

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SOUTHWEST FLORIDA WATER )  
MANAGEMENT DISTRICT, )  
 )  
Petitioner, )  
 )  
vs. ) Case Nos. 02-1116  
 ) 02-1117  
BALM ASSOCIATES, INC., and )  
GOODSON FARMS, INC., )  
 )  
Respondents. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, these matters were heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on June 12, 2002, in Tampa, Florida.

APPEARANCES

For Petitioner: Christine C. Stretesky, Esquire  
Mary Beth Russell, Esquire  
Southwest Florida Water Management  
District  
2379 Broad Street  
Brooksville, Florida 34604-6899

For Respondent: H. Vance Smith, Esquire  
(Balm) Smith, Clark, Delesie, Bierly,  
Mueller & Kadyk  
Post Office Box 2939  
Tampa, Florida 33601-2939

For Respondent: William L. Williams, Jr., Esquire  
(Goodson Farms) Williams and Trayner  
602 Channelside Drive  
Tampa, Florida 33602-5443

STATEMENT OF THE ISSUE

The issue is whether Respondents should be subject to civil penalties and required to submit a Compliance Plan for the reasons stated in the Administrative Complaint and Order filed on January 8, 2002.

PRELIMINARY STATEMENT

This matter began on January 8, 2002, when Petitioner, Southwest Florida Water Management District, issued an Administrative Complaint and Order alleging that between March 1999 and July 2001, Respondents, Balm Associates, Inc. and Goodson Farms, Inc., had made withdrawals of water without having a water use permit, and after obtaining a permit in August 2001, had made withdrawals in excess of the quantity of water authorized by the water use permit. For these violations, the charging document seeks to impose civil penalties and to require Respondents to take corrective action. On January 30, 2002, Balm Associates, Inc. filed its Petition and Request for Hearing. That matter has been assigned DOAH Case No. 02-1116. On January 31, 2002, Goodson Farms, Inc. (through a lay person) filed a paper styled as Revised Petition for Informal Administrative Hearing. That matter has been assigned DOAH Case No. 02-1117.

Both matters were referred to the Division of Administrative Hearings on March 19, 2002, with a request that an Administrative Law Judge be assigned to conduct a hearing. The two cases were later consolidated by Order dated April 1, 2002. On June 2, 2002, the cases were transferred from Administrative Law Judge Charles A. Stampelos to the undersigned.

Petitioner's Motion to Dismiss the Revised Petition for Informal Administrative Hearing filed by Goodson Farms, Inc., was granted by Order dated April 1, 2002, with leave to file an amended petition by April 20, 2002. After Goodson Farms, Inc., failed to make an amended filing, on May 22, 2002, Petitioner filed a Motion to Dismiss With Prejudice on the ground that Goodson Farms, Inc., had failed to file an amended petition as required by the earlier Order. At the final hearing, however, Petitioner requested that a ruling be reserved on its pending Motion to Dismiss until after the conclusion of the hearing.

By Notice of Hearing dated April 3, 2002, a final hearing was scheduled on June 12, 2002, in Tampa, Florida. At the final hearing, Petitioner presented the testimony of Edward Kouadio, staff hydrologist and accepted as an expert, and Michael E. Hare, supervisor for Goodson Farms, Inc. Also, it offered Petitioner's Exhibits 1-4, 6-10, 12, 13, and 15-17,

which were received in evidence.

The Transcript of the hearing was filed on June 28, 2002. Proposed Findings of Fact and Conclusions of Law were filed by Petitioner and Balm Associates, Inc., on July 15, 2002, and they have been considered by the undersigned in the preparation of this Recommended Order. None were filed by Goodson Farms, Inc.

#### FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

a. Background

1. In this enforcement action, Petitioner, Southwest Florida Water Management District (District), proposes to assess civil penalties against, and require a compliance plan from, Respondents, Balm Associates, Inc. (Balm) and Goodson Farms, Inc. (Goodson), on the grounds that from March 1999 through July 2001 they made water withdrawals from certain property in Hillsborough County, Florida, without a water use permit, and after a permit was obtained in August 2001, they continued to exceed the annual average daily withdrawals authorized under the permit through the month of November 2001, or just prior to the preparation and issuance of the Administrative Complaint and Order (Complaint).<sup>1</sup>

2. While not denying that excessive pumpages may have occurred, and that a permit was not obtained until August 2001, Balm points out that it is the owner-lessor of the property and not the consumptive user of the water, and contends that the District has no authority to enforce its rules against, and recover civil penalties from, the non-user of the water. In its request for a hearing, Goodson did not specifically dispute the allegation that it consumed water without a permit, or exceeded the withdrawal limits under the new permit, but contended instead that the limits were unrealistic and should be modified. At the final hearing, however, Goodson disputed the accuracy of the water consumption figures used in the Complaint.

3. The District is the administrative agency charged with the responsibility to conserve, protect, manage, and control water resources within its boundaries and to administer and enforce Chapter 373, Florida Statutes.

4. Balm is a corporation registered to do business in the State of Florida. Its mailing address is 2101 Huntington Avenue, Sarasota, Florida 34232. It owns approximately 220 acres of land in Section 28, Township 31 South, Range 21 East, in Hillsborough County, Florida, which is the site of the alleged wrongdoing.

5. Goodson is a corporation registered to do business in

the State of Florida. Its mailing address is Post Office Box 246, Balm, Florida 33503. Goodson is in the farming business and operates a total of 13 farms, including the farm at issue in this proceeding.

b. Permit Requirements

6. Under Rule 40D-2.041(1), Florida Administrative Code, a water use permit is required whenever total withdrawal capacity from any source or combined sources is greater than or equal to 1,000,000 gallons per day (gpd); annual average withdrawal from any source or combined sources is greater than or equal to 100,000 gpd; or withdrawal is from a well having an outside diameter of 6 inches or more at the surface.

7. Rule 40D-2.351(1), Florida Administrative Code, provides that a permittee must notify the District within 30 days of the sale or conveyance of permitted water withdrawal facilities or the land on which the facilities are located. The same rule also provides that where a permit has been issued to a party whose ownership or legal control of the permitted water withdrawal facilities subsequently ends, the party who assumes control over the facilities may apply to transfer the permit to himself or herself up to the renewal date of the transferor's permit.

8. Finally, Rule 40D-2.351(2), Florida Administrative

Code, provides that until a permit is transferred or a new permit is obtained, the party subsequently controlling the permitted water withdrawal facilities will be in violation of District rules for making withdrawals without the required permit.

c. History of Permits on the Property

9. On September 29, 1989, the District issued Water Use Permit No. 207135.001 (the .001 permit) to James Brown (Brown) and B & T Growers Partnership (B & T) for water withdrawals from one well for agricultural purposes on Balm's property. The .001 permit authorized annual average withdrawals of 102,000 gpd of groundwater for agricultural irrigation.

10. On August 29, 1990, the District adopted new rules applicable to District permits within the Eastern Tampa Bay Water Use Caution Area (ETBWUCA). The .001 permit was within the ETBWUCA, and Brown and B & T were provided with a Notice of Permit Modification and new Permit Conditions. The new conditions became effective November 15, 1990. New Condition No. 5 provided that

By July 31, 1995, all permitted withdrawal points shall be equipped with totalizing flow meters or other measuring devices as approved in writing by the Director, Resource Regulation Department. Such devices shall have and maintain accuracy within five percent of the actual flow installed.

11. On December 14, 1992, the District approved the transfer of the .001 permit from Brown and B & T to B. Kendra Produce.

d. The Unpermitted Water Withdrawals

12. On June 30, 1997, Goodson entered into a two-year agricultural lease with Balm to use a portion of the property, including acreage previously used by B. Kendra Produce. At the time the lease was entered into, neither Respondent applied to the District to have the .001 permit transferred from B. Kendra Produce. It can be reasonably inferred from the evidence that after the first lease expired, the parties continued to execute new lease agreements at least through the time of the hearing.

13. The portion of the property which Goodson leased and farmed is referred to as the "Sweat Loop Farm" and consists of approximately 100 acres. There is one well with an outside diameter of 10 inches at the surface located on the Sweat Loop Farm. The well's total withdrawal capacity is approximately



1,500 gallons per minute (gpm), which is over 1,000,000 gpd. Thus, withdrawals from the well required a water use permit.

14. As noted earlier, Goodson operates a total of 13 farms on approximately 2,500 acres of land. There are approximately 15 wells on all 13 farms, including the Sweat Loop Farm.

15. Michael E. Hare, an irrigation supervisor who is responsible for the irrigation of all 13 of Goodson's farms, installed a total of approximately 8 meters on the farms, including the meter on the Sweat Loop Farm. A totalizing flow meter, which was made by MiCrometer, was installed at the Sweat Loop Farm in June 1997.

16. Mr. Hare acknowledged that he was familiar with MiCrometer meters and would be aware if the MiCrometer flow meter on the Sweat Loop Farm was not functioning properly. Whenever metering devices on the various Goodson farms have malfunctioned in the past, Mr. Hare has taken the malfunctioning meter to a metering company to be fixed.

17. Goodson began irrigating the Sweat Loop Farm in June 1997. Since that time, Goodson has been the sole water user of the well on the farm. In March 1999, Goodson began submitting to the District monthly pumpage reports for the groundwater withdrawals on the Sweat Loop Farm. Although some unmeasured withdrawals presumably occurred prior to March

1999, the Complaint does not identify these as being a violation.

18. Mr. Hare and other supervisors are responsible for collecting the meter readings which go on the monthly pumpage reports and providing them to the District. The information on the reports includes the permit number; the last month's meter reading; the current month's meter reading; the total gallons of water pumped for the current month; the meter total; and the meter factor.

19. To determine the average daily withdrawal on the Sweat Loop Farm, the District relied upon the calculations provided by Goodson as to the total gallons of water pumped for the month and divided this number by 30 days. From March 1999 through July 2001, these quantities were as follows:

<u>MONTH/YEAR</u>	<u>AVERAGE DAILY PUMPAGE</u>
March 1999	531,487
April 1999	No data available
May 1999	364,930
June 1999	0
July 1999	0
August 1999	57,410
September 1999	49,563
October 1999	222,667
November 1999	250,667
December 1999	755,003
January 2000	689,433
February 2000	695,073
March 2000	544,427
April 2000	305,153
May 2000	597,720

June 2000	0
July 2000	62,120
August 2000	86,370
September 2000	123,233
October 2000	602,020
November 2000	409,550
December 2000	145,823
January 2001	957,690
February 2001	890,213
March 2001	391,280
April 2001	467,640
May 2001	617,177
June 2001	0
July 2001	0

20. Under Rule 40D-2.041(1)(a)-(c), Florida Administrative Code, a water use permit was required for Goodson's withdrawals since the well's total withdrawal capacity is approximately 1,500 gpm, which is greater than 1,000,000 gpd; the annual average withdrawals exceeded 100,000 gpd; and the well has an outside diameter of 10 inches at the surface.

21. The withdrawals on the Sweat Loop Farm were not authorized by the .001 permit since neither Goodson or Balm was a permittee under the permit. Even if Goodson could rely on the permit, which it cannot, pumpage data provided by Goodson reflects that the water withdrawals (except for nine months) were in excess of that authorized by the permit.

22. On June 16, 2000, the District mailed a Notice of Non-Compliance for excessive water withdrawals to Goodson. The Notice indicated that if the pumpage values submitted by

Goodson were incorrect, Goodson was to explain the error and provide corrected quantities.

23. On June 26, 2000, the District received a written response to the Notice of Non-Compliance from the superintendent of the Sweat Loop Farm who indicated that the pumpage values were correct, and that the excess usage was due to a "serious drought condition" which had caused a "significant financial hardship on [the] farm." The response also indicated that Goodson would contact Mr. Haftel, owner of Balm, to request that he "revise the water use permit for spring crops."

24. On November 22, 2000, the District mailed Goodson a Notice of Violation indicating that the quantities authorized by the .001 permit were still being exceeded and that the District might seek monetary penalties if Goodson failed to come into compliance within 30 days.

25. Despite the foregoing Notice, Goodson continued to make withdrawals without a permit and in excess of the quantities formerly authorized under the .001 permit until August 2001 when a new permit was finally obtained.

e. Issuance of a New Water Use Permit

26. On January 2, 2001, the District received an application for a General Water Use Permit seeking to modify the .001 permit to increase the withdrawal quantities and to

transfer the permit from B. Kendra Produce to Balm. "Seymour Haftel/ Balm Associates, Inc." was listed as the applicant, and "Donn Goodson" from " Goodson Farms" was listed as the contact or consultant. Mr. Haftel signed the application on behalf of Balm. Goodson assisted Balm in securing the permit for the Sweat Loop Farm because Goodson wanted more water for irrigation purposes.

27. Section 2.1 of the Basis of Review for Water Use Permit Application, adopted and incorporated by reference by Rule 40D-2.091, Florida Administrative Code, provides that "[a]pplications for leased property, except property leased from the District, must be either a joint application in the name of the lessee and the property owner(s) or be only in the name of the property owner(s)."

28. In a Request for Additional Information mailed to Balm on January 29, 2001, the District asked whether Goodson should be listed as co-applicant on the application. On April 27, 2001, Balm submitted a response which indicated that Goodson should not be listed as co-applicant.

29. On August 6, 2001, the District issued Water Use Permit No. 200007135.002 (the .002 permit) to Seymour Haftel/Balm Associates, Inc. authorizing an increase in the annual average withdrawals to 224,300 gpd. The permit had an expiration date of September 29, 2009. The permit contained a

number of special conditions, none of which were challenged by Balm.

f. Unauthorized Withdrawals Under the .002 Permit

30. Special Condition No. 2 of the .002 permit requires in part that the permittee:

continue to maintain and operate the existing non-resettable, totalizing flow meter(s), or other flow measuring device(s) as approved by the Regulation Department Director, Resource Regulation, for District ID No(s), Permittee ID No(s)[,] G-1. Such device(s) shall maintain an accuracy within five percent of the actual flow as installed. Total withdrawal and meter readings from each metered withdrawal shall be recorded on a monthly basis and reported to the Permit Data Section, Records and Data Department, (using District forms) on or before the tenth day of the following month.

31. In the event a permittee chooses not to use a totalizing flow meter, as required by Special Condition No. 2, the District will review information provided by the measuring device's manufacturer to determine if the measuring device would maintain a five percent accuracy as required by the Condition.

32. The meters have to be monitored and calibrated periodically for accuracy. It is the permittee's responsibility to comply with the conditions of the permit, including Special Condition No. 2, which requires the submittal of accurate pumpage reports.

33. Goodson submitted the meter readings on behalf of Balm beginning in September 2001, which covered the withdrawals for the month of August 2001.

34. The District relied on the meter readings submitted by Goodson to determine the annual average daily pumpage calculation for the .002 permit. The calculation is a running 12-month average, whereby each month the annual average daily quantity is recalculated based on the previous 12-month pumpage.

35. The running annual average daily pumpage and percentage of pumpage which exceeded the .002 permit from August 2001 through May 2002 are as follows:

<u>MONTH/YEAR</u> <u>OVERPUMPED</u>	<u>ANNUAL AVERAGE DAILY PUMPAGE</u>	<u>PERCENTAGE</u>
August 2001	378,462	69 percent
September 2001	382,622	71 percent
October 2001	376,687	68 percent
November 2001	383,008	71 percent
December 2001	379,212	69 percent
January 2002	327,343	46 percent
February 2002	321,530	43 percent
March 2002	350,701	56 percent
April 2002	356,013	59 percent
May 2002	338,131	51 percent

36. As the foregoing data reflects, the withdrawals from the Sweat Loop Farm were in excess of that authorized by the .002 permit from August 2001 through May 2002.

CONCLUSIONS OF LAW

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

38. Because Respondents may suffer civil penalties and other disciplinary action, Petitioner bears the burden of showing by clear and convincing evidence that the charges in the Administrative Complaint and Order are true. See, e.g., Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987).

39. Section 373.119(1), Florida Statutes, provides in part that

Whenever the executive director of a water management district has reason to believe that a violation of any provision of this chapter or any regulation promulgated thereunder or permits or order issued pursuant thereto has occurred, is occurring, or is about to occur, the executive director may cause a written complaint to be served upon the alleged violator or violators.

40. Acting under that authority, the District has issued a charging document alleging that (a) Respondents made "withdrawals prior to transferring an existing permit or obtaining a new permit" in violation of Section 373.219(1), Florida Statutes, and Rules 40D-2.041(1) and 40D-2.351, Florida Administrative Code, and (b) Respondents made "withdrawals in excess of the quantity of water authorized by



the .002 Permit" in violation of Section 373.219(1), Florida Statutes, and Rule 40D-2.381, Florida Administrative Code.

41. As to the first charge, Section 373.219(1), Florida Statutes, authorizes the District to "require such permits for consumptive use of water and may impose such reasonable conditions as are necessary to assure that such use is consistent with the overall objectives of the district . . . and is not harmful to the water resources of the area." Rule 40D-2.041(1), Florida Administrative Code, requires a water use permit if any of the following thresholds are exceeded: total withdrawal capacity from any source is greater than 1,000,000 gpd; annual average withdrawal from any source or combined sources is greater than or equal to 100,000 gpd; and withdrawal is from a well having an outside diameter of 6 inches or more at the surface. Finally, Rule 40D-2.351, Florida Administrative Code, generally relates to the transfer of permits and provides that where a permit has been issued to a party whose ownership or legal control of the facilities subsequently terminates, the party subsequently controlling the facilities may apply to transfer the permit to himself or herself up to the renewal date of the transferor's permit. Subsection (2) of the rule also contains a prohibition against any water withdrawals from a well until a permit is

transferred or a new permit is obtained.

42. As to the second charge, Rule 40D-2.381, Florida Administrative Code, enumerates the standard conditions found in all water use permits, including one in paragraph (3)(q) that "[a]ll permits issued pursuant to these Rules are contingent upon continued ownership or legal control of all property on which pumps, wells, diversions or other water withdrawal facilities are located." Another condition in paragraph (3)(c) requires that the permittee "not deviate from any of the terms or conditions of the permit [including the total quantities of water authorized under the permit] without written approval by the District."

43. Balm does not dispute its ownership of the property, the fact that overpumpage occurred on the Sweat Loop Farm, or that Goodson has violated the law. Rather, in its Proposed Findings of Fact and Conclusions of Law, Balm contends that the District lacks specific statutory authority to "require Balm[,] a non-user of the water withdrawal facility[,] to comply with the permit conditions required by Rule 40D-2.381." More specifically, it disputes the validity of Rule 40D-2.041, Florida Administrative Code, which requires a permit before withdrawals of water may occur, and Section 2.1(1) of the Basis of Review, which requires that "[a]pplications for leased property . . . must be either a joint application in

the name of the lessee and the property owner(s) or be only in the name of the property owner(s)."

44. Balm voluntarily applied for the .002 permit for the purpose of increasing water quantities for its lessee, Goodson. Although Balm was provided with notice of its rights to challenge the .002 permit, including any condition that it disagreed with, it did not request a hearing. Thus, Balm has waived its right to challenge any aspect of the permit.

45. At the time Balm was issued its permit, it was subjected to liability for any violations of the terms and conditions of the permit, including Standard Condition No. 3 which prohibits the permittee from deviating from "any of the terms or conditions of this permit without written approval by the District." Thus, Balm was responsible for complying with the condition that withdrawals not exceed the "current permitted quantities" of 224,300 gpd. By failing to comply with this provision, and as the permittee having "continued ownership or legal control of [the] property," Balm violated the terms of the permit and is subject to this disciplinary action. Accordingly, Balm is liable for any excessive withdrawals of water under the .002 permit, as charged in the Complaint.<sup>2</sup>

46. Balm has not complied with the provisions which govern challenges of an agency rule. See Section 120.56(1),

Florida Statutes (2001). Therefore, the undersigned lacks authority to consider the contention that an administrative rule or a portion of the Basis of Review are an invalid exercise of delegated legislative authority.

47. By clear and convincing evidence, Petitioner has shown that the withdrawals of water on the Sweat Loop Farm required a water use permit; that Goodson was in control of the water withdrawal facility located on the farm between June 1997 through July 2001, or prior to the issuance of permit .002; and that neither Goodson or Balm possessed a permit for withdrawals during this time. The evidence also clearly and convincingly demonstrates that the meter readings submitted by Goodson beginning in March 1999 and continuing through July 2001 were accurate and that all water withdrawals during that time period (except for the months of June and July 1999, June 2000, and June and July 2001 when none occurred) were not authorized. However, any withdrawals which may have occurred prior to March 1999, while unlawful, are not cited as a basis for disciplinary action.

48. Accordingly, it is concluded that Goodson is liable for withdrawing groundwater without a permit from March 1999 through July 2001 (except for the five months noted above), in violation of Section 373.219(1), Florida Statutes, and Rules 40D-2.041(1)

and 40D-2.351(2), Florida Administrative Code, as charged in the Complaint.

49. Like Balm, and as the lessee of the property, Goodson is also liable for withdrawing groundwater in excess of that authorized under the .002 permit from August 2001 through May 2002, in violation of Section 373.219(1), Florida Statutes, and Rule 40D-2.381(3)(c), Florida Administrative Code, as charged in the Complaint.

50. In its Proposed Recommended Order, Petitioner recommends that Balm and Goodson be required to submit to the District within fourteen days after entry of a final order an acceptable written plan describing how Respondents shall achieve full compliance with the .002 permit. However, no civil penalties are recommended by the District at this time. This recommendation tracks verbatim the suggested corrective action in paragraph 17 of the the Complaint. While this penalty appears to be relatively light given the repeated nature of the violations over a 3-year period, it has been recommended below.

51. In light of the above conclusions, the District's Motion to Dismiss with Prejudice Goodson's Revised Petition for Informal Administrative Hearing is rendered moot.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions

of Law, it is

RECOMMENDED that the Southwest Florida Water Management District enter a final order determining that Respondents are guilty of the charges in its Administrative Complaint and Order except as concluded in paragraph 48 above and endnote 2 below; that Respondents be required to submit an acceptable written plan (Compliance Plan) to the District for its consideration and approval within fourteen days after entry of the final order; that the Compliance Plan describe how Respondents shall achieve full compliance with the .002 permit; that the Compliance Plan include reductions in withdrawals, water conservation measures, and development and utilization of alternative resources; that the Compliance Plan establish deadlines for implementation and completion of corrective actions; that full compliance be achieved within 120 days after entry of the final order; and that any failure of Respondents to comply with any provision of the Compliance Plan shall constitute a violation of the final order.

DONE AND ENTERED this 30th day of July, 2002, in Tallahassee, Leon County, Florida.

---

DONALD R. ALEXANDER  
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 30th day of July, 2002.

ENDNOTES

1/ At hearing, and without objection, Petitioner introduced evidence showing that withdrawals continued to exceed the permit limits through the month of May 2002.

2/ Although the Complaint alleges that Balm is also guilty of withdrawing water without a permit prior to the issuance of the .002 permit, the District has abandoned that charge in its Proposed Recommended Order.

COPIES FURNISHED:

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

Christine C. Stretesky, Esquire  
Southwest Florida Water Management District  
2379 Broad Street  
Brooksville, Florida 34604-6899

William L. Williams, Jr., Esquire  
Williams & Traynor  
602 Channelside Drive  
Tampa, Florida 33602-5443

H. Vance Smith, Esquire  
Smith, Clark, Delesie, Bierly,  
Mueller & Kadyk  
Post Office Box 2939  
Tampa, Florida 33601-2939

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.