

RULING ON THE STATE OF WYOMING'S REQUEST FOR HEARING

I. PROCEDURAL HISTORY

On August 18, 2014, the Oregon Department of State Lands (“Department”) issued a proposed order denying Coyote Island Terminal, LLC’s (“Applicant’s”) application for a removal-fill permit.

Pursuant to ORS 196.825(7), an applicant whose permit is denied may, within 21 days of the denial of the permit, request a contested case hearing. If a request is timely received and the request includes a reason for the request for hearing, the Department must refer the matter for hearing. OAR 141-085-0575(1),(4).¹ On September 8, 2014, the Applicant filed a request for hearing. On October 1, 2014, the Department issued a ruling determining that the Applicant’s request is timely. Accordingly, the Department will refer the matter to the Office of Administrative Hearings.

In addition to an applicant’s opportunity to request a contested case hearing on a permit denial, the Department’s rules allow “any person who is aggrieved or adversely affected by the Department’s final decision” concerning a permit to request a hearing within 21 days of the permit decision. OAR 141-085-0575(2).

A person timely filing a request for hearing under this provision will become a party to the hearing if the Department determines that the request includes a reason for the request for hearing, and the requestor is “adversely affected or aggrieved.” OAR 141-085-0575(2),(4).

On September 8, 2014, both the State of Wyoming (“Wyoming”) and the Port of Morrow filed written requests for hearing pursuant to OAR 141-085-0575(2).² On October 1, 2014, the Department issued a separate ruling granting the Port of Morrow’s request for hearing. The Applicant and the Port of Morrow are therefore both parties to the contested case proceeding on the Department’s denial of the Applicant’s permit application. This Ruling considers Wyoming’s OAR 141-085-0575(2) request for hearing.

II. FINDINGS OF FACT

1. On September 8, 2014, the State of Wyoming (“Wyoming”) filed a written request for hearing pursuant to OAR 141-085-0575.

¹ References to the Department’s Division 085 rules are to the version of the rules in effect on the date of the Department’s proposed order: August 18, 2014.

² The Port of Morrow also cited to ORS 196.825(7) and ORS 196.835 as bases for its hearing request. Neither of these provisions is applicable to the Port of Morrow. ORS 196.825(7) applies only to the permit applicant. ORS 196.835 applies only to a person “aggrieved or adversely affected by the *grant* of a permit.” (Emphasis added). The permit application at issue here was denied.

2. The request for hearing was received within 21 days of the Department's decision denying the Applicant's permit application.

3. Wyoming did not timely submit written or verbal comments on the merits of the Applicant's proposed removal-fill to the Department during the Department's review of the project application.

III. CONCLUSIONS OF LAW

1. Wyoming's written hearing request is timely.

2. Wyoming has failed to establish that it is "aggrieved or adversely affected," as defined in OAR 141-085-0575, by the Department's denial of the Applicant's permit application.

IV. DISCUSSION

Pursuant to OAR 141-085-0575, Wyoming timely filed a written request for hearing, identifying a number of reasons it requested a contested case proceeding. In addition to satisfying these requirements, Wyoming must also establish that it has standing to request a contested case. The standing requirement is described in OAR 141-085-0575(3), which provides:

(3) Standing in Contested Case. For a person other than the applicant to have standing to request a contested case, the person must be either "adversely affected" or "aggrieved":

(a) To be "adversely affected" by the Department's individual removal-fill permit decision, the person must have a legally protected interest that would be harmed, degraded or destroyed by the authorized project. Eligible parties may include adjacent property owners and other parties; or

(b) To be "aggrieved" by the Department's individual removal-fill permit decision the person must have participated in the Department's review of the project application by submitting timely written or verbal comments stating a position on the merits of the proposed removal-fill to the Department.

Wyoming is neither "adversely affected" nor "aggrieved" by the Department's permit decision.

With respect to the "aggrieved" requirement, there is no evidence that Wyoming submitted timely written or verbal comments pertaining to the merits of Applicant's permit application during the Department's public comment period in review of the application, so Wyoming is not "aggrieved."

In order to be "adversely affected," Wyoming must establish that it has a legally protected interested that would be "harmed, degraded or destroyed by the *authorized* project." Wyoming has submitted two affidavits in support of its request for hearing. Both of these affidavits speak to alleged harm that Wyoming will suffer as a result of the permit *denial*. There is no evidence

that Wyoming's interests will be "harmful, degraded, or destroyed" if the permit were granted. Wyoming has therefore failed to establish that it is "adversely affected" by the Department's permit decision.³

Because Wyoming does not have standing to request a contested case under OAR 141-085-0575, Wyoming's request for contested case is denied. This means that Wyoming is unable to obtain party status in the contested case in the manner provided by OAR 141-085-0575(4)(b) and (c). However, because the Department has granted the Applicant's and the Port of Morrow's requests for hearing, there will be a contested case hearing on the Department's permit decision. The Department's rulings on Wyoming's, the Port of Morrow's, and the Applicant's hearing requests constitute procedural rulings in an ongoing contested case proceeding, and are not final orders.

V. RULING

Wyoming's hearing request is denied.



Mary M. Abrams, Ph.D

Director

Oregon Department of State Lands

1 Oct 2014
Date

³ Because Wyoming has not established harm resulting from an "authorized project," it is unnecessary to determine whether Wyoming's asserted interest in tax revenues from future income, generated as a result of mining activity attributable to the Coyote Island Terminal, is a "legally protected interest."