STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SEVEN SPRINGS WATER COMPANY,

Petitioner,

vs. Case No. 20-3581

SUWANNEE RIVER WATER MANAGEMENT DISTRICT,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted in Tallahassee, Florida, on October 19 through 21, 2020, before Administrative Law Judge Garnett W. Chisenhall of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether the Suwannee River Water Management District ("the District") should renew Seven Springs Water Company's ("Seven Springs") water use permit.

PRELIMINARY STATEMENT

On March 3, 2020, the District issued a proposed agency action, in the form of a Water Use Technical Staff Report, recommending denial of Seven Springs' application to renew a permit to withdraw 1.152 millions gallons of water per day ("mgd") in Gilchrist County, Florida for bulk sale to an adjacent water bottling facility. Seven Springs responded by petitioning for a formal administrative hearing, and the District referred this matter to DOAH on March 9, 2020. DOAH Case No. 20-1329 was assigned to this matter.

On July 31, 2020, the parties filed a "Stipulation and Joint Motion to Relinquish Jurisdiction" ("the Motion to Relinquish") stating that the District's staff would recommend to the District's governing board that a water use permit renewal be issued to Seven Springs. Based on the representations set forth in the Motion to Relinquish, the undersigned relinquished jurisdiction to the District. In doing so, it was noted that if the District "does not issue the proposed water-use permit renewal as set out in the Motion to Relinquish by August 12, 2020, then it is expected that [the District] will refer this matter back to DOAH by August 17, 2020."

On August 12, 2020, the District notified DOAH that Seven Springs' permit had not been renewed. DOAH Case No. 20-3581 was assigned to this matter, and a final hearing was scheduled for October 19 through 21, 2020.

On August 24, 2020, Our Santa Fe River, Inc., Merrillee Malwitz-Jipson, and Michael Roth filed a Petition opposing Seven Springs' application, and that Petition was assigned DOAH Case No. 20-3830. The undersigned issued an Order of Consolidation on August 27, 2020, consolidating DOAH Case Nos. 20-3581 and 20-3830.

On September 25, 2020, the undersigned issued an Order dismissing Our Santa Fe River, Inc., Merrillee Malwitz-Jipson, and Michael Roth from this proceeding. The aforementioned Order stated the following:

> The instant case is before the undersigned based on the Seven Springs Water Company's "Motion to Dismiss Our Santa Fe River, Inc., Merrillee Malwitz-Jipson, and Michael Roth's Petition" ("the Motion to Dismiss") filed on September 8, 2020. After considering the Response thereto filed on September 22, 2020, it is, therefore, ORDERED that the Motion to Dismiss is GRANTED. However, this dismissal is without prejudice to Santa Fe River, Inc., Merrillee Malwitz-Jipson, and Michael Roth filing a motion to intervene pursuant to Florida Administrative Code Rule 28-106.205 and section 403.412(5). *See* § 403.412(5), Fla. Stat. (providing that "[i]n any administrative, licensing, or other proceeding authorized by law for the protection of the air, water, or other natural resources of the state from pollution, impairment, or destruction . . . a citizen of the state shall have standing to intervene as a party on the filing of a verified pleading asserting that the activity, conduct, or product to be licensed or permitted has or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of this state.").

Our Santa Fe River, Inc., filed a Petition to Intervene on September 28, 2020, and the undersigned ruled as follows via an Order issued on October 2, 2020:

> The instant case is before the undersigned based on a "Petition to Intervene" ("the Motion to Intervene") filed by Our Santa Fe River, Inc. on September 28, 2020. After considering the verified assertions therein, the Motion to Intervene is GRANTED. However, Our Santa Fe River will not enjoy the same status as the Seven Springs Water Company and the Suwannee River Water Management District. *See Envtl. Confederation of Southwest Fla., Inc. v. IMC Phosphates, Inc.*, 857 So. 2d 207, 210-11 (Fla. 1st DCA 2003)(noting that "Florida courts have held that the rights of an intervenor are subordinate to the rights of the parties" and that "[i]ntervention is a dependent remedy in the sense that an intervenor may not inject a new issue into the case. The Confederation and Manasota-88 might be able to make an argument that would persuade the Department to deny the permit, but that would not be of any benefit to them if the argument did not fit within an issue raised by one of the parties.")(internal citations omitted). The case style shall be amended to reflect this ruling.

On October 6, 2020, Our Santa Fe River, Inc., filed a Notice of Voluntary Dismissal.

The final hearing was commenced as scheduled. Seven Springs offered testimony from David J. Brown, Adam Thibodeau, and Risa Wray. Seven Springs introduced the following exhibits into evidence: 1, 4, 5, 7 through 10, 12 through 15, 20, 23, 27 through 30, 36, and 37. The District offered testimony from Stefani Weeks, Warren Zwanka, and Thomas S. Rutledge. The District introduced Exhibit AA into evidence, and Joint Exhibits 1a through 1i and 2 through 12 were accepted into evidence.

The six-volume final hearing Transcript was filed on November 9, 2020. After being granted one extension, the parties filed timely proposed recommended orders that have been considered in the preparation of this Recommended Order.

Unless stated otherwise, all statutory references shall be to the 2020 version of the Florida Statutes.

FINDINGS OF FACT

Based on the evidence adduced at the final hearing, the record as a whole, and matters subject to official recognition, the following Findings of Fact are made:

The Parties

1. The District is a water management district created by section 373.069(1), Florida Statutes. It is responsible for conserving, protecting, managing, and controlling water resources within its geographic boundaries. *See* § 373.069(2)(a), Fla. Stat. The District, in concert with the Department of Environmental Protection, is authorized to administer and enforce chapter 373, including statutes pertaining to the permitting of consumptive water uses. The District also administers and enforces rules set forth in Florida Administrative Code Chapter 40B.

2. Seven Springs is a fourth generation, family-owned company. Through an exclusive water sales and extraction agreement and subsequent amendments thereto, Seven Springs has the right to withdraw water from wells[1] located on 7300 Northeast Ginnie Springs Road, High Springs, Florida 32643-9102. The water withdrawn by Seven Springs is piped to the adjacent High Springs bottled water facility. Both of the aforementioned properties are located in Gilchrist County and within the District's boundaries.

[1] Groundwater is withdrawn from two 10-inch diameter production wells. A third production well is proposed and would replace one of the aforementioned wells once placed into service.

3. Seven Springs' existing water use permit was originally issued by the District in 1994. On March 15, 2019, Seven Springs submitted its application for a five-year renewal of that permit.

4. In 1996, the property where the High Springs bottled water facility is located was sold by Seven Springs to AquaPenn. The parties executed a contract making Seven Springs the exclusive provider of water to the bottled water facility. The bottling plant was then constructed in 1998.

5. After AquaPenn, the High Springs plant was owned and operated by Dannon, Coca-Cola, Ice River, and now Nestle Waters of North America ("Nestle" or "NWNA"). Each time the High Springs plant was sold, the aforementioned contract with Seven Springs was also sold to the purchaser. Seven Springs has thus been the sole source of spring water for the High Springs plant since its construction in 1998.

Seven Springs Applies for a Permit Renewal

6. Seven Springs submitted an application to the District on March 15, 2019, to renew its water use permit. In a section of the application entitled "Water Use Category," Seven Springs marked a box indicating its intended water use was "commercial/industrial." The application gave the following examples of commercial/industrial uses: "service business, food and beverage production, cooling and heating, commercial attraction, manufacturing, chemical processing, [and] power generation."[2]

7. Seven Springs included supporting information with its application. With regard to "impact evaluation," Seven Springs stated that:

> [n]o increase from the current permitted groundwater withdrawal volumes is requested. The current permitted withdrawal of 420.48 million gallon[s] per year (MGY) and average annual daily rate (ADR) of 1.152 million gallons per day (MGD) represents between 0.6% and 0.9% of the combined

[2] That was the only Water Use Category that had any connection to extracting water and piping it to a facility for bottling. The other categories were agricultural, landscape/recreation, mining/dewatering, public supply, environmental/other, institutional, and diversions/impoundments.

> Ginnie Springs complex flow rate which has been approximated to range between 131 and 191 MGD. For reference, the 2018 Suwannee River Water Management District (SRWMD) permitted groundwater withdrawals within the Ginnie Springs complex springshed for agriculture is approximately 29 MGD which represents between 15% and 22% of the approximated spring flow.

8. Seven Springs identified the "requested water use" by stating "Seven Springs is a bulk water provider to the adjacent bottled water facility. Additional information will be provided upon request."

9. Seven Springs completed a "Water Balance Worksheet" indicating it planned to withdraw 1.152 mgd from an aquifer and use 1.152 mgd as "bottled water for consumer consumption."

10. The District issued its first request for additional information ("RAI") on April 2, 2019, requesting that Seven Springs:

> [p]rovide the following information in order to justify that the requested beverage processing allocation is [a] reasonable-beneficial [use] and [consistent] with the public interest:
>
> a. A market analysis;
>
> b. A schematic of water uses from the withdrawal point to the facility; and
>
> c. Schedule of construction and completion for any proposed bottling facility expansion

11. The District also asked Seven Springs to provide the following information in order to justify the requested beverage processing demand:

> a. A facility water budget, indicating water used for each individual process, potable uses, and fire suppression (if fire suppression does not come from an isolated source; and
>
> b. An account of all water losses and conservation practices throughout the facility.

12. Seven Springs responded via a letter dated June 27, 2019. In response to the District's request for information justifying that the requested beverage processing allocation is a reasonable-beneficial use and consistent with the public interest, Seven Springs stated, in pertinent part, that:

> [w]ater sourced from the withdrawal locations P-1 and P-2 is routed via underground pipeline to the 127,992 square foot Nestle Waters of North America (NWNA) High Springs Bottling Facility (Facility) . . . The underground pipeline supplies water only to the NWNA Facility. The NWNA Facility also utilizes two fire wells as shown on Figure 1 for fire suppression supply.

13. As for the District's request for a facility water budget and an account of all water losses and conservation practices throughout the facility, Seven Springs stated, in pertinent part, that "all but between 3-4% of the requested water withdrawal will be used within the NWNA Facility for bottled water use." Seven Springs also stated that "[w]ater losses at the NWNA Facility range from 3-4% and are from net fills, cleaning and leaks."

14. Seven Springs attached a letter from Nestle's Natural Resources Manager describing the market for bottled water and the Nestle-owned facility to which the water at issue was to be piped:

> Nestle Waters North America (NWNA) reports to Nestle Waters and is the world's leading bottled water company with an estimated 11 percent of the world's market share with 51 bottled water brands while employing nearly 31,000 at over 91 factories as of 2017. NWNA is the third largest non-alcoholic beverage company in the United States by volume and offers 11 bottled water brands.
>
> Production volumes at the NWNA High Springs Bottling Facility (Facility) are influenced by a variety of factors including (but not limited to) weather, market demand, the cost of fuel and electricity, and overall production efficiency. As a result, it is difficult to predict a "straight-line"

> trend for long-term usage volumes over time. However, NWNA continues to project steady, solid market annual growth rates for bottled water in the neighborhood of 2.1% over the next ten years.
>
> The Facility is in the process of adding bottling capacity, and expects significant increase in production volumes equal to the requested annual average daily withdrawal volume of approximately 1.152 million gallons of spring water by Seven Springs Water Company.

15. The District issued a second RAI on July 12, 2019, asking Seven Springs to provide the following information:

> The market analysis and the planned facility expansion must justify the requested groundwater demand of 1.1520 mgd. The highest reported water use at the facility over the last 4 years was 0.2659 mgd. Please provide the data used to calculate the 2.1% projected market growth and a schedule of construction/implementation for the bottling facility expansion reported [in] Attachment A as justification for the requested groundwater use.
>
> Please provide a facility water budget, indicating water used for each individual process, potable uses, and fire suppression. The water budget should include water losses throughout the facility. A facility water budget may be submitted in the form of a schematic or table and all water uses must add to the requested groundwater demand of 1.1520 mgd.

16. Seven Springs submitted a response on October 31, 2019, providing the following explanation regarding the projected market growth and the bottling facility expansion:

> On 28 December 2018, Nestle Waters North America ("NWNA") purchased the High Springs Plant ("Plant") that Seven Springs has supplied with spring water by pipeline for over twenty years. See Attachment A to this letter. Seven Springs has contracted with NWNA to continue to supply the

> Plant with spring water. NWNA has agreed to purchase spring water from Seven Springs up to the permitted allocation of 1.152 million gallons per day ("mgd") annual average for a period of time that exceeds the requested 5-year permit duration. NWNA is one of the largest non-alcoholic beverage companies in the United States by volume and offers 11 bottled water brands. The industry growth projections for bottled water consumption described in Section III of the attached Seven Springs Report show that demand is enough to utilize the requested/permitted amount with the 5-year duration of the proposed permit.
>
> Originally the Plant was designed to have four production lines for bottled water, but only two have been built to date. NWNA began operating the Plant in February of this year and has already completely renovated one production line and has begun work on the second line. When all four lines are up and running, the Plant will be capable of using all of the proposed/permitted annual average daily water allocation of 1,152,000 gallons. A schedule of construction/implementation for the Plant expansion is set forth in Section IV of the attached Seven Springs Report.

17. Seven Springs attached a revised water balance worksheet reaffirming that it planned to extract 1.152 mgd from an aquifer.

18. The District issued a third RAI on November 25, 2019, seeking the following information and citing pertinent portions of the Water Use Permit Applicant's Handbook ("the Handbook") that has been incorporated by the District into chapter 40B:

> In the RAI response dated October 31, 2019, reference was made to a contract between Nestle Waters North America (NWNA) and Seven Springs Water Company. If this contract is a written document (paper or electronic), please provide a copy of the contract (with proprietary or sensitive information redacted, if necessary). The non-redacted portion of the contract [or] other document

provided must, at a minimum, demonstrate the asserted reasonable-beneficial use and the parties' respective obligations to supply and purchase water and the term thereof. [Section 2.3.4.1 (i), A.H.]

The reported maximum use at the facility is 0.2659 mdg (SRWMD Water Use Reports for permit # 2-041-218202). When the 4.7% annual growth rate is applied to the reported use, it does not result in 1.152 mgd at the end of the requested permit duration. Please provide justification for the requested 1.152 mgd allocation. [Subections 2.3.4.1 (a) and (g), A.H.]

The proposed capacity of product lines three and four is inconsistent with both the previous reported water use at this facility (0.24 mgd per product line, page 4 of the Geosyntec Report) and the current NWNA business practice (0.183-0.202 mdg per product line) at the Lee, FL facility. Please provide an explanation of why the capacities for product lines three and four are higher than previous business practices. [Subsections 2.3.4.1 (a) and (j), A.H.]

The water budget provided (table 1 in section IV of the Geosyntec report) is unclear as to whether the entire requested allocation will be bottled within the facility located at 7100 NE CR340 in High Springs, FL, or if a portion of the requested allocation will be transported in bulk to another facility to be bottled. If bulk water transfer is anticipated, please provide the following information to demonstrate reasonable-beneficial use at the facility receiving the bulk transported water (tanker truck):

a. Whether there is a need for the requested amount of water at the receiving facility;

b. The location of the receiving beverage processing facility;

> c. Plan to convey water (quantity and frequency of transport) from withdrawal facility to the receiving beverage processing facility;
>
> d. A site plan for the receiving beverage processing facility;
>
> e. Schedule for completion of construction of the receiving beverage processing facility (if applicable);
>
> f. Contractual obligation to provide water for beverage processing (if applicable);
>
> g. Other evidence of physical and financial ability to process the requested amount at the receiving beverage processing facility; and
>
> h. Documentation (references, studies, contracts, etc.) that support the materials provided for [in] a. through g. (above). [Section 2.3.4.1., A.H.]

19. Seven Springs responded to the third RAI on January 14, 2020. With regard to the contract sought by the District, Seven Springs stated the following:

> Please note that the District has not previously requested any information concerning a contract between Seven Springs and Nestle Waters North America ("NWNA") in either the first RAI dated April 2, 2019 ("First RAI") or the second RAI dated July 12, 2019 ("Second RAI"). Furthermore, Subsection 2.3.4.1, A.H., does not require contractual information [to] be submitted as part of a Water Use Permit application, but rather states that the District will consider certain information, which may include contractual obligations. Seven Springs has previously provided information in accordance with Subsection 2.3.4.1, A.H., demonstrating that the continued use is reasonable, beneficial, and in the public interest. Therefore, pursuant to Section 120.60(1), F.S., the District is not authorized by law or rule to require a copy of the contract for issuance of this straight

> renewal permit request. The contract contains information that is subject to a non-disclosure agreement between the parties and has propriety business information within it.
>
> As we discussed at our meeting with District staff regarding this matter, in order to address the specific terms in the contract that District staff inquired about, the parties have executed a Memorandum of Agreement ("MOA") summarizing pertinent terms of the contract regarding exclusivity, duration and water quantity. The MOA is attached as Exhibit A. This MOA provides that NWNA and the applicant have entered into a contract in which NWNA is obligated to exclusively purchase spring water from the applicant to serve the NWNA High Springs Plant facility (the "Plant" or "High Springs Plant"), which NWNA owns and operates, up to the full permitted allocation for a period of time that significantly exceeds the requested 5-year permit duration.

20. Seven Springs attached its Memorandum of Agreement ("the MOA") with Nestle, but the MOA description of the parties' contract was limited to the following:

> 1. The term of the Contract extends to 2096.
>
> 2. The Contract requires NWNA to purchase from Seven Springs ***all*** water pumped, extracted, processed or sold by NWNA through the High Springs Plant, with such amounts only being limited by the average and maximum daily limits set forth in water use permit No. 2-93-00093 (together with any modifications and renewals thereof) ("Permit").
>
> 3. The Contract requires Seven Springs to be the exclusive source for all water bottled at the High Springs Plant.[3]

[3] The MOA was amended on May 27, 2020, to add a provision stating that "[a]s long as NWNA meets its payment obligations under the Contract, the Contract requires Seven Springs to exclusively provide all water withdrawn under the Permit to NWNA's High Springs Plant."

21. With regard to the request for information regarding product lines 3 and 4 at Nestle's High Springs plant, Seven Springs stated in the January 14, 2020, letter that:

> as explained in the Second RAI response, NWNA is expanding the High Springs Plant and has already completed the renovation of one production line and has begun work on the second. As previously explained, when all four (4) lines are up and running, the High Springs Plant will have the production capacity to utilize all of the proposed/permitted annual average daily water allocation of 1,152,000 gallons. NWNA intends on utilizing the entire permitted quantity for its product distribution throughout the proposed five-year permit term and beyond. The justification for the requested 1.152 million gallons per day ("mgd") is the agreement by NWNA to purchase the spring water from the applicant for the permit duration as well as the expansion of the production lines at the High Springs Plant.
>
> * * *
>
> To date, NWNA has spent over $40 million on updating, renovating and other work at the High Springs Plant. Additionally, Phase I of the High Springs Plant expansion project, which has not yet been completed, is budgeted to have a projected construction budget of $27.6 million. The large amount of capital invested and expended by NWNA on the Plant is a clear indication that the use is both real and of NWNA's intent to utilize the full renewal quantities.

22. Seven Springs offered more information regarding the capacity of the High Springs plant:

> Bottled water lines are designed for each facility and are not purchased "off the shelf," but designed specifically for each facility and use. Through time, increasingly better and more efficient bottling technology and equipment has been developed.

> NWNA has already completely renovated the first line at the Plant, as seen by the District staff at the recent site tour, which has increased the efficiency, speed, and production capacity at the Plant. The old line that was replaced could produce approximately 700 bottles per minute, whereas the new line produces up to approximately 1,300 bottles per minute. Current projections indicate that the renovation of the second line will be completed in year 2020. This will complete Phase 1 of the renovation and expansion of the Plant. Phase 2 of the Plant expansion will include two additional lines that will be engineered and custom designed to further meet the capacity and product needs for the facility.
>
> In the second RAI response, it was stated that NWNA is expanding the High Springs Plant to add proposed lines 3 and 4, has already completely renovated one production line and begun work on renovating the second. This information was provided in response to RAI item 1 of the Second RAI which, in relevant part, asked for "a schedule of construction/implementation for the bottling facility expansion reported [in] Attachment A as justification for the requested groundwater use." The increase in capacity in new lines 3 and 4 is planned as part of the Phase 2 expansion. As explained above, each line can be designed for the capacity needed.

23. As for the District's inquiry about whether a portion of the requested allocation was to be tankered to another facility, Seven Springs stated the following:

> There is no amount of water included in the water budget for tankering water. Seven Springs (the applicant) does not tanker any water to the Plant; all spring water is conveyed by pipeline to the Plant. Nor does Seven Springs have any plans to tanker water during the term of the permit.[4] Please note that the District did not request any

[4] As will be discussed herein, Seven Springs subsequently changed its position on tankering.

> information regarding bulk transported water (tanker truck) in either its First RAI dated April 2, 2019 or its Second RAI dated July 12, 2019.

24. Finally, Seven Springs concluded its response to the third RAI by stating it was not going to respond to any more requests for information:

> The information Seven Springs has submitted to the District to date demonstrates reasonable assurance that the Application meets the conditions for issuance for renewal of an existing water use permit at the same allocation of water quantities, and the Application is complete. Some of the questions asked in the Third RAI as indicated are not authorized by law or rule. Therefore, pursuant to Section 120.60(1), F.S., Seven Springs hereby requests that the District deem the Application complete and proceed to process its proposed agency action to renew its water use permit.

25. On March 2, 2020, Warren Zwanka, the Director of the Division's Resource Management Division, wrote a memorandum to the District's Deputy Executive Director for Business and Community Services stating that the District's staff was recommending that the District's Governing Board deny Seven Springs' renewal application. In doing so, Mr. Zwanka gave the following explanation:

> Section 40B-2.361(2), Florida Administrative Code (F.A.C.) provides that all permit renewal applications shall be processed as new permits, and shall contain reasonable assurances that the proposed water use meets all of the conditions for issuance in rule 40B-2.301, F.A.C., and the Water Use Permit Applicant's Handbook (Handbook). Section 2.3.4.1 of the Handbook contains factors that must be considered for beverage processing water uses. The definition of "beverage processing use" set out in section 1.1 of the Handbook specially includes the sealing of drinkable liquids (including bottled water, as defined in section 500.03(1)(d),

> F.S.) in bottles, packages, or other containers and offered for sale for human consumption.
>
> The application as submitted does not provide reasonable assurances that the proposed beverage processing use is reasonable-beneficial and consistent with the public interest as described in the attached staff report.

26. The staff report referenced by Mr. Zwanka described the Handbook provisions that Seven Springs' renewal application supposedly failed to satisfy:

> Section 2.3.4.1(i) requires the District to consider the contractual obligation to provide water for beverage processing. The applicant declined to provide a copy of its contract with NWNA and, instead, provided a memorandum of this contract. This memorandum does not show that [the] applicant is obligated to provide any or all of the requested allocation to NWNA. Therefore, the required reasonable assurance has not been provided.
>
> Section 2.3.4.1(j) requires the District to consider evidence of the physical and financial ability to process the requested amount of water. The applicant has requested an allocation of 1.1520 mgd. As part of the application, the applicant reported the actual use of water at the facility for the years 1995 through 2019. The highest reported actual use of water at the facility was for 2006, which showed an average annual water use of 0.3874 mgd (page 63 of the January 14, 2020 RAI response). As the highest reported actual use of water in the facility was significantly less than the requested allocation, the previous use does not provide evidence of the physical ability to process the requested allocation. The applicant has asserted that the facility is being renovated to have the physical ability to process the requested allocation. But the applicant has failed to provide sufficient evidence showing that such renovations will create the necessary physical ability.

> Therefore, the required reasonable assurance has not been provided.
>
> Section 2.3.4.1(c) through (f) and (h) require the District to consider certain matters concerning the beverage processing facility or facilities where the use will occur. The applicant has only provided information for the High Springs facility, but has provided no reasonable assurance that the High Springs facility is the only beverage processing facility where the use of the requested allocation will occur. Therefore, the required reasonable assurance has not been provided.

The DOAH Proceedings

27. On March 6, 2020, Seven Springs filed a Petition seeking to challenge the District's preliminary decision to deny the renewal application.[5] The District referred this matter to DOAH on March 9, 2020, DOAH Case No. 20-1329 was assigned to this matter, and the undersigned issued a Notice on March 24, 2020, scheduling a final hearing for July 21 through 23, 2020.

28. Seven Springs filed a Motion in Limine on June 18, 2020, seeking to prohibit the District from raising grounds for denial that were not set forth in the staff report referenced by Mr. Zwanka. Based on its review of discovery responses, Seven Springs argued that the District was preparing to provide testimony or evidence on issues that were not identified in the staff report.

29. On June 29, 2020, the undersigned issued an Order partially granting Seven Springs' Motion in Limine:

> The instant case is before the undersigned based on a "Motion in Limine" filed by Petitioner on June 18, 2020. After considering the arguments set forth in the Motion in Limine and the Response thereto, the undersigned rules that, at this point, the potential

[5] The staff recommendation in the District's March 3, 2020, notice and the enclosed Water Use Technical Staff Report is a proposed agency action which Seven Springs could challenge by petitioning for a formal administrative hearing under section 120.57, Florida Statutes. *See generally Hillsboro-Windsor Condo. Ass'n v. Dep't of Nat. Res.*, 418 So. 2d 359, 361–62 (Fla. 1st DCA 1982) (treating a DNR staff recommendation as the equivalent of a notice of intent of proposed final agency action).

> grounds for denying Petitioner's renewal application shall be limited to the reasons set forth in the "Water Use Technical Staff Report" dated February 27, 2020. *See M.H. v. Dep't of Children & Fam. Svcs.*, 977 So. 2d 755, 763 (Fla. 1st DCA 2008)(stating that "in this case, DCF offered a precisely formulated reason for its denial of the renewal of the Foster Parents' license. At the administrative hearing, the ALJ properly restricted his consideration of the matter to the specific question that DCF itself had framed as the issue to be decided."). In order for Respondent to properly raise additional reasons for denying Petitioner's renewal application, it is incumbent on Respondent to promptly set forth those grounds in a formal pleading and demonstrate that Petitioner will suffer no prejudice. *See generally Cottrill v. Dep't of Ins.*, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996)(stating that "[p]redicating disciplinary action against a licensee on conduct never alleged in an administrative complaint or some comparable pleading violates the Administrative Procedure Act. To countenance such a procedure would render nugatory the right to a formal administrative proceeding to contest the allegations of an administrative complaint.") Respondent fails to cite any controlling authority to support its argument that disclosure of additional grounds of denial during the discovery process amounts to sufficient notice.

30. On July 8, 2020, the parties filed a joint motion requesting that the final hearing be continued for at least 30 days, and the undersigned issued an Order on July 23, 2020, rescheduling the final hearing for October 14 through 16, 2020.

31. The parties filed another joint motion on July 31, 2020, asking that jurisdiction be relinquished to the District. In support thereof, the parties stated that Seven Springs and the District's staff had reached a proposed settlement agreement that was contingent on the approval of the District's governing board. After the relinquishment of jurisdiction, the District's staff

would recommend to the governing board that "a proposed water use permit renewal be issued to [Seven Springs] consistent with [the] Water Use Technical Staff Report which is attached hereto as Exhibit 'A.'"
The aforementioned exhibit indicated that Seven Springs was seeking a permit for "beverage processing" and set forth 27 "conditions for issuance of permit number 2-041-218202-3." The seventh and eight conditions respectively specified that the "[u]se classification is Beverage Processing" and that the "[s]ource classification is 'Groundwater.' Among the proposed conditions was that Seven Springs "is authorized to withdraw a maximum of 0.9840 mdg of groundwater for beverage processing use." During the course of the final hearing, Seven Springs committed to the reduction of the withdrawal to 0.9840 mgd and to a corresponding permit limitation.

32. The 25th and 26th conditions addressed where the water could be bottled:

> 25. Except as may be expressly provided in the permit conditions, the entire groundwater allocation authorized by this permit shall be bottled at the Gilchrist County facility or otherwise used at the Gilchrist County facility for potable uses, equipment cooling, line flushing, and other industrial uses. As used in the permit conditions, the term "bottled" means sealed in bottles, jugs, and/or similar containers that are intended to be later offered for retail sale for human consumption. As used in the permit conditions, the term "Gilchrist County facility" means the manufacturing facility located at 7100 NE CR 340, High Springs, Florida 32643 in Gilchrist County, Florida.
>
> 26. A portion of the groundwater allocation authorized by the permit may be bottled at the Madison County facility. As used in the permit conditions, the term "Madison County facility" means the manufacturing facility located at 690 and 1059 NE Hawthorn Avenue, Lee, Florida 32059 in Madison County, Florida. (The

> groundwater allocation authorized by the permit is not based on any use at the Madison County facility. The permit allocation is being granted based on the expectation that the product line build-out at the Gilchrist County facility will be completed in accordance with the schedule provided in the application documents submitted on November 1, 2019.)[6]

33. The District's Governing Board held a public meeting on August 11, 2020. When Seven Springs' application came up for consideration, the following comments were made:

> Vice Chairperson Quincey: I would – I would like to move that we table the Seven Springs permit application. And the reason why I'm asking to table this is because we've looked at the application; and, as you look through, other water bottling facilities that's in our district, we have always had the actual user of the water bottling permit on the application.
>
> So, in my opinion, we need to have Nestle as a co-applicant for – for this permit. So I think them being – if I understand it correctly, the well is on one property; but then, once it leaves there, it enters into a pipeline which goes to a facility. And the water – all of the water is actually used by Nestle and utilized by Nestle. So, with that being said, I think that they need to be co-applicants where we can be directly relating to them as we go through this process.
>
> * * *
>
> Board Member Schwab: I think that the science is sound on this permit. Seven Springs has gone through the process of applying for it, and they've met all the criteria. To have another person co-apply on the permit, I personally don't think it's necessary. I think the ones that are -- just because

[6] Seven Springs' proposed consumptive use of water, even with the proposed tankering of water to the Madison County Plant, is not an interdistrict transfer of water that is regulated by section 373.2295.

you're using the water somewhere else other than who is – who owns the property that the water is being pumped off of as well as the – that is applying for the permit and who hasn't had the permit in the past, I just don't necessarily agree with that right there. I'd rather --- I'd rather go ahead and do – take a vote and use what we've done right now in the way it is.

* * *

Chairperson Johns: Is there a rule or is there a legality that we need to look at? I mean, is there a rule that would need for Nestle to be a co-applicant or have their name on an application? And I don't know whether you can help us with that or not.

Mr. Reeves[7]: I think there is certainly – there is certainly support for that in our rules. I think that's certainly something we would look at in the Board's discretion. I think they're – the issue I guess is what you've got is you've got a situation where the applicant owns the real property where the water is coming off of. To get the right to use the real – the water, they have to show a use; and they have to show what is going to be done with that water.

In this case, the ultimate user is not on the permit. I think that's Mr. Quincy's point is that ultimate user is not on the permit, and so does that ultimate user need to be an applicant? Yeah, I think that is within the Board's discretion in my opinion.

* * *

Vice Chairperson Quincy: I think that we should have that co-applicant, and I think they need to be part of when we say, [these are] the restrictions, they're the ones using it, they need to agree to the restrictions. If they're – whatever – whatever it is because, if you don't have them, they're the ones –

[7] Mr. Reeves is the Governing Board's counsel. However, the transcript from the August 11, 2020, Governing Board meeting does not give Mr. Reeves's first name

> actually the ones using the water. It's not the folks that we're giving the permit to. They're just pumping it out of the ground.
>
> * * *
>
> Chairperson Johns: This is a difficult vote. And I know everyone has looked at this on the Board. It's a very important decision in many ways. I do feel like that [for] all of the reasons that Mr. Richard has said that I feel like that permit has been vetted well. But I do think that the – having their name on the permit is not a bad idea if we are going to – if theirs is going to be the ones that are using the water and have to respect the – the permit and the permit obligations.

34. The Governing Board then took a vote and elected to table Seven Springs' application. On August 12, 2020, the District referred this matter back to DOAH where it was assigned DOAH Case No. 20-3581.

35. On August 14, 2020, the District filed a "Motion to Amend Grounds for Denial" ("the Motion to Amend") arguing that Seven Springs' application fails to satisfy section 2.1.1 of the Handbook entitled "Legal Control Over Project Site":

> Applicants shall demonstrate the legal right to conduct the water use on the project lands or site. Legal right is demonstrated through property ownership or other property interest, such as a lease, at the project site. Applicants shall provide copies of legal documents demonstrating ownership or control of property through the requested permit duration. The recommended permit duration shall take into consideration the time period of the legal interest in the property. The requirements of this section shall not apply to proposed water uses reviewed in accordance with 40B-2.025(2), F.A.C., under the Florida Power Plant Siting Act.

36. The District also argued that Seven Springs' application fails to satisfy section 2.3.1 of the Handbook entitled "General Criteria":

> Under section 373.223, F.S., in order to receive an individual permit, an applicant must demonstrate that the proposed water use is a reasonable-beneficial use of water. As part of the demonstration that a water use is reasonable-beneficial, the applicant must show demand for the water in the requested amount. This section describes the factors involved in determining whether there is demand and the appropriate permit allocation for a proposed water use.
>
> Demonstration of need requires the applicant to have legal control over the project site, facilities, and for potable water supply, the proposed service area, as required in sections 2.1.1 and 2.1.2. The allocation permitted to serve the applicant's need for water must be based on the demonstrated need. Sections 2.3.2 through 2.3.4 identify the components of demand that must be identified by applicants for individual permits for each water use type.

37. The District argued that Seven Springs' application for a renewal permit should be denied because it:

> does not meet the above quoted provisions of the Applicant's handbook because such application does not demonstrate (or even assert) that SEVEN SPRINGS has the legal right to conduct the water use on the project lands or site and further does not show (or even assert) that SEVEN SPRINGS has legal control over the project site and/or facilities.

38. Seven Springs responded to the Motion to Amend, in part, by stating the following:

> In March 2019, Seven Springs submitted its application for the renewal of its existing permit. The requested renewal is for the same water allocation. In other words, the application does not propose any change in the use type, permittee, or allocation from what is currently permitted. Yet, just short of a year and five months after the application was filed, the District has developed a

> new theory to reject the renewal. On August 12, 2020, the District's counsel notified Seven Springs that if Nestle Waters North America did not agree to be a co-applicant on the permit, the District would file its Motion to Amend.
>
> * * *
>
> Assuming arguendo that the District's new position is correct, as the District's motion makes clear, this alleged "error or omission" is glaringly obvious, and, therefore, there is no excuse for the District's failure to timely raise the issue. More importantly, regardless of whether the District is otherwise permitted to amend its 120.60(3) agency action notice letter, the District is still prohibited by section 120.60(1) from denying Seven Springs' permit for failure to correct this "error or omission" found in the initial application and continuing from the issuance of the original permit.

39. After being granted leave to file a reply, the District replied, in pertinent part, as follows:

> SEVEN SPRINGS asserts that the DISTRICT cannot amend its notice of denial under the provisions of § 120.60(1), Fla. Stat., which provides, "An agency may not deny a license for failure to correct an error or omission or to supply additional information unless the agency timely notified the applicant within this 30-day period." The problem with this argument is that the DISTRICT is not seeking to amend the notice of denial to assert any, "failure to correct an error or omission or to supply additional information." As far as the requested amendment is concerned, there is no error or omission nor additional information to be supplied.
>
> SEVEN SPRINGS has represented numerous times that Nestle Waters of North America owns the facility which will be bottling the water allocation. The applicable rules of the DISTRICT require the applicant to have control of the site where the water use will occur (Handbook at 2.1.1 Legal

> Control over Project Site, "Applicants shall demonstrate the legal right to conduct the water use on the project lands or site.") (Handbook at 2.3.1 General Criteria, "Demonstration of need requires the applicant to have legal control over the project site, facilities, . . ."). The use of the water occurs where it is bottled (Handbook at 1.1(13) Beverages Processing Use – The sealing of drinkable liquids (including bottled water, as defined in section 500.03(1)(d), F.S.) in bottles, packages, or other containers and offered for sale for human consumption").
>
> The amendment requested by the DISTRICT is not an amendment to assert a failure to correct an error or omission or to supply additional information. Rather, it is an amendment to assert that a particular DISTRICT rule should be applied to the application which, for the purposes of the amended grounds, has no error [or] omission or need of additional information. As all the amendment seek[s] to do is apply an additional DISTRICT rule[,] the proscriptions of § 120.60(1), Fla. Stat., do not apply.

40. The undersigned issued an Order on September 16, 2020, denying the Motion to Amend based on the following reasoning:

> In the course of arguing that Seven Springs' application should be denied, the District and Petitioners are not necessarily limited to the grounds set forth in the District's March 3, 2020, letter. *See generally DeCarion v. Dep't of Envtl Reg.*, 445 So. 2d 619, 620 (Fla. 1st DCA 1984)(rejecting an argument that the Department of Environmental Regulation was "locked in" to the reasons for denial set forth in its letter of intent to deny a permit application).
>
> However, section 120.60(1), Florida Statutes (2020), forecloses certain grounds for denial from being raised at this stage of Seven Springs' permit application proceeding. The aforementioned statute provides in pertinent part that:

> [u]pon receipt of a license application, an agency shall examine the application and, within 30 days after such receipt, notify the applicant of any apparent errors or omissions and request any additional information the agency is permitted by law to require. An agency may not deny a license for failure to correct an error or omission or to supply additional information unless the agency timely notified the applicant within this 30-day period . . . An application is complete upon receipt of all requested information and correction of any error or omission for which the applicant was timely notified or when the time for such notification has expired.

Whether the Motion to Amend and Petitioner's Motion to Amend will be granted turns on whether Seven Springs' alleged failure to demonstrate legal right and legal control in its application is a pure substantive deficiency undermining the merits of Seven Springs' application or a paperwork deficiency that could possibly have been corrected via the provision of additional documentation. That distinction was described by the Honorable John G. Van Laningham in *MVP Health v. Agency for Health Care Administration*, Case No. 09-6021 (Fla. DOAH April 22, 2010), *rejected in part*, Case No. 2009012001 (Fla. AHCA May 26, 2010)):

> Simply put, the failure of an applicant to meet the criteria for a license, which results in a denial on the merits, is not, as a logical matter, equal to the failure of an applicant to timely provide requested information (or correct an identified error or omission), which results, as a procedural matter, in a refusal to consider (or to deny) an application consequently deemed to be incomplete. It is one thing, in other words, to say,

> based on all the necessary information, that a person is ineligible for licensure. It is another thing to say that the person's eligibility cannot and will not be determined because the person has failed to provide all of the necessary information upon which such a determination must be based.

The Water Use Permit Applicant's Handbook indicates that the new grounds for denial urged by the District and Petitioners are issues that Seven Springs could have potentially corrected if it had been provided the timely notice required by section 120.60(1). For instance, Section 2.1.1. indicates that "legal right" can be demonstrated by providing a legal document such as a lease. Section 2.3.1. refers to demonstrating "legal control," and that requirement could certainly be satisfied by the provision of legal documents.

In sum, the new grounds for denial urged by the District and Petitioners are in the nature of alleged deficiencies that Seven Springs could have potentially corrected if it had been given the notice and opportunity required by section 120.60(1). While the District asserts that Seven Springs has represented numerous times that Nestle owns the facility that will be bottling the water allocation, that assertion (even if true) does not excuse the District from timely notifying Seven Springs of the perceived omission in its application and giving Seven Springs an opportunity to correct that perceived omission. Now that the 30-day notification period in section 120.60(1) has passed, the District is foreclosed from basing denial of Seven Springs' application on a failure to submit documentation to demonstrate compliance with Sections 2.1.1. and 2.3.1. *See* § 120.60(1), Fla. Stat. (mandating that "[a]n agency may not deny a license for failure to correct an error or omission or to supply additional information unless the agency timely notified the applicant within this 30-day period.").

41. In a Motion for Reconsideration, the District argued that:

> SEVEN SPRINGS does not bottle the water and does not propose to bottle the water. SEVEN SPRINGS sells the water to a local facility, apparently owned or legally controlled by someone else, to be bottled. As SEVEN SPRINGS does not bottle the water, it is not possible for SEVEN SPRINGS to "demonstrate the legal right to conduct the water use" as required by 2.1.1 of the Applicant's Handbook. This is not a "paperwork deficiency." This is a "substantive deficiency" which is shown on the face of SEVEN SPRINGS' application. The DISTRICT's motion to amend should be granted so this issue can be conducted at the final hearing.

42. The undersigned issued an Order on September 25, 2020, denying the District's Motion for Consideration:

> The instant case is before the undersigned based on Respondent's "Motion for Reconsideration of Order Denying Motion to Amend" ("the Motion for Reconsideration") filed on September 21, 2020. After considering the arguments set forth therein, the Motion for Reconsideration is DENIED based on the reasoning set forth in the "Order Denying Motions to Amend" issued on September 16, 2020. However, the undersigned provides this clarification. The issue in the instant case is decided by the fact that all of the information available to the undersigned demonstrates that the alleged deficiency in the Seven Springs Water Company's ("Seven Springs") application is of the type that potentially could have been corrected by the provision of additional information. Thus, this alleged deficiency is something that could have, and should have, been the subject of a notice to Seven Springs within 30 days of Respondent receiving Seven Springs' application. *See* § 120.60(1), Fla. Stat. (2020). Regardless of whether Seven Springs was actually capable of correcting that alleged deficiency, any other ruling would render the pertinent requirement set forth in section 120.60(1) meaningless.

43. The District filed a "Second Motion in Limine" ("the Second Motion in Limine") on September 28, 2020, arguing that:

> The only testimony and evidence allowed at the final hearing herein should be required to be related to SEVEN SPRINGS' presently filed permit application, and the permit terms and conditions requested by SEVEN SPRINGS therein. Testimony and evidence of any permit terms and conditions not included or requested in SEVEN SPRINGS' presently-filed application should be precluded from being introduced into evidence or considered at the final hearing.

44. Seven Springs responded, in part, as follows:

> 4. Further, the District's position that "the only testimony and evidence allowed at the final hearing should be required to be related to SEVEN SPRINGS' presently filed permit application" ignores the fact that the District has already received multiple documents addressing the few issues raised by the District in its March 3, 2020 proposed agency action. In fact, some of those documents are currently available in the District's online permitting file for the Seven Springs' permit. This publicly accessible permit file includes Seven Springs' engineering report titled "NWNA High Springs Water Consumption Viability Analysis" prepared by Adam Thibodeau and dated July 30, 2020, and the District's engineering report titled "NWNA High Springs Water Consumption Annual Daily Usage Estimate" prepared by Tom Rutledge for the District and dated July 30, 2020. Additionally, the District's own summary/description in its online permit file identifies the requested allocation as 0.984 MGD (*See* Exhibit A), which is the reduced allocation contained in the July 30, 2020 Seven Springs' expert report and accepted in the District's expert report.
>
> 5. Additional information already reviewed or prepared by the District as part of this proceeding

should not be precluded from being considered as evidence, including the amended memorandum of agreement between Seven Springs and NWNA dated May 27, 2020, provided to SRWMD in June 2020, and the additional permit conditions contained in the Technical Staff Report attached to the Stipulation and Joint Motion for Relinquishment of Jurisdiction and published online by the District in its August 4, 2020 Governing Board Agenda Package. No statute, rule or case law supports limiting or precluding consideration of this information which has been in the District's possession for months and is directly relevant to the issues in this proceeding (i.e., providing reasonable assurances of the applicable permitting criteria). Nor is there any rule or statute limiting the information which may be considered in a de novo administrative hearing to only the information "presently on file with the DISTRICT" based upon some arbitrary date chosen by the District.

6. The District's argument that "amendments may not be made at the last minute and under circumstances which prejudice other parties," is without merit as any "changes" to the Seven Springs' application have already been discussed with, reviewed by, and accepted by the District months before the final hearing date. The District's reliance upon *City of West Palm Beach v. Palm Beach County*, 253 So. 3d 623 (Fla. 4th DCA 2018), the only case cited to in the District's Motion, is misplaced. In *City of West Palm Beach*, "[t]he amended application included revised construction plans, a redesigned storm water management system, a nutrient loading analysis, a compensatory mitigation plan addendum, and a new cumulative impact assessment" that were submitted only one week prior to the final hearing. *Id.* at 625. To the extent there has been any "amendment" or additional evidence provided to support issuance of the Seven Springs permit, it is Seven Springs responding to the District's three alleged basis for denial, all asserting more

> information was required. The Amended Memorandum of Agreement provided the response the District found sufficient to address the first basis for denial; the Seven Springs expert report dated July 30, 2020 provided the response to address the District's second basis for denial; and the two additional permit conditions (quoted below in footnote 4) were provided by the District to address the third basis for denial. The District's expert report also provides evidence that the High Springs Plant, as proposed, has the capacity and ability to use the 984,000 gpd annual average water allocation and satisfies the second basis for denial. None of the [grounds] for denial at issue in this proceeding include any environment or resource protection criteria, nor do they require any new complex evidence to be developed.
>
> 7. Unlike *City of West Palm Beach*, here the District is aware of Seven Springs' acceptance of the reduced allocation and there are no "highly technical" amendments being proposed. The District is fully aware of, and has had ample opportunity to review the responses to the basis of denial that have been provided to, or suggested by, it in this proceeding. It is ironic that the District is continuing to request new information (discussed below) to satisfy one of the basis for denial while, at the same time, attempting to limit Seven Springs to only what is in its "current" permit file.

45. The undersigned issued an Order on October 13, 2020, denying the District's Second Motion in Limine on the basis that the District had failed to demonstrate that it was in danger of being prejudiced.

Findings Specifically Relating to the Grounds for Denial

46. The District's first basis for denial asserts that the MOA failed to show that Seven Springs is obligated to provide "any or all of the requested allocation to NWNA." When one considers the MOA, the amended MOA, and the 25th and 26th conditions negotiated between Seven Springs and the District's staff, the greater weight of the evidence demonstrates that the

entire groundwater allocation will be bottled at the Nestle plants at High Springs and Madison. As a result, this first basis cannot support denial of Seven Springs' permit application.

47. With regard to the second ground for denial, the 21st condition negotiated between Seven Springs and the District's staff reduced the requested allocation from 1.152 mgd to 0.984 mgd. The testimony and evidence presented at the final hearing demonstrated that there are currently two bottling lines in operation in the High Springs plant. Line 1 has been replaced since NWNA acquired the facility with a new "high–speed" line (at a cost of approximately $15 million) that fills 81,000 half-liter bottles per hour ("bph"), and Line 2 is an older 54,000 bph line that is undergoing renovations to a high–speed line.

48. Although there are currently only two lines, NWNA has plans to buildout the High Springs plant so that it will have four high-speed lines. Seven Springs presented evidence and credible expert testimony of Adam Thibodeau, P.E., demonstrating that the High Springs plant will have four high-speed lines in operation within the proposed permit term of five years. The third high-speed line will be installed within the existing building. A building expansion will allow the addition of a fourth high-speed line.

49. It is expected that the third and fourth lines added to the High Springs plant will be capable of producing at least 90,000 bottles per hour. The greater weight of the evidence supports a finding that the plans for expansion of the bottling plant production lines are sufficiently established.

50. Mr. Thibodeau calculated the estimated daily water usage at the High Springs Plant using two separate assumed average line efficiency rates: 85 percent (the original number proposed by Mr. Thibodeau) and 77 percent (the number arrived at after discussions with the District's expert). Mr Thibodeau testified that, on average, high-speed lines can operate at an overall 80 to 85 percent efficiency, and that both 85 and 77 percent are reasonable efficiency rates for the proposed lines. His testimony is accepted.

51. Ultimately, the 77 percent efficiency rate was chosen, meaning water demand was calculated at 77 percent of the maximum line production (accounting for mechanical efficiency and planned and unplanned downtime/maintenance) for the four lines at the High Springs Plant once it is built out. This resulted in a demonstration of a 0.8740 mgd water demand for product water, and a 0.1100 mgd water demand for equipment cooling, line flushing, and other uses. Those numbers result in a cumulative total expected daily water usage of 0.984 mgd annual average for the High Springs plant.

52. The District's expert authored a report stating that his "evaluation would support a proposed average water usage of 0.984 million gallons per day annually." In addition, the District's expert testified that the 0.984 mgd figure was in the range of possible outcomes.

53. In sum, the greater weight of the evidence demonstrated that the High Springs plant will have sufficient physical capacity to use the full requested allocation of water within the proposed five-year permit term.[8]

54. The District's third basis for denial asserts that Seven Springs "has provided no reasonable assurance that the High Springs facility is the only beverage processing facility where the use of the requested allocation will occur."

55. The issue of tankering water to Madison is not part of the application, was subject to no RAI, and was not part of the original denial. It was raised, apparently, as part of settlement negotiations that were not accepted by the District.

56. In keeping with the previous rulings limiting the District from adding grounds for denial, the undersigned does not accept that Seven Springs can simply amend its application at the hearing to add activities and add uses for the water that were not proposed.

[8] The physical ability to process 0.984 mgd is satisfied by the High Springs plant without any reliance on tankering water to the Madison County plant.

57. If Seven Springs wants to use the water from its High Springs wells at a facility other than the adjacent Nestle bottling plant, then it may propose that use in a request for a permit modification. However, because that use is not a part of either the application or the notice of agency action properly before this tribunal, it is not authorized by anything contained in this Recommended Order.

CONCLUSIONS OF LAW

58. DOAH has jurisdiction over the relevant subject matter and the parties to this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

59. Section 373.216 provides that "[t]he governing board of each water management district shall . . . implement a program for the issuance of permits authorizing the consumptive use of particular quantities of water covering those areas deemed appropriate by the governing board."

60. Section 373.219 provides that "[t]he governing board or [the Department of Environmental Protection] may require such permits for consumptive use of water and may impose reasonable conditions as are necessary to assure that such use is consistent with the overall objectives of the district or [the Department of Environmental Protection] and is not harmful to the water resources of the area."

61. Section 373.223 sets forth the conditions for obtaining a permit. An application must establish that the proposed use of water: (a) is a reasonable-beneficial use as defined in section 373.019; (b) will not interfere with any presently existing legal use of water; and (c) is consistent with the public interest.[9]

[9] Section 373.223(2) states that the governing board of a water management district or the Department of Environmental Protection ("DEP") "may authorize the holder of a use permit to transport and use ground or surface water beyond overlying land, across county boundaries, or outside the watershed from which it is taken if the governing board or [DEP] determines that such transport and use is consistent with the public interest, and no local

62. Section 373.019(16) defines a "reasonable-beneficial use" as "the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest."

63. Florida Administrative Code Rule 40B-2.301(1) mirrors section 373.223 by providing that "[t]o obtain a water use permit, renewal, or modification, an applicant must provide reasonable assurance that the proposed consumptive use of water": (a) is a reasonable-beneficial use; (b) will not interfere with any presently existing legal use of water; and (c) is consistent with the public interest.

64. Rule 40B-2.301(1) further provides that:

> [t]he standards and criteria set forth in the Water Use Permit Applicant's Handbook, http://www.flrules.org/Gateway/reference.asp?No=Ref-11315, effective December 4, 2019, hereby incorporated by reference into this chapter, if met, will provide the reasonable assurances required in rule 40B-2.301, F.A.C.

65. As the applicant seeking to renew a water use permit so that water can be withdrawn from an aquifer and bottled for consumer consumption, Seven Springs has the burden of proving, by a preponderance of the evidence, that the reasonable assurances required by rule 40B-2.301 exist. As noted above, an applicant demonstrates the existence of those reasonable assurances by satisfying the standards and criteria set forth in the Handbook. The dispute in the instant case concerns whether Seven Springs' application satisfies certain standards and criteria set forth in the Handbook. Each of the three grounds for denial cited in the staff report referenced by Mr. Zwanka in his March 2, 2020, memorandum recommending denial of Seven Springs' renewal application shall be discussed below.

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government shall adopt or enforce any law, ordinance, rule, regulation, or order to the contrary."

Handbook Section 2.3.4.1(i)

66. As the first basis for denial, the District's staff noted that:

> Section 2.3.4.1(i) requires the District to consider the contractual obligation to provide water for beverage processing. The applicant declined to provide a copy of its contract with NWNA and, instead, provided a memorandum of this contract. This memorandum does not show that [the] applicant is obligated to provide any or all of the requested allocation to NWNA. Therefore, the required reasonable assurance has not been provided.

67. The District sets forth multiple arguments in its Proposed Recommended Order related to this basis for denial: (a) Seven Springs does not own or control the property from which the water will be withdrawn; (b) Seven Springs does not own or control the Nestle bottling plant at High Springs; (c) Seven Springs has no ownership or control over Nestle's Madison bottling facility.

68. Because Seven Springs does not own or control the High Springs facility, the District argues that "there will be no way for [it] to ensure compliance with any conditions for issuance limiting the bottling/packaging use – the District will not be able to enforce the permit [conditions] against Nestle." To the contrary, Seven Springs stated in response to an RAI, and agreed in the proposed settlement, that all water extracted will be bottled at the adjacent bottling plant. If that representation, and the allowable permit condition incorporating that representation, is violated, then the District would be well within its authority to take enforcement action against Seven Springs up to and including revocation of the permit.

69. As for why the District did not raise Seven Springs' lack of ownership in the High Springs facility sooner, the District asserts in its Proposed Recommended Order that:

> 23. The District did not pursue the issue of ownership and control of the High Springs Facility

> with Seven Springs because Nestle Waters North America Inc. filed an application for a public supply water use (the water use type category chosen by the applicant should have been Beverage Processing Use) for the High Springs Facility shortly after the Seven Springs Application was filed. The District attempted to address the ownership and control issue in this Nestle application and intended to consolidate the Seven Springs and the Nestle applications to connect the groundwater withdrawal with the bottling/packaging of the requested allocation (the Beverage Processing Use)
>
> 24. After the District issued the first Request for Additional Information ("RAI") related to the Seven Springs Application on April 2, 2019 (and in which it did not raise the issue of the ownership or control of the High Springs Facility), Nestle withdrew its application (which was actually for a Beverage Processing Use, not a public supply use), thereby foreclosing the ability of the District to address this issue with Seven Springs.

70. The District's position is that the water use will occur at the High Springs facility where the water will be bottled for personal consumption. Therefore, the District argues in its Proposed Recommended Order that:

> Seven Springs must account for the use of the requested water allocation after it is withdrawn, and was required to present evidence at hearing that it was and is capable of sealing the water allocation in bottles, packages, or other containers for sale for human consumption *on Seven Springs' property or at a location under the ownership or control of Seven Springs*. (emphasis added)

71. All of the arguments set forth amount to alleged errors or omissions in Seven Springs' application that could have been raised as grounds for denial. In other words, it should have been readily apparent to the District staff who reviewed the application that Seven Springs either omitted or erroneously failed to include information demonstrating that Seven Springs: (a) owned or

controlled the land from which the water was to be withdrawn; or (b) owned or controlled the facilities where the water at issue was to be bottled.[10]

72. Seven Springs does not own or control either of Nestle's bottling facilities. Nonetheless, section 120.60(1) does not set forth any circumstances in which noncompliance can be excused, nor is there anything in the statute indicating the District's failure to inquire about ownership should be excused based on the District's purported intent to consolidate Seven Springs' application with the since withdrawn application of Nestle. *See* § 120.60(1), Fla. Stat. (mandating that: "[u]pon receipt of a license application, an agency shall examine the application and, within 30 days after such receipt, notify the applicant of any apparent errors or omissions and request any additional information the agency is permitted by law to require. *An agency may not deny a license for failure to correct an error or omission or to supply additional information unless the agency timely notified the applicant within this 30-day period.* The agency may establish by rule the time period for submitting any additional information requested by the agency. For good cause shown, the agency shall grant a request for an extension of time for submitting the additional information. If the applicant believes the agency's request for additional information is not authorized by law or rule, the agency, at the applicant's request, shall proceed to process the application. *An application is complete upon receipt of all requested information and correction of any error or omission for which the applicant was timely notified or when the time for such notification has expired.* An application for a license must be approved or denied within 90 days after receipt of a completed application unless a shorter period of time for agency action is provided by law.")(emphasis added)

[10] The evidence establishes, clearly and without contradiction, that the District and its staff were well aware that the water extracted by Seven Springs was to be bottled by Nestle at the adjacent plant, a relationship recognized by the District since 1998 and accepted through permit renewals since then.

73. Nevertheless, section 2.3.4.1(i) of the Handbook still requires an evaluation of the contractual obligation to provide water for beverage processing, and Seven Springs still bears the burden of demonstrating by a preponderance of the evidence the existence of reasonable assurances that the proposed consumptive use of water is a reasonable-beneficial use. As noted above, District staff recommended denial, in part, based on their determination that a memorandum of agreement between Seven Springs and Nestle did not show that Seven Springs was obligated to provide any or all of the requested allocation to Nestle.

74. In response to the District's third RAI, Seven Springs attached its Memorandum of Agreement with NWNA, and the Memorandum of Agreement's description of the parties' contract was limited to the following:

> 1. The term of the Contract extends to 2096
>
> 2. The Contract requires NWNA to purchase from Seven Springs ***all*** water pumped, extracted, processed or sold by NWNA through the High Springs Plant, with such amounts only being limited by the average and maximum daily limits set forth in water use permit No. 2-93-00093 (together with any modifications and renewals thereof) ("Permit").
>
> 3. The Contract requires Seven Springs to be the exclusive source for all water bottled at the High Springs Plant.

75. Seven Springs and Nestle executed an amended MOA containing the same information as the first and adding that "as long as NWNA meets its payment obligations under the Contract, the Contract requires Seven Springs to exclusively provide all water withdrawn under the Permit to NWNA's High Springs Plant."

76. As this is a *de novo* proceeding, Seven Springs provided competent, substantial, and unrebutted evidence of the contractual obligation between it

and Nestle, and of the obligation for all water to be used at the High Springs bottling plant. Thus, the District now has reasonable assurances that all of the water withdrawn by Seven Springs will be utilized for a beneficial use, i.e., bottled water for personal consumption. *See Dep't of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d 778, 786-87 (Fla. 1st DCA 1981)(explaining "there was no final agency action by DER in this proceeding prior to the petitioning landowners' request for a hearing. Their request for a hearing commenced a de novo proceeding, which, as previously indicated, is intended to formulate final agency action, not to review action taken earlier and preliminarily."); *Hamilton Cnty. Bd. of Cnty. Comm'rs v. Dep't of Envtl Reg.*, 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991)(noting that "[a]ny additional information necessary to provide reasonable assurance that the proposed facility would comply with the applicable air emission standards could be properly provided at the hearing."); As a result, Seven Springs has satisfied its burden of proof as to the District's first basis for denial.

Handbook Section 2.3.4.1(j)

77. As the second basis for denial, the District's staff noted that:

> Section 2.3.4.1(j) requires the District to consider evidence of the physical and financial ability to process the requested amount of water. The applicant has requested an allocation of 1.1520 mgd. As part of the application, the applicant reported the actual use of water at the facility for the years 1995 through 2019. The highest reported actual use of water at the facility was for 2006, which showed an average annual water use of 0.3874 mgd (page 63 of the January 14, 2020 RAI response). As the highest reported actual use of water in the facility was significantly less than the requested allocation, the previous use does not provide evidence of the physical ability to process the requested allocation. The applicant has asserted that the facility is being renovated to have the physical ability to process the requested allocation. But the applicant has failed to provide sufficient evidence showing that such renovations

> will create the necessary physical ability. Therefore, the required reasonable assurance has not been provided.

78. Seven Springs agreed to, and has, lowered the requested allocation from 1.1520 mgd to a "maximum of 0.9840 mdg of groundwater for beverage processing use." Seven Springs provided reasonable assurances, supported by competent, substantial evidence during the final hearing, that the High Springs plant will be able to process the newly-revised requested allocation. As a result, Seven Springs has satisfied its burden of proof as to the District's second basis for denial.

Handbook Sections 2.3.4.1(c) through (f) and (h)

79. With regard to the third basis for denial, the District's staff noted that:

> Section 2.3.4.1(c) through (f) and (h) require the District to consider certain matters concerning the beverage processing facility or facilities where the use will occur. The applicant has only provided information for the High Springs facility, but has provided no reasonable assurance that the High Springs facility is the only beverage processing facility where the use of the requested allocation will occur. Therefore, the required reasonable assurance has not been provided.[11]

80. As discussed above, the undersigned does not accept that Seven Springs can simply amend its application at the hearing to add activities and uses for the water that were not proposed.

81. If Seven Springs wants to use the water from its High Springs wells at a facility other than the adjacent Nestle bottling plant, then it may propose that use in a request for a permit modification. However, because that use is

[11] The parties stipulated prior to the final hearing that the only remaining question pertaining to the third basis for denial was "whether Seven Springs has provided sufficient information under Section 2.3.4.1(c), for the District to consider regarding the location of the beverage processing facility." The aforementioned Handbook provision provides that "[i]n determining whether a proposed beverage processing use is reasonable-beneficial and consistent with the public interest, the Governing Board will consider the following information . . . (c) The location of the beverage processing facility."

not a part of either the application or the notice of agency action properly before this tribunal, it is not authorized by anything contained in this Recommended Order.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Suwannee River Water Management District render a Final Order granting permit No. 2-041-218202-3 to the Seven Springs Water Company.

DONE AND ENTERED this 20th day of January, 2021, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.