

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SOUTH FLORIDA WATER MANAGEMENT)
DISTRICT, a public corporation,)
)
Petitioner,)
)
vs.) CASE NO. 89-5737
)
SAMUEL HUBSCHMAN AND CONNIE)
HUBSCHMAN, as Trustees; BOB)
CADENHEAD and CADENHEAD & SONS)
CONSTRUCTION,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Veronica E. Donnelly, held a formal hearing in the above-styled case on May 9, 10, 11, 14, 15 and 16, and June 5, 1990, in Fort Myers, Florida.

APPEARANCES

For Petitioner: John J. Fumero, Esquire
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STATEMENT OF THE ISSUES

Whether Surface Water Management Permit No. 36-00315-S issued to Respondents Samuel and Connie Hubschman, Trustee, expired or vested.

Whether the alleged violations set forth in the Notice of Violation dated December 20, 1988, were resolved in a settlement prior to hearing.

Whether the Respondents have conducted construction activity outside the scope of any permit authorization.

Whether there has been an alteration of a wetland impoundment.

Whether the Respondents have violated conditions set forth in permits issued by Petitioner.

PRELIMINARY STATEMENT

In an Administrative Complaint and Order dated September 15, 1989, the Petitioner, South Florida Water Management District (SFWMD), charged the Respondents, Samuel Hubschman and Connie Hubschman, Trustees (Hubschman), Bob Cadenhead (Cadenhead) and Cadenhead & Sons Construction (Construction Co.) with a series of violations of Chapter 373, Florida Statutes. Essentially, the Respondents are charged with having violated existing permit authorizations and conditions, and failing to acquire necessary permits for construction work. The construction activity was undertaken on real property in Lee County known as Bonita Farms. SFWMD seeks to enforce the issued permits, and to require Respondents to obtain additional permits by assessing a civil penalty against Respondents. In addition, Respondents are to restore the disturbed wetland vegetation, and to pay investigative costs, court costs and attorney's fees.

The Respondents contest the factual allegations in the complaint and have requested a formal administrative hearing to resolve the dispute of material facts.

During the hearing, SFWMD presented five witnesses and filed twenty-nine exhibits. The Respondents called five witnesses and submitted twenty-one exhibits. All of the exhibits were admitted into evidence.

The transcript of the proceeding was filed September 11, 1990. Due to some mechanical difficulties with recording equipment at hearing, the parties were given an additional ten days to review the transcript and reconcile any questions concerning accuracy. The parties waived the thirty-day time requirement for the filing of the Recommended Order, and agreed that the established due date for the Recommended Order would be extended to accommodate the Hearing Officer's schedule. Proposed recommended orders were timely filed by the parties. Rulings on the proposed findings of fact are in the Appendix to the Recommended Order.

FINDINGS OF FACT

1. Petitioner SFWMD is a public corporation of Florida. It is charged with the responsibility of issuing permits and enforcing orders relating to surface water management within its jurisdictional boundaries.

2. Respondents Hubschman, as trustees, have full rights of ownership in 1,280 contiguous acres located in Sections 17 and 20, Township 47 South, Range 26 East, Lee County, Florida. These lands are known as Bonita Farms I and II. They are located within the jurisdictional boundaries of SFWMD. In their pre-developed state, these lands could generally be categorized as marsh and wetlands with cypress forest and some uplands in the northern half of the project area.

3. After deciding to develop the acreage for use as pasture and farmland for small vegetable crops, Respondents Hubschman applied for a surface water management permit from SFWMD. The purpose of the permit was to allow the construction and operation of a water management system that would serve both farms. A system was designed to drain water off both parcels through a 62-acre

retention area into a natural slough system which runs water into Kehl Canal. In order to create the system, the Respondents Hubschman had the following facilities designed for the site: internal ditches, dikes, pumps, a retention area and control structures.

4. On April 15, 1982, SFWMD issued Surface Water Management Permit No. 36-00315-S, and Respondents Hubschman were allowed to proceed with their proposed construction plan.

5. A modification to the permit was issued on April 14, 1983. The retention area was enlarged from 62 acres to 88 acres by relocating the perimeter dike. The outfall structure was revised in that the two pumps and the weir were to be replaced by three 18" CMP culverts that would discharge the drained water by gravity flow from the retention area through the slough into Kehl Canal.

6. The duration of the construction phase of its permit was a three-year period, unless the construction of the permitted project discharge structure or equivalent had been completed prior to that date.

7. After the close of the three-year period, there was a dispute between the Respondents and SFWMD as to whether the permit had expired. The controversy was resolved through a compromise agreement. An application for the reissuance of Permit No. 36-00315-S was filed on October 13, 1986.

8. Instead of reissuing Permit No. 36-00315-S, as requested by Respondents Hubschman, SFWMD decided to issue a new permit on May 14, 1987. As part of the processing procedures, SFWMD again reviewed and approved the entire surface water management system designed to serve the 1,280 acres of land proposed by Respondents. Because the additional work proposed for Section 17, the northern section was limited at this stage of development to the selective clearing of additional upland areas to create more improved pasture, the new permit directed attention to Section 20, the southern section of the land. The new permit advised the Respondents that if they wanted to propose additional development to Section 17, they were required to seek a modification of this new permit, Surface Water Management Permit No. 36-00764-S, to include those changes.

9. The Respondents applied for a modification of Permit No. 36-00764-S on July 30, 1987. The proposed modification sought to change the status of the development of Section 17 from improved pasture to small vegetable farmland on 639 acres. The surface water management system plan was modified to drain water in Section 17 to the reservoir on Section 20. The water would be directed via a series of lateral ditches and swales. A six foot high dike and one 27,000 GPM pump were also required. Two additional 18" CMP culverts were required at the discharge facilities to accommodate the increased outflow.

10. The Modification of Permit No. 36-00764-S was approved and issued on June 16, 1988.

11. The original Permit NO. 36-00764-S and its modification are similar to a contract novation because the new permits substituted new obligations between the parties for the old ones under Permit No. 36-00315-S. Based upon this approach to the situation, SFWMD allowed the construction work completed under Permit No. 36-00315-S prior to the Stop Work Order of August 27, 1986, to vest. The completion of the berm around the reservoir in Section 20, as set forth in the letter from Elizabeth D. Ross, attorney for SFWMD, on September 19, 1986, was also allowed to vest. However, if the vested matters were changed in the

subsequent permits, they became revisions. The revisions take precedence over the vested matters. Otherwise, completed construction under Permit No. 36-00764-S as modified, and post Stop Work Order construction remains in effect perpetually for the operation portion of the permit.

12. In order to determine with certainty what was permitted when the Notice of Violation was issued on December 20, 1988, the parties would have to look to the project work actually completed on August 27, 1986, the specific construction approved by SFWMD after that date, the subsequent Surface Water Management Permit No. 36-00764-S issued May 14, 1987, and its Modification issued June 16, 1988. The substantial compliance determination issued by Richard A. Rogers, P.E., Resource Control Department dated September 24, 1987, should also be considered as authorized activity.

13. The Notice of Violation dated December 20, 1988, was issued to Respondent Samuel Hubschman, Trustee. He was advised that recent routine inspections indicate that current on-site activity was in violation of Special Conditions 2,3,4,7,14, 17 & 23 of Permit No. 36-00764-S (issued 5/14/87) and Special Conditions 5,16 & 22 of 36-00315-S (modified 6/16/88). A meeting to resolve these issued was suggested by SFWMD.

14. Respondent Hubschman agreed to attend the meeting through his consultants. Both parties elected to attempt resolution of the Notice of Violation controversy through negotiations in a meeting scheduled for January 5, 1989. To demonstrate their sincerity, the parties agreed not to bring attorneys to the meeting.

15. During the meeting, the parties resolved the controversy by agreeing to the following:

- a) SFWMD would no longer consider the project to be in violation of Florida law if the Respondents submitted certain items that would cause SFWMD to issue certain permits and modify others.
- b) The Respondents would promptly file an application for a dewatering permit so that the governing board could issue the permit at its March 9, 1989 meeting.
- c) The Respondent's contractor would make no field changes in the mitigation or excavation areas without first obtaining appropriate permit modification from SFWMD.
- d) Small jockey pumps were to be installed to pump water from the internal water management system into certain cypress and/or mitigation areas for the sole purpose of establishing wetland vegetation within the areas.
- e) Respondents were to apply for a modification of Permit No. 36-00764-S, as currently modified, to allow a single phase of mining for the entire affected area.
- f) The perimeter dike was to be made structurally adequate.
- g) Respondents were to submit an alternative proposal for the disposal of cap rock within ninety days. In the meantime, the contractor could continue to bury the cap rock within the mitigation areas.

16. Both parties demonstrated their reliance on the settlement reached in the meeting by their subsequent actions towards completing and processing the applications for permit modifications and additional permits. Although the noted violations were not cured by these actions, the parties intended to reach a cure or to mitigate for present permit violations through new permit conditions.

17. The preliminary staff review of the Respondents' application for modification of Permit No. 36-00764-S, as currently modified, was completed by March 31, 1989. The following information was requested by SFWMD staff:

- a) Revised engineering calculations which reflect that the permitted discharge structure is five 18" CMP culverts.
- b) An explanation as to why the 6.3 acre maidencane/juncus marsh designated as a preserve area and the adjacent western preserve area were excavated and otherwise disturbed by project activities.
- c) The scrapedown methodology for the replanting of mitigation areas.
- d) The Respondents' plans for the area delineated on the plans as pine, which is currently permitted as part of a cypress preservation area.
- e) Dike certification and reservoir certification.

18. The above-listed information was required to be returned to the SFWMD within ninety days from the date of the written request.

19. At the close of the ninety days, the information was not received. A second request for a response within thirty days was submitted by SFWMD on August 4, 1989.

20. In September 1989, the Respondents attempted to comply with SFWMD's second request for information. Communications continued in regard to the filed application for modification of Permit No. 36-00764-S, as currently modified, into December 1989.

21. After the thirty days expired for the response to the second request for information dated August 4, 1989, SFWMD filed the Administrative Complaint in these proceedings.

22. After the second request for information, a partial response was received from Respondent Hubschman's consultants. The application continues to go through the review process. It has not yet been deemed complete by SFWMD.

23. As part of the resolution of the Notice of Violation dated December 20, 1988, SFWMD issued permit No. 36-01023-W to Respondent Hubschman for construction dewatering, excavation of an irrigation pond, and water storage at the site. The permit was issued on March 9, 1989.

24. Special condition No. 20 of this permit requires a 200-foot setback from the cypress mitigation area and the irrigation pond being dewatered. The setback is shown on Exhibit 10 of the Bonita Farms Dewatering Application which was made part of the permit. A copy of the permit was attached to the Administrative Complaint.

25. No evidence was submitted by SFWMD regarding alleged violations of Special condition No. 20 which were allegedly observed and documented after the permit was issued, before the filing of the Administrative Complaint

26. Respondent Bob Cadenhead is the contractor hired by Respondents Hubschman to construct the surface water management system. There was no evidence presented to show the connection of another party, Respondent, Cadenhead & Sons Construction, to the project.

CONCLUSIONS OF LAW

Jurisdiction

27. The Division of Administrative Hearings has jurisdiction over portions of the subject matter and some of the parties, pursuant to Section 120.57(1), Florida Statutes, and Rule 40E-1.612, Florida Administrative Code.

Limitations on Jurisdiction

28. Section 373.119(1), Florida Statutes and Rule 40E-1.612, Florida Administrative Code, allow the Executive Director of SFWMD to take administrative enforcement action against alleged violators of statutes, regulations, permits or orders issued pursuant to Chapter 373, Florida Statutes. This particular enforcement procedure is designed to cause the alleged violator to take the necessary corrective action within a reasonable time prescribed in the order filed with the complaint.

29. In the Administrative Complaint and Order filed in these proceedings, SFWMD combined as enforcement proceedings under Section 373.119(1), Florida Statutes, with a civil action authorized under Section 373.129, Florida Statutes. The Division of Administrative Hearings does not have jurisdiction over SFWMD action to recover civil penalties, investigative costs, court costs, and reasonable attorney's fees because those matters have been delegated by the Legislature to the judicial branch of government. Therefore, only the alleged violations and the proposed corrective action can be addressed in this Recommended Order. Enforcement of the Final Order issued as a result of these proceedings is a civil action. It should take place within the courts of the state. If such a suit is commenced by the governing board, SFWMD would be able to seek civil penalties, investigative costs, court costs and reasonable attorney's fees. Section 373.129 and 373.136(1), Florida Statutes.

Reduction of Parties

30. As there was no evidence presented in hearing to demonstrate that Cadenhead & Sons Construction was involved in the alleged violations, it should be dismissed as a party in the enforcement proceeding.

Surface Water Management Permit No. 36-00315-S (as modified)

31. SFWMD has consistently represented to Respondents Hubschman that Permit No. 36-00315-S (as modified) expired pursuant to Rule 40E-4.321(b), when the placement of the three 18" CMP culverts that would discharge water from the retention area was not completed in three years. At hearing, the Respondents Hubschman presented evidence that a pump equivalent to the discharge structure was in place on the site prior to the expiration of the permit. It was argued

that the permit vested because Rule 40E-4.321(1)(b) allows equivalent structures to authorize the construction permit for the duration of the project.

32. If a formal administrative hearing had taken place regarding the issue of equivalency after the governing board issued new Permit No. 36-00764-S, instead of re-issuing Permit No. 36-00315-S, Respondents' legal argument would have been considered. However, Respondents Hubschman did not pursue the matter during their logical point of entry when the new permit issued. Both parties have relied upon the new permit in their subsequent activities. Respondents have received benefits from this permit in that construction has continued. As a result, the new permit supercedes the prior permit in all matters it specifically addresses. Respondents Hubschman are estopped to deny its validity for the purposes of this proceeding, and their legal argument that the original permit vested is rejected.

Notice of Violation

33. The parties implicitly represented to each other during the meeting of January 5, 1990, that the negotiators present had the authority to make binding agreements. Evidence adduced at hearing showed that the parties reached an agreement relied upon by Respondents, Samuel Hubschman and Cadenhead. Equitable estoppel applies in this instance against SFWMD due to the Respondents' substantial change in position in reliance upon the representation that the Notice of Violation would be settled by the permit changes and the issuance of an additional permit. *Reedy Creek Imp. v. State Dept. of Envir.*, 486 So.2d 642 (Fla. 1st DCA 1986).

34. When SFWMD chose to settle the Notice of Violation, an election of remedies was made. The Doctrine of Election of Remedies prevents SFWMD from inconsistently availing itself of an administrative enforcement proceeding in addition to the settlement. *Bliss & Laughlin Industries, Inc. v. Mailey*, 364 So.2d 65 (Fla. 4th DCA 1978). Accordingly, the parties should proceed under their agreement and all matters originally addressed in the Notice of Violation should be dismissed from this proceeding.

Dewatering Permit Violation

35. The burden of proof was on SFWMD to establish that the Respondents violated Special condition No. 20 of the dewatering permit issued March 9, 1989. No competent evidence was presented at hearing to establish that the alleged violation occurred. Accordingly, paragraph 19 of the Administrative Complaint relating to the alleged violation should be dismissed.

The Pending Permit Review

36. The request for additional information issued by SFWMD in relation to the March 2, 1989 application for modification of Permit No. 36-00764-S (as currently modified) asked Respondents Hubschman to address certain site activity which was not permitted. By handling the unpermitted activity as part of the permit modification, SFWMD elected a remedy inconsistent with this proceeding prior to the filing of the Administrative Complaint and Order. If SFWMD had intended to enforce existing permits when the unpermitted activities were discovered, the Respondents should have been notified, as required by Rule 40E-1.609(1)(d), Florida Administrative Code. This was not done. Based upon the foregoing, all information requested by SFWMD as part of the permit modification application is not properly before the Hearing Officer at this time. These

allegations should also be dismissed because they are being resolved in the pending application for permit modification.

Additional Enforcement Matters

37. All permit violations or unauthorized construction activity not raised in the pleadings, which were raised for the first time at the administrative hearing, were not dealt with by the Hearing Officer. *Hunter v. Department of Professional Regulation*, 458 So.2d 842 (Fla. 2d DCA 1984) and *The Conklin Center v. Phyllis Williams*, 519 So.2d 38 (Fla. 5th DCA 1987).

RECOMMENDATION

Based upon the foregoing, it is RECOMMENDED:

1. That Surface Water Management Permit No. 36-00315-S be deemed to have vested as to all construction activity completed under the permit which was not addressed in the subsequent permit issued by SFWMD. The completion of the berm, as set forth in Attorney Ross' September 19, 1986 letter, should also be allowed to vest.

2. That Permit No. 36-00764-S and its later modification be ordered to supercede the prior permit in all matters specifically addressed.

3. That the parties be held to their prior agreements to resolve pending permit violations through the permit modification process.

4. That the alleged dewatering violation in paragraph 19 of the Administrative Complaint be dismissed for lack of evidence.

5. That a specific deadline be set to reasonably complete pending application modifications.

6. That all future enforcement action specifically comply with Rule 40E-1.612, Florida Administrative Code, and remain separate from any permit or permit modification applications.

7. That the parties create a new, active permit file with current drawings and a specific construction schedule.

8. That the Administrative Complaint and Order filed in these proceedings be dismissed.

9. That future agreements be reduced to writing and signed by the proper parties before they are relied upon by either party.

DONE and ENTERED this 9th day of November, 1990, in Tallahassee, Leon County, Florida.

VERONICA E. DONNELLY
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904)488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of November, 1990.

APPENDIX TO RECOMMENDED ORDER IN CASE NO. 89-5737

Petitioner's Proposed Findings of Fact are addressed as follows:

1. Rejected. Irrelevant.
2. Accepted. See HO number 4.
3. Accepted. See HO number 3.
4. Accepted.
5. Rejected. Improper summary.
6. Accepted. See HO number 6.
7. Rejected. Improper opinion testimony.
8. Rejected. Irrelevant. Argumentative.
9. Rejected. Legal argument.
10. Accepted. See HO number 5.
11. Rejected. Legal argument.
12. Rejected. Contrary to fact. See HO number 15.
13. Rejected. Contrary to fact. See HO number 15. The argument presented in this paragraph is overly punctilious. It ignores the detrimental reliance of opposing parties to the agreement.
14. Rejected. Contrary to fact. See HO number 15 and number 16.
15. Rejected. Legal argument and improper opinion.
16. Rejected. Contrary to fact. See HO number 15 and number 16.
17. Rejected. Matters presented were either not ripe for these proceedings or not proved at hearing. See HO number 16-number 20 and HO number 23.
18. Rejected. Contrary to fact and law.
19. Rejected. Not set forth in pleadings. Irrelevant.
20. Rejected. Not set forth in pleadings. Irrelevant.
21. Rejected. Not set forth in pleadings as separate from the Notice of Violation. Irrelevant.
22. Accepted as fact, resolved by agreement.
23. Rejected. Improper opinion testimony.
24. Rejected. Improper opinion testimony.
25. Rejected. Irrelevant.
26. Rejected. Irrelevant. See HO number 15.
27. Rejected. Irrelevant. See HO number 15.
28. Rejected. Irrelevant.
29. Accepted.

30. Rejected. See HO number 15.
31. Rejected. Cumulative.
32. Rejected. See HO number 11-number 12. Contrary to fact.
33. Accepted. See HO number 9.
34. Accepted.
35. Accepted. See HO number 16-number 20.
36. Rejected. Matter is still pending. See HO number 16-number 20.
37. Rejected. Resolved through agreement. See HO number 15.
38. Rejected. Matter is still pending. See HO number 16-number 20.
39. Rejected. Legal argument.
40. Rejected. Not in pleadings. Irrelevant.
41. Rejected. Irrelevant.
42. Accepted. See HO number 21.
43. Accepted.
44. Accepted.
45. Rejected. Speculative.

Respondent's Proposed Findings of Fact are addressed as follows:

1. Accepted. See HO number 13.
2. Rejected. See HO number 23. Contrary to fact and pleadings.
3. Accepted. See HO number 14.
4. Accepted. See HO number 15.
5. Accepted. See HO number 15.
6. Accepted. See HO number 20.
7. Accepted.
8. Rejected. Argumentative. See HO number 20.
9. Accepted. See HO number 4-number 7.
10. Rejected. Contrary to fact. The permit modification specifically required replacement of a pump with 3 culverts. See HO number 5.
11. Accepted. See HO number 5.
12. Accepted.
13. Rejected. Irrelevant. See HO number 7.
14. Rejected. Irrelevant. See HO number 7.
15. Rejected. Irrelevant.
16. Rejected. Contrary to fact. See HO number 7 and number 11.
17. Rejected. Contrary to fact. See HO number 11.
18. Accepted.
19. Accepted.
20. Rejected. See HO number 15. Additional matters were agreed upon which were not reflected in the letter. This is an incomplete summary.
21. Rejected. Irrelevant.
22. Rejected. Irrelevant to these proceedings.
23. Rejected. Contrary to fact.
24. Accepted.
25. Accepted.
26. Rejected. Contrary to fact. See HO number 8 and number 9.
27. Rejected. See HO number 8 and number 9. Contrary to fact.
28. Accepted.
29. Accepted.
30. Accepted.
31. Rejected. Contrary to fact.

32. Accepted. See HO number 23.
33. Rejected. Contrary to fact.
34. Accepted.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.