

APRIL 18, 1996 - ENVIRONMENTAL PROTECTION COMMISSION - DRAFT MINUTES

The Hillsborough County Environmental Protection Commission (EPC) met in Regular Meeting, scheduled for Thursday, April 18, 1996, at 10:00 a.m., in the Boardroom, County Center, Tampa, Florida.

The following members were present: Chairman Dottie Berger and Commissioners Phyllis Busansky, Joe Chillura, Chris Hart, and Sandra Wilson. The following members were absent: Commissioners Jim Norman (legislative business) and Ed Turanchik,

Chairman Berger called the meeting to order at 10:10 a.m. Commissioner Hart led in the pledge of allegiance to the flag. Mr. Roger Stewart, Executive Director, EPC, advised that the audit issue concerning the State Department of Environmental Protection (DEP) would be deferred to the next meeting, and a short video on clean air would be shown after the Commissioners' requests.

SPECIAL PRESENTATIONS

Cockroach Bay Seagrass Study - Dr. Clifton Dawes, University of South Florida (USF) Department of Biology, showed a slide presentation of seagrasses and reported on a study being conducted within and outside Cockroach Bay on seagrass recovery from propeller cuts, efforts to mitigate the cuts through the use of nurseries, et cetera. A comparison showed changes in seagrasses within/outside Cockroach Bay over a period of six months. It was felt that the resumption of normal rainfall caused the changes in the seagrass in the summer, which depressed and put stress in the seagrass growth, and the plants in Tampa Bay proper were growing stronger than those inside Cockroach Bay. Dr. Dawes reported on efforts to create seagrass nurseries (beds) in barren areas of Cockroach Bay to induce the production of more seagrasses, which had a 98 percent survival at the end of six months.

AIR MANAGEMENT DIVISION

Proclamation - Clean Air Month - Commissioner Hart presented to Mr. Ed Tokarc, The American Lung Association of Florida, and Mr. Charles Thomas, chairman, Air Quality Task Force, proclamations from EPC declaring May 1996 as Clean Air Month in Hillsborough County and Tampa Bay. Mr. Tokarc thanked the EPC for its efforts.

Cockroach Bay Seagrasses - Resumed - Dr. Nick Ehringer, Hillsborough Community College, reported on efforts over the past three years to map the seagrasses in Cockroach Bay, and for the last 18 months beyond Cockroach Bay into Little Cockroach Bay and into Tampa Bay, for the purposes of studying damages to seagrasses from boat propellers. Since July 1995 boaters had not caused any further damage to the seagrasses inside Cockroach Bay, which he attributed to education, and the disappearance of seagrasses within Cockroach Bay was attributed to natural events and weather changes. Chairman Berger commended the work being done by the Cockroach Bay Users Group (C-BUG) in educating the public. Mr. Stewart felt educating the public in seagrasses far transcended any type of enforcement, and it was the most economical and publicly sensible way to work.

Attorney William Humphries, 442 West Kennedy Boulevard, representing the Martin brothers, reported on the status of environmental destruction on the Martin property, their inability to remediate the property, and Pinellas

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County's responsibility in the cleanup of the site. He presented a detailed history of the ongoing lawsuit brought by Pinellas County against the Martin brothers in 1982 alleging that certain pollutants in a borrow pit were contaminating the Eldridge Wilde Wellfield water. Pinellas County Judge Bryson had ruled in favor of Pinellas County and ordered Mr. Bobby Martin to remove the pollutants, which were identified by Pinellas County's paid experts, but no other local, State or federal entity had found any pollutant. When Mr. Martin refused to comply with the court order, he was held in contempt of court and imprisoned for an indeterminate length. Attorney Humphries reviewed details of the contract prepared by Pinellas County and ordered by the court for C. P. Ward and its subsidiary KBH Construction to remove alleged pollutant material and clean fill from the Martin property, which was supervised by Pinellas County. The Martins could not afford to remediate the property and Hillsborough County had the responsibility to see that it was remediated to within code regulation. The Martin brothers asked the EPC to look into what it could do to create a safe environment to prevent children from going onto the property, such as installing a fence, and to look into how the remediation could take effect by any/all parties other than the Martins.

Attorney Humphries answered questions about mitigation of the property. Commissioner Chillura felt that if a judge was included in the act and supported by Pinellas County, EPC and the County could jointly pursue damages, or at least the cost of mitigation, against all parties and have an independent judge issue a finding. He would copy the Commissioners on a proposal he was developing. Attorney Humphries asked EPC and the County to participate in bringing the issue to a logical conclusion in a manner that would be determined as most proper and appropriate by the Board of County Commissioners (BOCC), with EPC determining how best to pursue it. Responding to questions from Commissioner Busansky concerning how to deal with the fence issue and what EPC might do to help in the case, EPC Chief Counsel Sara Fotopulos advised it was her understanding that a fence had been installed after the dangerous situation became evident, but she was not sure if that fence continued to be adequate. Because the Pinellas County Court had a hearing scheduled on the issue of mitigation and the continuing litigation in Pinellas County, and it had not been determined under those procedures who was responsible for completing the mitigation requirements, Assistant County Attorney Ray Allen of the County Attorney's Office and she both felt it was premature for EPC to take independent action on pursuing the mitigation. However, both agreed on the need to inform the Pinellas County Court of Hillsborough County's concerns, and then whatever happened after that proceeding to re-evaluate the position, but she did feel there were legal avenues available to ensure that the mitigation was properly handled. Commissioner Chillura spoke to the safety problems and moved to ask Attorney Fotopulos, County Attorney Emeline Acton, the County Administrator, and the EPC staff very quickly, within the next two weeks (14 calendar days), to look at the cost of bringing the excavation up to County standards for the EPC's consideration to be brought back to the BOCC (this was a request from EPC to the BOCC in another capacity), and provide a fence around the excavated area for safety, in the interim some kind of temporary fence, because once the area was brought to standards and there was a proper embankment, it may be reasonably safe unless the water was too deep. The motion was seconded by

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Commissioner Busansky. Mr. Stewart commented that the obvious way to proceed would be to fill the hole, there was no shortage of innocuous earth material available that did not need any special permits, and then top it off so that grass and trees could grow. **Commissioner Chillura also included in his motion to ask both staffs to approach the Florida Department of Transportation (FDOT) and the industry for participation on the part of the public and private sector to help resolve the issue. Commissioner Busansky agreed.** Concerning the use and amount of clean debris to fill the holes, Attorney Humphries advised that the destruction that took place on the Bobby Martin property currentented amounted to two lakes. **The motion carried five to zero.** (Commissioners Norman and Turanchik were absent.) When asked who would do the appraisal, Commissioner Chillura advised that both attorneys needed to collaborate, but the County staff had access to an engineering staff.

Noise Demonstration - Mr. Anthony de Aquila, EPC Staff, distributed background material, and with the use of a sound level analyzer and a sound level meter, gave a demonstration of common community experienced noises.

CONSENT AGENDA

- A. Approval of Minutes: November 15, 1995, February 15 and March 21, 1996
- B. Report of the Executive Director:
 - 1. Acceptance of Monthly Activity Reports
 - 2. Legal Department Monthly Reports
 - 3. Acceptance of Contributions to Pollution Recovery Fund
 - 4. Analysis of Gardinier Settlement Fund

Chairman Berger advised there was a correction to item 3. Clayton Lake should be changed from \$34,700 to \$129,000. **Commissioner Chillura moved the Consent Agenda items A, B, 1, 2, 3, and 4, seconded by Commissioner Hart, and carried five to zero.** (Commissioners Norman and Turanchik were absent.)

LEGAL DEPARTMENT

Request Authority to take appropriate action against: GATX and Billings Amoco. Attorney Fotopulos requested authority to take appropriate legal action against 1) GATX for having an aboveground storage facility constructed without the required secondary containment, and 2) Billings Amoco for having a gasoline facility with underground storage tanks that were not being properly managed. As the BOCC representative at the Tampa Port Authority (TPA), Commissioner Chillura asked if staff had approached the TPA staff to approach GATX to get the work done. Ms. Leslie Campbell, EPC Enforcement Coordinator, explained EPC staff had not been able to arrive at a consensus with GATX about how to assess the contamination on the site. Staff had not involved the TPA because it was not sure what the TPA could do to get GATX to comply with environmental regulations more than what EPC had tried, but staff would approach the TPA. **Commissioner Chillura moved both of the items, particularly with GATX, to authorize Attorney Fotopulos to proceed, but prior to any formal legal action that at least an attempt be made with Mr. Steiner, TPA director and his staff support person, to see if there was any benefit from a meeting of the minds regarding this, but failing that to take formal legal action. The motion was seconded by Commissioner Hart and carried four to zero.** (Commissioner Busansky was out of the room; Commissioners Norman and Turanchik were absent.)

COMMISSIONERS' REQUESTS

Stephen J. Dibbs - County Attorney Emeline Acton introduced the item. She explained that Mr. Dibbs had alleged, through a lawsuit pending against the BOCC, that road widening and road realignments had caused flooding of his property, which combined with not being able to do mitigation as he wished, had resulted in deprivation of his property rights and the need for the County to reimburse him certain costs. The County, not EPC, was set for trial the second week in May, and Mr. Dibbs had offered to settle the mitigation litigation for \$50,000; FDOT had settled its case with Mr. Dibbs. A contingency of that settlement was that EPC's wetland jurisdiction be delegated to Southwest Florida Water Management District (SWFWMD). At a deposition in the case, SWFWMD staff had said, under oath, that they would be looking for the same problems as EPC and would be competent to enforce EPC's rules. Attorney Acton felt it was a good business decision for the EPC to settle the case, and if the EPC were to vote to do that, such action would not be binding on the BOCC in paying the \$50,000 when the item was brought to the BOCC. The only issue before the EPC was the delegation of the wetland mitigation to SWFWMD.

Commissioner Chillura asked if they were being asked to react as EPC or BOCC members. Attorney Acton advised she did not want to bring the issue before the BOCC if the wetland mitigation was not approved. Mr. Stewart advised that he had no idea what Mr. Dibbs was proposing to do and suggested that the question of delegation was bound up in the code, but if Mr. Dibbs wanted to settle the issue and eliminate a second review by using only one agency, it would be logical and practical for SWFWMD to defer to EPC to review the site.

Attorney John Wilcox, with the firm of Akerman Senterfitt and Eidson, 100 Ashley Drive, South, representing Mr. Dibbs, advised that because the project involved the addition of more acres of wetlands than originally permitted, and part of that addition was a function of the settlement of the stormwater issues, he had proposed, as part of the settlement, that it made sense to have one agency permit the additional impact and mitigation. He had already discussed that with SWFWMD, the application was pending to amend the permit for the 2.014 acres already permitted to add 3 acres of additional impact, and SWFWMD had informed him that the modification was allowed. He asked the EPC to approve the following paragraph: "It is the intent of the parties that the project should be constructed with SWFWMD alone permitting the environmental features of the project. Hillsborough will recommend to the Environmental Protection Commission of Hillsborough County that the EPC decline to exercise any independent permitting or regulation of the stormwater, wetlands, or any other environmental media in lieu thereof, deferring to SWFWMD such matters of surface water permits, environmental resource permits, Hillsborough County construction plan approvals, or any other permits which SWFWMD may issue or modify in conjunction with the construction of the project, and the roadway realignment referenced in another paragraph. This settlement agreement shall be contingent upon EPC deferring jurisdiction to SWFWMD as set herein above."

Chairman Berger asked how the mitigation was doing since it was a hotly debated issue when discussed last year. Attorney Wilcox said the mitigation was very successful, was proceeding along very well, described by SWFWMD and

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the DEP staff as highly successful and a model project. Mr. Darrell Howton, EPC staff, commented that EPC wetlands staff had visited the site in January. The mitigation could not be termed successful because it was not completed, although the transplanting of the vegetation looked to be successful. Attorney Wilcox distributed pictures of the site. Discussion followed about delegation of wetland responsibilities, the one-stop permitting agency concept through an interlocal agreement, and what, if any, arrangements EPC had with SWFWMD. Mr. Howton explained there was a draft memorandum of use with SWFWMD that EPC would handle enforcement and complaints in the County associated with wetland impacts, and there was an understanding that EPC would do the compliance of mitigation projects in the County. The memorandum would also have a section that EPC would do preapplication meetings jointly with SWFWMD on projects, and the next step would be to pursue the jurisdiction lineation and formal environmental resource permitting (ERP) delegation.

Mr. Stewart commented that what he was hearing seemed to be referring to the technicalities of mitigating, but the application of the criteria for approval of intrusion and the resulting mitigation, which prevailed in the County, was missing and, unless that was adhered to, it would bypass a very critical element of EPC's jurisdiction over wetlands. In responding to Chairman Berger regarding the different ratios, Attorney Wilcox advised that SWFWMD was 1.25 acres to one acre and EPC was one acre to one acre. Attorney Fotopulos explained the primary difference between EPC's rule and SWFWMD's and DEP's rule was that EPC prohibited all impacts to wetlands unless that impact was necessary for reasonable use of the property, then there would be discussion of what mitigation was possible, whereas SWFWMD allowed impact if mitigation could be done. Attorney Fotopulos explained that two words had been used, which meant two different things--"defer" meant EPC would not apply its rules and standards, but allow SWFWMD to apply its own standards, and "delegate" meant that SWFWMD would apply the EPC rules. Attorney Fotopulos felt EPC had the authority to delegate to SWFWMD if it chose and set it up in a rule and that EPC had the authority to defer to SWFWMD if it was in a rule, but there was nothing in the wetland rule or act that allowed EPC to decide on a case-by-case basis that it would not assert its jurisdiction on a particular piece of property. Attorney Fotopulos did not see any way under EPC's existing rules, without changing the rules, to say that it would not apply its standards in this case. Commissioner Wilson referred to statements made by Attorney Fotopulos about changing the EPC rules and commented that until the issue of the rule was raised she felt the item could have been settled.

Commissioner Chillura asked if the EPC Board could implement an emergency rule change that could be used only with a simple majority vote to settle the lawsuit. Attorney Fotopulos explained the EPC Board could have an emergency meeting on a new rule so long as it gave the 10-day public notice. Commissioner Chillura was willing to make a motion to ask Attorney Fotopulos to prepare an emergency rule change with the clear caveat that this was a rule that was not to be used in a cavalier way, that it was only for unusual circumstances where no compromises were to be made by either agency but where there was clearly a settlement issue, and an issue of a unique nature. The second reason for making the motion was that he believed he had a clear

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conflict of interest because, as an EPC Board member, he had to do everything to enforce the rules of the County, while as a BOCC member he probably would vote to settle, because of his fiduciary responsibility to the taxpayers of the County. Commissioner Chillura moved to ask the EPC Attorney to prepare an emergency rule change meeting to be called, and in the process of preparing that rule change with the caveats that he had outlined that EPC have an emergency meeting, and he would ask the chairman if that was possible within the time constraints, (Attorneys Acton and Fotopulos knew what they were) even if it was necessary to have an emergency or a called meeting. Commissioner Wilson seconded the motion for purposes of discussion.

Commissioner Hart asked Attorney Fotopulos if EPC had a rule that said the EPC could or could not delegate the work to SWFWMD because the BOCC had to make decisions in the best interest of the community. Since SWFWMD had a higher standard than EPC, delegation might be acceptable under the proviso that SWFWMD's high standard would be used along with EPC's wording of the rules so that SWFWMD and the property owner were accepting that higher standard but applied by only one agency. However, if EPC had a rule that it could not delegate then the EPC needed to proceed further. Unless Attorney Fotopulos could show him a rule that said the EPC could not make a decision, then he wanted to make a decision in the best interest of the taxpayers, the environment of the community, set a higher standard, and move on.

Commissioner Wilson asked what would happen if EPC acknowledged the documentation and the presentation, and if it went to the BOCC without comment, so that the BOCC could delegate SWFWMD to do the work with no reference to EPC. Attorney Acton advised that only the EPC Board could do that, but she could sue EPC on behalf of the BOCC on the basis that EPC was the reason the litigation was not being resolved in that EPC was unwilling to work with Mr. Dibbs to let him develop his site, and in that way the Board would all be defendants with her. Attorney Fotopulos contended that was not true in that nothing had been presented to EPC staff, and a realistic opinion could not be rendered to the EPC regarding its liabilities without knowing the issues, or anything about the litigation. Commissioner Busansky felt there needed to be more time for the County to talk to EPC and would support the motion on the floor, but asked that the motion include a super majority of the EPC vote if there was going to be an emergency meeting. Attorney Fotopulos advised there were no EPC rules that said the EPC could or could not waive the rule that applied; however, the act under which EPC acted provided in the section that dealt with EPC's authority to resolve citizen concerns and objections to the director's position stated, "The EPC Commission could modify the decision of the hearing officer to do what it wanted, provided that the Commission shall not take any action which conflicted with, or nullified any provisions of the act or rules enacted pursuant to the act," which brought the EPC back to the wetland rule that required a certain process and approval by the director in order to impact any wetlands, which suggested to her that the EPC did not have the authority to waive a rule unless provided for in a rule, which was why she suggested a rule modification. Commissioner Chillura advised he would include a super majority vote in the motion, with the proviso that the meeting met the time constraints that had been established by the developer, EPC Attorney, and County Attorney.

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Following discussion about the conditions, Attorney Jim Hellinger, Jr., representing Mr. Dibbs in his action against the County and the FDOT, said he needed either an agreement with the language that day or he would have to proceed to trial, which was scheduled on May 16. Attorney Hellinger agreed to accept the 1.25 acres to one acre mitigation standards, but he could not accept the EPC standard that property could not be impacted unless it was a reasonable necessary condition, nor would he accept EPC delegating the work with SWFWMD applying the higher standards of EPC and SWFWMD. Attorney Hellinger felt that for the purposes of a settlement the work needed to be deferred to SWFWMD. Mr. Stewart advised that if EPC's more restrictive requirements to qualify for intrusion in a wetland and the resulting mitigation was not acceptable, he saw that as a distinct effort to bypass the criteria applied historically, and still on the books of the County, by EPC, and in the strongest terms he objected to deferring. Commissioner Busansky understood the motion was to have an emergency meeting, to publicize a rule change, which might not be considered, but to continue the discussion and also give a public hearing on a possible rule change with a super majority vote in the public hearing section. Attorney Acton was opposed to having the emergency meeting and preferred voting it up or down at this meeting. **The motion carried five to zero.** (Commissioners Norman and Turanchik were absent.)

DISCUSSION - Agency Newsletter - Chairman Berger advised that the roundtable discussion with EPC, DEP, SWFWMD, and the County at the EPC retreat would be open to the public and had been scheduled for May 6 at 2:00 p.m. on the 26th floor, County Center. The agencies had been asked to submit recommendations of what they considered to be duplication/overlapping of regulations. The roundtable meeting was to allow the various agencies to decide among themselves where they felt there was overlapping and suggest how to proceed. Commissioner Chillura commented that the issue involved a report about the roundtable discussion in the newsletter. Chairman Berger understood the item had been pulled from the newsletter by Mr. Stewart because he felt the item created staff uneasiness. Mr. Stewart said he regretted the situation had developed, but the newsletter was a function within the agency for the morale and information of staff. Certain expressions at the retreat had caused considerable concern among staff related to what might have been an underlying intent, which was never clarified; he saw the report as something that could cause further misunderstanding and agitation among staff. Since he could not contact Chairman Berger and the newsletter was already beyond the deadline, he pulled the article, and he regretted any problems it had caused between Chairman Berger and himself. Commissioner Chillura commented that to prevent a re-occurrence, protocol needed to be established regarding the chairperson. If there was anything on the EPC Board that there was a consensus on that the chairman wanted to message the recipients of the newsletter, there needed to be a protocol to allow the chairperson to do that and the EPC Board needed to take a position on it, but the chairperson should not use the newsletter for any personal agendas. **Commissioner Chillura moved to give the chairman of the EPC the prerogative of inclusion of any item of interest, whether it be a story on the environment and/or a position that the EPC Board took, or some program that the EPC Board was currently engaged in.** If the chairman had the blessing of the EPC Board, the EPC director should not have the right to veto that. **The motion was seconded by Commissioner**

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Hart and carried four to zero. (Commissioner Busansky had left the meeting; Commissioners Norman and Turanchik were absent.)

There being no further business, the meeting was adjourned at 12:30 p.m.

READ AND APPROVED: _____
CHAIRMAN

ATTEST:
RICHARD AKE, CLERK

By: _____
Deputy Clerk
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