STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALAN BEHRENS and DeSOTO CITIZENS AGAINST POLLUTION, INC.,	)	
Petitioners,	)	
vs.	)	Case No. 02-0282
MICHAEL J. BORAN and SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT,	)	
Respondents.	)	

RECOMMENDED ORDER

On May 29, 2002, final administrative hearing was held in this case in Sarasota, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner Alan Behrens:

Alan Behrens, pro se
4070 Southwest Armadillo Trail
Arcadia, Florida 34266

For Respondent Southwest Florida Water Management District:

Mark F. Lapp, Esquire
Mary Beth Russell, Esquire
Southwest Florida Water Management District
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For Respondent Michael J. Boran:

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David M. Pearce, Esquire

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STATEMENT OF THE ISSUE

The issue in this case is whether Water Use Permit (WUP) Application Number 20009478.005 meets the conditions for issuance as established in Section 373.223, Florida Statutes (2001), Florida Administrative Code Rule 40D-2.301 (April 2001), and the District's Basis of Review for Water Use Permit Applications.

PRELIMINARY STATEMENT

On September 11, 2000, Respondent Michael J. Boran (Boran) filed an application with the Southwest Florida Water Management District (the District), requesting a modification of his already existing Water Use Permit (WUP) Number 20009478.004. The application received its own designation: WUP Number 20009478.005. On November 16, 2001, the District issued a Notice of Proposed Agency Action for approval of the application, with final approval contingent upon no objection being filed within the time frames provided in the Notice.

After receiving the Notice of Proposed Agency Action, Petitioners Alan Behrens (Behrens) and DeSoto Citizens Against Pollution, Inc. (DCAP), a Florida not-for-profit corporation, timely filed a joint petition for administrative hearing on December 10, 2001. Behrens is the President of DCAP. On

December 18, 2001, the District dismissed the joint petition for failure to comply with the requirements of Florida Administrative Code Rule 28-106.201(2) but gave Behrens and DCAP leave to file an amended petition on or before January 2, 2002. Behrens and DCAP filed their amended petition on December 31, 2001.

The District referred the amended petition to the Division of Administrative Hearings on January 15, 2002. On January 18, 2002, Boran moved to dismiss the amended petition on the grounds that it was not verified as required by Section 403.412(5), Florida Statutes (2001), and that it contained insufficient allegations of standing.

On February 5, 2002, the amended petition was dismissed, with leave given to amend. On February 7, 2002, the case was set for final hearing on May 29-31, 2002, in Sarasota, Florida. On February 12, 2002, Behrens and DCAP filed their second amended petition. On February 20, 2002, Boran moved to dismiss the second amended petition, again alleging that Behrens and DCAP did not verify the petition or raise sufficient allegations of standing. Boran's motion to dismiss the second amended petition was denied on March 12, 2002.

On April 4, 2002, Boran moved to compel answers to certain questions asked and production of certain documents requested during the deposition duces tecum of DCAP’s

designated representative, Alan Behrens, on February 28, 2002. On April 12, 2002, just prior to a hearing on the motion to compel, DCAP filed a notice of voluntary withdrawal of its petition.

On May 17, 2002, before entry of an order dropping DCAP as a party, Boran filed a Motion for Summary Recommended Order and Sanctions, which sought sanctions against both Behrens and DCAP for filing petitions and participating in this proceeding allegedly for improper purpose.

Behrens, Boran, and the District filed a Joint Pre-Hearing Stipulation on May 17, 2002, which contained a section stating that Boran's Motion for Summary Recommended Order and Sanctions was the only one which remained pending as of that date. By way of response on May 22, 2002, Behrens filed his own Motion for Summary Recommended Order and Sanctions. Three more motions were filed prior to final hearing: Boran's Motion in Limine; the District's Motion to Quash Subpoenas; and Boran's Motion to Quash Subpoenas.

At the outset of final hearing on May 29, 2002, the parties agreed to waive oral argument on the merits of their respective motions for summary recommended order and sanctions. The other motions were then resolved on the final hearing record.

Boran offered the testimony of two witnesses: Todd Boran; and expert witness Dale Hardin, P.G., who was accepted as an expert in the fields of hydrogeology and water use permitting. Boran's Exhibits 1 through 20 were admitted into evidence without objection.

The District offered the testimony of expert witness David Brown, P.G., who was accepted as an expert in the fields of geology, hydrogeology and water use permitting and well construction. The District's Exhibits 1 through 10, 13, 14, 17 through 19, 21, 23 through 25, 27, 29, 34 (Behrens' May 2, 2002 deposition), and 37 through 40 were admitted without objection.

Behrens testified on his own behalf and offered two exhibits into evidence. Ruling was reserved on the District's relevance objection to Behrens' Exhibit 1; the relevance objection is now overruled, and the exhibit is admitted. Behrens' Exhibit 3 was admitted over relevance objections at final hearing.

After presentation of evidence, Boran requested a transcript of the final hearing, and the parties requested and were given 15 days from the filing of the transcript in which to file proposed recommended orders (PROs). The Transcript was filed on June 11, 2002, making PROs due no later than June 26, 2002. On the deadline, Boran and the District filed a

Joint PRO, and Petitioner filed Proposed Findings of Fact and Conclusions of Law.

On July 1, 2002, Petitioner filed what he entitled a Memorandum of Law in Support of Proposed Recommended Order. Actually, it was a reply to the Joint PRO filed by Boran and the District, who filed a Joint Motion to Strike on July 3, 2002. Petitioner did not file a response in the time allotted by Florida Administrative Code Rule 28-106.204(1), and the Motion to Strike is granted.

FINDINGS OF FACT

The Parties

1. Petitioner, Alan Behrens, owns real property and a house trailer located at 4070 Southwest Armadillo Trail, in Arcadia, Florida. Behrens uses a two-inch well as the primary source of running water for his trailer.

2. Boran and his family operate a ranch and sod farm in Arcadia, Florida, under the limited partnership of Boran Ranch and Sod, Ltd. Boran uses several different on-site wells to irrigate the farm. See Findings 12-17, infra.

3. 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 Florida Administrative Code Rule Chapter 40D.

Permit History

4. Boran’s property is a little over 1,000 acres in size, on which he has raised cattle and grown sod for approximately the past four years. Before Boran owned the property, its prior occupants used the land for growing fall and spring row crops (primarily tomatoes). Boran's cattle and sod farm uses less water than was used by previous owners and occupants.

5. In 1989, the original permit holders could make annual average daily withdrawals of 309,000 gallons but also were allowed a maximum daily withdrawal of 6,480,000 gallons. In 1992, the permitted withdrawals increased to an annual average daily quantity of 2,210,000 gallons, with a peak monthly limit of 3,596,000 gallons per day.

6. On December 14, 1999, Boran received an agricultural water use permit (WUP No. 20009478.004) from the District. This current existing permit expires on December 14, 2009. The current permit grants Boran the right to withdraw groundwater for his agricultural use in the annual average daily quantity of 1,313,000 gallons, and with a peak month daily quantity of 3,177,000 gallons.

7. On September 11, 2000, Boran filed an application to modify his existing water use permit. Modification of Boran's existing permit does not lengthen the term of the permit, and the scope of the District's review was limited to those features or changes that are proposed by the modification.

8. The proposed modification would allow Boran to increase his annual average daily quantity by 175,000 gallons, and increase the peak month daily quantity by 423,900 gallons, for the irrigation of an additional 129 acres of sod. With the proposed increase, the new annual average daily quantity

will be 1,488,000 gallons, and the new peak month daily quantity will be 3,600,900 gallons.

9. The proposed modification also provides for the construction of an additional well (DID #6) on the southeastern portion of property, which will withdraw groundwater from the upper Floridan aquifer.

10. The proposed agency action also entails a revision of the irrigation efficiency rating for the entirety of Boran Ranch. Irrigation efficiency refers to the ability to direct water to its intended target, which in this case means the root zone of the sod, without losing water to evaporation and downward seepage. Under the proposed permit modification, Boran will increase the entire farm’s water efficiency from 65 percent to 75 percent.

11. As discussed further in the Conditions for Issuance section infra, the District's AGMOD modeling program uses this efficiency rating as part of its determination of the appropriate quantities for withdrawals. The higher the efficiency rating, the less water received under a permit. Because the efficiency rating increased, the application rate for water decreased from 42" per year to 36.4" per year for the entire Boran Ranch.

Boran's Wells

12. There are six well sites (labeled according to District identification numbers, e.g., DID #3) existing or proposed on Boran's property.

13. DID #1 is an eight-inch well located in the northeastern portion of the property. DID #1 provides water solely from the intermediate aquifer. DID #2 is an eight-inch well located in the middle of the property. DID #2 withdraws water from both the intermediate and upper Floridan aquifers. Both DID #1 and DID #2 were installed in 1968, and predate both the first water use permit application for the farm and the District's water use regulatory system.

14. DID #4 is a twelve-inch well located in the north-central part of the property and solely taps from the upper Floridan aquifer. DID #4 had already been permitted and constructed as of the date of the proposed modification application at issue in this case.

15. DID #3 and DID #5 are twelve-inch wells which have already been permitted for the southern and northern portions of the property, respectively, but have not yet been constructed. Both wells will withdraw water only from the upper Floridan aquifer.

16. DID #6 is a proposed twelve-inch well to be located on the southeastern portion of the property and to irrigate an additional area of sod. DID #3, #5, and #6 will all be cased

to a depth of approximately 540 feet, and only open to the upper Floridan aquifer to a depth of approximately 940 feet. By casing the well with pipe surrounded by cement, these wells will be sealed off to all aquifers above 540 feet, including the intermediate aquifer.

17. All the wells on the property are used to irrigate sod. The wells have artesian flow, but utilize diesel pumps to provide consistent flow pressure year-round throughout the fields (some of which can be a mile and a half from a well). Since running the pumps costs money, there is an economic incentive not to over-irrigate. In addition, over-irrigation can lead to infestations of fungi and insects, and eventually cause the grass to rot and die. As a result, the fields receive irrigation only when dry areas in the fields appear and the grass begins to wilt.

Boran Ranch Operations and Management Practices

18. Boran Ranch primarily grows three kinds of grasses: St. Augustine Floratam; St. Augustine Palmetto; and Bahia. (Boran also is experimenting on a smaller scale with common paspalum and common Bermuda.) The Bahia grass, which is what also grows in the ranch's cattle pasture, does not require irrigation; the St. Augustine grasses are less drought-resistant and require irrigation at times. The majority of the sod sold to residential installers (who ordinarily work

for landscape companies) is a St. Augustine grass. Commercial or governmental roadside installations favor Bahia. Currently, Boran sells more Bahia than St. Augustine. But market demand determines which types of grass are produced on the farm. As residential use and demand for St. Augustine in southwest Florida increases, so would the proportion of the farm used for growing St. Augustine grass.

19. Boran grows sod year-round because of a large demand for the product in Ft. Myers and Cape Coral, and to a lesser extent in Punta Gorda and Port Charlotte. Sod helps control erosion and is considered to have aesthetic value. There also was some evidence that sod lowers the ambient temperatures, as compared to bare dirt; but the evidence was not clear how sod would compare to other ground cover in lowering temperatures.

20. When subsurface seepage irrigation is being used, a sod field must be disked and "laser-leveled" to the proper elevation, with a slight slope created in the field to help ensure proper irrigation and drainage, before it can be used for sod production.

21. The fields are laser-leveled before the irrigation system is installed and the crop is planted. The perforated irrigation supply lines of Boran Ranch’s subsurface irrigation system, also known as the "tile," run the opposite direction

of the slope of the field and perpendicular to the main irrigation line.

22. Once the subsurface irrigation system is installed, the field receives sprigs of sod, which are then watered and "rolled" to pack them into the ground. Approximately three months after a field has been rolled, the new sod is then periodically fertilized, sprayed and mowed. Sod takes approximately one year to grow before it may be harvested. The sod at Boran Ranch is harvested via tractor with a "cutter" on its side, which cuts underneath the grass, lifts it up onto a conveyor belt, and then onto a pallet for shipping.

23. There are four different types of irrigation systems used for growing sod in Florida: (1) pivot systems which rely on sprinklers attached to overhead lines that rotate around a fixed point; (2) overhead rain guns which utilize motorized hydraulic pressure to spray a field; (3) above-ground seepage; and (4) subsurface irrigation systems (which can also be used to drain excess water from fields during large rain events). The most efficient irrigation system used for sod in Florida is the subsurface irrigation system.

24. Boran Ranch first started the subsurface irrigation system approximately four years ago. Since that time, Boran Ranch has converted almost all its fields to the subsurface

irrigation system, at a cost of approximately $1150 to $1350 per acre. As a result of this conversion process, Boran Ranch now uses less water per acre of sod.

25. The subsurface irrigation system delivers water from a well to a water control structure (also known as the "box") via the imperforated main irrigation line. The perforated lines of the "tile" are connected to this main irrigation line at a 90-degree angle.

26. The largest portion of the "box" sits underground. Once the water in the main irrigation line reaches the "box," water builds up behind removable boards contained in the box, creating the backpressure which forces water out into the tile. Water flows out from the tile to maintain the water table level at or near the root zone of the sod.

27. Subsurface irrigation systems only function on property that has a hardpan layer beneath the soil. The hardpan layer acts as a confining unit to minimize the downward seepage of water, thereby allowing the subsurface irrigation system to work efficiently. Behrens questioned whether Boran Ranch has the necessary hardpan based on Todd Boran's reliance on hydrogeologists for this information. But the expert testimony of Boran's hydrogeology consultant and the District's hydrogeologist confirmed Todd Boran's understanding.

28. Typically, the highest board in the box has the same height as the top of the field. Once the water level inside the box surpasses the height of the last board, water will spill over that board into the remainder of the box and then out another main irrigation line to the next box and set of tiles. By removing some of the boards in the box, Boran can bypass irrigating certain sections of his fields in favor of other areas.

29. Excess water from the fields flows into field ditches which lead to wetlands on the property. If water leaves the wetlands during episodes of heavy rains, it flows downstream to the Peace River.

Conditions for Issuance

30. Boran Ranch is located in southwestern DeSoto County, in an area designated by the District as the Southern Water Use Caution Area (SWUCA). The District created the SWUCA, which covers 5,000 square miles, after first determining that the groundwater resources of eastern Tampa Bay and Highlands Ridge regions were stressed and creating the Eastern Tampa Bay Water Use Caution Area (ETBWUCA) and Highlands Ridge Water Caution Area (HRWUCA). Both the ETBWUCA and the HRWUCA are contained within the larger boundaries of the SWUCA. Within the ETBWUCA is an area along the coasts of portions of Hillsborough, Manatee, and Sarasota counties known

as the Most Impacted Area (MIA). Special permitting rules exist for new projects located within the ETBWUCA, HRWUCA, and MIA, but not within the remainder of the "undifferentiated" SWUCA. Boran Ranch is located in this "undifferentiated" area of the SWUCA.

31. Behrens took the position that Boran should not be permitted any additional water use until special permitting rules are promulgated for the "undifferentiated" SWUCA. But Behrens could cite no authority for such a moratorium. Meanwhile, the more persuasive evidence was that no such moratorium would be reasonable or appropriate.

32. The evidence proved that the quantities authorized by the proposed modification are necessary to fulfill a certain reasonable demand, as required by Rule 40D-2.301(1)(a). Boran sought additional water quantities through the permit modification application in order to irrigate an additional 129 acres of its sod farm. The application reflects a need for additional water, associated with additional acreage added to the farm. Boran used the District's AGMOD spreadsheet model, which is based on a mathematical methodology known as the modified Blainey-Criddle method, to determine the reasonable quantities for Boran's specific agricultural use.

33. AGMOD inputs into its computations the following variables: (1) geographic location of the proposed use; (2) type of crop grown; (3) irrigation (efficiency); (4) pump capacity; (5) soil type; and (6) number of acres to be irrigated. AGMOD is a generally accepted tool used for determining the allocation of water quantities for agricultural use. In the instant case, the AGMOD calculations incorporated 87 years of rainfall data and its results reflect the quantities necessary in the event of a two-in-ten-year drought. Similarly, the AGMOD calculations in the instant case take into account the change in irrigation efficiency from 65 percent to 75 percent.

34. Behrens suggested that Boran should not be allowed to use any more water until minimum flows and levels are established for the intermediate aquifer in the vicinity. However, Behrens could cite no authority for imposing such a moratorium. Meanwhile, the more persuasive evidence was that no such moratorium would be reasonable or appropriate. See Finding 49 and Conclusion 86, infra.

35. Behrens also suggested that inputs to AGMOD should assume more Bahia and less St. Augustine grass so as to reduce the resulting amount of reasonable demand. He also suggested that Boran's reasonable demand should not take into account possible future increases in St. Augustine grass production

based on possible future market demand increases. But it does not appear that the District requires an applicant to differentiate among various types of grasses when inputting the crop type variable into the AGMOD model for purposes of determining reasonable demand. See Water Use Permit Information Manual, Part C, Design Aids (District Exhibit 2C), Table D-1, p. C4-9.

36. The evidence proved that Boran demonstrated that the proposed use will not cause quantity or quality changes that adversely impact the water resources, on either an individual or cumulative basis, including both surface and ground waters, as required by Rule 40D-2.301(1)(b).

37. Data from water quality monitoring reports indicate that water quality at Boran Ranch and in the region has remained fairly consistent. There were no statistically significant declining trend in water levels in the region. Behrens admitted that water quality in his well has been consistently good.

38. One apparent increase in total dissolved solids and chlorides in DID #1 was explained as being a reporting error. Boran inadvertently reported some findings from DID #2 as coming from DID #1. Until the error was corrected, this made it appear that water quality from DID #1 had decreased because, while DID #1 is open only to the intermediate

aquifer, DID #2 is open to both the intermediate aquifer and the upper Florida aquifer, which has poorer water quality.

39. Both Boran and the District used the MODFLOW model, a generally accepted tool in the field of hydrogeology, to analyze withdrawal impacts. The purpose of modeling is to evaluate impacts of a proposed use on the aquifer tapped for withdrawals, and any overlying aquifers including surficial aquifers connected to lakes and wetlands. MODFLOW uses mathematics to simulate the different aquifer parameters for each production unit determined from aquifer performance testing.

40. During the permit application process, both Boran and the District conducted groundwater modeling by simply adding the proposed new quantities to models developed for Boran's permit application in 1999. The models were comparable but not identical; the District's model was somewhat more detailed in that it separated predicted drawdowns into more aquifer producing units. Both models satisfied the District that the proposed modification would have no adverse impact on water resources.

41. After the challenge to the Proposed Agency Action, the District created a new model to assess the impact of only the additional quantities requested by the modification. This new model added some aquifer parameters obtained from Regional

Observation Monitoring Program (ROMP) well 9.5, which was constructed very close to the Boran Ranch in 1999. (Information from ROMP 9.5 was not available at the time of the earlier models.) The new model allowed the District to limit the scope of its review to those changes proposed by the modification. The results of this model show that impacts are localized and that most are within the confines of Boran's property.

42. The greatest impacts resulting from the proposed modification would occur in the Suwannee Limestone producing unit (the upper-most portion of the upper Floridan aquifer), the unit to be tapped by DID #6. The confining unit above the upper Floridan aquifer in this region of DeSoto County is approximately 300-400 feet thick, and impacts on the intermediate aquifer, which is above this confining unit, are much less. When the District's new model was run for peak monthly withdrawals (423,900 gpd for 90 days), the model's 1.0 foot drawdown contour was contained within the confines of Boran's property, and the 0.1 foot drawdown contour extended only approximately two miles out from the well node of DID #6. Atmospheric barometric changes can cause fluctuations in aquifer levels that exceed a tenth of a foot.

43. As minimal as these modeled impacts appear to be, they are larger than would be expected in reality. This is

because, for several reasons, MODFLOW is a conservative model--i.e., impacts modeled are greater than impacts that would be likely in actuality.

44. First, MODFLOW is a mathematical, asyntopic model. This means it models very gradually decreasing drawdowns continuing over long distances as predicted drawdowns approach zero. This tends to over-predict impacts at greater distances from the withdrawal. In reality, the heterogeneity or discontinuity of confining units cuts down on drawdown effects. The steepest drawdowns occur at a well node and then decline relatively rapidly with distance.

45. Second, several model inputs are conservative. The annual average quantities for water use generated under the AGMOD methodology is based on a two-in-ten-year drought year. The peak month quantity applies to the three driest months within the two-in-ten-year drought period. The MODFLOW model applies this 90-day peak usage continuous pumping under AGMOD and conservatively assumes no rainfall or recharge to the aquifers during this period. Both of these are extremely conservative assumptions for this region of Florida.

46. The District's determination of reasonable assurances "on both an individual and a cumulative basis" in water use permit cases only considers the sum of the impact of the applicant's proposal, together with all other existing

impacts (and perhaps also the impacts of contemporaneous applicants). The impacts of future applicants are not considered. This differs from the cumulative impact review under Part IV of Chapter 373 (environmental resource permitting). See Conclusions 80-84, infra.

47. Modeling is a component of the District's assessment of impacts on a cumulative basis. In addition, the District reviewed and assessed hydrographs of the potentiometric surface from nearby ROMP wells, water quality data, permit history of the Boran site, and regional hydrologic conditions. The hydrographs represent the accumulation of all impacts from pumpage in the area and show stable groundwater levels in the region. Water quality also is stable, with no declining trends. The permit history indicates that permitted withdrawals on the Boran site have declined. For all of these reasons, the evidence was that Boran's proposed withdrawals would create no adverse impacts on water resources on a cumulative basis.

48. The evidence proved that the proposed agency action will not cause adverse environmental impacts to wetlands, lakes, streams, estuaries, fish and wildlife, or other natural resources, as required by Rule 40D-2.301(1)(c). Due to the significant confinement between the source aquifers and the surficial aquifer and surface water bodies, the modeling

results show no adverse impact to the surficial aquifer, and no adverse impact to wetlands, streams, estuaries, fish and wildlife, or other natural resources.

49. The evidence was that there are no minimum flows or levels set for the area in question. Furthermore, Standard Condition 9 of the Proposed Agency Action requires Boran to cease or reduce withdrawals as directed by the District if water levels should fall below any minimum level later established by the District. The more persuasive evidence was that the requirements of section 4.3 of the District's Basis of Review have been met. (A moratorium on water use permits until establishment of minimum flows and levels would be neither reasonable nor appropriate.)

50. The evidence proved that the proposed use will utilize the lowest water quality he has the ability to use, as required by Rule 40D-2.301(1)(e), because the new withdrawals are exclusively from the upper Floridan aquifer, which has poorer quality than the intermediate aquifer. Deeper aquifers cannot be used because the water quality is poorer than the upper Floridan aquifer, and it is technically and economically infeasible to use it for agricultural purposes.

51. Behrens suggests that Boran should be required to discontinue all withdrawals of higher quality water from the intermediate aquifer as part of the proposed modification.

While an offer to do so might be welcomed (as was Boran's offer to install subsurface seepage irrigation and apply the higher efficiency percentage to the entire Boran Ranch), Behrens could cite no authority for imposing such a condition; and the more persuasive evidence was that imposition of such a condition would be neither reasonable nor appropriate under the circumstances of this case.

52. The evidence proved that the proposed use will not significantly induce saline water intrusion, as required by Rule 40D-2.301(1)(f), because the model results show that the drawdown contours do not approach anywhere near the ETBWUCA or MIA areas. Boran's Ranch is located approximately 21 miles from the MIA boundary and 10.8 miles from ETBWUCA boundary. Further, Boran must monitor the water quality in DID #1 and DID #4 and document any changes in water quality as a result of the withdrawals.

53. The parties have stipulated that the proposed use meets the requirements of Rule 40D-2.301(1)(g) and will not cause pollution of the aquifer.

54. The evidence proved that the proposed use will not adversely impact offsite land uses existing at the time of the application, as required by Rule 40D-2.301(1)(h), because the modeling showed no impact to the surficial aquifer or land use outside Boran Ranch. The confinement between the point of

withdrawal and the surface is too great to impact offsite land uses in the instant case.

55. The evidence proved that the proposed use will not adversely impact any existing legal withdrawal, as required by Rule 40D-2.301(1)(i), based on the ROMP hydrographs and modeling showing minimal drawdowns outside the boundaries of Boran Ranch.

56. Behrens claims that Boran's proposed modification will adversely impact his well, which is approximately 3.5 miles northeast of the northeast corner of the Boran property and over four miles away from DID #6. But the greater weight of the evidence was to the contrary. (The wells of other DCAP members were even further away, making impacts even less likely.)

57. Behrens has no independent knowledge of the depth of his two-inch well but believes it is approximately 150 feet deep, which would place it within the intermediate aquifer. In view of the consistent quality of Behrens' well water, and the nature of his well construction, it is most likely that Behrens' well does not penetrate the confining layer between the intermediate aquifer and the upper Floridan aquifer. If 150 feet deep, Behrens' well would not extend into the deepest producing unit of the intermediate aquifer (PZ-3); rather, it would appear to extend into the next deepest producing unit of

the intermediate aquifer (PZ-2). But it is possible that Behrens' well cross-connects the PZ-2 and the shallowest producing unit of the intermediate aquifer (PZ-1). (The evidence did not even rule out the possibility that Behrens' well also is open to the surficial aquifer.)

58. Assuming that Behrens' well is open to the PZ-2 only, conservative MODFLOW modeling predicts no impact at all from the proposed modification. (Behrens' well would be outside the zero drawdown contour.)

59. Meanwhile, hydrographs of PZ-2 from nearby ROMP wells show marked fluctuations (five-foot oscillations) of the potentiometric surfaces in producing units of the intermediate aquifer. These fluctuations appear to coincide with increased pumping out of the intermediate aquifer. These fluctuations in the potentiometric surface are not being transmitted up from the upper Floridan aquifer or down from the surficial aquifer. The potentiometric surface in those aquifers do not exhibit matching fluctuations. It appears that the intermediate aquifer is being impacted almost exclusively by pumping out of that aquifer. (This evidence also confirms the integrity of the relatively thick confining layer between the intermediate and the upper Floridan aquifers, which serves to largely insulate Behrens' well from the influence of pumping out of the upper Floridan.)

60. Behrens seems to contend that, in order to determine adverse impacts on a cumulative basis, the impact of Boran's entire withdrawal, existing and proposed, which is modeled conservatively at approximately 0.3 feet, must be considered. But the District considers an adverse impact to an existing legal withdrawal to consist of an impact large enough to necessitate modification to the producing well in order for it to continue to function as intended. The greater weight of the evidence was that the well on Behrens' property was not designed to be a free-flowing well but was designed to use a pump to operate as intended.

61. At the time Behrens purchased his property, there was a well and a non-functioning pump on the property. Even at the beginning of his ownership, he did not always have running water without a functioning pump. In approximately 1986 or 1987, Behrens installed a new electric pump because it allowed the well to produce more water. After installation of the pump, Behrens raised his trailer an additional five feet (to guard against flooding) which caused it to be approximately ten feet high, meaning the water had to travel that much farther against gravity to reach Behrens' faucets. For most of the time that he has owned the property, Behrens has used a pump on the well.

62. Behrens installed a check valve to allow him to turn off the pump. Sometimes during storm or flood conditions, electric power failed or was cut off, and Behrens was forced to rely solely on artesian flow, which was sometimes adequate in flood conditions during the rainy season. At other times when artesian flow was adequate, Behrens would turn off the pump and rely solely on artesian flow. But it also was sometimes necessary for Behrens to use the pump to get adequate water flow.

63. During the summer of 2001, Behrens' pump failed, and he had to rely solely on artesian flow. As in prior years, artesian flow was sometimes inadequate. In order to be able to get at least some artesian flow for the maximum amount of time, Behrens lowered the spigot on his well by about two feet.

64. Although Behrens is aware that the iron casing of his well could corrode over time, he has never called a licensed well driller or other contractor to inspect his well. Behrens did not test his own well for possible blockage that would result in a lower yield. Furthermore, Behrens admits that his whole outdoor water system needs to be completely replaced.

65. The evidence proved that the proposed use will incorporate water conservation measures, as required by Rule

40D-2.301(1)(k), based on the water conservation plan submitted to the District, installation of a state-of-the-art irrigation system, increase in efficient use of the water, and decrease in the application rate. (Behrens' arguments that Boran has been allowed to use too much water and his question as to the existence of hardpan underlying Boran's fields already has been addressed. See Findings 27 and 35, supra.)

66. The parties have stipulated that Boran has demonstrated that the proposed use will incorporate reuse measures to the greatest extent practicable, as required by Rule 40D-2.301(1)(l).

67. The evidence proved that the proposed use will not cause water to go to waste, as required by Rule 40D-2.301(m), because the irrigation method is the most efficient system that is economically and technically feasible available for sod. (Behrens' question as to the existence of hardpan underlying Boran's fields already has been addressed. See Finding 27, supra.)

68. The evidence proved that the proposed use will not otherwise be harmful to the water resources of the District, as required by Rule 40D-2.301(1)(n), based on the review of all other permit criteria.

Propriety of Behrens' Purpose

69. Behrens did not review the District's permit file on Boran's application before he filed his petition. The evidence suggested that he traveled to the District's Sarasota office for that purpose but found on his arrival that the complete permit file was not available for inspection there. Because of the filing deadline, he did not find time to make another attempt to review the permit file of record before he filed his petition. Behrens also did not contact Boran, the District or anyone else with any questions about the proposed agency action before filing his petition. He also did not visit Boran's property, and made no inquiry as to the irrigation system employed by Boran. Behrens also did not do any additional legal research (beyond what he had done in connection with other water use permit proceedings) before filing his petition. Behrens believed he had all the information he needed to file his petition.

70. Behrens has previously filed at least one unsuccessful petition challenging the District's issuance of a water use permit. See Behrens v. Southwest Fla. Water Management Dist., DOAH Case No. 00-4801 (DOAH Jan. 29, 2001). DCAP, with Behrens acting as its president, has previously filed at least three unsuccessful petitions challenging the District's issuance of a water use permit. See, e.g., DeSoto Citizens Against Pollution, Inc. v. Farmland Hydro Limited

Partnership, DOAH Case No. 02-232 (Southwest Fla. Water Man. Dist. June 25, 2002); DeSoto Citizens Against Pollution, Inc. v. Southwest Fla. Water Management Dist., DOAH Case No. 01-3056 (DOAH Aug. 22, 2001); DeSoto Citizens Against Pollution, Inc. v. Southwest Fla. Water Management Dist., DOAH Case No. 01-2917 (DOAH Sept. 24, 2001). However, none of those proceedings involved a project at the Boran site.

71. It is found that, under the totality of circumstances, Behrens' and DCAP's participation in this proceeding was not for an improper purpose--i.e., not primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of Boran's permit modification. While a reasonable person would not have raised and pursued some of the issues raised by Behrens and DCAP in this proceeding, it cannot be found that all of the issues they raised were frivolous or that their participation in this proceeding was for an improper purpose.

72. It appears that Behrens based his standing in part on the requirement in Rule 40D-2.301(1)(i) that Boran provide reasonable assurances that the proposed use will not adversely impact an existing legal withdrawal to be provided "on both an individual and a cumulative basis." (Emphasis added.) Not unreasonably, Behrens argued that this requirement allowed him to base his standing on alleged injuries from all of Boran's

withdrawals, existing and proposed, which would create a 0.3-foot drawdown on his well. While his argument is rejected, it cannot be found to be frivolous or made for improper purpose.

73. Behrens' argument that Boran did not meet Rule 40D-2.301(1)(i) was based on the 0.3-foot drawdown and his position that his well was designed to be artesian free-flowing. While Behrens' proposed finding was rejected, the position he took is not found to be frivolous or taken for improper purpose.

74. Several other arguments made and positions taken by Behrens have been rejected. See Findings 27, 34, 35, and 51, supra, and Conclusions 86-87, infra. But they cannot all be found to have been frivolous or made and taken for improper purpose.

CONCLUSIONS OF LAW

Burden of Proof and Initial Burden of Presenting Evidence

75. The standard for an applicant’s burden of proof is one of reasonable assurances, rather than absolute guarantees, that the conditions for issuance of a permit have been met. Manasota-88, Inc. v. Agrico Chem. Co., 12 F.A.L.R. 1319, 1325 (Dept. Env. Reg. Feb. 19, 1990). The term "reasonable assurance" means "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).

76. As an applicant for a permit, Boran had the initial burden of presenting a prima facie case of entitlement to the permit. Florida Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

Permit Criteria

77. In order for Boran to meet his prima facie burden of entitlement to modification of his permit, he had to demonstrate compliance with Section 373.223(1), Florida Statutes (2001). (All statutory references are to sections of the 2001 codification of the Florida Statutes.) This statute establishes a three-prong test that a proposed use: (1) is reasonable and beneficial; (2) is in the public interest; and (3) does not adversely affect existing legal users of the water resource. The District's conditions for issuance contained in Rule 40D-2.301(1) implement the three-prong test.

78. The April 2001 version of Rule 40D-2.301 was in effect at the time the proposed agency action was issued and provided in pertinent part 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;

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

79. Florida Administrative Code Rule 40D-2.091 incorporates by reference the Basis of Review for Water Use Permit Applications into Chapter 40D-2. Section 1.12.1 of the Basis of Review provides that "ordinarily, only the modified aspects of the permit will be addressed in the evaluation of the application for modification." For that reason, Boran's existing permitted withdrawals are not at issue in this case (although they must be considered to determine whether certain reasonable assurances have been given "on both an individual and a cumulative basis.")

80. Under the State Water Resource Plan outlined in Part

I of Chapter 373, Florida Statutes, which generally applies throughout Chapter 373, the Florida Legislature declared that the Department and the water management districts should take into account cumulative impacts on water resources. Section 373.016(2), Florida Statutes (2001). Section 373.223(1) does not contain a specific requirement for an applicant to do a cumulative impact assessment, but the District has implemented Section 373.016(2)'s requirement by including in Rule 40D-2.301(1) the requirement that an applicant provide reasonable assurances "on both an individual and a cumulative basis."

81. In Southwest Florida Water Management District v. Charlotte County, 774 So. 2d 903 (Fla. 2d DCA 2001), rev. denied, 801 So. 2d 615 (Fla. 2001), the Rule 40D-2.301(1) requirement that reasonable assurances be provided "on both an individual and a cumulative basis" was challenged as being too vague. The court upheld the ALJ's ruling denying that rule challenge based on the undisputed finding of fact "that the determination of cumulative impact 'unavoidably involves site-specific considerations which render it impractical to adopt rule criteria that can be applied with "cookie cutter" certainty.'" Id. at 913.

82. As found by the ALJ in the rule challenge, "only subsections (b), (c), (d), (f), (g), (h), (i), and (n) involve cumulative analysis and that '[w]hile the wording of the rule

is somewhat confusing, the remaining criteria by their very nature, can only be applied on an individual basis.'" Id. As also found by the ALJ in the rule challenge, as to the criteria to which the cumulative analysis applies, "for 'any regulatory scheme to be effective, there has to be an ability to take cumulative impact into account.'" Id.

83. As interpreted by the District, the determination of reasonable assurances "on both an individual and a cumulative basis" under Part II of Chapter 373 (water use permitting) differs from the cumulative impact review under Part IV of Chapter 373 (environmental resource permitting). See Section 373.414(8)(a), Florida Statutes. As explained in Caloosa Property Owners Ass'n, Inc. v. Department of Envtl. Regulation, 462 So. 2d 523, 526 (Fla. 1st DCA 1985), the latter requires consideration of "the precedential value of granting a permit under the assumption that similar future permits will be granted in the same locale." (Essentially, instead of allowing a single applicant to create all of the environmental impacts a certain geographic area can tolerate, an effort is supposed to be made to apportioned those impacts among the similar projects determined to be reasonably likely to occur in that locale.) In contrast, as found, the District's determination of reasonable assurances "on both an individual and a cumulative basis" in water use permit cases

only considers the sum of the impact of the applicant's proposal together with all other existing impacts (and perhaps also the impacts of contemporaneous applicants). The impacts of future applicants are not considered.

84. There is no compelling reason not to defer to the District's interpretation of its own Rule 40D-2.301(1). While different from the cumulative impact analysis utilized in under Part IV of Chapter 373 (environmental resource permitting), it appears to be a reasonable and permissible interpretation.

85. In applying the District's interpretation of the rule, Boran and the District properly considered site specifics in determining whether Boran provided reasonable assurances "on both an individual and a cumulative basis." See Southwest Florida Water Management District v. Charlotte County, supra at 913.

86. Behrens takes the position that Boran's permit modification should not be granted at this time because the District has not yet established special permitting requirements for the "undifferentiated" SWUCA, or minimum flows and levels for the intermediate aquifer in the vicinity. But the District's evidence was persuasive that lack of these things does not require a moratorium on water use permits. To the contrary, it is concluded that, if no applicable minimum

flows and levels have been established, the permit modification application complies with established minimum flows and levels. As result, the condition of issuance set out in Rule 40D-4.301(1)(d) and the provisions of 4.3 of the Basis of Review. (In addition, as found, Standard Condition 9 of the Proposed Agency Action requires Boran to cease or reduce withdrawals as directed by the District if water levels should fall below any minimum level later established by the District.)

87. Behrens took the position that Boran is not using the "lowest water quality the Applicant has the ability to use" under Rule 40D-4.301(1)(e) because two of the existing wells on Boran Ranch draw water from the intermediate aquifer instead of the upper Floridan. Behren asks why Boran should not be required to deepen those wells and close them to the intermediate aquifer as a condition to the proposed modification. While the question may not be unreasonable, the requirement may not be imposed on this proposed permit modification. It may, however, be raised when those wells come up for renewal in 2009.

88. In 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), the court affirmed an Administrative Law Judge's 1997 invalidation of Rule 40D-2.301(1)(j). After issuance of the Proposed Agency Action in this case, the District repealed this rule provision. However, Section 373.016(4)(a), Florida Statutes, restored requirement that the District encourage applicants such as Boran to use water from sources nearest the area of use or application whenever practicable. Boran has complied with this requirement because DID #6 taps the upper Floridan aquifer, which is a local source, is located on property wholly-owned and controlled by Boran and will irrigate sod on

this same property.

Shifting of Burden of Presenting Evidence

89. Under the statutes and rules, as interpreted by the District, Boran easily met his initial burden to present evidence. As a result, the burden shifted to Behrens rebut the evidence produced by the applicant with contrary evidence of equivalent quality to that presented by Boran. J.W.C., 396 So. 2d at 789. Mere speculation concerning what "might" occur is insufficient. Chipola Basin Protective Group, Inc. v. Department of Envtl. Protection, Case No. 88-3355, 1998 WL 1859947 (Dept. Env. Reg. Dec. 29, 1988).

90. Behrens failed to meet his burden of presenting evidence. Essentially, he relied on rule interpretation and legal arguments that have been rejected.

Applicant Met Ultimate Burden of Proof

91. Based on the Findings of Fact, Boran and the District have satisfied the standards contained in Section 373.223, Florida Statutes, Florida Administrative Code Chapter 40D-2, and the Basis of Review for Water Use Permit Applications.

Behrens' Standing

92. In order to prove his standing, Behrens was required to prove injury-in-fact resulting from the proposed agency action. Section 120.52(12)(b) defines a "party" to include "[a]ny person . . . whose substantial interests will be

affected by proposed agency action . . . ." (Other parts of the definition are not applicable to Behrens.) It was held in Agrico Chemical Co. v. Dept. of Environmental Reg., 406 So. 2d 478, 482 (Fla. 2d DCA 1981):

> We believe that 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.

See also Ameristeel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997).

93. It is concluded that Behrens did not prove his standing. Conservative MODFLOW modeling indicated that Boran's proposed modification will not impact the potentiometric surface of Behrens' well at all. The combination of Boran's existing and proposed water use may reduce the potentiometric surface of Behrens' well by up to 0.3 feet. But it is concluded that, notwithstanding that some reasonable assurances must be given "on both an individual and a cumulative basis," the inquiry for purposes of standing is how the proposed modification will affect Behrens' well.

Propriety of Behrens' Purpose

94. Prehearing, Boran moved for attorney's fees and costs against both Behrens and DCAP under Section

120.569(2)(e) and under Section 120.595(1), Florida Statutes. The District did not oppose Boran's motion and joined in the request in their Joint PRO. Behrens filed a motion for attorney's fees and costs against Boran under Sections 120.569(2)(e) and 120.595(1).

95. Jurisdiction will be reserved to determine the requests under Section 120.569(2)(e) because DOAH has jurisdiction to enter the final order under that statute. See Procacci Commercial Realty, Inc. v. Dept. of Health and Rehab. Services, 690 So. 2d 603, 606 (Fla. 1st DCA 1997); Dept. of Health and Rehab. Services v. S.G., 613 So. 2d 1380, 1384-85 (Fla. 1st DCA 1993). Under Section 120.595(1), the procedures (and, to some extent, substantive law) are different.

96. Section 120.595(1) provides in pertinent part:

> (a) The provisions of this subsection are supplemental to, and do not abrogate, other provisions allowing the award of fees or costs in administrative proceedings.
> (b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.
> (c) In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall 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.
> (d) In any proceeding in which the administrative law judge determines that a party participated in the proceeding for an improper purpose, the recommended order shall so designate and shall determine the award of costs and attorney's fees.
> (e) For the purpose of this subsection:
> 1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity.

(Emphasis added.) Since Behrens did not prevail, he clearly is not entitled to prevailing party fees and costs under Section 120.595(1). The only issue under Section 120.595(1) is whether Boran and the District are entitled to fees and costs from DCAP and Behrens.

97. It is concluded that Boran and the District are not entitled to an award against DCAP under Section 120.595(1). Although no order had been entered dropping DCAP as a party, DCAP voluntarily dismissed over a month before Boran first requested sanctions against DCAP under Section 120.595(1). (The District's request was first made over another month later in the Joint PRO.) Since DCAP voluntarily dismissed, no final order will be entered as to DCAP in this proceeding.

That leaves the question whether Behrens participated in this proceeding for an improper purpose.

98. The "definition" of improper purpose in Section 120.569(2)(e) is not identical to the definition in Section 120.595(1)(e)1. Section 120.569(2)(e) provides that signatures on pleadings, motions, or other papers certify that the signatory has read the document and that "based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation."

99. Construing the definition in Section 120.595(1)(e)1 in pari materia with the "definition" in Section 120.569(2)(e), it is concluded that Section 120.595(1) only references the examples of improper purposes cited in Section 120.569(2)(e), but that participation in a proceeding is for an improper purpose under Section 120.595(1) only if it is "primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity." (If such a limitation on the definition is not part of Section 120.569(2)(e), Section 120.595(1)(a) provides that its provisions are "supplemental to, and do not abrogate, other provisions allowing the award of fees or costs in administrative proceedings.")

100. Boran and the District attempted to use the

rebuttable presumption of improper purpose created by Section 120.595(1)(c). But it is concluded that the statutory presumption does not apply in this case. The evidence was that Behrens individually only participated in one previous proceeding involving the District. (DCAP participated in three previous proceedings involving the District, but none of the previous proceedings involved a project on the Boran site.)

101. Case law holds that an objective standard is used to determine improper purpose for the purpose of imposing sanctions on a party or attorney under Section 120.569(2)(e) and predecessor statutes. As stated in Friends of Nassau County, Inc. v. Nassau County, 752 So. 2d 42, 49-51 (Fla. 1st DCA 2000):

> In the same vein, we stated in Procacci Commercial Realty, Inc. v. Department of Health and Rehabilitative Services, 690 So.2d 603 (Fla. 1st DCA 1997): The use of an objective standard creates a requirement to make reasonable inquiry regarding pertinent facts and applicable law. In the absence of "direct evidence of the party's and counsel's state of mind, we must examine the circumstantial evidence at hand and ask, objectively, whether an ordinary person standing in the party's or counsel's shoes would have prosecuted the claim." Id. at 608 n. 9 (quoting Pelletier v. Zweifel, 921 F.2d 1465, 1515 (11th Cir.1991)). See In re Sargent, 136 F.3d 349, 352 (4th Cir.1998) ("Put differently a legal position violates Rule 11 if it 'has "absolutely no chance of success under the existing precedent." ') Brubaker v. City of

> Richmond, 943 F.2d 1363, 1373 (4th Cir.1991)(quoting Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 988 (4th Cir.1987))."[)]
>
> * * *
>
> Whether [predecessor to Section 120.595(1)] section 120.57(1)(b)5., Florida Statutes (1995), authorizes sanctions for an initial petition in an environmental case turns . . . on the question whether the signer could reasonably have concluded that a justiciable controversy existed under pertinent statutes and regulations. If, after reasonable inquiry, a person who reads, then signs, a pleading had "reasonably clear legal justification" to proceed, sanctions are inappropriate. Procacci, 690 So.2d at 608 n. 9; Mercedes, 560 So.2d at 278.

Although there is no appellate decision explicitly extending the objective standard to Section 120.595(1), there does not appear to be any reason why, absent the rebuttable presumption, the objective standard should not be used to determine whether Petitioner's participation in this proceeding was for an improper purpose. See Friends Of Nassau County, Inc., v. Fisher Development Co., et al., 1998 WL 929876 (Fla. Div. Admin. Hrgs.); Amscot Insurance, Inc., et al. v. Dept. of Ins., 1998 WL 866225 (Fla. Div. Admin. Hrgs.).

102. In another appellate decision, decided under a predecessor to Section 120.595(1) before the objective standard was enunciated for cases under Section 120.569(2)(e) and its predecessor statutes, the court in Burke v. Harbor

Estates Ass'n, 591 So. 2d 1034, 1036-1037 (Fla. 1st DCA 1991), held:

> The statute is intended to shift the cost of participation in a Section 120.57(1) proceeding to the nonprevailing party if the nonprevailing party participated in the proceeding for an improper purpose. A party participates in the proceeding for an improper purpose if the party's primary intent in participating is any of four reasons, viz: to harass, to cause unnecessary delay, for any frivolous purpose, [FN1] or to needlessly increase the prevailing party's cost of securing a license or securing agency approval of an activity.
>
> Whether a party intended to participate in a Section 120.57(1) proceeding for an improper purpose is an issue of fact. See Howard Johnson Company v. Kilpatrick, 501 So.2d 59, 61 (Fla. 1st DCA 1987) (existence of discriminatory intent is a factual issue); School Board of Leon County v. Hargis, 400 So.2d 103, 107 (Fla. 1st DCA 1981) (questions of credibility, motivation, and purpose are ordinarily questions of fact). The absence of direct evidence of a party's intent does not convert the issue to a question of law. Indeed, direct evidence of intent may seldom be available. In determining a party's intent, the finder of fact is entitled to rely upon permissible inferences from all the facts and circumstances of the case and the proceedings before him.
>
> FN1. A frivolous purpose is one which is of little significance or importance in the context of the goal of administrative proceedings. Mercedes Lighting & Electrical Supply, Inc. v. Department of General Services, 560 So.2d 272, 278 (Fla. 1st DCA 1990).

103. Burke also is of interest because it involves facts similar in some respects to the facts of this case; in other respects, the facts are different. According to Burke, the hearing officer found:

> 6. Petitioner . . . submitted no evidence to show facts necessary to sustain the pleadings in the Petition. . . . Petitioner offered no expert testimony in support of the pleadings in the Petition. . . . The testimony of fact witnesses called by Petitioner was not material to Petitioner's claims. . . .
> 7. Petitioner consistently demonstrated a lack of knowledge of the applicable law, the proper scope of the formal hearing, and the distinction between argument and evidence. Petitioner repeatedly attempted to establish violations of laws not relevant to the proceeding. . . . Petitioner attempted to establish issues by arguing with witnesses during direct and cross-examination, and by repeatedly making unsworn ore tenus representations of fact.
> 8. There was a complete absence of justiciable issue of either law or fact in this proceeding because petitioner failed to show facts necessary to sustain the pleadings. Petitioner presented no evidence refuting Respondent, Burke's, showing that the modifications required by DER were adequate to assure water quality and the public health, safety, or welfare, or the property of others. Evidence presented by Petitioner was not material to the issue of whether the modifications required by DER were adequate for the purposes of the law applicable to this proceeding. Therefore, Petitioner participated in this proceeding for a frivolous purpose, primarily to cause unnecessary delay, or to needlessly increase the cost of licensing or approval of the proposed activity.

Id. at 1035-1036. (For reasons unknown, there are minor discrepancies between the court's version of the findings and those appearing at Harbor Estates Associates, Inc. v. E. Burke, et al., 1990 WL 749394 (Fla. Div. Admin. Hrgs.), and at DOAH's Internet website, Recommended Order, DOAH Case No. 89-2741, entered April 4, 1990.) In Burke, the Department of Environmental Regulation (predecessor to DEP) accepted the hearing officer's findings as to the petitioner's conduct but reversed the hearing officer's award, holding "that the conduct described in the recommended order cannot, as a matter of law, evince an improper purpose as defined in Section 120.59(6), Florida Statutes." Burke at 1037. The court reversed, holding:

> Despite acceptance of factual findings below, the final order characterizes the conduct of Harbor Estates' representative as mere "incompetent representation." We reject that characterization as not consistent with the hearing officer's findings and, therefore, do not here decide whether incompetent representation alone permits a finding of improper purpose.
>
> * * *
>
> We reject appellees' argument that a qualified lay representative in a Section 120.57 proceeding should be held to a lesser standard of conduct, as distinguished from legal competence, than a licensed attorney. Section 120.62(2), Florida Statutes, permitting qualified lay representatives to represent parties in administrative proceedings, provides no basis for holding such representatives to a lesser standard of conduct. A contrary

> rule would permit a party to insulate itself from the consequences of Section 120.59(6), Florida Statutes, by choosing lay representation.

Id. at 1037-1038.

104. As indicated, the facts in Burke were similar to the facts of this case in some respects but different in other respects. First, Behrens was not represented by a qualified lay person; he participated pro se. (DCAP also was pro se, having been represented by Behrens, one of its officers.) Second, there was no evidence that Behrens repeatedly attempted to establish violations of laws not relevant to the proceeding, argued with witnesses, or repeatedly made unsworn ore tenus representations of fact during direct and cross-examination of witnesses. To the contrary, Behrens willingly conceded some issues. (DCAP voluntarily dismissed.) Third, Behrens testified and offered two exhibits in evidence although his evidence was minimal, inadequate, and insufficient under applicable statutes and rules.

105. In addition, as found, there also were other factors apparently not present in Burke which are relevant to the determination whether Behrens (or DCAP) participated in this proceeding for improper purpose. As found, under the totality of these circumstances, it was not proven that Behrens' participation in this proceeding was for an improper purpose--i.e., primarily to harass or to cause unnecessary

delay or for frivolous purpose or to needlessly increase the cost of Boran's permit modification.

RECOMMENDATION

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

RECOMMENDED that the District enter an order granting Boran's water use permit application number 20009478.005; and denying the motions for attorney's fees and costs under Section 120.595(1), Florida Statutes.

Jurisdiction is reserved to enter a final order on the part of the motions for sanctions under Section 120.569(2)(e).

DONE AND ENTERED this 29th day of July, 2002, in Tallahassee, Leon County, Florida.

_____

J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings

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Filed with the Clerk of the
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this 29th day of July, 2002.

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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 should be filed with the agency that will issue the final order in this case.