STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

RECOMMENDED ORDER

On October 1-3, 6-10, and 15-16, 2008, a final administrative hearing was held in Sanford, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

The primary issue in this case is whether the St. Johns River Water Management District (District, or SJRWMD) should issue consumptive use permit (CUP) 95581 to Seminole County

(Seminole) authorizing the withdrawal and use of 2,007.5 million gallons a year (mgy) or 5.5 million gallons a day (mgd) of surface water from the St. Johns River for public supply and reclaimed water supply augmentation.

PRELIMINARY STATEMENT

On March 4, 2008, St. Johns Riverkeeper, Inc. (Riverkeeper), and the City of Jacksonville (Jacksonville) filed petitions challenging the District's proposed issuance of CUP 95581 to Seminole. St. Johns County filed a similar petition on March 7, 2008. The petitions were referred to DOAH and were assigned DOAH Case Nos. 08-1316, 08-1317, and 08-1318. Seminole County petitioned to intervene as an indispensable party in all three cases and moved to consolidate. Consolidation and intervention were granted.

Several motions to dismiss were filed, which resulted in the filing of a Corrected Petition to Intervene by Jacksonville on June 16, 2008, which was treated as an amended petition in Case No. 08-1317, and St. Johns County's Second Amended Petition, which was filed on August 5, 2008. Petitions by the City of Cocoa, City of Sanford, Tohopekaliga Water Authority, and Osceola County to intervene on behalf of the District and Seminole were dismissed.

On July 17, 2008, and August 5, 2008, Jacksonville and St. Johns County, respectively, filed stipulations regarding relevant issues.

On September 3, 5, and 9, 2008, Seminole served motions for attorney's fees and costs against Riverkeeper, St. Johns County, and Jacksonville, respectively, under Sections 57.105(4) and 120.595(1), Florida Statutes.

On September 25, 2008, the parties filed a Joint Prehearing Stipulation. Riverkeeper, St. Johns County, and Jacksonville filed Notices of Withdrawal of Claims Consistent with Pretrial Stipulation on September 24, September 26, and September 29, 2008, respectively.

On September 24, 2008, Seminole filed a motion for attorney's fees and costs against Riverkeeper under Sections 57.105(4) and 120.595(1), Florida Statutes. On September 30, 2008, Seminole filed similar motions against Jacksonville and St. Johns County. The time for responding to these motions was extended to December 31, 2008.

At the final hearing, Seminole presented testimony from Matthew Alvarez, P.E., who was accepted as an expert in the fields of water supply and water resource engineering; Alan William Aikens, P.G., who was accepted as an expert in the fields of geology, hydrogeology, hydrology, water resources, water supply development, and water use permitting; Randall K. Bushey, P.E., who was accepted as an expert in the fields of

water resource engineering, hydraulics, and hydrology; Ivan B. Chou, P.E., who was accepted as an expert in the fields of hydraulics, hydrology, hydrodynamic modeling, water quality, water quality modeling, stormwater management, and river, coastal and oceanographic engineering; William E. McMillin, Jr., P.E., who was accepted as an expert in the fields of hydraulics, hydrology, hydrodynamic modeling, water quality, water quality modeling, modeling, water quality, water quality modeling, stormwater management, point and non-point source wastewater discharges, pollutant loading, total maximum daily loads (TMDLs), and wastewater treatment and collection systems; Ralph T. Montgomery, Ph.D., who was accepted as an expert in the fields of biology non-point source wastewater discharges, pollutant loading, TMDLs, and wastewater treatment and collection systems; Ralph T. Montgomery, Ph.D., who was accepted as an expert in the fields of biology, botany, zoology, estuarine, freshwater and terrestrial ecology, water quality, stormwater, and ecological effects of surface water withdrawals; Terrence M. McCue, P.E., Ph.D., who was accepted as an expert in the fields of environmental engineering, potable and reclaimed water supply planning and development, potable and reclaimed water demand projections, conservation and water use efficiency, and advanced water and wastewater treatment processes; Brenda Van Ravenswaay, P.E., who was accepted as an expert in

the fields of environmental engineering, water and wastewater engineering, and water and wastewater planning; and James Murin, Jr., P.E., who was accepted as an expert in the fields of water and wastewater engineering, water, wastewater, and reclaimed water master planning, water demand projections, conservation and water use efficiency, and advanced and wastewater treatment processes.

Seminole had the following of its exhibits admitted in evidence: 1-9, 12-59, 71-74, 107-138, 140, 141, 143-151, 154, 156-191, 194-203, 205-208, 218-221, 223-228, 230, 258-267, 272-275, 280-282, 284, 288-294, 296-307, 368, 355-364, 952-960, 986-991, and Rebuttal Exhibits 1-14.

The District presented the testimony of Peter Sucsy, Ph.D., who was accepted as an expert in the field of hydrodynamic modeling; Harold Wilkening, P.E., who was accepted as an expert in the fields civil and water resources, engineering, groundwater and surface water hydrology, water supply, including alternative water supplies, water resource management, and requirements and implementation of the District's CUP and water supply programs; Richard Doty, who was accepted as an expert in the fields of urban planning, geographic information systems analysis, population projection modeling, and water demand projection in relation to population projection; Dwight T. Jenkins, J.D., P.G., who was accepted as an expert in the fields

of geology, hydrology, hydrogeology, and the District's rules and policies implementing statutory authority for the consumptive use permitting program; Jane W. Mace, who was accepted as an expert in the fields of biology, forestry, riverine ecology and ecological and hydrological basis for establishing minimum flows and levels (MFLs) in the river and other waterbodies; Greenville B. "Sonny" Hall, Ph.D., who was accepted as an expert in the fields of wetlands biology and ecology (also known as aquatic biology), the process of establishing MFLs under Sections 373.042 and 373.0421, Florida Statutes; Price Robison, P.E., who was accepted as an expert in the fields of surface water hydrology and hydrologic modeling; William J. Dunn, Ph.D., who was accepted as an expert in the fields of wetland biology and ecology, freshwater estuarine hydrology, statistical analysis, water quality, and MFLs; James J. Hollingshead, P.G., who was accepted as an expert in the fields of geology, hydrology, hydrogeology, and the District CUP program requirements, processes, and implementation; John Hendrickson, who was accepted as an expert in the fields of hydrologic watershed modeling and analysis, the District's program for setting pollution load reduction goals and TMDL's; Ernest Estevez, Ph.D., who was accepted as an expert in the fields of marine and estuarine ecology; and Ernst Peebles, Ph.D., who was accepted as an expert in the fields of biology,

marine science, including marine and estuarine ecology, biological oceanography and physical biology, and marine and estuarine and ichthyology.

The District had the following of its exhibits admitted in evidence: 2-5, 5a, 6-10a, 10b, 11-22, 25-29, 30a-30f, 32-37, 40, 41b-41g, 42-49, 51, 53, 57-58, 61, 62a-62f, 65, 71-72, 74-79, 80a-80c, 82-85, 86a-86c, 87-104, 108, 111, 112, 115, 117-161, 162a-162f, 163-167, 170a, and 171. The District also requested and was granted official recognition of the applicable statutes and rules.[1]

Riverkeeper presented testimony from Neil Armingeon; Quinton White, Ph.D., who was accepted as an expert in the field of marine biology; John Woolschlager, Ph.D., who was accepted as an expert in the fields of engineering related to potable water supply, and wastewater treatment and reclaimed water and related infrastructure; Mark E. Luther, Ph.D., who was accepted as an expert in the fields of hydrology and hydrologic modeling; and Roy R. (Robin) Lewis, III, who was accepted as an expert in the field of ecology.

Riverkeeper had its Exhibits 1-4, 20, 38, and 47 admitted in evidence. Ruling was deferred on objections to the admission of RK Exhibit 41, which are sustained.

Jacksonville presented testimony from Terry Cheek, C.F.P., who was accepted as an expert in the field of biology;

Joseph Gregory Menniti, P.E., P.S., who was accepted as an expert in the field of engineering; and Nolton G. Johnson, P.E., who was accepted as an expert in the field of engineering.

Jacksonville had its Exhibits 1, 8, 16, 21, 29, 31, and 33 admitted in evidence. Ruling was reserved on objections to the admission of Jacksonville Exhibits 9, 12, and 14. The objections are overruled, and the exhibits are admitted in evidence.

St. Johns County presented testimony from Jan Brewer, who was accepted as an expert in the fields of biology and environmental management. St. Johns County had its Exhibits 28, 30, and 34.1 admitted in evidence. Ruling was reserved on objections the admission of St. Johns County Exhibit 1. The objections are overruled, and the exhibit is received.

At the conclusion of the presentation of the evidence, the parties ordered the preparation of a Transcript, which was filed (in 17 volumes) on October 20, 2008, and requested until December 8, 2008, to file proposed recommended orders and memoranda of argument, which were timely filed and have been considered in the preparation of this Recommended Order.

On December 8, 2008, Jacksonville and Riverkeeper also filed a Request for Official Recognition of several pleadings in a pending request for Florida Land and Water Adjudicatory Commission review of the Third Addendum to the 2005 District Water Supply Plan, which identified Seminole's proposed CUP as an

Alternative Water Supply (AWS). Seminole and the District filed responses in opposition, and the Request for Official Recognition is denied.

On December 31, 2008, Petitioners filed their responses to Seminole's motions for attorney's fees and costs under Sections 57.105(4) and 120.595(1), Florida Statutes. Jurisdiction is being retained to rule on these motions by separate final order.

FINDINGS OF FACT

A. Parties

1. Seminole County (Seminole) is north of Orlando, Florida, and contiguous with the St. Johns River. It is located entirely within the District, and the Central Florida Coordination Area ("CFCA"). Seminole owns and operates water, wastewater, and reclaimed water utilities. These include a wastewater treatment facility at Yankee Lake near the St. Johns River just downstream from Lake Monroe, where Seminole proposes to construct surface water withdrawal and related facilities.

2. The District is the regulatory agency charged with issuing permits for the consumptive use of water within a sixteen county area located in East-Central Florida.

3. The City of Jacksonville (Jacksonville) is a Florida municipality located about 140 miles downstream of the proposed Yankee Lake facility. Jacksonville's standing is based on the filing of a verified pleading pursuant to Section 403.412(5), Florida Statutes.[2]

4. St. Johns County (St. Johns) is a Florida political subdivision located approximately 100 miles downstream of the proposed Yankee Lake facility. St. Johns County's standing also is based on the filing of a verified pleading pursuant to Section 403.412(5), Florida Statutes.

5. St. Johns Riverkeeper, Inc. (Riverkeeper), is a Florida not-for-profit corporation. It alleges Seminole's proposed withdrawal of water will adversely affect the use and enjoyment of the St. Johns River by a substantial number of its members. At the end of its evidentiary presentation at the final hearing, Riverkeeper requested leave to amend its petition to also allege standing under Section 403.412(6), Florida Statutes.

B. Seminole's Water Utility Systems

6. Seminole serves customers in its Northwest, Northeast, Southwest, and Southeast Potable Water Service Areas, and holds separate groundwater CUPs for each service area. The existing CUPs authorize a total allocation of 21.7 mgd.

7. Seminole has four main wastewater water service areas roughly contiguous with its water service areas. Seminole

treats wastewater from the Southeast Service Area at the Iron Bridge Regional Water Reclamation Facility,[3] and treats wastewater from the Northwest and Northeast Service Areas at its Yankee Lake Wastewater Treatment Plant (WWTP) and Greenwood Lakes WWTP.

8. Seminole has two reclaimed water service areas, the Northwest-Northeast Service Area, which utilizes treated wastewater supplied by the Yankee Lake and Greenwood Lakes WWTPs, and the Southeast Service Area, which utilizes treated wastewater from the Iron Bridge WWTP. Seminole plans to expand reclaimed water use in the Northwest-Northeast Service Area by installing an $80 million, 5-phase residential reclaimed retrofit program.

9. Seminole has developed an Integrated Water Supply Plan (Seminole's Plan) to address existing and future potable and reclaimed water needs in compliance with the CFCA rules, which limit groundwater withdrawals to the quantity required to meet each user’s 2013 demand and encourage development of AWS sources to meet excess demands.[4] Seminole's Plan includes traditional and AWS sources and a conservation program that has been approved by the District. Seminole's traditional water source is groundwater, and Seminole has a pending application to consolidate its existing groundwater CUPs (Consolidated Groundwater CUP). With current allocations of 21.7 mgd expired

or soon to expire, the Consolidated Groundwater CUP requests an allocation of 25.6 mgd to meet 2013 demands. The current plan is for surface water withdrawals from St. Johns River at Yankee Lake be Seminole's non-traditional water source.

C. Yankee Lake Project CUP

10. On February 12, 2008, the District issued its Technical Staff Report ("TSR") for CUP 95581. The TSR recommended a 20-year CUP with a surface water allocation of 0.70 mgd starting in 2009, increasing to 5.5 mgd in 2025-2028. Between 2009 and 2013, the surface water allocation identified in the TSR would be used for reclaimed water augmentation. Starting in 2014, the TSR recommends an allocation of 5.35 mgd, which coincides with the completion of Seminole's surface water treatment facility and the use of surface water as a potable water source. Condition 6 of the TSR limits the maximum daily withdrawal to 11.59 mgd.

11. The intake structure for the Yankee Lake surface water facility will be located on a manmade canal connected to the St. Johns River, in or just outside the Wekiva River Aquatic Preserve and in Seminole's Yankee Lake Black Bear Wilderness Area. The capacity of the intake structure is 10 mgd, and it has been sized for expansion to 50 mgd to meet potential future demands over the useful life of the facility.

12. The intake structure is designed with an intake velocity much less than 0.5 feet per second, which is the industry standard. The intake structure includes a sheet pile wall, an 8-inch bar screen manatee barrier at the mouth of the canal, a second screen which removes aquatic debris and serves as a second barrier to aquatic life, and a 4-millimeter intake pump screen.

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.

D. Seminole Water Demand and Need

14. The reasonableness of Seminole's proposed CUP depends in large part on potable water and reclaimed water demand.

(i) Potable Water

15. In 2005, Seminole provided water service to a residential population of 101,585. For the most recent five-year period, from 2003-2007, Seminole’s average residential per

capita potable water use rate was 153.7 gallons per capita per day (gpcd).

16. The historic per capita use rates in Seminole's four service areas are below 150 gpcd, with the exception of the Northwest Service Area. The served population in the Northwest Service Area increased from 12,655 in 2001 to 20,745 in 2005, and per capita usage declined from 285 gpcd in 2001 to 213.5 gpcd in 2005.

17. The higher per capita rate in the Northwest Service area is attributable to larger residential lots and lawns and more irrigation than in the other service areas. Additionally, the residents are more affluent and are not as responsive to Seminole's water conservation rate structure. Seminole is implementing an $80 million reclaimed water retrofit program in order to reduce per capita potable water use in the Northwest Service Area.

18. In order to project future water demands for the life of the proposed CUP, Seminole's consultant, Dr. Terrence McCue, used the population projections published by the University of Florida Bureau of Economic and Business Research ("BEBR").[5] He used the BEBR 2008 medium population projections, which were the most recent projections available at the time of hearing. Since BEBR data are published on a county-wide basis, Dr. McCue disaggregated the data to Seminole's service areas by using

traffic analysis zones and water utility billing data. This is a recognized methodology used to calculate service area population for the purpose of determining water demand. Using this methodology, Dr. McCue estimated Seminole's service area population to be 110,860 in 2008 and projected that it would increase to 126,531 in 2013 and to 161,971 in 2027.

19. The District asked its consultant, Richard Doty, to perform an independent water demand projection as a check on Dr. McCue's work product. Mr. Doty also relied on BEBR projections, but disaggregated the county-wide population projections differently, using a sophisticated GIS model to calculate build-out densities. Mr. Doty estimated Seminole's service area population to be 109,202 in 2007 and projected that it would increase to 126,075 in 2013 and to 155,368 in 2027.

20. Although Mr. Doty's population projections were somewhat lower than Dr. McCue's, they were close enough to essentially corroborate the validity of Dr. McCue's projections. Mr. Doty testified that, while he prefers his projection, Dr. McCue's population projections are plausible. Jacksonville's expert witness, Nolton Johnson, who did not himself project service area population, could not say that Mr. Doty's population projections are superior because Dr. McCue used actual water billing data that was more specific to Seminole's service area. For these reasons, it is reasonable to

base projected water demand on either Dr. McCue's or Mr. Doty's population projections.

21. To project service area demand, projected population is multiplied by a use rate. Here, Mr. Doty used the simple method specified in A.H. Section 12.2.2. He basically averaged the historical gross per capita daily (gpcd) water use in each service area for the most recent five-year period (2003-2007). Using the average use rate for those years, he calculated a total potable water demand (for all sources and all kinds of uses) of 24.87 mgd for 2013, 30.67 mgd for 2027, and 30.76 mgd for 2028.

22. In contrast, Dr. McCue averaged the historical per capita residential use rate for 2001 through 2005, instead of 2003 through 2007. Then, he made several adjustments not used by Mr. Doty and not included in A.H. Section 12.2.2. Some of these adjustments had the effect of increasing demand while others decreased demand.

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.

24. Second, Dr. McCue multiplied the historical average by a 6% "drought correction factor." Dr. McCue's rationale for the drought correction factor was that it accounted for the increased demand that would occur during drought years (although the historical average already accounted for use rate changes due to the fluctuations in rainfall that occurred during 2001-2005).

25. Dr. McCue also made adjustments to the historical use rate to reduce projected potable water demand as a result of Seminole's Water Conservation Plan, which meets all District requirements and CUP permitting criteria and has been approved by the District. Seminole's Water Conservation Plan includes Seminole’s ongoing residential irrigation audit program, which from 2007 through 2013 is projected to conserve 0.082 mgd per year, with a total savings of 0.622 mgd. Seminole has had a water conservation rate structure in place since 1985, which discourages high water use by increasing customer billing rates as usage increases. Seminole also has implemented a block billing structure for its reclaimed water customers to conserve that water. Seminole's Water Conservation Plan also includes an

augmentation minimization plan, conservation gardens, and a public education program.

26. The total cost of implementing Seminole’s conservation plan will exceed $125 million. The plan is focused on the Northwest Service Area, where per capita water use has declined 25% from 2001 to 2007. If Seminole's objectives are achieved, projected water use within the Northwest Service Area will decline an additional 25%, for a 50% reduction in potable water use within the Northwest Service Area from 2001-2028.

27. Dr. McCue applied a 9% reduction in potable water demand due to implementation of the reclaimed water retrofit program and a 4% reduction to account for other planned conservation measures. Based on Dr. McCue’s projections, Seminole’s residential per capita use rate will fall below 150 gpcd in 2012, and will continue to decline to 134.5 gpcd in 2027 as a result of the proposed conservation, with corresponding reductions in potable water demand.

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.

29. Riverkeeper expert witness, Dr. John Woolschlager, testified that Seminole could achieve greater reductions (15%) in water use through conservation. He based his opinion on reductions achieved by other utilities, including the City of Tampa and Miami-Dade County.

30. Dr. Woolschlager relied on an EPA report on the City of Tampa, which indicated that Tampa experienced a 26% decline in per capita use from 1989 to 2001. However, he was not aware of how lot sizes, land use patterns, persons per household, or other demographic information for Tampa compare to Seminole, and he did not have enough data to say that Seminole could achieve similar savings from 2008 to 2028. Dr. Woolschlager also did not know whether Seminole had already implemented any of the conservation measures utilized by Tampa from 1989 to 2001.

31. Dr. Woolschlager also relied on a study involving Miami-Dade County. However, he admitted that Miami-Dade County is not similar to Seminole demographically. Dr. Woolschlager also was not aware of Miami-Dade's total water use during the study period, but was only aware that Miami-Dade had reduced its water consumption by 19.8 mgd. Without knowing Miami-Dade's total use, it was impossible to calculate the percentage savings that was achieved by Miami-Dade in order to compare it to Seminole.

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.

33. In addition, Mr. Johnson based his assumptions regarding the amount of water savings achievable through mandatory implementation of the Florida Water Star Program on a District brochure. However, the brochure assumed an extremely high starting per capita water rate prior to implementation of the program--much higher than Seminole's existing per capita water use rate, even in the Northwest Service Area. For that reason, Mr. Johnson's assumptions were not applicable to Seminole.

34. In part as a result of his conservation adjustments, Dr. McCue assumed that Seminole would be allocated only 23.71 mgd of groundwater from 2013 on, instead of the 25.6 mgd of

groundwater requested in the pending Consolidated Groundwater CUP.

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.

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.

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.

38. Seminole also is requesting a maximum day allocation of 11.59 million gallons. Of this amount, 7.59 million gallons are attributable to potable water needs. This maximum day demand for potable water supply use was calculated using a peaking factor of 1.7 based on existing potable water use rates, which is consistent with the District's applicable rules. See A.H. § 12.2.4.

(ii) Reclaimed Water

39. Seminole has undertaken the expansion of its reclaimed water system to existing potable water customers in the Northwest-Northeast Service Area, which receives reclaimed water from the Yankee Lake and the Greenwood Lakes WWTPs. In 2005, about 4 mgd of reclaimed water was produced at these facilities; by 2025, 8.16 mgd will be available for reclaimed use. Upon implementation of the reclaimed water retrofit program, roughly 75% of the reclaimed water produced by these facilities will be reused to meet annual average demand, and about 100% will be used to meet maximum day demands. This 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. See A.H. § 10.3(g).

40. The reclaimed retrofit program is being implemented in 5 phases. Phase I has been completed and was put on-line in 2008. Phase II will be completed in 2010. Phases III, IV, and

V are scheduled to be completed in 2015. The reclaimed retrofit program cannot be accelerated, because Seminole must produce sufficient wastewater to meet reclaimed water demands in those areas. Otherwise, greater reclaimed water augmentation than requested in the pending CUP application would be required to meet reclaimed water demand.

41. There was no genuine dispute as to Seminole's need for an mgd on an annual average basis and a four-million gallon maximum daily allocation to augment its reclaimed water system as a result of the reclaimed retrofit program.

42. The relevant issue raised by the objectors is whether there are lower acceptable quality sources of water than the St. Johns River available to augment Seminole's reclaimed water system. See A.H. § 10.3(g).

E. Seminole’s Consideration of AWS Options

43. Before filing the application for the CUP at issue in this case, Seminole evaluated a number of AWS options, including brackish groundwater, seawater desalination, and the St. Johns River.

(i) Brackish Groundwater

44. Seminole considered and actually identified brackish groundwater withdrawn from Lower Floridan Aquifer wells as a potential AWS source and applied for a CUP in 2004 to use

brackish groundwater wells near its Greenwood Lakes WWTP as a source of water to augment its reclaimed water system.

45. Preliminary modeling of withdrawals of 6.25 mgd from wells near the Greenwood Lakes WWTP and 1 mgd from wells near the Yankee Lake WWTP indicated that there would be adverse impacts to wetlands and other surface waters, including the minimum level established at Lake Sylvan.

46. The Greenwood Lakes WWTP is approximately five miles from Lake Sylvan. The Yankee Lakes WWTP is approximately a mile from Lake Sylvan. The modeled impacts on Lake Sylvan probably were significantly larger than the impacts of smaller brackish groundwater withdrawals, especially if withdrawn only from Greenwood Lakes wells. No pump tests were conducted.

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.

(ii) Seawater Desalination

48. The most probable location of a desalination facility to supply Seminole would be near the Atlantic Ocean in Volusia County. This option would require the construction of an extensive pipeline to transport desalinated water to Seminole, and reverse osmosis concentrate would have to be disposed of through an ocean outfall or deep injection well.

49. Seawater desalination would require a complicated, expensive, and energy-intensive treatment process. The capital cost to supply 4.5 mgd to Seminole would be about $183 million, and operation costs would be twice those of the proposed Yankee Lake project, making the desalination option economically infeasible.

(iii) RIBs

50. Petitioners contended that Seminole should obtain supplemental water for its reclaimed system from its rapid infiltration basins ("RIBs"). RIBs are basins with highly-permeable soil that allow water to percolate into the surficial aquifer for disposal and beneficial recharge. Seminole uses RIBs to dispose of excess reclaimed water during wet weather conditions, when it is not needed to meet reclaimed water demands. When needed to meet reclaimed water demands, reclaimed

water will be supplied to reclaimed water customers and will not be discharged to RIBs. Thus, reclaimed water will not be available from the RIBs during those times when augmentation water is needed.

51. For RIBs 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.

(iv) Stormwater

52. Petitioners also contend that Seminole could use stormwater to meet its reclaimed water augmentation needs, something that is almost unheard of in Florida. For this idea to work, stormwater would have to be captured and stored in order. This would require construction of a stormwater collection and transmission system extending throughout the

Northwest Service Area. It also would require construction of a 450-million gallon reservoir and a treatment facility. The capital cost of a stormwater augmentation option would be $171 million, making it technically and economically infeasible.

(v) Tri-Party Agreement

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.

(vi) Iron Bridge WWTP

54. The Iron Bridge WWTP is owned by the City of Orlando (Orlando). Under a contract with Orlando, Seminole sends wastewater from its Southeast Service Area to the facility and is entitled to receive a like amount of reclaimed water from the facility for reuse, up to a limit of 8.5 mgd. As a result, Seminole does not need augmentation for its reclaimed water reuse system for the Southeast Service Area. In addition to itself using reclaimed water under this contract, Seminole also sends some to the City of Oviedo (Oviedo) and to the University of Central Florida (UCF) under a contract for reuse by them.

55. Riverkeeper in particular contends that Seminole should be required to use reclaimed water from the Iron Bridge WWTP to meet its needs for augmentation of its reclaimed water reuse system in the Northwest Service Area. But this 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 the Northwest Service Area. In addition, it would create an augmentation

deficit in the Southeast Service Area or eliminate amounts of reclaimed water being sent to Oviedo and UCF for reuse. The evidence was that this is not a feasible option for Seminole.

(vii) St. Johns River

56. Seminole's ultimate selection of the St. Johns River as an AWS source was the culmination of more than a decade of planning and study. The 1994 District Water Supply Needs and Source Assessment found groundwater resources to be limited in Central Florida. The District engaged in the Water 2020 process to identify AWS sources to meet future demands in the region. The Water 2020 evaluation led to the development of the 2000 Surface Water Treatability Study at Lake Monroe on the St. Johns River, near the Yankee Lake site, which found the St. Johns River to be a cost-effective public supply source.

57. In 1999-2000, the District developed the 2000 District Water Supply Plan, which identified the St. Johns River as a potential AWS source for Central Florida. The 2000 District Water Supply Plan was updated in 2004 to specifically identify the St. Johns River near Lake Monroe as a potential water source. The 2005 District Water Supply Plan re-confirmed the St. Johns River near Lake Monroe as a specific AWS project. Updates to the 2005 District Water Supply Plan also identified the Yankee Lake Site as the proposed location of the St. Johns River near the Lake Monroe Project.

58. Starting in 2006, the District began implementation of an action plan for development of AWS sources consistent with the CFCA rules. The CFCA planning process also resulted in the identification of the proposed Yankee Lake Facility as an appropriate AWS source to meet Seminole's post-2013 demands.

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.

60. In addition to the planning and regulatory efforts described above, the District also established MFLs at various locations along the St. Johns River. In particular, the District established MFLs at State Road (SR) 44, which is 10 miles downstream of the Yankee Lake Site. In developing this MFL, the District determined that 155 mgd could be withdrawn from the St. Johns River upstream of SR 44. Since the requested

5.5 mgd is less than 4% of this quantity, the MFL determinations provide assurance that the river is a reliable AWS source.

61. The capital costs of a 4.5 mgd surface water facility at Yankee Lake on the St. Johns River would be $78 million. The operation cost for a surface water facility at Yankee Lake would be much less than a seawater desalination facility, which would require twice as much energy as the surface water source.

F. Capability and Environmental Concerns

(i) General

62. The St. Johns River runs from south to north, starting at its headwaters in Indian River, Osceola, and Okeechobee Counties and emptying into the Atlantic Ocean in Duval County. The District has adopted 6 MFLs along the St. Johns River, and there are numerous United States Geologic Survey gauging stations which provide a long-term record of stage and flow.

63. The St. Johns River Watershed is about 8,900 square miles. The St. Johns has a very gradual elevation decline from its headwater to its mouth. Rainfall, surface runoff, springs, seepage from the aquifer, and ocean tides affect the flow of the River. These characteristics result in relatively slow flow, slow reaction to rainfall, and reverse flows from the tidal influences.

64. Seminole evaluated the historic relationships between rainfall and stage and flow in the St. Johns River over time.

Because rainfall is the primary source of water for the St. Johns River, there is a close relationship between rainfall and river flow and stage.

65. The stage and flow of the St. Johns River has fluctuated over time. These fluctuations are attributable to the Atlantic Multidecadal Oscillation, which is a long-term natural rainfall frequency cycle. Increases and decreases in flow and stage of the St. Johns River are explained by changes in rainfall. The evidence does not demonstrate manmade impacts to river stage or flow.

66. The major tributaries of the St. Johns River are the Wekiva and Ocklawaha Rivers. The evidence does not indicate detectable impacts to the flow in the main stem of the St. Johns River due to changes in flow in these major tributaries.

(ii) MFLs

67. MFLs are defined as limits beyond which further withdrawals would be significantly harmful to the water resources or ecology of the area. MFLs are established based on: the collection of ecological data to identify the most constraining water resource features; the development of hydrologic models to simulate the effects of water withdrawals; the preparation of reports; scientific peer review; and the adoption of standards by the District through formal rulemaking. See § 373.042, Fla. Stat.

68. MFLs are used by the District to assess cumulative impacts on a water body. The MFLs determinations at SR 44 near Deland measure from withdrawals in existence prior to 1999. Existing permitted withdrawals on the St. Johns River upstream of the SR 44 MFL, plus Seminole's proposed 5.5 mgd withdrawal, total 37.9 mgd. Of this total, 22 mgd was not being withdrawn from the St. Johns River prior to 1999. Seminole used a conservative 25 mgd of new withdrawals to evaluate potential cumulative impacts. A total of 57 mgd of withdrawals from the entire St. Johns River was used to evaluate cumulative impacts associated with Seminole's proposed withdrawals. This amount reflects the total permitted quantity of water which was not being withdrawn prior to 1999.

69. The District is required to establish recovery strategies when an MFL has been violated and prevention strategies when an MFL will be violated within the next 20 years. None of the MFLs on the St. Johns River require recovery or prevention strategies.

(iii) Impact of Yankee Lake Withdrawal

(a) Flow and Stage

70. The historic flow records do not indicate that the existing withdrawals have had a detectable impact on flow or stage. Since these withdrawals are significantly greater than Seminole's proposed withdrawal, it is reasonable to conclude

that Seminole’s proposed withdrawal also would have an undetectable impact on the St. Johns River.

71. The historic relationship between rainfall and flow can also be used to evaluate whether historic withdrawals have had any impact on flow in the St. Johns River. A double-mass analysis of rainfall and flow on the St. Johns River does not indicate any change in the relationship between rainfall and flow over time, even as the quantity of withdrawals has increased.

72. The evidence was that the proposed withdrawal of 5.5 mgd would not cause a measurable change in either the flow or stage of the St. Johns River on an individual basis or cumulatively with other withdrawals from the River.

(b) Salinity

73. Seminole and the District used sophisticated hydrodynamic models to predict the impact of the proposed withdrawal, individually and cumulatively with other withdrawals on the St. Johns. The models were well-calibrated to observed data, including water level, velocity, salinity, and discharge.

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.

75. Dr. Luther also testified that it would have been more appropriate to examine salinity changes for each layer of the hydrodynamic models, rather than using vertically-averaged salinity values. But Seminole's expert, Mr. Ivan Chou, determined that there was no perceptible difference in the salinity impacts derived from vertically-averaged salinity versus salinity values at specific model layers for the proposed 5.5 mgd and cumulative 57 mgd withdrawals. As a result, it was proper to use vertically-averaged salinities when evaluating the impact of Seminole’s proposed withdrawal.

76. Using the hydrodynamic models, Mr. Chou compared salinity values at 60 points along the St. Johns River from the mouth of the river to Buffalo Bluff, which is 90 river miles upstream, for a pre-1999 baseline scenario, a 5.5 mgd individual withdrawal scenario, a cumulative withdrawal scenario of 25 mgd, a cumulative withdrawal scenario of 57 mgd, and the minimum flow scenario of 155 mgd.

77. The baseline modeling scenario reflects the natural fluctuations in salinity that occur as a result of tidal influence and seasonal changes in rainfall. The natural fluctuation in salinity on a daily basis can be 7 to 8 parts per thousand (ppt), while the seasonal change can be as high as 20 ppt.

78. When the simulated 5.5 mgd, 25 mgd, and 57 mgd withdrawals are plotted against the baseline salinity levels, whether for maximum or minimum daily or 5-year salinities, the differences are undetectable. (For the 155 mgd withdrawal scenario, there is a slightly increased salinity level, but the change is still a fraction of a ppt.) The same results occur when examining average salinities or dry season salinities (May and June).

79. In the 57 mgd withdrawal scenario, the largest increase in average salinity under annual conditions is only 0.135 ppt, and under dry season conditions is only 0.170 ppt.

Even in the 155 mgd scenario, the largest predicted increase in average salinity at any point on the St. Johns River is just 0.365 ppt.

80. The withdrawal scenarios have minimal impact on the location of isohalines--a line representing a specific salinity level in the river. Under natural conditions, there are large daily and seasonal changes in the location of a particular isohaline due to tidal effects. For example, the 15 ppt isohaline moves 8.1 miles on the average day.

81. In comparison, the withdrawal of 5.5 mgd would cause the 15 ppt isohaline to move by just 0.02 miles, a withdrawal of 25 mgd would cause the 15 ppt isohaline to move 0.07 miles, and a withdrawal of 57 mgd would cause the 15 ppt isohaline to move 0.59 miles during the dry season.

82. The salinity modeling demonstrates that the impact of Seminole’s proposed 5.5 mgd withdrawal is so small as to be indiscernible with the field instruments used to measure salinity in the St. Johns River. The cumulative withdrawal scenarios of 25 mgd and 57 mgd are similarly minimal and would not be measurable using conventional instrumentation.

(c) Nutrients

83. The most prominent manifestation of nutrient imbalance in the St. Johns River is the increase in algal biomass, which can result in algal blooms. In the St. Johns River, algal

biomass begins to accumulate in April, and the potential for algal blooms continues through September.

84. Seminole will not make any nutrient discharges to the St. Johns River as part of its proposed use of water. Instead, the proposed withdrawals will remove nutrients from the River. It was determined there would not be a significant hydrodynamic impact from any of the three withdrawal scenarios. A 5.5 mgd withdrawal results in just a 0.17% decrease in flow, a 25 mgd withdrawal results in a 0.8% decrease in flow, and a 57 mgd withdrawal results in a 1.8% decrease in flow.

85. From 1995-2007, the average total nitrogen level in the vicinity of the Yankee Lake site was 1.51 mg/l, while the average total phosphorus concentration was 0.09 mg/l. For 2003-2007, the average total nitrogen concentration was 1.29 mg/l, while the average total phosphorus concentration was 0.09 mg/l. For the 5.5 mgd withdrawal scenario, the quantity of water removed would result in a 0.13% reduction in nitrogen loading and 0.14% reduction in phosphorus loading compared to the 1995-2007 levels, and a 0.11% reduction in nitrogen loading and 0.14% reduction in phosphorus loading compared to 2003-2007 levels. A comparison of flow and load reduction for the 5.5 mgd withdrawal shows no impact on water quality. The same relationship holds true for cumulative withdrawals of 25 mgd or 57 mgd.

86. Withdrawals of water from the River can increase residence time, which in turn has the potential to increase biomass in the water body. Seminole and the District used another version of Dr. Sucsy's hydrodynamic model to simulate water age and evaluate the effect of 5.5 mgd and 55.4 mgd withdrawals on residence time in the Lower St. Johns River.

87. Compared to the baseline condition of 1996-2005, a withdrawal of 5.5 mgd is projected to cause a slight increase in the duration of algal blooms at Racy Point and Lake George. Under baseline conditions, an algal bloom with a duration of 60 days is expected to occur once every other year, an algal bloom with a duration of 71 days is expected to occur once every three years, and an algal bloom with a duration of 115 days is expected to occur once every 20 years. When Seminole’s proposed 5.5 mgd withdrawal is applied to these baseline values, the duration of an algal bloom increases by less than one hour once every other year up to 3.2 hours once every 20 years. When the cumulative 55.4 mgd scenario is applied, the duration of an algal bloom increases by 22.6 hours once every other year up to 71 hours once every 20 years.

88. It is possible to offset the elevated algal biomass resulting from the slight increase in residence time from surface water withdrawals by further reducing nutrient loading to the river. Seminole and the District propose to achieve this

nutrient reduction through reductions in discharges from the Iron Bridge WWTP. The Iron Bridge facility currently discharges treated wastewater to the Little Econlockhatchee River (the Little Econ), a tributary of the St. Johns River. However, Seminole and the other Iron Bridge participants plan to eliminate the discharge of wastewater to the Little Econ through increased reclaimed water use. The cessation of discharges to the Little Econ from the Iron Bridge facility will more than offset the impacts of increased retention time caused by the Yankee Lake withdrawal. The load reduction achieved through elimination of the Little Econ discharges is 3.3 times greater than the load reduction that would have to be achieved in order to offset the increased residence time. Even at 11.59 mgd, the maximum permitted daily withdrawal from the Yankee Lake intake facility, the Iron Bridge offset would still be 1.7 times greater than the amount needed to offset increased residence time.

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.

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.

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.

(d) Ecological Evaluation

92. The evidence provided reasonable assurance that there will be no discernable changes to key ecological parameters as a result of the Yankee Lake withdrawal, individually or cumulatively with other surface water withdrawals from the River system.

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.

94. The evidence was that there was no appreciable change in population of the American shad, a common species in the St.

Johns River, between the 1970s and 2000s. No appreciable change in the biodiversity of fish species is expected as a result of the proposed Yankee Lake withdrawal, individually or cumulatively.

95. Submerged aquatic vegetation (SAV) provides a static habitat and a food source for aquatic species. The most common SAV in the St. Johns River is Vallisneria americana, or tape grass, which occurs in freshwater and oligohaline habitats. Its ideal salinity level is 1 ppt or less, but it can tolerate salinities up to 8 or 9 ppt.

96. Between 1999 and 2001, an extended drought resulted in a fairly sizable decline in Vallisneria in the Lower St. Johns River due to higher salinities. Data from 2003-2004 indicate that Vallisneria had expanded and re-colonized areas with salinities up to 5 ppt. Since changes in salinity as a result of Seminole's proposed withdrawal, on an individual or cumulative basis, will be small, it is not expected that there will be a significant impact on Vallisneria, or the aquatic life that depends on it.

97. Riverkeeper witness Robin Lewis testified that existing withdrawals have reduced flows in the St. Johns River, which has impacted the ability of SAV to recover from higher salinities that occur during droughts. However, the graph he relied on to show a declining trend in flows in the St. Johns

River only reflected data recorded through 2002; the most recent flow data indicates there has been an increase in flows, with the highest flow on record at SR 44 occurring in August 2008.

98. The evidence provided reasonable assurance that there will be no impact to macroinvertebrates as a result of Seminole's proposed withdrawal. Macroinvertebrates tolerate wide salinity ranges, and there would be no meaningful change in the distribution of macroinvertebrates due to Seminole's proposed withdrawal.

(e) Impingement and Entrainment

99. The intake structure for the proposed Yankee Lake facility is designed to prevent impingement and entrainment by minimizing the velocity of water entering the structure and by using a series of screens to prevent entry into the structure. The intake structure is in an area where the intake velocity would be equal to or less than the velocity of the river, making the intake structure area an unattractive place for fish to spawn.

100. While fish and other mobile aquatic life would not be expected to be impinged or entrained, it is expected that some immobile aquatic life forms, such as certain fish eggs, will become entrained. Jacksonville's consultant Terry Cheek estimated that 35,000 American shad eggs could be entrained by Seminole's proposed withdrawal each year. However, an American

shad female typically carries about 470,000 eggs and spawns repeatedly during a season, meaning a single female can produce more than a million eggs in a season. Meanwhile, the average number of female shad removed from the St. Johns River due to recreational fishing is about 1,130 individuals, meaning that fishing removes about 530 million eggs from the St. Johns River every year. Even if the egg density were two orders of magnitude greater than Mr. Cheek assumed, entrainment would remove far fewer eggs from the St. Johns River than recreational fishing.

G. Public Interest

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.

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.

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 Oklawaha. The greater weight of evidence indicates that such a delay is unwarranted and would impose additional unnecessary costs on Seminole.

104. Starting in 2006, Seminole implemented an increased rate structure to finance a $156 million bond issue for its water and wastewater capital improvement program, including the Yankee Lake Project. Seminole has also received a $7.5 million grant from the District to finance the project. Seminole has already incurred approximately $4.3 million in engineering design services. If the project were delayed one year, it would incur about $4.5 million of additional costs. If the Yankee Lake Project were delayed more than a year, Seminole would incur additional cost of $15.4 million, including the expenditures to date and the loss of the $7.5 million in grant money. Given the extra costs that would be incurred by Seminole and its residents as a result of any delay in implementation of the Yankee Lake

Project, deferring Seminole's CUP until after completion of the larger AWS study would not be in the public interest.

H. Petitioners' Standing

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.

106. Riverkeeper also bases its standing in part on Section 403.412(6), Florida Statutes, which allows not-for-profit corporations to establish standing if they have 25 members residing in the county where the proposed activity is to take place. Riverkeeper introduced evidence that, by the time of the final hearing, it had more than 25 members residing in Seminole County. Some of these Seminole residents did not join Riverkeeper until shortly before the final hearing. Seminole did not object to testimony regarding the new Seminole members of Riverkeeper, and it was given an opportunity to depose the witness during the hearing but declined to do so. (Seminole's objection to admission of an updated membership list into evidence was overruled.) At the conclusion of Riverkeeper's

case on the second-to-last day of the final hearing, Riverkeeper made an ore tenus motion to amend its petition to allege standing based on Section 403.412(6), Florida Statutes, and ruling was reserved. See Conclusion of Law 141, infra, for the ruling.

107. Jacksonville and St. Johns County base their standing on Section 403.412(5), Florida Statutes, which allows local governments to establish standing by filing a verified pleading alleging that the permitted activity will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state.

108. Jacksonville and St. Johns County filed the verified petitions required by Section 403.412(5), Florida Statutes. In addition, the evidence proved that Seminole's proposed CUP will impair, pollute, or otherwise injure the air, water, or other natural resources of the state 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.

CONCLUSIONS OF LAW

109. This is a de novo proceeding intended to formulate final agency action. Dept of Transp. v. J.W.C., Inc., 396 So. 2d 778, 786-87 (Fla. 1st DCA 1981). The burden of proof falls upon the applicant to prove entitlement by a preponderance of

the evidence. Id. at 788. To prove entitlement, the applicant must provide reasonable assurance through presentation of credible evidence. Id. at 789; Lake Brooklyn Civic Ass'n v. St. Johns River Water Mgmt. Dist., DOAH Case No. 92-5017, 1993 Fla. ENV LEXIS 118 (FLWAC Sept. 30, 1993), 1993 Fla. ENV LEXIS 93 (SJRWMD Jul. 14, 1993), 1993 Fla. Div. Adm. Hear. LEXIS 5210 (DOAH Jun. 4, 1993). The term "reasonable assurance" means a "substantial likelihood that the project can be successfully implemented." Metropolitan Dade County v. Coscan, Fla., Inc., 609 So. 2d 644 (Fla. 3d DCA 1992). The applicant is not required to provide an absolute guarantee. Lake Brooklyn Civic Ass'n, supra.

I. Permitting Criteria

110. Seminole must demonstrate compliance with Section 373.223, Florida Statutes, which requires proof that the proposed use (1) is a reasonable-beneficial use of water; (2) will not interfere with any presently existing legal use of water; and (3) is consistent with the public interest. Only the first and third prongs of the test are at issue; the proposed CUP will not interfere with any presently existing legal use of water.

111. The three-prong test is implemented through Rule 40C-2.301 and the Applicant's Handbook, which has been adopted by reference in Rule 40C-2.101(1). In many cases, the criteria in

these provisions are redundant or circular, making it difficult to apply them in a concise manner.

112. Rule 40C-2.301(4)(a) and A.H. Section 10.3(a) requires that the water allocated in a CUP be the amount necessary for economic and efficient utilization. For reasonable assurance that these criteria are met, there must be a demonstration that the quantity of water requested is needed and that the requested amount of water will be used efficiently.

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.

115. Before these adjustments were made, Seminole's historic per capita use rate was slightly above 150 gpcd, due primarily to high water use in the Northwest Service Area. However, Seminole demonstrated that it is taking aggressive action to address the high use rates by implementing a reclaimed retrofit program and other conservation measures. Seminole projects a system-wide per capita rate well below 150 gpcd starting in 2012.

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.

117. Seminole calculated the maximum day demand for the potable water component of Seminole's proposed withdrawal using a peaking factor of 1.7, based on existing potable water use rates, which is consistent with A.H. Section 12.2.4. Four mgd of the total requested maximum daily allocation of 11.59 is associated with the reclaimed augmentation and is not part of Seminole's potable water demand.

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.

119. In order to demonstrate compliance with Rule 40C-2.301(4)(b) and A.H. Section 10.3(b), Seminole must demonstrate that its proposed use is for a purpose that is reasonable and consistent with the public interest. Rule 40C-2.301(2)(c) also requires that an applicant provide reasonable assurance a proposed use is consistent with the public interest.

120. A.H. Section 9.3 defines "public interest" as:

> . . . those rights and claims on behalf of people in general. In determining the public interest in consumptive use permitting decisions, the Board will consider whether an existing or proposed use is beneficial or detrimental to the overall collective well-being of the people or to the water resources of the area, the District and the State.

121. Seminole's proposed use will provide potable and reclaimed water to its customers, which is in the public interest. Additionally, since the proposed use is an AWS as the term is defined in Section 373.019(1), Florida Statutes, the proposed use is presumed to be in the public interest. See § 373.223(5), Fla. Stat.

122. Rule 40C-2.301(4)(b) and A.H. Section 10.3(b) relate to the purpose of the proposed use, not the source of the proposed use. See "A Model Water Code", 171 (Maloney, et al., 1972), which can be used to ascertain the meaning and intent behind the provisions of Chapter 373, Florida Statues. See Sheffield Briggs Steel Products, Inc. v. Ace Concrete Co., 63

So. 2d 924 (Fla. 1953). The proposed use must be "reasonable in relation to other uses" and must not be "detrimental to other users or totally inconsistent with the character of the watercourse from which the supply is taken"; it does not have to be "the most economic use of water possible." Id. Seminole's proposed use is reasonable in relation to other uses because it will meet the water needs of its citizens. It will not be detrimental to other water users, and Seminole County's proposed use is consistent with the character of the watercourse, since other utilities use the St. Johns River as a source of potable water and reclaimed water augmentation.

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, Fla. Stat.

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.

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.

126. Rule 40C-2.301(4)(c) and A.H. Section 10.3(c) require the proposed source is capable of producing the requested amount of water. The St. Johns River is capable of producing 5.5 mgd without any measurable impact. It is uncontroverted that the average flow of the St. Johns River at the point of Seminole's proposed withdrawal is nearly 2 billion gallons per day and the 5.5 mgd withdrawal constitutes about 0.25% of that flow. The reduction in river stage due to the proposed withdrawal will only be an indistinguishable 0.04 feet near the mouth of the manmade canal, where the intake structure will be located.

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.

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.

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.

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.

132. Petitioners have waived Rule 40C-2.301(4)(i) and A.H. Section 10.3(i), which require that the proposed use not cause or contribute to flood damage, which it will not.

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.

134. Rule 40C-2.301(4)(k) and A.H. Section 10.3(k) require that the proposed use not cause or contribute to a violation of state water quality standards in receiving waters of the state. Seminole's proposed withdrawal will not cause or contribute to a violation of state water quality standards in receiving water.

135. Rule 40C-2.301(5)(a) and A.H. Section 9.4 identify several reasons for denial of a CUP application. Some of those provisions already have been addressed in connection with other provisions on the same or similar subjects. The evidence was that none of the other reasons for denial of a CUP application are present in this case.

J. Standing

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), Fla. Stat. 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.

138. Section 403.412(6), Florida Statutes, allows not-for-profit corporations to establish standing to initiate an administrative proceeding if they have 25 members residing in the county where the proposed activity is to take place.

139. Riverkeeper introduced evidence that it has more than 25 members in Seminole. However, some of these members joined Riverkeeper a few days before the final hearing, which Seminole contends was too late, especially since Riverkeeper moved ore tenus to amend its petition to allege standing based on Section 403.412(6) at the conclusion of its case on the second to last day of the final hearing.

140. In support of its position, Seminole cites Pilla v. School Board of Dade County, 655 So. 2d 1312 (Fla. 3d DCA 1995). In Pilla, a school board's reversed a hearing officer's denial of the school board's motion to amend its complaint to revoke a teacher's certificate to add charges. The hearing officer denied the motion to amend because the teacher did not have the ability to develop a response to the new charges and conduct meaningful discovery. Here, Seminole did not object to testimony regarding the new Seminole members of Riverkeeper and was given an opportunity to depose the witness during the hearing but declined to do so. For that reason, amending Riverkeeper's petition to conform to the evidence will not deny Seminole an opportunity to develop a response or conduct meaningful discovery. For that reason, Riverkeeper's motion to amend is granted.

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 the final hearing.

142. Jacksonville and St. Johns County attempt to base their standing solely on Section 403.412(5), Florida Statutes, which allows local governments to establish standing by filing a verified pleading alleging that the permitted activity will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state.

143. Jacksonville and St. Johns County filed the verified petitions required by Section 403.412(5), Florida Statutes. In addition, the evidence proved that Seminole's proposed CUP will impair, pollute, or otherwise injure the air, water, or other natural resources of the state 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.

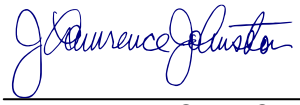
RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the District enter a final order granting Seminole's pending CUP 95581 with the conditions specified in the TSR and the additional condition proposed by the District and Seminole regarding nutrient impacts.

Jurisdiction is retained for up to 30 days after the District's entry of its final order to rule on Seminole's motions for attorney's fees and costs under Sections 57.105(4) and 120.595(1), Florida Statutes, by a separate final order if Seminole invokes the exercise of that jurisdiction within the 30-day time period.

DONE AND ENTERED this 12th day of January, 2009, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of January, 2009.

ENDNOTES

1/ All rule references are to the version of the Florida Administrative Code in effect at the time of the final hearing.

The Applicant's Handbook, which is incorporated by reference in Rule 40C-2.101(1), will be referred to as A.H.

2/ Unless otherwise noted, all statutory references are to the 2007 codification of the Florida Statutes.

3/ The Iron Bridge Facility is a regional wastewater treatment plant, located in Seminole, which treats wastewater from Seminole and Orange Counties. Seminole has a contract with the City of Orlando to utilize reclaimed water from the facility equal to the amount of wastewater Seminole sends to the Iron Bridge Facility.

4/ The CFCA rules actually refer to the development of supplemental water supply. See A.H. § 12.10(b)1. "Supplemental water supply" is defined as "surface water, stormwater, reclaimed water, and saltwater." A.H. § 2.0(hh). "Brackish groundwater may be considered a supplemental water supply if it can be developed in a manner that will not cause or contribute to harmful impacts from cumulative groundwater withdrawals in the CFCA." Id. However, the statutory definition of "alternative water supplies" includes those sources of supply and others, including "any other water supply source that is designated as nontraditional for a water supply planning region in the applicable regional water supply plan." § 373.019(1), Fla. Stat.

5/ Use of BEBR population data for projecting population is approved by the District. See A.H. § 12.2.1.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.