ENVIRONMENTAL STANDING IN ADMINISTRATIVE PROCEEDINGS

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Overview

Florida environmental organizations frequently bring administrative challenges against state agencies, such as the Florida Department of Environmental Protection, in order to safeguard or further their organizational interests. The legal concept known as "standing" has proven to be a major obstacle for environmental groups in bringing these administrative challenges. For example, the agencies themselves have denied many environmental organizations' challenges based on their conclusion that the organizations lacked standing.[1]

"Standing" to sue in court is commonly defined as a "sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."[2] To obtain standing in Florida administrative proceedings, one must generally show a similar stake in the outcome.[3] The more precise nature of that stake, as defined in the Florida Statutes and interpreted in case law, is the focus of this paper.

I. Standing to Challenge Agency Action Under §§ 120.569 and 120.57, Florida Statutes.

A. Statutory Construction

Florida administrative challenges are governed by Florida's Administrative Procedure Act, located in Chapter 120 of the Florida Statutes.[4] Principally, Section 120.569, Fla. Stat., ("Decisions which affect substantial interests") is the provision by which an individual or entity,

1. Still v. Fla. Dep't of Envtl. Prot., No. 18-1061 (Fla. Dep't Envtl. Prot. Aug. 20, 2018) (Final Order); Greenhalgh v. Fla. Dep't of Envtl. Prot., No. 17-1165 (Fla. Dep't Envtl. Prot. Aug. 20, 2018) (Final Order).
2. BLACK'S LAW DICTIONARY (6th ed. 1991) (citing Sierra Club v. Morton, 405 U.S. 727 (1972)).
3. Richard M. Ellis, *Standing in Florida Administrative Proceedings*, 75 FLA. B.J. 49, 49 (2001).
4. FLA. STAT. §§ 120.50–81 (2018).

aggrieved by an unfavorable agency determination[5], may petition for an administrative hearing.[6] Section 120.569(1) states that "[t]he provisions of this section apply in all proceedings in which the *substantial interests* of a party are determined by an agency."

In considering whether Section 120.569 provides an individual or an entity the right to participate in administrative proceedings, two foundational issues are whether they are a "party" and whether their "substantial interests" are being determined or affected by an agency. A "party" is defined in Florida Statutes as "(1) Specifically named persons whose substantial interests are being determined in the proceeding or (2) Any other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party."[7]

Typically, environmental organizations are not "specifically named persons" per subsection (1), as this language is limited to persons subject to licensing/permitting decisions, enforcement determinations, etc. Thus, unless an environmental organization can point to a statutory or constitutional provision that expressly allows for their participation in a proceeding, the organization must prove that their "substantial interests will be affected" by the proposed agency action they wish to challenge.

Though many environmental challenges to agency action under Section 120.569, Fla. Stat., utilize the "substantial interests" avenue to effectively allege standing, the phrase "substantial interests" is not actually defined anywhere in the Florida Statutes. Instead, the "substantial interests test" has been defined and expanded in Florida case law.

5. It is important to note that Sections 120.569 and 120.57 apply to challenges against agency action, such as an agency's final order, and do not apply to agency "rules." Section 120.52(16), Fla. Stat., defines a "rule" as "[e]ach statement of general applicability that implements, interprets, or prescribes law or policy or describes a procedure or practice requirements of an agency . . ."
6. Ellis, *supra* note 3.
7. FLA. STAT. §120.52(13).

B. Agrico and the Substantial Interests Test

Agrico Chemical Co. v. Department of Environmental Regulation[8] is the principal case regarding the meaning of "substantial interests" and standing to challenge decisions which affect them.[9] *Agrico* established a two-prong substantial interests test that a party must satisfy to demonstrate standing. First, the party must suffer an "injury in fact" which is of "sufficient immediacy" to entitle them to a Section 120.57 hearing, and second, the substantial injury must be of a type or nature which the proceeding is designed to protect.[10] "The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury."[11]

Since *Agrico*, a series of Florida cases have provided significant interpretations of *Agrico*'s two-part substantial interests test. In *Village Park Mobile Home Owners Ass'n v. Department of Business Regulation*,[12] the First District Court of Appeal held that, "a petitioner can satisfy the injury-in-fact standard set forth in Agrico by demonstrating in his petition either: (1) That he had sustained actual injury in fact at the time of filing his petition; or (2) That he is immediately in danger of sustaining some direct injury as a result of the challenged agency's action."[13]

Further, *Village of Key Biscayne v. Department of Environmental Protection*[14] is an oft-cited case regarding the second prong of *Agrico*'s standing test, commonly known as the "zone of interests" test. In that case, Florida's Third District Court of Appeal held that the Village of Key Biscayne lacked standing to intervene in an environmental permitting proceeding because it alleged injury to its economic and contractual interests, rather than the environmental interests protected in that type of proceeding.[15] Thus, *Village of Key Biscayne* reflects the principle that a petitioner must allege injury within the zone of interests contemplated by the agency's action.

8. 406 So. 2d 478 (Fla. 2d DCA 1981).
9. Ellis, *supra* note 3.
10. *Agrico Chem. Co.*, 406 So. 2d at 482.
10. *Id.*
12. 506 So.2d 426, 433 (Fla. 1st DCA 1987).
13. *Id.*; Broward Hosp. Dist. v. State, 141 So. 3d 678 (Fla. 1st DCA 2014).
14. 206 So. 3d 788 (Fla. 3d DCA 2016).
15. *Id.* at 791.

C. Judicial Review Process

Whether a party has standing to maintain an administrative proceeding is a question of law and will be reviewed de novo on appeal.[16] "In determining whether a party has standing to seek a formal administrative hearing, the allegations contained in the party's petition must be taken as true."[17] Moreover, some cases have held that an agency's determination on the issue of standing was not entitled to any deference because it involved the application of general principles of administrative law, over which the agency had no special expertise.[18]

When standing is challenged during an administrative hearing, the petitioner "must offer proof of the elements of standing, and it is sufficient that the petitioner demonstrate by such proof that his substantial interests *'could* reasonably be affected by . . . [the] proposed activities."'[19] Standing is a "forward-looking concept" that "cannot 'disappear' based on the ultimate outcome of the proceeding."[20] Florida tribunals must treat the issue of standing separately from the merits of a petitioner's claim; otherwise, "a party would always be required to prevail on the merits to have had standing."[21]

II. Standing to Challenge an Agency Rule Under Section 120.56, Florida Statutes.

A. Statutory Construction

Standing to challenge a rule issued by an agency does not significantly differ from standing to challenge agency action adopted by final order. Section 120.52(16), Fla. Stat., defines a "rule" as "[e]ach statement of general applicability that implements, interprets, or prescribes law or policy or describes a procedure or practice requirements of an agency . . ."

16. *Mid-Chattahoochee River Users v. Fla. Dep't of Envtl. Prot.*, 948 So. 2d 794, 796 (Fla. 1st DCA 2006).
17. *Id.*
18. S. Broward Hosp. Dist. v. Agency for Health Care Admin., 141 So. 3d 678, 681 (Fla. 1st DCA 2014).
19. Palm Beach Cty. Envtl. Coal. v. Florida Dep't of Envtl. Prot., 14 So.3d 1076, 1078 (Fla. 4th DCA 2009) (quoting Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1084 (Fla. 2d DCA 2009)).
20. *Peace River/Manasota Reg'l Water Supply Auth.*, 18 So.3d at 1083.
21. *Id.* (quoting Reily Enter., LLC v. Florida Dep't of Envtl. Prot., 990 So.2d 1248 (Fla. 4th DCA 2008)).

A challenge to an existing rule may be filed at any time during which the rule is in effect,[22] and if the rule or part of the rule is declared invalid, the rule or part becomes void when the time for filing an appeal expires.[23]

Under Section 120.56, any person "substantially affected" by an existing or proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an "invalid exercise of delegated legislative authority."[24] In this regard, the petition seeking an administrative determination of the invalidity of a rule or proposed rule must state with particularity the provisions alleged to be invalid, as well as facts sufficient to show that the person challenging a rule is substantially affected by it or that the person challenging a proposed rule would be substantially affected by it.[25]

B. "Substantially Affected" Standard — Case Law Interpretation

As with adjudicatory challenges, there are more general guidelines than bright lines in the case law on standing to challenge the validity of administrative rules under §120.56, Fla. Stat. To establish that one is or will be "substantially affected" by a rule or proposed rule, an individual challenger must establish that application of the rule will result in "a real and sufficiently immediate injury in fact" and that "the alleged interest is arguably within the zone of interest to be protected or regulated."[26] The zone-of-interest element of the substantially affected test may be satisfied where a party asserts that a rule implementing a statute encroaches upon an interest protected by a statute or the constitution.[27]

The test as articulated is very similar to the *Agrico* test for standing in 120.569/120.57 hearing, but the test is applied differently, with both prongs being interpreted to allow broader

22. FLA. STAT. § 120.56(3)(a).
23. Cathy M. Sellers, *Overview of the Administrative Procedure Act*, ADP FL-CLE 2-1 (2017).
24. FLA. STAT. § 120.56.
25. 2 FLA. JUR. 2D *Administrative Law* § 173 (2019).
26. Fla. Bd. of Med. v. Fla. Acad. of Cosmetic Surgery, 808 So. 2d 243, 250 (Fla. 1st DCA 2002) (citing Lanoue v. Fla. Dep't of L. Enf't, 751 So. 2d 94, 96 (Fla. 1st DCA 1999)); Ward v. Bd. of Trs. of Internal Improvement Tt. Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995); All Risk Corp. of Fla. v. State Dep't of Labor & Emp't Sec., 413 So. 2d 1200, 1202 (Fla. 1st DCA 1982); Fla. Dep't of Offender Rehab. v. Jerry, 353 So. 2d 1230 (Fla. 1st DCA 1978).
27. 2 FLA. JUR. 2D *Administrative Law* § 176 (2019).

participation by the public in rule challenges.[28] Thus, several commentators state that the case law requires a lesser showing for a rule challenge than that required to challenge agency decisions adopted by final order that affect a petitioner's substantial interests.[29]

For example, "[f]rom the beginning of its use in rule-challenge cases, 'zone of interest' has been considered more broadly than it has been in challenges to agency determinations under F.S. §120.57(1)."[30] The rule-challenge petitioner is not limited to the statutes being implemented by the agency action, in asserting the interest to be protected or regulated.[31] Rather, the "zone of interest" in a rule-challenge case may be founded in an interest created by another statute or by the constitution.[32]

III. Associational Standing

Standing is particularly challenging for environmental organizations because of the difficulty in proving that the members of the organization are suffering from an injury—not just an injury to the environment.[33] The Florida Supreme Court outlined the three-prong test for associational standing in *Florida Home Builders Association v. Department of Labor & Employment Security*.[34]

> An organization has standing to bring a suit on behalf of its members when an association must demonstrate that a substantial number of its members, although not necessarily a majority, are "substantially affected" by the challenged rule. Further, the subject matter of the rule must be within the association's general scope of interest and activity, and the relief requested must be of the type appropriate for a trade association to receive on behalf of its members.[35]

28. *See* Fla. Med. Ass'n v. Bd. of Optometry, 426 So. 2d 1112 (Fla. 1st DCA 1983).
29. *See* Ellis, *supra* note 3 at 52.
30. Richard M. Ellis, *Rule-Challenge Standing After* NAACP, Inc. v. Florida Board of Regents, 78 FLA. B.J. 58, 58 (2004).
30. Lanoue v. Fla. Dep't of L. Enf't, 751 So. 2d 94, 98–99 (Fla. 1st DCA 1999) (citing *Ward*, 651 So. 2d at 1238; *Fla. Med. Ass'n*, 426 So. 2d at 1117–18).
31. *See* Ellis, *supra* note 29 at 58.
33. The leading case on this issue was looked at in federal court. In *Lujan v. Defenders of Wildlife*, the United States Supreme Court held that the environmental groups lacked standing because they couldn't prove an injury that any of their members or the group itself would suffer. 504 U.S. 555, 578 (1992). In *Lujan*, injury to the animals was not enough to prove organizational standing for the environmental groups. *Id.* at 566–67.
34. 412 So. 2d 351 (Fla. 1982).
35. *Id.* at 354.

First, the groups must meet the *Agrico* test and prove that they are suffering from an actual injury, not a hypothetical injury.[36] Next, the group's purpose and mission must align with the subject matter of the challenged petition. Finally, the group can only have injunctive relief and not monetary relief.[37] *Florida Home Builders* involved a rule challenge but *Farmworker Rights Organization, Inc. v. Department of Health and Rehabilitative Services*[38] extended the standing requirements for associations to section 120.57(1).[39]

The Florida Supreme Court concluded that *Florida Home Builders* does not impose a requirement "that an association would have to prove that one of its members would actually prevail on the merits in a rule challenge in order to establish associational standing. Such a concept improperly mixes the issue of merit with the issue of standing."[40] This is a key distinction because many challenges have thrown out for lack of standing when the agency determined that there was no injury by looking at the merits, and not just the allegations of the organization.

Lastly, Florida courts since *Florida Home Builders* have not attempted to be more specific concerning the percentage of an association's members required to be "substantially affected" in order for the association itself to have standing.[41] It therefore may be inferred that associational standing issues will be taken on a case-by-case basis.

Standing for a Coalition of Groups

Environmental organizations have been increasingly interested in joining coalitions. These groups are made up of other organizations that agree to work together toward a common goal or purpose. Since many environmental groups are largely funded from donations, these coalitions are vital to pool resources and work together on various challenges facing the environment. The coalitions are also beneficial to bring members of the community together to

36. Vill. Park Mobile Home Ass'n v. State Dep't of Bus. Regulation, 506 So.2d 426, 433 (Fla. 1st DCA 1987).
37. Fraternal Order of Police v. City of Miami, 233 So.3d 1240, 1243 (Fla. 3d DCA 2017).
38. 417 So. 2d 753 (Fla. 1st DCA 1982).
39. *Id.* at 754.
40. NAACP v. Fla. Bd. of Regents, 863 So.2d 294, 300 (Fla. 2003).
41. Ellis, *supra* note 3 at 52.

discuss matters that are important to the various member organizations and brainstorm ways to solve different issues.

There have been no cases determining whether or not a coalition of groups could have standing and sue for its member groups. There are several hurdles that these types of coalitions would have to overcome in order to meet standing. The first prong of the *Florida Home Builders* test would be the hardest to accomplish.[42] A substantial number of members of the coalition must have standing to sue in their own right.[43] In order to satisfy this prong of associational standing the coalition would have to do a two-step standing analysis. First, look to its member organizations and determine if a substantial number of their members would have standing to sue in their own right. Next, determine if a substantial number of its member organizations would satisfy the associational standing test on their own. If a substantial number of the organizations would be able to sue on their own because a substantial number of their own members have standing as well, then the coalition is likely to succeed.

The coalition must also follow the remaining requirements outlined in *Florida Home Builders*.[44] The group must be challenging an agency action that aligns with its general scope of interest and activity and to be safe, the coalition should ensure that a substantial number of the member organizations also have a similar interest and activity and they would be able to succeed under this test. The relief requested should not be monetary and should be injunctive relief.[45]

Allowing coalitions of groups to sue on behalf of its members will further the purpose of the APA. "One of the major purposes of [Florida's] APA is 'expansion of public access to the activities of governmental agencies.'"[46] Many smaller organizations may lack the funds to hire a lawyer and challenge agency action that affects them. These small organizations have the ability to come together and be a part of a larger coalition in order to pool their resources are more successfully challenge agency actions that affect their substantial interests.

42. Fla. Home Builders Ass'n v. Dep't of Labor & Emp't, 412 So. 2d 351, 354 (Fla. 1982).
43. *Id.*
44. *Id.*
45. *Id.*
46. Friends of the Everglades, Inc. v. Bd. of Trs. of the Internal Improvement Tr. Fund, 595 So. 2d 186, 189 (Fla. 1st DCA 1992) (quoting *Florida Home Builders Ass'n*, 412 So. 2d. at 352.

IV. Environmental Protection Act

An additional avenue for environmental organizations to consider can be found under the Environmental Protection Act of 1971.[47] However, organizations should not rely exclusively on this statute because they still must meet the minimum standing requirements. The Environmental Protection Act states:

> Any Florida corporation not for profit which has at least 25 current members residing within the county where the activity is proposed, and which was formed for the purpose of the protection of the environment, fish and wildlife resources, and protection of air and water quality, may initiate a hearing pursuant to s. 120.569 or s. 120.57, provided that the Florida corporation not for profit was formed at least 1 year prior to the date of the filing of the application for a permit, license, or authorization that is the subject of the notice of proposed agency action.[48]

In *Florida Wildlife Federation v. State Department of Environmental Regulation*,[49] the Florida Supreme Court decided that the Environmental Protection Act created a new cause of action that gave citizens of Florida a new substantive right, "the capacity to protect their rights to a clean environment."[50] The Florida Supreme Court said that "by providing that the manner in which a potential plaintiff is affected must be set out, the statute ensures that the minimum requirements of standing-injury and interest in redress-will be met."[51] The Court held that in order to state a cause of action under this law, "a mere allegation of irreparable injury not sustained by the allegation of facts will not ordinarily warrant the granting of injunctive relief."[52] Further, the Court said that "the question raised [must be] real and not merely theoretical and that the plaintiff has a bona fide and direct interest in the result."[53] The Court allowed the environmental organization to bring an action about the Department of Environmental Regulation not only because of the statute, but also because the group could satisfy the basic elements of standing.[54]

47. FLA. STAT. § 403.412(6).
48. *Id.*
49. 390 So. 2d 64 (Fla. 1980).
50. *Id.* at 66–67.
51. *Id.* at 66.
52. *Id.* at 67.
53. *Id.* at 68.
54. *Id.*

In *Conservation Alliance of St. Lucie County, Inc. v. Florida Department of Environmental Protection*,[55] the Fourth District Court of Appeal denied standing to an environmental organization challenging a settlement agreement.[56] The Florida Department of Environmental Protection read the Environmental Protection Act to only grant standing to challenges of permits, licenses, or authorizations and the court deferred to the agency's interpretation of the statute.[57] However, it is unclear how the interpretation of this statute will be decided in the future because agency deference is now not permitted. In 2018, voters in Florida approved a Constitutional Amendment that eliminated deference given to administrative agencies when interpreting a state statute or rule.[58] This is an important development in Florida's law that many groups may want to follow.

V. Division of Administrative Hearings Case Example

A recurring issue for environmental groups in Florida has been the failure to prove injury. Florida agencies have dismissed challenges for lack of standing because they state that there is no injury when the agency is creating an improvement plan for the environment.[59] However, this reasoning seems flawed and environmental groups should be able to argue enough concrete facts to overcome it. If there is a legitimate dispute about whether the plan goes far enough to protect the environment, then the injury would be to the substantial interests of the organization.[60]

A great example of how an environmental organization can succeed in proving standing is a Division of Administrative Hearings (DOAH) order from July 2018. In the order the Administrative Law Judge (ALJ) found that Sierra Club succeeded in proving standing to challenge agency action regarding a local power plant. Some of the harms that Sierra Club

55. 144 So. 3d 622 (Fla. 4th DCA 2014).
56. *Id.* at 625.
57. *Id.*
58. Florida Division of Elections, *Proposed Constitutional Amendments and Revisions for the 2018 General Election*, FLA. DEP'T OF ST., https://dos.myflorida.com/media/699824/constitutional-amendments-2018-general-election-english.pdf; Samantha J. Gross, *Florida Voters Pass Amendment 6 on Rights of Crime Victims*, MIAMI HERALD (Nov. 6, 2018), https://www.miamiherald.com/news/politics-government/state-politics/article220678905.html.
59. Still v. Fla. Dep't of Envtl, Prot., No. 18-1061 (Fla. Dep't Envtl. Prot. Aug. 20, 2018) (Final Order); Greenhalgh v. Fla. Dep't of Envtl Prot., No. 17-1165 (Fla. Dep't Envtl Prot. Aug. 20, 2018) (Final Order).
60. *See, e.g.*, *In re* Fla. Power and Light Co.; Dania Beach Energy Ctr. Project Power Plant, No. 17-4388EPP, 83 (Fla. DOAH July 20, 2018) (Recommended Order).

alleged included "rising sea level, saltwater intrusion, contamination of drinking water aquifers, property damage due to flooding and increased storm intensity, adverse impacts on recreational activities due to degradation of coral reef and mangrove ecosystems, algal blooms, and human health impacts."[61] These injuries were considered concrete enough to pass the first prong of the *Florida Home Builders* test.[62] In the case, the ALJ noted that Sierra Club has 38,000 members who lived in Florida and approximately 18,000 of those members lived in the service area of the powerplant.[63] This constituted a substantial number of its members.[64] Although it is not required, it would be helpful for environmental groups to calculate the actual number of members that the group has as well as the number that would be affected or harmed by the agency's action.

"Standing is 'a forward-looking concept' and 'cannot disappear based on the ultimate outcome of the proceeding.'"[65] As the Florida Supreme Court held in *NAACP v. Florida Board of Regents*, standing should not be confused with an analysis of the merits of the case.[66] As long as the party challenging agency action presents evidence to show that if its allegations were correct, the party reasonably *could* be injured by the proposed activity, then the injury in fact prong of standing should be met.[67] In the DOAH order, Sierra Club satisfied this because the ALJ determined that if the allegations of "rising sea level, saltwater intrusion, contamination of drinking water aquifers, property damage due to flooding and increased storm intensity, adverse impacts on recreational activities due to degradation of coral reef and mangrove ecosystems, algal blooms, and human health impacts" were correct, then the group could reasonably be injured by the agency's proposed activities.[68] Distinguishing the difference of facts needed to prove standing from the facts needed to prove the merits is important.

61. *Id.* at 76.
62. *Id.* at 83.
63. *Id.* at 76.
64. *Id.* at 83–84.
65. Palm Beach Cty. Envtl. Coal. v. Fla. Dep't of Envtl. Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009) (quoting Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079 (Fla. 2d DCA 2009)).
66. 863 So. 2d 294, 300 (Fla. 2003).
67. *See In re* Fla. Power and Light Co.; Dania Beach Energy Ctr. Project Power Plant, No. 17-4388EPP, 82 (Fla. DOAH July 20, 2018) (Recommended Order).
68. *Id.* at 76, 83.

In order to meet the first prong of associational standing the group must satisfy the second part of the *Agrico* test known as the "zone of interest" test.[69] In the DOAH order, Sierra Club brought the challenge under a law that was designed to balance the need for an electric power plant with considerations such as air and water quality as well as other environmental concerns.[70] This contrasts with the facts in *Agrico* because in *Agrico*, the group was denied standing because their alleged injury was economic.[71] Economic interests were not within the zone of interest of the statute the group in *Agrico* brought the challenge under, which dealt with environmental licensing.[72] In order for organizations to succeed under this prong they must ensure that the proceeding is designed to protect whichever interests they are attempting to protect with the challenge. The zone of interest is defined within the statute.

Conclusion

The issue of standing is a critical first step for environmental organizations seeking to challenge agency decisions that impact Florida's environment. Failure to prove standing has prevented many organizations' challenges from moving forward, even before the merits of their petition are considered. Therefore, environmental organizations and their attorneys should carefully examine the standing issue before filing petitions and assert as many facts as possible to effectively prove their stake in agency proceedings.

69. *See id.* at 83.
70. *Id.* at 84–85.
71. Agrico Chem, Co. v. Dep't of Envtl. Regulation, 406 So. 2d 478, 479–80 (Fla. 2d DCA 1981).
72. *Id.*