STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WEST COAST REGIONAL WATER SUPPLY AUTHORITY,	)	
Petitioner,	)	
PINELLAS COUNTY,	)	CASE NO. 80-1004RP
Intervenor,	)	
SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT,	)	
Respondent.	)	

FINAL ORDER

Pursuant to notice, an administrative hearing was held before Diane D. Tremor, Hearing Officer with the Division of Administrative Hearings, on June 27 and 30, 1980, in Tampa, Florida. The issue for determination at the hearing was whether respondent's proposed Rule 40D-2.301, subsections (6) and (7), Florida Administrative Code, constitutes an invalid exercise of delegated legislative authority.

APPEARANCES

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For Respondent: L.M. Blain and Thomas E. Cone
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INTRODUCTION

By a petition timely filed with the Division of Administrative Hearings pursuant to Florida Statutes, Section 120.54(4), the West Coast Regional Water Supply Authority seeks an administrative determination of the invalidity of respondent's Rule 40D-2.301(6) and (7), Florida Administrative Code. Thereafter, Pinellas County filed a motion to intervene as a party-petitioner.

Prior to the hearing, the petitioner filed a motion for official recognition of certain documents and a motion for summary final order. The intervenor joined in said motions. These prehearing motions were considered at the outset of the hearing.

Without objection from the respondent, the motion of Pinellas County to intervene as a party-petitioner was granted. The motion for official recognition was granted for the sole purpose of considering the motion for summary final order. This latter motion sought a summary order declaring the proposed rule invalid on the grounds of collateral estoppel or estopped by judgment. In support of the motion, the parties-petitioner cite the consolidated cases of Pinellas County v. Southwest Florida Water Management District, Case No. 79-2325R, and West Coast Regional Water Supply Authority v. Southwest Florida Water Management District, Case No. 79-2393R. wherein by Final Order entered on April 9, 1980, the undersigned Hearing Officer declared the respondent's existing Rule 16J-2.11(3), Florida Administrative Code, to be an invalid exercise of delegated legislative authority. That rule provided that the issuance of a consumptive use permit would be denied if the amount of water consumptively used would exceed the water crop of lands owned, leased or otherwise controlled by the applicant. After considering the motion for summary final order, the respondent's response to the motion and oral argument by the respective parties, the motion was denied on the grounds that the factual and legal issues in the instant proceeding were not litigated and determined in the prior proceedings.

The cause then proceeded to an evidentiary hearing. Following the close of the testimony, the respondent requested permission to submit to the Hearing Officer a final, approved version of the proposed challenged rule with correct numbering of subsections. The parties-petitioner had no objection provided that the proceeding be kept open through July 8, 1980, to allow any response they may have to the revised version of the challenged rule. The revised proposed rule was timely submitted and no further response was filed. The hearing was officially closed on July 8, 1980, and the transcript was filed on July 22, 1980.

Subsequent to the hearing, all parties submitted proposed orders containing proposed findings of fact and proposed conclusions of law. These documents, as well as the memoranda submitted by the parties, have been carefully considered by the undersigned. To the extent that the parties' proposed findings of fact are not incorporated in this Final Order, they are rejected as being either irrelevant and immaterial to the issues for determination herein, not supported by competent, substantial evidence adduced at the hearing or as constituting conclusions of law as opposed to findings of fact.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant facts are found:

1. The petitioner West Coast Regional Water Supply Authority (WCRWSA) was formed in 1974 by inter-local agreement under Chapter 373, Florida Statutes, as a supply entity to provide and develop sources of water for its members and other governmental entities. The members of WCRWSA include the two cities of St. Petersburg and Tampa and the three counties of Pinellas (intervenor herein), Hillsborough and Pasco.

2. The petitioner and the intervenor own and operate permitted well fields which are regulated by the respondent Southwest Florida Water Management District (SWFWMD) and are therefore subject to the rules and regulations of SWFWMD. All parties have stipulated, and the evidence so demonstrates, that the WCRWSA and Pinellas County are substantially affected by the challenged proposed rule and therefore have standing to challenge its validity.

3. The proposed rule being challenged in this proceeding was considered by the Governing Board of SWFWMD as a result of a prior rule being declared invalid in another proceeding. The prior rule, codified as Rule 16J-2.11(3), Florida Administrative Code, provided as follows:

> 16J-2.11 Conditions for a Consumptive Use Permit
> (3) Issuance of a permit will be denied if the amount of water consumptively used will exceed the water crop of lands owned, leased or otherwise controlled by the applicant. (Except where determined otherwise, the water crop [precipitation less evapotranspiration] throughout the District will be assumed to be three hundred sixty-five thousand (365,000) gallons per year per acre.)

By Final Order dated April 9, 1980, 1/ that rule was declared to be an invalid exercise of delegated legislative authority on the grounds that

> (a) it exceeded SWFWMD's statutory authority under Chapter 373, Florida Statutes,
> (b) it impermissibly conflicted with provisions of Chapter 373, Florida Statutes,
> (c) it created property rights to water by virtue of land ownership contrary to Chapter 373 and the decision in the case of Village of Tequesta v. Jupiter Inlet Corp., 371 So.2d and 663 (Fla. 1979); and
> (d) it was a hydrologically unsound method of determining the issuance or denial of consumptive use permits and was accordingly arbitrary and capricious in nature.

4. The two subsections of proposed Rule 40D-2.301 being challenged in this proceeding read as follows:

> "40D-2.301. Conditions for Issuance of Permits.
> (6) Among other factors to be considered by the Board in determining whether a particular use is consistent with the public interest will be: the maximum amount to be withdrawn of a single day; the average amount to be withdrawn during a single week, during a typical growing (or irrigation) season, during an extreme cold season, during a year of extreme drought an during the term of the proposed permit; the amount to be withdrawn in relationship to amounts being withdrawn from adjacent or nearby properties;

the proximity of withdrawal points to location of points of withdrawal by others; the total amounts presently permitted from the entire basin, or other hydrologic unit; and the change in storage that such withdrawal and use will cause.

(7) If the proposed consumptive use will average less than 1,000 gallons per acre per day, in the absence of evidence to the contrary, the Board will presume that the quantity of water proposed for consumptive use is consistent with the public interest and the applicant will not be required to submit further evidence on this point. If the proposed consumptive use is to average 1,000 gallons or more per acre per day, the applicant must establish that the proposed use of water in such quantity is consistent with the public interest.

(NOTE: Present subsections 6 through 11 will be renumbered consecutively following the above new subsections.)

5. The factors listed in subsection (6) of the proposed rule are not all-inclusive. Each of the factors listed are resource related or hydrological considerations. The effect of each of the factors listed is appropriate for consideration by the Governing Board of SEFWMD when making a determination as to whether a consumptive use permit should be granted. With the exception of that portion of subsection (6) relating to a weekly average amount to be withdrawn, the factors listed in subsection (6) are covered by existing specific rules of SWFWMD.

6. The word "acre" in the phrase "1,000 gallons per acre per day" is intended to mean land owned, leased or otherwise controlled by the applicant.

7. The figure of 1,000 gallons per acre per day represents the average quantity of water which is available within the respondent's District for man's use and to maintain natural systems. The figure is a district wide estimation. It cannot be arbitrarily applied to any specific site within the District due to the fact that different parcels of land do not possess identical geologic or hydrologic characteristics. The amount of water which is available from a specific parcel of land is dependent upon geographical and hydrological factors which vary considerably from site to site. These factors include, among other things, the amount of rainfall the land receives, the water table, the existence of confining layers, soil and vegetation types, and transmissivity, storage and leakage coefficients.

8. Withdrawals of water in small amounts per acre per day are generally less likely to have adverse hydrologic effects on the water resources within the District than are withdrawals in greater amounts. In most areas of the District, 1,000 gallons per acre per day can be withdrawn without jeopardizing or adversely affecting the resource or the availability of water for others. This would not necessarily be true of coastal areas where salt water intrusion is a possibility or in areas where wells presently exist which withdraw large quantities of water on a daily basis. Eighty-nine percent (89%) of the more than 6,000 consumptive use permits which have been issued by the SWFWMD are for amounts less than 1,000 gallons per acre per day.

CONCLUSIONS OF LAW

9. There is no issue in this proceeding as to the standing of the petitioner or the intervenor to seek an administrative determination as to the validity of proposed Rule 40D-2.301(6) and (7), nor is there any issue concerning the respondent's compliance with the procedural requirements in the rule adoption proceeding. The sole issue is whether subsections (6) and (7) of Rule 40D-2.301 constitute invalid exercises of delegated legislative authority.

10. The multi-faceted contentions of the petitioner and the intervenor to support their claim of invalidity include assertions that

(a) SWFWMD has no authority to add a fourth criterion to the three statutory criteria for obtaining a consumptive use permit;

(b) SWFWMD may not create a property right to water by virtue of land ownership;

(c) the rule is arbitrary and without a rational basis in fact;

(d) SWFWMD has no authority to attempt to define the term "public interest" in strictly hydrological terms;

(e) the list of factors in proposed sub-section (6) is incomplete and vague, without reference to the effect to be allocated to the factors listed therein; and

(f) the phrase "inthe absence of evidence to the contrary" in subsection (7) is vague.

11. The permitting of consumptive uses of water is governed by Florida Statutes, Chapter 373, Part II. SWFWMD is given authority to promulgate rules not inconsistent with Chapter 373. Section 373.171 and 373.113, Florida Statutes. The criteria required to be met prior to the issuance of a consumptive use permit have been set forth by the legislature as follows:

"373.223. Conditions for a permit.

(1) To obtain a permit . . ., the applicant must establish that the proposed use of water:

(a) Is a reasonable beneficial use as defined ins. 373.019(5); and

(b) Will not interfere with any presently existing legal use of water; and

(c) Is consistent with the public interest.

The definition of "reasonable-beneficial use" is now set forth in Section 373.019(4), Florida Statutes (1979), as

"the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner

which is both reasonable and consistent
with the public interest."

12. The challenged portions of proposed Rule 40D-2.301 constitute an attempt by SWFWMD to list some of the factors which will be considered by the governing Board in determining whether an application is "consistent with the public interest" and to inform the public as to the quantum of proof necessary to comply with the statutory criterion relating to the concept of public interest. An agency certainly has the authority to set forth in rule form its interpretation of the statutes it is called upon to implement or enforce and to inform the public of the procedures it will follow in carrying out the language of the statute. Indeed, the very definition of a "rule" includes agency statements of general applicability which "implement, interpret or prescribe law or policy" or describe the "procedure or practice requirements of an agency." Section 120.52(14), Florida Statutes.

13. The petitioner and intervenor contend, in summary form, that the SWFWMD has improperly defined the term "public interest" in vague, purely hydrological terms and have created an unlawful presumption with respect to the consideration of consumptive use permit applications. The evidence adduced at the hearing, together with the language contained in the challenged rule, does not support such contentions.

14. With respect to the contentions that the factors listed in subsection (6) are vague, incomplete and confined to hydrological considerations, it must first be noted that subsection (6) begins with the language "among other factors to be considered by the Board . . ." This language clearly illustrates that the list of factors is not intended to be all-inclusive, and the evidence adduced at the hearing confirms such intent. Each of the factors listed constitutes a valid consideration when acting upon a permit application. They are reasonably related to the protection of the resource and the consumptive use of water by the public. The fact that there may be other, equally valid factors to be considered in the evaluation of permit applications does not render the challenged subsection (6) invalid. That portion simply defines some of the factors which will be considered in the "public interest" determination. The proposed rule does not preclude the applicant or the Governing Board from considering other factors. Also, under the terms of Section 373.223, Florida Statutes, the applicant must still demonstrate that the proposed use is a "reasonable beneficial use" and that it "will not interfere with any presently existing legal use of water." Factors pertaining to these criteria must still be presented by the applicant and considered by the Governing Board from considering other factors. Also, under the terms of Section 373.223, Florida Statutes, the applicant must still demonstrate that the proposed use is a "reasonable beneficial use" and that it "will not interfere with any presently existing legal use of water." Factors pertaining to these criteria must still be presented by the applicant and considered by the Governing Board. Finally, it should be remembered that a person regulated by an agency or having a substantial interest in an agency rule may petition the agency to adopt or amend a rule. Florida Statutes, Section 120.54(5).

15. The next group of assertions by the petitioner and the intervenor relate to subsection (7) of the proposed rule. In summary, it is contended that use of the test of "1,000 gallons per acre per day" (the water crop theory) is hydrologically and legally invalid and cannot be utilized as the basis for a presumption. The language and effect of the prior rule is equated by the challengers with the present, proposed rule.

16. The prior rule, in unequivocal terms, called for a denial of a permit application to withdraw amounts in excess of 1,000 gallons per acre per day. The present proposed rule simply creates a presumption that particular quantities of water withdrawals, absent evidence to the contrary, are consistent with the public interest. Unlike the prior rule, the rule does not mandate denial of a permit when the applicant requests in excess of 1,000 gallons of water per acre per day, that quantity of water, in the absence of evidence to the contrary, will be presumed to be consistent with the public interest and the applicant will not be required to submit further evidence with regard to that criterion. The proposed rule does not presume that the permit will be issued or denied based upon the amount of water to be withdrawn. It simply presumes that if the withdrawal rate is less than 1,000 gallons per acre per day, it satisfies the "public interest" criterion without the necessity for further information.

17. The proposed rule does not create, grant or deny property rights to water by virtue of land ownership. It simply provides that applicant information as to the amount and nature of proof required to satisfy one of the three statutory criteria for consumptive use permits. Grouping the figure of 1,000 gallons per day to the amount of acreage involved provides the agency with information concerning the density of withdrawals from a given area. The factor of density, along with the size of a withdrawal, is rationally related to the ultimate issue of adverse hydrological consequence.

18. The undersigned concludes that the respondent has authority to create such a procedural evidentiary presumption if it is otherwise reasonably and rationally related to the purposes of the enabling legislation and is not arbitrary and capricious. SWFWMD obviously has authority to set guidelines for the regulation of consumptive uses within the purposes of Chapter 373. It has illustrated two rational reasons for creating a presumption in favor of the "public interest" criterion based upon a withdrawal rate of less than 1,000 gallons per acre per day. First, this figure represents the average quantity of water that is available throughout the District. In other words, that amount will be naturally replenished on a districtwide basis by the hydrologic cycle. Second, the SWFWMD has demonstrated that in most areas throughout the District, quantities of water may be withdrawn up to 1,000 gallons per acre per day without substantial risk of adverse hydrologic impact. SWFWMD's accumulated experience in regulating withdrawals of less than 1,000 gallons per acre per day is vast (89% of the 6,000 permits issued), and drawing the line at this numerical amount has not been demonstrated to be arbitrary or capricious.

19. Petitioner and intervenor have argued that a presumption cannot be based upon a hydrologically unsound concept, and cite the final order entered in the cases challenging the prior existing rule which was declared invalid. In those cases, cited elsewhere in this Order, the concept which was declared invalid based upon hydrological unsoundness was that a specific permit could be denied solely on the basis of the water crop theory. As indicated above, the present rule does not purport to use the water crop theory as a basis for granting or denying an application for a permit. It is simply an evidentiary presumption which disappears in the face of some evidence that the application is inconsistent with the public interest. Applicants who seek to withdraw more than 1,000 gallons per acre per day are not even affected by the presumption. For them, the burden of proof is to illustrate to the Governing Board that the three statutory criteria are met.

20. Finally, it is claimed that the terms and phrases used in subsections (6) and (7) of the challenged rule are vague and ambiguous and do not put an applicant or other interested person on notice as to the type of information

called for or as to the effect to be given the information provided. The challengers have failed to demonstrate such a contention on the record of this proceeding. The hydrological factors listed in proposed subsection (6) are specifically covered in a more detailed fashion by other rules of the respondent. Guidance can therefore be gleaned from those rules as to the effect to be given to the various factors. This is also true with respect to the phrase "in the absence of evidence to the contrary" in subsection (7). The phrase pertains to any evidence which would tend to illustrate that the quantity proposed by an applicant is not consistent with the public interest.

FINAL ORDER

Based upon the findings of fact and conclusions of law recited herein, it is ORDERED that respondent's proposed Rule 40D-2.301(6) and (7) constitutes a valid exercise of delegated legislative authority.

Done and entered this 8th day of August, 1980.

DIANE D. TREMOR, Hearing Officer
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of August, 1980.

ENDNOTE

1/ Pinellas County v. Southwest Florida Water Management District, DOAH Case No. 79-2325R, and West Coast Regional Supply Authority v. Southwest Fla. Water Management District, DOAH Case No. 79-2393R.

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