

ADMINISTRATIVE REVIEW OF DECISIONS BY THE FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION



Overview

The Florida Department of Environmental Protection (“DEP”) frequently makes decisions that affect individual members of the public. For example, the DEP makes decisions on permit applications for sources of air and water pollution, and takes actions to assure compliance with environmental laws. Those decisions made by the DEP are generally “agency actions” under the Florida Administrative Procedure Act, which can be found in Chapter 120 of the Florida Statutes. When the DEP takes “agency action,” parties whose substantial interests will be affected have procedural rights to a fair and impartial review of the DEP’s decision. A citizen’s challenge to an agency action should be viewed as a means of assisting the agency in making the correct decision. The system is designed so that an ordinary citizen can present his or her point of view successfully, without requiring the assistance of an attorney. In complex cases, of course, the advice of an attorney may be advisable. This brochure is intended to assist citizens who object to a decision the DEP has made or proposed to make and who seek to change that decision or proposed decision through an administrative hearing.

Important References

To present your point of view effectively, you should be aware that agencies must follow procedural requirements stated in statutes and administrative rules. Before you begin, it is strongly suggested that you review 1) the Administrative Procedure Act located in Chapter 120 of the Florida Statutes (and the pertinent statutes authorizing the particular kind of action that you wish to challenge, such as Chapter 373 for dredging and filling and Chapter 403 for air or water pollution); 2) the Rules of Administrative Procedures for the DEP – Rulemaking, and Final Agency Action and Appeal located in Chapters 62-102 & 62-103 of the Florida Administrative Code; 3) the administrative procedures generally applicable to the executive branch of the government located in Chapters 28-3 and 28-101—28-110 the Florida Administrative Code; and 4) any written notice of the DEP’s decision that you may have received or seen in a newspaper, or other periodical. Current editions of the Florida Statutes and the Florida Administrative Code should be available at your local public library; you can also access them online at <http://www.leg.state.fl.us/> for the Florida Statutes, and at <http://fac.dos.state.fl.us/> for the Administrative Code. The written notice may suggest specific material for you to review and consider, including the DEP’s files on the matter. [Maybe add something on public records requests, or make a whole other fact sheet.]

Getting Started: Time and Content Requirements

If you have learned of a DEP decision and wish to request a hearing, you must act promptly in filing a written request, commonly known as a petition. Please refer to Section 62-110.106 of the Florida Administrative Code to determine your filing deadline, paying particular attention to subsections (2) and (3). Note that the request must be filed, or physically delivered, at the place described by the DEP rules. Documents can be delivered by hand, fax, or courier service to that address during regular business hours. Delivery by mail is risky because the DEP may not receive the request for deadline and will consider the date of receipt, not the date of mailing, in determining whether the request is timely.

With respect to the form and content of the petition, pay close attention to Section 120.54(5)(b)4 of the Florida Statutes and rule 28-106.201 of the Florida Administrative Code, which specify what you must include in a petition for a formal administrative hearing. Emphasize the facts that you believe the DEP overlooked to the legal standards (e.g., statutes and rules) that you cite in your petition. Before preparing your petition, obtain as much relevant factual information as you can, and take the time to review the rules and statutes governing the subject matter of the decision that you wish to challenge.

If your petition does not include all of the information described in rule 28-106.201, the DEP will send you a copy of an order dismissing the petition. That order will provide you with an opportunity to submit an amended petition within a certain deadline, and will identify what is lacking in the petition so that you may amend it properly and proceed further. Remember the deadline is strictly enforced, and that if your petition is even one day late, you will lose your right to an administrative hearing. If your petition or amended petition is received before the deadline and complies with all procedural rules, an independent administrative law judge (“ALJ”) from the Division of Administrative Hearings (“DOAH”) will be assigned to resolve factual disputes concerning the matters described in your petition.

Occasionally, cases arise where the parties do not dispute any facts described in the petition, and where it is unnecessary to resolve any factual disputes. In that case, you can proceed, by a petition for an informal hearing, to present legal arguments to the DEP in your attempt to persuade the DEP to change its position. The filing deadlines will remain the same, but the procedure is very different, restricted only to legal arguments made directly to the DEP, rather than to an ALJ sitting as an independent trier of facts. For further information regarding proceedings and hearings not involving disputed issues of material fact, please refer to Sections 28-106.301 through 28-106.307 of the Florida Administrative Code.

Referral of Your Petition to the DOAH

When a petition is referred to the DOAH, you will receive self-explanatory documents regarding the time, place, and manner of the final hearing on your petition. Rules of evidence are less formal than those that would apply in civil and criminal

cases, but you should be prepared to present substantial and competent evidence - not speculation, conjecture, or rumor. Close attention to subsection 120.57(1) of the Florida Statutes is recommended. In addition, when the matter is referred to the DOAH, it is strongly recommended that you review the DOAH's own procedural rules, set forth in Chapter 60Q-2 of the Florida Administrative Code.

You should be prepared to present your evidence, in the form of your witnesses' testimony, documents, or tangible items, at the time of hearing. After allowing some time (often, thirty days) for all of the parties to present their written positions on what the findings of fact should be, the ALJ will issue a "recommended order" to the agency. Two categories of material will be included in the recommended order: first, findings of fact; and second, conclusions of law.

Final Action on Your Petition

You will be afforded a relatively short period of time to present objections (usually called "exceptions") to the recommended order to the Secretary of the DEP. The Secretary will not have discretion to reverse any of the findings of fact, as long as they are supported by competent and substantial evidence. The Secretary may, and often does, reject or change the conclusions of law stated in the final order. The Secretary will consider the DOAH recommended order, the exceptions, and any responses in opposition to exceptions, and resolve your petition in a written final order. That order will contain a notice of appellate rights, so that you may appeal the DEP's final order to a district court of appeal if you so choose.

References and Contact Information

Florida Statutes Online

- <http://www.leg.state.fl.us/>

Florida Administrative Code Online

- <http://fac.dos.state.fl.us/>

DOAH, the Desoto Building 1230 Apalachee Parkway, Tallahassee, FL 32399

- (850) 488-9675
- <http://www.doah.state.fl.us/internet/default.cfm>
- DOAH Rules:
<http://www.doah.state.fl.us/internet/uniformdoah.cfm>

Prepared by the Environmental and Land Use Law Section, Committee on Access to Justice

The Environmental and Land Use Law Section ("ELULS") is an organization within the Florida Bar. One of the ELULS's major purposes is to promote increased knowledge and understanding of environmental and land use law. In response to the need for increased legal services to people who are unable to afford legal counsel, the ELULS has created a Committee on Access to Justice to encourage pro bono activities in the areas of environmental and land use law. Right now, the ELULS is sponsoring a variety of activities, including *Legal Assistance*

through Legal Services, Inc. and the Florida Pro Bono Coordinators Association, Public Workshops on Environmental and Land Use Law, and Educational Materials for Citizens.

For more information, visit the Florida Bar at <http://www.flabar.org/>; or contact the Environmental and Land Use Law Section, 651 E. Jefferson Street, Tallahassee, FL 32399-2300, 904/561-5623, <http://www.eluls.org>.

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