

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

HENRY C. ROSS, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 10-10214  
 )  
 CITY OF TARPON SPRINGS AND )  
 SOUTHWEST FLORIDA WATER )  
 MANAGEMENT DISTRICT, )  
 )  
 Respondents. )  
 \_\_\_\_\_ )

AMENDED RECOMMENDED ORDER

This case was heard by David M. Maloney, Administrative Law Judge of the Division of Administrative Hearings, on January 18, 2011, in Tarpon Springs, Florida. A Recommended Order was entered on April 14, 2011. Immediately after the entry of the Recommended Order, Petitioner filed a Proposed Recommended Order. This Amended Recommended Order is entered after consideration of Petitioner's Proposed Recommended Order.

APPEARANCES

For Petitioner: Henry C. Ross, pro se  
1020 South Florida Avenue  
Tarpon Springs, Florida 34689

For Respondent City of Tarpon Springs:

Thomas J. Trask, Esquire  
Frazer, Hubbard, Brandt, Trask  
& Yacavone, LLP  
595 Main Street  
Dunedin, Florida 34698

For Respondent Southwest Florida Water Management District:

Adrienne E. Vining, Esquire  
Southwest Florida Water  
Management District  
2379 Broad Street  
Brooksville, Florida 34604-6899

BACKGROUND

The City of Tarpon Springs (the "City") applied to the Southwest Florida Water Management District (the "District" or "SWFWMD") for a Water Use Permit (the "WUP") by submitting Application No. 20000742.010 (the "Application"). In October of 2010, the District issued its Notice of Proposed Agency Action approving the Application. Henry C. Ross ("Petitioner Ross") promptly filed a timely Petition for Administrative Hearing (the "First Petition") with the District.

After the dismissal of the First Petition "without prejudice," Petitioner filed a series of documents including a document entitled "Petition for Administrative Hearing" (the "Petition"). The District determined the collective filings of Petitioner Ross to substantially comply with the statutory and rule requirements governing the initiation of administrative proceedings involving disputed issues of material fact.

The District requested that the Division of Administrative Hearings ("DOAH") assign the matter to an Administrative Law Judge to conduct all necessary formal proceedings and submit a recommended order to the District. Originally assigned to

Administrative Law Judge Bram D.E. Canter, the case was transferred to the undersigned and set for hearing on January 18, 2011. It proceeded to hearing as scheduled.

STATEMENT OF THE ISSUES

1. Whether Petitioner Ross has standing to challenge the issuance of the WUP?

2. Whether the District should approve the Application and enter a final order that issues the WUP?

PRELIMINARY STATEMENT

The District issued the Proposed Notice of Agency Action for approval of the City's Application on October 20, 2010. The First Petition was filed by Petitioner Ross on October 22, 2010. After the dismissal of the First Petition without prejudice and the subsequent filing of multiple documents by Petitioner Ross, the District referred the matter to DOAH.

At the final hearing, the City presented the testimony of two fact witnesses: Bob Robertson, P.E., Public Services Program Manager for the City and Project Manager for the Tarpon Springs Reverse Osmosis Water Treatment Plant; and Mike Carballa, P.E., an Environmental Engineer employed by Camp, Dresser & McKee ("CDM"), who worked for the City on the project's design. The City also presented the testimony of three expert witnesses: Jeff Trommer, a hydro-geologist employed by Leggette, Brashears & Graham ("LBG"), accepted as an

expert in hydro-geologic activities; Roger Menendez, a Senior Environmental Scientist, employed by CDM, accepted as an expert in the fields of biology and ecology; and David Wiley, a hydro-geologist employed by LBG, accepted as an expert in hydro-geology. The City offered 43 exhibits, marked for identification as City Exhibits 1-16, 18-35, 38, 39, 41, and 45-50. All were admitted into evidence.

The District presented the testimony of two experts: Darrin Herbst, a Water Use Regulation Manager for the District, accepted as an expert in the fields of water use permitting, hydro-geology, and groundwater flow modeling; and Patricia Frantz, a Senior Environmental Scientist for the District, accepted as an expert in aquatic and wetland ecology, wetland assessment and monitoring, habitat assessment as it relates to threatened and endangered species, and water use permitting. The District offered five exhibits. Marked as District Exhibit Nos. 1, 2, 17, 36 and 37, all five were admitted into evidence.

Petitioner Ross testified on his own behalf. He presented no other witnesses. Petitioner Ross offered four exhibits. Petitioner Exhibit Nos. 1-3 were not admitted into evidence and were proffered; Petitioner Exhibit No. 4, a composite, was admitted over objection from the City.

At the request of the City and the District, official recognition was taken of sections 120.569, 120.57, and 373.019, Florida Statutes; Part II of Chapter 373, Florida Statutes; Florida Administrative Code Chapter 40D-2; and the Southwest Florida Water Management District Water Use Permit Informational Manual, Part B, Basis of Review.

The Transcript of the final hearing was filed on February 11, 2011. The deadline for filing proposed recommended orders was agreed by the parties to be 15 days after the Transcript was filed. The City filed its Proposed Recommended Order on February 25, 2011. The District filed its Proposed Recommended Order on February 28, 2011. Both were timely filed since the fifteenth day after February 11, 2011, fell on February 26, 2011, a Saturday.

Petitioner Ross was granted an extension of time to April 1, 2011, in which to file a proposed recommended order. On April 1, 2011, he filed an "Amendment to Addendum to Proposed Order of Petitioner." After the expiration of the extension of time for the filing of a proposed recommended order and no such document having been filed, an Order was entered on April 7, 2011, that treated the document filed April 1 as Petitioner Ross' Proposed Recommended Order. The parties were given seven days to reply. The City and the District both filed notices that they did not intend to reply. Mr. Ross's "Amendment to the

Addendum to Proposed Order" was considered in the preparation of this Recommended Order.

Immediately after the entry of this Recommended Order, on the same day as the entry (April 14, 2011), Petitioner Ross' Proposed Recommended Order was received (two weeks late.) Despite the lateness of the order, Mr. Ross was given latitude consistent with earlier procedural rulings. The latitude was afforded in light of difficulty Petitioner Ross had encountered in obtaining a copy of the transcript of the final hearing requested through a public records request from the District and mailing difficulties that appeared not to be attributable to actions of Mr. Ross. It was also recognized that Mr. Ross appeared in this case pro se. Despite his statement that he had been licensed to practice law in Georgia at some time prior to the commencement of this proceeding, Mr. Ross was given the benefit of the doubt that he might have interpreted the Order requiring the filing of his proposed recommended order by April 1, 2011 to mean service by that date. Indeed, as evidenced by the postmark of April 1 on the envelope containing his Proposed Recommended Order, Petitioner Ross served his Proposed Recommended Order on April 1 even though it was not received at DOAH until two weeks later.

FINDINGS OF FACT

The Parties

a. Petitioner Ross

1. Petitioner Ross is a resident of Pinellas County, (referred to by him at hearing as "the most urbanized county in the State of Florida"). Besides residing there, Petitioner Ross operates a farm on his property in the County.

2. The City's experts reasonably projected and mapped a 0.5 foot drawdown contour surrounding the well field that is the subject of this proceeding. The contour defines "the cone of depression" associated with the well field. See Tr. 136. Mr. Ross' property is outside the cone of depression, to its south and west.

3. The overall groundwater gradient in the area of the well field is from the east to the west. The water pumped from the well field does not pull water from the west because the pumping withdrawal will not reduce the potentiometric surface gradient enough to reverse the current gradient.

4. Mr. Ross' property and the well on his property are "way outside," tr. 138, the well field and the 0.5 drawdown contour surrounding the well field. Based on the amount of drawdown reasonably projected by the well field, the effect on Mr. Ross' property could not be measured because it would be so slight. If the water in his well were to rise after the WUP is

implemented, it would be impossible to tell whether the water rose "because the pump's turned off or because it rained the day before." Tr. 163.

b. The District

5. The District is the administrative agency charged with the responsibility to conserve, protect, manage, and control the water resources within its geographic boundaries.

6. The District administers and enforces chapter 373, and the rules promulgated pursuant thereto. Among those rules are those that relate to the consumptive use of water found in chapter 40D-2.

c. The City

7. The City of Tarpon Springs is the applicant for the WUP that is the subject of this proceeding. The City's application seeks to modify an existing permit.

The Existing Permit

8. The City has an existing Water Use Permit (the "Existing Permit") from the District. Originally granted in 1976, it allows for withdrawal of fresh groundwater for public supply. The Existing Permit was last renewed in October of 2005 for a ten-year period. It expires in October of 2015.

9. Under the Existing Permit, the withdrawal capacity is 1.38 million gallons per day annual average and allows for seven production wells.



The Application and its Modification

10. The City submitted the Application in July, 2008. The Application at that time was for 25 wells in a brackish water well field for a proposed brackish groundwater reverse osmosis plant that the City plans to build.

11. The City's intent originally was to apply for a permit separate from the Existing Permit.<sup>1/</sup> In September of 2009, however, the City requested that the Application be considered a modification of the Existing Permit. In honoring the request, the District changed the number assigned to the Application to "20000742.010."<sup>2/</sup>

12. The Application was also modified with regard to the number of production wells in the brackish well field. The number was reduced from 25 to 22, "due to land acquisition efforts indicating that the maximum number of wells . . . required for the project would be 22." Tr. 54.

13. The Application contains an introduction that summarized the City's water supply system and its water supply plans, a completed Individual Water Use Permit Application form, a completed Public Supply Supplemental form, and an Impact Analysis Report (the "Report").

14. The Report states that the ground-water flow model "MODFLOW"<sup>3/</sup> was used to perform the impact analysis. Assessment of average annual and peak month withdrawal impacts in the Upper

Floridan and surficial aquifers used the SWFWMD District Wide Regulation Model Version 2 ("DWRM2"). One of the enhancements the DWRM2 offers over earlier model versions is "integrated focused telescopic mesh refinement (FTMR) which allows the model grid user to refine the model grid spacing to focus on specific areas within the District."<sup>4/</sup>

15. The Report included the FTMR model grid, total drawdown scenarios in the Upper Floridan Aquifer and the surficial aquifer, and a peak month drawdown scenario.

16. The Application also included a summary of the regional hydro-geology, a summary of the City's wastewater system, a description of the City's potable water supply, an historical operating protocol and a proposed well field management plan for the City's new brackish water well field, a service area and well field location aerial, a table showing the general hydrostratigraphy in northern Pinellas County, a summary of seasonal fluctuations which addressed the conditions for issuance of a permit as set forth in rule 40D-2.381, a summary of the City's reclaimed water system, well location maps, wetland maps, Water Use Permit maps and schedules, the City's well field protection ordinance, maps pertaining to the proposed service areas, a water conservation letter, and water conservation information.

17. The 22 new production wells in the brackish water well field will provide enough water once treated at the proposed reverse osmosis membrane treatment plant to enable the City to supply the anticipated potable water demand for all of the City's customers through the year 2015. Installation of the additional production wells will increase the annual average quantity of groundwater pumpage to 4,200,000 gallons per day ("gpd") and the peak month quantity to 6,300,000 gpd.

18. Review of the Application by the District led to four requests by the District for additional information. The City responded to each. The responses included a well construction and aquifer testing program report, a Water Quality/Water Level Well Impact Mitigation Plan, a Water Quality Action Plan, a revised Water Quality/Water Level Well Impact Mitigation Plan, a revised Water Quality Action Plan and a second revision of the Water Quality Action Plan, a second Water Quality/Water Level Well Impact Mitigation Plan, a proposed Environmental Monitoring Plan, a third revised Water Quality Action Plan, a third revised Water Quality/Water Level Well Impact Mitigation plan, and the final Environmental Monitoring Plan.

Draft Water Use Permit

19. On October 8, 2010, the District gave notice of its intent to issue a permit that would modify the City's Existing

Permit for public supply use. Attached to the notice is a Draft WUP.

20. The modification includes the development of a brackish water well field with 22 additional production wells to allow the City to self-supply the anticipated potable water demand in 2015 for a customer base of approximately 34,259 persons. The annual average quantity authorized by the WUP is 4,200,000 gpd and the permitted peak month quantity increases to 6,300,000 gpd.<sup>5/</sup>

21. Special conditions of the Draft WUP require the City to maintain meters on existing and proposed withdrawal points; record and report monthly meter readings; confirm meter accuracy every five years; monitor and report the water quality and aquifer water levels; maintain an adjusted per capita rate of 150 gpd or less; conduct and report water audits; submit annual reports of residential water use, reclaimed water supplied, per capita water use rates, and well field operations; investigate withdrawal-related well complaints; conduct a well field inventory prior to the activation of the proposed production wells; comply with the environmental monitoring plan; set water quality concentration limits prior to the activation of the proposed production wells; and submit an Annual Water Quality Report and an annual Well Field Report.

Criteria in Rule for Issuance of WUPs

22. The District utilizes rule 40D-2.381 (the "Rule") in its review of water use permit applications. The Rule opens with the following:

In order to obtain a Water Use Permit, an Applicant must demonstrate that the water use is reasonable and beneficial, is consistent with the public interest, and will not interfere with any existing legal use of water . . .

Rule 40D-2.381(1), Tab 1 of the Binder Containing the Matters Officially Recognized, pp. 7-8. The Rule requires that the applicant make the required demonstrations through the provision of "reasonable assurances, on both an individual and a cumulative basis that the water use," id., will meet 14 conditions listed in subsections (a) through (n).<sup>6/</sup>

Condition (a)

23. Condition (a) requires that the City demonstrate that the water use is necessary to fulfill a certain reasonable demand. To meet this condition, the City provided a population estimate through the end of the permit term and also provided a per capita rate that the City had used in the last five years. Calculations set forth in a table prepared at the request of the City show the population projections and projected water demands over a period from 2008 through 2030. These calculations

provide reasonable assurances that the proposed water use meets Condition (a).

Condition (b)

24. Condition (b) requires that the City must demonstrate that the water use will not cause quantity or quality changes that adversely affect the water resources, including both surface water and groundwater.

25. The City provided a groundwater model showing the anticipated groundwater drawdowns within the Upper Floridan and surficial aquifers. The City also completed a study on the wells within the sections of the actual proposed well field. Based upon the modeling, the drawdowns are not large enough to cause any impacts to quantity or quality of the water in the area.

26. The City has a Water Quality/Water Level Well Impact Mitigation Plan, should there be any complaints of impact, to correct any problems after implementation of the WUP.

27. The well field is designed with 22 supply wells. All 22 wells need not be operated at the same time to meet the water demand. Wells beyond those needed by demand have been designed into the well field so that there can be rotational capacity. Pumping at lower rates from among the 22 wells on a rotational basis is a management tool for protecting the resource and minimizing the effects of the withdrawals.

28. The City's monitoring program provides for the collection of water levels from a large number of wells either on a monthly or quarterly basis to assess water level fluctuations in the Upper Floridan and surficial aquifers. The City also has numerous wells that will sample for chloride sulfates, total dissolved solids (TDS) and other water quality constituents on a monthly and quarterly basis to ensure that the conditions of issuance continue to be met. The City will submit groundwater pumping data on a monthly basis from all the production wells so that the District can determine that the City is indeed adhering to the quantities reflected in the WUP.

29. Groundwater in the Upper Floridan Aquifer flows in a westward direction towards the Gulf of Mexico. The location of the proposed wells is in an urban land use area near the Gulf Coast. The wells will capture brackish groundwater that would otherwise flow westward into the Gulf. Brackish groundwater from the City's service area is the lowest quality water available for public supply in the area.

30. The City plans to construct a reverse osmosis facility to utilize available brackish groundwater. The brackish groundwater pumped from the well field is an alternative supply source. Isolated from the regional system, it will be used for public supply in the service area.

31. The high number of low-capacity wells will provide rotational ability for the City to manage the quantity and quality of the water resource in the area of the well field.

32. Maximum drawdown within the well field area due to the average annual withdrawal is approximately 3 feet, with an additional 1.5 feet during peak month withdrawal. This amount of drawdown is not likely to impact other wells in the area.

Condition (c)

33. Condition (c) requires the City to demonstrate that water use will comply with the provisions of 4.2 of the WUP Basis of Review, incorporated by reference in rule 40D-2.091, regarding adverse impacts to wetlands, lakes, streams, estuaries, fish and wildlife or other natural resources.

34. The Anclote River and associated wetlands are tidally influenced and will not be adversely impacted by the proposed withdrawal.

35. Other wetlands in the well field area examined by a District biologist identified several isolated wetlands of concern. Isolated wetlands are generally more sensitive to withdrawal of groundwater than wetlands connected to larger basins.

36. Initially, the City's proposed drawdowns were deemed to be unacceptable to the District because of the impact to the isolated wetlands of concern. As a first step, the City reduced



the quantities of water to be withdrawn. Subsequently, an extensive Wetland Monitoring Plan was developed that included a mitigation plan if adverse impacts did occur to wetlands.

37. Storm-water runoff will be the primary factor controlling the functions of the wetland areas. Mitigation measures, should any adverse impact become too great, include reduction of well field pumping, augmentation with well water, potable water and other feasible sources, and the purchase of mitigation credits.

Condition (d)

38. Condition (d) requires the City to demonstrate that the water use will not interfere with a reservation of water as set forth in rule 40D-2.302.

39. The groundwater modeling that the City provided the District indicates that there are no adverse impacts to the minimum flows and levels ("MFLs") in the Anclote River or the water level at the Tarpon Road Deep Well. There are, therefore, no impacts to reservations of water.

Condition (e)

40. Condition (e) requires the City to demonstrate that the water use will comply with the provisions of 4.3 of the WUP Basis of Review,<sup>7/</sup> regarding MFLs. The closest MFL site is the Upper Floridan Aquifer monitoring well called Tarpon Road Deep, located approximately 2.4 miles southeast of the well field.

The impact analysis model results show that at the annual average withdrawal rate of 4.20 million gallons per day ("mgd") approximately 0.1 feet of drawdown at this MFL site is currently projected to occur, assuming static pumping conditions in all other regional groundwater withdrawals. This amount of drawdown will not cause the water level at the Tarpon Road Deep Well to fall below its minimum level.

41. The District is in the process of setting an MFL for the Anclote River. Based on the operation of the new well field and the City's continued operation of their freshwater discharge to the Anclote River from their reclaimed water facility, there will be no impact to the Anclote River.

Condition (f)

42. Condition (f) requires the City to demonstrate that the water use will utilize the lowest water quality the City has the ability to use, provided that its use does not interfere with the recovery of a water body to its established MFL and it is not a source that is either currently or projected to be adversely impacted.

43. The City is using brackish water, the lowest water quality available to be used for public supply. The City will be treating it at a reverse osmosis water treatment plant. Water of this quality is not available for others to use without special treatment.

44. Based upon the modeling provided by the City, there are no anticipated impacts to MFLs or any other water body resources.

Condition (g)

45. Condition (g) requires the City to demonstrate that the water use will comply with section 4.5 of the WUP Basis of Review,<sup>8/</sup> regarding saline intrusion.

46. Groundwater in the Upper Floridan Aquifer in the area of the well field is brackish. The well field's design allowing well rotation minimizes changes in water quality during operation. The amount of drawdown and the fact that water levels will remain above sea level suggests that saline water intrusion will not occur.

47. The reported potentiometric surface in the area of the well is approximately five feet NGVD while the land surface is roughly five feet higher at approximately ten feet NGVD.

48. The City's monitoring and mitigation programs will address adverse impacts from saline intrusion should they occur.

Condition (h)

49. Condition (h) requires the City to demonstrate that the water use will not cause the pollution of the aquifer.

50. Soil and groundwater contamination is documented at the Stauffer Management Company site located approximately 3,000 feet west of the well field. The drawdown from the well field

is calculated to be about one foot at the Stauffer site. That level of drawdown will not induce migration of contaminants because the upward head differential from the Upper Floridan Aquifer to the surficial aquifer will be altered and the Stauffer site is down gradient of the well field.

51. Testimony from Mr. Wiley established that the aquifers should not be contaminated by the City's withdrawals despite the presence of the Stauffer site:

[T]here is a known source of contamination approximately 3,000 feet from the new well field to the west, Stauffer Chemical Company. With the small amount of drawdown that's caused in the Upper Floridan aquifer and the surficial aquifer, there's no potential for the withdrawals to cause pollution of the aquifer.

Tr. 254-55. Mr. Wiley's opinion was reached primarily based on the use of the groundwater flow model to determine the drawdown at the Stauffer site and through review of groundwater levels in the Floridan and the surficial aquifers.

52. The United States Environmental Protection Agency (the "EPA") is in charge of managing the contamination at the Stauffer site. A remediation plan has been developed based, in part, on EPA records. The remediation plan includes the construction of a barrier wall in the subsurface around the contaminated area to prevent contaminated groundwater from migrating.

53. The City's groundwater monitoring wells will detect movement of contaminants toward the well field. The monitoring of the wells and the mitigation plan will assist in preventing pollution of the aquifers.

Condition (i)

54. Condition (i) requires the City to demonstrate that the water use will not adversely affect offsite land uses existing at the time of the application.

55. Primary existing land uses within the City's service area are residential, commercial, and light industrial. The proposed withdrawal will not adversely impact these land uses as shown in Figure 10 of the City Exhibit 1.

56. Five sink holes are known to exist in the general area around the well field. The closest is approximately 1,000 feet from a proposed well location. Maximum drawdown at the distance is approximately 2 feet. This amount of drawdown does not significantly increase the potential for sinkhole activity.

Condition (j)

57. Condition (j) requires that the City demonstrate the water use will not adversely impact an existing legal withdrawal.

58. The Pasco County Utilities' wells located to the north of the well field are listed on the WUP as plugged.

59. Wells owned by Crest Ridge Utility Corp. are located within 0.5 to 0.8 miles of the well field. Drawdown at these wells, due to the average annual withdrawal, is approximately one foot, with an additional 0.4 feet during peak month withdrawal. This amount of drawdown will not create a water level impact at these wells.

60. Maximum drawdown at domestic wells in the area due to the average annual withdrawal is approximately three feet, with an additional 1.5 feet during peak month withdrawal. This amount of drawdown is not likely to impact other wells in the area.

61. The City's mitigation plan addresses any adverse impact that might occur from the City's withdrawal.

Condition (k)

62. Condition (k) requires the City to demonstrate that the water use will incorporate water conservation measures.

63. The existing per capita use rate for the City's service area is 110 gpd. Its position well below the district goal of 150 gpd per person demonstrates that the City's water conservation measures are effective.

64. The City uses an inclined block rate structure which encourages water conservation. It also encourages water conservation through a reclaimed water system that encourages

conservation of public water supply. It currently uses a little over one million gallons per day of reclaimed water.

65. The City also conserves water through a leak protection program, a water loss audit program, adherence to the District's watering restrictions and provision of a low-flow toilet rebate program through the County, a landscape code, and the provision of educational materials to users.

Condition (l)

66. Condition (l) requires the City to demonstrate that the water use will incorporate the use of alternative water supplies to the greatest extent possible.

67. The City has an extensive reclaimed water program. It provides reclaimed water for its golf course, for residential irrigation, for public parks and recreation, and for public schools.

68. The City expanded its reclaimed water storage system recently by doubling the amount of reclaimed water that it is able to store for redistribution.

Condition (m)

69. Condition (m) requires the City to demonstrate that the water use will not cause water to go to waste.

70. The City performs an unaccounted-for water audit of its system as required by a special condition of its existing WUP. The unaccounted-for water use is approximately 4 percent,

well below the District guidelines. Furthermore, the City's per capita use rate of 110 gpd is well within the District's goal of 150 gpd per person. The City also has an extensive reclaimed water system which offsets potable water supply and prohibits wasted drinking water as an irrigation source.

Condition (n)

71. Condition (n) requires that the City demonstrate that the water use will not otherwise be harmful to the water resources within the District.

72. Facts found above support a conclusion that the City has provided reasonable assurances that it meets this condition. In addition, the water that is pumped locally by the City will offset the need for ground water that would have otherwise been obtained from elsewhere in the region.

Notices

73. The District published its Notice of Proposed Agency Action in the Tampa Tribune on October 22, 2010.

74. The District published its Notice of Proposed Agency Action in the St. Petersburg Times on October 24, 2010.

CONCLUSIONS OF LAW

Jurisdiction

75. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this case. §§ 120.569 and 120.57, Fla. Stat.



## Standing

76. Standing is an issue of subject matter jurisdiction, which is never waived. The issue, therefore, may be raised at anytime. Dep't of Rev. v. Daystar Farms, Inc., 803 So. 2d 892, 896. The District raises the issue in its Proposed Recommended Order.

77. In addition to administrative agencies and "specifically named"<sup>9/</sup> persons whose substantial interests are determined in a proceeding, 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 . . . ."

78. In Gibby Family Trust v. Blueprint 2000 and Dep't of Env'tl. Prot., Case No. 10-9292 (DOAH April 11, 2011), Administrative Law Judge Johnston recently wrote the following with regard to the "standing" standard in a section 120.57 administrative proceeding:

32. For years, standing to be a party in a proceeding under section 120.57 was determined under the standard set out in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981):

[B]efore 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. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Although Agrico was decided on the second prong of the test, its first prong also has been applied make standing determinations.

33. More recent appellate decisions have clarified the first prong of the Agrico test. 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 affect by the agency's action. See St. Johns Riverkeeper, Inc., et al. v. St. Johns River Water Mgmt. Distr., et al., Fla. 5th DCA Case No. 5D09-1644, Op. Filed February 18, 2011; Palm Beach Cnty. Env'tl. Coal. V. Fla. Dep't of Env'tl. 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 Env'tl. 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.")

Gibby Family Trust, at 14-16.

79. The Fifth DCA St. Johns Riverkeeper case and the three cases which preceded it cited above, two of which were decided by the Fourth DCA and one by the Second DCA, (the "St. Johns

Riverkeeper Line of Cases") appear to have relaxed the first prong of the Agrico test for a party to have standing in a 120.57 proceeding. Rather than prove an actual injury in fact of sufficient immediacy as required by the first prong of the Agrico test, a party need only allege such an injury and then prove that it was reasonable to expect that such an injury could occur. Proof that the actual injury would occur should the agency action be implemented is not necessary under the St. Johns Riverkeeper Line of Cases for a party to have standing.

#### Standing under Agrico

80. The District advances the Agrico test as the appropriate measure to be applied to Petitioner Ross' standing. If the first prong of the Agrico test applies, then there is no doubt that Petitioner Ross does not have standing. Petitioner presented no evidence of his own that demonstrated that his substantial interests could be affected by the District's issuance of the WUP to the City. Cross-examination by Petitioner of Mr. Trommer, one of the City's witnesses, showed that there was no injury in fact to him or his property. Futhermore, the witness provided proof that the impact to Petitioner Ross' property from the implementation of the WUP would be so de minimis, if it were to exist at all, that one could not know whether an impact was due to activity under the

WUP or an occurrence of a natural event such as a recent rainfall. See paragraph 4., above.

Standing under the St. Johns Riverkeeper Line of Cases

81. The evidence showed where Petitioner's farm is in relation to the well field to be permitted by the WUP. There was no evidence, however, presented by Petitioner (or that was admitted through the other parties) that showed that it is reasonable to expect that Petitioner's property could be affected by activity conducted under the WUP.

82. In short, Petitioner's assertion of standing is not supported under the standard of the St. Johns Riverkeeper Line of Cases, by the facts that relate to any injury to Mr. Ross. There is no showing in this record that it is reasonable to expect that there could be injury to Mr. Ross or his property through implementation of the WUP.

Petitioner Does not Have Standing

83. Whether under the more stringent first prong of the Agrico test or the relaxed standard applied by the St. Johns Riverkeeper Line of Cases, Petitioner Ross does not have standing to initiate this section 120.57 proceeding. His petition should be dismissed.

### Burden of Proof and Reasonable Assurances

84. As the challenger, Petitioner Ross has the burden of proving standing to initiate the proceeding. He has failed to meet that burden.

85. The City, as the applicant for the WUP, has the burden of proof to demonstrate entitlement to the permit, if it is determined contrary to the recommendation of this Recommended Order that Petitioner Ross has standing. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). The City must demonstrate the reasonable assurances required by the rule.

86. "Reasonable assurance" means a demonstration that there is a substantial likelihood of compliance with standards, or "a substantial likelihood that the project will be successfully implemented," not an absolute guarantee. Metro. Dade Cnty. v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3rd DCA 1992).

87. Once an applicant has presented evidence and made a preliminary showing of reasonable assurances, the permit cannot be denied unless "contrary evidence of equivalent quality" is presented by the Petitioner. J.W.C., at 789.

### The Merits

88. The City has met the initial burden of proof in presenting a prima facie case that demonstrates the Application

complies with all of the Rule's conditions for issuance of a water use permit.

89. The City and the District provided evidence through expert opinion and otherwise of the City's satisfaction of the conditions contained in sections 1(a) through (n) of rule 40D-2.381 for issuance of the modification to the WUP that is the subject of this proceeding.

90. The City provided reasonable assurances, on both an individual and cumulative basis, that the water use for which it has applied and that has been approved by the Draft WUP meets Conditions (a) through (n) as contained in rule 40D-2.381(1).

91. In his Amendment to the Addendum to the Proposed Recommended Order, Petitioner asserts:

Cost is Public Interest. Public Interest is this Petitioner's payment of his monthly water bill to the City. Public Interest is Paragraph 2. Of Rule 40D-2.381(a)-[end of the rule], F.A.C.

The word "cost," however, does not appear in rule 40D-2.381. Nor is there any mention of the impact of a WUP to the water bills of consumers.

92. Petitioner's Proposed Recommended Order and Addendum to the Proposed Recommended Order received at DOAH on April 14, 2011, after entry of a Recommended Order in this case raise issues that are irrelevant, disposed of by Orders entered earlier in the case or, when relevant to the application of rule

40D-2.381, do not require any changes to the Recommended Order issued in this case on April 14, 2011.

93. In short, Petitioner did not present "contrary evidence of equivalent quality" to that presented by the City and the District. The WUP should be issued.

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 Petitioner Ross lacks standing and that his Petition, therefore, be dismissed.

Should it be determined in a Final Order that Petitioner Ross has standing, it is recommended that the Southwest Florida Water Management District enter a Final Order that issues Water Use Permit No. 20000742.010 to the City of Tarpon Springs.

DONE AND ENTERED this 22nd day of April, 2011, in Tallahassee, Leon County, Florida.



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DAVID M. MALONEY  
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Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 22nd day of April, 2011.

ENDNOTES

1/ The original application was assigned the number "200013292.000." The three zeroes after the decimal point in the number indicate that it is an application for a new permit.

2/ The "010" after the decimal point in the permit number indicates that the application is for a modification (the "tenth" modification) of the Existing Permit, presumably numbered "20000742.000" when it was issued prior to any modifications.

3/ City Ex. 1, Attachment 7, p. 2 of the Report.

4/ Id., at 2.1.

5/ The limits set by the Existing Permit do not meet the public supply demand for the City. The City currently meets the demand through an interconnect with Pinellas County.

6/ The conditions will be referred to in this Recommended Order as "Conditions (a) through (n)."

7/ Incorporated by reference in rule 40D-2.091.

8/ Incorporated by reference in rule 40D-2.091.

9/ Section 120.52(13)(a), Florida Statutes.

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NOTICE OF RIGHT TO SUBMIT EXCPETIONS

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.