St. Johns River
Water Management District
Kirby B. Green III, Executive Director • David W. Fisk, Assistant Executive Director

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On the Internet at *www.sjrwmd.com.*

April 16, 2009

Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

RE: St. Johns Riverkeeper, Inc., City of Jacksonville, and St. Johns County, Petitioners, vs. SJRWMD, Respondent, and Seminole County, Intervenor
DOAH Case Nos. 08-1316, 08-1317, and 08-1318
SJRWMD F.O.R. Nos. 2008-31, 2008-33, and 2008-34

Dear Sir or Madam,

Pursuant to Section 120.57(1)(m), Florida Statutes, this agency is providing a copy of its final order to the Division of Administrative Hearings within 15 days of the final order having been filed with the agency clerk. Also enclosed are the Exceptions to the Recommended Order and the Responses to the Exceptions to the Recommended Order.

If you have any questions, please call me at (386) 329-4153

Sincerely,

Stanley J. Niego
Sr. Assistant General Counsel
Office of General Counsel

SN/kp

Enclosures

SJR 2009-22

FILED
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DIVISION OF ADMINISTRATIVE HEARINGS

BEFORE THE GOVERNING BOARD OF THE ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

ST. JOHNS RIVERKEEPER, INC., CITY OF JACKSONVILLE, AND ST. JOHNS COUNTY,

Petitioners,

vs.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondent,

and

SEMINOLE COUNTY,

Intervenor.
_____/

DOAH Case Nos. 08-1316
08-1317
08-1318

SJRWMD FOR Nos. 2008-31
2008-33
2008-34

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, the Honorable J. Lawrence Johnston ("ALJ"), held a formal administrative hearing in the above-styled case on October 1-3, 6-10 and 15-16, 2008, in Sanford, Florida.

On January 12, 2009, the ALJ submitted to the St. Johns Water Management District ("District" or "SJRWMD") and all other parties to this proceeding a Recommended Order, a copy of which is attached as Exhibit "A." Petitioners, St. Johns Riverkeeper, Inc. ("Riverkeeper"), City of Jacksonville ("Jacksonville"), and St. Johns County (collectively "Petitioners") and Intervenor, Seminole County ("Seminole"), timely filed exceptions to the Recommended Order. Riverkeeper timely filed a response to Seminole's exceptions. Seminole

timely files a response to Petitioners' exceptions. This matter then came before the Governing Board on April 13, 2009 for final agency action.

A. STATEMENT OF THE ISSUE

The issue is whether the District should issue consumptive Use Permit (CUP) No. 95581 to Seminole, authorizing the withdrawal and use of 2,007.5 million gallons per year (mgy) or 5.5 million gallons per day (mgd) of surface water from the St. Johns River for public supply and reclaimed water augmentation ("the CUP").

B. STANDARD OF REVIEW

The rules regarding an agency's consideration of exceptions to a recommended order are well established. The Governing Board is prescribed by section 120.57(1)(l), Florida Statutes ("F.S."), in acting upon a recommended order. The ALJ, not the Governing Board, is the fact finder. *Goss v. Dist. Sch. Bd. of St. Johns County*, 601 So.2d 1232 (Fla. 5th DCA 1992); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277 (Fla. 1st DCA 1997). A finding of fact may not be rejected or modified unless the Governing Board first determines from a review of the entire record that the finding of fact is not based upon competent substantial evidence or that the proceedings on which the finding of fact was based did not comply with essential requirements of law. Section 120.57(1)(l), F.S.; *Goss, supra.* "Competent substantial evidence" is such evidence as is sufficiently relevant and material that a reasonable mind would accept such evidence as adequate to support the conclusion reached. *Perdue v. TJ Palm Associates, Ltd.*, 755 So.2d 660 (Fla. 4th DCA 1999). The term "competent substantial evidence" relates not to the quality, character, convincing power, probative value or weight of the evidence, but refers to the existence of some quantity of evidence as to each essential element and as to the legality and admissibility of

that evidence. *Scholastic Book Fairs v. Unemployment Appeals Commission*, 671 So.2d 287, 289 (Fla. 5th DCA 1996).

If a finding is supported by any competent substantial evidence from which the finding could be reasonably inferred, the finding cannot be disturbed. *Freeze v. Dep't of Business Regulation*, 556 So.2d 1204 (Fla. 5th DCA 1990); *Berry v. Dep't of Envtl. Regulation*, 530 So.2d 1019 (Fla. 4th DCA 1998). The Governing Board may not reweigh evidence admitted in the proceeding, may not resolve conflicts in the evidence, may not judge the credibility of witnesses or otherwise interpret evidence anew. *Goss, supra; Heifitz, supra; Brown v. Criminal Justice Standards & Training Commission*, 667 So.2d 977 (Fla. 4th DCA 1996). The issue is not whether the record contains evidence contrary to the findings of fact in the recommended order, but whether the finding is supported by any competent substantial evidence. *Florida Sugar Cane League v. State Siting Board*, 580 So.2d 846 (Fla. 1st DCA 1991). Because the Governing Board is not the fact-finder, it cannot make additional findings of fact. *See, e.g., Florida Power & Light Co.*, 693 So.2d 1025, 1026-27 (Fla. 1st DCA 1997); *Boulton v. Morgan*, 643 So.2d 1103 (Fla. 4th DCA 1994) (agency may not make supplemental findings of fact on an issue where the hearing officer has made no findings); *Cohn v. Dep't of Professional Regulation*, 477 So.2d 1039 (Fla. 3d DCA 1985) (agency has no authority to make supplemental findings on matters susceptible of ordinary proof; if missing finding is critical to resolve an issue, the agency should remand).

In its final order, the Governing Board may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretations of administrative rules over which it has substantive jurisdiction, provided the reasons for such rejection or modification are stated with particularity and the Governing Board finds that such rejection or modification is as or more reasonable than the ALJ's conclusion or interpretation. Section 120.57(1)(l), F.S. Furthermore,

the Governing Board's authority to modify a recommended order is not dependent on the filing of exceptions. *Westchester General Hospital v. Dept. Human Res. Servs.*, 419 So.2d 705 (Fla. 1st DCA 1982).

In issuing its final order, the Governing Board need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S.

C. EXCEPTIONS AND RESPONSES FILED

The Administrative Procedure Act provides the parties to an administrative hearing with an opportunity to file exceptions to a recommended order. Sections 120.57(1)(b) and (k), F.S. The purpose of exceptions is to identify errors in a recommended order for the Governing Board to consider in issuing its final order. As discussed above in Section B (Standard of Review), the Governing Board may accept, reject, or modify the recommended order within certain limitations. When the Governing Board considers a recommended order and exceptions, its role is like that of an appellate court in that it reviews the sufficiency of the evidence to support the ALJ's findings of fact and, in areas where the District has substantive jurisdiction, the correctness of the ALJ's conclusions of law. In an appellate court, a party appealing a decision must show the court why the decision was incorrect so that the appellate court can rule in the appellant's favor. Likewise, a party filing an exception must specifically alert the Governing Board to any perceived defects in the ALJ's findings, and in so doing the party must cite to specific portions of the record as support for the exception. *John D. Rood and Jamie A. Rood v. Larry Hecht and Department of Environmental Protection*, 21 F.A.L.R. 3979, 3984 (DEP 1999); *Kenneth Walker and R.E. Oswalt d/b/a Walker/Oswalt v. Department of Environmental Protection*, 19 F.A.L.R. 3083, 3086 (DEP 1997);

Worldwide Investment Group, Inc. v. Department of Environmental Protection, 20 F.A.L.R. 3965, 3969 (DEP 1998). To the extent that a party fails to file written exceptions to a recommended order regarding specific issues, the party has waived such specific objections. *Environmental Coalition of Florida, Inc. v. Broward County*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991).

In addition to filing exceptions, the parties have the opportunity to file responses to exceptions filed by other parties. Rule 28-106.217(2), F.A.C. The responses are meant to assist the Governing Board in evaluating and ultimately ruling on exceptions by providing the Governing Board with legal argument and citations to the record.

Riverkeeper filed 26 exceptions to the ALJ's Recommended Order. Jacksonville filed one exception. St. Johns County filed six exceptions. Seminole filed one exception. The District did not file exceptions.

D. RULINGS ON EXCEPTIONS[1]

I. Ruling on Seminole County's Exception

Seminole takes exception to the ALJ's determination in conclusions of law paragraphs 139-141 that Riverkeeper has standing to contest the CUP pursuant to section 403.412(6), F.S., which provides:

> (6) Any Florida corporation not for profit which has at least 25 current members residing within the county where

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[1] Citations to page numbers in the transcript of the formal administrative hearing will be designated by the last name of the witness followed by the transcript page(s); (e.g., Wilkening: 827). Where citations do not involve witness testimony, the citation shall be to the transcript page(s); (e.g., T: 234). Citations to exhibits admitted by the ALJ will be made by identifying the party that entered the exhibit followed by the exhibit number (e.g., District Ex. 2.). Citations to the Prehearing Stipulation will be designated by "Stip." followed by the page and paragraph number. Citations to the Recommended Order will be designated by "RO" followed by the abbreviation "FOF" (Finding of Fact) or "COL" (Conclusion of Law) and paragraph number (e.g., RO: FOF 13). Citations to the District's *Applicant's Handbook:* Consumptive Uses of Water (August 12, 2008) will be designated by the abbreviation "A.H." followed by the section number [e.g., A.H. § 10.3(g)].

> the activity is proposed, and which was formed for the purpose of the protection of the environment, fish and wildlife resources, and protection of air and water quality, may initiate a hearing pursuant to s. 120.569 or s. 120.57, provided that the Florida corporation not for profit was formed at least 1 year prior to the date of the filing of the application for a permit, license, or authorization that is the subject of the notice of proposed agency action.

Seminole asserts that Riverkeeper did not "initiate" the hearing so as to confer standing under section 403.412(6), F.S., because it did not submit proof of 25 or more members in Seminole County until long after the commencement of the administrative process (Exception, ¶7). At the conclusion of its evidence and after Seminole had concluded its case in chief, Riverkeeper brought an ore tenus motion to amend its petition to conform with the evidence (T: 2186-87). The ALJ reserved ruling on this motion, granting the motion in the Recommended Order and determining that Riverkeeper had standing (RO: COL 140). Seminole also asserts that the ALJ's ruling allowing Riverkeeper to amend its petition ore tenus at the conclusion of Riverkeeper's case "deprived Seminole, which has the ultimate burden of proof, of its essential due process right to rebut the claims raised by a permit challenger." (Exception, ¶ 8).

Although exception was not taken to FOF No. 106, whereby the ALJ determined the facts related to Riverkeeper's standing under section 403.412(6), F.S., and discussed evidentiary matters, this finding is implicated by Seminole's exceptions to COL Nos. 139-141. In this regard, Seminole has not demonstrated that any procedural rulings of the ALJ did not comply with the essential requirements of law. Section 120.57(1)(l), F.S. Similarly, insofar as COL Nos. 139-141 involve a ruling by the ALJ regarding evidentiary matters, these issues are outside the District's substantive jurisdiction and must be taken up in the first instance on appeal to the District Court of Appeal. *See, e.g., Barfield v. Department of Health*, 805 So.2d 1008 (Fla. 1st DCA 2001) (agency lacks substantive jurisdiction to apply business records exception to hearsay

rule); *Pope v. Ray*, 2004 WL 1211594 (DEP 2003) (timely and proper filing of proposed recommended order a procedural matter outside the agency's substantive jurisdiction).

Assuming, however, that there was no evidentiary or procedural error regarding allowing Riverkeeper to amend its petition at the conclusion of its case to allege standing under section 403.412(6), F.S., the legal question remains as to whether this is sufficient to meet the standing requirements of this statutory provision. The issue of standing under section 403.412(6) to initiate a section 120.57 hearing regarding a permitting activity under chapter 373, F.S., is a matter within the District's substantive jurisdiction. *Bobby C. Billie and Shannon Larsen v. St. Johns River Water Management District, et al.*, DOAH Case No. 03-1881, p. 23 (Final Order entered April 13, 2004), *citing*, *Friends of the Everglades, Inc. v. South Florida Water Mgmt. Dist.*, 446 So.2d 1116 (Fla. 4th DCA 1984) (water management district did not err in denying environmental corporation's petition to intervene under section 403.412(5) in surface water management permit proceeding); *Friends of Nassau County, Inc., v. Fisher Dev. Co. and St. Johns River Water Management District*, 1998 WL 929876 (SJRWMD 1998) (hearing initiated by section 403.412(5) verified petition); *Friends of the Wekiva v. Saboff and St. Johns River Water Management District*, 1992 WL 880941 (SJRWMD 1992) [petitioners had standing under section 403.412(5)]. *See also*, *Woodhouse v. Suwannee American Cement Co., Inc.*, 23 F.A.L.R. 503, 507 (Dep't of Envtl. Protection 2000) [DEP has substantive jurisdiction because it is charged with implementing section 403.412(5)].

The matter at issue is how the word "initiate" in section 413.412(6), F.S., should be applied to the facts herein. Was it too late at the conclusion of Riverkeeper's' case and after Seminole had presented its case in chief for Riverkeeper to "initiate" a section 120.57 formal

hearing, with the requisite membership joining Riverkeeper a few days before the final hearing? The ALJ concluded in this regard in COL No. 141:

> Seminole also contends Section 403.412(6), Florida Statutes, refers to membership status at the time of initiation of an administrative proceeding. However, the language of the statute itself does not specify the time reference. It is concluded that the statute should be interpreted to allow a not-for-profit to establish the membership necessary for standing at the time of final hearing.

Both Riverkeeper and Seminole agree that the paramount rule to apply herein is that statutes should be construed according to the plain meaning of the statutory language words. (Seminole Exception, ¶ 12; Riverkeeper Response to Exception, p. 6). *See, e.g., State v. Hoyt*, 609 So.2d 744,747 (Fla. 1st DCA1992) ("When a statute does not specifically define words of common usage, courts must construe such words according to the plain and ordinary meaning."). The term "initiate" means "to cause or facilitate the beginning of." Merriam-Webster Online, http://www.m-w.com/dictionary. The District's view of the proper interpretation of section 403.412(6), F.S., is that allowing a petitioner to "initiate" a section 120.57, F.S., proceeding at the conclusion of the petitioner's case on final hearing by amending the petition to conform to the evidence stretches the meaning of "initiate" beyond its plain and ordinary meaning. While we believe it would be permissible for a petitioner to amend its petition before final hearing to add an allegation of standing under section 403.412(6), F.S., in the course of an administrative proceeding that was initiated on other grounds, once the requisite membership is achieved, amendment of the petition at the conclusion of the hearing to allege standing under section 403.412(6), F.S., cannot provide the sole basis for standing in a section 120.57, F.S, proceeding.

Riverkeeper argues that "the purpose of section 403.412(6) is to expand traditional "substantial interest" standing to allow environmental groups broader access to administrative hearings and greater opportunity to challenge permits and rules that could adversely affect the

environment." (Riverkeeper Response to Seminole Exception, p. 6). While creating citizen standing for not for profit corporations to initiate section 120.57, F.S., proceedings is the overall purpose of this section, the requirement of at least 25 current members in the county where the activity is proposed is obviously intended as a limitation on the right to initiate these proceedings. When the use of "initiate" in section 403.412(6), F.S., is contrasted with the use of "intervene" in section 403.412(5), F.S., it is clear that the use of "initiate" in section 403.412(6), F.S., is intended to mean what the plain meaning indicates. Section 403.412(5), F.S., states: "As used in this section and as it relates to citizens, the term 'intervene' means to join an ongoing s. 120.569 or s. 120.57 proceeding; this section does not authorize a citizen to institute, initiate, petition for, or request a proceeding under s. 120.569 or s. 120.57."

Nevertheless, even though the Governing Board interprets "initiate" in section 403.412(6), F.S., to preclude amendment of a petition at the conclusion of the administrative hearing to first allege standing under this statute, the Governing Board believes that, in an abundance of caution, because the matter is infused with a procedural ruling by the ALJ as to amendment of the petition, which is outside the District's substantive jurisdiction, the appropriate course of action at this time is to not deny Riverkeeper standing under section 403.412(6), F.S. The entire matter is more appropriately addressed by the appellate court, which may review the District's statutory interpretation without any issue as to substantive jurisdiction.

The above discussion is hereby substituted for COL No. 141. In accordance with section 120.57(1)(l), F.S., the Governing Board hereby finds that its substituted conclusion of law is as or more reasonable than COL No. 141 with regard to Riverkeeper's standing under section 403.412(6), F.S. As to Seminole's exception to COL Nos. 139 and 140, because these

conclusions of law involve evidentiary and procedural matters, no modification is made to these conclusions of law and the exception is denied.

II. Ruling on Riverkeeper's Exceptions

Riverkeeper's Exception 1 – Preliminary Statement

Riverkeeper takes exception to the portion of the Preliminary Statement at page 8 of the Recommended Order in which the ALJ sustained Seminole's and the District's objection to the admissibility of Riverkeeper Exhibit 41, a paper entitled "Technical Review of the Statistical Analyses Contained in Wycoff, R. L. 2008, *Ocklawaha River Basin Rainfall – Yield Analysis,* Special Publication SJ2008 – SP8, SSRWMD, prepared by Steven A Bloom, PhD." Although Riverkeeper treats this exception as an exception to a finding of fact, it is in actuality an exception to an evidentiary ruling by the ALJ, regarding which the District lacks substantive jurisdiction. *Barfield v. Dep't of Health,* 805 So.2d 1008, 1010-11 (Fla. 1st DCA 2001). Additionally, agencies do not have the authority to modify or reject an ALJ's determinations that apply general legal concepts typically resolved by judicial or quasi-judicial officers. *See Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140, 1142, (Fla. 2d DCA 2001).

For the above reasons, this exception is denied.

Riverkeeper's Exception 2 – Finding of Fact 23

The ALJ found as follows in FOF No. 23:

> 23. First, Dr. McCue's demand estimates included an 8% "unaccounted-for flow factor." There was evidence that this is an accepted industry standard and consistent with other utilities in Central Florida. However, it seems high for Seminole, which may actually over-account for flow. (Seminole is currently attempting to ascertain the accuracy of its flow meters.) Mr. Doty did not incorporate an "unaccounted-for flow factor" in his demand projections because any discrepancy, whether Seminole's flow meters are over-accounting or under-accounting for actual flow,

> should already be incorporated into the historical use rate Mr. Doty calculated.

Riverkeeper takes exception, stating that: "the finding is deficient in that it fails [to] note that the only evidence of the proper handling of unaccounted water in the demand projections indicates that it should not be accounted for separately because it is already included in the five-year average used to calculate demand." (Exceptions, pp. 2-3; *citing* Doty: 1102) Riverkeeper also argues that "the finding is also deficient in its failure to quantify that no evidence puts the unaccounted for factor higher than 4%." (*Id.*, *citing* Doty: 1132).

The first item to note is that the ALJ did not make a finding of fact as to a specific methodology for considering unaccounted-for flow or as to the amount of unaccounted-for flow within the Seminole utility system. He simply discussed the methodologies that were used by the two experts and found as fact that an eight percent unaccounted-for flow factor is an accepted industry standard that is consistent with other utilities in Central Florida. There is competent substantial evidence in the record to support this finding. (McCue: 893-95; Van Ravenswaay: 921-22, 942-43). Riverkeeper relies upon the testimony of the District's expert, Mr. Richard Doty, who testified that, based on the best of his recollection, the factor was "around 4%." (Doty: 1132). This testimony, to the extent it may conflict with the testimony of Seminole's experts, does not supersede the competent substantial evidence from Seminole's experts. Nor did the Petitioners provide any evidence at the final hearing to rebut Seminole's witnesses on this point.

With regard to Riverkeeper's argument that "the finding is also deficient in its failure to quantify that no evidence puts the unaccounted for factor higher than 4%," as discussed above, there is evidence to place the factor at eight percent. Moreover, to the extent Riverkeeper is requesting that the District make a finding of fact that was not made by the ALJ, an agency lacks authority to make supplemental findings on disputed facts that the ALJ has not resolved. *See,*

e.g., Inverness Convalescent Ctr. v. Dep't of Health Rehab. Servs., 512 So.2d 1011, 1015 (Fla. 1st DCA 1987); *Cohn v. Dep't of Professional Regulation*, 477 So.2d 1039, 1047 (Fla. 3d DCA 1985). To the extent Riverkeeper seeks to have the Governing Board reweigh the evidence considered by the ALJ, this is outside the District's authority and must be rejected. *Goss*, 601 So.2d at 1235.

For the above reasons, this exception is denied.

Riverkeeper's Exception 3 – Finding of Fact 28

The ALJ found as follows in FOF No. 28:

> 28. Petitioners contend that Dr. McCue's conservation adjustments were "negotiated" between Seminole and the District, and are too low. The "negotiation" process itself does not negate the reasonableness of the resulting agreed conservation adjustments since it is impossible to predict the results of Seminole's Water Conservation Plan with certainty. The conservation adjustments used by Dr. McCue were reasonable.

Riverkeeper argues that, although it is indisputable that the anticipated reduction in water demand due to conservation efforts cannot be determined with certainty, it does not follow from the evidence that conservation adjustments Seminole purportedly "negotiated" with the District were reasonable in the absence of a breakdown of the specific demand reductions anticipated for the numerous conservation measures being implemented by Seminole. Here again, Riverkeeper is taking exception to the absence of specific findings of fact regarding the breakdown of the estimated reduction in water use due to various conservation efforts, which is beyond the Governing Board's authority to require at this point in the proceedings. *Inverness; Cohn, supra.* There is ample competent substantial evidence in the record to support the demand reductions estimated by Seminole's expert as being "reasonable." (McCue: 824-837; Doty: 1094; Hollingshead: 1388-93; Seminole Exhibit 284).

Dr. McCue testified that the estimated rate was based on Seminole's conservation plan (McCue: 832-833), and more specifically, the savings that could be achieved through the indoor water conservation Seminole has not already achieved (McCue: 853). Though this estimate is not based on specific calculations, it is an expert opinion based on Dr. McCue's expertise in water conservation (McCue: 812), as applied to Seminole's conservation plan. The finding is therefore a reasonable inference resting on competent substantial evidence. Obviously, the ALJ found the testimony of Seminole's and the District's witnesses more credible on this issue than that of the Petitioners' witnesses. The agency cannot reweigh the evidence considered by the ALJ regarding the reasonableness of Seminole's estimate of water demand reductions. *Goss*, 601 So.2d at 1235.

For the above reasons, this exception is denied.

Riverkeeper's Exceptions 4 – Finding of Fact 35

The ALJ found as follows in FOF No. 35:

> 35. While on the one hand criticizing Dr. McCue's assumed conservation savings for being too low, Riverkeeper in particular also criticized Dr. McCue for applying any conservation adjustments to reduce the assumed groundwater allocation in the pending Consolidated Groundwater CUP. Riverkeeper argued essentially: that Seminole was entitled to the groundwater necessary to supply its 2013 projected demand, without any conservation reduction, as requested in the pending Consolidated Groundwater CUP; that Seminole essentially is being unfair to itself by not asserting in this case its entitlement to the full 25.6 mgd of groundwater requested for 2013 in the pending Consolidated Groundwater CUP (which would have the effect of reducing or eliminating its need for any water from the river); and that allowing Seminole to decline to take the maximum groundwater would somehow discourage other applicants from implementing conservation programs. These criticisms are rejected.

It should first be noted that this paragraph does not make any affirmative factual findings. It simply states and rejects Riverkeeper's argument that Seminole incorrectly estimated its future available groundwater supply based upon what it anticipated would be authorized in the pending Consolidated Groundwater CUP application. It is the precursor to paragraph 36, in which the ALJ discussed the factual bases for concluding that it was reasonable for Seminole to estimate a CUP authorization less than the amount requested. Riverkeeper asserts that "this paragraph correctly finds that reduction of Seminole County's 2013 demand by conservation and reuse measures would reduce or eliminate the need for any water from the river ...." (Exceptions, p. 3). In actuality, the ALJ simply stated the same as being part of Riverkeeper's argument.

For the above reasons, this exception is denied.

Riverkeeper's Exception 5 – Finding of Fact 36

The ALJ found as follows in FOF No. 36:

> 36. First, there is no guarantee that the Consolidated Groundwater CUP will authorize the full requested amount, as the District has expressed concern about potential environmental impacts to wetlands and lake MFLs. Second, there is no guarantee that the District will approve the Consolidated Groundwater CUP in time to meet Seminole's needs. At the time of the final hearing, it was projected that Seminole could begin to face a water deficit in some of its service areas as early as the end of 2008 if the Consolidated Groundwater CUP was not approved soon. Finally, there is no requirement that Seminole use groundwater up to the 2013 demand limit in the CFCA rules. If Seminole is allocated surface water from the St. Johns River in this case because it applied conservation adjustments to its demand calculations, the appropriate amount of groundwater Seminole needs for reasonable-beneficial use will be determined in the pending Consolidated Groundwater CUP application, which also will determine how much "redundancy" is appropriate, if any. Condition 4 of the TSR specifically provides that the combined allocations of surface water under CUP 95581 and groundwater resulting from pending Consolidated Groundwater CUP application may not exceed the total projected demand for all four service areas in any year.

Riverkeeper argues that the ALJ incorrectly found as fact that Other Condition 4 of the TSR for the CUP requires that Seminole's total projected demand in any year cannot exceed the combined surface and groundwater allocations under both CUPs. Riverkeeper argues that because this condition applies to "existing permits," it will not apply to the pending Consolidated Groundwater CUP application because it will not "exist" at the time of permit issuance.

Other Condition 4 provides in pertinent part that "[t]he combined use of surface water allocated in this permit and groundwater allocated in existing permits issued to the permittee in any given year, may not exceed the total District-approved allocations for the permittee's service areas in that year." (emphasis added). This condition clearly provides that Seminole's combined withdrawal from the St. Johns River and groundwater sources cannot exceed its total projected demand for all of its service areas in any given year. Riverkeeper's contrary interpretation is not credible, as the plain language clearly indicates that it applies not only to Seminole's uses at the time of permit issuance, but to any permit in existence "in any given year" for the duration of the CUP. The ALJ's interpretation is consistent with the testimony of District Consumptive Use Policy Development Coordinator, Dwight Jenkins, (Jenkins: 2333-35), and other competent substantial evidence (McCue: 843-844; Hollingshead: 1390-91, 1406). Consequently, the Governing Board cannot disturb this finding of fact. *Heifetz*, 475 So.2d at 1281.

Riverkeeper also ignores the fact that the Consolidated Groundwater CUP application includes Seminole's existing groundwater permits. Under rule 40C-1.610(1), F.A.C., those permits (and their allocations) are preserved by the timely consolidated application for renewal (Jenkins: 2331-32). Thus, upon issuance of the CUP, Other Condition No. 4 will apply to all of Seminole's then-existing permitted allocations, which includes allocations that are currently in existence. The Consolidated Groundwater CUP will become an "existing permit" in the year of

issuance and "in any given year" after that, during the term of the CUP. This condition expresses the District's intent to limit the combined allocations of groundwater and river water without waiting for issuance of the Consolidated Groundwater CUP (Jenkins: 2332-35).

Riverkeeper also argues that providing for redundancy in permitted public supply systems is irrelevant because there is no provision for redundancy in District rules. (Exceptions, p. 4). However, District witnesses testified that the District does allow some redundancy to cover the uncertainty associated with other future sources of water or to facilitate efficient operation of the withdrawal facility (Hollingshead: 1390-91); that this is appropriate so long as it does not result in over-allocation (Jenkins: 2335), and that allowing redundancy reflects a reasonable interpretation or application of the District's rules on reasonable-beneficial use (Jenkins: 2344-45), especially A.H. § 10.3(a), which requires the allocation be "necessary for economic and efficient utilization," based in large part on the demonstration of need (Hollingshead: 1388-91; Jenkins: 2335). In addition, the redundancy at issue is largely temporary, since the District will adjust the allocations in the Consolidated Groundwater CUP so as to make the combined allocations in that permit and the CUP match Seminole's demonstrated need for water (Hollingshead: 1441-42; Jenkins: 2358-59).[2] Finally, in *Miami Corporation v. City of Titusville*, DOAH Case Nos. 05-0344, 05-2607, 05-2940 (Final Order entered September 13, 2007), the District determined that providing redundancy or reserve capacity can be a reasonable-beneficial use under the District's permitting criteria. *Id.*, Final Order at 116-119.

For the above reasons this exception is denied.

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[2] If necessary in the future to avoid unanticipated harm to the river and its related water resources, the District would reduce the allocations in the CUP under section 373.219(1), F.S., Rule 40C-2.381(1), F.A.C., and Condition 13 of the proposed permit. See Seminole Ex. 364 (TSR) at 19, ¶ 13.

Riverkeeper's Exception 6 – Finding of Fact 47

The ALJ found as follows in FOF No. 47:

> 47. Even with limited knowledge, Seminole and the District concluded that the Lower Floridan Aquifer would not be a long-term, stable water supply source in Seminole and that use of brackish groundwater would require Seminole to design and construct a water treatment facility with a short useful life, making brackish groundwater an infeasible AWS option for Seminole. This conclusion was reached because there is little freshwater recharge to the Lower Floridan Aquifer in the area, and withdrawn brackish groundwater likely would be replenished by saltier water from the deeper aquifer, resulting in a degraded water supply. No expert testimony refuted that evaluation.

Riverkeeper argues that FOF No. 47 is "deficient because it fails to distinguish between the two types of uses for which Seminole County seeks water" (potable and reclaimed water augmentation), and that the determination that brackish water is not a feasible source was based upon computer modeling that was performed for a 6.25 mgd potable water supply. (Exceptions, p. 4-5). The Governing Board fails to see the relevance of this distinction. The computer modeling determined that the brackish groundwater source is insufficient to meet Seminole's water needs, whether for potable use or reclaimed water augmentation. The ALJ found facts showing that the source of supply would be adversely affected by saline water intrusion and was not sustainable. Riverkeeper has failed to cite any portion of the record in support of this exception or state a legal basis for this exception. Section 120.57(1)(k), F.S. In fact, Petitioners did not present any expert testimony in the field of groundwater hydrology. There is unrebutted competent substantial evidence that brackish groundwater is not a feasible alternative source due to potential adverse impacts on wetlands and water quality. (Alvarez: 89-90, 169-171; Aikens: 237-238; Hollingshead: 1400-01). The Governing Board may not reject this finding of fact, since it is supported by competent substantial evidence. *Heifetz*, 475 So.2d at 1281-82.

Riverkeeper also objects because FOF No. 47 "fails to note" whether Seminole considered brackish water as a reclaimed augmentation source. The Governing Board must reject this invitation to make an impermissible supplemental finding of fact. *Florida Power & Light Co.; Boulton, supra.*

For the above reasons this exception is denied.

Riverkeeper's Exception 7 – Finding of Fact 51

The ALJ found as follows in FOF No. 51:

> 51. For RIBs [rapid infiltration basins] to be used for reclaimed water augmentation, they would have to be combined with a large reservoir. The evidence was that a 400-acre, 450 million gallon reservoir would have to be constructed to store enough reclaimed water to meet Seminole's augmentation needs. In addition, a treatment facility would be required to treat the reclaimed water stored in a reservoir prior to distribution to customers. Construction of the reservoir and treatment system would cost $110 million, which is far more than the $41 million required for construction of the reclaimed water augmentation component of the Yankee Lake Project. It would not be economically or technically feasible for Seminole to implement this reclaimed water storage and re-treatment system.

Riverkeeper argues that "there is no finding of fact related [to] the uncontroverted evidence that brackish groundwater would cost less than half of what it would cost to take water from the river. Accordingly, using river water for supplemental reuse water is not economically or technically feasible. Brackish groundwater is a lower quality source than the river." (Exceptions, p. 5). Inasmuch as FOF No. 51 does not relate to the feasibility of using brackish groundwater, which the ALJ addressed in FOF Nos. 44-47, there is no basis to modify this finding of fact based upon Riverkeeper's contention in this regard. Riverkeeper has failed to present any competent substantial evidence or legal basis for its exception pertaining to rapid infiltration basins. See §120.57(1)(k), F.S. Competent substantial evidence supports FOF No.

51. (Alvarez: 89-93, 106-08, Aikens: 237-39; Murin: 2210-17; Seminole Exs. 26, 38, 39; Rebuttal Ex. 3).

It is unclear whether Riverkeeper is seeking a supplemental finding of fact. Riverkeeper appears to contend that, because the ALJ determined that it is not economically feasible for Seminole to construct a large reservoir for storage of reclaimed water that would otherwise be sent to rapid infiltration basins, he should have also made a finding of fact regarding the economic feasibility of brackish groundwater. However, section 120.57(1)(k), F.S., and Rule 28-106.216(1), F.A.C., require only that an ALJ submit findings of fact—not address in the findings all testimony and evidence admitted at hearing. It is the ALJ's province to resolve conflicts and weigh the evidence for inclusion into the findings of fact. *See, e.g.*, *Goss*, 601 So.2d at 1234. To the extent Riverkeeper seeks to have the Governing Board reweigh the evidence as to the feasibility of using brackish groundwater, as discussed in FOF Nos. 44-47, the District incorporates its discussion regarding Exception No. 6.

In addition, there was no need for the ALJ to determine the economic feasibility of using brackish groundwater as a lower quality source. Rule 40C-2.301(4)(g), F.A.C., and A.H. § 10.3(g) require using a lower quality source unless the source is not "economically, environmentally, **or** technologically feasible" (emphasis added). The ALJ found that the use of brackish groundwater was not environmentally and technologically feasible as a lower quality water source. (RO FOF No. 47). A determination regarding the economic feasibility of brackish groundwater is unnecessary where it has been determined to be infeasible on these other grounds.

For the above reasons, this exception is denied.

Riverkeeper's Exception 8 – Finding of Fact 53

The ALJ found as follows in FOF No. 53:

> 53. In December 1996, Seminole and the Cities of Sanford and Lake Mary entered into a contract known as the Tri-Party Agreement for the potential development of a regional reuse system. On its face, the agreement allows Seminole to obtain up to 2.75 mgd of reclaimed water from Sanford. However, in reality, the Tri-Party Agreement is not a feasible source of reclaimed water. First, the Tri-Party Agreement does not guarantee a specific quantity of reclaimed water that will always be available to Seminole. Second, Sanford's effluent is not required to meet the more stringent water quality standards, in particular for nitrogen, established for the Wekiva River Protection Zone, which Seminole's Northwest-Northeast Service Area is in. Sanford only has to meet a 12 mg/l standard for nitrogen, while 10 mg/l is required for the Wekiva River Protection Zone. There is no indication that Sanford would be willing to guarantee 10 mg/l, and meeting the Wekiva River Protection Zone standards through blending would be problematic because blending would have to occur before introduction into Seminole's distribution system. Finally, Sanford's reclaimed water transmission system does not operate at a high enough pressure to provide the required flow to Seminole's system. For these reasons, despite the fact the Agreement has been in effect for over a decade, Sanford has been unable to provide any reclaimed water to Seminole.

Riverkeeper takes exception to the ALJ's finding that there is no guarantee of water to Seminole under the Tri-Party Agreement. Riverkeeper cites various portions of the record to dispute the various findings made by the ALJ in this regard. In so doing, Riverkeeper asks the Governing Board to reweigh the evidence concerning the availability of additional reclaimed water pursuant to the Tri-Party Agreement. However, there is competent substantial evidence to support each of the findings in FOF No. 53. Evidence was produced to show that: the agreement does not guarantee the availability of reclaimed water to Seminole (Alvarez: 220; McCue: 864-865); Sanford does not treat its wastewater to a high enough level to be used in Seminole's Northwest-Northeast Service Area, and Sanford's reclaimed water transmission system does not

operate at a high enough pressure to provide the required flow to Seminole's system. (McCue: 864-865; Alvarez: 220-222; Hollingshead: 1396-97; Murin: 2221-23; (Seminole Exhibit 291). Contrary to Riverkeeper's claim that there was "no evidence" that Sanford has been unable to provide reclaimed water to Seminole under the Tri-Party Agreement, Seminole's expert, Dr. Terrence McCue, testified that "this agreement has been in place for more than ten years and no water has been supplied to Seminole County to date, as a result of this contract." (McCue: 864). Competent substantial evidence also supports the finding that the nitrogen differential between Sanford's reclaimed water and the standard that Seminole must meet in the Wekiva River Protection would be problematic (Murin: 2220-23, McCue: 864-65; Alvarez: 220-22). Thus, competent substantial evidence exists to support this finding of fact. *Freeze*, 556 So.2d 1204.

For the above reasons, this exception is denied.

Riverkeeper's Exception 9 – Finding of Fact 59

The ALJ found as follows in FOF No. 59:

> 59. In evaluating the St. Johns River as an AWS source, Seminole considered existing withdrawals from the St. Johns River. The Cities of Melbourne and Cocoa have used the St. Johns River for potable supply for several decades, and both are permitted to withdraw quantities greater than the 4.5 mgd requested by Seminole for potable use. In addition, the Cities of Deland, Winter Springs, and Sanford each have been permitted to use the St. Johns River as a reclaimed water augmentation source. These existing permitted uses have proved to be safe and reliable and created a reasonable expectation the river can be used for potable supply and reclaimed water augmentation.

Riverkeeper objects to the finding that previously permitted withdrawals of river water by five cities in Central Florida "have proved safe and reliable and created a reasonable expectation [that] the river can be used for potable supply and reclaimed water augmentation." Riverkeeper argues that FOF No. 59 "suggests that the next proposed permittee is entitled to a permanent

[supply] simply because others have also been permitted to use water from the river" and that this finding "has no place in the District's final order." (Exceptions, p. 6). Riverkeeper fails to state a legal basis for this exception. Section 120.57(1)(k), F.S. The claim that a finding "has no place in the District's final order" is not a legal basis for rejecting a finding of fact.

This finding is part of the ALJ's summary of the planning process for the development of alternative water supply (AWS) sources that led to the District's adoption of the CFCA rules and Seminole's decision to turn to river water in the application for the CUP. *See* RO at FOF Nos. 56-60. The finding that "existing permitted uses have proved to be safe and reliable and created a reasonable expectation the river can be used for potable supply and reclaimed water augmentation" is supported by competent substantial evidence. Seminole's witnesses testified that it was reasonable to conclude that its proposed withdrawal would not have an adverse impact on the St. Johns River, since significantly larger existing withdrawals have not measurably impacted the flow of the river. (Alvarez: 76-78; Bushey: 355-359) (Seminole Exs. 123, 124, 126, 127, 128, 129, 130, 154). The ALJ determined this evidence to be more credible than that of Petitioners, and his factual determination cannot be modified by the Governing Board. *Heifetz*, 475 So.2d at 1281-82.

For the above reasons, this exception is denied.

Riverkeeper's Exception 10 – Finding of Fact 74

The ALJ found as follows in FOF No. 74:

> 74. Pointing to differences between observed and modeled salinities, primarily at the Dames Point Bridge (relatively near the mouth of the river), Riverkeeper's modeling expert, Dr. Mark Luther, expressed concern that the models did not properly account for estuarine or overturning circulation and therefore did not accurately predict salinity changes. Dr. Peter Sucsy, who developed the models, recognized the importance of estuarine overturning circulation. However, with the exception of the Dames

> Point station, statistical analysis showed a very good fit between simulated and observed data. At the Dames Point Station, the differences between simulated and observed salinities are larger (1.6 parts per thousand). But that location is close enough to the mouth of the river that it often measures marine water and a narrow range in salinities. Taking this into consideration, the model matches the observed data reasonably well. Dr. Sucsy's models are sufficiently accurate to provide reasonable assurance with respect to harm to the estuary system from water withdrawals.

Riverkeeper disputes the findings as to the reliability of Dr. Sucsy's model and cites evidence from one of Petitioners' witnesses, Dr. Luther, that there were problems with the calibration of the model. Riverkeeper clearly seeks to have the Governing Board reweigh the evidence and afford greater weight to the testimony of its expert, Dr. Mark Luther, which it cannot do. *Heifetz*, 475 So.2d at 1281-82. There is ample competent substantial evidence in the record to support FOF No. 74 as to the calibration of Dr. Suscy's model. There is evidence directly refuting the claim that Dr. Sucsy did not calibrate the earlier version of his model used for establishing DEP's Total Maximum Daily Load limits on the lower basin of the river. (Suscy: 407-08; District Ex. 108). In the testimony cited by Riverkeeper as showing that Dr. Sucsy did not calibrate his earlier model (Suscy: 467), Dr. Suscy was simply confirming that his PowerPoint discussion only addressed calibration of the later version of the model. He did not concede that none of his testimony addressed calibration of the earlier version of the model, which was addressed much earlier in his testimony (Suscy: 407-08). As for the "other problems" asserted by Dr. Luther and cited but left unexplained by Riverkeeper, the ALJ apparently regarded Dr. Chou's testimony as more credible (Chou: 485, 2306-25; SJRWMD Exs. 82, 93, 102, 108, 115).

For the above reasons, this exception is denied.

Riverkeeper's Exception 11 – Findings of Fact 89

The ALJ found as follows in FOF No. 89:

> 89. The District and Seminole have agreed to an additional permit condition that would prohibit Seminole from withdrawing water from the St. Johns River on any day following a day when discharges have occurred to the Little Econ from April 1 to September 15. This additional condition provides reasonable assurance that the proposed CUP will not cause or contribute to an increase in nutrients in the River.

Riverkeeper takes exception to the ALJ's finding that this additional permit condition provides reasonable assurance that the proposed CUP will not cause or contribute to an increase in nutrients in the River, but fails to provide any record references, instead referring to legal arguments "*infra*" without any reference to a specific legal argument. Riverkeeper has clearly failed to state a legal basis for this exception. Section 120.57(1)(k), F.S. In any event, rejection or modification of a conclusion of law may not form the basis for rejection or modification of findings of fact. Section 120.57(1)(l), F.S. In addition, this finding of fact is supported by competent substantial evidence. The testimony of witnesses for Seminole and the District demonstrated that the proposed permit condition will more than offset any impact to nutrient levels occurring as a result of Seminole's withdrawal. (McMillin: 654; Lowe: 1631-38; SJRWMD Exs. 122, 167a, 168, 170a). These matters were addressed in FOF No. 88, regarding which Riverkeeper has not taken exception.

For the above reasons, this exception is denied.

Riverkeeper's Exceptions 12 – Finding of Fact 90

The ALJ found as follows in FOF No. 90:

> 90. It is not uncommon for the District to require permittees to work with other entities to make reclaimed water changes a condition for CUP issuance. Such a permit condition appears in a recent CUP issued to the Orlando Utilities Commission.

Riverkeeper argues that the ALJ's discussion of condition on a CUP to the Orlando Utilities Commission "is not in any way comparable to the permit condition here which is relied upon by Seminole County as a way of divesting others of rights without their being represented or acquiescing in the divestiture." (Exceptions, p. 7). Riverkeeper does not object to the veracity of this finding of fact. Instead, Riverkeeper asserts a legal argument as to the enforceability and validity of the permit condition discussed in FOF No. 91. Riverkeeper has not directed any argument toward the factual veracity of this finding or stated a legal basis for this exception. Section 120.57(1)(k), F.S.

In addition, competent substantial evidence supports that finding. When asked whether the District has issued other permits with a similar condition requiring applicants to work with other entities to make reclaimed water changes, Mr. Wilkening testified that the OUC permit was an example. (Wilkening: 1891-92). Although Riverkeeper now objects to relevance, Riverkeeper did not object to this testimony at the hearing.

For the above reasons, this exception is denied.

Riverkeeper's Exception 13 – Findings of Fact 91

The ALJ found as follows in FOF No. 91:

> 91. Riverkeeper in particular contends that these permit conditions are not enforceable without the agreement of the other entities involved in Iron Bridge, namely those who would relinquish a right to discharge to the Little Econ. But the condition clearly is enforceable against Seminole.

Riverkeeper asserts that the ALJ has misapprehended its argument regarding the enforceability of the subject permit condition, and that there is an additional impediment to agreement from the other parties involving the taking of credits for improvement of nutrient levels in the river. Riverkeeper's exception fails to state a valid legal basis, as a finding of fact

cannot be rejected by the Governing Board because it is allegedly "misapprehends" a party's argument. Section 120.57(1)(k), F.S. In addition, however, FOF No. 91 simply finds that Riverkeeper contends that the subject permit condition is not enforceable without the agreement of the other parties to the Iron Bridge facility, and that the permit condition is clearly enforceable against Seminole. Riverkeeper does not take exception to either of these facts, which are supported by competent substantial evidence. (Wilkening: 1879-91; SJRWMD Exhibit 171). Instead, Riverkeeper asserts an additional impediment as to why the other parties will not agree to comply with the permit condition, apparently seeking to have the Governing Board make an additional finding of fact in this regard, which it cannot do. *Florida Power and Light Co.; Boulton; supra.* The ALJ did not consider Riverkeeper's argument in this regard to be a material issue, apparently due to his finding in FOF No. 89 that the additional permit condition restricting Seminole's withdrawals the day after discharging to the Little Econ provided reasonable assurances, in and of itself, that the CUP will not cause or contribute to an increase in nutrients on the River.

For the above reasons, this exception is denied.

Riverkeeper's Exception 14 – Finding of Fact 93

The ALJ found as follows in FOF No. 93:

> 93. Ongoing withdrawals on the Peace and Alafia Rivers having a much greater impact on the flow of water in those rivers than the proposed Yankee Lake withdrawal, individually or cumulatively, have not caused significant changes in vegetation, benthic invertebrates, fish population, phytoplankton population, or other indicators.

Riverkeeper argues that the finding regarding the Peace and Alafia Rivers is not relevant because they are different systems than the St. Johns River. Relevancy is not a valid legal basis for rejecting a finding of fact. Section 120.57(1)(k), F.S. Relevancy objections must be raised

when evidence is introduced. Admissibility of evidence is not within the District's substantive jurisdiction. *Barfield, supra.* Although objecting to relevance, Riverkeeper fails to dispute the validity of these findings, which are supported by competent substantial evidence. (Peebles: 1596-98; Montgomery: 729-738; Seminole Exhibits 221, 223, 224, 225, 226, 227, 228, 230). Moreover, the ALJ considered a great deal of evidence and made substantial findings on issues relating to harm to the St. Johns River based on studies of this river. *See* RO at FOF Nos. 62-100.

For the above reasons, this exception is denied.

Riverkeeper's Exception 15 – Finding of Fact 103

The ALJ found as follows in FOF No. 103:

> 103. The Petitioners contend that issuance of Seminole's CUP should be delayed until after the District completes its two-year AWS Study of the entire St. Johns River basin, including the Ocklawaha. The greater weight of evidence indicates that such a delay is unwarranted and would impose additional unnecessary costs on Seminole.[3]

Riverkeeper argues that the purpose of the AWS study is to determine the amount of water that can be safely withdrawn from the river, and that no permits should be issued until the results of this study are known. However, pursuant to section 120.60, F.S., the District must act upon a complete application within 90 days or a default permit is issued.

This exception fails to state a legal basis or provide citations to the record in support of an alternative finding. Section 120.57(1)(k), F.S. The ALJ's findings are to the contrary. Paragraphs 70-100 of the Recommended Order present the bulk of the ALJ's findings that Seminole provided reasonable assurances that the CUP will not result in unacceptable environmental harm or otherwise fail to meet applicable permitting criteria. In these findings,

[3] For the purpose of additional clarity, it should be noted that what the ALJ referred to as the "AWS Study" is currently titled: "Potential Environmental Effects of Surface Water Withdrawals on the St. Johns River."

the ALJ summarizes the scientific facts and analyses from which he reasonably concluded that the best available information is sufficient to provide reasonable assurance that the application meets all criteria relating to environmental impacts. Of these 31 paragraphs, Riverkeeper has taken exception to only five (FOF Nos. 74, 89, 90, 91, and 93; Exceptions 10-14).

The voluminous record of this case and the numerous findings of the ALJ demonstrate that sufficient information was presented by Seminole to declare its application complete, evaluate its potential impact upon the river, and conclude that Seminole's proposed withdrawal, on an individual and cumulative basis, would not harm the river. The ALJ indicated that he had weighed the evidence in this regard and concluded that a delay until the study is complete is unwarranted. This conclusion is supported by competent substantial evidence. (Alvarez: 141-142; Van Ravenswaay: 934-937). The ALJ found in FOF No. 104, which no party has taken exception to, that Seminole would incur additional costs of "about $4.5 million" from a one-year delay, and that a two-year delay would result in $15.4 million of additional costs. It is not the Governing Board's function to reweigh the evidence and reach an alternative conclusion if there is competent substantial evidence in the record to support the ALJ's conclusion. District staff testified that the AWS study is intended to evaluate the impact of future cumulative withdrawals in the order of 260 mgd from the river -- not Seminole's 5.5 mgd withdrawal. (Sucsy: 471-472).

Riverkeeper's exception misapprehends the fundamental nature of the consumptive use permitting process. Cumulative impact analysis is an integral part of the issuance of each CUP. During the permit review process, the proposed withdrawal amount associated with a permit

application is added to existing authorized withdrawals to determine the total impact upon the resource. Additional water will not be allocated if the limits of the resource have been reached.[4]

For example, in determining whether there will be an interference with existing legal uses pursuant to section 373.223(1)(b), F.S, regarding a proposed groundwater withdrawal, a computer model of the projected impact of the water withdrawal is run, which includes other existing authorized water withdrawals within the cone of influence of the proposed withdrawal. With regard to environmental permitting criteria, such as whether environmental harm from a proposed CUP will be reduced to an acceptable amount so as to meet Rule 40C-2.301(4)(d), F.A.C., and A.H. § 9.4.3, the analysis will include not only any incremental environmental impact associated with a proposed CUP but will also include the environmental impact that may have occurred as a result of previously authorized withdrawals that may have impacted the resource. If a proposed CUP causes additional environmental impact that will result in an unacceptable amount of harm, the new application will be denied. This is an iterative cumulative impact analysis that is performed with each new permit application. For the surface water withdrawal involved in this case, Seminole and the District evaluated the impact of the proposed withdrawal using sophisticated hydrodynamic models to predict the impact of the proposed withdrawal, individually and cumulatively with other withdrawals from the river. (RO: FOF No. 73).

Therefore, for the purpose of the pending application, cumulative impacts have been considered during the permit review process through application of the permitting criteria. The

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[4] In certain areas where the traditional groundwater resource is reaching sustainable limits, the District has also adopted criteria requiring applicants to expeditiously implement certain lower quality water supply projects in order to expand available water supply sources and avoid both environmental harm and the adverse effects of competition. See the Central Florida Coordination Area rules in A.H. sections 12.1.2, 12.10 and 13.3.

negligible impact associated with the pending CUP, in conjunction with impacts of previous authorized withdrawals and the current state of the river, was determined not to result in any impacts that would cumulatively result in an unacceptable amount of harm to the river or otherwise violate any of the permitting criteria. The AWS study is a forward looking document that will provide the District with additional scientific information that it will use, as appropriate, for making decisions in the water supply planning process, MFL development, and in future consumptive use permitting. In the absence of this study, the District and Seminole have utilized sufficient scientific information, including complex hydrodynamic modelling, to evaluate the pending CUP and determine that it meets the applicable permitting criteria.

There was some discussion of cumulative impacts at FOF No. 68 under the heading of "MFLs,"[5] and in subsequent findings of fact under the heading of "Impact of the Yankee Lake Withdrawal" that is in need of clarification. FOF No. 68 discusses the manner in which Seminole derived the withdrawal amount of 57 mgd for the cumulative impact analysis that it conducted by performing model runs and analysis of several permitting criteria.[6] *See* FOF Nos. 78 (salinity) and 84-88 (nutrients). To the extent this analysis projected future water withdrawals in addition to the CUP, for the reason stated above, this was not necessary in order to determine whether the applicant provided reasonable assurances that the applicable permitting criteria were met. FOF No. 68 finds that the total of existing water withdrawals from the St. Johns River and the proposed 5.5 mgd additional withdrawal under the CUP is 37.9 mgd. This is the appropriate

[5] The minimum flow and level (MFL) criteria of Rule 40C-2.301(5)(a)5, F.A.C., require that a proposed withdrawal not "[c]ause the rate of flow of a surface watercourse to be lowered below any minimum flow which has been established in Chapter 40C-8, F.A.C."

[6] Seminole considered the 37.9 mgd of existing withdrawals, which included the 5.5 mgd proposed withdrawal of the CUP, and added 25 mgd of new future withdrawals. This resulted in an estimated 57 mgd for cumulative impact analysis. (Bushey: 327-31)

figure for evaluating the impact of the CUP, which takes into account all past withdrawals in conjunction with the proposed withdrawal. As discussed above, permit evaluations in the future will include the permitted withdrawal under the CUP at issue here, prior authorized withdrawals, and any new CUP applicant's proposed withdrawal. Seminole, therefore, went beyond that which was necessary for the purpose of evaluating the CUP. However, because negligible impacts were found when a withdrawal of 57 mgd was evaluated, this provides additional reasonable assurance for issuance of the CUP.

For the above reasons, this exception is denied.

Riverkeeper's Exception 16 – Finding of Fact 105

The ALJ found as follows in FOF No. 105:

> 105. Riverkeeper bases its standing in part on allegations that Seminole's proposed use will impact the use and enjoyment of the St. Johns River by a substantial number of Riverkeeper's members. A substantial number of Riverkeeper's members use and enjoy the River for recreation, boating, fishing, watching wildlife, and similar activities. However, it was not proven that Seminole's proposed CUP will affect their use or enjoyment of air, water, or natural resources of the River.

Riverkeeper takes exception to the ALJ's finding of fact that its members' use and enjoyment of the St. Johns River will not be affected by Seminole's proposed withdrawal, arguing that this is a "misplaced conclusion of law" that "confuses the merits of Riverkeeper's claim with its standing to challenge the issuance of a permit." (Exceptions, p. 8). Riverkeeper is incorrect in this regard. When standing is contested, the factual issue arises regarding whether the petitioner's "substantial interests" under section 120.569(1), F.S., have been adversely affected so as to confer "injury in fact ... of sufficient immediacy" within the meaning of *Agrico Chemical Company v. Department of Environmental Reg.*, 406 So.2d 478 (FLA 1st DCA 1981). This issue is resolved by evidence presented at the final hearing. The voluminous record and

findings in this case demonstrate that the CUP will have a negligible impact upon the river that is immeasurable and imperceptible from the standpoint of any of the recreational activities engaged in by Riverkeeper's members on the river. The conclusion of ultimate fact that Riverkeeper has failed to demonstrate that its members will be substantially affected in their use and enjoyment of the river rests upon the numerous factual findings made by the ALJ in this regard, most of which have not been challenged by Riverkeeper. Competent substantial evidence supports the ALJ's finding that there will not be any measurable impact to the River, and thus, use of the river by Riverkeeper's members cannot be affected. (Bushey: 339-349, 355-359; Chou: 488-500, 527-528; McMillin: 600-609, 654; Montgomery: 689-691, 710-715, 729-738; Wilkening: 1010-11, 1014-15, 1879-91; Robison: 1285-86; Dunn: 1324-27; Hendrickson: 1478-79, Peebles: 1600-01; Lowe: 1633-37; Seminole Exhibits 107-124, 126-130, 132, 133, 135, 137, 154, 162-179, 186, 187, 189-191, 218-220; SJRWMD Exhibits 18, 19, 20, 61, 167a, 168, 170a).

Riverkeeper argues that FOF No. 105 is contradicted by the ALJ's finding that a substantial number of Riverkeeper's members use and enjoy the River for recreational purposes. However, the fact that Riverkeeper's members use the River does not mean their use of the River will be adversely impacted by Seminole's withdrawal sufficient to confer standing.

For the above reasons, this exception is denied.

Riverkeeper's Exception 17 – Conclusion of Law 114

The ALJ found as follows in COL No. 114:

> 114. Seminole followed the requirements of A.H. Section 12.2.1 for projecting a public supply utility's future population and A.H. Section 12.2.2 for determining its projected water demands based on historical average per capita use rates during the most recent 5 years. However, Seminole reasonably adjusted this per capita use to account for drought events and to account for planned conservation measures, including the reclaimed water retrofit program.

Riverkeeper makes a lengthy exception to COL No. 114, which is better characterized as a conclusion of ultimate fact. In this paragraph, the ALJ summarizes the ultimate factual conclusion developed in the underlying findings of fact regarding whether Seminole has reasonably estimated its future water demand in compliance with District rules. (RO FOF Nos. 15-38.) Riverkeeper disputes the ALJ's conclusion that Seminole "reasonably adjusted this per capita use to account for drought events and to account for planned conservation measures, including the reclaimed water retrofit program," arguing that because Seminole did not follow Mr. Doty's methodology, which does not include an upward adjustment of demand based upon anticipated drought conditions, the District would be deviating from its rules by accepting Seminole's demand projection. (Exceptions, p. 10). District rules, however, do not require an applicant to follow a specific methodology in estimating demand. A.H. § 12.2 provides that, in addition to the methods of projecting water use set forth in A.H. § 12.2, an applicant may use "other methods ... as approved by staff." The standard methods for estimating demand set forth in A.H. § 12.2.2, include the use of historic average per capita daily water use rates for the last five years, or when historic demand patterns are inappropriate based on changes in the service area, the use of alternate per capita estimates accompanied by appropriate documentation.

The ALJ found that Seminole's residential per capita use rate for the most recent five-year period is 153.7 gallons per capita per day (gpcd). (RO: FOF No. 15). Rather than use this rate, Seminole elected to use a *lower* per capita use rate for its demand projections. As described in paragraphs 23-27 of the Recommended Order, Seminole determined its future per capita use rates by applying adjustments to account for a number of factors, including drought, unaccounted-for water use, increased conservation, and the expansion of Seminole's reclaimed

water system. The ultimate result was a significant *decrease* in the per capita use rate from Seminole's historic 153.7 gpcd to 134.5 gpcd in 2027.

Nevertheless, Riverkeeper argues that Seminole should have used a lower per capita rate by not applying a drought correction factor. Riverkeeper fails to note that Seminole's overall water demand projections using the countervailing factors of drought demand increases and conservation demand reductions are very close to those made by the District's expert, Richard Doty. (Murin: 2230-31; Seminole. Ex. 284; District Ex. 28). Riverkeeper has not challenged Mr. Doty's demand projections. Since there is no material difference between those projections and Seminole's, there is no substance to Riverkeeper's exceptions to Seminole's methodology. In addition, there is competent substantial evidence that accounting for increased water demand as a result of drought is reasonable and commonly incorporated in demand projections and, thus, is appropriate under Section 12.2.2. (McCue: 824-825). Moreover, section 373.0361(2)(a), F.S., requires the WMDs to consider in regional water supply planning the amount of water required to meet public supply needs in a 1-in-10 year drought. Thus, the District's statutory framework recognizes the importance of accounting for increased demand during droughts.

Riverkeeper then takes exception to the manner in which Seminole has applied the conservation factor to reduce projected demand, arguing that Seminole improperly subtracted reuse of reclaimed water and conservation water savings from its projected 2013 demand, resulting in a reduced need for groundwater, and that Seminole is entitled to meet its demand from groundwater sources unadjusted by conservation reductions through 2013. (Exceptions, p. 10). COL No. 114 is better characterized as a finding of ultimate fact regarding the reasonableness of Seminole's demand projections. The underlying findings of fact that support COL No. 114 are at paragraphs 14-42 of the Recommended Order. Riverkeeper has not taken

exception to most of these findings of fact. Those findings of fact that Riverkeeper has taken exception to (FOF Nos. 23, 28, 35 and 36) have been rejected by this order. Therefore, there is no basis in the record for rejecting or modifying COL No. 114. Section 120.57(1)(k), F.S.

Riverkeeper also contends that Seminole's methodology is contrary to the purpose of the Central Florida Coordination Area (CFCA) rule to encourage implementation of surface water supply projects if permittees must substitute surface water for less expensive groundwater in their demand projections. (Exceptions, pp. 10-11). This is a complete misapprehension of the intent of the CFCA rules, which restrict groundwater use after the limits of this resource are reached, but are by no means intended to limit an applicant's ability to substitute surface water for groundwater prior to 2013.

As the ALJ found in FOF Nos. 35 and 36, the CFCA rules do not guarantee Seminole a groundwater source to meet its entire 2013 demands. Nor do they exempt Seminole from the District's conservation requirements. The CFCA rules provide that an applicant is restricted to "a *maximum* allocation of groundwater in an amount *no greater* than its demonstrated 2013 demand." A.H. § 12.10(a) (emphasis added) (Hollingshead: 1390-91, 1406; Jenkins: 2334-35). Nothing in the District's rules prohibits Seminole from obtaining water from an alternative water source like the St. Johns River in excess of the minimum amount that is required to be developed under the CFCA rules to meet post-2013 demands.

The purpose of the CFCA rules is to protect water resources from harm by requiring the expeditious implementation of surface water supply projects -- not merely encouraging their development. As phrased, the rule allows but does not require an applicant to maximize its use of groundwater. It certainly does not preclude the District from approving a permittee's reduction of its groundwater demand at any time, whether before or after 2013. While it may be

presumed that applicants will prefer to maximize the use of available groundwater before 2013, the CFCA rules do not require this result.

The requirement that applicants develop surface water supply sources to meet increased demand after 2013 remains whether or not an applicant has maximized its use of groundwater prior to 2013. In addition, although the CFCA rules rest in part on an expectation by the District and the regulated community that most applicants will be able to meet their 2013 demands through groundwater withdrawals, the rules do not guarantee that result. In certain areas, including Seminole County, the limit of sustainable withdrawals may be reached before 2013. (Hollingshead: 1421).

Riverkeeper also argues that the District should not recognize the use of conservation methodologies and reclaimed water in its review of demand projections because the CFCA rule has only limited the use of groundwater after 2013. However, allowing an applicant to subtract from its total demand projection the portion that it expects to meet through conservation is consistent with the purpose of the CFCA rules, which is to protect the water resources from harm, and with the CFCA rule provisions for allocating available groundwater up to an amount not to exceed the demonstrated 2013 demand. Riverkeeper's argument runs counter to the overriding conservation objective of the District's rules.

Riverkeeper also argues that by deducting reclaimed water usage from total demand, the District is placing reclaimed water users at a disadvantage in relation to applicants that utilize groundwater to meet demand, in contravention of section 373.250(3), F.S. (Exceptions, pp. 11-12). Section 373.250(3), F.S., provides in pertinent part:

> (a) It is the intent of this paragraph to ensure that users of reclaimed water have the same access to ground or surface water and will other wise be treated in the same manner as other users of the same class not relying on reclaimed water.

> (b) A water management district shall not adopt any rule which gives preference to users within any class of use established under s. 373.246 who do not use reclaimed water over users within the same class who use reclaimed water.

Riverkeeper has taken section 373.250(a), F.S., entirely out of context. Subparagraph (a) requires the WMDs to adopt rules that provide reclaimed water users, such as a golf course, access to other water sources when reclaimed water is not available. It has no bearing upon demand projections of a CUP for a surface water source. Similarly, section 373.250(b), F.S., also has no bearing on the CUP. The CFCA rules do not afford any preference to non-reclaimed water users over reclaimed water users. They are intended to protect the water resources from excessive groundwater withdrawals due to the unavailability of groundwater within the CFCA after 2013.

Sections 373.250(3)(a) and (b), F.S., do not require the District to disregard an applicant's reduced demand as a result of reclaimed water use when permitting potable water uses. Riverkeeper's argument that the conservation benefits of reclaimed water usage should not be deducted from a user's demand runs counter to the central purpose of section 373.250, F.S., which is [t]he encouragement and promotion of water conservation and reuse of reclaimed water ...." Section 373.250(1), F.S. If the WMDs could not consider an applicant's reduced demand projections based on the applicant's expected water conservation savings and reduce projected demand calculations by the amount of feasible and available reclaimed water, the WMDs would lose an effective mechanism for requiring applicants to use reclaimed water to meet their water needs.

For the above reasons, this exception is denied.

Riverkeeper's Exception 18 – Conclusion of Law 116

The ALJ found as follows in COL No. 116:

> 116. Although Seminole's existing groundwater permits have already expired or will expire shortly, and the amount of groundwater that will be allocated on a long-term basis by the District is uncertain, Seminole only requested approximately a fifth of its total projected 2027 demand under this CUP. This requested potable water allocation is only slightly greater than the difference between Seminole's projected 2013 and 2027 water demands. This small difference is reasonable, given the fact that the CFCA rules require Seminole to meet its post-2013 water demands from an AWS source and the uncertainty surrounding the amount of groundwater that will be permitted by the District to meet Seminole's pre-2013 demands. In addition, Condition 4 of the Technical Staff Report provides the combined use of surface water under CUP No. 95581 and groundwater allocated in existing permits may not exceed the total District-approved allocations for Seminole's service areas, providing reasonable assurance Seminole's allocation across all of its existing permits will not exceed its total demand.

Riverkeeper takes exception to the portion of COL No. 116 involving Other Condition 4 of the Technical Staff Report (TSR), arguing that "[i]t was not until the last rebuttal witness that it was asserted for the first time that the allocation sought in the supplemental permit application [meaning the CUP] controls the amount of the groundwater permit and not the reverse." (Exceptions, p. 13). Riverkeeper's proposed interpretation of Other Condition 4, including its argument as to the permissibility of redundant capacity in CUPs, has been addressed in response to Exception 5. Moreover, Seminole's allocation under the CUP cannot be supplemental to a permit that has yet to be issued, as there is no specific known amount to supplement before the Consolidated Groundwater CUP is issued.

The remainder of Riverkeeper's argument involves evidentiary matters that are outside the District's substantive jurisdiction. *Barfield, supra.* However, Other Condition 4 has been in the TSR from the date of the mailing of the first notices of rights and Riverkeeper has had ample

opportunity to conduct discovery regarding the District's interpretation of this provision. Riverkeeper has not raised any inconsistency in the District's interpretation of Other Condition 4 during the course of the administrative proceedings.

For the above reasons, this exception is denied.

Riverkeeper Exception 19 – Conclusion of Law 118

The ALJ found as follows in COL No. 118:

> 118. The economic and efficient use evaluation does not consider whether the design of the facilities associated with the proposed use is an economical or efficient use of the applicant's money. See Miami Corporation v. City of Titusville, DOAH Case Nos. 05-0344, 05-2607, 05-2940, SJRWMD F.O.R. 2004-88, 2005-40, 2005-52, 2007 Fla. Div. Adm. Hear. LEXIS 418, *135 ¶¶ 277-279, (DOAH Jul. 31, 2007), at Final Order Resp. to Petitioners Exception No. 90 (DOAH, SJRWMD 2007). For that reason, the current and future sizing of the Yankee Lake Facility is irrelevant to the evaluation of whether Seminole's proposed use is economic and efficient.

Riverkeeper argues that, although the cost of constructing a water treatment facility is typically not considered by the District when allocating water, it should be considered in this case because Seminole's facility will have treatment capacity substantially greater than the proposed withdrawal (Exceptions, pp. 13-14). Riverkeeper provides no citations in support of its novel interpretation. The ALJ's interpretation is consistent with the District permitting criteria, and the prior District final order cited by the ALJ. *See also Osceola County v. SJRWMD and South Brevard Water Auth.*, DOAH Case No. 91-1779 (SJRWMD Final Order 1992) at Appendix C p. 7. ("Cost to the consumer is not a substantive factor considered under District rules in determining whether a proposed water use is reasonable-beneficial or in the public interest, but may be relevant in certain factual instances, . . . such as when an applicant contends that water conservation measures, water reuse or use of the lowest acceptable quality water source

otherwise required are not economically feasible. See paragraphs 40C-2.301(4)(e)(f), and (g), F.A.C."). Thus, while it is relevant to consider the cost of development of a water supply in evaluating whether an applicant should be required to use a specific water source, it is not relevant to determining the efficient utilization of the water supply, which involves, for example, whether an agricultural user is applying the most efficient irrigation methodology.

Riverkeeper also argues that the ALJ's failure to consider facilities cost is inconsistent with the consideration of facilities cost in FOF No. 51, whereby it was determined that rapid infiltration basins were not economically or technically feasible, and FOF No. 61, whereby it was determined that the capital cost of the Yankee Lake facility would be $78 million. However, both of these findings were related to the economic or technical feasibility of utilizing a specific water source. In contrast, COL No. 118 relates to evaluating the efficiency of the water use, which involves the manner in which water is utilized after it has been produced by the water source. For the purpose of evaluating the efficiency of the water use, the cost of production of the water is irrelevant. Riverkeeper has not cited any provision in the District's rules requiring consideration of facilities cost in evaluating economic and efficient utilization of the water that is produced by the source of supply.

For the above reasons, this exception is denied.

Riverkeeper's Exception 20 – Conclusion of Law 124

The ALJ found as follows in COL No. 124:

> 124. Petitioners have argued that issuance of Seminole's CUP should be delayed or denied until after the District completes its AWS study of the St. Johns River. A delay for that reason is not required by the public interest criterion. Besides, delay would cause Seminole and its citizens to suffer significant financial loss as a result of such a delay.

COL No. 124 is essentially a restatement of FOF No. 103, which has been addressed in the response to Exception 15. In addition, Riverkeeper fails to state a legal basis for the exception or provide any citation supporting its contention that the District has the authority to refuse to issue a CUP until a pending study is completed. Section 120.57(1)(k), F.S.

For the above reasons, this exception is denied.

Riverkeeper's Exception 21 – Conclusion of Law 125

The ALJ found as follows in COL No. 125:

> 125. The evidence provided reasonable assurance that the requirements of Rules 40C-2.301(2)(c) and 40C-2.301(4)(b) and A.H. Sections 9.3 and 10.3(b) are satisfied.

Riverkeeper objects to COL No. 125 because it was reached "without elaboration." COL No. 125 is a finding of ultimate fact involving application of the public interest test. It is supported by the numerous factual findings in the Recommended Order pertaining to the lack of harm to the St. Johns River associated with the proposed withdrawal and the adverse impact to Seminole associated with additional delay in meeting its public water supply needs, including the specific public interest test findings at FOF Nos. 101 – 104. Riverkeeper did not taken exception to FOF Nos. 101, 102 and 104. Moreover, a lack of "elaboration" is not a valid basis to object to a conclusion of law, and thus it may be disregarded by the Governing Board. Section 120.57(1)(k), F.S.

For the above reasons, this exception is denied.

Riverkeeper's Exception 22 – Conclusion of Law 127

The ALJ found as follows in COL No. 127:

> 127. Rules 40C-2.301(4)(d) and 40C-2.301(5)(a)2. and A.H. Sections 9.4.3, 9.4.1(b), and 10.3(d) require that the environmental or economic harm from a proposed CUP be reduced to an acceptable amount. The evidence provided reasonable assurance

> that the only potentially significant economic or environmental impact from the CUP project, as proposed, would be a slight increase in duration of an algal bloom in the St. Johns River due to a virtually imperceptible increase in residence time resulting from decreased flow. However, this increase in residence time would be more than offset by the reduction in nutrient levels from the cessation of wastewater discharges from the Iron Bridge WWTP to the St. Johns River. The District and Seminole have agreed to an additional CUP condition which would prohibit Seminole from withdrawing water from the St. Johns River the day following a discharge from the Iron Bridge facility to the Little Econlockhatchee River. This condition provides additional reasonable assurance that any environmental harm associated with the proposed use has been reduced to an acceptable amount.

Riverkeeper through this exception elaborates upon the argument presented in Exception 13 regarding its contention that the other entities involved with the Iron Bridge facility will not agree to assign their right to credits for pollution load reductions to Seminole. (Exceptions, p. 13). Riverkeeper has not cited any portion of the record in support of any of this argument. This argument has been addressed in the response to Exception 13.

In addition, Riverkeeper's argument misses the mark because reduction of all discharges from the Iron Bridge facility is not a required condition of the CUP. The agreed-upon additional condition of the CUP to offset any adverse impacts associated with water age and algal blooms is discussed at FOF No. 89. Seminole must cease any withdrawals on any day following discharges to the Little Econ from April 1 to September 15. It is beyond dispute that, regardless of whether Seminole can eliminate discharges from the Iron Bridge facility, it has sole control over the water it withdraws from the St. Johns River, and indisputably has the ability to cease withdrawals if any discharges occur from the Iron Bridge facility and thereby comply with the CUP. There is no need for Seminole to be assigned any rights or credits from any other party to comply with this permit condition. By eliminating any adverse impact from the proposed CUP, it was not necessary for the ALJ to determine whether Seminole had reduced the environmental

harm to an "acceptable amount" so as to meet Rule 40C-2.301(4)(d), F.A.C. The planned elimination of all discharges from the Iron Bridge facility is a prospect that will further reduce nutrient inflows into the river, and Seminole has committed itself to this effort. However, this is not required to provide reasonable assurances for the CUP.

Riverkeeper also argues that the contract between Seminole and other participants in the Iron Bridge facility should have been entered into evidence. (Exception, p. 15). Riverkeeper, however, had the opportunity to enter the contract into evidence and has not referred to a portion of the record where it sought and was denied this opportunity. Unrebutted testimony was presented at the final hearing by knowledgeable persons regarding the Iron Bridge facility. (Alvarez: 223-224; Wilkening: 1879-91).

For the above reasons, this exception is denied.

Riverkeeper's Exception 23 – Conclusions of Law 129 and 130

The ALJ found as follows in COL Nos. 129 and 130:

> 129. Rule 40C-2.301(4)(f) and A.H. Section 10.3(f) require that readily available reclaimed water be used in place of higher quality water, unless the applicant demonstrates that it is not economically, environmentally, or technologically feasible. To meet this requirement, Seminole has committed to implementing an expensive reclaimed water retrofit program that will make reclaimed water available to existing customers in its Northwest-Northeast Service Area for irrigation purposes. In order to fully utilize its available reclaimed water, Seminole will have to develop a supplemental source of water capable of providing 1 mgd on an annual basis and 4 mgd on a maximum day basis. The greater weight of the evidence demonstrated that the most technically, environmentally, and economically feasible source of supplemental water is the St. Johns River. It is not technically or economically feasible for Seminole to meet this supplemental demand through reclaimed water storage, stormwater augmentation, or the acquisition of reclaimed water from other sources suggested by Petitioners.
>
> 130. In compliance with Rule 40C-2.301(4)(g) and A.H. Section 10.3(g), Seminole has provided reasonable assurance the lowest acceptable quality water source is being utilized for the proposed 5.5 mgd withdrawal. Of this total, 4.5 mgd is for direct human consumption or food preparation use, and is thus exempt from the lowest acceptable water quality requirements in this criterion. The remaining 1 mgd will provide reclaimed augmentation. The greater weight of the evidence indicated that the St. Johns River water is the lowest acceptable quality water source available to meet this need.

These conclusions of law may also be characterized as conclusions of ultimate fact regarding whether Seminole has provided reasonable assurances sufficient to meet the requirements of Rule 40C-2.301(4)(f) and A.H. § 10.3(f) that readily available reclaimed water be used in place of higher quality water, unless the applicant demonstrates that it is not economically, environmentally, or technologically feasible, and Rule 40C-2.301(4)(g) and A.H. § 10.3(g), that the lowest acceptable quality water source is being utilized for non-potable water

use. These conclusions of law and ultimate fact are based upon underlying findings of fact that Riverkeeper has either failed to take exception to, or if exception was taken, have been rejected by the Governing Board. Riverkeeper's exceptions to FOF Nos. 47, 51, and 53 were rejected because these findings are supported by competent substantial evidence. In addition, Riverkeeper did not take exception to FOF Nos. 39, 44-46, 48-50, 52, 54-55, and 61, all of which support the ALJ's conclusions of law and ultimate fact in FOF Nos. 129 and 130.

Riverkeeper argues that these conclusions fail "to recognize the higher standard to approve use of a high quality source such as the river" and that reclaimed water is available to and must be used before Seminole can use river water. (Exceptions, p. 16). However, Riverkeeper does not identify the 'higher standard" that it is referring to. A.H. § 10.3(g) simply provides that an applicant must use the lowest acceptable quality water source (except for direct human consumption or human food preparation) or demonstrate that that the use of all lower quality water sources will not be economically, environmentally, or technologically feasible.

The ALJ found in FOF Nos. 53 - 55 that neither the Iron Bridge facility nor the City of Sanford (under the tri-party agreement) were feasible options for Seminole to obtain reclaimed water. The evidence showed that it would require the construction of multiple conveyance systems and large storage capacity to move sufficient quantities of reclaimed water from the Iron Bridge WWTP to Seminole's Northwest Service Area. Likewise, the ALJ found that the tri-party agreement with Sanford is not a feasible source of reclaimed water because of water quality problems, hydraulic problems, and the inability of Sanford to provide any reclaimed water to Seminole during the more than ten years the agreement has been in effect. In FOF No. 39, the ALJ found that Seminole's expansion of its reclaimed water system to existing potable water customers in the Northwest-Northeast Service Area complies with the requirement that

CUP applicants meet non-potable water demands through the use of lower quality sources, such as reclaimed water, when feasible. In FOF No. 61, the ALJ found that the operational cost of the surface water facility on the river is much less than other options such as desalination.

For the above reasons, this exception is denied.

Riverkeeper's Exception 24 – Conclusion of Law 131

The ALJ found as follows in COL No. 131:

> 131. Rules 40C-2.301(4)(h) and 40C-2.301(5)(a)1. and A.H. Sections 10.3(h) and 9.4.2 require that the proposed use not cause significant saline water intrusion or further aggravate existing saline water intrusion problems. These provisions refer to the movement of saline water through the groundwater aquifer system. Even if they were applicable to surface water, the greater weight of the evidence was that the increase in salinity due to the proposed withdrawal would be so small as to be immeasurable.

Riverkeeper disputes the conclusion that Rules 40C-2.301(4)(h) and 40C-2.301(5)(a)1., F.A.C., and A.H. §§ 10.3(h) and 9.4.2 are inapplicable because they relate to groundwater saline intrusion. Riverkeeper contends that Rule 40C-2.301(4)(h), F.A.C., also includes saline water "intrusion" associated with surface water withdrawals from the river due to potential movement of the interface between fresh and saline water. (Exceptions, pp. 17-18). Rule 40C-2.301(4)(h), F.A.C., states that "[t]he consumptive use should not cause significant saline water intrusion problems." District staff testified that these provisions refer to intrusion of saline water through an aquifer system -- not surface water. (Hollingshead: 1402-03). Florida courts generally give deference to an agency's interpretation of its own rules. *See, e.g., Harloff v. City of Sarasota*, 575 So.2d 1324 (Fla. 2d DCA 1991); *Franklin Ambulance Serv. v. Dep't of Health & Rehab. Servs.*, 450 S.2d 580 (Fla. 1st DCA 1984).

The District's interpretation of Rule 40C-2.301(4)(h), F.A.C. and A.H. § 10.3(h) is evidenced by the use of the term "significant saline water intrusion" in Rule 40C-2.301(4)(h),

F.A.C. This term is defined in A.H. § 9.4.2 as "saline water encroachment which detrimentally affects the applicant or other existing legal users of water, or is otherwise detrimental to the public interest." The criteria in A.H. § 9.4.2 for determining saline water encroachment deal strictly with the effects of withdrawals on groundwater aquifers. See A.H. §§ 9.4.2(a)-(c).

Riverkeeper argues that A.H. § 9.4.2 is unrelated to Rule 40C-2.301(4)(h), F.A.C., and thus, implicitly also to A.H. § 10.3(h). (Exceptions, p. 18). However, A.H. § 9.4.1 provides that the conditions described in A.H. §§ 9.4.2 – 9.4.7 are a complement to the criteria described in A.H. §§ 9.1 (Reasonable-Beneficial), 9.2 (Interference with Presently Existing Legal Uses), and 9.3 (Public Interest). When read together, they reinforce the conclusion that the "significant saline water intrusion" applies only in the context of groundwater impacts.

Moreover, this interpretation does not preclude evaluation of salinity impacts related to surface water withdrawals. Rule 40C-2.301(4)(j), F.A.C., and A.H. § 10.3(j) require that "[t]he water quality of the source of the water . . . not be seriously harmed by the consumptive use." These rules apply to both surface and groundwater, and the District interprets their language as encompassing salinity impacts on surface water quality. The District evaluated the impact potential on salinity concentrations in the river under this criterion and the "environmental harm" criterion of A.H. § 10.3(d). (Seminole Ex. 364, p. 10).

Furthermore, even if Riverkeeper's interpretation of the above saline water intrusion provisions is correct, the ALJ determined in FOF Nos. 73-82 and 96-98 that the proposed use both on an individual and a cumulative basis would not cause significant saline water intrusion problems, and that the impact of Seminole's proposed withdrawal on salinity is so small as to be indiscernible with the field instruments used to measure salinity in the river. Riverkeeper only took exception to FOF No. 74, which has been denied by the Governing Board.

For the above reasons, this exception is denied.

Riverkeeper's Exception 25 – Conclusion of Law 133

The ALJ found as follows in COL No. 133:

> 133. Rule 40C-2.301(4)(j) and A.H. Section 10.3(j) require that the quality of the water source not be seriously harmed by the proposed use. Seminole has provided reasonable assurance the quality of the St. Johns River will not be seriously harmed as a result of Seminole's proposed withdrawal. The effect of the proposed withdrawal on salinity in the St. Johns River will be so insignificant as to be virtually immeasurable using state-of-the-art field measuring equipment. Any potential impact to water quality due to increased residence time will be more than offset by the reduction in nutrient load resulting from the reduction of wastewater discharges to the St. Johns River from the Iron Bridge Wastewater Treatment Facility, and the District and Seminole have agreed to an additional CUP condition which would prohibit Seminole from withdrawing water from the St. Johns River the day following a discharge from the Iron Bridge Facility to the Little Econ.

COL No. 133 may also be characterized as a conclusion of ultimate fact that the quality of the water source not be seriously harmed by the proposed use. This conclusion is dependent upon the many underlying findings of fact related to the impact of the proposed withdrawal upon river water quality. Riverkeeper bases its exception on "all of the exceptions set forth above" (Exceptions, p. 18), which have been rejected by the Governing Board. In addition, COL No. 133 is supported by additional findings of fact that were not the subject of exceptions. See FOF Nos. 73 and 75-88.

For the above reasons, this exception is denied.

Riverkeeper's Exception 26 – Conclusion of Law 136-137

The ALJ found as follows in COL Nos. 136 and 137:

> 136. Riverkeeper bases its standing in part on Sections 120.569 and 120.57, Florida Statutes, which give standing to a person whose "substantial interests will be affected by proposed agency

> action." In order to establish standing in this way, a party must allege and prove "an injury in fact which is of sufficient immediacy and is of the type or nature intended to be protected" by the substantive law. See § 403.412(5), F.S. See also Agrico Chemical Company v. Department of Environmental Reg., 406 So.2d 478 (Fla. 2d DCA 1981). Section 403.412(5), Florida Statutes, also provides: "No demonstration of special injury different in kind from the general public at large is required. A sufficient demonstration of a substantial interest may be made by a petitioner who establishes that the proposed activity, conduct, or product to be licensed or permitted affects the petitioner's use or enjoyment of air, water, or natural resources protected by this chapter."
>
> 137. Riverkeeper alleges that Seminole's proposed use will impact the use and enjoyment of the St. Johns River by a substantial number of Riverkeeper's members. However, it was not proven that Seminole's proposed CUP will affect their use or enjoyment of air, water, or natural resources of the River.

In this exception Riverkeeper argues that the ALJ's conclusion that Riverkeeper lacks standing under sections 120.569 and 120.57, F.S., "is wrong as a matter of law because it is improperly premised upon the ALJ's ultimate conclusion that there would be no harm to the River from the withdrawal," and that the ALJ improperly "confuses the merits of the case with Riverkeeper's standing to challenge the issuance of the permit." (Exceptions, p. 19). Riverkeeper is incorrect because, as discussed regarding Exception 16, when standing is challenged it becomes a factual issue as to whether the petitioner has met the applicable criteria for establishing standing. While these criteria involve fact issues associated with the merits of the case, they are not one and the same. One may prove sufficient facts to meet the standing criteria while still failing to prevail on the merits of the case. In *Miami Corporation v. City of Titusville*, DOAH Case Nos. 05-0344, 05-2607, 05-2940 (Final Order entered September 13, 2007), the District determined that, although the applicant had provided reasonable assurance that its proposed use would not cause environmental harm sufficient to deny the permit, the petitioners had demonstrated that some

harm could occur to the petitioners' interests, and thus established standing. By contrast, in this case the ALJ affirmatively determined there would be no impact on Riverkeeper's members' use or enjoyment of the River.

The general rule regarding standing is set forth in *Agrico Chemical Co. v. Dept. of Environmental Reg.*, 406 So.2d 478 (Fla. 2d DCA 1981) and its progeny, which provide that in order to establish standing under sections 120.569 and 120.57, F.S., a party must allege and prove an injury in fact which is of sufficient immediacy and is the type or nature intended to be protected by the substantive law. *Id.* at 482. Riverkeeper misinterprets *Agrico* in claiming that it may establish standing by merely *alleging* it will suffer injury in fact without *proving* injury in fact at the final hearing. *Agrico* provides that a petitioner must prove that its substantial interests will be affected if standing is disputed:

> Third-party protestants...must frame their petition for a section 120.57 formal hearing in terms which clearly show injury in fact to interests protected by [the applicable statute]. If their standing is challenged in that hearing by the permit applicant and the protestants are then unable to produce evidence to show that their substantial environmental interests will be affected by the permit grant, the agency must deny standing...

Id. at 482.

In addition, because Riverkeeper is an incorporated association, it must meet the requirements for associational standing to assert a "substantial interest" under section 120.569(1), F.S. This requires proof that: (1) a substantial number of the association's members, although not necessarily a majority, are substantially affected by the agency action; (2) the subject matter of the agency action is within the association's general scope of interest and activity; and (3) the relief sought is of the type appropriate for an association to receive on behalf of its members. *See, e.g., Farmworker Rights Org., Inc. v. Dep't of Health and Rehab. Servs.*, 417 So.2d 753 (Fla. 1st DCA 1982). To be "substantially affected," the members must show an

injury in fact different than to the general public that is not speculative or remote. *See, e.g.*, *Ameristeel Corp. v. Clark*, 691 So.2d 471 (Fla. 1997); *City of Panama City v. Bd. of Trustees of the Internal Improvement Trust Fund*, 418 So.2d 1132 (Fla. 1st DCA 1982).

While a petitioner does not have to prevail on the merits to prove standing, *Billie v. SJRWMD*, No. 2004-106 (2005) (COL No. 103), it must still prove an injury in fact. As discussed regarding Exception 16, the ALJ found that Riverkeeper did not prove injury in fact. Although Riverkeeper proved that its members use the river for recreation (Armingeon: 1807), the ALJ determined that the evidence demonstrated there would be no impact on its members' use or enjoyment of the river due to the proposed withdrawal. Thus, Riverkeeper was unable to demonstrate its substantial interests would be affected, and the ALJ properly found it lacked substantial interest standing.

In addition, although Riverkeeper has over 1,500 members, a substantial number of which use the river, only 50 members, or slightly more than three percent of its membership, are located in Seminole County (Armingeon: 1816). No evidence was offered as to whether these members live near the CUP facility or use the river in the vicinity of this facility. In *Concerned Citizens of Orange Lake Area v. Celebrity Vill. Resorts Inc. & SJRWMD*, Case No. 91-1067 (SJRWMD 1991), the 76-member organization failed to prove standing to contest the issuance of a management and storage of surface waters permit for a facility adjacent to Orange Lake. While the organization's purpose was to prevent pollution of Orange Lake, the association did not show how it was affected differently than the general public. Moreover, the testimony of only three members, or four percent of the membership, that used the lake and lived from one to two miles from the project site was found insufficient to prove injury in fact to the organization. *See also Captiva Civic Ass'n v. SFWMD*, DOAH No. 06-0805 (2006), 2006 WL 3257349,

remanded on other grounds, (SFWMD 2006) (organization formed to protect the natural environment of Southwest Florida lacked standing to contest an ERP permit for a project on Captiva Island because the 5,600-member organization presented no evidence of how many of the members used the natural resources in the vicinity of the project).

Riverkeeper argues that *Reily Enterprises, LLC v. Florida Department of Environmental Protection*, 990 So.2d 1248, 1251 (Fla. 4th DCA 2008), supports its position. In *Reily*, the ALJ determined that the petitioner failed to establish standing because the alleged injury did not arise from the permitted activity, but rather as a result of potential future development planned for the property in question. *Id.* at 1250. The ALJ then addressed the merits of the petition and found that if the petitioners had established standing, the requested permit should have been denied based on uncertainty regarding potential wetland impacts. *Id.* FDEP denied the permit after reversing the ALJ's standing determination based on testimony by one of the petitioners regarding his use of the affected area. *Id.* at 1250-1251. The appellate court affirmed, based on the ALJ's determination that environmental harm could occur, and the ALJ's finding of fact regarding the petitioner's use of the affected area. *Id.* at 1251. In contrast to *Reily*, the ALJ herein determined that, although Riverkeeper's members may use the river, such use will not be affected with sufficient immediacy and reality to demonstrate injury in fact and confer standing. The *Reily* court noted that "the ALJ did not make a blanket finding there would be no harm to the area, and the Secretary properly considered the facts applicable to standing separate from the merits." *Id.*

Riverkeeper also cites *Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates* Company, ___ So. 2d ___, 2009 WL 331660 (Fla. 2d DCA 2009) (hereafter "*Peace River*") pursuant to a Notice of Supplemental Authority. In this case, the ALJ and the agency

determined that the regional water supply authority ("Authority") lacked standing after a hearing on the merits concluded that there would be no adverse impacts to the water body from which the Authority withdrew water for public water supply. The court ruled that this ruling was incorrect and sought to distinguish its prior ruling in *Agrico,* stating:

> IMC is correct that if standing is challenged during an administrative hearing, the petitioner must offer evidence to prove that its substantial rights could be affected by the agency's action. *See Agrico*, 406 So.2d at 482. However, the proof required is proof of the elements of *standing*, not proof directed to the elements of the case or to the ultimate merits of the case. Here, the Authority offered unrebutted evidence that it had a substantial interest in the flow of Horse Creek and the Peace River and that this interest *could* reasonably be affected by IMC's proposed activities. Thus the Authority established its standing by competent, substantial evidence. The fact that the ALJ and DEP ultimately found that IMC's activities would not adversely affect the Peace River does not retroactively eliminate the Authority's standing to prosecute the action. *See Reily Enters., LLC,* 990 So.2d at 1251 (rejecting attempt to inject factual issues relating to the merits into the consideration of standing because doing so "would confuse standing and the merits such that a party would always be required to prevail on the merits to have had standing.")

2009 WL 331660 at 4-5 (court emphasis).

Peace River holds that an allegation that the petitioner's substantial interests "could" be affected by a permitted activity is sufficient to confer standing, and that subsequent proof of "injury in fact" is not necessary once proof is offered that there is a potential for harm to substantial interests. This holding appears to be inconsistent with the court's prior ruling in *Agrico* that:

> If their standing is challenged in that hearing by the permit applicant and the protestants are then unable to produce evidence to show that their substantial environmental interests <u>will</u> be affected by the permit grant, the agency must deny standing...

406 So.2d at 482 (emphasis added). The *Peace River* court considered its ruling to be harmonious with *Agrico*, and therefore did not recede from or expressly modify *Agrico*. The Governing Board believes that *Agrico* and *Peace River* are not in harmony on this point and that the *Reily* decision is also lacking clarity as to whether mere allegations of injury are sufficient to confer standing without any proof of actual injury at final hearing if standing is contested.

It is the Governing Board's view that, although proof of "injury in fact" will necessarily involve factual issues that are intertwined with the merits or the case, this is not to say that standing and prevailing on the merits of the case are one and the same. The quantum of injury needed to confer standing does not necessarily correspond with the applicable permitting criteria for which the applicant must provide reasonable assurances. For example, under Rule 40C-2.301(4)(j), F.A.C., the applicant must provide reasonable assurances that the quality of the water source will not be "seriously harmed." This is a higher threshold of impact than the degree of impact necessary to confer standing based upon "injury in fact." Thus, under this interpretation, the agency "would not confuse standing and the merits such that a party would always be required to prevail on the merits to have standing." *Reily*, 990 So.2d at 1251.

In addition, the issues to be determined at final hearing are not confounded by the fact that standing may be intertwined with the merits of the case and is subject to proof at final hearing. A petitioner, by making the necessary allegations to show injury in fact, obtains the right to an administrative hearing because these allegations are taken as true for the purpose of determining the validity to the petition. However, as with all contested factual matters, factual allegations must be later proven either on summary judgment or at the final hearing in order to provide a basis for adjudication on the merits. In the case of standing, allegations of injury in fact must also be proven. Because standing issues are often intertwined with the merits of the

case, for the purpose of judicial economy a separate hearing is often not utilized to develop the facts pertinent to standing. Upon final hearing, failure to prevail on the merits can be due to any number of legal or fact issues not related to standing, or may include fact issues associated with the impact of the permitted activity that are intertwined with standing. The mere fact that standing may involve issues associated with the merits of the case should not mean that the statutory requirement that a person demonstrate that their substantial interests will be determined by the agency action in order to have standing to initiate section 120.57, F.S., proceedings should be disregarded in favor of accepting bare allegations as final proof of standing.

In view of this lack of clear guidance from the Second District Court of Appeal and the numerous case precedents that require a showing of "injury in fact" in order to confer standing, *see, e.g., Bd. of Commissioners of Jupiter Inlet Dist. v. Thibadeau*, 956 So.2d 529 (Fla. 4th DCA 2007); *Florida Department of Offender Rehabilitation v. Jerry*, 353 So.2d 1230 (Fla. 1st DCA 1978), the Governing Board will not modify the ALJ's conclusion of law based upon the *Peace River* decision.

Riverkeeper also relies upon the ALJ's determination in COL No. 143 that:

> Seminole's proposed CUP will impair, pollute, or otherwise injure the air, water, or other natural resources to some extent, even if not enough to require denial of the CUP application, especially before the agreement between the District and Seminole to add a condition to the CUP.

Riverkeeper argues that if there was injury sufficient to confer standing under section 403.412(5), F.S., to the City of Jacksonville and St. Johns County, there was also injury sufficient to confer standing to Riverkeeper under sections 120.569 and 120.57, F.S. This argument fails because the standards for conferring standing under these statutes are not the same. Riverkeeper did not allege standing under section 403.412(5), F.S. *Agrico* and the other

authorities cited above control as to Riverkeeper's standing under sections 120.569 and 120.57, F.S. Although the ALJ found that the proposed CUP would have some impact upon the air, water or other natural resources of the state, this is not the same as saying that the use and enjoyment of the river by Riverkeeper's members will be impaired by this impact sufficient to confer standing under sections 120.569 and 120.57, F.S.

However, COL No. 137 is in need of clarification in that it states that "it was not proven that Seminole's proposed CUP will affect their use or enjoyment of air, water, or natural resources of the River." In referring to "air, water, or natural resources of the River" the impression is given that standing under section 403.412(5) is being discussed, although Riverkeeper did not allege standing under this statute. Therefore, this sentence is modified to read as follows: "However, it was not proven that Seminole's proposed CUP will affect their use or enjoyment of ~~air, water, or natural resources of~~ the River." Although this is a minor clarification, because the Governing Board is modifying a conclusion of law, it hereby finds that its interpretation of applicable law is as or more reasonable than that of the ALJ.

For the above reasons, this exception is denied, subject to the above clarification of COL No. 137.

III. Ruling On Jacksonville's Exception

Jacksonville's Exception No. 1 to Finding of Fact 37 and Conclusions of Law 113 and 114

The ALJ found as follows in FOF No. 37:

> 37. With his adjustments, Dr. McCue projected a total potable water demand (for all sources and all kinds of uses) of 23.19 mgd for 2013 and 28.1 mgd for 2027. Based on those assumptions, Dr. McCue projected a requirement for 0.46 mgd of AWS in 2012, none in 2013 and 2014, 0.18 mgd in 2015, with increasing AWS requirements each succeeding year, up to 4.39 mgd in 2027.

The ALJ found as follows in COL Nos. 113 and 114:

113. Seminole requests a 4.5 mgd allocation to meet its potable water demand and 1 mgd to augment its reclaimed water supply in order to maximize the reuse of reclaimed water. Rule 40C-2.301(4)(a) requires proof these uses are "in such quantity as is necessary for economic and efficient utilization." A.H. Section 10.3(a) provides in part "[t]he quantity applied for must be within acceptable standards for the designated use (see Section 12.0 for standards used in evaluation of need/allocation)." A.H. Section 10.3(f) requires that all readily available reclaimed water be used unless shown not to be economically, environmentally, or technically feasible.

114. Seminole followed the requirements of A.H. Section 12.2.1 for projecting a public supply utility's future population and A.H. Section 12.2.2 for determining its projected water demands based on historical average per capita use rates during the most recent 5 years. However, Seminole reasonably adjusted this per capita use to account for drought events and to account for planned conservation measures, including the reclaimed water retrofit program.

Jacksonville takes exception to FOF No. 37, arguing that Seminole has been allocated more water than is necessary for economic and efficient utilization. Jacksonville's argument, however, is based upon a chart prepared by Jacksonville's counsel for the purpose of its exception, which is not admitted into evidence and is not supported by the references.[7]

[7] Jacksonville cites as authority for the table its counsel constructed on page six of its exceptions Seminole Ex. 284 (McCue demand table), Seminole Exhibit 364 (District Technical Staff Report), Jacksonville Exs. 27 and 29, and District Exhibits 73-a and 73-b. Column T in Seminole Exhibit 284 provides competent substantial evidence for Seminole's need for a supplemental water supply in excess of the potable demand that will be met through the Consolidated Groundwater CUP. This information is incorrectly labeled in the third column of Jacksonville's table as relating to "Applicant's demand projection for reclaimed [water]." Reclaimed water is accounted for in Dr. McCue's demand table (Seminole Ex. 284) as an offset to potable water demand, column M being subtracted from the "Total Potable Demand" calculation in column Q. The fourth column in counsel's table ("Applicant's Dem. Proj. for potable") does not appear to have any supporting competent substantial evidence and it is not clear as to what it is based upon. The other cited references (Jacksonville Exs. 27 and 29, and District Exhibits 73-a and 73-b) do not provide any support. Jacksonville Exhibit 27 is a demonstrative exhibit that was not admitted into evidence. District Exhibits 73-a and 73-b were not admitted into evidence. Jacksonville Exhibit 29 contains a chart of potable demand that is

Assuming that the proposed table has been mislabelled, the thrust of Jacksonville's exception is that more St. Johns River water was allocated in certain years than is actually needed to meet potable water demand and supplement the reclaimed water system. However, as the ALJ discussed in FOF No. 36, which Jacksonville has not taken exception to, pursuant to Condition 4 of the CUP, the surface water allocation under the CUP will ultimately be reconciled with the groundwater allocation under the Consolidated Groundwater CUP so that no excess water will be allocated when the two permits are taken together, with the exception of some small amount of redundant capacity for the overall system with its various complex and interrelated components.[8] When the Consolidated Groundwater CUP is issued, any excess surface water under the CUP will go toward reducing the amount of groundwater allocated under the Consolidated Groundwater CUP. As discussed by the ALJ in FOF No. 101 relating to the public interest, this serves to relieve stress on the groundwater supply. In addition, because the combined CUPs will consider Seminole's total water needs and sources and make any necessary adjustment in the Consolidated Groundwater CUP to avoid over-allocation, there is no "water banking," as Jacksonville contends. (Exception, p. 7).

Although there is no basis to modify FOF No. 37 based upon the argument presented by Jacksonville, the District has pointed out that there are scrivener's errors in this finding, apparently from incorrectly transferring the information contained in Dr. McCue's table

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unexplained by any references to the transcript. The fifth column ("Difference (excess approval)," is derived by subtracting the third and fourth columns from the second column.

The District can only speculate that Jacksonville mislabeled the tables, and that column 3 is intended to the labeled for potable water demand, while column 4 should have been labeled for reclaimed water demand. The Governing Board will assume this is the case for the purpose of further discussion.

[8] FOF No. 36 is supported by competent substantial evidence, as discussed with regard to Riverkeeper's Exception 5.

summarizing his demand projections (Seminole Ex. 284). Therefore, FOF No. 37 is modified to read as follows:

> 37. With his adjustments, Dr. McCue projected a total potable water demand (for all sources and all kinds of uses) of ~~23.19~~ 23.71 mgd for 2013 and 28.1 mgd for 2027. Based on those assumptions, Dr. McCue projected a requirement for 0.46 mgd of AWS in ~~2012~~ 2014, none in ~~2013~~ 2015 and ~~2014~~ 2016, 0.18 mgd in ~~2015~~ 2017, with increasing AWS requirements each succeeding year, up to 4.39 mgd in 2027.

With regard to Jacksonville's exception to COL Nos. 113 and 114, these conclusions of law are the ultimate conclusions of law and fact that rest upon the underlying FOF Nos. 14 through 42 relating to Seminole's water demand and allocation. With the exception of the non-material modification of FOF No. 37, these findings of fact have not been modified by this order. There is, therefore, no basis for modifying these conclusions of law. Jacksonville argues that the ALJ never concluded that Seminole met its burden to demonstrate that its proposed use is in such quantity as necessary for economic and efficient utilization as required by Rule 40C-2.301(4)(a), and A.H. Section 10.3(a). (Exceptions, p. 9). In fact, COL No. 116 concludes that the evidence presented by Seminole and the conditions to the TSR provides "reasonable assurance Seminole's allocation across all its existing permits will not exceed its total demand."

For the above reasons, this exception is denied.

IV. Ruling On St. Johns County's Exceptions

St. Johns County's Exception 1 – Finding of Fact 13

The ALJ found as follows in FOF No. 13:

> 13. Raw water pipelines from the intake structure will run through previously disturbed wetlands within the Wekiva River Aquatic Preserve and the Seminole Black Bear Wilderness Area to new treatment facilities, all of which will be located on land owned by Seminole. The pipelines consist of two 42-inch lines with a total capacity of 50 mgd, which is intended to meet possible future

> demands during the 50-year useful life of the facilities. It is common to design utility infrastructure to accept larger quantities of water than immediately needed to accommodate possible future expansion.

St. Johns County takes exception to this finding of fact because it "fails to take into account to what extent the disturbed wetlands have recovered" or to describe "the specific areas that will be impacted by installation and operation of the pipelines." This exception fails to identify the legal basis for the exception, or include citations to the record. § 120.57(1)(k), F.S. Competent substantial evidence supports the location of Seminole's raw water pipelines. (Alvarez: 130-135; Seminole Exs. 53, 54, 57 and 58). In addition, this exception seeks to have the Governing Board make supplemental findings of fact, which it does not have the authority to do. *Florida Power and Light Co.; Boulton, supra.* Lastly, the potential impacts of the pipeline are irrelevant to the issuance of the CUP.

For the above reasons, this exception is denied.

St. Johns County's Exception 2 – Finding of Fact 32

The ALJ found as follows in FOF No. 32:

> 32. Jacksonville expert witness, Nolton Johnson, opined that greater conservation savings could be achieved through the mandatory implementation of the Florida Water Star Program, a voluntary certification process for builders. While promoted by the District, the Florida Water Star Program is not part of the District's conservation requirements. It is not appropriate to include a CUP requirement that Seminole make the program mandatory. It is not reasonable from an engineering perspective, or appropriate, to assume savings from 100% compliance with the Florida Water Star Program by new development in Seminole, as Mr. Johnson did for his opinion.

St. Johns County argues that the Governing Board should modify this finding to conclude as fact that implementation of Florida Water Star is part of the District's conservation requirements and that it would be appropriate to make this program a mandatory condition of the

CUP. (Exceptions, pp. 2-3). While agreeing that Water Star is a voluntary program, St. Johns County argues that Seminole was under a burden to show that implementation of this program is not economically, environmentally, or technically feasible. However, St. Johns County failed to cite any record evidence in support of its assertion that making implementation of Water Star mandatory in Seminole County is economically, environmentally, or technically feasible as applied to Seminole in this case. Section 120.57(1)(k), F.S. The only evidence introduced by St. Johns County indicated that additional conservation savings could be achieved through implementation of Water Star (Johnson: 1949-51), which is not at issue. In contrast, competent substantial evidence was presented by both Seminole and the District that Seminole is already implementing all feasible conservation measures, including measures in addition to those required for a conservation plan (McCue: 844-855; Jenkins: 1118-30). The District's Consumptive Use Policy Development Coordinator, Dwight Jenkins, also testified that there is no CUP rule requirement that Water Star be implemented; that lack of implementation of Water Star was not an indication that Seminole was failing to implement all water conservation measures; that Water Star is still a "fledgling program" that is designed to provide an incentive to building owners and homeowners to undertake "pretty exceptional water conservation measures" with the benefit that a Water Star certification could increase the marketability of a property or personal satisfaction; and that because the program is based on fairly exceptional measures, it would not be appropriate to adopt this as a consumptive use permitting requirement. (Jenkins: 2329-2331). Although the Governing Board may in the future determine that implementation of some or all of the Water Star conservation measures are appropriate, at the present time the Water Star program is still in the development stage and not appropriate as a general regulatory requirement.

For the above reasons, this exception is denied.

St. Johns County's Exception 3 – Finding of Fact 101

The ALJ found as follows in FOF No. 101:

> 101. The evidence provided reasonable assurance that the issuance of Seminole's CUP is in the public interest. It will provide a source of needed potable water other than stressed fresh groundwater. It will allow Seminole to maximize reuse of reclaimed water, which will also reduce its need for fresh groundwater. There is reasonable assurance that environmental harm from the issuance of Seminole's CUP will not be significant and has been reduced to an acceptable amount.

St. Johns County argues that FOF No. 101 is not supported by competent substantial evidence because "the finding that the proposed CUP will reduce the need for fresh groundwater is insufficient to support a conclusion that the environmental harm caused by the consumptive use is not significant and has been reduced to an acceptable amount." (Exceptions, p. 3). St. Johns County incorrectly assumes that the finding as to lack of environmental harm is dependent on a finding of a reduction in the need for fresh groundwater. These are two separate findings, each of which is supported by competent substantial evidence. (See Hollingshead: 1393-95 as to reducing the need for fresh groundwater, and FOF Nos. 70-100 as to the lack of environmental harm, none of which have been the subject of exceptions by St. Johns County). In evaluating the impact on the public interest, the ALJ was simply pointing out the beneficial aspect of reducing the need for fresh groundwater, while also noting the lack of negative aspects associated with environmental harm.

In determining whether a proposed consumptive use is in the public interest, the District considers whether the use is for a legitimate purpose, whether the use meets the reasonable-beneficial use requirements, and whether any of the reasons for recommendation of denial of a permit have been established. (A.H., §§ 9.3, 9.4, 10.1, and 10.3). Public interest is further

addressed in the CFCA rules by providing an interim regulatory framework to allow for the allocation of available groundwater in the CFCA area, subject to avoidance and mitigation measures to prevent harm, and by requiring the expeditious implementation of supplemental water supply projects. A.H. § 12.1.2(a).

The conclusion of ultimate fact in FOF No. 101 that the proposed uses are in the public interest is supported by previous factual findings that the proposed uses are for legitimate purposes of potable water supply and supplementing a reclaimed water system. *See Nassau v. Beckham*, DOAH Case No. 92-0246 (SJRWMD Final Order 1992) (a city's proposed renewal of its public water supply use was consistent with the public interest because it was for public water supply purposes and would not be harmful to the water resources of the area, the District, or the State); *The Sierra Club v. Hines Interests Ltd. P'ship*, DOAH Case No. 99-1905 (SJRWMD Final Order 2000) (proposed golf course for residential development is consistent with the public interest because it serves the needs of people using the common facilities; meets the reasonable beneficial use requirement; will be primarily irrigated by stormwater, minimizing wetland impacts; involved extensive water conservation and use of available reclaimed water, and met other environmental criteria).

With regard to the ALJ's finding as to lack of environmental harm, the District considers whether the environmental or economic harm caused by the consumptive use is reduced to an acceptable amount in its evaluation of reasonable-beneficial use. A.H. § 10.3(d). The competent substantial evidence introduced in support of FOF Nos. 70-100 underlies the ALJ's conclusion in FOF No. 101 that there is reasonable assurance that environmental harm has been reduced to an acceptable amount.

For the above reasons, this exception is denied.

St. Johns County's Exception 4 – Finding of Fact 102

The ALJ found as follows in FOF No. 102:

> 102. St. Johns County in particular contends that, despite all the evidence of reasonable assurance provided, not enough consideration has been given to the impact of Seminole's CUP project on the Wekiva River Aquatic Preserve and Seminole's Black Bear Wilderness Area. However, additional consideration of those kinds of impacts will be considered in further required permitting for the project. The evidence in this case provided reasonable assurance that the proposed water withdrawal will not significantly harm those natural resources and that harm to those resources has been reduced to an acceptable amount.

St. Johns County also takes exception to FOF No. 102 "to the extent it states that additional consideration regarding impacts to the Wekiva River Aquatic Preserve and Seminole Black Bear Wilderness Area will be considered in further permitting of the Yankee Lake Project," arguing that "there is no authority which suggests that additional review of the project by other agencies in any way relieves the applicant of its burden to provide reasonable assurance that the proposed withdrawal meets all applicable criteria in this case." (Exceptions, p. 4). St. Johns County further argues that there is no competent substantial evidence to support the ALJ's determination that the Wekiva River Aquatic Preserve or the Seminole Black Bear Wilderness Area will not be impacted by Seminole's use of water because Seminole "failed to provide any analysis of potential environmental harm to the Wekiva River Aquatic Preserve and to the Seminole Black Bear Wilderness Area resulting from the proposed use." *Id.*

The fact that the record does not include the specific study St. Johns County believes is necessary does not mean that there is no competent substantial evidence in the record to support the ALJ's conclusion in this regard. St. Johns County cannot argue that a lack of additional evidence amounts to a lack of competent substantial evidence necessary to support a finding of fact. The ALJ made numerous findings of fact showing that Seminole's proposed withdrawal

will not have a measurable impact on the relevant environmental parameters that might affect the Wekiva River Aquatic Preserve or the Seminole Black Bear Wilderness Area. See FOF Nos. 65, 66, 68, and 70-100. St. Johns County has not taken exception to any of these findings, which are supported by competent substantial evidence. Bushey: 339-349, 355-359; Chou: 488-500, 527-528; McMillin: 600-609, 654; Montgomery: 689-691, 710-715, 729-738; Wilkening: 1010-11, 1014-15, 1879-91; Robison: 1285-86; Dunn: 1324-27; Hendrickson: 1478-79; Peebles: 1600-01; Lowe: 1633-37; Seminole Exs. 107-124, 126-130, 132, 133, 135, 137, 154, 162-179, 186, 187, 189-191, 218-220; SJRWMD Exs. 18, 19, 20, 61, 167a, 168, 170a).

With regard to St. Johns County's argument that additional review by other agencies is not a substitute for the requisite review under chapter 373, that is no doubt true. However, the above discussion demonstrates that an extensive review was conducted in this case regarding the applicable permitting criteria within the District's jurisdiction to consider. To the extent St. Johns County objects to the ALJ's finding that additional permitting will further consider impacts to the Wekiva River Aquatic Preserve or the Seminole Black Bear Wilderness Area, a reasonable interpretation is that the ALJ intended this to refer to matters that are outside the District's consumptive use permitting jurisdiction under chapter 373. This would include the potential impacts of the water transmission lines and intake structure, which will be addressed through the Environmental Resource Permit (ERP) issued under Part IV of chapter 373.

The criteria for a consumptive use permit looks only at the proposed consumptive use and what, if any, impacts may result from that use. All of the criteria look at the "use" of the water - not the means by which the water is transmitted to the point of delivery. *See* §§ 373.219(1) - 373.223, F.S.; Rule 40C-2.301(2), F.A.C. The thresholds for determining whether a CUP is required involve the amount of the use or the capacity of the well or other facility. Rule 40C-

2.041, F.A.C. Nowhere in Part II of Chapter 373 is there authority for the District to consider the placement of a proposed facility or pipeline, otherwise referred to as a "work" under Part IV of Chapter 373, section 373.402(5), F.S., in its reasonable-beneficial use evaluation.

For the above reasons, this exception is denied.

St. Johns County's Exception 5 – Conclusion of Law 123

The ALJ found as follows in COL No. 123:

> 123. Petitioners have argued that Seminole's proposed use is not in the public interest because of potential impacts at the location of the pipeline and treatment facility associated with the Yankee Lake Facility. These issues are outside the scope of the permitting criteria for consumptive uses of water, which focus on the impact of the consumptive use of water itself, not the potential impact of facilities associated with the proposed withdrawal. Evaluation of the potential impact of the pipeline and treatment facilities is the subject of a separate Environmental Resource Permit, not the CUP. See generally, Ch. 373, Part IV, F.S.

St. Johns County's takes exception to the extent COL No. 123 "states that evaluation of the potential impact of the pipeline and treatment facility is outside the scope of the permitting criteria for the instant proposed use," arguing that, based on the definition of "reasonable-beneficial use" in section 373.019(16), F.S., and A.H. § 10.3(d), involving the "use of water in such quantity as is necessary for economic and efficient utilization for a purpose *and in a manner* that is both reasonable and consistent with the public interest," in addition to the evaluation of the potential impact of the withdrawal of water itself, "consideration of potential impacts caused by construction and operation of the pipeline and treatment facility are properly within the scope of the permitting criteria for the proposed use." (Exceptions, pp. 4-5). St. Johns County's does not cite to any prior case law or District final orders to support this interpretation.

St. Johns County's argument has been addressed in response to Exception 4. In addition, it is worth noting that the District has adopted numerous rules specifying the kinds of environmental impacts that are evaluated under the three-prong test for reasonable-beneficial use,

all of which focus on the potential impact of the withdrawal and use of water and not the indirect effects such as the impacts of the infrastructure associated with the project. For example, A.H. § 10.3, which explains the reasonable-beneficial use criterion, contemplates evaluation of impacts to the source of the water [A.H. § 10.3(c)], saline water intrusion [A.H. § 10.3(h)], the potential for flood damage [A.H. § 10.3(i)], harm to water quality [A.H. § 10.3(j)], and violations of state water quality standards [A.H. § 10.3(k)], each relating only to the direct impact of the consumptive use of water. Even A.H. § 10.3(d), cited by St. Johns County, indicates that the type of environmental harm contemplated by the District permitting criteria is limited to the direct impact of the withdrawal. The specified methods of reducing such harm include: reducing the amount of water withdrawn, modifying the method or schedule of withdrawal, or mitigating damages caused by the withdrawal. None of these criteria make reference to environmental impacts that may be indirectly associated with the proposed withdrawal, but not caused by the use of water itself.

This interpretation is further supported by the recent case *Marion County v. Greene*, 2007 WL 81023 at 13 (DOAH 2007, SJRWMD 2007), *affirmed* ___ So.2d ___, 2008 WL 2937828 (Fla. 5th DCA 2008) (corrected opinion filed March 20, 2009), in which the Fifth District Court of Appeal ruled that:

> The District does not consider whether local government approvals have been obtained prior to issuance of a CUP for purposes of determining whether the application is consistent with the public interest. **Neither does the District consider impacts related to local roads from trucks transporting the water not related to water resources.**

2008 WL 2937828 at 3 (Fla. 5th DCA 2008) (emphasis added).

For the reasons stated above, this exception is denied.

St. Johns County's Exception 6 – Conclusion of Law 128

The ALJ found as follows in COL No. 128:

> 128. Rule 40C-2.301(4)(e) and A.H. Section 10.3(e) require an applicant to implement all available water conservation measures unless it 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 under A.H. Sections 10.3 and 12.0 and Rule 40C-2.301(4)(e). A.H. Section 12.2.5 sets forth water conservation actions for public supply applicants that are deemed to meet the water conservation requirements of the water conservation criterion. Seminole is implementing a District-approved water conservation plan, which satisfies the requirements of Rule 40C-2.301(4)(e) and A.H. Section 10.3(e), and more than satisfies the conservation plan elements specified in A.H. Section 12.2.5.

St. Johns County restates the objection it made in Exception 2 to FOF No. 32. Issues raised by St. Johns County pertaining to the Florida Water Star Program were addressed in response to that exception. However, this exception appears to go beyond Exception 2 in its ultimate conclusion, seeking to have the Governing Board find that Seminole did not meet the applicable conservation planning requirements of Rule 40C-2.301(4)(e), F.A.C., and A.H. §§ 10.3(e) and 12.2.5.

St. Johns County argues that A.H. § 12.2.5.1(h) compels Seminole to adopt the Florida Water Star Program in order to comply with the CUP criteria. The plain language of Section 12.2.5.1(h) indicates it only applies when

> an audit and/or other additional information indicates there is a need for additional water conservation measures in order to reduce a project's water use to a level consistent with projects of a similar type, or when an audit and/or other information indicates that additional significant water conservation savings can be achieved by implementing additional measures, other specific measures will be required by the District, to the extent feasible, as a condition of

the permit. Additional water conservation measures include those listed in Appendix I.

The conditions described in 12.2.5.1(h) are, therefore, not applicable because St. Johns County has not referred to an audit or other information meeting the criteria of this program.

In addition, the District's water conservation requirements are satisfied by the adoption of a water conservation plan approved by the District. A.H. § 10.3(e). St. Johns County has not taken exception to FOF No. 25, which determined that Seminole's conservation plan meets all District requirements and CUP permitting criteria and has been approved by the District. Nor was exception taken to FOF Nos. 26 and 27, which describe that Seminole will reduce the potable water use in its Northwest Service Area by 50% in the 2001-2028 time period by spending more than $125 million to implement its conservation plan, thereby reducing its per capita use rate from above 150 gpcd to 134.5 gpcd in 2027. Based upon the facts as found in FOF Nos. 25-27, the ALJ correctly found in COL No. 128 that Seminole met the applicable conservation criteria of the District's rules.

For the above reasons, this exception is denied.

FINAL ORDER

ACCORDINGLY, IT IS HEREBY ORDERED:

1. The Recommended Order dated January 12, 2009, attached hereto as Exhibit "A", is adopted in its entirety, except for the following modifications:

(a) FOF No. 37 is modified to read as follows:

> 37. With his adjustments, Dr. McCue projected a total potable water demand (for all sources and all kinds of uses) of ~~23.19~~ 23.71 mgd for 2013 and 28.1 mgd for 2027. Based on those assumptions, Dr. McCue projected a requirement for 0.46 mgd of AWS in ~~2012~~ 2014, none in ~~2013~~ 2015 and ~~2014~~ 2016, 0.18 mgd in ~~2015~~ 2017, with increasing AWS requirements each succeeding year, up to 4.39 mgd in 2027.

(b) COL No. 137 is modified to read as follows:

> 137. Riverkeeper alleges that Seminole's proposed use will impact the use and enjoyment of the St. Johns River by a substantial number of Riverkeeper's members. However, it was not proven that Seminole's proposed CUP will affect their use or enjoyment of ~~air, water, or natural resources of~~ the River.

(c) COL No. 141 is modified to substitute the text in section D.I. of this order.

2. Consumptive Use Permit Application No. 95581 is approved for issuance of a consumptive use permit with the conditions specified in the Consumptive Use Technical Staff Report and the additional "Other Condition" discussed in paragraph 89 of the Recommended Order, stating as follows:

> 17. For every year during the pendency of this permit, starting on April 1 and ending on September 15, permittee shall not withdraw any water from the St. Johns River on any day that follows a day when the Iron Bridge wastewater treatment facility has discharged water to the St. Johns River.

DONE AND ORDERED this 13th day of April, 2009, in Palatka, Florida.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

BY: _____
KIRBY B. GREEN III
EXECUTIVE DIRECTOR

RENDERED this 15th day of April, 2009.

BY: Sandra Bertram for
ROBERT NAWROCKI
DISTRICT CLERK

Copies furnished to:

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Notice of Rights

1. Any substantially affected person who claims that final action of the District constitutes an unconstitutional taking of property without just compensation may seek review of the action in circuit court under section 373.617 of the Florida Statutes and the Florida Rules of Civil Procedure, by filing an action within 90 days of the rendering of the final District action.

2. Under section 120.68 of the Florida Statutes, a party who is adversely affected by final District action may seek review of the action in the district court of appeal by filing a notice of appeal under rule 9.110 of the Florida Rules of Appellate Procedure within 30 days of the rendering of the final District action.

3. A District action or order is considered "rendered" after it is signed by the Chairman of the Governing Board, or his delegate, on behalf of the District and is filed by the District Clerk.

4. Failure to observe the relevant time frames for filing a petition for judicial review as described in paragraphs 1 or 2 will result in waiver of that right to review.

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing NOTICE OF RIGHTS has been furnished on this 16th day of April 2009, to each of the following:

Via U.S. Mail:

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