCCC's Petition to DOAH for formal proceedings, and a final hearing was held by an Administrative Law Judge, (the "ALJ"), on December 3-5 and 8-10, 2003.

The ALJ entered his Recommended Order ("RO") in this case on May 4, 2004. The Recommended Order contains detailed findings of fact, conclusions of law, and a recommendation concerning the final disposition of this case. The ALJ found that BCCC did not demonstrate that it had standing to challenge the Consent Agreement because neither WBG's project nor the actions authorized by DEP in the Consent Agreement adversely affected the water quality of Lake Butler, either in the short or long term, or adversely affected its wildlife habitat.

STANDARDS OF REVIEW FOR CONSENT ORDERS

A consent order[2] is a consensual administrative order authorized under § 120.57(4), Florida Statutes, that is agreed to by DEP and one or more respondents. Abbanat v. Reynolds and Dept. of Environmental Regulation, 9 FALR 1989 (Fla. DER 1987). DEP consent orders are

[2] There is no legal difference between a consent order and consent agreement. Both are administrative settlements authorized under §120.57(4), Fla. Stat.

of two classes. The first is a license or permit substitute that serves "as authorization for a permittable type of activity that has not yet been conducted or is ongoing." Sarasota County v. Dept. of Environmental Regulation and Falconer, 9 FALR 1822, 1823 (Fla. DER 1987). The second is a resolution of environmental violations that is designed to bring a violator back into compliance with the law. Williams v. Moeller and Dept. of Environmental Regulation, 8 FALR 5537, 5541 (Fla. DER 1986); North Fort Myers Homeowners Assoc., Inc. v. Dept. of Environmental Regulation and Florida Cities Water Company, Inc., 14 FALR 1502 (Fla. DER 1992). DEP must review the first class of consent order as if it were a permit. Abbanat; Williams, at 5542. In the second class of consent order, DEP has the burden of proving the consent order is a reasonable exercise of its enforcement discretion. Falconer, at 1825.

When a substantially affected third party challenges an enforcement consent order, the appropriate standard of review is whether DEP abused its enforcement discretion in agreeing to the settlement. If DEP is found not to have abused its discretion, the consent order is adopted; if that burden of proof is not met, then the consent order is voided. As a consensual document, DEP cannot compel the respondent to accept unilateral changes to a consent order. West Coast Regional Water Supply Authority v. Central Phosphates, Inc., 11 FALR 1917, 1938 (1988). If the consent order is voided, the parties must re-enter negotiations before a replacement consent order could be entered.

A third party can have standing under § 120.569(1), Florida Statutes, to challenge the action taken by the Department under either class of consent order by meeting the test set forth in Agrico Chemical Co. v. Dept. of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981). As long as the petitioner can show a real impact to its substantial interests caused by the Department's actions under the consent order, the petitioner does not have to quantify the

impact. Lambou v. Dept. of Environmental Protection and Panfla Development, L.P., 26 FALR (Fla. DEP 2003).

STANDARDS OF ADMINISTRATIVE REVIEW OF RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency may not reject or modify findings of fact in a recommended order, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." ALJ's are the triers of fact who resolve the evidentiary issues at the hearing. The reviewing agency may not reweigh or resolve conflicts in the evidence presented at a formal DOAH hearing, judge the credibility of witnesses, or include additional findings of fact. Such evidentiary matters are within the province of the ALJ. See, e.g., Dunham v. Highlands County School Board, 652 So.2d 894 (Fla. 2d. DCA 1995); Florida Dept. of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987); Belleau v. Dept. of Environmental Protection, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997). As long as the ALJ's findings are reasonable interpretations or inferences, the agency is not free to modify them. Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281-1282 (Fla. 1st DCA 1985).

RULINGS ON BCCC'S EXCEPTIONS TO RECOMMENDED ORDER

BCCC filed 15 exceptions to the RO, which will be addressed in the order in which they appear. Citations to the transcript are by volume ("Vol.") and Roman numeral (I-XI) followed by the page number.

Exception No.1: BCCC takes exception to the ALJ's use of the word "abrupt" in paragraph 16 of the RO to describe the increase in the average chlorophyll a values when the drought ended in 2002. BCCC believes that this error underlies the ALJ's mistaken finding that the algae bloom occurred in the summer of 2002 rather than in the fall of that year. Contrary to BCCC's

assertion, however, the ALJ did not find that the chlorophyll a levels abruptly increased in the summer 2002. After a review of the record, I find that this finding of abrupt increase in chlorophyll a is a fair characterization of the competent substantial evidence presented at hearing. Further, I note that BCCC states in its Exception No. 7 that it does not assert that WBG caused the algae bloom, which was caused by an increase in phosphorus in the lake. In light of that stipulation, the findings in regard to the algae bloom are irrelevant to this proceeding. Therefore, I reject this exception.

Exception No. 2: BCCC takes exception to the ALJ's finding in paragraph 18 of the RO that the lakeshore development around Lake Butler predates strict stormwater management controls and that runoff from the Isleworth Golf Course receives little treatment. Peter Gottfried, a limnologist, testified that houses around the lake contribute to its degradation because they lack swales and vegetation that would filter nutrients from stormwater (Vol. V, 868). He also testified that Orange County does not have an ordinance that requires swales on new construction. A review of the record reveals that competent substantial evidence supports that finding, and thus I reject this exception.

Exception No.3: BCCC contests the ALJ's finding in paragraphs 24 and 28 of the RO that there was one, large floating tussock in the cove prior to the WBG project. After reviewing the record, I find ample competent evidence to support these findings (Thomas testimony, Vol. II, 210, 220-221; Harris testimony, Vol. II, 365). In addition, as these findings concern the BIPM permit and only tangentially affect the issues concerning the appropriateness of the Consent Agreement, they are background findings that do not affect the outcome of this case. Therefore, I deny the exception as irrelevant to the substantive issues in this proceeding. See, e.g., Adult World, Inc. v. State Div. of Alcoholic Beverages and Tobacco, 408 So.2d 603, 607 (Fla. 5th DCA 1982).

Exception No. 4: BCCC takes exception to the ALJ's finding in paragraph 30 of the RO that WBG representatives adequately supervised the contractors on the project. After a review of the record, I find that the ALJ's finding is a fair inference from the evidence presented at hearing and reject this exception.

Exceptions Nos. 5 and 6: These exceptions concern the amount of material to be removed and replanted under the BIPM permit. The ALJ found in paragraph 28 of the RO that DEP intended that WBG remove the nuisance and non-native vegetation on the tussock in the cove, regardless of its size. In paragraph 27 of the RO, the ALJ found that the 2001 BIPM permit required WBG to plant "nearly all of the cove bottom with 60,000 plants." BCCC asserts that 60,000 plants planted on 2-foot centers would cover only 5.5 acres rather than the approximately eight acres of the cove. Ed Harris testified as to how he arrived at the 60,000-plant calculation, and it appears to have been based on the estimated size of the tussock rather than the size of the entire cove (Vol. II, 369-370, Vol. XI, 2049). The record is not clear on this issue, so I must defer to the ALJ's interpretation of the evidence. Regardless of the area covered by 60,000 plants planted on 2-foot centers, the record supports the ALJ's finding that WBG was authorized to remove the tussock (Harris testimony, Vol. II, 321, 370) and required WBG to plant 60,000 plants. Thus, I reject these exceptions.

Exception No. 7: BCCC takes exception to the ALJ's finding in paragraph 41 of the RO that "Lake Butler suffered a catastrophic algae bloom" at the end of July and in the first few days of August 2002. I agree with BCCC that the evidence supports a finding that although the lake became turbid in the summer of 2002, the large algae bloom did not occur until the fall of that year. However, as mentioned above in the discussion of Exception No. 1, BCCC stipulates that it does not assert that WBG's actions caused the algae bloom, which renders this finding by the

ALJ irrelevant. BCCC requests that I remand the case to the ALJ for further findings on the timing of the algae bloom, but in light of BCCC's stipulation, I find that there is no need to take more evidence on this issue. Accordingly, I accept BCCC's exception to the finding that the algae bloom occurred in the summer of 2002, but reject the request to remand because this finding is irrelevant to BCCC's claims.

Exception Nos. 8 and 14: BCCC contests the ALJ's findings in paragraphs 42, 60, and 61 of the RO that the turbidity curtains installed by WBG were effective and that the berm and turbidity curtains provided temporary protection to Lake Butler from construction and stormwater-related turbidity. BCCC asserts that the ALJ should have found that the WBG project caused turbidity violations inside and outside the cove. In support of both these exceptions, BCCC cites to testimony from its president, Lori Bradford, that she saw darkened waters on the lakeward side of the turbidity curtain on several occasions. BCCC states that this testimony of Ms. Bradford is unrebutted and requests that these challenged findings of the ALJ be stricken.

BCCC further asserts that Dr. Battoe, who testified on behalf of WBG, did not rebut Ms. Bradford's testimony when he calculated the velocity of stormwater entering the cove. Dr. Battoe testified that this stormwater velocity was insufficient to re-suspend sediments and cause turbidity violations in Lake Butler, because sediments stirred up during the de-mucking operation and berm construction could have entered the lake under the curtains, regardless of the force of the stormwater. I reject these assertions of BCCC for several reasons.

First, I find that there is sufficient evidence in the record to support the ALJ's finding that the turbidity curtains were effective. Dr. Battoe's expert testimony, accepted by the ALJ, was that the project did not increase the contribution of turbidity or phosphorus to the lake than normally would be expected from the cove. Second, the transcript of Ms. Bradford's testimony

(Vol. XI, 2005) is ambiguous on the location of the "dark water." I would note that "dark waters" alone are not necessarily turbid, and such testimony without more may not be sufficient to prove a violation of the turbidity standard in DEP's rules.

Finally, even if the turbidity curtains were at times ineffective, the water quality violations caused by those ineffective turbidity curtains would concern the bases for entering the Consent Agreement, not the appropriateness of the remedy contained therein. Any water quality violations caused by WBG's project occurring prior to the entry of the Consent Agreement are only relevant to this proceeding if these violations are settled in the Consent Agreement and the required remedies adequately addressed those violations. In this regard, the ALJ addressed the issue of water quality violations by finding that the completion of the cove project, which is authorized by the Consent Agreement, would improve the water quality of Lake Butler. This finding is supported by competent substantial evidence. Accordingly, BCCC's Exception Nos. 8 and 14 are denied.

Exceptions Nos. 9 and 10: In these exceptions, BCCC is again concerned with the amount of phosphorus that entered Lake Butler as a result of the WBG project and before the Consent Agreement was effective. In paragraph 50 of the RO, the ALJ accepted Dr. Battoe's conclusions that there was little evidence that the WBG project was responsible for the dramatic increases in phosphorus levels in Lake Butler, and that the increased loading was caused by runoff from the entire Lake Butler watershed at the end of the drought. In paragraph 51 of the RO, the ALJ states that Dr. Battoe concluded that Lake Butler "suffered no disproportionate phosphorus loading from the Tilden's Grove subbasin," which discharges directly into the cove, or from cove itself. BCCC argues that Dr. Battoe did not rule out the effects of a "first flush" of phosphorus

from Tilden's Grove to the lake that could have been disproportionate because the vegetation had been removed from the cove in the demucking operation.

BCCC asserts that "[i]t is reasonable to infer that there was less stormwater treatment during the latter half of 2002 than there had been before the project started." But the ALJ did not make that inference, and I do not have the authority to reweigh the evidence as BCCC requests. Even if BCCC is correct that some additional phosphorus was discharged to the lake above what would be normally expected, this would be evidence of an underlying water quality violation rather than an attack on the appropriateness of the remedy in the Consent Agreement. I find that the ALJ's characterization of Dr. Battoe's testimony to be supported by competent substantial evidence, and I reject these exceptions.

Exception No. 11: In paragraphs 52 through 56 of the RO, BCCC asserts that the ALJ assumes that the replanting of the cove with aquatic plants was related to the Consent Agreement. After review of these paragraphs, I find that the ALJ made no such assumption. The ALJ may have included these paragraphs in response to BCCC's contention throughout these proceedings that the revegetation would not be successful or was insufficient to either create an appropriate replacement wetland or to provide adequate treatment for stormwater entering the cove. In addition, DEP asserted that the success of the revegetation plan required in the BIPM permit was a factor it considered in fashioning the relief in the Consent Agreement (Drauer testimony, Vol. IV, 689-699). For these reasons, the ALJ's findings concerning WBG's revegetation efforts are appropriate, relevant, and supported by competent substantial evidence. I reject this exception.

Exception No. 12: BCCC asserts that the ALJ's findings in paragraphs 53 and 60 of the RO that the revegetated cove will provide a more diverse wildlife habitat than existed previously is not based on competent substantial evidence. BCCC argues that Lake Butler already contains

enough open water habitat and that DEP should have required that WBG create a shallower wetland to better compensate for the loss of the cove. A review of the record reveals that several people testified that muck removal and replanting provides improved habitat for fish and wildlife (Gottfried testimony, Vol. V, 814-815, 875-876; Harris testimony, Vol.II, 372; Caton testimony, Vol. II 321; Thomas testimony, Vol. II, 210, 226-227). Accordingly, the ALJ's findings are supported by competent substantial evidence, and the exception is rejected.

Exceptions Nos. 13 and 15: BCCC takes exception to Conclusions of Law 60 and 61 in the RO, in which the ALJ determined that BCCC lacks standing. In his related Conclusion of Law 59, the ALJ cites to Agrico Chemical Co. v. Dept. of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981), a leading decision on standing under the Florida Administrative Procedure Act (APA). The ALJ specifically limited his consideration to the first prong of the two-pronged Agrico standing test – whether BCCC demonstrated that "it will suffer an injury in fact that is of sufficient immediacy to entitle it to a formal hearing."

BCCC contends that it has standing in this case because several of its members were adversely impacted by the changes in wildlife habitat and the decrease in water quality of Lake Butler that it attributes to WBG's project. However, the ALJ found that none of the "acts and omissions by WBG contributed to any water quality violations in Lake Butler." The ALJ further found that "[i]n the long run, the removal of the tussock and muck from the cove, especially in tandem with the completion of the revegetation required by the 2001 BIPM Permit, will improve the water quality of Lake Butler and add to the diversity of the habitat associated with the lake. And, in the short run, the berm and turbidity barriers protected the open waters of the lake from construction- and stormwater-related turbidity." I conclude that these findings and conclusions of the ALJ in paragraphs 60 and 61 of the RO dealing with the standing issue are based on

competent substantial evidence of record. This competent substantial evidence includes the testimony at the DOAH final hearing of Dr. Battoe, Ed Harris, and James Thomas. Accordingly, BCCC's Exception Nos. 13 and 15 are denied.

Exception 16: In its final exception, BCCC alleges that the ALJ's denial of standing does not meet the federal Clean Water Act ("CWA") standing requirements. I deny this exception for several reasons. First, BCCC did not raise this issue in its proposed recommended order, and it appears for the first time in its exceptions. Second, the CWA does not apply to this case. BCCC cites Arkansas Wildlife Federation v. ICI Americas, Inc., 29 F.3d 376 (8th Cir, 1994), cert. denied, 513 U.S. 1147 (1995), in support of its argument that the enforcement of state law must be comparable to the CWA. The cited decision does not stand for that proposition, however. Instead, it concerns the enforcement by a delegated state environmental program of violations of a National Pollutant Discharge Elimination permit. This administrative proceeding involves dredge and fill, state lands, and alleged, but unproven, water quality violations. Third, even if the CWA did apply, the Petitioner needed to demonstrate that DEP's actions caused it to suffer a substantial injury, which it did not.

BCCC also appears to argue that DEP had a burden to collect water quality data that could have been used by BCCC to prove that the WBG project caused water quality violations. No legal authority is cited in support of this novel argument, and I reject it as unsupportable. BCCC should be focusing its argument on the quality of the corrective actions agreed to by DEP, rather than on allegations of water quality violations. In that regard, the ALJ found that the WBG project would improve water quality in Lake Butler. Thus, even if there were evidence of water quality violations in this case, the corrective action proposed by DEP is appropriate and adequate. BCC's final exception is denied.

ORDERED:

1. To the extent that the Recommended Order (Exhibit A) has not been modified by the above rulings, it is adopted and incorporated herein by reference.

2. The Consent Agreement issued in this case is ratified and approved as final agency action of DEP in accordance with Chapter 120, Florida Statutes.

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 the Department 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 clerk of the Department.

DONE AND ORDERED this 2nd day of ~~July~~ August, 2004, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

ALLAN F. BEDWELL
Deputy Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
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FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

Heather Chapman 8/2/04
CLERK DATE

CERTIFICATE OF SERVICE

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

Jacob D. Varn, Esquire
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Ann Cole, Clerk and
Robert E. Meale, Administrative Law Judge
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and by hand delivery to:

Kelli M. Dowell, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 2nd day of August, 2004.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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