

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

TROPICAL AUDUBON SOCIETY, INC.,

Petitioner,

vs.

Case No. 15-3845

FLORIDA POWER & LIGHT COMPANY  
AND SOUTH FLORIDA WATER  
MANAGEMENT DISTRICT,

Respondents.

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RECOMMENDED ORDER

The final hearing in this case was held on October 13 and 14, 2015, in Miami, Florida, before Bram D.E. Canter, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner Tropical Audubon Society, Inc.:

James M. Porter, Esquire  
James M. Porter, P.A.  
9350 South Dixie Highway, 10th Floor  
Miami, Florida 33156

For Respondent Florida Power & Light Company:

Gary Perko, Esquire  
Brooke E. Lewis, Esquire  
Hopping Green and Sams, P.A.  
119 South Monroe Street, Suite 300  
Tallahassee, Florida 32301

Peter Cocotos, Esquire  
Florida Power & Light Company  
215 South Monroe Street, Suite 810  
Tallahassee, Florida 32301

For South Florida Water Management District:

Jennifer D. Brown, Esquire  
South Florida Water Management District  
Mail Stop Code 1410  
3301 Gun Club Road  
West Palm Beach, Florida 33406

STATEMENT OF THE ISSUE

The issue to be determined in this case is whether Florida Power & Light Company ("FPL"), is entitled to a water use permit issued by the South Florida Water Management District ("District") to withdraw water for use at FPL's Turkey Point Power Plant in Miami-Dade County.

PRELIMINARY STATEMENT

On June 1, 2015, the District provided notice of its intent to issue Individual Water Use Permit No. 13-05856-W to FPL. Petitions for administrative hearing challenging the proposed permit were filed by Atlantic Civil, Inc., on June 22, 2015, and by Tropical Audubon Society, Inc. ("Tropical Audubon"), on June 23, 2015. The District referred the two cases to DOAH where they were consolidated for hearing.

Respondents filed motions to strike portions of the two petitions and they were granted with respect to provisions of the petitions for hearing which claim the proposed water use cannot

be authorized except in a proceeding held pursuant to the Power Plant Siting Act ("PPSA").

On September 14, 2015, Atlantic Civil, Inc., voluntarily dismissed its petition for hearing and Case No. 15-3844 was closed.

At the final hearing, official recognition was taken of the Florida Department of Environmental Protection's ("DEP") Administrative Order of December 23, 2014 (OGC No. 14-0741), Florida Administrative Code Chapters 40E-2 and 40E-10, and the Applicant's Handbook for Consumptive Use Permit Applications within the South Florida Water Management District ("Applicant's Handbook"). Joint Exhibits J-1 through J-6 were admitted into evidence.

Tropical Audubon presented the testimony of Laura Reynolds, Tropical Audubon's Executive Director; Thomas E. Lodge, Ph.D., accepted as an expert in coastal ecology; Kirk Martin, P.G., accepted as an expert in groundwater hydrology; Phillip Coram, an Environmental Administrator with DEP, and Jefferson Giddings, Principal Scientist with the District. Tropical Audubon Exhibits T2, T12, T14-T16, and T20 were admitted into evidence.

FPL presented the testimony of Steven Scroggs, accepted as an expert in power plant engineering, design and operation; and W. Scott Burns, P.G. accepted as an expert in groundwater

hydrology and groundwater flow and transport. FPL Exhibits FPL1-FPL6, FPL8, FPL10, and FPL20-FPL23 were admitted into evidence.

The District presented the testimony of Simon Sunderland, P.G., District's Section Leader for Lower East Coast Planning, Permitting, and Compliance; and Steven Memberg, P.G., the District's Chief Scientist. District Exhibits D1-D4 and D13 were admitted into evidence.

Respondents' Joint Exhibits R-2 and R-4 were admitted into evidence.

The three-volume Transcript of the final hearing and the transcript of the August 21, 2015, motion hearing were filed with DOAH. The parties filed proposed recommended orders that were considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

##### The Parties

1. Tropical Audubon is a Florida not-for-profit corporation incorporated more than one year prior to the date FPL filed its permit application. Tropical Audubon was formed for the purpose of protecting the environment, fish and wildlife resources, and air and water quality. Its mission is to "conserve and restore South Florida's ecosystems, focusing on birds, other wildlife and their habitats for the benefit of humanity and the earth's biological diversity."

2. Tropical Audubon has approximately 465 members. More than 25 reside in Miami-Dade County. A substantial number of Tropical Audubon's members use the area near Turkey Point for recreational activities, including wildlife observation.

3. The District is a multi-purpose water management district with powers and duties set forth in chapter 373, Florida Statutes, and Florida Administrative Code Chapters 40E and 62-40.410, including powers and duties related to the regulation of consumptive uses of water. Its principal office is located at 3301 Gun Club Road, West Palm Beach, Florida.

4. FPL is a regulated public utility which provides electric service to its customers in 35 Florida counties. FPL owns and operates the Turkey Point Power Plant, an electric power generating facility located in unincorporated southeastern Miami-Dade County and within the boundaries of the District.

#### Background

5. FPL's Turkey Point property is located 25 miles south of Miami and is situated on the coastline adjacent to Biscayne Bay. The property covers about 9,400 acres.

6. The Turkey Point Power Plant consists of five electric generating units. Units 1 and 2 are gas and oil-fired boilers. Unit 2 has been decommissioned. Units 3 and 4 are nuclear units. Unit 5 is a combined cycle gas turbine unit.

7. Construction of Units 1, 2, 3, and 4, as well as the Turkey Point Cooling Canal System ("CCS"), predated the enactment of the PPSA. However, Units 3 and 4 were certified under the PPSA in 2008 when they were updated to increase their steam-electric generating capacity. Unit 5 was certified under the PPSA in 2005.

8. Units 1 and 2 originally used once-through cooling, which involved taking water from Biscayne Bay and discharging it back into the Bay. In 1971, following a lawsuit brought by the U.S. Department of Justice, FPL signed a Consent Decree that required FPL to construct the CCS, a closed-loop cooling canal system, to eliminate heated, surface water discharges to Biscayne Bay and Card Sound.

9. The CCS is a 5,900-acre network of canals which dissipate heat from the water used in the operation of Units 3 and 4, as well as Unit 1 when in operation.

10. The CCS functions like a large radiator, which uses evaporation, convective heat transfer, and radiated heat loss to lower the water temperature. Circulating water pumps provide for counter-clockwise flow of water from the discharge canal, down through the western side of the CCS, and then back up the eastern side of the CCS to the power plant. The full circuit from discharge to intake takes about 48 hours.

11. The CCS does not directly discharge to surface water, but water can enter or leave the CCS by groundwater seepage because the canals are not lined. Additions of water into the CCS include plant process water, rainfall, stormwater runoff, and groundwater seepage.

12. In addition to the Consent Decree, FPL entered into an agreement with the District's predecessor agency in 1972 to address the operation of the CCS. The agreement has been updated, with the most recent version being the Fifth Supplemental Agreement, executed in 2009.

13. Pursuant to the Fifth Supplemental Agreement, FPL implemented an extensive surface water and groundwater monitoring program in and around the CCS. Since 2010, FPL has collected monitoring data for water levels, fluid density, salt concentrations, and conductivity from 42 groundwater monitoring wells. FPL also collects water level data at seven locations within the CCS on an hourly basis.

14. In 2013 and 2014, monitoring data showed water quality decreased in the CCS, with increased salinity, algae blooms, and suspended solids in the water. Decreased water quality reduced heat dissipation, so water temperatures increased.

15. FPL was authorized by the Nuclear Regulatory Commission (NRC) to operate the CCS with water temperatures as high as 100 degrees Fahrenheit (F). In 2014, water temperatures exceeding

100 degrees caused plant shutdowns. As a result, FPL requested and the NRC allowed the maximum operating temperature of CCS water to be raised to 104 degrees.

16. Higher water temperatures cause more evaporation and because the evaporation of water leaves its salt content behind, the salinity of the water in the CCS increased.

17. Water in the CCS became "hypersaline," having chloride concentrations greater than 35 Practical Salinity Units (PSU), which is the average salinity of seawater. Because hypersaline water is denser and heavier than the naturally occurring groundwater, it sinks down through the CCS canals into the Biscayne Aquifer and down through the aquifer to a confining layer that separates the Biscayne Aquifer from the Floridan Aquifer, about 80 feet below the CCS.

18. When the hypersaline water reaches the bottom of the Biscayne Aquifer, it moves laterally in all directions. However, the primary focus of the District and the DEP has been on the western movement of the hypersaline water because of the potential harm to existing legal uses of water and offsite land uses to the west. The hypersaline "plume" has migrated two to three miles west of the CCS.

19. In August 2014, FPL requested and the District issued an emergency order to withdraw water from the L-31E Canal and discharge it to the CCS to reduce salinity and temperature. FPL



withdrew water over a 21-day period in September and October, an average of 43 mgd, and observed reductions in salinity, algae blooms, and temperatures within the CCS. With the combination of rainfall and water from the L-31E Canal, CCS salinity levels were reduced by about 20 practical salinity units (PSU).

20. When the proposed permit that is the subject of this case was challenged, FPL sought and obtained another emergency order to use water from the L-31E Canal during the 2015 rainy season (June 1 to November 30).

21. Use of water from the L-31E Canal in 2015 reduced temperature and salinity levels in the CCS. Salinity declined from 95 PSU to 60 PSU.

22. On December 23, 2014, the DEP issued an Administrative Order ("AO") which, among other things, directs FPL to submit a Salinity Management Plan with the primary goal of "reduc[ing] the hypersalinity of the CCS to abate westward movement of CCS groundwater into class G-II groundwaters of the State."

#### The Proposed Permit

23. FPL applied for the water use permit at issue in this case so it could continue to use water from the L-31E Canal for reducing temperature and salinity in the CCS.

24. The proposed water use permit would authorize FPL to pump up to 100 million gallons per day during the period June 1 through November 30 in 2015 and 2016.<sup>1/</sup>

25. The permit prohibits withdrawals during the June through November period if they would interfere with the water reservation for Nearshore Central Biscayne Bay, which was established by Florida Administrative Code Rule 40E-10.061.

26. The proposed project involves installation of three pumps and pipes to transfer water from the L-31E North Canal to the L-31E Canal where it would flow south to a point where two pumps would withdraw the water and discharge it through two pipes into the CCS.

27. The permit would allow FPL to withdraw up to 100 million gallons per day ("mgd"). The proposed permit does not identify temperature or salinity objectives, but FPL would be required to submit weekly water temperature and salinity data to demonstrate that the water use is reducing the temperature and salinity of the water within the CCS.

28. Tropical Audubon contends the proposed project is not entitled to a permit because it would harm the natural resources of Biscayne Bay, would increase saltwater intrusion, is not limited to the amount of water needed, and is inconsistent with the 2008 Certification Order and the 2014 AO.

#### Biscayne Bay

29. Biscayne Bay was a tidal estuary before human changes, as described above, reduced freshwater inflows to the Bay. Now the Bay has salinity levels characteristic of a marine lagoon.

30. Salinity levels historically varied across Biscayne Bay, but now the salinity levels are higher.

31. The species richness of Biscayne Bay has been reduced by the reduction of freshwater inflows; that is, the observed numbers of some animals and the areal extent of some plants have been reduced.

32. The reservation of water for Nearshore Central Biscayne Bay is for a geographic area which generally follows the shoreline along Biscayne Bay and extends 500 meters from the shoreline. It is a small fraction of the total area of the Bay.

33. Tropical Audubon stipulated that FPL's proposed water use would not interfere with the water reservation for Nearshore Central Biscayne Bay, but it contends the reservation does not account for all of the freshwater needs of the Bay.

34. Tropical Audubon's expert, Dr. Lodge, suggested that the areal extent of "lower salinity grass beds" would increase with fresh water inputs exceeding the water reservation, which would benefit the species that use these grass beds.

35. Neither the reservation rule nor the evidence presented by Tropical Audubon indicates what amount of freshwater is needed for all of Biscayne Bay. Tropical Audubon's position is simply that more freshwater flow into Biscayne Bay is better than less and FPL's proposed water withdrawal from the L-31E Canal will result in less freshwater reaching Biscayne Bay.

36. Respondents stipulated that a substantial number of Tropical Audubon's members have substantial interests in recreational uses in and near Biscayne Bay, but Respondents did not stipulate that the proposed project affected those interests.

37. Tropical Audubon presented little evidence to demonstrate the proposed water use could affect its members' substantial interests. Instead, it devoted almost all of its efforts at the final hearing and in its proposed recommended order to addressing matters that would not affect Tropical Audubon's members, such as saltwater intrusion or inconsistency with the Certification Order.

38. Tropical Audubon's three-part proposition for harm to the substantial interests of its members is that (1) taking fresh water out of the L-31E Canal will deprive Biscayne Bay of fresh water that would otherwise flow to the Bay; (2) there will be a resulting reduction in the biological health of the Bay; and (3) the reduction in biological health will be noticed by Tropical Audubon's members and will materially diminish their recreational enjoyment of the Bay.

39. However, Dr. Lodge, was unable to say what effect FPL's proposed water use (in two wet seasons) would have on the Bay. The effect could be de minimis. It could be undiscernible to a member of Tropical Audubon who is recreating on or near the Bay.

40. Tropical Audubon failed to prove the proposed water use would have more than a de minimis effect on the environmental resources of Biscayne Bay. Therefore, it failed to prove non-compliance with any District permit requirement applicable to protection of Biscayne Bay and its natural resources.

#### Saline Water Intrusion

41. Section 3.4 of the Applicant's Handbook requires that a water withdrawal must not cause harmful saline water intrusion.

42. The saline water interface is generally where groundwater with greater than 10,000 milligrams per liter total dissolved solids ("mg/L TDS") meets groundwater with less than 10,000 mg/L TDS.

43. Because DEP classifies groundwater with less than 10,000 mg/L TDS as G-II groundwater and groundwater with greater than 10,000 mg/L TDS as G-III groundwater, the saline water interface can also be described as the interface between G-II and G-III groundwater.

44. The location of the saltwater interface is affected by many factors, such as rainfall. "Saltwater intrusion" usually describes the human-induced landward movement of the saline water interface that has resulted from drainage structures, fresh water withdrawals, and other activities that have reduced the volume and, therefore, reduced the "push" of fresh groundwater toward the coast.

45. Saltwater intrusion is considered harmful to water resources in large part because of its effect on land uses. Saltwater intrusion prevents or makes significantly more difficult future land uses that typically require withdraw and use of fresh groundwater, such as agriculture. For existing land uses that rely on withdraw of fresh groundwater, saltwater intrusion "contaminates" the water supply and can make the land uses no longer practicable.

46. The hypersaline plume extends two or three miles west of the CCS and continues to move westward. It is pushing the saline water interface, which is now four or five miles west of the CCS, futher west. The saline water interface is moving westward at the rate of 400 to 600 feet per year.

47. The CCS is causing harmful saline water intrusion. The factual dispute in this proceeding is whether the proposed use of water from the L-31E Canal increases the current intrusion problem.

48. The parties also have a legal dispute about the scope of the District's review regarding saline water intrusion: whether the District's review is confined to the impacts of the withdrawal, itself, or whether the District must also consider the impacts of the use of the water after the withdrawal (discharging it into the CCS).

49. The criteria in the Applicant's Handbook focus the District's review on the effects of a proposed withdrawal. With regard to saline water intrusion, the District evaluates whether the withdrawal will cause lateral or vertical migration of saline water. The District determined that FPL's withdrawal from the L-31E Canal would not cause the migration of saline water. That determination was not disputed by Tropical Audubon.

50. Tropical Audubon contends the District must also determine whether FPL's use of the water--discharging it into the CCS--would cause harmful saline water intrusion by pushing the saline water interface more landward.

51. The District permit reviewer testified that, in determining whether FPL's proposed project was consistent with the public interest, he considered the expected benefits of lowering salinity and temperature in the CCS, as well as reducing the hypersaline plume and its impacts on saline water intrusion.<sup>2/</sup> As explained in the Conclusions of Law, this analyses is required to determine whether FPL's proposed water use is consistent with the public interest.

52. FPL used a water/salt budget model for the CCS to quantify the volume of water and mass of salt entering and exiting the CCS over time. The water/salt budget model was run for dry and average weather conditions and multiple withdrawal rates. In each scenario, the model results showed that the

greater the volume of water pumped into the CCS, the greater the reduction of salinity in the CCS.

53. The District performed groundwater modeling which showed that freshening of the groundwater would occur rapidly in the upper portion of the Biscayne aquifer near the CCS. The model showed no adverse impacts and some slight improvements in water quality in all areas except for one temporary effect at one monitor well.

54. Based on modeling results and monitoring well data, it was the opinion of the District's principal scientist, Mr. Giddings, that the addition of water from the L-31E Canal would not increase the western movement of the saline interface. FPL's expert hydrologist, Mr. Burns, agreed.

55. Tropical Audubon's expert hydrogeologist, Mr. Martin, opined that the addition of L-31E water into the CCS would increase the westward migration of the hypersaline water in the Biscayne Aquifer and the saline water interface. It was his opinion that the addition of freshwater into the CCS would increase the water levels and the "driving head" within the CCS and thereby increase the downward push against the hypersaline plume, pushing it westward at a greater rate. Mr. Martin did not know what the increase in the rate of western movement would be.

56. Mr. Martin conducted no modeling or other analysis to substantiate his opinion about the increase in driving head, and



it appeared he did not take into account how the driving head would be affected by reducing the density of the water in the CCS. Reducing the density of the water would offset the effects of raising the water level.

57. Mr. Martin's opinion that adding water from the L-31E Canal would push the saline water interface westward was also based on his assumption that the fresher water moving downward from the CCS would not mix with the hypersaline water. However, this opinion was not supported by modeling as was the contrary opinions of Mr. Giddings and Mr. Burns.

58. Monitoring data collected during the period in which FPL has added fresher water to the CCS indicates that mixing is occurring and that head differences in the CCS do not appear to affect chloride levels at distance.

59. FPL provided reasonable assurance that the proposed water use would not increase the rate of saline water intrusion.

Existing Legal Uses, Offsite Land Uses, and Pollution

60. Tropical Audubon does not contend the withdrawal of water from the L-31E Canal would interfere with existing legal uses of water, adversely affect off-site land uses, or cause pollution. However, similar to its claim regarding harmful saline water intrusion, Tropical Audubon claims the proposed discharge of the water into the CCS would interfere with existing legal uses of water, harm offsite land uses, and cause pollution.

These claims are derived from Tropical Audubon's belief that discharging freshwater into the CCS would increase the rate of saline water intrusion. Because Tropical Audubon failed to prove the proposed water would increase saline water intrusion, there is no need to address the derivative claims.

Conflict with the Conditions of Certification

61. Tropical Audubon asserts that the proposed water use is inconsistent with the DEP National Pollution Discharge Elimination System ("NPDES") permit for the Turkey Point Plant and with the Fifth Supplemental Agreement between FPL and the District. As explained in the Conclusions of Law, it is normally beyond the scope of a permit proceeding to claim the conditions of another permit would be violated. However, because the NPDES permit and the Fifth Supplemental Agreement are incorporated into or addressed in the 2008 Certification Order for Turkey Point, and the PPSA preempts all other environmental permitting associated with an electric power plant, it is relevant in this proceeding to determine whether the proposed water use would conflict with the conditions of certification for the Turkey Point Power Plant.

62. It is also explained in the Conclusions of Law that the Administrative Law Judge's consideration of potential conflict must be based on a conflict ascertainable from the plain meaning

of the Certification Order, NPDES permit, and Fifth Supplemental Agreement.

63. There has been no determination of conflict by the Siting Board or DEP. In fact, DEP has determined there is no conflict between the proposed water use permit and the NPDES permit.

64. The fact that the NPDES permit describes the CCS as a closed-loop system does not create an irreconcilable conflict. The requirement for a closed-loop system was to terminate a system that had surface discharges of heated water to Biscayne Bay and replace it with a system that circulates water through the power plant with no surface discharges to the Bay. The CCS would still be a closed-loop system with the additions of water from the L-31E Canal because it would still have no surface discharges to Biscayne Bay.

65. The fact that the NPDES permit does not mention the discharge of water from the L-31E Canal into the CCS does not create an irreconcilable conflict. The NPDES permit also does not address rainfall inputs to the CCS. The NPDES permit addresses industrial waste inputs. Water from the L-31E Canal, like rainwater, is not a waste input.

66. The fact that the CCS will operate differently with the addition of L-31E water does not create an irreconcilable conflict. The manner in which water from the L-31E Canal would

change the operation of the CCS is not different from the way variable rainfall constantly changes the operation of the CCS.

67. The NPDES permit does not specifically prohibit the introduction of other water into the CCS.

68. DEP determined that the addition of L-31E water would not require a modification of the NPDES permit because it would not change the effluent limits or monitoring requirements of the permit.

69. Tropical Audubon asserts that the proposed permit is inconsistent with the Fifth Supplemental Agreement between the District and FPL. It points to a requirement in the agreement to "operate the interceptor ditch system to restrict movement of the water from the cooling water system westward of Levee 31 E adjacent to the cooling water system to those amounts which would occur without the existence of the cooling canal system."

70. The interceptor ditch is a ditch running along the western border of CCS, which was intended to intercept hypersaline groundwater and prevent it from moving further westward. It has failed to prevent the western movement of hypersaline water.

71. Tropical Audubon did not show the proposed water use would affect the operation of the interceptor ditch. Therefore, Tropical Audubon failed to prove there is an irreconcilable

conflict between the proposed water use permit and the Fifth Supplemental Agreement.

Conflict with the DEP Administrative Order

72. Tropical Audubon asserts that the proposed permit is inconsistent with an AO issued by DEP in December 2014 to address CCS salinity issues. However, the AO is not yet in effect and is not a part of the 2008 Certification Order. As explained in the Conclusions of Law, FPL's compliance with the AO cannot be made a condition of compliance with the proposed water use permit.

73. Furthermore, Tropical Audubon failed to demonstrate there is a conflict between the AO and the proposed water use.

Summary

74. In summary, FPL provided reasonable assurance that the proposed water use would comply with all applicable permit criteria. Tropical Audubon did not meet its burden to prove otherwise.

CONCLUSIONS OF LAW

Standing

75. Tropical Audubon has standing to bring this challenge under section 403.412(6), Florida Statutes.

76. Tropical Audubon offered competent evidence to show how the substantial interests of its members could be affected, which is sufficient to establish association standing under chapter 120. See St. Johns Riverkeeper, Inc. v. St. Johns River Water

Mgmt. Dist., 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011); Fla. Homebuilders Ass'n, Inc. v. Dep't of Labor and Emp't Servs., 412 So. 2d. 351 (Fla. 1982). However, Tropical Audubon failed to show by a preponderance of the evidence that its members would be adversely affected.

#### Nature of the Proceeding

77. This is a de novo proceeding, intended to formulate final agency action and not to review action taken earlier and preliminarily. McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

78. An applicant is entitled to a water use permit if it provides reasonable assurance that it will comply with all applicable permitting criteria. The term "reasonable assurance" means "a substantial likelihood that the project will be successfully implemented." Metro. Dade Cnty. v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). It does not mean absolute guarantees.

#### Burden and Standard of Proof

79. Because Tropical Audubon has challenged a water use permit issued under chapter 373, Florida Statutes, the procedure described in section 120.569(2)(p), Florida Statutes, is applicable, which places the burden of ultimate persuasion upon the challenger after the permit applicant has introduced the permit file constituting the *prima facie* case.

80. The standard of proof is a preponderance of the evidence. See § 120.57(1)(j), Fla. Stat. (2015).

Permit Criteria

81. Section 373.223(1) provides that "[t]o obtain a permit pursuant to the provisions of this chapter, the applicant must establish that the proposed use of water: (a) Is a reasonable-beneficial use as defined in s. 373.019; (b) Will not interfere with any presently existing legal use of water; and, (c) Is consistent with the public interest."

82. The District implements section 373.223(1) via rule 40E-2.301(1), which provides in relevant part as follows:

In order to obtain a permit, permit renewal, or permit modification under this chapter, an applicant must give reasonable assurances that the proposed water use at the time the permit application is deemed complete:

- (a) Will not cause harmful saline water intrusion;
- (b) Will not harm offsite land uses;
- (c) Will not cause harm to wetlands or other surface waters;
- (d) Will not cause pollution of the water resources;
- (e) Is otherwise a reasonable-beneficial use as defined in Section 373.019(13), F.S., with consideration given to the factors set forth in Rule 62-40.410, F.A.C.;
- (f) Will not interfere with presently existing legal uses;

\* \* \*

(j) Is consistent with Sections 373.016 and 373.036, F.S., and otherwise is consistent with the public interest as prescribed by Chapter 373, F.S., and this chapter.

83. The District further implements the requirements of chapter 40E-2.301 via the Applicant's Handbook, which is incorporated by reference in rule 40E-2.091(1).

#### Water Quantity

84. Tropical Audubon argues that FPL failed to demonstrate its need for the amount of water requested, up to 100 mgd, because FPL did not identify any salinity or temperature goals in the CCS. However, this is a unique situation in which the withdrawal is limited to two wet seasons and the mitigative effects on saline water intrusion increase with increased freshwater volumes. It is not unreasonable for the District to allow the 100 mgd withdrawal and to require monitoring of the effects on salinity in the CCS and on saline water intrusion in the Biscayne Aquifer.

#### Saline Water Intrusion

85. Tropical Audubon's primary claim is that the proposed water use should be denied because the discharge into the CCS would cause harmful saline water intrusion. The District argues that its review of this criterion, as well as criteria regarding interference with existing legal uses of water, harm to offsite



land uses, and pollution, is confined to the impacts of the withdrawal, itself, and not the use of the water by the permittee after the water is withdrawn.

86. Tropical Audubon points to language in rule 40E-2.301 and elsewhere which it believes requires the District to consider the impacts of the intended water use, not just the withdrawal.

87. The District defines the term "water use" as "Any use of water which reduces the supply from which it is withdrawn or diverted." Applicant's Handbook, § 1.1. Even this definition of water "use" reflects a focus on the water withdrawal, rather than on how the water is used by the permittee.

88. Section 3.4 of the Applicant's Handbook is intended to implement the criteria in rule 40E-2.301 with respect to saline water intrusion. Section 3.4 defines saline water intrusion in a manner that shows it relates to the potential of the water withdrawal to affect saline water movement. Section 3.4 does not address the potential effect of the permit applicant's intended use of the water on saline water intrusion.

89. The same focus on the withdrawal of water is contained in the sections of the Applicant's Handbook that pertain to the impacts on existing legal uses, offsite land uses, and pollution. The District's interpretation of these rules has not been invalidated in any rule challenge proceeding. Nor has DEP determined that the criteria in the Applicant's Handbook are

inconsistent with state water policy pursuant to DEP's authority under rule 62-40 to review all water management rules for consistency with state water policy.

90. An agency's interpretations of the statutes it is charged with implementing, and of its own rules, are entitled to deference. See Fla. Dep't of Rev. v. Fla. Mun. Power Agency, 789 So. 2d 320, 323 (Fla. 2001); Falk v. Beard, 614 So. 2d 1086, 1089 (Fla. 1993).

91. Nevertheless, it is clear that the statutory requirement that water uses be "reasonable-beneficial" is directed to more than the withdrawal of water. "Reasonable-beneficial" is defined in 373.019(16) to require that the "purpose" of the use be both reasonable and consistent with the public interest. See also Maloney, Ausness, and Morris, A Model Water Code 170-173 (1972) (explaining the authors' intent in creating the reasonable-beneficial standard). The "beneficial" element of the reasonable-beneficial standard is related to the use of the water after it is withdrawn. There is no benefit associated with just the withdrawal of water.

92. Consistency with the public interest is a part of the reasonable-beneficial use standard and is the third prong of the "three-prong test" in section 373.223.

93. Reducing the hypersaline plume and its impacts on saline water intrusion was expressly identified at the final

hearing and in the District's proposed recommended order as a basis for the District's determination that the proposed water use was consistent with the public interest. It follows logically that, if FPL's proposed water use would have the opposite effect--increasing the hypersaline plume and its impacts on saline water intrusion--the District could not have determined that the water use was consistent with the public interest. Untenable is the proposition that chapter 373 and the rules of the District do not enable the District to prevent foreseeable harm to the water resources that will be caused by an applicant's use of water.

94. However, Tropical Audubon failed to demonstrate that the proposed water use would cause harmful saline water intrusion. Tropical Audubon did not prove the existing intrusion problem would be made worse by the proposed water use.

#### Conflict with the Conditions of Certification

95. Through the PPSA, the State preempts the regulation of electrical power plant sites. See § 403.510(2), Fla. Stat. The operation of a power plant is only subject to the conditions of certification. See § 403.511(2)(a), Fla. Stat. Modifications to the conditions of certifications can only be made pursuant to the PPSA. See § 403.516, Fla. Stat.

96. The District argued that a conflict with the Certification Order cannot be considered by the District in its

review of FPL's proposed water use. It cited legal cases holding that entitlement to a permit cannot be based on compliance with the criteria applicable to another agency's authorization. E.g., Council of the Lower Keys v. Charley Toppino & Sons, Inc., 429 So. 2d 67 (Fla. 3d DCA 1983).

97. However, this proceeding presents a different and unique situation because of the legislative mandate that only one authorization--a site certification order--shall govern the operation of a power plant. A certification order "shall be in lieu of" any water use permit required by chapter 373. See § 403.511(3), Fla. Stat.

98. In an Order issued August 28, 2015, the Administrative Law Judge ruled that:

Section X of the conditions of certification establishes "the framework for new monitoring [of the impacts of the CCS on water resources] and, as may be needed, abatement and mitigation measures, for approval of FPL's Turkey Point Units 3 and 4 Uprate Applications." The framework is a condition of certification and, therefore, has preemptive effect. The framework cannot be changed except in a PPSA proceeding.

Pursuant to Section X, the framework for monitoring and mitigating CCS impacts calls for the approval of monitoring and mitigation measures by the District, following consultation with DEP and Miami-Dade County. The proposed consumptive use permit conforms with the framework and implements the conditions of certification.

99. The August 28, 2015 Order was, in essence, a ruling that issuance of the proposed water use permit to FPL was not a *per se* violation of the PPSA. However, remaining to be determined was Tropical Audubon's claim that the water use permit is inconsistent with DEP's NPDES permit and, therefore, would be in conflict with the conditions of certification.

100. There are no reported cases that have dealt with the specific issue of how an alleged conflict with conditions of certification is to be resolved. Tropical Audubon's claim that the proposed water use permit conflicts with DEP's NPDES permit should entail a more limited review by the Administrative Law Judge than the review that would be conducted in a typical permit proceeding in which DEP is a party and will issue the final order with respect to its own permit. The review here should be akin to the review that an Administrative Law Judge can make of real property instruments when they are relevant in an administrative proceeding to show colorable rights or standing; that is, the review is limited to determining what is indicated by the plain meaning of the instrument. See e.g., Bonnie Conklin v. Putnam Cnty., Case 09-3597GM, ¶ 61 (DOAH Rec'd Order Dec. 24, 2009). If this limited review is insufficient to resolve a dispute about the intent or effect of the instrument, then the party with the burden to establish the intent or effect has failed to meet its burden of proof.

101. In this case, DEP determined that the proposed water use permit creates no conflict with the NPDES permit and Tropical Audubon failed to show there is a irreconcilable conflict.

102. Tropical Audubon also failed to establish any irreconcilable conflict with the Fifth Supplemental Agreement.

Conflict with DEP's Administrative Order

103. The AO is not a part of the 2008 Certification Order. FPL's compliance with DEP's AO is not a relevant consideration in determining FPL's entitlement to the District permit. See Council of the Lower Keys, supra.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law it is

RECOMMENDED that South Florida Water Management District issue a final order that grants the proposed Individual Water Use Permit (No. 13-05856-W) to Florida Power & Light Company.

DONE AND ENTERED this 31st day of December, 2015, in  
Tallahassee, Leon County, Florida.



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BRAM D. E. CANTER  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 31st day of December, 2015.

ENDNOTES

- <sup>1/</sup> The withdrawal in 2015 was prevented by this permit challenge.
- <sup>2/</sup> Tropical Audubon asserts that that the District did not consider the effect on saline water intrusion in its public interest analysis, but Mr. Sunderland testified otherwise at pp. 209-210.

COPIES FURNISHED:

James M. Porter, Esquire  
James M. Porter, P.A.  
9350 South Dixie Highway, 10th Floor  
Miami, Florida 33156  
(eServed)

Peter Cocotos, Esquire  
Florida Power & Light Company  
215 South Monroe Street, Suite 810  
Tallahassee, Florida 32301  
(eServed)

Erin L. Deady, Esquire  
Erin L. Deady, P.A.  
1111 Hypoluxo Road, Suite 207  
Lantana, Florida 33462  
(eServed)

Gary Perko, Esquire  
Brooke E. Lewis, Esquire  
Hopping Green and Sams, P.A.  
119 South Monroe Street, Suite 300  
Tallahassee, Florida 32301  
(eServed)

Carlyn H. Kowalsky, Esquire  
South Florida Water Management District  
Mail Stop Code 1410  
3301 Gun Club Road  
West Palm Beach, Florida 33406  
(eServed)

Jennifer D. Brown, Esquire  
South Florida Water Management District  
Mail Stop Code 1410  
3301 Gun Club Road  
West Palm Beach, Florida 33406  
(eServed)

Blake C. Guillory, Executive Director  
South Florida Water Management District  
3301 Gun Club Road  
West Palm Beach, Florida 33416-4680

Kirk Burns, General Counsel  
South Florida Water Management District  
3301 Gun Club Road  
West Palm Beach, Florida 33416-4680  
(eServed)

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.