STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SAVE OUR BAYS AND CANALS, INC.,	)	
Petitioner,	)	
vs.	)	
TAMPA BAY WATER and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents,	)	Case No. 00-2010
and	)	
SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT,	)	
Intervenor.	)	

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Tampa, Florida, on July 7 and 10-12, 2000.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether Respondent Department of Environmental Protection may issue to Respondent Tampa Bay Water a variance from the requirements, in Rules 62-555.520(4)(c) and (d), Florida Administrative Code, that an application for a permit to construct and operate a drinking water system contain drawings of the project with sufficient detail to describe clearly the work to be undertaken and complete specifications of the project to supplement the drawings.

PRELIMINARY STATEMENT

By Final Order Granting Petition for Variance From Rule 62-555.520(4)(c) and (d), F.A.C., Respondent Department of

Environmental Protection issued Respondent Tampa Bay Water a variance from the cited rule's requirements for the contents of an application for a public drinking water facility construction permit.

By petition dated May 1, 2000, Petitioner challenged the issuance of the variance on various grounds. By Request for Assignment of Administrative Law Judge and Notice of Preservation of Record filed May 11, 2000, Respondent Department of Environmental Protection requested that an Administrative Law Judge of the Division of Administrative Hearings conduct the final hearing and issue a recommended order. In response to the Initial Order requesting available dates for the final hearing, the parties filed a response on June 5, 2000, offering, as their first available dates, July 7 and 10-13, 2000. By Notice of Hearing entered June 12, 2000, the Administrative Law Judge set the hearing for July 7 and 10-13, 2000.

By Order entered June 12, 2000, the Administrative Law Judge denied a Motion to Consolidate or Hold in Abeyance filed by Petitioner on June 8, 2000, and a Motion to Dismiss filed by Respondent Tampa Bay Water on May 22, 2000.

On June 1, 2000, Intervenor filed a Petition for Leave to Intervene in Formal Administrative Proceeding. By Order entered July 3, 2000, the Administrative Law Judge granted the petition.

On June 29, 2000, Petitioner filed an amended petition challenging the issuance of the variance. By order entered July

3, 2000, the Administrative Law Judge granted leave to Petitioner to file the amended petition that had been filed on June 29, 2000. At the commencement of the hearing, the Administrative Law Judge granted the request of Petitioner to file an amended verified petition, which was identical to the amended petition, except that it was verified by the president of Petitioner.

At the hearing, Petitioner called nine witnesses and offered into evidence Petitioner Exhibits 1-9 and 11-14. Respondent Tampa Bay Water called six witnesses. Respondent Department of Environmental Protection called four witnesses. Intervenor called one witness. One member of the public testified. The parties jointly offered into evidence Joint Exhibits 1-12, 14-16, 20, and 22-37. All exhibits were admitted except Petitioner Exhibits 9 and 11; as for Petitioner Exhibit 12, only the blue, checked circled items were admitted. Petitioner proffered the exhibits and portion of Exhibit 12 that were not admitted.

At the end of the hearing, the Administrative Law Judge gave the parties nine days, or until Friday, July 21, 2000, within which to file proposed recommended orders, so that the Administrative Law Judge could issue his recommended order by the following Monday, July 24, 2000.

The court reporter filed the Transcript on July 14, 2000. The parties filed their proposed recommended orders on July 21, 2000. Respondents and Intervenor filed a joint proposed recommended order.

Respondent Tampa Bay Water also filed on July 21, 2000, a Motion for the Award of Attorney's Fees and Costs and Memorandum of Law.

FINDINGS OF FACT

I. Inception of Tampa Bay Water, Consolidated Permit, and Other Documentation for the Production of Drinking Water

1. Respondent Tampa Bay Water (TBW) is a wholesale public water supply utility. TBW is governed by a nine-member board of directors with one member each from the municipalities of Tampa, St. Petersburg, and New Port Richey and two members each from the counties of Hillsborough, Pinellas, and Pasco. The purpose of TBW is to use group resources to find regional solutions to the problems of water supply in the region. Over two million persons in the three-county area rely on TBW for their drinking water.

2. The predecessor of TBW was the West Coast Regional Water Supply Authority (WCRWSA), which was created in 1974. The West Coast Regional Water Supply Authority was also a wholesale public water supply authority. However, the authority operated as a cooperative entity, and TBW operates as a regulatory entity.

3. In 1996, WCRWSA sought to renew its permit from Intervenor Southwest Florida Water Management District (SWFWMD) to allow continued withdrawals from four of its eleven major wellfields. Concerned with the environmental impacts, such as drawdowns of the water levels of wetlands, streams, and lakes, from the environmental, if not regulatory, overpumping of the

wellfields, SWFWMD denied the application for the quantities requested.

4. An Administrative Law Judge at the Division of Administrative Hearings conducted a hearing and issued a recommended order finding adverse environmental effects from overpumping, but recommending that SWFWMD issue the requested permits subject to certain conditions. Subsequent negotiations resulted in the parties' entering into a series of agreements covering withdrawals from the four wellfields that had been the subject of the administrative hearing and seven more wellfields that were approaching repermitting (11 Wellfields), as well as a series of other matters.

5. On May 20, 1998, WCRWSA, the three member counties, the three member municipalities, and SWFWMD entered into the Northern Tampa Bay New Water Supply and Ground Water Withdrawal Reduction Agreement (Partnership Agreement).

6. The Partnership Agreement requires WCRWSA to bring one or more projects online, by December 31, 2002, to produce at least 38 million gallons per day (MGD) and, by December 31, 2007, to produce at least 85 MGD of new water supply. The Partnership Agreement requires SWFWMD to provide WCRWSA with $183 million toward eligible water supply projects.

7. The Partnership Agreement notes that the then-current Master Water Plan of WCRWSA recognizes that "an aggressive conservation and demand management program is an integral

component of a sustainable water supply." (Joint Exhibit 3, p. 31.) The Partnership Agreement notes that the then-current Master Water Plan states that the conservation program was expected to reduce use by 10 MGD per day by 2000 and 17 MGD by 2005.

8. From the effective date of the agreement through December 31, 2002, the Partnership Agreement requires a reduction in pumping of the 11 Wellfields to 158 MGD, based on a rolling 36-month average. For the next five years, the Partnership Agreement requires a reduction in pumping of the 11 Wellfields to 121 MGD, based on an annual average. After that, effective December 31, 2007, the Partnership Agreement requires a reduction in pumping of the 11 Wellfields to 90 MGD, also based on an annual average.

9. Three weeks after the execution of the Partnership Agreement, WCRWSA was reorganized into TBW in June 1998 through the execution of two documents: an Amended and Restated Interlocal Agreement dated June 10, 1998 (Interlocal Agreement), and a Master Water Supply Contract dated June 10, 1998. TBW assumed WCRWSA's rights and responsibilities under the Partnership Agreement.

10. The Interlocal Agreement empowers TBW to produce and supply drinking water "in such manner as will give priority to reducing adverse environmental effects of excessive or improper

withdrawals of Water from concentrated areas." (Joint Exhibit 1, pp. 20-21.)

11. The Interlocal Agreement incorporates the phased-in reductions in withdrawals from the 11 Wellfields that are set forth in the Partnership Agreement. The Interlocal Agreement notes that, if the Partnership Agreement provides for extensions of the deadlines, the deadlines contained in the Interlocal Agreement shall likewise be subject to extension.

12. Applying to the 11 Wellfields, SWFWMD issued TBW a Consolidated Permit, which was issued on December 15, 1998, and became effective on January 1, 1999. Complementing the Partnership Agreement, which reflects SWFWMD's resource-development role, is the Consolidated Permit, which reflects SWFWMD's regulatory role.

13. The Consolidated Permit incorporates the phased-in reductions of withdrawals, as set forth above, for the 11 Wellfields. Although the deadlines for phased-in reductions are conditioned on the funding to be provided by SWFWMD, pursuant to the Partnership Agreement, these deadlines are otherwise unconditional and firm. The Consolidated Permit expressly provides for extensions of deadlines, except the deadlines set for the phased-in reductions of withdrawals from the 11 Wellfields.

14. The Consolidated Permit imposes upon TBW extensive responsibilities regarding environmental monitoring, reporting,

and mitigation. These responsibilities extend to groundwater, wetlands, and surface waters, as TBW must, among other things, monitor and report levels in the surficial and Floridan aquifers and potentiometric surfaces in the Floridan aquifer in the vicinity of the 11 Wellfields, as well as in the vicinity of selected wetlands and surface waters. The Consolidated Permit sets specific "regulatory levels" for these resources.

II. Present and Future Tampa Bay Water Facilities, Including the Surface Water Treatment Plant

15. A majority of TBW's production facilities consists of the 11 Wellfields. In an effort to supplement these production sources so as to comply with the phased-in reduction deadlines set forth in the Consolidated Permit and other documents, TBW annually adopts a New Water Plan, which describes capital planning for drinking water production facilities.

16. The June 2000 New Water Plan summarizes the requirements of the Partnership Agreement. The June 2000 New Water Plan notes that TBW reaffirmed its Master Water Plan and New Water Plan projects in April 2000. These projects include the Enhanced Surface Water System, which includes the Tampa Bay Regional Surface Water Treatment Plant (SWTP), Tampa Bay Reservoir Project (Reservoir), and projects obtaining water from the Alafia River, Hillsborough River, and Tampa Bypass Canal. Other projects, besides the Enhanced Surface Water System, include Seawater Desalination (Desal Plant).

17. The June 2000 New Water Plan states that the Enhanced Surface Water System is eligible for a maximum of $120 million from SWFWMD, pursuant to its funding obligation under the Partnership Agreement.

18. This case involves the means by which the SWTP will be permitted, and, in consideration of the manner of permitting, this case involves the means by which the SWTP will be designed and constructed. The June 2000 New Water Plan notes that TBW and USFilter Operating Services, Inc. (USFilter) have entered into a contract for the latter to design, build, and operate (DBO) the SWTP (DBO Contract). The June 2000 New Water Plan reports that USFilter is currently constructing an access road to the site.

19. Among current issues, the June 2000 New Water Plan describes this case, noting that TBW obtained a variance from Respondent Department of Environmental Protection (DEP) allowing a design, build (DB) approach to permitting the SWTP. The June 2000 Water Plan states that the present challenge "has the potential to delay the completion of the [SWTP] by an estimated 8 months, subsequently delaying delivery of the initial 22 mgd (dry weather conditions) of new surface water to the regional system until May 2003 and more likely final acceptance of the [SWTP] to September 2003." (Joint Exhibit 5, p. 4.) (The accuracy of this statement is open to debate because SWFWMD granted an environmental resource permit for the SWTP project

only on June 27, 2000--before which no significant alteration of the land could have taken place.)

20. In the meantime, the June 2000 New Water Plan predicts a water supply shortfall of 100,000 to 2 million gallons per day in the South-Central service area of Hillsborough County.

21. Addressing the SWTP, the June 2000 New Water Plan states that TBW purchased the site in October 1999 and released a Request for Proposals on July 19, 1999. Four pre-qualified DBO teams responded on October 18, 1999.

22. The June 2000 New Water Plan erroneously states that TBW applied for a public drinking water facility construction permit (Water Treatment Permit) in October 1999. Actually, in September or October, TBW prefiled with the Hillsborough County Health Department (Health Department) its application for a Water Treatment Permit and paid the $7500 filing fee. The purpose of this courtesy filing or prefiling was to allow Health Department representatives to examine the application, including drawings and specifications for the SWTP, and perhaps expedite the approval process, once TBW filed a formal application.

23. The June 2000 New Water Plan reports that the SWTP will have a peak day, surface water treatment capacity of 60 MGD and will be located on a 433-acre site near U.S. Route 301 and Broadway Avenue in central Hillsborough County. The June 2000 New Water Plan states that the SWTP project schedule calls for completion of construction by March 2003 with plant startup and

testing in May 2003 and final acceptance testing in September 2003. The June 2000 New Water Plan estimates that detailed design, site permitting, and construction of the SWTP will cost $84.3 million, and the annual operation and maintenance expenses will be $7.9 million.

24. As for the Desal Plant, the June 2000 New Water Plan reports that TBW will pursue a design, build, own, operate, and transfer (DBOOT) approach to acquire a plant to produce, initially, 25 MGD and capable of expansion by an additional 10 MGD. The June 2000 New Water Plan states that this plant will cost a total of about $96 million in capital expenses and about $19 million annually to operate.

III. Procurement of the Surface Water Treatment Plant

A. Design, Build, Operate Contract and Basis of Design

25. TBW issued a Request for Proposals (RFP) that invited base and alternative proposals for the SWTP. TBW hired Parsons Engineering Sciences to prepare a preliminary design of the SWTP, so as to assist in the preparation of the proposals; although offerors could use alternative designs to the Parsons base design, all proposals had to meet the performance standards specified in the RFP.

26. After publishing the RFP in papers and technical journals and on the Internet, TBW was able to prequalify five teams of offerors. Four of the five prequalified offerors submitted proposals. TBW received a total of nine proposals

because each offeror submitted a base proposal and one alternative proposal, and one offeror submitted a second alternative proposal.

27. At its January board meeting, TBW selected the USFilter proposal. No party filed a bid protest to the specifications of the RFP or the selection of USFilter and its team. After the selection of USFilter, TBW entered into negotiations with USFilter. During this process, USFilter agreed, at its expense, to add sand to the granulated activated carbon filters to remove fine particles more efficiently, even though it cannot recover the resulting cost of $1.5 million before or after the commencement of operations.

28. TBW and USFilter entered into the DBO Contract on April 10, 2000 (DBO Contract). The DBO Contract identifies "Design Requirements" that "are intended to include the basic design principles, concepts and requirements for the [c]onstruction . . but do not include the detailed design or indicate or describe each and every item required for full performance of the physical [c]onstruction . . .." (Joint Exhibit 23, Section 1.2.6.)

29. The "Design Requirements" are Schedule 6 to the DBO Contract. Schedule 6 contains all of the individual, technical specifications for the SWTP. Schedule 6 occupies two of the four volumes of large, three-ringed binders forming the DBO Contract.

30. The DBO Contract identifies USFilter, Clark, and Camp Dresser & McKee, Inc. (Camp Dresser) as the DBO team for the SWTP

project. Camp Dresser is providing design services, Clark is performing the construction, and USFilter is providing the operation and maintenance services for at least 15 years, as well as the financial guarantee, through its corporate parent.

31. The DBO Contract provides TBW with a fixed construction cost, fixed operating costs, and guaranteed finished water quality. Schedule 8 assures that finished water quality will meet all applicable state and federal drinking water quality standards. Two witnesses at the hearing testified that TBW exacted from USFilter assurances of water quality that, as to certain parameters, will exceed applicable state and federal drinking water quality standards.

32. The DBO Contract provides TBW with a firm completion date, subject to design modifications requested by TBW and uncontrollable circumstances, such as acts of God, raw water whose quality exceeds the maximum limits, or the delay caused by this case.

33. A key document in this case is the Basis of Design Report (Basis of Design), which was prepared by the DBO team in April 2000. Acknowledging the phased-in withdrawal limitations and potential for fines for not meeting the deadlines set forth in the Consolidated Permit, the Basis of Design describes the purpose of the DBO process as follows:

> By utilizing the [DBO] approach for the [SWTP], [TBW] expects to secure substantial benefits . . .[,] includ[ing] costs savings, innovative design, reduced risk of schedule

> and cost excesses, long-term contracted facility operations, and maintenance efficiencies and guaranties.

(Joint Exhibit 8, pp. 1-2.)

34. The Basis of Design reports that the SWTP will be located on a 100-acre parcel within a 435-acre tract that will also accommodate facilities for groundwater treatment and storage of the treated groundwater, treated surface water from the SWTP, and treated saline water from the Desal Plant.

35. The Basis of Design identifies the sources of raw water for the SWTF as the Tampa Bypass Canal, Hillsborough River, and Alafia River. Once online, the reservoir will help normalize quantities of available raw water throughout the dry season.

36. The Basis of Design describes the main treatment process as pretreatment, including pH adjustment with sulfuric acid or caustic soda, powdered activated car feed, and ferric sulfate coagulant addition; coagulation, flocculation, and sedimentation using a high-rate ballasted sedimentation process known by its tradename as ACTIFLO; ozonoation for primary disinfection, taste and odor control, and partial conversion of dissolved organic carbon to an assimilable or biodegradable form; biologically active filtration for turbidity reduction, taste and odor control; reduction of biodegradable organic carbon; and post-treatment, including secondary disinfection using chloramines. The finished water will then be pumped into tanks

for storage and blending before release into the distribution facilities.

37. Distinguishing the DB process from the typical design, bid, build (DBB) process, the Basis of Design states:

> a very significant amount of process studies and pre-engineering was performed by the Project Team in support of its [DBO p]roposal. This work included a set of drawings covering all disciplines and developed to the 25 to 30 percent completion stage at a minimum with some drawings developed to a greater degree. This stage of drawing development is significantly beyond the sketches and diagrams usually provided in Basis of Design or Preliminary Design Reports. For this [Basis of Design,] the referenced drawings are attached and should be examined when reviewing this [Basis of Design]. As such, a relatively small number of figures are contained within this [Basis of Design].

(Joint Exhibit 8, pp. 1-4.)

38. The Basis of Design notes that the Project Team conducted "pilot-scale" studies of the chosen treatment processes using Lake Manatee raw water. The purpose of these studies was to validate the selected treatment processes, provide water quality data, and establish appropriate operating criteria, such as coagulant dosages.

39. The Basis of Design addresses raw water quality issues. One table sets out values for 30 different water quality parameters for each of the three raw water sources. The Basis of Design discloses expected water quality data for 11 water quality parameters.

40. Of particular interest are total nitrogen and total phosphorus because, as noted in the Basis of Design, the algal life-cycle increases dissolved organic carbon and nutrient concentrations in reservoir water, and the "severity of this problem is impossible to predict." (Joint Exhibit 8, pp. 2-4.) The expected water quality values for total nitrogen and total phosphorus, respectively, are, on average, 0.8 and 0.55 mg/L and, at maximum, 1.6 and 2.1 mg/L.

41. Each of the three surface waters approaches the average values, but none approaches the maximum values, for total nitrogen. The same is true for total phosphorus for the Tampa Bypass Canal and Hillsborough River. However, for the Alafia River, total phosphorus is 2.09 mg/L, so the raw water from the Alafia River may present a substantial treatment challenge, as it exceeds even the maximum expected value for total phosphorus.

42. An error in Table 2-4 in reporting the maximum and average values of manganese (either the maximum value should be 0.02 mg/L or the average value should be 0.001 mg/L) and the omission of a turbidity parameter expressed in NTUs precludes analysis of these water quality parameters. However, the other expected parameters appear to reflect the actual water quality of these three surface waters.

43. Section 4 of the Basis of Design describes the facilities and design criteria for the SWTP. This section begins with site grading, roadways, yardpiping, and stormwater

management and extends to detailed discussions of the pretreatment and treatment processes, including the ACTIFLO, ozone contactor, and biologically active filtration.

B. Urgency of New Means of Producing Drinking Water

44. The SWTP is the hub of a network of production, storage, transmission, and distribution facilities that TBW plans to bring online in order to meet the requirements and deadlines set forth in the Consolidated Permit and other documents. The urgency for bringing this component of these new facilities online as soon as possible is due to environmental reasons, as well as the financial and legal reasons set forth above.

45. Overpumping of existing wellfields has drawn down water levels in surface waters and wetlands, to the detriment of the overall level of biodiversity supported by these natural resources. Some lakes have been down 10 years, and a few have been down 40 or 50 years. During the recent drought, the City of Tampa, which obtains water from the Hillsborough River, lacked adequate volumes of surface water from which to produce sufficient finished water to meet the demand of its customers.

46. Not surprisingly, these supply problems are accompanied by record withdrawals from the 11 Wellfields. Withdrawals in May and June of this year were the highest monthly withdrawals on record--208 MGD and 175 MGD, respectively. If the drought continues and TBW continues to meet the demands of its customers,

TBW's withdrawals from the 11 Wellfields will exceed the permitted 158 MGD, on a rolling 36-month average, by April 2001.

47. Wellfield overpumping has stressed the groundwaters. Although surface waters respond to substantial rains in as little as a day or two, groundwater takes significantly longer to respond. The surficial water table is as much as 20 feet below ground level, and the Floridan Aquifer is even deeper. The surficial aquifer does not begin to respond to substantial rains for one week, and the Floridan Aquifer begins to respond in two to four weeks.

48. The condition of the surficial and Floridan aquifers affects the Hillsborough River and Tampa Bypass Canal, which are significantly recharged by the surficial and, sometimes, the Floridan Aquifer. The Floridan Aquifer is especially important to the Tampa Bypass Canal, whose rock bed has been breached. During dry periods, the two aquifers are the primary sources of recharge for these two surface waters. The Alafia River is more confined, but gets water from the Floridan Aquifer through two springs at the head of the river.

49. TBW has already made substantial gains through conservation and has met the goal of nearly 10 MGD for 2000. Over the next 20 years, maximum potential gains are expected to be no more than 74-94 MGD. Conservation will continue to play an important role in securing adequate drinking water supplies in the Tampa Bay area, but conservation, even in conjunction with

reclaimed water, will not suffice, especially when future population growth in the area is considered.

50. TBW also manages wellfield production efficiently. Under its Optimized Regulatory Operations Plan, TBW collects and analyzes wellfield data to determine which wellfield to tap, notwithstanding specific limits set by wellfield, in order to minimize environmental damage. The consumptive use permits issued to TBW for the surface waters that will provide raw water to the SWTP restrict the amounts and timing of the removals. Additionally, a hydrobiological monitoring program requires the collection and analysis of data to safeguard against adverse effects in the rivers and, downstream, in the estuary.

51. The contractual deadline for delivery of the SWTP is September 30, 2002. The timeframe for bringing online the SWTP necessarily relies on acceptance testing in the wet season, during which 60-65 percent of the annual rain occurs. The wet season extends from mid June to the end of September. Acceptance testing of the SWTP is imperative toward the end of this period because this is when the water quality of the surface waters bears the highest levels of the contaminants. Thus, if delays postpone beyond the wet season the point at which acceptance testing can take place, the postponement will effectively be until the next wet season and, possibly, the end of the next wet season.

IV. Permitting the Design, Build Process for the Surface Water Treatment Plant

A. General

52. The DB process envisioned by TBW would essentially break into phases the process by which TBW would obtain the necessary Public Drinking Water Treatment Construction Permit (Permit). The Permit initially would be based on "30 percent plans," which reflect about a 30 percent level of effort toward the overall design work or 30 percent completion of all of the design work (30 Percent Plans).

53. Generally, 30 Percent Plans mark the end of the preliminary design phase. Plans reflecting 30, 60 and 90 percent levels of effort are customary in DBB processes, as these are the stages at which owners typically review design work. In 30 Percent Plans, some items are designed to 100 percent and other items are not designed at all. However, 30 Percent Plans provide reasonable assurance that the designed system is constructable.

54. In essence, the Permit initially would be a conceptual permit for the entire SWTP coupled with a construction permit for those components for which the design is already complete on the 30 Percent Plans. Construction of each remaining component of the SWTP would await subsequent permit modifications authorizing construction of that component. As noted above, the May 18, 2000, cover letter anticipates another interim permit, or permit modification, covering specific components, and then the final permit, or permit modification, covering the entire SWTP.

55. The DEP district office in Orlando has substantial experience with permitting DB water treatment projects. From 1996-98, the DEP Orlando office has permitted four such projects for the Orlando Utilities Commission and one such project for the City of Kissimmee. One of the Orlando Utilities Commission projects was to construct a completely new water treatment plant.

56. Based on the experience of the DEP Orlando office, DB permitting, when based initially on 30 Percent Plans, shortens and simplifies the permitting process. DB permitting eliminates, or at least postpones, the presentation of elements, such as electrical and HVAC, that are irrelevant to the permitting process; the elimination of elements irrelevant to permitting from the initial designs helps the regulator find the elements that are relevant to the permitting process. Also, the experience of the DEP Orlando office is that the DB process results in no more permit modifications for change orders than are typical of a conventional DBB process.

57. The DB-approval process used by the DEP Orlando office is modeled after the DEP-permitting process for wastewater treatment plants. DEP rules allow DB permitting of these plants, which are similar in construction to water treatment plants. In fact, DEP is preparing to adopt rules to allow DB permitting of water treatment plants.

58. Because the DEP Orlando office did not issue variances from the rules that arguably preclude DB construction of water

treatment plants, there is no precedent for the issuance of the variance sought in this case. However, the experience of the DEP Orlando office is that applicants do not present basic design changes after the initial submission, and DB permitting does not mean that regulatory objectives are sacrificed to the expediency sought by the applicant.

B. The Present Case

59. On April 11, 2000, Camp Dresser, on behalf of TBW, filed with the Health Department an Application for a Public Drinking Water Facility Construction Permit. The April 2000 drawings that accompanied the April 11, 2000, application are described above. The cover letter to the Health Department notes that, "upon conceptual approval of the project, individual components will be permitted through permit modifications based on submittals of complete drawings and specifications for each component."

60. In this case, the availability of the Basis of Design meant that the 30 Percent Plans reflected more than a 30 percent level of effort or completion of the five-stage process of pretreatment, pH adjustment, ozone contactors, filtration, and storage in tanks. The engineer had already sized the facilities and defined all of the processes and elements of the SWTP. The April 2000 drawings, as supplemented by the Basis of Design, therefore presented a relatively detailed description of the scope, elements, and processes of the project.

61. On May 18, 2000, Camp Dresser submitted to the Health Department more advanced drawings, which are dated May 18, 2000. The cover letter explains that the drawings are a complete set of Phase I drawings and specifications. The letter states that Camp Dresser intends to file complete drawings and specifications in three phases. Phase I, which is completed with the May 2000 drawings, consists of sitework, high rate flocculation and sedimentation, and ozone contact tanks. Phase II consists of biologically active granulated active carbon filters, clearwell, and gravity thickeners. Phase III consists of the remainder of the project.

62. As of July 3, 2000, prior to the final hearing, the design for the SWTP had reached the 60 percent level of effort or completion.

63. Although the SWTP described in the DBO Contract, Basis of Design, and May drawings is a relatively large, complex facility, it does not employ unproven technology. The standardization of design and regulatory review is facilitated by the use of the so-called Ten States' Standards, which are standards commonly used by the permitting authorities of numerous states, including Florida, to determine the capabilities of specified treatment processes in achieving specific water quality levels.

64. Although the ACTIFLO technology is relatively new, it has been in use for at least five years. A pretreatment

sedimentation barrier that reduces treatment time and thus tankage volume requirements, ACTIFLO is in use in a water treatment plant with a capacity of 60 MGD in Canada, which TBW's selection team members visited. ACTIFLO presently is being incorporated into a surface water treatment plant in Melbourne, Florida, where it must treat the nutrient-rich water of Lake Washington and the St. Johns River. The City of Tampa is adding ACTIFLO basins to its facilities. Also significant is the fact that ACTIFLO easily passed the pilot test on Lake Manatee. At present, 25 facilities using ACTIFLO are under design or construction in North America.

65. As is consistent with the theory, the DBO process for designing, building, and operating the SWTP has demanded greater cooperation among the three entities that operate relatively independently in the DBB process. Pursuant to their obligations under the DBO Contract, Camp Dresser, Clark, and USFilter have coordinated, and likely will continue to coordinate, their efforts closely from design and construction, up to operation, to save time and money from the traditional DBB process, in which the design phase, construction phase, and operation phase are relatively independent of each other.

C. The Variance

66. In general, DEP has the authority to issue public drinking water treatment construction permits. The successful

applicant obtains one permit--for construction and operation. There are no conceptual permits or separate operating permits.

67. In Hillsborough County, as well as 10 other counties, DEP has delegated its responsibilities for issuing public drinking water treatment construction permits. In Hillsborough County, DEP has delegated this responsibility by an interagency agreement to the Health Department. Applying DEP rules to determine whether to issue a public drinking water construction permit, the Health Department defers to DEP for the issuance of variances from DEP rules.

68. In typical permitting cases, the Health Department uses its own staff in processing the application and reaching a permitting decision. In a large case, such as this, the Health Department's lone professional engineer, who was hired in September 1999, can obtain considerable assistance from professional engineers within the Tampa Bay area and professional engineers employed by DEP.

69. Perceiving a possible incompatibility between the DB process and the rules from which the variance is sought in this case, TBW initially filed a request for a variance with the Health Department. However, the Health Department declined to issue a variance to DEP rules and informed TBW that it had to file its request with DEP. Thus, on January 10, 2000, TBW filed a petition for a variance with DEP.

70. On March 28, 2000, DEP issued a final order, pursuant to Section 120.542, Florida Statutes, granting the requested variance from Rule 62-555.520(4)(c) and (d), Florida Administrative Code (Variance). The Variance finds that the purpose of the underlying statutes would be met "because no component of the project would be permitted or constructed without review by the permitting authority of the complete plans and specifications for that portion of the project." The Variance finds that the DB approach will protect the public health, safety, and welfare in providing safe drinking water without exacerbating possible negative environmental impacts from the overuse of groundwater.

71. The Variance relieves TBW of the necessity of complying with two subsections of the rule governing the contents of applications for a public drinking water construction permit. Rule 62-555.520(4)(c) and (d), Florida Administrative Code, provides:

> The permit application form sets forth the minimum information which is to be supplied to the Department or the Approved County Health Department. Additional information may be required by the Department to clarify information submitted in the permit application or to demonstrate that the proposed level of treatment will effectively treat the contaminants present in the raw water. The information required by the application is as follows:
>
> * * *
>
> (c) Prints of drawings of the work project which contain sufficient detail to clearly

> apprise the Department of the work to be undertaken. All prints shall be minimum of 18 x 24 inches and a maximum size of 36 x 42 inches. The scale of details contained shall be satisfactory for microfilm reproduction. (Reduced size photographic reproduction of drawings for submission may be authorized.)
>
> (d) Complete specifications of the project necessary to supplement the prints submitted.

72. The issuance of the Variance by DEP has met with approval, albeit cautious approval, by the Health Department. One Health Department witness was an Engineer III, who is 19-year employee of the Health Department and supervisor of four Environmental Specialists charged with reviewing construction plans for drinking water plants. He testified that he agreed with DEP's final order granting the Variance. The Engineer III and the other Health Department witness, its professional engineer, testified that the issuance of the initial permit would not influence the Health Department in deciding whether to issue permit modifications, except to ensure compatibility.

73. Allowing TBW not to comply with Rule 62-555.520(4)(c) and (d), Florida Administrative Code, the Variance provides that the initial permit shall not authorize the construction of any component of the SWTP; each component may be constructed only after the submission of complete plans and specifications for that component and the issuance of a permit modification based on those complete plans and specifications. The Variance also provides that the permitting authority shall publish a notice of

intent to issue a permit modification "if the permitting authority believes that the modifications are of a controversial nature, or that there is heightened public awareness of the project."

V. Save Our Bays and Canals, Inc.

A. The Verified Amended Petition

74. On May 1, 2000, Petitioner filed a petition challenging the Variance. On June 29, 2000, Petitioner filed an amended petition challenging the Variance, and the Administrative Law Judge granted Petitioner leave to file an amended petition on July 3, 2000. At the start of the hearing, on July 7, 2000, Petitioner filed a verified amended petition, which was identical to the amended petition, except that, on July 6, 2000, Petitioner's president had verified the pleading "to the best of [his] knowledge, information and belief."

75. The verified amended petition states that Petitioner has over 400 members. The verified amended petition alleges that a substantial number of Petitioner's members will consume the finished water produced by the SWTP and will use the surface waters supplying the SWTP for recreation.

76. The verified amended petition states that the purpose of Petitioner is to save the bays, canals, and waterways of the Tampa Bay area and to ensure safe drinking water for its members and residents of the Tampa Bay area.

77. The verified amended petition states that the Variance affects Petitioner because it would allow the issuance of the Permit and construction of initial phases of the SWTP prior to submittal, review, and approval of complete plans for the next and subsequent phases. The verified amended petition alleges that Petitioner incorporated to pool its resources to review applications, so as to ensure safe drinking water. The verified amended petition states that submittal and review of a complete set of drawings and specifications is necessary prior to construction of the SWTP to ensure the ability of the facility to comply with state drinking water standards. The verified amended petition states that review of all individual components of the SWTP is necessary to assure the protection of the public health, safety, and welfare and the compliance with all applicable state and federal laws.

78. Addressing specifically the 30 Percent Plans, the verified amended petition objects to the absence of a list of items to be included in the 30 Percent Plans. The verified amended petition alleges that this piecemeal approach to permitting will require Petitioner to request administrative hearings on each phase of permitting. The verified amended petition states that the Variance may have adverse environmental and safety impacts that cannot be evaluated fully without a submittal and review of the complete drawings and specifications.

79. The verified amended petition states that the DBO approach is "self-created." The verified amended petition objects to the failure of TBW to obtain the Variance before issuing the RFP and instead using the DBO Contract as a basis for claiming hardship so as to qualify for the Variance.

80. The verified amended petition states that the number of variances issued for similar 30 Percent Plans threatens to create a situation in which the variance subsumes the rule requiring complete drawings and specifications. The verified amended petition objects to this form of unwritten policy that has not been published as a rule.

81. The verified amended petition states that the phased permitting of the SWTP may create permitting momentum that discourages a rigorous application of the rules at a later stage.

82. The verified amended petition states that the request for a variance is improper because it is for a variance from statutes, not rules. The verified amended petition states that Section 403.861(10), Florida Statutes, requires DEP or Health Department approval of "complete plans and specifications prior to the installation, operation, alteration, or extension of any public water system." The verified amended petition states that "installation" means construction.

83. The verified amended petition states that Section 403.861(5), Florida Statutes, prohibits the issuance of a public drinking water treatment construction permit "until the water

system has been determined to have the required capabilities . . .." The verified amended petition states that the assurances of USFilter are insufficient to satisfy this requirement.

84. The verified amended petition states that Section 120.542, Florida Statutes, which authorizes the variance procedure used in this case, does not authorize variances for compliance with federal law. The verified amended petition states that TBW must obtain a federal variance in order to obtain the Variance.

85. The verified amended petition states that the 30 Percent Plans omit information required for permitting, such as the listing of a certified operator, monitoring and recordkeeping programs, and various financial elements, such as the posting of a bond and creation of reserves to demonstrate financial soundness.

86. The verified amended petition states that TBW's substantial hardship is based on contract deadlines that are entirely self-created and, thus, insufficient to warrant a variance. The verified amended petition notes that the environmental damage cited as a basis for granting the Variance "was caused by years of overpumping by . . . TBW . . .." Also, the verified amended petition states that member governments of TBW continue to approve new development, which increases the demand for drinking water, because TBW and its member governments have failed to exploit fully the potential for conservation and

reclaimed water. Similarly, the verified amended petition states that SWFWMD helped create the hardship by renewing the permits for additional withdrawals from the 11 Wellfields.

87. The verified amended petition states that the DBO process will not necessarily save time and money and is not a recognized exception to the general requirement that an applicant must submit complete drawings and specifications prior to permitting. The verified amended petition states that 30 Percent Plans do not provide sufficient detail to know what the contractor is promising to build, and it would be faster to correct any mistakes prior to the start of construction, rather than after the start of construction.

B. Standing

88. Petitioner was an unincorporated association from its formation in early October 1999 through February 3, 2000, when it was incorporated as a Florida not-for-profit corporation. Originally named Save Our Bays and Canals Association, the unincorporated association was formed by members of the Apollo Beach Civic Association who were concerned about the environmental impact upon their bays and canals of intensive utility and industrial land uses in close proximity to their homes. Apollo Beach is an unincorporated area along the southeast shore of Tampa Bay, just south of the mouth of the Alafia River.

89. The land uses with which the unincorporated association has been concerned in its brief existence include a sulfur plant, the TECO Big Bend plant, a proposed National Gypsum plant, a proposed concrete plant, the proposed Desal Plant, and, now the proposed SWTP. The Apollo Beach area is very close to the proposed site of the Desal Plant, but is about 17 miles south southeast from the proposed site of the SWTP.

90. Petitioner and its members are primarily concerned with the Desal Plant, not the SWTP. However, Petitioner and its members express concern with the SWTP. The concerns are that DB permitting of the SWTP will jeopardize the production of safe drinking water and will result in greater costs to TBW customers, who will eventually bear the financial burden of costly reworking of a hastily designed and constructed project.

91. Standing analysis is simplified by the elimination of the issue of whether the verification of the amended petition confers standing. The claims of Petitioner in this case do not rise to the level of an attempt to prevent an activity, conduct, or product to be permitted from impairing, polluting, or otherwise injuring the air, water, or other natural resources of the State.

92. First, finished drinking water is not a natural resource of the State. Although a resource, finished drinking water is not natural. Although of lower water quality, raw water

is a natural resource. The potable water leaving the SWTP is a manufactured resource.

93. Second, even if finished drinking water were a natural resource, the issuance of the Variance does not have the effect of impairing, polluting, or otherwise injuring a natural resource. The Variance excuses compliance with two rules requiring complete drawings and specifications. Even assuming that the SWTP would impair, pollute, or otherwise injure natural resources, the Variance would not have such an effect because the act of granting the Variance is distinct from the act of granting the Permit itself.

94. Thus, facts regarding the circumstances under which Petitioner's president verified the amended petition are irrelevant for the purpose of determining standing.

95. Petitioner's standing is a function of the characteristics of the corporation and its members.

96. At the corporate level, the articles of incorporation state that the "specific and primary purposes for which this corporation is formed are to operate for the public education and advancement of the water quality of Tampa Bay, its tributaries, its estuaries and its canals and for other charitable purposes, by the distribution of its funds for such purposes."

97. There is some indication in the record of an attempt, after filing the petition commencing this proceeding, to amend the articles of incorporation to state, among Petitioner's

purposes, the protection of drinking water. The record does not contain the written articles of incorporation, as amended, or amended articles of incorporation after February 3, 2000. However, for the purpose of this recommended order, the Administrative Law Judge shall assume that such an amendment was made at some point after the filing of the petition and before the final hearing.

98. At the membership level, the water to be produced by the SWTP will be distributed primarily to customers in Pasco and Pinellas counties, St. Petersburg, and the Northwest Service Area of Hillsborough County, not to Apollo Beach, which is in southern Hillsborough County. Nearly all of Petitioner's members reside in Apollo Beach or other nearby communities, which also will not be served by the SWTP.

99. Although an insubstantial number of Petitioner's members will consume finished water from the SWTP in their homes, a substantial number will consume finished water from the SWTP at their places of work or schools and where they shop or dine out. Drinking water is ubiquitous, and the mixture of functional land uses in Apollo Beach is not, so it is highly probable that members of Petitioner will travel the three-county area in connection with their employment, education, and recreation.

100. Close analysis of the characteristics of Petitioner and its members reveals no basis for finding standing to challenge the Variance.

101. Nothing in the record suggests that Petitioner or any of its members have devoted themselves to the arcane task of resisting a perceived trend of state and local agencies to issue series of permits in response to DB proposals--or, more colorfully, to engage in "piecemeal permitting."

102. About the only interest that Petitioner can legitimately claim in DB permitting is that multiple points of entry, at each permit and permit modification, will result in additional expense. If Petitioner has standing to contest even the permitting of the SWTP, Petitioner must petition each time for an administrative hearing, conduct discovery, and participate in the final hearing. However, this seems, at most, like a tenuous interest, which suffers also from the speculation that later stages of the DB permitting process will continue to present new issues not raised in the challenge of the Permit initially approved.

103. Turning to the members themselves, their consumption of drinking water produced by the SWTP is no basis for standing either because the attenuated relationship between the Variance, which excuses compliance with two rules concerning the contents of applications, and the safety of drinking water or the additional costs that could arise from hasty designing, constructing, or permitting. Although it is conceivable that a record could have been made that the DB permitting proposed in this case would likely result in incomplete, incompetent

permitting review, so as to jeopardize the public health if the permit were to issue, the record in this case does not support such a contention. To the contrary, the record establishes that the DB permitting is at least as likely as DBB permitting to provide the regulatory oversight necessary to assure the design and construction of a successful public drinking water treatment plant

104. Lacking a substantial nexus in the record between the DB permitting authorized by the Variance and the quality of the drinking water that, if the Health Department issues the Permit, would likely be produced by the SWTP and likelihood of success of the overall construction project, the members of Petitioner likewise lack standing to challenge the Variance.

VI. Ultimate Findings of Fact

105. Petitioner and its members lack standing to challenge the Variance.

106. TBW faces a substantial hardship if not given the Variance. The legal and financial consequences of a failure to meet the phased-in withdrawal reductions are real and substantial. The environmental damage caused by overpumping the 11 Wellfields underscores the urgency of developing alternative sources of raw water for production into finished drinking water.

107. The rule from which TBW seeks the Variance is derived from the statute discussed in the Conclusions of Law. The underlying purpose of this statute is the protection of the

public health, safety, and welfare. The Variance serves the underlying purposes in two respects. First, the 30 Percent Plans contain sufficient detail to allow permitting to proceed without jeopardizing the objective of the rules to ensure that the USFilter team designs and constructs a water treatment plant that is in full compliance with all federal and state law. Second, the Variance provides that the USFilter team shall construct no component of the SWTP until it has been permitted, either initially or by a permit modification.

VII. Petitioner's Liability for Attorneys' Fees and Costs

108. Petitioner has a Technical Committee on which Petitioner relies for examination of technical aspects of matters that are of general concern to Petitioner. This committee obtained a copy of the Variance and, after examination and discussion, developed a position in opposition to DEP's stated intent to grant the Variance.

109. The Chair of Petitioner's Technical Committee, who has a bachelor of science degree in chemistry and is an industrial hygienist, drafted a letter reflecting the opinion of the committee in opposition to the Variance. Petitioner's attorney then converted this letter into the petition that commenced this proceeding.

110. At all times, the Board of Directors of Petitioner approved the actions of the Technical Committee and Petitioner's attorney, including the filing of the petition.

111. When Petitioner's president verified the amended petition, he reasonably relied on the advice of counsel concerning the substance of the assertions, and the advice of counsel was based on the work of the Technical Committee. Petitioner's president also reasonably relied on the work of the Technical Committee when he verified the amended petition.

112. Although DB permitting has been available for the design and construction of wastewater treatment plants for an undetermined period of time, DB permitting for the design and construction of public drinking water plants is a new concept. The concept is so new that the DEP Orlando office mistakenly issued at least 2 DB permits for public drinking water plants without requiring the applicant to obtain a variance from the two rules that prevent DB permitting for such facilities. The concept is so new that the key Health Department employees have expressed concern over personnel demands from this new means of permitting, although they have also expressed at least lukewarm support for the Variance.

113. The record portrays the employees of the Health Department as hard-working and competent, but over-burdened. The DB permitting obviously places significant responsibilities upon the Health Department, especially as it familiarizes itself with DP permitting. Although the availability of professional support from other sources, including DEP, ultimately resolves this

issue, the situation of the Health Department also is relevant in assessing Petitioner's liability for attorneys' fees and costs.

114. Two or three aspects of the drawings were deficient, according to Petitioner's professional engineer, whose testimony has been admitted despite the unreasonably restricted opportunity presented for cross-examination by his contractually driven refusal to identify past clients or jobs. Although none of these items seems likely to jeopardize a successful construction project, these were design points on which well-informed professionals could reasonably differ.

115. Although the issue of "improper purpose" presents a closer question than the substantive issues discussed above, there is inadequate subjective or objective evidence in the record supporting TBW's claim for attorneys' fees and costs on this ground. Ultimately, the novelty of DB permitting of drinking water treatment plants precludes a finding of improper purpose. All available facts drive this determination, and, at this point in time, the relative uniqueness of DB permitting of drinking water treatment plants to DEP, the Health Department, and Petitioner and its members provides the necessary margin to preclude a finding of improper purpose.

CONCLUSIONS OF LAW

116. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida

Statutes. (All references to Sections are to Florida Statutes. All references to Rules are to the Florida Administrative Code.)

117. Seeking the Variance, the burden of proof is on TBW. Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). See also Section 120.542(2).

118. Section 120.542(1) recognizes that "[s]trict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances." Consequently, Section 120.542(2) provides that variances and waiver shall be granted when the applicant "demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness."

119. TBW chose not to proceed under the fairness prong. Section 120.542(2) defines a "substantial hardship" as a "demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver."

120. As noted above, TBW proved the substantial hardship. The need for the SWTP is urgent--environmentally, legally, and financially.

121. Petitioner did not rely on Section 403.810(5) in its proposed recommended order. (An examination of that subsection suggests that it may have been miscited.) The statute underlying

Rule 62-555.520(4)(c) and (d) is Section 403.861(10), which empowers DEP to:

> Require department or county health department review and approval of complete plans and specifications prior to the installation, operation, alteration, or extension of any public water system.

122. "Installation" is construction. The Variance does not permit construction of any component of the SWTP prior to its permitting.

123. In general, the purpose of Section 403.861 is to assure the public health, safety, and welfare. As noted above, the Variance serves the underlying purpose of the statute.

124. Section 403.412(5) addresses "any administrative, licensing, or other proceedings authorized by law for the protection of the air, water, or other natural resources of the state from pollution, impairment, or destruction . . .." In such proceedings, Section 403.412(5) provides that a citizen of Florida "shall have standing to intervene as a party on the filing of a verified pleading asserting that the activity, conduct, or product to be licensed or permitted has or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state."

125. As noted above, Petitioner may not obtain standing under Section 403.412(5).

126. Also as noted above, Petitioner and its members are not otherwise persons whose substantial interests are affected by the issuance of the Variance. Petitioner lacks standing.

127. In Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), rev. denied, 415 So. 2d 1359 (Fla. 1982), the court stated: "before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect."

128. As noted above, neither Petitioner nor its members have made the required showing under either of the two prongs set forth in Agrico.

129. Section 120.569(2)(e) provides that the signing of all pleadings constitutes a "certification that the person has read the pleading, motion, or other paper and that, based upon reasonably inquiry, it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation." A violation of these requirement requires the imposition of attorneys' fees and costs.

130. Section 120.595(1)(c) requires the Administrative Law Judge to

> determine whether any party participated in the proceeding for an improper purpose as defined by this subsection and s.120.569(2)(e). In making such determination, the administrative law judge shall consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.

131. The determination of a violation of Section 120.595(1)(c) requires that the recommended order determine the amount of attorneys' fees and costs.

132. The inquiry concerning improper purpose is objective, not subjective. In other words, "if reasonably clear legal justification can be shown for the filing of the paper in question, improper purpose cannot be found and sanctions are inappropriate." Friends of Nassau County, Inc. v. Nassau County, 752 So. 2d 42, 50 (Fla. 1st DCA 2000)(construing predecessor to Section 120.569(2)(e)).

133. For the reasons noted above, TBW has failed to prove any improper purpose by Petitioner associated with the filing of any pleading or participation in this case.

RECOMMENDATION

It is

RECOMMENDED that the Department of Environmental Protection enter a final order granting the Variance and denying the request of Tampa Bay Water for attorneys' fees and costs.

DONE AND ENTERED this 24th day of July, 2000, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order must be filed with the agency that will issue the final order in this case.