

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SAVE OUR SUWANNEE,)
)
 Petitioner,)
)
 vs.) CASE NO. 95-3899
)
 ROBERT PIECHOCKI AND)
 DEPARTMENT OF ENVIRONMENTAL)
 PROTECTION,)
)
 Respondents.)
)
 _____)
 ROBERT AND BEVERLY HAWKINS,)
)
 Petitioners,)
)
 vs.) CASE NO. 95-3900
)
 ROBERT PIECHOCKI AND)
 DEPARTMENT OF ENVIRONMENTAL)
 PROTECTION,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

Upon due notice, this cause came on for formal hearing on October 16, 1994, in Tallahassee, Florida, before Ella Jane P. Davis, a duly assigned hearing officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioners Save Our Suwannee:	Peter B. Belmont, Esquire 511 31st Avenue North Saint Petersburg, Florida 33704
For Petitioners Robert and Beverly Hawkins:	Robert Hawkins, pro se HC 4 Box 180 Old Town, Florida 32680
For Respondent Robert Piechocki:	Marty Smith, Esquire 125 North East 1st Avenue, Suite 1 Ocala, Florida 34478-3319
For Respondent Department of Environmental Protection:	Christine C. Stretesky, Esquire Department of Environmental Protection 3900 Commonwealth Boulevard Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

Whether Robert Piechocki is entitled to a permit as governed by Section 403.087 F.S. and Chapter 62 F.A.C. (formerly Chapter 17 F.A.C.) to construct and operate a rotational grazing dairy, with an accompanying dairy waste management system.

PRELIMINARY STATEMENT

Respondent Piechocki applied for the presently disputed wastewater permit on August 18, 1994. The permit application seeks approval of a proposed rotational grazing farm in Dixie County, Florida. After several requests for additional information, the application was deemed complete.

On July 7, 1995, Respondent Department of Environmental Protection (DEP) issued an intent to issue permit, including groundwater monitoring requirements and specific and general permit conditions.

DEP's proposed permitting action was challenged by Petitioners.

At the commencement of formal hearing, Robert and Beverly Hawkins withdrew their petition in DOAH Case No. 95-3900. That withdrawal result in a recommendation of dismissal of that case.

At formal hearing, Applicant Piechocki presented the oral testimony of Terry Tremwel, P.E., an expert in agricultural engineering and dairy waste management; Mark Bardolph, an expert in dairy waste management; John J. Davis, P.G., an expert in geology and hydro-geology; and Ron J. Kuehl, an expert in soil science, and Malcolm Howell. The applicant had two composite exhibits admitted in evidence

DEP presented the oral testimony of Edward Cordova, P.E., an expert in dairy waste management design, and had one exhibit admitted in evidence.

In opposition to the requested permit, Save Our Suwannee (SOS) presented the oral testimony of Ron Ceryk, expert in hydrology and hydro-geology with the Suwannee River Water Management District; Robert Hawkins; Anthony Zenner; Dennis J. Price, P.G., an expert in geology and hydro-geology; David Still, Director for Research Management of the Suwannee River Water Management District; and Hans L. Stoddard, D.V.M. SOS also had four exhibits admitted in evidence.

A transcript of the proceedings was filed in due course. All timely-filed proposed findings of fact have been considered and are ruled upon in the appendix to this recommended order, pursuant to Section 120.59 (2), F.S. To the extent appropriate, the parties' prehearing stipulation(s) also have been utilized in the preparation of this recommended order.

FINDINGS OF FACT

1. Respondent Piechocki applied for the presently disputed DEP industrial wastewater permit on August 18, 1994. After submittal of additional information, the application was deemed complete. On July 7, 1995, DEP issued an intent to issue permit, including groundwater monitoring requirements and specific and general permit conditions. Petitioners challenged the intent to issue. SOS was stipulated to have standing to bring its petition. At formal hearing, Robert and Beverly Hawkins withdrew their petition in DOAH Case No. 95-3900.

2. The permit application seeks approval of a proposed dairy farm to be located on approximately 267 acres of property of which 255 acres will be utilized as rotational grazing paddocks. The herd will be 699 cows.

3. The dairy will be located at a site in the extreme northeast corner of Dixie County. The site is less than one mile from the Suwannee River.

4. At low water conditions, gravity dictates groundwater will flow from the proposed dairy site to the Suwannee River, which is the bottom level of the groundwater aquifer.

5. Petitioners' environmental concern is that nitrogen, phosphorous, and pathogens from the dairy may reach the Suwannee River via surface water and groundwater runoff, through sinkholes or from leaching through the soil.

6. The proposed dairy will have a waste management collection system consisting of collection, storage, treatment lagoon, and application system components. The waste management system is intended to collect the wastewater deposited upon the high use surfaces of the milking parlor, the collection system, and the cow transit area leading to the collection system.

7. Wastewater deposited upon the high intensity or impervious surfaces of the milking parlor, the collection system and the cow transit leading to the collection system will be flushed six times daily by a 2500 gallon flushing tank. The cows are only on that area 15 percent of the time, so only 15 percent of their waste must be processed this way. That water and any stormwater that falls into the collection system will drain to the anearobic wastewater lagoon. The adequacy of the design of the lagoon system was not refuted for a 25 year-24 hour storm (flood event). The wastewater will be used to irrigate the 255 acres of rotational grazing patterns by a spray irrigation system. There will be no direct discharge of effluent to waters of the state.

8. DEP inspections showed no ponding, but conditions of the permit provide that wastewater effluent may not be applied to ponded areas and that there be no surface water runoff from the dairy site. The only impact on the Suwannee River will be from the groundwater flowing from the site. Groundwater concerns are part of this wastewater permitting process.

9. Six groundwater monitoring wells are to be installed as part of the proposed project. One of the wells will be located in the barn vicinity; one will be placed up gradient of the barn; and four will be located along the farm perimeter on the down gradient side of the dairy, specifically to provide extra security to the Suwannee River. The wells have been adapted to optimize monitoring within the expected flow pattern. The draft permit allows for a change in the number of wells should either analytical data or water flow data be other than as expected.

10. The proposed dairy farm is designed to contain nutrients in the upper zones of soil, in the root zone or in the argillic layer.

11. Mr. Piechocki plans to use a rotational grazing system. Fifty-seven paddocks would be utilized and 699 cows would be moved from paddock to paddock. This permits even grazing over the entire paddock area. If the contingency of thinning plant cover occurs in part of any paddock, electric tape can be used to seal that area off from the cows. Cows would be prohibited from congregating in

a bare area or from grazing in one area until it became bare. Presumably, the same measures can keep cows out of any areas which subsequently pond or develop a sinkhole.

12. Rotational dairy farming is relatively new to Florida, but has been practiced in other parts of the country for some time. Rotational dairy farming is designed to reduce the amount of nitrogen being imported as compared to a non-rotational dairy. Rotational dairy farming is a concept which essentially relies on the pasture production and grazing of grasses to meet most of the nutritional requirements of the dairy cows. This compares to other types of dairy farming where cows are generally brought together in a feed lot and fed with hay and grains.

13. Rotational grazing means rotational loading of nitrogen. Rotational grazing prevents higher loads at any one spot caused by the natural congregational proclivities of cows in conventional confinement or free roam dairies. Rotational grazing means there will be no "manure pack" created in the feed lot, as was usual in older free roaming dairy systems which have created groundwater degradation in South Florida through nutrients leaching from the "manure pack" into the groundwater and surface runoff.

14. The 699 cows intended for this dairy herd would not produce enough nitrogen in their manure to even produce a vigorous crop of grass, so the dairy will have to add fertilizer to the soil in order to be economically profitable. The fertilizer will contain phosphorous and nitrogen, but it is to the dairy's economic interest to use the resident cow manure to greatest advantage since the more vigorous a crop is produced naturally, the less imported fertilizer must be purchased. Fertilizer will be applied only when testing shows it is necessary. No environmental danger from phosphorous was demonstrated.

15. Each paddock area will be free of all cows and all irrigation spraying for nine days at a time, thus "resting" from any nitrogenous deposit during that period of time unless fertilizer is applied.

16. By rule, there is no requirement that each dairy have a DEP permit. By policy established in 1990, DEP has required every new dairy in the Suwannee River Water Management District to obtain an industrial waste management permit.

17. Contrary to opposing experts' assumption that all or part of the dairy site was within the 100 year flood plain, Mr. Piechocki's experts were clear in their finding that the site is not within the 100 year flood plain. Regardless thereof, DEP has no requirement excluding utilization of sites which lie below the 100 year flood plain.

18. For dairies of under 700 cows, DEP requires that there be no discharge through a man-made flushing device to surface waters of the state. This project has no such device.

19. In this case, the proximity of the Suwannee River and the presence of a karst region made DEP personnel particularly cautious. Several on-site inspections were made by DEP personnel. Also, DEP applied its higher standards for dairies of over 700 cows.

20. DEP's rule and/or policy creates a threshold of 700 cows to which more stringent rules apply for discharge to surface water, i.e., applicants must

prove the project will not degrade water quality even under the 25 year-24 hour storm event criteria. This applicant ultimately demonstrated the dairy could meet that standard.

21. DEP's concerns in this permitting process focus on nitrogen and nutrient loading of nitrogen into the soil and in this case, the Suwannee River, which has been designated an Outstanding Florida Water (OFW). This designation entitles the Suwannee River to the highest level of environmental protection.

22. Nitrogen is necessary in limited quantities to grow the plants cows eat so that they can produce milk. Some nitrogen from the plants goes into the milk which, upon leaving the cow is transported off-site. Some nitrogen is found in the waste produced by the cows, mostly manure. A portion of the deposited manure then volatilizes approximately 70 percent of the nitrogen in the manure into the air. The nitrogen remaining in the manure becomes part of the soil and plant system over time. Any volatilized nitrogen that might be returned to the soil by rainwater is considered lost as pure elemental nitrogen.

23. The unfavorable side effect of nitrogen with which DEP is concerned in this case is when it affects groundwater and surface water runoff, and then only if the nitrogen is in a concentration which violates drinking water standards.

24. The groundwater quality standard to be applied by DEP is the drinking water standard for nitrogen content. The applicant ultimately demonstrated the dairy will meet this standard.

25. The geology underneath the proposed dairy farm site is characterized as karst geology but most of Florida is highly overlaid with karst. This type of geology can be described as being cavernous with many connected conduits allowing for rapid movement of groundwater. The site is classified by the Suwannee River Water Management District Aquifer Vulnerability Map as being highly vulnerable to groundwater contamination. The karst geology means that sometime in the past, limestone rose up and cracked, creating fissures, which ultimately resulted in sinkhole formation. Over time, sinkhole or collapse features tend to plug up with sands or clays. The feature becomes less steep-sided and more difficult to find, although a conduit between the surface and groundwater aquifer may still exist. Surface depressions can be indicators of subsurface solution features. Surface depressions can result in surface ponding. If there is a direct conduit, surface waters can more rapidly reach the groundwater aquifer as compared to other parts of the surface. Also, because of the limestone fractures and the porosity of the limestone, water can flow through the interconnected pore features.

26. Normally, karst is only a problem as regards nitrogen loading if a particular conduit (or sinkhole) is subject to nutrient loading. If a sinkhole is active, that is, extending to the surface, it creates a direct link to the groundwater with no opportunity for treatment of contaminants through the soil. Barring the presence of active sinkholes, if there is a sufficient overlying soil layer over any subterranean solution feature, the soil layer with crops growing on it will provide the necessary safeguards to protect surface and groundwater. However, the permit DEP intends to issue has conditions relevant to that issue to the effect that if any sinkholes should form on the dairy property, the cows must be fenced away from them or berms erected to prevent runoff or the sinkholes capped with clay to prevent water moving downward.

27. Mr. Robert Hawkins, who owns the property directly north of the dairy site, but on the opposite side of the county road, demonstrated that his

property is riddled with sinkholes, some as deep as seven feet, through which he can watch deep water often run rapidly to the Suwannee River. He theorized that this phenomenon occurs whenever both the Steinhatchee Refuge (basically a swamp) on the west side of his property and the Suwannee River to the east of both his property and the proposed dairy site rapidly fill from heavy rains. Then the water bubbles up through the sinkholes. Eight years ago, Mr. and Mrs. Hawkins and a friend paddled a canoe the length of his woods to the Suwannee River. He also claimed the water flows through the porous karst environment under all surrounding properties as well as his own, but he has not observed the phenomenon occurring on the dairy site. He has no recognized area of expertise and did not know the geology of the dairy site in particular. He has been on the site only one time, briefly, and then had observed some depressions but no sinkholes. He had allowed cattle to roam freely on his own property for fourteen years some years ago.

28. Mr. Hawkins' theory had limited support in the testimony of Dennis J. Price, an expert in geology and hydrology, but Mr. Price seemed to believe one additional monitoring well on the southern border of the dairy site would provide sufficient security.

29. Mr. Malcolm Howell owned the proposed dairy site property from 1956 until Mr. Piechocki bought it. Mr. Howell also owns parcels of real property scattered throughout the area. He confirmed other testimony to the effect that 30 years ago, a hurricane caused water to stand for several days on the county road north of the dairy property and on the parcel immediately southeast of the dairy site property. It is logical that flooding is likely to occur again under the same conditions. However, Mr. Howell has never seen a sinkhole on the dairy property.

30. Although there are some depressions at various locations on the dairy property, no witness could say unequivocally that they were former sinkholes. The theory most damaging to the applicant is that these depressions are solution holes that developed on top of limerock and filled in, resulting in a gentler grade than an active sinkhole, but no witness could unequivocally say that these areas are over open karst fissures. There is limerock on the site which could indicate a conduit. Limerock also is highly porous. Ground penetrating radar was done. Ground penetrating radar is very site specific. Ground penetrating radar detected no active sinkholes on the dairy site. A fracture trace analysis may or may not have been more accurate for showing fracture resolution conduits, but such an analysis was not required and was not performed. The applicant has made adequate arrangements to prevent cows being in the depressed areas should a ponding effect or sinkhole occur. Ponding is more a nuisance (flies and odor) concern than a problem affecting groundwater.

31. The Natural Resources Conservation Service (NRCS) sets standards and assists farmers in developing dairy designs and other soil related designs pertaining to agriculture. Under its criteria, there must be at least a three inch thick layer of soil with at least five per cent silt plus clay content. DEP uses this criteria as a guideline. The applicant meets this guideline.

32. In order to analyze the soil at the dairy site, the applicant had qualified engineers make 47 borings eight feet deep over a 600 foot grid. Except for one boring, all borings met NRCS standards. Only one sample was shown by professional soil testers to be 2 percent clay and 2 percent silt. In an abundance of caution, DEP required additional borings. Cal-Tech, a consulting firm retained by the applicant, made about a dozen soil borings at the proposed dairy farm site. Eight of the borings identified sand only as

being encountered to depths of 10 to 12 feet. The clay and organic content of the soils is not uniform across the proposed dairy farm site, but it may be assumed the 59 borings are representational. DEP was then satisfied that reasonable assurances based on soil content had been provided.

33. DEP reviewers consulted with field representatives of the NRCS and reached the independent conclusion that the dairy would have a negligible impact on all Florida waters and an immeasurably small impact on the Suwannee River.

34. In assessing this application, DEP accepted figures and calculations produced by the applicant's experts, but the draft permit provides safeguards in case the data is other than as represented. The experts used standard and accepted formulas, even down to measuring the estimated averages of cow manure as collected and standardized by the American Society of Agricultural Engineers. In designing the dairy, a critical decision formula was utilized by the applicant's engineer, Mr. Tremwel. Mass-loading and mass balance equations were made for the proposed dairy farm operation to determine "worst case" loading of nitrogen and phosphorous to the Suwannee River. These calculations of the dairy farm's impact to the Suwannee River were made using low flow conditions for the river. Mr. Tremwel used low flow per the United States Geologic Survey standards to predict a higher concentration of nitrogen would affect the Suwannee River than probably would ever actually reach it. He assumed that once nitrogen got below the argillic layer of the earth, there would be no further adsorption to the soil. The foregoing assumption is very unrealistic because even subsoil and limerock can absorb some nitrogen, but the assumption was made to maximize the estimated nitrogen or phosphorus (primarily from phosphate fertilizers) that could be transported to the Suwannee River as a result of this dairy. Even using this "worst case" scenario, any change at all would be undetectable at low flow and have no negative offsite effects. Assuming arguendo there were some occasional cumulative impact not accounted for by these calculations, the dynamic flow of the Suwannee River would flush most nutrients quickly.

35. In parts of the application process, DEP consults with Suwannee River Water Management District (SRWMD) personnel. In this case, SRWMD personnel had reviewed the initial application and presented some groundwater and wastewater concerns primarily related to the vulnerability of the aquifer in a karst/sinkhole region.

36. Among those who testified, there were still some concerns, but the witnesses were either basing their assumptions on 100 year storm event criteria and/or had not reviewed all the supplemental material such as additional boring data on soil content which the applicant submitted in response to DEP's requests for further information, and/or had never been to the site. The SRWMD witnesses deferred to experts in other fields. They expressed no clear opinion as to the adequacy of the agricultural engineering or dairy waste management system proposed for this dairy.

37. The SRWMD had issued an Environmental Resource Permit for a road at the dairy site, but deferred to DEP on ground and wastewater issues.

38. Pathogens are related to viral and bacterial agents which cause disease syndromes. A number of pathogens are found in the manure and urine of cows. DEP permitting rules only consider the potential for pollution from one bacteriological pathogen: e.coli. Petitioners did not demonstrate any threat by the dairy from e.coli.

39. Experts for Mr. Piechocki and DEP in the fields of agricultural engineering, dairy waste management, geology, hydro-geology, and soil science testified credibly that within reasonable professional certainty, the dairy will abate and prevent water pollution to the extent required by the applicable statute and rules. Petitioner has provided reasonable assurances to that effect. Terry Tremwel, Mark Bardolph, Edward Cordova and John J. Davis each gave their expert opinion that all existing applicable environmental permit criteria had been met.

40. Petitioners presented no expert in dairy waste management.

41. The applicant has provided reasonable assurances any discharges will be "free from" named nutrient concentrations covered by rule.

42. The Suwannee River collects groundwater from a tremendously large area. This area contains numerous towns, private homes with septic tank systems, commercial farms and timberland, recreational areas, and other uses which all have some impact on groundwater quality. Further, most of these other uses do not require environmental permits nor do they provide for any specific safeguards to the quality of the groundwater. The potential impact of the proposed dairy is negligible and insignificant when compared with all of these other uses which may impact groundwater quality. Witnesses agreed that virtually all human or animal activity within the Suwannee River drainage area could potentially have an adverse impact on the quality of the groundwater flowing into the Suwannee River. It was not established that the proposed dairy would significantly degrade, either alone or in combination with other stationary installations, the Suwannee River, or that the proposed dairy would violate any applicable regulations protecting the Suwannee River.

CONCLUSIONS OF LAW

43. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Section 120.57(1), F.S.

44. Mr. Piechocki has the burden to provide "reasonable assurances" that his proposed dairy will abate and prevent water pollution to the extent required by DEP rules and that the final proposed project will not discharge or cause pollution in violation of statutes and rules. See, Rules 62-4.030 and 62-4.070, F.A.C..

45. Section 403.087 F.S., provides authority for this permit process. This statute is implemented by Chapters 62-4, 64-302, 62-522, 62-660, F.A.C.

46. Here, Mr. Piechocki has affirmatively provided reasonable assurances based on plans, test results, and other information that the construction and operation of the proposed facility will not discharge or cause pollution in contravention of DEP standards and rules based on a "worst case" scenario derived by experts in many fields. In opposition, Petitioners have presented only a "parade of horrors" based on generalized geological information about nearly adjacent, but not necessarily adjoining, areas.

47. Mr. Piechocki does not oppose, and no party objects to the general and specific conditions DEP intends to include in its permit. The suggestion by Dennis J. Price, P.G., would enhance the safety of the Suwannee River and would be not unduly burdensome even if not proven to be absolutely necessary. Since the draft permit allows the addition of wells if warranted, it might as well be done now.

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that:

(1) The Department of Environmental Protection enter a final order dismissing the Petition in DOAH Case No. 95-3900 as withdrawn ,and

(2) The Department of Environmental Protection enter a final order granting Respondent Piechocki permission to construct his dairy waste management system in accord with the draft permit's general and special conditions as modified to include one additional monitoring well on the southern border, and dismissing the Petition in DOAH Case NO. 95-3899 on the merits.

RECOMMENDED this 22nd day of December, 1995, in Tallahassee, Florida.

ELLA JANE P. DAVIS, 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 22nd day of December, 1995.

APPENDIX TO RECOMMENDED ORDER 95-3899 and 95-3900

The following constitute specific rulings, pursuant to S120.59(2), F.S., upon the parties' respective proposed findings of fact (PFOF).

Save Our Suwannee's PFOF:

1-10, 15-16, 19-20, 22-28, 30-33, 35-39, 41-45, 47-50, 60-61, 64-83, 85-93, 95-102

Accepted, except that unnecessary, subordinate and/or cumulative material has not been adopted. Legal argumentation and proposed conclusions of law have also been excluded or relegated to the conclusions of the recommended order.

11-12, 17-18, 29, 34, 40 and 46

Rejected because as stated, or in context with other proposals, they are not supported by the greater weight of the credible evidence. However, the issues are covered within the recommended order to the degree they are material. Many of these proposals may be generally true as related by Mr. Ceryk and other of Petitioners witnesses, but are not site-specific and therefore not accepted. Many are opinions of experts who ultimately deferred to other experts. Legal argumentation on accepted opinions was excluded.

13, 56-59 Rejected as immaterial and as legal argumentation
14 The proposal is accepted. The footnote is not precisely supported by the transcript citation and is immaterial.
21 Accepted, except for the last sentence which is contrary to the facts as found upon the greater weight of the credible evidence.
51-55 Rejected as largely legal argumentation, but the 10 parts per million and cumulative discharge issues are covered in the recommended order and the weight and credibility of the testimony cited is likewise discussed therein.
62 Accepted, except for the last conclusory sentence which is legal argumentation contrary to the facts as found.
63 First sentence cumulative; second sentence immaterial.
84 Irrelevant under the facts of this rotational grazing system.
94 Rejected as immaterial, cumulative, and as legal argumentation.

Mr. Piechocki's and DEP's Joint PFOF:

1-5, 8, 14 Accepted.
6 Accepted, except that "pollutants" in the generic sense are not the subject of permit but only as defined by statute and rule.
7, 9 Accepted, except that conclusions of law are assigned to that portion of the recommended order.
10-12, 15-29 Accepted, except for unnecessary, subordinate, and/or cumulative material. Also, legal argumentation has been excluded. Conclusions of law are assigned to that portion of the recommended order
13 The significance of the 100 year flood plain is covered in Finding of Fact 17.

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.

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AGENCY FINAL ORDER
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STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

SAVE OUR SUWANNEE, INC.,

Petitioner,

vs.

OGC Case No. 95-1694
DOAH Case No. 95-3899

ROBERT PIECHOCKI AND
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.

ROBERT AND BEVERLY HAWKINS,

Petitioners,

vs.

OGC Case No. 95-1711
DOAH Case No. 95-3900

ROBERT PIECHOCKI AND
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.

FINAL ORDER

On December 22, 1995, a Hearing Officer with the Division of Administrative Hearings (hereinafter "DOAH") submitted her Recommended Order to the Department of Environmental Protection, (hereinafter "Department"). The Recommended Order was also served upon the Petitioners, Save our Suwannee, Inc. (hereinafter "Petitioner"), and Robert and Beverly Hawkins 1/ , and Co-Respondent, Robert Riechoki (hereinafter "Applicant") A copy of the Recommended Order is attached as Exhibit A.

On January 5, 1996, Petitioner filed its Exceptions to Recommended Order with the Department's Office of General Counsel. The Department served its responses to Petitioner's exceptions on January 18, 1996. Applicant served his responses to exceptions on January 23, 1996. The matter is now before the Secretary of the Department for final agency action.

BACKGROUND

On August 18, 1994, Applicant applied to the Department for a permit to construct and operate a rotational grazing dairy with an accompanying dairy waste management system l the northeast corner of Dixie County, Florida. The proposed dairy would contain a maximum of 699 cows on approximately 255 acres of land. This application was assigned file number FLA. 01 6197 by the Department. On July 7, 1995, the Department issued an intent to issue Applicant's requested permit, subject to groundwater monitoring requirements and general and specific conditions.

The Petitioners filed timely petitions challenging the Department's preliminary permitting action. These petitions were forwarded to the Department of Management Services, DOAH for the assignment of a hearing officer to hold a formal hearing. The petitions were consolidated for final hearing before DOAH Hearing Officer Ella Jane P. Davis (hereinafter "Hearing Officer"). A formal hearing was held before the Hearing Officer in Tallahassee, Florida, on October 16, 1995 2/

On December 22, 1995, the Hearing Officer entered her Recommended Order. The Hearing Officer found that the proposed dairy farm operation would not significantly degrade that water quality of the Suwannee River 3/ and concluded that Applicant provided reasonable assurances that the proposed facility would not violate any applicable water quality standards. The Hearing Officer ultimately recommended that the Department enter a Final Order granting the requested permit to Applicant, subject to the general and specific conditions in the draft permit and a recommended additional monitoring well on the southern border of the property.

RULINGS ON PETITIONER'S EXCEPTIONS

Preface

Various exceptions to the Recommended Order have been filed on behalf of the Petitioner. As a preface to the following rulings on these exceptions, it is appropriate to comment here upon the standards of review imposed by Florida law on agencies reviewing recommended orders of hearing officers.

Under Section 120.57(1)(b)10, Florida Statutes, a reviewing agency may reject or modify the conclusions of law and interpretations of administrative rules contained in the recommended order of a hearing officer. See, also, *MacPherson v. School Board of Monroe County*, 505 So.2d 682 (Fla. 3d DCA 1987); *Siess v. Dept. of Health and Rehabilitative Services*, 468 So.2d 478 (Fla. 2d DCA 1985); *Alles v. Dept. of Professional Regulation*, 423 So.2d 624 (Fla. 5th DCA 1982).

The findings of fact of a hearing officer, however, may not be rejected or modified, "unless the agency first determines from a review of the complete record, . . . that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based do not comply with the essential requirements of law." Section 120.57(1)(b)(10), Florida Statutes. (emphasis supplied) See, also, *Martuccio v. Dept. of Professional Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993); *Freeze v. Dept. of Business Regulation*, 556 So.2d 1204 (Fla. 5th DCA 1990); *Florida Department of Corrections v. Bradley*, 510 So.2d 1122 (Fla. 1st DCA 1987). Consequently, if the record of the DOAH proceedings discloses any competent substantial evidence to support a finding of fact made by the hearing officer, the reviewing agency is bound by such finding. *Bradley*, supra, at 1123.

Ruling on Exceptions 1. 2. 3. 4.

In these exceptions, Petitioner takes issue with various rulings of the Hearing Officer set forth on page 19 of the Recommended Order. These rulings reject Petitioner's proposed findings of fact 11, 40, 53, 54, 56, 57, 58, and the last sentence of proposed finding of fact 63. These proposed findings of fact were rejected by the Hearing Officer on grounds that they were not supported by the greater weight of the credible evidence or were immaterial or constituted legal argumentation 4/ rather than factual findings.

Petitioner's exceptions questioning the Hearing Officer's rulings on the relevance and materiality of its proposed findings of fact are rejected. Issues such as relevancy and materiality of evidence are "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations". *Martuccio*, at 622 So.2d 609; *Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277,1281 (Fla. 1st DCA 1985). Thus, such evidentiary issues are generally within the sound prerogative of the Hearing Officer as the trier of the facts.

Petitioner's reliance on the administrative case of *Leisey Shellpit, Inc. v. Dept. of Environmental Regulation*, 9 FALR 2814 (Fla. Dept. of Env. Regulation), is misplaced. The *Leisey Shellpit* Final Order contains a specific finding that a portion of the proposed project would be located within an Outstanding Florida Water. In this case, it is uncontroverted that the proposed dairy operation would not be conducted in the waters or even on the banks of the Suwannee River. Furthermore, the Hearing Officer's significant findings in Findings of Fact Nos. 7 and 8 that there "will be no direct discharge of

effluent [from the proposed dairy] to waters of the state" and "there will be no surface runoff from the dairy site" were not even disputed by Petitioner in its exceptions. Thus, the Hearing Officer correctly rejected Petitioner's contention that Applicant was required to establish an Outstanding Florida Water baseline year of the Suwannee River under Rule 62-4.242(2), Florida Administrative Code.

In view of the above, Petitioner's exceptions are granted to the limited extent of rejecting the Hearing Officer's characterization of its proposed findings of fact 53 and 54 as "largely legal argumentation". Such mischaracterization, however, is deemed to be harmless error. In all other aspects, Petitioner's exceptions 1, 2, 3, and 4 are denied.

Exceptions 5 and 6

Petitioner's exceptions 5 and 6 take issue with the last sentence of paragraph 14 and the first sentence of paragraph 19 of the Recommended Order primarily 5/ on the grounds of lack of relevancy and as not being supported by the weight of evidence presented at the formal hearing. These two sentences contain findings of the Hearing Officer that "no environmental danger from phosphorous was demonstrated" and that " the proximity of the Suwannee River and the presence of a karst region made DEP personnel particularly cautious" in this case.

As discussed in the Preface above, Florida law imposes substantial limitations on the authority of an agency to reject or modify the findings of fact of a hearing officer. Also, as noted in the preceding ruling, questions dealing with the relevancy and materiality of evidence are generally within the sound prerogative of the Hearing Officer as the trier of the facts. Heifetz, 475 So.2d 1277,1281. In addition, a reviewing agency is not free to modify the findings of fact in a recommended order to fit a conclusion desired by it or by a party by interpreting the evidence or drawing inferences therefrom in a manner different from the interpretations made and inferences drawn by a hearing officer. Heifetz, 1281-1282.

The Applicant and the Department presented the combined testimony of five expert witnesses at the formal hearing. These challenged findings appear to be reasonable inferences drawn by the Hearing Officer from the testimony of these five expert witnesses 6/ and are upheld. Consequently, Petitioner's exceptions 5 and 6 are denied.

Exceptions 7 and 8

These two exceptions of Petitioner challenge findings of the Hearing Officer in paragraph 22 of the Recommended Order dealing with the volatilization of nitrogen in the air and the related return of a portion of the nitrogen to the soil in the form of rainwater. The Department's responses do not directly contest the two exceptions, but conclude that the challenged findings are not relevant to the Hearing Officer's recommendation.

I agree with the positions of both Petitioner and the Department. The challenged findings of the Hearing Officer do not appear to be based on any competent substantial evidence of record and are rejected. These findings, however, are subordinate in nature and are not essential to support the Hearing Officer's ultimate recommendation that the requested dairy permit be issued to Applicant. Accordingly, Petitioner's exceptions 7 and 8 are granted, but the rejected findings of the Hearing Officer are deemed to be harmless error.

Exceptions 10 and 11

Petitioner's exceptions 10 and 11 take issue with factual findings of the Hearing Officer in the last sentence of paragraph 29 and the sixth and seventh sentences of paragraph 30 of the Recommended Order. Petitioner argues in essence that the respective findings of the Hearing Officer should be rejected because they are not based on competent substantial of record. This argument appears to be without merit.

The disputed findings of the Hearing Officer are based on the factual testimony of Applicant's witnesses Malcom Howell and Ron Kuehl and Petitioner's witness Dennis Price relying on their respective personal observations of the physical characteristics of the land on which the proposed dairy project would be located. (Tr. 314-315; 135-137; 288-289) These challenged findings appear to be reasonable interpretations made and inferences drawn by the Hearing Officer from the cited testimony of the named witnesses and are adopted in this Final Order. See, *Heifitz*, 475 So.2d 1281-1282. Petitioner's exceptions 10 and 11 are therefore denied.

Exceptions 9. 12. 14. 16 and 17

These five exceptions dispute the correctness of various findings and conclusions of the Hearing Officer in paragraphs 23, 34, 39, and 42 of the Recommended Order. The core issue presented in all these exceptions relates to Petitioner's basic contention that Applicant should have been required to establish an Outstanding Florida Water baseline year existing water quality value of the Suwannee River as a prerequisite for being entitled to issuance of its requested dairy waste system permit. This contention was considered and expressly rejected in the prior ruling on Petitioner's exceptions 1, 2, 3, and 4, which ruling is incorporated herein by reference. Petitioner's exceptions 16 and 17 also raise the issue of materiality of certain findings or conclusions of the Hearing Officer in paragraph 42 of the Recommended Order. As also discussed in the prior ruling, questions of relevance and materiality are factually based issues generally within the sound prerogative of the Hearing Officer as the trier of the facts.

Petitioner's exceptions 9,14, and 17 also object to the respective findings or conclusions of the Hearing Officer as being legal conclusions rather than factual findings. These challenged determinations of the Hearing Officer in paragraphs 23, 39, and 42 of the Recommended Order actually appear to consist of a mixture of legal conclusions and factual findings. As to "mixed questions of law and fact", the reviewing agency does have the authority to substitute its judgment concerning the ultimate determination as to whether the particular facts found by the Hearing Officer establish reasonable assurance of compliance with the applicable permitting laws. *Harloff v. City of Sarasota*, 575 So.2d 1324,1328 (Fla. 2d DCA 1991). A review of the governing law as applied to the evidence in the record on review in this case indicates that these mixed determinations of law and fact of the Hearing Officer are essentially correct legal conclusions and proper factual findings supported by competent substantial evidence of record. 7/

In view of the above, and for the reasons set forth in the incorporated prior ruling, Petitioner's exceptions 9,12,14,16, and 17 are denied.

Exception 13

This exception finds fault with the Hearing Officer's conclusion in paragraph 38 of the Recommended Order that "DEP permitting rules only consider the potential for pollution from one bacteriological pathogen: e. coli." The Department's response does not object to this exception of Petitioner. I concur with Petitioner's position that this assertion of the Hearing Officer is not a finding of fact, but is an incorrect legal interpretation of Rule 62-520.400, Florida Administrative Code. This erroneous rule interpretation is therefore rejected, but is deemed to be a subordinate legal conclusion having no significant bearing on the Hearing Office's ultimate recommendation or the disposition of this Final Order. Petitioner's exception 13 is therefore granted.

Exception 15

Exception 15 takes issue with paragraph 41 of the Recommended Order concluding that Applicant "has provided reasonable assurances [that] any discharges will be `free from' named nutrient concentration covered by rule." Petitioner once again contends that this is a designated finding of fact which is actually an erroneous legal conclusion. 8/ As noted above, the determination of whether an applicant has provided "reasonable assurance" is essentially a mixed question of fact and law.

There appears to be competent substantial evidence of record in the form of testimony from the various expert witnesses testifying on behalf of the Applicant and the Department to support an underlying factual finding that any pathogens present in the cattle manure and urine will not pose a significant threat of groundwater contamination based on the design of the dairy management system prescribed in the Department's notice of intent to issue. 9/ The ultimate legal determination of whether Applicant has provided the necessary reasonable assurance that there will be no water quality violations is addressed hereafter in this Final Order.

In view of the above. Petitioner's exception 15 is denied, except for the clerical modification of Finding of Fact 41 by substituting the terms "substance" in lieu of the existing term "nutrient" on line two of this paragraph.

Exception 18

This exception takes issue with proposed Finding of Fact 24 in the joint "Recommended Final Order" of Applicant and the Department filed with DOAH pursuant to Rule 60Q-2.031 (1), Florida Administrative Code, prior to the Hearing Officer's entry of the Recommended Order on review. There is no statutory or rule basis, however, for a party filing exceptions with the reviewing agency challenging proposed findings of fact previously submitted to a DOAH hearing officer prior to the entry of a Recommended Order. Florida law only authorizes exceptions to a hearing officer's ultimate Recommended Order. 10/ See Section 120.57(1)(b)9, Florida Statutes, and Rule 62-103.200(1), Florida Administrative Code. Consequently, Petitioner's exception 18 is denied.

Exceptions to Conclusions of Law

In these exceptions, Petitioner basically takes issue with the Hearing Officer's critical Conclusion of Law 46 that Applicant has provided the requisite "reasonable assurances" that its proposed dairy operation will not

violate applicable water quality standards and rules. Petitioner's argument is essentially a repetition and further exposition of contentions previously raised in previous exceptions and denied in the prior rulings in this Final Order.

The critical standard for Applicant's burden of proof in establishing its entitlement to the requested permit is "reasonable assurance that applicable water quality standards and rules will not be violated. See Section 373.414(1), Florida Statutes; Rule 62-4.070(1), Florida Administrative Code. This critical standard of reasonable assurance has been construed by the Florida courts to mean "a substantial likelihood that the project will be successfully implemented." *Metro Dade County v. Coscan Florida, Inc.*, 609 So.2d 644, 648 (Fla. 3d DCA 1992). Thus, Applicant is not required by Florida law to provide an absolute guarantee that its proposed dairy project will comply with all applicable water quality standards.

In this case, Applicant and the Department presented the testimony of a total of five expert witnesses in support of the proposed dairy project. Three of these witnesses, two of which were Department personnel, were accepted by the Hearing Officer as experts in dairy waste management design. (Tr. 34, 91,176-177) All three experts in dairy waste management design rendered expert opinions based on reasonable professional certainty that Applicant's proposed dairy waste management system will comply with all applicable water quality standards and rules. (Tr. 50-51,111,190). Another Department permitting specialist accepted as an expert in geology and hydro-geology also gave an opinion that the proposed dairy project would comply with applicable water quality rules and regulations. (Tr. 149-154) These cumulative expert opinions clearly constitute a record source of competent substantial evidence supporting a related legal conclusion that Applicant has provided the requisite reasonable assurance by demonstrating "a substantial likelihood that the project will be successfully implemented."

Petitioner did present the testimony of various expert witnesses in opposition to the permit. The transcript of testimony at the formal hearing, however, does not seem to contain any specific expert opinion based on reasonable professional certainty by Petitioner's witnesses that the proposed dairy project will violate any specific water quality standards and rules. Petitioner's experts basically testified as to their personal concerns about the possibility of the dairy project contaminating groundwater based on hypothetical situations and "worst case scenarios. It is obvious that the Hearing Officer chose to place more credibility and weight on the more definite and site-specific testimony of the expert witnesses testifying in support of the permit than those experts testifying in general opposition to the permit.

The decision to accept one expert's testimony over that of another is a matter within the sound discretion of the hearing officer and cannot be altered, absent a complete lack of competent substantial evidence of record from which the finding could be reasonably inferred. See, *Collier Medical Center v. State*. Dept. of HRS, 446 So.2d 83, 85 (Fla. 1st DCA 1985); and *Florida Chapter of Sierra Club v. Orlando Utilities Commission*, 436 So.2d 383, 389 (Fla. 5th DCA 1983). Furthermore, the sufficiency of the facts required to form the opinion of an expert must normally reside with the expert and any purported deficiencies in such facts relate to the weight of the evidence, a matter also within the province of the Hearing Officer as the trier of the facts. *Gershanik v. Dept. of Professional Regulation*, 458 So.2d 302, 305 (Fla. 3rd DCA 1984), rev. den. 462 So.2d 1106 (Fla. 1985).

In view of the above, Petitioner's exceptions to the Hearing Officer's Conclusions of Law are denied.

Conclusion

Petitioner is to be commended for its demonstrated commitment to the protection of the Suwannee River, an Outstanding Florida Water and a precious natural resource of this state. In addition, the Department permit review staff is also to be commended for the special attention and close scrutiny given to Applicant's proposed dairy project due to its proximity to the Suwannee River. It is undisputed that staff applied its more stringent standards prohibiting discharge to surface waters to Applicant's proposed dairy project, even though the maximum number of cows to be permitted at the site is slightly below the more stringent standard threshold of 700 cows. Finally, the record is devoid of any testimony rebutting or contradicting the emphatic testimony of the Department's dairy waste management specialist Mark Bardolph that "this has been the most highly reviewed dairy application that there has ever been in the history of the Department during my tenure." (Tr. 103)

It is therefore ORDERED:

A. Page one of the Recommended Order is modified by inserting the year "1995" in lieu of "1994" on the second line of the opening paragraph.

B. Page 19 of the Recommended Order is modified to delete therefrom the Hearing Officer's rejection of Petitioner's proposed Findings of Facts 53 and 54 as "largely legal argumentation".

C. Finding of Fact 38 of the Recommended Order is modified by deleting therefrom the third sentence.

D. Finding of Fact 39 of the Recommended Order is modified by inserting "Applicant" in lieu of "Petitioner" at the beginning of the second sentence.

E. Finding of Fact 41 of the Recommended Order is modified by inserting the word "substance" in lieu of the existing word "nutrient" on the second line of the paragraph.

F. The Recommended Order of the Hearing Officer, as modified in paragraphs A, B, C, D, and E above, is adopted and incorporated by reference herein.

G. The petition filed by Robert and Beverly Hawkins in OGC Case No. 95-1711, also bearing DOAH Case No. 95-3900, is dismissed on the ground of being voluntarily withdrawn and the Department's file is closed.

H. Permit number FLA. 016197 proposed for issuance by the Department to Applicant Robert Piechocki on July 7, 1995, is hereby ISSUED, subject to the conditions set forth in the notice of intent to issue permit and the supplemental condition of one additional monitoring well on the southern boundary of the proposed dairy site as recommended by the Hearing Officer, the location of which is to be directed by Department staff.

Any party to this Order has the right to seek judicial review of the Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the

appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date of this Order is filed with the clerk of the Department.

DONE AND ORDERED this 5th day of February, 1996, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

VIRGINIA B. WETHERELL
Secretary
Marjory Stoneman Douglas Bldg.
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

ENDNOTES

1/ The record reflects that the Petition of Robert and Beverly Hawkins was voluntarily withdrawn at the commencement of the formal hearing.

2/ The date of the formal hearing is erroneously designated as October 16, 1994, on page one of the Recommended Order.

3/ A portion of the proposed dairy farm is less than one mile from the Suwannee River, an Outstanding Florida Water. As an Outstanding Florida Water, the Suwannee River is entitled to the highest level of environmental protection. Rules 62-302.700 and 62-4.242, Florida Administrative Code.

4/ Petitioner's exception to the Hearing Officer's rejection of its proposed findings of fact 53 and 54 on the ground of being "largely legal argumentation" appears to be well-taken. Such mischaracterization on the part of the Hearing Officer, however, is deemed to be harmless error. These proposed findings of fact of Petitioner were basically considered and essentially rejected by the Hearing Officer in her Findings of Fact 33, 34, 41 and 42.

5/ Petitioner's alternative suggestion that the last sentence of paragraph 14 of the Recommended Order should not be adopted because it is a "legal conclusion" is rejected. This determination of the Hearing Officer appears to be one constituting a mixture of fact and law. The factual portion of this determination is upheld as reflected in the body of this ruling and the legal portion appears to be a correct interpretation of the law as applied to the weight of the evidence presented at the formal hearing.

6/ Expert testimony concerning potential ground water contamination by phosphorous not being considered a significant problem at the proposed dairy site due to its greater adsorption capacity is found at pages 70-72, 81, and 201 of the transcript. The Hearing Officer's challenged finding in paragraph 19 of the Recommended Order relating to the Department's particular caution or concern over Applicant's proposed dairy due to the proximity of the Suwannee River and the presence of a karst region is amply supported by the testimony of the Department's dairy management waste specialist Mark Bardolph. (Tr. 103-105, 108-110, 115-116)

7/ The Hearing Officer does mistakenly refer to Applicant as "Petitioner" in the second sentence of Finding of Fact 39.

8/ Petitioner correctly notes that the reference to the term "nutrient" in Finding of Fact 41 as applied to Rule 62-520.400, Florida Administrative Code, is confusing and that the testimony of record deals with the potential for groundwater contamination at the proposed dairy site from pathogenic substances found in the manure and urine of cattle. For purposes of this Final Order, the term "substance" as used in the rule will be substituted for the term "nutrient" in the Hearing Officer's Finding of Fact 41.

9/ The Hearing Officer made a finding in the first sentence of her Finding of Fact 39 that "[e]xperts for Mr. Piechocki and DEP in the fields of agricultural engineering, dairy waste management, geology, hydrology, and soil science testified credibly that within reasonable professional certainty, the dairy will abate and prevent water pollution to the extent required by the applicable statute and rules." This significant finding was not directly challenged in paragraph 14 of Petitioner's exceptions or elsewhere and must be accepted as valid in this agency review proceeding. Furthermore, the testimony of Petitioner's key expert witness on this subject, Hans Stoddard, dealt primarily with the existence of pathogens in cattle manure and urine, as opposed to its potential existence in the groundwater at the proposed dairy site. (Tr. 303-311) Dr. Stoddard is a veterinarian who possesses no particular expertise in geology, hydrology, soils, or dairy waste management. Also, Applicant presented rebuttal expert testimony from the Department's dairy waste management specialist Mark Bardolph that past monitoring experience indicates pathogens such as E. coliform are removed as the groundwater percolates through the soil. (Tr. 319-320)

10/ Of course, to the extent that a party's proposed finding of fact is specifically incorporated into the Recommended Order as one of the findings of fact of a hearing officer, then such finding may be challenged by the filing of an exception with the reviewing agency.

CERTIFICATE OF SERVICE

HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by United States Postal Service to:

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511 31st Avenue North
St. Petersburg, Florida 33704

Marty Smith, Esquire
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and by hand delivery to:

Ann Cole, Clerk, and
Ella Jane P. Davis, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
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Tallahassee, Florida 32399-1550

Christine C. Stretesky, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, Florida 32399-3000

this 6th day of February, 1996.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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