

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EARTHMARK SOUTHWEST FLORIDA)
MITIGATION, LLC,)
)
Petitioner,)
)
vs.) Case No. 08-5950
)
RESOURCE CONSERVATION HOLDING,)
INC., and DEPARTMENT OF)
ENVIRONMENTAL PROTECTION,)
)
Respondents.)
_____)

RECOMMENDED ORDER OF DISMISSAL

This cause came before Bram D.E. Canter, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), on the Emergency Motion to Dismiss, Request for Attorneys Fees, and Alternative Motion to Strike filed by Respondent Resource Conservation Holdings, Inc. A case management conference was held by telephone to address the nature of the emergency circumstances and to determine whether evidence was required to resolve the untimeliness issue that appeared on the face of the Petition for Formal Administrative Hearing. Following the telephone conference, an Order was issued which set forth expedited discovery instructions and identified three subjects upon which evidence could be offered at an expedited hearing:

(1) The facts surrounding the request for notice of agency

action; (2) The practice of the Department with regard to Florida Administrative Code Rule 62-343.090(2)(h); and (3) The facts relevant to whether the permitted project qualifies for the summary hearing proceeding described in Section 337.0261(4), Florida Statutes (2008).

APPEARANCES

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PRELIMINARY STATEMENT

The hearing was held on December 23, 2008, in Tallahassee, Florida. Petitioner Earthmark Southwest Florida Mitigation, LLC (Earthmark), presented two witnesses and Earthmark's Exhibits 1

through 4, 6 and 7 were admitted into evidence. Respondent Resource Conservation Holding, Inc. (RCH), presented one witness and RCH's Exhibits 1 through 9 were admitted into evidence. The Department presented two witnesses and the Department's Exhibits 1 through 4 were admitted into evidence. At the conclusion of the presentation of evidence, the parties were allowed to make closing arguments. The parties were informed that a ruling on the motion to dismiss would be issued without post-hearing written submittals and without a transcript of the hearing.

FINDINGS OF FACT

1. Earthmark operates the Corkscrew Regional Mitigation Bank under contract with the South Florida Water Management District (SFWMD).

2. RCH is a company in the business of sand and limestone mining and was the applicant for Environmental Resource Permit No. 0266397-001.

3. The Department is the state agency with the authority and duty to regulate mining activities in Florida.

4. On August 20, 2008, the Department issued a Notice of Intent to Issue Environmental Resource Permit No. 0266397-001 ("Corkscrew Road Excavation" or "the mining permit") to RCH to extract sand and limestone from a 1,365.5-acre tract of land owned by RCH in Lee County.

5. On August 22, 2008, the Notice of Intent was published in the Fort Myers News-Press, a daily newspaper of general circulation in Lee County and nearby counties in the region. The newspaper notice included a statement that a person desiring to challenge the proposed action of the Department must file a petition for hearing with the Department within 21 days.

6. No petition to challenge the proposed action was received by the Department within 21 days of publication of the newspaper notice.

7. On November 25, 2008, 43 days after the deadline stated for the filing of a petition for hearing, Earthmark filed its Petition for Formal Administrative Hearing with the Department. On December 8, 2008, the Department referred the petition to DOAH.

8. The Corkscrew Regional Mitigation Bank operated by Earthmark is located on 632.5 acres of land adjacent to the proposed sand and limestone mine.

9. The mitigation bank was established in the 1990s and was originally operated by Mariner Properties Development, Inc. (Mariner).

10. Negotiations began in 2006 between Earthmark Mitigation Services, Inc., of which Petitioner Earthmark was a subsidiary, to purchase from Mariner the contractual rights to operate the mitigation bank. The purchase agreement was

executed in April 2007, and closed (all contingencies satisfied) in March 2008.

11. Throughout the time that Mariner operated the mitigation bank, it regularly employed the consulting services of Kevin L. Erwin Consulting Ecologist, Inc. Erwin's company has its offices in Fort Myers. Erwin has had a long career in environmental consulting and is knowledgeable about the Department's environmental permitting procedures.

12. In November 2007 and January 2008, Erwin was paid by Earthmark for consulting services. In May 2008, Earthmark and Erwin executed an agreement for consulting services.

13. Erwin is the Qualified Mitigation Supervisor for the Corkscrew Regional Mitigation Bank.

14. On March 28, 2007, Erwin attended a meeting in Fort Myers with SFWMD and Lee County employees, and other interested persons to discuss, among other topics, mining activity in Lee County. Erwin's interests at the workshop were generalized. He was not attending exclusively because of his association with the Corkscrew Regional Mitigation Bank. He testified that he was representing the interests of "three or four dozen" clients. On the sign-in sheet for the workshop, under the heading "Organization," Erwin wrote KLECE, the initials of his consulting company.

15. Howard Hayes, Program Administrator in the Department's Bureau of Mines and Minerals Regulation, was invited to attend the meeting and to make a presentation. Hayes testified that, during his presentation at the meeting, he mentioned that a permit application for the Corkscrew Road Excavation was pending at the Department. It was not made clear in Hayes' testimony whether he included details sufficient to identify the location of the proposed Corkscrew Road Excavation. It is logical that Hayes would mention the pending permit application because mining activity in Lee County was a prominent subject of the workshop.

16. Attached to Earthmark's petition for hearing is an affidavit by Erwin that includes the following statement:

On March 28, 2007, as a representative of Earthmark, I requested, from the Program Administrator of the FDEP Mines and Mineral Regulation, that I be notified of any actions concerning the proposed mine.

Erwin subsequently prepared an amended affidavit that changed this statement to read as follows:

On March 28, 2007, I, as a representative of the Mitigation Bank, requested from the Program Administrator of the FDEP Bureau of Mines and Minerals Regulation that I, on behalf of the Mitigation Bank, be notified of any agency action concerning the proposed corkscrew excavation project (application number 0266397-001).

17. The clarity and specificity of Erwin's request for notice, as described in his affidavit statements, with respect to the permit application of interest to Erwin and the identity of the mitigation bank as the entity for whom Erwin was making the request, was not borne out in Erwin's testimony at the hearing. Erwin testified at the hearing that he does not recall hearing Hayes mention the proposed Corkscrew Road Excavation. Erwin testified that he asked Hayes to "keep us posted" about meetings, permit applications, and proposed agency actions regarding any mining proposals in Lee County. Erwin did not specifically request to be informed about the Corkscrew Road Excavation. Furthermore, although Erwin said that Hayes knew that Erwin was associated with the Corkscrew Regional Mitigation Bank, Erwin did not refer specifically to the mitigation bank when he asked Hayes to "keep us posted."

18. Erwin did not describe Hayes' response to his oral request for notice about mining permits, except that Hayes' response was understood by Erwin to be in the affirmative. Erwin did not say, for example, that Hayes told him, "Okay, I will notify you when the Department issues its Notice of Intent on the Corkscrew Road Excavation." Erwin did not say that Hayes made a written note to himself regarding Erwin's request for notice.

19. Hayes remembers seeing and talking to Erwin at the meeting in Fort Myers. Hayes said that Erwin was one of several people that stood around him after Hayes' presentation to ask Hayes questions or to discuss mining issues. However, Hayes does not recall being asked by Erwin to give him notice of mining permit applications or proposed Department actions on mining permits, in general, or the Corkscrew Road Excavation, in particular.

20. It is Hayes' practice to take notes at meetings and workshops and to include in his notes any request that he receives from a person to be notified of proposed agency action. Hayes took notes during the March 28, 2007 meeting, which were admitted into evidence, but Hayes made no note that Erwin (or anyone else) had requested notice of mining permit applications or proposed Department actions on mining permits.

21. In the past, the Department's Bureau of Mines and Minerals Regulation has accepted both written and oral requests for notification of proposed agency action. When such a request is made, a note is placed in the Department's permit application file as a reminder to send the person who made the request a copy of the Notice of Intent. No note was placed in the permit application file for the Corkscrew Road Excavation.

22. The preponderance of the evidence, taking into account the credibility of the witnesses, supports a finding that,

whatever Erwin said to Hayes on March 28, 2007, his words were not effective to cause Hayes to understand that Erwin was making a formal request for notice of the Corkscrew Road Excavation that required Hayes to place a note in the permit application file and to send Erwin a copy of the Notice of Intent when it was issued.

23. Earthmark claims that it first became aware of the Corkscrew Road Excavation when it was informed by Erwin in October 2008. Erwin testified that he first learned about the mining permit from a SFWMD employee and received a copy of the Notice of Intent on October 7, 2008. By that date, the 21-day deadline for filing a petition had already passed.

24. From the March 2007 workshop in Fort Myers to October 2008, a period of almost 19 months, neither Erwin nor any employee or agent of Earthmark made an inquiry at the Department about proposed mining activity in Lee County. If Erwin knew about the proposed Corkscrew Road Excavation in March 2007, as indicated in his affidavits, the fact that he never inquired about the proposed mine is difficult to understand. Erwin said he made no inquiry because he trusted the Department to inform him.

25. After being informed by Erwin about the Corkscrew Road Excavation on or about October 7, 2008, Earthmark waited 20 days to file with the Department a Request for Extension of Time to

File a Petition for Formal Administrative Hearing. Earthmark requested an extension of 21 days, to November 17, 2008, which the Department granted. Earthmark then waited until November 17, 2008, to file a second request for an extension of time to file a petition. The Department denied the second request and ordered Earthmark to file its petition no later than November 25, 2008. Earthmark filed its petition on November 25, 2008, 39 days after it was informed about the mining permit.

CONCLUSIONS OF LAW

26. Florida Administrative Code Rule 62-343.090(2)(h) provides:

A notice of receipt of a complete or substantially complete application shall be provided to any persons who have filed a written request for notification of any pending applications affecting the particular area in which the proposed activity is to occur. Where a person has requested notice of the intended agency action for a specific application, the Department shall provide such person with notice of such intended agency action on that specific application.

27. RCH argues that, pursuant to this rule, a person is not entitled to notice of the Department's intended action on a permit application unless the request for notice was made in writing. Petitioner argues that because the rule only refers to a written request in the first sentence regarding "pending applications," but not in the second sentence regarding

"intended agency action," a written request is not required for the latter.

28. It is unlikely that the rule was intended to make a distinction regarding the formality of the request for notice, depending on whether the subject was a permit application or intended agency action. For one reason, logic would suggest that notice of intended agency action, because of the legal rights and procedures that pertain thereto, would be the subject that is more deserving of the requirement for a written request. Evidence was not presented regarding the Department's original intent when it promulgated the rule, which is applicable to all types of Department permits. This particular dispute is made moot, however, by the practice of the Bureau of Mines and Minerals Regulation to provide notice to persons without regard to whether they requested notice in writing or orally.

29. Nevertheless, this does not resolve the timeliness issue, because the Department has no memory or record of an oral request from Erwin to be notified of proposed action on the Corkscrew Road Excavation. Therefore, the timeliness of Earthmark's petition must be analyzed under the doctrine of equitable tolling.

30. The doctrine of equitable tolling can cure an otherwise untimely petition under certain circumstances. The

leading case on the doctrine is Machules v. Dept. of Admin., 523 So. 2d 1132 (Fla. 1988), which held that equitable tolling should apply when a person has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his or her rights, or has timely filed in the wrong forum. In this case, the doctrine can only cure the untimeliness of Earthmark's petition if Earthmark can show that it was misled or lulled into inaction by the Department.

31. As the party asserting the applicability of equitable tolling, Earthmark has the burden to prove by a preponderance of the evidence the existence of facts that justify application of the doctrine. See Dept. of Env'tl. Reg. v. Puckett Oil Co., 577 So. 2d 988 (Fla. 1st DCA 1991) (late filing presumed to be a waiver of rights, but may be rebutted at an evidentiary hearing).

32. When equitable tolling is premised on the content of an oral conversation, as it is in this case, it is essential to know the words that were exchanged with some precision. Erwin did not describe his oral request made to Hayes with precision or consistency. This situation highlights the risk that a person takes when he or she make an oral request for notice, rather than a written request.

33. Florida Administrative Code Rule 62-343.090(2)(h) refers to a request for notice of the "intended agency action

for a specific application." It was not made clear that Erwin asked Hayes to be notified specifically about the Corkscrew Road Excavation. If his request entitled Erwin to be notified about the Corkscrew Road Excavation, then it also entitled Erwin to be notified about all mining permits issued in Lee County, into the indefinite future.

34. RCH argued that Earthmark cannot invoke the doctrine of equitable tolling because it was Mariner, not Earthmark, that was the operator of the Corkscrew Regional Mitigation Bank at the time Erwin made his request for notification. RCH also argued that, if Earthmark can rely on Erwin's request for notice, so could the "three or four dozen" other clients that Erwin said he represented at the March 2007 workshop. That would expand the entitlement to Department notice beyond the person who requests notice to any undisclosed parties that the requesting persons later say they made the request on behalf of. This issue does not have to be decided, however, because it is concluded that Erwin's reliance on his request for notice to Hayes was unreasonable.

35. Under the circumstances shown by the more persuasive evidence, it was unreasonable for Erwin to rely on his oral request to Hayes and Hayes' response to that request as the sole means by which Erwin would protect the potential interest of a client associated with the Corkscrew Regional Mitigation Bank in

filing a petition for hearing to challenge a proposed mining permit that might adversely affect the mitigation bank.

36. Earthmark failed to show by a preponderance of the evidence that it was misled or lulled into inaction by the Department, or that other considerations of equity require that the deadline for filing the petition be tolled.

37. Although Earthmark's petition for hearing was untimely, the record evidence is sufficient to demonstrate a plausible claim of timeliness by Earthmark and a reasonable concern about the operation of a limestone mine adjacent to the Corkscrew Regional Mitigation Bank. Therefore, Earthmark did not participate in the proceeding for an improper purpose and should not be required to pay the attorney's fees and costs incurred by RCH in this proceeding.

RECOMMENDATION

Based on the forgoing Findings of Fact and Conclusions of Law, it is recommended that Earthmark's Petition for Formal Administrative Hearing be DISMISSED as untimely.

DONE AND ENTERED this 29th day of December, 2008, in
Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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 of Dismissal. Any exceptions to this Recommended Order of Dismissal should be filed with the agency that will issue the Final Order in this case.