

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

DONNA BROOKS, CHARLIE JONES,
and DAVID and PATTY COLE

Petitioners,

vs.

PAUL CRUM and STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.

Case Nos. 06-2312
06-2313
06-2314

FILED
2007 FEB -8 A 11:51
DIVISION OF
ADMINISTRATIVE
HEARINGS

FINAL ORDER

On December 22, 2006, an administrative law judge from the Division of Administrative Hearings ("DOAH") submitted his Recommended Order to the Department of Environmental Protection ("DEP" or "Department"), a copy of which is attached as Exhibit A. The Recommended Order indicates that copies were served upon counsels for DEP, co-respondent Paul Crum ("Crum"), and the petitioners, David Brooks, Charlie Jones, and David and Patty Cole ("Petitioners"). DEP filed one exception on January 8, 2007, and none of the other parties filed exceptions or responses. The matter is now before me as Secretary of DEP for final agency action.

BACKGROUND

On December 6, 2005, DEP gave notice to Crum of its Determination of Qualification for Noticed General Permit No. 16-253057-002-EG ("Determination") of his single-family residential dock on Pumpkin Hill Creek located at 15696 Shark Road West, Jacksonville, Duval County, Florida. The project involves the removal of an existing wooden dock and the construction of a new 186.56-foot long dock with an

access pier, terminal platform, and boatlift with catwalk. The Petitioners timely filed petitions challenging the Determination claiming the proposed dock impeded navigation in a tidal creek that flows to Pumpkin Hill Creek. The Department forwarded the petition to DOAH, and Administrative Law Judge Bram D. E. Cantor (the "ALJ") was assigned to the case. Patty Cole voluntarily dismissed her petition prior to the hearing.

The ALJ found that no evidence was presented at the hearing to show that Petitioners Donna Brooks and David Cole ever used the tidal creek for fishing or boating, and he concluded their substantial interests were not affected by the proposed dock, and they had no standing to challenge the Determination. The ALJ found that Petitioner Charlie Jones did prove his standing but failed to prove the navigation of the creek was significantly impeded by the proposed dock. The ALJ recommended that DEP enter a final order granting the permit.

DEP'S EXCEPTION

DEP filed a single exception regarding the ALJ's interpretation of the standing requirements to challenge the Determination. In paragraph 31 of the Recommended Order, the ALJ cites to Section 120.569(1), Florida Statutes, as the legal basis for his determination that Donna Brooks and David Cole did not have standing because they did not allege an injury different from any that would be suffered by the general public. Neither Brooks nor Cole presented evidence at the hearing, and the ALJ found that the only evidence of their interest in the proceeding is their ownership of adjacent properties. DEP points out that the ALJ appears to apply a "special injury" test to Brooks and Cole, which overlooks the provisions of Section 403.412(5), Florida Statutes.

Section 403.412(5), Florida Statutes (2006), provides that a citizen challenging an activity “that has or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state” can meet the standing requirements to institute a Section 120.569 or 120.57, Florida Statutes, proceeding “by demonstrating it may suffer an injury in fact which is of sufficient immediacy and is of the type and nature intended to be protected” by Chapter 403, Florida Statutes. The statute also provides that “No demonstration of special injury different in kind from the general public at large is required.” Thus, contrary to the implication of the ALJ’s statement, Petitioners Brooks and Cole were not required to demonstrate they had an injury different from any suffered by the general public. However, these Petitioners had the burden to demonstrate some injury of the type protected by Chapter 403, and in the context of this proceeding their ownership of adjacent property alone was insufficient to make that demonstration.

For these reasons, I accept DEP’s exception and reject the ALJ’s legal interpretation of the standing requirements. However, the ALJ’s conclusion that Brooks and Cole failed to prove standing is unaffected by this change.

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). In this formal proceeding, the Recommended Order on review

expressly rejects the Petitioners' claims and recommends that the Permit be issued to Crum without additional permit conditions. Nevertheless, no exceptions to Recommended Order were filed by any of the Petitioners contesting the ALJ's adverse factual findings, legal conclusions, and recommendation.

Having considered the Recommended Order and being otherwise duly advised, it is ORDERED:

A. Paragraph 31 of the Recommended Order is modified by striking the sixth sentence in that paragraph. The remainder of the Recommended Order is adopted in toto.

B. The Department is directed to GRANT to Crum Noticed General Permit No. 16-253057-002-EG.

DONE AND ORDERED this 5 day of February, 2007, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



MICHAEL W. SOLE
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

2/5/07
DATE

CERTIFICATE OF SERVICE

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

Richard L. Maguire, Esquire
Charles F. Mills, III, Esquire
Rogers Towers, P.A.
1301 Riverplace Boulevard, Suite 1500
Jacksonville FL 32207-9000


Marcia Parker Tjoflat, Esquire
Angela M. Sarabia, Esquire
Pappas, Metcalf, Jenks & Miller, P.A.
245 Riverside Ave., Suite 400
Jacksonville FL 32202-4926

And by hand-delivery to:

Francine M. Ffolkes, Esquire
Timothy E. Markey
Department of Environmental Protection
3900 Commonwealth Boulevard
MS 35
Tallahassee FL 32399-3000

this 6th day of February, 2007.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



Thomas M. Beason
General Counsel
3900 Commonwealth Boulevard MS - 35
Tallahassee, Florida 32399-3000

NOTICE OF RIGHTS

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.