

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS**

WWALS WATERSHED COALITION, INC.,

Petitioner,

vs.

DOAH CASE NO.: 15-4975

SABAL TRAIL TRANSMISSION, LLC  
and STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION,

Respondents.

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**STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION'S  
PROPOSED RECOMMENDED ORDER**

Under notice, this cause was heard by Judge Bram D. E. Canter, the assigned Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH), on October 19 through 21, 2015 in Jasper, Florida.

**APPEARANCES**

The following appearances were entered.

**APPEARANCES**

For Respondent, Department of Environmental Protection	B. Jack Chisolm, Esq. Sidney C. Bigham III, Esq. 3900 Commonwealth Boulevard, MS 35 Tallahassee, FL 32399-3000
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For Respondent, Sabal Trail Transmission, LLC	Timothy Riley, Esq. Richard Brightman, Esq. French Brown, Esq. Hopping Green & Sams, P.A. 119 South Monroe Street, Suite 300 Tallahassee, FL 32301
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For Petitioner,  
WWALS Watershed  
Coalition, Inc.

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#### STATEMENT OF THE ISSUES

The issues in this case are whether Petitioner, WWALS Watershed Coalition, Inc. (WWALS or Petitioner) established standing to maintain this action, and, if so, whether Respondent, the Florida Department of Environmental Protection (Department), should grant Respondent, Sabal Trail Transmission, LLC's (Sabal Trail's) application (Application) for Environmental Resource Permit and Easement/Authorization to Use Sovereign Submerged Lands, permit number 0328333-001 (collectively, the Permit).

#### PRELIMINARY STATEMENT

On, July 31, 2014, Sabal Trail applied to the Department for the Permit, seeking to construct a new natural gas transmission pipeline (the Pipeline).

On July 10, 2015, the Department issued a Consolidated Notice of Intent to Issue Environmental Resource Permit and Easement to Use Sovereign Submerged Lands, which included a draft of the Permit (Notice of Intent). The Department denied WWALS' request for enlargement of time to challenge the Permit and WWALS thereafter filed its original petition with the Department. The Department dismissed WWALS' original petition

with leave to amend.

WWALS filed an amended petition with the Department on August 28, 2015, which also served as an initial petition from a newly formed non-profit subsidiary corporation, WWALS Watershed Coalition Florida, Inc. (WWALS-FL). On September 2, 2015, the Department entered an order dismissing the petition of WWALS-FL with prejudice as untimely and striking portions of WWALS' amended petition. On September 3, 2015, the Department referred WWALS' amended petition, along with its order striking portions thereof, to DOAH.

On September 23, 2015, Sabal Trail filed with DOAH a Motion in Limine and Motion to Strike additional elements of the Amended Petition that it argued were irrelevant or beyond the scope of this proceeding. On October 2, 2015, the ALJ granted Sabal Trail's motion, and subsequently on October 7, 2015 issued an order granting WWALS leave to file a second amended petition.

On October 9, 2015, WWALS timely filed a re-amended petition (Re-Amended Petition), and on October 12, 2015, Sabal Trail again filed a Motion to Strike portions of the Re-Amended Petition it argued were irrelevant and immaterial. This motion was granted in part on October 15, 2015.

The parties filed a Joint Prehearing Stipulation (Joint Stipulation) setting forth certain stipulated facts and issues of law.

The final hearing was held on October 19 through 21, 2015 in Jasper, Florida.

At hearing, WWALS presented the testimony of: Dennis Price, an expert in geology; Dr. Donald M. Thieme, an expert in geomorphology; David Shields, WWALS member; Joe McClung, WWALS member; Thomas Edwards, WWALS member and landowner; Deanna Mericle, WWALS member; Christopher Mericle, WWALS member; Donna Ellison, WWALS member and landowner; Wayne Ellison, WWALS member and landowner; Merrilee Malwitz-Jipson, WWALS member; Dana Stevens, WWALS member and landowner; Debra Johnson, WWALS member; Richard Gamble, Suwannee County Commissioner; Willard Randall, WWALS member; Lori McCraney, WWALS member; Carlos Herd, Director of the Water Supply Division for the Suwannee River Water Management District; Dale Jenkins, Bureau Chief for the Bureau of Project Management with the Saint Johns River Water Management District; Guy Means, Florida Geological Survey (FGS); Lisa Prather, environmental consultant for Department of Environmental Protection Central District.

Sabal Trail presented the testimony of: Jim Abrosino, PhD, an expert in archeology; David Dickson, senior consultant for Cardno, Inc. and part of the Permit team responsible for putting together the application; David Shammo, corporate representative of Spectra Energy Partners, LP; Marty Bass, an expert in pipeline construction management; Gregg Jones, an expert in geology and hydrogeology; and

Alan K. Lambeth, P.E., an expert in natural gas pipeline design and operations.

The Department presented the testimony of Lisa Prather, environmental consultant for the Department on submerged lands and environmental resource permitting.

Joint Exhibits (JE) 1 through 12 were admitted into evidence. Sabal Trail's Exhibits (ST) 1 through 55 were admitted into evidence. Petitioner's Exhibits 1 through 12 were admitted into evidence, with certain portions of their exhibits excluded.

The Transcript of the final hearing was filed with DOAH. The parties submitted proposed recommended orders that were considered in the preparation of this Recommended Order.

Four volumes of the six volume transcript were filed on November 4, 2015, with the remaining two volumes filed on November 6, 2015. By order of the ALJ the parties were given ten days to file their proposed recommended orders.

#### FINDINGS OF FACT<sup>1</sup>

##### I. The Parties

##### Petitioner WWALS

1. Petitioner, WWALS, is a Georgia 501(c)(3) not-for-profit corporation which challenged the Department's intent to

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<sup>1</sup> Citations to the transcript are by volume, then page number, then testifying witness (where necessary): e.g., [II, 223 (Prather)] means Volume II, page 223, testimony by Mrs. Prather.

issue the Permit to Sabal Trail.

Petitioner's Evidence in Support of Standing

2. WWALS does not own any real property. [VI, 637 (Quarterman)]. WWALS' mission statement is to advocate for conservation and stewardship of the Withlacoochee, Alapaha, Little, and upper Suwannee river systems in South Georgia and North Florida through citizen activities. [VI, 635 (Quarterman)].

3. According to the Re-Amended Petition, WWALS has a total of 85 members, 36 of whom reside in Florida.

4. At the final hearing, however, Petitioner's witnesses identified only 46 specific members. See, Petitioner's Ex. 11<sup>2</sup> (26 members listed); [VI, 620-625 (D. Mericle) (14 additional members not listed on Petitioner's Ex. 11); II, 171 (Edwards) (TSE Plantation, LLC is also a member); III, 269-270 (C. Mericle) (Gary Gentry, David Hetzel and Gretchen Quarterman are members); IV, 387 Price (Mr. Price is a member); and IV, 447 (Thieme) (Mr. Thieme is a member)].

5. Mr. Quarterman testified that WWALS' membership "keeps growing" but did not testify as to the total number of WWALS members, either as of the date of filing the Amended Petition or

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<sup>2</sup> Petitioner's Exhibit 11 was admitted only for purposes of providing the names of 26 members, it was not accepted for purposes of showing where those members live in relation to the proposed route of the Pipeline Project. [VI, 625-626].

as of the final hearing dates. [VI, 632 (Quarterman)].

6. The only sources of evidence regarding the total number of WWALS members were the membership sheet (Petitioner's Ex. 11), testimony by WWALS' membership committee chair, and testimony by WWALS members regarding their own membership statuses and the statuses of their family members or associates.

7. WWALS' President testified that there are more members than those identified by WWALS' membership committee chair. [VI, 632 (Quarterman) and VI, 624-625 (D. Mericle)].

8. For the vast majority of the 46 specifically identified members, WWALS provided no reliable evidence to establish when those individuals became members of WWALS, where those members live, whether they own property on or near the proposed Pipeline route, the nature of their substantial interests relative to the Pipeline Project, or how their substantial interests would be affected by the Pipeline Project.

9. Of the 46 members specifically identified by Petitioner's witnesses, only four own property that would be traversed by the Pipeline (the Landowners). [II, 120 and 171 (Edwards)];<sup>3</sup> IV, 379 and 386 (D. and L. Ellison); and VI, 610 (Stevens)].

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<sup>3</sup> Mr. Edwards and TSE Plantation, LLC are both members of WWALS, but TSE Plantation, LLC is the owner of the property that would be traversed by the Pipeline.

10. Three of the four Landowners became members of WWALS after the filing of the Re-Amended Petition. [IV, 381 (D. Ellison); IV, 385 (L. Ellison); and VI, 613 (Stevens)].

11. Five witnesses testified that they recreate near the proposed Pipeline route, but none of these witnesses explained how the Pipeline Project would affect them or would affect their ability to continue recreating in these areas. [III, 258-259 and 264-265 (C. Mericle); VI, 620 (D. Mericle); VI, 616 (McCraney); VI, 617-618 (Johnson); and VI, 627-628 (Quarterman)].

12. Instead, WWALS merely raised speculative concerns about what "might" happen and did not demonstrate that these contingencies would affect its members' ability to recreate.

13. Several member-witnesses testified about potential impacts to their business interests, which are not cognizable in this proceeding. [III, 241-243 (Malwitz-Jipson); III, 278-281 and 283-289 (Shields); IV, 387 (Price)].

14. Except for the Landowners, the testifying WWALS members raised only vague or speculative "concerns" about the Pipeline Project, but none specifically explained how the project, as proposed and permitted, would impact their particular interests.

#### Respondent Sabal Trail Transmission

15. Sabal Trail is a Delaware limited liability company that is registered to do business in the State of Florida. [Joint Stipulation (e)2.; I, 39].



16. Sabal Trail is the applicant for the Permit. [JE 1, 1-1].

Respondent the Florida Department of Environmental Protection

17. The Department is the state agency charged with administering the Environmental Resource Permitting program and associated regulations in Florida under chapter 373, Florida Statutes, and Florida Administrative Code chapters 62-4, and 62-330. [II, 202-204].

18. The Department is also the state agency authorized by Chapter 253, Florida Statutes, and Chapter 18-21, Florida Administrative Code, to review and authorize certain uses of state-owned submerged lands.

19. The Department's proposed agency action to grant the Permit is the subject of these proceedings.

II. The Project

Background and Overview

20. Sabal Trail seeks to construct an interstate natural gas Pipeline subject to certification by the Federal Energy Regulatory Commission (FERC) (Docket No. CP15-17-000) [Joint Stipulation (e)4.]. A portion of the overall project will be constructed in Florida. [ST 2, 2-1].

21. The Pipeline project includes 232.75 miles of 36-inch diameter Pipeline for the Mainline Route, 13.1 miles of 36-inch diameter Pipeline for the Hunter's Creek Line, and 21.5 miles of

24-inch Pipeline for the Citrus County Line. It also includes the construction and operation of three compressor stations and three meter and regulation stations (the Stations). The project will traverse twelve Florida counties. [Joint Stipulation, (e)5; II, 206; ST 3].

22. The Pipeline enters the state just east of the Withlacoochee River in Hamilton County, and ends at the Central Florida Hub in Osceola, County. [I, at 32; ST 3].

23. The Pipeline traverses sensitive karst terrain in the vicinity of the Suwannee and Santa Fe Rivers. There is extensive discussion of the area, karst features, and the potential impacts of the project on karst features in the record. [JE 2, 2-7; JE 3, 3-77 to 3-78, 3-3092 to 3-3153; JE 4, 4-4 to 4-6; JE 5, 5-1158 to 5-1163, 5-1767 to 5-1801; ST 17, 17-1 to 17-32; ST 18; ST 19, ST 21, 21-1 to 21-34; ST 22; Pet. 5; Pet. 7; Pet. 8; V, 517-518].

#### Activities Authorized by the Permit

24. The Permit authorizes Sabal Trail to conduct activities in, on or over wetlands or other surface waters of the state in connection with the construction and operation of the Pipeline and Stations. It also proposes to grant Sabal Trail easements necessary to construct portions of the project under sovereign submerged lands owned by the Board of Trustees of the Internal Improvement Trust Fund. The construction will include digging a trench and

installing the Pipeline in both uplands and wetlands, horizontal directional drilling (HD Drilling) under the riverbeds of the Suwannee and Santa Fe Rivers, and some filling of wetlands at the proposed Stations. [I, 64]. The Permit also authorizes construction and operation of stormwater management systems at the Stations. [I, 68].

#### WWALS' Challenge

25. WWALS' Re-Amended Petition for Administrative Hearing challenges both the issuance of the Permit and the associated authorization to use state-owned sovereign submerged lands. WWALS contends that the Project will be constructed in sensitive karst terrain, and that the construction, in particular the HD Drilling under the Suwannee and Santa Fe Rivers, may adversely affect the river, underground caverns, nearby springs, and the Floridan Aquifer. It also raises issues about reduction of wildlife habitat due to clearing of forests and filling of wetlands, and potential impacts on troglobites (cave dwelling organisms). Finally, it raises an issue about the impact of construction on the Falmouth Spring system in Suwannee County. It raises no issues concerning the proposed stormwater management systems.

26. WWALS specifically contends that the project does not meet the public interest tests under 373.414 and section 253.034, Florida Statutes, does not meet the anti-degradation requirements

of rule 62-4.242, Florida Administrative Code, fails to maintain "essentially natural conditions" under rule 18-21.004(2), Florida Administrative Code, will adversely impact fish and wildlife resources, or public recreation or navigation, will violate water quality, and will adversely impact significant historical or archeological resources.

#### Pre-Application Meetings and Review of the Application

27. Prior to submitting its application for the project to the Department on July 31, 2014, Sabal Trail met with the Department on multiple occasions. [I, 67; II, 205; JE 10, 10-1 through 10-8]. During these meetings, Sabal Trail and the Department discussed the proposed project, its route and potential impacts, and potential mitigation. [I, 67].

28. As a result of the discussions in these meetings, the Department staff conducted numerous field inspections along the proposed route of the Pipeline. [II, 205]. The Department field verified every proposed wetland delineation. It also evaluated the impacts of the proposed project on the functions of every wetland proposed to be impacted using the Uniform Mitigation Assessment Methodology (UMAM) required by rule. [IV, 373].

29. During this pre-application process Sabal Trail made changes to the proposed alignment and route of the Pipeline to reduce or eliminate as many impacts as were practicable at the Department's suggestion. [II, 205-206].

30. The Department distributed the initial application to multiple interested parties and requested input from those parties. These reviewers included both internal groups, such as FGS, and outside entities, such as the Florida Fish and Wildlife Conservation Commission (FWC). [II, 208-209].

31. After receiving comments and concerns from these entities and completing its review of the application, the Department sent Sabal Trail a Request for Additional Information (RAI), seeking clarification on the deficiencies or concerns noted in the reviews. The RAI included comments from FGS about potential impacts to karst features. [II, 209; JE2, 2-7].

32. Sabal Trail submitted an extensive response to the Department's RAI. [JE 3].

33. With reference to concerns the Department expressed in the RAI about impacts to sensitive karst areas, Sabal Trail submitted a best drilling practices plan, a plan to characterize karst sensitive areas, and a plan to mitigate impacts on karst. [II, 212; JE 3, 3-2688 to 3-2699, 3-3092 to 3-3124, 3-3125 to 3-3153].

34. The Department again provided Sabal Trail's response to the first RAI to FGS and other interested entities. This led to the Department's issuance of a second RAI, which included additional requests for information from FGS about the potential impacts of the project on karst. [II, 213-214; JE 4, 4-4 to 4-6].

The RAI also provided information received from a concerned citizen, Tom Edwards, and recommended that Sabal Trail address his concerns. [II, 214-217; JE 4, 4-6].

35. Sabal Trail provided information in response to the second RAI, including a revised karst mitigation plan and comments responding to Mr. Edwards' concerns. [II, 217-218; JE 5, 5-1767 to 5-1801 and 5-2310 to 5-2318].

36. The Department again distributed Sabal Trail's response to the second RAI to interested parties, including FGS. FGS notified the permitting team that the revised karst mitigation plan had satisfied their questions. [II, 217-218].

37. Sabal Trail provided proof that it had reserved mitigation bank credits from selected sources in response to the Department's third and final RAI. [II, 218-219; JE 7; JE 8].

38. The Department reviewed all of the information provided to it in accordance with the criteria in the Applicant's Handbook, including elimination or reduction of impacts, as practicable, reasonable assurance that the project would not adversely impact fish and wildlife or their habitats, implementation of best management practices to limit short term water quality impacts during construction, and whether the project was not contrary to, or for Outstanding Florida Waters (OFWs), was clearly in, the public interest. [II, 220]. The Department prepared a technical review document discussing the

relevant issues. [II, 221-222; JE 9]. The Department found that the proposed project met all permitting criteria and that Sabal Trail met the conditions necessary for issuance of the requested easement. The Department therefore issued the Notice of Intent. [II, 222-223; JE 10].

39. Sabal Trail's efforts to reduce or eliminate impacts to wetlands included many reroutes of the Pipeline, both before and after the formal application was submitted. [I, 103-104; II, 205-206; II, 232; III, 319-321; JE 9, 9-3 to 9-5]. These include elimination of a crossing of the Ichetucknee River, rerouting the crossing of the Santa Fe River to avoid potential impacts to Ginnie Springs and to co-locate the crossing with other existing utility crossings; rerouting the Pipeline at Gum Slough, at Halpata Tastinaki Preserve and at Davenport Creek to reduce impacts to wetlands and surface waters and to avoid other sensitive lands, and realigning the Pipeline through the Green Swamp to decrease impacts to wetlands and surface waters and to avoid sensitive lands. [JE 9, 9-4 to 9-5].

40. Sabal Trail also avoided potential impacts to spring/cave systems at the proposed crossing of the Withlacoochee River in Hamilton County by re-aligning the project. Where avoidance was not possible, it conducted geophysical tests, developed drilling best management practices, evaluated the potential for sinkhole development, and prepared a karst

mitigation plan to address any potential adverse circumstances that might arise during construction. [II, 223 (Prather) and JE 9, 9-2 to 9-3].

41. Sabal Trail provided mitigation to fully offset all impacts to wetlands and surface waters that could not be eliminated. [II, 223; JE 9, 9-5 to 9-8].

42. The Department field-verified all delineations of impacted wetlands and verified all UMAM assessments, to ensure all impacts were offset by appropriate mitigation. [II, 210; IV, 373].

43. Sabal Trail provided upland buffers or mitigation to address secondary impacts. The Department included conditions recommended by FWC in the Permit to address potential impacts from construction to bald eagles and wetland/aquatic dependent species. Sabal trail will address potential impacts of construction on historical and cultural resources during the FERC review process. There will be no additional phases of this project. [JE 9, 9-3].

44. Although there will be temporary impacts to wetlands during construction, there will be few permanent impacts. Sabal Trail will offset all permanent impacts to forested wetlands by providing compensatory mitigation. There will be no adverse impacts to the abundance of or habitat for fish, wildlife and listed species. [JE 9, 9-2].



45. Sabal Trail acquired all mitigation credits necessary to offset wetland impacts. [I, 41; II, 223].

The Environmental Resource Permit Public Interest Test

46. During the review process, the Department evaluated the project to determine if it was "not contrary to the public interest." [IV, 360]. Section 373.414, Florida Statutes, and rule 62-330.302, Florida Administrative Code, list seven factors to consider.

47. As to the first factor: "whether the activity will adversely affect the public health, safety or welfare or the property of others . . . " the Department considered everything in the application, including the karst mitigation plan and found no environmental hazards that would affect public health, safety, welfare or the property of others. [II, 230; IV, 362-364].

48. Although WWALS raised concerns about impacts on potable water wells, the Pipeline will not adversely impact them. Sabal Trail will replace any impacted wells. [VI, 670-672].

49. As to the second factor: "whether the activity will adversely affect the conservation of fish and wildlife, including endangered and threatened species, or their habitats . . . " the Department found no adverse impacts to these values from the Pipeline Project. The Department provided information to FWC about the Pipeline Project. FWC assessed the potential impacts of the project on these species and provided the Department with

conditions, which were incorporated into the permit. Sabal Trail provided mitigation for any impacts. [II, 220, 226; IV, 364-365, 375-376].

50. As to the third factor: "whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling . . . " the Department found no adverse impacts. [IV, 365-366]. Since the Pipeline crosses the rivers using HD Drilling beneath the riverbeds it should cause no impacts to water flow or navigation and no adverse impacts to navigation or shoaling of the rivers. [II, 230-231; IV, 375].

51. As to the fourth factor: "whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity . . . " the Department found the Pipeline would have no adverse impacts on these values because Sable Trail is crossing the Suwannee and Santa Fe Rivers by horizontally drilling under them. [II, 231; IV, 366-367, 375].

52. In its Re-Amended Petition WWALS contends that the HD Drilling under the Suwannee and Santa Fe Rivers could have catastrophic impacts on spring and river water flow, water quality in the rivers and in private wells, and on troglobites. However, WWALS presented no evidence to support these claims. WWALS' only geology expert, Mr. Price, testified that the HD Drilling under the rivers would be difficult and that, because

underground boulders could shift, the drill or bit or caisson could become stuck. He did not testify as to what the impact might result. He testified that the river crossings were not a good area to make the crossings but he did not say why. He doesn't know of a good area to make the crossings. The river crossings will not impact nearby springs. [VI, 659-664].

53. As to the fifth factor, the Department found that most of the activities conducted during pipeline construction would be temporary, and Sabal Trail will provide mitigation for any permanent impacts. [II, 231; IV, 367-368].

54. As to the sixth factor: "whether the activity will adversely affect or will enhance significant historical and archeological resources under the provisions of section 267.061, Florida Statutes . . . " the Department found no adverse impacts. [II, 231; IV, 368]. Sabal Trail conducted a cultural resource survey of the project to identify archeological sites, historic structures, or other resources, involving background research on prior studies and field testing of the entire route. The survey found three sites that were significant. [II, 189-190]. The design of the project avoided all three sites. [II, 190-191]. "Deadhead logs" are not considered a cultural resource unless there is evidence of some special use, like as a canoe, and the Department did not consider "deadhead logs" lying on the river bottom in weighing this factor because they are not a cultural

resource and, in any event, the river crossings go 50 feet under the river bottom. [II, 197; IV, 368]. The project will have no adverse impact or secondary impacts on Archeological or cultural resources. [II, 191-193].

55. As to the last factor: "[t]he current condition and relative value of functions being performed by areas affected by the proposed activity . . . " the Department evaluated and scored all impacts to wetlands using the UMAM process. Sabal Trail will mitigate for these impacts. [II, 231-232; IV, 369-371].

56. After considering the seven factors, the Department determined the Project was not contrary to the public interest. [II, 220-221].

57. One small portion of the Project will require activities in wetlands associated with the Santa Fe River, an OFW. Because the proposed impacts at that location would be minor and temporary, and based upon the other considerations set forth above, the Department determined that portion of the project is clearly in the public interest. [II, 221]. There is no evidence that the Project will significantly degrade any Outstanding Florida Water. Sabal Trail's detailed plans addressing the horizontal directional drilling under the Suwannee and Santa Fe Rivers, including its karst mitigation plan will prevent any significant degradation of those water bodies.

58. WWALS presented no evidence on any of these issues.

## Impacts on Karst Terrain and the Floridan Aquifer

59. Before and during the Application review, both FGS and the Suwannee River Water Management District raised concerns about impacts on the karst terrain through which the Pipeline passes and the impacts to the Floridan aquifer. [Pet. 5; Pet. 10]. These concerns were fully addressed and resolved during the Application review process. [Paragraphs 29-36 above; V, 561].

60. HD Drilling under the rivers could inadvertently release drilling fluids or grout into the Floridan aquifer. However substantial impact on the Floridan aquifer are unlikely for a number of reasons.

61. First, the Floridan aquifer contains 2.2 quadrillion gallons of fresh water. The amount of drilling fluid released into the aquifer if a mishap occurred is infinitesimal in comparison. [V, 562-563]. Second, the drilling fluid is just bentonite-a naturally occurring clay. [V, 563; JE 5, 5-1772].

62. Third, the drillers have an incentive to avoid losing grout and drilling fluid-it cost them money. [V, 563-564]. Fourth, geophysical and geotechnical studies conducted to characterize the sites do not suggest that any caves or conduit systems will be encountered. [JE V, 5-1772]. Finally, the karst mitigation plan requires careful monitoring of drilling mud and grout. [V, 564; JE 5, 5-1797 to 5-1799].

63. Natural gas pipelines, including a 36 inch diameter pipeline, have been installed under the Suwannee River.

64. Both Interstate 10, Interstate 75, and railroads have been successfully constructed on top of karst terrain. These highways and railroads bear loads much higher than would be imposed by a pipeline. [VI, 655-657].

65. The only place the Pipeline crosses above a cave system is at the Falmouth cave, and it will be installed by trenching near the surface with no impacts to the cave system. [VI, 659].

#### State Lands Authorization

66. The Pipeline Project is not contrary to the public interest. It is beneficial. [Paragraphs 51-53 above].

67. Sabal Trail will install the Pipeline in trenches, which will be backfilled. Impacts will be largely temporary. The areas will return to a natural state or mitigation will be provided. [Paragraph 45 above]. Since the Pipeline crosses underneath the rivers, no riparian rights will be adversely affected and the project will not cause adverse impacts to fish and wildlife resources, or public recreation or navigation. [Paragraphs 54-56 above].

68. For the reasons stated above, the project is beneficial to the public.

### III. Respondents' Prima Facie Case

69. The relevant portions of the permit file, including the permit application, responses to requests for additional information, other supporting information, the Notice of Intent, and the Permit were admitted into evidence at the final hearing.

70. With the admission of these documents into evidence, Sabal Trail established its prima facie case demonstrating its entitlement to the Permit. See § 120.569(2)(p), Fla. Stat.

### CONCLUSIONS OF LAW

#### Jurisdiction

71. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

72. The Department is authorized by Part IV, Chapter 373, Florida Statutes, and Title 62, Florida Administrative Code, to implement a regulatory program to prevent harm to the water resources of the District, and to administer and enforce Part IV, Chapter 373, Florida Statutes.

73. The Department is also authorized by Chapter 253, Florida Statutes, and Chapter 18-21, Florida Administrative Code, to review and authorize certain uses of state-owned submerged lands.

### De Novo Proceeding

74. This is a de novo proceeding intended to formulate final agency action, not to review action taken earlier and preliminarily. See, Young v. Dep't of Cmty. Affairs, 625 So. 2d 831, 833 (Fla. 1st DCA 1991). Therefore, new information regarding the project was admitted into evidence and was properly considered in these proceedings. WWALS' focus at this stage of these proceedings on the purported inadequacy of the Department's prior application review is misplaced. See, e.g., Hamilton Cnty. Comm'rs v. Dep't of Env'tl Reg., 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991); and Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 785 (Fla. 1st DCA 1981).

75. If WWALS has standing, the dispositive issue is whether the evidence presented at the final hearing provided reasonable assurance that Sabal Trail's project will not violate applicable laws and rules. See, McDonald v. Dep't of Banking & Fin., 346 So.2d 569, 584 (Fla. 1st DCA 1977).

### Burden and Standard of Proof

76. Since chapter 373, Florida Statutes, governs the issuance of the Permit, subsection 120.569(2)(p) governs the order of procedure and the parties' respective burdens in this case.

77. Under subsection 120.569(2)(p), Sabal Trail had the initial burden of going forward to demonstrate its prima facie case, and then the burden shifted to Petitioner to go forward with



the evidence as the ultimate burden of persuasion rests with Petitioner to prove its case in opposition by a preponderance of the competent substantial evidence. § 120.569(2)(p), Fla. Stat. Sabal Trail proved its prima facie case as described in that subsection; WWALS did not meet its ultimate burden of persuasion.

78. The Sovereign Submerged Lands Authorization was issued under chapter 253. The applicant for such an authorization has the burden of ultimate persuasion to demonstrate its entitlement to the authorization. See, Fla. Dep't of Transp. V. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). The applicant's burden is to provide reasonable assurances, not absolute guarantees. See, Save Anna Maria, Inc. v. Dep't of Transp., 700 So. 2d 113, 117 (Fla. 2d DCA 1997); see also, Metro. Dade Cnty., 609 So. 2d 644, 648 (Fla. 3d DCA 1992); and McCormick v. City of Jacksonville, Case No. 88-2283 (Fla. DOAH Oct. 16, 1989).

79. Speculation by WWALS about what "might" occur is not sufficient to carry the petitioner's ultimate burden of persuasion. Jacobs v. Far Niete II, LLC, Case No. 12-1056 (Fla. DOAH April 26, 2013); FINR II, Inc. v. CF Indus., Inc., Case No. 11-6495 (Fla. DOAH April 30, 2012); and see also Menorah Manor, Inc. v. Ag. for Health Care Admin., 908 So. 2d 1100, 1104 (Fla. 1st DCA 2005).

80. Sabal Trail met its ultimate burden of persuasion as to the Sovereign Submerged Lands Authorization.

## Standing

81. Persons whose substantial interests will be affected by the proposed agency action have standing to participate in a proceeding. See, §§ 120.52(13)(b), 120.569 and 120.57, Fla. Stat.

82. In order to have standing to participate as a party, a person must have substantial rights or interests that reasonably could be affected by the agency's action. See, St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011).

83. To establish associational standing, Petitioner must prove that a substantial number of its members, but not necessarily a majority, have a substantial interest that reasonably could be affected, that the subject matter of the proposed activity is within the general scope of the interests and activities for which the organization was created, and that the relief requested is of the type appropriate for the organization to receive on behalf of its members. See, Fla. Home Builders Ass'n v. Dep't of Labor & Emp't Sec., 412 So. 2d 351 (Fla. 1982); Fla. League of Cities, Inc. v. Dep't of Env'tl Reg., 603 So. 2d 1363 (Fla. 1st DCA 1992).

84. While WWALS has adequately demonstrated that the environmental effects of the Pipeline Project are within its general scope of interests and activities and that the relief requested (denial of the Permit) is appropriate for the

organization to receive on behalf of its members, WWALS lacks standing because it did not show that a substantial number of its members, not necessarily a majority, have substantial interests that would be affected by the project.

85. Several considerations lead to the conclusion that WWALS lacks standing: (I) WWALS showed that it has 46 or more members, (II) fewer than ten of WWALS' members demonstrated that they have substantial interests, (III) WWALS showed that fewer than five of its members would be affected by the Pipeline Project, and (IV) WWALS lacks standing under section 403.412, Florida Statutes.

I. Number of WWALS Members

86. While no witness testified exactly how many members WWALS has WWALS specifically identified 46 people who, at least as of the dates of the final hearing, were members. Some testimony indicated that the total membership of WWALS exceeds 46, but by an unknown amount.

87. Of the 46 specifically identified WWALS members, 15 testified at the final hearing. WWALS presented no competent, substantial, non-hearsay evidence<sup>4</sup> as to where the remaining 31

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<sup>4</sup> Petitioner's Exhibit 11 contains a list of 26 members and purports to reflect where those members reside and which of those members live within 1,000 feet of the proposed Pipeline Route. However, Petitioner's Exhibit 11 was only admitted for the names of those 26 members, and the other information in that exhibit was not admitted; that remaining information is

non-testifying WWALS members reside, whether they own property along the proposed route of the Pipeline, when they became members of WWALS, whether they recreate in the area, what their substantial interests are in the outcome of these proceedings and how the proposed Pipeline would affect their substantial interest. In fact, many of these questions also went unanswered for the 15 members who testified.

## II. WWALS Members with Cognizable Substantial Interests

88. Only the Landowners and members who recreate in the area of the Pipeline's proposed route have substantial interests that are cognizable in these proceedings. Conversely, members whose only interests involved their business concerns do not have "substantial interests" that are cognizable in these proceedings. See, Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1085 (Fla. 2d DCA 2009) (citing Agrico Chem. Co. v. Dep't of Env'tl. Reg., 406 So.2d 478, 482 (Fla. 2d DCA 1981)).

89. Of the 46 or more WWALS members, there was evidence that only four own property that would be traversed by the Pipeline. Three of those four Landowners were not members of WWALS when the Re-Amended Petition was filed, and those three

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uncorroborated hearsay, in any case. [VI, 626].

members should not be included in the count of WWALS' substantially affected members.

90. Five additional members testified that they recreate in the area of the Pipeline's proposed route, but WWALS provided no competent, substantial, non-hearsay evidence to show how the Pipeline Project would impact those five members' recreational interests, if at all.

### III. Members with Substantial Interests that would be Affected

91. WWALS demonstrated that the Project would affect the substantial interests only of the four landowners. Moreover, as previously noted, three of those four people were not WWALS members at the time the Re-Amended Petition was filed. Those three should not be included in the tally of WWALS' substantially affected members.

92. The vague or speculative concerns WWALS offered regarding the project's effects on recreation are not sufficient to confer standing. Speculation by WWALS about what "might" occur is not sufficient to carry its ultimate burden of persuasion. See, e.g., Jacobs v. Far Niete II, LLC, Case No. 12-1056 (Fla. DOAH Apr. 26, 2013); FINR II, Inc. v. CF Indus., Inc., Case No. 11-6495 (Fla. DOAH Apr. 30, 2012); see also Menorah Manor, Inc. v. Ag. for Health Care Admin., 908 So. 2d 1100, 1104 (Fla. 1st DCA 2005).

93. Therefore, WWALS failed to demonstrate that the Pipeline Project would affect the interests of the five members who testified that they recreate in the area, and those five members should not be included in the tally of WWALS' substantially affected members.

94. Petitioner thus proved only that a single member of WWALS had a substantial interest that the project would affect. A single member does not constitute a "substantial number" for purposes of associational standing. See, e.g., Conservation Alliance of St. Lucie Cnty., Inc. v. Ft. Pierce Utilities Auth. & Dep't of Env'tl Prot., Case No. 09-1588, 2013 WL 2371793, at \*14-15 (Fla. DOAH May 24, 2013).

95. Even if WWALS is allowed to include of the three Landowners who did not become members until after the Re-Amended Petition was filed, only four members have substantial interests that WWALS demonstrated could be affected by the project. Four out of more than 46 members is insufficient to confer associational standing. Associations have been found to lack standing even in cases where they were shown to have more than quadruple that number of substantially affected members. See, Fla. Wildlife Fed'n v. CRP/HLV Highlands Ranch, LLC and Dep't of Env'tl Prot., Case No. 12-3219, 2013 WL 1624300, at \*26 (Fla. DOAH April 11, 2013) (19 members is not a substantial number for purposes of proving associational standing).

96. Assuming that WWALS has exactly 46 members, rather than a greater number as Mr. Quarterman suggested,<sup>5</sup> four substantially affected members amounts to just over 8% of WWALS' total membership. In Lambou v. Department of Environmental Protection, Case No. 02-4601, 2003 WL 21467299, at \*25 (Fla. DOAH June 24, 2003) the ALJ found that four members, composing less than 10% of the total membership, "can hardly be said to be substantial" for purposes of establishing associational standing. See also, Fla. Ass'n of Med. Equip. Serv. v. Ag. for Health Care Admin., Case No. 02-1400, 2002 WL 31440708, at \*10 (Fla. DOAH Oct. 18, 2002) (50 out of 300 members – over 16% of membership – was insufficient to show a substantial number of affected members for purposes of associational standing); and Golden Gate Area Taxpayers Assoc. v. Collier Cnty., City of Naples & S. Fla. Water Mgmt. Dist., Case No. 89-2100, 1989 WL 644472, at \*4 (Fla. DOAH Nov. 22, 1989) (showing that, at best, 13 out of 59 members – about 22% of the membership – have substantial interests that would be affected is insufficient to establish associational standing).

IV. Standing under Section 403.412, Florida Statutes

97. In its Re-Amended Petition, WWALS cites section 403.412(5), Florida Statutes, which allows a citizen to intervene

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<sup>5</sup> The Re-Amended Petition states that WWALS has 85 members.

in an ongoing 120.569 or 120.57 proceeding by filing a verified pleading but "this section does not authorize a citizen to institute, initiate, petition for, or request a proceeding under 120.569 or 120.57." § 403.412(5), Fla. Stat., (emphasis added).

98. WWALS cannot rely on subsection 403.412(5) to establish standing since WWALS initiated this proceeding (rather than acting as an intervenor. Moreover, WWALS is not a citizen of Florida, and its Re-Amended Petition is not verified.

99. Similarly, as a Georgia corporation, WWALS cannot rely on subsection 403.412(6) to establish standing, since that provision grants standing only to Florida corporations. §403.412(6), Fla. Stat.; and see also, Fla. Wildlife Fed'n v. Dep't of Env'tl Reg., 390 So. 2d 64, 67-68 (Fla. 1980) (only private and corporate citizens of Florida can claim standing under 403.412(5)); accord, Legal Env'tl Assistance Found. v. Dep't of Env'tl Prot., 702 So. 2d 1352 (Fla. 1st DCA 1997) (same).

100. WWALS failed to demonstrate standing. Nevertheless, WWALS received a full and fair opportunity to present its case and failed to carry its ultimate burden of persuasion.

Environmental Resource Permit and Proprietary Authorization

101. Chapter 373, Part IV, Florida Statutes, rule chapter 62-330, Florida Administrative Code, and the Applicant's Handbook, adopted by reference in rule chapter 62-330, Florida



Administrative Code, establish the criteria for issuance or denial of a requested Environmental Resource Permit (ERP).

102. Section 373.414(1) requires an applicant for an ERP to provide reasonable assurance that the proposed activity will not violate state water quality standards, and that any activities in, on, or over surface waters or wetlands, other than activities in or significantly degrading an OFW, is not contrary to the public interest. This criterion applies to all but one small area of wetlands adjacent to the Santa Fe River crossing.

103. Sabal Trail established that its project will not cause any water quality violations. Although it is possible that some bentonite could escape into groundwater resulting in the possibility of some turbidity in groundwater, Sabal Trail established that this bentonite is unlikely to reach surface water or to result in a violation of the surface water criteria for turbidity. Any potential impacts would be temporary. WWALS did not meet its burden of establishing that the Project will result in a water quality violation.

104. Section 373.414(1)(a) sets forth the criteria to be considered in determining whether a proposed project is not contrary to the public interest. Sabal Trail satisfied these criteria. The Project will have no adverse effects on public health, safety, or welfare, or the property of others. Although there is some possibility that the HD Drilling crossings of the

Suwannee and Santa Fe Rivers could result in temporary impacts to them, Sabal Trail has taken into account those contingencies that could reasonably be expected. Hoffert v. St. Joe Paper Co., 12 FALR 4972, 4987 (Fla. DOAH October 29, 1990); Alafia River Basins Stewardship Council, Inc. v. S.W. Fla. Water Mgmt. Dist., Case No. 98-4295, 1999 WL 1486358 (Fla. DOAH July 2, 1999); Crystal Springs Recreational Preserve, Inc. v. S.W. Fla. Water Mgmt. Dist., Case No. 99-1415, 2000 WL 248392 (Fla. DOAH Jan. 27, 2000).

105. The Department has included conditions in the Permit that were requested by the Florida Fish and Wildlife Conservation Commission to address the conservation of fish and wildlife, including endangered and threatened species. There will be no adverse effect on navigation, the flow of water, or on erosion or shoaling because the river crossings will be accomplished by drilling under them. For the same reason, the Project will not cause any adverse effect on fishing, recreational values, or marine productivity in the vicinity of the crossings. The activities are primarily temporary in nature, and Sabal Trail will provide mitigation for those that are not. The Project will not adversely affect any archeological or historical resources. Finally, Sabal Trail will provided mitigation for all functions of wetlands that will be impaired by the project. Weighing these factors, the Project is not contrary to the public interest

106. If an activity significantly degrades or is in an Outstanding Florida Water, the applicant must provide reasonable assurance that the activity in OFWs will be clearly in the public interest, using the same seven criteria. Reasonable assurance that a proposed activity is clearly in the public interest does not require a demonstration of need or net public benefit. See, 1800 Atlantic Developers v. Dep't of Env'tl. Reg., 552 So. 2d 946, 957 (Fla. 1st DCA 1989).

107. There is no evidence that the Project will significantly degrade any OFW. The area that the Project will impact within the OFW is a small area of wetland adjacent to the Santa Fe River that will be temporarily affected by the horizontal directional drilling. Impacts at this location will reduce potential impacts to the river by allowing for the drilling under the river.

108. Because the applicant has demonstrated compliance with the criteria in section 373.414(1), Florida Statutes, and because all other applicable requirements are met, the project is considered to be necessary and desirable under circumstances which are clearly in the public interest. R. 62-302.300(17), Fla. Admin. Code

109. Sabal Trail also satisfied the criteria in rule 18-21.004, Florida Administrative Code, for issuance of an easement to use sovereign submerged lands. The Project is not contrary to

the public interest; in fact it is beneficial since it will provide increased fuel supply stability, diversity, and other economic benefits. Sabal Trail will install the Pipeline in trenches, which will be backfilled. Impacts will be largely temporary. The areas will return to a natural state or mitigation will be provided. Because crossings of the Suwannee and Santa Fe Rivers will be accomplished by drilling under them, the Pipeline Project will not cause adverse impacts to fish and wildlife resources, public recreation, or navigation and will not affect any person's riparian rights.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that:

1. The Department of Environmental Protection issue a Final Order approving the issuance of Environmental Resource Permit No. 0328333-001 to Sabal Trail Transmission, LLC; and

2. The Department of Environmental Protection grant an easement to Sabal Trail Transmission, LLC, to use sovereign submerged lands in connection with the Sabal Trail Natural Gas Pipeline.

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Respectfully submitted on this 16th day of November 2015.

STATE OF FLORIDA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION



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**CERTIFICATE OF SERVICE**

I CERTIFY that a true copy of the foregoing was **emailed only** to Bill Wohlsifer, Counsel for WWALS Watershed Coalition, Inc., 1100 East Park Ave., Tallahassee, Florida 32301, at william@wohlsifer.com; Richard S. Brightman, Timothy M. Riley, and H. French Brown, IV, Hopping Green and Sams, P.O. Box 6526, Tallahassee, Florida, 32314-6526, at richardb@hgslaw.com, timothy@hgslaw.com, frenchb@hgslaw.com, on this 16th day of November 2015.



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