Water Law Review

Volume 4 | Issue 2 Article 40

1-1-2001

Wentworth v. Fla. Dep't of Envtl. Prot., 771 So. 2d 1279 (Fla. Dist. Ct. App. 2000)

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One of the factors that the District considered when deciding to issue a permit was the impact a proposed development would have on wildlife. South Shores argued it was not required to obtain a permit. South Shores based its argument on a Florida Administrative Code provision that exempted projects from applying for permits where they received prior approval.

Save the Manatee Club petitioned the Division of Administrative Hearings to invalidate the rule. The Administrative Law Judge ("ALJ") concluded the relevant sections in the rule neither implemented nor interpreted any specific power granted by the applicable enabling statute. Thus, the ALJ declared the provision was an invalid exercise of legislative power. The District appealed.

The court reviewed the enabling statute to determine whether it granted specific powers or duties to the District that would authorize the rule. The enabling statute granted the District authority to issue environmental resource permits according to the statutory criteria established in the Florida Water Resources Act of 1972. The statute limited exemptions from the permitting requirements to those that did not allow significant adverse impacts on the environment. The court determined the exemption in the regulation was not based on the absence of a potential impact on the environment, but rather was based on prior approval. Because the statute did not provide specific authority for an exemption based on prior approval, the court agreed with the ALJ and held the rule invalid.

Dawn Watts

Wentworth v. Fla. Dep't of Envtl. Prot., 771 So. 2d 1279 (Fla. Dist. Ct. App. 2000) (holding notice must be duly published or otherwise provided to all substantially affected persons before a party can rely on a Department of Environmental Protection permit grant).

Appellant, George Wentworth, appealed an Amended Final Order of the Department of Environmental Protection ("DEP") partially granting his request for permission to build a boat dock over sovereign submerged lands. Wentworth's property bordered the Indian River Lagoon, where he wished to build both a dock and access pier through the lagoon's mangroves. The lagoon was a State Aquatic Preserve, an Outstanding Florida Water, and subject to special water quality protection, permitting requirements, and DEP oversight.

Wentworth applied to DEP for a "noticed general permit" and the agency consent required to build on sovereign submerged lands. The "noticed general permit" was a pre-approved grant of authority, until and unless DEP notified Wentworth otherwise within thirty days. DEP sent Wentworth notice of agency action and consent to use the sovereign submerged lands. However, DEP did not send such notice to Wentworth's neighbors. In its consent letter, DEP notified Wentworth that neighbors or other substantially affected parties may request an administrative hearing contesting the permit within twenty-

one days of notice. Wentworth was to give notice through general publication in a newspaper or through personal receipt of written notice. Wentworth failed to provide such notice. DEP also noted that an administrative hearing could lead to rejection of a permit.

The court examined whether Appellees, Wentworth's neighbors, received substantial notice of the dock construction to satisfy due process. The court recognized the neighbors only received notice when Wentworth actually began construction. The court stated that while agency proceedings may be "free-form decisions," agency rules must grant affected parties a clear "point of entry" to challenge agency proceedings. The court held the neighbors did not receive adequate notice and were denied a "clear point of entry" until they had actual notice when construction began.

The court stated due process applied to all parties and the neighbors had a right to challenge the permit upon notice at any time, as a substantially affected party. The court also held Wentworth could not justifiably rely on the finality of a DEP permit grant until he had fully and fairly given notice.

Christine Ellison

IDAHO

***In re* SRBA, 20 P.3d 693 (Idaho 2001)** (holding appellant landowners failed to prove conditions beyond the control of the water right holder caused the abandonment and forfeiture of water).

Between 1973 and 1984, Gerald Storer owned and farmed real property ("Storer property") appurtenant to water rights 34-00600 and 34-00606. In 1976, Storer changed from irrigating the land from Alder Creek, the source of the water, to irrigating by sprinkler. Storer purchased an irrigation system, drilled a well in the northeastern portion of the property, and plowed in all but one of the irrigation ditches on the eastern side of the property. In 1984, Storer transferred the property and the appurtenant rights to the Farmers Home Administration ("FHA"). FHA leased the property for the next ten years to various people. During this time, the property was irrigated for only a few weeks in 1990 through the irrigation ditches located on the property. Yet, due to Alder Creek's lack of water and broken irrigation equipment, the owners irrigated only twenty-five acres.

The 1990 irrigation ended when the watermaster diverted the Alder Creek water above the property onto his land. In 1991 and 1992, the watermaster's son, Shane Rosenkrance, leased the property and used Alder Creek water on his own land rather than on the Storer property.

On May 27, 1992, a director's report recommended the water rights appurtenant to the Storer property be discontinued based on abandonment and/or forfeiture. The United States, through FHA,