

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FRIENDS OF PERDIDO BAY, INC.	)	
and JAMES LANE,	)	
	)	
Petitioners,	)	
	)	
and	)	
	)	
JACQUELINE LANE,	)	
	)	
Intervenor,	)	
	)	
vs.	)	Case No. 09-2446RX
	)	
DEPARTMENT OF ENVIRONMENTAL	)	
PROTECTION,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
INTERNATIONAL PAPER COMPANY,	)	
	)	
Intervenor.	)	
_____	)	

FINAL ORDER OF DISMISSAL

On May 8, 2009, Petitioners, Friends of Perdido Bay, Inc., and James Lane, filed a Motion for Summary Final Order Regarding the Invalidity of Florida Administrative Code Rule 62-302.800(2). Petitioners claim that Rule 62-302.800(2) is an invalid exercise of delegated legislative authority based on the grounds for a determination of invalidity set forth in Section 120.52(8)(b) and (c), Florida Statutes (2008). Intervenor, International Paper Company (IP), filed a response in opposition to the motion and a cross motion for a final order determining that the rule is valid. Respondent, Department of Environmental Protection, filed a response in opposition to Petitioners' motion, a motion for summary final order determining that the rule is valid, and separate motions to dismiss Petitioners for lack of standing.

Florida Administrative Code Rule 62-302.800(1) establishes procedures for petitioning the Department to adopt one or more site specific alternative criteria (SSAC) for a specific water body, or portion thereof, if the water body is not meeting the "default" water quality criteria "due to natural background conditions or man-induced conditions which cannot be controlled or abated." Rule 62-302.800(2) establishes similar procedures for the adoption of alternative criteria "on the basis of site-specific reasons other than those set forth in subsection 62-302.800(1)." A SSAC must be adopted as a rule by the Environmental Regulation Commission.

In order to have standing to challenge a rule, a person must demonstrate that he is substantially affected by the rule. § 120.56(3)(a), Fla. Stat. A party may demonstrate standing by showing that a rule has a real and immediate effect upon his case, as well as by proving injury in fact. Prof. Firefighters of Fla., Inc. v. Dep't of Health and Rehab. Services, 396 So. 2d 1194 (Fla. 1st DCA 1981).

Petitioners claim to be substantially affected by Rule 62-302.800(2) because it is referred to in the Consent Order between IP and the Department that authorizes IP to make modifications to the wastewater treatment system and the effluent discharge at IP's paper mill in Escambia County. The validity of the Consent Order is one of the issues pending in consolidated DOAH Case Nos. 08-3922 and 08-3933 ("the permit cases"), involving the same parties. Paragraph 10 of the Consent Order states:

The New Permit and this Consent Order require the Respondent [IP] to undertake long-term comprehensive monitoring of Elevenmile Creek, Perdido Bay, and the wetlands to verify the effectiveness of the corrective actions, demonstrate compliance with New Permit effluent limits, and to demonstrate whether Site Specific Alternative Criteria ("SSAC") should apply within the waters of the wetland effluent zone. This information may enable the Department to adopt SSAC pursuant to Florida Administrative Code Rule 62-302.800. If approved, the site specific alternative criteria would replace the statewide Class III default criteria identified in Rule

62-302.530, F.A.C., that would otherwise apply to the wetland effluent zone.

Paragraph 14(f) of the Consent Order states:

Within 97 months of the effective date of the Consent Order, the Respondent [IP] may petition for the establishment of site specific alternative water quality criteria pursuant to Rule 302.800, F.A.C. Upon an affirmative demonstration that such criteria meet the requirements of the Rule 62-302.800, F.A.C., the Department shall follow the procedure described in that rule for the adoption of site-specific alternative criteria. Any proposed agency action with respect to any site specific alternative criteria will be subject to review under Chapter 120, F.S.

It is unnecessary to address Petitioners' claim of rule invalidity, or the cross claims of rule validity, because Petitioners are not substantially affected by Rule 62-302.800(2). Petitioners' factual allegations, found sufficient to establish Petitioners' standing in the permit cases, are not sufficient for standing to challenge the rule unless the rule affects the validity of the proposed permit and Consent Order. It is concluded that the challenged rule does not affect the validity of the proposed permit and Consent Order.

The Consent Order does not authorize a SSAC pursuant to Rule 62-302.800(2), and does not require IP to petition for a SSAC. IP may never petition for a SSAC pursuant to the challenged rule. The Department is not relying on Rule 62-302.800(2) to authorize IP's discharge into the wetland adjacent to the paper mill.

The Consent Order also refers (in Paragraph 14(g)) to IP's ability in the future to seek to obtain a variance or waiver, but the rules authorizing variances and waivers likewise do not affect the validity of the Consent Order and proposed permit. These "moderating provisions" would be available to IP even if they had not been mentioned in the Consent Order. Until a SSAC, variance, or waiver is sought by IP, the rules which allow SSACs, variances, and waivers do not affect Petitioners.

Petitioners point out that the Department made a statement in the permit cases that "reasonable assurance that International Paper will achieve compliance with all applicable standards" is provided in part by the "ability of International Paper to address site-specific conditions within the receiving wetland under Rule 62-302.800." However, the Department has retreated from that statement and moved for dismissal of the rule challenge for lack of standing on the ground that Petitioners' claim of injury is "hypothetical, conjectural, or speculative, rather than real and immediate."

Although Petitioners are justifiably frustrated with the Department's changes of position, the posture of the permit cases is now equivalent to the outcome of a successful rule challenge - - the Department and IP cannot rely on Rule 62-302.800(2) to demonstrate the validity of the Consent Order and proposed permit.

Rule 62-302.800(2) does not cause or threaten a real and immediate effect on Case Nos. 08-3922 and 08-3923, or other injury to Petitioners. Petitioners' claim of injury is speculative and remote. Petitioners are not substantially affected by the rule and, therefore, lack standing to challenge the rule.

Accordingly, it is

ORDERED that

1. Petitioners' motion for summary final order is denied.
2. IP's motion cross motion for final order is denied.
3. The Department's motion for summary final order denied.
4. The Department's motions to dismiss are granted.

DONE AND ORDERED this 2nd day of June, 2009, in  
Tallahassee, Leon County, Florida.



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Filed with the Clerk of the  
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this 2nd day of June, 2009.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.