STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST. JOHNS RIVERKEEPER, INC., AND HENRY O. PALMER,	)	
Petitioners,	)	
vs.	)	Case No. 09-7054RX
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondent,	)	
and	)	
FLORIDA PULP & PAPER ASSOCIATION ENVIRONMENTAL AFFAIRS, INC., AND BUCKEYE FLORIDA, LIMITED PARTNERSHIP,	)	
Intervenors.	)	

FINAL ORDER

The final hearing in this challenge to the validity of existing Florida Administrative Code Rule[1] 62-302.800(2) was scheduled to take place on May 25-26, 2010. However, the hearing was canceled because the parties agreed that there were no factual disputes and that the case could be determined on motions for summary final order and responses, which have been filed and considered.[2]

STATEMENT OF THE ISSUES

The issues to be determined in this case are: whether Petitioners have standing; and whether Rule 62-302.800(2) is an invalid exercise of delegated legislative authority, as defined by Section 120.52(8)(b) and (c), Florida Statutes.[3]

FINDINGS OF FACT

1. Petitioner, St. Johns Riverkeeper, Inc. (Riverkeeper), is a nonprofit, membership-based corporation with its principal place of business in Jacksonville, Florida. It is dedicated to the protection, preservation, and restoration of the ecological integrity of the St. Johns River watershed, monitors water quality in the river and its tributaries, and involves citizens in the decisions that affect the health of the river, and organizes regular boat trips for its members and citizens to learn more about the river and how they can participate in its management.

2. Petitioner, Henry O. Palmer (Palmer), uses the lower St. Johns River (LSJR), including its marine portions and tributaries, for kayaking, boating, and observation of wildlife, and a substantial number of Riverkeeper's members use the LSJR, including its marine portions and tributaries, for boating, fishing, crabbing, observing birds and other wildlife, and other water-based recreational activities. Based on undisputed affidavits, Petitioners are substantially affected by algal

blooms and decay and vegetation and fish kills in and along the river. These conditions can be caused by excessive nutrients along with other factors.

3. Respondent, Department of Environmental Protection (DEP), has used the procedures in Rule 62-302.800(2) to establish a Type II site-specific alternative criterion (SSAC) for dissolved oxygen (DO) for the LSJR that is lower than the otherwise-applicable, default water quality standard in Rule 62-302.530(30). See Fla. Admin. Code R. 62-302.800(5)(a). As a result of the SSAC, DEP revised the Total Maximum Daily Load (TMDL) for total phosphorus (TP) and total nitrogen (TN) allowed for the marine portion of the LSJR.

4. Rule 62-302.800 sets out a procedure for establishing a SSAC. Paragraph (1) sets out the procedure for Type I SSACs, which can be established when a "water body, or portion thereof, may not meet a particular ambient water quality criterion specified for its classification, due to natural background conditions or man-induced conditions which cannot be controlled or abated" and "when an affirmative demonstration is made that an alternative criterion is more appropriate for a specified portion of waters of the state." Paragraph (2), which is challenged in this case, sets out the procedure to petition DEP for a Type II SSAC for unspecified "reasons other than those set forth above in subsection 62-302.800(1), F.A.C."

5. Rule 62-302.800(2) provides in part:

> (c) The Department shall initiate rulemaking for the [Environmental Regulation] Commission to consider approval of the proposed alternative criterion as a rule if the petitioner meets all the requirements of this subparagraph and its subparts. The petitioner must demonstrate that the proposed criterion would fully maintain and protect human health, existing uses, and the level of water quality necessary to protect human health and existing and designated beneficial uses. If the petition fails to meet any of these requirements (including the required demonstration), the Department shall issue an order denying the petition. In deciding whether to initiate rulemaking or deny the petition, the Department shall evaluate the petition and other relevant information according to the following criteria and procedures:
>
> > 1. The petition shall include all the information required under subparagraphs (1)(a)1.-4. above.
> >
> > 2. In making the demonstration required by this paragraph (c), the petition shall include an assessment of aquatic toxicity, except on a showing that no such assessment is relevant to the particular criterion. The assessment of aquatic toxicity shall show that physical and chemical conditions at the site alter the toxicity or bioavailability of the compound in question and shall meet the requirements and follow the Indicator Species procedure set forth in Water Quality Standards Handbook (December 1983), a publication of the United States Environmental Protection Agency,

incorporated here by reference. If, however, the Indicator Species Procedure is not applicable to the proposed site-specific alternative criterion, the petitioner may propose another generally accepted scientific method or procedure to demonstrate with equal assurance that the alternative criterion will protect the aquatic life designated use of the water body.

3. The demonstration shall also include a risk assessment that determines the human exposure and health risk associated with the proposed alternative criterion, except on a showing that no such assessment is relevant to the particular criterion. The risk assessment shall include all factors and follow all procedures required by generally accepted scientific principles for such an assessment, such as analysis of existing water and sediment quality, potential transformation pathways, the chemical form of the compound in question, indigenous species, bioaccumulation and bioconcentration rates, and existing and potential rates of human consumption of fish, shellfish, and water. If the results of the assessments of health risks and aquatic toxicity differ, the more stringent result shall govern.

4. The demonstration shall include information indicating that one or more assumptions used in the risk assessment on which the existing criterion is based are inappropriate at the site in question and that the proposed assumptions are more appropriate

or that physical or chemical characteristics of the site alter the toxicity or bioavailability of the compound. Such a variance of assumptions, however, shall not be a ground for a proposed alternative criterion unless the assumptions characterize a factor specific to the site, such as bioaccumulation rates, rather than a generic factor, such as the cancer potency and reference dose of the compound. Man-induced pollution that can be controlled or abated shall not be deemed a ground for a proposed alternative criterion.

5. The petition shall include all information required for the Department to complete its economic impact statement for the proposed criterion.

6. For any alternative criterion more stringent than the existing criterion, the petition shall include an analysis of the attainability of the alternative criterion.

7. No later than 180 days after receipt of a complete petition or after a petitioner requests processing of a petition not found to be complete, the Department shall notify the petitioner of its decision on the petition. The Department shall publish in the Florida Administrative Weekly either a notice of rulemaking for the proposed alternative criterion or a notice of the denial of the petition, as appropriate, within 30 days after notifying the petitioner of the decision. A denial of the petition shall

become final within 14 days unless timely challenged under Section 120.57, F.S.

(d) The provisions of this subsection do not apply to criteria contained in Rule 62-302.500, F.A.C., or criteria that apply to:

1. Biological Integrity.

2. B.O.D.

3. Nutrients.

4. Odor.

5. Oils and Greases.

6. Radioactive Substances.

7. Substances in concentrations that injure, are chronically toxic to, or produce adverse physiological or behavioral response in humans, animals, or plants.

8. Substances in concentrations that result in the dominance of nuisance species.

9. Total Dissolved Gases.

10. Any criterion or maximum concentration based on or set forth in paragraph 62-4.244(3)(b), F.A.C.

(e) Despite any failure of the Department to meet a deadline set forth in this subsection (2), the grant of an alternative criterion shall not become effective unless approved as a rule by the Commission.

(f) Nothing in this rule shall alter the rights afforded to affected persons by Chapter 120, F.S.

6. Rule 62-302.800 cites several statutes as its specific rulemaking authority and specific provisions of law implemented, including Section 403.061, Florida Statutes, which states in pertinent part:

> The department shall have the power and the duty to control and prohibit pollution of air and water in accordance with the law and rules adopted and promulgated by it and, for this purpose, to:
>
> * * *
>
> (7) Adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this act.
> . . . .
>
> * * *
>
> (9) Adopt a comprehensive program for the prevention, control, and abatement of pollution of the air and waters of the state, and from time to time review and modify such program as necessary.
>
> (10) Develop a comprehensive program for the prevention, abatement, and control of the pollution of the waters of the state. In order to effect this purpose, a grouping of the waters into classes may be made in accordance with the present and future most beneficial uses.
> . . . .
>
> (11) Establish ambient air quality and water quality standards for the state as a whole or for any part thereof, and also standards for the abatement of excessive and unnecessary noise.
> . . . .

7. Section 403.201, Florida Statutes, sets out a separate procedure to apply to DEP for a variance from DEP's rules and regulations, including water quality standards, "for any one of the following reasons":

> (a) There is no practicable means known or available for the adequate control of the pollution involved.
>
> (b) Compliance with the particular requirement or requirements from which a variance is sought will necessitate the taking of measures which, because of their extent or cost, must be spread over a considerable period of time. A variance granted for this reason shall prescribe a timetable for the taking of the measures required.
>
> (c) To relieve or prevent hardship of a kind other than those provided for in paragraphs (a) and (b). Variances and renewals thereof granted under authority of this paragraph shall each be limited to a period of 24 months, except that variances granted pursuant to part II may extend for the life of the permit or certification.

8. There was no evidence that the revised TMDLs for TP and TN allowed for the marine portion of the LSJR will lead to algal growth and algal blooms, reduced DO, fish kills, or adverse impacts to recreation on the river. To the contrary, the Type II DO SSAC for the marine portion of the LSJR has not been challenged and conclusively establishes that it will "maintain and protect human health, existing uses, and the level of water quality necessary to protect human health and existing and

designated beneficial uses" and will "protect the aquatic life designated use of the water body." Fla. Admin. Code R. 62-302.800(2)(c). See also Affidavit of Douglas J. Durbin, Ph.D., filed June 25, 2010.

CONCLUSIONS OF LAW

9. A substantially affected person can challenge a rule under Subsections 120.56(1)(a) and (3)(a), Florida Statutes.

10. The challenged Rule does not substantially affect Petitioners. The Rule's effect on Petitioners is remote. See Fla. Bd. of Med. v. Fla. Acad. of Cosmetic Surgery, Inc., 808 So. 2d 243, 250 (Fla. 1st DCA 2002)(to have standing, a rule challenger must establish that "application of the rule will result in 'a real and sufficiently immediate injury in fact'"). Moreover, the Rule's unchallenged application to establish the Type II SSAC for the marine portion of the LSJR conclusively establishes that Petitioners are not substantially affected. See Finding 8, supra.

11. Even if Petitioners had standing, they would not have met their "burden of proving by a preponderance of the evidence that the existing rule is an invalid exercise of delegated legislative authority as to the objections raised." § 120.56(3)(a), Fla. Stat.

12. Section 120.52, Florida Statutes, provides in pertinent part:

> (8) "Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> * * *
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.; . . . .
>
> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

The language following the lettered paragraphs of Section 120.52(8), Florida Statutes (sometimes referred to as the "flush

left" language) is reiterated in Section 120.536(1), Florida Statutes. It is a "set of general standards to be used in determining the validity of a rule in all cases." Sw. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594, 597-98 (Fla. 1st DCA 2000). This standard has been held to mean that

> agencies have rulemaking authority only where the Legislature has enacted a specific statute, and authorized the agency to implement it, and then only if the (proposed) rule implements or interprets specific powers or duties, as opposed to improvising in an area that can be said to fall only generally within some class of powers or duties the Legislature has conferred on the agency.

Bd. of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc., 794 So. 2d 696, 700 (Fla. 1st DCA 2001), clarified on reh., 798 So. 2d 847 (Fla. 1st DCA 2001). See also Sw. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d at 599.

13. Petitioners did not prove that DEP exceeded its grant of rulemaking authority by adopting Rule 62-302.800(2), or that the Rule enlarges, modifies, or contravenes the specific provisions of law implemented. Rule 62-302.800 cites several statutes as its rulemaking authority and specific provisions of law implemented, including Section 403.061, Florida Statutes. Paragraphs (9) and (10) of that statute authorize DEP to adopt a

comprehensive program to prevent, control, and abate the pollution of state waters. Paragraph (11) of that statute authorizes DEP to establish "water quality standards for the state as a whole or for any part thereof."

14. Petitioners concede that Section 403.061, Florida Statutes, provides specific rulemaking authority to adopt water quality standards but contend that it does not provide specific authority to adopt Rule 62-302.800(2). In support of this contention, they cite Day Cruise, supra, and Lamar Outdoor Advert. - Lakeland v. Fla. Dep't of Transp., 17 So. 3d 799, 800 (Fla. 1st DCA 2009).

15. Day Cruise involved a rule regulating "vessels, floating homes, or any other watercraft" adopted under the authority of Section 253.03(7)(b), Florida Statutes, which gives the Board of Trustees (BOT) authority to "adopt rules governing all uses of sovereignty submerged lands by vessels, floating homes, or any other watercraft, which shall be limited to regulations for anchoring, mooring, or otherwise attaching to the bottom." The court held that the statute did not authorize a rule prohibiting vessels used for gambling offshore.

16. In Lamar the statutory authority was specific to outdoor advertising sign dimensions other than height. As a result, the agency rule addressing height was held not to be authorized by the cited statutes.

17. In contrast, the authorization in Section 403.061(11), Florida Statutes, to adopt water quality standards includes the authority to adopt a procedure for the adoption of a SSAC. Under the federal and Florida statutory and rule regulatory scheme, a "moderating provision" such as Rule 62-302.800(2) is part of Florida's water quality standards. See Fla. Admin. Code R. 62-302.200(31) ("water quality standards" are defined to include "moderating provisions"); 40 C.F.R. § 131.11(b)(1) (states' numerical water quality criteria based on federal Clean Water Act Section 304(a) Guidance can be "modified to reflect site specific conditions").

18. Even if Rule 62-302.800(2) were not a water quality standard, it is authorized as part of DEP's comprehensive program for the prevention, control, and abatement of pollution of state waters. See § 403.061(9) and (10), Fla. Stat. See also Frandsen v. Dep't of Envtl. Prot., 829 So. 2d 267 (Fla. 1st DCA 2002), rev. den. 845 So.2d 889 (Fla. 2003), cert. denied, 540 U.S. 948 (2003) (unsuccessful challenge to the validity of Rule 62D-2.014(18), which pertained to free speech activities in state parks and was authorized by Section 258.007(2), Florida Statutes, which granted DEP the authority to adopt rules to carry out its duty under Section 258.004, Florida Statutes, to "supervise, administer, regulate, and control the operation of all public parks" and to "preserve, manage, regulate, and

protect all parks and recreational areas held by the state . . . ."); Hennessey v. Dep't of Bus. & Prof. Reg., 818 So. 2d 697, 698 (Fla. 1st DCA 2002) (unsuccessful challenge to the validity of Rule 61D-6.002(1), which made race animal trainers the absolute insurers of (i.e., imposed absolute liability for) the condition of the animals entered into any race and was authorized by Sections 550.0251(3) and 550.2415(2) and (13), Florida Statutes[4]); Myers v. Dep't of Envtl. Prot., DOAH Case No. 09-2928RX, 2009 Fla. ENV LEXIS 93; 2009 ER FALR 154 (DOAH Aug. 24, 2009) (unsuccessful challenge to Rule 18-14.003, which prohibited "structures whose use is not water-dependent; sanitary septic systems; . . . houses; . . . and utility installations on or over state land without consent or authority from the Board or Department," and Rule 18-21.004, which prohibited non-water dependent uses over sovereign submerged lands, unless in the public interest as determined by a case-by-case evaluation, and prohibited stilt houses, boathouses with living quarters, and other residential structures, which were authorized by Section 253.03(7)(a), Florida Statutes, which granted BOT the authority to adopt rules to create "an overall and comprehensive plan of development concerning the acquisition, management, and disposition of state-owned lands so as to ensure maximum benefit and use" and to implement "this act").

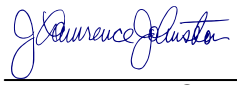
19. Petitioners also rely on Dep't of Highway Safety and Motor Vehicles v. JM Auto, Inc., 977 So. 2d 733 (Fla. 1st DCA 2008), which upheld a determination that a rule was invalid for not having specific statutory authority. But that case is distinguishable in that the only statutory authority for the challenged rule was a general rulemaking authorization to adopt rules to implement a chapter of the Florida Statutes.

20. Finally, Petitioners contend that Rule 62-302.800(2) directly contravenes Section 403.201, Florida Statutes, which sets out a separate procedure to apply to DEP for a variance from DEP's rules and regulations, including water quality standards. But Rule 62-302.800(2) is not a variance, which would apply to a single applicant (or limited number of applicants); it is a "moderating provision," which is a generally applicable water quality standard. For that reason, the Rule does not contravene Section 403.201, Florida Statutes.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, Petitioners' challenge to the validity of Rule 62-302.800(2) is denied and dismissed.

DONE AND ORDERED this 14th day of July, 2010, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of July, 2010.

ENDNOTES

1/ Unless otherwise specified, all rule citations refer to the current version of the Florida Administrative Code.

2/ Petitioners' filings contest Intervenor's standing because Intervenor's standing allegations were not established by any evidence. (Intervenor alleged that it is an incorporated association of eight pulp and paper mill companies that are regulated by and subject to DEP statutes, rules, and regulations, including water quality standards.) Ordinarily, this would indicate a factual issue requiring an evidentiary hearing. However, even if Petitioners have not waived the issue, it is not necessary to hold a hearing on Intervenor's standing allegations in light of the rulings in this Final Order.

3/ Unless otherwise specified, all statutory citations are to sections of the 2009 codification of the Florida Statutes.

4/ Section 550.0251(3) required the agency to "adopt reasonable rules for the control, supervision, and direction of all . . . licensees, and for the holding, conducting, and operating of all . . . races" and stated that "the duty of exercising this control and power [over licensees and races] is made mandatory upon the division." Section 550.2415(2) and (13) provided:

(2) Administrative action may be taken by the division against an occupational licensee responsible pursuant to rule of the division for the condition of an animal that has been impermissibly medicated or drugged in violation of this section.

* * *

(13) The division shall adopt rules to implement this section. The rules may include a classification system for prohibited substances and a corresponding penalty schedule for violations.

COPIES FURNISHED:

Marcy I. LaHart, Esquire
Marcy I. LaHart, P.A.
4804 Southwest 45th Street
Gainesville, Florida 32608

W. Douglas Beason, Esquire
Department of Environmental Protection
Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Terry Cole, Esquire
Oertel, Fernandez, Cole & Bryant, P.A.
Post Office Box 1110
Tallahassee, Florida 32302-1110

F. Scott Boyd
Executive Director and General Counsel
Administrative Procedures Committee
120 Holland Building
Tallahassee, Florida 32399-1300

Michael W. Sole, Secretary
Department of Environmental Protection
Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Tom Beason, General Counsel
Department of Environmental Protection
Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

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.