

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

CITY OF GROVELAND,

Petitioner,

v.

DOAH Case No. 08-4201
SJRWMD F.O.R. No. 2008-84

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT and
NIAGARA BOTTLING COMPANY, LLC,

Respondents.

FINAL ORDER

The Division of Administrative Hearings, by its designated Administrative Law Judge, the Honorable Bram D. E. Canter (“ALJ”), held a formal administrative hearing in the above-styled case on April 8-10 and 14-15, 2009, in Orlando, Florida. On August 7, 2009, the ALJ submitted a Recommended Order to the St. Johns River Water Management District (“District”). Petitioner City of Groveland (“Groveland”) and Respondent District filed Exceptions to the Recommended Order. The three parties each filed Responses to Exceptions. This matter then came before the Executive Director for final agency action and entry of a Final Order.

A. STATEMENT OF THE ISSUE

The general issue before the District is whether to adopt the Recommended Order as the District’s Final Order, or to reject or modify the Recommended Order in whole or part, in accordance with Section 120.57(1)(l), Florida Statutes (“F.S.”). The specific issue is whether consumptive use permit (“CUP”) application number 114010 meets the conditions for issuance of a permit as set forth in Section 373.223, F.S., Chapter 40C-2, Florida Administrative Code

("F.A.C."), and the Applicant's Handbook: Consumptive Uses of Water (March 8, 2009)("A.H."). The CUP application from Niagara Bottling, LLC ("Niagara"), is for the use of 484,000 gallons per day ("gpd") of groundwater from the Upper Floridan aquifer to produce bottled water at a facility in Lake County. The ALJ recommended issuance of the CUP.

B. STANDARD OF REVIEW

The rules regarding an agency's consideration of exceptions to a recommended order are well established. The agency is prescribed by Section 120.57(1)(l), F.S., in acting upon a recommended order. The ALJ, not the agency, is the fact finder. *Goss v. Dist. Sch. Bd. of St. Johns County*, 601 So.2d 1232, 1235 (Fla. 5th DCA 1992); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281-82 (Fla. 1st DCA 1997). A finding of fact may not be rejected or modified unless the agency first determines from a review of the entire record that the finding of fact is not based upon competent substantial evidence or that the proceedings on which the finding of fact was based did not comply with essential requirements of law. §120.57(1)(l), F.S. "Competent substantial evidence" is such evidence as is sufficiently relevant and material that a reasonable mind would accept such evidence as adequate to support the conclusion reached. *Perdue v. TJ Palm Associates, Ltd.*, 755 So.2d 660 (Fla. 4th DCA 1999). The term "competent substantial evidence" relates not to the quality, character, convincing power, probative value or weight of the evidence, but refers to the existence of some quantity of evidence as to each essential element and as to the legality and admissibility of that evidence. *Scholastic Book Fairs v. Unemployment Appeals Commission*, 671 So.2d 287, 289 (Fla. 5th DCA 1996).

If a finding is supported by any competent substantial evidence from which the finding could be reasonably inferred, the finding cannot be disturbed. *Freeze v. Dep't of Business Regulation*, 556 So.2d 1204 (Fla. 5th DCA 1990); *Berry v. Dep't of Env'tl. Regulation*, 530 So.2d

1019 (Fla. 4th DCA 1998). The agency may not reweigh evidence admitted in the proceeding, may not resolve conflicts in the evidence, may not judge the credibility of witnesses or otherwise interpret evidence anew. *Goss*, 601 So.2d at 1235; *Heifitz*, 475 So.2d at 1281-82; *Brown v. Criminal Justice Standards & Training Comm'n*, 667 So.2d 977 (Fla. 4th DCA 1996). The issue is not whether the record contains evidence contrary to the findings of fact in the recommended order, but whether the finding is supported by any competent substantial evidence. *Florida Sugar Cane League v. State Siting Bd.*, 580 So.2d 846 (Fla. 1st DCA 1991). Finally, the agency is precluded from making additional or supplemental findings of fact. *Florida Power & Light Co. v. State of Florida, Siting Board*, 693 So.2d 1025, 1026-27 (Fla. 1st DCA 1997); *Boulton v. Morgan*, 643 So.2d 1103 (Fla. 4th DCA 1994).

With respect to conclusions of law in the recommended order, the agency may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretations of administrative rules over which it has substantive jurisdiction, provided the reasons for such rejection or modification are stated with particularity and the agency finds that such rejection or modification is as or more reasonable than the ALJ's conclusion or interpretation. §120.57(1)(I), F.S. In interpreting the term “substantive jurisdiction,” the courts have continued to interpret the standard of review as requiring deference to the expertise of an agency in interpreting its own rules and enabling statutes. *See, e.g., State Contracting & Eng'g Corp. v. Dep't of Transp.*, 709 So.2d 607, 610 (Fla. 1st DCA 1998).

The agency lacks subject matter jurisdiction to overturn an ALJ's rulings on procedural and evidentiary issues. *Barfield v. Dep't of Health*, 805 So.2d 1008, 1012 (Fla. 1st DCA 2001) (the agency lacked jurisdiction to overturn an ALJ's evidentiary ruling); *Lane v. Dep't of Env'tl. Protection*, 29 F.A.L.R. 4063 (DEP 2007) (the agency has no substantive jurisdiction over

procedural issues, such as whether an issue was properly raised, and over an ALJ's evidentiary rulings); *Lardas v. Dep't of Env'tl. Protection*, 28 F.A.L.R. 3844, 3846 (DEP 2005) (evidentiary rulings of the ALJ concerning the admissibility and competency of evidence are not matters within the agency's substantive jurisdiction).

The agency's authority to modify a recommended order is not dependent on the filing of exceptions. *Westchester Gen. Hosp. v. Dept of Health and Rehabilitative Serv.*, 419 So.2d 705 (Fla. 1st DCA 1982). However, when exceptions are filed, they become part of the record before the agency. §120.57(1)(f), F.S. In the final order, the agency must expressly rule on each exception, except for any exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record. §120.57(1)(k), F.S. Thus, the agency is not required to rule on an omnibus exception in which a party states that its exception to a particular finding of fact is also an exception to any portion of the recommended order where the finding of fact is restated or repeated. Similarly, an exception that simply refers to or attempts to incorporate by reference an exception to another finding of fact or conclusion of law fails to comply with the statutory requirements.

C. EXCEPTIONS AND RESPONSES

The Administrative Procedure Act provides the parties to an administrative hearing with an opportunity to file exceptions to a recommended order. §§120.57(1)(b) and (k), F.S. The purpose of exceptions is to identify errors in a recommended order for the agency to consider in issuing its final order. As discussed above in Section B (Standard of Review), the agency may accept, reject, or modify the recommended order within certain limitations. When the agency considers a recommended order and exceptions, its role is like that of an appellate court in that it reviews the

sufficiency of the evidence to support the ALJ's findings of fact and, in areas where the District has substantive jurisdiction, the correctness of the ALJ's conclusions of law. In an appellate court, a party appealing a decision must show the court why the decision was incorrect so that the appellate court can rule in the appellant's favor. Likewise, a party filing an exception must specifically alert the agency to any perceived defects in the ALJ's findings, and in so doing the party must cite to specific portions of the record as support for the exception. *John D. Rood and Jamie A. Rood v. Larry Hecht and Dep't of Env'tl. Protection*, 21 F.A.L.R. 3979, 3984 (DEP 1999); *Kenneth Walker and R.E. Oswalt d/b/a Walker/Oswalt v. Dep't of Env'tl. Protection*, 19 F.A.L.R. 3083, 3086 (DEP 1997); *Worldwide Investment Group, Inc. v. Dep't of Env'tl. Protection*, 20 F.A.L.R. 3965, 3969 (DEP 1998). To the extent that a party fails to file written exceptions to a recommended order regarding specific issues, the party has waived such specific objections. *Environmental Coalition of Florida, Inc. v. Broward County*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991).

In addition to filing exceptions, the parties have the opportunity to file responses to exceptions filed by other parties. Rule 28-106.217(2), F.A.C. The responses are meant to assist the agency in evaluating and ultimately ruling on exceptions by providing legal argument and citations to the record.

D. RULINGS ON EXCEPTIONS

Groveland filed exceptions to 46 of the 129 paragraphs in the Recommended Order, and District staff filed exceptions to four paragraphs in the Recommended Order. Groveland, the District, and Niagara filed responses to the exceptions.

RULINGS ON GROVELAND'S EXCEPTIONS

Preliminary Objection/Exception

Groveland's preliminary objection/exception argues the District Governing Board, rather than the Executive Director, should consider the Recommended Order. As grounds, Groveland asserts that a part of section 6 and section 7 of Senate Bill 2080 (2009), enacted as sections 6 and 7 of Chapter 2009-243, Laws of Florida, are invalid and unconstitutional as applied because: (a) they violate Groveland's right to due process under the federal and Florida constitutions because the Executive Director is not impartial; (b) they violate Groveland's right to equal protection under the federal and Florida constitutions because there is no rational basis for the legislature's segregation of CUP approvals and denials between the Executive Director and Governing Board; (c) they violate Groveland's right to due process by its retroactive application to this proceeding; and (d) they violate the Florida constitution and statutory law by eliminating Groveland's alleged right to a public hearing before the Governing Board on its exceptions to the Recommended Order.

The District lacks jurisdiction and authority to determine the validity or constitutionality of the challenged sections of Chapter 2009-243, Laws of Florida. *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So.2d 249 (Fla. 1987) (an agency has no power to declare a statute void or otherwise unenforceable); *Lennar Homes, Inc. v. Dep't of Bus. and Prof'l Regulation, Div. of Florida Land Sales, Condominiums and Mobile Homes*, 888 So.2d 50 (Fla. 1st DCA 2004) (an agency does not possess the authority to determine the constitutionality of statutes); *Hays v. State Dept. of Bus. Regulation, Div. of Pari-Mutuel Wagering*, 418 So.2d 331 (Fla. 3d DCA 1982) (an administrative agency lacks jurisdiction to consider constitutionality of its own

action). On that basis, the District lacks substantive jurisdiction to rule on this objection/exception.

Exception No. 1 – Need for Requested Allocation

a. Quality of Water Requested

Groveland takes exception to FOF 32 and COLs 94 and 103 without stating a valid basis as required by Section 120.57(1)(k), F.S. Even though the District need not provide a ruling, the District rejects the exception.

FOF 32 and COLs 94 and 103 state as follows:

32. Niagara’s proposed use was shown to be of such a quantity as necessary for economic and efficient utilization.

94. Niagara demonstrated by a preponderance of the evidence that the proposed consumptive use of water is necessary for economic and efficient utilization as required by Florida Administrative Code Rule 40C-2.301(4)(a). In this context, the District’s interpretation and application of the term “necessary” is a reasonable one.

103. Niagara demonstrated by a preponderance of the evidence that it will use the lowest acceptable quality water source, as required by Florida Administrative Code Rule 40C-2.301(4)(g). In this context, the District’s interpretation and application of the term “direct human consumption” is a reasonable one.

In its exception, Groveland states that Niagara does not need groundwater because it will use the reverse osmosis treatment process. Groveland implies that reverse osmosis would treat lower quality water to standards appropriate for bottled water. Whether Niagara would use the lowest quality water required under the CUP permitting criteria was a significant issue in this case, and the ALJ made many findings on this topic, in addition to those cited in this exception. In fact, Groveland’s exception is nearly identical to paragraph 19 of its proposed recommended order, which was considered by the ALJ in preparing the Recommended Order (see page 4). As explained under the heading “Standard of Review,” at this stage in the process, an agency may not reweigh evidence or interpret evidence anew.

To the extent this argument relates to the quality of water allocated to Niagara, this exception is addressed under the ruling on Exception No. 2 (Lower Quality Source). To the extent this argument relates to the quantity of any type of water, this exception is addressed under the heading “Quantity of Water Requested.” To the extent that Groveland is arguing that the record provides no basis for these findings, the record contains competent substantial evidence to support the findings. (T: 156, 163-168,179-185, 218-223, 312-314, 329, 784-788; Niagara Ex. 44-46)

b. Quantity of Groundwater Requested

Groveland takes exception to FOFs 24 and 32 and COLs 94, 98, and 104 without stating a valid basis as required by Section 120.57(1)(k), F.S. Even though the District need not provide a ruling, the District rejects the exception.

Three of the five challenged paragraphs relate to Rule 40C-2.301(4)(a), F.A.C., which is one criterion for determining whether a use is reasonable-beneficial: “The use must be in such quantity as is necessary for economic and efficient utilization.” FOFs 24 and 32 and COL 94 state as follows:

24. The evidence presented regarding the bottled water market and Niagara’s position in the market was sufficient to demonstrate that the requested volume of water is necessary through the duration of the CUP.

32. Niagara’s proposed use was shown to be of such a quantity as necessary for economic and efficient utilization.

94. Niagara demonstrated by a preponderance of the evidence that the proposed consumptive use of water is necessary for economic and efficient utilization as required by Florida Administrative Code Rule 40C-2.301(4)(a). In this context, the District’s interpretation and application of the term “necessary” is a reasonable one.

The record contains competent substantial evidence to support the above findings and conclusions. (T: 156, 163-168,179-185, 218-223, 312-314, 329, 784-788; Niagara Ex. 44-46,

209, and 220) Niagara demonstrated that there is a demand for purified bottled water and that the water needed to produce the product is efficient based on industry standards. (T: 785-788) Groveland cross-examined the witnesses but did not present evidence on this issue.

Groveland believes that the quantity is excessive because Niagara is not currently operating the facility at its maximum capacity of four bottling lines. However, the consumptive use permitting criteria do not require that a permit applicant be operating at maximum capacity at the time of application. The applicant must provide reasonable assurance that it can implement the project, but it need not implement the project before receiving the permit. *Miami Corp., Inc., et al v. City of Titusville, et al*, Case No. 2004-88 (SJRWMD 2007), *aff'd*, 6 So.3d 69 (Fla. 5th DCA 2009); *Marion County v. Greene, et al.*, Case No. 06-071 (SJRWMD 2008), *aff'd* 4 So. 3d 775 (Fla. 5th DCA 2009). In this case, Niagara demonstrated that the amount of groundwater requested was based on the production capacity of two bottling lines and that its facility will accommodate four bottling lines. (T:108-116, 136-137, 142-143, 259-262, 283-284)

Groveland also argues that Niagara does not need the full allocation because Niagara plans to continue bottling spring water, which would occupy production capacity. However, the amount of groundwater requested was based on the production capacity of two lines to produce purified bottled water specifically. (T:109, 111-112, 143) The facility is designed to handle four production lines, which would leave two lines available for spring water.¹ (T:259, 283-284)

The two other paragraphs that Groveland cites in this exception (COLs 98 and 104) contain conclusions regarding Niagara's compliance with Rule 40C-2.301(4)(b), F.A.C., and

¹ In its exception, Groveland contends that "[t]he requested allocation of .484 mgd would result in 'water banking' because it substantially exceeds the volume of groundwater currently being used by Niagara on the single production line it is operating." (Groveland's Exceptions at 6) To avoid "water banking" even after an applicant has provided reasonable assurance that it meets the CUP permitting criteria, the District is authorized to revoke a permit if the "water supply allowed by the permit" is not used for 2 years. §373.243(4), F.S.

Section 373.223(1)(a), F.S. Because Groveland provides no basis for its exception, and because the District finds no reason to modify the underlying and related findings, the District need not discuss the two paragraphs that were merely cited in the exception.

c. Current Source of Water

Groveland takes exception to FOFs 24 and 32 and COLs 94, 98, and 104 because, in Groveland's view, "the ALJ failed to take into account that Niagara has a current source of water to meet the demand for its manufactured bottled water product," and thus erroneously concluded that Niagara needs groundwater. Groveland took exception to these same five paragraphs under the heading "Quantity of Groundwater Requested." The exception is rejected.

Three of the five challenged paragraphs relate to Rule 40C-2.301(4)(a), F.A.C., which is one criterion for determining whether a use is reasonable-beneficial: "The use must be in such quantity as is necessary for economic and efficient utilization." FOFs 24 and 32 and COL 94 state as follows:

24. The evidence presented regarding the bottled water market and Niagara's position in the market was sufficient to demonstrate that the requested volume of water is necessary through the duration of the CUP.

32. Niagara's proposed use was shown to be of such a quantity as necessary for economic and efficient utilization.

94. Niagara demonstrated by a preponderance of the evidence that the proposed consumptive use of water is necessary for economic and efficient utilization as required by Florida Administrative Code Rule 40C-2.301(4)(a). In this context, the District's interpretation and application of the term "necessary" is a reasonable one.

The record contains competent substantial evidence to support the above findings and conclusions. (T: 156, 163-168, 179-185, 218-223, 312-314, 329, 784-788; Niagara Ex. 44-46, 209, and 220)

Groveland's claim that the ALJ "failed to take into account" that Niagara has a current source of water is incorrect, based on testimony at the administrative hearing and the Recommended Order itself. (T:83-84, 105-108, 138-140; FOFs 2 and 44) The evidence is undisputed that Niagara currently uses water from Wildwood Springs to produce bottled water to sell as spring water and purified water. Groveland may be arguing that Niagara does not need water in addition to the water supplied by Wildwood Springs. If so, then the record contains competent substantial evidence that the amount of groundwater requested by Niagara is to fulfill a need beyond that being fulfilled by Wildwood Springs. The amount of water requested is based on the production capacity of two lines to produce purified bottled water. Because the facility can accommodate four lines, both spring and purified bottled water could be produced. (T:108-109, 111-112, 136-137, 143) Niagara's witness testified that Wildwood Springs is unable to provide the quantity of water needed to operate the plant for both spring and purified water lines. (T: 140) Also, Niagara's witness testified that the company's primary product is purified water. (T: 217) In summary, the ALJ was aware that Niagara has a current source of water for its facility.

Groveland suggests that Niagara should purchase spring water instead of withdrawing groundwater to produce purified bottled water. In FOF 44, the ALJ found that the spring water that Niagara is using is of equivalent quality to the groundwater that Niagara proposes to withdraw. Groveland did not object to FOF 44 in this exception and cites no authority for the District to require the use of a different, equivalent quality source of water. Niagara was, however, required to evaluate lower quality sources for the cooling water component of its requested allocation, as required by Rule 40C-2.301(4)(g), F.A.C.

Groveland prefers that Niagara use the Wildwood Springs water rather than withdrawing groundwater from a location within the Central Florida Coordination Area (CFCA) and a Priority Water Resource Caution Area (PWRCA). The location of Niagara's withdrawal in the CFCA was considered under the public interest test, but the CFCA rule itself does not apply to Niagara's proposed use, as found in FOF 76 (to which Groveland did not take exception). The location in a PWRCA was not considered as a permitting criterion, given that Section 373.0361(7), F.S., prohibits the PWRCA designation from being used, unless the applicable portion of the water supply plan has been adopted by rule. To the extent that this exception relates to Groveland's exception regarding the public interest test, this issue is addressed under Exception No. 4, "Location in the CFCA and PWRCA."

The two other paragraphs that Groveland cites in this exception (COLs 98 and 104) contain conclusions regarding Niagara's compliance with Rule 40C-2.301(4)(b), F.A.C., and Section 373.223(1)(a), F.S. Because Groveland provides no basis for its exception, and because the District finds no reason to modify the underlying and related findings, the District need not discuss the two paragraphs that were merely cited in the exception.

Exception No. 2 – Lower Quality Source

Under this heading, Groveland takes exception to findings and conclusions related to several rules that require the use of lower quality sources in certain circumstances: Rules 40C-2.301(4)(e), (f), and (g), F.A.C., and Section 12.3.2.1(c), A.H. The arguments in this exception are organized by four topics. The exception is rejected.

1. Water Conservation Measures

Groveland takes exception to FOF 13 and COLs 100 and 103 on the ground that they are not supported by competent substantial evidence, and also that they reflect an erroneous interpretation of District rules. FOF 13 and COLs 100 and 103 state as follows:

13. The proposed CUP includes a conservation plan with provisions for monitoring water use, repairing leaks, conducting quality assurance inspections, using totalizing flow meters, and minimizing spillage.

100. Niagara demonstrated by a preponderance of the evidence that all economically, environmentally, or technologically feasible conservation measures will be implemented, as required by Florida Administrative Code Rule 40C-2.301(4)(e), and Section 12.3 of the Applicant's Handbook.

103. Niagara demonstrated by a preponderance of the evidence that it will use the lowest acceptable quality water source, as required by Florida Administrative Code Rule 40C-2.301(4)(g). In this context, the District's interpretation and application of the term "direct human consumption" is a reasonable one.

The record contains competent substantial evidence to support this finding and conclusions. (T: 257, 495-499, 788-792, 911-912; Niagara Ex. 67 and 220)

FOF 13 states that there is a conservation plan; it is not clear why Groveland objects to this finding. Similarly, because COL 103 does not deal with water conservation measures, it is not clear why Groveland included it here. COL 103 is addressed elsewhere under the heading "Direct Human Consumption." Notably, Groveland does not take exception to FOF 31, which finds that the water conservation plan is equal to or better than other plans for beverage bottlers.

Groveland's exception appears to be directed primarily at COL 100, which concludes, in essence, that Niagara's water conservation plan meets the criteria of Rule 40C-2.301(4)(e), F.A.C., and Section 12.3, A.H. Rule 40C-2.301(4)(e), F.A.C., states as follows:

All available water conservation measures must be implemented unless the applicant demonstrates that implementation is not economically, environmentally or technologically feasible. Satisfaction of this criterion may be demonstrated by implementation of an approved water conservation plan as required in section

12.0., Applicant's Handbook: Consumptive Uses of Water.

Section 12.3, A.H., addresses commercial/industrial-type uses, and Section 12.3.2.1, A.H., requires applicants to submit a water conservation plan for their facility that contains specific activities to conserve water. The section lists components of a water conservation plan, including Section 12.3.2.1(c), A.H., which requires an analysis of the economic, environmental, and technical feasibility of using the lower quality sources, among other things.

Groveland seems to argue that the water conservation plan is the appropriate context for Niagara to evaluate whether it could use a lower quality source of water for bottling. In fact, a water conservation plan is for *the facility* where the commercial/industrial-type use occurs.² (T: 788-790, 911-912; Niagara Ex. 67; Rule 12.3.2.1, A.H.) District staff testified that the plan applies to the facility and that the plan adequately addressed the facility's water conservation measures. (T: 788-790, 911-912) Groveland's argument regarding a lower quality source for bottling falls under Rule 40C-2.301(4)(g), F.A.C., which is addressed under the heading "Direct Human Consumption."

2. Lowest Quality Source for Cooling Water

Groveland takes exception to FOFs 38-43 and COLs 100, 102, and 103, on two grounds: (1) that no competent substantial evidence supports these findings and conclusions and (2) that the interpretation of "economically feasible" is unreasonable. These findings and conclusions relate to the allocation of 29,797 gallons per day (gpd) of groundwater to cool Niagara's manufacturing equipment. Groveland states that Niagara should use a lower quality source of water for this purpose.

² The ALJ did not conclude, as Groveland alleges, that Niagara "was excused from the requirements of Section 12.3.2.1 A.H." because its non-process water was for "direct human consumption." In COL 103, the ALJ concluded that in the context of Rule 40C-2.301(4)(g), F.A.C., the District's interpretation of and application of the term "direct human consumption" was reasonable. He made no such conclusion with regard to Rule 40C-2.301(4)(e), F.A.C., which relates to conservation measures.

Except for COL 100, which is addressed under the heading “Water Conservation Measures,” these findings and conclusions relate to Rules 40C-2.301(4)(f) and (g), F.A.C., which state in pertinent part:

(4) The following criteria must be met in order for a use to be considered reasonable-beneficial:

...

(f) When reclaimed water is readily available it must be used in place of higher quality water sources unless the applicant demonstrates that its use is either not economically, environmentally or technologically feasible.

(g) For all uses except human food preparation and direct human consumption, the lowest acceptable quality water source, including reclaimed water or surface water (which includes stormwater), must be utilized for each consumptive use. To use a higher quality water source an applicant must demonstrate that the use of all lower quality water sources will not be economically, environmentally, or technologically feasible. If the applicant demonstrates that use of a lower quality water source would result in adverse environmental impacts that outweigh water savings, a higher quality source may be utilized.³

FOFs 38-43 state as follows:

38. There are technical and economic problems associated with using water of lower quality for the cooling process at the Niagara facility because higher TDS levels would damage the cooling equipment.

39. Using water with higher TDS levels would also require greater volumes of water to achieve cooling. Niagara’s cooling system is designed to reject water when the dissolved solids reach a certain high level, and to replace the reject water with fresh water. Operating at higher dissolved solid levels would cause the system to reject water more frequently, so greater volumes of water would be needed for cooling and greater volumes of wastewater would be generated.

³ Section 10.3(g), A.H., states the following: “The lowest acceptable quality water source, including reclaimed water or surface water (which includes stormwater), which is addressed in paragraph 40C-2.301(4)(f), must be utilized for each consumptive use. To use a higher quality water source an applicant must demonstrate that the use of all lower quality water sources will not be economically, environmentally, or technologically feasible. If the applicant demonstrates that use of a lower quality water source would result in adverse environmental impacts that outweigh water savings, a higher quality source may be utilized. This criterion shall not be used to require the use of lower quality sources for direct human consumption or human food preparation. Entities using water for these purposes and also for other purposes, such as irrigation, must evaluate the feasibility of using lower quality sources for such other purposes. However, it is possible that the unavailability of higher quality sources may necessitate the development of lower quality sources in order to meet projected demands, including the demands resulting from direct human consumption and human food preparation needs.” At the administrative hearing, a District witness testified that if higher quality sources are not available, an applicant would not be able to use the higher quality source even if the use is for direct human consumption. (T:793-795)

40. Using water from the St. Johns River, which has TDS levels much higher than in the groundwater, would require twice as much water to operate Niagara's cooling system. In addition, a 44-mile pipeline would be needed to convey water from the St. Johns River to the Groveland facility, which would involve much higher costs.

41. Seawater has even higher TDS levels and would require desalinization and a different cooling system. Using seawater would require much greater volumes of water for treatment and cooling. Disposal of the brine concentrate generated by the treatment process would create additional costs. The use of seawater would require the construction of 120-mile pipeline, which would involve large capital and operating costs.

42. Groveland insists that the much higher costs associated with these sources of lower quality water are still economically feasible for Niagara based on Niagara's projected income from its bottling operation. The District does not determine feasibility based on the balance sheet of the individual permit applicant. The District evaluates relative costs of alternative sources in the context of normal practices and expected benefits.

43. Reliable volumes of reclaimed water to use in Niagara's cooling system are not readily available to Niagara from domestic wastewater treatment facilities in the area.

Elsewhere in its exceptions, Groveland objected to FOF 48, which is related to this topic:

48. Niagara demonstrated that it is not technically nor economically feasible to use a source of lower quality water for its cooling water.

COLs 102 and 103 state as follows:

102. Niagara demonstrated by a preponderance of the evidence that there is no readily available reclaimed water that is economically, environmentally, or technologically feasible to use for cooling water, as required by Florida Administrative Code Rule 40C-2.301(4)(f).

103. Niagara demonstrated by a preponderance of the evidence that it will use the lowest acceptable quality water source, as required by Florida Administrative Code Rule 40C-2.301(4)(g). In this context, the District's interpretation and application of the term "direct human consumption" is a reasonable one.

With respect to using reclaimed water for the cooling system, the ALJ addressed compliance with Rule 40C-2.301(4)(f), F.A.C., in FOF 43 and COL 102. There is competent substantial evidence to support this finding and conclusion. (T:684-687, 792-793; Niagara Ex. 179) Rule 40C-2.301(4)(f), F.A.C., requires that the applicant first address whether reclaimed

water is readily available. In FOF 43, the ALJ found that reclaimed water is not readily available. If reclaimed water is available, then the applicant must use reclaimed water, unless the applicant demonstrates that its use is not economically, environmentally, or technologically feasible. In this case, the ALJ's finding in FOF 43 was sufficient; it was not necessary to find that the use of reclaimed water is not economically, environmentally, or technologically feasible.

With respect to using all available lower quality water sources for the cooling system in accordance with Rule 40C-2.301(4)(g), F.A.C., there is competent substantial evidence to support FOFs 38-42 and 48 and COL 103. (T:313, 317-319, 321-332, 351-356; Niagara Ex. 69, 71, 72, 74, 75, 76) The use of lower quality water sources for bottled water is addressed under the heading "Direct Human Consumption."

Groveland asserts that the interpretation of "economically feasible" is unreasonable and that, under Groveland's interpretation, Niagara should be required to use a lower quality source for cooling water. (Presumably, this argument relates to FOFs 42 and 48 and COL 103.) First, as stated above, the findings related to economic feasibility are supported by competent substantial evidence. Second, even if the economic feasibility findings were unsupported, the ALJ found in FOF 48 that the use of a lower quality source is not technologically feasible. Notably, Groveland did not object to FOF 48 in this exception (see Groveland's Exceptions, pages 9-10). Rule 40C-2.301(4)(g), F.A.C., requires applicants to demonstrate that the use of all lower quality water sources are not economically or environmentally or technologically feasible. Thus, an applicant must demonstrate only one type of infeasibility to be able to use a higher quality source.

3. “Direct Human Consumption”

Groveland takes exception to FOFs 34-37 and COLs 100, 103, and 104 on the ground that these findings and conclusions reflect an erroneous interpretation of District rules. Specifically, Groveland argues that a lower quality source of water should be used for bottled water because bottled water is not for “direct human consumption.”

FOFs 34 through 37 and COL 103 state as follows:

34. The requirement to use a lower water quality source, however, is not applicable when the water is for “direct human consumption” or human food preparation. §10.3(g), Applicant’s Handbook. Groveland argues that the word “direct” should mean unaltered and, therefore, Niagara’s bottled water is not intended for direct human consumption because the water is treated before it is bottled.

35. The District, however, does not interpret or apply the term “direct human consumption” to mean drinking water directly from the source without treatment. In the case of water delivered to households and businesses by public water suppliers, which also must be treated before it is delivered, the District regulates the water as being for direct human consumption.

36. The fact that Niagara would filter the groundwater, apply RO treatment, add acid to prevent mineral buildup in the RO equipment, and add minerals for taste if requested by customers, does not disqualify Niagara’s bottled water as being for direct human consumption.

37. Because 454,000 gpd of Niagara’s proposed water withdrawal would be processed for direct human consumption, Niagara did not have to seek to use a source of lower water quality for that volume. The requirement to use available sources of lower quality water would apply to the 30,000 gpd that Niagara intends to use for cooling.

103. Niagara demonstrated by a preponderance of the evidence that it will use the lowest acceptable quality water source, as required by Florida Administrative Code Rule 40C-2.301(4)(g). In this context, the District’s interpretation and application of the term “direct human consumption” is a reasonable one.

FOFs 34 and 35 state Groveland’s and the District’s positions, so the purpose of objecting to these paragraphs is not clear. In any event, Groveland states in its exception that there is no factual dispute.

During the administrative hearing and in its proposed recommended order and exceptions, Groveland argued that water that will be bottled is not for “direct human consumption” and therefore Niagara must use a lower quality water source unless it demonstrates that such use is not economically, environmentally, or technologically feasible pursuant to Rule 40C-2.301(4)(g), F.A.C., and Section 10.3(g), A.H. The District has consistently concluded that drinking water, whether bottled or public supply, is for direct human consumption or human food preparation. (T:853-854, 912-915) *Miami Corp., Inc., et al v. City of Titusville, et al*, Case No. 2004-88 (SJRWMD 2007) *aff’d*, 6 So.3d 69 (Fla. 5th DCA 2009); *Marion County v. Greene, et al.*, Case No. 06-071 (SJRWMD 2008), *aff’d*, 4 So.3d 775 (Fla. 5th DCA 2009). Under Groveland’s interpretation, even public supply for drinking water is not “direct human consumption.” (Groveland’s Exceptions at 10-11) In essence, this part of the exception amounts to an attempt to reargue the evidence. As explained under the heading “Standard of Review,” when entering a final order, an agency may not reweigh evidence or interpret evidence anew.

COL 100 relates to the facility’s water conservation plan and was addressed under the heading “Water Conservation Measures.” Groveland cites COL 104 in this exception, which is a conclusion regarding Niagara’s compliance with the reasonable-beneficial criterion, which in turn depends on compliance with other criteria, including the paragraphs addressed above. Because the District finds no reason to modify the underlying and related findings, the District need not discuss the broader conclusion.

4. Lower Floridan Aquifer as a Source

Groveland takes exception to FOFs 45-48 and COL 103 because, in Groveland’s view, the ALJ erred in concluding “that Niagara met its burden of analyzing all lower quality sources

as Niagara did not investigate the use of the Lower Floridan Aquifer.” Groveland fails to state a proper legal basis for this portion of the exception as required by Section 120.57(1)(k), F.S.

FOFs 45, 46, and 47 state as follows:

45. Groveland contends that Niagara did not investigate the quality of the Lower Floridan Aquifer as a potential source of lower quality water as a potential source of lower water quality water for Niagara’s proposed use.

46. Studies conducted by the U.S. Geological Survey indicate that the water quality of the Lower Floridan Aquifer is about the same or better quality than the quality of the water in the Upper Floridan Aquifer. Water quality data from a Lower Floridan well in the vicinity also indicates that the quality of the water in the Lower Floridan is as good as, or better than, the water quality in the Upper Floridan in this area.

47. Withdrawals from the Lower Floridan create a risk of saline water intrusion into the fresh portion of the Lower Floridan or Upper Floridan.

FOF 45 states Groveland’s position, so the reason for objecting to this finding is not clear. In any event, the paragraphs are supported by competent substantial evidence. (T: 398-401, 499-506, 934-937, 997, 1010-1011)

During the administrative hearing, evidence was presented on the Lower Floridan and whether it should be investigated as a lower quality source. The ALJ found in FOF 46 that the water quality of the Lower Floridan is as good or better than the source proposed for Niagara’s use. In this exception, Groveland cites no authority for the District to require the use of a different, equivalent quality source of water. Groveland’s exception attempts to reargue the evidence. As explained under the heading “Standard of Review,” at this stage in the process, an agency may not reweigh evidence or interpret evidence anew.

Groveland also cited FOF 48 and COL 103, which contain conclusions regarding Niagara’s compliance with Rule 40C-2.301(4)(g), F.A.C. Because Groveland provides no basis for its exception, and because the District finds no reason to modify the underlying and related findings, the District need not discuss the two paragraphs that were merely cited in the exception.

Exception No. 3 – “Purpose and Value of Use”

Groveland takes exception to FOF 71 and COL 97 on the grounds that the ALJ “wrongfully concluded that the District was limited in its ability to ‘elevate the status of one water use over another.’” (Groveland’s Exceptions at 12) In addition, Groveland’s exception references FOF 22. With regard to the findings in FOFs 22 and 71, Groveland’s exception fails to meet the requirements of Section 120.57(1)(k), F.S., and, thus, the District need not rule on it. Nevertheless, the exception is rejected because (1) these FOFs are supported by competent substantial evidence and (2) Section 10.2, A.H., is not applicable to Niagara’s CUP application.

FOFs 22 and 71 and COL 97 state:

22. Groveland contends that the consumer demand for bottled water could be met by other water bottlers and, therefore, there is no need for Niagara’s proposed withdrawal. However, no statute or rule requires Niagara to demonstrate that this particular CUP is the only means to meet the consumer demand for bottled water. The District’s evaluation focuses on the applicant’s need for the requested volume of water.

71. Groveland suggests that Niagara’s proposed use, and perhaps all commercial/industrials [sic] uses, are less important and worthy than public water supply uses like its own, and should not be allowed to take water that a public supplier might need in the future. As discussed in the conclusions of law, all reasonable beneficial uses of water are equal under Chapter 373, except in certain contexts which are not applicable here.

97. Chapter 373, Florida Statutes, and the consumptive use permitting rules adopted by the District do not elevate the status of one water use over another except in certain specified contexts. For example, water can be reserved for a particular future use. See, §373.223(4), Fla. Stat. During a declared water shortage, certain uses may be given priority. See, §§ 373.175 and 373.246, Fla. Stat. When there are pending applications for a volume of water that is inadequate for all, the District can approve the application which best serves the public interest. See, §373.233, Fla. Stat. None of these situations are applicable in this case.

The first and third sentences of FOF 22 and the first sentence of FOF 71 are findings of fact and are supported by competent substantial evidence. (T: 135-36, 239, 784-787; Pre-hearing Stipulation at 2) The second sentences of FOFs 22 and 71 and COL 97 will be treated as

conclusions of law. The District may reject or modify conclusions of law over which it has substantive jurisdiction and interpretations of administrative rules over which it has substantive jurisdiction provided the reasons for such rejection or modification are stated with particularity and the District finds that such rejection or modification is as or more reasonable than the ALJ's conclusions or interpretation. §120.57(1)(1), F.S.

To support its argument that the conclusions of law in FOFs 22 and 71 and in COL 97 should be rejected, Groveland relies squarely on the applicability of Section 10.2(d), A.H., to Niagara's CUP application. Groveland contends that "Section 10.2(d), A.H. requires the District to give consideration to any evidence concerning the purpose and value of the use in conducting its reasonable beneficial analysis" and, further, that "nothing in Chapter 373 nor in the District rules limits the circumstances under which Section 10.2(d), AH must be applied." In discussing FOF 22, Groveland states that "[t]his conclusion overlooks the mandate of Section 10.2(d), AH that the District consider the purpose and value of the use in determining whether it is reasonable beneficial." (Groveland's Exceptions at 12 and 14)

Contrary to Groveland's assertion, Section 10.2(d), A.H., is not a substantive requirement that an applicant must meet to obtain a consumptive use permit from the District. *Corp. of the President v. SJRWMD*, Case No. 89-751 (SJRWMD 1990). Section 10.2 (entitled "State Water Policy") and Section 10.3 of the Applicant's Handbook, which immediately follows Section 10.2, A.H., provide in pertinent part:

10.2 State Water Policy

Section 62-40, F.A.C., provides that in determining whether a use is a reasonable beneficial use, consideration should be given to any evidence presented concerning the following factors:

...

(d) the purpose and value of the use.

...

10.3 Reasonable-beneficial Use Criteria

Based upon the statutory guidance and the delineation of factors found in State Water Policy, the Governing Board has determined that the following criteria must be met in order for a use to be considered reasonable-beneficial:

...

(emphasis added)

Rule 62-40, F.A.C., is a rule adopted by the Department of Environmental Protection (DEP) pursuant to Section 373.036, F.S. Once known as the State Water Policy, this rule has been renamed the “water resource implementation rule.” *Corp for the President; see §§ 373.036(1)(d) and 373.019(23), F.S.* Under Section 373.036(1)(d), F.S., DEP must review rules of the water management districts for consistency with this rule. *See §§373.036(1)(d) and 373.114(2), F.S.* Under Section 373.114(2), F.S., DEP has:

the exclusive authority to review rules of the water management districts, other than rules relating to internal management of the districts, to ensure consistency with the water resource implementation rule as set forth in the rules of the department. Within thirty (30) days after adoption or revision of any water management district rule, the department shall initiate a review of such rule pursuant to this section.

Consistent with these provisions, Rule 62-40, F.A.C., explicitly states that:

This chapter in and of itself *shall not constitute standards or criteria for decisions on individual permits*. This chapter also does not constitute legislative authority to the District for the adoption of rules if such rules are not otherwise authorized by statute.

(emphasis added) Rule 62-40.110(4), F.A.C. Rule 62-40.110(11), F.A.C., further states that “[t]his chapter does not repeal, amend, or otherwise alter any rule . . . adopted by the Department or the Districts.” Thus, Groveland’s premise that Section 10.2(d), A.H., applies to Niagara’s CUP application is erroneous. *Corp for the President*. As a result, the District need not address

Groveland's recitation and reinterpretation in this exception of the evidence regarding how this (inapplicable) criterion was not met.

Exception No. 4 – Public Interest

Under the heading "Public Interest," Groveland takes exception to certain findings of fact and conclusions of law relating to the ALJ's determination that Niagara's proposed use of water is consistent with the public interest. Specifically, Groveland takes exception to FOFs 70, 71, 72, 74 and 81 and COLs 98, 106, 114 through 116, and 122 through 126 on the ground that these findings and conclusions are "erroneous." In addition, Groveland's exception references COLs 105, 109, 110, 107 through 111, and 114 through 117. This exception is rejected because: (a) the findings of fact are supported by competent substantial evidence and (b) Groveland's four arguments that the conclusions of law at which the exception is directed are "erroneous" are without merit.

With regard to the first sentence of FOF 71 and to FOFs 70, 72, 74 and 81 and COL 98,⁴ the characterization of these findings and conclusion as "erroneous" does not meet the legal requirements of Section 120.57(1)(k), F.S. Accordingly, the District need not rule on the exception with regard to these paragraphs. In any event, the findings of fact in the first sentence of FOF 71 and in FOFs 70, 72, 74 and 81 are all supported by competent substantial evidence and, therefore, may not be modified by the District. (T:409, 781, 789, 801, 832-834, 843-846, 861, 926; Niagara Ex. 220) As noted in the ruling on Exception No. 3, the second sentence in FOF 71 will be treated as a conclusion of law.

Groveland makes four legal arguments in support of its exception.

⁴ COL 98 concludes that Niagara's proposed use is "both reasonable and consistent with the public interest, as required by Florida Administrative Code Rule 40C-2.301(4)(b)." While Groveland asserts that this COL is "erroneous" (Groveland's Exceptions at 15), the arguments in this exception are directed at the interpretation of the public interest test in Section 373.223(1)(c), F.S., and Section 9.3, A.H. COL 98, however, relates to the public interest test under Section 373.223(1)(a), F.S.

1. Scope of Public Interest Test under §373.223(1)(c), F.S.

First, Groveland argues that the scope of the public interest test under Section 373.223(1)(c), F.S., extends beyond considerations of water resource management and should include additional adverse environmental impacts that Groveland alleged would be caused by Niagara's proposed use, such as "plastic bottle disposal issues, consumption of scarce petroleum resources for bottle manufacture and transport, air pollution from the transport of raw materials to Niagara's facility and of the finished product to market and petroleum runoff from the transportation of materials and product." (Groveland's Exceptions at 15 and 18) No evidence of these alleged environmental impacts was admitted into evidence (T: 97; Order on Motion in Limine dated April 7, 2009; Groveland's Exceptions at 18), and the District does not have substantive jurisdiction over evidentiary rulings. *Barfield v. Dept. of Health*, 805 So.2d 1008, 1012 (Fla. 1st DCA 2001).

The consideration of only water resource related matters in the evaluation of whether Niagara's proposed water use is consistent with the public interest under Section 373.223(1)(c), F.S., and Section 9.3, A.H., was appropriate. The District is a creature of statute and its powers are those expressed in statutory language, or necessarily implied from expressed language, and powers are not conferred by the absence of language.⁵

The scope of the District's Chapter 373 powers are gleaned from the language of the statute itself.⁶ The first indicator is the title of Chapter 373 – "Florida Water Resources Act of

⁵ *State, Bd. of Trustees v. Day Cruise Ass'n, Inc.*, 794 So.2d 696 (Fla. 1st DCA 2001) (the Board lacked authority to regulate day cruise gambling where the statute was silent about the subject matter). Powers may also be implied where necessary to implement an expressed power. *Keating v. State ex rel. Ausebel*, 167 So.2d 46 (Fla 1st DCA 1964).

⁶ *Depart v. Macri*, 902 So.2d 271 (Fla. 1st DCA 2005) (legislative intent is gleaned from the language used in the legislation).

1972.”⁷ The legislative policy of Chapter 373 is to conserve and fully control the State’s waters to realize their full beneficial use and to manage the water resources to ensure their sustainability.⁸ The Legislature vested DEP with the power and responsibility on the state level “to accomplish the conservation, protection, management, and control of the waters of the state,” but also recognized that the “water resource problems of the state” vary by region and commanded DEP to delegate the powers of Chapter 373 to the water management districts.⁹ The specific policy guideposts of Chapter 373 provide legislative intent, and all of them involve water resources, namely: manage water and related land resources; conserve, replenish, enhance, develop, and utilize surface and groundwater; develop and regulate dams, impoundments, reservoirs, and other works and provide water storage for beneficial purposes; promote the availability of sufficient water for existing and future reasonable-beneficial uses and natural systems; prevent flood damage, erosion and excessive drainage; minimize degradation of water resources from stormwater discharge; preserve natural resources, fish and wildlife; prevent pollution of water resources; promote recreational development, protect public land and assist in maintaining navigability; and otherwise promote the public general welfare.¹⁰

⁷ § 373.013, F.S.; *Larimore v. State*, 2 So.3d 101 (Fla. 2008) (the title of an act is properly considered in determining legislative intent).

⁸ §§ 373.016(1) and (2), F. S.; *See St. Johns River Water Mgmt. Dist. v. Consolidated-Tomoka Land Co.*, 717 So.2d 72, 78 (Fla. 1st DCA 1998) (Chapter 373 lays out the legislative plan to protect state waters); *Osceola County v. St. Johns River Water Mgmt. Dist.*, 486 So.2d 616, 617 (Fla. 5th DCA,) *aff’d in part and rev’d in part*, 504 So.2d 385, 387 (Fla. 1987) (the Water Resources Act was enacted in 1972 to provide the state with a comprehensive policy for the management of Florida’s water); *City of St. Petersburg v. Southwest Fla. Water Mgmt. Dist.*, 355 So.2d 796, 798 (Fla. 2^d DCA 1977)(the Florida Water Resources Act was enacted by the state legislature for the dual purpose of providing for conservation of the available water resources while maximizing the beneficial use of the resources).

⁹ § 373.016(5), F.S.

¹⁰ § 373.016(3), F.S.; *Osceola County v. St. Johns River Water Mgmt. Dis.*, 504 So.2d 385, 387 (Fla. 1987) (the court examined § 373.016 to determine legislative intent). The “general welfare” guidepost of § 373.016(3)(j) is constrained to the water resources matters enumerated elsewhere in the provision. *Quarantello v. Leroy*, 977 So.2d 648 (Fla. 5th DCA 2008) (under statutory construction, where a list of specific things is followed by some more general word or phrase, that general word or phrase will usually be construed to refer to things of the same kind or species as those specifically listed); *State v. Hobbs*, 974 So.2d 1119 (Fla. 5th DCA 2008) (a general term that follows a list of specific terms implies that all the items be construed as part of the same class of items); *see e.g.* §§ 373.171(1) (the District may adopt certain rules and issue certain orders regarding the water resources to protect the public welfare); § 373.119(2) (issue emergency orders to protect the public welfare regarding water resource issues)

The CUP program of Part II of Chapter 373 was enacted to accomplish the water resource conservation and protection policy goals of Chapter 373.¹¹ The permitting requirement is intended to regulate water uses to prevent harm to the water resources and ensure the use is consistent with the overall water resource objectives of the District.¹² Reading Chapter 373 as a whole, the term “consistent with the public interest,” as implemented by Section 9.3, A.H., is cabined by the purpose of Chapter 373 to address water resource-related issues.¹³ A principal example is that the legislature has expressly indicated that when there is a transport of water across county boundaries, the criterion “consistent with the public interest” in Section 373.223(1)(c), F.S., incorporates only water resource-related factors.¹⁴ Likewise, when there is a proposed interdistrict transfer of water, the legislature indicates that the needs of water providers and water users are to be considered in evaluating the criterion in Section 373.223(1)(c), F.S.¹⁵ Also, a CUP applicant’s use of a designated preferred water supply source is a positive factor under the “consistent with the public interest” criterion in Section 373.223(1)(c), F.S., and an applicant’s use of a designated alternative water supply source is presumed to meet that criterion.¹⁶

and § 373.139(1), F.S. (the District is empowered to acquire certain lands for the public welfare to conserve and protect water and water-related resources).

¹¹ See *Village of Tequesta v. Jupiter Inlet Corp.*, 371 So.2d 663,670-671 (Fla. 1979) (the CUP program was created for the conservation and control of the waters in the state).

¹² § 373.223(1), F. S.; See *City of Sunrise v. South Fla. Water Mgmt. Dist.*, 615 So.2d 746 (Fla. 4th DCA 1993) (Part II of Chapter 373 concerns environmental concerns, not economic concerns); *Mid-Chattahoochee River Users v. Fla. Dep’t of Env’tl. Protection*, 948 So.2d 794 (Fla. 1st DCA 2006) (Part II of Chapter 373 addresses problems of water supply, not economic injuries).

¹³ *Fla. Dep’t of Env’tl. Protection v. Contract Point Fla. Parks, LLC*, 986 So.2d 1260 (Fla. 2008) (to discern legislative intent, courts consider the statute as a whole, the evil to be corrected, the language, title, and history of the enactment).

¹⁴ § 373.223(3), F. S.

¹⁵ § 373.2295(4), F. S.

¹⁶ § § 373.2234, 373. 223(5), F. S.

Consequently, there is no language in Chapter 373, F.S., to indicate that the criterion “consistent with the public interest,” as defined by Section 9.3, A.H., authorizes considerations unconnected to water resource-related issues.¹⁷

In support of its argument that the scope of the public interest extends beyond water resource related considerations, Groveland relies on *Pinellas County v. Lake Padgett Pines*, 333 So.2d 472 (Fla. 2nd DCA 1976). According to the court, the “central issue” in that case was “whether the trial court erred in holding that a project known as the “Cypress Creek Well Field Project” was a ‘development of regional impact’ [DRI] as defined in Fla.Stat. Ch. 380.” *Lake Padgett Pines* at 473. The court determined that the project was not subject to review under Chapter 380, F.S. (1975).

Contrary to Groveland’s assertion, the *Lake Padgett Pines* decision did not rule that water management districts must consider all environmental issues when evaluating a CUP, including those not related to the water resources. Nothing in the opinion indicates the court’s discussion related to CUP criteria.¹⁸ Rather, the case involved a cooperative governmental project regarding the development of a water wellfield, flood detention area, wildlife refuge, and open space recreational area pursuant to Section 373.1961, F.S. (1975). *Id.* at 476. Because of this cooperative water supply effort, the court emphasized the statutory obligation of the project members, Southwest Florida Water Management District and the West Coast Regional Water Supply Authority, to “reduce any adverse environmental effects of improper or excessive withdrawals from the wellfield project” under Sections 373.1961 and 373.1962, F.S. (1975),

¹⁷ Groveland included an Exhibit C to its exceptions which it characterizes as “legislative history” of Section 9.3, A.H. It quotes from the portion of the exhibit entitled “II. Chapter 40C-2 Background Paper: Conditions for Issuance of Consumptive Use Permits.” Given the title, the document appears to be no more than background information provided to the District’s Governing Board in 1982. This document was not admitted into evidence in this case. Section 120.57 F.S., provides no authority to a reviewing agency to receive additional evidence other than that already presented and evaluated by the hearing officer. §120.57(1)(f) and (j), F.S.; *Sch. Bd. Of Leon County v. Weaver*, 556 So.2d 443, 445 (Fla. 1st DCA 1990).

¹⁸ In fact, the project had already received a twelve month CUP for water well withdrawal testing. *Id.* at 476.

when instituting proprietary public water supply projects. *Id.* at 478. The court’s discussion of consideration of the entire environmental effects of the project was not related to the criteria of CUP issuance, but rather to the district’s and water supply authority’s statutory duties to consider the total environmental effects of their projects to develop, store and supply water, as involved in that case, when proceeding under Sections 373.1961 and 373.1962, F.S. (1975). Consequently, the court’s discussion of consideration of the “total environment” related to these particular statutory duties of these “agencies” in their water supplier roles under Sections 373.1961 and 373.1962, and not to the district’s regulatory role under Section 373.223, F.S. *Id.* at 479. The court held that because Chapter 373 is to be liberally construed, the “environmental effects” to be evaluated in such circumstance are not “limited to the effects on a single resource” but should take into account environmental policy considerations of the location, development, and impacts of the water supply project itself. Thus, the District disagrees that *Padgett Pines* stands for the proposition that the scope of the public interest test under Section 373.223(1)(c), F.S., extends beyond considerations of water resource management.

The Recommended Order and the record reflect that the following water resource related matters were properly considered in this case: (1) whether the use meets the reasonable-beneficial use requirements; (2) whether any of the reasons for recommendation of denial apply; (3) whether there are competing applications; (4) whether the CFCA rules apply; (5) whether the local sources first criteria apply;¹⁹ (6) whether the use is an interdistrict transfer of water; and (7) the proposed use’s location within the CFCA. *See, e.g.*, FOFs 11, 13, 14, 15, 19, 24, 25, 26, 27, 28, 29, 30, 31, 32, 37, 39, 40, 41, 43, 44, 46, 47, 48, 52, 54, 55, 57, 67, and COLs 93, 97 and

¹⁹ The local sources first criteria in Section 373.223(3), F.S., do not apply to the transport and use of water “supplied exclusively for bottled water as defined in s. 500.03(1)(d)” Thus, the legislature has exempted such uses from the additional public interest considerations in Section 373.223(3), F.S.

112; T: 798-812. Additional water resource related considerations may be appropriate in the evaluation of future consumptive use permit applications.

2. “Lost Groundwater”

Second, Groveland argues that Niagara’s proposed use of groundwater cannot be consistent with the public interest since “94,000 gallons per day will be rendered not potable and . . . another 72,600 gallons per day will be shipped out of state” and that as a result, one-third of Niagara’s requested daily allocation “that would otherwise be available to meet the drinking water needs of Floridians will be lost, increasing the burden on Floridians to spend their money on alternate water supply development.” (Groveland’s Exceptions at 19) By making this argument, Groveland is seeking to have the District (a) create additional findings of fact, which it by law may not do, or implicitly reject findings of fact that are supported by competent substantial evidence and (b) determine that the shipment of products containing water out of state is contrary to the public interest.

In the Recommended Order, the ALJ found that:

- (1) The technology to be used at Niagara’s facility is state of the art, using constant online monitoring to reduce reject water. The cooling equipment and its operation have been designed to minimize water use. [FOF 25];
- (2) RO [reverse osmosis] is the industry treatment standard for production of purified bottled water. It is the most cost efficient treatment method in terms of energy use and water consumption. [FOF 26];
- (3) The proposed RO equipment and its operational perimeters are designed to optimize treatment efficiencies. The estimate of 91,000 gpd of RO concentrate is conservatively high based on the TDS levels and groundwater samples. The actual volume of RO concentrate produced by Niagara could be smaller. [FOF 27];
- (4) Groveland was critical of Niagara’s wastewater volume contending that the conversion of 90,000 gpd of groundwater to wastewater is inefficient and contrary to the public interest. The fact that Niagara’s bottling process would produce 91,000 gpd of wastewater does not make it inefficient. Nearly every commercial and industrial water use has a wastewater component. [FOF 28];

(5) [E]very gallon of RO concentrate used for irrigation reduces by one gallon the volume of groundwater that would otherwise be withdrawn for irrigation. [FOF 29]; and

(6) Using Niagara's wastewater for irrigation contributes to the efficiency of Niagara's proposed use. [FOF 29].

Of course, the groundwater presently used for irrigation is not available for drinking. Based on these findings of fact, Niagara's RO concentrate/reject water is not "lost groundwater," as Groveland asserts in its exception and as it argued throughout the administrative hearing. Notably, Groveland did not take exception to any of these findings of fact.

The shipment of some portion of Niagara's product out of state also does not result in "lost groundwater" nor does it render the use of groundwater for production of that product contrary to the public interest. Whether water is consumed in-state or out-of-state – in bottles or incorporated into any other product (e.g. soft drinks) – is not a consideration under the public interest test. Bottled water is a product, and it meets the definition for the commercial/industrial use classification in Section 6.2.3(d), A.H. Water that is incorporated into a product is considered "used" at the place where the product is made – an interpretation of Chapter 373, F.S., and Rule 40C-2.301, F.A.C., that the ALJ found was reasonable. (COL 114) Therefore, Groveland's argument that Niagara's proposed use of water is contrary to the public interest because its product – purified water – will be consumed out of state and, therefore "will be lost," lacks merit.

In essence, Groveland's "lost groundwater" argument suggests that Groveland does not believe any use of water, other than for public supply, within the CFCA should be permitted. This is because under Groveland's definition of "lost groundwater," any use, whether for bottled water or for other products, could result in "lost groundwater." (Groveland's Exceptions at 19) Groveland's position amounts to an argument for the reservation of groundwater for future

public water supplies within the CFCA. Under the District's rules, one reason for denying a consumptive use permit is if "the proposed use will require the use of water which ... the Board has reserved from use by rule." Rule 40C-2.301(5)(a), F.A.C., and Rule 9.4.1 (d), A.H. Section 373.223(4), F.S., states that the Governing Board "by regulation may reserve from use by permit, applicants, water in such locations and quantities, and for such seasons of the year, as in its judgment may be required for the protection of fish and wildlife or the public health and safety." The District has not adopted a rule reserving water in the CFCA for public water supply.

To the extent that Groveland seeks for the District to evaluate bottled water, including purified water, differently from other products²⁰ and to treat it as an "undesirable use," the Governing Board would need to make a designation by rule pursuant to Section 373.036(4), F.S.²¹ For example, the District has determined that the use of groundwater for augmentation of a surface water body solely for an aesthetic purpose is not a reasonable-beneficial use of water. Rule 12.8.1, A.H.; *see also*, Rule 40A-2.802(1)(b), F.A.C. (Northwest Florida Water Management District's determination that in certain coastal areas in Santa Rosa, Okaloosa, and Walton Counties "[n]ew and expanded uses of the Florida Aquifer System for golf course, recreation, or landscape irrigation or other non-potable uses are determined not to be consistent with the public interest and prohibited by the Governing Board" unless certain conditions are met).

3. Location in the CFCA and PWRCA

Third, Groveland argues that Niagara's proposed use should not be determined to be consistent with the public interest because the location of Niagara's proposed water withdrawal

²⁰ Bottled water is considered a product and by regulation purified water – the product Niagara proposes to produce – is distinct from tap water and from bottled spring water. (COL 101 and FOF 8)

²¹ Section 373.036(4), F.S., provides: "The governing board may designate certain uses in connection with a particular source of supply which, because of the nature of the activity or the amount of water required, would constitute an undesirable use for which the governing board may deny a permit."

is in a priority water resource caution area (PWRCA) and in an area designated by rule as the Central Florida Coordination Area (CFCA). In FOFs 80 and 81, the ALJ found that:

80. ...The District designates Priority Water Resource Caution Areas as part of its water supply 20-year planning process. In the PWRCA, the District has determined that there is inadequate groundwater in the Floridan aquifer to meet all existing and future needs without having unacceptable impacts on the water resources.

81. The District stated that the designation of a priority water resource caution area is strictly a planning tool and does not preclude the issuance of permits. CUPs are commonly issued for proposed withdrawals in priority water resource caution areas in the District.

These findings are supported by competent substantial evidence. (T: 409, 844, 861)

Section 373.0361(7), F.S., provides in pertinent part that:

Except as provided in 373.223(3) and (5), the [water supply] plan may not be used in the review of permits under part II unless the plan or an applicable portion thereof has been adopted by rule. However, this subsection does not prohibit a water management district from employing the data or other information used to establish the plan in reviewing permits under part II nor does it limit the authority of the department or governing board under part II.

Neither Section 373.223(3), F.S., nor Section 373.223(5), F.S., apply to Niagara's proposed use. Since the District has not adopted any portion of its water supply plan by rule, the plan's designation of the PWRCA itself may not be used in the review of Niagara's permit application. *See, Miami Corp., Inc., et al v. City of Titusville, et al*, Case No. 2004-88 (SJRWMD 2007) *aff'd*, 6 So.3d 69 (Fla. 5th DCA 2009); *Marion County v. Greene, et al.*, Case No. 06-071 (SJRWMD 2008), *aff'd*, 4 So. 3d 775 (Fla. 5th DCA 2009) (nothing in District rules prohibits a water use because it is in a PWRCA).

The ALJ's findings of fact reflect that the location of Niagara's water withdrawal within the CFCA was properly considered in the evaluation of whether Niagara's proposed use is

consistent with the public interest. It should be noted that the CFCA rules²² do not apply to Niagara's proposed use. FOFs 76, 77 and 78 state:

76. Niagara is not requesting additional water above its 2013 demand and, therefore, is not subject to the restrictions imposed by the various CFCA rules. Nevertheless, the District treated Niagara's location within the CFCA as a matter affecting the public interest.

77. The District determined that it was inconsistent with the public interest to allow Niagara to withdraw groundwater in the CFCA unless Niagara was required to participate in the development of supplemental water supplies. Therefore, Niagara is required by "Other Condition" 14 in the District's Technical Staff Report to identify potential partners for the development of supplemental water supply projects, determine the viability of developing the partnerships, evaluate potential supplemental water supply projects available and submit a comprehensive written report evaluating whether identified projects are feasible future water supply sources for Niagara.

78. The District imposed a permit expiration date of December 31, 2013 to enable the District and Niagara to re-evaluate Niagara's ability to use a lower quality water source after that date.

Groveland did not take exception to these findings of fact.

Groveland presupposes facts that were not found by the ALJ in the Recommended Order when it argues that Niagara's proposed water use in the CFCA is contrary to the public interest because "an adequate source is available and being used which is not located in a water shortage area." (Groveland's Exceptions at 20) The undisputed evidence indicated that this source -- which the ALJ found was of equivalent quality to the groundwater Niagara proposes to withdraw -- would not be able to meet all of Niagara's water needs. (T: 140) In making this argument, Groveland suggests that water users such as Niagara should be required to use water from outside the CFCA so that the groundwater that Niagara (or other water users) would otherwise

²² The District has adopted rules pertaining to only the CFCA. These rules apply to "any public supply utility applicant or similar applicant proposing to withdraw groundwater in the CFCA." Rule 12.10, A.H. A "similar applicant" for purposes of the additional permitting requirements applicable within the CFCA is defined as "an applicant, other than a public supply utility, whose projected water demand after 2013 will exceed its demonstrated 2013 demand." Rule 2.0 (gg), A.H.

withdraw in the CFCA for a particular use would be available to meet increased public supply needs after 2013.

In the same vein, Groveland argues that it would be contrary to the public interest for the District to authorize Niagara to withdraw groundwater in the CFCA (and thereby allow Niagara to make a profit) when at the same time Groveland and other public water suppliers in the CFCA must expend public funds for development of alternative water supplies. Again, the inference to be drawn from Groveland's argument is that groundwater should be reserved for public water supply.

In effect, both of these arguments amount to a request for a reservation of groundwater for public supply in the CFCA. As explained previously, the District has not adopted such a rule. Niagara's proposed use is consistent with the public interest based on the ALJ's findings of fact in this case.

4. Distinction between Public Interest Test in Section 373.223(1)(c), F.S., and Rule 40C-2.301(4)(b), F.A.C.

With regard to COL 105, Groveland argues that “[c]ontrary to the express language of Section 9.3, A.H., and the District's own interpretation of the public interest criteria[,] the ALJ considered the public interest requirement to have no independent meaning.” (Groveland's Exceptions at 16) The District has addressed this portion of the exception in its ruling on District staff's Exception No. 3.

RULINGS ON DISTRICT'S EXCEPTIONS

Exception No. 1

District staff takes exception to a portion of the second sentence of FOF 6 on the ground that it is not supported by competent substantial evidence. The sentence states: “[t]he CUP

authorizes the installation of three water supply wells for the facility... .” The exception is granted.

There is no competent substantial evidence that issuance of the CUP that authorizes the proposed water use would also authorize the construction of the three proposed water wells. Niagara is required to obtain separate water well construction permits from the District or pertinent local government for the construction of the water wells. (Niagara Ex. 220 at 9) A CUP is conditioned by rule that prior to construction of a water well, the permittee must obtain a separate water well permit. Rule 40C-2.381(2)(a)3, F.A.C. Accordingly, FOF 6 is modified as follows:

6. The proposed CUP authorizes Niagara to withdraw 484,000 gpd from the Upper Floridan Aquifer to produce bottled water. The CUP permittee intends to use ~~authorizes the installation of~~ three water supply wells for the facility: a 16-inch production well, a 16-inch backup well, and a 4-inch supply well for domestic uses at Niagara’s facility.

Exception No. 2

District staff takes exception to a scrivener’s error in COL 105 that refers to the reasonable-use prong in Section 373.223(1)(a), F.S., as the “second prong of the three-prong test” when in fact it is identified in the provision as the first prong. This scrivener’s error also occurs in the last sentence of COL 108. The exception is granted. *Westchester Gen. Hosp. v. Dep’t of Human Res. Servs.*, 419 So.2d 705 (Fla. 1st DCA 1982) (an agency is not dependent on the filing of an exception to modify a recommended order).

Section 373.223(1), F.S., itself identifies the reasonable-beneficial use standard as the first prong of the three-prong test. The second prong is whether a proposed use will interfere with a presently existing legal use of water. *See Marion County v. Greene*, 5 So.2d 775, 777 (Fla. 5th DCA 2009) (the three requirements of Section 373.223(1) are referred to as the three-prong test). Accordingly, COLs 105 and 108 are modified as follows:

105. As explained above, consistency of the public interest is a component of the reasonable-use standard, the first ~~second~~-prong of the three-prong test. The authors of A Model Water Code did not explain why they repeated consistency with the public interest as a third prong.

108. In the recent case of Marion County v. Greene, 5 So. 2d 775 (Fla. 5th DCA 2009), the court addressed Marion County's argument that the third prong allows for the consideration of whether a proposed water use interferes with county plans and regulations. In holding to the contrary, the court accepted the District's position that the public interest inquiry in the third prong is a consideration of "whether the use of water is efficient, whether there is a need for the water requested, and whether the use is for a legitimate purpose; and the inquiry focuses on the impact of the use on water resources and existing legal users." Id. at 779. As explained above, that inquiry is the same used in the context of the first ~~second~~-prong – whether the water use is reasonable-beneficial.

Exception No. 3

District staff takes exception to COLs 105 and 110 because certain statements could be jointly read to conclude the term "consistent with the public interest" in the definition of "reasonable-beneficial use" contained in the first prong of Section 373.223(1)(a), F.S., has the same meaning as the term "consistent with the public interest" in the third prong of Section 373.223(1)(c), F.S.²³ COL 105 observes "[t]he authors of A Model Water Code did not explain why they repeated consistency with the public interest as a third prong." The first sentence of COL 110 states "[t]he third prong of the three-prong test in Section 373.223(1), Florida Statutes, appears to do no more than give consideration of the public interest a prominent place in water use permitting, on the same footing as reasonable-beneficial and avoiding interference with existing water users." Also, in discussing the opinion of *Marion County v. Greene*, 5 So.3d 775 (Fla. 5th DCA 2009) regarding the third prong analysis, the last sentence of COL 108 states: "[a]s explained above, that inquiry is the same used in the context of...whether the water use is

²³ Reasonable-beneficial use is defined as "the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable *and consistent with the public interest.*" § 373.019(16), F.S. (Emphasis added)

reasonable-beneficial.” The exception is granted. *Westchester Gen. Hosp. v. Dep’t of Human Res. Servs.*, 419 So.2d 705 (Fla. 1st DCA 1982) (an agency is not dependent on the filing of an exception to modify a recommended order).

Collectively, the statements in COLs 105, 108 and 110 could be viewed to conclude that the meaning of the “consistent with the public interest” component of reasonable-beneficial use is identical to the term as used in the third prong of Section 373.223(1)(c), F.S. The more reasonable interpretation is that the legislature intended the term “consistent with the public interest” to have different meanings, although the factors considered under the prongs may overlap. Generally the use of the same term in different parts of the same statute are construed to have the same meaning. *Rollins v. Pizzarelli*, 761 So.2d 294, 298 (Fla. 2000); *IBP, Inc. v. Alaverez*, 546 U.S. 1144 (2005). But this principle is not inflexible and must yield where there is such a variation in the connection in which the term is used to warrant an intent to have different meanings. *Gen. Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 595 (2004). Such is the case with Section 373.223(1), F.S., which expressly sets forth a distinct three-prong test for the determination of whether a proposed water use should be issued a consumptive use permit. If the reasonable-beneficial “consistent with the public interest” component of the first prong had an identical meaning as the third prong “consistent with the public interest,” then the third prong would become meaningless, and the three-prong test would incongruously become a two-prong test. Section 373.223, F.S., should not be construed to contain superfluous language, but rather interpreted to render its provisions meaningful. *Johnson v. Feder*, 485 So.2d 409, 411 (Fla. 1986) (courts are not to presume that a given statute employs useless language but should be interpreted to give provisions meaning); *Goode v. State*, 39 So. 461, 463 (1905) (In construing statutes, a construction is favored which gives effect to every clause, thus producing a consistent

and harmonious whole. A construction which would leave without effect any part of the language used should be rejected, if an interpretation can be found which will give it effect).

This conclusion is reinforced by the legislature's treatment of "consistent with the public interest" in Sections 373.223(3), 373.223(5) and 373.2234, F.S., where the legislature pointedly separates the term as used in the third prong of Section 373.223(1)(c) from its use in the first prong of Section 373.223(1)(a), F.S. In each of these provisions, the legislature explicitly identifies certain factors in certain circumstances for determining consistency with the public interest under the third prong of Section 373.223(1)(c), F.S. Had the legislature intended the term to have the same meaning in both Section 373.223(1)(a) and (1)(c), it would have also cross-referenced Section 373.223(1)(a) in these provisions. By its omission, it is presumed the legislature intended to differentiate the prongs. *See Pro-Art Dental Lab, Inc. v. V-Strategic Group, LLC*, 986 So.2d 1244, 1258 (Fla. 2008) (it is presumed a legislative omission is intentional; under the canon of statutory construction, the mention of one thing implies the exclusion of another). In fact, the last sentence of Section 373.223(5)²⁴ expressly indicates that public interest of Section 373.223(1)(a) involves a different evaluation than under Section 373.223(1)(c), F.S.

This ruling clarifies any apparent misapprehension from the statements of COLs 105, 108 and 110. To the extent that the last sentence of COL 108 is intended to conclude the terms have the same meaning, the sentence is not adopted.

²⁴ Section 373.223(5), F.S., states: In evaluating an application for consumptive use of water which proposes the use of an alternative water supply project as described in the regional water supply plan and provides reasonable assurances of the applicant's capability to design, construct, operate, and maintain the project, the governing board or department shall presume that the alternative water supply use is consistent with the public interest under paragraph (1)(c). However, where the governing board identifies the need for a multijurisdictional water supply entity or regional water supply authority to develop the alternative water supply project pursuant to s. 373.0361(2)(a)2., the presumption shall be accorded only to that use proposed by such entity or authority. This subsection does not affect evaluation of the use pursuant to the provisions of paragraphs (1)(a) and (b), subsections (2) and (3), and ss. 373.2295 and 373.233.

Exception No. 4

District staff take exception to the last two sentences of COL 120 because they are dicta and should not be adopted by the District. The sentences state:

The District's authority to impose free-form, CFCA-type permit conditions on Niagara when, according to the CFCA rule, Niagara is not subject to the rule's requirements, is far from clear. The District did not adequately explain how a general public interest criterion is sufficient authority to impose conditions on persons who are made exempt by the specific rule on the subject.

The challenged sentences question the statutory authority of the District to impose "Other Condition 14" (Niagara Ex. 220 at 11) on Niagara's proposed CUP when Niagara's proposed water use, while in the CFCA, is exempt from the CFCA rule. *See* FOF 76; Rule 12.10, A.H. The exception is granted. *See Bd. of Comm'rs of Jupiter Inlet Dist., et al. v. Thibadeau and Dep't of Env'tl. Protection*, 28 F.A.L.R. 1064, 1072, 1073, 1078 n.8 (DEP 2005) (dicta in recommended order was not adopted in the final order).

The ALJ's remarks have no relevance to any matter at issue for resolution in this proceeding and thus constitute dicta. *State ex rel. Biscayne Kennel Club v. Bd. of Bus. Regulation*, 276 So.2d 823, 826 (Fla. 1973) (a statement that is not essential to a decision is dictum and had no force as precedence); *Bunn v. Bunn*, 311 So.2d 387 (Fla. 4th DCA 1975) (a gratuitous observation in an opinion on some application of the law that is not at issue is dictum). The authority of the District to impose the condition was never raised as an issue before, or at, the hearing. *See* Joint Pre-Hearing Stipulation at 8-9 (list of issues of law to be litigated); *see Nieves v. Crawford*, 2009 WL 2601821(Fla. 3d DCA 2009) (a court should not determine matters not pled and not noticed for hearing).

Consequently, there was no legal issue raised or contested in this proceeding regarding the authority of the District to impose Other Condition 14. COL 120 is modified as follows:

120. Section 12.10 of the Applicant's Handbook was adopted pursuant to public rulemaking proceedings. The rule contains the measures that the District and interested persons considered appropriate to protect and promote the public interest associated with the water resources of the CFCA. ~~The District's authority to impose free form, CFCA-type permit conditions on Niagara when, according to the CFCA rule, Niagara is not subject to the rule's requirements, is far from clear. The District did not adequately explain how a general public interest criterion is sufficient authority to impose conditions on persons who are made exempt by the specific rule on the subject.~~

ACCORDINGLY, IT IS HEREBY ORDERED:

The Recommended Order dated August 7, 2009, attached hereto as Exhibit "A", is adopted in its entirety except as modified by the final action of the agency in the rulings on FOF 6, COL 105, COL 108, and COL 120. Niagara's CUP number 114020 is hereby issued under the terms and conditions contained in the Technical Staff Report dated July 17, 2008, attached hereto as Exhibit "B," except that Other Condition 10 shall be modified to read as set forth in Paragraph 12 of the Recommended Order and Other Condition 14 shall be clarified to read as follows:

The permittee shall implement the following actions to investigate and participate in the development of a supplemental water supply project to supply future water demands for each component of its commercial/industrial-type use (e.g., bottled water, process water) ~~this project~~ after expiration of the permit:

- a. No later than 2 years from the date of permit issuance, permittee shall identify potential supplemental water supply projects that could be implemented, with or without partners, to secure the quantities of water necessary to meet permittee's water supply needs.
- b. If potential partners are identified, the permittee shall contact these potential partners and determine the viability of developing partnership agreements with them for the identified potential water supply projects.
- c. A written description of the potential projects shall be submitted to the District no later than 2 years from the date of permit issuance.
- d. For each potential project that potential partners are identified, a written description of the contacts between the permittee and the potential partners and the viability of the development of partnership agreements shall be submitted to the District no later than 2 years from the date of permit issuance.

e. No later than 3 years from the date of permit issuance, permittee shall submit to the District a comprehensive written report evaluating whether each of the identified viable projects are technologically, economically, and environmentally feasible.

DONE AND ORDERED this 25th day of September, 2009, in Palatka, Florida.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

BY: Kirby B. Green III
KIRBY B. GREEN III
EXECUTIVE DIRECTOR

RENDERED this 25th day of September, 2009.

BY: Andia Berttram
Acting DISTRICT CLERK

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CITY OF GROVELAND,)
)
 Petitioner,)
)
 vs.) Case No. 08-4201
)
 NIAGARA BOTTLING COMPANY, LLC,)
 and ST. JOHNS RIVER WATER)
 MANAGEMENT DISTRICT,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

The final hearing in this case was held on April 8-10, and 14-15, 2009, in Orlando, Florida, before Bram D. E. Canter, Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

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For Respondent Niagara Bottling Company LLC:

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For Respondent St. Johns River Water Management District:

William Congdon, Esquire
Kealey A. West, Esquire
St. Johns River Water Management District
4049 Reid Street
Palatka, Florida 32177

STATEMENT OF THE ISSUE

The issue in this case is whether Niagara Bottling Company, LLC (Niagara), is entitled to Consumptive Use Permit (CUP) No. 114010 issued by the St. Johns River Water Management District (District), which authorizes Niagara to withdraw and use 484,000 gallons per day (gpd) of groundwater to produce bottled water at a facility in Lake County.

PRELIMINARY STATEMENT

On August 11, 2008, the City of Groveland and Lake County filed a Petition for Formal Administrative Hearing with the District, challenging the District's intent to issue the CUP to Niagara. In addition to claiming that its substantial interests would be affected by the issuance of the CUP to Niagara, Groveland filed a verified pleading pursuant to Section 403.412(5), Florida Statutes (2008),^{1/} asserting that Niagara's water withdrawal will have the effect of impairing or otherwise injuring the water or other natural resources of the State. The District referred the matter to DOAH.

On March 3, 2009, Lake County voluntarily withdrew its petition. Groveland's Petition was amended twice. On March 26,

2009, Groveland filed a notice of withdrawal of a number of claims asserted in its Second Amended Petition.

At the final hearing, Niagara presented the testimony of Andrew Still; Barclay Griffiths; Paul Kirkman; Matthew Zimmer, who was accepted as an expert in bottled water facility design; Grant Newhouse, who was accepted as an expert in the design and servicing of systems for water reuse, recycling, and treatment and reverse osmosis systems; Sarah Whitaker, P.G., who was accepted as an expert in hydrology, groundwater flow modeling, well design installation and construction, aquifer performance testing, water quality and water quality monitoring, and environmental assessment; Shirley Denton, Ph.D., who was accepted as an expert in wetland and lake ecology; and William Armentrout, P.E., who was accepted an expert in water and wastewater engineering. Niagara Exhibits 2 through 25, 30 through 49, 53 through 56, 60, 61, 63 through 69, 71, 72, 74 through 78, 82 through 99, 101, 102, 105, 108 through 113, 116, 120 through 123, 126 through 130, 134, 138, 141 through 148, 166, 167, 169 through 171, 173 through 177, 179, 180, 185, 207 through 213, 215 through 220, 504, 505, 508, 509, 662, 701, 911, 950, and Rebuttal Exhibits 1 through 3 were admitted into evidence.

The District presented the testimony of Robert Fewster, who was accepted as an expert in botany, environmental biology, and

wetlands ecology; and Dwight Jenkins, P.G., who was accepted as an expert in geology and hydrogeology. District Exhibits 3, 4, 15, 17, 20, 25, 29, 33, and 39 were admitted into evidence.

Groveland presented the testimony of Charles Drake, P.G., who was accepted as an expert in hydrogeology and groundwater flow models; Jay Exum, Ph.D., who was accepted as an expert in wetland ecology and wetland jurisdictional determinations; and Larry Walker, utilities director for Groveland. Groveland Exhibits 14, 77, 78, and 128a were admitted into evidence.

The parties stipulated to the admission into evidence of portions of the deposition testimony of Hal Wilkening in lieu of his live testimony. Official recognition was taken of the Applicant's Handbook for Consumptive Uses of Water, Florida Administrative Code Chapter 40C-2, and the Code of Federal Regulations, Title 21, Parts 129 and 165.

The nine-volume Transcript of the final hearing was filed with DOAH. The parties filed Proposed Recommended Orders that were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. Groveland is a municipal corporation located in Lake County.

2. Niagara is a water bottling company registered to do business in Florida. Niagara currently owns and operates six water bottling facilities in the United States, including a bottling facility in unincorporated Lake County, northwest of Groveland. Niagara currently operates one bottling line at its Groveland facility, which can be used to bottle either spring water or purified water.

3. The District is a special taxing district created by the Florida Water Resources Act of 1972, with jurisdiction over a sixteen-county area that includes Groveland and the site of Niagara's proposed water withdrawal. The District administers a permitting program for the consumptive use of water.

The Proposed Permit

4. The top geologic layer in the region is the surficial aquifer, which starts at the ground surface and extends down about 50 feet to the Intermediate Confining Unit. Below the Intermediate Confining Unit is the Upper Floridan Aquifer, which starts at a depth of about 150 feet and extends downward to about 550 feet below the ground surface. Below the Upper Floridan Aquifer is the Middle Semi-Confining Unit, which extends down another 450 feet. Below the Middle Semi-Confining Unit is the Lower Florida Aquifer, which extends down to about 2,200 feet below sea level.

5. Nearly all of the groundwater withdrawn for consumptive uses in central Florida comes from the Upper Floridan Aquifer. Groveland's public water supply wells, for example, withdraw water from the Upper Floridan Aquifer.

6. The proposed CUP authorizes Niagara to withdraw 484,000 gpd from the Upper Floridan Aquifer to produce bottled water. The CUP authorizes the installation of three water supply wells for the facility: a 16-inch production well, a 16-inch backup well, and a 4-inch supply well for domestic uses at Niagara's facility.

7. Of the 484,000 gpd that Niagara would withdraw, approximately 454,000 gpd would be treated and bottled as "purified water" and approximately 30,000 gpd would be used for cooling some of the equipment used in the bottling process.

8. Under federal regulations, bottled water sold as purified water must meet certain maximum contaminant levels, including a total dissolved solids (TDS) level of less than 10 parts per million. By regulation, purified water is distinct from tap water and from bottled spring water.

9. Niagara would treat the groundwater by filtration and reverse osmosis (RO), primarily to remove TDS. At a customer's request, minerals can be added to the water to enhance taste. Also before the water is bottled, it disinfected with ozone.

10. The RO process at the Niagara facility is projected to turn 454,000 gpd of groundwater into about 363,000 gpd of purified drinking water for bottling and 91,000 gpd of RO concentrate/wastewater. Reject water from the cooling water system would add some additional wastewater.

11. Niagara has arranged to send its RO concentrate to the Frozen Grove Wastewater Treatment Facility to be blended and used for irrigation at the Mission Inn Golf and Tennis Resort in Howey-in-the-Hills. The City of Minneola has also agreed to take Niagara's RO concentrate.

12. Niagara and the District requested that the proposed CUP be modified to add the City of Minneola wastewater treatment facility as an alternative recipient for Niagara's RO concentrate. Niagara and the District propose the following change to Condition 10 of the Technical Staff Report:

Withdrawals of groundwater from Well Nos. 1 (GRS Id No 145009) and 2 (GRS Id No 145010 for commercial/industrial type use shall not be initiated until Niagara Bottling LLC and the Frozen Grove WWTF or alternatively Niagara Bottling LLC and the City of Minneola WWTF have obtained all necessary permits to create and use the blend of process waste water (R/O concentrate) and reclaimed water for irrigation, as described in Attachment 4 of the application materials submitted to the District on May 9, 2008 for the Frozen Grove WWTF and the material submitted to the District on March 4, 2009 for the City of Minneola WWTF. The permittee shall provide documentation to the District that the necessary permits have been

obtained within 30 days of initiating withdrawals of groundwater for commercial/industrial type use from Well Nos. 1 (GRS Id No 145009) and 2 (GRS Id No 145010).

13. The proposed CUP includes a conservation plan with provisions for monitoring water use, repairing leaks, conducting quality assurance inspections, using totalizing flow meters, and minimizing spillage.

14. Niagara's proposed CUP contains conditions for environmental monitoring. Niagara would be required to collect water level and rainfall data, and basic vegetation and soils conditions at Lake Arthur. Lake Arthur was selected for monitoring because hydrologic modeling indicated that Niagara's greatest potential impact to the water table was near Lake Arthur. The monitoring is intended to detect any unexpected adverse environmental impacts caused by Niagara's proposed withdrawal so that they can be addressed.

15. The proposed permit has an expiration date of December 31, 2013.

Stipulations and Withdrawn Claims

16. Before the final hearing, Groveland withdrew a number of allegations made in its Second Amended Petition for Hearing. Groveland stated that its intent was to withdraw the claims that its substantial interests were affected by Niagara's proposed

groundwater withdrawal. Groveland no longer contends that it would be specially injured by the proposed water use.

17. In the parties' Joint Pre-Hearing Stipulation, Groveland stipulated that Niagara's proposed water use would not interfere with any legal uses of water. Groveland also stipulated that Niagara's proposed use would not cause adverse or significant impacts to lake stages or vegetation, would not impact adjacent land uses, would not cause significant saline water intrusion, would not cause or contribute to flood damage, would not harm the quality of the water source, would not cause or contribute to a violation of state water quality standards, would not impact minimum flows and levels established by the District, would not cause the water table or aquifer potentiometric surface to be lowered so that lake stages or vegetation would be adversely and significantly affected, would not affect spring flows or water levels, and would not use water reserved by the District from consumptive use.

18. The record evidence supports the stipulations identified above.

Economic and Efficient Utilization

19. The Upper Floridan Aquifer is capable of producing the requested amount of water.

20. Florida Administrative Code Rule 40C-2.301(4)(a) and Section 10.3(a) of the Applicant's Handbook require that a water

use be in such quantity as is necessary for economic and efficient utilization. The District's determination of economic necessity focuses on preventing "water banking," which is securing rights to water in excess of an applicant's actual needs, for possible future use.

21. Niagara's 484,000 gpd allocation is based on the peak maximum daily output of the processing equipment operating at 74 percent capacity, which is the average capacity that Niagara achieves at its bottling facilities.

22. Groveland contends that the consumer demand for bottled water could be met by other water bottlers and, therefore, there is no need for Niagara's proposed withdrawal. However, no statute or rule requires Niagara to demonstrate that this particular CUP is the only means to meet the consumer demand for bottled water. The District's evaluation of need focuses on the applicant's need for the requested volume of water.

23. In determining whether a requested use of water is necessary, the District does not evaluate the appropriateness of the associated business or activity, but only whether the applicant can reasonably be expected to use the requested volume of water, and do so efficiently based on industry standards.

24. The evidence presented regarding the bottled water market and Niagara's position in the market was sufficient to

demonstrate that the requested volume of water is necessary through the duration of the CUP.

25. The 30,000 gpd that Niagara would use for its cooling system is a reasonable amount of the water for that purpose. The technology to be used at Niagara's facility is state-of-the-art, using constant online monitoring to reduce reject water. The cooling equipment and its operation have been designed to minimize water use.

26. RO is the industry treatment standard for production of purified bottled water. It is the most cost-efficient treatment method in terms of energy use and water consumption.

27. The proposed RO equipment and its operational parameters are designed to optimize treatment efficiencies. The volume of RO concentrate that would be produced depends on the TDS levels in the groundwater. The estimate of 91,000 gpd of RO concentrate is conservatively high, based on the TDS levels in groundwater samples. The actual volume of RO concentrate produced by Niagara could be smaller.

28. Groveland was critical of Niagara's wastewater volume, contending that the conversion of 91,000 gpd of groundwater to wastewater is inefficient and contrary to the public interest. The fact that Niagara's bottling process would produce 91,000 gpd of wastewater does not make it inefficient. Nearly every commercial and industrial water use has a wastewater component.

In the context of water bottling processes and water treatment systems, Niagara's operation is efficient.

29. Groveland asserts that sending Niagara's RO concentrate to the Mission Inn golf course or the City of Minneola for irrigation purposes is inefficient because a large portion of irrigation water is usually lost to evaporation and does not recharge the aquifer. This assertion fails to account for the fact that every gallon of RO concentrate used for irrigation reduces by one gallon the volume of groundwater that would otherwise be withdrawn for irrigation. Using Niagara's wastewater for irrigation contributes to the efficiency of Niagara's proposed use.

30. There is typically a deficit of reclaimed water from public wastewater treatment systems in the summer when the demand for reclaimed water for irrigation and other purposes increases. Niagara's supply of RO concentrate, however, would remain constant throughout the year. Mission Inn and Minneola would benefit if they were able to use Niagara's RO concentrate.

31. Niagara's conservation plan for water use at its facility is equal to or better than the conservation plans incorporated into the CUPs that the District has issued to other beverage bottlers.

32. Niagara's proposed use was shown to be of such a quantity as is necessary for economic and efficient utilization.

Sources of Lower Quality Water

33. Florida Administrative Rule 40C-2.301(4)(f) states that reclaimed water must be used if it is "readily available." Section 10.3(g) of the Applicant's Handbook requires that the "lowest acceptable quality water source, including reclaimed water or surface water" must be used for a consumptive use, unless the applicant demonstrates that the use of a lower quality water source is not economically, environmentally, or technologically feasible.

34. The requirement to use a lower water quality source, however, is not applicable when the water is for "direct human consumption" or human food preparation. § 10.3(g), Applicant's Handbook. Groveland argues that the word "direct" should mean unaltered and, therefore, Niagara's bottled water is not intended for direct human consumption because the water is treated before it is bottled.

35. The District, however, does not interpret or apply the term "direct human consumption" to mean drinking water directly from the source without treatment. In the case of the water delivered to households and businesses by public water suppliers, which also must be treated before it is delivered, the District regulates the water as being for direct human consumption.

36. The fact that Niagara would filter the groundwater, apply RO treatment, add acid to prevent mineral buildup in the RO equipment, and add minerals for taste if requested by customers, does not disqualify Niagara's bottled water as being for direct human consumption.

37. Because 454,000 gpd of Niagara's proposed water withdrawal would be processed for direct human consumption, Niagara did not have to seek to use a source of lower water quality for that volume. The requirement to use available sources of lower quality water would apply to the 30,000 gpd that Niagara intends to use for cooling.

38. There are technical and economic problems associated with using water of lower quality for the cooling process at the Niagara facility because higher TDS levels would damage the cooling equipment.

39. Using water with higher TDS levels would also require greater volumes of water to achieve cooling. Niagara's cooling system is designed to reject water when the dissolved solids reach a certain high level, and to replace the reject water with fresh water. Operating at higher dissolved solid levels would cause the system to reject water more frequently, so greater volumes of water would be needed for cooling and greater volumes of wastewater would be generated.

40. Using surface water from the St. Johns River, which has TDS levels much higher than in the groundwater, would require twice as much water to operate Niagara's cooling system. In addition, a 44-mile pipeline would be needed to convey water from the St. Johns River to the Groveland facility, which would involve much higher costs.

41. Seawater has even higher TDS levels and would require desalinization and a different cooling system. Using seawater would require much greater volumes of water for treatment and cooling. Disposal of the brine concentrate generated by the treatment process would create additional costs. The use of seawater would require the construction of a 120-mile pipeline, which would involve large capital and operating costs.

42. Groveland insists that the much higher costs associated with these sources of lower quality water are still economically feasible for Niagara based on Niagara's projected income from its bottling operations. The District does not determine feasibility based on the balance sheet of the individual permit applicant. The District evaluates relative costs of alternative sources in the context of normal practices and expected benefits.

43. Reliable volumes of reclaimed water to use in Niagara's cooling system are not readily available to Niagara from domestic wastewater treatment facilities in the area.

44. The spring water sources that Niagara is currently using are not sources of lower quality water. These sources are of equivalent quality to the groundwater that Niagara proposes to withdraw.

45. Groveland contends that Niagara did not investigate the quality of the Lower Floridan Aquifer as a potential source of lower water quality water for Niagara's proposed use. Groveland believes, but did not prove, that the Lower Floridan has lower quality water.

46. Studies conducted by the U.S. Geological Survey indicate that the water quality of the Lower Floridan Aquifer is about the same or better quality than the quality of the water in the Upper Floridan Aquifer. Water quality data from a Lower Floridan well in the vicinity also indicates that the quality of the water in the Lower Floridan is as good as, or better than, the water quality in the Upper Floridan in this area.

47. Withdrawals from the Lower Floridan create a risk of saline water intrusion into the fresh portion of the Lower Floridan or Upper Floridan.

48. Niagara demonstrated that it is not technically nor economically feasible to use a source of lower quality water for its cooling water.

Individual Effect on Wetlands and Lakes

49. To identify the "zone of influence" of Niagara's proposed withdrawal of water and to assess the individual and cumulative effects of the drawdown associated with the withdrawal, Niagara's consulting hydrogeologist used a steady-state numerical groundwater model developed by the District, known as the East Central Florida (ECF) groundwater model. It is a steady-state model, which produces a value that represents a long-term average effect.

50. The ECF model predicts the level of drawdown in the surficial aquifer. The model assumes that wetlands and other surface waters are directly connected to the surficial aquifer so that a given drawdown of the surficial aquifer causes the same drawdown of the water levels in wetlands and other surface waters.

51. The ECF model is calibrated to water level data from 1995. A drawdown predicted by the model is a drawdown from 1995 water levels. The ECF model results are graphically depicted as drawdown contours that are overlaid on aerial photography.

52. The District considers the condition and functions of the surface waters in and around the withdrawal site to determine how they might be affected by a predicted drawdown. The dominant surface waters in the area of the proposed withdrawal are sand hill lakes. There are few wetlands.

53. In sand hill lake systems, water table levels fluctuate widely, as much as eight or ten feet. Consequently, these systems are colonized by herbaceous plants that are adapted to widely fluctuating water levels.

54. The wetlands and lakes in the area are not currently showing signs of environmental harm as a result of existing groundwater withdrawals.

55. Niagara's modeling predicted that the proposed water withdrawal, by itself, would cause a maximum drawdown in the surficial aquifer of 0.1 feet, except for one small area where the predicted drawdown was 0.2 feet. All the expert witnesses were in agreement that Niagara's drawdown, by itself, is unlikely to cause environmental harm. In fact, the impacts of such a small drawdown on the physical conditions or functions of wetlands or lakes in the area would probably be impossible to detect.

Cumulative Effect on Wetlands and Lakes

56. For the analysis of cumulative impacts, the ECF model takes into account all permitted withdrawals for the year 2013, because that is the key year for the regulation of water uses in the Central Florida Coordination Area (CFCA), which includes the site of Niagara's bottling facility. The CFCA is discussed in greater detail later in this Recommended Order.

57. The ECF model predicated that the cumulative surficial aquifer drawdown within the area of influence of Niagara's proposed withdrawal would be less than one foot except for one small area where the drawdown is predicted to be 1.1 feet.

58. Niagara submitted an environmental assessment report, the Lotspeich report, with its permit application. The Lotspeich report concluded that no ecological harm would be caused by Niagara's proposed withdrawal.

59. Subsequently, Niagara's consulting ecologist, Dr. Shirley Denton, who has extensive experience with the effects of drawdowns on wetlands and other surface waters, reevaluated the potential effects of Niagara's proposed withdrawal. Dr. Denton visited all of the natural systems in the field. It was her opinion that the cumulative drawdown would not cause unacceptable harm to these natural systems.

60. The District's environmental expert agreed with Dr. Denton. In the Central Florida sand hill lakes area, a drawdown of this magnitude is not an uncommon cumulative impact from groundwater withdrawals that the District has determined to be acceptable.

61. Groveland presented the testimony of Dr. Jay Exum who opined that the cumulative drawdown in the area of Niagara's proposed withdrawal would adversely impact wetlands. Dr. Exum's opinion was based on his prediction that the cumulative drawdown

would result in a substantial reduction in the size of the wetlands in the area. However, his opinion about the loss of wetland acreage is not persuasive because of the unconventional methodology^{2/} that he used and the unreasonable assumptions upon which his opinion was based.

62. Dr. Exum reviewed land cover maps of Lake County, calculated the size and topography of eight wetlands in the area (only one was within Niagara's zone of influence), came up with an estimated reduction in wetland acreage for these wetlands, and then extrapolated from that number a prediction of the total area of wetlands within Niagara's area of influence that would be lost as a result of the cumulative drawdown.

63. Dr. Exum did not account for the fact that the wetlands and lakes in the area already reflect most of the cumulative drawdown. The cumulative drawdown predicted by the modeling is not a drawdown below today's average water levels; it is a drawdown below 1995 levels.

64. In addition, Dr. Exum assumed that a drawdown in the surficial aquifer of .5 foot will cause the future loss of the vegetation at the outer edges of a wetland in an amount that can be calculated simply by determining how much area .5 feet of water would occupy. That assumption would only apply in a hypothetical, unnatural situation where water levels are constant and the wetland vegetation will not survive if the

water table drops .5 feet. However, the actual situation is that the water table fluctuates widely in these natural systems and the vegetation is adapted to the fluctuations. The area "formerly" occupied by the .5 feet of water could still be inundated frequently enough to sustain the vegetation.

65. Dr. Exum's opinion about the environmental effects that would be caused by the cumulative drawdown of the surficial aquifer was given less weight than the opinions offered by Niagara's and the District's ecologists because Dr. Exum has little or no prior experience with the effects of drawdowns on natural systems. Dr. Exum's professional experience is almost entirely with the impacts associated with construction activities in or near wetlands, which would not acquaint him with the unique, long-term responses of natural systems to water table drawdowns caused by groundwater withdrawals.

66. Dr. Denton, who has over 25 years of experience with monitoring wetlands affected by groundwater withdrawals, stated that drawdowns in the surficial aquifer do not usually cause reductions in the size of a wetlands.

67. The more persuasive evidence in the record demonstrates that Niagara's proposed withdrawal would not cause adverse impacts to wetlands on an individual or a cumulative basis. Niagara provided reasonable assurance that any

environmental harm caused by the proposed use has been reduced to an acceptable amount.

68. The five-year duration of the permit is reasonable and appropriate.

Public Interest

69. Section 9.3 of the Applicant's Handbook defines "public interest" as:

those rights and claims on behalf of the people in general. In examining whether an application is consistent with the public interest, the District considers whether a particular use of water is going to be beneficial or detrimental to the overall collective well-being of the people or to the water resource in the area, the District and the State.

70. The policy and practice of the District has been to limit its public interest analysis to matters directly related to water resources and the management of those resources. Other matters, such as vehicle traffic generated by the applicant, are not considered by the District.

71. Groveland suggests that Niagara's proposed use, and perhaps all commercial/industrials uses, are less important and worthy than public water supply uses like its own, and should not be allowed to take water that a public water supplier might need in the future. As discussed in the Conclusions of Law, all reasonable beneficial uses of water are equal under Chapter 373, except in certain contexts which are not applicable here.

72. Commercial and industrial activities that make consumptive uses of water, when conducted in conformance with regulations established to efficiently use and protect the water resources, are generally beneficial to the collective well-being of the people.

73. Groveland also claims that Niagara's CUP is not in the public interest because a portion of Niagara's bottled water will be shipped out of Florida. Although Niagara cannot project precisely the amount of bottled water that would end in the hands of consumers residing out-of-state, an estimate of 20 percent was given.

74. For beverage bottlers or any other commercial or industrial water users that incorporate water into their products, the District deems the location of the water use to be where the water is bottled or incorporated into the products. The District does not look to where products are ultimately purchased by a retail consumer. Therefore, the District did not consider the fact that a portion of Niagara's bottled water would be consumed outside of Florida as a factor in the District's determination of whether the proposed water use is in the public interest.

75. Niagara's withdrawal is within the Central Florida Coordination Area (CFCA), an area covering parts of the jurisdiction of three water management districts and which

includes the City of Groveland and the site of Niagara's proposed water withdrawal. The CFCA is a highly productive area for groundwater withdrawals, but the water management districts have determined that it does not have sufficient water to serve water needs above the levels that have been allocated through the year 2013. To protect the water resources of the CFCA, rules were adopted to require public water suppliers and other water users within the CFCA to use "supplemental water supplies" to meet their increases in demand after 2013. Supplemental water supplies are identified in the CFCA rules as reclaimed water, stormwater, surface water, and seawater desalinization.

76. Niagara is not requesting additional water above its 2013 demand and, therefore, is not subject to the restrictions imposed by the various CFCA rules. Nevertheless, the District treated Niagara's location within the CFCA as a matter affecting the public interest.

77. The District determined that it was inconsistent with the public interest to allow Niagara to withdraw groundwater in the CFCA unless Niagara was required to participate in the development of supplemental water supplies. Therefore, Niagara is required by "Other Condition" 14 in the District's Technical Staff Report, to identify potential partners for the development of supplemental water supply projects, determine the viability of developing the partnerships, evaluate potential supplemental

water supply projects available, and submit a comprehensive written report evaluating whether identified projects are feasible future water supply sources for Niagara.

78. The District imposed a permit expiration date of December 31, 2013, to enable the District and Niagara to reevaluate Niagara's ability to use a lower quality water source after that date.

79. Groveland does not believe the conditions imposed by the District go far enough and asserts that Niagara's water withdrawal from the CFCA is still contrary to the public interest.

80. Niagara's proposed withdrawal is also within a Priority Water Resource Caution Area (PWRCA) designated by the District. The District designates priority water resource caution areas as part of its water supply 20-year planning process. In the PWRCA, the District has determined that there is inadequate groundwater in the Floridan Aquifer to meet all existing and future water needs, without having unacceptable impacts on the water resources.

81. The District stated that the designation of a priority water resource caution area is strictly a planning tool and does not preclude the issuance of permits. CUPs are commonly issued for proposed withdrawals in priority water resource caution areas in the District.

CONCLUSIONS OF LAW

82. DOAH has jurisdiction over the parties to and the subject matter of this case pursuant to Sections 120.569 and 120.57, Florida Statutes.

83. Groveland withdrew its claims that Niagara's proposed water use would affect Groveland's substantial interests. Groveland's standing is based on Section 403.412(5), Florida Statutes, which provides that local governments and private citizens may intervene in ongoing administrative proceedings by filing a verified pleading asserting that an activity to be licensed by an agency will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the State.

84. Section 403.412(5), Florida Statutes, states that "this section does not authorize a citizen to . . . initiate . . . a proceeding under s. 120.569 or s. 120.57." Because only citizens are mentioned in this express limitation, and not local governments, the statute can be reasonably interpreted as authorizing local governments to initiate an administrative proceeding.

85. Niagara argues that Groveland lacks standing because it failed to prove that Niagara's proposed water use would injure the air, water, or other natural resources of the State. However, a petitioner's standing is not dependent on proving its

claims. Palm Beach County Env'tl. Coalition v. Dep't of Env'tl. Prot., 34 Fla. L. Weekly D 1106 (Fla. 4th DCA 2009). It is undisputed that Niagara's proposed withdrawal of water would have an effect on nearby wetlands and other surface waters. Groveland has standing to attempt to show that the effect would amount to unacceptable harm to the environment.

86. This is a de novo proceeding, intended to formulate final agency action. McDonald v. Dep't of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977). Therefore, the agency's final action can deviate from its proposed action when the record contains substantial competence evidence to support the changes.

87. As the permit applicant, Niagara has the burden to prove by a preponderance of the evidence that it is entitled to the permit. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

88. However, an applicant need not prove anew all items in a permit application down to the last detail. The petitioner in a case must identify the specific areas of controversy. Id. at 789.

89. Once the applicant has made a preliminary showing of entitlement, the burden of presenting contrary evidence shifts to the petitioner. A petitioner must then present evidence of

equivalent quality to prove the truth of the facts alleged in the petition. Id.

90. Niagara must demonstrate compliance with Section 373.223(1), Florida Statutes, which requires a permit applicant to establish that a proposed use of water: (a) is a reasonable-beneficial use; (b) will not interfere with any presently existing legal use of water; and (3) is consistent with the public interest.

91. The disputed issues in this case were narrowed by the parties' Joint Pre-Hearing Stipulation. For example, Groveland stipulated that Niagara's proposed water use would not interfere with any presently existing legal use of water. With regard to all statute and rule criteria applicable to Niagara's proposed water use for which there was no dispute raised by Groveland, Niagara provided reasonable assurances of compliance. The disputed issues are addressed below.

Reasonable Beneficial Use

92. Florida Administrative Code Rule 40C-2.301(4) requires the following criteria to be met in order for a use to be considered reasonable-beneficial:

(a) The use must be in such quantity as is necessary for economic and efficient utilization.

(b) The use must be for a purpose that is both reasonable and consistent with the public interest.

(c) The source of the water must be capable of producing the requested amounts of water.

(d) The environmental or economic harm caused by the consumptive use must be reduced to an acceptable amount.

(e) All available water conservation measures must be implemented unless the applicant demonstrates that implementation is not economically, environmentally or technologically feasible. Satisfaction of this criterion may be demonstrated by implementation of an approved water conservation plan as required in Section 12.0., Applicant's Handbook: Consumptive Uses of Water.

(f) When reclaimed water is readily available it must be used in place of higher quality water sources unless the applicant demonstrates that its use is either not economically, environmentally, or technologically feasible.

(g) For all uses except food preparation and direct human consumption, the lowest acceptable quality water source, including reclaimed water or surface water (which includes stormwater), must be utilized for each consumptive use. To use a higher quality water source an applicant must demonstrate that the use of all lower quality water sources will not be economically, environmentally or technologically feasible. If the applicant demonstrates that use of a lower quality water source would result in adverse environmental impacts that outweigh water savings, a higher quality source may be utilized.

(h) The consumptive use shall not cause significant saline water intrusion or further aggravate currently existing saline water intrusion problems.

(i) The consumptive use shall not cause or contribute to flood damage.

(j) The water quality of the source of the water shall not be seriously harmed by the consumptive use.

(k) The consumptive use shall not cause or contribute to a violation of state water quality standards

(l) The consumptive use must not cause water levels or flows to fall below the minimum limits set forth in Chapter 40C-8, F.A.C.

93. Niagara's compliance with paragraphs (c) and (h) through (l), above, was not disputed by Groveland.

94. Niagara demonstrated by a preponderance of the evidence that the proposed consumptive use of water is necessary for economic and efficient utilization as required by Florida Administrative Code Rule 40C-2.301(4)(a). In this context, the District's interpretation and application of the term "necessary" is a reasonable one.

95. The Florida Water Resources Act is based largely on a model water code developed at the University of Florida College of Law. See A Model Water Code, (Maloney, et al., 1972). The original enactment was taken almost verbatim from the model water code. Therefore, the commentary in A Model Water Code is helpful to determine the meaning and intent of provisions of Chapter 373, Florida Statutes. See, e.g., A. Duda and Sons,

Inc. v. St. Johns River Water Mgtm. Dist., 34 Fla. L. Weekly D 972 (Fla. 5th DCA 2009); Southwest Florida Water Mgmt. Dist. v. Charlotte County, 774 So. 2d 903 (Fla. 2nd DCA 2001).

96. The commentary in A Model Water Code pertaining to the reasonable-beneficial use standard states:

The reasonable-beneficial use standard also requires that the water (regardless of amount) be used "for a purpose . . . which is both reasonable and consistent with the public interest." The requirement means that the purpose must be reasonable in relation to other uses. This criterion does not require that the use be the most economical use of water possible but only that the use not be detrimental to other users or totally inconsistent with the character of the watercourse from which the supply is taken.

Id. at 171.

97. Chapter 373, Florida Statutes, and the consumptive use permitting rules adopted by the District do not elevate the status of one water use over another except in certain specified contexts. For example, water can be reserved for a particular future use. See § 373.223(4), Fla. Stat. During a declared water shortage, certain uses may be given priority. See §§ 373.175 and 373.246, Fla. Stat. When there are pending applications for a volume of water that is inadequate for all, the District can approve the application which best serves the public interest. See § 373.233, Fla. Stat. None of these situations are applicable in this case.

98. Niagara demonstrated by a preponderance of the evidence that the proposed use is for a purpose that is both reasonable and consistent with the public interest, as required by Florida Administrative Code Rule 40C-2.301(4)(b).

99. Niagara demonstrated by a preponderance of the evidence that the potential for environmental harm has been reduced to an acceptable amount as required by Florida Administrative Code Rule 40C-2.301(4)(d).

100. Niagara demonstrated by a preponderance of the evidence that all economically, environmentally, or technologically feasible conservation measures will be implemented, as required by Florida Administrative Code Rule 40C-2.301(4)(e) and Section 12.3 of the Applicant's Handbook.

101. Niagara is prohibited by Florida Administrative Code Rule 62-610.650(4) from using reclaimed water for its bottled water product.

102. Niagara demonstrated by a preponderance of the evidence that there is no readily available reclaimed water that is economically, environmentally, or technologically feasible to use for cooling water, as required by Florida Administrative Code Rule 40C-2.301(4)(f).

103. Niagara demonstrated by a preponderance of the evidence that it will use the lowest acceptable quality water source, as required by Florida Administrative Code Rule 40C-

2.301(4)(g). In this context, the District's interpretation and application of the term "direct human consumption" is a reasonable one.

104. In summary, Niagara demonstrated by a preponderance of the evidence that its proposed water use is reasonable-beneficial.

Public Interest

105. As explained above, consistency of the public interest is a component of the reasonable-use standard, the second prong of the three-prong test. The authors of A Model Water Code did not explain why they repeated consistency with the public interest as a third prong.

106. Groveland contends that the third prong calls for the consideration of matters affecting the public that are not limited to water resources. These could include, for example, vehicle traffic and other land use issues normally decided by a local government in zoning and comprehensive planning proceedings. However, other than the structure of Section 373.223(1), Florida Statutes, there is nothing to support that argument. The evidence presented by Groveland on this point was not persuasive.

107. There is nothing in Chapter 373, Florida Statutes, Florida Administrative Code Rule 42-2.301, or A Model Water Code

that directs the water management districts to consider matters of public interest that are not related to water resources.

108. In the recent case of Marion County v. Greene, 5 So. 2d 775 (Fla. 5th DCA 2009), the court addressed Marion County's argument that the third prong allows for the consideration of whether a proposed water use interferes with county plans and regulations. In holding to the contrary, the court accepted the District's position that the public interest inquiry in the third prong is a consideration of "whether the use of water is efficient, whether there is a need for the water requested, and whether the use is for a legitimate purpose; and the inquiry focuses on the impact of the use on water resources and existing legal users." Id. at 779. As explained above, that inquiry is the same used in the context of the second prong -- whether the water use is reasonable-beneficial.

109. When confronted with the question of whether the public interest inquiry in environmental permitting required the Department of Environmental Protection to consider matters other than those affecting the environment, the courts have held that the Department's public interest inquiry is limited to impacts to the environment. Save Anna Maria, Inc. v. Dep't of Transp., 700 So. 2d 113, 116 (Fla. 2d DCA 1997); Miller v. Dep't of Env'tl. Reg., 504 So. 2d 1325 (Fla 1st DCA 1987).

110. The third prong of the three-prong test in Section 373.223(1), Florida Statutes, appears to do no more than give consideration of the public interest a prominent place in water use permitting, on the same footing as reasonable-beneficial and avoiding interference with existing water users. The third prong does not expand the public interest inquiry beyond water resource-related issues.

111. Some of Groveland's public interest arguments are water resource-related. Groveland argues that Niagara's expectation of distributing 20 percent of its bottled water for ultimate retail purchase and consumption out of state should have been considered by the District, and that it requires denial of the permit.

112. Niagara's proposed water use is not an interdistrict transfer of groundwater that is regulated pursuant to Section 373.2295, Florida Statutes.

113. Groveland does not identify any provision of Chapter 373, Florida Statutes, that expressly authorizes the water management districts to prohibit or restrict the issuance of CUPS to water bottlers if a portion of the bottled water will be consumed out-of-state. Groveland relies solely on the third prong and argues that withdrawing Florida groundwater for use outside of Florida is contrary to the public interest.

114. The District deems water incorporated into a commercial or industrial product as "used" at the place where the product is made. Therefore, the District's position is that the water Niagara has requested would be used at its bottling facility in Lake County, not out of state. That is a reasonable interpretation and application of Chapter 373, Florida Statutes, and Florida Administrative Code Rule 40C-2.301.

115. Whether water bottlers and other water users that incorporate water into their products should be prohibited or limited from selling their products out-of-state, is a matter that should first be addressed by the Legislature. In Florida, agencies can only exercise authority that has been specifically granted to them by statute. See Southwest Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000). The water management districts have not been granted specific authority to prohibit or limit the out-of-state sale of bottled water.

116. If, however, Groveland is correct, and the District must determine whether Niagara's distribution of 20 percent of its product out-of-state would be inconsistent with the public interest, then it is concluded that this factor does not make Niagara's proposed water use inconsistent with the public interest.

117. Groveland also argues that Niagara's proposed withdrawal of water is inconsistent with the public interest because it is located within the CFCA and a priority water resource caution area (PWRCA).

118. Special regulations in Section 12.10 of the Applicant's Handbook are applicable to water users within the CFCA. Primarily, the rules restrict applicants to a maximum allocation of groundwater based on their 2013 demand. Increased water use in excess of an applicant's 2013 demands must be obtained from "supplemental water sources," i.e., sources other than groundwater.

119. Niagara is not requesting an increase in water in excess of its 2013 demand, so the CFCA regulations do not apply to Niagara's proposed water use. Nevertheless, the District determined that Niagara's proposed water use would be inconsistent with the public interest unless Niagara was required to participate with other water users in developing supplemental water sources.

120. Section 12.10 of the Applicant's Handbook was adopted pursuant to public rulemaking proceedings. The rule contains the measures that the District and interested persons considered appropriate to protect and promote the public interest associated with the water resources of the CFCA. The District's authority to impose free-form, CFCA-type permit conditions on

Niagara when, according to the CFCA rule, Niagara is not subject to the rule's requirements, is far from clear. The District did not adequately explain how a general public interest criterion is sufficient authority to impose conditions on persons who are made exempt by the specific rule on the subject.

121. Niagara has agreed to comply with the CFCA-related permit conditions in its proposed CUP.

122. Niagara's proposed withdrawal of groundwater from the CFCA is consistent with the public interest.

123. Chapter 373, Part II, Florida Statutes, and the rules adopted thereunder, establish the exclusive criteria for the regulation of consumptive uses of water. § 373.217(2), Fla. Stat. Neither Part II of Chapter 373 nor any rule of the District adopted pursuant thereto imposes additional criteria that must be met by an applicant for a permit to withdrawal water from a PWRCA. Because the District has chosen not to adopt a rule to impose additional criteria for water withdrawals within a PWRCA, a general public interest criterion is insufficient authority to make an exception for Niagara's proposed withdrawal.

124. Niagara's proposed withdrawal of groundwater from the PWRCA is consistent with the public interest.

125. Groveland suggests that Niagara's reduction of the naturally occurring groundwater, in and of itself, is an injury

to the water resources and inconsistent with the public interest. However, the common law of water rights, reflected in the Florida Water Resources Act of 1972, grew out of principles associated with the use of water and how best to allocate water among competing users. See, e.g., Water Law 1980, (Maloney et al. 1980). If a water use meets the first two prongs of the three-prong test, the use will not fail the third prong -- consistency with the public interest -- merely because the volume of water remaining at the source has been reduced.

126. In summary, Niagara's proposed water use is consistent with the public interest.

127. Florida Administrative Code Rule 40C-2.301(5)(a) describes six effects of a proposed water use that would require the use to be denied. Groveland only disputed Niagara's compliance with Rule 40C-2.301(5)(a)4, pertaining to lowering the water table and harming vegetation. Niagara demonstrated by a preponderance of the evidence that Niagara's water use would not cause the water table or surface water level to be lowered so that stages or vegetation will be adversely and significantly affected on lands other than those owned, leased, or otherwise controlled by the applicant.

128. Niagara's proved by a preponderance of the evidence that it is entitled to the permit it is seeking.

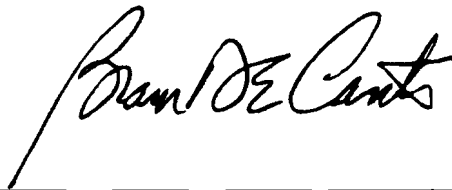
129. DOAH retains jurisdiction to consider and rule on Niagara's motions for attorney's fees after issuance of the Final Order.

RECOMMENDATION

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

RECOMMENDED that the District enter a final order granting Consumptive Use Permit No. 114010 with the conditions specified in the Technical Staff Report and the additional condition proposed by the District and Niagara and set forth in paragraph 12, above.

DONE AND ENTERED this 7th day of August, 2009, in Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of August, 2009.

ENDNOTES

^{1/} All references to the Florida Statutes are to the 2008 codification.

^{2/} Dr. Exum was unaware of any other ecologist who has used this methodology.

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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.

Response to RAI - Additional Material	03/25/2008
Request for additional information:	04/02/2008
Meeting with applicant to discuss RAI	04/09/2008
Response to RAI	05/09/2008
Request for additional information:	06/03/2008
Response to RAI	06/05/2008
Application complete	06/05/2008
90 th day	09/03/2008
Last legal Board date	08/12/2008

PROJECT DESCRIPTION:

Project Location

The proposed facility is located in Lake County, in an industrial park (Christopher C. Ford Commerce Park, a/k/a Lake County Central Park, Phase 1) northwest of the city of Groveland.

Background

Niagara Bottling, LLC (Niagara) proposes to manufacture plastic water bottles, purify groundwater through a reverse osmosis process, and fill 0.5-liter bottles for shipment.

Water Supply System Description

Niagara proposes to install three new water supply wells to provide groundwater for its operations. These proposed wells include a 16-inch production well for commercial/industrial use, a 16-inch back up well for commercial/industrial use, and a 4-inch well to provide water for the potable requirements of workers in the facility. The proposed wells will be completed in the lower production zone of the upper Floridan aquifer.

A fourth, existing well on the property (Well 4, GRS Id. No. 145012) is a 4-inch well that the previous owner of the property used for landscape irrigation. The applicant has proposed to discontinue the use of this existing well and has requested no allocation for landscape irrigation at the facility.

Details of the proposed and existing wells are summarized in the table at the end of this report.

Water Use Description

Proposed uses for the requested allocation of groundwater include production of bottled water and potable water use for employees that will staff the facility. Niagara has decided to discontinue landscape irrigation at the facility and has not requested an allocation for this purpose. The requested allocation of 0.484 million gallons per day, annual average is based upon the peak maximum daily capacity of the processing equipment, operating at an average production rate of 74% capacity.

Niagara has proposed to purify groundwater used in the bottling operation via reverse osmosis (R/O). Design calculations indicate approximately 80% of the allocation will be bottled and 20% will be R/O concentrate. The applicant has presented plans and agreements establishing that the R/O concentrate will be transported to an off-site treatment facility (Mission Inn's Frozen Grove WWTF (CUP No. 2662)) where the R/O concentrate will be blended with treated wastewater and beneficially re-used for golf

course and landscape irrigation. This beneficial reuse of the R/O concentrate will replace a portion of an existing use of groundwater for irrigation type use under CUP No. 2662.

SUMMARY OF COMMENTS RECEIVED:

As of July 14, 2008, the District received over 800 letters and e-mails. Approximately half expressed objection to the issuance of a permit and half expressed support for issuance of a permit. In the following summary, the principal concerns of objectors that the District has the ability to consider are noted and addressed.

Concerns expressed by those opposed to the application include:

- A concern that the proposed use would adversely affect surface water and wetland resources. District permitting criteria require that a proposed withdrawal will not cause unacceptable environmental harm to water levels in wetlands or surface waters for the duration of the permit pursuant to sections 9.4.3. and 10.3(d) of the District's Applicant's Handbook: Consumptive Uses of Water, February 13, 2008 (A.H.). This criterion is addressed below in the discussion entitled No Environmental Impacts.
- A concern that the proposed use would adversely affect existing legal uses of water. District permitting criteria require that a proposed use of water will not cause an interference with a legal use of water that existed at the time of permit application pursuant to sections 9.4.1(c) and 9.4.4, A.H. This criterion is addressed below in the discussion entitled Must Not Cause Interference with Existing Legal Uses of Water.
- A concern that the proposed use should not be allowed since residents are required to limit irrigation of household landscapes to no more than two days per week. The Governing Board has granted a general permit by rule that authorizes water use by all users that fall below the threshold to obtain a standard or individual permit. As is the case with all consumptive use permits issued by the District, residents and other users are authorized to use water only in accordance with the conditions of the general permit by rule. This requires that water users use water efficiently. In the case of landscape irrigation, the general permit by rule requires that residents and other users irrigate landscapes no more than two days per week. The conditions of the general permit by rule in Ch. 40C-2.042, F.A.C. do not affect the criteria under which staff must evaluate applications for individual permits, which are set forth in Ch. 40C-2.301, F.A.C.
- A concern that the proposed use would not be in the public interest. Some objectors expressed a concern that the proposed use would be inconsistent with public sentiment, as expressed by letters of objection and by resolutions passed by elected governing bodies within Lake County. Section 9.3, A.H., defines public interest as "those rights and claims on behalf of people in general" and provides that "[i]n determining the public interest in consumptive use permitting decisions, the Board will consider whether an existing or proposed use is beneficial or detrimental to the overall collective well-being of the people or to the water resource in the area, the District, and the State." The staff analysis of this topic is presented below under the discussion entitled Public Interest.

Those who wrote to express support for the application generally stated that the proposed use of water would be in the public interest as a worthwhile use of water that

would create jobs for the local economy. Some supporters expressed a favorable opinion of bottled water for human consumption, especially when compared to other potential uses. As noted above, District criteria regarding the public interest are considered below in this report under the discussion entitled Public Interest.

PERMIT APPLICATION REVIEW:

Section 373.223, Florida Statutes (F.S.), and section 40C-2.301, Florida Administrative Code (F.A.C.), require an applicant to establish that the proposed use of water:

- (a) is a reasonable-beneficial use;
- (b) will not interfere with any presently existing legal use of water; and,
- (c) is consistent with the public interest.

The above requirements are detailed further in the District's Applicant's Handbook: Consumptive Uses of Water, February 13, 2008. District staff reviewed the consumptive use permit application pursuant to the above-described requirements and determined that the application meets the conditions for issuance of this permit. Highlights of the staff review are provided below.

Reasonable-Beneficial Use:

The District requires that certain criteria be met for a proposed water use to be considered reasonable-beneficial. The criteria are contained in rule 40C-2.301, F.A.C. and are included in section 10.3, A.H. The highlights of staff evaluation of the reasonable-beneficial criteria are outlined in the following narrative.

Economic and Efficient Utilization

Niagara proposes to use the requested allocation of groundwater to produce bottled water and to supply potable water for employees. Design calculations submitted with the application indicate approximately 80% of the allocation will be bottled and 20% will be R/O concentrate. The R/O concentrate will be transported to an off-site treatment facility to be blended with treated wastewater and beneficially re-used for golf course and landscape irrigation. Thus, approximately 80% of the requested allocation will be bottled for human consumption, and the balance will be beneficially re-used in a manner that replaces an existing use of groundwater for irrigation.

A small portion of the requested allocation (approximately 2,000 gallons per day, or 0.4%) would be used to meet the potable water requirements of workers in the facility. The potable water requirement for workers is very small and is ancillary to the commercial/industrial use for bottled water. It is necessary for operation of the facility.

Niagara has also requested that the primary production wells be available for fire protection (essential type use) In cases where an applicant requests an allocation for fire protection, the District authorizes the use of the full pumping capacity of the designated sources on an as needed basis in the event of a fire emergency (see other condition no. 11).

Based on the above, staff has concluded that the proposed quantity of water use is necessary for economic and efficient utilization pursuant to section 10.3(a), A.H., provided the permittee complies with conditions recommended for this permit.

Capability of source to produce the requested amounts of water

Niagara has proposed to withdraw the requested allocation of groundwater from three wells completed in the lower production zone of the upper Floridan aquifer. The upper Floridan aquifer in the area of the proposed facility is a highly productive aquifer that readily yields water to wells that have been properly constructed in accordance with District well construction criteria. The wells and pumps described in the application are similar to those used near the project, many of which produce greater volumes than the allocation requested in this application.

Environmental Impacts

Under the reasonable-beneficial use standard, environmental harm caused by the proposed consumptive uses must be reduced to an acceptable level. Unmitigated harm to the environment is not considered acceptable. Pursuant to this criterion, staff considered the results of groundwater flow modeling, reviewed aerial photography, and performed a site assessment to evaluate the potential for environmental harm due to the proposed withdrawals.

Staff inspected wetlands and surface waters located within the zone of influence of the proposed withdrawals, looked for any indications of harm associated with other permitted withdrawals, and evaluated their sensitivity to changes in the water table. No harm to wetlands or surface waters due to the other permitted withdrawals was observed.

Model simulations of the applicant's requested allocation from the upper Floridan aquifer predict a maximum drawdown near the applicant's wells of 0.2 feet in the surficial aquifer. No lakes or wetlands occur within the 0.2-foot contour, but several lakes and wetlands occur within the 0.1-foot contour in the surficial aquifer. The surface waters present within the applicant's zone of influence are sandhill lakes that regularly experience wide range of fluctuation under natural conditions. The projected change to the surficial aquifer would have a negligible effect on water levels in these wetlands and surface waters. Staff concluded that this negligible impact, along with cumulative impacts from other permitted uses, will not result in water level changes that would harm the lakes and wetlands within the applicant's zone of influence. Staff recommends that applicant be required to monitor Lake Arthur (see conditions 19 to 25), in order to verify that the applicant's water use is not contributing to harm to surface waters and wetlands within the applicant's zone of influence. Staff concludes that the applicant has provided reasonable assurance that the proposed withdrawal will not cause unacceptable environmental harm to water levels in wetlands or surface waters for the duration of this permit, in accordance with sections 9.4.3 and 10.3(d), A.H.

Water Conservation

For a use to be considered reasonable-beneficial, all available water conservation measures must be implemented, unless the applicant demonstrates that implementation is not economically, environmentally or technologically feasible. Satisfaction of this criterion may be demonstrated by implementation of an approved water conservation plan as required in section 12.0, A.H.

Furthermore, for commercial/industrial type use, section 12.3.2.1 provides that water conservation plans shall include: a) an audit within two years after permit issuance for new uses; b) a program for making improvements in water conservation; c) an analysis of the feasibility of reusing reclaimed water, recycling water on site, utilizing the lowest acceptable quality water source, and providing reclaimed water for reuse or stormwater for reuse; d) an employee awareness and customer education program concerning water

conservation; and e) procedures and timeframes for implementation, and for periodic assessment and revision of the water conservation plan.

The applicant provided a water conservation plan with the initial application and submitted a revised plan on March 7, 2008. The plan provides for auditing and accounting for all water uses; monitoring for and repairing leaks; leak testing; recycling water used in cooling towers, boilers, and heaters; employee education and awareness; use of low flow plumbing fixtures; elimination of landscape irrigation; and annual review and updates of the water conservation plan.

Staff concludes that the applicant has provided reasonable assurance that the water conservation plan submitted with the application materials on March 7, 2008 meets the criteria in sections 10.3(e) and 12.3.2.1, A.H.

Saline Water Intrusion

The facility is in an inland location with no reported history of salt-water intrusion. The potable water zone in the area of the project is approximately 2,000 feet thick. Since the maximum predicted drawdown of the potentiometric surface in the Floridan aquifer (approximately 1.1 ft) is small compared to the thickness of potable water, and the Floridan aquifer contains intervening confining beds, the proposed use is unlikely to induce upwelling of saline water from deep within the Floridan aquifer. Consequently, staff has concluded that the proposed consumptive use is unlikely to cause significant saline water intrusion or further aggravate currently existing saline water intrusion problems pursuant to sections 10.3(h) and 9.4.2, A.H, provided the permittee comply with the conditions recommended for this permit.

Water Quality Considerations

Section 10.3(j), A.H., provides that the water quality of the source of the water should not be seriously harmed by the consumptive use. The proposed source of water is the lower production zone of the upper Floridan aquifer via three production wells. Section 10.3(k), A.H., provides that the proposed consumptive use shall not cause or contribute to a violation of state water quality standards in receiving waters of the state, as set forth in chapters 62-3, 62-4, 62-302, 62-520 and 62-550, F.A.C. District staff found no evidence in the plans presented with the application that the proposed use of water from the Floridan aquifer would result in discharges to receiving waters of the state. The applicant has proposed to pump water from the lower production zone of the upper Floridan aquifer for the uses previously described in this report. Approximately 80% of the proposed allocation will be bottled for sale. The applicant has proposed to transport the R/O concentrate to another facility, where it will be blended and used for irrigation. Wastewater from potable uses at the facility will be discharged to an existing sanitary sewer connection. Therefore, staff concludes that the proposed consumptive use will not cause or contribute to a violation of state water quality standards in receiving waters of the state, provided the conditions recommended for this permit are met.

Lowest Quality Source

Niagara evaluated the feasibility of using lower quality sources of water for the proposed uses. The analysis demonstrated that there are no lower quality water sources currently feasible for use. However, the applicant expressed a willingness to participate in partnerships with other water users in the area to develop projects that could provide lower quality sources to supply the facility in future. While it is not feasible to use lower quality sources at the proposed facility in the near term, it is reasonable to expect that

one or more projects may become available to serve the area of Niagara's facility by 2013.

Public Interest:

Staff evaluated the permit application in terms of whether or not the consumptive use is consistent with the public interest. Section 9.3, A.H., defines public interest as "those rights and claims on behalf of people in general" and provides that "[i]n determining the public interest in consumptive use permitting decisions, the Board will consider whether an existing or proposed use is beneficial or detrimental to the overall collective well-being of the people or to the water resource in the area, the District, and the State."

Niagara proposes to use groundwater to produce a healthful product for human consumption. However, purified water produced through reverse osmosis, as Niagara plans to do here, does not require high quality groundwater. Niagara has located its bottling plant in the Central Florida Coordination Area (CFCA). In this area, stress on the water resources is escalating because of rapidly increasing withdrawals of groundwater. The CFCA rule provisions in sections 12.10(a) and (b), A.H., contain requirements that public supply utility applicants and similar applicants develop supplemental water supply sources of a lower quality than fresh groundwater, to meet projected water demands above the level of demand existing in 2013. Therefore, lower quality supplemental water supply sources should be developed and may become available to Niagara by the end of 2013. Niagara's proposal to use groundwater from the Floridan aquifer to operate a bottled drinking water facility is considered beneficial to the collective well being of the people, until such time that a lower quality source becomes available.

Many water suppliers who are required under the CFCA rules to develop supplemental water supply sources are concerned about the cost of treating and transporting lower quality supplemental water supplies, such as surface water or seawater, from remote locations for use in their service areas. Although the cited CFCA rules are not directly applicable to Niagara, the existence of a facility such as Niagara's, one that can feasibly use a lower quality source, is beneficial to people and water resources in the area, because Niagara would be in a position to partner with public supply utilities and similar applicants in developing a supplemental water supply project, or being a customer of a such a source when provided by a supplier. Participation of such a project partner or customer is expected to be beneficial to the economics and overall feasibility of the supplemental water supply project(s) that need to be developed in the area.

Therefore, allocating the use of groundwater for a duration of 5 years until the end of 2013, when lower quality supplement sources will need to be developed, and requiring Niagara to participate in the development of a supplemental water supply during the 5 year period, is consistent with the public interest. Staff recommends a permit condition (see other condition 14), that requires Niagara to undertake, during the term of the permit, specific actions needed to develop or participate in the development of lower quality water supply for the proposed use

Some of those parties that submitted written objections to this permit asserted that it would not be in the public interest since the requested allocation would be removed from the local area for use elsewhere. Staff considered this assertion; however, section 373.223(3), F.S., provides a specific exception for the transport and use of water supplied exclusively for bottled water when evaluating whether a potential transport and use of ground or surface water across county boundaries is consistent with the public interest. Therefore, staff has concluded that the prospective transport and use of bottled water

under the proposed permit cannot be judged inconsistent with the public interest based on a “local sources first” type argument. The portion of the requested allocation that would not result in a bottled water product (process wastewater and sewage) would be provided for beneficial reuse within the county of origin.

Based on all of the information and analysis described in this report, staff has determined that the proposed use is consistent with the public interest pursuant to section 9.3, A.H., provided the permittee complies with the conditions recommended for this permit.

Reasons for Recommendation for Denial:

A permit will be denied if, at the time of permit consideration, a proposed use is not a reasonable beneficial use, will interfere with presently existing uses, or is not in the public interest as described in sections 9.1, 9.2 or 9.3, A.H. Additionally, six conditions have been established, that by their very nature, will not meet the standards of these sections, as reasons for recommendation of denial in section 9.4, A.H. Staff evaluated these criteria and concluded that, if the applicant complies with the conditions of the permit, reasonable assurances have been provided that no criteria for denial apply.

Must Not Cause Interference with Existing Legal Uses of Water:

The staff does not anticipate an adverse impact to existing legal uses as a result of the proposed uses.

Section 9.4.4, A.H., provides that the issuance of a permit will be denied if the permit would allow withdrawals of water that would cause an interference with a legal use of water that existed at the time of the permit application. Section 9.4.4, A.H., also provides that interference is presumed to occur when, because of the use, the withdrawal capability of an individual withdrawal facility of a presently existing legal use of water experiences a 10% or greater reduction in withdrawal capacity or the existing legal user experiences economic, health, or another type of hardship.

The applicant’s consultant prepared a project-specific groundwater model to simulate the proposed withdrawals. Maximum predicted declines in the water table of the surficial aquifer were approximately 0.2 feet. Maximum predicted declines in the upper production zone of the upper Floridan aquifer were approximately 0.3 feet, and the maximum predicted declines in the lower production zone of the upper Floridan aquifer were approximately 1.1 feet.

In each aquifer zone, the predicted drawdown effects decrease rapidly with distance from the facility’s wells. For example, nearby water supply wells with allocations under consumptive use permits would experience an increase in drawdown of approximately 0.1 to 0.3 feet. The City of Groveland’s public supply wells at the Sunshine Parkway water plant would experience an increase in drawdown of approximately 0.1 feet. This magnitude of drawdown is not expected to interfere with existing legal uses.

If unanticipated interference occurs, the District can modify or revoke the permit as necessary to curtail or abate the interference unless the permittee mitigates for the interference (see other condition 16).

PERMIT DURATION:

The applicant has requested a 20-year permit. Pursuant to section 6.5.1, A.H., when requested by an applicant, a consumptive use permit shall have a duration of 20 years if the applicant provides reasonable assurance that the proposed use meets the conditions

for issuance in section 40C-2.301, F.A.C., for the requested 20-year permit duration. Pursuant to section 6.5.2(a), A.H., when an applicant fails to provide reasonable assurance to support a 20- year duration, a consumptive use shall have a duration of 10 years; unless the Governing Board determines that a different permit duration is warranted based on a consideration and balancing of the factors listed in section 6.5.3., A.H. Consideration and balancing of the factors in section 6.5.3, A.H. for this application, yields a recommended permit duration of 5 years. Under section 6.5.3(c), A.H., consideration of whether a lower quality water source can reasonably be expected to become available for the permitted consumptive use during the period of the permit, and the permittee is not proposing to use this water source when it becomes available, will result in a shorter duration than specified in section 6.5.2(a), A.H., to enable the District and the permittee to reevaluate the ability of the permittee to use the lower quality source at the time it becomes available.

Niagara evaluated the feasibility of using lower quality sources of water for the proposed uses and concluded that there is no currently viable lower quality source project near the area of the proposed withdrawal. However, one or more such projects can be reasonably expected to become available to serve the area of Niagara's project by the end of 2013 and the applicant may then be able to participate in such projects. Therefore, staff recommends that this permit for use of groundwater be for a 5-year duration, through the end of 2013.

RECOMMENDATION:

Staff has concluded that the proposed use, as limited by the 5-year permit duration and attached permit conditions, is reasonable-beneficial, will not cause or contribute to interference with existing legal uses, and is consistent with the public interest. Therefore, staff recommends approval of this application.

GENERAL CONDITIONS BY RULE:

1, 2, 3, 4, 7, 8

OTHER CONDITIONS:

1. All submittals to the District intended to demonstrate compliance with the conditions issued under this permit must include the CUP Number 114010 plainly labeled on the submittal.
2. This permit will expire December 31, 2013.
3. Prior to initiation of use, Well Nos 1 (GRS Id No145009), 2 (GRS Id No 145010), and 3 (GRS Id No 145011) and the Niagara Reclaimed Connection Point (GRS Id No 242472) shall be equipped with totalizing, in-line, flowmeters. These meters must maintain 95% accuracy, be verifiable and be installed according to the manufacturer's specifications.
4. Total withdrawals of water from Well Nos 1 (GRS Id No145009), 2 (GRS Id No 145010), and 3 (GRS Id No 145011) must be recorded continuously, totaled monthly, and reported to the District, using Form EN-50, at least every six months from the initiation of withdrawal. The reporting dates each year will be as follows for the duration of the permit:

Reporting Period

Report Due Date

January-June

July 31

July – December

January 31

5. The Permittee shall document proper installation of flow meters by submitting a copy of the manufacturer's specifications and a photograph, or by a site visit by District staff, within 30 days of meter installation.
6. The permittee must maintain all flow meters. In case of failure or breakdown of any meter, the District must be notified in writing within 5 days of discovery. A defective meter must be repaired or replaced within 30 days of discovery.
7. The permittee must have all flowmeters checked for accuracy at least once every 3 years within 30 days of the anniversary date of permit issuance, and recalibrated if the difference between the actual flow and the meter reading is greater than 5%. District Form No. EN-51 must be submitted to the District within 10 days of the inspection/calibration.
8. Maximum annual groundwater withdrawals (combined total) from Well Nos 1 (GRS Id No145009), 2 (GRS Id No 145010), and 3 (GRS Id No 145011) for commercial/industrial type use must not exceed as follows:
 - 68.3 million gallons (0.187 million gallons per day, annual average) in 2008; and
 - 176.79 million gallons (0.484 million gallons per day, annual average) in 2009–2013
9. The maximum withdrawal (combined total) in any single day from Well Nos 1 (GRS Id No145009), 2 (GRS Id No 145010), and 3 (GRS Id No 145011) for commercial/industrial type use must not exceed 0.655 million gallons, unless a lower daily maximum is specified by District staff as a consequence of water restrictions declared by the District.
10. Withdrawals of groundwater from Well Nos 1 (GRS Id No145009) and 2 (GRS Id No 145010) for commercial/industrial type use shall not be initiated until Niagara Bottling LLC and the Frozen Grove WWTF have obtained all necessary permits to create and use the blend of process waste water (R/O concentrate) and reclaimed water for irrigation, as described in Attachment 4 of the application materials submitted to the District on May 9, 2008. The permittee shall provide documentation to the District that the necessary permits have been obtained within 30 days of initiating withdrawals of groundwater for commercial/industrial type use from Well Nos 1 (GRS Id No145009) and 2 (GRS Id No 145010).
11. Maximum daily ground water withdrawals from the Floridan aquifer for fire protection from Well Nos 1 (GRS Id No145009) and 2 (GRS Id No 145010) must not exceed 5.76 million gallons. The permittee shall maintain a separate accounting of all water used for fire protection. The permittee shall submit documentation of water used for fire protection to the District within 30 days of each occurrence on which water is withdrawn for fire protection (essential) type use.
12. The permittee must implement the revised water conservation plan that was submitted to the District March 7, 2008 in accordance with the schedule contained therein. Annual reports detailing the progress of plan implementation and

proposed plan updates to enhance water conservation must be submitted to the District for review and approval on or before July 31st of each year for the duration of the permit.

13. The permittee shall prepare an audit of all water uses under this permit for the 12-month period January 1, 2009 to December 31, 2009. The permittee shall submit a report of the water use audit to the District with the water conservation plan report that is due to the District no later than July 31, 2010.
14. The permittee shall implement the following actions to investigate and participate in the development of a supplemental water supply project to supply future water demands for this project after expiration of the permit:
 - a. No later than 2 years from the date of permit issuance, permittee shall identify potential supplemental water supply projects that could be implemented, with or without partners, to secure the quantities of water necessary to meet permittee's water supply needs.
 - b. If potential partners are identified, the permittee shall contact these potential partners and determine the viability of developing partnership agreements with them for the identified potential water supply projects.
 - c. A written description of the potential projects shall be submitted to the District no later than 2 years from the date of permit issuance.
 - d. For each potential project that potential partners are identified, a written description of the contacts between the permittee and the potential partners and the viability of the development of partnership agreements shall be submitted to the District no later than 2 years from the date of permit issuance.
 - e. No later than 3 years from the date of permit issuance, permittee shall submit to the District a comprehensive written report evaluating whether each of the identified viable projects are technologically, economically, and environmentally feasible.
15. All process wastewater from the facility shall be discharged and measured via the Niagara Reclaimed Connection Point (GRS Id No 242472). The process wastewater discharge shall be transported for beneficial reuse, as described in application materials submitted to the District on May 9, 2008. Total discharge of process wastewater via the Niagara Reclaimed Connection Point (GRS Id No 242472) must be recorded continuously, totaled monthly, and reported to the District using Form No. EN-50 at least every six months from the initiation of the discharge. The reporting dates each year will be as follows for the duration of the permit:

<u>Reporting Period</u>	<u>Report Due Date</u>
January-June	July 31
July – December	January 31

16. Legal uses of water existing at the time of permit application shall not be significantly adversely impacted as a result of the consumptive use. If unanticipated significant adverse impacts occur, the District shall revoke the permit

in whole or in part, to curtail or abate the adverse impacts, unless the impacts are mitigated by the permittee pursuant to a District-approved plan.

17. The permittee shall plug and abandon Well No. 4 (GRS Station Id. No. 145012), the use of which has been permanently discontinued, not later than August 12, 2009. Plugging and abandonment of this well shall conform to District requirements under chapter 40C-3, F.A.C.
18. The permittee's consumptive use shall not adversely impact wetlands, lakes, and spring flows, or contribute to a violation of minimum flows and levels adopted in Chapter 40C-8, F.A.C., except as authorized by a SJRWMD-approved minimum flow or level (MFL) recovery strategy. If unanticipated significant adverse impacts occur, the SJRWMD shall revoke the permit in whole or in part to curtail or abate the adverse impacts, unless the impacts are mitigated by the permittee pursuant to a District-approved plan.
19. Water level monitoring must be initiated by January 13, 2009. The permittee must conduct hydrologic and photo monitoring at Lake Arthur, (Sec 29 &30, T. 21 S., R. 25 E.).

The permittee must install a shallow monitoring well at the above-listed site. The well must be located near the upland/wetland interface. The monitoring well design and specific location must be approved in writing by the District staff before the well is installed. The monitoring well must be installed by a licensed water well contractor (as required in 373.336 (1)(b), F.S.), and all monitoring devices shall be surveyed to NAVD (1988) to an accuracy of +/- 0.01 foot.

If another agency or utility is monitoring the same water body, then the same monitoring equipment/data can, upon written approval by SJRWMD, be used with the owner's consent. A staff gauge may substitute for a shallow monitoring well if District staff determine that the substitution would be capable of capturing a complete range of water fluctuation.

20. The transect location where vegetation and soils are to be sampled must be approved by the District for the Lake Author monitoring site by January 13, 2009. The transect shall be 150 feet in length, and located such that 50 feet of the adjacent upland is included, and oriented towards the wetland center and perpendicular to the wetland edge. The monitoring well should be located on the transect (if possible). If the adjacent upland consists of placed fill, then the transect may be limited to 120 feet in length, such that 20 feet of the adjacent upland is included. The following information must be recorded for the transect:
 - A permanent photo station must be monumented on the transect near the monitoring well for annual photographs.
 - Soil surface elevations must be recorded to an accuracy of +/- 0.1 foot at 5 foot intervals and wherever there is a change in plant community.
 - Other environmental features such as the upland/wetland interface, current water level, cypress buttress inflection points (up to 3 individuals), lower extent of lichen lines or upper extent of moss collars, watermarks, and the lower edge of the saw palmetto (*Serenoa repens*) fringe must be surveyed, if present.

- Plant communities must be described, including a listing of all vascular plant species, by plant community, present within 10 feet of one side of the transect line, their relative abundance, and the diameter at breast height (d.b.h.) of any woody plants greater than 1" d.b.h.
 - A description of soil color, texture, and hydric soil indicators must be made in the top 24 inches of soil at 25 foot intervals along the transect described above for a total of 7 stations. If the soil survey depicts the soils as open water, then the soil description will occur out to a water depth of 3 feet, and depth to sediment surface, and depth of organic substrate will be recorded for the remaining intervals.
21. Rainfall from a rain gauge in the vicinity of the monitoring well must be recorded weekly, on the same day as the water level recording. The location of the rain gauge shall be submitted to the District by January 13, 2009 for written approval.
 22. A Baseline Monitoring Site Report must be submitted to the District on or before August 12, 2009. The report must include the following information for the Lake Arthur monitoring site: a) a diagram of the elevations, plant communities, and hydric soils located along the transect, b) a summary of the soils data collected, c) a summary of the vegetation data collected, d) a map showing the location of the rain gauge, and e) information regarding the installation of the monitoring well, including a well completion report, latitude/longitude coordinates of the well, well location on a map, and a brief site description.
 23. Monitoring data must be submitted electronically as spreadsheets on or before January 31st and July 31st, in a District approved computer accessible format. Data submittal will start on July 31, 2009. The following information must be recorded by the permittee for the Lake Arthur monitoring site: water level (weekly without data loggers or daily with data loggers), inches of rainfall (weekly), and pumping volume (weekly by well). Water level data must be reported as elevation above sea level (NAVD). The Permittee must contact the District for specific details on how to submit the computer accessible information.
 24. On or before March 31st, starting in 2010, the permittee must submit an annual report summarizing the monitoring efforts and comparing all of the Lake Arthur monitoring data recorded for the last calendar year and previous years. The report must include panoramic photographs taken in September at the established photo station, and graphs summarizing the rainfall, pumping volume, and monitoring data. The elevation of the upland/wetland interface must be indicated on the graphs. In addition, the report will include a brief analysis of any data trends.
 25. If the permittee is unable to obtain or maintain legal access to the monitoring site referenced above, the permittee must notify SJRWMD in writing within 15 days of concluding that access to any specific site is not possible. Within 45 days of this notification, the permittee must submit an alternative site to modify the monitoring network. Within six months of SJRWMD approval of the monitoring network modification, the permittee must implement the approved change(s).

REVIEWERS:

Adams, Fewster

STATION INFORMATION:**SITE NAME:** Project Falls

Well Information:

Well No.	GRS Station No.	Casing Diameter (inches)	Casing Depth (feet)	Well Depth (feet)	Status	Source
1	145009	16	360	450	Proposed	Floridan Aquifer
2	145010	16	360	450	Proposed	Floridan Aquifer
3	145011	4	360	450	Proposed	Floridan Aquifer
4	145012	4	94	130	To be abandoned	Floridan Aquifer

Connection Point Information:

Name	GRS Station No.	Status	Source
Niagara Reclaimed Connection Point	242472	Proposed	Project Falls

Notice of Rights

1. Any substantially affected person who claims that final action of the District constitutes an unconstitutional taking of property without just compensation may seek review of the action in circuit court under section 373.617 of the Florida Statutes and the Florida Rules of Civil Procedure, by filing an action within 90 days of the rendering of the final District action.

2. Under section 120.68 of the Florida Statutes, a party who is adversely affected by final District action may seek review of the action in the district court of appeal by filing a notice of appeal under rule 9.110 of the Florida Rules of Appellate Procedure within 30 days of the rendering of the final District action.

3. A District action or order is considered "rendered" after it is signed by the Chairman of the Governing Board, or his delegate, on behalf of the District and is filed by the District Clerk.

4. Failure to observe the relevant time frames for filing a petition for judicial review as described in paragraphs 1 or 2 will result in waiver of that right to review.

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing NOTICE OF RIGHTS has been furnished on this 25th day of September 2009, to each of the following:

Via U. S. and Electronic Mail

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