

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

PAUL STILL,
Petitioner,

v.

SUWANNEE RIVER WATER MANAGEMENT
DISTRICT,
Respondent.

Case No. 14-1420RU
14-1421RP
14-1443RP
14-1644RP

ICHETUCKNEE ALLIANCE’S PROPOSED FINAL ORDER

The final hearing in this case 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”).

APPEARANCES

For Petitioner Ichetucknee Alliance, Inc.: Alisa A. Coe, Bradley Marshall, Monica K. Reimer, and David G. Guest, Earthjustice, 111 S. Martin Luther King, Jr. Boulevard, Tallahassee, Florida 32301. For Respondent Department of Environmental Protection: Jeffrey Brown and Benjamin Melnick, Department of Environmental Protection, 3900 Commonwealth Boulevard, MS 35, Tallahassee, FL 32399-3000. For Respondent/Intervenor Suwannee River Water Management District: Frederick T. Reeves, Frederick T. Reeves, P.A., 5709 Tidalwave Drive, New Port Richey, Florida 34562 and George T. Reeves, Davis, Schnitker, Reeves and Browning, P.A., Post Office Drawer 652, Madison, Florida 32341. For Intervenor North Florida Utility Coordinating Group, Clay County Utility Authority, and JEA: Nicolas Q. Porter and Edward de la Parte, Jr., de la Parte and Gilbert, P.A., Suite 2000, 101 East Kennedy Boulevard, Tampa, Florida 33602. For Intervenor St. Johns River Water Management District:

Vance W. Kidder, St. Johns River Water Management District, 4049 Reid Street, Palatka, Florida 32177-2529. For Intervenor Alachua County: Sylvia Torres, Alachua County, Post Office Box 5547, Gainesville, Florida 32627 and Jennifer B. Springfield, Springfield Law, P.A., Suite B, 806 Northwest 16th Avenue, Gainesville, Florida 32608. For Intervenor Gilchrist County: David M. Lang, Gilchrist County, 204 Southeast 1st Street, Trenton, Florida 32693. For Intervenor Suwannee County: James W. Prevatt, Prevatt Law Firm, P.L., 123 East Howard Street, Live Oak, Florida 32064. For Intervenor Board of County Comm'rs of Bradford County: William Edward Sexton, County Attorney, Bradford County, 945 North Temple Avenue, Starke, Florida 32091. For Intervenor Columbia County: Sidney F. Ansbacher, Upchurch, Bailey and Upchurch, P.A., Post Office Drawer 3007, St. Augustine, Florida 32085-3007 and Marlin M. Feagle, Post Office Box 1653, Lake City, Florida 32056-1653.

STATEMENT OF THE ISSUE

The issue to be determined is whether certain provisions in proposed rules of the Department of Environmental Protection which establish minimum flows and levels (“MFLs”) for the Lower Santa Fe River, the Ichetucknee River, and Associated Priority Springs, and which incorporate by reference a portion of the Suwannee River Water Management District’s Recovery Strategy for those Rivers, are invalid exercises of delegated legislative authority.

PRELIMINARY STATEMENT

The Department of Environmental Protection (“DEP”) initially noticed the proposed rules on March 7, 2014. A public hearing was conducted on April 3, 2014; and a Notice of Change was published on April 8, 2014. The Statement of Estimated Regulatory Costs was initially noticed on March 27, 2014, and a revised SERC was noticed on March 31, 2014 and again on April 8, 2014. Florida Wildlife Federation (“FWF or the “Federation”) timely filed a rule

challenge petition on April 11, 2014 which was assigned DOAH Case No. 14-1644. That petition was consolidated with an earlier filed rule challenge petition (DOAH Case No. 14-1420) on April 22, 2014. On April 25, 2014, with the consent of respondents, a timely amended petition was filed which added Ichetucknee Alliance (“IA” or the “Alliance”) as a party. Petitions to intervene were filed by North Florida Utility Coordinating Group, Clay County Utility Authority, and JEA (“NFUCG”); the St. Johns River Water Management District; the Suwannee River Water Management District (“SRWMD” or “the District”); Alachua County; Gilchrist County; Suwannee County; Board of County Commissioners of Bradford County; and Columbia County, all of which were granted intervention. The District and DEP filed motions to dismiss the FWF/IA petition for lack of standing which in the alternative requested exclusion of various categories of evidence. The motion to dismiss was denied; the motion in limine was granted in part and denied in part with an explanation of the issues that could or could not be permissibly tried in this proceeding. The Alliance and the Federation filed a Motion to File a Third Amended Petition. Respondents objected to what they perceived as illegal challenges to the Recovery Strategy, and Intervenor NFUCG objected that the Alliance’s petition was untimely. After a telephonic hearing, the motion to amend the petition was granted, accompanied by a ruling that the Alliance’s petition was timely filed pursuant to section 120.56(2)(a), Florida Statutes; that the Federation and the Alliance were not challenging the MFLs; that the Federation and the Alliance were not to be construed as challenging the validity of recovery strategy provisions in the District’s water supply plan; and that whether DEP was required to adopt the entirety of the Recovery Strategy and not just its regulatory provisions was a disputed issue of law that would be tried in the proceeding. Intervenors NFUCG, *et al.* filed a Motion for Summary Dismissal of the Federation for lack of associational standing, which

motion was granted on the first day of hearing. The case was tried on the issues set forth in the Alliance's Third Amended Petition.

The Alliance called four witnesses: John Jopling, President of the Alliance, Ken Weber, an expert in hydrogeology, Janet Llewellyn, a DEP employee, and Russell Kiger, a District employee. The Alliance offered into evidence Exhibits 1-3, 49, 51, 60A, 62, 93, 163, 167, 172C, 175, 191A, 195, and 196 and NFUCG 26, and made an offer of proof as to Exhibit 171B. Seventeen members of the Alliance testified under oath as to their use of the Rivers at issue. DEP called one witness: Janet Llewellyn, an expert in aquatic ecology, aquatic and wetland systems, water quality protection and management, and regional water supply planning, and offered into evidence Exhibits 1.9 and 3.7. The District called four witnesses: Carlos Dean Herd, John Good, an expert in civil engineering (including water resources engineering) and development of minimum flows and levels, Russell T. Kiger, and Warren Zwanka. The District offered into evidence Exhibits 1, 2, and 3. NFUCG called one witness, Ken Weber, and offered into evidence Exhibits 27, 36, 37, and 39. FWF proffered Exh. 60A which showed FWF membership by county, and proffered testimony that ten FWF standing witnesses were available to testify and that an additional 10-15 standing witnesses were available to testify if FWF could use video for their presentation. Vol. 1, pp. 40-44. At the conclusion of the petitioners' case the District made an *ore tenus* motion for involuntary dismissal which was denied. The hearing transcript was filed on July 8, 2014.

FINDINGS OF FACT

The Parties

1. Petitioner Ichetucknee Alliance, Inc. is a Florida not-for-profit organization, founded on the banks of the Ichetucknee in March 2013, for the purpose of advocating and being

a voice for the Ichetucknee River and for restoring and preserving the Ichetucknee for the members' children and grandchildren and future generations. V. 2, pp. 114-16 (Jopling); IA Exh. 51. Therefore, it is also the goal of the Ichetucknee Alliance to ensure the sustainability (quantity and quality) of the Floridan Aquifer System, the primary source of water that nourishes the Ichetucknee River. IA Exh. 51. A substantial number of the members of the Alliance use and enjoy the waters of the Ichetucknee and the Santa Fe River and associated springs for a variety of purposes including wading, boating, swimming, snorkeling, diving, canoeing, wildlife observation, and fishing. V. 2, pp. 49-56 (accepting stipulation). Members of the Alliance also participate in water quality monitoring of the springs and rivers. V. 2, pp. 122-23. Seventeen members of the Alliance testified under oath that they regularly use the Ichetucknee and Santa Fe Rivers (Lucinda Faulkner Merritt, Bob Palmer, Lynn Polk, Yolanda Jopling, John Jopling, Loye Barnard, Merrilee Malwitz-Jipson, Robert Baker, James Tatum, Charles Maxwell, Sue Karcher, Laura Dailey, Leslie Gamble, John Moran, Jim Stevenson, Lars Anderson, and Gina Alvarez). *See also* Vol. 2, p. 120 (Jopling on membership use). The District has set minimum flows for the Lower Santa Fe and Ichetucknee Rivers. Dist. Exh. 1. A minimum flow is defined by statute as the limit at which further withdrawals would be significantly harmful to the water resources or the ecology of the area. § 373.042(1)(a), Fla. Stat. The District has found that these two rivers and their associated springs have already fallen below their minimum flows and are in need of recovery. IA Exh. 2, p. 19. On the Ichetucknee and Santa Fe Rivers, low flows are linked to adverse impacts to: a) floodplain vegetation and ecological communities including hardwood swamps, Dist. Exh. 1, pp. 5-16 to 5-32; b) water quality, Dist. Exh 1, pp. 5-35 to 5-36 (finding significant correlation between increasing flows and decreasing levels of nitrate pollution on the Santa Fe); pp. 5-37 to 5-38 (finding strong positive correlation between turbidity and flow on

Ichetucknee); p. 5-37 (highest chlorophyll a values (an indicator of algal biomass) occur at low flow in Santa Fe); pp. 5-34 to 5-35 (strong correlation between low flows and color in Santa Fe); c) fish passage; Dist. Exh. 1, pp. 5-39 to 5-46; d) navigation and tubing, Dist. Exh. 1, p. 5-14; pp. 5-60 to 5-62; e) manatee passage, Dist. Exh. 1, p. 5-11; and, f) submerged aquatic vegetation, pp. 5-12; 5-61 to 5-62.

2. Respondent Department of Environmental Protection is a state agency authorized under section 373.042(1), Florida Statutes to establish a minimum flow for a surface watercourse. DEP is authorized under section 373.042(4), Florida Statutes, to adopt a minimum flow for a water body and a recovery strategy as a rule which the Districts are then required to implement without the need for additional rulemaking.

3. Respondent/Intervenor Suwannee River Water Management District is a regional governmental agency that oversees water resources in the northern part of the state. It is authorized under section 373.042(1) to establish a minimum flow for a surface water course; and is required under section 373.042(4) to both provide the Department with assistance in development of a minimum flow or a recovery strategy which is to be adopted by the Department by rule, and to apply any minimum flow or recovery strategy adopted by the Department without the District's adoption by rule of such minimum flow or recovery strategy.

4. Intervenor St. Johns River Water Management District is a regional governmental agency that oversees water resources in the northern part of the state. The area subject to the proposed rule includes portions of the St. Johns River Water Management District.

5. Intervenor Alachua County, Gilchrist County, Suwannee County, Board Of County Comm'rs of Bradford County, and Columbia County are political subdivisions of the State of Florida and lie in geographic proximity to the rivers, springs, and waters at issue.

6. Intervenors North Florida Utility Coordinating Group, *et. al.*, are a regional trade organization representing interests of public water supply utilities in North Florida; Clay County Utility Authority, and JEA are members of NFUCG. Each holds a consumptive use permit.

The Lower Santa Fe and Ichetucknee Rivers

7. The Lower Santa Fe runs for approximately 30 miles from Santa Fe River Rise Spring to its confluence with the Suwannee River. Dist. Exh. 1, p. 1-4 to 1-6. The Lower Santa Fe is fed primarily by groundwater discharge from the Upper Floridan aquifer including the baseflow provided by multiple major springs. Dist. Exh. 1, pp. 1-4; 2-9. The Lower Santa Fe River system, including its tributary, the Ichetucknee River (below S.R. 27), is an outstanding Florida water – a designation conferred on waters “with exceptional recreational or ecological significance.” Ch. 62-302.700(3), F.A.C.

8. The Ichetucknee runs for 6 miles from the Head Spring to its confluence with the Lower Santa Fe. Dist. Exh. 1, p. 1-5. Its flow is almost completely driven by springflow including that of the Head Spring and an additional eight named springs. Dist. Exh. p. 6-1.

9. The rivers’ ecological, recreational, and economic value is widely recognized. Dist. Exh. 1, p. 1-6. Both rivers flow through lands preserved for public use as part of the state park system with the rivers as their main attraction. Dist. Exh. 1, pp. 1-7, 2-25. All of the parks rely on the maintenance of water levels for recreation as well as aesthetics. Dist. Exh. 1, p. 2-25.

Minimum Flows and Recovery Strategies

10. The water management districts and DEP are authorized to establish minimum flows for surface water courses. § 373.042(1), Fla. Stat. Minimum flows “shall be the limit at which further withdrawals would be significantly harmful to the water resources of the area.” § 373.042(1)(a), Fla. Stat. If the existing flow in a water body is below the established minimum

flow, DEP or the district is required to develop a “recovery strategy” designed to “achieve recovery to the established minimum level as soon as practicable.” § 373.0421(2), Fla. Stat.

11. The proposed rule was adopted pursuant to section 373.042(4), Florida Statutes, which authorizes DEP to adopt “minimum flows and levels” and a “recovery strategy” by rule.

12. Recovery strategies must allow for provision of sufficient water supplies for all existing and future users (through development of additional water supplies and implementation of conservation and efficiency measures) that are needed to offset reductions in permitted withdrawals. § 373.042(2)(a), Fla. Stat.

13. A recovery strategy is to be implemented as part of the regional water supply plan described in chapter 373.709, Florida Statutes. That statute requires water management districts to develop regional water supply plans in regions where they determine that existing sources of water are not adequate to both supply water for all existing and future users and sustain the water resources and related natural systems for the planning period. § 373.709(1), Fla. Sta. The planning period must be at least 20 years. § 373.709(2), Fla. Stat.

14. Governing boards must approve regional water supply plans, but Governing Board approval is not subject to the rulemaking requirements of Chapter 120. § 373.709(5), Fla. Stat. However, “any portion of an approved plan which affects substantial interests of a party shall be subject to s. 120.569.” *Id.* Such plans must include both minimum flows and levels established for water resources in the region, and accompanying recovery strategies. §§ 373.709(2)(c)&(g), Fla. Stat. The District does not have an approved Regional Water Supply Plan. IA Exh. 2, p. 6 of 63 (draft to be completed in late 2015); Vol. 7, p. 805 (Herd) (same).

The District’s 2010 Assessment of the Upper Floridan Aquifer
and the Lower Santa Fe River Basin

15. The District’s last Water Supply Assessment was published in 2010. IA Exh. 2,

p. 6 of 63; IA Exh. 175 (2010 Water Supply Assessment). The purpose of the Assessment was to determine whether water demands could be met for the 2010-2030 planning period without impacting natural resources within the District. Dist. Exh. 1, p. 6-2.

16. The 2010 Water Supply Assessment was the first step in Phase I of the Recovery Strategy. IA Exh. 2, p. 81 (App. B).

17. The District used the North Florida groundwater flow model, a predictive model, to evaluate how groundwater withdrawals were affecting aquifer levels and the flows in springs and rivers. IA Exh. 175, p. 9 of 110.

18. The Assessment concluded that water resources in the eastern and northeastern portions of the District were in decline and that this trend was evident in the decline in groundwater levels of the Upper Floridan Aquifer. IA Exh. 175, p. 54 of 110. The phrase “in decline” indicates a continuing decline – not that the decline has stabilized. Vol. 3, p. 393 (Weber).

19. The District’s analysis of river and streamflows also found existing declining trends and predicted that those trends would extend into the future, finding that the Lower Santa Fe River and a number of its major springs would exceed “interim constraints,” *i.e.*, estimates of the degree of flow reduction that would result in significant harm to a river or spring, during the planning period. IA Exh. 175, pp. 44, 59-60 of 100.

20. As a result of the District’s analysis, the Lower Santa Fe Basin (including the Ichetucknee) was designated as a water supply planning region and also as a Water Resource Caution Area. Dist. Exh. 1, p. 6-2. These developments led to prioritization of work on minimum flows and levels for these water bodies. Dist. Exh. 1, p. 6-2.

21. The 2010 Assessment also projected increases in water uses for various categories

of users. As its low-range projection for agricultural demand, the District projected a zero percent increase in agricultural water use from 2010 through 2030:

For the low-range projections, agricultural demands were held at the estimated year 2005 quantities for the planning period. This decision was based on the fact that in the South Florida, Southwest, and St. John's River Water Management Districts, agricultural activities are expected to decline over the next several decades due to displacement of agricultural lands by urban development, the North American Free Trade Agreement and other global competition issues, and destructive insect and disease outbreaks.

IA Exh. 175, p. 31 of 110.

22. The District also developed a high-range agricultural demand projection for 2010-2030 planning period due to recent new and expanded agricultural operations in the District:

The low-range agricultural demands were based on the assumption that agricultural demands would not increase over the planning period. . . . Recently, however, several large agricultural operations have located or expanded their operations within the District. The agricultural high-range demand projections were developed in response to the need to account for further potential growth in the agricultural category. The high-end demands for the planning period were held to the US Geological Survey agricultural projections, which were developed in conjunction with District staff. Table 2-12 is the high-range demand projections for agriculture. The table shows an increase for the planning period of 29.3 million gallons per day, or 21.8 percent.

IA Exh. 175, p. 37 of 110.

The Lower Santa Fe and Ichetucknee MFLs and Flow Deficits

23. The District established minimum flows for the Lower Santa Fe River, the Ichetucknee River, and Associated Priority Springs on November 11, 2013. Dist. Exh. 1.

24. The minimum flows are not being set at historical flow levels. This is because the District has interpreted the term "significant harm" in the statutory definition of a minimum flow to mean that the rivers can sustain a 15% loss of habitat or resource without sustaining "significant harm." Dist. Exh. 1, p. 3-8.

25. The District then developed the minimum flows using various "metrics," such as flow needed for fish passage, flow needed to sustain floodplain vegetation, and flow needed to

sustain recreation, and calculated the minimum flow based on the allowed 15% reduction in habitat, either temporal or spatial. Dist. Exh. 1, p. 5-15 to 5-16; 5-19. Minimum flows for the springs were determined by applying a uniform percent reduction to the springs based on the median percent MFL reduction in the streamflows for the rivers. Dist. Exh. 1, p. 6-10. The District's minimum flows are reflected in proposed rule 62-42.300(1)(a), (b), & (c). The Alliance does not challenge the minimum flows contained in those proposed rules.

26. The District also established the flow "deficit" in the rivers at issue – meaning how far below the minimum flow the rivers were – as of 2010. Dist. Exh. 1, p. 6-14. As of 2010, the Lower Santa Fe River had a flow deficit of 17 cfs (11 mgd); the Ichetucknee River had a flow deficit of 3 cfs (2.0 mgd). Dist. Exh. 1, p. 6-14.

27. As a result, as of 2010, the Lower Santa Fe needed an additional 11 mgd of streamflow to return to its established MFL, and the Ichetucknee needed an additional 2.0 mgd of streamflow to return to its established MFL.

28. The District determined that both rivers are "in recovery" – meaning that they are below their established minimum flows and are in need of recovery. Dist. Exh. 1, p. 6-14; *see* § 373.0421(2)(a), Fla. Stat. This finding triggered the development of the statutorily required Recovery Strategy for the MFL water bodies. Dist. Exh. 1, p. 6-14.

The District's Recovery Strategy for the Lower Santa Fe River Basin

29. Section 373.042(4) requires the District to provide technical information to DEP for the development of a recovery strategy, and DEP actively worked on development of this Recovery Strategy as part of the chapter 120 process. Vol. 4, p. 492 (Llewellyn).

30. The District voted on and accepted the document titled "Recovery Strategy: Lower Santa Fe River Basin." Section 6.0 of this document is the "regulatory strategy" which

was incorporated by reference into DEP's MFL rule. Vol. 2, p. 186 (Kiger).

31. The document represents that it presents the method and approaches intended to recover and then maintain the streamflows and springflows in the Lower Santa Fe River Basin at established MFL levels. IA Exh. 2, p. 1.

32. The Recovery Strategy finds that the Lower Santa Fe and the Ichetucknee are dominated by springflow resulting from Upper Floridan Aquifer discharges. IA Exh. 2, p. 6.

33. The Recovery Strategy acknowledges that the 2010 Water Assessment concluded that water resources and flows in the region were declining or predicted to decline during the 2010-2030 period and that unacceptable impacts to flows in the Lower Santa Fe basin were predicted for the same time period. IA Exh. 2, p. 2.

34. It also finds that in recent years agricultural uses have increased significantly in the inland areas, and that these uses have contributed to significant regional groundwater declines which have impacted groundwater-based resources including freshwater springs and their contribution to baseflow in streams and rivers. IA Exh. 2, pp. 7-8.

35. Since it found that localized agricultural use has increased significantly, the District determined that the Recovery Strategy would be designed to address and ameliorate the effects of local groundwater withdrawals. IA Exh. 2, pp. 8-9.

36. The District's "recovery goals" are: 1) to achieve restoration of the Lower Santa Fe Rivers and their priority springs to their proposed minimum flows, and; b) to develop measures to provide sufficient water supplies for existing and projected reasonable-beneficial uses as practical. IA Exh. 2, p. 19.

37. The focus of the "first phase" of the Recovery Strategy was "implementation of preliminary regulatory measures to protect the MFL water bodies from additional harm, creation

of water resource development project concepts, and the implementation of water conservation measures.” IA Exh. 2, p. 20.

38. Rule language to implement the preliminary regulatory measures is contained in Section 6.0 of the Recovery Strategy, which DEP incorporated by reference into its MFL rule. IA Exh. 2, p. 36; Proposed Rule 62.42-300(1)(d).

39. The District described these rules as “an important interim mechanism for the prevention of additional harm to the recovering MFL water bodies while also providing protections to existing legal uses.” IA Exh. 2, p. 36.

40. When DEP’s representative was asked: “How would the Supplemental Regulatory Measures support the overall Recovery Strategy?” The answer was:

The purpose of these Phase I Regulatory Measures is basically to prevent new allocations being issued through individual permits that make the situation worse. It's basically a holding the line on individual permit allocations, to give time for the planning process that I discussed earlier to get further along.

Vol. 8, p. 996 (Llewellyn).

41. The Recovery Strategy’s Appendix A contains the actual Recovery Strategy. Appendix A is titled “Lower Santa Fe and Ichetucknee River Prevention and Recovery Strategy: Summary of Recovery Targets, Existing Projects and Programs, and Concepts with Potential Lower Santa Fe Basin Benefits.” IA Exh. 1, App. A, Table A1.

42. Table A1 is titled “Estimated Streamflow Recovery Required for LSFR (“Lower Santa Fe River”) Basin MFLs.” The first row sets out the streamflow deficits that existed in 2010 as established by the MFL report. The streamflow recovery required to meet the Lower Santa Fe MFL is 11.0 mgd and the streamflow recovery required to meet the Ichetucknee MFL is 2.0 mgd as of 2010. IA Exh. 1, App. A, Table A1.

43. The next 14 rows are estimates of projected volumes of increased water use for

various categories of SRWMD and SJRWMD users. The twelfth row (“SRWMD Ag increase”) shows the estimated increased water use due to SRWMD agricultural use is 0.0. IA Exh. 2, App. A, Table A1.

44. According to Table A1, footnote 1, the basis for the projection of zero increase in agricultural water use from 2010 through 2030 is “the low range projections from the 2010 SRWMD Water Supply Assessment,” IA Exh. 2, App. A, Table A1, n.1, which projected a zero percent increase as its low-range projection of agricultural demand based on urbanization in other water management districts, NAFTA, pests and disease. IA Exh. 175, p. 31 of 110.

45. The last row of Table A1 is “TOTAL Recovery Targets (Est. Current Recovery + Future Demand).” This is the amount of water needed to restore the system to MFL levels given the existing 2010 streamflow and the estimated increased water use during the planning period. The Total Recovery Target for the Lower Santa Fe River is set at 20.6 mgd; the Total Recovery Target for the Ichetucknee River is set at 3.3 mgd. IA Exh. 2, App. A, Table A. Vol. 3, pp. 279-80 (Weber) (table is District’s estimation of how much extra flow needs to get put back into the river systems which would then guide the District in terms of recovery).

46. Appendix A, Table A2 is titled “Conceptual Lower Santa Fe Basin Recovery Projects/Programs,” and contains eleven projects/programs which are estimated to provide 13.7 mgd benefit to the streamflow of the Lower Santa Fe River and 4.97 mgd benefit to the streamflow of the Ichetucknee River.

47. The projects listed in Appendix A, Table A2 are not projected to provide enough streamflow benefit to bring the Lower Santa Fe River out of “recovery” status, *i.e.*, (Total Recovery Target of 20.6) – (Estimated benefit of 13.7) = 6.9 mgd of additional streamflow needed to bring Lower Santa Fe back to its established MFL.

48. Tables A3 through A5 contain additional concepts and programs, but the footnote at the bottom of each of these tables states that “these and other concepts under development are not a component of the Recovery Strategy for the Lower Santa Fe Basin, but are provided here to demonstrate their potential ancillary benefits to the Lower Santa Fe MFL recovery efforts.” IA Exh. 2, App. A (Tables A3 through A5, n. ***); Vol. 9, pp. 1043-44 (Herd).

49. On its face, the Recovery Strategy (which includes only those calculations and projects set forth in Tables A1 and A2) is not designed, by itself, to achieve recovery of the Lower Santa Fe River and its priority springs.

DEP’s Proposed Rule

50. DEP proposes to adopt the District’s MFLs for the Lower Santa Fe River and the Ichetucknee River and Associated Priority Springs and the regulatory provisions (Section 6.0) of the District’s Recovery Strategy. Proposed Rule 62-42.100. DEP states in the proposed rule that it “recognizes” that recovery strategies may contain both regulatory and non-regulatory provisions and that non-regulatory provisions will not be included in the proposed rule but will be included in the regional water supply plan once it is approved. Proposed Rule 62-42.100(2).

51. The minimum flows and levels are contained in Proposed Rule 62-42.300(1)(a), (b),&(c). Proposed Rule 62-42.300(1)(d) incorporates by reference Section 6.0 of the District’s Recovery Strategy, makes the MFLs and the Section 6.0 provisions inseverable, and requires that they be construed as a whole.

52. Proposed Rule 62-42.300(1)(e) requires that the MFLs and the present status of the MFL water bodies be reevaluated after the completion of the North Florida Southeast Georgia Regional Groundwater Flow Model that is currently under development:

No later than three years from publication of the final peer review report on the North Florida Southeast Georgia Regional Groundwater Flow Model, or by December 31, 2019,

whichever is earlier, the Department shall:

1. Publish a Notice of Proposed Rule to strike paragraphs 62-42.300(1)(a) through (d), F.A.C., and re-propose for adoption Minimum Flows and Levels for the Lower Santa Fe and Ichetucknee Rivers and Associated Priority Springs and any associated recovery or prevention strategies; and
2. Adopt the proposed rule in accordance with the timeframes provided in section 120.54(3), F.S.

53. DEP has never before adopted an MFL. Vol. 8, p. 985 (Llewellyn).

The Regulatory Provisions – Section 6.0 of the Recovery Strategy

54. Section 6.0 is titled “Supplemental Regulatory Measures.” These measures are designed to prevent the permitting of additional quantities of water under the expectation that permitting additional quantities would produce additional harm. Vol. 4, pp. 498-99 (Llewellyn).

55. Section 6.0.5(e) addresses existing permitted uses:

e) Existing permitted uses: Existing permitted uses shall be considered consistent with the Recovery Strategy provided the permittee does not exceed its permitted quantity. Such permits shall not be subject to modification during the term of the permit due to potential impacts to the MFL water bodies unless otherwise provided for in rule revisions pursuant to Rule 62-42.300(1)(e), F.A.C. Nothing in this section shall be construed to alter the District’s authority to enforce or modify a permit under circumstances not addressed in this provision.

56. Specifically, section 6.0.5(e) allows existing permitted uses to continue in effect, up to their full permitted quantity, regardless of their impact on the MFL water bodies; it does not allow those permits to be called back or opened up until the MFL is revisited. Vol. 4, pp. 494-95 (Llewellyn).

57. Section 6.0.5(d)(ii) addresses renewals and modifications of permits requesting increased water allocations:

Renewal applicants that demonstrate a potential impact to the MFL water bodies based on the requested allocation shall be considered consistent with the Recovery Strategy and shall be issued a permit for a duration of no more than five years provided the applicant meets all other existing conditions for issuance. If potential impacts to the MFL water bodies will be eliminated or offset, the five year permit duration limitation under this subparagraph shall not apply. Permits issued for a duration longer than five years

must include the necessary actions to provide for elimination or offset of impacts to the MFL water bodies, and a schedule for implementation.

58. Specifically, Section 6.05(d)(ii) allows for five-year renewals of existing permitted quantities with no additional criteria even though those permits demonstrate a potential to impact the MFL water bodies. Vol. 4, p. 498 (Llewellyn).

59. DEP made a policy decision that Section 6.0 would place no additional restrictions on general permits currently authorized by District Rules. Vol. 8, pp. 998-99 (Llewellyn).

60. Under Section 6.0.6(a) new permittees in the Lower Santa Fe Basin area agree to participate in a Mobile Irrigation Lab (MIL) program and allow access to their property for the purpose of conducting an evaluation at least once every five years.

61. However, neither Section 6.0.6(a) nor any other provision in Section 6.0 imposes any kind of conservation measures on existing users, Vol. 4, pp. 530-31 (Llewellyn), even though agricultural water conservation has been identified as a major area where reduction of groundwater withdrawals could be achieved. Vol. 8, p. 997 (Llewellyn).

62. Section 6.0.5(f) exempts permittees in Florida from being responsible for recovery from impacts to the MFL water bodies from water users in Georgia.

DEP's Explanation of its Rulemaking

63. The proposed rule itself is not a “recovery strategy” because it does not provide for recovery – it is designed to hold the line on additional harm – not to improve the MFL’s condition. Vol. 8, p. 996 (Llewellyn).

64. DEP asserted that adoption of a “maintain the status quo” strategy was permissible based on its interpretation of section 373.0421, which anticipates a phased in recovery strategy. Vol. 8, pp. 959-61 (Llewellyn). Based on that interpretation, DEP explained

that it is authorized to adopt a “regulatory portion” of a recovery strategy under 373.042(4) that allows significant harm to continue while it relies upon the provisions of the Recovery Strategy itself to achieve the recovery required by the statute. Vol. 8, p. 962-66; 983-84 (Llewellyn).

65. According to DEP, the harmful withdrawals are allowed to continue because they are consistent with the Recovery Strategy which is designed to achieve recovery over the long-term. Vol. 6, p. 752 (Llewellyn).

66. In short, the regulatory strategy is to prevent additional harm; the overall Recovery Strategy “is the tool by which [DEP] would seek to achieve recovery.” Vol. 4, p. 499 (Llewellyn).

DEP’s Statement of Regulatory Costs

67. As required by statute, DEP produced a Statement of Regulatory Costs for the proposed rule with the assistance of the District. IA Exh. 3; Vol. 8, p. 1007 (Llewellyn). The purpose of an SERC was to estimate the economic effects of the proposed rule. Vol. 8, p. 1007 (Llewellyn).

68. As part of this analysis, DEP/District analyzed agricultural consumptive water use permit renewals and new permit applications. IA Exh. 3, pp. 31-42.

69. In conducting this analysis, DEP noted the existence of a trend in which a “significant portion of renewing consumptive use permits applicants in SRWMD has requested increases in allocations in recent years.” IA Exh. 3, p. 33 of 80.

70. Based on its review of actual 2013 permitting data, DEP/SRWMD determined that, in fact, 44% of renewal applications were requesting an increase in allocation and of those requesting an allocation, the average increase requested represented a 33% increase in individual water use. IA Exh. 3, pp. 33-34 of 80.

71. In its analysis of new permit applicants, DEP/SRWMD used the 2010 Water Supply Assessment's projections to analyze impacts on new commercial/industrial uses, public water supply uses, and recreational uses *but not* on agricultural uses. IA Exh. 3, pp. 38-39 of 80.

72. Instead, because of the recent trend, DEP/SRWMD again used actual 2013 agricultural water use permitting data, and found that, in 2013 alone, it had issued 80 new agricultural water use permits totaling 23 mgd (at an average daily rate) of permitted water use District-wide. IA Exh. 3, pp. 39-40 of 80.

73. DEP/SRWMD estimated that of the 80 new CUPs issued for agricultural use in 2013, 8 would have been required to produce offsets had the proposed rule been in effect, and those 8 permits represented 2.2 mgd of permitted water use that impacted the Lower Santa Fe River and Ichetucknee River in just the year 2013. IA Exh. 3, p. 40 of 80. This amount is not accounted for in Table A1.

Groundwater, Springflows, and Streamflows
in the MFL Area are in Continuing Decline

74. As set forth above, the District's research and analysis prior to adoption of the rule found a declining trend in Upper Floridan aquifer levels which was linked to declining trends in springflows and streamflow including those of the MFL water bodies. IA Exh. 175, p. 54 of 110 (2010 Water Supply Assessment); IA Exh. 2, p. 6 (Recovery Strategy).

75. In discussing the relationship between groundwater levels and river and spring flows, Mr. Good testified for the District that in the Lower Santa Fe and Ichetucknee the surface water and ground water function as a single resource. Vol. 9, p. 1099 (Good). In fact, the groundwater levels in one of the long term wells, the Lake City well, was such a good fit with surface flows in the Ichetucknee that it was used to extend the flow record of that river during MFL development. Vol. 9, pp. 1089-90 (Good).

76. That the 2010 prediction of continuing decline was correct is evidenced by long-term hydrographs of aquifer levels in SRWMD Upper Floridan wells that show a continuing long-term decline in the MFL area. IA Exh. 191-A, p. 17 of 17; Vol. 3, pp. 303-04 (Weber).

77. One of the wells in Exhibit 191-A is the Lake City well, which had levels that were such a good fit with flow in the Ichetucknee that it was used to extend flow records for that river during MFL development. Vol. 9, pp. 1089-90 (Good).

78. A 2011 paper by Jack Grubbs of the United States Geological Survey titled “Analysis of Long-Term Trends in Flow from a Large Spring Complex in Northern Florida” found declining flows in the Ichetucknee River from 1900 to 2009 and found that the stream-flow losses “have probably accelerated over time” as the declining trend steepened in the period from 1970 to 2009. IA Exh.163, pp. 6-8 of 8.¹

79. The Alliance also put into evidence the deposition of the District’s expert witness Patrick Tara,² a civil engineer and modeler with the consulting firm Intera (a contractor for SRWMD on MFL development), who conducted an analysis of base (low) flows in the Santa Fe and Ichetucknee Rivers. Tara’s analysis found that there was a continuing decrease in flows in both rivers. IA Exh. 196, pp. 5-7,10 (Tara Depo).

¹ The paper was properly admitted as corroborative hearsay pursuant to section 120.57(1)(c), Fla. Stat. Alliance’s expert Ken Weber had already testified that the groundwaters/streamflows were in a continuing decline based on his general knowledge of the area, Vol. 4, p. 448, and examination of non-hearsay evidence including the District’s groundwater well long-term hydrographs which showed a continuing decline, IA Exh. 191-A, and the District’s Water Supply Assessment, IA Exh. 175, which, using predictive modeling, found the groundwater levels were “in decline” meaning that the decline had not stabilized. Vol. 3, pp. 303-04, 322-33. *Pasco County School Bd. v. Florida Public Employees Relations Commission*, 353 So.2d 108, 120 (Fla. 1st DCA 1977).

² Tara was listed as a SRWMD contractor and a DEP/SRWMD expert witness in the Pretrial Stipulation. As an expert witness his deposition is admissible. *Robison By and Through Bugera v. Faine*, 525 So. 2d 903, 906-07 (Fla. 3d DCA 1987) (citing Florida Rule of Civil Procedure 1.330(a)(3)(F)).

80. Tara submitted a report under contract to the SRWMD in which his best conservative estimate “of the annual decline in flow rates due to groundwater pumping” was .47 cfs for the Ichetucknee and 4.7 for the Lower Santa Fe. IA Exh. 196, pp. 82-83; IA Exh. 196 (Exhibit 1: Intera Report, p. 98, Table 39). In his errata, Tara rewrote his testimony and stated that he meant impacts from all anthropogenic effects and not just groundwater pumping. IA Exh. 196 (Errata Sheet). He did not correct his statement with regards to the existence or the magnitude of the continuing annual declines in flow rates in the MFL water bodies. Tara was listed on the District’s expert witness list but was not called to testify. Tara’s report is Appendix 2-1 to the MFL report. Dist. Exh. 1.

81. John Good of the District testified that the bulk of the impact to streamflow in the Lower Santa Fe system is due to groundwater withdrawals. Vol. 7, pp. 864-66.

82. An annual decline of 4.7 cfs in the Lower Santa Fe equates to an annual decline of 3 mgd; an annual decline of .47 cfs in the Ichetucknee equates to an annual decline of .30 mgd.³

83. Over a period of five years, this continuing annual decline would produce a total decline in baseflow on the Santa Fe of approximately 23.5 cfs (15 mgd) and a total decline of baseflow in the Ichetucknee of approximately 2.35 cfs (1.5 mgd).

84. In conducting its MFL analysis, the District did not estimate or document a decline per year. IA Exh. 196, pp. 69-70; 83-84 (Tara).

85. The flow deficits in the MFL water bodies were established as of 2010. Dist. Exh. 1, p. 6-14.

86. The MFL itself (against which the flow deficits are measured) is based on decades

³ The Alliance asked the court to take judicial notice of the conversion rate between millions of gallons per day and cubic feet per second (1mgd = 1.547 cfs). The court took official recognition of the conversion rate. Vol. 1, p. 5.

of flow data and so would be unlikely to change except over the course of decades. Vol. 9, pp. 1102-03 (Good).

87. When asked if waiting for five years before any actual reductions in use would mean the situation would get worse Mr. Tara replied, “If you do nothing, then yes.” IA Exh. 196, pp. 75-76 (Tara). In his errata sheet he again rewrote his testimony and stated that a prediction assuming “nothing” will change in the next five years and that declines will continue at the same rate is invalid because the recovery plan will take effect. IA Exh. 196 (Tara Errata Sheet).

Since the MFL has been surpassed the proposed recovery plan will take into (sic) effect. The recovery plan will work to slowly reduce the groundwater pumping AND only allow new pumping IF impacts are mitigated

IA Exh. 196 (Tara Errata Sheet).

88. Mr. Tara’s errata does not take into account declines that would have occurred between 2010 (when the stream flow deficits that became the District’s recovery target were set) and 2014 during which time there was no recovery strategy in effect.

89. Mr. Tara was listed on the District expert witness list but was not called to testify.

90. The Recovery Strategy, Appendix A, Table A1, uses the MFL Report’s 2010 estimate to establish its Recovery Targets. IA Exh. 2, App. A, Table A1. These Recovery Targets do not account for the continuing annual decline in the MFL water bodies which has occurred since 2010.

91. Section 6.0, which is designed only to maintain the status quo as of 2010, does not address these continuing declines.

92. Instead it allows existing permitted uses and renewals of existing permitted uses at existing permitted rates – it does nothing to slow the rate of existing groundwater withdrawals

for at least another 5 years – it is intended solely to “keep the situation from getting worse.” Vol. 8, p. 996 (Llewellyn).

93. Furthermore, the “situation” Section 6.0 is addressing is the MFL water bodies’ streamflow deficits as they existed in 2010 – not the situation as it exists in 2014 (after an additional four years of decline) and not the situation that will exist another five years later (after an additional nine years of decline).

Groundwater Levels and Related Streamflows Have Not Stabilized

94. A chart in the Recovery Strategy titled “Local Historical Groundwater Withdrawals: 1965-2010,” shows that locally both total groundwater withdrawals and agricultural withdrawals have increased in the Santa Fe Basin during that time period. IA Exh. 2, p. 9 (Figure 1-3) (data from USGS).

95. The Recovery Strategy finds that agricultural water use in the Santa Fe River basin has increased significantly, and that self-supplied agriculture is the largest user of water in the basin accounting for 41% of all freshwater withdrawals in 2010. IA Exh. 2, p. 8.

96. The Recovery Strategy upon which DEP relies calculates its Total Recovery Target based on the assumption that there will be a 0% increase in agricultural water use permitting in the SRWMD. IA Exh. 2, App. A, Table A1.

97. However, in the SERC, DEP/SRWMD rejected the 0% as the basis for its analysis; instead, the District’s analysis of actual permitting data from 2013 showed that: a) 44% of renewing agricultural water use applicants requested an average 33% increase in their allocated amount; b) that 80 new agricultural water use permits totaling 23.38 mgd (average daily rate) had been issued; and c) that just 8 of those permits had produced 2.2 mgd of adverse impacts to the Lower Santa Fe and Ichetucknee Rivers. IA Exh. 3, p. 41 of 80 (Table 2-4).

98. Based on actual 2013 data, the District also predicted, based on existing trends, that there would be an additional 400 agricultural water use permits issued District-wide in the time frame from 2014-2018. IA Exh. 3, p. 41 of 80.

99. Mr. Weber's analysis of a spreadsheet of water use permitting information compiled by a District employee shows that there has in fact been 46 mgd additional groundwater withdrawals (average daily rate) authorized between 2011 and 2013 in the Lower Santa Fe basin 6-county area. Vol. 9, p. 1137, 1147-1152 (Weber).

100. The District attempted to rebut their own analysis by offering testimony that examining permits *issued* during 2013 without also examining permits *retired* during the same time period would not give any insights into total permitted consumption because it was examining only one side of the equation. Vol. 9, 1119-20 (Kiger). No District or DEP witness testified that they had actually performed this analysis or that they had examined total permitted consumptive uses as part of the development of the Recovery Strategy.

101. Mr. Weber testified that the number of new water use permits always greatly exceeds the numbers retired. Vol. 9, p. 1152 (Weber).

102. Mr. Good testified on behalf of the District that Tara's and Grubb's work demonstrating continuing decline in the MFL water bodies were only evaluating historical trends through the end of the data they were using. Vol. 9, p. 1086-87.

103. He further theorized that the groundwater levels had stabilized because the only way the documented continuing decline could happen was if the water use withdrawals continued to increase, and groundwater pumping "appears to have been constant for a number of years, as shown in the data that's in the technical report from the USGS." Vol. 9, pp. 1087-88. Mr. Good did not contest that the system had been in decline during the time periods covered by

the Tara and Grubbs analysis.

104. Mr. Good had no data confirming the decline had stabilized. Vol. 9, p. 1117 (Good). Mr. Good had not looked at actual permitting data and had no knowledge of the fact that the District had predicted that 400 additional permits would be issued in the 2014 to 2018 time frame. Vol. 7, pp. 901; 910-11. For his testimony with regards to groundwater withdrawals Mr. Good relied on estimated data from the USGS. Vol. 7, p. 911.

105. He agreed that if there was a net increase in withdrawals then he would expect a decline in groundwater levels. Vol. 9, p. 1117 (Good).

93.25% of Existing Permitted Allocations
Will Never Be Subject to Section 6.0

106. DEP offered testimony that a limitation imposed by the rule was the 5-year permit condition under Section 6.0.6(a); however, if permits don't come up for renewal in the next five years they will not be impacted by this proposed rule. Vol. 8, p. 1012-13 (Llewellyn).

107. DEP/SRWMD analyzed the number and amounts of existing permits of all types likely to be coming up for renewal in 2014-2018. IA Exh. 3, pp. 34-35 of 80. It found a total of 230 permits of all types comprising 68.31 mgd as an average daily rate. IA Exh. 3, p. 35 of 80 (Table 2-1). The total permitted withdrawal amount within the District is 1,012.47 mgd as an average daily rate. IA Exh. 62. 68.31mgd is 6.75% of 1,012.47 mgd. Consequently, 93.25% of permitted withdrawals are not up for renewal within the five-year period, will never be subject to DEP's rule, and will never have Section 6.0's five year permit term condition imposed.

108. Groundwater withdrawals are the main cause of the impacts the system is currently experiencing. Vol. 7, p.p. 866, 900 (Good).

109. DEP testified that, when the rule is revised, one option would be to make existing users come into compliance with the rule. Vol. 8, pp. 1011-12 (Llewellyn).

CONCLUSIONS OF LAW

I. STANDING

110. Section 120.56(1)(a) provides that any person substantially affected by a proposed rule may seek an administrative determination of the invalidity of the rule.

111. 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). To meet the standing requirements of 120.56(1) an association 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. *NAACP v. Fla. Bd. of Regents*, 863 So. 2d 294, 298 (Fla. 2003) (citing *Fla. Home Builders Ass'n v. Dept. of Labor & Employment Security*, 412 So. 2d 351, 353-54 (Fla. 1982)). There is no need "to demonstrate immediate and actual harm," only a "substantial effect of the rule change on a substantial number of the association's members." *NAACP v. Fla. Bd. of Regents*, 863 So. 2d 294, 300 (Fla. 2003).

112. An environmental association adequately pleads standing to challenge a proposed rule when it alleges that a substantial number of its members directly use and enjoy the natural resources affected by the proposed rule and alleges how the proposed rule could cause harm to the natural resources in a manner that would materially diminish the members' enjoyment and use. Order of May 12, 2014 at p. 5.

113. As shown in paragraph 1 *supra*, the Alliance showed at the hearing that the proposed rules are within Ichetucknee Alliances' mission; a substantial number of Ichetucknee Alliance members directly use and enjoy the Lower Santa Fe and Ichetucknee Rivers and

springs; and the proposed rules will harm these rivers and springs in a manner that would substantially diminish their enjoyment and use by not achieving recovery. Likewise, the relief sought is appropriate for an association to receive.

II. GENERAL RULE CHALLENGE PRINCIPLES

114. A proposed rule is not presumed to be valid or invalid. § 120.56(2)©, 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.*; *Southwest Fla. Water Mgmt. Dist. V. Charlotte Cnty.*, 774 So. 2d 903, 908 (Fla. 2d DCA 2001).

III. THE IMPACT OF SECTION 373.709, FLORIDA STATUTES

115. This court has ruled that the Alliance cannot legally challenge the Regulatory Strategy because its petition only challenges that portion which has been incorporated by reference into DEP’s proposed rule. However, the Recovery Strategy is admissible as context for the proposed rule.

116. Both DEP and the District argued section 373.709(5) forbids this court from examining the District’s Recovery Strategy as part of this case. Section 373.709(5) reads:

(5) Governing board approval of a regional water supply plan shall not be subject to the rulemaking requirements of chapter 120. However, any portion of an approved regional water supply plan which affects the substantial interests of a party shall be subject to s. 120.569.

117. Nothing in this provision applies under the circumstances of this case. This section addresses approval of regional water supply plans and challenges to portions of approved

plans. This case does not involve approval of a regional water supply plan and there is no approved regional water supply plan of which the District's Recovery Strategy for the MFL water bodies at issue is a portion. IA Exh. 2, p. 6 of 63.

118. *Washington Cnty. v. NFWMD*, 85 So. 3d 1127 (Fla. 1st DCA 2012), which held that section 373.709(5) allowed a 120.569 challenge to a portion of an approved regional water supply plan that designated an inland ground water project as an alternative water supply source but which found the petitioners lacked standing, is inapplicable. *Id.* at 1129-32.

119. *Putnam Cnty v. NFWMD*, 2014 WL 1665835 (Fla. 1st DCA 2014), which found that section 373.709(5) allows districts to forego formal rulemaking with regards to approval of regional water supply plans, but not does exempt rulemaking in all aspects of water supply plans, confirms that nothing in 373.709 prohibits rulemaking with regards to MFL recovery strategies. Section 373.709(7) expressly condones rulemaking of any portion of the regional water supply plan that may be used in permit review, and the legislature expressly ordered rulemaking for recovery strategies adopted by DEP pursuant to 373.042(4).

120. Section 373.0421(2) requires a recovery strategy that provides for "recovery." DEP argues that adoption of a "regulatory strategy" that does not provide for recovery is lawful because it is a "portion" of a Recovery Strategy and DEP can rely upon the entirety of the Recovery Strategy to provide the "recovery" mandated by statute. However, if the entirety of the Recovery Strategy fails to provide for recovery, then DEP's reliance upon the non-rule portion as a basis for its proposed rule is arbitrary and capricious and the "regulatory strategy" contravenes the statutory "recovery" requirement.

121. In sum, under the circumstances of this case, there is nothing in either section 373.709 or related case law that either strips this court of jurisdiction or bars this court from

examining the invalidity of a proposed rule in the context of a recovery strategy of which the proposed rule is a part and upon which DEP relies in arguing for the proposed rule's validity.

IV. THE ELEMENTS OF THE CHALLENGE TO THE PROPOSED RULE

A. PROPOSED RULES 62-42.100(1)&(2)

122. The Alliance challenged Proposed Rules 62-42.100(1)&(2) on the ground that they enlarge, modify, or contravene sections 373.042(4) and 373.0421(2), Florida Statutes because:

These proposed rules purport that DEP has the authority to adopt only the regulatory portion of an MFL recovery strategy whereas the laws implemented require the adoption of the entirety of the regulatory strategy approved by the District.

Third Amended Petition, ¶ 42.

123. Pursuant to section 373.0421(2), Florida Statutes, a “recovery strategy” that achieves “recovery” must be developed when a water body is currently below its established MFL as is the case for both the Lower Santa Fe and the Ichetucknee Rivers.

124. Section 373.042(4), Florida Statutes authorizes DEP, with the assistance of the District, to adopt a “recovery strategy” by rule:

(4) 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. A water management district shall apply any reservation, minimum flow or level, or recovery or prevention strategy adopted by the department by rule without the district's adoption by rule of such reservation, minimum flow or level, or recovery or prevention strategy.

125. Instead of adopting the District's Recovery Strategy as required by the plain meaning of the statute, DEP “recognizes” that a recovery strategy may contain both regulatory and non-regulatory provisions though it cited to no authority as the basis for its “recognition,” *see* Proposed Rule 62-42.100(a)(2), and proposed adopting only a portion of the Recovery Strategy, *i.e.*, Section 6.0 (the “regulatory strategy”).

126. DEP and the District argue that resort must be had to legislative intent, and that DEP's construction, found in proposed rules 62-42.300(1)(a)&(b), is entitled to deference. At the hearing DEP put on testimony as to the legislature's intent in adopting section 373.042(4).

127. Janet Llewellyn testified that section 373.0421 allowed a phased recovery strategy which DEP interpreted as allowing it, under 373.042(4), to adopt a regulatory strategy (which it admits doesn't achieve recovery), and instead rely upon the provisions in the Recovery Strategy to achieve recovery. Vol. 8, p. 958-66; 983-84 (Llewellyn).

128. An agency interpretation should not be overturned unless clearly erroneous. *Legal Envtl. Assistance Found. v. Bd. of Cnty. Comm'rs of Brevard Cnty.*, 642 So. 2d 1081, 1083-4 (Fla. 1994). An agency interpretation is clearly erroneous where it conflicts with the statute's plain meaning. *Fla. Power and Light Co. v. Fla. Pub. Serv. Comm'n.*, 31 So. 3d 860, 865-866 (Fla. 1st DCA 2010). If the meaning of a statute is plain, then the administrative construction of the statute, the legislative history of its enactment, and other extraneous matters are not considered. *Micjo, Inc. v. Department of Business and Professional Regulation, Div. of Alcoholic Beverages and Tobacco*, 78 So.3d 124, 127 (Fla. 2d DCA 2012) (rejecting agency argument that "wholesale price of tobacco" included federal taxes and shipping costs where statute clearly stated that "wholesale price" was based only on the manufacturer's price of the tobacco product). Here, "recovery strategy" is described in section 373.0421(2) and that term includes the entirety of the recovery strategy, not just the regulatory portion. DEP is not authorized to adopt something less.

129. DEP's interpretation of the statute is clearly erroneous.

B. PROPOSED RULE 62-42.300 (INCORPORATING BY REFERENCE SECTION 6.0 OF THE RECOVERY STRATEGY)

130. The Alliance challenged Proposed Rule 62-42.300 (which incorporates by

reference Section 6.0 of the Recovery Strategy in section 62-42.300(1)(d)) as an invalid exercise of delegated legal authority under both section 120.58(8)(c)&(e), Florida Statutes:

43. Proposed Rule 62-42.300 contravenes sections 373.042(4) and 373.0421(2), Florida Statutes, because the MFL levels fail to account for continuing annual declines in base flows in the MFL water bodies over the next five years, the incorporated recovery strategy is designed only to maintain the status quo and therefore provides for degradation and not recovery, and the Rule has the effect of exempting over 85% of permitted withdrawals in the Lower Santa Fe Basin.

44. Proposed Rule 62-42.300 is arbitrary and capricious because the MFL levels fail to account for continuing annual declines in base flows in the MFL water bodies over the next five years, the incorporated recovery strategy is designed only to maintain the status quo and therefore provides for degradation and not recovery, and the Rule has the effect of exempting over 85% of permitted withdrawals in the Lower Santa Fe Basin.

Third Amended Petition, ¶¶ 43, 44.

131. The intent of Section 6.0 is: “the prevention of additional harm to the recovering MFL water bodies, while also providing protections for existing users.” IA Exh. 2, p. 40 of 63. Section 373.042(4) authorizes DEP to adopt by rule a “recovery strategy” that is then enforceable by multiple WMDs without the need for additional rulemaking. Obviously, the proposed rule itself is not a “recovery strategy” because it does not provide for recovery: DEP’s own testimony is that it is designed to hold the line on additional harm, not to improve the MFL’s condition. Vol. 8, p. 996 (Llewellyn). Adoption of a “recovery strategy” which does not provide for recovery or for recovery as soon as practicable is arbitrary and capricious and in direct contravention of both sections 373.042(4) and 373.0421(2), Florida Statutes.

132. DEP argues that adoption of a “maintain the status quo” strategy is permissible based on its interpretation that section 373.0421, authorizes DEP to adopt a “regulatory portion” of a recovery strategy under 373.042(4) that allows significant harm to worsen. Vol. 9, p. 973-94 (Llewellyn).

133. DEP argues that even if the rule is invalid for the reasons articulate by the

Alliance, that invalidation can be avoided through DEP's ability to cure the defects in the future. Specifically they contend they could amend the rule to reduce existing permitted quantities or take other actions in the future. Proposed Rule 62-42.300(1)(e); Vol. 8, pp. 987-88, 1012 (Llewellyn). As a matter of law, the existence of future actions that could cure the defect is an insufficient defense to an invalid rule. An otherwise invalid rule is not "saved" by an agency's ability to amend it in the future. *Conservancy of Southwest Fla., Inc. v. SFWMD*, DOAH Case No. 14-1329 (Final Order, April 25, 2014) (District cannot save rule that improperly declares existing permitted uses not contrary to public interest "for the duration of the permit" by arguing District could amend determination in the future).

134. DEP describes the Recovery Strategy "as the tool by which we would seek to achieve recovery." Vol. 4, p. 499 (Llewellyn). Assuming that DEP has authority to adopt only a portion of a recovery strategy under section 373.042(4), Florida Statutes, the legality of Section 6.0 therefore depends on whether the evidence in the case, both record and adduced at the hearing, supports a rule whose standard is maintenance of the status quo given the statutory requirement that a recovery strategy must achieve recovery. *Dep't of Health v. The Fla. Insurance Council*, 919 So. 2d 561, 564 (Fla. 1st DCA 2006) (in weighing validity of a proposed rule ALJ should consider evidence presented to agency during rulemaking proceeding as well as evidence presented for the first time during the hearing).

135. The Recovery Strategy is properly considered as context for the proposed rule. Chapter 373.042(4) requires the District to provide technical information to DEP for the development of a recovery strategy, DEP actively worked on development of this Recovery Strategy as part of the chapter 120 process for the MFL rule at issue, Vol. 4, p. 492 (Llewellyn), DEP's representative testified that the agency relies upon the Recovery Strategy, Vol. 8, pp. 962-

66, 983-84, and the Recovery Strategy was admitted into evidence in this proceeding. IA Exh. 2.

1. The Rule That Purports to Maintain the Status Quo Allows for Continuing Degradation

136. The proposed rule is arbitrary and capricious because it purports to maintain the status quo but grandfathers in degradation that occurred between 2010 and 2014 and will allow continuing degradation to occur in the future. The Alliance showed that the proposed rule will not maintain the status quo due to two ongoing trends that were known, but ignored by, both the District and DEP: a) a continuing downward trend in ground water levels and associated MFL water body streamflows; and, 2) an upward trend in the number of permits issued and the number of water use permit renewals in which the applicant was requesting an increase in the allocated amount coupled with an average 33% increase in the amount of water requested.

137. The impact of these trends on the MFL water bodies is also twofold: 1) stream flow deficits have demonstrably increased since 2010; and 2) between 2010 and 2014 significant new and additional groundwater withdrawals had been added to the existing groundwater withdrawals which were already causing significant harm to the MFL water bodies as of 2010.

138. A permitting scheme that allows existing withdrawals to continue unabated when streamflows are in decline and consumptive uses have increased contravenes the statute which is to prevent additional harm from occurring.

139. In response to facts showing continuing decline, District witnesses theorized that the decline had in fact stabilized, but had no evidence to support this theory.

140. Rather than put on evidence disputing the District's own analysis of permitting trends, it put on a witness to hypothesize that evidence showing permitting increases did not prove that total permitted consumption had increased because new permits would be offset by retired permits. Vol. 9, pp. 1119-20 (Kiger). No data was provided to support this theory.

141. Using the District's permitting data, Ken Weber testified for the Alliance that between 2010 up to 2013 approximately 46 million gallons per day of new permits had been issued in the local six-county area using the permit's average withdrawal rate. Vol. 9, pp. 1150-51. He also testified that in his professional opinion and at all times in his professional experience the number of new water use permits greatly exceeded the number of permits retired. Vol. 9, p. 1151-52.

142. District expert John Good agreed that a net increase in permitted withdrawals would be expected to produce a decline in groundwater levels. Vol. 9, p. 1117 (Good).

2. The Rule Will Not Maintain the Status Quo Because the Recovery Strategy Prevents Recovery of the Lower Santa Fe River

143. The Recovery Strategy prevents recovery of the MFL water bodies because the non-regulatory portion, taken at its face value, fails to provide sufficient additional water to bring the Lower Santa Fe River back to the established minimum flow level and the regulatory strategy merely holds the line on existing use. A regulatory strategy that fails to reduce existing water uses, examined in the context of a Recovery Strategy that also fails to provide sufficient additional water to achieve recovery of the Lower Santa Fe River, is both arbitrary and capricious and contravenes sections 373.042 and 372.0421, Florida Statutes.

144. As explained by Ms. Llewellyn:

The purpose of these Phase I Regulatory Measures is basically to prevent new allocations being issued through individual permits that make the situation worse. It's basically a holding the line on individual permit allocations, to give time for the planning process that I discussed earlier to get further along.

Vol. 8, p. 996 (Llewellyn).

145. However, if the planning process does not actually provide enough water for recovery to happen, then the regulatory portion of the recovery strategy would have to take up

the slack by reducing consumptive uses of water.

146. The Alliance showed that on its face, that the Recovery Strategy contained in Tables A1 and A2 of Appendix A of the Recovery Strategy, does not provide for a enough additional water to bring the Lower Santa Fe River back to its established MFL.

147. That is because the Total Recovery Target (existing streamflow deficit combined with anticipated additional withdrawals) shown on Table A1 is greater than the amount of benefit that can be achieved by the projects the District has listed to bring the Lower Santa Fe River out of “recovery” status on A2, *i.e.* (Total Recovery Target of 20.6) – (Estimated benefit of 13.7) = 6.9 additional mgd of streamflow needed to bring Lower Santa Fe back to its established MFL. IA Exh. 2, App. A (Tables A1 and A2).

148. The Alliance also showed that neither the District nor DEP was relying upon the conceptual projects found in Tables A3 through A5 to make up the deficit needed to achieve recovery because Tables A3 through A5 specifically state “these and other concepts under development are not a component of the Recovery Strategy for the Lower Santa Fe Basin.” IA Exh. 2, App. A (Tables A3 through A5, n. ***); Vol. 9, pp. 1043-44 (Herd).

149. The District presented testimony that the District had authorized funding for some demonstration projects and were examining the feasibility of some additional projects that are not listed in the Recovery Strategy. Vol. 9, pp. 1038-42 (Herd). However, this testimony failed to include any discussion of the amount of actual “streamflow benefits” any of these projects might provide the Lower Santa Fe River beyond that contained in Table A2, and therefore could not serve as evidence that recovery would be achieved.

150. Section 6.0, which allows existing water use consumption, and significant harm, to continue unabated, when taken in the context of a Recovery Strategy which on its face fails to

provide enough additional water to bring the Lower Santa Fe River back to its established MFL, is both arbitrary and capricious and in contravention of sections 373.042 and 373.0421, Florida Statutes, because it provides for continued degradation, not recovery of the MFL water bodies.

151. The Alliance additionally showed that the Recovery Strategy upon which it is relying to achieve recovery assumes that there has been 0 increase in growth of agricultural consumptive water use since 2010 and that there will be 0 increase during the time the proposed rule is in place. IA Exh. 2, App. A, Table A1 (App. A, Table A1).

152. As set forth above, the Recovery Strategy itself, the District's permitting records, and the analysis of existing agricultural permitting trends performed by the District as part of the SERC process all show that, in fact, agricultural water use in both the localized area and the district is in fact increasing. Of note is that the District itself, specifically rejected use of the zero increase projection when conducting its SERC analysis due to increasing upward trends in agricultural use permitting renewals. IA Exh. 3, pp. 38-40 of 80.

153. Section 6.0 cannot provide for recovery if there was a significant increase in permitting post-2010 – the date the recovery targets were established by the MFL.

154. DEP's rule allows existing water use withdrawals that are already causing significant harm to continue, on the assumption that they will not cause additional harm. That assumption is not the result of any study to determine its validity, and the assumption is not supported by any reports, data, or research. Indeed, data, research, and the District's own documents, including the Recovery Strategy itself, refute its validity.

3. The Rule Exempts 93.25% of Existing Permitted Allocations from Its Additional Permitting Conditions

155. DEP asserts that the proposed rule will help protect and restore the Lower Santa Fe and the Ichetucknee Rivers and associated springs. Vol. 8, pp, 987-88 (Llewellyn).

156. DEP analysis of its permitting records showed that during 2014-2018 there were 230 permits (of all types) comprising 63.31 mgd as an average daily rate that would be coming up for renewal. IA Exh. 3, pp. 34-35 of 80 (Table 2-1). Since the total permitted withdrawal amount within the District is 1,012.47 mgd, IA Exh. 62, a simple calculation shows that 93.25% of permitted withdrawals will not be coming up for renewal and therefore will never be subject to DEP's proposed rule.

157. In addition, for those permits that do come in for renewal, only additional allocated amounts are subject to the conditions imposed by the proposed rule; existing allocations (even when shown to adversely impact the MFL water bodies) are deemed consistent with the Recovery Strategy. *See* Section 6.0.5(c)(ii)

158. A rule which exempts nearly 100% of the withdrawals that are currently causing significant harm to the MFL water bodies, is neither "protecting" nor "restoring" the Lower Santa Fe and Ichetucknee Rivers.

4. Summary

159. A rule whose underlying basis lacks any scientific justification is not supported by fact or reason and is arbitrary and capricious. *Adam Smith Enterprises, Inc. v. State of Fla., Dep't of Environmental Protection*, 553 So. 2d 1260, 1264, 1275 (Fla. 1st DCA 1990) (five year standard used as period of time in which a contaminant introduced into groundwater would be discovered and removed or otherwise dealt with was arbitrary and capricious where no research supported the 5 years standard and agency's in-house research showed it took 7-8 years to find a contaminant and another 10-15 years to begin cleanup); *Ameriquatic, Inc. v. State of Fla., Dep't of Natural Resources*, 651 So. 2d 114, 121 (Fla. 1st DCA 1995) (rule requiring relocation of removed aquatic plants to maintain fish habitat was arbitrary and capricious where basis for rule

was agency's theory that there was a correlation between aquatic vegetation and fish population, correlation was not supported by evidence in the record, and petitioners presented expert testimony that correlation did not exist).

160. Proposed rule 62-42.300, which maintains the status quo of significant harm, but fails to address demonstrable continuing decline, increases in permitting levels, exemption of virtually all existing harmful withdrawals, and which relies upon a Recovery Strategy that on its face will not achieve recovery is: a) in contravention of sections 373.042(4) and 373.0421(2), Florida Statutes which require a strategy that provides for recovery; and b) also arbitrary and capricious because it is not supported by facts or logic.

C. EXEMPTION FOR IMPACTS CAUSED BY GEORGIA WATER USERS

161. The Alliance challenged Section 6.0.5(f), which exempts all Florida water users from being held responsible for recovery from impacts to the MFL water bodies from water users in Georgia, on the ground that it modifies, enlarges, or contravenes sections 373.042, and 373.223(1), Florida Statutes because "DEP lacks the authority to excuse permit holders from the constraints imposed by a finding that a water body is below its MFL because Georgia users have contributed to violation of the limit." Third Amended Petition ¶ 46.

162. Section 373.042, Florida Statutes states:

(1) Within each section, or the water management district as a whole, the department or the governing board shall establish the following:

(a) Minimum flow for all surface watercourses in the area. The minimum flow for a given watercourse shall be the limit at which further withdrawals would be significantly harmful to the water resources or ecology of the area.

163. Section 373.042 is a legislative finding that it is in the public interest that streams, an important natural resource of the state, be maintained at a level where significant harm is not occurring. Section 373.223(1)(c), Florida Statutes, prohibits the granting of consumptive use

permits unless those permits can be found to be “in the public interest.”

164. Section 6.0.6(f) requires the District to grant consumptive use permits that dramatically lower the Floridan aquifer and diminish the flow in the MFL water bodies to a level below that existing currently so long as the District can assign a proportional share of the blame on Georgia users.

165. It is not in the public interest to prohibit the District from denying consumptive use permits where those permits would increase the significant harm the MFL water bodies are already enduring.

166. Respondents would have section 373.042 read as follows:

(1) Within each section, or the water management district as a whole, the department or the governing board shall establish the following:

(a) Minimum flow for all surface watercourses in the area. The minimum flow for a given watercourse shall be the limit at which further withdrawals would be significantly harmful to the water resources or ecology of the area to the extent those withdrawals are caused by withdrawals in Florida.

167. When interpreting a statute, courts are not at liberty to add words to the statute that were not placed there by the legislature. *University of Florida Bd. of Trustees v. Andrew*, 961 So.2d 375 (Fla. 1st DCA 2007). Section 6.0.6(f) modifies and contravenes sections 373.042 and 373.223(1)(c), Florida Statutes and therefore is an invalid exercise of delegated legal authority.

CONCLUSION

168. Based on the foregoing Findings of Fact and Conclusions of Law, it is determined that the Alliance proved by a preponderance of the evidence that the challenged provisions are invalid exercises of delegated legal authority. As the provisions in the rule are inseverable, the entire proposed rule is declared invalid.

Dated: August 11, 2014

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served by electronically delivery on all counsel of record in this proceeding on August, 11, 2014.

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