SUWANNEE RIVER WATER MANAGEMENT DISTRICT

OUR SANTA FE RIVER, INC., FLORIDA SPRINGS COUNCIL, INC.,
and MICHAEL ROTH,
Petitioners,
vs.

SUWANNEE RIVER WATER MANAGEMENT DISTRICT, and
SEVEN SPRINGS WATER COMPANY,
Respondents.
_____/

PETITION FOR ADMINISTRATIVE HEARING

Petitioners Our Santa Fe River, Inc., Florida Springs Council, inc., and Michael Roth file this Petition for Administrative Hearing pursuant to Sections 120.569 and 120.57, Fla. Stat., and Chapter 28-106, Fla. Admin. Code, challenging the issuance of water use Permit Number 2-041-218202-3 (Permit) issued by the Suwannee River Water Management District (District) to Seven Springs Water Company on February 24, 2021.

PROCEDURAL BACKGROUND

On March 3, 2020, the District issued a notice that the District proposed to deny Water Use Permit Renewal Application 2-041-218202-3 for the Seven Springs Water Company project in Gilchrist County. On March 6, 2020, the Seven Springs Water Company, the permit applicant, filed a Petition for Formal Administrative Hearing with the District, challenging the proposed

agency action by the District. The Petition was forwarded to the Division of Administrative Hearings, wherein the administrative proceeding commenced.

Also on March 6, 2020, a "Public Notice of Agency Action Taken by the Suwannee River Water Management District" was published in the Gainesville Sun newspaper. The Notice stated as follows:

> Notice is hereby given that the Suwannee River Water Management District (District) has issued proposed agency action that water use permit renewal number 2-041-218202-3 for the Seven Springs Water Company Project, Gilchrist County, be denied for failure to provide reasonable assurance that the requested water use will meet the conditions for issuance set forth in Rule 40B-2.301, Florida Administrative Code and the Water Use Permit Applicant's Handbook.

The Notice did not state any further the reasons for the denial. The Notice included a "Notice of Rights," with the statement that "[i]f the Governing Board takes action which substantially differs from the notice of the District's decision to grant or deny the permit application, a person whose substantial interests are or may be determined has the right to request an administrative hearing …" The Notice did not reference the District Rule 40B-1.1010 "Point of Entry into Proceedings."

On July 31, 2020, the District and Seven Springs filed a Stipulation and Motion to Relinquish Jurisdiction, indicating that the parties have settled, and that the District and Seven Springs would take the proposed settlement to the District Governing Board to approve the District staff recommendation to issue the permit. The motion was granted, and the parties proceeded to the Governing Board on August 11, 2020, whereupon the Board "tabled" the

decision as to whether to grant or deny the permit. Therefore, the matter was referred back to DOAH.

On August 21, 2020, Our Santa Fe River, Inc., Michael Roth, and Merrillee Malwitz-Jipson filed a "Petition for Formal Proceedings Before a Hearing Officer" as third party Petitioners in this matter. The Petition stated that it was "specifically directed to the agency decision made on August 11, 2020, and is in support of the District's decision not to issue the renewal permit to the Applicant." Upon the third party Petitioners becoming parties to the proceeding, Seven Springs filed a motion to dismiss their Petition. Seven Springs' central argument was that no "agency action" had occurred at the Governors Board meeting on August 11, because the Board had just "tabled" the decision on whether to issue or deny the permit. The motion also argued that the Petition failed to properly allege standing, and that the Petition was untimely because it should have been filed back in March when the proposed agency action to deny the permit was first noticed. In a one-paragraph order, the Administrative Law Judge (ALJ) granted Seven Springs' motion, dismissing the third party Petitioners from the proceeding. The ALJ's order provided no bases for his decision.

In his order the ALJ did note that the Petitioners could file a motion to intervene in the proceeding as allowed under Florida rules and statutes. The third party Petitioners did so and the motion was granted, but later, in reliance on the District's position to deny the permit, and due to the limits on the issues they could raise as an intervenor party, the third party Petitioners filed a Notice of Voluntary Dismissal. The Notice of Voluntary Dismissal included the caveat that the dismissal was filed without prejudice to challenge any further action by the District concerning this permit.

Thereafter the case proceeded to hearing, with District staff taking the position that the permit should be denied, mainly due to the permit applicant's failure to show it has the legal right to utilize water at the bottling facility as required by District rules. The ALJ then issued a Recommended Order, recommending that the permit be issued. The ALJ did not allow consideration of lack of the applicant's legal control over the water bottling facility because the District had not requested information regarding this issue within 30 days of receipt of the permit application, citing Section 120.60(1) of the Florida Statutes. On February 23, 2021, the Governing Board voted to adopt the Recommended Order. The Final Order issuing the permit was filed on February 24, 2021 (the Recommended Order was adopted "under protest" to preserve the District's right to appeal its own final order).

Therefore, based on the above actions, and based on District Rule 40B-1.1010, Fla. Admin. Code, which allows Petitioners to challenge District actions which materially differ from the previous written notice of the District actions, Petitioners file their objections to the issuance of this permit as noted below.

The name and address of each agency affected.

1. This action concerns a water use permit issued by the Suwannee River Water Management District (District), 9225 County Road 49, Live Oak, Florida 32060.

The name, address and telephone number of the Petitioners' representative, and an explanation of how the Petitioners' substantial interests will be affected by the agency determination.

2. Petitioners are represented by Douglas MacLaughlin, FBN 251054, at 319 Greenwood Drive, West Palm Beach, Florida 33405, telephone number 561-329-4403,

douglasmaclaughlin@aol.com; John Jopling, FBN 348104, at Dell Graham, P.A., 2631 NW 41st Street, Gainesville, FL 32606-6689, telephone number 352-416-6689, john.jopling@dellgraham.com.

3. Our Santa Fe River, Inc., (OSFR) is a 501(c)(3) not-for-profit organization incorporated in Florida on December 18, 2007. OSFR is composed of approximately 100 concerned citizens working to protect the waters and lands supporting the aquifer, springs and rivers within the watershed of the Santa Fe River. One of the main concerns in OSFR's formation was to make sure that bottled water extraction for use outside the river's watershed was not harmful or unnecessary. Because the Santa Fe is impaired and in recovery OSFR, has concerns that all of those using waters from the Santa Fe River and its contributing springs comply with all appropriate water use requirements. OSFR actively provides stewardship, education and advocacy to protect and preserve the river and its contributing springs, and to prevent unnecessary or wasteful withdrawals from the river and its springs. Many of the members of OSFR are riparian landowners along the river, and all members have and wish to continue to enjoy using the river and springs for swimming, boating, fishing and aesthetics. Consequently, for all the above reasons, OSFR's substantial interests will be affected by the District's issuance of this permit.

4. The Florida Springs Council (FSC) is a 501(c)(3) not-for-profit organization incorporated in Florida on June 1, 2016. FSC is composed of concerned citizens and non-profit organizations working to restore, preserve, and protect Florida's freshwater springs and spring-fed rivers, including the Santa Fe River and its springs, and the Floridan aquifer. A primary focus of FSC is implementation of Suwannee River Water Management District rules, consideration of

the public interest in consumptive use permit decisions, and rules, policies, and legislation to protect the Santa Fe River and associated springs. FSC educates and advocates to protect and preserve the river and its contributing springs, and to prevent unnecessary or wasteful withdrawals from the river and its springs. Many of the individual and organizational members of FSC have enjoyed and wish to continue to enjoy using the river and springs for swimming, boating, fishing and aesthetics. Consequently, for all the above reasons, FSC's substantial interests will be affected by the District's issuance of this permit.

5. Michael Roth lives directly on the Santa Fe River downstream from the extraction point of the operation being permitted. He lives within the zone of influence where the extraction of spring water may adversely affect water flow within the river and overall health of the river. He is an active member of OSFR and personally takes part in stewardship, education, and advocacy to protect and preserve the river and its contributing springs, and to prevent unnecessary or wasteful withdrawals from the river and springs. He is concerned that water from the river and springs can be extracted for uses outside the watershed of the river, especially if those uses are unnecessary or wasteful. He enjoys use of the river and springs for swimming, boating, fishing and aesthetics, and wishes to continue doing so. Consequently, for all the above reasons, Michael Roth's substantial interests would be affected by the issuance of this permit.

Statement of when and how the Petitioners received notice of the agency decision.

6. The Petitioners have not received notice, as defined in District Rule 40B-1.1010(2)(a), of the Final Order issuing the Permit filed on February 24, 2021.

Statement of all disputed issues of material fact.

7. The applicant has failed to provide reasonable assurance that it has the legal right to utilize water at the bottling facility as required by the District's Water Use Applicant's Handbook, Sections 2.1.1 and 2.3.1.

8. The applicant has failed to provide reasonable assurance that the proposed water use is "consistent with the public interest" as required by § 373.223(1)(c), Fla. Stat. and in Rule 40B-2.301(1)(c), Fla. Admin. Code. "Public interest" is defined in Rule 40B-2.021(7) as "those broad-based interests and concerns that are collectively shared by members of a community or residents of the District or the State."

Concise statement of the ultimate facts alleged, including the specific facts the Petitioner contends warrant reversal or modification of the Agency's proposed action.

A. Permit applicant's lack of legal control over the water use facility.

9. The applicant does not own or control the bottling facility where the bottling/packaging water use will occur (High Springs Facility), nor does the applicant own the property on which this facility is located.

10. The applicant does not own or control the property on which the existing and proposed water withdrawals are to occur, nor does the applicant have the ability to bottle or package the requested water allocation on the property where the water is extracted.

11. Therefore, the applicant has failed to provide reasonable assurance that it has the legal right to conduct the water use at the bottling facility as required by the District's Water Use Applicants Handbook, Sections 2.1.1 and 2.3.1.

12. Because the applicant does not own or control the bottling/packaging facility, there is no reasonable way for the District to ensure compliance with permit conditions limiting

the bottling/packaging use. Lacking control of the bottling/packaging facility, the applicant cannot assure that the allocated water will be used for a beneficial use, in this case the sealing of water in bottles, packages, or other containers for sale for human consumption. Also, without enforcement authority over the entity that owns or has legal control over the bottling/packaging facility, the District is not able to obtain information or to require compliance for a facility using almost one million gallons of water a day.

13. As noted above, any decision concerning the applicant's failure to comply with Sections 2.1.1 and 2.3.1 of the District's Handbook was thwarted in the administrative hearing, based on the ALJ's ruling that Section 120.60(1) of the Florida Statutes precluded the District from considering this issue. The ALJ's ruling was incorrect. Failure to comply with Section 120.60(1) of the Florida Statutes does not mandate the issuance of a permit where the permit application fails to meet the minimum permit requirements of agency. *See* MedPure, LLC v. Dep't of Health, 295 So. 3d 318 (Fla. 1st DCA 2020). The requirement under Sections 2.1.1 and 2.3.1 that the permit applicant have legal control over the project site is a clear and basic permit requirement. Without such control the District will have no direct authority to require compliance by the water bottler, which has legal control over the project site.

14. Also, the self-evident purpose of Section 120.60(1) is to prevent agencies from causing unnecessary delay when reviewing permit applications. Whether or not the District failed to comply with Section 120.60(1), when third parties could be adversely impacted by a project, and those impacted persons seek access to an agency proceeding to assure that his or her rights under Florida law are protected, the applicant's rights under Section 120.60(1) should not be looked at in isolation. The District is also required under Section 373.223(1) of the

Florida Statutes to assure that the consumptive use permit it issues will protect the third party from any water use (1) that is not reasonable or beneficial, (2) that will adversely affect his existing water use, and (3) that will not be consistent with the public interest. Section 120.60(1) does not obviate the duty of the District to issue permits that are enforceable, and that protect the public from non-compliant permittees. Substantially affected third parties can not be precluded from their right to a Chapter 120 de novo hearing to address agency actions. See Young v. Department of Community Affairs, 625 So. 2d 831 (Fla. 1993) ("[a] chapter 120 proceeding is a hearing de novo intended to formulate agency action, not review action taken earlier and preliminarily'"); see also Couch Const. Co. v. Dep't of Transp., 361 So. 2d 172, 176 (Fla. 1st DCA 1978) (explaining that chapter 120 hearings "are designed to give affected parties an opportunity to change the agency's mind.").

B. Failure to address whether the proposal is "consistent with the public interest" under Section 373.219(1)(c)

15. Section 373.223(1) of the Florida Statutes and District Rule 40B-2.301(1) require consumptive use permit applicants to satisfy a three-pronged test to obtain a water use permit. The three requirements are (1) the proposal is a reasonable-beneficial use; (2) the proposal will not interfere with any presently existing legal use of water; and (3) the proposal is consistent with the public interest.

16. Rule 40B-2.021 defines reasonable-beneficial use as "the use of water in such quantity as is necessary for economic and efficient consumption for a purpose and in a manner which is both reasonable and consistent with the public interest."

17. This three-pronged test uses the phrase "consistent with the public interest" for two separate requirements in a three-part test, the first prong and the third prong. The

phrases must have separate meanings. *See* City of Groveland v. St. Johns River Water Management District and Niagara Bottling Company, LLC, DOAH Case No. 08-4201, SJRWMD F.O.R. No. 2008-84 (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 pronged test would incongruously become a two-prong test): *See also* Gulfstream Park Racing Ass'n, Inc., v. Tampa Bay Downs, Inc., 948 So.2d 599, 606 (Fla. 2006) (citing Hechtman v. Nations Title Ins. of N.Y., 840 So.2d 996 (Fla. 2003) ("it is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of [a] statute, if possible, and words in a statute should not be construed as mere surplusage.")

18. The first prong "consistent with the public interest" requirement (as contained in the "reasonable-beneficial" test) is identified in Rule 40B-2.301(2), which states:

> (2) In order to provide reasonable assurance that the consumptive use is reasonable-beneficial, an applicant shall demonstrate that the consumptive use:
>
> (a) Is a quantity that is necessary for economic and efficient use;
>
> (b) Is for a purpose and occurs in a manner that is both reasonable and consistent with the public interest;
>
> (c) Will utilize a water source that is suitable for the consumptive use;
>
> (d) Will utilize a water source that is capable of producing the requested amount;
>
> (e) Except when the use is for human food preparation and direct human food consumption, will utilize the lowest quality water source that is suitable for the purpose and is technically, environmentally, and economically feasible;
>
> (f) Will not cause harm to existing offsite land uses resulting from hydrologic alterations;

(g) Will not cause harm to the water resources of the area in any of the following ways;

1. Will not cause harmful water quality impacts to the water source resulting from the withdrawal or diversion;

2. Will not cause harmful water quality impacts from dewatering discharge to receiving waters;

3. Will not cause harmful saline water intrusion or harmful upconing;

4. Will not cause harmful hydrologic alterations to natural systems, including wetlands and other surface waters; and

5. Will not otherwise cause harmful hydrologic alterations to the water resources of the area.

(h) Is in accordance with any minimum flow and level and implementation strategy established pursuant to Sections 373.042 and 373.0421, F.S.; and

(i) Will not use water reserved pursuant to subsection 373.223(4).

19. The first prong "public interest" issues identified in Rule 40B-2.301(2) are very broad. Yet the third prong "public interest" issues can not be the same as the first prong "public interest" issues, as noted in City of Groveland and Gulfstream Park, supra. District rules are not clear what those additional third prong "public interest" issues are. However, there is guidance both in the District Rule 40B-2.021(7) and in the Water Use Permit Applicant Handbook which define "public interest" as the "broad-based interests and concerns that are collectively shared by members of a community or residents of the District or the State."

20. Section 2.3.4.1 of the Water Use Permit Applicant's Handbook is applicable to beverage processing permits. In this case it appears the District intends that this Section satisfies the public interest test in both the first and third prongs. This Section would not be applicable for any other water use permits that beverage facilities. It reads as follows:

2.3.4.1

In determining whether a proposed beverage processing use is reasonable-beneficial and consistent with the public interest, the Governing Board will consider the following information:

(a) Whether there is a need for the requested amount of water;

(b) The location of the withdrawal;

(c) The location of the beverage processing facility;

(d) Plan to convey water from the withdrawal facility to the beverage processing facility;

(e) A site plan for the beverage processing facility;

(f) Existing land use and zoning designations;

(g) A market analysis;

(h) Schedule for completion of construction of the beverage processing facility;

(i) Contractual obligation to provide water for beverage processing;

(j) Other evidence of physical and financial ability to process the requested amount; and

(k) Other documentation necessary to complete the application.

21. There are no additional third prong "public interest" tests identified in District rules. Some criteria in Handbook Section 2.3.4.1. overlap the third prong "public interest" criteria in Rule 40B-2.301(2), e.g. whether there is a need for the requested amount of water. However, most of the eleven factors listed in Handbook Section 2.3.4.1 relate to economic utilization of the water resource – that is, geographical, contractual, and regulatory factors that will affect the profitability of the enterprise. None of these factors, individually or in tandem, have any bearing whatsoever on whether the proposed water withdrawal would be consistent with the "broad-based interests and concerns that are collectively shared by members of a community or residents of the District or the State". The third-prong public-interest test must be concerned with more than the profitability of an individual business operation.

22. Even though the District does not have any rules adequately identifying the third prong "public interest" test, it still may apply the statutory mandate in Section 373.223(1)(c) to implement the third prong "public interest" test. See Amerisure Mutual Ins. Co. v. Dep't of Fin. Svcs., 156 So. 3d 520, 532 (Fla. 1st DCA 2015) (quoting St. Francis Hospital, Inc., v. HRS, 553 So.2d 1351, 1354 (Fla. 1st DCA 1989) ("An agency interpretation of a statute which simply reiterates the legislature's statutory mandate … is not an unpromulgated rule, and action upon an interpretation is permissible without requiring an agency to go through rulemaking.").

23. Under Section 373.219(1), Fla. Stat., there is a Legislative mandate that the District may impose conditions as are necessary to assure that the water use is consistent with the overall objectives of the District and assure that the use is not harmful to water resources of the area. In this case, if interests and concerns that have been shared by the public relate to the objectives of the District and protection of water resources, those concerns must be addressed by the applicant.

24. In this case there are many "broad-based interests and concerns that are collectively shared by members of a community or residents of the District or State." There have been over 19,000 comments submitted to the District expressing interests and concerns by members of the community surrounding the springs where the water will be extracted and river that these springs feed. The interests and concerns about this proposed permit application have been expressed at many Governing Board meetings and through many newspaper and television reports throughout the State and nation.

25. Most of the interests and concerns from the public relate to water resource concerns. They include such issues as the applicant's lack of legal control over the bottling

plant or the land where the water is extracted. As noted above, this issue has yet to be addressed due to the ALJ's ruling that the District did not comply with a procedural requirement under Section 120.60(1) of the Florida Statutes. A concern exists as to whether water is being conserved to the greatest extent reasonable at the water bottling facility. Another concern expressed was the transfer of water outside of the watershed, not for ultimate consumption by persons, businesses, or agriculture within the community or District. Another concern was that none of the water used would be returned to the watershed as occurs with agricultural or municipal uses.

26. These public interest concerns are reflective of the Legislature's concerns about the bottled water industry. In Section 4 of the "Clean Waterways Act" in SB 712 (2020) (Chapter 2020-150, Laws of Florida) the Legislature directed the Department of Environmental Protection, in coordination with the Water Management Districts, to conduct a study on the bottled water industry in Florida. The Legislature directed the Department to identify the types of water conservation measures employed at bottled water facilities permitted to derive water from a spring. The Department was directed to evaluate the benefits and the costs to local communities resulting from bottled water facilities that derive water from springs. The Department was also directed to do a cost-benefit analysis of withdrawing, producing, marketing, selling, and consuming spring water as compared to sources of bottled water.

27. Petitioners contend that the applicant has not provided reasonable assurances that the proposed permit, on an individual and cumulative basis, is consistent with the public interest, as set forth in Section 373.223(1)(c), Fla. Stat., and Rule 40B-2.301(1)(c), Fla. Admin. Code. The applicant has not addressed the broad-based interests and concerns that are

collectively shared by members of the Santa Fe River community and the extensive number of residents of the District and State.

A statement of the specific rules or statutes that the petitioners contend require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes.

28. The statutes that require reversal or modification of the issuance of the consumptive use permit in this matter are Part II of Chapter 373, Fla. Stat., specifically including Section 373.219(1), Fla. Stat., authorizing the District to require consumptive use permits and impose conditions necessary to assure such use is consistent with the overall objectives of the District and is not harmful to the water resources of the area, and Section 373.223(1), Fla. Stat., as described in the Petition above. The rules that require reversal or modification of the issuance of the consumptive use permit in this matter are Chapter 40B-2, Florida Administrative Code, specifically including Rules 40B-2.021(7) and (8), and Rule 40B-2.301, as described above, and the Suwannee River Water Management Water Use Handbook (adopted by reference in Rule 40B-2.301(3)), specifically including Sections 2.1.1, 2.3.1, and 2.3.4.1 as described above.

A statement of relief sought by the Petitioners, stating precisely the action Petitioners wish the agency to take with respect to the agency's proposed action.

29. Petitioners request that:

a. If the District determines that either of the two issues presented in this Petition do not involve disputed issues of material fact, Petitioners request that the District conduct an informal hearing pursuant to Section 120.57(2), Fla. Stat., and Part III of Chapter 28-106, Fla. Admin. Code. Otherwise, the Petitioners request that the District forward this Petition to the Division of Administrative Hearings for a formal hearing pursuant to Section 120.57(1) and 120.569, Fla. Stat., on disputed issues of fact and law.

b. If all or part of this Petition is forwarded to the Division of Administrative Hearings, the Petitioners request the Administrative Law Judge render a recommended order denying the Permit.

c. The Petitioners request the District issue a final order denying the proposed renewal permit to Seven Springs.

Respectfully submitted this 16th day of March, 2021.

/s/ Douglas H. MacLaughlin
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed via email with the deputy clerk of the Suwannee River Water Management District, Warren Zwanka, warren.zwanka@srwmd.org, Office of the District Clerk, 9225 County Road 49, Live Oak, Florida 32060, and a copy was served via email to Tom Reeves at Tommy.Reeves@srwmd.org, legal counsel for the Suwannee River Water Management District Governing Board, 9225 County Road 49, Live Oak, Florida 32060, and Douglas Manson, legal counsel for Seven Springs Water Company, at dmanson@mansonbolves.com, 101 North Brush Street, Suite 300 Tampa, Florida 33602, on this 16th day of March, 2021.

/s/ Douglas H. MacLaughlin

Douglas H. MacLaughlin