

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ATLANTIC CIVIL, INC.,

Petitioner,

vs.

Case No. 15-1746

FLORIDA POWER AND LIGHT COMPANY
AND DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.

_____/

CITY OF MIAMI,

Petitioner,

vs.

Case No. 15-1747

FLORIDA POWER AND LIGHT COMPANY
AND DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.

_____/

RECOMMENDED ORDER

The final hearing in this case was held on November 2 through 4, 2015, in Miami, Florida, before Bram D. E. Canter, Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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STATEMENT OF THE ISSUE

The issue to be determined in this case is whether the Administrative Order issued by DEP on December 23, 2014, is a reasonable exercise of its enforcement authority.

PRELIMINARY STATEMENT

On December 23, 2014, DEP issued Administrative Order OGC No. 14-0741 ("the AO") related to the cooling canal system at FPL's Turkey Point Power Plant in southeast Miami-Dade County. On February 9, 2015, petitions for administrative hearing challenging the AO were filed by Tropical Audubon Society, Inc., Blair Butterfield, Charles Munroe, and Jeffrey Mullins; Miami-Dade County; ACI; and the City of Miami. After referral to DOAH, the four cases were consolidated for hearing.

On April 16, 2015, Respondent FPL filed a motion to dismiss portions of the petitions on grounds that the petitions failed to allege sufficient grounds for standing. The motion was denied.

On October 2, 2015, ACI filed a motion for leave to file an amended petition for administrative hearing. The motion was granted except with respect to the request in ACI's Amended Petition that the Administrative Law Judge recommend "additional appropriate terms and criteria to halt and remediate the ongoing westward migration of saltwater intrusion in the Aquifer."

On October 9, 2015, Miami-Dade County filed a Notice of Voluntary Dismissal and Case No. 15-1745 was closed.

FPL filed a Motion for Partial Summary Recommended Order or Alternatively for Dismissal of Petitioner City of Miami, claiming the City lacked standing. The motion was denied.

On August 24, 2015, Petitioner Mullins filed a Notice of Voluntary Dismissal. On October 30, 2015, Petitioners Tropical Audubon Society, Butterfield, and Munroe filed an Agreed Notice of Voluntary Dismissal without Prejudice. Accordingly, Case No. 15-1744 was closed.

At the final hearing, Joint Exhibits J-1, J-2, J-3, J-5, J-6, and J-7 were admitted into evidence. DEP presented the testimony of Phillip Coram, a DEP Program Administrator who was accepted as an expert in environmental engineering; Terri Bates, Division Director of Water Resources at the South Florida Water Management District ("SFWMD"), and Jefferson Giddings, a Principal Scientist at SFWMD who was accepted as an expert in groundwater modeling. DEP Exhibits D-2, D-6, D-7, D-10, D-11, D-13, D-15, and D-16 were admitted into evidence.

FPL presented the testimony of Michael Sole, who is FPL's Vice President of Governmental Affairs; Steven Scroggs, a Senior Director of Project Development for FPL who was accepted as an expert in power plant engineering, design and siting; and

Peter Andersen, who was accepted as an expert in groundwater hydrology and groundwater flow and transport modeling.

FPL Exhibits FPL-1 through FPL-6, FPL-9, FPL-11, FPL-14, FPL-15, FPL-25, and FPL-26 were admitted into evidence.

ACI presented the testimony of Steve Torcise, Jr., who is ACI's President; Marc Harris, who is a DEP employee responsible for issuing NPDES permits for power plants; William Nuttle, Ph.D., who was accepted as an expert in water salt budgets; and Edward Swakon, who was accepted as an expert in groundwater resources and groundwater monitoring. ACI Exhibits ACI-7, ACI-8, ACI-9, ACI-11, ACI-31, ACI-33, ACI-34, ACI-63, and ACI-66 were admitted into evidence.

The City presented the testimony of Miguel Augustin, who is the City's Controller; and Mark Crisp, who was accepted as an expert in design and function of electrical generating facilities and cooling systems. City Exhibits 40 and 43 were admitted into evidence. The City's motion for official recognition of its City Charter was denied, but a copy of the City Charter was accepted as a proffer.

The five-volume transcript of the final hearing was filed with DOAH. The parties filed proposed recommended orders that were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Parties

1. FPL is a subsidiary of NextEra Energy. It is a regulated Florida Utility providing electric service to 4.7 million customers in 35 counties.

2. FPL owns and operates the Turkey Point Power Plant, which includes a cooling canal system ("CCS") that is the subject of the AO at issue in this proceeding.

3. DEP is the state agency charged with administering the Florida Electric Power Plant Siting Act ("PPSA"), chapter 403, Part II, Florida Statutes. DEP has the power and the duty to control and prohibit pollution of air and water in accordance with the law and rules adopted and promulgated by it. § 403.061, Fla. Stat. (2015).

4. ACI is a Florida corporation and the owner of 2,598 acres of land in southeast Miami-Dade County approximately four miles west of the Turkey Point CCS. ACI is engaged in agriculture and limerock mining on the land.

5. ACI withdraws and uses water from the Biscayne Aquifer pursuant to two SFWMD water use permits. ACI also has a Life-of-the-Mine Environmental Resource Permit issued by DEP for its mining activities. The Life-of-the-Mine permit requires that mining be terminated if monitoring data indicate the occurrence

of chloride concentrations greater than 250 milligrams per liter ("mg/L") in the mine pit.

6. The City of Miami is a municipal corporation located about 25-miles north of Turkey Point.

7. The City purchases water from Miami-Dade County, which withdraws the water from the Biscayne Aquifer.

Turkey Point

8. FPL's Turkey Point property covers approximately 9,400 acres in unincorporated Miami-Dade County, along the coastline adjacent to Biscayne Bay.

9. Five electrical generating units were built at Turkey Point. Units 1 and 2 were built in the 1960s. Unit 2 ceased operating in 2010. Units 3 and 4 are Florida's first nuclear generating units, which FPL constructed in the 1970s. Unit 5 is a natural gas combined cycle generating unit brought into service in 2007.

10. Units 1 through 4 pre-date the PPSA and were not certified when they were built. However, Units 3 and 4 were certified pursuant to the PPSA in 2008 when FPL applied to increase their power output, referred to as an "uprate." Unit 5 was built after the PPSA and was certified under the Act.

The CCS

11. The Turkey Point CCS is a 5,900-acre network of canals, which provides a heat removal function for Units 1, 3, and 4, and receives cooling tower blowdown from Unit 5.

12. FPL constructed the CCS pursuant to satisfy a 1971 consent judgment with the U.S. Department of Justice which required FPL to terminate its direct discharges of heated water into Biscayne Bay.

13. The CCS is not a certified facility under the PPSA, but it is an "associated facility," which means it directly supports the operation of the power plant.

14. The CCS functions like a radiator, using evaporation, convective heat transfer, and radiated heat loss to lower the water temperature. When cooling water enters the plant, heat is transferred to the water by flow-through heat exchangers and then discharged to the "top" or northeast corner of the CCS. Circulating water pumps provide counter-clockwise flow of water from the discharge point, down (south) through the 32 westernmost canals, across the southern end of the CCS, and then back up the seven easternmost canals to the power plant intake.

15. The full circuit through the CCS from discharge to intake takes about 48 hours and results in a reduction in water temperature of about 10 to 15 degrees Fahrenheit.

16. The CCS canals are unlined, so they have a direct connection to the groundwater. Makeup water for the CCS to replace water lost by evaporation and seepage comes from process water, rainfall, stormwater runoff, and groundwater infiltration.

17. When the CCS was first constructed, FPL and SFWMD's predecessor, the Central and Southern Florida Flood Control District, entered into an agreement to address the operation and management of the CCS. The agreement has been updated from time to time. The original agreement and updates called for monitoring the potential impacts of the CCS.

18. Operation of the CCS is also subject to a combined state industrial wastewater permit and National Pollution Discharge Elimination System ("NPDES") permit administered by DEP. The industrial wastewater/NPDES permit is incorporated into the Conditions of Certification.

Hypersaline Conditions

19. The original salinity levels in the CCS were probably the same as Biscayne Bay. However, because the salt in saltwater is left behind when the water evaporates, and higher water temperature causes more evaporation, the water in the CCS becomes saltier. Salinity levels in the CCS are also affected by rainfall, air temperature, the volume of flow from the power plant, and the rate of water circulation.

20. In 2008, when FPL applied for certification of the uprate of Units 3 and 4, it reported average salinity to be 50 to 60 Practical Salinity Units ("PSU"). This is a "hypersaline" condition, which means the salinity level is higher than is typical for seawater, which is about 35 PSU.

21. Higher salinity makes water denser, so the hypersaline water in the CCS sinks beneath the canals and to the bottom of the Biscayne Aquifer, which is about 90 feet beneath the CCS. At this depth, there is a confining layer that separates the Biscayne Aquifer from the deeper Upper Floridan Aquifer. The confining layer stops the downward movement of the hypersaline "plume" and it spreads out in all directions.

22. FPL estimated that the average daily loading of salt moving from the CCS into the Biscayne Aquifer is 600,000 pounds per day.

23. In late 2013, salinity levels in the CCS began to spike, reaching a high of 92 PSU in the summer of 2014. FPL believes the salinity spikes in recent years are attributable in part to lower than normal rainfall and to higher turbidity in the CCS caused by algal blooms. Reductions in flow and circulation during this period associated with the retirement of Unit 2 and the uprate of Units 3 and 4 could also have contributed to increased temperatures in the CCS, more evaporation, and higher salinity.

24. ACI presented evidence suggesting that the uprate of Units 3 and 4 could be the primary cause of recent, higher water temperatures and higher salinity.

25. The analyses that have been conducted to date are not comprehensive or meticulous enough to eliminate reasonable disagreement about the relative influence of the factors that affect salinity in the CCS.

26. FPL has taken action to reduce salinity within the CCS by adding stormwater from the L-31E Canal (pursuant to emergency orders), adding water from shallow saline water wells, and removing sediment build-up in the canals to improve flow. These actions, combined with more normal rainfall, have decreased salinity levels in the CCS to about 45 PSU at the time of the final hearing.

Saltwater Intrusion

27. Historical data show that when the CCS was constructed in the 1970s, saltwater had already intruded inland along the coast due to water withdrawals, drainage and flood control structures, and other human activities.

28. The "front" or westernmost line of saltwater intrusion is referred to as the saline water interface. More specifically, the saline water interface is where groundwater with total dissolved solids ("TDS") of 10,000 mg/L or greater meets groundwater with a lower chloride concentration. DEP

classifies groundwater with a TDS concentration less than 10,000 mg/L as G-II groundwater, and groundwater with a TDS concentration equal to or greater than 10,000 mg/L as G-III groundwater, so the saline water interface can be described as the interface between Class G-II groundwater and Class G-III groundwater.

29. In the 1980s, the saline water interface was just west of the interceptor ditch, which runs generally along the western boundary of the CCS. The interceptor ditch was installed when the CCS was first constructed as a means to prevent saline waters from the CCS from moving west of the ditch. Now, the saline water interface is four or five miles west of the CCS, and it is still moving west.

30. The groundwater that comes from the CCS can be identified by its tritium content because tritium occurs in greater concentrations in CCS process water than occurs naturally in groundwater. CCS water has been detected four miles west of the CCS.

31. Saline waters from the CCS have been detected northwest of the CCS, moving in the direction of Miami-Dade County's public water supply wellfields.

32. The hypersaline plume from the CCS is pushing the saline water interface further west.

33. Respondents identified factors that contributed to the saltwater intrusion that occurred before the CCS was constructed. However, while saltwater intrusion has stabilized in other parts of Miami-Dade County, it continues to worsen in the area west of the CCS.

34. Respondents made no effort to show how any factor other than the CCS is currently contributing to the continuing westward movement of the saline water interface in this area of the County.

35. The preponderance of the record evidence indicates the CCS is the major contributing cause of the continuing westward movement of the saline water interface.

36. Fresh groundwater in the Biscayne Aquifer in southeast Miami-Dade County is an important natural resource that supports marsh wetland communities and is utilized by numerous existing legal water uses including irrigation, domestic self-supply, and public water supply. The Biscayne Aquifer is the main source of potable water in Miami-Dade County and is designated by the federal government as a sole source aquifer under the Safe Drinking Water Act.

37. Saltwater intrusion into the area west of the CCS is reducing the amount of fresh groundwater in the Biscayne Aquifer available for natural resources and water uses.

Water Quality Violations

38. At the final hearing, a DEP administrator testified that DEP was unable to identify a specific violation of state groundwater or surface water quality standards attributable to the CCS, but DEP's position cannot be reconciled with the undisputed evidence that the CCS has a groundwater discharge of hypersaline water that is contributing to saltwater intrusion. Florida Administrative Code Rule 62-520.400, entitled "Minimum Criteria for Ground Water," prohibits a discharge in concentrations that "impair the reasonable and beneficial use of adjacent waters."

39. Saltwater intrusion into the area west of the CCS is impairing the reasonable and beneficial use of adjacent G-II groundwater and, therefore, is a violation of the minimum criteria for groundwater in rule 62-520.400.

40. In addition, sodium levels detected in monitoring wells west of the CCS and beyond FPL's zone of discharge are many times greater than the applicable G-II groundwater standard for sodium. The preponderance of the evidence shows that the CCS is contributing to a violation of the sodium standard.

Agency Response

41. The 2008 Conditions of Certification included a Section X, entitled "Surface Water, Ground Water, Ecological Monitoring," which, among other things, required FPL and SFWMD

to execute a Fifth Supplemental Agreement regarding the operation and management of the CCS. New monitoring was required and FPL was to "detect changes in the quantity and quality of surface and ground water over time due to the cooling canal system."

42. Section X.D. of the Conditions of Certification provides in pertinent part:

If the DEP in consultation with SFWMD and [Miami-Dade County Department of Environmental Resources Management] determines that the pre- and post-Uprate monitoring data: is insufficient to evaluate changes as a result of this project; indicates harm or potential harm to the waters of the State including ecological resources; exceeds State or County water quality standards; or is inconsistent with the goals and objectives of the CERP Biscayne Bay Coastal Wetlands Project, then additional measures, including enhanced monitoring and/or modeling, shall be required to evaluate or to abate such impacts. Additional measures include but are not limited to:

* * *

3. operational changes in the cooling canal system to reduce any such impacts;

43. DEP determined that the monitoring data indicates harm to waters of the State because of the contribution of CCS waters to westward movement of the saline water interface. Under the procedures established in the Conditions of Certification, this

determination triggered the requirement for "additional measures" to require FPL to "evaluate or abate" the impacts.

44. Pursuant to the Conditions of Certification, a Fifth Supplemental Agreement was executed by FPL and SFWMD, which, among other things, requires FPL to operate the interceptor ditch to restrict movement of saline water from the CCS westward of Levee 31E "to those amounts which would occur without the existence of the cooling canal system." The agreement provides that if the District determines that the interceptor ditch is ineffective, FPL and the District shall consult to identify measures to "mitigate, abate or remediate" impacts from the CCS and to promptly implement those approved measures.

45. SFWMD determined that the interceptor ditch is ineffective in preventing saline waters from the CCS in deeper zones of the Biscayne Aquifer from moving west of the ditch, which triggered the requirement of the Fifth Supplemental Agreement for FPL to mitigate, abate, or remediate the impacts.

46. Following consultation between DEP and SFWMD, the agencies decided that, rather than both agencies responding to address the harm caused by the CCS, DEP would take action. DEP then issued the AO for that purpose.

The AO

47. The AO begins with 36 Findings of Fact, many of which are undisputed background facts about the history of Turkey Point and the CCS.

48. Also undisputed is the statement in Finding of Fact 25 that "the CCS is one of the contributing factors in the western migration of CCS saline Water" and "the western migration of the saline water must be abated to prevent further harm to the waters of the state."

49. Findings of Fact 16-19 and 25 indicate there is insufficient information to identify the causes and relative contributions of factors affecting saltwater intrusion in the area west of the CCS. However, as found above, the preponderance of the record evidence indicates the CCS is the major contributing cause of the continuing westward movement of the saltwater interface.

50. In the "Ordered" section of the AO, FPL is required to submit to DEP for approval a detailed CCS Salinity Management Plan. The AO explains that "[t]he primary goal of the Management Plan shall be to reduce the hypersalinity of the CCS to abate westward movement of CCS groundwater into class G-II (<10,000 mg/L TDS) groundwaters of the State."

51. The goal of reducing hypersalinity of the CCS to abate westward movement of CCS groundwater into class G-II

groundwaters is to be demonstrated by two success criteria: (1) reducing and maintaining the average annual salinity of the CCS at a practical salinity of 34 within 4 years of the effective date of the Salinity Management Plan; and (2) decreasing salinity trends in four monitoring wells located near the CCS.

52. Although the AO states that FPL's proposal to withdraw 14 mgd from the Upper Florida Aquifer and discharge it into the CCS might accomplish the goal of the AO, the AO does not require implementation of this particular proposal. It is just one of the options that could be proposed by FPL in its Salinity Management Plan.^{1/}

53. If the success criteria in the AO are achieved, hypersaline water will no longer sink beneath the CCS, the rate of saltwater intrusion will be slowed, and the existing hypersaline plume would begin to "freshen."

Petitioners' Objections

54. ACI and the City object to the AO because the success criteria do not prevent further harm to water resources. Maintaining salinity in the CCS to 34 PSU will not halt the western movement of the saline water interface.

55. They also contend the AO is vague, forecloses salinity management options that could be effective, and authorizes FPL's continued violation of water quality standards.

56. For ACI, it doesn't matter when the saline water interface will reach its property because, advancing in front of the saltwater interface (10,000 mg/L TDS) is a line of less salty water that is still "too salty" for ACI's mining operations. Years before the saline water interface reaches ACI's property, ACI's mining operations will be disrupted by the arrival of groundwater with a chloride concentration at or above 250 mg/L.^{2/}

CONCLUSIONS OF LAW

Standing

57. To establish standing, a party must present evidence to show that its substantial interests could be affected. St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1054 (Fla 5th DCA 2011).

58. The City claims standing based on the doctrine of *parens patriae*, which generally recognizes an inherent authority of the state to protect persons who are unable to act on their own behalf and there is a sovereign interest involved. See Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006). In Engle, the Court stated "it is clear that a state may sue to protect its citizens against the pollution of the air over its territory; or interstate waters in which the state has rights." Id. at 1260.

59. The City cites no case in which the City or any other local government was held to have standing under the doctrine *parens patriae* to participate in a proceeding like the present case. The Administrative Law Judge declines the City's invitation to be the first forum in Florida to extend the doctrine of *parens patriae* to allow a municipality to intervene in a DEP enforcement action.

60. The City holds no water use permit and, generally, an entity has no water rights unless it has obtained a permit for the water or is using water pursuant to a statutory exemption from permitting. See Tequesta v. Jupiter Inlet Corp., 371 So. 2d 663 (Fla. 1979). However, in Osceola County v. St. Johns River Water Management District, 486 So. 2d 616 (Fla. 5th DCA 1986), it was held that Osceola County had standing based of the potential effect of the decision on the County's "various statutory duties and responsibilities with respect to planning for water management and conservation." See also South Fla. Water Mgmt. Dist. v. City of St. Cloud, 550 So. 2d 551 (Fla. 5th DCA 1989).

61. All local governments have statutory duties and responsibilities with respect to planning for water management and conservation under section 163.3177(6)(c), Florida Statutes. Therefore, based on the precedent established in Osceola County

and City of St. Cloud, supra, it is concluded the City of Miami has standing in this proceeding.

62. ACI and the City presented competent evidence that their substantial interests could be affected.

The Nature of the Proceeding

63. The parties debated the nature of the proceeding that was initiated by the AO. The AO begins with a statement that it is being issued under the authority of sections 403.061(8). Section 403.061(8) is the authority to issue "such orders as are necessary to effectuate the control of air and water pollution and enforce the same by all appropriate administrative and judicial proceedings."

64. Respondents contend the AO resolves a "violation" of Section X.D. of the Conditions of Certification, but Section X.D. has not been violated. A "violation" involves doing something that is prohibited or failing to do something that is required. FPL has done nothing prohibited by Section X.D. and has not failed to do something required by Section X.D. The section is directed to DEP, which is required to determine whether harm has been caused, consult with other agencies, and then require additional measures to address the harm.

65. The Conditions of Certification do not say what procedure DEP should use. DEP admitted the AO is not a typical administrative order and referred to it as a "hybrid" between an

administrative order and a consent order. Still, Respondents also describe the AO as a "pure" enforcement action.

66. The AO lacks the most fundamental element of an enforcement action: charges. An agency enforcement action charges a party with one or more violations of law, which the party has the right to challenge and attempt to refute. DEP did not charge FPL with violating the minimum criteria for groundwater, with violating the conditions of its industrial wastewater permit, or with violating the primary groundwater standard for sodium. FPL did not come to the final hearing to defend against these charges.

67. DEP cites some of its final orders that involved consent orders, but the AO is not a consent order.

68. ACI and the City are wrong in characterizing the AO as a permit. The Salinity Management Plan required by the AO could possibly lead to a permit or a modification to the Conditions of Certification, but the AO's requirement for a plan is not an authorization for FPL to change any facilities or operations at Turkey Point. For comparison, SFWMD issued a water use permit to FPL (the subject of DOAH Case No. 15-3845) to withdraw water from the L-31E Canal and discharge it into the CCS to lower water temperature and salinity. A permit was necessary because a water withdraw was authorized. The AO does not authorize any action.

69. Section 403.088(2)(e) gives DEP enforcement authority suited for the circumstances associated with the CCS discharge. This statute provides that, if a discharge will not meet permit conditions or applicable statutes and rules, DEP "may issue, renew, revise, or reissue the operation permit" when one of six specified criteria is satisfied. The criteria pertain to actions to come into compliance or to demonstrate why non-compliance is justified. However, DEP did not choose this approach.

The Meaning of the Term "Abate"

70. DEP defines the term "abate" in Paragraph 37 of the AO as "to reduce in amount, degree or intensity; lessen; diminish" and believes it is consistent with the meaning of the term in Section X.D. of the Conditions of Certification. ACI and the City dispute this interpretation and contend the term "abate" means to stop or terminate. However, this dispute is largely moot because the AO states that "[f]or the purposes of this Order" the term "abate" means to reduce. With this caveat, the term "abate" in the AO can have a different meaning than it has in the Conditions of Certification. However, the following analysis of the law was undertaken to show that the term "abate," as used in the Conditions of Certification, does not mean to reduce.

71. The term "abate" is not defined in Section X.D. or elsewhere in the Conditions of Certification. Under Section III, the following statement appears:

The meaning of terms used herein shall be governed by the definitions contained in chapter 373 and 403, Florida Statutes, and any regulation adopted pursuant thereto. In the event of any dispute over the meaning of a term used in these conditions which is not defined in such statutes or regulations, such dispute shall be resolved by reference to the most relevant definitions contained in any other relevant state or federal statute or regulation or, in the alternative by the use of the commonly accepted meaning as determined by the Department.

72. There is no definition of "abate" in chapter 373 or chapter 403, or in any regulation adopted pursuant thereto. DEP made no showing about the use of the term in a relevant statute or regulation of the Federal Government or another state. DEP chose to use a dictionary definition of the term "abate."

73. Respondents made no effort to show the definition in the AO is the "most commonly accepted meaning" of the term. The most commonly accepted meaning is a matter subject to objective determination. DEP cannot simply deem a definition to be the most commonly accepted meaning if it is not.

74. In Webster's New Collegiate Dictionary, the first definition entry for the word "abate" is "to put an end to." The second entry is similar to the definition in the AO; that

is, to reduce or lessen. Most suggested synonyms are associated with the meaning to reduce or lessen. See e.g., Thesaurus.com

75. However, the terms "abate" and "abatement" are regularly used in environmental law. Therefore, choosing one of the meanings of "abate" outside the environmental context is unnecessary and inappropriate.

76. Several environmental statutes use the phrase "prevent or abate." This usage is not free of ambiguity, but it is more likely to mean "prevent or, if it is already occurring, then stop." See e.g., §§ 376.308, 403.061(9) 403.081(4), and 403.191(1), Fla Stat.

77. Section 373.433, entitled "Abatement," refers to injunctions if certain water control structures are violating DEP or water management district standards. The meaning of "abatement" in this section is clearly to stop the violation, not merely to diminish it.

78. Section 376.12(1) refers to "abatement of a prohibited discharge," which means to stop the discharge.

79. Sections 376.09 and 376.305, pertaining to the removal of prohibited discharges, states that polluters shall immediately "contain, remove, and abate the discharge," which is not free of ambiguity regarding the intended meaning of the word "abate." There are a few other statutes with this kind of ambiguous wording.

80. Section 403.4154(3) authorizes DEP to "abate or substantially reduce" hazards caused by phosphogypsum stacks. In this section, the term abate is clearly intended to mean to stop and to be distinguished from "reduce."

81. Section 403.709 refers to an "abatement action" brought by DEP to bring an illegal waste tire site into compliance. In this context, the word "abatement" means to stop the violation of waste tire regulations.

82. Section 403.726 is entitled "Abatement of imminent hazard caused by hazardous substance" and includes a similar statement that DEP "shall take and any action necessary to abate or substantially reduce any imminent hazard." In this section, the term "abate" means to stop.

83. Section 403.727(1)(g) refers to statutory remedies "available to the department to abate violations of this act." In this context, the term "abate" means to stop.

84. Section 376.11(6) provides for payment of moneys from the Florida Coastal Protection Trust Fund for "the abatement of any other potential pollution hazards," which means to end the hazard, not to diminish it.

85. Finally, article II, section 7(a) of the Florida Constitution provides:

It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall

be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources.

It is likely that the word "abate" in section 7(a) was intended to mean to stop pollution. A state policy to only reduce pollution does not sound very ambitious.

86. When these uses of the term "abate" or "abatement" are objectively considered, it is clear that the most commonly accepted meaning for the term in Florida environmental laws is to stop, terminate, or end.

87. It is logical that a statute granting enforcement power to DEP would grant full power to stop a violation or harmful activity, rather than only the power to reduce the violation or activity. Therefore, even in the statutes cited above, where the use of the term "abate" did not make its meaning clear, it is likely that the intended meaning was to stop.

88. The use of the term "abate" or similar terms in Florida statutes has not been interpreted by DEP or any court to mean DEP must always require complete restoration of the harm caused or full compliance with a standard. DEP retains enforcement discretion. It is a separate question whether the circumstances in any case provide a reasonable basis for DEP to require less than complete restoration or full compliance.

89. If the term "abate" in Section X.D. was intended by the Siting Board to mean to lessen or diminish, that would mean the Siting Board, without explanation, meant to prevent DEP from exercising its full range of enforcement authority with respect to harm caused by the CCS. That is an unreasonable interpretation.

Reasonable Enforcement Discretion

90. Because the AO purports to be an enforcement action, the applicable standard of review in this case is whether the action taken by the Department is a reasonable exercise of its enforcement discretion.

91. ACI and the City have the burden to prove by a preponderance of the evidence that the AO is not a reasonable exercise of enforcement discretion. They met their burden.

92. The AO is not a reasonable exercise of DEP's enforcement discretion because FPL has not been charged with violations of law and afforded due process to address the charges through litigation, consent order, or settlement.

93. The AO is not a reasonable exercise of DEP's enforcement discretion because, without demonstrating a reasonable basis for doing so, DEP does not require FPL to come into compliance with standards or specify a reasonable time for FPL to come into compliance.

94. The AO is an unreasonable exercise of DEP's enforcement discretion because the success criteria are inadequate to accomplish DEP's stated purposes as explained below.

a. Maintaining Salinity at 34 PSU in the CCS

i. Requiring FPL to maintain salinity in the CCS at 34 PSU is based on 34 PSU being the average salinity of Biscayne Bay. However, in the context of addressing existing harm to the Biscayne Aquifer, it could be an unnecessary impediment. It was not shown why it is important not to allow the water in the CCS to become fresher than Biscayne Bay.

ii. The evidence presented shows that, the fresher the water in the CCS, the greater would be the freshening of the Biscayne Aquifer beneath and west of the CCS. Perhaps FPL would be able to explain in the Salinity Management Plan why economic, technological, ecological, or other considerations support the reasonableness of going no fresher than 34 PSU. However this record does not show the reasonableness of restricting FPL's options in this manner. FPL should be free to consider and propose options to lower the salinity in the CCS even further if it is practicable and could achieve greater benefits.

iii. Requiring salinity to be maintained at 34 PSU is also unreasonable because it forecloses all options that could achieve the goal of the AO to abate westward movement of CCS

groundwater into Class G-II groundwater without lowering the salinity of CCS water or not lowering it as much. Respondents did not explain in the record why FPL should be foreclosed from considering any option that achieves the goal of reducing the westward movement of CCS groundwater.

b. Decreasing Salinity Trends in Nearby Wells

i. Another success criterion in the AO is for FPL to demonstrate "decreasing salinity trends" in four monitoring wells near the CCS, but the decreasing trend is not quantified.

ii. The wording in the AO allows for achievement of this success criterion even with decreasing trends that are smaller than was predicted by the computer modeling upon which DEP relied. If decreasing salinity trends in wells near the CCS are smaller, then there would likely be less slowing of the westward movement of the saline water interface than was predicted by the modeling, and one of DEP's stated purposes would be thwarted.

iii. In addition, by only using wells near the CCS, the AO allows for the possibility that salinity trends near the CCS decrease as predicted by the computer modeling, but the predicted benefits at distance do not occur.

c. FPL's Contribution to the Harm

In this proceeding, DEP never stated that it had made a determination that FPL should not be required to terminate its contribution to the westward movement of the saline water

interface. Instead, DEP stated that FPL's contribution had not been determined. That was the reason given for the enforcement approach taken by DEP. However, the AO does not require FPL to determine its contribution.

95. All of the infirmities in the AO described above can be cured by amending the AO to delete the proposed success criteria and require FPL to submit a Salinity Management Plan that includes an analysis of the factors contributing to the western movement of saltier groundwater and options that could eliminate the CCS's contribution. In this amended form, the AO would not be an enforcement instrument, but would achieve DEP's apparent intent to require further analysis of the problem and its solution.

96. Petitioners' claim that DEP should take immediate enforcement action to stop FPL's current violations and prevent further harm is a claim that must be brought in a proceeding under section 403.412, section 120.69, or other law which allows for redress of injuries when DEP has chosen not to exercise its enforcement authority.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law it is

RECOMMENDED that the Department of Environmental Protection rescind the AO or amend it as described above.

DONE AND ENTERED this 15th day of February, 2016, in
Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of February, 2016.

ENDNOTES

^{1/} FPL applied to modify the Conditions of Certification to authorize FPL to withdraw 14 mgd from the Upper Floridan Aquifer for use in the CCS. ACI challenged the proposed modification in a separate DOAH proceeding, a hearing was held, a Recommended Order was issued, and the matter is now pending before the Governor and Cabinet in their capacity as the State Siting Board.

^{2/} TDS and chloride concentration are not equivalent, but can be considered roughly equivalent for the purpose of this finding.

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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.