

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

For Petitioner: Edmund T. Baxa, Jr., Esquire
Foley & Lardner LLP
111 North Orange Avenue, Suite 1800
Orlando, Florida 32801

For Respondent Niagara Bottling Company LLC:

Edward P. de la Parte, Esquire
Nicolas Porter, Esquire
de la Parte & Gilbert, P.A
101 East Kennedy Boulevard, Suite 3400
Tampa, Florida 33602

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 is 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 Eenvtl. Coalition v. Dep't of Eenvtl. 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
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 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.

COPIES FURNISHED:

Edmund T. Baxa, Jr., Esquire
Foley & Lardner LLP
111 North Orange Avenue, Suite 1800
Orlando, Florida 32801

Edward P. de la Parte, Esquire
Nicolas Porter, Esquire
de la Parte & Gilbert, P.A
101 East Kennedy Boulevard, Suite 3400
Tampa, Florida 33602

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

Kirby B. Green, III, Executive Director
St. Johns River Water Management District
4049 Reid Street
Palatka, Florida 32177

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.