

APPROVED

BY ORANGE COUNTY BOARD
OF COUNTY COMMISSIONERS

AUG 26 2008 JRL/nc

**STATE OF FLORIDA
SOUTH FLORIDA WATER MANAGEMENT DISTRICT**

ORANGE COUNTY,

Petitioner,

**DOAH CASE #: 08-0259
Order No. SFWMD 2008- DAO-WU
App. No. 060516-41**

vs.

**SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,**

Respondent,

and

**POLK COUNTY, OSCEOLA COUNTY and
TOHOPEKALIGA WATER AUTHORITY,
FLORIDA AUDUBON SOCIETY INC.,
d/b/a AUDUBON OF
FLORIDA and KENNETH GARDNER,**

Intervenors.

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT is made and entered into by and between Orange County, a charter county and political subdivision of the State of Florida, and the South Florida Water Management District, a public corporation of the State of Florida.

WITNESSETH:

WHEREAS, in the *Kissimmee Basin Regional Water Supply Plan 2005-2006 Update* (KBWSP Update) (approved in December 2006), the South Florida Water Management

District ("SFWMD") determined that a significant increase in public water supply demand is likely to occur in Central Florida within the next 20 years; and

WHEREAS, SFWMD has concluded that limited water supplies are available to meet these future demands; and

WHEREAS, SFWMD adopted rules implementing the Central Florida Coordination Area Action Plan, and requiring that water users develop alternative water supplies to meet consumptive water use demands after the year 2013; and

WHEREAS, SFWMD is in the process of defining sustainable water resource availability from both surface and ground water sources; and

WHEREAS, timely development of alternative water supplies, as defined in section 373.019(1), Florida Statutes, will be necessary to meet projected demands of all water users within Central Florida; and

WHEREAS, the *KBWSP Update* provides that alternative sources include reclaimed domestic wastewater; surface water from local storm water management systems or from the Central and Southern Florida Flood Control Project that has been determined not necessary for restoration or protection of natural resources or natural resources; aquifer recharge projects using storm water or treated wastewater; and, desalinated brackish or saline water; and

WHEREAS, it is in the public interest to promote a cooperative relationship between the SFWMD and water users for the purpose of exploring opportunities to jointly develop water resource projects, water supply projects, and alternative water supplies consistent with Chapter 373, Florida Statutes, and the SFWMD's regional water supply plans for Central Florida; and

WHEREAS, the *KBWSP Update*, in addition to other SFWMD plans, projects, permits and rules have stressed the need for undertaking technical evaluations for identifying available water supplies for meeting future consumptive use demands while sustaining the natural systems and meeting the overall objectives of the SFWMD, such as Kissimmee River restoration and protection of the Kissimmee Chain of Lakes; and

WHEREAS, in June of 2007, SFWMD issued to Orange County a water use permit wherein Orange County is required to develop (1) an alternative water supply source having the capability of producing at least ten million gallons per day (“mgd”) for use by Orange County by 2013, and (2) an alternative water supply source from the Upper Kissimmee Basin or one or more alternative water supply projects meeting a minimum of 10 mgd of Orange County’s public supply water demands not met by the groundwater allocation authorized by the SFWMD; and

WHEREAS, Notwithstanding the present limitations set forth in the SFWMD’s rules implementing the Central Florida Coordination Area Action Plan, there is an immediate need to develop and implement a combination of alternative and traditional water supply projects in Central Florida, which are permissible and environmentally, economically, and technically viable. Implementation of a variety of such projects on an incremental or phased basis through a prioritization process is needed in order to meet Orange County’s water needs and permit requirements, as well as the water needs and permit requirements of other water suppliers in Central Florida; and

WHEREAS, over the past several years, SFWMD, Orange County, and other Central Florida water suppliers have been cooperating to develop a joint and comprehensive

program for the identification, permitting, funding, and timely development of water supplies in Central Florida; and

WHEREAS, the comprehensive program mentioned above should be completed in a sufficiently detailed manner to enable timely short-term and long-term water supply decisions, and provide assurances of satisfying District consumptive use permitting requirements; and

WHEREAS, in an effort to avoid the adverse effects of competition and potentially associated litigation, the parties agree that it is desirable to equitably allocate the available surface water and remaining available groundwater in Central Florida; and

WHEREAS, SFWMD intends to establish long-term criteria defining surface and groundwater availability in Central Florida; and

WHEREAS, some key SFWMD activities and future decisions expected to facilitate achieving above expressed objectives include the following:

- a. Work with local governments to develop a strategy for identification of sustainable withdrawals from available surface water and groundwater sources and developing a program for equitable distribution of those resources to meet future demands in a timely manner;
- b. Conduct surface water and groundwater availability research;
- c. Modify, as appropriate, consumptive use permitting criteria;
- d. Develop Kissimmee River & Kissimmee Chain of Lakes system operating criteria and resource protection rules, such as water reservations, so that regulatory constraints on supply sources are identified;
- e. Provide water suppliers with development and simulation assistance regarding a surface water model for the Kissimmee River and Kissimmee Chain of Lakes;
- f. Provide funding assistance for alternative water supply project planning and implementation; and
- g. Provide access to and use of SFWMD land for water supply development activities, as appropriate.

WHEREAS, Orange County anticipates the need for development of alternative water supplies as well as implementation of additional water conservation and reuse measures in

order to meet future water demands beyond the demands addressed under the County's existing permits. Key activities expected to be undertaken by Orange County to meet these additional future demands, and future decisions that are anticipated in connection therewith, include the following:

- a. Implement development of alternative water supplies consistent with its permit limiting conditions, SFWMD rules and Chapter 373, Florida Statutes;
- b. Investigate additional water conservation measures and projects for reuse of reclaimed water to mitigate, as necessary, water demands in excess of demands currently provided for in the County's existing water use permits; and
- c. Participate in regional water resource development planning and regional water supply planning activities.

WHEREAS, on December 13, 2007, SFWMD's Governing Board denied Orange County's application for a consumptive use permit (Application No. 060516-41) authorizing withdrawals of surface water from the C-29 and C-29A canals, a part of the headwaters of the Kissimmee River; and

WHEREAS, on December 31, 2007, Orange County filed a Petition for Administrative Hearing contesting SFWMD's decision to deny its application for consumptive use permit (Application No. 060516-41) (DOAH Case No. 08-0259); and

WHEREAS, on June 2, 2008, Orange County filed a Petition Challenging Agency Statements of South Florida Water Management District Pursuant to § 120.56(4), Florida Statutes (DOAH Case No. 08-2624RU); and

WHEREAS, Orange County and SFWMD have agreed that in exchange for Orange County's dismissal with prejudice of DOAH Cases Nos. 08-0259 and 08-2624RU and withdrawal of Application No. 060516-41, SFWMD will vacate its decision dated December 13, 2007, denying the application of Orange County for a consumptive use permit (Application No. 060516-41); and

WHEREAS, SFWMD published notice of this Settlement Agreement and other intended agency actions identified herein pursuant to Chapter 120, Florida Statutes.

NOW THEREFORE, in consideration of the foregoing premises, which are made a part of this Settlement Agreement, and the mutual terms, covenants and conditions set forth herein, the SFWMD and Orange County agree as follows:

Section 1. The parties hereto agree that the above recitals are true and correct, and the above-stated recitals are made a part of this Settlement Agreement.

Section 2. On the Effective Date of this Settlement Agreement, and contemporaneous with the actions of SFWMD set forth immediately below, and in accordance with the terms of this Settlement Agreement, Orange County (1) voluntarily dismisses with prejudice its petition for administrative hearing contesting SFWMD's decision to deny its application for consumptive use permit no. 060516-41 (DOAH Case No. 08-0259); (2) voluntarily dismisses with prejudice its Petition Challenging Agency Statements of the District Pursuant to § 120.56(4), Florida Statutes (DOAH Case No. 08-2624RU); and (3) withdraws its application for consumptive use permit no. 060516-41. Upon execution of this Settlement Agreement, Orange County shall file the Notices of Dismissal with Prejudice for each of the petitions referenced above, and a Notice of Withdrawal of Application with the SFWMD, which will be come effective only after the contingencies set forth in Sections 3 and 4 below are complete.

Section 3. Contemporaneous with the effective Date of this Settlement Agreement, and in accordance with the terms of this Settlement Agreement, SFWMD will by order vacate its prior determination, dated December 13, 2007, on consumptive use permit Application No. 060516-41 and withdraw its staff report relating to same and published

on or about December 13, 2007. The order shall also accept the Notices of Dismissal with Prejudice and Notice of Withdrawal of Application filed by Orange County, referenced in Section 2., contingent upon the order becoming final pursuant to Section 4., below. If the order does not become final, the notices will be deemed withdrawn.

Section 4. On August 23, 2008, SFWMD published notice of intended agency action on this Settlement Agreement and the order identified in Section 3., above, to provide a clear point of entry as required under Chapter 120, Florida Statutes. SFWMD also provided actual notice to interested parties that have requested said notice. If any third-party challenges any of these proposed actions, SFWMD may accept the notices provided by Orange County pursuant to Section 2., above, only upon a resolution of all challenges, including all appeals, upholding the proposed actions or actions of SFWMD. Otherwise, such notices shall be deemed withdrawn.

Section 5. Nothing in this Settlement Agreement shall be construed to prohibit Orange County from reapplying for a consumptive use permit or permits for the development of surface water from the Kissimmee River system, the Kissimmee Chain of Lakes, including the C-29 or C-29A canals.

Section 6. Nothing in this Settlement Agreement shall be construed to prohibit the SFWMD from taking appropriate action on any future permit application for surface water from the Kissimmee River system or the Kissimmee Chain of Lakes, including the C-29 or C-29A canals, or be construed to otherwise affect SFWMD's authority to protect the water resources or achieve the overall objectives of SFWMD, pursuant to Chapter 373, Florida Statutes.

Section 7. In order to meet the short-term and long-term needs of water suppliers within Central Florida, Orange County, SFWMD, and other participating water suppliers intend to complete a comprehensive water supply plan (the "Plan") for those portions of the area within SFWMD. The Plan shall identify short and long-term water supply projects and an incremental strategy for developing and permitting these projects such that the needs of Orange County are timely met. The Plan and water supply projects identified in the Plan shall be completed within a timeframe that is mutually agreed upon by the participants and may vary depending upon strategy. SFWMD agrees to contribute \$500,000.00 towards development of the Plan. The District's share of the funding pursuant to the Settlement Agreement shall be subject to appropriation by the District's Governing Board in the 2008-2009 fiscal year budget and encumbered in October 2008 after the adoption of the 2008-2009 budget.

Section 8. Nothing in this Settlement Agreement binds SFWMD to make any specific future permit, rule, or planning decisions. Nothing in this Settlement Agreement is intended to affect the rights of individuals or entities who are not parties to this Settlement Agreement. This Settlement Agreement is not intended in any way to modify Orange County's existing consumptive use permits.

Section 9. This Settlement Agreement is executed for the sole purpose of resolving the permit and rule challenge cases and in no way precludes or limits the parties rights to make arguments relevant to issues raised at final hearing in such cases, should one become necessary. This Settlement Agreement shall not be admissible as evidence in any subsequent hearing between the Parties.

Section 10. This Settlement Agreement requires the approval of the governing boards of both Orange County and SFWMD.

Section 11. The Effective Date of this Settlement Agreement shall be on the date last executed by the parties hereto as evidenced by the dates recorded under the signatures of the authorized representatives below set forth.

Section 12. Notwithstanding Section 11, this Settlement Agreement shall not become effective until a Settlement Agreement is executed by the City of St. Cloud and the South Florida Water Management District in resolution of *City of St. Cloud vs. South Florida Water Management District, DOAH Case No. 08-0260.*

Section 13. The Notice of Rights is attached hereto as Exhibit A.



ORANGE COUNTY, FLORIDA
By: Board of County Commissioners

By: Richard T. Crotty
Richard T. Crotty
Orange County Mayor

ATTEST: Martha O. Haynie, County Comptroller
As Clerk of the Board of County Commissioners

By: Martha O. Haynie
Deputy Clerk

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
BY ITS GOVERNING BOARD

By: _____
Chair Person

ATTEST:

District Clerk

Approved as to form:

By: _____
Office of Counsel

EXHIBIT A

NOTICE OF RIGHTS

As required by Sections 120.569(1), and 120.60(3), Fla. Stat., following is notice of the opportunities which may be available for administrative hearing or judicial review when the substantial interests of a party are determined by an agency. Please note that this Notice of Rights is not intended to provide legal advice. Not all the legal proceedings detailed below may be an applicable or appropriate remedy. You may wish to consult an attorney regarding your legal rights.

RIGHT TO REQUEST ADMINISTRATIVE HEARING

A person whose substantial interests are or may be affected by the South Florida Water Management District's (SFWMD or District) action has the right to request an administrative hearing on that action pursuant to Sections 120.569 and 120.57, Fla. Stat. Persons seeking a hearing on a District decision which does or may determine their substantial interests shall file a petition for hearing with the District Clerk within 21 days of receipt of written notice of the decision, unless one of the following shorter time periods apply: 1) within 14 days of the notice of consolidated intent to grant or deny concurrently reviewed applications for environmental resource permits and use of sovereign submerged lands pursuant to Section 373.427, Fla. Stat.; or 2) within 14 days of service of an Administrative Order pursuant to Subsection 373.119(1), Fla. Stat. "Receipt of written notice of agency decision" means receipt of either written notice through mail, or electronic mail, or posting that the District has or intends to take final agency action, or publication of notice that the District has or intends to take final agency action. Any person who receives written notice of a SFWMD decision and fails to file a written request for hearing within the timeframe described above waives the right to request a hearing on that decision.

Filing Instructions

The Petition must be filed with the Office of the District Clerk of the SFWMD. Filings with the District Clerk may be made by mail, hand-delivery or facsimile. **Filings by e-mail will not be accepted.** Any person wishing to receive a clerked copy with the date and time stamped must provide an additional copy. A petition for administrative hearing is deemed filed upon receipt during normal business hours by the District Clerk at SFWMD headquarters in West Palm Beach, Florida. Any document received by the office of the SFWMD Clerk after 5:00 p.m. shall be filed as of 8:00 a.m. on the next regular business day. Additional filing instructions are as follows:

- Filings by mail must be addressed to the Office of the SFWMD Clerk, P.O. Box 24680, West Palm Beach, Florida 33416.
- Filings by hand-delivery must be delivered to the Office of the SFWMD Clerk. **Delivery of a petition to the SFWMD's security desk does not constitute filing. To ensure proper filing, it will be necessary to request the SFWMD's security officer to contact the Clerk's office.** An employee of the SFWMD's Clerk's office will receive and file the petition.
- Filings by facsimile must be transmitted to the SFWMD Clerk's Office at (561) 682-6010. Pursuant to Subsections 28-106.104(7), (8) and (9), Fla. Admin. Code, a party who files a document by facsimile represents that the original physically signed document will be retained by that party for the duration of that proceeding and of any subsequent appeal or subsequent proceeding in that cause. Any party who elects to file any document by facsimile shall be responsible for any delay, disruption, or interruption of the electronic signals and accepts the full risk that the document may not be properly filed with the clerk as a result. The filing date for a document filed by facsimile shall be the date the SFWMD Clerk receives the complete document.

Initiation of an Administrative Hearing

Pursuant to Rules 28-106.201 and 28-106.301, Fla. Admin. Code, initiation of an administrative hearing shall be made by written petition to the SFWMD in legible form and on 8 and 1/2 by 11 inch white paper. All petitions shall contain:

1. Identification of the action being contested, including the permit number, application number, District file number or any other SFWMD identification number, if known.
2. The name, address and telephone number of the petitioner and petitioner's representative, if any.
3. An explanation of how the petitioner's substantial interests will be affected by the agency determination.
4. A statement of when and how the petitioner received notice of the SFWMD's decision.
5. A statement of all disputed issues of material fact. If there are none, the petition must so indicate.
6. A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the SFWMD's proposed action.
7. A statement of the specific rules or statutes the petitioner contends require reversal or modification of the SFWMD's proposed action.
8. If disputed issues of material fact exist, the statement must also include an explanation of how the alleged facts relate to the specific rules or statutes.
9. A statement of the relief sought by the petitioner, stating precisely the action the petitioner wishes the SFWMD to take with respect to the SFWMD's proposed action.

A person may file a request for an extension of time for filing a petition. The SFWMD may, for good cause, grant the request. Requests for extension of time must be filed with the SFWMD prior to the deadline for filing a petition for hearing. Such requests for extension shall contain a certificate that the moving party has consulted with all other parties concerning the extension and that the SFWMD and any other parties agree to or oppose the extension. A timely request for extension of time shall toll the running of the time period for filing a petition until the request is acted upon.

If the District's Governing Board takes action with substantially different impacts on water resources from the notice of intended agency decision, the persons who may be substantially affected shall have an additional point of entry pursuant to Rule 28-106.111, Fla. Admin. Code, unless otherwise provided by law.

Mediation

The procedures for pursuing mediation are set forth in Section 120.573, Fla. Stat., and Rules 28-106.111 and 28-106.401-.405, Fla. Admin. Code. The SFWMD is not proposing mediation for this agency action under Section 120.573, Fla. Stat., at this time.

RIGHT TO SEEK JUDICIAL REVIEW

Pursuant to Sections 120.60(3) and 120.68, Fla. Stat., a party who is adversely affected by final SFWMD action may seek judicial review of the SFWMD's final decision by filing a notice of appeal pursuant to Florida Rule of Appellate Procedure 9.110 in the Fourth District Court of Appeal or in the appellate district where a party resides and filing a second copy of the notice with the SFWMD Clerk within 30 days of rendering of the final SFWMD action.