

NUTS AND BOLTS OF PERMIT CHALLENGES



Kevin S. Hennessy, Esq.
and
Susan Roeder Martin, Esq.





Final Agency Action

- Issuance or denial of a permit is a decision which affects a party's substantial interest under Section 120.569, F.S.
- A petition for formal administrative hearing may be filed with the agency by the applicant or a 3rd party.
- Petitions are seldom filed by applicants because applicants normally chose to address the issues that would otherwise result in a denial or withdraw application.
- If there is a disputed issue of material fact, the petitioner may be entitled to a hearing before a Division of Administrative Hearings' (DOAH) Administrative Law Judge (ALJ).

Notice of Rights

- Agency decisions include a formal notice of rights which is provided to the applicant and 3rd parties who requested notice. Section 120.569(1), F.S. and Rule 28-106.111, F.A.C.
- Notice may also be:
 - Constructive (published)
 - Actual
 - Without proper notice, time to challenge remains open.

21 Days

- A permit must be challenged within 21 days of notice. Rule 28-106.111, F.A.C.
- An extension of time may be filed before the 21 days expires to extend the deadline. This deadline may be extended only based on good cause or agreement of the parties. Rule 28-106.111(3), F.A.C.
- If the agency decision is modified, a new point of entry is created but may be limited to the modification.
- Filing must be with agency clerk.



Challenges are Initiated by Filing a Petition

- Specific requirements for a petition are set forth in Rule 28-106.201, F.A.C.
- The agency will review the petition for adequacy. It will then:
 - Accept the petition and refer it to DOAH;
 - Dismiss the petition; or
 - Dismiss portions of the petition (i.e.: if a portion of the petition is not within the agency's jurisdiction).
- The agency will give the petitioner the opportunity to amend a deficient petition unless it “conclusively appears on the face of the petition that the defect cannot be cured.” Section 120.569(2)(c), F.S.

Primary Petition Deficiencies

- Failure to follow the requirements of Rule 28-106.201, F.A.C.
- Failure to allege a dispute within the agency's jurisdiction.
- Failure to adequately allege standing.

Standing

- The petitioner must allege:
 - Injury in fact;
 - Sufficient immediacy; and
 - Substantial interest of the type or nature which the proceeding is designed to protect.

Landmark case is *Agrico Chem. Co. v. Dept. of Env'tl. Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981).

Special statutory provisions pertain to associational standing.
§ 403.412(6), F.S.



Referral to DOAH for Assignment of ALJ

- Only the petition and responsive pleadings are sent to DOAH. The permit file/record is not sent.
- ALJ issues an initial order requiring the parties to provide the location, number of days needed, and hearing dates within 30 to 70 days. This timeframe is rarely met.
- An answer to the petition is not required.
- Thereafter, the ALJ issues an order setting the hearing and establishing pre-hearing requirements.



Discovery and Pre-Hearing Procedure

- Discovery is pursuant to the Florida Rules of Civil Procedure.
- This may create timing problems because hearings are promptly set. The discovery cut-off is set forth in the order of pre-hearing procedure.
- Parties must work together to file a pre-hearing stipulation with stipulated facts, law, and other matters.
- Administrative Law Judges do not like discovery disputes.
- Motions usually decided without hearing – should always respond.



FINAL HEARING