STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST. JOHNS RIVERKEEPER, INC., CITY OF JACKSONVILLE, and ST. JOHNS COUNTY,	)	
Petitioners,	)	
vs.	)	Case Nos. 08-1316
	)	08-1317
ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,	)	08-1318
Respondent,	)	
and	)	
SEMINOLE COUNTY,	)	
Intervenor.	)	

FINAL ORDER

On October 9, 2009, a hearing was held in this case before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUES

The issues are whether attorney's fees and costs should be assessed against Petitioners, St. Johns Riverkeeper, Inc. (Riverkeeper), and City of Jacksonville (Jacksonville), and paid to Intervenor, Seminole County (Seminole), under Sections 120.595(1) and 57.105, Florida Statutes.[1]

PRELIMINARY STATEMENT

Seminole applied to the St. Johns River Water Management District (SJRWMD) for a consumptive use permit (CUP) to withdraw water from the St. Johns River. When SJRWMD issued a Technical Staff Report (TSR) and gave notice of its intent to grant a CUP to Seminole, Riverkeeper and Jacksonville filed challenges that were referred to DOAH for a hearing. Before the hearing, Seminole filed motions for attorney's fees and costs against

Riverkeeper and Jacksonville under Sections 120.595(1) and 57.105, Florida Statutes. After the CUP hearing, a Recommended Order (RO) and a Final Order (FO) were entered granting a CUP to Seminole, with an added condition that Seminole would not withdraw surface water from the river on any day after there were discharges to the river from the Iron Bridge Regional Wastewater Treatment Facility during times of the year when algal blooms may occur (the Iron Bridge condition). Jurisdiction over the motions for attorney's fees and costs was reserved. After the CUP FO, Seminole invoked the reserved jurisdiction, and a hearing was scheduled for August 17 and rescheduled for October 9, 2009, in Tallahassee.

Prior to the hearing, the part of Seminole's motion seeking attorney's fees and costs under Section 120.595(1), Florida Statutes, was stricken as to Riverkeeper based on Riverkeeper's argument that it was not a "non-prevailing adverse party" due to the addition of the Iron Bridge condition. Jacksonville did not seek similar relief before the hearing.

At the hearing, Seminole called three witnesses: Neil Armingeon; Jimmy Orth; and Lisa Rinaman. Seminole also had Jacksonville Exhibit 6 and Seminole Exhibits A20, A22, A25-A28, A30, A39, A45-A50, A54, A56, A60, A71, A73, A84, A89 (clips 2 and 4), and A90 admitted in evidence. Seminole also offered deposition transcripts as its Exhibits A1-A3, A6, A7, A10, A12,

and A15-A18, but it was agreed that excerpts would be designated post-hearing, subject to the rulings on objections.

Jacksonville called Dana Morton and had its Exhibits 3-5 admitted in evidence. Riverkeeper re-called Mr. Armingeon and called Michael Howle, Esquire. Riverkeeper also offered its Exhibits 5, 6, and 11. Riverkeeper Exhibit 11 was admitted in evidence. Ruling was reserved on objections to Exhibits 5 and 6; the objections are overruled, and Exhibits 5 and 6 are admitted in evidence.

Seminole, Jacksonville, and Riverkeeper requested official recognition of various documents (including exhibits and excerpts from the testimony previously admitted in evidence during the CUP hearing), but it was agreed that excerpts would be designated post-hearing, subject to the rulings on objections.

A three-volume Transcript of the final hearing was filed on October 26, 2009. A schedule was established for designating official recognition documents and deposition transcript excerpts, objections, and cross-designations. The objections were overruled. Jacksonville's designated official recognition document (Chapter 95 of the Jacksonville Ordinance Code), and all deposition transcript excerpts designated as Seminole Exhibits A1-A3, A6, A7, A10, A12, and A15-A18, plus an additional deposition transcript, with deposition exhibits 174-188, designated by Seminole as its Exhibit A9, were received in evidence.[2]

The parties were given until December 1, 2009, to file proposed final orders, and those filings have been fully considered.

FINDINGS OF FACT

A. Prevailing Party Fees and Costs against Jacksonville

1. Like Riverkeeper, Jacksonville opposed Seminole's CUP in part because Seminole did not provide reasonable assurance that the proposed CUP would not cause adverse environmental impacts, including water quality impacts. The CUP RO and FO found that the Iron Bridge condition was intended to resolve those concerns by providing the necessary assurance as to water quality.

2. Seminole asserts that Jacksonville cannot rely on the Iron Bridge condition because it withdrew all issues as to water quality. Although Jacksonville withdrew paragraphs 35(d) and 41(d) of its Petition, which identified water quality as a disputed issue of material fact, Jacksonville did not withdraw paragraphs 35(e) and (j), 36, 46-48, 61, and 63, which asserted a failure by SJRWMD to properly ascertain the extent of harm to the river's water quality and environmental values.

3. Seminole also asserts that Jacksonville's professed concern about the water quality issue addressed by the Iron Bridge condition is a fabrication to avoid liability for attorney's fees and costs. But in his deposition on August 31, 2008, Mr. Morton testified that his concerns included

"biological integrity, potential for dissolved oxygen violations, [and] potential for the narrative nutrient standards to be impacted." He also testified that he had numerous discussions with several experts for SJRWMD on the river's water quality, including John Hendrickson, whose testimony and evidence at the CUP hearing was the factual basis for the Iron Bridge condition.

4. Seminole asserts that Jacksonville's reliance on the Iron Bridge condition cannot be based on Mr. Morton's testimony because: he testified during his deposition on August 31, 2008, that he knew of nutrient level violations in Duval County, but not upstream; by the time of his deposition, Jacksonville already stipulated it would not raise the issue "whether the Proposed Use will cause detrimental environmental effects in that portion of the river located in Duval County"; and Jacksonville withdrew all water quality claims and stipulated at the CUP hearing that it no longer contested water quality and nutrient loading.

5. The stipulation to which Seminole refers was the following exchange of counsel during the CUP hearing:

> MR. de la PARTE: Your Honor, we would move Seminole County Exhibits 50 and 51 into evidence. There's an objection on the basis of relevance.
>
> MR. WRIGHT: Your Honor, the issue of nutrient loading, and specifically the TMDL, is no longer an issue in this case. And on that basis, we don't believe that these exhibits are relevant.

> MR. de la PARTE: Let me just make it clear, because there was still an issue of serious harm to water quality in the river was reserved as an issue. I'm all for knocking out issues, if we can. If the nutrient loading part of that is no longer an issue in this proceeding, we would not move these into evidence, Your Honor, but we were under the assumption that that was still something that the Petitioners were raising in the case, as a result of the proposed withdrawal.
>
> MR. FRAZIER: For Jacksonville, that issue is withdrawn. The stipulation withdrew that issue, for us at least.
>
> MR. WRIGHT: As far as the issues for purposes of meeting the TMDL, it's not an issue for us either.

This stipulation addressed total maximum daily load (TMDL) nutrient loading limitations. It is not clear that Jacksonville was waiving the issue that increased "residence time" of nutrients in the river from reduced flow would increase algal biomass and the duration of algal blooms, or that those issues did not remain within the water quality issues preserved by Jacksonville.

B. Sanctions for Unreasonable Delay under § 57.105(3)

6. Seminole asserts that Riverkeeper and Jacksonville filed their challenges to Seminole's CUP primarily for the purpose of unreasonable delay. Riverkeeper and Jacksonville knew their challenges would delay the issuance of Seminole's CUP. They also maintained that SJRWMD should not issue the CUP before the completion of a study of the cumulative impacts of

surface water withdrawals from the St. Johns River and its largest tributary, the Oklawaha River.

7. Seminole argued that Riverkeeper's primary purpose of unreasonable delay was proven by statements made in various member newsletters and internet blogs to the effect that more than just the allocation of surface water requested in Seminole's CUP was at stake because more CUP applications to withdraw surface water from the river would follow Seminole's CUP. Those statements were made for purposes of rallying support among the members and increasing membership, were based on information available at the time (some of which was inaccurate), and often were "cut-and-pasted" from previous statements to save time and effort (sometimes resulting in erroneous information being included).

8. Seminole also argued that Jacksonville's primary purpose of unreasonable delay was proven by Jacksonville's narrowing of the environmental issues, and limitation of its evidentiary presentation to impingement and entrainment of aquatic organisms in the intake structure for the CUP, which would not justify Jacksonville's litigation of the CUP case. But the environmental issues preserved by Jacksonville, and evidence presented by all the parties during the CUP hearing, were broader than just impingement and entrainment. They included alleged impacts on salinity, submerged aquatic vegetation, and increased "residence time" of nutrients in the

river from reduced flow (enough to increase algal biomass and the duration of algal blooms), and other environmental features of the St. Johns River.

9. Seminole argues that unreasonable delay was proven by findings in the CUP RO and FO that further delay until after the completion of SJRWMD's cumulative impacts study was unwarranted and not in the public interest. But that is not the same as a finding that Petitioners' participation in the CUP proceeding was primarily for the purpose of unreasonable delay.

10. Seminole did not prove that the primary purpose of Riverkeeper and Jacksonville was to unreasonably delay the issuance of the CUP. Rather, their primary purpose was to prevent the CUP from being issued without reasonable assurances that all permitting criteria were met (including not only environmental criteria but also need for the requested allocations). The delay inherent in the proceeding was not unreasonable. Neither Riverkeeper nor Jacksonville litigated in a way calculated to lengthen the proceeding unnecessarily or unreasonably.

C. Sanction for Lack of Factual Support for Claims

11. Seminole also asserts that Riverkeeper and Jacksonville knew or should have known that several of their claims were not supported by the material facts necessary to

establish the claims or by the application of then-existing law to those material facts.

(i) Environmental Claims

12. The CUP RO and FO found no measurable impacts on salinity, submerged aquatic vegetation, and several other environmental features of the St. Johns River.

13. As to those environmental claims, not proven at the CUP hearing, Riverkeeper presented the testimony and evidence of: Quinton White, Ph.D., an expert in marine biology; Mark E. Luther, Ph.D., an expert in hydrology and hydrologic modeling; and Roy R. (Robin) Lewis, III, an expert in ecology. Jacksonville presented the testimony and evidence of Terry Cheek, C.F.P., an expert in biology.

14. It was reasonable for Riverkeeper and Jacksonville to believe they could support these environmental claims with the material facts necessary to establish the claims and by the application of then-existing law to those material facts.

15. In addition, the CUP RO and FO found that, without the Iron Bridge condition, reduced flow from the withdrawals would increase "residence time" of nutrients in the river enough to increase algal biomass and the duration of algal blooms. This finding related to most, if not all, of the environmental claims filed by Riverkeeper and Jacksonville.

(ii) Need Claims

16. In the CUP case, Riverkeeper and Jacksonville claimed that Seminole did not need the requested allocation of surface water. Seminole asserts that Riverkeeper and Jacksonville knew or should have known that those claims were not supported by the material facts necessary to establish the claims or by the application of then-existing law to those material facts.

17. The CUP RO and FO found a need for the CUP based in large part on the interplay between the St. Johns River surface water CUP and a pending application to consolidate Seminole's existing groundwater CUPs, which were expired or expiring. It did not appear that any party anticipated a finding that the interplay between the two CUPs established a clear need for the allocation of surface water requested in the CUP. Instead, all parties appeared to assume Seminole's entitlement to at least the groundwater allocations requested in the pending groundwater CUP application. (Riverkeeper asserted that higher-than-requested groundwater allocations should have been assumed.) Seminole (and SJRWMD) appeared to recognize the interplay between the two CUPs as essentially a "safety feature" that would correct any over-allocation of surface water.

18. At the CUP hearing, Riverkeeper presented the testimony and evidence of Dr. John Woolschlager, an engineer. Jacksonville presented the testimony and evidence of

Nolton Johnson, also an engineer. Riverkeeper and Jacksonville also cross-examined Richard Doty, an expert for SJRWMD, and Dr. Terrence McCue, an expert for Seminole. But for the unanticipated finding on the interplay between the surface water and groundwater CUPs, the evidence on demonstration of need could have supported a finding that Seminole did not demonstrate a need for the entire requested surface water CUP allocation. It was reasonable for Riverkeeper and Jacksonville to believe they could support their claims, that not all of Seminole's requested surface water CUP allocation was needed, with the material facts necessary to establish the claims and by the application of then-existing law to those material facts.

D. Factual Support for Claims Unknown When Filed

19. Seminole appears to argue that, regardless of what may have been reasonable at the time of the CUP hearing, it was not reasonable at the time of filing for Riverkeeper and Jacksonville to believe that they could support their claims with the material facts necessary to establish the claims and by the application of then-existing law to those material facts. This argument is rejected.

(i) Jacksonville

20. Jacksonville's initial Petition was filed on March 4, 2008. An Amended Petition was filed on April 17, 2008, supported by the affidavit of Vincent Seibold, Jacksonville's

Division Chief for Environmental Quality. Mr. Seibold's affidavit swore that Seminole's proposed use may have the effect of impairing, polluting, or otherwise injuring the water or other natural resources of the State. On June 18, 2008, Jacksonville filed a Corrected Petition to Intervene, which was treated as a Second Amended Petition. It was supported by the affidavit of Dana Morton, an aquatic biologist employed by Jacksonville. His affidavit swore that Seminole's proposed CUP will have the effect of impairing, polluting, or otherwise injuring the water or other natural resources of the State.

21. Seminole took Mr. Seibold's deposition on July 31, 2008. Mr. Seibold, a professional engineer, testified at his deposition that he used "may" rather than "will" in his affidavit because he did not have enough information to determine whether Seminole's proposed use was permittable. He testified that he would have to review more information regarding Seminole's proposed use than was available at the time of his deposition to allege that Seminole's proposed CUP will have the effect of impairing, polluting, or otherwise injuring the water or other natural resources of the State. He also testified that he was referring to impairment or injury from impingement and entrainment and from increases in salinity. He had not seen any studies or specific information regarding the design of Seminole's intake structure that would support his conclusion and was unaware of any data indicating

that measurable increases in salinity would result from Seminole's CUP withdrawals. Mr. Seibold also testified that neither he nor his staff had evaluated whether Seminole's proposed CUP was necessary to fulfill a potable demand, but the proposed CUP did not demonstrate to him that there was a need for the part of the allocation intended to augment Seminole's reuse system. Overall, Mr. Seibold did not think that the proposed CUP provided reasonable assurance that it was permittable.

22. Seminole took Mr. Morton's deposition on August 31, 2008. During his 20 years of work for the City, Mr. Morton has studied St. Johns River extensively. He would be considered the City's in-house expert for purposes of evaluating impacts from a proposed surface water withdrawal on the overall biological or ecological health of the river.

23. Mr. Morton reviewed the Corrected Petition to Intervene a few hours before he signed his affidavit. He did not conduct his own separate study or technical analysis of the potential environmental impacts of Seminole's proposed withdrawal. His affidavit was based on his review of the TSR and his knowledge of the river, which included discussions with several experts for SJRWMD on the river's water quality, including Mr. Hendrickson.

24. As he testified in his deposition on August 31, 2008, Mr. Morton's environmental concerns included adverse impacts to

biological integrity, potential for dissolved oxygen violations, and potential for the narrative nutrient standards. He also testified that, shortly after signing his affidavit, he had additional discussions with several experts for SJRWMD, including Mr. Hendrickson, on the proposed CUP's impacts on the water quality of the river. He clarified in his deposition on July 27, 2009, and in testimony during the attorney's fee hearing on October 9, 2009, that his concerns about the proposed CUP's impacts on the water quality of the river included impacts from increased nutrient residence time and algae blooms.

25. Seminole also takes the position that Jacksonville must be limited to the testimony of Terry Cheek and Nolton Johnson, the two retained experts produced by Jacksonville for deposition on August 31, 2008, to testify regarding the "basis and evidence" for each of Jacksonville's allegations. Mr. Cheek testified regarding Jacksonville's allegations of environmental harm, and Mr. Johnson testified regarding Jacksonville's allegations that Seminole did not need the requested allocation of water.

26. At his deposition, Mr. Cheek testified that he did not become aware of Seminole's CUP until May 2008, and that the work he performed occurred after the filing of Jacksonville's original Petition. Mr. Cheek testified that he was unaware of any measurable impact that Seminole's proposed CUP would have

on water quantity and quality, on wetlands, estuaries or other aspects of the natural resource, other than entrainment and impingement of fish eggs in the CUP intake structure.

27. Mr. Johnson testified that Seminole did not need the requested allocation of water. Mr. Johnson testified he was not aware of Seminole's CUP until June 2008.

28. Notwithstanding Jacksonville's designation of Mr. Cheek and Mr. Nolton to answer Seminole's deposition questions as to the "basis and evidence" for Jacksonville's allegations, it was reasonably clear that Jacksonville also was relying on the testimony of Mr. Seibold and Mr. Morton, whose depositions were taken, respectively, a month earlier and on the same day as the depositions of Mr. Cheek and Mr. Johnson.

(ii) Riverkeeper

29. Riverkeeper's Petition challenging Seminole's proposed CUP on March 4, 2008, was prepared by Neil Armingeon and Riverkeeper's part-time, in-house counsel, Michael Howle. Both had considerable knowledge about the St. Johns River and the environmental concerns experts have about the river and surface water withdrawals from it. They also had consulted with John Woolschlager, P.E., Ph.D., who was on the faculty of the University of North Florida at the time, on the subject of minimum flows and levels for the river. They reviewed SJRWMD's TSR on Seminole's proposed CUP. Attorney Howle, and to a more limited extent Mr. Armingeon, also reviewed the CUP application

and Seminole's responses to requests for additional information before preparing Riverkeeper's Petition.

30. According to the testimony of Attorney Howle, he also consulted with Dr. Woolschlager specifically on Seminole's CUP after Dr. Woolschlager reviewed the TSR and the CUP application documents that were posted at the District's website e-permitting portal, and Dr. Woolschlager provided a preliminary opinion that the requested allocation of surface water from the river was not needed. Seminole attacked on the credibility of Riverkeeper's evidence, pointing out Dr. Woolschlager's deposition testimony in the CUP case that his work for Riverkeeper on the case began after his retention as an expert witness in August 2008. The testimony of Attorney Howle and Mr. Armingeon explained that, at the time his preliminary opinion was given, Dr. Woolschlager proposed terms for his formal retention in a draft agreement. Riverkeeper's all-volunteer Board of Directors, which meets only monthly and carefully considers all substantial expenditures, did not immediately approve Dr. Woolschlager's proposed retention. Before Riverkeeper's Board voted to retain him, Dr. Woolschlager accepted a faculty position in Arizona. During the time he was moving himself and his family from Florida to Arizona and commencing employment in Arizona, Riverkeeper had difficulty communicating with Dr. Woolschlager.

31. Seminole attacked the credibility of the testimony of Attorney Howle and Mr. Armingeon, challenging Riverkeeper to produce any corroborating evidence. In response, Riverkeeper produced a copy of Dr. Woolschlager's proposed retainer agreement dated February 27, 2008, which was admitted in evidence as Riverkeeper Exhibit 11.

32. After the admission of Riverkeeper Exhibit 11, Seminole continued to attack the credibility of the testimony of Attorney Howle and Mr. Armingeon that Dr. Woolschlager gave his preliminary opinion prior to the filing of the Petition, citing CUP deposition testimony given by Mr. Armingeon and Dr. Woolschlager and some of Riverkeeper's CUP discovery responses.

33. In his CUP deposition Dr. Woolschlager testified in part as follows:

> Q. And what information was supplied to you on which you -- that you saw showing that categorization?
>
> A. Well, I've seen that in several places. It was in the Seminole County Water Supply Plan I previously mentioned. It's on the St. Johns Water Management District Web site.
>
> Q. And when did you review or obtain the information that you relied on to see the water service areas or identify the water service areas?
>
> A. This is all occurring in early August.
>
> Q. Have you visited any of these existing potable water facilities?
>
> A. No.

> Q. Would it be correct to say that your familiarity with the Seminole County potable water system began in early August as a result of this case?
>
> A. That is correct.

(Seminole Exhibit A9, p. 11.) Seminole contends that these questions should have elicited testimony about what Dr. Woolschlager reviewed for his preliminary opinion in February 2008, if there actually was one. But it appears from the context of the deposition in its entirety that Dr. Woolschlager was being asked questions about the work he did after his formal retention in August 2008, questions intended to prepare Seminole for the CUP hearing, not about any preliminary review he might have done previously.

34. In his CUP deposition, Mr. Armingeon testified in part as follows:

> Q. Did any expert provide information to the St. Johns Riverkeeper, Incorporated which was used to prepare the Petition for Administrative Hearing?
>
> A. Would you define expert? How would you define that?
>
> Q. I would define expert as someone who has more knowledge than the public at large and has a skill either through education or experience.
>
> A. No.
>
> Q. Did the St. Johns Riverkeeper, Incorporated consult with any expert concerning Seminole County's proposed withdrawal from the St. Johns River prior to

filing its Petition for Administrative Hearing?

A. No.

Q. Since filing the Petition for Administrative Hearing, has the St. Johns Riverkeeper retained any experts to assist it in analyzing the impact of Seminole County's proposed withdrawal from the St. Johns River?

A. We retained one expert.

Q. And which expert is that?

A. Robin Lewis.

Q. And when was Mr. Lewis retained?

A. Last week.

Q. Has Mr. Lewis completed his analysis of the impact of Seminole County's proposed withdrawal from the St. Johns River and shared that information with the St. Johns Riverkeeper, Incorporated?

A. No.

Q. As of today's date, has the St. Johns Riverkeeper, Incorporated relied on the opinion of any experts to support its position regarding the proposed withdrawal by Seminole County from the St. Johns River?

A. Define relied. I'm not sure I understand what that means.

Q. Relied means, in the normal vernacular, that you have considered an analysis or study or opinion, professional opinion, supplied to you by an expert, to confirm your belief that this withdrawal is going to cause harm or damage to the river.

DEPONENT: Could you repeat the question?

(Pending question read back by court reporter).

A. (By the Deponent) We have relied on our own opinion.

Q. And when you say your own opinion, who do you mean in the collegial we?

A. Myself.

Q. Anybody else?

A. No.

Q. Do you consider yourself an expert on the hydrologic impacts of the proposed withdrawal by Seminole County from the St. Johns River?

A. An expert? No.

Q. Do you consider yourself an expert on the ecological effects of the proposed withdrawal by Seminole County from the St. Johns River?

A. No.

Q. Do you consider yourself an expert with respect to any impact caused by the proposed withdrawal by Seminole County from the St. Johns River?

A. Expert? No.

(Seminole Exhibit A1, p. 11-13.) Seminole contends that these questions should have elicited the disclosure of Dr. Woolschlager, if he actually had given Riverkeeper a preliminary opinion. But it appears from the context of the deposition in its entirety that this testimony was focused on environmental impacts, not need, which was the subject of Dr. Woolschlager's preliminary opinion.

35. Similarly, Seminole argues that Riverkeeper should have disclosed Dr. Woolschlager in response to written discovery requests for the names of persons having knowledge

about the CUP case, if he actually had given Riverkeeper a preliminary opinion. But those discovery requests were answered during the time when Riverkeeper was unable to communicate with Dr. Woolschlager to determine if he would be formally retained as an expert witness. As soon as communication with Dr. Woolschlager was re-established, and he was retained to testify, Riverkeeper disclosed to Seminole that he would be testifying at the CUP hearing.

36. Regardless of whether Riverkeeper should have disclosed Dr. Woolschlager and his preliminary opinion earlier in response to CUP discovery requests, Riverkeeper's explanation for not disclosing Dr. Woolschlager until after his formal retention is accepted as true. It is found that Dr. Woolschlager actually provided Riverkeeper with a preliminary opinion, as described in the testimony of Attorney Howle and Mr. Armingeon, prior to the filing of Riverkeeper's Petition.

37. Riverkeeper has a legal committee of prominent attorneys from the Jacksonville area. The committee reviewed and vetted Riverkeeper's Petition before it was filed.

CONCLUSIONS OF LAW

E. Prevailing Party Fees and Costs against Jacksonville

38. Section 120.595(1)(e)3., Florida Statutes, authorizes claims against a "non-prevailing adverse party," which is defined as "a party that has failed to have substantially

changed the outcome of the proposed or final agency action which is the subject of the proceeding. In the event that a proceeding results in any substantial modification or condition intended to resolve the matters raised in a party's petition, it shall be determined that the party having raised the issue addressed is not a nonprevailing adverse party."

39. The CUP RO and FO found the Iron Bridge CUP condition to be necessary for the provision of reasonable assurance as to water quality. For that reason, the Iron Bridge CUP condition was substantial. Jacksonville's opposition did not fail to substantially change the outcome of the proposed CUP, and Jacksonville was not a "nonprevailing adverse party" under Section 120.595(1), Florida Statutes.

40. Seminole contends that Jacksonville meets the definition of "nonprevailing adverse party" because SJRWMD already was studying the impacts on water quality and natural resources from increased "residence time" resulting from Seminole's CUP and would have completed its study and required the Iron Bridge CUP condition on its own initiative either during Seminole's CUP proceeding or after issuance of the CUP FO. Regardless what SJRWMD may have done on its own initiative, the Iron Bridge CUP condition was intended to resolve water quality issues raised by Jacksonville's opposition.

41. Seminole also contends that Jacksonville cannot rely on the Iron Bridge condition because it withdrew all issues as to water quality. Actually, Jacksonville withdrew some but not all water quality issues. The remaining allegations were broad enough to include the impacts on water quality and natural resources from increased "residence time" resulting from Seminole's CUP. Seminole's other arguments why Jacksonville should not be allowed to rely on the Iron Bridge condition for purposes of Section 120.595(1)(e)3. have been rejected. Like Riverkeeper, Jacksonville is not a "non-prevailing adverse party," and Seminole is not entitled to attorney's fees and costs from Jacksonville under Section 120.595(1), Florida Statutes.

42. Even if Jacksonville were a "non-prevailing adverse party" under Section 120.595(1), Florida Statutes, it also was necessary for Seminole to prove that Jacksonville's participation in this proceeding was for an "improper purpose." § 120.595(1)(e)1, Fla. Stat. An "improper purpose" is defined as participation in a proceeding "primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing or securing the approval of an activity." Id. It would not be enough for Seminole to prove that there was no basis for some of the claims made by Jacksonville; rather, Seminole would have had to prove that Jacksonville presented no justiciable

controversy. See Friends of Nassau County, Inc. v. Nassau County, 752 So. 2d 42, 49-51 (Fla. 1st DCA 2000)(utilizing an objective standard under a statute to determine whether "a justiciable controversy existed under the pertinent statutes and regulations"). In contrast, it is not necessary to prove a complete absence of any justiciable controversy of law or fact under Section 57.105, Florida Statutes. See, e.g., Albritton v. Ferrera, 913 So. 2d 5, 8 (Fla. 1st DCA 2005); Wendy's v. Vandergriff, 865 So. 2d 520, 523 (Fla. 1st DCA 2003). Seminole did not meet this heavy burden of proof.

F. Fees and Costs under Section 57.105

43. Seminole seeks attorney's fees and costs against both Riverkeeper and Jacksonville and under Section 57.105, Florida Statutes, which provides in part:

> (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then-existing law to those material facts.
>
> However, the losing party's attorney is not personally responsible if he or she has acted in good faith, based on the representations

> of his or her client as to the existence of those material facts. If the court awards attorney's fees to a claimant pursuant to this subsection, the court shall also award prejudgment interest.
>
> (2) Paragraph (1)(b) does not apply if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.
>
> (3) At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof, the assertion of or response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.
>
> (4) A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

(Under Subsection (5), the statute applies in administrative proceedings.[3])

(i) Unreasonable Delay under Subsection (3)

44. Seminole did not prove that either Riverkeeper or Jacksonville took action in this case "primarily for the purpose of unreasonable delay." § 57.105(3), Fla. Stat.

(ii) Factual Support for Claims

45. Under Section 57.105(4), Florida Statutes, there is no liability for Jacksonville's withdrawn claims (or, in accordance with the prehearing rulings, for Riverkeeper's claims).

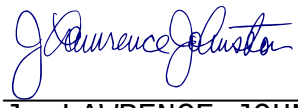
46. As to Jacksonville, the relevant filing for purposes of Section 57.105(1) is the Corrected Petition to Intervene, which was treated as a Second Amended Petition.

47. Seminole did not prove that Riverkeeper or Jacksonville knew or should have known that any of the claims they did not withdraw within the "safe harbor" period set out in Subsection (4) of the statute were not supported by the material facts necessary to establish the claim or by the application of then-existing law to those material facts. See § 57.105(1), Fla. Stat.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, Seminole's motions for attorney's fees and costs against Riverkeeper and Jacksonville are denied.

DONE AND ORDERED this 18th day of December, 2009, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of December, 2009.

ENDNOTES

1/ Unless otherwise indicated, all statutory references are to the 2009 Florida Statutes.

2/ Jacksonville designated excerpts of the deposition transcripts submitted as its Exhibits 3-5. These depositions were designated in their entirety by Seminole and were admitted in evidence as Seminole Exhibits A15 and A16. An errata sheet was added to Seminole Exhibit A3.

3/ As reflected in the DOAH file, it has been ruled that the procedural requirements of Subsection (4) have been met; and claims withdrawn by Riverkeeper within the "safe harbor" period in Subsection (4) have been stricken from Seminole's motions for attorney's fees and costs.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.