

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

RICHARD WHITECLOUD, SEA TURTLE
OVERSIGHT PROTECTION, INC. (S.T.O.P.),

Petitioner,

vs.

Case No. 21-1785

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held via Zoom in this matter before the Honorable Francine M. Ffolkes, an assigned Administrative Law Judge with the Division of Administrative Hearings (DOAH), on July 28 and 29, 2021.

APPEARANCES

For Petitioner: Ralf Gunars Brookes, Esquire
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For Respondent: Rhonda E. Parnell, Esquire
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STATEMENT OF THE ISSUES

Whether Petitioner, Sea Turtle Oversight Protection, Inc. (STOP), is entitled to renewal of three existing marine turtle permits (MTPs), which

allow hatchling recovery and release programs on Broward County beaches, and whether Respondent, Florida Fish and Wildlife Conservation Commission (FWC), proved its reasons for denial of renewal by a preponderance of the evidence.

PRELIMINARY STATEMENT

On April 28, 2021, FWC issued its notice of denial to Petitioner of applications to renew MTP-195, MTP-196, and MTP-197. FWC informed Petitioner that it reviewed five renewal applications dated January 7, 2021, for existing permits. FWC denied renewal of permits MTP-195, MTP-196, and MTP-197. FWC issued permits for MTP 21-192 and MTP 21-193 to Petitioner to conduct hatchling recovery and release programs during 2021.

Petitioner challenged the denials on May 20, 2021. FWC referred the challenge to DOAH. The parties filed their Amended Parties' Joint Prehearing Stipulation on July 20, 2021.

At the final hearing, the parties stipulated to the admission of all proposed exhibits. Joint Exhibits J-1 through J-7 were admitted into evidence. Petitioner's Exhibits 1 through 5 were admitted into evidence. FWC's Exhibits R-1 through R-6 were admitted into evidence.

Petitioner presented the expert and fact testimony of Richard Whitecloud (Mr. Whitecloud), principal officer of STOP and accepted as an expert; and Kurt Rusenko, Ph.D. (Dr. Rusenko), board member and science advisor to STOP and accepted as an expert. FWC presented the expert and fact testimony of Robin Trindell, Ph.D. (Dr. Trindell), accepted as an expert in marine turtle management; and the fact testimony of Meghan Koperski (Ms. Koperski) and Tonya Long.

A three-volume Transcript was filed with DOAH on September 14, 2021. The parties timely filed their proposed recommended orders on October 5, 2021, which were carefully considered in the preparation of this Recommended Order.

All statutory references are to the 2021 version unless otherwise indicated.

FINDINGS OF FACT

The Parties

1. FWC is the agency with exclusive jurisdiction to regulate all wild animal life, fresh-water aquatic life, and marine life in Florida. *See* Art. IV, § 9, Fla. Const. However, FWC's authority to regulate the marine life species that were considered endangered or threatened, as defined by section 372.072, Florida Statutes (1997), at the time of promulgation of Article IV, section 9 of the Florida Constitution, is statutory in nature. An MTP from FWC is required to take, possess, disturb, mutilate, destroy, sell, transfer, molest or harass a marine turtle or its nest or eggs or hatchlings. *See* § 379.2431(1), Fla. Stat.

2. STOP is a not-for-profit corporation with a mission to rescue sea turtles on the beaches of Broward County. Mr. Whitecloud is the principal officer of STOP and the designated qualified individual on the MTPs at issue in this proceeding. An MTP may also include up to 24 authorized personnel (volunteers).

3. STOP recognizes that artificial light disorientation is a problem on the heavily urbanized beaches of Broward County. STOP, in conjunction with FWC, is involved with educating the community and local governments. STOP was formed in 2010 and achieved not-for-profit status in 2013.

Background

4. FWC authorizes holders of MTPs to conduct marine turtle conservation activities. MTPs are conservation permits issued for any activity involving live or stranded animals, nesting surveys and protection, or holding marine turtles for rehabilitation or education. MTPs are issued for one year to include the appropriate marine turtle nesting season.

5. Mr. Whitecloud first got involved with rescuing sea turtle hatchlings around 2007 and became a volunteer at the Gumbo Limbo Nature Center from 2008 to 2014. After gaining enough hours, he obtained his first permit, MTP-192, which he has held for 14 seasons. He testified that under the MTPs, he and his volunteers conduct night time monitoring of hatchlings, patrol the beach, and conduct rescue and release of hatchlings during the marine turtle nesting season.

6. Mr. Whitecloud identified the problems that cause disorientation on Broward County's urbanized beaches as: (a) visible artificial light sources that cause hatchling disorientation; (b) natural disorientation; (c) lack of beach slope; (d) lack of beach vegetation that would function as a dark silhouette; and (e) direct access to open horizon.

Volunteers

7. With a maximum of 24 volunteers per MTP, STOP could, if all of the five MTPs were approved, have up to approximately 120 volunteers who qualify as authorized personnel. FWC reviewed and approved the curriculum for training STOP volunteers, which includes four hours of classroom instruction and up to 40 hours of supervised field work. Dr. Rusenko, who is a STOP board member and its science advisor, reviewed the FWC-approved classroom course materials.

8. FWC expressed concerns about STOP's citizen scientist program. However, the program uses the same classroom curriculum and supervised field training approved by FWC. Dr. Trindell testified that under such

circumstances, the citizen scientist would be an authorized volunteer under STOP's MTPs.

9. Even so, FWC is concerned with the number of volunteers who are routinely swapped out under STOP's MTPs. FWC's, Ms. Koperski, testified that Mr. Whitecloud initially provided incomplete information about the new volunteers. This required a lot of follow-up phone calls to obtain more complete information. The evidence established that during 2020, STOP made one approved personnel amendment to each of three MTPs.

10. Mr. Whitecloud explained that for the 17-mile stretch of Broward County beaches that fall under STOP's MTPs, he averages 20 volunteers per night. The result is that at least one volunteer patrols a one-mile stretch of beach. STOP's volunteers usually commit to a minimum of eight hours per week during the marine turtle nesting season. Mr. Whitecloud's experience is that all five MTPs are necessary to maintain a pool of qualified volunteers.

11. STOP trains its volunteers to avoid and minimize impacts to nesting marine turtles and their nests. The volunteers wear black clothing and carry red lights. When groups of citizens and tourists gather on the beach at night, the volunteers engage with them to educate them about avoiding the use of improper white lights from cameras and cell phones, and other activities that impact nesting turtles, their nests, and hatchlings.

12. Mr. Whitecloud explained that, in his experience, he found this community engagement more effective than a purely regulatory approach.

Reporting

13. STOP volunteers fill out disorientation reports that help to identify the frequency and magnitude of impacts, including the location of offensive lighting documented by photographs and location coordinates. The same form for disorientation reporting is used throughout the state by MTP holders.

14. Broward County is the only disoriented hatchling recovery and release program in Florida with a program of night time on-beach volunteers. In

other coastal counties, MTP holders fill out disorientation reports during their early morning nesting surveys. In Dr. Rusenko's expert opinion, this night time program is still needed on the heavily urbanized beaches of Broward County.

15. The April 28, 2021, denial letter refers to a "history of non-compliance with permit conditions and reporting requirements ... for MTP-192, MTP-193, MTP-195, MTP-196 and MTP-197." FWC's evidence was a notice of non-compliance letter dated July 30, 2020, regarding MTP-192 and MTP-196 and activities that occurred between June 20 and 23, 2020.

16. Mr. Whitecloud testified that sometimes a few written reports are submitted beyond the deadlines. He usually gives FWC a call or emails the field office to let them know the reasons why he is running late with written reports. He testified that he is currently in compliance with reporting requirements.

17. Mr. Whitecloud also explained that recovery and reporting declined in 2020 compared to other years because of the COVID pandemic. Uncertainty caused by the emergency health orders delayed volunteers getting out on the beach and also delayed reporting.

18. Although the FWC's July 30, 2020, non-compliance letter cited to MTP-192 and MTP-196, FWC only denied MTP-196.

Lighting Ordinances

19. FWC's letters denying MTP-195, MTP-196, and MTP-197, and granting MTP-192 and MTP-193, all reference FWC's intention to phase out the on-beach disoriented hatchlings recovery and release programs. FWC explains that the program was never intended to remain in place long-term but was created so local governments could work to implement local lighting ordinances and bring beachfront properties into compliance. The denial letter states that since all local governments covering Broward County beaches

have adopted lighting ordinances, there is now a mechanism to address beachfront lighting.

20. FWC conducts code enforcement training workshops with Broward County and the local governments. However, the evidence showed that the county-wide compliance rate of 15 percent in 2011 had only increased to 23 percent by 2020. FWC also educates the local governments regarding other mitigation measures to help prevent disorientation effects. These measures include raised sidewalks and steps, seawalls, and dunes.

21. Mr. Whitecloud testified that in his experience code enforcement of lighting ordinances is marginal. The local governments take a non-punitive, educational approach. Identification of offensive lighting and repeat offenders is usually done by STOP volunteers who identify and document non-compliant light sources as part of their disoriented hatchlings reporting.

FWC Program Reassessment of Need

22. FWC acknowledged that the disoriented hatchling recovery program has reduced "the lethal impact of poorly managed lighting to hatchlings." FWC also acknowledged that while STOP's "volunteers have stepped up to address an issue not of [STOP's] making, the continued lighting impacts to nests on these beaches despite the many years of on-beach hatchling recovery programs demonstrates that an alternative approach is needed."

23. FWC then concludes that the "alternative approach" needed is to discontinue on-beach hatchling recovery programs because "human presence on the beach at night [is] a significant threat to nesting and hatchling sea turtles." Even recognizing that the beaches are open to the public, FWC concludes that the presence of STOP volunteers on the beaches at night increases "the number of people on the beach and the potential for disturbance of nesting females."

24. However, the facts adduced in the hearing are that members of the public, comprised of tourists and citizens, are the main disturbing presence

on the beaches, and not STOP volunteers whose presence comprise approximately one volunteer per mile of beach.

25. FWC failed to prove by a preponderance of the evidence that STOP volunteers are a disturbing presence on the beaches at night. In fact, the evidence established that STOP volunteers are trained to avoid disturbing nesting female turtles and hatchlings. STOP volunteers function as a deterrent to the untrained members of the public who are most likely to disturb nesting females, dig-up nests, and handle hatchlings. In Dr. Rusenko's expert opinion, this night time program is still needed on the heavily urbanized beaches of Broward County.

26. In addition, FWC's reliance on mere adoption of lighting ordinances by the local governments is evidence of a purely regulatory approach that is not as effective as community engagement. Enforcement is marginal and non-punitive. The result is only a slight increase in county-wide compliance rates between 2011 and 2020.

Reasons for denial

27. FWC did not prove by a preponderance of the evidence that STOP remains out of compliance with reporting requirements and requests for information.

28. FWC did not prove by a preponderance of the evidence that STOP volunteers use inappropriate lights and shine lights on nests in contravention of permit conditions.

29. FWC did not prove by a preponderance of the evidence that there no longer exists a need for the permitted activities.

30. STOP proved that it is currently in compliance with reporting requirements and requests for information. STOP volunteers utilize appropriate lighting when patrolling the beach. STOP proved the need for the permitted activities.

31. STOP proved by a preponderance of the evidence that it is entitled to renewal of MTP-195, MTP-196, and MTP-197.

CONCLUSIONS OF LAW

32. DOAH has jurisdiction over the subject matter of this case and the parties under section 120.57(1), Florida Statutes. *See Fla. Admin. Code R. 68-1.008.*

33. FWC's discretionary action on permits or licenses, which affect substantial interests, is subject to adjudication under sections 120.57, 120.569, and 120.60. *See Fla. Admin. Code R. 68-1.008(5)(b)3.*

34. Florida Administrative Code Rule 68E-1.004(19)(b) provides that "[p]ermit renewals shall be based upon satisfactory compliance with this Chapter, the conditions of the existing permit, receipt of all reports for authorized activities, compliance with the Handbook for authorized activities, the need for a specific activity, and response to Commission staff upon request for information related to authorized activities."

35. STOP proved that it meets the criteria for renewal and that its marine turtle conservation activities are still needed on the urbanized beaches of Broward County. STOP proved by a preponderance of the evidence that it is entitled to renewal of MTP-195, MTP-196, and MTP-197.

36. FWC did not prove by a preponderance of the evidence that STOP remains out of compliance with reporting requirements and requests for information. FWC did not prove by a preponderance of the evidence that STOP volunteers use inappropriate lights and shine lights on nests in contravention of permit conditions. FWC did not prove by a preponderance of the evidence that there no longer exists a need for the permitted activities.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that FWC enter a final order granting STOP's applications to renew MTP-195, MTP-196, and MTP-197.

DONE AND ENTERED this 20th day of December, 2021, in Tallahassee, Leon County, Florida.



FRANCINE M. FFOLKES
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of December, 2021.

COPIES FURNISHED:

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