STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAUL STILL,

Petitioner,

vs. Case No. 14-1420RU

SUWANNEE RIVER WATER MANAGEMENT DISTRICT,

Respondent,

and

NORTH FLORIDA UTILITY COORDINATING GROUP; CLAY COUNTY UTILITY AUTHORITY; JEA; ST. JOHNS RIVER WATER MANAGEMENT DISTRICT; ALACHUA COUNTY; GILCHRIST COUNTY; SUWANNEE COUNTY; BOARD OF COUNTY COMMISSIONERS OF BRADFORD COUNTY, AND COLUMBIA COUNTY,

Intervenors.
_____/

PAUL STILL,

Petitioner,

vs. Case No. 14-1421RP

SUWANNEE RIVER WATER MANAGEMENT DISTRICT,

Respondent,

and

NORTH FLORIDA UTILITY COORDINATING GROUP; CLAY COUNTY UTILITY AUTHORITY; JEA; ST. JOHNS RIVER WATER MANAGEMENT DISTRICT; ALACHUA COUNTY;

GILCHRIST COUNTY; SUWANNEE
COUNTY; BOARD OF COUNTY
COMMISSIONERS OF BRADFORD
COUNTY; AND COLUMBIA COUNTY,

Intervenors.
_____/
PAUL STILL,

Petitioner,

vs. Case No. 14-1443RP

SUWANNEE RIVER WATER MANAGEMENT
DISTRICT,

Respondent,

and

NORTH FLORIDA UTILITY
COORDINATING GROUPS; CLAY COUNTY
UTILITY AUTHORITY; JEA; ST.
JOHNS RIVER WATER MANAGEMENT
DISTRICT; ALACHUA COUNTY;
GILCHRIST COUNTY; SUWANNEE
COUNTY; BOARD OF COUNTY
COMMISSIONERS OF BRADFORD
COUNTY; AND COLUMBIA COUNTY,

Intervenors.
_____/

FLORIDA WILDLIFE FEDERATION, INC., AND ICHETUCKNEE ALLIANCE, INC.,

Petitioners,

vs. Case No. 14-1644RP

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent,

and

NORTH FLORIDA UTILITY COORDINATING GROUPS; CLAY COUNTY UTILITY AUTHORITY; JEA; ST. JOHNS RIVER WATER MANAGEMENT DISTRICT; SUWANNEE RIVER WATER MANAGEMENT DISTRICT; ALACHUA COUNTY; GILCHRIST COUNTY; SUWANNEE COUNTY; BOARD OF COUNTY COMISSIONERS OF BRADFORD COUNTY; AND COLUMBIA COUNTY,

Intervenors.
_____/

FINAL ORDER

The final hearing in these consolidated cases was held on May 28-30 and June 12-13, 2014, in Tallahassee, Florida, before Bram D.E. Canter, Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

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STATEMENT OF THE ISSUES

The issues to be determined in this case are whether proposed Florida Administrative Code Rules 62-42.100, 62-42.200, 62-42.300, and a document incorporated by reference ("the Proposed Rules") are invalid exercises of delegated legislative authority; whether the Department of Environmental Protection ("DEP") complied with statutory requirements regarding preparation of a statement of estimated regulatory costs ("SERC") for the Proposed Rules; and whether the approval by the Governing Board of the Suwannee River Water Management District ("SRWMD") of a document entitled "Recovery Strategy: Lower Santa Fe River Basin" ("Recovery Strategy") is invalid because it required rulemaking.

PRELIMINARY STATEMENT

On March 7, 2014, DEP published a Notice of Proposed Rule in the Florida Administrative Register to adopt the Proposed Rules, which would establish minimum flows for the Lower Santa Fe and Ichetucknee Rivers and their associated priority springs ("the MFL water bodies"), and create supplemental regulatory criteria for the review of applications for consumptive use

permits in the area. The notice also informed the public that a SERC had been prepared regarding the Proposed Rules and was available for review.

On March 11, 2014, SRWMD approved the Recovery Strategy that had been developed for the MFL water bodies. On March 24, 2014, Paul Still filed a petition to challenge SRWMD's action in approving the Recovery Strategy, claiming that it constituted an unpromulgated rule. The petition was assigned DOAH Case No. 14-1420RU.

Also on March 24, 2014, Paul Still filed a petition to challenge the Department's SERC. This second petition was assigned DOAH Case No. 14-1421RP.

On March 27, 2014, Paul Still filed a petition to challenge the Proposed Rules. This third petition was assigned DOAH Case No. 14-1443RP.

On April 8, 2014, DEP published a Notice of Change/Withdrawal to explain that it had made changes to the Supplemental Regulatory Measures adopted by reference in rule 62-42.300. This notice also informed the public that a revised SERC was available for review.

On April 11, 2014, Florida Wildlife Federation, Inc. ("FWF"), filed a petition to challenge the Proposed Rules. The petition was assigned DOAH Case No. 14-1644RP.

Petitioner Still's petitions in DOAH Case Nos. 14-1421RP and 14-1443RP were dismissed on motion from Respondents, but he was granted leave to amend. FWF was also granted leave to amend its petition, including leave to add Ichetucknee Alliance, Inc. ("the Alliance"), as a party. In an Order dated May 21, 2014, the motion to add the Alliance was deemed to be the Alliance's timely rule challenge petition.

The four cases were consolidated for hearing, but they are distinct. All Petitioners challenged the Proposed Rules, but only Petitioner Still challenged the proposed minimum flows in the Proposed Rules. Only Petitioner Still challenged the SERC and SRWMD's approval of the Recovery Strategy.

Petitions to intervene in support of the Proposed Rules were filed by St. Johns River Water Management District ("SJRWMD"), North Florida Utility Coordinating Group ("NFUCG"), Clay County Utility Authority ("CCUA"), JEA, Alachua County, Bradford County, Columbia County, Gilchrist County, and Suwannee County, all of which were granted.

Before the final hearing, Intervenors NFUCG, CCUA, and JEA (referred to collectively as "JEA") moved for Summary Final Order dismissing the petitions of FWF and the Alliance for lacking associational standing. On the first day of the hearing, the motion was granted with respect to FWF, but denied with respect to the Alliance.

At the final hearing, Petitioner Still testified on his own behalf and presented the testimony of Russell Kiger, a hydrologist employed by SRWMD; Warren Zwanka, a senior hydrologist for SRWMD; Janet Llewellyn, Administrator of DEP's Office of Water Policy, who was accepted as an expert witness in the fields of aquatic ecology, aquatic and wetland systems, water quality protection and management, and regional water supply planning; Carlos Herd, the Director of SRWMD's Water Supply Division; John Good, Chief Professional Engineer for SRWMD who was accepted as an expert in the fields of civil engineering, water resource engineering, and the development of minimum flows and levels; Clay Coarsey, a Professional Engineer employed by SRWMD; and Jack Grubbs, a hydrologist employed by SRWMD. Still Exhibits 1A, 1B, 2A, 3, 3A, 13A, and 15 were admitted into the record.

The Alliance presented the testimony of John Jopling, President of the Alliance; Ken Weber, a private consultant who was accepted as an expert in hydrogeology; Russell Kiger; and Janet Llewellyn. The testimony of Patrick Tara was presented through the admission into evidence of the transcript of his deposition.

Respondents placed on the record a stipulation that a substantial number of the Alliance's members make regular use of the MFL waterbodies for recreation and other relevant purposes.

However, to accommodate 17 members who had traveled to Tallahassee to provide this kind of testimony for standing purposes, the Administrative Law Judge placed them under oath and allowed them an opportunity to make summary statements regarding their uses of the MFL waterbodies. They were Lucinda Marritt, Bob Palmer, Lynn Polk, Yolanda Jopling, Loye Barnard, Jill Lingard, Dave Morris, Robert Baker, James Tatum, Marrillee Malwitz-Jipson, Charles Maxwell, Sue Karcher, Laura Dailey, Leslie Gamble, John Moran, Jim Stevenson, and Lars Anderson.

Alliance Exhibits 2-3, 49, 51, 60A, 62, 163, 167, 172C, 175, 191A, 195, and 196 were admitted into the record.

FWF made a proffer of FWF Ex. 60A, which shows FWF membership by county, and an oral proffer regarding the witness testimony it was prepared to present for standing purposes.

DEP presented the testimony of Janet Llewellyn. DEP Exhibits 1.9 and 3.7 were admitted into the record.

SRWMD presented the testimony of Carlos Herd; John Good; Russell Kiger; and Warren Zwanka. SRWMD Exhibits 1-3 were admitted into the record.

JEA presented the testimony of Ken Weber. JEA Exhibits 26, 36, 37, and 39 were admitted into the record.

The Proposed Rules, SERC, and related rulemaking documents were officially recognized by the Administrative Law Judge.

The nine-volume Transcript of the final hearing was filed with DOAH. The parties filed proposed final orders that were considered by the Administrative Law Judge in the preparation of this Final Order.

FINDINGS OF FACT

A. The Parties

1. The Alliance is a Florida not-for-profit corporation with its principal place of business at 203 Northeast First Street, Gainesville, Florida. Its mission is to ensure the restoration, preservation, and protection for future generations of the ecosystems along the Ichetucknee River, including its associated springs.

2. The Alliance has approximately 40 members. Seventeen members appeared at the final hearing and testified that they regularly use the Ichetucknee River and its associated priority springs for recreation, wildlife observation, and other purposes. Seventeen members is a substantial number of the total membership of the Alliance.

3. Petitioner Still is a natural person who owns 117 acres of land in Bradford County. He uses the land primarily for timber production. He does not have a consumptive (water) use permit. He has used the Lower Santa Fe River and associated springs for recreation since 1979 and continues to visit the river and springs for this purpose.

4. Petitioner FWF is a Florida not-for-profit corporation with its principal place of business at 2545 Blairstone Drive, Tallahassee, Florida. The mission of FWF includes the preservation, management, and improvement of Florida's water resources and wildlife habitat.

5. In the parties' Pre-Hearing Stipulation, FWF identified Manley Fuller, its President, as its witness for organizational standing. It also listed "standing witnesses as needed," but did not name them. At his deposition, Mr. Fuller stated that he did not know how many FWF members use the MFL water bodies.

6. At the beginning of the final hearing, FWF made an oral proffer that it was prepared to call "10 members who are using the water bodies." Later, FWF stated that some members were unwilling or unable to come to Tallahassee, but suggested that 10 or 15 might (now) be talked into coming to the final hearing or testifying by video.

7. FWF also proffered a membership list, showing the number of members by county. It shows that FWF has a total of 11,788 members. In the six counties in the vicinity of the MFL water bodies (Alachua, Bradford, Columbia, Gilchrist, Suwannee, and Union) there are 457 FWF members. Ten, 15, or 20 members is not a substantial number of FWF's 11,788 total members, nor is it a substantial number of its 457 members who live in the vicinity of the MFL waterbodies.

8. Respondent DEP is a state agency with powers and duties under chapter 373, Florida Statutes, including the power and duty under section 373.042(1), which it shares with the water management districts, to establish minimum flows for surface watercourses and minimum levels for groundwater ("MFLs") and recovery strategies when MFLs will not be achieved.

9. Respondent/Intervenor SRWMD is a regional water management district with powers and duties under chapter 373, including powers and duties related to MFLs. The MFL waterbodies are located within SRWMD.

10. Intervenor SJRWMD is the water management district adjacent to SRWMD. A portion of SJRWMD is included within the planning area created for the MFL waterbodies.

11. Intervenor NFUCG is a regional trade organization representing interests of public water supply utilities in North Florida that hold consumptive use permits and are subject to the Proposed Rules. Intervenors CCUA and JEA are two members of NFUCG.

12. Intervenors Alachua County, Gilchrist County, Suwannee County, Bradford County, and Columbia County are political subdivisions of the State in geographic proximity to the MFL water bodies. These Counties have the duty to plan for and protect the MFL water bodies as part of their local government

comprehensive planning responsibilities under chapter 163, Florida Statutes.

B. Minimum Flows and Recovery Strategies

13. The water management districts and the DEP are required to establish minimum flows for surface water courses. § 373.042(1), Fla. Stat. Minimum flows are "the limit at which further withdrawals would be significantly harmful to the water resources or ecology of the area." § 373.042(1)(a), Fla. Stat.

14. If the existing flow in a water body is below its established minimum flow, DEP or the district is required to develop a "recovery strategy" designed to "[a]chieve recovery to the established minimum flow or level as soon as practicable." § 373.0421(2), Fla. Stat.

15. MFLs and recovery strategies are required to be included in a water management district's regional water supply plan. § 373.709(2)(c) and (g), Fla. Stat. Water management districts must develop regional water supply plans in regions where they determine existing sources of water are not adequate to supply water for all existing and future users and to sustain water resources and related natural systems. § 373.709(1), Fla. Stat.

16. SRWMD does not have a regional water supply plan. It is working on a draft plan that is expected to be completed in late 2015.

C. The MFL Water Bodies

17. The Lower Santa Fe River runs for approximately 30 miles from Santa Fe River Rise Spring to its confluence with the Suwannee River. The Lower Santa Fe is fed primarily by groundwater discharge from the Upper Floridan aquifer including the baseflow provided by several major springs. The Lower Santa Fe River system, including its tributary, the Ichetucknee River (below State Road 27), is classified as an Outstanding Florida Water, a designation conferred on waters "with exceptional recreational or ecological significance." See Fla. Admin. Code R. 62-302.700(3).

18. The Ichetucknee River runs for six miles from the Head Spring to its confluence with the Lower Santa Fe. Its flow is derived almost entirely from springflow.

19. The ecological, recreational, and economic values of the Santa Fe and Ichetucknee Rivers are widely recognized. Both rivers flow through lands preserved for public use as part of the State Park System.

20. SRWMD published a Water Supply Assessment in 2010 to determine whether water demands could be met for the 2010-2030 planning period without adversely affecting natural resources. The North Florida Groundwater Flow Model was used to evaluate groundwater withdrawals and their effect on aquifer levels and the flows in springs and rivers.

21. The 2010 assessment concluded that groundwater levels of the Upper Floridan Aquifer in the eastern and northeastern portions of the District were in decline. The District's analysis of river and streamflows also found declining trends. It was concluded that existing water sources would not be able to meet projected water demands over the planning period. As a result, the Lower Santa Fe River Basin (including the Ichetucknee River) was designated as a water supply planning region and SRWMD began to develop minimum flows for these water bodies.

22. Because groundwater withdrawals within the adjacent SJRWMD were also affecting the MFL waterbodies[1/], DEP, SRWMD, and SJRWMD entered into an interagency agreement in 2011 to work together on water supply issues and the development of a joint regional groundwater model.

D. Development of the Minimum Flows

23. The procedural difficulties faced in establishing minimum flows affected by water uses in two water management districts eventually lead to the Legislature's creation of section 373.042(4) in 2013, which authorizes DEP to adopt relevant rules which can be applied by the water management districts without the need for their own rulemaking. In June 2013, SRWMD requested that DEP adopt minimum flows for the MFL waterbodies pursuant to the new law.

24. A gage[2/] for the Lower Santa Fe River near Fort White, and a gage for the Ichetucknee River on US 27 were selected for establishment of the respective minimum flows. The minimum flows were determined by first establishing a hydrologic baseline condition at the two gages. Then, SRWMD determined a departure from the baseline that would cause significant harm to the water resources and ecology of the area.

25. The minimum flows are expressed as stage duration curves rather than a single number, in order to account for the changes in flow that occur naturally due to seasonal, climatic, and other factors affecting rainfall.

26. Once the minimum flows were determined, SRWMD evaluated whether they are being met. It concluded that the minimum flows are not being met. Therefore, in accordance with section 373.0421(2), a recovery strategy had to be prepared and implemented.

E. The Recovery Strategy

27. A recovery strategy is a plan for achieving a return to adopted MFLs and will generally include plans for developing new water supplies and implementing conservation and efficiency measures. See § 373.0421(2), Fla. Stat. The practice of the water management districts has been to also adopt regulatory measures that are used in the review of consumptive use permits

as part of a recovery strategy. See, e.g., Fla. Admin. Code R. 40D-80.074.

28. That practice was followed for the MFL water bodies. The Recovery Strategy includes planning, water conservation, water supply development, and water resource development components. These components comprise the non-regulatory portion of the Recovery Strategy. Section 6.0 of the Recovery Strategy, entitled "Supplemental Regulatory Measures," is the regulatory portion and is incorporated by reference in proposed rule 62-42.300(1)(d).

29. The Recovery Strategy is to be implemented in two phases and the objectives of each phase are described in Table 4-1 of the Recovery Strategy. Phase I includes adoption of supplemental regulatory measures, work with user groups to implement water conservation measures, completion of an improved regional groundwater model, and identification and investigation of water supply projects.

30. In Phase II of the Recovery Strategy, DEP plans to use the new regional model to develop long-term regulatory measures to address regional impacts to the MFLs water bodies. In addition, SRWMD and SJRWMD would develop and implement additional water resource and supply projects.

F. The Proposed Rules

31. The Proposed Rules would create three sections in a new chapter 62-42 of the Florida Administrative Code. Rules 62-42.100 and 62-42.200 set forth the scope and definitions:

> 62-42.100 Scope
>
> (1) The purpose of this chapter is to set forth Department-adopted minimum flows and levels (MFLS) and the regulatory provisions of any required recovery or prevention strategy as provided in Section 373.042(4), F.S.
>
> (2) The Department recognizes that recovery and prevention strategies may contain both regulatory and non-regulatory provisions. The non-regulatory provisions are not included in this rule, and will be included in the applicable regional water supply plans approved by the appropriate districts pursuant to Section 373.0421(2) and Section 373.709, F.S.
> [Rulemaking authority and law implemented omitted.]
>
> 62-42.200 Definitions
>
> When used in this chapter, the following words shall have the indicated meanings unless the rule indicates otherwise:
>
> (1) Flow Duration Curve means a plot of magnitude of flow versus percent of time the magnitude of flow is equaled or exceeded.
>
> (2) Flow Duration Frequency means the percentage of time that a given flow is equaled or exceeded.
> [Rulemaking authority and law implemented omitted.]

32. Rule 62-42.300 is where the proposed minimum flows are set forth. The minimum flows for the Lower Santa Fe River are established in rule 62-42.300(1)(a); the minimum flows for the Ichetucknee River are established in rule 62-42.300(1)(b); and the minimum flows for 16 priority springs are established in rule 62-42.300(1)(c).

33. The minimum flows for the Santa Fe and Ichetucknee Rivers are expressed as water flow in cubic feet per second ("cfs") at various points on a flow duration curve.

34. The minimum flows for ten named springs associated with the Santa Fe River and six named springs associated with the Ichetucknee River are set forth as a "percent reduction from the median baseline flow contribution of the spring to the flow" at a particular river gage. This approach, which ties spring flow to river flow, was used by DEP because there is minimal flow data for the springs.

35. Rule 62-42.300(1)(d) adopts by reference "Supplemental Regulatory Measures," which is Section 6.0 of the Recovery Strategy.

36. Rule 62-42.300(1)(e) states that DEP, in coordination with SRWMD and SJRWMD, shall reevaluate these minimum flows after completion of the North Florida Southeast Georgia Regional Groundwater Flow Model, which is currently under development. The rule also states that DEP will "strike" rules

62-42.300(1)(a) through (d) and adopt new rules no later than three years after completion of the final peer review report regarding the new groundwater model, or by December 31, 2019, whichever date is earlier.

37. The Supplemental Regulatory Measures adopted by reference in rule 62-42.300(1)(d) are intended to provide additional criteria for review of consumptive use permit applications during Phase I. These measures would be applied to water uses within the North Florida Regional Water Supply Planning Area.

38. For the purposes of the issues raised in these consolidated cases, it is necessary to discuss three categories of permit applications and how they would be treated under the Supplemental Regulatory Measures in Phase I: (1) A new permit application that shows a "potential impact" to the MFL water bodies must eliminate or offset the potential impact; (2) An application to renew a permit, which does not seek to increase the amount of water used, would be renewed for five years no matter what impact it is having on the MFL water bodies; however, if the impact is eliminated or offset, the renewal would not be limited to five years; and (3) An application to renew a permit which seeks an increased quantity of water would have to eliminate or offset the potential impact to the MFL water bodies associated only with the increase. This category

of permits is limited to a five-year renewal unless the existing impacts are also eliminated or offset. See § 6.5(a)-(d) of the Recovery Strategy.

39. Section 6.5(e) states that existing permits that do not expire during Phase I are considered consistent with the Recovery Strategy and are not subject to modification during the term of their permits.

40. Many permits are issued for a 20-year period, so Phase I would not capture all existing permits because they would not all expire during Phase I.[3/] DEP stated that existing permits may be affected by the regulatory measures DEP plans to adopt for Phase II.

41. Section 6.5(f) of the Supplemental Regulatory Measures states that permittees are not responsible for impacts to the MFL water bodies caused by water users in Georgia, or for more than the permittee's "proportionate share of impacts." The record evidence established that the effect of Georgia water users on the MFL water bodies is small.

42. Section 6.6(b) requires permits for agricultural use in the counties surrounding the MFL water bodies to include a condition requiring participation in the Mobile Irrigation Lab (MIL) program. The purpose of SRWMD's MIL program is to improve the efficiency of irrigation systems. SRWMD provides cost-sharing in this program.

G. Whether DEP Must Adopt the Entire Recovery Strategy by Rule

43. Petitioners contend that proposed rules 62-42.100(1) and (2) enlarge, modify, or contravene sections 373.042(4) and 373.0421(2) because these statutes require DEP to adopt all of a recovery strategy by rule, not just the regulatory portion of a recovery strategy. Respondents contend that it was consistent with the law for DEP to adopt only the regulatory portion of the Recovery Strategy by rule and have SRWMD approve the non-regulatory portion and implement it through a regional water supply plan.

44. It has been the practice of the water management districts to adopt by rule only the regulatory portion of a recovery strategy and to implement the non-regulatory portion as a component of their regional water supply plans.

45. This is primarily a legal issue and is addressed in the Conclusions of Law where it is concluded that DEP is not required to adopt the entire Recovery Strategy by rule.

H. Whether SRWMD Must Adopt the Recovery Strategy By Rule

46. Petitioner Still challenged SRWMD's approval of the Recovery Strategy as violating the rulemaking requirements of section 120.54. However, Petitioner Still presented no evidence in support of his claim that the Recovery Strategy contains

statements that meet the definition of a rule, but were not adopted as rules.

I. Whether the Non-Regulatory Portion of the Recovery Strategy Will Prevent Recovery

47. The Alliance claims that there are flaws in the non-regulatory portion of the Recovery Strategy that was approved by SRWMD, primarily related to the estimate of flow deficits in the MFL water bodies and the corresponding amount of water that must be returned to the system to achieve the minimum flows.

48. There is unrefuted record evidence indicating that SRWMD did not account for consumptive use permits issued in the last three or four years. Therefore, the Recovery Strategy probably underestimates the flow deficits in the Lower Santa Fe and Ichetucknee Rivers and the amount of water needed to achieve the minimum flows.[4/] However, as explained in the Conclusions of Law, the Alliance cannot challenge the non-regulatory portion of the Recovery Strategy in this proceeding.

49. The Recovery Strategy, including the non-regulatory portion approved by SRWMD, is in Phase I. SRWMD can revise the Recovery Strategy at any time, and in Phase II can do so with the improved analysis made possible with the new regional model. As explained in the Conclusions of Law, the non-regulatory portion does not have to achieve recovery in Phase I.

J. Whether the Minimum Flows are Based on the Best Information Available

50. Petitioner Still contends that the minimum flows are not based on the best information available as required by section 373.042(1)(b). He claims that the wrong method was used to estimate streamflow, the modeling was based on a false assumption about the relationship between groundwater levels and river flows, the relationship between withdrawals and flows was not properly accounted for, withdrawals and other anthropogenic impacts were not properly distinguished, tailwater effects were not properly accounted for, and the wrong period of record was used.

51. Petitioner Still's arguments in this respect are based largely on his own opinions about the quality and significance of the technical data that was used and how it affects the modeling results used in establishing the minimum flows. Petitioner Still does not have the requisite expertise to express these opinions and he did not get expert witnesses at the final hearing to agree with his claims. Petitioner Still does not have an expertise in modeling to express an opinion about the ability of the model to use particular data or how the model accounts for various surface and groundwater phenomena.

52. Petitioner Still failed to prove that the minimum flows are not based on the best available information.

K. Whether the Proposed Rules Are Vague

53. Petitioner Still contends the Proposed Rules are invalid because they use terms that are vague. Some of the terms which Petitioner Still objects to are the same or similar to terms commonly used in other environmental regulations, such as "best available information," "impact," "offset," and "eliminate." The term "potential impact" is not materially different than the term "impact."

54. The term "best available modeling tools" is not vague. It reflects the recognition that, like best available information, hydrologic models and technical information are continually being created and updated.

55. Petitioner Still contends that the definitions of "Flow Duration Curve" and "Flow Duration Frequency" in proposed rules 62-42.200(1) and (2), respectively, are vague because they do not state whether "synthetic" data may be used in the production of the flow duration curve, or that they are based on a specific period of record.

56. Synthetic data are numeric inputs used to account for missing data and are created by extrapolating from existing data. As an example, they can be used to satisfy a model's need to have a water flow entry for every month in a multi-year period being analyzed when there is no actual data available for some of the months. The use of synthetic data is a regular and

accepted practice in modeling and does not have to be mentioned in the rule.

57. Flow duration curves and flow duration frequencies are calculated from data covering specific periods of record. Although the definitions of these two terms in proposed rule 62-42.200 could contain more information than is provided, the proposed definitions are not inaccurate. They are not vague.

58. Petitioner Still contends that proposed rule 62-42.300(1)(a) is vague because it establishes the minimum flows for the Santa Fe River at a location without precisely identifying the location. The record shows that the reference in proposed rule 62-42.300(1)(a) to "the Santa Fe River near Ft. White, FL" is the actual name of the United States Geological Survey flow gage that has been in use for many years.

59. Furthermore, proposed rule 62-42.300(1)(c), which establishes the minimum flows for the priority springs, refers to "the respective river gages listed in paragraphs 62-42.300(1)(a) and (b)." Therefore, it is made clear that the reference to "the Santa Fe River near Ft. White, FL" in proposed rule 62-42.300(1)(a) is a reference to a river gage. The rule is not vague.

60. Petitioner Still asserts that the minimum flows in proposed 62-42.300(1) are vague because they do not identify the period of record that was used in deriving the flow duration

curves which are used in the rule. He compared the wording in the proposed rule to SRWMD's existing rule 40B-8.061(1), which identifies the technical report from which the flow duration curve in that rule was derived.

61. A general description of flow duration curves is found in "Minimum Flows and Levels for the Lower Santa Fe and Ichetucknee River and Priority Springs" dated November 22, 2013 ("MFL Technical Document"), at page 3-6:

> They show the percent of time specified discharges were equaled or exceeded for a continuous record in a given period. For example, during the period 1932 to 2010, the daily mean flow of the Santa Fe River near Fort White (Figure 3-2) was at least 767 cfs, 90 percent of the time. The curves are influenced by the period of record used in their creation, but for comparison purposes between different scenarios over a fixed time period they are extremely useful. [Emphasis added.]

However, proposed rule 62-42.300(1) does not give the period of record for the flow duration curves that will be used to determine compliance with the minimum flows for the Lower Santa Fe and Ichetucknee Rivers.

62. Respondents argued that identifying the period of record is unnecessary because anyone interested in knowing the period of record or anything else pertaining to how the flow duration curves were produced could refer to the MFL Technical Document.

63. This is not a situation where a specific number and unit, such as 100 cfs, has been established as a criterion based on technical analyses that can be found in documents. In such a case, the technical documents are not needed to determine compliance with the criterion; they simply explain why the criterion was selected. In the case of a flow duration curve, however, the period of record for the data to be used must be known to determine compliance.

64. For example, proposed rule 62-42.300(1)(a)1. would establish the following criterion: "3,101 cubic feet per second (cfs) for a flow duration frequency of five percent." Five percent of what? Five percent of what data set? Data from what time period? Must the same synthetic data be used?

65. The rule does not inform persons subject to the rule what data SRWMD will use to determine compliance. They would not know how to calculate flow duration frequencies without reviewing the MFL Technical Document. Because the minimum flows are not completely identified in the rule, they are vague.

L. Whether a Minimum Flow Should be Established for Each Priority Spring

66. Petitioner Still contends that the Proposed Rules are invalid because minimum flows are not established for each priority spring, which causes them to be unprotected. He claims

that each spring needs its own minimum flow "that takes into account the surface and ground water inputs to its flow."

67. DEP and SRWMD presented evidence that establishing minimum flows for each spring was impracticable because there were insufficient data for the springs. Petitioner Still did not refute this evidence.

M. Whether the Proposed Rules Allow Further Degradation of the MFL Water Bodies

68. The Alliance contends that the Proposed Rules must reduce permitted withdrawals in Phase I and must require monitoring of water use by agricultural water users, but it did not present evidence that these alternative regulatory measures are practicable in SRWMD in Phase I.

69. The Alliance did not show there are permitting mechanisms that have been used by other water management districts as part of the first phase of a recovery strategy that are practicable for use in SRWMD and would be more effective. The only evidence presented on the subject of what regulatory measures other water management districts have adopted as part of a recovery strategy pertained to the Southwest Florida Water Management District ("SWFWMD"). That evidence showed that SWFWMD took a similar approach of allowing existing permitted uses to continue their water withdrawals while new water supplies and conservation mechanisms were developed.

70. The Alliance contends that the Supplemental Regulatory Measures do not prevent further degradation because there are projected to be numerous, new agricultural water uses in Phase I. However, under section 6.5(b), new water uses will not be allowed to adversely impact the MFL water bodies. The Alliance makes a similar argument regarding existing agricultural water users who will request an increase in water. Under section 6.5(c), increases in water use will not be allowed to adversely impact the MFL water bodies.

N. Whether the SERC and Revised SERC are Good Faith Estimates and Whether the Proposed Rules Impose the Lowest Cost Regulatory Alternatives

71. Petitioner Still failed to meet his burden under section 120.56(2) of going forward with evidence to support his allegations that DEP's original SERC or the revised SERC were not good faith estimates of regulatory costs associated with the Proposed Rules. The record evidence shows they are good faith estimates.

72. He also failed to meet his burden under section 120.56(2) of going forward with evidence to support his allegations that the objectives of the law being implemented could be substantially accomplished by a less costly regulatory alternative.

CONCLUSIONS OF LAW

A. Standing

73. Any person substantially affected by an existing or proposed rule may seek an administrative determination of the invalidity of the rule. See § 120.56(1)(a), Fla. Stat.

74. The burden is on the petitioner to prove standing. Dep't of Health and Rehab. Servs. v. Alice P., 367 So. 2d 1045, 1052 (Fla. 1st DCA 1979).

75. Generally, to establish standing a party must show the challenged agency action will result in a real or immediate injury in fact and the alleged interest is within the zone of interest to be protected or regulated. See Jacoby v. Fla. Bd. of Med., 917 So. 2d 358, 360 (Fla. 1st DCA 2005).

76. A less demanding test for standing is applicable in rule challenge cases than in licensing cases. See Fla. Dep't of Prof. Reg. v. Fla. Dental Hygienists Ass'n, 612 So. 2d 646, 651-52 (Fla. 1st DCA 1993). In a rule challenge, the alleged injury does not have to be immediate. See NAACP v. Fla. Bd. of Regents, 863 So. 2d 294, 300 (Fla. 2003).

77. Petitioner Still is substantially affected by the Proposed Rules and has standing as a petitioner.

78. No Intervenor's standing to participate in these consolidated cases was contested. The parties' stipulated facts

show the Intervenors are substantially affected by the Proposed Rules. The Intervenors have standing to participate as parties.

79. For an association to establish its standing, it must demonstrate that a substantial number of its members are substantially affected by the rule, that the subject matter of the rule is within the association's general scope of interest and activity, and that the relief requested is appropriate for the association to receive for its members. Fla. Home Builders Ass'n v. Dep't of Labor & Emp. Sec., 412 So. 2d 351, 353-54 (Fla. 1982).

80. The Alliance satisfied the requirements for association standing.

81. FWF was dismissed as a party at the beginning of the final hearing, following legal argument and an oral proffer by FWF, because FWF was not prepared to prove that a substantial number of its members are substantially affected by the Proposed Rules. FWF was recently dismissed as a party for a similar reason in the case of Florida Wildlife Federation, Inc. v. CRP/HLV Highlands Ranch, LLC., Case No. 12-3219 (Fla. DOAH Apr. 11, 2013; Fla. DEP Jun. 13, 2013)(Nineteen members is not a substantial number of FWF's members). It is apparent FWF believes that because its mission is to protect natural resources, and the challenged agency action affects natural resources, FWF's standing should be satisfied by proof of these

facts. However, the courts have not applied a "mission test" for associational standing. The test for associational standing is to prove that a substantial number of the association's members would have standing as individuals to contest the agency action.

82. Referring to the holdings in cases that have dealt with association standing, JEA suggested in its Motion for Summary Final Order that a substantial number of FWF's total membership of 11,788 would be over a thousand persons. The inconveniences to parties and courts associated with producing at trial or hearing a thousand witnesses or even a few hundred witnesses are obvious.[5/] It is unlikely the courts intended by their decisions in these cases to require large associations to prove standing through the testimony of hundreds of witnesses.[6/]

83. The membership list proffered by FWF shows there are 457 FWF members who reside in the six counties surrounding the MFL waterbodies. This "local" membership may be a reasonable focus in the "substantial number" analysis for an association with statewide, nationwide, or worldwide membership. However, FWF's proffer showed it was not prepared to prove that a substantial number of its members living in the vicinity of the MFL water bodies are substantially affected by the Proposed Rules. It failed to prove its standing.[7/]

B. General Rule Challenge Principles

84. A proposed rule is not presumed to be valid or invalid. § 120.56(2)(c), Fla. Stat. A person challenging a proposed rule must state "with particularity" the reasons that the proposed rule is an invalid exercise of delegated legislative authority. § 120.56(2), Fla. Stat. At hearing, the petitioner has the burden of going forward with evidence to support the allegations in the petition. Id. If the challenger meets this burden, the burden of persuasion shifts to the agency to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority "as to the objections raised." Id.

85. The validity of a rule does not turn on whether it represents the best means to accomplish the agency's purposes. See Bd. of Trs. of Int. Imp. Trust Fund v. Levy, 656 So. 2d 1359, 1364 (Fla. 1st DCA 1995).

86. To the extent that an agency's rule is based on an interpretation of a statute that the agency administers, broad discretion and deference is accorded the agency's interpretation and it should be upheld when it is within the range of permissible interpretations. See Bd. of Podiatric Med. v. Fla. Med. Ass'n, 779 So. 2d 658, 660 (Fla. 1st DCA 2001).

87. An agency's interpretation of its own rules is also entitled to great weight and should not be overturned unless it

is clearly erroneous. Falk v. Beard, 614 So. 2d 1086, 1089 (Fla. 1993).

88. Deference to the agency's interpretation is especially appropriate when the agency has made scientific determinations within its area of special expertise. See Island Harbor Bch. Club, Ltd. v. Dep't of Nat. Res., 495 So. 2d 209, 223 (Fla. 1st DCA 1986).

C. Whether DEP must Adopt by Rule the Entire Recovery Strategy

89. Petitioners contend that rules 62-42.100(1) and (2) enlarge, modify, or contravene sections 373.042(4) and 373.0421(2) because these statutes require DEP to adopt all of a recovery strategy by rule, not just the "regulatory provisions" of a recovery strategy.

90. The statutes do not expressly prohibit DEP from adopting less than all of a Recovery Strategy by rule, but Petitioners argue that the wording of the statutes shows a plain meaning that the entire Recovery Strategy must be adopted by rule. Section 373.042(4) states:

> A water management district shall provide the department with technical information and staff support for the development of a reservation, minimum flow or level, or recovery or prevention strategy to be adopted by the department by rule.

91. The principal object of this sentence is the requirement for water management districts to provide information and support to DEP. The principal object is not to require rulemaking. The required assistance is for things "to be adopted by the department by rule." Standing alone, the wording does not foreclose DEP's interpretation that the required assistance is for whatever DEP intends to adopt by rule.

92. Section 373.0421(2) states "the department or governing board, as part of the regional water supply plan described in s. 373.709, shall expeditiously implement a recovery or prevention strategy." Standing alone, this wording also fails to give a definitive answer to the question.

93. However, sections 373.042(4) and 373.0421(2) do not stand alone. Their meaning is affected by the provisions of section 373.709, which pertains to regional water supply plans. Such plans are required to include MFLs and recovery strategies. See § 373.709(2)(c) and (g), Fla. Stat.

94. Section 373.709(5) provides that the approval of a regional water supply plan by the water management district is not subject to the rulemaking requirements of chapter 120. See § 373.709(5), Fla. Stat. This likely indicates the Legislature's acknowledgement that a regional water supply plan, which is to contain "projections" and "alternatives," does not

fit the definition of a rule. However, section 373.709(7) states that the plan may not be used in the review of permits "unless the plan or an applicable portion thereof has been adopted by rule." In other words, a plan is not subject to rulemaking except for that portion of the plan that will be used in the review of permits. The portion that will be used to review permits (thus meeting the definition of a rule) must be adopted pursuant to rulemaking requirements.

95. Based on the distinctions made in section 373.709, it has been the practice of the water management districts to only adopt the regulatory portion of a recovery strategy by rule, and to implement the non-regulatory portion as a component of their regional water supply plans.

96. When sections 373.042(4), 373.0421(2), and 373.709 are read together and harmonized, DEP's interpretation that it is not required to adopt the non-regulatory portion of the Recovery Strategy by rule is a reasonable interpretation.

D. Whether the Non-Regulatory Portion of the Recovery Strategy is Reviewable in this Proceeding

97. Section 373.709(5) provides that approval of a regional water supply plan is not subject to rulemaking, but that "any portion of an approved plan which affects the substantial interests of a party shall be subject to s. 120.569." Section 120.569 provides for administrative hearings

to contest agency action. The Alliance did not file a petition to challenge SRWMD's approval of the Recovery Strategy pursuant to section 120.569.

98. The Alliance contends that section 373.709(5) is inapplicable because SRWMD has not adopted a regional water supply plan, so the Recovery Strategy approved by SRWMD is not part of a regional water supply plan. Whether section 373.709(5) is applicable is debatable because MFLs and recovery strategies are required components of a regional water supply plan. However, regardless of whether 373.709(5) is applicable to SRWMD's approval of the Recovery Strategy, section 120.569 is applicable. Section 373.709(5) did not create a remedy for challenging a water management district's action which affects a person's substantial interests; it simply identified the remedy that is available.

99. Under chapter 120, all agency action, whether by rule or order, is reviewable upon timely petition by a substantially affected person. If SRWMD's approval of the non-regulatory portion of the Recovery Strategy affected the Alliance's substantial interests, the Alliance could have challenged the approval pursuant to section 120.569 and moved to consolidate that case with its challenge to the Proposed Rules.

100. The Alliance did not file a petition to contest SRWMD's action. Therefore, the Administrative Law Judge cannot

consider whether the non-regulatory portion of the Recovery Strategy is consistent with the law implemented.

E. Whether the Proposed Rules Contravene the Statutes or are Arbitrary Because they Allow Further Degradation of the MFL Water Bodies

101. Section 120.52(8)(c) provides that a rule is an invalid exercise of delegated legislative authority if it enlarges, modifies, or contravenes the law implemented.

102. Section 120.52(8)(e) provides that a rule is invalid if it is arbitrary or capricious. A rule is "arbitrary" if "it is not supported by logic or the necessary facts" and it is "capricious" if "it is adopted without thought or reason or is irrational." Id. If there is any evidence to show a rational basis for the rule, the rule is not arbitrary or capricious. Levy at 1362. A rule is not arbitrary or capricious if it is a product of a process involving the thoughtful balancing of various factors. Id. at 1363.

103. The flush left paragraph of section 373.0421(2) states:

> The recovery or prevention strategy shall include phasing or a timetable which will allow for the provision of sufficient water supplies for all existing and projected reasonable-beneficial uses, including development of additional water supplies and implementation of conservation and other efficiency measures concurrent with, to the extent practical, and to offset, reductions in permitted withdrawals, consistent with the provisions of this chapter.

104. It is significant that the law requires that a water body's recovery be accomplished in phases. It logically follows that recovery does not have to be accomplished in the first phase.

105. It is also significant that the express legislative objective for phasing is to avoid the reduction of permitted withdrawals until such reductions can be offset by new water supplies and/or conservation and other efficiency measures, "to the extent practicable."

106. The Alliance argues that the Proposed Rules must "take up the slack" caused by flaws in the non-regulatory portion of the Recovery Strategy by immediately reducing permitted withdrawals. That is not a legal argument. Section 373.0421(2) requires a recovery strategy, as a whole, to achieve recovery and it would be contrary to the law for DEP to attempt to achieve recovery solely by reducing permitted withdrawals. In addition, the non-regulatory portion of the Regulatory Strategy is also in Phase I. It is not required to achieve full recovery of the minimum flows. Although it sets targets for full recovery, those targets can be revised at any time to account for improved information.

107. The Alliance argues that the Proposed Rules contravene the law because they seek only to "hold the line" on impacts rather than make progress toward recovery. However,

there is no wording in the statutes that indicates preventing further impacts is not an acceptable objective for Phase I regulatory measures.

108. The Alliance claims the Proposed Rules will not hold the line on degradation because of the consumptive use permits that have been issued since 2010 and the projected new permits that will be issued or renewed with increases. The Proposed Rules cannot hold the line until they go into effect. When the Proposed Rules go into effect, they will prevent new water uses and increases in water use from harming the MFL water bodies.

109. The Alliance did not prove there would be no progress toward recovery in Phase I when the Recovery Strategy is considered as a whole. The Alliance did not prove that the Supplemental Regulatory Measures prevent recovery.

110. The Alliance failed to prove that the Proposed Rules contravene the law implemented or that they are arbitrary or capricious.

F. Whether the Proposed Rules Contravene the Law Implemented Because they Exempt Impacts Caused by Georgia Water Users.

111. Section 6.5(f) of the Supplemental Regulatory Measures states:

> Nothing contained in this Section shall be construed to require a permittee in Florida to be responsible for recovery from impacts to an MFL water body from water users in Georgia, or in any case to be responsible

> for more than its proportionate share of impacts to an MFL water body that fails to meet the established minimum flow or level.

The Alliance described this as an "exemption" that contravenes section 373.042 because the statute does not provide for such an exemption.

112. The Alliance's argument seems to be based on the belief that section 6.5(f) would prevent recovery because if the impact of Georgia water users is not offset, the flows in the MFL water bodies would remain below the minimum flows. However, to have that effect, section 6.5(f) would have to state that Florida water users are only responsible for their proportionate share of the water deficit below the minimum flow. Instead, the section uses the phrase "proportionate share of impacts to an MFL water body."

113. Even under the Alliance's apparent interpretation of the section, it would not contravene the law implemented because the law allows recovery to be achieved in phases.

G. Summary

114. It is obvious that the Alliance wants DEP and the SRWMD to be more aggressive in Phase I, but its claim that the Supplemental Regulatory Measures contravene the law implemented is not based on section 373.0421(2), which is the only place where the Legislature describes a recovery strategy. Section 373.0421(2) does not show a legislative intent that recovery

strategies should be aggressive in the first phase. It clearly does not show a legislative intent for recovery strategies to be aggressive in reducing permitted withdrawals in the first phase.

115. Section 373.0421(2) also states that recovery is to be achieved "as soon as practicable," but the Alliance presented no evidence on the subject of what is practicable.

116. DEP probably has discretion to do more under the law being implemented, but the Alliance did not prove that the law requires DEP to do more.

H. Whether the Proposed Rules Are Vague

117. Section 120.52(8)(d) provides that a rule is an invalid exercise of delegated legislative authority if it is vague, fails to establish adequate standards for agency decisions, or vests "unbridled discretion" in the agency.

118. Vagueness requires a determination that the rule forbids or requires the performance of an act in terms that are so vague that persons of common intelligence must guess at its meaning and differ as to its application. S. Fla. Water Mgmt. Dist. v. Charlotte Cnty., 774 So. 2d 903, 915 (Fla. 2d DCA 2001).

119. The field of environmental regulation has been acknowledged in several court decisions as one requiring rules that allow flexibility in dealing with the "infinite variety" of situations that can occur. See Avatar Dev. Corp. v. State, 723

So. 2d 199, 207 (Fla. 1998). Flexibility to administer a legislatively articulated policy is essential to meet the complexities of our modern society. Albrecht v. Dep't of Envtl. Reg., 353 So. 2d 883 (Fla. 1st DCA 1977), cert. denied, 359 So. 2d 1210 (Fla. 1978); Brewster Phosphates v. State, Dep't of Envtl. Reg., 444 So. 2d 483 (Fla. 1st DCA), rev. denied, 450 So. 2d 485 (Fla. 1984).

120. General terms such as "harmful" or "significant" pollution are a practical necessity in regulating complex subjects. Cross Key Waterways v. Askew, 351 So. 2d 1062, 1069 (Fla. 1st DCA 1977), approved, 372 So. 2d 913 (Fla. 1978); Watson v. City of St. Petersburg, 489 So. 2d 138 (Fla. 2d DCA), rev. denied, 494 So. 2d 1153 (Fla. 1986).

121. The evidence demonstrated that, except with respect to the description of the flow duration curves in proposed rules 62-42.300(1)(a) and (b), the terms in the Proposed Rules which Petitioner Still contends are vague reflect the need for scientific judgment in making permitting decisions that involve the complexities inherent in natural systems. Dr. Still did not prove these terms are vague.

122. By omitting the period of record for the flow duration curve and the synthetic data used to generate the curve or, alternatively, a reference to the technical report where the

information can be found, the minimum flows in proposed rule 62-42.300(1) are not adequately described. They are vague.

I. Unpromulgated Rule Challenge

123. Any person substantially affected by an agency statement may seek an administrative determination that the statement violates the rulemaking requirements of section 120.54(1)(a).

124. Petitioner Still failed to prove that the Recovery Strategy approved by SRWMD violates section 120.54(1)(a). The Recovery Strategy includes the Supplemental Regulatory Measures, which meet the definition of a rule, but they were adopted by DEP in conformance with section 120.54(1)(a).

125. Petitioner Still failed to prove that the non-regulatory portion of the Recovery Strategy included statements that required rulemaking.

J. Whether the Proposed Rules Are Invalid Because DEP did not Respond to Petitioner Still's Second LCRA

126. A proposed rule is invalid under section 120.52(8)(f) if it imposes regulatory costs which could be reduced by adoption of less costly alternatives that substantially accomplish the statutory objectives.

127. Upon submission of a LCRA pursuant to section 120.541(1)(a), the agency must revise its prior statement and either adopt the alternative or provide a statement of the

reasons for rejecting the alternative in favor of the proposed rule.

128. A rule is invalid under section 120.52(8)(a) if the agency has materially failed to follow the applicable rulemaking procedures or requirements.

129. Section 120.541(1)(e) states that an agency's failure to respond to a LCRA is a material failure to follow the applicable rulemaking procedures or requirements.

130. On April 8, 2014, DEP published a Notice of Change regarding sections 6.5(c)ii and 6.5(d)ii of the Supplemental Regulatory Measures. In the Notice of Change, DEP gave notice that it had prepared an "updated revised" SERC pursuant to section 120.541.

131. Following the Notice of Change, Petitioner Still submitted to DEP a second LCRA. DEP rejected the second LCRA as untimely.

132. Section 120.541(1)(a) states that a substantially affected person may submit a LCRA within 21 days "after publication of the notice required under s. 120.54(3)(a)." Respondents argue there is no provision for a LCRA to be submitted in response to a Notice of Change and, because the second LCRA was submitted more than 21 days after publication of the Notice of Proposed Rule, it was untimely.

133. This issue has not previously been addressed by the courts. The issue is not as clear as Respondents suggest because, although there is no express provision for a second LCRA, the effect of not allowing a LCRA to be submitted in response to a Notice of Change is that the legislative intent to prevent agencies from imposing unnecessary regulatory costs would seem to be thwarted and may even be sabotaged by an agency's practice of waiting to put costly regulations in a Notice of Change. However, the issue need not be resolved here because a rule may not be declared invalid based on the rejection of a LCRA unless "the substantial interests of the person challenging the rule are materially affected by the rejection." See § 120.541(1)(g).

134. Petitioner Still did not demonstrate that he was materially affected by the rejection of his second LCRA. He has no water use permit that could be affected by the Supplemental Regulatory Measures that were changed. His statement that he expects to apply for a permit at some indefinite point in the future is a matter of speculation. Furthermore, the subject rules could be replaced by other rules in Phase II of the Recovery Strategy before Petitioner Still applies for a permit.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is determined that:

1. Proposed rule 62-42.100 is a valid exercise of delegated legislative authority;

2. Proposed rule 62-42.200 is a valid exercise of delegated legislative authority;

3. Proposed rules 62-42.300(1)(a) and (b) are invalid exercises of delegated legislative authority; and

4. Proposed rules 62-42.300(1)(c), (d), and (e) and the Supplemental Regulatory Measures incorporated by reference in proposed rule 62-42.300(1)(d) are valid exercises of delegated legislative authority.

DONE AND ORDERED this 11th day of September, 2014, in Tallahassee, Leon County, Florida.

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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of September, 2014.

ENDNOTES

[1/] The boundaries of the water management districts were established based on the watersheds of major surface waters. Surface watershed boundaries do not accurately describe groundwater resources or groundwater flow.

[2/] This is not a misspelling. Hydrologists have replaced the word "gauge" with "gage" for reasons not in the record.

[3/] DEP's SERC states that 230 permits are due to be renewed during 2014-2018, representing about 67 million gallons per day as an average daily rate. It is estimated that 72 of these permitted uses (about 29 percent) may be having an adverse effect on the MFL water bodies. Alliance Ex. 3, Table 2-1.

[4/] There was considerable dispute about whether a pattern (graphed data) of declining groundwater levels documented in the 2010 Water Assessment will continue through Phase I. The Alliance did not prove that the factors which affected groundwater levels in the past will remain unchanged and, therefore that the pattern of decline will remain unchanged in Phase I. However, the issue is not whether a past pattern of groundwater decline will look the same in five years. The issue is whether estimated groundwater levels will be lower than has been estimated.

[5/] A witness may name other members who go canoeing together on an affected river or attend an annual festival at the river. However, FWF did not proffer such testimony.

[6/] This discussion assumes that opposing parties will not agree to affidavits, signature petitions, or any other out-of-court statements to establish that a substantial number of an association's members are substantially affected.

[7/] FWF was represented by the same attorneys as the Alliance and its issues were identical to those of the Alliance. Therefore, its interests in the case were preserved despite its dismissal for lack of standing.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.