Florida Department of Environmental Protection

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

Charlie Crist
Governor

Jeff Kottkamp
Lt. Governor

Michael W. Sole
Secretary

June 22, 2009

Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

Re: Lois Mahute, Wallis Mahute, and Nathaniel Williams vs.
Suncoast Concrete, Inc. and DEP
DOAH Case No.: 08-6042
DEP/OGC Case No.: 08-2635

Dear Clerk:

Attached for filing are the following documents:

1. Agency Final Order (Pages 2-25)
2. Petitioner's Exceptions (Pages 26-38)
3. DEP's Response to Exceptions (Pages 39-58)

If you have any questions, please do not hesitate to contact me at 245-2212 or lea.crandall@dep.state.fl.us.

Sincerely,

Lea Crandall

Lea Crandall
Agency Clerk

Attachments

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

LOIS MAHUTE, WALLIS MAHUTE, and and NATHANIEL WILLIAMS,	)	
Petitioners,	)	
vs.	)	**OGC CASE NO. 08-2635**
	)	**DOAH CASE NO. 08-6042**
SUNCOAST CONCRETE, INC., and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents.	)	

FINAL ORDER

On May 20, 2009, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH") submitted a Corrected Recommended Order ("RO") to the Department of Environmental Protection ("DEP" or "Department") in the above referenced proceeding. A copy of the RO is attached as Exhibit A. The RO indicates that copies were sent to the Petitioners, Wallis Mahute, Lois Mahute, and Nathaniel Williams ("Petitioners"). The RO was also sent to counsel for the Co-Respondent, Suncoast Concrete, Inc., ("Suncoast"), and to counsel for the Department. On June 1, 2009, the Petitioners (who participated in this proceeding, *pro se*) filed Written Exceptions to the RO.[1] On June 11, 2009, the Department filed its Response to Petitioners' Exceptions. This matter is now before me for final agency action.

[1] The pro se Petitioners sent their Written Exceptions to DOAH and sent a copy to the Department's counsel. The Written Exceptions were not filed with the Department's Agency Clerk.

BACKGROUND

On October 9, 2008, the Department issued a Notice of Intent to issue Permit No. 194919-003-SO to Suncoast, to construct and operate a C & D facility in Santa Rosa County. The site of the proposed C & D facility is already permitted by the Department as a disposal facility for land-clearing debris. The disposal area is 7.2 acres on a parcel of land that is 57.8 acres. It is located on U. S. Highway 90, 1.9 miles east of State Road 87 in Santa Rosa County. The Petitioners Lois and Wallis Mahute live within two miles of the proposed C & D facility. The Petitioner Nathaniel Williams resides less than one mile from the proposed facility.

On October 30, 2008, the Department received a petition from 35 persons challenging the proposed agency action. The matter was then referred to DOAH. As described by the ALJ in the RO's Preliminary Statement, "[m]any of the original Petitioners apparently did not understand that their names had been submitted as Petitioners and did not intend to present evidence or to otherwise participate as Petitioners." Before the final hearing, 25 of the original petitioners voluntarily dismissed their claims in the case. Only the three named Petitioners attended the final hearing. At the final hearing the other remaining petitioners were dismissed by order of the ALJ.

The ALJ conducted the final hearing on March 17, 2009, in Milton, Florida. A one-volume Transcript of the final hearing was filed with DOAH. The Petitioners attached to their post-hearing submittal to the ALJ a number of documents which had not been offered as exhibits at the final hearing or had been offered, but not admitted into evidence. The ALJ granted the Respondents' motion to strike these documents from the Petitioners' post-hearing submittal. The ALJ subsequently issued his RO.

THE RECOMMENDED ORDER

In the RO the ALJ determined that Suncoast provided reasonable assurance by a preponderance of the evidence that the C & D facility, with the conditions in the permit, will comply with all applicable rule requirements regarding the protection of groundwater, odor and fire control, and proper closure of the facilities. (RO ¶¶ 16, 24). He found that Suncoast proved by a preponderance of the evidence that the proposed facility met all regulatory criteria for entitlement to Permit No. 194919-003-SO. (RO ¶¶ 17, 25).

The ALJ found that Suncoast will be required to use an impermeable liner, conduct groundwater monitoring, install stormwater controls, leachate collection and storage, and control access. The requirement for an impermeable liner is not common for C & D facilities and adds greater groundwater protection. (RO ¶¶ 6-9, 16). The ALJ noted that the draft permit conditions required a small working face and weekly cover with soil. He found that these measures would minimize odors and the possibility of fires at the facility. (RO ¶¶ 12, 13, 16). The ALJ further found that the financial assurance requirements of the draft permit provided a means to close the facility in the event that Suncoast was unwilling or unable to close the facility. (RO ¶¶ 14, 16).

STANDARDS OF REVIEW

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "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." § 120.57(1)(l), Fla. Stat. (2008); *Charlotte County v. IMC Phosphates Co.*, 34 Fla. L.

Weekly D357 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So.2d 61 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence (quantity) as to each essential element and as to its admissibility under legal rules of evidence. *See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So.2d 287, 289 n.3 (Fla. 5th DCA 1996).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See e.g., Rogers v. Dep't of Health,* 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.,* 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands County Sch. Bd.,* 652 So.2d 894 (Fla. 2d. DCA 1995). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Also, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See e.g., Collier Med. Ctr. v. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So.2d 383, 389 (Fla. 5th DCA 1983). An agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." An agency's review of legal conclusions in a recommended order, are restricted to those that concern matters within the agency's field of expertise. *See, e.g., Charlotte County v. IMC Phosphates Co.*, 34 Fla. L. Weekly D357 (Fla. 2d DCA 2009); *G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004). An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. *See, e.g., Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994). Considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See, e.g., Falk v. Beard*, 614 So.2d 1086, 1089 (Fla. 1993); *Dep't of Envtl. Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

However, agencies do not have jurisdiction to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993);

Heifetz v. Dep't of Bus. Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So.2d 1025, 1028 (Fla. 1st DCA 1997). Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio,* 622 So.2d at 609. Agencies do not have the authority to modify or reject conclusions of law that apply general legal concepts typically resolved by judicial or quasi-judicial officers. *See, e.g., Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1142 (Fla. 2d DCA 2001).

Finally, in reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." *See* § 120.57(1)(k), Fla. Stat. (2008). However, the agency need not rule on an exception that "does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." *Id.*

RULINGS ON EXCEPTIONS

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 ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker,* 677 So.2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing,* 954 So.2d 77 (Fla. 5th DCA 2007); *Fla. Dep't of Corrs. v. Bradley*, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward County*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Medical Ctr.,*

Inc. v. State of Fla., Agency for Health Care Admin., 847 So.2d 540, 542 (Fla. 4th DCA 2003).

Under Section 120.57(1)(k), Florida Statutes, the parties have 15 days after the ALJ issues the RO to submit written exceptions to the agency that will issue the final order. Therefore exceptions to the RO were due to the Department's agency clerk on June 4, 2009. The Petitioners' Written Exceptions were mailed on May 27, 2009, and were received (filed) with DOAH on June 1, 2009. In its response to the Petitioners' Exceptions the Department's counsel states that she received a copy on June 1, 2009. The Department represents that it was not prejudiced by the Petitioners' error and requests that I consider the Petitioners' exceptions as timely filed. Therefore, since the Department responded to the exceptions, and for the purposes of judicial review, I've provided the following rulings on the Petitioners' exceptions.

THE PETITIONERS' EXCEPTIONS

Exception No. 1

The Petitioners take exception to the ALJ's statement that "[m]any of the original Petitioners apparently did not understand that their names had been submitted ...." This sentence appears in the "Preliminary Statement" portion of the RO. The sentence in the RO continues on to say that " ... submitted as Petitioners and did not intend to present evidence or to otherwise participate as Petitioners." The Petitioners contest the accuracy of this sentence on the basis of personal conversations with these original Petitioners. However, the referenced personal conversations are not part of the evidence in the record of this administrative proceeding. On administrative review of a

recommended order I am only authorized to review the record on which the ALJ based his rulings, findings and conclusions. *See* § 120.57(1)(f), Fla. Stat. (2008).

The Petitioners further argue that letters to the ALJ in which original petitioners dropped out of the hearing did not indicate that the reason was that they "did not understand." The Petitioners request that I strike the sentence in the RO's Preliminary Statement "if there were no written, signed statements dated before the hearing on March 17th by any of the 25 dismissed petitioners stating that 'they did not understand'." However, I do not have substantive jurisdiction over the procedural, discovery, and evidentiary rulings of the ALJ in these administrative hearings. *See Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So.2d 1025, 1028 (Fla. 1st DCA 1997).[2]

Therefore, this exception is denied.

Exception No. 2

The Petitioners take exception to paragraph 6 where the ALJ found that the impermeable liner adds greater protection for groundwater. (RO ¶ 6). The Petitioners concede that "liners provide greater protection [for] *sic* groundwater." The Petitioners then argue that the liner's makeup and life expectancy "will most likely only delay the inevitable pollution of groundwater." As the Department points out in its response, the ALJ's finding is supported by competent substantial record evidence. (T. 38, lines 16-

[2] I note that my review of the record shows that the ALJ entered an Order of Dismissal on February 17, 2009, that states in part "these Petitioners ... stated in their signed answers to interrogatories ... that they did not wish to remain petitioners in the case." The Order further states "[i]t appears that the Petitioners in this case did not understand that their names had been submitted as Petitioners." (see also T. 86, lines 18-20).

18). In addition, the Petitioners' exception contains information about the makeup and life expectancy of the liner that was not presented at the hearing, and is contrary to the competent substantial evidence in the record of the hearing. The record evidence is that the liner is synthetic (T. 50, lines 15-16; JE 7, Tab 13), and has an indefinite life expectancy (T. 41, lines 9-13; JE 7, Tab 13).

In this exception the Petitioners also request that I additionally condition the draft permit to require an escrow account of $1 million for cleanup of any future environmental impacts on groundwater; and that the funds be transferrable to a new owner should the C & D facility change ownership. The Petitioners did not present any evidence at the hearing to support such an additional permit condition, and I am not authorized to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994). In addition, the ALJ's factual findings regarding financial assurance in paragraph 14 of the RO is supported by competent substantial record evidence. (T. 51-52; JE 7, Tab 5; JE 9; JE11 Specific Condition 5.0).

Therefore, based on the foregoing, this exception is denied.

Exception No. 3

In this exception the Petitioners raise an issue regarding potential asbestos-containing material disposal that was not previously raised or addressed in the administrative hearing. The RO contains no findings of fact or legal conclusions addressing this issue. Therefore, I'm not required to rule on the Petitioners' exception because it "does not clearly identify the disputed portion of the recommended order by

page number or paragraph," and "does not include appropriate and specific citations to the record." *See* § 120.57(1)(k), Fla. Stat. (2008) and Fla. Admin. Code R. 28-106.217.

Exception No. 4

In this exception the Petitioners raise an issue regarding the proposed C & D facility's footprint in relation to the proposed zone of discharge as described in Joint Exhibit 7. This issue was not raised or addressed in the administrative hearing. The RO does not contain any findings or conclusions addressing this issue. Therefore, I'm not required to rule on the Petitioners' exception because it "does not clearly identify the disputed portion of the recommended order by page number or paragraph," and "does not include appropriate and specific citations to the record." *See* § 120.57(1)(k), Fla. Stat. (2008) and Fla. Admin. Code R. 28-106.217.

Exception No. 5

In this exception the Petitioners raise an issue regarding the materials authorized for use as initial cover in Specific Condition 3.4 of the Draft Permit (JE 10). The Petitioners contend that the Specific Condition does not comply with County Ordinance No. 2007-16, and request that the Department requires Suncoast to comply with the County Ordinance. The record reflects that at the hearing the ALJ granted the Department's motion in limine to exclude evidence regarding local county zoning or land use ordinances (T. 8, lines 4-7; Department's Motion in Limine filed March 6, 2009). Although the local county ordinance referenced in this exception was not at issue in the hearing, the same well established case law cited in the Department's motion in limine precludes consideration of any statute or rule that does not provide the parameters governing the type of permit program at issue. *See Kate Wright, et al. v. Miami-Dade*

County DERM, 2009 WL 1583517, DOAH Case No. 08-4546 (Fla. Dept. Env. Prot. May 18, 2009)(citing *Council of the Lower Keys v. Charley Toppino and Sons, Inc., 429 So. 2d 67, 68 (Fla. 3d DCA 1983); Taylor v. Cedar Key Special Water and Sewerage Dist.,* 590 So. 2d 481 (Fla. 1st DCA 1991); *Save the St. Johns River v. St. Johns River Water Mgmt. Dist.,* 623 So. 2d 1193, 1198 (Fla. 1st DCA 1993)).

Therefore, based on the foregoing, this exception is denied.

CONCLUSION

Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the RO, and being otherwise duly advised, it is ORDERED that:

A. The Recommended Order (Exhibit A) is adopted in its entirety and incorporated herein by reference.

B. The Respondent Suncoast Concrete, Inc.s', application for a solid waste permit in FDEP File No. 194919-003-SO is GRANTED subject to all the conditions set forth in the Department's October 9, 2008, Notice of Intent to Issue and Draft Permit.

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 Rules 9.110 and 9.190, 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 22nd day of June, 2009, 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.

Lea Crandall
CLERK

6/22/09
DATE

CERTIFICATE OF SERVICE

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

William J. Dunaway, Esquire
Clark, Partington, Hart, Larry Bond
& Stackhouse
125 West Romana, Suite 800
Pensacola, FL 37502

Lois Mahute
5504 Cox Road
Milton, FL 32583

Nathaniel Williams, Jr.
8984 Tara Circle
Milton, FL 32583

Wallis Mahute
5500 Cox Road
Milton, FL 32583

by electronic filing to:

Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Ronda L. Moore, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 22 day of June, 2009.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

for FRANCINE M. FFOLKES
Administrative Law Counsel

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