STATE OF FLORIDA
LAND AND WATER ADJUDICATORY COMMISSION

PUTNAM COUNTY
ENVIRONMENTAL COUNCIL, INC.,

Petitioner,

vs. FLWAC Case No. WMD-09-005

ST. JOHNS RIVER
WATER MANAGEMENT DISTRICT,

Respondent.
_____/

REQUEST FOR REVIEW OF A FINAL ORDER OF THE ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

TOHOPEKALIGA WATER AUTHORITY'S ANSWER BRIEF IN SUPPORT OF RESPONDENT ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

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INTRODUCTION

Pursuant to Rule 42-2.015(2), F.A.C. and the Florida Land and Water Adjudicatory Commission (the "Commission") Secretary's July 24, 2015, Order Setting Briefing Schedule, Tohopekaliga Water Authority (TOHO), by and through its undersigned counsel, respectfully submits the following in support of a determination by the Commission that the St. Johns River Water Management District's (the "District" or "SJRWMD") Fourth Addendum to its 2005 Water Supply Plan (the "Fourth Addendum") is consistent with Chapter 373, Florida Statutes.

This proceeding was initiated by Petitioner Putnam County Environmental Council, Inc. ("PCEC"), via its June 9, 2009, Request for Review of the District Water Supply Plan 2005, Fourth Addendum (the "Request for Review"). PCEC sought invalidation of the Fourth Addendum, which designates alternative water supply projects to meet regional water supply needs, including projects involving withdrawals of surface water from the St. Johns River and its tributaries.

Tohopekaliga Water Authority is an independent special district established and created pursuant to Chapter 189, Florida Statutes, by special act of the Florida Legislature. TOHO was created and is governed by an interlocal agreement entered into by the City of Kissimmee and Osceola County. TOHO is the largest provider of water, wastewater and reclaimed water services in Osceola County, Florida.

TOHO owns and operates its utility system pursuant to permits issued by state and federal agencies including consumptive use permits.

TOHO is a party to the ongoing development of the St. Johns River/Taylor Creek Reservoir Water Supply Project (the "Taylor Creek Project"), an alternative water supply ("AWS") development project designed to utilize permitted surface water withdrawals from Taylor Creek and St. Johns River to meet the regional water supply needs of populations in Osceola County, Orange County, the City of Cocoa, and the City of Orlando. [R.34, 37. 39, 83-86, 306, 308, 339, 5514-5515, 6536, 6538, 6569, 6622, 6624, 6641, 6665, 6670, 6673] This regional project was specifically recognized as an AWS and has been selected for implementation by the St. Johns River Water Management District as Project No. 12 in Technical Publication SJ2006-2D, entitled "St. Johns River Water Management District, District Water Supply Plan 2005, Fourth Addendum, May 12, 2009" (the "Fourth Addendum"). The Fourth Addendum identifies eight potential sponsors of the SJR/TCR Project, including TOHO. TOHO has entered into agreements with SJRWMD, SFWMD, the City of Cocoa, Orange County, the City of Orlando, and East Central Florida Services, Inc. describing its intent to participate in the development of the Taylor Creek Project as shown in the record cites above.

When the Fourth Addendum was being prepared by the SJRWMD, TOHO, as a regulated utility under Chapter 373, Florida Statutes, provided written

comments and support to the District by letter dated May 8, 2009, on its Technical Publication SJ2006-2D, St. Johns River Water Management District, District Water Supply Plan, Draft Fourth Addendum, March 25, 2009. [R. 644]

STATEMENT OF CASE AND FACTS

TOHO adopts the Statement of the Case and Facts presented by the SJRWMD in its Answer Brief.

Summary of the Argument

The Commission should deny Petitioner's requested relief for two reasons: (1) the Commission lacks the legal authority to order SJRWMD to amend the Fourth Addendum; and (2) the Fourth Addendum is consistent with the District's interpretation of Chapter 373, Florida Statutes. The District's interpretation of Section 373.019(1) is reasonable and is entitled to great deference.

The First District Court of Appeal has determined that FLWAC's jurisdiction over this appeal is based solely on the premise that the Fourth Addendum raises policy issues of regional or statewide significance. By statute, where FLWAC's jurisdiction is found solely on this basis, the remedy FLWAC can provide is limited to directing future rulemaking ensuring consistency with Chapter 373. As such, even if FLWAC were to find the Fourth Addendum to be inconsistent with Chapter 373, it cannot order SJRWMD to amend the Fourth Addendum, as PCEC requests.

Nevertheless, FLWAC should not direct SJRWMD to initiate future rulemaking because the Fourth Addendum is consistent with the plain meaning of Chapter 373, specifically Section 373.019(1), Florida Statutes.

FLWAC STANDARD ON REQUEST FOR REVIEW

Pursuant to Section 373.114, Florida Statutes, the Commission has the "exclusive authority to review any order a rule of a water management district . . . to ensure consistency with the provisions and purposes" of Chapter 373. The Commission's review is appellate in nature and is based solely on the record below. *See* Section 373.114(1)(b), Florida Statutes; and Rule 42-2.0132, Fla. Admin Code. Where, as in this case, no evidentiary administrative proceeding has been held, the facts contained in the District's agency action (i.e.. the Fourth Addendum), including any technical staff report (i.e. the District staff report for the Fourth Addendum) shall be deemed undisputed absent a remand for additional factual findings. *See* Section 373.114(1)(b), Florida Statutes.

The interpretation of a statute is a question of law subject to de novo review. *Southeast Floating Docks, Inc. v. Auto-Owners Ins. Co.*, 82 So. 3d 73, 78 (Fla. 2012). An agency's interpretation of a statute it is charged with administering is entitled to great deference and will not be overturned unless clearly erroneous. *Public Employees Relations Commission v. Dade City Police Benevolent*

Association, 467 So. 2d 987, 989 (Fla. 1985); *Suddath Van Lines v. Department of Environmental Protection*, 668 So. 2d 209, 212-213 (Fla. 1st DCA 1996).

ARGUMENT

I. The Commission Lacks the Legal Authority to Grant Petitioners Requested Relief.

In its June 9, 2009, Request for Review of St. John's River Water Management District Water Supply Plan 2005, Fourth Addendum ("Request for Review"), PCEC asks the commission to determine that the Fourth Addendum improperly identifies surface waters from the St. Johns and Ocklawaha Rivers associated with water projects numbered 61 through 65, and 78 and 79 as alternative water supplies under Section 373.709, Florida Statutes, and "to order that such designations be stricken and/or specifically limited to capture during wet weather flows." See Request for Review, p. 21. As a matter of law, FLWAC may not provide the relief requested.

Under Section 373.114(1)(a), Florida Statutes, FLWAC has jurisdiction to review an appealed water management district order that (a) "would substantially affect natural resources of state wide or regional significance"; or (b) "raises issues of policy, statutory interpretation, or rule interpretation that have regional or state wide significance from the standpoint of agency precedent." Relevant to this proceeding, the First District Court of Appeals has already determined that the Fourth Addendum is not an order that "substantially affects natural resources of

state wide or regional significance." *Putnam County Environmental Council v. St. Johns River Water Management District*, 136 So. 3d 766, 768 (Fla. 1st DCA 2014) (finding no effect on natural resources because the Fourth Addendum does not approve anything, but rather merely lists water supply options for suppliers to choose). Instead, the Court ruled that FLWAC's jurisdiction in this proceeding is based solely on the premise that the fourth addendum "raises issues of policy ... that have regional or state wide significance." *Putnam County*, 136 So. 3d at 769.

Given that FLWAC's jurisdiction over the Fourth Addendum is based solely on the premise that the Fourth Addendum raises issues and policy that have regional or state was significance, Section 373.114(1)(c), Florida Statutes, does not authorize FLWAC to require the SJRWMD to amend or change the Fourth Addendum, as PCEC requests. Instead, even if FLWAC were to find the Fourth Addendum inconsistent with Chapter 373, the statute limits FLWAC to directing the SJRWMD to initiate rulemaking ensuring future consistency with Chapter 373. *See* Section 373.114(1)(c), Florida Statutes. PCEC does not request this relief.

Therefore, PCEC's Request for Review should be denied because FLWAC lacks the legal authority to order that designations of surface waters as alternative water supplies be stricken from the Fourth Addendum, or alternatively be limited to capture during wet weather flows. In addition, for the reasons set forth herein,

FLWAC should not order the District to initiate future rulemaking because the Fourth Addendum is consistent with the provisions and purposes of chapter 373.

II. The District's Fourth Addendum is Consistent with Chapter 373, Florida Statutes, Because the Projects Would Use Water Sources That Meet the Definition of "Alternative Water Supplies" in Section 373.019(1), Florida Statutes.

In its Request for Review, PCEC contends that water supply development project options 61 – 65, 78, and 79 listed in the Fourth Addendum, which involve potential surface water withdrawals from the St. Johns River or lower Ocklawaha River, do not meet the definition of "alternative water supplies" under Subsection 373.019(1), Florida Statutes. [A-4 11287-88] PCEC's contention is based on (1) disputing numerous facts stated in the Fourth Addendum and the District staff report, which are statutorily deemed undisputed in this appellate review, and (2) misinterpreting and misapplying the definition of "alternative water supplies" in Section 373.019(1). [A-4 11287-88]

First, the facts established in the Fourth Addendum and the District staff report, which are statutorily deemed undisputed, demonstrate that the challenged AWS project options clearly fall within one or more of the following categories of "alternative water supplies" in Subsection 373.019(1):

> (1) "Alternative water supplies" means salt water; *brackish surface and groundwater*; surface water captured predominately during wet-weather flows; sources made available through the addition of new storage capacity for surface or groundwater, water that has been reclaimed after one or more public supply, municipal, industrial,

> commercial, or agricultural uses; the downstream augmentation of water bodies with reclaimed water; stormwater; *and any other water supply source that is designated as nontraditional for a water supply planning region in the applicable regional water supply plan*.

Section 373.019(1), Florida Statutes (Italics added)

The District staff report, which recommends approval of the Fourth Addendum, states that water withdrawn from the St. Johns River "is considered to be brackish surface water and is considered to be from a water supply source that the District has designated as a nontraditional source." [A-2 521] The District staff report also states that within the District, fresh groundwater is "the only traditional water supply source in its jurisdiction." [A-2 522] Thus, water withdrawn from the St. Johns River meets two categories of AWS – brackish surface water and a source that is designated as nontraditional for that region.

The District staff report also states that while water withdrawn from the lower Ocklawaha River, if project options 7 and 61 were implemented, "would be fresh at all times," these options would still be "considered to be alternative water supply project options because they are from a nontraditional source." [A-2 522] Therefore, water withdrawn from the lower Ocklawaha River would fall under one category of alternative water supplies -- a source designated by the governing board as nontraditional for the District-wide water supply planning region. [A-2 521]

A. The Plain and Ordinary Meaning of "Alternative Water Supplies" in Subsection 373.019(1) is Clear and No Resort to Rules of Statutory Construction is Needed

In *Hill v. Davis*, the Florida Supreme Court set out the following principles of statutory construction:

> "Legislative intent guides statutory analysis, and to discern that intent we must look first to the language of the statute and its plain meaning." In this regard, "legislative intent is determined primarily from the text" of the statute. This is because "the statute's text is the most reliable and authoritative expression of the Legislature's intent." Courts are "without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power." "Thus, if the meaning of the statute is clear then this Court's task goes no further than applying the plain language of the statute."

Hill v. Davis, 70 So. 3d 572, 575–76 (Fla. 2011) (internal citations omitted). "It is a fundamental principle of statutory construction that where the language of a statute is plain and unambiguous there is no occasion for judicial interpretation." *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454-55 (Fla. 1992). "Even when the court is convinced that the legislature really meant and intended something not disclosed in the act, the court should not depart from the plain meaning of the statute that is unambiguous." *CGH Hosp., Ltd v. State, Agency for Health Care Admin.*, 965 So. 2d 262, 266 (Fla. 1st DCA 2007) (quoting *Van Pelt v. Hilliard*, 75 Fla. 792, 78 So. 693, 694-95 and *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454-55).

In this case, the definition of "alternative water supplies" in Subsection 373.019(1), Florida Statutes, is unambiguous. Section 373.019(1) states:

> "Alternative water supplies" means [1] salt water; [2] *brackish surface and groundwater*; [3] surface water captured predominately during wet-weather flows; [4] sources made available through the addition of new storage capacity for surface or groundwater, [5] water that has been reclaimed after one or more public supply, municipal, industrial, commercial, or agricultural uses; [6] the downstream augmentation of water bodies with reclaimed water; [7] stormwater; *and* [8] *any other water supply source that is designated as nontraditional for a water supply planning region in the applicable regional water supply plan*.

§373.019(1), Florida Statutes. (Italics added). As indicated in brackets, the statute identifies eight separate categories of water supply sources that are not mutually exclusive. Water supply sources that fall under the first 7 categories are considered alternative water supplies (i.e., non-traditional) throughout the State of Florida. Water supply sources other than those identified in the first 7 categories (e.g., surface water sources not limited to wet weather flows) may qualify as alternative water supplies under the eighth category in those instances where a water management district has designated such a source as nontraditional for a particular water supply planning region[1]. As established in the Fourth Addendum, a source may fall under one or more of these categories, all of which are non-traditional water supply sources. [A-3 000061-000177]

[1] In the Fourth Addendum, the entire St. Johns River Water Management District is one water supply region. [See A-3 1-177]

There is no ambiguity in the wording of the category "any other water supply source that is designated as nontraditional for a water supply planning region in the applicable regional water supply plan." The term "water supply source" refers to a source that can be used to supply water, and that term is used in Section 373.2234, Florida Statutes ("preferred water supply sources"), and the related terms "multijurisdictional *water supply* entity," "regional *water supply* plan," and "*water supply* development" are defined in Subsections 373.019(12), (19), and (26), respectively. The plain dictionary definition of "designated" is to "specify, stipulate" (e.g., "to be sent by a designated shipper"). *See www.merriam-webster.com/dictionary/designated.* In a regional water supply plan, the designation of a water supply development project option as either a "traditional" water supply or an "alternative" water supply would necessarily be made by the water management district. *See* Section 373.709(2)(a)2., Florida Statutes.

The term "nontraditional" is not defined by statute in Chapter 373, but the plain meaning of that term is "not traditional." The dictionary definition of "traditional" is "pertaining to or in accord with tradition." *American Heritage Dictionary*, (1976 Ed.). The plain dictionary definition of "tradition" is "an inherited, established, or customary pattern of thought, action, or behavior." *See www.merriam-webster.com/traditional*. Notably, the term "traditional" appears in

several places in Chapter 373, including in Sections 373.0363(2)(c), 373.707(8)(f)3. , 373.709(2)(a)2. , and 373.709(6)(e) , Florida Statutes.

Confirming this interpretation of the statute's plain meaning, the 2005 Staff Analysis on Committee Substitute for House Bill 1881 (a companion Bill to Senate Bill 444, which added the current definition of "alternative water supplies"), states:

> However, it is now well understood that Florida can no longer rely solely on the *traditional*, inexpensive groundwater sources to meet all the potable water needs of the people of the state and the nonpotable water needs of agriculture, industry, commerce and the environment. The development of *alternative water supplies* (i.e. sources *other than the traditional*, inexpensive groundwater sources) will be required to meet those needs.

Fla. H.R. Comm. on Water & Natural Resources, HB 1881 (2005) Staff Analysis Final (April 27, 2005).

The plain dictionary definition of "region" is "an administrative area, division, or district" or "any of the major subdivisions into which the body or one of its parts is divisible." *See www.merriam-webster.com/dictionary/region*. In the water supply planning context of Chapter 373, the phrase "water supply planning region in the applicable regional water supply plan" plainly means an area covered by a water management district's water supply plan. See §373.709(1) , Florida Statutes. Taken together, a water supply source that is designated by a water management district (in a regional water supply plan) as "not traditional" for "a

water supply planning region in the applicable regional water supply plan" would be considered "nontraditional."

B. The District's Interpretation of Section 373.019(1) Is Reasonable and Should be Given Great Weight.

An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. In *Public Employees Relations Commission v. Dade County Police Benevolent Association*, 467 So. 2d 987, 989 (Fla. 1985), the Florida Supreme Court held:

> [W]e agree that a reviewing court must defer to an agency's interpretation of an operable statute as long as that interpretation is consistent with legislative intent and is supported by substantial, competent evidence. *See State ex rel. Szabo Food Services, Inc., v. Dickinson*, 286 So.2d 529 (Fla. 1973); *State ex rel Biscayne Kennel Club v. Board of Business Regulation*, 276 So.2d 823 (Fla. 1973). *See also State ex rel. Siegendorf v. Stone*, 266 So.2d 345 (Fla. 1972); Sections 120.68(9) and (14), Fla. Stat. (1983).

Moreover, an agency's interpretation of rules and statutes within its regulatory jurisdiction do not have to be the only reasonable interpretation. It is enough if the agency's interpretation is a "permissible" one. *Suddath Van Lines v. Department of Environmental Protection*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

Thus, the Commission should uphold the District's interpretation of Section 373.019(1) as including 7 water source categories that are not mutually exclusive and which are considered "alternative water supplies" (i.e., non-traditional) under

the statute, as well as water supply sources other than those identified in the first 7 categories (e.g., surface water supplies not limited to wet weather flows) may qualify as "alternative water supplies" in those instances where a water management district has designated such as source as nontraditional for a particular water supply planning region. The Commission should further uphold the District interpretation of Section 373.019(1) as it was specifically applied as a planning tool to water supply projects set forth in the Fourth Addendum using brackish surface and groundwater as alternative water supplies. The District's statutory interpretations are reasonable and are based upon the plain meaning of the statutes. *See Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452, 454-55 (Fla. 1992). In contrast, the position of the PCEC in this proceeding is strained, fails to follow the plain meaning rule, and should be rejected.

WHEREFORE, Tohopekaliga Water Authority respectfully requests the Commission deny PCEC's Request for Review as FLWAC lack legal authority to order that designations of surface waters as alternative water supplies be stricken from the Fourth Addendum, or alternatively be limited to capture during wet weather flows, and to determine SJRWMD's identification of surface water project options as AWS in the Fourth Addendum is consistent with Chapter 373, Florida Statutes and it would not be proper for the Commission to order the District to initiate rulemaking to amend its rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by email or U.S. Mail on this 10th day of August, 2015, on:

Cynthia P. Kelly at FLWAC.Clerk@laspbs.state.fl.us;
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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies compliance with the Florida Land and Water Adjudicatory Commission's Standards of Operations rules as follows:

a) The original physically signed Answer Brief for Tohopekaliga Water Authority for the duration of the proceeding and of any subsequent appeal or subsequent proceeding in that cause, and Tohopekaliga Water Authority shall produce it upon the request of the other parties; and

b) Tohopekaliga Water Authority 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.

/s/ Segundo J. Fernandez
Segundo J. Fernandez, Esq.

CERTIFICATE OF COMPLIANCE WITH FLORIDA RULE OF APPELLATE PROCEDURE

I HEREBY CERTIFY that the text herein is printed in Times New Roman 14-point font, and that this notice complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

/s/ Segundo J. Fernandez
Segundo J. Fernandez