STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DANNY J. SUGGS, DEBORAH SUGGS, GARY D. SUGGS, AMBER SUGGS, JOSEPH KRUEGER, and JOANN SUGGS-KRUEGER,	)	
Petitioners,	)	
vs.	)	Case No. 08-3530
SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT,	)	
Respondent.	)	

RECOMMENDED ORDER

A final administrative hearing was held in this case on January 13 and 14, 2009, in Bushnell, Florida, and by telephone on January 16, 2009, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

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and

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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioners' activities on their property in Sumter County, which impacted 38 acres of wetlands, are exempt under Section 373.406(2)-(3), Florida Statutes,[1] from environmental resource permit (ERP) regulation.

PRELIMINARY STATEMENT

This case has a long and tortured history of related litigation, at the end of which Petitioners applied for the exemptions at issue. The Southwest Florida Water Management District (SWFWMD, or District) denied the exemption requests and referred the matter to DOAH for a hearing. Based on the litigation history, the District moved to relinquish jurisdiction based on the law of the case and collateral estoppel. An Order Denying Motion to Relinquish Jurisdiction was entered on September 12, 2008,[2] and the case proceeded to a final hearing on January 13, 2009.

At the final hearing, the District's Request for Official Recognition of 24 documents reflecting part of the litigation history was granted. Petitioners called Danny J. Suggs, Gary Bethune, P.E. (an agricultural engineer), and Gary D. Suggs. Petitioners' Exhibits 1-25 were admitted in evidence. The District called Leonard Bartos, Mark Luchte, P.E. (an agricultural engineer), Jeffrey Whealton, and Harry Clark Hull. SWFWMD Exhibits 1, 3, 11, 12, 16, 18, 19, 20, 24, and 25 were admitted in evidence. In rebuttal, Petitioners re-called

Gary Bethune and called Charles Lynn Miller, P.E. (a civil engineer), whose testimony was heard by telephone on January 16, 2009.

After presentation of evidence, the District ordered a Transcript of the final hearing, and the parties were given ten days from the filing of the Transcript in which to file proposed recommended orders (PROs). The Transcript was filed (in five volumes) on February 4, 2009, making PROs due February 16, 2009. The timely PROs have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioners hold title to approximately 180 acres of agricultural land north of State Road 44 in Sumter County.[3] Danny J. Suggs and his wife purchased the property in 1997 and 1998 to start to fulfill his "dream" to build multiple residences for himself and his wife and for members of his family on the property and to raise cattle and plant a pecan grove and retire from his construction and roofing contracting businesses. His concept was for the real estate to be held in a family trust.

2. When Mr. Suggs began to implement his plans, he learned that Sumter County required that the building permit for each residence be on a separate parcel of at least five acres in size. For that reason, he gave his family members five-acre deeds for each residence he wanted to build. However, while they had deeds for their lots, none of the family paid more than nominal

consideration, paid for costs of development or construction, or had any actual control of Mr. Suggs' plans for the property.

3. Soon after buying the property, Mr. Suggs bought a few head of cattle that were allowed to roam and graze on the property. He then began to develop the property. He dug canals, ditches, and ponds, and constructed fill roads. As part of his surface water management system, Mr. Suggs constructed an earthen berm along part of the western perimeter of the property to keep water from flowing off his property and into Rutland Swamp and Creek, which are waters of the State. Some of Mr. Suggs' land alterations were in the 100-year floodplain, including an encroachment into land owned by a neighbor. Mr. Suggs testified that he has the neighbor's permission, but he has no written permission for the encroachment.

4. Mr. Suggs' activities on the property impacted approximately 38 acres of wetlands. In December 2002, the District cited Petitioners for dredging and filling wetlands on the property without a permit. Extensive litigation ensued, during which Petitioners took the position that they were exempt under Section 373.406(2)-(3), Florida Statutes--the "agricultural" and the "agricultural closed system" exemptions, which are set out in Conclusion 18. Petitioners continued development and construction activities until enjoined by the circuit court in March 2004.

5. By the time of the court's injunction, Mr. Suggs had completed about 80 percent of his planned surface water management system for the property. Mr. Suggs intended his design to retain all surface on the property in a 50-year, 24-hour storm event. However, it was not proven that Mr. Suggs' design would have accomplished his intended purpose.

6. By the time of the court's injunction, Mr. Suggs also had built six large residences for family members and dug ditches around each residence for drainage. He says he has plans to build another eight identical residences for other family members.

7. In May 2004, Petitioners retained Gary Bethune, an agricultural engineer, to attempt to design an agricultural closed system that would be exempt under Section 373.406(3), Florida Statutes, for presentation in a hearing before the state circuit court. Mr. Bethune completed his design in June 2004.

8. Mr. Bethune's design includes an earthen berm to retain all surface on the property in a 100-year, 24-hour storm event. It also incorporates a spillway to discharge excess water into the Rutland Swamp and a covered conveyance structure to allow water from the eastern side of the property to pass through without commingling with surface water on the property and to discharge into Rutland Swamp on the western side of the property.

9. Mr. Bethune's design will not retain surface water on the property in the event of a storm exceeding the 100-year, 24-

hour design storm; it also will not necessarily retain all surface water on the property in the event of multiple storm events not exceeding the 100-year, 24-hour storm event.

10. Mr. Bethune's design does not address groundwater. Groundwater will flow under the property towards Rutland Swamp and Creek. Surface water on the property, together with contaminants from cattle grazing on the property and fertilizer and pesticides used growing pecan trees, will percolate into the ground, mix with the groundwater, and flow into Rutland Swamp and Creek.

11. Mr. Bethune's design is not appropriate or reasonable for either a cattle ranch or a pecan grove. It will cause the property to flood during the design 100-year, 24-hour storm and in various combinations of lesser storms. A bona fide cattle ranch is not designed to flood during the wet season. Similarly, a bona fide pecan grove is not designed to flood during the wet season.

12. During and after Mr. Suggs' development and construction activities, his cattle have continued to roam freely around the property. However, besides the inappropriateness and unreasonableness of Mr. Bethune's design for a cattle ranch, Mr. Suggs' other activities also are inappropriate and unreasonable for a bona fide cattle ranch. The ponds, canals, and ditches he dug are much deeper and have banks much steeper than a bona fide cattle ranch would have. They are so deep and

steep that cattle will have great difficulty using them for drinking water. In addition, fill from the extraordinarily deep ponds, canals, and ditches as well as fill Mr. Suggs had delivered from offsite has been spread on the property to a thickness that has reduced the amount of cattle forage on the property, instead of increasing and improving it, as would occur on a bona fide cattle ranch.

13. Besides the inappropriateness and unreasonableness of Mr. Bethune's design for a pecan grove, there are no pecan growers anywhere near Petitioners' property. Even if feasible to grow pecans for profit on the property, there was no evidence that any alteration of the property would be appropriate or reasonable to plant a pecan grove. Although there is an area of upland where Mr. Suggs says he wants to plant pecan trees, not a single pecan tree has been planted yet (as of the time of the final hearing). In addition, there was no evidence that the land designated for a pecan grove would not be needed for the eight additional residences Mr. Suggs says he plans to build on the property.

14. The primary purpose of Mr. Suggs' surface water management system is not for agricultural purposes, or incidental to agricultural purposes. Rather, the primary purpose is to impound and obstruct the flow of surface water to facilitate the construction of the residences on his property--the six already built and another eight he plans to build.

15. Mr. Suggs refers to the residences he has built and plans to build as family residences to be owned by a family trust, the six residences already built are now for sale at an asking price of a million dollars each.

CONCLUSIONS OF LAW

16. It is clear from the facts of this case, and from the related litigation history, that the District has jurisdiction over this matter. It also is clear that DOAH has jurisdiction under Sections 120.569 and 120.57, Florida Statutes.

17. Petitioners have the burden to prove that their activities are exempt from ERP regulation under Chapter 373, Part IV, Florida Statutes. See Hough v. Menses, 95 So. 2d 410, 412 (Fla. 1957); Key v. Trattman, 959 So. 2d 339, 345 (Fla. 1st DCA 2007).

18. Section 373.406, Florida Statutes, includes the only two exemptions asserted by Petitioners[4]:

> (2) Nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to affect the right of any person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture to alter the topography of any tract of land for purposes consistent with the practice of such occupation. However, such alteration may not be for the sole or predominant purpose of impounding or obstructing surface waters.
> (3) Nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to be applicable to construction, operation, or maintenance of any agricultural closed system. However, part II of this chapter shall be applicable as to the taking and discharging of water for

> filling, replenishing, and maintaining the water level in any such agricultural closed system. This subsection shall not be construed to eliminate the necessity to meet generally accepted engineering practices for construction, operation, and maintenance of dams, dikes, or levees.

These exemptions are commonly referred to as the "agricultural exemption" and "agricultural closed system exemption," respectively.

19. The "agricultural exemption" can be claimed by "a person engaged in the occupation of agriculture, . . . for purposes consistent with the practice of such occupation," so long as the alteration is not "for the sole or predominant purpose of impounding or obstructing surface waters." In this case, none of the Petitioners are engaged in the occupation of agriculture, their activities are not consistent with the practice of agriculture, and their sole or predominant purpose is to impound or obstruct surface waters. For these reasons, the "agricultural exemption" clearly does not apply.

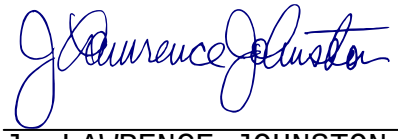
20. The "agricultural closed system exemption" also clearly does not apply to Petitioners' surface water management system, either as it now exists, as Mr. Suggs originally designed it, or as Mr. Bethune subsequently redesigned it. It is not an agricultural system, and it is not a closed system.

RECOMMENDATION

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

RECOMMENDED that the District enter a final order that Petitioners' activities on their property are not exempt from ERP regulation.

DONE AND ENTERED this 19th day of February, 2009, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of February, 2009.

ENDNOTES

1/ Unless otherwise indicated, statutory citations are to the 2008 Florida Statutes.

2/ The litigation history is recited in this Order.

3/ The property is in Section 2, Township 19 South, Range 21 East.

4/ During the course of these proceedings, Petitioners also asserted an exemption under Rule 40D-4.051(7), but they dropped that assertion during and after the final hearing. In any event,

the evidence clearly did not prove entitlement to an exemption under the Rule since it only applies to "a single family dwelling unit, duplex, triplex or quadruplex that is not part of a larger common plan of development or sale and does not involve wetlands or other surface waters."

COPIES FURNISHED:

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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.