STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OUT OF BOUNDS, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-2683
	)	
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondent.	)	
	)	
ROBERT E. MCCUNE AND HERNANDO SSK, LLC,	)	
	)	
Petitioners,	)	
	)	
vs.	)	Case No. 10-2987
	)	
OUT OF BOUNDS, INC., AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondents.	)	
	)	

RECOMMENDED ORDER

On August 23-24, 2011, a final administrative hearing was held in this case in Temple Terrace before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner Out of Bounds, Inc.:

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STATEMENT OF THE ISSUE

The issue in this case is whether the Department of Environmental Protection (DEP) should issue a permit to Out of Bounds, Inc. (Out of Bounds, or applicant), to construct, operate, and close a construction and demolition debris disposal facility (C&D facility) in Hernando County.

PRELIMINARY STATEMENT

Out of Bounds applied for the permit on September 12, 2008. DEP made four requests for additional information. Out of Bounds responded, and the application was complete on September 3, 2009. On February 19, 2010, DEP gave notice of its intent to issue the permit.

DEP granted extensions of time to Robert McCune and Paige Cool to file a petition for a formal administrative hearing. On April 20, 2010, DEP withdrew the previous notice of intent and gave notice of intent to deny the permit because there were two potable water wells within 500 feet of the proposed disposal area and because no liner was proposed.

Out of Bounds petitioned for a formal administrative hearing on the denial, which was referred to DOAH and given Case No. 10-2683. Robert McCune and Paige Cool also filed a petition to ensure that the denial was not reversed. DEP also referred the McCune/Cool petition to DOAH, and it was given Case No. 10-2987. At DOAH, the cases were consolidated and scheduled for hearing on August 30, 2010.

On July 27, 2010, DEP filed an unopposed Request for Official Recognition regarding an amendment to section 403.707(9)(b), Florida Statutes, that was enacted during the 2010 regular legislative session and became effective on July 1, 2010. Before the amendment, the statute provided that liners and leachate collection systems were not required for C&D facilities unless DEP demonstrated that they were necessary to prevent violations of groundwater standards and criteria. As amended, the statute makes liners and leachate collection systems mandatory for all C&D facilities, unless the applicant

demonstrates that the facility will not be expected to result in violations of groundwater standards and criteria.

On August 16, 2010, the cases were placed in abeyance until February 28, 2011, to give Out of Bounds time to decide whether to modify its proposal to include a liner and for the parties to determine whether the matter could be settled. At the end of the abeyance period, the parties reported that the application was not being modified and the matter was not being settled. The final hearing was rescheduled for August 22-24, 2011.

On May 2, 2011, Hernando SSK, LLC (Hernando SSK), was substituted for Paige Cool, who had died.

The parties filed a Pre-Hearing Stipulation on August 15, 2011. At the final hearing, Joint Exhibits 1-18 were admitted in evidence. Out of Bounds then called: John Morris, P.G., the Department's Southwest District Solid Waste Professional Geologist; Susan Pelz, P.E., the Department's Southwest District Solid Waste Program Administrator; Michael Hardy, P.E.; Jack Hamilton, P.E.; Randy Yoho, owner of the proposed C&D facility site and president of Out of Bounds; and Eric Eshom, P.G., recently retired from employment with the Southwest Florida Water Management District. Out of Bounds had its Exhibits 10, 22, 30, 33, 39 (for non-hearsay purposes only), 49, 53, and 54 admitted in evidence.

The Department called: Susan Pelz; John Morris; brothers Daniel and Robert Knox (who own property near the proposed C&D facility); and Robert McCune. The Department had its Exhibits 1-7 and 9-10 admitted in evidence.

Robert McCune and Hernando SSK called: David Belcher (a principal of Hernando SSK); and Jerry Kubal, P.G., as an expert in geology. McCune and Hernando SSK also had their Exhibits G, M, T, X, MM, and QQ admitted into evidence.

A Transcript of the final hearing was filed on October 14, 2011. (The Transcript erroneously uses a circuit court case number instead of the DOAH case number.) On November 4, 2011, the parties filed proposed recommended orders, which have been considered.

FINDINGS OF FACT

1. On September 8, 2008, Out of Bounds applied to DEP for a permit to construct, operate, and close an unlined C&D facility on 26 acres located at 29251 Wildlife Lane, Brooksville, Hernando County, Florida, to be known as the Croom C&D Debris Landfill and Recycling Facility. There were four requests by DEP for additional information, which was provided, and the application was complete on September 3, 2009.

2. In 1994, a previous owner of the property was issued a permit to construct, operate, and close an unlined C&D facility on the property. That owner did not proceed with construction,

and the permit expired in 1999. The Out of Bounds application was for a new permit, not for the renewal of an existing permit.

3. Robert McCune owns property adjacent to the proposed C&D facility. He and his wife reside on the property, keep horses in stables on the property, and use the property for horseback riding business, which includes hosting public horseback riding events.

4. Hernando SSK was formed by David Belcher and one or more others to continue the business being operated by Paige Cool when she died during this proceeding. The business is conducted on ten acres of property Cool owned approximately one mile west of the proposed C&D facility. Belcher is one of two co-personal representatives of Cool's estate. Belcher and his wife hold a mortgage on the property. When the estate is finalized, the Belchers plan to assign their mortgage to Hernando SSK. It is not clear who will own the property after the estate is finalized, or how Hernando SSK will be authorized to continue the business on the property.

5. Western pleasure and trail-riding horses are boarded on the Cool property, which is known as At Home Acres. The business also has access to 20 adjoining acres to the east, which are used for grazing. Access to the horseback riding trails in the Withlacoochee State Forest is conveniently located just across Wildlife Lane from the property, to the north. A

manager resides in a double-wide trailer on the property, and another trailer and a barn to the east of it are leased out. There is a potable water well on the property, which is the source of drinking water for the manager and lessees.

Well Setback

6. In the application process, Out of Bounds disclosed two potable water wells within 500 feet of the proposed landfill disposal area. The application provided that those wells would be converted to non-potable use.

7. Out of Bounds did not disclose the existence of a third potable water well, on property owned by Daniel Knox, which is within 500 feet of the proposed landfill disposal area.

8. When the Knox well was brought to the attention of DEP, Out of Bounds admitted that the well was permitted for potable use but took the position that it was not for potable use because it was not in use, was not connected to a source of electricity, and appeared to be abandoned.

9. Daniel Knox and his brother, Robert Knox, had the Knox well dug and permitted in 1979 in anticipation of using it as the source of potable water for a residence to be built on the property for their parents and sister. The Knoxes have not yet built a residence on the property, but it still is their intention to do so and to use the well as the source of potable water. Since its construction, the well had been maintained and

operated periodically using a gasoline-powered generator so that it will be ready for use when needed.

10. During the application process, Out of Bounds also did not disclose the existence of a fourth potable water well within 500 feet of the proposed landfill disposal area on property once owned by Larry Fannin and now owned by his daughter and son-in-law, Robert McCune. The McCune well was permitted and installed in mid-2005 while the sale of the land from Fannin to the McCunes was pending. The intended purpose of the well was to provide potable water for the use of the McCunes when they started to reside on the property. Despite this intent, and unbeknownst to the McCunes, Fannin had the well permitted as an irrigation well.

11. In mid-2008, the McCunes began to reside on their property. At first, they resided in a mobile home. They ran pipes from the well to the mobile home to provide drinking water. Eventually, later in 2008, they began construction of a residence on the property and ran pipes from the well to the house to provide drinking water to the house. The well was being used for drinking water before the Out of Bounds application was complete. (They also use water from the well from time to time for irrigation purposes--i.e., when they host horseback-riding events on weekends, they truck water from the

well to their horseback-riding arena to apply to the ground to control dust.)

12. Groundwater flows from the disposal area of the proposed landfill to the west and southwest. The Knox and McCune wells are down-gradient of the groundwater flow from the proposed disposal area.

13. Out of Bounds represented at the hearing that it would accept a permit condition that no C&D debris, but only clean debris, would be disposed within 500 feet of the Knox and McCune wells. See Fla. Admin. Code R. 62-701.200(15)-(16) and (24). However, there was no evidence of new designs, plans, or operations that would be used to meet such a permit condition.

Liner and Leachate Collection

14. Existing unlined C&D facilities in the Southwest District report various parameters that exceed groundwater quality standards and criteria. These include arsenic, benzene, iron, aluminum, nitrate, ammonia, vinyl chloride, methylene chloride, 3- and 4-methyl phenols, sulfate, and total dissolved solids (TDS). Arsenic and benzene are primary (health-based) groundwater quality standards. The others are secondary standards that relate to taste, odor, and aesthetics.

15. The likely source of the reported arsenic violations in the Southwest District is wood treated with chromate copper arsenate (CCA). See Fla. Admin. Code R. 62-701.200(11). Out of

Bounds proposes to not accept CCA-treated wood and to use a trained "spotter" to exclude CCA-treated wood from the landfill. This is an appropriate measure to prevent arsenic violations, and is now required for C&D facilities. See Fla. Admin. Code R. 62-701.730(7)(d), (8), and (20). It was not clear from the evidence whether the C&D facilities in the Southwest District with arsenic violations accepted CCA-treated wood. Even if they did, the operational plan proposed by Out of Bounds to exclude CCA-treated wood and to use a trained spotter is not a guarantee that no CCA-treated wood will enter the landfill.

16. A C&D facility would not be expected to dispose of material that would result in benzene contamination. The reported benzene violations suggest that unauthorized material contaminated with benzene nonetheless makes its way into C&D facilities in the Southwest District. The evidence was not clear whether a trained spotter was used at those facilities. Whether or not a spotter was used at those facilities, having a trained spotter would not guarantee that no benzene-contaminated material will enter the landfill proposed by Out of Bounds.

17. Out of Bounds suggested that ammonia violations result from C&D facilities accepting yard trash. However, there was no evidence of a connection between acceptance of yard trash and ammonia violations.

18. The operational plan proposed by Out of Bounds to "cover as you go" is the accepted best practice to control hydrogen sulfide odor, which comes from wet drywall. Out of Bounds suggested that its cover plan would prevent any sulfate violations, but there was no evidence to prove it.

19. There was no evidence as to whether the C&D facility proposed by Out of Bounds would be substantially different from the other existing C&D facilities in DEP's Southwest District. Absent such evidence, Out of Bounds did not provide reasonable assurances that its proposed facility would not cause groundwater quality violations.

20. The site for the C&D facility proposed by Out of Bounds is internally drained. There are no surface waters onsite or within a mile of the site. There was no evidence of a surficial aquifer above the Floridan aquifer. Rainfall entering the Out of Bounds property migrates downward into the Floridan aquifer. Once in the aquifer, there is a horizontal component of groundwater water flow in a generally southwest direction, towards the Knox and McCune wells. Contaminated leachate from the proposed C&D facility would migrate with the groundwater.

21. Out of Bounds suggests that a thick clay layer under the site of its proposed facility would prevent the downward migration of groundwater into the Floridan aquifer. There are several reasons why the clay layer does not provide the

reasonable assurance of a liner that contamination from the proposed landfill would not reach the Floridan aquifer.

22. Clay is much more permeable than a geomembrane meeting DEP's specifications for use as a liner. The clay on the proposed site is on the order of at least a thousand times more permeable. (Out of Bounds appeared to confuse the permeability of such a geomembrane with the allowable permeability of the geosynthetic clay layer or compacted clay layer underlying the geomembrane. Cf. Fla. Admin. Code R. 62-701.730(4)(f).)

23. In the application process, Out of Bounds relied on the clay layer for purposes of sinkhole prevention and mitigation, not for reasonable assurance that no liner was needed. The limestone formation underlying the site is highly variable, with numerous pinnacles; for that reason, the thickness of the clay layer also is highly variable, making it difficult to excavate the proposed landfill with complete assurance that the clay layer would not be penetrated. To provide reasonable assurance for purposes of sinkhole prevention and mitigation, Out of Bounds proposed to leave or create a clay layer at least six feet thick underlying the bottom of the proposed landfill.

24. Because the site is in an area of high recharge to the Floridan aquifer and drains entirely internally, the clay layer alone does not provide reasonable assurance that there will be

no downward migration of contaminated groundwater to the Floridan aquifer. Reasonable assurance requires a liner and leachate collection system.

CONCLUSIONS OF LAW

Standing

25. In addition to the administrative agency making the decision (in this case, DEP), and under section 120.52(13)(a), Florida Statutes, a "specifically named" person whose substantial interests are being determined by the agency in the proceeding (in this case, the applicant, Out of Bounds), section 120.52(13)(b) provides that the term "party" includes "[a]ny other person . . . whose substantial interests will be affected by proposed agency action . . . ."

26. In order for a third party to have standing as a petitioner to challenge agency action in an administrative proceeding, the evidence must prove that the petitioner has substantial rights or interests that reasonably could be affected by the agency's action. See St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1055 (Fla. 5th DCA 2011); Palm Beach Cnty. Envtl. Coal. v. Fla. Dep't of Envtl. Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009); Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1082 (Fla. 2d DCA 2009); Reily Enters., LLC v. Fla. Dep't of Envtl. Prot., 990 So. 2d 1248, 1251 (Fla. 4th DCA

2008). See also § 403.412(5), Fla. Stat. ("A citizen's substantial interests will be considered to be determined or affected if the party demonstrates it may suffer an injury in fact which is of sufficient immediacy and is of the type and nature intended to be protected by this chapter. No demonstration of special injury different in kind from the general public at large is required. A sufficient demonstration of a substantial interest may be made by a petitioner who establishes that the proposed activity, conduct, or product to be licensed or permitted affects the petitioner's use or enjoyment of air, water, or natural resources protected by this chapter.")

27. Robert McCune has substantial rights or interests that reasonably could be affected by DEP's action on the application filed by Out of Bounds. It is not clear from the evidence that Hernando SSK has any substantial rights or interests that reasonably could be affected by the agency's action in this case. McCune proved standing; Hernando SSK did not.

Burden of Proof

28. A permit applicant has the burden to prove, by a preponderance of the evidence, that it is entitled to the requested permit. See Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981). See also Fla. Admin. Code R. 62-4.070(1) ("[a] permit shall be issued to the

applicant upon such conditions as the Department may direct, only if the applicant affirmatively provides the Department with reasonable assurance . . . that the construction, expansion, modification, operation or activity of the installation will not discharge, emit, or cause pollution in contravention of Department standards or rules.").

Pertinent Criteria

29. Florida Administrative Code Rule 62-701.300 provides in pertinent part:

> (2) Siting. Unless authorized by a Department permit or site certification in effect on May 27, 2001, or unless specifically authorized by another Department rule or a Department license or site certification based upon site-specific geological, design, or operational features, no person shall store or dispose of solid waste:
>
> * * *
>
> (b) Within 500 feet of an existing or approved potable water well unless storage or disposal takes place at a facility for which a complete permit application was filed or which was originally permitted before the potable water well was in existence. This prohibition shall not apply to any renewal of an existing permit that does not involve lateral expansion, nor to any vertical expansion at a permitted facility; . . . .

The prohibition applies in this case.

30. Rule 62-701.200(86) defines "potable water well" as "any excavation that is drilled or bored, or converted from non-

potable water use, when the intended use of such excavation is for the location and acquisition of ground water that supplies water for human consumption." The McCune and Knox wells are potable under this definition and are within 500 feet and down-gradient of the proposed disposal area.

31. Section 403.707(9)(b), which became law on July 1, 2010, provides:

> The department shall require liners and leachate collection systems at individual disposal units and lateral expansions of existing disposal units that have not received a department permit authorizing construction or operation prior to July 1, 2010, unless the owner or operator demonstrates, based upon the types of waste received, the methods for controlling types of waste disposed of, the proximity of the groundwater and surface water, and the results of the hydrogeological and geotechnical investigations, that the facility is not expected to result in violations of the groundwater standards and criteria if built without a liner.

Out of Bounds failed to make the required demonstration and did not provide reasonable assurance that its proposed facility would not result in groundwater quality violations.

32. The prior version of the statute prohibited DEP from requiring a liner unless it demonstrated that the facility is expected to result in violations of the groundwater standards and criteria if built without a liner. Out of Bounds argues that the former version of the statute should govern and that

DEP should be required to prove that a liner is needed. That argument is rejected. See Lavernia v. Dep't of Prof. Reg., Bd. of Med., 616 So. 2d 53, 54 (Fla. 1st DCA 1993)(the law in effect at the time of the agency's final decision governs unless the agency unreasonably delays acting on the application until after the effective date of the new law).

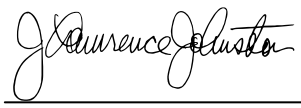
33. The applicant's reliance on Cimini, et al. v. Department of Environmental Protection and Lake Environmental Resources, LLC, Case No. 06-2005 (DEP Dec. 13, 2006; DOAH Nov. 8, 2006), is misplaced. In that case, decided under the prior version of the statute, DEP issued a permit for an unlined C&D facility within 500 feet of a potable water well; however, there was a consistent, thick clay layer under the landfill, and the well was upgradient, which provided reasonable assurance that the Floridan aquifer would not be contaminated by the proposed landfill, as well as site-specific geological, design, and operational features that protected the well from contamination. See Fla. Admin. Code R. 62-701.300(2).

RECOMMENDATION

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

RECOMMENDED that DEP deny the application for a C&D facility made by Out of Bounds.

DONE AND ENTERED this 8th day of December, 2011, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 8th day of December, 2011.

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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.