STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM NASSAU, Petitioner, vs. VERNON & IRENE BECKHAM, UTILITIES COMMISSION OF NEW SMYRNA BEACH, VOLUSIA CITY-COUNTY WATER SUPPLY AUTHORITY, and ST. JOHNS RIVER WATER MANAGEMENT DISTRICT; Respondents.	)	CASE NO. 92-0246 SJRWMD File of Record No. 91-1132

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on March 24-26, 1992, in New Smyrna Beach, Florida, before the Division of Administrative Hearings, by its designated Hearing Officer, Diane K. Kiesling.

APPEARANCES

For Petitioner, William Nassau:	William Nassau, Pro Se 4680 Cedar Road New Smyrna Beach, Florida 32168
For Respondent, St. Johns River Water Management District:	Nancy B. Barnard and Eric Olsen Attorneys at Law St. Johns River Water Management District Post Office Box 1429 Palatka, Florida 32178-1429
For Respondent, Utilities Commission of New Smyrna Beach:	Roger Sims, Rory Ryan and Lynda Goodgame Attorneys at Law HOLLAND & KNIGHT Post Office Box 1526 Orlando, Florida 32802

STATEMENT OF ISSUES

The disputed issues are as follows:

1) Whether the proposed Water Conservation Plan is sufficient to meet the requirements of the District rule;

2) Whether the proposed pumping will adversely affect wetlands and wetland vegetation in contravention of District rule;

3) Whether the permit applicant has provided reasonable assurance of entitlement to the requested permit as required by the District rule; and

4) What limiting conditions pursuant to Rule 40C-2.381, F.A.C., should be imposed on the Consumptive Use Permit (CUP).

PRELIMINARY STATEMENT

The following acronyms or names will be used in this Recommended Order:

"Commission" for the Utilities Commission of New Smyrna Beach.

"District" for the St. Johns River Water Management District.

"SR 44 wellfield" for the proposed wellfield at SR44 and CR4118.

"APT" for Aquifer Performance Test.

The following abbreviations for technical terms will be used:

gpcpd for gallon per capita per day
mgd for million gallons per day
mg/l for milligrams per liter
gfpd for gallons per feet per day
bls for below land surface

The Commission is seeking permission to withdraw an annual average daily rate of 5.29 mgd and a maximum daily rate of 7.62 mgd. Subject to certain limiting conditions to be set forth in the Commission's consumptive use permit, the water will be produced from Floridan Aquifer wells. The District proposes to grant the permit application with certain specified conditions. William Nassau challenges the issuance of a permit to the Commission on the basis of the Commission's alleged failure to comply with the applicable requirements of Chapter 373, Florida Statutes, and Chapter 40C-2, Florida Administrative Code, and other applicable law.

At the final hearing, the Commission presented the following witnesses: George Sheeter, accepted as an expert in water project planning and civil engineering; Peter Korelich, accepted as an expert in public water system planning, operation and engineering; Joel Kimrey, accepted as an expert in hydrogeology, hydrology and water resources; Michael Dennis, accepted as an expert in wetland ecology, biology, threatened and endangered species and wildlife evaluation; and Stephen Kintner, accepted as an expert in hydrogeology and water resource planning.

The Commission's Exhibits 1 through 30 were admitted in evidence.

The Petitioner presented the following expert witnesses: Victor Carlisle, accepted as an engineer in soil genesis and classification; William Sinclair, accepted as an expert in hydrogeology; and Sydney T. Bacchus, accepted as an expert in botany and wetland ecology. The Petitioner presented the following non-expert witnesses: Charles Tibbles, William Nassau, Richard Wagner, Florence Bailey and Jeff Smith.

Petitioner's Exhibits 2, 3, 4, 6, 44 and 45 were admitted in evidence.

The District presented the following witnesses: Richard Levin, accepted as an expert in accepted as an expert in geology, hydrogeology and groundwater modeling; Lance D. Hart, accepted as an expert in wetlands ecology, plant ecology and environmental impact assessment; and Doug Dycus, accepted as an expert in civil engineering with expertise in surface water drainage patterns.

The District's Exhibits 1, 2, 4, 7A, 7B, 7C, 7D, 8A, and 8B were admitted in evidence.

A motion for Official Recognition of Chapters 90, 120, and 373, Florida Statutes, Chapters 22I-6, 28-5, 40C-1, 40C-2, and 17-40, Florida Administrative Code, and the St. Johns River Water Management District's Applicant's Handbook on consumptive uses of water was GRANTED.

The transcript was filed on April 13, 1992. All parties timely filed their proposed findings of fact and conclusions of law. All proposed findings of fact and conclusions of law have been considered. A specific ruling on each proposed finding of fact is made in the Appendix attached hereto and made a part of this Recommended Order.

On May 6, 1992, Petitioner filed a Motion for Reconsideration of Evidentiary Rulings and Motion for New Hearing. Both are hereby DENIED.

On May 7, 1992, the Commission filed a Motion for Determination of Improper Purposes and Award of Attorney's Fees and Costs. Appropriate findings of fact and conclusions of law are set forth infra, and based thereon, the Motion is hereby DENIED.

FINDINGS OF FACT

I. THE PARTIES

1. The Commission was created by the legislature pursuant to Public Law 67-1754 in combination with Public Law 85-503. Its principal office is located in New Smyrna Beach, Volusia County, Florida.

2. The Commission is charged with maintaining a water supply and providing wastewater treatment and electrical power.

3. The District is an agency created pursuant to Chapter 373, Florida Statutes, in charge of regulating, among other things, consumptive uses of water in a 19 county area of the State of Florida, including all of Volusia County. The geographical boundaries of the District are described in Section 373.069(2)(c), Florida Statutes.

4. Vernon and Irene Beckham are property owners of the property proposed for the construction of the new State Road 44 wellfield.

5. Volusia City-County Water Supply Authority is a cooperative created by interlocal agreement in accordance with Section 163.01, Florida Statutes (1991), which party made no appearance at the Formal Administrative hearing but adopted the position of the Commission.

6. Nassau is an individual residing at 4680 Cedar Road, New Smyrna Beach, Florida.

II. THE APPLICATION

7. The present service area of the Commission encompasses approximately 43 square miles, of which only about 15 square miles of the service area are located in the City of New Smyrna Beach.

8. On August 8, 1984, the District issued Consumptive Use Permit No. 2-127-0214NG to the Commission for its Glencoe and Samsula wellfields, which permit would expire in seven years.

9. The combined authorized withdrawal of the existing wellfields is 5.2 mgd on an average day and 8.31 mgd on a maximum day.

10. In December 1990, the Commission submitted its Consumptive Use Permit Application to renew the existing permit, including the development of an additional water supply wellfield.

11. This application also sought an increased allocation to meet projected demand for the Commission's service area. The total allocation sought was 5.59 mgd on an average day and 8.31 mgd on a maximum day. However, the District has recommended 5.29 mgd on an average day and 7.62 mgd on a maximum day by 1998.

12. The source of the water for all three wellfields is the Floridan aquifer.

13. The Floridan aquifer can produce the volumes of water requested based on the past pumpage from the Samsula wellfield and the Glencoe wellfield.

14. The Glencoe wellfield has been in operation since early 1950. The Samsula wellfield has been in operation since 1982.

15. The Commission has never exceeded the currently permitted withdrawals as measured by annual, daily, or peak basis.

III. WATER DEMAND

16. Approximately 75% of the demand is related to residential consumption. Approximately 10% of the demand is related to commercial and industrial consumption. Approximately 7% of the demand is related to irrigation. Lastly, approximately 8% of the demand is for miscellaneous consumption, including loss that occurs in the treatment process itself.

17. Gross water use in the area served by the Commission is about 138 gallons per person per day.

18. The approximate 103 gallons per person per day (net) used by residences is small as compared to other providers of potable water.

19. The present population of the Commission's service area is approximately 31,570 customers.

20. The projected 1997 population of the Commission's service area is 40,680.

21. The Commission's population projections were obtained by methods consistent with the District's Permit Manual.

VI. PERMIT CRITERIA

A. Water Conservation Plan

22. The Commission has submitted a complete Water Conservation Plan. The implementation of that plan is a condition of the permit.

23. The Water Conservation Plan includes a customer audit program of the system to determine how much water is pumped and where the water goes once it is distributed.

24. The customer audit program involves employees of the Commission discussing the historical water usage with the customer, detection of leaks, installation of water restrictors, and the prevention of freezing pipes in the wintertime.

25. The Commission encourages reduced consumption through the water meter charges. Larger meters use more water than smaller meters. The monthly charge for the larger meters is higher thereby encouraging the use of smaller meters.

26. The Water Conservation Plan includes a pressure monitoring program to detect leaks in the system. The program has been implemented.

27. The system pressure monitoring plan measures the pressure in different zones around the Commission's service area and, should a large main burst, an alarm is triggered. Repair of that water main would occur immediately.

28. The Water Conservation Plan includes an analysis of the economic, environmental and technical feasibility of using reclaimed water in Commission's Exhibit No. 14, Reuse of Reclaimed Wastewater Conceptual Planning Document.

29. The Reuse of Reclaimed Wastewater Conceptual Planning Document involves four major phases of construction starting in 1991 with completion in 1995. The first phase is underway.

30. As part of the reuse plan, the Commission is modifying the wastewater treatment plant to accept reuse water. The construction is 99 percent complete. A total cost for that is approximately 1.5 million.

31. The Commission will be replacing some freshwater irrigation sources with reclaimed water.

32. The Commission has valid DER permits for this use of reclaimed water.

33. As part of the reuse plan, the Commission has entered into construction contracts to serve the municipal golf course, the landscape at city hall and city parks with wastewater. The transmission and distribution lines will be completed before October 1992. The cost is approximately $700,000.

34. Other phases of the reuse plan include construction of the major infrastructure inside and outside the city for reuse distribution. Total investment is in excess of five million dollars. Major customers along the route have been identified to increase the demand on the reuse system.

35. The Water Conservation Plan includes an employee awareness program and an educational program as well as a time frame to implement those programs.

36. The Commission has a public relations program to inform the customers about water conservation which includes newspaper publications concerning reading water meters, xeriscaping, and methods to reduce water consumption and the time/temperature machine which has prerecorded messages.

37. The Commission has a program for educating the public and encouraging xeriscaping or the use of drought resistant foliage. Xeriscaping is implemented at the wastewater lift stations.

38. The Commission has used direct mailing to provide water conservation information to customers.

39. The Commission has a program for inspecting and replacing defective meters. If a meter malfunctions, the replacement reduces the system losses and accurately records water usage.

40. The Commission has a program to monitor unmetered uses, which includes reporting from users such as the fire department of their unmetered use. On a monthly basis, the fire department reports its water usage as calculated by its operation schedule.

41. The Commission is using the lowest acceptable quality water source, including reclaimed water, for certain types of needs such as irrigation of golf courses.

42. The Water Conservation Plan addresses the use of treated effluent to minimize withdrawals of groundwater.

B. Issues Related to Reasonable Assurance

(1) Hydrogeology

43. The Floridan aquifer occurs at approximately 100 feet below the land surface throughout Volusia County. It's overlain by approximately 100 foot of sandy and clayey material collectively called the Clastic aquifer or the surficial aquifer.

44. The proposed SR 44 wellfield site is underlain by an approximate 900-foot depth of freshwater of the Floridan aquifer.

45. In the high recharge area of the Deland Ridge, water moves rapidly into the surficial aquifer and recharges the Floridan aquifer.

46. A regional groundwater gradient extends from the Deland Ridge towards the east. There is a volume of water in the Floridan aquifer that is constantly moving from the west to the east to replenish water that is being withdrawn.

47. Based on the regional movement of the Floridan aquifer and the nature of the Floridan aquifer, the water that is being replenished by the withdrawal is mainly coming from the Floridan aquifer with some contribution from the surficial.

48. Another way to determine the source of the water is by geochemical analysis.

49. The source of the water for this use is characterized as freshwater category number three meaning that it is Floridan aquifer water that is

replenishing the water that is being withdrawn and not surface water that is going directly into the Floridan aquifer system.

(2) Aquifer Tests

50. The aquifer performance test at the SR 44 wellfield shows that the aquifer is able to produce the volumes of water requested.

51. The depths of the proposed wells, and APT test well, at the SR 44 wellfield is 250 feet below land surface or 150 feet into the Floridan aquifer.

52. The APT at the SR 44 wellfield site provided for the collection of data to show what happens to the water levels while the aquifer is stressed.

53. The second APT at the SR 44 wellfield site tested the Floridan aquifer at a depth of 750 feet below land surface. The section of the Floridan aquifer tested was 500 feet thick.

54. The second APT and geophysical logs showed that there were not any additional flow zones below the upper Floridan aquifer which would yield additional water.

55. Prior to the pump recovery test at the Samsula wellfield, the wells were pumping at 2.59 million gallons per day for a couple of days prior to shutting them off.

56. For a period of five days, four wells in the vicinity of the Samsula wellfield were monitored by the District for water level recovery.

57. The actual observations and the predicted drawdowns in the model correlated well.

58. Drawdown does occur at homeowners' wells when the Commission's Samsula wellfield is pumping, but it does not interfere with existing legal users based on the District rules.

59. The drawdown will not cause a ten percent reduction in the withdrawal capability of the homeowner's well.

(3) Computer Modeling

60. The PLASM model simulates the response of the surficial and Floridan aquifers to pumping.

61. The computer model oversimplifies the nature of the surficial aquifer by characterizing the layer as a solid homogeneous type of a system, basically being all sand. In reality, there are some shell and clay layers or hardpan.

62. The transmissivity or the ability to transmit water through the aquifer for surficial aquifer sand ranges between 1,000 up to about 12,000.

63. The transmissivity in the model is 5,000 gallons per day per foot (gpdpf) for Layer 1 which was reasonable.

64. In Layer 2, the data from the APT produced a value of 50,000 gpdpf and a leakance value, or value that would correspond to water that moves from the surficial aquifer down to the Floridan aquifer, of 0.0012 gpdpf.

65. This 50,000 and 0.0012 values are reasonable numbers for this area of Volusia County.

66. The PLASM model is an accepted model for simulating pumpage.

67. In the PLASM model, the transmissivity was varied in two different directions, but it averaged 50,000 gpdpf in the Floridan aquifer system.

68. In the Floridan aquifer system, water is going to be moving based on the transmissivity of the aquifer and a leakance value from the surficial aquifer. The water primarily flows in a horizontal direction. There is a component of vertical movement. The difference between the horizontal movement and the vertical movement is an order of magnitude.

69. There's an order of magnitude difference between the 50,000 gpdpf and the 0.0012 gpdpf which shows that the majority of the water is coming from a horizontal direction. There is some vertical movement. The vertical movement is not only from above, but because of the Floridan aquifer there is also vertical movement from below.

70. When a well is pumping water, the water is being replenished mostly from the horizontal direction and from the lower direction in the same aquifer system, with some contribution downward based on the leakance value from above.

71. This is demonstrated or shown by a small predicted drawdown in the surficial aquifer and that predicted drawdown is basically two orders of magnitude less than the drawdowns in the Floridan aquifer.

(4) Proposed Recommended Withdrawal Rates

72. The proposed recommended withdrawal rate from the SR 44 wellfield is 1.43 mgd for average daily flow.

73. With the proposed recommended withdrawal of 1.43 mgd at the SR 44 wellfield, the maximum drawdown in the surficial aquifer is approximately 0.34 feet.

74. With the proposed recommended withdrawal of 1.43 mgd at the SR 44 wellfield, the maximum drawdown in the Floridan aquifer is approximately ten (10) feet.

75. A withdrawal of 1.93 mgd at the SR 44 wellfield site would result in a maximum drawdown in the surficial aquifer of 0.7 feet and in the Floridan aquifer of thirteen (13) feet.

76. The proposed recommended withdrawal rate from the Samsula wellfield is 1.93 mgd for average daily flow.

77. With the proposed recommended withdrawal of 1.93 mgd at the Samsula wellfield, the maximum drawdown in the surficial aquifer is approximately seven tenths (0.70) of a foot.

78. With the proposed recommended withdrawal of 1.93 mgd at the Samsula wellfield, the maximum drawdown in the Floridan aquifer is approximately seventeen (17) feet.

79. The proposed recommended withdrawal rate from the Glencoe wellfield is 1.93 mgd for average daily flow.

80. Under the existing permit, the Samsula wellfield is withdrawing at the higher rate of approximately 2.59 million gallons per day.

81. The volumes of water requested from both the Samsula wellfield and the SR 44 wellfield have been reduced from what was originally proposed by the Commission.

82. The reduced allocation for the Samsula wellfield will improve groundwater elevations and thereby reduce groundwater impacts.

(5) Water Quality

83. The state water quality standard for public drinking water is 250 milligrams per liter (mg/l) chlorides.

84. For water supply systems where the chloride level is below 250 mg/l, the District uses that level to determine whether or not the pumping is going to cause significant saline water intrusion. The proposed use cannot cause the water quality to exceed 250 mg/l in chlorides.

85. The water quality data from the existing Samsula and Glencoe wellfields shows that none of the wells or trends from the indicate that they are either above 250 mg/l or trending in a degradation mode toward 250 mg/l.

86. The water quality in the wells is stable without degradation of the water quality in either of the Glencoe wellfield or the Samsula wellfield.

87. The water quality data collected during the APT at the SR 44 wellfield showed that the chlorides were below 250 mg/l and that during the test, there was no change or a trend of becoming salty.

88. An independent study used geophysical methods to determine the depths below land surface where high concentrations of saline water exist. That depth was at approximately 1200 feet below land surface.

(6) Proposed Permit Conditions

89. The Commission accepts the conditions of the permit as proposed in the Commission Ex. 10-B.

90. The proposed conditions require the Commission to limit the withdrawals per wellfield as specified and to monitor each production well with a flow meter, monitor the groundwater levels, monitor the surface water conditions, monitor rainfall, and monitor the wetlands.

91. The proposed permit conditions and the County's ombudsman program adequately address the possible impacts of the proposed wellfield on existing users. The monitoring will be able determine the impact of the wellfield on those users.

92. The Commission accepts the condition to mitigate for interference with existing legal users in compliance with the proposed permit conditions.

93. The Volusia County ombudsman program provides the method of investigating and resolving issues related to interference of the proposed wellfield operation with existing legal users. The Commission will participate in this program.

94. The Commission's purchase of the property is contingent upon obtaining the consumptive use permit. The Commission will own the site as shown on various exhibits.

95. The drainage pattern of Tiger Bay is northerly for most of the basin. A canal located north of the area provides the primary drainage for Tiger Bay.

96. A small drainage area within Tiger Bay of approximately 90 acres drains south into the SR 44 wellfield site. Some of the drainage does come through the two 30-inch culverts under SR 44, and both commingle with the wetlands that are on the site as well as drain into a ditch located along the Ranchette Road.

97. The maximum capacity at ideal conditions for those two culverts would be approximately 300 CFS, cubic feet per second.

98. The entire Tiger Bay drainage basin is approximately 13,000 acres. The volume of surface water which can flow from Tiger Bay is 13,000 cfs. That volume could not flow through the culverts at SR 44 without overtopping the road.

C. Ecology

99. The upland communities surrounding the Samsula wellfield are primarily pine flatwoods and mixed pine forested areas.

100. The proposed 1.93 mgd average day withdrawal quantity being recommended by the District for the Samsula wellfield will not adversely affect these upland communities because: (a) the upland communities do not rely on inundated or saturated conditions so the proposed consumptive use will not adversely affect the hydrology these upland communities rely on; and (b) the magnitude of the predicted drawdown will not cause a shift in vegetation meaning a change in the types of plants that already exist there.

101. The wetland communities surrounding the Samsula wellfield site consist of cypress dome and bay swamp communities.

102. With the projected drawdowns information for the Samsula wellfield, there will not be significant adverse impacts to uplands or wetlands that would be identifiable based upon the projected wellfield withdrawal rates as recommended by the District.

103. Any potential for impacts has been reduced in that the current pumpage rates are projected to decrease.

104. The proposed 1.93 mgd average day withdrawal quantity being recommended by the District for the Samsula wellfield will not cause the water table to be lowered such that these wetland communities will be significantly and adversely affected for the following reasons:

a) The wetlands in the area of the Samsula wellfield lie in a sloped terrain.

b) Underlying the site is a soil area known as a spodic horizon or a hardpan layer.

c) The spodic horizon is an area where there is a deposition of organics and it has a different chemistry than the surrounding soils.

d) The spodic horizon, when saturated, acts as a semi-impervious or impermeable layer which causes impedance of water as it goes through.

e) This spodic horizon in the area of the Samsula wellfield is typically two feet below the soil surface.

f) The predicted drawdown will not cause water levels to be dropped such that in normal wet season conditions, which is the time when hydrology to a wetland is most important, the spodic horizon will still be saturated so that water is coming into the wetlands through rainfall directly, as well as rainfall that falls on the adjacent uplands and moves laterally through the soils to the wetland above the spodic horizon.

g) Thus, the spodic horizon will prevent a shift in the "water budget" of these wetlands such that the wetlands will not be harmed by the proposed use.

h) The wetlands systems surrounding the Samsula wellfield are primarily densely forested systems with a fairly substantial accumulation of organic or muck type soils in the surface. The soils assist these wetlands in retaining moisture which provides a "built-in system" for the wetlands to withstand fluctuations in hydroperiods.

i) The wetland systems surrounding the Samsula wellfield appear to have an altered hydrology. The identifiable impacts are ditches or shallow swales along State Road 44. The wetlands south of 44 in the vicinity of wells one, two and three have been bisected by roads and there are swales cut adjacent to those roads. The power line that runs north-south has cut off and eliminated half of a cypress wetland south of 44 and about half of a cypress wetland north of 44. It is possible that these ditches and roads may have caused the altered hydrology in these wetlands.

j) It cannot be concluded that the current Samsula wellfield operation has caused this altered hydroperiod.

k) However, the drawdown that is predicted to occur at the Samsula wellfield under the proposed 1.93 mgd average day withdrawal being recommended by the District is much less than the drawdown that is occurring from the current pumpage at this wellfield. The projected drawdowns from the proposed three wellfield configurations indicate less potential for impacts than the current two wellfields as far as Samsula is concerned.

l) Thus, even if the wetlands surrounding the Samsula wellfield have been affected in any way by the current pumpage rate, the reduced drawdown rates that will result from the 1.93 mgd average day proposed pumpage rate will greatly improve this condition.

105. Other than slight alteration along the edge of SR 44, the wetlands in the vicinity of Samsula wells five and six have not been significantly altered. No changes in vegetation and no apparent changes in hydrology occur in those areas. The cypress wetland north of SR 44 has a drainage ditch emerging to the

east. Another wetland immediately north of SR 44, north of well four, is adjacent to the road and the roadside swale or ditch in that vicinity.

106. The species of wildlife identified are ones that are adapted to altered conditions. Abundant wildlife is generally found living in association with improved pastures and close proximity to man.

107. Most of the wetlands in the area of the Samsula wellfield, north and south of SR 44, are in improved pasture or where roads and power lines have been cut. There was evidence of impacts to the wetlands and some drainage. The edge of the cypress dome north of SR 44 has blackberries and other weedy type species along the margins of it.

108. The wetland immediately southeast of well one at the Samsula wellfield was a healthy bay dominated area with ferns underneath.

109. The lichen line on the trunk of the tree and the mosses indicate that the water has been up to or near the historical high within the past season or two. Otherwise, the lichens would grow at the base of the tree.

110. At the Samsula wellfield site, there are no wetlands within the inner drawdown contour of 0.7. There are some wetlands between the 0.7 and the 0.5 contours.

111. The upland communities in the vicinity of the proposed SR 44 wellfield are primarily pine flatwoods and improved pasture.

112. In the pine flatwoods areas, the soils indicate that the water table extends from a height of 0.5 feet below land surface and down to a hardpan layer.

113. The water table in the pine flatwoods fluctuates between the hardpan and 0.5 feet below land surface.

114. The proposed 1.43 mgd average daily withdrawal which is being recommended by the District for the proposed SR 44 wellfield will not significantly and adversely affect these upland communities because these upland communities are not reliant on inundated or saturated conditions, and the proposed consumptive use will not cause a shift in hydrology such that the vegetation found in these communities will no longer be there.

115. The wetland communities in the vicinity of the proposed SR 44 wellfield consist of cypress sloughs and cypress domes which also have herbaceous areas with them. The cypress dominated wetlands are on the northeastern portion of the site and the northwestern portion of the site extending down through the central and southeastern part of the site. Cypress dominated wetlands occur on the southwestern border with one in the east-central portion of the site. Between the cypress dominated wetlands and pine flatwoods are grass prairies.

116. The Commission determined the hydroperiod of the wetlands using vegetative physical evidence or biological indicators, such as lichen lines and mosses, and soil physical evidence from soil probes, which are indicators of long-term and sometimes short-term changes.

117. The wetland on the east-central portion of the proposed SR 44 wellfield site inundates to approximately six and one half inches. In the dry season, the soils dry out to 0.15 feet below land surface.

118. In the wet prairie or wet grassy area, the water table seasonally fluctuates between the hardpan layer of 2.2 feet bls and a tenth or two-tenths of an inch above the surface as based on adventitious roots growing from a St. Johns wort plant species.

119. The water table fluctuations explain the seasonal high and the seasonal low water elevations.

120. The factors which most influence the wetlands and their hydrology are subsurface flow during the wet season, the runoff and direct rainfall.

121. The proposed 1.43 mgd average daily withdrawal for the proposed SR 44 wellfield will not significantly and adversely affect these wetland communities because these wetlands are also underlain by a spodic horizon which, as in the case of the Samsula wellfield wetlands, functions to provide lateral movement of water into the wetlands.

122. The predicted drawdowns for the proposed SR 44 wellfield will not lower the water levels in these wetlands so as to prevent the spodic horizon from performing this function.

123. The recommended withdrawal rate of 1.43 mgd for the proposed SR 44 wellfield reduces the opportunity for impacts.

124. The part of the wellfield site where the greatest drawdown of 0.34 feet occurs is the furthest away from the majority of the wetlands on the site.

125. However, the wetland and soil types on the surface layer are different than the wetland and soil types found at the Samsula wellfield site.

126. The District is recommending a pumpage rate for the proposed SR 44 wellfield that would result in a maximum .34 feet of drawdown in the surficial aquifer while recommending a pumpage rate that would result in a maximum .7 foot drawdown in the surficial aquifer for the Samsula wellfield.

127. The wetlands at the proposed SR 44 wellfield site do not have the dense canopy as well as the accumulation of muck soils in the surface that the wetlands at the Samsula site have.

128. Additionally, the wetlands in the vicinity of the proposed SR 44 wellfield site include herbaceous systems which tend to be shallower systems, not as deeply set as the forested cypress systems are, and therefore tend to be more sensitive to changes that occur in the top couple of inches of soil which is above the spodic horizon.

129. Thus, the wetlands in the vicinity of the proposed SR 44 wellfield would be significantly and adversely affected if the Commission were permitted to withdraw water at a pumpage rate that would result in a drawdown of greater that .34 feet.

130. The drawdowns upon which the evaluation of potential wetland impacts are based are predicted drawdowns.

D. Monitoring and Proposed Conditions

131. To provide additional assurance, the District has recommended a series of permit conditions, numbered 31 through 45 on the Commission Ex. 10-B, that will require the permittee to conduct extensive groundwater and surface water monitoring, as well as vegetative monitoring in the vicinity of the proposed SR 44 wellfield and the Samsula wellfield site. Condition number 31 identifies the overall program of wetland and ground and surface water monitoring.

132. Condition number 32 requires the permittee to install surficial aquifer monitoring wells in the vicinity of the wellfield sites. These monitoring wells will be constructed below the spodic horizon and inside and outside the "area of concern" which is the area within the tenth of a foot drawdown contour at the wellfield sites. This condition will enable the District to analyze how the proposed use is affecting the overall groundwater levels unaffected by the spodic horizon.

133. Placing these wells both inside and outside the area of concern will allow the District to determine if any change in groundwater levels is due to the wellfields or normal climatic patterns.

134. Condition number 33 will allow the District to obtain a constant record of information to analyze what trends are occurring in the wetlands in the wellfields and to have sufficient data during normal climatic variations of the wet and the dry seasons to determine the presence of a trend.

135. The required period of record collection, defined in this condition as the shorter of one calendar year or one consecutive wet to dry season, is a sufficient period of record collection because the purpose of this condition is to obtain a picture in time of the existing conditions in the wetlands surrounding the wellfields during the dry season and the wet season.

136. Condition 33 requires the permittee to submit an annual hydrologic report to the District. This is a sufficient time period of reporting because the purpose of the report is to allow the District to accumulate and assess an entire year's of data or the entire dry to wet season variation. With the annual report, any adverse wetland vegetation changes can be detected prior to any permanent harm to the wetlands.

137. Condition number 34 requires the permittee to install shallow piezometers and staff gauges in the monitored and referenced wetland areas. The monitored wetlands are the wetlands inside the "area of concern." The referenced wetlands are outside the "area of concern."

138. Condition number 34 will allow the District to analyze the hydrology above the spodic horizon. This in turn will allow the District to evaluate the hydrology of the monitored wetlands against the hydrology of the referenced wetlands to determine if any adverse impacts are occurring in the wetlands due to the wellfields' operation.

139. Condition Number 35 requires the permittee to submit surveyed cross-sections of each of the monitored wetlands and the referenced wetlands. This condition will allow the District to receive a linear view of both the monitored and referenced wetlands so that when the District receives the groundwater and surface water information required by condition number 34, it can assign that

information to a picture, and know what the wetlands look like under varying water conditions.

140. Condition number 36 requires the permittee to select referenced wetlands similar to the wetlands that are going to be monitored in the area of concern. This will ensure that the reference wetlands match vegetatively and hydrologically with the wetlands that are being monitored within the area of concern.

141. Condition number 37 requires the permittee to install rain gauges at both wellfield sites. This will allow the District to compare rainfall to groundwater information and determine what the relationship is between water levels in the surficial aquifer and the amount of rainfall that has occurred.

142. Condition number 38 requires the permittee to monitor, on a weekly interval, the water levels in each of the monitored wetlands and in the referenced wetlands and submit annual reports of this data.

143. Condition number 39 requires the permittee to install continuous recorders on the staff gauges and piezometers in the reference and monitored wetlands. The information gathered will provide the District with detailed records of the water fluctuations in these wetlands systems relative to rainfall input.

144. Condition number 39 requires the permittee to submit annual reports of the information gathered to the District. The annual report will allow the District to determine if any adverse trends are occurring in the wetlands. No permanent adverse change could occur to the wetlands communities surrounding either wellfield before the District receives this annual report.

145. Condition number 40 requires the permittee to conduct baseline water quality monitoring at each of the monitored wetlands. If any adverse change does occur to the wetlands surrounding either wellfield, and if the permittee chooses to mitigate for this adverse change by augmenting the wetland systems, then this permit condition will allow the District to ensure that the water used to augment those wetlands is of the same quality as the water currently found in those wetlands.

146. Condition number 41 requires the permittee to initiate a baseline vegetative monitoring program of the monitored and reference wetlands at both wellfields. This condition will allow the District to have a vegetative picture of the wetlands prior to any pumpage.

147. Condition number 42 requires the permittee to conduct a vegetative monitoring program of the monitored and reference wetlands at both wellfields with the initiation of withdrawals.

148. Condition number 43 requires the permittee to provide a wetland similarity assessment for both wellfields. The permittee must compare the results of the wetland vegetative monitoring program each year against the baseline vegetative monitoring of the same wetland and against the vegetative monitoring of the referenced wetlands. This condition will assist the District in determining if any adverse trends are occurring in the wetlands surrounding either wellfield.

149. Condition number 44 requires the permittee to create two duplicate reference herbarium collections of the flora present in the monitored and

referenced wetlands and the adjacent upland areas. This condition will ensure that there is consistency in the vegetative identification throughout the monitoring program.

150. Condition number 45 requires the permittee to mitigate any harm to the wetlands that is detected from the monitoring required by other permit conditions. This condition does not require any particular form of mitigation.

151. The wellfield withdrawals at the projected rates and the suggested permit rates should not have an impact on threatened or endangered plant or animal species in the Samsula wellfield area or the proposed SR 44 wellfield area.

152. The monitoring program will provide the data to determine on a short-term or long-term basis whether the pumpage rates are causing impacts.

153. Potential harm can be mitigated by adjusting the quantities and locations of withdrawal.

V. ATTORNEY'S FEES AND COSTS

154. The Commission seeks fees and costs from Petitioner pursuant to Section 120.59(6), Florida Statutes (1991). Such entitlement requires a showing that the Petitioner brought this case or filed a pleading for an improper purpose.

155. While the evidence does show that certain pleadings filed by Petitioner (or his attorney who withdrew 24 hours prior to the beginning of the hearing) may have had as one purpose the delay of the hearing scheduled for March 24, 1992, the totality of the evidence establishes that Petitioner's purposes were not improper.

156. Section 403.412(5), Florida Statutes (1991), establishes the right of any citizen of the state to intervene into "proceedings for the protection of air, water, or other natural resources of the state from pollution, impairment, or destruction . . . ."

157. The actions of Petitioner in this proceeding were not clearly shown to be for delay, harassment or other improper purpose. In fact, Petitioner handled himself well as a pro se litigant after his attorney's untimely withdrawal.

158. If anyone acted with an improper purpose in this proceeding, it was Peter Belmont, Nassau's attorney until he withdrew less than 24 hours prior to the hearing. The record shows that Belmont entered into the representation of Nassau with full knowledge that he would seek all possible delays in the proceedings. He engaged in no preparation for the hearing and he left Nassau unprepared also. Belmont's bad faith actions in this case however can only be determined and remediated by the Florida Bar, not by the undersigned through an award of fees and costs.

159. Finally, there has been no delay in these proceedings. The petition was filed with DOAH on January 16, 1992. The District moved to consolidate it with two other pending case set for January 20, 1992. Those cases were voluntarily dismissed. An Initial Order was sent to the parties on January 21, 1992, seeking suggested dates for the hearing. The hearing was set to begin March 16, 1992, less than 60 days from the filing of the case. A one week

continuance was granted and the case was heard beginning on March 24, 1992. If anything, this case has proceeded expeditiously.

CONCLUSIONS OF LAW

160. The Division of Administrative Hearings has jurisdiction of the parties to and subject matter of these proceedings. Section 120.57(1), Florida Statutes.

161. The District's regulatory authority over the Commission's application for a CUP is governed by and subject to the provisions of Chapter 373, Florida Statutes (1991), and Florida Administrative Code Chapter 40C-2, Florida Administrative Code.

162. The Commission has the burden of proof to establish its entitlement to the requested permit. Rule 40C-2.301(7). Capeletti Brothers v. Department of General Services, 432 So.2d 1359 (Fla. 1st DCA 1983).

163. Section 373.223(1), Florida Statutes, provides:

> 373.223 Conditions for a permit. --
> (1) To obtain a permit pursuant to the provisions of this chapter, the applicant must establish that the proposed use of water:
> (a) Is a reasonable-beneficial use as defined in s. 373.019(4);
> (b) Will not interfere with any presently existing legal use of water; and
> (c) Is consistent with the public interest.

164. "Reasonable-beneficial use" is defined in Section 373.019(4), Florida Statutes, as

> . . .the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest.

165. Rule 40C-2.301, F.A.C., provides in pertinent part:

> (2) To obtain a consumptive use permit for a use which will commence after the effective date of implementation, the applicant must establish that the proposed use of water:
> (a) is a reasonable beneficial use; and
> (b) will not interfere with any presently existing legal use of water; and
> (c) is consistent with the public interest.
> (3) For purposes of subsection (2)(b) above, "presently existing legal use of water" shall mean those legal uses which exist at the time of receipt of the application for the consumptive use permit.
> (4) The following criteria must be met in order for a use to be considered reasonable beneficial:

(a) The use must be in such quantity as is necessary for economic and efficient utilization.
(b) The use must be for a purpose that is both reasonable and consistent with th public interest.
(c) The source of the water must be capable of producing the requested amounts of water.
(d) The environmental or economic harm caused by the consumptive use must be reduced to an acceptable amount.
(e) All available water conservation measures must be implemented unless the applicant demonstrates that implementation is not economically, environmentally or technologically feasible. Satisfaction of this criterion may be demonstrated by implementation of an approved water conservation plan as required in Section 12.0., Applicant's Handbook: Consumptive Uses of Water.
(f) When reclaimed water is readily available it must be used in place of higher quality water sources unless the applicant demonstrates that its use is either not economically, environmentally or technologically feasible.
(g) The lowest acceptable quality water source including reclaimed water which is addressed in paragraph 40C-2.301(4)(f) above, must be utilized for each consumptive use. To use a higher quality water source an applicant must demonstrate that the use of all lower quality water sources will not be economically, environmentally, or technologically feasible. If the applicant demonstrates that use of a lower quality water source would result in adverse environmental impacts that outweigh water savings, a higher quality source may be utilized.
(h) The consumptive use should not cause significant saline water intrusion or further aggravate currently existing saline water intrusion problems.
(i) The consumptive use should not cause or contribute to flood damage.
(j) The water quality of the source of the water should not be seriously harmed by the consumptive use.
(k) The water quality of the receiving body of water should not be seriously harmed by the consumptive use. A valid permit issued pursuant to Rule 17-4.240 or Rule 17-4.260, Florida Administrative Code, shall establish a presumption that this criterion has been met.
(l) All individual consumptive use permit applicants must comply with the monitoring

> requirements in section 6.7.1, of the Applicant's Handbook, Consumptive Uses of Water, on or before January 1, 1994, unless waived by the Governing Board due to extreme hardship.
> (5)(a)A proposed consumptive use does not meet the criteria for the issuance of a permit set forth in Rule 40C-2.301(2) if such proposed water use will:
> 1. significantly induce saline water encroachment; or
> 2. cause the water table or surface water level to be lowered so that stages or vegetation will be adversely and significantly affected on lands other than those owned, leased or otherwise controlled by the applicant; or
> 3. cause the water table level or aquifer potentiometric surface level to be lowered so that significant and adverse impacts will affect existing legal users; or
> * * *
> 5. cause the rate of flow of a surface water course to be lowered below a minimum flow which has been established pursuant to Section 373.042(1), F.S.; or
> 6. cause the level of a water table aquifer, the potentiometric surface level of an aquifer source, or the water level of a surface water source to be lowered below a minimum level which has been established pursuant to Section 373.042(2), F.S.

166. The District has by rule adopted a presumption in Section 9.4.4 of the Applicant's Handbook that an interference with an existing legal use occurs when:

> . . . the withdrawal capability of any individual withdrawal facility of a presently existing legal user experiences a 10% or greater reduction in withdrawal capability or when the existing user experiences economic, health or other type of hardship as a result of the new use.

167. The second pump test conducted by the District established that the drawdowns observed in homeowners' wells were not interfered with to the extent that a 10% reduction in withdrawal capacity was observed. With the proposed, reduced allocation for the Samsula wellfield, from 2.59 mgd to 1.93 mgd, there will not be interference with existing legal users.

168. The District defines the public interest at Section 9.4.4 of the Applicant's Handbook as:

> . . . . those rights and claims on behalf of people in general. In determining the public interest in consumptive use permitting

> decisions, the Board will consider whether an existing or proposed use is beneficial or detrimental to the overall collective well being of the people or to the water resource in the area, the District and the State.

This definition has two components which requires a determination as to whether the use is "detrimental" or "beneficial": 1) The overall collective well being of the people; and 2) the water resource in the area, the District and the State. As the findings of facts herein indicate, the proposed water use, as conditioned, will not be harmful to the water resources of the area, the District or the State.

169. In the application of its permitting criteria, the District considers the use of water for public supply purposes to be in the public interest. This use proposed in the application is in the public interest.

Rule 40C-2.301(2)(a), F.A.C.

170. The amount of water requested here is reasonable for the purposes intended. The population figures are accurate. The per capita usage figures for this service area, 103 gpcpd, are reasonable and within the range contemplated by the District.

Rule 40C-2.301(4)(b), F.A.C.

171. The consumptive use is for a purpose which is both reasonable and consistent with the public interest because: (1) use of water for public supply purposes is in the public interest; (2) the water will used by the residents in the Commission's service area for a variety of purposes, all of which are accepted classes of use; and (3) the use is needed to provide additional sources of potable water to the citizens of the Commission service area. Therefore, the criteria of Rule 40C-2.301(4)(b) have been met.

Rule 40C-2.301(4)(c), F.A.C.

172. The APT, pump tests and historical records establish that the Floridan aquifer is capable of producing the requested amounts of water. Therefore, the criteria of Rule 40C-2.301(4)(c) have been met.

Rule 40C-2.301(4)(d), F.A.C.

173. The proposed consumptive use will not cause economic harm, and the consumptive use as proposed and conditioned will prevent any environmental harm. In addition, the environmental harm has been reduced to an acceptable amount. The existing allocation of Samsula wellfield has been reduced from 2.59 mgd to 1.93 mgd. This reduces the impacts on the surficial aquifer and wetlands. The allocation for the proposed SR 44 wellfield has been reduced from 1.93 mgd as requested to 1.43 mgd as proposed. Any environmental harm which may result from the withdrawal quantities being recommended by the District has been reduced to an acceptable amount because in the event the drawdowns in the surficial aquifer are greater than the drawdowns being predicted by the District, the District is recommending a detailed wetland monitoring program which will detect any adverse change occurring in the wetlands surrounding either wellfield. The District will require the Commission to mitigate for any adverse changes that do occur. No harm will come to the environment or to adjacent property owners as a result of the Commission's withdrawals as proposed by the District.

Rule 40C-2.301(4)(e), F.A.C.

174. The Commission's Water Conservation Plan insures that water is used efficiently through xeriscape, system pressure monitoring, meter rating and public education programs. Available water conservation and reuse measures which are financially, environmentally and socially practicable have been and are being utilized. Condition No. 22 of the Commission Ex. 10-B requires the Commission to implement the Water Conservation Plan, dated December 9, 1991. Therefore, the criteria of 40C-2.301(4)(e), F.A.C., have been met.

Rules 40C-2.301(4)(f) and (g), F.A.C.

175. The Commission has demonstrated that it is using water lower in quality than potable water. The Commission, through the reuse of reclaimed water, will distribute reuse water to the municipal golf course, city hall and city parks for irrigation. Lower quality of water will be used in place of potable water. Therefore, the criteria of 40C-2.301(4)(f) and (g), F.A.C., have been met.

Rule 40C-2.301(4)(h), F.A.C.

176. The Commission has met this criteria based on the results of APT tests at the proposed SR 44 wellfield and existing water quality data from the Samsula and Glencoe wellfields. There will be no detrimental impacts to existing legal users or to the public interest during the term of the permit resulting from any increase in chloride concentrations. The District's recommended condition no. 25 requires the construction of monitoring wells to monitor chlorides and other water quality parameters. The proposed permit condition no. 5 can prohibit withdrawals which would cause the water from a well that causes changes in water quality. Therefore, the criteria of 40C-2.301(4)(h), F.A.C., has been met.

Rule 40C-2.301(4)(i), F.A.C.

177. The consumptive use is a withdrawal of groundwater for distribution as a public water supply. Therefore, the use will not cause flood damage and the criteria in Rule 40C-2.301(4)(i) is met.

Rule 40C-2.301(4)(j), F.A.C.

178. The water quality of the source of the water will not be harmed. The Glencoe and Samsula wellfields have operated for forty (40) and ten (10) years, respectively. By limiting the withdrawal rates, the water quality at each wellfield has remained stable with no trend of degradation toward 250 mg/l of chlorides. Condition nos. 23, 25, 26, 27, 28 require the installation of monitoring wells, collection of water quality samples, metering and submission of reports. Deterioration, if any, in water quality will be detected so as to prevent adverse water quality impacts. No adverse water quality impact will be caused by the proposed use; therefore, the criteria in Rule 40C-2.301(4)(j) are met.

Rule 40C-2.301(4)(k), F.A.C.

179. The receiving body of water for this use is the discharge point from the wastewater treatment plant. The Commission has a valid permit pursuant to Section 17-4.240, F.A.C., which satisfies the criteria of Rule 40C-2.301(4)(k).

Rule 40C-2.301(4)(l), F.A.C.

180. Pursuant to condition nos. 27, 28, 29, and 30 on the permit, the Commission must monitor the withdrawal quantity by submitting actual pumpage reports, as well as install, calibrate and use flow meters. Therefore the criteria of 40C-2.301(4)(l), have been met.

Rule 40C-2.301(5)(a), F.A.C.

181. As a compliment to the three standards set forth in Rule 40C-2.301(2), the Governing Board has determined that failing to meet six certain criteria, due to their very nature, will cause a use to fail the three referenced standards. These six criteria are set forth in Rule 40C-2.301(5)(a)1-6. See also 109.4.1, A.H. The Commission has demonstrated that its proposed consumptive use has met these criteria for the following reasons:

182. The Commission has met the requirement of Rule 40C-2.301(5)(a)1 that the proposed use not significantly induce saline water encroachment for the same reasons as set forth in the discussion of Rule 40C-2.301(4)(h) above.

183. The permit application will be denied if it would allow withdrawals that would cause the water table or surface water level to be lowered so that stages or vegetation will be adversely affected on lands other than those owned, leased or otherwise controlled by the applicant. Based upon the field investigations, groundwater modeling, and other analyses performed by the applicant and District, it is clear that there will be no significant reduction in the water table or in any surface water body and that there will be no damage to crops, wetlands, or other types of vegetation caused by the proposed use whatsoever. The forested nature and heavy organic soil content of the wetlands surrounding the Samsula wellfield and the continuing presence of the spodic horizon in the wetlands surrounding both wellfields will prevent these wetlands from being harmed from the surficial aquifer drawdowns being predicted by the District. Therefore, impacts on-site and off-site have merged since there will be no impacts in the immediate vicinity of the wellfield.

184. The District's recommended wetland conditions will ensure that wetlands in and adjacent to the wellfield will be appropriately monitored, and if any problems arise, the necessary steps will be taken to maintain the health of these wetlands. Therefore, the Commission has established that the requirements of 40C-2.301(5)(a)2 are met.

185. The requirements of Rule 40C-2.301(5)(a)3-6 are either met or are not at issue in this proceeding.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is recommended that the St. Johns River Water Management District enter a Final Order GRANTING the Utilities Commission of New Smyrna Beach's Consumptive Use Permit, subject to the March 9, 1992 permit conditions proposed by the District (Commission's Exhibit 10-B).

RECOMMENDED this 13th day of May, 1992, in Tallahassee, Florida.

DIANE K. KIESLING
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of May, 1992.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 92-0246

The following constitutes my specific rulings pursuant to Section 120.59(2), Florida Statutes, on the proposed findings of fact submitted by the parties in this case.

Specific Rulings on Proposed Findings of Fact
Submitted by Petitioner, William Nassau

1. Each of the following proposed findings of fact is adopted in substance as modified in the Recommended Order. The number in parentheses is the Finding of Fact which so adopts the proposed finding of fact: 4(3) and 5(10).

2. Proposed findings of fact 1-3, 6-9, 11, 12, 14, 19, and 22 are subordinate to the facts actually found in this Recommended Order.

3. Proposed findings of fact 13, 15-18, 20, and 21 are unsupported by the credible, competent and substantial evidence.

4. Proposed finding of fact 10 is irrelevant.

Specific Rulings on Proposed Findings of Fact
Submitted by Respondent, Utilities Commission of
New Smyrna Beach

1. Each of the following proposed findings of fact is adopted in substance as modified in the Recommended Order. The number in parentheses is the Finding of Fact which so adopts the proposed finding of fact: 1-11(1-11); 13-19(15-21); and 35(12).

2. Proposed findings of fact 12 and 20 are unsupported by the credible, competent and substantial evidence.

3. Proposed findings of fact 32-34 are irrelevant.

4. Proposed findings of fact 21-31 and 36-111 are subordinate to the facts actually found in this Recommmended Order.

Specific Rulings on Proposed Findings of Fact
Submitted by Respondent, St. Johns River
Water Management District

1. Each of the following proposed findings of fact is adopted in substance as modified in the Recommended Order. The number in parentheses is the Finding of Fact which so adopts the proposed finding of fact: 1-21(22-46); 22(16); 23(7); 25(19-21); 29-31(12-14); and 32-142(43-153).

2. Proposed findings of fact 24 and 26-28 are subordinate to the facts actually found in this Recommended Order.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS:

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.