

STATE OF FLORIDA
LAND AND WATER ADJUDICATORY COMMISSION

PUTNAM COUNTY
ENVIRONMENTAL COUNCIL, INC.
Petitioner,

v.

FLWAC Case No. WMD-09-005

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,
Respondent.

_____ /

FINAL ORDER

This cause came before the Governor and Cabinet, sitting as the Florida Land and Water Adjudicatory Commission ("Commission"), on September 29, 2015, for consideration of a Request for Review filed by Putnam County Environmental Council, Inc. ("Petitioner"), challenging the Fourth Addendum of the 2005 Water Supply Plan ("Fourth Addendum") adopted by the St. Johns River Water Management District ("Respondent") on May 12, 2009. Pursuant to Section 373.114(1), Florida Statutes, the Commission has the exclusive authority to review rules or orders of a water management district to ensure consistency with the provisions and purposes of Chapter 373, F.S. For the reasons stated herein, the Commission accepted jurisdiction of the Request for Review, but denied relief

on the merits of Petitioner's claims, and found Respondent's Fourth Addendum to be consistent with the provisions and purposes of Chapter 373, Florida Statutes.¹

STANDARD OF REVIEW

Consideration of a request for review of a water management district's rule or order "is appellate in nature and shall be based solely on the record below unless the Commission determines that a remand for a formal evidentiary proceeding is necessary to develop additional findings of fact."² Fla. Stat. §373.114(1)(b); R. 42-2.0132(1), F.A.C. Absent such a supplemental evidentiary proceeding, the facts contained in the water management district action, and any technical staff report that accompanied it, shall be deemed undisputed. Fla. Stat. §373.114(1)(b).

To be entitled to relief, the petitioner must allege with particularity, and the Commission must determine, the order conflicts with statutory requirements or the requirements of a duly adopted rule. Fla. Stat. §373.114(1)(a)1. and 2.

¹ After accepting review of this matter, the Commission ruled upon pending motions to intervene and motions to participate as *amicus curiae*. Three entities sought to intervene in this proceeding in support of Respondent - Seminole County, the Orlando Utilities Commission, and the Tohopekaliga Water Authority. The Commission determined neither Section 373.114, F.S., nor Rule 42-2.0132, F.A.C., provided for intervention in these proceedings, as requested by the three movants, noting the term "party" defined in statute relates to an entity's standing to file a request for review, not to intervene. Nonetheless, the Commission granted the movants permission to participate as *amicus curiae*, and their respective briefs were accepted into the record of this proceeding.

Three movants sought permission to participate solely as *amicus curiae* - St. Johns Riverkeeper, the Florida Water Environment Association Utilities Council, and a joint filing by the Northwest Florida Water Management District, South Florida Water Management District, Southwest Florida Water Management District, and Suwannee River Water Management District. The Commission granted the movants permission to participate as *amicus curiae*, and their respective briefs were accepted into the record of this proceeding.

² The Commission directed Respondent to compile and submit the index and record relating to the adoption of the Fourth Addendum in its "Order Granting Motion to Lift Order of Abeyance, Directing the Filing of Proceeding Records, Directing Amendment of Petition, Granting Motion for Extension of Time; and Notice of Timeliness and Sufficiency of Request for Review," dated January 31, 2012. Citations to the record of the proceedings below are indicated as: [R.: page #].

When the Commission accepts review of an order that raises issues of policy, statutory interpretation, or rule interpretation having regional or statewide significance from the standpoint of agency precedent, but the order does not itself substantially affect natural resources of statewide or regional significance, only limited relief may be granted. If the Commission determines the order under review conflicts with the requirements of a statute or a duly adopted rule, the Commission may "direct the district to initiate rulemaking to amend its rules to assure that future actions are consistent with the provisions and purposes of [Chapter 373, F.S.] without modifying the order." Fla. Stat. §373.114(1)(c).

ACCEPTANCE OF REVIEW

To accept a request for review, three members of the Commission must determine either, based on the record below, "the activity authorized by the order would substantially affect natural resources of statewide or regional significance" or, "the order raises issues of policy, statutory interpretation, or rule interpretation that have regional or statewide significance from the standpoint of agency precedent." Fla. Stat. §373.114(1)(a).

The Commission accepted Petitioner's Request for Review based upon the determination that the Fourth Addendum constituted an order of the water management district that raised issues of policy or statutory interpretation having regional or statewide significance from the standpoint of agency precedent. Appendix N of the Fourth Addendum identifies several planning-level water supply development projects, which Respondent designated as developing "alternative water supplies" for the region. Petitioner challenged the designation of 11 proposed projects along the St. Johns and

Ocklawaha rivers as developing "alternative water supplies," arguing the projects failed to meet the statutory definition of that term in Section 373.019(1), F.S. Petitioner further argued both rivers have significant natural resource value to the region. Therefore, the Commission agreed whether Respondent properly designated the challenged water supply development projects in the Fourth Addendum as "alternative water supplies," in accord with Section 373.019(1), F.S., raises an issue of policy and statutory interpretation that has regional significance from the standpoint of agency precedent. Based upon this determination, the Commission accepted Petitioner's Request for Review and proceeded to evaluate the merits of its challenges to the Fourth Addendum.

DETERMINATION OF CONSISTENCY WITH CHAPTER 373, F.S.

Petitioner challenged the Fourth Addendum on three grounds. First, Petitioner argued the Fourth Addendum improperly designated 11 proposed water supply development projects utilizing surface water withdrawals as "alternative water supplies," alleging the projects do not comply with the definition in Section 373.019(1), F.S. Second, Petitioner asserted the Fourth Addendum was not adopted by Respondent through a valid public process, because Respondent failed to effectively engage the public in drafting the plan. Third, Petitioner alleged Respondent failed to make water conservation a priority in the Fourth Addendum.³

³ In support of its second and third arguments, Petitioner cited to Sections 373.0361(1) and 373.1961(1)(a), respectively, which were operative at the time Petitioner filed its Request for Review in June 2009, but were subsequently repealed and replaced in 2010. Section 373.0361 previously pertained to regional water supply planning by a water management district, but was replaced by Section 373.709 in 2010. Section 373.1961 defined the general powers and duties of a water management district board with regard to water production, but was replaced in 2010 by Section 373.703.

Designation of "Alternative Water Supplies" Projects

Petitioner's first argument alleged the Fourth Addendum improperly identified certain water supply development projects as "alternative water supplies," contrary to the statutory definition of that term.⁴ Specifically, Petitioner argued the challenged projects did not qualify as "alternative water supplies" because each proposed to use surface water withdrawals, but did not limit such use to quantities captured predominantly during wet-weather flows. Petitioner further argued surface water withdrawals are not a non-traditional water source for the planning region.

The term "alternative water supplies" is defined in Section 373.019(1), F.S., which reads:

"Alternative water supplies" means salt water; brackish surface and groundwater; surface water captured predominately [sic] during wet-weather flows; sources made available through the addition of new storage capacity for surface or groundwater, water that has been reclaimed after one or more public supply, municipal, industrial, commercial, or agricultural uses; the downstream augmentation of water bodies with reclaimed water; stormwater; and any other water supply source that is designated as nontraditional for a water supply planning region in the applicable regional water supply plan.

Discerning legislative intent must begin with the statutory text and its plain meaning. *Hill v. Davis*, 70 So.3d 572, 575 (Fla. 2011). "Courts are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms

⁴ Petitioner challenged the "alternative water supplies" designations of Projects 7, 8, 10, 12, 61, 62, 63, 64, 65, 78, and 79 in Appendix N of the Fourth Addendum. See Putnam County Environmental Council's Request for Review of St. Johns River Water Management District Water Supply Plan 2005, Fourth Addendum at 9-10, *Putnam County Envtl. Council v. St. Johns River Water Mgmt. Dist.*, FLWAC Case No. WMD-09-005 (June 9, 2009); see also Putnam County Environmental Council, Inc.'s Statement in Support of Commission Review at 3-6, *Putnam County Envtl. Council v. St. Johns River Water Mgmt. Dist.*, FLWAC Case No. WMD-09-005 (February 17, 2012).

or its reasonable and obvious implications." *Id.* (citations omitted). "When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v. Auld*, 450 So.2d 217, 291 (Fla. 1984).

Section 373.019(1), F.S., is not ambiguous. The statute clearly recognizes distinct categories of qualifying "alternative water supplies," including, but not limited to, the supply source identified by Petitioner in its argument. Although "surface water captured predominately [sic] during wet-weather flows" is a particular category of "alternative water supplies," it cannot be read to the exclusion of the remainder of the statutory definition. *See Martinez v. State*, 981 So.2d 449, 452 (Fla. 2008) ("It is a basic rule of statutory construction that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless." (citations and quotations omitted)). Thus, so long as each challenged water supply development project meets at least one of the categories included in the definition in Section 373.019(1), F.S., it properly qualifies as an "alternative water supply."

In addition to the specific water sources identified in the definition, Section 373.019(1), F.S., also recognizes "any other water supply source that is designated as nontraditional for a water supply planning region in the applicable regional water supply plan." Thus, the Legislature clearly intended "nontraditional" water sources to also qualify as "alternative water supplies," but deferred to the water management districts to determine which sources are "nontraditional" based on the particular characteristics of their respective planning regions. Such a determination by a water management district is

entitled to great deference from this Commission. *Level 3 Commc'ns, LLC v. Jacobs*, 841 So.2d 447, 450 (Fla. 2003) ("An agency's interpretation of the statute that it is charged with enforcing is entitled to great deference.").

Petitioner's argument that the challenged water supply development projects do not qualify as "alternative water supplies" is without merit. First, Respondent specifically found each of the challenged projects would develop a "nontraditional" water source for its planning region. The District Staff Report that accompanied the Fourth Addendum noted, "[f]or water supply planning purposes, the district has recognized and continues in the proposed Fourth Addendum to recognize fresh groundwater as the only traditional water supply source in its jurisdiction." *District Staff Report on Proposed Fourth Addendum Amending District Water Supply Plan (DWSP) 2005*, at 8-9 (May 12, 2009) ("District Staff Report") [R.: 000521-000522]. Furthermore, in discussing the proposed projects, the Fourth Addendum states, "[a]ll of the water supply development project options in the DWSP 2005 as amended by this Fourth Addendum would develop alternative water supplies as defined by Section 373.019, F.S., and all of the options would use water from nontraditional water supply sources." *Fourth Addendum*, at 17-18 [R.: 000019-000020]. Additionally, the descriptions of each of the challenged projects in Appendix N specifically state the water comes from a nontraditional source, and "SJRWMD considers all sources other than fresh groundwater to be nontraditional." *See id.*, Appx. N, at 71, 76, 81, 87, 92, 95, 99, 104, 120, 164 [R.: 000073, 000078, 000083, 000089, 000094, 000097, 000101, 000106, 000122, 000166]. Respondent's determination that only fresh groundwater is a "traditional" water source for

its region, and therefore all other water sources are “nontraditional,” is an undisputed finding of fact. *See Fla. Stat. §373.114(1)(b).*

Moreover, in addition to developing a “nontraditional” water source, nine of the eleven projects challenged by Petitioner also qualify as “alternative water supplies” based upon one of the other water source categories identified in Section 373.019(1), F.S. Projects 8, 10, 63, 64, 65, and 79 propose to develop a brackish surface water source. *See Fourth Addendum, Appx. N at 71, 76, 95, 99, 104, 164 [R.: 000073, 000078, 000097, 000101, 000106, 000166].* Project 12 involves the addition of new storage capacity for surface or groundwater, utilizing surface water captured predominantly during wet-weather flows. *Id.* at 81 [R.: 000083]. Project 62 proposes additional storage capacity, most likely using brackish surface water. *Id.* at 92 [R. 000094]. Project 78 utilizes reclaimed water from the city of Sanford wastewater reclamation facility. *Id.* at 139 [R.: 000141].

Because Respondent designated all water sources other than fresh groundwater as “nontraditional” for its planning region in its Fourth Addendum, and the challenged water supply development projects each proposed to utilize a “nontraditional” water source, each of the challenged projects qualifies under the definition of “alternative water supplies.” Based on the foregoing, the Commission finds Respondent’s designation of the challenged water supply development projects as “alternative water supplies” is consistent with Section 373.019(1), F.S., and Petitioner’s challenge is without merit.

Public Process

Petitioner’s second argument alleged Respondent had not conducted a valid public process in the development and adoption of the Fourth Addendum. Specifically, Petitioner

argued Respondent "focused all of its efforts on coordinating with local governments and utilities to meet their needs without effectively engaging the general public in a discussion of what is in the public interest," contrary to its obligations to actively engage in public education and outreach. Request for Review, at 10-11.

Each water management district is required to conduct water supply planning in an open, public process in coordination and cooperation with affected entities, municipalities, and parties in its region. Fla. Stat §373.709(1). Each district must "actively engage in public education and outreach," and "shall also hold several public meetings to communicate the status, overall conceptual intent, and impacts of the plan on existing and future reasonable-beneficial uses and related natural systems." *Id.* Additionally, during the development of its water supply plan, each district must "conduct at least one public workshop to discuss the technical data and modeling tools anticipated to be used to support the regional water supply plan." *Id.*

Based upon the record of the proceedings below, it appears Respondent's development and adoption of the Fourth Addendum was consistent with the requirements of Section 373.709(1), F.S. The District Staff Report details Respondent's extensive public outreach during the water supply planning process, including Respondent's participation in at least 150 public meetings in the decade prior to the adoption of the Fourth Addendum related to potential water supply projects along the St. Johns and Ocklawaha Rivers. DSR at 3-8 [R.: 000516-000521]. Notably, the District Staff Report points out Petitioner was represented at several of the public meetings held during the water supply planning process, which undermines Petitioner's argument of a deficient public process. *See* DSR at

5 [R.: 000518]. Moreover, the record shows Respondent held the required public workshop to present the Fourth Addendum on April 6, 2009, a meeting at which Petitioner was represented, and subsequent to which Petitioner submitted two written comments objecting to the proposed Fourth Addendum. DSR at 3 [R.: 000516]; St. Johns River Water Management District Public Workshop Notice, March 18, 2009 [R.: 001132]; Public Workshop Sign-In Sheet, April 6, 2009 [R.: 001125]; Public Workshop Speaker Card of Karen Ahlers (PCEC), April 6, 2009 [R.: 001131]; E-mail from K. Ahlers (PCEC) to D. Hornsby, April 7, 2009 [R.: 000649-000652]; Letter from J. Thomas (PCEC) to D. Hornsby (with attachments), April 20, 2009 [R.: 000659-001089].

Petitioner failed to allege with particularity the supposed deficiencies of the public process through which the Fourth Addendum was developed and adopted, but the record nonetheless demonstrates Respondent engaged in substantial public outreach, education, and coordination with various entities in its planning region. Therefore, the Commission finds Respondent's development and adoption of the Fourth Addendum was consistent with the requirements of Section 373.709(1), F.S., and Petitioner's challenge is without merit.

Water Conservation

Petitioner's final argument challenged the consideration given to water conservation by Respondent in the development and adoption of the Fourth Addendum. Specifically, Petitioner alleged "[t]he Fourth Addendum fails to make water conservation a priority, instead [Respondent] merely adds a lengthy section regarding the District's allegedly aggressive conservation program." Request for Review, at 11.

Citing to Section 373.1961(1)(a), F.S., Petitioner claimed Respondent was required to make water conservation a priority in its regional water supply planning.⁵ However, regional water supply planning by a water management district is governed by Section 373.709, F.S., not the provision relied upon by Petitioner. The only reference to “water conservation” in Section 373.709, F.S., relates to the requirement to include a list of water supply development project options, and reads: “The total capacity of the projects included in the plan must exceed the needs identified in subparagraph 1., *and take into account water conservation and other demand management measures, as well as water resources constraints, including adopted minimum flows and levels and water reservations.*” Fla. Stat. §373.709(2)(a)2. (emphasis added).

The record of the proceedings below demonstrates Respondent accounted for water conservation in its development and adoption of the Fourth Addendum. Respondent’s staff directly addressed Petitioner’s argument in the District Staff Report, noting the Fourth Addendum includes a specific water conservation section, and referred to the District’s promotion of water conservation through its consumptive use permitting program, stringent landscape watering restrictions, and public education and awareness initiatives. *See DSR, at 9-12 [R.: 000522-000525].* Moreover, the Fourth Addendum, itself, includes substantive provisions related to water conservation, including a discussion of the new

⁵ Section 373.1961 was repealed in 2010, and replaced by Section 373.703. Section 373.703(1)(a), which is substantially similar to Section 373.1961(1)(a), requires a governing board of a water management district: “Shall engage in planning to assist counties, municipalities, special districts, publicly owned and privately owned water utilities, multijurisdictional water supply entities, regional water supply authorities, or self-suppliers in meeting water supply needs *in such manner as will give priority to encouraging conservation and reducing adverse environmental effects of improper or excessive withdrawals of water from concentrated areas.*” (emphasis added).

Water Conservation Component chapter being added to the 2005 District Water Supply Plan, the water conservation potential of the region, and various regulatory programs implemented by the District with a focus on water conservation, including its consumptive use permitting program and landscape irrigation watering restrictions. *See* Fourth Addendum, at 6-11 [R.: 000008-000013]. The Fourth Addendum also identifies non-regulatory water conservation initiatives Respondent has implemented or participated in, including the Conserve Florida Water Conservation Information Clearinghouse, Landscape Water Conservation Ordinance Guidelines, its Water Conservation Public Awareness Campaign, and its Strategic Water Conservation Initiative. *See id.* at 11-13 [R.: 000013-000015]. Therefore, the record shows Respondent properly took water conservation into account in its development and adoption of the Fourth Addendum.

Although Petitioner criticized the water conservation components of the Fourth Addendum in its brief, it failed to allege with particularity how the plan conflicted with statutory requirements. The record clearly demonstrates the Fourth Addendum includes substantive provisions related to water conservation, and other regulatory and non-regulatory programs implemented by Respondent also account for water conservation in its region. Based on the foregoing, the Commission finds Respondent properly accounted for water conservation in its development and adoption of the Fourth Addendum, and Petitioner's challenge is without merit.

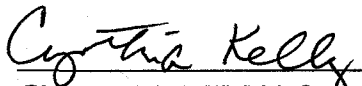
CONCLUSION

The Commission determines Respondent's Fourth Addendum of the 2005 Water Supply Plan is consistent with the provisions and purposes of Chapter 373, Florida Statutes.

NOTICE OF RIGHTS

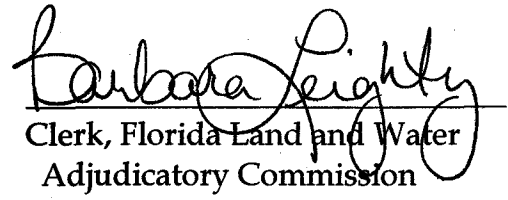
"A party who is adversely affected by final agency action is entitled to judicial review." Fla. Stat. §120.68. Pursuant to Rule 9.110, Florida Rules of Appellate Procedure, judicial review shall be invoked by filing a Notice of Appeal within thirty (30) days of the rendition of the Final Order with the Clerk of the Commission, Office of Policy and Budget, Executive Office of the Governor, The Capitol, Room 1801, Tallahassee, Florida 32399-0001; and by filing a copy of the Notice of Appeal with the clerk of the appropriate District Court of Appeal, accompanied by the applicable filing fees.

DONE AND ORDERED this 17th day of November, 2015.



CYNTHIA KELLY, Secretary
Florida Land and Water
Adjudicatory Commission

17th FILED with the Clerk of the Florida Land and Water Adjudicatory Commission this
day of November, 2015.


Clerk, Florida Land and Water
Adjudicatory Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing was delivered to the following persons by United States Mail, electronic transmission, or hand delivery this 17th day of November, 2015.


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