

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DESOTO CITIZENS AGAINST)
POLLUTION, INC.,)
)
Petitioner,)
)
vs.) Case No. 02-0232
)
FARMLAND HYDRO LIMITED)
PARTNERSHIP; FRANK T. BASSO, Jr.;)
REDLAND GROWERS EXCHANGE, INC.;)
and SOUTHWEST FLORIDA WATER)
MANAGEMENT DISTRICT,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its designated Administrative Law Judge, Charles A. Stampelos, held a final hearing in the above-styled case on April 9, 2002, in Bartow, Florida.

APPEARANCES

For Petitioner Desoto Citizens Against Pollution, Inc.:

Alan R. Behrens, President
DeSoto Citizens Against Pollution, Inc.
4070 Southwest Armadillo Trail
Arcadia, Florida 34266

For Respondent Farmland Hydro Limited Partnership:

William Hawkins, pro se
Farmland Hydro Limited Partnership
Post Office Box 367
Ona, Florida 33865

For Respondents Frank T. Basso, Jr. and Redland Growers Exchange, Inc.:

Frank T. Basso, Jr., pro se
c/o Redland Growers Exchange, Inc.
Post Office Box 1563
Wauchula, Florida 33873

For Respondent Southwest Florida Water Management District:

Martha A. Moore, Esquire
Southwest Florida Water Management District
2379 Broad Street
Brooksville, Florida 34604-6899

STATEMENT OF THE ISSUE

Whether General Water Use Permit (WUP) Number 20012185.000 (Permit) meets the conditions for issuance as established in Section 373.223, Florida Statutes, and Rule 40D-2.301, Florida Administrative Code, and should be issued to Farmland Hydro Limited Partnership and Frank T. Basso, Jr. and Redland Growers Exchange, Inc.

PRELIMINARY STATEMENT

On April 11, 2001, Respondents, Frank T. Basso, Jr. (Basso) and Farmland Hydro Limited Partnership (Farmland Hydro)(collectively referred to as the Applicants), filed an Application with the Southwest Florida Water Management District (District), requesting approval of a WUP to withdraw groundwater from a proposed well for the purpose of crop irrigation to be undertaken on a parcel of land owned by Farmland Hydro and leased by Basso and Redland Growers Exchange, Inc. (Redland), and

located in Hardee County, Florida. The Application was assigned number 20012185.000.

After the Application was filed, the District requested additional information from the Applicants, which was supplied. On December 7, 2001, the District advised the Applicants that the WUP was approved, with final approval contingent upon no objection to the District's action being filed within the time frames provided in the written notice of approval.

On or about January 3, 2002, a timely Petition for Administrative Hearing (Petition) was filed with the District on behalf of DeSoto Citizens Against Pollution, Inc. (DCAP) and Alan R. Behrens (Behrens). The District determined that the Petition, with respect to DCAP, substantially complied with the requirements of Section 120.569(2)(c), Florida Statutes, and Rule 28-106.201(2), Florida Administrative Code. With respect to Behrens, the District determined that the Petition was deficient in that it lacked the signature of Behrens in his individual capacity. Thus, the District issued an Order of Dismissal as to Behrens, without prejudice. Behrens did not amend the Petition to include his individual participation as a party. (Behrens, as the President of DCAP, appeared as DCAP's authorized representative in this administrative proceeding.)

On January 16, 2002, the District forwarded the Petition to the Division of Administrative Hearings for the assignment of an

administrative law judge. On January 28, 2002, this case was set for final hearing for April 9 and 10, 2002, in Bartow, Florida.

On March 29, 2002, the parties filed a Joint Pre-Hearing Stipulation.

On April 1, 2002, DCAP requested a continuance of the final hearing, which was opposed by the Respondents, and denied.

The final hearing took place on April 9, 2002. Basso testified in his own behalf, but did not offer any exhibits into evidence. Edward Marshal Craig, IV, Florida Department of Agriculture and Consumer Services, Office of Agriculture Water Policy, testified on behalf of Basso/Redland. William Hawkins testified on behalf of Farmland Hydro and Basso, but did not offer any exhibits into evidence. The District offered the testimony of Thomas E. Jackson, P.G.; Michael K. Balser, P.G., Water Regulation Manager, Bartow Regulation Department; and Scott Laidlaw, Water Use Regulation Manager for the District's Sarasota Regulation Department, in rebuttal. The District's Exhibits one through eleven were admitted into evidence without objection. Behrens testified on behalf of DCAP. DCAP's Exhibits one through three were admitted into evidence without objection. (DCAP Exhibit three is the deposition transcript of George Chase.)

At the close of the final hearing on April 9, 2002, the parties agreed to file proposed recommended orders within 20 days after the Transcript was filed with the Division.

On April 17, 2002, DCAP filed a Motion requesting permission to offer exhibits into evidence. These exhibits were listed on DCAP's exhibit list, but were not offered into evidence during the final hearing. Respondents objected to the Motion. The Motion was denied.

The two-volume Transcript of the final hearing was filed with the Division on April 29, 2002.

On May 20, 2002, DCAP filed a Motion requesting an extension of time to file its proposed recommended order. The Motion was opposed. Also, the District filed its proposed recommended order on May 20, 2002. Over objection, the Motion was granted and DCAP was afforded until May 28, 2002, to file a proposed recommended order. On May 28, 2002, DCAP filed a proposed recommended order and the proposed recommended orders have been considered during the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. DCAP is not-for-profit corporation incorporated in the State of Florida. Behrens is the President of DCAP. See also Findings of Fact 63-77.

2. Farmland Hydro is a Delaware Limited Partnership authorized to transact business in Florida, and is the owner of the property leased by Basso/Redland, which is the subject of this WUP.

3. Frank T. Basso, Jr., is a third generation farmer, who operates as Redland Growers Exchange, and seeks a General WUP to authorize groundwater withdrawals for crop irrigation.

4. The District is the administrative agency charged with the responsibility to conserve, protect, manage, and control water resources within its boundaries pursuant to Chapter 373, Florida Statutes, and the rules promulgated thereunder as Chapter 40D, Florida Administrative Code.

The Proposed Water Use

5. An Application for a General WUP was submitted by Farmland Hydro and Basso, as co-applicants, and received by the District on April 11, 2001. After receipt of additional information, the Application was deemed complete on October 22, 2001.

6. The Applicants seek a General WUP to authorize a new water use for the irrigation of 140 acres for the production of both Spring and Fall row crops, using a seepage-with-mulch irrigation system.¹ Basso plans to grow tomatoes and/or peppers in the Spring, and squash and/or cucumbers in the Fall. Crop planting for both seasons will be phased-in over a one-month

period. Water allocation quantities are calculated on a weekly phase-in basis of approximately 35 acres for each planting date. The total time that the parcel will be in use for farming, to include planting and harvesting for each crop, is approximately six months per year.

7. The subject parcel is part of a 250-acre tract known as the Brushy Creek Tract and is located in Hardee County approximately two miles south of the town of Ona; approximately two miles south of the intersection of U.S. Highway 64 and County Road 663; and is within the Southern Water Use Caution Area (SWUCA). The subject parcel currently does not contain a water well.

8. The Brushy Creek Tract is a larger parcel of approximately 1,230 acres leased from Farmland Hydro by Redland and also by Parker Farms for cattle grazing, farming, and hunting. The subject parcel is used for cattle grazing and is surrounded by land owned by Farmland Hydro and used for either cattle grazing or agricultural row crops.

9. Farmland Hydro also operates an additional approximately 1,941 acres of property near the subject parcel, which is used for citrus groves. Farmland Hydro has consumptive WUPs for this property.

10. The closest existing legal user to the proposed Basso well site is another well on the Farmland Hydro property.

11. As is generally done with vegetable crop production in Florida, vegetable crops grown on the Farmland Hydro property are grown in rotation with pasture, and have been rotated in this manner for many years. Typically, farmers have farmed a piece of land for one, two or three years and then, to avoid the buildup of insects and diseases, have allowed the land to revert to pasture and have moved on to another field for crop production. The subject parcel for which the WUP is being sought will be similarly treated.

12. Crop rotation is an important agricultural best management practice that is used to address pest management, soil conservation, and maximizing nutrients for obtaining favorable crop production. Soil conservation is important to Basso, notwithstanding that there is a response in the Application that no approved Soil Conservation Service plan exists for the operation included in the Application.

13. If the WUP is issued and the subject parcel is placed into crop production, another parcel of land will be taken out of crop production by Basso, resulting in the discontinuation of another permitted well. As a result, the issuance of this WUP will not result in a "water use change."

Determination of Reasonable Demand/Allocated Quantities

14. In determining whether a proposed water use is reasonable-beneficial and in the public interest, the District

calculates the appropriate permit quantities for the particular water use, which is a function of demonstrated need, or demand for water; efficiency of the water treatment and distribution systems; whether water is sold or transferred to other entities; whether acceptable water can be acquired from lower quality sources; and whether conservation practices are employed.

District Basis of Review (BOR), page B3-1.

15. The reasonable need for agricultural water use is generally composed of one or more demand components, depending upon the specific agricultural use. "Typically, the reasonable need for irrigation water uses is equal to the supplemental crop requirement divided by the system efficiency or the system design capacity, whichever is less." "The supplemental crop requirement is the amount of water needed for a particular crop beyond the amount of water provided by effective rainfall." The supplemental crop requirement is generally determined by using the Agricultural Water Use Calculation Program (AGMOD) Version 2.1, which is based on the modified Blaney-Criddle method. This program takes into account site specific information such as crop type, growing period, evapotranspiration rate, soil type, rainfall, irrigation method and number of irrigated areas. "In most cases, the supplemental irrigation requirement is determined for a 2 in 10-year drought condition."

16. The AGMOD program determines an inch-application rate which, when applied to the number of acres to be irrigated, results in a calculation of total annual average and peak monthly quantities for the proposed water use. District BOR, pages B3-4 and 3-5. See also District Water Use Design Aids, pages C4-1 through C4-7.

17. In determining the allocated quantities, or reasonable demand for water, the District seeks to avoid both over-allocating water and under-allocating water for the specific crop intended, to ensure that the permitted amount is sufficient for the "2 in 10-year drought condition." Consequently, the allocated quantities arrived at by District staff through use of the AGMOD methodology may be different from the quantities indicated on an applicant's initial application, which are generally estimated without benefit of an agricultural water use calculation program.

18. The AGMOD program was used to calculate water use quantities for the proposed water use. The allocated quantities for Basso's proposed use are 454,000 gallons per day (gpd) on an annual average basis and 1,241,000 gpd, as a peak month quantity. No quantities were requested or allocated for crop protection. See Finding of Fact 52.

Modeling for Simulated Impacts

19. As part of the application review process, the District evaluates potential impacts to existing legal uses of water, the water resources and environmental features that may result from the proposed groundwater withdrawals. To assist in the review process, analytical and numerical models, which incorporate best available hydrogeologic parameters for the area being considered for a permit, are used to simulate drawdowns for the withdrawal of the proposed quantities. The results of these simulations are used in the evaluation of potential impacts to assess whether the application meets the conditions for issuance.

20. The District undertook simulation modeling of the potential effects of the proposed water withdrawals to be authorized by the permit. The allocated quantities were entered into the MODFLOW 387 groundwater flow model, which is a three-layer model developed by the U.S. Geological Survey and is the generally accepted model for this purpose. Model layers were set up to represent the surficial, intermediate, and Upper Floridan aquifers. (The Applicants seek to pump water solely from the Upper Floridan Aquifer.)

21. There are limitations to the model in that the model assumes a homogeneous isotropic aquifer, with no preferred flow direction. In actuality, there is variability in the geology of the area.

22. Modeling is intended to serve as a screening tool for assessing localized impacts anticipated from a proposed water use and is based upon the best available information. As distance from the proposed withdrawal site increases, the reliability of the modeling decreases, due to the variability in the geology and other parameters or boundary conditions that can affect the model. Use of the MODFLOW groundwater model allows the District to look at potential impacts at the site, and in the proximity of the site, and assists the District in assessing possible cumulative impacts associated with a proposed use.

23. To assist in assessing potential impacts from the proposed use, a Peak Month modeling simulation was undertaken by the District, which simulates the effect of pumping the proposed Peak Month withdrawal rate of 1,241,000 gpd for 90 consecutive days, with no recharge to the aquifer systems. The model essentially presents a worst case scenario that is a more severe prediction than what is actually likely to occur from the permitted use under normal conditions. Simulating the period of greatest demand on the hydrologic system is likely to provide maximum protection to existing legal water users and the water resources.

24. The Peak Month simulation undertaken by the District predicts drawdowns in the potentiometric surface of the Upper Floridan Aquifer of approximately 2.6 feet at the proposed

withdrawal site; less than 1.4 feet at the nearest property boundary (approximately 1,250 feet from the proposed withdrawal site); and less than 1.2 feet at the nearest existing legal user (a Farmland Hydro well approximately 3,500 feet from the proposed withdrawal site). These numbers did not raise a concern for District staff. ("Potentiometric surface" is "a surface defined by the level to which water rises in an open pipe that is constructed into or all the way through an artesian aquifer. This is measured in feet relative to NGVD or sea level. The level to which water rises inside this open pipe is a function of the pressures on the water in the artesian aquifer." District BOR, page B-xii.)

25. The Peak Month simulation predicts drawdowns in the intermediate aquifer of approximately 0.9 feet at the proposed withdrawal site, and less than 0.9 feet at the property boundary, and at the nearest existing legal user.

26. The Peak Month simulation predicts drawdowns in the water level of the surficial aquifer (water table) of approximately 0.01 feet or less at the proposed withdrawal site, property boundary and nearest existing legal user.

27. Based upon the Peak Month simulations, the District reasonably determined that further cumulative impact modeling was not necessary in order to assess localized cumulative impacts resulting from the proposed use. To assess regional cumulative

impacts, the District evaluated Regional Observation Monitoring Program (ROMP) data and found no significant trends in withdrawals in recent years, other than a slight decline attributed to the recent drought.

Conditions of Issuance of the Proposed Permit

28. In order to obtain a water use permit, an applicant must establish that the proposed use of water is a reasonable-beneficial use, will not interfere with any existing legal use of water, and is consistent with the public interest, by providing reasonable assurance, on both an individual and cumulative basis, that the water use meets the conditions for issuance as specified in Section 373.223(1), Florida Statutes, and Rule 40D-2.301, Florida Administrative Code.

29. A permit must be obtained from the District prior to withdrawing water, where the withdrawal is from a well having an outside diameter of six inches or more at land surface, where the annual average withdrawal from all sources is 100,000 gpd or greater, or where the total combined withdrawal capacity from all sources is greater than or equal to 1 mgd. The proposed water use falls within these parameters. Rule 40D-2.041(1)(b) and (c), Florida Administrative Code.

30. The quantities allocated for the proposed use have been determined by the District to be necessary to fulfill a certain reasonable demand, for the reasons specified herein.

31. To assist in assessing impacts, the District utilizes a network of ROMP wells to obtain basic groundwater monitoring data over time and to help characterize the lithology, stratigraphy, aquifer depths, water levels and, in some cases, water quality for the various water resources. Data obtained from the ROMP and other wells is compiled to ascertain aquifer characteristics within the District and is also integrated into the District's modeling efforts pertaining to proposed water uses.

32. ROMP well No. 31 is located just off the northeast corner of the Basso site. Having a ROMP well adjacent to the Basso site increases confidence in the specific geological information being used in the groundwater model to assess potential impacts from the proposed uses. ROMP well No. 17 is located approximately 1/2 mile from DCAP member Behren's well. Data from both wells were considered in assessing potential impacts from the proposed water use.

33. Based on available information, the possible sources of groundwater for the proposed use at the Basso site are the surficial aquifer, intermediate aquifer, and the Upper Floridan Aquifer systems. To ensure sufficient quantities of water for the proposed use and to avoid potential impacts to environmental features, such as wetlands and surface waters, the District will require the proposed use to limit withdrawals to solely the Upper Floridan Aquifer.

34. By examining stratigraphic cross sectional information generated from the ROMP wells, particularly ROMP No. 31 well, which is in close proximity to the Basso site, District staff were able to determine, with reasonable certainty, the approximate depths of the aquifers at the Basso well site. To ensure that the well will be open solely to the Upper Floridan Aquifer, the permit requires the Basso well to have a minimum of 400 feet of casing, with an estimated well depth of 1,000 feet.

35. Based upon available information concerning the construction of other wells in the vicinity of the proposed Basso well, the District is reasonably assured that a well cased for a minimum of 400 feet will draw water only from the Upper Floridan Aquifer and will minimize the potential for water to move between the aquifers through the well. The well construction requirements imposed for Basso's well are in line with the best available stratigraphic information and with known construction of wells in the area. By casing the well to a depth of 400 feet and due to the extremely low leakage of the intermediate confining unit, the intermediate and surficial aquifers will be buffered from impacts associated with the proposed use.

36. The District will deny a water use permit application if the proposed withdrawal of water, together with other withdrawals, would cause an unmitigated adverse impact on a legal water withdrawal existing at the time of the application. The

District considers an adverse impact "to occur when the requested withdrawal would impair the withdrawal capacity of an existing legal withdrawal to a degree that the existing withdrawal would require modification or replacement to obtain the water it was originally designed to obtain." District BOR, page B4-14.

37. Based upon an assessment of individual and cumulative regional information, there are no existing legal uses of water that will be adversely impacted as a result of the proposed withdrawals.

38. Based upon an assessment of individual and cumulative regional information, no quantity or quality changes that adversely impact the water resources, including both surface and groundwaters, are anticipated from the proposed withdrawals.

39. The District requires that consideration be given to the lowest water quality available, which is acceptable for the proposed use. Lower quality water includes reclaimed water, collected stormwater, recovered agricultural tailwater, saline water or other sources. District BOR, page B4-12.

40. For the proposed water use, there is no viable lower quality water source and no reclaimed water available near the site to use as an alternative to groundwater pumping. The Applicants are proposing to use the lowest quality water that is available.

41. There are no known concerns regarding the quality of water in the Upper Floridan Aquifer at this location in Hardee County. Restricting the proposed water use to the Upper Floridan Aquifer will not cause water quality concerns or result in pollution to any of the aquifers.

42. Simulated drawdowns to the Upper Floridan Aquifer of approximately 2.6 feet at the proposed withdrawal site, less than 1.4 feet at the nearest property boundary, and less than 1.2 feet at the nearest permitted well, provide reasonable assurance that adverse impacts will not occur from the proposed water use.

43. Simulated drawdowns to the intermediate aquifer of 0.9 feet at the proposed withdrawal site, and less as the distance from the proposed withdrawal site increases, provide reasonable assurance that adverse impacts will not occur from the proposed water use.

44. Simulated drawdowns to the surficial aquifer of 0.01 feet or less at the proposed withdrawal site, and less as the distance from the proposed withdrawal site increases, constitute a nearly undetectable impact to the surficial aquifer, which is not an adverse impact.

45. The modeling simulations demonstrate that the proposed withdrawals will have no significant effect on the surficial aquifer and, therefore, will not cause adverse impacts to

environmental features such as wetlands, lakes, streams, fish and wildlife, or other natural resources.

46. None of the simulated drawdowns are considered to be predictions of adverse impacts, not even in the localized vicinity of the well site.

47. Mr. Jackson explained that because the localized modeling simulations were small or insignificant and showed no adverse impacts, cumulative modeling is not considered necessary. Reasonable assurance on a cumulative basis is determined by assessing the potential localized impacts in conjunction with existing cumulative data for the region, such as the available ROMP data and hydrographs, which depict the existing regional condition, taking into account, on a cumulative basis, all existing uses as well as rainfall conditions and climate. Based on an assessment of the cumulative data and the modeling for individualized impacts, and applying professional judgment, District staff reasonably concluded that the proposed water use presents no concerns that it will cause, on either an individual or a cumulative basis, adverse impacts to the water resource or existing legal uses.

48. Minimum flows and levels have not been established by the District for the area where the proposed use is located. (The parties stipulated that the District has not established minimum flows and levels pursuant to Section 373.042, Florida

Statutes, for the Southern Water Use Caution Area (SWUCA)). Therefore, Rule 40D-2.301(1)(d), Florida Administrative Code, (requirements for minimum flows and levels), is not applicable to the proposed permit.

49. The proposed use presents no concerns for saline water intrusion.

50. The proposed use raises no concerns regarding causing pollution to the aquifer.

51. There are no offsite land uses that will be adversely impacted as a result of this permit.

52. Basso currently uses best management practices for water conservation in his ongoing farming operations, and intends to use such practices with the new farming operation authorized under the permit. In keeping with such practices, irrigation is stopped when the water reaches the end of the watering ditch. Basso uses seepage irrigation and tries to regulate the ditches so that there is a minimum, if no, runoff. Also, a watering cycle generally lasts from three to seven days before irrigation has to be resumed. Any runoff goes into "filtering ponds, before reaching ditches or creeks" in its raw content. Basso does not intend to farm during months of likely frost so no separate allocation for frost/freeze protection was requested or needed.

53. Given these irrigation practices, water is not reasonably expected to be wasted.

54. All necessary and feasible agricultural water conservation activities will be implemented upon issuance of the WUP. In addition, Specific Condition No. 3 of the proposed WUP requires the incorporation of best water management practices in all irrigation practices.

55. The proposed use presents no concerns that it will otherwise be harmful to the water resource.

56. The Applicants have met all the requirements for issuance of a WUP.

Southern Water Use Caution Area

57. The proposed water use site is located within the SWUCA. The District established the SWUCA as a means of addressing on a regional scale concerns about long-term impacts to the water resource. Water use caution areas were created in recognition of regional water concerns. There have been drought conditions in the area which have caused reduced aquifer levels.

58. The proposed water use site is not within the "Most Impacted Area" (MIA), which is located approximately 18 miles to the west of the site in Manatee County, nor within the "East Tampa Bay Water Use Cautionary Area" (ETB WUCA), which is approximately six miles to the west of the proposed site, also in Manatee County. (The SWUCA includes the MIA and ETB WUCA.)

59. Pending final adoption of rules for the SWUCA, the District will continue to issue WUPs for proposed water uses that

meet the conditions for issuance. The District cannot treat new uses and existing renewal uses any differently when considering the issuance of a permit.

60. Once SWUCA rules and minimum flows and levels are established, the District expects to rely on a more regional approach to address long-term cumulative impacts over the entire use caution area, instead of relying on a permit-by-permit basis to address regional concerns.

61. Standard Condition No. 9 of the proposed WUP requires the permittee to cease or reduce withdrawals as directed by the District, if water levels in the aquifers fall below the minimum levels established by the District Governing Board.

62. The proposed withdrawal will use a seepage with mulch irrigation method, which has a 50 percent efficiency level. See footnote 1. This is the minimum efficiency level currently required for agricultural WUPs within the SWUCA, which approve the use of this irrigation method. As SWUCA rules come into effect, a higher percentage efficiency level probably will be required, as is now required in the Eastern Tampa Bay Water Use Caution Area and also in the Highlands Ridge Water Use Caution Area. Consequently, Standard Condition No. 11 of the proposed WUP requires that, when SWUCA rules are implemented, the permittee must comply with any higher efficiency level or other special regulation that may be required for the SWUCA area.

DCAP's Challenge to the Proposed WUP

63. DCAP does not keep official membership records. It does not maintain any list of current members. According to Behrens, there are five members of the board of directors. DCAP does not hold corporate meetings, annual meetings or maintain corporate records. Members do not meet. There are no means to document the existence of members for this organization.

64. Behrens is a member of DCAP. He has owned five acres adjoining the west side of Horse Creek (in DeSoto County) since 1985.

65. Behrens complains that the District does not look at the cumulative effect on his well and other people he knows, such as George Chase. Behrens is concerned with any lowering of the water level in the area, including Horse Creek. He believes that approval of wells in the area, including the proposed well, is the straw that is breaking the camel's back. Mr. Chase shares this view.

66. Behrens relies on an artesian free-flowing, two-inch diameter well, for domestic water use, located in the intermediate aquifer, approximately 150 feet deep. (Behrens' well is approximately 18-20 miles from the proposed Basso well.) For most of the time he has lived there, the well had an electric pump for obtaining water. Approximately one year ago, the pump went bad, and a replacement system has not been installed.

Currently, Behrens has no pump on the well, and in dry periods, has to obtain water for domestic uses from nearby Horse Creek, which is low during the dry season. (Behrens depends on Horse Creek to pursue his recreation, wildlife, and aesthetic values.) Having a flowing artesian well will enable him to obtain water from the well without having to install an electrical pump, a situation which is desired by Behrens, in part, because the property is in a flood plain and experiences frequent flooding and electrical outages.

67. Not all artesian wells flow. Artesian wells are completed into confined aquifers in which the water in a tightly cased well, will rise to a level above the formation being measured. Water would have to rise above the land surface to be a flowing well. For a well to be artesian, the well must be under confined pressure. For a well drawing water from a confined aquifer, such as the intermediate or the Upper Floridan Aquifer systems, the measured water level in the well is a reflection of the amount of potentiometric pressure in the well. This level can be affected just as much by the amount of recharge as it can by the amount of water withdrawals. There is no evidence that the proposed water use will adversely impact the flowing nature of either Behrens' or Chase's well.

68. The evidence demonstrates that the proposed water use will not adversely impact Behrens' well.

69. George Chase is a member of DCAP. Mr. Chase lives in Arcadia, DeSoto County, Florida. His property is adjacent to the Peace River. Mr. Chase's well is a two-inch diameter well, believed to be about 150 feet deep and equipped with a 12-volt DC solar-powered pump. Mr. Chase has in the past relied on artesian pressure within the confined intermediate aquifer to supply water to his solar-powered home. The solar-powered pump assists in supplying water to the home.

70. In recent years, Mr. Chase has experienced low water pressure in his well. In Spring 2000, Mr. Chase contacted the District to complain that when an adjacent citrus grove was irrigating the groves, it appeared to affect the water level in his well such that the well's ability to flow was impacted. (According to Mr. Chase, his neighbors have had problems obtaining sufficient water from their wells and reaching water with standard pumps.) This citrus grove is an existing legal user of water that pre-existed Mr. Chase's well.

71. In recent years, numerous domestic wells have been constructed in the vicinity of the Chase home that are large diameter wells utilizing submersible pumps with 110-volt AC power. These wells are more efficient at producing water than the type of well and pump being used by Mr. Chase, are located within a few hundred feet of Mr. Chase's well, and are open to the intermediate aquifer as is the Chase well. Based upon the

District's experience in other areas, where there is a cluster of domestic wells drawing from the same intermediate aquifer, such adjacent wells have a much greater impact on each other than do other more distant wells, such as the previously discussed citrus irrigation wells, that are open solely to the confined Upper Floridan Aquifer System. This conclusion is based upon monitoring of the ROMP sites in the affected areas.

72. Mr. Chase's well is approximately ten miles from the proposed withdrawal site.

73. There is no basis to conclude that the proposed water use will cause any adverse impacts to Mr. Chase's well.

74. DCAP members' interests are not affected any differently by the proposed use than are the interests of the general public.

75. DCAP has produced no evidence to support its assertion that the issuance of this permit will result in lowered water levels in the Horse Creek and Peace River or other surface waters.

76. DCAP has produced no evidence to support its assertion that the permit will cause adverse impacts to surface water flows or surface waters or to environmental features such as vegetation, fish, and wildlife.

77. DCAP has produced no evidence that its substantial interests are affected by the proposed agency action.

CONCLUSIONS OF LAW

78. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. Sections 120.569 and 120.57(1), Florida Statutes.

79. The purpose of this proceeding, conducted pursuant to Section 120.57(1), Florida Statutes, is to "formulate final agency action, not to review action taken earlier and preliminarily." McDonald v. Florida Department of Banking and Finance, 346 So. 2d 81 (Fla. 1st DCA 1977).

80. The burden of proof in the proceeding is on the party asserting the affirmative in the proceeding. Florida Department of Transportation v. J.W.C. Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981). If a regulatory agency gives notice of intent to grant a permit application, the applicant has the initial burden of going forward with the presentation of a prima facie case of the applicant's entitlement to a permit. In the context of this proceeding, the District undertook the burden of showing that the Applicants provided reasonable assurances that the conditions for issuance of the WUP have been satisfied in accordance with the applicable statutes and rules and the Basis of Review.

81. Once the applicant has made a prima facie case that the proposed permit should be issued, the petitioner, here DCAP, must rebut that prima facie case and support the allegations of its petition challenging the proposed permit. Id. at 789. Unless

the petitioner, here DCAP, presents "contrary evidence of equivalent quality" to the evidence presented by the applicant and agency, the permit must be approved. Id. at 789-790.

82. Petitioner cannot carry the burden of presenting contrary evidence by mere speculation concerning what "might" occur. Chipola Basin Protective Group, Inc. v. Department of Environmental Protection, Case No. 88-3355, 1998 WL 1859974 (Dept. Env. Reg. Dec. 29, 1988).

83. The standard for applicant's burden of proof is one of reasonable assurances, not absolute guarantees, that the applicable conditions for issuance of the permit have been satisfied. Manasota-88, Inc. v. Agrico Chemical Co. and Florida Department of Environmental Regulation, 12 F.A.L.R. 1319, 1325, (DER Feb. 19 1990).

84. "Reasonable assurance" contemplates "a substantial likelihood that the project will be successfully implemented." Metropolitan Dade County v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). See also Hamilton County Board of County Commissioners v. Florida Department of Environmental Regulation, 587 So. 2d 1378 (Fla. 1st DCA 1991).

85. The issuance of a permit must be based solely on compliance with applicable permit criteria. Council of Lower Keys v. Toppino, 429 So. 2d 67 (Fla. 3d DCA 1983).

86. To meet their burden, the applicants must meet the requirements of Section 373.223(1), Florida Statutes, which provides in relevant part that to obtain a WUP, the applicant must establish that the proposed use of water is a reasonable-beneficial use; will not interfere with any presently existing legal use of water; and is consistent with the public interest.

87. "Reasonable-beneficial use" is defined in Section 373.019(13), Florida Statutes, as "the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest."

88. The District has adopted Rule 40D-2.301, Florida Administrative Code, which implements Section 373.223(1), Florida Statutes. In relevant part, Rule 40D-2.301(1), Florida Administrative Code, provides as follows:

(1) In order to obtain a Water Use Permit, an Applicant must demonstrate that the water use is reasonable and beneficial, is in the public interest, and will not interfere with any existing legal use of water, by providing reasonable assurances, on both an individual and a cumulative basis, that the water use:

(a) Is necessary to fulfill a certain reasonable demand;

(b) Will not cause quantity or quality changes which adversely impact the water resources, including both surface and ground waters;

(c) Will not cause adverse environmental impacts to wetlands, lakes, streams, estuaries, fish and wildlife, or other natural resources;

(d) Will comply with the provisions of 4.3 of the Basis of Review described in 40D-2.091;

(e) Will utilize the lowest water quality the Applicant has the ability to use;

(f) Will not significantly induce saline water intrusion;

(g) Will not cause pollution of the aquifer;

(h) Will not adversely impact offsite land uses existing at the time of the application;

(i) Will not adversely impact an existing legal withdrawal;

(j) Will utilize local water resources to the greatest extent practicable;

(k) Will incorporate water conservation measures;

(l) Will incorporate reuse measures to the greatest extent practicable;

(m) Will not cause water to go to waste; and,

(n) Will not otherwise be harmful to the water resources within the District.

(Subsections 40D-2.301(1)(h) and (j) have been invalidated. See Southwest Florida Water Management District v. Charlotte County, 774 So. 2d 903, 913 (Fla. 2d DCA 2001), rev. denied, 800 So. 2d 615 (Fla. 2001)).

89. Rule 40D-2.301(3), Florida Administrative Code, provides that the standards and criteria set forth in the Basis of Review for Water Use Permit Applications shall be used to provide the reasonable assurances required in Rule 40D-2.301(1).

90. Based on the findings of fact set forth above, the District, on behalf of the Applicants, has established a prima facie case of the Applicants' entitlement to the proposed WUP.

91. DCAP did not carry its burden of proof with regard to its challenge to the proposed permit.

92. Reasonable assurances have been provided that the proposed water use is reasonable and beneficial, is in the public interest, and will not interfere with any existing legal use of water

93. DCAP did not provide credible evidence that the proposed WUP would violate any of the applicable permitting statutes or rules.

94. Farmland Hydro and Basso/Redland are entitled to issuance of a General WUP for the proposed use.

95. To meet the requirements for standing under Section 120.57(1), Florida Statutes, DCAP must show that a substantial number of its members will suffer an injury in fact of sufficient immediacy to entitle the association to a hearing on the members' behalf and that the alleged injury is within the zone of interest the proceeding is designed to protect. Agrico Chemical Co. v.

Department of Environmental Protection, 406 So. 2d 478 (Fla. 2d DCA 1981), rev. denied, 415 So. 2d 1359 (Fla. 1982) and 415 So. 2d 1361 (Fla. 1982). See also Florida Home Builders Association v. Department of Labor and Employment Security, 412 So. 2d 351, 353-54 (Fla. 1982).² Furthermore, the alleged injury or threat of injury must be both real and immediate; hypothetical or conjectural allegations of injury are not sufficient. Village Park Mobile Home Association v. Department of Business Regulation, 506 So. 2d 426 (Fla. 1st DCA 1987).

96. DCAP did not prove its standing to challenge the issuance of the subject WUP because it has failed to demonstrate that a substantial number of its members will suffer an injury in fact of sufficient immediacy as required by law. The alleged injuries are neither real nor immediate and are based solely on unproven allegations.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that Southwest Florida Water Management District enter a final order:

1. Determining that Farmland Hydro Limited Partnership and Frank T. Basso, Jr. and Redland Growers Exchange, Inc., have satisfied the requirements of Section 373.223, Florida Statutes,

and Rule 40D-2.301, Florida Administrative Code, regarding conditions for issuance of WUPs;³

2. Issuing proposed General Water Use Permit No. 20012185.000, as set forth in District Exhibit No. 4; and

3. Finding that DCAP lacks standing to challenge the issuance of the permit.

DONE AND ENTERED this 3rd day of June, 2002, in Tallahassee, Leon County, Florida.

CHARLES A. STAMPELOS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of June, 2002.

ENDNOTES

1/ The weight of the evidence indicates that Applicants propose to use this form of irrigation. However, the proposed WUP, issued December 7, 2001, (District Exhibit 4, page 21), indicates that the irrigation method is "Drip." The method of irrigation should be clarified if the WUP is approved.

2/ The parties stipulated that issues of fact and law which remain to be litigated include "[w]hether a substantial number of DCAP members are substantially affected by the agency action," and "[w]hether DCAP has demonstrated that it has standing in this manner." DCAP refers to Section 403.412(5), Florida Statutes, on page five of its Petition. (This subsection requires a "citizen"

to file a "verified pleading," which was not done by DCAP.) However, it does not appear that DCAP is relying on this subsection as a predicate for standing in this proceeding in light of the parties' stipulation.

3/ It appears that the District's preliminary action taken on December 7, 2001, was to issue the WUP to "Farmland Hydro Limited Partnership" and "Frank Basso, c/o Redland Growers Exchange, Inc." If the District approves the final issuance of a WUP in this proceeding, the District should clarify to whom the permit is granted. The case has been re-styled in light of the evidence presented in this proceeding to more accurately reflect the proper parties.

COPIES FURNISHED:

Frank T. Basso, Jr.
c/o Redland Growers Exchange, Inc.
Post Office Box 1563
Wauchula, Florida 33873

Alan R. Behrens, President
Desoto Citizens Against Pollution, Inc.
4070 Southwest Armadillo Trail
Arcadia, Florida 34266

William Hawkins
Farmland Hydro Limited Partnership
Post Office Box 367
Ona, Florida 33865

Martha A. Moore, Esquire
Southwest Florida Water Management District
2379 Broad Street
Brooksville, Florida 34604-6899

E. D. "Sonny" Vergara, Executive Director
Southwest Florida Water Management District
2379 Broad Street
Brooksville, Florida 34604-6899

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 should be filed with the agency that will issue the Final Order in this case.