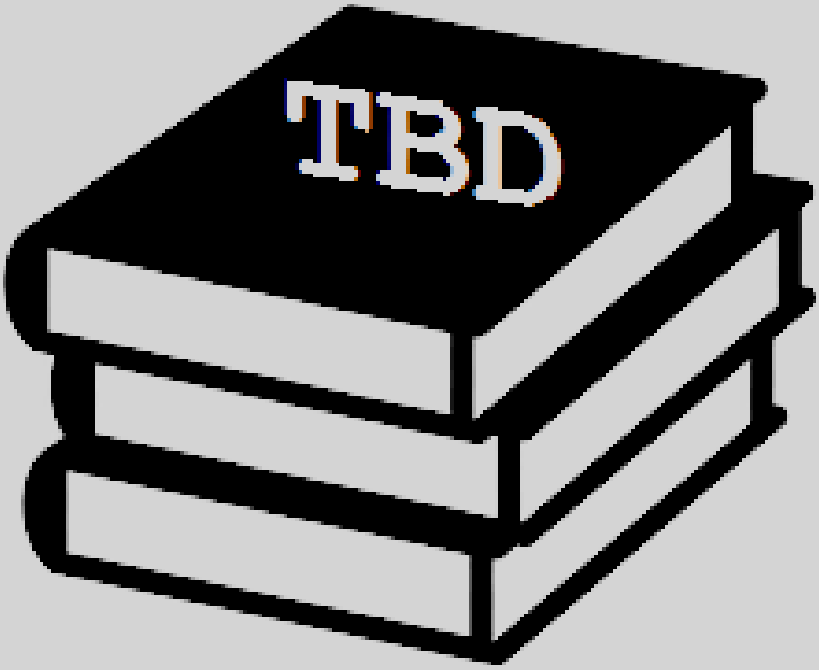

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IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

HIGHLAND LAKES ESTATES HOMEOWNERS' ASSOCIATION, JOHN W. FROST, II AND TERRY P. FROST,

Petitioners,

v.

REPUBLIC SERVICES OF FLORIDA, L.P., AND FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents,

and

CITY OF BARTOW,

Intervenor /

CASE NO:
Lower court nrs: 09-6750; 09-6754
09-6759, 09-6762

EMERGENCY
PETITION FOR CERTIORARI

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THE EMERGENCY NATURE OF THE PETITION

The final hearing in the underlying dispute is scheduled to begin this-coming Monday, May 10, 2010. Petitioners are forced to proceed to the final hearing without the benefit of a geotechnical expert, all due to a fault by a third party and no fault of Petitioners as found by ALJ in his order. On April 23, 2010, the expert was threatened with litigation, by a business associate of one of the Respondents herein, if the expert decided to proceed with his testimony at the impending final hearing beginning May 10, 2010. On May 5, 2010, the Administrative Law Judge Robert Meale denied Petitioners' motion for continuance, even though Petitioners only requested a continuance until sometime in June.

Petitioners request this Honorable Court to take the instant petition on an emergency basis and to order a stay in the underlying administrative proceeding until the petition is adjudicated.

BASIS FOR INVOKING JURISDICTION

The "review of final administrative action would not provide an adequate remedy by appeal." Fla. R. App. P. 9.100(h). Venue is proper under section 120.68(2)(a) stating "Judicial review shall be sought in the appellate district . . . where a party resides." Petitioners reside in Polk County. Jurisdiction is also proper under section 120.68(1), because article V, section 4(b)(2) of the Florida Constitution provides for legislative grants of jurisdiction to the district courts to

review administrative action without regard to the finality of that action. *See* Fla. R. App. P. 9.100, committee notes.

The underlying administrative proceeding arose out of Florida Department of Environmental Protection's ("FDEP") notice of intent to issue to Respondent Republic Services of Florida, L.P. ("Republic") a permit for construction and operation of Class I Cedar Trails Landfill in Polk County. (Apx.1.)

On May 5, 2010, the Administrative Law Judge Robert Meale ("ALJ") denied Petitioners' motion for continuance of the final hearing filed May 4, 2010. (Apx.2.) Petitioners ground for continuance was that Petitioners cannot proceed with the final hearing scheduled to begin May 10, 2010, because on May 4, 2010, Petitioners' key geotechnical expert refused to testify because of litigation threats of civil litigation brought by a non-party, O-M Holdings, L.L.C., who also happened to have a business relationship with Respondent Republic. (Apx.3.) ALJ offered to leave the record open for Petitioners to present the testimony of an alternative geotechnical expert at a later time and to leave the record open to recross Respondents experts. (Apx.2.)

However, for the reasons more specifically stated in the argument section of this petition, the proposed alternative leaves Petitioners at a prejudicial tactical disadvantage, because one of the main purposes of the geotechnical expert in the underlying expert-driven proceeding was to prepare Petitioners' counsel for proper

analysis in shaping their case from the geotechnical perspective and an analysis of the direct testimony rendered by Respondents' and Intervenor's geotechnical experts during their case-in-chief and to further assist Petitioners in their cross-examination. (Apx.3; Apx.4.)

The proposed alternative by the ALJ is not a viable alternative. Proceeding at this time would require Petitioners to advance their case through part of the final hearing without the guidance of a geotechnical expert prior to the hearing and the use of his geotechnical expertise for cross-examination of a slew of experts. Accordingly, should ALJ recommend approval of the permit, Petitioners would have already lost their opportunity to a fair trial. Accordingly, the preliminary basis for jurisdiction exists. *See Outdoor Resorts at Orlando, Inc. v. Hotz Mgmt. Co., Inc.*, 483 So. 2d 2, 3 (Fla. 2d DCA 1985) (granting certiorari and reversing the trial court's denial of motion for continuance).

STATEMENT OF THE CASE AND FACTS

The underlying dispute arose out of Republic's application for permits to construct and operate a Class I landfill in Polk County, Florida, immediately adjacent to the Highland Lakes subdivision and near the Frosts' residence. On November 13, 2009, FDEP issued two notices of intent to issue permits to construct and operate the proposed landfill. (Apx.1.) The primary areas of contention are the adequacy of geotechnical investigation pursuant to the

requirements of the Florida Administrative Code ("F.A.C."), the public health requirements of the F.A.C., and the aviation-related requirements of the F.A.C. (Apx.5.)

In December 2009, Petitioners filed petitions with Department of Administrative Hearings, arguing that ALJ should recommend denial of the permits, because FDEP inadequately assessed the potential for adverse health risks, the potential for sinkhole formation risks, the aircraft safety risks for flights to and from Bartow Regional Airport arising from the disposal of putrescible waste and sludge, and because Republic did not provide FDEP with adequate assurances that the location and operation of the proposed landfill will not cause pollution in violation of FDEP's rules and standards. (Apx.6.)

The assessment of sinkhole formation is within the area of knowledge of a geotechnical expert. The specific issues for geotechnical expert were framed as follows: (a) whether Republic has provided reasonable assurances that possible sinkhole development will not prevent the site from providing structural support for the proposed landfill as required by F.A.C. 62-701.340(3)(a); (b) whether Republic has provided reasonable assurances that possible sinkhole development at the site will not pollute the underground soil and aquifer; and (c) whether Republic is required to provide reasonable assurances that the design of the proposed landfill will withstand the development of a sinkhole under the proposed landfill. (Apx.5.)

In March 2010, Petitioners found Larry Madrid, of Madrid Engineering Group, Inc., to help advancing Petitioners' arguments relative to sinkhole formations. Approximately one month later, on April 9, 2010, Petitioners disclosed Mr. Madrid as their geotechnical expert in the area of sinkholes. (Apx.7.)

Late Friday afternoon, April 23, 2010, a non-party O-M Holdings, L.L.C., by its attorney Robert L. Barnes, Jr., threatened to initiate civil proceedings, including proceedings with the Florida Department of Business and Professional Regulation, to preclude Madrid's testimony in the instant case. (Apx.3, at 6-16.) The alleged ground was based on an executory contract between Madrid Engineering Group, Inc. and O-M Holdings, L.L.C., to perform "As needed services providing geotechnical expertise during construction/land reclamation activities at Ellsworth Property." O-M Holdings, L.L.C. is admittedly in a contractual relationship with Republic.

The letter of April 23 stated to Mr. Madrid that "O-M does not waive any conflict of interest that would be created by your future testimony, nor does it waive any violation or breach created by the consultations and services you have delivered to any or all of the Petitioners to date. And so that there is no confusion on this last point, O-M respectfully but forcefully demands that you terminate your expert witness services in the DOAH Action and that you take any and all steps

necessary to avoid providing any testimony at all in the DOAH Action, including deposition testimony or testimony at a final hearing." (Apx.3, at 16.)

On May 4, 2010, O-M Holdings, L.L.C., by their attorney, sent another letter purportedly "waiving" a conflict of interest, but narrowly stating that "My clients have given this matter additional consideration and have come to the conclusion that they are willing to waive any conflict that may be created by Mr. Madrid's testimony in this matter so that the administrative hearing can proceed as scheduled." (Apx.4, at 17.) Considered the limited nature of the purported waiver, Mr. Madrid, Petitioners' expert, perceived that a door to future litigation against him and against his company was left wide open. (Apx.4, at 2.) Additionally, the time for his trial preparation has been wasted through multiple attempts to appease O-M Holdings, L.L.C. Accordingly, on May 5, 2010, Mr. Madrid filed an affidavit with the lower tribunal, in support of Petitioners' motion for continuance stating that even if he could still clear up the existing problems with O-M Holdings, L.L.C. (and there were no assurances he could), "at this time and date it is too late for me to adequately prepare for my testimony and be ready for the Final hearing for which Petitioners employed me." (Apx.4, at 2.)

Also on May 5, 2010, Respondents FDEP, Republic and the Intervenor, City of Bartow entered into a joint stipulation to modify conditions for one of the

permits. (Apx.8.) This last-minute modification after months of Petitioners' preparation highlighted the prejudice to Petitioners and the importance of experts.

Later the same day, on May 5, 2010, ALJ held a hearing on Petitioners' motion for continuance. Even though Petitioners only wanted a continuance until sometime in June, 2010 so they could retain a new expert and, therefore, be prepared, ALJ denied Petitioners' request for continuance, offering instead to leave the record open for Petitioners to present the testimony of an alternative geotechnical expert at a later time, or of Mr. Madrid, should he be able to secure a satisfactory release, and to allow recross of Respondents experts. This petition for certiorari ensued.

NATURE OF RELIEF SOUGHT

Petitioners pray for an order reversing the ALJ's order denying Petitioners' motion for continuance of the final hearing. Accordingly, Petitioners request the Court to issue an order directed at Respondents FDEP, and Republic, and at Intervenor City of Bartow, staying the proceedings and directing them to show cause why the requested relief should not be granted immediately.

ARGUMENT

"In determining whether a trial court has abused its discretion in ruling on a motion for a continuance, appellate courts have considered the following factors: 1) whether the movant suffers injustice from the denial of the motion; 2) whether the underlying cause for the motion was unforeseen by the movant and whether the motion is based on dilatory tactics; and 3) whether prejudice and injustice will befall the opposing party if the motion is granted." *Rice v. NITV, LLC*, 19 So. 3d 1095, 1099 (Fla. 2d DCA 2009) (quoting *Baron v. Baron*, 941 So. 2d 1233, 1235-36 (Fla. 2d DCA 2006); *Taylor v. Inst. for Med. Weight Loss*, 863 So. 2d 398, 399 (Fla. 4th DCA 2003).

Applying the three above-mentioned factors relevant under the governing law to the case at hand, the Court should conclude that the ALJ's order denying request for continuance should be reversed.

I. PETITIONERS WILL SUFFER INJUSTICE FROM THE DENIAL OF THE MOTION FOR CONTINUANCE, BECAUSE ADMINISTRATIVE LAW JUDGE'S ORDER REQUIRES PETITIONERS TO ADVANCE THEIR CASE THROUGH AN IMPORTANT PART OF THE FINAL HEARING WITHOUT THE BENEFIT OF GUIDANCE FROM A GEOTECHNICAL EXPERT IN SHAPING PETITIONERS' CASE, AND FOR USE OF A GEOTECHNICAL EXPERT DURING THE CROSS-EXAMINATION OF RESPONDENTS' AND INTERVENOR'S EXPERTS.

The constitutional guarantee of due process requires that each litigant be given a full and fair opportunity to be heard. *See County of Pasco v. Riehl*, 635 So.

2d 17, 18-19 (Fla. 1994) (ruling that "The Due Process Clause of the Fourteenth Amendment requires that deprivation of life, liberty, or property be preceded by a notice and opportunity for hearing appropriate to the nature of the case."). The right to be heard at a final hearing includes more than simply being allowed to be present and to speak. *See Baron,* 941 So. 2d at 1236 (noting that the mere court's permission to the father to cross-examine an expert witness and to testify on his own behalf did not automatically satisfy the due process requirements). The right to be heard includes the right to "introduce evidence at a meaningful time and in a meaningful manner" and also includes the opportunity to cross-examine expert witnesses. *See id.* at 1236.

To meaningfully participate at the final hearing Petitioners retained Mr. Madrid, so that he could help Petitioners to analyze from the geotechnical perspective the testimony rendered by the Respondents' and Intervenor's experts during their preparation for trial and during their case-in-chief and direct examination. Petitioners also need their geotechnical expert to further assist Petitioners in cross-examination of Respondents' and Intervenor's experts. Depriving Petitioners of the opportunity to use their geotechnical expert in the intended manner effectively deprives Petitioners from a full and fair opportunity to be heard at the final hearing. *See Riehl*, 635 So. 2d at 18; *Baron*, 941 So. 2d at 1236.

There is no dispute that the instant case is expert-driven and that the testimony on sinkholes and Karst geology is essential for Petitioners' case. The underlying issues hinge on the possible sinkhole development at the proposed landfill site with the likely ensuing pollution of the underground soil and aquifer. It would be a due process violation to require Petitioners to possess the knowledge of professional geologists. It would also be a due process violation to require Petitioners to proceed to the final hearing without a geotechnical expert's help and to meaningfully sift through a morass of terminology and technical arguments specific to the science of geology, and develop a theory for the cases and conduct a proper cross-examination of geologists presented by Respondents and the Intervenor. *See Riehl*, 635 So. 2d at 18; *Baron*, 941 So. 2d at 1236.

Further, ALJ's proposal to leave the record open and to defer the ultimate ruling until Petitioners find and present the testimony of a new expert does not cure Petitioners prejudice. Petitioners would be unable to effectively prepare this case for trial and prepare an effective cross-examination of Respondents' and Intervenor's experts without assistance from a geotechnical expert. Depriving Petitioners of the opportunity to use their geotechnical expert in the intended manner effectively deprives Petitioners from a full and fair opportunity to be heard at the final hearing. *See Riehl*, 635 So. 2d at 18; *Baron*, 941 So. 2d at 1236.

Furthermore, ALJ's proposal to leave the record open in effect requires Petitioners to go through an expense of ordering the two-or-three days worth of transcripts. Additionally, reopening cross-examination of Respondents' and Intervenor's witnesses would amount to a second trial, for which Petitioners would need to find supplementary funding. This result appears unintended by ALJ, since he appeared sympathetic to Petitioners' proclaimed limited funding available for litigation of the underlying cause.

Mr. Madrid was the only geotechnical expert retained by Petitioners to testify on the sinkhole issues in the underlying dispute. Indeed, Petitioners should not be required to double-up on experts during litigation lest unforeseeable contingency may force a testifying expert off the case. Accordingly, a continuance was warranted in the instant case. *See, e.g., Outdoor Resorts at Orlando, Inc. v. Hotz Management Co., Inc.*, 483 So. 2d 2, 3 (Fla. 2d DCA 1985) (reversing the trial court's denial of motion for continuance and reasoning that unavailability of a key witness warranted deferral of the trial for a period of eight weeks).

Finally, on May 5, 2010, Respondents FDEP, Republic and the Intervenor, City of Bartow, entered into a joint stipulation to modify conditions for one of the permits. The permit modification changes the litigation angle at the last minute. The last-minute modification after months of Petitioners' preparation highlighted the prejudice to Petitioners and the importance of retained experts.

ALJ's denial of request for continuance jeopardized Petitioners' due process rights to a fair trial, and Petitioners will suffer injustice should the underlying proceeding proceed as scheduled on May 10, 2010.

II. THE UNDERLYING CAUSE FOR CONTINUANCE WAS UNFORESEEN BY PETITIONERS, BECAUSE THE PRESSURE ON PETITIONERS' EXPERT TO NOT TESTIFY AT THE FINAL HEARING WAS EXERCISED BY A THIRD PARTY, WHICH, BY CHANCE OR OTHERWISE, HAPPENED TO BE A BUSINESS ALLY OF RESPONDENT REPUBLIC; ACCORDINGLY, THE REQUEST FOR CONTINUANCE WAS NOT BASED ON PETITIONERS' DILATORY TACTICS.

The second criterion clearly weighs in Petitioners favor. Petitioners could not have foreseen that O-M Holdings, L.L.C. would pressure Mr. Madrid into not testifying at the hearing, especially in light of the fact that Petitioners disclosed Mr. Madrid as a witness in early April, 2010.

Petitioners are without fault with respect to the instant request for continuance. Petitioners were diligent in procuring the expert testimony in the domain of sinkholes. The testimony of Madrid was not duplicative or cumulative. Mr. Madrid's testimony was addressing the potential for sinkholes on the proposed site and the effect of sinkholes on the proposed class I landfill and to assist Petitioners in cross-examination of Republic's FDEP and Intervenor's experts. Petitioners had no reason to anticipate that a third party, O-M Holdings L.L.C., who has a business relationship with Respondent Republic, with an alleged interest in the outcome of the case, would pressure an expert witness out of the case.

Respondent Republic argued that Petitioners' failure to advance their own case should be a ground for denial of requested continuance, explaining that Petitioners "never took the opportunity to conduct discovery on Republic or its witnesses." (Apx.9, at 6.) A few hours later on the same day, May 5, 2010, Petitioners filed a limited reply due to the time constraints in advance of an afternoon hearing. (Apx.10.) At the hearing Petitioners underscored that they had access to materials and reports from Republics' experts, through FDEP's records, which were presented for analysis to Petitioners' experts. Accordingly, Petitioners *did* conduct discovery of Republic's experts. It was Petitioners' litigation choice, however, not to depose those experts, mainly due to lack of financial resources and to not educate the witnesses as to how they would be examined.

The case law in Florida clearly favors grant of continuance, when the movant shows that the ground for continuance was unanticipated and was not subject of dilatory tactics. *See, e.g., Outdoor Resorts*, 483 So. 2d at 3 (reversing the trial court's denial of motion for continuance and reasoning that unavailability of a key witness due to unforeseeable emergency warranted deferral of the trial for a period of eight weeks); *Fisher v. Perez*, 947 So. 2d 648, 651 (Fla. 3d DCA 2007) (ruling that the trial court abused its discretion by denying defendant's motion for a continuance in trial of negligence action when defendant's counsel was informed during trial that defendant's expert medical witness was unavailable to testify live

due to sudden and unforeseeable medical emergency); *Taylor*, 863 So. 2d at 399 (ruling that it was an abuse of discretion to deny continuance and stating that "[t]here is no evidence to suggest that Taylor's counsel could have anticipated Dr. Deutsch's lack of cooperation and decision to withdraw from acting as an expert witness prior to this 'eleventh hour' decision.").

Further, from the time Petitioners received a copy of the first letter from O-M Holdings, L.L.C., Petitioners made a diligent effort in trying to secure an alternative geotechnical expert. The underlying case contains thousands of pages, of which Republic's application with attachments and supplements approaches three thousand pages. Due to the shortness of time until the commencement of the hearing, Petitioners were unable to secure a substitute for Mr. Madrid.

Accordingly, there is not a shred of evidence to show that Petitioners' request for continuance was caused by a dilatory tactic. It was entirely unforeseeable on Petitioners' part that Respondent's business ally would force one of Petitioners' experts out of giving testimony at the final hearing.

III. THE TOTALITY OF CIRCUMSTANCES ANALYSIS SHOWS THAT NEITHER PREJUDICE NOR INJUSTICE WILL BEFALL UPON FDEP, REPUBLIC OR THE CITY OF BARTOW, BUT WILL PREJUDICE PETITIONERS.

The only prejudice articulated by any of Respondents during the May 5, 2010 hearing was by Republic, which stated that it will incur temporary pecuniary loss from a continuance. Petitioners' counsel requested the hearing be continued to

the month of June. When ALJ asked whether the parties would take Mr. Frost on his offer to conduct the hearing in June, Respondents refused.

While Respondent Republic would potentially incur a one-month-worth of pecuniary loss, Petitioners stand to lose a due process right to a meaningful opportunity to be heard. *See Riehl*, 635 So. 2d at 18; *Baron*, 941 So. 2d at 1236. The courts have traditionally balanced the interest of parties under these circumstances. *See Outdoor Resorts*, 483 So. 2d at 3-4.

The prejudices to Petitioners to proceed as the ALJ proposes would also increase the cost to Petitioners and the length of the trial. Petitioners would have to prepare for the hearing next week without a geological expert to assist in the preparation. Have to expend additional funds to have the transcript typed up after the experts testify for the first time. Come back for additional days of hearing time and additional preparation time. All this seems to be a waste of judicial time and money which could be eliminated by granting a continuance until June.

In *Outdoor Resorts*, this Court balanced the detriments of the failure to deny petition for certiorari when a motion for continuance was at issue. This Court in *Outdoor Resorts* ruled that "a balancing of interests has led us to conclude there is a greater likelihood of detriment to the petitioner if we were to deny the petition that will be imposed upon the respondent by our finding it meritorious." *Id.*

CONCLUSION

For the reasons stated in the instant petition, Petitioners will suffer injustice from the denial of their motion for continuance. Additionally, the underlying cause for their motion for continuance was unforeseen, and the motion was not based on dilatory tactics. Finally, under the totality of circumstances analysis, Respondents and Intervenor will not suffer prejudice and injustice should continuance be granted. But the Petitioners will be prejudiced if the ALJ's order is upheld.

Accordingly, Petitioners pray for an order reversing the ALJ's order denying Petitioners' motion for continuance of the final hearing. The Court is requested to issue an order to stay the trial for Monday, May 10, 2010, and require Respondents FDEP, and Republic, and Intervenor City of Bartow to show cause why the requested relief should not be granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been filed by facsimile (850) 921-6847 with the Division of Administrative Hearings and a copy has been furnished via Electronic Mail this 7th day of May, 2010 to:

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The undersigned counsel hereby certifies that the foregoing Appellant's Initial Brief is filed in compliance with the Florida Rules of Appellate Procedure 9.100(*l*) and 9.210(a)(2).

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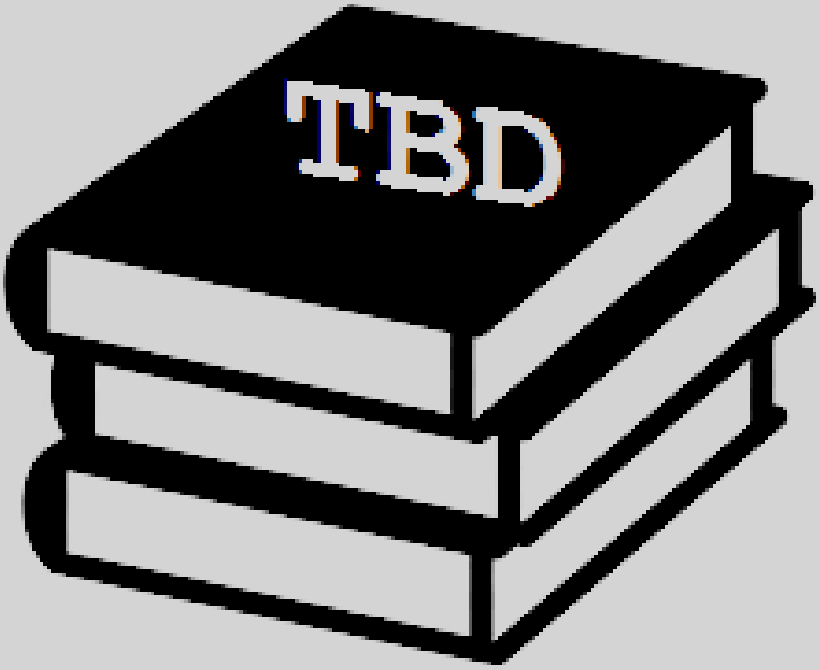

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