

BEFORE THE GOVERNOR AND CABINET
STATE OF FLORIDA
SITTING AS THE SITING BOARD

Richard A. Buck
File DER
RECEIVED
JUN 22 1992
DEPARTMENT OF STATE
CABINET AFFAIRS

IN RE:

APPLICATION FOR POWER PLANT)
SITE CERTIFICATION OF LEE)
COUNTY SOLID WASTE RESOURCE)
RECOVERY FACILITY)

DOAH CASE NO. 90-3942EPP

FINAL ORDER APPROVING CERTIFICATION

On June 16, 1992, this case came before the Governor and Cabinet, sitting as the Siting Board, pursuant to the Florida Electrical Power Plant Siting Act (PPSA), Section 403.501 et seq., Florida Statutes, (1991), for final action concerning a recommended order dated December 9, 1991, attached as Exhibit 1, and a recommended order dated May 21, 1992, attached as Exhibit 2. Both recommend certification of the proposed Lee County Solid Waste Resource Recovery Facility site located in Lee County, Florida, near Fort Myers. The County seeks certification of an ultimate site capacity for 1800 tons per day of municipal solid waste (MSW) incineration at the facility.

The first recommended order was considered by the Board on February 4, 1992. On that date, the Board remanded the certification case to the assigned hearing officer for the purpose of receiving additional evidence bearing on the limitation of emissions of mercury from the proposed facility. On February 14, 1992, the Board entered an Order of Remand detailing the categories of evidence to be received at the

hearing. The remand hearing was held in Fort Myers on April 13, 1992.

Exceptions to the first recommended order were filed by the County on December 19, 1991, and by Intervenor Southwest Floridians for a Clean and Risk-free Environment, Inc. (SFCARE) on December 23, 1991. The County's single exception relates to the recommended order's characterization of its plans for water uses at the facility. In contrast, SFCARE submitted nine exceptions directed at findings of fact and recommended conclusions of law contained in the first recommended order. As to the recommended order on remand, on July 9, 1992, SFCARE submitted untimely exceptions. Seven exceptions are directed to the findings made by the hearing officer and two to the conclusions of law contained in the order. No exceptions to the recommended order on remand were filed by any party to the proceeding.

On March 30, 1992, during the course of the remand proceedings before the Division of Administrative Hearings, SFCARE filed with the Board a pleading styled "Motion for Clarification." Timely responses in opposition to the Motion were filed by the County and the Department of Environmental Regulation on April 7, 1992. The Motion requested that the Board overrule an evidentiary ruling by the hearing officer concerning the scope of the remand hearing.

Turning first to the exceptions of SFCARE, its six original

factual exceptions contest findings contained in the first recommended order which are based upon competent substantial evidence of record. For example, in Exceptions 2-5, SFCARE objects to Finding §§99-102 of the first recommended order. The challenged findings all bear on the issue of whether "source separation," that is, prohibiting the incineration of certain components of the MSW stream which would otherwise be burned in a mass burn facility, would result in a significant decrease in emissions of pollutants and should, therefore, be required as part of the Best Available Control Technology (BACT) determination for the facility.

The proposed findings of SFCARE regarding "source separation as BACT" were rejected by the hearing officer as unsupported by the evidence. Exhibit 1, Appendix B. Review of the record discloses ample record support for the contrary findings of the hearing officer which are criticized by SFCARE. It is well-settled that findings of fact which are supported by competent substantial evidence may not be overturned by an agency on review of a recommended order. §120.57(1)(b)10, Fla. Stat. (Supp. 1990); Heifitz v. Department of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Exceptions 2-5 are rejected.

SFCARE also excepts to the finding found at paragraph 7 of the first recommended order (Exhibit 1, p.6). SFCARE disputes that MSW incineration would cause a up to a 90% reduction in the volume of waste to be landfilled by the County. Further, SFCARE

brands as immaterial and irrelevant any findings "as to the ultimate disposal of the ash and its effects on the environment. . . ." SFCARE Exceptions, at p. 1. Because the finding challenged by SFCARE is supported by substantial competent evidence, SFCARE's Exception 1 is rejected for the reasons stated above. .

The last of SFCARE's original exceptions to a finding of fact is directed at paragraph 104 of the first recommended order (Exhibit 1, p.35.) It too is without merit for the reasons already stated. The record supports the hearing officer's finding that the members of SFCARE will not be affected differently by the proposed facility than will other members of the community. Exception 6 is rejected.

SFCARE's next exception challenges the hearing officer's recommended conclusion that SFCARE failed to prove standing in this case. Exhibit 1, p. 37-38. Because SFCARE was allowed full participation during the evidentiary proceedings, resolution of this exception will have no practical effect on the outcome here. The exception is therefore moot. Hamilton County Board of County Commissioners v. State Dept. of Environmental Regulation, 587 So. 2d 1378, 1383 (Fla. 1st DCA 1991) Nevertheless, while the Board does not believe that the hearing officer failed properly to construe the PPSA in denying standing to SFCARE, it is still appropriate to discuss the question raised by SFCARE's exception in order to provide guidance for future cases.

The recommended order denies standing to SFCARE because, as the hearing officer found, SFCARE failed to show that "a substantial number" of the members of SFCARE would be affected differently than members of the public at large by the construction or operation of the proposed facility. Exhibit 1, at p.38. There is no dispute that SFCARE is a "domestic nonprofit corporation or association formed, in whole or in part, to promote conservation or natural beauty; to protect the environment, personal health, or other biological values. . . ," within the meaning of Section 403.508(4)(c)2 of the PPSA. SFCARE could have obtained intervention in the case by the filing of a notice of intent to be a party "at least fifteen days prior to the land use hearing. . . ," but it did not do so. Once the deadline for intervention by notice passed, it became necessary for SFCARE to demonstrate standing under Section 403.508(4)(e) of the PPSA.

The Board agrees with the recommended order's conclusion that SFCARE failed to meet the test for organizational standing set forth in Florida Home Builders Assn. v. Dept. of Labor, 412 So. 2d 351, 353 (Fla. 1982). The Board disagrees, however, that SFCARE was required to show that its membership would suffer any special injury different from the public at large in order to prove standing in a PPSA proceeding. The Board encourages public participation in the PPSA process to assist the Board in protecting the "broad interests of the public." §403.502, Fla. Stat. (1991) Given the PPSA's unique statutory scheme

governing standing, the Board declines to apply an additional "special injury" test which has the practical effect of further restricting citizen access to participation in the PPSA process.

SFCARE's last two original exceptions raise issues which were specifically dealt with by the Board in its order approving certification of the Pasco County Resource Recovery Facility. In re: Application for Power Plant Site Certification of Pasco County Solid Waste Resource Recovery Facility, Certification No. PA-87-23 (Final Order, August 24, 1988). SFCARE urges the Board to deny certification to the facility by adopting non-rule policies requiring "source separation" as BACT for resource recovery facilities and prohibiting the siting of any such facility in "unimpacted agricultural and recreational areas."

In the Pasco County case, rejecting a call for the creation of a non-rule policy to bar a proposed incinerator, the Board held that it had "no authority to devise and apply a new non-rule policy limiting resource recovery facilities to 'areas of pre-existing industrial and commercial development' solely to circumvent a recommended order favorable to the County's proposed facility. . . ." Slip op. at 4. Similarly rejecting a call for a policy to bar MSW incineration under the guise of BACT, the Board held that "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. . . ." Slip op. at 5.

The Board held as follows concerning the creation of non-rule policy under Florida administrative law:

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. Fla. Public Service Commission, 384 So. 2d 1280 (Fla. 1980). Accord, Anheuser-Busch, Inc. v. Dept. of Business Regulation, 393 So. 2d 1177 (Fla. 1st DCA 1981)

Slip op. at 4. This principle applies with equal force to the free-standing requests for policy adoption made by SFCARE.

No record foundation supports the denial of the certification sought by the County for the reasons advanced by SFCARE. Here, as in the Pasco case, there was no showing that additional emissions reductions would be expected to occur, given the stringent emissions control technologies required under federal law for MSW incinerators, merely as a result of withholding certain components of MSW from a resource recovery facility. Nor was there a showing that the proposed facility site was "unimpacted." On the contrary, record evidence shows, and the hearing officer found, that the the site has been "heavily impacted by past logging and agricultural activities, including ditching and cattle grazing. . . ." Exhibit 1, §11, p.7. For the same reasons expressed in the Pasco County decision, the Board rejects the balance of SFCARE's original exceptions.

As to the exceptions of SFCARE to the recommended order on remand, these exceptions were not timely filed with the Department, designated Clerk for the Siting Board, within the fifteen day period allotted by Rule 17-103.200, Florida

Administrative Code, applicable to this proceeding as the Department-promulgated procedural rule governing exceptions to recommended orders in analogous permit proceedings. Nevertheless, the Board has examined the exceptions to determine whether any has merit. See Hamilton County Board of County Commissioners, *supra*, at 1389.

SFCARE takes exception, both in its Motion for Clarification and in its first exception to the Recommended Order on Remand, to the hearing officers' interpretation of the Board's Order on Remand. Contrary to SFCARE, however, the Board agrees that the hearing officer correctly interpreted the Board's intent in remanding the case. It was not the Board's intention to allow relitigation of issues raised at the certification hearing, but rather to obtain detailed evidence as to the question of the facility's expected mercury emissions. The exception is rejected and the Motion for Clarification is denied.

As noted above in connection with SFCARE's first set of exceptions, findings of fact which are supported by competent substantial evidence are binding upon the Board. SFCARE, however, excepts to findings of fact contained in paragraphs 4, 8-12, 19, 23, 27-32, and 33 of Exhibit 2 which are all supported by competent substantial evidence. These exceptions are, therefore, rejected for the reasons stated above.

Finally, SFCARE excepts to the recommendation, and supporting conclusions of law, of the Recommended Order on Remand. In these exceptions, SFCARE asks the Board to reject the ultimate legal

conclusion of the Recommended Order on Remand, found on page 20 of Exhibit 2, that "the County has demonstrated that the project as a whole will have 'minimal adverse effects' compared to the need for the electrical generating capacity at issue." See AES Cedar Bay, Inc. v. Dept. of Environmental Regulation, Application No. PA 88-24, DOAH Case No. 88-5740 (Siting Board, Feb. 18, 1991) SFCARE disputes this conclusion, asserting that "the public need for the electricity produced by this facility is far outweighed by the deleterious environmental affects [sic] of any additional quantum of mercury dispersed in an ecological system that has already been shown to suffer from the effects of mercury." The factual basis of this assertion, however, was not proven by SFCARE in the record of this case. The record before the Board does not support a conclusion that the level of mercury emissions now expected from the facility will have, as SFCARE contends, any significant impacts on Florida's air, water, soil, or wildlife. Indeed, the hearing officer expressly found to the contrary. See Exhibit 2, p. 17, para. 37.

A party that contests a proposed site certification carries no different burden of persuasion than the appellate court has assigned to any third party that challenges an environmental permit: to provide credible and credited evidence in support of its legal argument in opposition to the license. See Fla. Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778, 789 (Fla. 1st DCA 1981) Here, as noted at pages 17-18 of the Recommended Order on Remand, "SFCARE presented little or no

evidence concerning the specific issues raised in the Siting Board's Order of Remand. . . . SFCARE's evidence on the disputed issues was not persuasive."

SFCARE also criticizes as too lenient the conditions of certification relating to mercury control recommended by the hearing officer. This exception demonstrates a complete lack of understanding by SFCARE that the intent of these conditions is to achieve the maximum reduction in mercury emissions available through the use of the carbon reagent injection system, with a progressive reduction in overall emission limits following extensive testing of the emissions from the facility. This approach is required because the County's facility will be the first municipal waste combustor in the nation required by permit to make full-time operational use of the mercury control technology.

The Board agrees with the hearing officer that the conditions of certification regarding mercury control represent a reasonable and appropriate method for achieving the lowest mercury emission rate possible for an MWC such as the facility. Accordingly, the Board rejects SFCARE's exceptions on this point.

The County's exception seeks to clarify an erroneous impression left by the first recommended order that potable water for the facility will only be drawn from two wells located on the site. In fact, the record reflects that potable water will be supplied to the facility, except in emergencies, by the County's existing water system; in emergencies, however, water will be

withdrawn from more than two wells located on site. The County's exception is granted.

Having considered the recommended orders, exceptions, and otherwise being fully advised as to the issues in this case, it is ORDERED:

1. The Recommended Order (Exhibit 1) and Recommended Order on Remand (Exhibit 2) are approved and adopted, except as specifically noted above. The application of Lee County for certification of its proposed solid waste resource recovery facility is APPROVED for an ultimate site capacity of 1800 tons per day of solid waste and approximately 60 MW of generating capacity, subject to the conditions of certification contained in Appendix A to Exhibit 1 and Appendix B to Exhibit 2.

2. The Board ORDERS that Condition XIV.A.(1).a.13 contained in Appendix A to Exhibit 1 be amended as follows to reflect the reduced mercury emissions limitations being imposed by this Order:

*Hg: Mercury emissions shall not exceed .00009
lb/MMBTU, 0.025 lbs/hr/unit, and .11 tons/yr per unit.

3. The Department of Environmental Regulation is hereby delegated authority to assure and enforce compliance by Lee County and its agents with all conditions of certification.

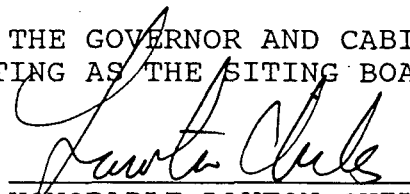
NOTICE OF RIGHTS

Any party to this certification proceeding has the right to seek judicial review of this order pursuant to Section 120.68,

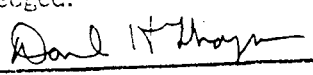
Florida Statutes, by filing of a notice of appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the Siting Board in the Department of Environmental Regulation Office of General Counsel, 2600 Blair Stone Road, Tallahassee, Florida 32399-2400; and by filing a copy of the notice with the appropriate District Court of Appeal. The notice of appeal must be filed within 30 days of the date this Final Order is filed with Clerk of the Siting Board.

DONE AND ORDERED this 17th day of June, 1992, at Tallahassee, Florida, pursuant to the vote of the Governor and Cabinet sitting as the Siting Board, at a duly noticed Cabinet meeting on June 16, 1992.

FOR THE GOVERNOR AND CABINET
SITTING AS THE SITING BOARD

BY: 
THE HONORABLE LAWTON CHILES
GOVERNOR

FILING AND ACKNOWLEDGEMENT
FILED, on this date, pursuant to §120.52
Florida Statutes, with the designated Department Clerk, receipt of which is hereby acknowledged.


Clerk

6/19/92
Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished
by U.S. Mail to:

Honorable Lawton Chiles
Governor
State of Florida
The Capitol
Tallahassee, Florida 32399

Honorable Robert A. Butterworth
Attorney General
State of Florida
The Capitol
Tallahassee, Florida 32399-1050

Honorable Bob Crawford
Commissioner of Agriculture
State of Florida
The Capitol
Tallahassee, Florida 32399-0810

Honorable Betty Castor
Commissioner of Education
State of Florida
The Capitol
Tallahassee, Florida 32399

Honorable Jim Smith
Secretary of State
State of Florida
The Capitol, PL-02
Tallahassee, Florida 32399-0250

Honorable Tom Gallagher
Treasurer and Insurance Commissioner
State of Florida
The Capitol
Tallahassee, Florida 32399-0300

Honorable Gerald A. Lewis
Comptroller
State of Florida
The Capitol, Plaza Level
Tallahassee, Florida 32399-0350

Diane K. Kiesling
Hearing Officer &
Ann Cole, Clerk
Division of Administrative Hearings
The Desoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550

Steve Pfeiffer, General Counsel
L. Kathryn Funches, Assistant General Counsel
Department of Community Affairs
2740 Centerview Drive
Tallahassee, Florida 32399-2100

Cecile Ross
Attorney at Law
South Florida Water Management District
Post Office Box 24680
West Palm Beach, Florida 33416

M.B. Adelson IV
Assistant General Counsel
Department of Natural Resources
3900 Commonwealth Blvd.
Douglas Building, MS-35
Tallahassee, Florida 32399-3000

Jim Antista, General Counsel
Florida Game and Fresh Water Fish Commission
620 South Meridian Road
Tallahassee, Florida 32399-1600

Rob Vandiver, General Counsel
Mike Palecki, Chief, Bureau of Electric and Gas
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32399-0850

Wayne Daltry, Executive Director
Southwest Florida Regional Planning Council
Post Office Box 3455
North Fort Myers, Florida 33918-3455

David S. Dee
Attorney at Law
Carlton, Fields, Ward,
Emmanuel, Smith & Cutler
Post Office Drawer 190
Tallahassee, Florida 32302

David S. Dee
Attorney at Law
Carlton, Fields, Ward,
Emmanuel, Smith & Cutler
Post Office Drawer 190
Tallahassee, Florida 32302

David M. Owen
Lee County Assistant Attorney
Post Office Box 398
Fort Myers, Florida 33902

Matthew Farmer
Attorney at Law
Farmer & Fitzgerald
2910 Bay to Bay Boulevard
Tampa, Florida 33629

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL REGULATION



RICHARD T. DONELAN
Assistant General Counsel

Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Fl 32399-2400
Telephone (904) 488-9730