STATE OF FLORIDA
SOUTH FLORIDA WATER MANAGEMENT DISTRICT

IN THE MATTER OF:

ORDER NO. SFWMD 2009-016 DAO

Petition for Administrative Hearing filed by New Hope Sugar Company and Okeelanta Corporation re: Agreement for Sale and Purchase between United States Sugar Corporation, SBG Farms, Inc., and Southern Gardens Groves Corporation and the South Florida Water Management District.

_____/

ORDER DISMISSING PETITION WITH LEAVE TO AMEND

The Governing Board of the South Florida Water Management District ("District" or "SFWMD"), or its assigned designee, being otherwise fully informed, issues this Order containing the following Findings of Fact and Conclusions of Law after careful review of the Petition for Administrative Hearing ("Petition") filed by New Hope Sugar Company and Okeelanta Corporation ("Petitioners") on January 6, 2009, attached as Exhibit A.

FINDINGS OF FACT

1. Under Section 120.569(1), Florida Statutes, a party whose substantial interests are determined by an agency may request an administrative hearing with the agency. Rules 28-106.111, 28-106.201(1) and 40E-1.521, Florida Administrative Code, require persons who are requesting a hearing under Sections 120.569 and 120.57(1), Florida Statutes, to file a petition which substantially complies with Rule 28-106.201(2),

Florida Administrative Code, within 21 days of receipt of written notice of the agency decision.

2. Petitioners own and farm approximately 175,000 acres of land located in the Everglades Agricultural Area ("EAA"). Petition at ¶ 11. On January 6, 2009, Petitioners filed a Petition for Administrative Hearing objecting to an Agreement for Sale and Purchase, with an incorporated Lease Agreement (the "USSC Land Acquisition Agreement"), entered into between the District and United States Sugar Corporation and its subsidiaries, SBG Farms, Inc., and Southern Gardens Groves Corporation, who also own and farm a significant number of acres of land within the EAA and who are competitors with Petitioners. *Id.* at Ex. A, p. 1; ¶ 13. The USSC Land Acquisition Agreement was approved by the District's Governing Board on December 16, 2008, and signed by the Sellers, United States Sugar Corporation, SBG Farms, Inc., and Southern Gardens Groves Corporation (collectively "USSC"), on December 8, 2008. *Id.* at Ex. A.

3. Pursuant to the USSC Land Acquisition Agreement, the District agreed to purchase approximately 180,000 acres of USSC farmland located in the EAA, and the adjoining C-139, S-4, and L-8 Basins, for a purchase price of $1,340,000.00, payable at closing. *Id.* at Ex. A, p. 1. According to Petitioners, the purchase price is above the land's appraised market value. The incorporated Lease Agreement further provides that the District will lease the farmland back to USSC for seven years for continued use in conjunction with USSC's existing sugar cane and citrus operations. According to Petitioners, the $50.00 per acre rent to be paid by USSC is substantially below fair market value. *Id.* at ¶ 24.

4. As set forth in the USSC Land Acquisition Agreement (and as acknowledged by Petitioners), the District seeks to acquire the USSC farmlands in order to construct Everglades restoration projects, such as reservoirs and stormwater treatment areas. *See Id.* at Ex. A at Exhibit A 19e (Lease Agreement) ¶ 18F and Schedule 4. at ¶¶ 1–2; *see also Id.* at ¶¶ 19, 27.

5. The USSC Land Acquisition Agreement contains at least three significant conditions precedent to closing. First, the District must secure acceptable financing arrangements to fund the purchase. *Id.* at Ex. A at ¶ 7.a.iv–v. (In that regard, it is important to note that the District has commenced bond validation proceedings in the Circuit Court for Palm Beach County, styled *South Florida Water Management District v. Florida,* Case No. 2008-CA-031975, to obtain authority to issue certificates of participation to fund the land acquisition.) Second, the District must also determine that the costs of funding the acquisition will not adversely affect its ability to fund its existing legal obligations and core operations, i.e., water supply, flood control, Everglades restoration, regulatory enforcement, etc. *Id.* at Ex. A at ¶ 7.a.xviii. Third, USSC has the right to "go shop" the USSC Land Acquisition Agreement to find better offers than those agreed to by the District. *Id.* at Ex. A at ¶ 25.

6. Petitioners assert several reasons explaining why its substantial interests will be affected by the USSC Land Acquisition Agreement. Petition at ¶¶ 11-16. As a landowner and taxpayer in the EAA, Petitioners complain that the District is paying too much to buy the land and not charging enough when renting it back to USSC. Petitioners also observe that the transaction would cause the District to incur debt greater than that

envisioned by its internal debt policy guidance (*id.* at ¶ 39) and that the purchase does not satisfy the requirements found in Section 373.139, Florida Statutes. *Id.* at ¶¶ 42–43. Petitioners further contend that the below market value Lease Agreement amounts to a State subsidy to one of its competitors, thereby adversely affecting Petitioners' "business interests." *Id.* at ¶ 13. Finally, Petitioners claim that the cost of the USSC land acquisition will undermine the District's ability to implement other Everglades restoration projects contemplated by the Everglades Forever Act ("EFA"), Section 373.4592, Florida Statutes, which are funded, in part, by its tax dollars.[1] *See, e.g., id.* at ¶ 29.

CONLUSIONS OF LAW

7. Section 120.569(2)(a), Florida Statutes, requires the District to take action on a petition for hearing. If the District accepts the petition, it may request that the Division of Administrative Hearings ("DOAH") be assigned to conduct the hearing. Before referring a petition to DOAH, however, the District must review the petition to determine if it is an appropriate petition and contains all required information.

8. Pursuant to Section 120.569(2)(c), Florida Statutes, a petition shall be dismissed if it is not in substantial compliance with these requirements or it has been

[1] Contrary to Petitioners' allegations, neither the State's phosphorus water quality standard, Rule 62-302.540, F.A.C., or the District's *Long-Term Plan for Achieving Water Quality Standards* ("Long-Term Plan"), mandate implementation of water quality projects. Petition at ¶¶ 31–41. Rather, the EFA mandates implementation of the projects set forth in the Long-Term Plan. *See, e.g.,* Fla. Stat. § 373.4592(3)(b) and (e). In that regard, Petitioners have not alleged specifically what projects in the Long-Term Plan would be delayed or abandoned, nor how any such change in approach to achieving the Long-Term Plan would adversely affect their interests.

untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured.

9. The District has carefully reviewed the Petition in accordance with Section 120.569(2)(c) and, for the reasons set forth below, finds that the Petition must be dismissed with leave to amend.

I. Petitioners fail to adequately identify "substantial interests."

10. In *Agrico Chem. Co. v. Dep't. of Envt'l. Reg.*, 406 So. 2d 478 (Fla. 2d DCA 1981), the court set forth the definition of "substantial interest" in the context of a Chapter 120 proceeding, stating:

> Before one can be considered to have a substantial interest in the outcome of the proceeding, he must show: 1) that he will suffer an 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.

Id. at 482; *see also, City of Sunrise v. South Florida Water Management District,* 615 So. 2d 746 (Fla. 4th DCA 1993). Subsequent courts have explained that the "first element pertains to the degree of injury whereas the second deals with the nature of the injury." *Mid-Chattahoochee River Users v. FDEP,* 948 So. 2d 794, 797 (Fla. 1st DCA 2007). In this case, Petitioners fail to satisfy both prongs of the *Agrico* test.

11. With respect to the first prong of *Agrico,* the allegations in the Petition fail to establish a sufficiently "immediate" injury. *See City of Sunrise,* 615 So. 2d at 747; *see also, Florida Sugar Cane League, Inc. v. South Florida Water Management District,* 617 So. 2d 1065, 1066–67 (Fla. 4th DCA 1993); *Seacoast Utility Authority v. PGA Nat'l Golf*

Club, DOAH Case No. 94-2903, 1995 WL 1052594 (Feb. 6, 1995), at ¶ 46. Similar to the facts in the preceding authorities, in this case, it is not the District's execution of the USSC Land Acquisition Agreement that will cause the injuries complained of by Petitioners. Rather, the harm, if any, that may result stems from a series of speculative future events that may ultimately result in a decision of the District to not comply with Florida law, i.e., to not implement the Everglades Forever Act. The acquisition of USSC's farmlands must proceed to closing, an event not only contingent on USSC's "go shop" efforts, but the District's efforts to obtain bond validation in circuit court and have underwriters successfully issue certificates of participation. Moreover, the District's Governing Board would also have to make a series of budgetary decisions that would place the District in a position so that it cannot fulfill its commitments under the EFA. For example, the District would have to conclude that it will not raise taxes to meet its obligations or borrow additional money to do so, or pursue other funding mechanisms.

12. It should also be noted that pursuant to Paragraph 6(a)(xviii) of the USSC Land Acquisition Agreement, the District has the authority to walk away from the transaction if it concludes that it will "adversely affect the capacity of [the District] to continue to fulfill its statutory, contractual, and other legal obligations and mandates . . . ." Given this language, approval of the USSC Land Acquisition Agreement will not cause Petitioners' injuries; rather, it will be a future budgetary decision by the District to disregard its obligations under the EFA. *Id., see also Montgomery v. Dep't. of Health and Rehabilitative Services,* 468 So. 2d 1014, 1015-1016 (Fla. 1st DCA 1985) (under injury-in-fact analysis one is "required to show an injury which is real and

immediate, not conjectural or hypothetical"); *Dep't. of Corrections v. Van Poyck,* 610 So. 2d 1333, 1336 (Fla. 1st DCA 1992) (party can satisfy injury-in-fact test only by "demonstrating either that he had sustained actual injury at the time of filing the petition, or that he is immediately in danger of sustaining some direct injury") (internal citation omitted).

13. With respect to the second prong of *Agrico,* Petitioners fail to allege facts showing that its injury is of a type or nature that this type of proceeding is designed to protect. Consistent with *Agrico*, a person's competitive "business interests" do not fall within the zone of protection the District is authorized to consider under Chapter 373, Florida Statutes. *Agrico* at 482; *Mid-Chattahoochee* at 798. To paraphrase *Agrico*, Chapter 373 simply was not meant to redress or prevent injuries to a competitor's profit and loss statement. *Id. See also, City of Sunrise, supra.*

14. In addition, the District's budgetary decisions, such as to buy the USSC property, are not the types of actions reviewable under Chapter 120. Generally, a taxpayer does not have standing to contest agency expenditures—even expenditures that exceed the agency's statutory authority or waste public money—unless he claims to have suffered a special injury distinct from other taxpayers or launches a constitutional attack upon the agency's action. *School Board of Volusia County v. Clayton*, 691 So. 2d 1066 (Fla. 1997) (taxpayer challenge to School Board's purchase of real property); *North Broward Hosp. Dist. v. Fornes*, 476 So. 2d 154 (Fla. 1985) (taxpayer challenge to hospital district's expenditures to expand medical facility).

15. In essence, Petitioners largely complain about how their tax dollars will be spent. However, as explained in *Fornes*, taxpayer standing rules "are based on highly debatable policy choices, but they represent . . . a reasonable effort to guarantee that the state and county lawfully exercise their taxing and spending authority without unduly hampering the normal operations of a representative democratic government." 476 So. 2d at 156. Having failed to allege a special injury distinct from that suffered by other taxpayers that will also be funding the District's purchase of the USSC land, Petitioners may not pursue their claims. To paraphrase *Fornes*, allowing Petitioners to proceed would render every public expenditure subject to judicial review, unduly hampering and crippling the normal operations of government. *See also, Calabria v. Dept. of Transportation,* DOAH Case No. 02-3531, 2002 WL 31911465 (Dec. 21, 2002) at ¶¶ 44–53; *cf. Terwilliger v. South Florida Water Management District,* DOAH Case No. 01-1504, 2002 WL 569480 (Feb. 27, 2002) at ¶¶ 128–137, PCA *aff'd,* 846 So. 2d 526 (Fla. 4th DCA 2003).

16. In addition, the USSC Land Acquisition Agreement is not the type of "agency action" within the scope of Section 120.569, Florida Statutes. That statute is applicable "in all proceedings in which the substantial interests of a party are determined by an agency." Section 120.569(1), Fla. Stat. Unless otherwise specifically identified, Section 120.52(13) defines a "party" as a person "whose substantial interests will be affected by proposed agency action." "Agency action" means "the whole or part of a rule or order." Section 120.52(3). A "rule" means an "agency statement of general applicability that implements, interprets, or prescribes law or policy." Section

120.52(16), Fla. Stat. The term "order" is not defined in Chapter 120, so its use in this matter requires further analysis.

17. The meaning of "order," as it applies to water management districts, can be found in Chapter 373, Florida Statutes, because Chapter 120 should be read *in pari materia* with Chapter 373. *See, South Florida Regional Planning Council v. State Land and Water Adjudicatory Commission,* 372 So. 2d 159 (Fla. 3d DCA 1979)(Chapters 120 and 380 must be read in harmony when determining standing of party to bring administrative action on land management issue); *see also,* Op. Att'y Gen. Fla. 062-47 (1962) (concluding that Florida Highway Patrol performance review procedures should be read *in pari materia* with Chapter 120). Specifically, Section 373.083, Florida Statutes, defines the general powers and duties of the governing board of a water management district as follows:

> In addition to other powers and duties allowed it by law, the governing board is authorized to:
>
> (1) Contract with public agencies, private corporations, or other persons; sue and be sued; and appoint and remove agents and employees, including specialists and consultants.
>
> (2) Issue orders to implement or enforce any of the provisions of this chapter or regulations thereunder.
>
> (3)–(5) . . .

This statutory definition of governing board powers and duties clearly distinguishes the term "contract" from the term "order". Based on that distinction, the two terms must have different meaning, and a contract executed by a water management district is not an order.

18. The definitions of "rule" and "order" make it evident that the USSC Land Acquisition Agreement is not a type of action covered by Section 120.569. The agreement is simply a contract between the District and landowners concerning the sale of property. It is not a rule or order and, therefore, not an agency action subject to Chapter 120. Since Petitioners are attempting to challenge something other than an agency action subject to Chapter 120, they cannot be parties in an administrative hearing initiated under Section 120.569 of the Florida Statutes. *See General Development Utilities, Inc., v. Florida Department of Environmental Regulation,* 417 So. 2d 1068, 1070 (Fla. 1st DCA 1982) (to be entitled to a 120.57 [now 120.569] hearing there must be a final agency action affecting the petitioner's substantial interest, coupled with disputed issues of material fact). *See also, Florida Sugar Cane League,* 617 So.2d at 1066–67 (settlement agreement did not create a point of entry for an administrative hearing pursuant to Section 120.57(1), Fla. Stat.).

19. Additionally, the District's decision to enter into the Agreement is not a quasi-judicial decision subject to notices and fact-finding adjudicative hearings. This decision is not based on specific criteria in rules or statutes. In essence, the District is deciding how to allocate its budget. The District debt management policy referred to in the Petition is merely a guideline for the District's own review.

20. Therefore, in making the decision to enter into the contract, the District's Governing Board was making an executive or legislative decision in a matter to which the Petitioners were not a party. Consequently Petitioners were not entitled to relief under the Florida Administrative Procedures Act in Chapter 120, Florida Statutes. *See*

Capeletti Bros. v. State Dept. of Transp., 362 So. 2d 346 (Fla. 1st DCA 1978). (Day-to-day business decisions of an agency are considered "free-form" proceedings not subject to Chapter 120 Administrative Procedure Act challenges. If such agency activities were subject to the APA "the wheels of government would come to a halt.")

II. The District's Debt Policy.

21. As alternative grounds for attacking the USSC Land Acquisition Agreement, Petitioners allege that the cost of financing it is "very near [the District's] newly raised 30 percent debt ceiling." Because Petitioners do not allege that the District is, in fact, exceeding its debt ceiling, this does not create an issue appropriate for resolution. It should be noted, however, that there does not appear to be any statutory or regulatory "debt ceiling" limiting the amount of money the District may borrow, nor do Petitioners cite to one. Rather, the District has an internal publication, titled *South Florida Water Management District Policies and Procedures* ("Manual"), that provides guidance on a broad range of intra-District issues, including such issues as human resources, land management, information technology and finance. In Section 110-47 of the Manual, it provides that the "the debt-to-assessed value shall not exceed .30% of the assessed value of the property in the District." Section 110-41, however, further states that the purpose of the District's debt management policy is to establish *guidance* for the issuance and management of the debt. Similarly, Section 110-44(f) explains that failure to comply with any part of this policy shall not affect the validity of any indebtedness of the District.

III. Section 373.139, Florida Statutes.

22. Petitioners claim that the District violated Section 373.139, Florida Statutes, when entering into the USSC Land Acquisition Agreement. Petition at 42–43. In addition to the deficiencies discussed *supra,* these claims must be dismissed for the following reasons.

23. First, with regard to the procedural requirements in Section 373.139(3), including the alleged need for the District to justify spending more than the appraised value, the language in the statute, as well as its legislative history, demonstrate that those requirements apply only when a water management district is requesting funds for land acquisition from the Florida Department of Environmental Protection. *See* Section 33 of Ch. 99-247; Final Analysis Report of the House of Representatives Committee on Environmental Protection on Bill CS/CS/SB 908, Chapter Law 99-247 (July 26, 1999). Because the District is not using State funds to acquire the property, nor alleged to be doing so, this claim must be dismissed.

24. Second, with regard to the question of whether the District is actually purchasing the USSC farmlands for the purpose of Everglades restoration, this issue is now pending in the previously filed, Chapter 75, Florida Statutes, bond validation proceeding brought by the District in Palm Beach County Circuit Court, Case No. 50-2008-CA-0311975, in which Petitioners intervened on December 11, 2008. In such circumstances, abatement is appropriate. *See Thomas v. English,* 448 So. 2d 623 (Fla. 4th DCA 1984). Dismissal is also appropriate when a party seeks to use the administrative process as a vehicle for obstructing an opposing party's pursuit of a judicial remedy or

attempting to obtain administrative preemption over legal issues then pending in court of competent jurisdiction and involving the same parties. *Suntide Condominium Assoc., Inc. v. Div of Florida Land Sales,* 504 So. 2d 1343, 1345 (Fla. 1st DCA 1987).

IV. The Petition is Inadequate for Failing to Properly Allege Disputed Issues of Material Fact

25. Rule 28-106.201(2)(d), Florida Administrative Code, requires a petition for administrative hearing to contain a statement of all disputed issues of material fact. Petitioners have failed to state any facts that are material to an agency action in their petition. As noted above, an "agency action" of a "quasi-judicial" nature that would be subject to a 120.569 hearing has not yet occurred, and therefore all of the matters raised by the Petitioners concerning the USSC Land Acquisition Agreement are not material.

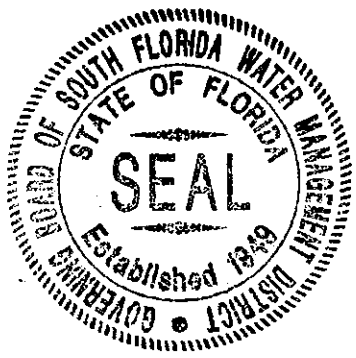
26. The District's Governing Board delegated to the Executive Director, General Counsel, and Deputy General Counsel authority to enter orders determining whether a petition for administrative hearing is timely filed or meets required pleading requirements, and to refer petitions for administrative hearing to the Division of Administrative Hearings filed subsequent to the Governing Board acting upon the permit application or other agency action being challenged. Section 373.083(5), Fla. Stat., and the *District's Policies and Procedures,* Sections 101-22(a)(3) and (4).

ORDER

The District, based upon the above cited Findings of Facts and Conclusions of Law, and being fully informed otherwise, hereby orders that the Petition for Administrative Proceedings filed by Petitioners on January 6, 2009, is hereby dismissed

with leave to amend. The Amended Petition must be received by the Office of the District Clerk no later than 21 days from the date of the entry of this order.

Done and Ordered this 21st day of January, 2009.



SOUTH FLORIDA WATER
MANAGEMENT DISTRICT
BY ITS GENERAL COUNSEL

BY: Sheryl G. Wood
SHERYL G. WOOD

ATTEST:

BY: Cathy Wilcox

DATE: 1/22/09

LEGAL FORM APPROVED:

BY:

DATE: 1/21/09

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order Dismissing Petition with Leave to Amend has been served on the following by U.S. Mail this 22 day of January, 2009: GABRIEL E. NIETO, ESQUIRE, Berger Singerman, P.A., Suite 1000, 200 South Biscayne Boulevard, Miami, Florida 33131 and JOSEPH P. KLOCK, JR., ESQUIRE and JUAN CARLOS ANTORCHA, ESQUIRE, Epstien, Becker & Green, P.C., Suite 4300, 200 South Biscayne Boulevard, Miami, Florida 33131.