

BEFORE THE GOVERNOR AND CABINET OF THE STATE OF FLORIDA

In re:	APPLICATION FOR POWER PLANT)	DOAH CASE NO. 87-5337
	SITE CERTIFICATION OF PASCO)	CERTIFICATION NO. PA-87-23
	COUNTY SOLID WASTE RESOURCE)	OGC FILE NO. 87-1587
	RECOVERY FACILITY)	

FINAL ORDER

BY THE GOVERNOR AND CABINET

On August 23, 1988, this matter came before the Governor and Cabinet, sitting as the Siting Board pursuant to the Florida Electrical Power Plant Siting Act, Section 403.501 et seq., Florida Statutes (1987), for final action concerning a Recommended Order dated July 20, 1988, attached as Exhibit 1, which recommends certification of the Pasco County Solid Waste Resource Recovery Facility. On August 1, 1988, as allowed by Rule 17-103.200(1), F.A.C. Intervenor Shady Hills Park and Civic Association, Inc., ("the Association") filed timely exceptions to the Recommended Order. On August 9, 1988, Applicant Pasco County Board of County Commissioners ("the County") filed a timely response to the Association's exceptions.

The Association directs six exceptions to findings of fact contained in the Recommended Order. The Association challenges findings by the hearing officer that metals will be removed from incinerator ash prior to landfilling; that the County considered source separation and recycling when considering Best Available Control Technology (BACT) for the facility; and that hazardous waste, hospital waste, and infectious waste will

not be permitted at the facility. In addition, the Association contends that the hearing officer erred by failing to find that waste and blowdown process water would require pretreatment prior to discharge to a County treatment plant; that the proposed landfill area is located over a poorly-confined aquifer and provides recharge to the Floridan aquifer; and that metals and other pollutants will leach from the incinerator ash.

The County's response to the Association's exceptions correctly points out that findings of fact made by a hearing officer in the course of a formal administrative hearing are conclusive if supported by competent substantial evidence. §120.57(1)(b)(10), Florida Statutes (1987); Heifitz v. Department of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). As demonstrated by the County's response to the exceptions, all three findings challenged by the Association are supported by competent substantial record evidence and, therefore, must stand. Numerous appellate decisions make clear that agencies are not authorized to reject well-supported findings of fact. Heifitz, supra; FUSA-FTP-NEA v. Hillsborough Community College, 440 So.2d 593 (Fla. 1st DCA 1983); Leapley v. Board of Regents, 423 So.2d 431 (Fla. 1st DCA 1983).

The Association's exceptions directed to the failure of the hearing officer to make certain factual findings also lack merit. The hearing officer rejected as unsupported by competent substantial evidence a finding proposed by the Association that metals would leach from incinerator ash particles. As noted above, the hearing officer's determination

of the weight and sufficiency of the record evidence may not lawfully be displaced by the reviewing agency. See McDonald v. Department of Banking and Finance, 346 So.2d 569, (Fla. 1st DCA 1977). On the landfill issue, the hearing officer found, and Intervenor does not challenge, that "the installation of impervious liners will eliminate surface water recharge to the Floridan aquifer within the landfill boundaries." Exhibit 1, p. 13, paragraph 17. In light of this undisputed finding, the Intervenor's suggested finding is subordinate and redundant.

As to the question of wastewater pretreatment, the record is clear that wastewater and cooling tower process water generated by the facility will be routed to the County's Hudson wastewater plant for treatment and disposal. The record does not demonstrate that pretreatment will be required before the waters in question can be accepted by the Hudson plant without violating Rule 17-6.180(2)(d), F.A.C., which prohibits a treatment plant's acceptance of wastewater discharges which have not received necessary pretreatment. In light of this, the Board concludes that it was not error for the hearing officer to have failed to find that pretreatment is required for all waste and process water from the facility.

Turning next to the Association's exceptions to the conclusions of law contained in the Recommended Order, four out of five of these exceptions could only be sustained if the findings of fact contained in the Recommended Order were to be disregarded by the Board. For example, the Association urges that the Board conclude "as a matter of law" that the proposed

site is not suitable and that the 1984 ballot by which County voters approved the creation of a resource recovery system did not actually indicate approval of a massburn resource recovery facility. Applicable law, however, does not allow an agency to reject findings of fact by labeling them "conclusions of law." Leapley, supra, at 432; School Board of Leon County v. Hargis, 400 So.2d 103, 106-107 (Fla. 1st DCA 1981). Contrary to the Association, the factual findings of the Recommended Order establish that the proposed resource recovery facility can be constructed and operated on the proposed site without causing pollution in violation of applicable statutes and regulations.

The Association also presses the Board to adopt a new non-rule policy prohibiting the siting of resource recovery facilities in "unimpacted residential recreational areas", and to apply this policy as the basis for denying certification to the County's proposed facility. However, as the County suggests in its response to the Association's exceptions, Florida law prohibits the dispositive application of a non-rule policy in the absence of a record foundation demonstrating the rationality of the policy. Florida Cities Water Co. v. Florida Public Service Commission, 384 So.2d 1280 (Fla. 1980). Accord, Anheuser-Busch Inc. v. Department of Business Regulation, 393 So.2d 1177 (Fla. 1st DCA 1981). In this case, the Board has no authority to devise and apply a new non-rule policy limiting resource recovery facilities to "areas of preexisting industrial and commercial development" solely to circumvent a recommended order favorable to the County's proposed facility.

Throughout this proceeding, the Association has urged that the County be compelled to withhold certain components of the municipal solid waste stream from incineration to reduce emissions from the facility. The Association, however, has never demonstrated that pre-burn removal of plastics, metals, glass, or yard waste would actually reduce expected emissions from the facility. Given the unchallenged finding that the facility's proposed air pollution control systems will render plant emissions "substantially less than the Florida Ambient Air Quality Standards," (Exhibit 1, p. 10, ¶11), no justification exists in this record for a requirement that BACT for a mass burn resource recovery facility include a prohibition against the incineration of the plastics, metals, glass, or yard clippings normally found in municipal solid waste.

Finally, the Association urges the Board to adopt a requirement that draft "staff reports and recommendations . . . in conjunction with any final recommendation by a commenting agency" be included in the record of a power plant site certification proceeding. The Board declines to impose such a requirement. The mandatory bifurcated hearing process established by Section 403.508, Florida Statutes, provides ample opportunities for interested parties to submit any relevant documentary evidence for consideration by the hearing officer and the Board. If non-final drafts of agency reports required by Section 403.507, Florida Statutes, have any probative value, they can be proffered and made part of the record in accordance with Chapter 120, Florida Statutes.

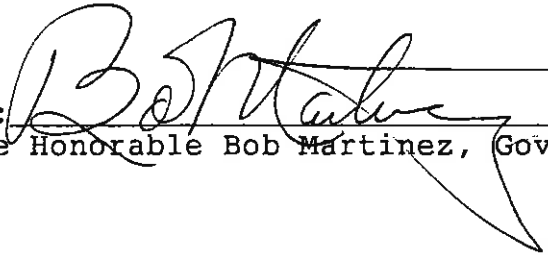
Having considered the Recommended Order, exceptions, argument of counsel, and being otherwise fully advised in the premises, it is ORDERED:

1. The Recommended Order (Exhibit 1) is approved and adopted in its entirety. The application of Pasco County for site certification of its proposed solid waste resource recovery facility is APPROVED at an ultimate capacity of 29 megawatts, subject to the conditions of certification contained in (Exhibit 2).

2. The exceptions of Intervenor Shady Hills Park and Civic Association, Inc., are REJECTED for the reasons set forth above.

DONE AND ORDERED this 23 day of August, 1988 in Tallahassee, Florida, pursuant to the vote of the Governor and Cabinet, sitting as the Siting Board, at a duly noticed and constituted Cabinet meeting on August 23, 1988.

FOR THE GOVERNOR AND CABINET
SITING AS THE SITING BOARD

By: 
The Honorable Bob Martinez, Governor

FILING AND ACKNOWLEDGEMENT
FILED, on this date, pursuant to S120.52
Florida Statutes, with the designated Department Clerk, receipt of which is hereby acknowledged.

C. Hutchins
Clerk

8-24-88
Date

The action of the Siting Board is based on the following vote:

	<u>For</u>	<u>Against</u>	<u>Absent</u>
Honorable Bob Butterworth			
Honorable Betty Castor			
Honorable Doyle Conner			
Honorable Bill Gunter			
Honorable Gerald A. Lewis			
Honorable Bob Martinez			
Honorable Jim Smith			

FILING AND ACKNOWLEDGEMENT

Filed on this date, pursuant to Section 120.52(1), Florida Statutes (1985), with the designated Department Clerk, receipt of which is hereby acknowledged.

Clerk

Date