STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF COMMUNITY AFFAIRS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE No. 89-3566RP
	)	
WITHLACOOCHEE REGIONAL PLANNING COUNCIL,	)	
	)	
Respondent.	)	
_____	)	

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, William J. Kendrick, held a formal hearing in the above-styled case on August 4, 1989, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Richard Grosso, Esquire
Department of Community Affairs
2740 Centerview Drive
Tallahassee, Florida 32399-2100

For Respondent: Phil Trovillo, Esquire
Suite 8
1107 East Silver Springs Boulevard
Ocala, Florida 32670

STATEMENT OF THE ISSUES

The issues for determination are whether petitioner, Department of Community Affairs, has standing to maintain this action, and whether the respondent's, Withlacoochee Regional Planning Council's, proposed amendments to Rule 29E-11.001, Florida Administrative Code, constitute an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

This is a rule challenge brought under the provisions of Sections 120.54(4) and 186.508(3), Florida Statutes, to challenge the validity of respondent's proposed amendment of its regional policy plan. The gravamen of petitioner's challenge is its contention that the proposed amendments are inconsistent with the state comprehensive plan, and that the amendments fail to establish adequate standards for the Commission's decisions or vest unbridled discretion in the Commission

At hearing, the petitioner called as witnesses: Charles Harwood; Bob Nave; Tom Beck; Greg Daugherty; and Perry Oldenburg, accepted as an expert in wetland ecology. Petitioner's exhibits 1-6 were received into evidence. Respondent

called Nick Bryant, Ralph Shepard, and Charles Harwood as witnesses. Respondent's exhibits 1-9 were received into evidence.

The parties declined to file a transcript of the hearing, and were granted leave until August 28, 1989, to file proposed findings of fact. Accordingly, the parties waived the requirement that a final order be rendered within thirty days of the date of hearing. Rule 221-6.031(2), Florida Administrative Code. The parties' proposed findings are addressed in the appendix to this final order.

FINDINGS OF FACT

The parties

1. Petitioner, Department of Community Affairs (Department), is the state land planning agency under the provisions of Chapter 163, Part II, Florida Statutes, [the "Local Government Comprehensive Planning and Land Development Regulation Act" (LGCPA)]. As the state land planning agency for the LGCPA, the Department is charged by law with the duty to provide technical assistance to local governments in preparing comprehensive plans and with the duty to ascertain whether local comprehensive plans are in compliance with the provisions of Chapter 163, Part II, Florida Statutes. Inherent in the Department's determination of compliance is a finding that the local government comprehensive plan elements are consistent with the state comprehensive plan and the appropriate regional policy plan. Where, as here, a comprehensive regional policy plan is inconsistent with the state comprehensive plan, the performance of the Department's mandated duty is stymied absent the ability to challenge the offensive parts of the regional policy plan, and thereby bring the planning process into harmony. Accordingly, as the state land planning agency charged with the responsibility of implementing the LGCPA, the Department has a real and immediate interest in assuring consistency between the state comprehensive plan and the various regional policy plans.

2. Respondent, Withlacoochee Regional Planning Council (Council), is a regional planning council established pursuant to Section 186.504, Florida Statutes, and consists of the Counties of Citrus, Hernando, Levy, Marion, and Sumter. Rule 29E-1.001, Florida Administrative Code. As a regional planning council, the Council is charged by law with the duty to develop a comprehensive regional policy plan that is consistent with, and which furthers, the goals and policies of the state comprehensive plan. Section 186.507(1), Florida Statutes.

The existent comprehensive regional policy plan and the proposed amendments

3. The Council has, consistent with the requirement of Section 186.507(1), Florida Statutes, adopted its comprehensive regional policy plan by rule. That rule, codified as Rule 29E- 11.001, Florida Administrative Code, adopts and incorporates by reference the Council's comprehensive regional policy plan, with an effective date of April 13, 1989.

4. On June 9, 1989, the Council duly noticed its intent to amend Rule 29E-11.001, Florida Administrative Code, and published notice thereof in volume 15, number 23, of the Florida Administrative Weekly. Pertinent to this case, the proposed amendments would alter the policies of the Council's comprehensive plan as they relate to resource extraction (mining) in environmentally sensitive areas.

5. On June 30, 1989, the Department filed a timely petition with the Division of Administrative Hearings, pursuant to Section 120.54(4), Florida Statutes, contending that the proposed amendments to Rule 29E-11.001, Florida Administrative Code, were an invalid exercise of delegated legislative authority. The gravamen of the Department's challenge to the validity of the proposed rule amendments is its contention that the amendments are not consistent with the state comprehensive plan policies as they relate to mining in environmentally sensitive areas, and that the amendments fail to establish adequate standards for the Commission's decisions or vest unbridled discretion in the Commission.

6. The policies of the state comprehensive plan pertinent to this case, as set forth in Section 187.201, Florida Statutes, are as follows:

> (10) NATURAL SYSTEMS AND RECREATIONAL LANDS
>
> * * *
>
> (b) Policies -
> 1. Conserve forests, wetlands, fish, marine life, and wildlife to maintain their environmental, economic, aesthetic, and recreational values.
>
> * * *
>
> 3. Prohibit the destruction of endangered species and protect their habitats.
>
> * * *
>
> 7. Protect and restore the ecological functions of wetlands systems to ensure their long-term environmental, economic, and recreational value.
>
> * * *
>
> (14) Mining -
>
> * * *
>
> (b) Policies -
> 5. Prohibit resource extraction which will result in an adverse effect on environmentally sensitive areas of the state which cannot be restored.
> (Emphasis added)

7. The Council's proposed amendments to Rule 29E-11.001, Florida Administrative Code (the comprehensive regional policy plan), are hereinafter set forth, with the proposed amendments in clear text and the existing language of the rule that is to be amended lined through. In such format, the proposed amendments to the existing rule that are under challenge in this proceeding provide as follows:

> 14.3.1.1. Regional Policy:
> Resource extraction which will result in an adverse effect on environmentally sensitive areas that cannot be reclaimed or restored to beneficial use shall be prohibited. Examples of such environmentally sensitive areas are: wetlands, rivers, streams, lakes, springs, coastal floodplains, endangered species habitat, prime agricultural lands, prime

> groundwater recharge areas, and historically significant sites. (Emphasis added)
> Wetlands, rivers, streams, lakes, springs, coastal, floodplains, endangered species' habitat, prime agricultural lands, prime groundwater recharge areas, and historically significant sites shall be identified and protected by a prohibition on mining activities within those areas and the establishment of buffer zones around them.

Additionally, the Council proposes to amend its implementation strategy as to Regional Policies 14.3.1.1, 14.3.1.2, and 14.3.1.3, as follows:

> GROWTH MANAGEMENT
> (1) Local governments with assistance from other agencies should inventory their wetlands, rivers, streams, lakes, springs, coastal floodplains, endangered species' habitat, prime agricultural lands, prime groundwater recharge areas, historically significant sites, and important mineral reserves.
> (2) Local governments should adopt comprehensive plan amendments and ordinances that 1) prohibit mining activities in environmentally sensitive areas if they cannot be reclaimed or restored to beneficial use; define buffer zones around the areas and resources identified above and restrict mining activities to land outside those buffers, 2) require identification and protection of archaeological properties on sites proposed for mining; 3) restrict the use of land that contains economically recoverable mineral deposits and lies outside environmentally sensitive areas to activities that will not preclude later extraction of those minerals. (Emphases added)
> INTERGOVERNMENTAL COORDINATION
> (1) DNR, GFC, FWS, SCS, DER and WMDs, within their respective areas of expertise, should help local governments to identify and map the above areas and resources and to define appropriate buffer widths.

8. Contrary to the provisions of the state comprehensive plan which prohibit resource extraction that will adversely effect environmentally sensitive areas unless they can be "restored," the proposed amendments would only prohibit such activities if the environmentally sensitive areas could not be "reclaimed or restored to beneficial use." The terms "restored" and "reclaimed," although not defined by the proposed amendments, have commonly accepted meanings. To restore a site means to put back the same thing that had previously existed, i.e.: restore the type, nature, and function of the ecosystem to the condition in existence prior to mining. To reclaim a site is to alter its character such that beneficial use can be made of it, even though the character or function of the site may be entirely different from that which

previously existed. To "restore to beneficial use" is a phrase consistent with the definition of "reclamation," and not consistent with the definition of "restoration" as that term is commonly defined. Accordingly, it is found that the proposed amendments to Rule 29E-11.011, Florida Administrative Code, are patently inconsistent with the policies of the state comprehensive plan that relate to the protection of environmentally sensitive areas and, more particularly, the policy of the state comprehensive plan that prohibits resource extraction in such areas unless they can be restored.

9. Notwithstanding the patent inconsistency between the proposed amendments and the state comprehensive plan, the Council argued that it "intends" to interpret the proposed amendment consistent with the state plan. To this end, the Council offered the testimony of its chairman, Nick Bryant, who testified that he would interpret the proposed amendment to require that the post-mining beneficial use be the same beneficial use that existed prior to mining. The Council's vice chairman, Ralph Shepard, testified, however, that he would not interpret the proposed amendment to require that the property be returned to the same character it enjoyed prior to mining, but only that it be reclaimed to the extent necessary to provide a beneficial use. Under such interpretation, the proposed amendment would allow, for example, the total destruction of a wetland by mining even if the net result would be a borrow pit in which people could swim and water ski.

10. The Council's contention that it would interpret the proposed amendment consistent with the state plan is not only irrelevant in view of the patent inconsistency which exists between the proposed amendments and the state plan, but is also not credible. Rather, the clear impact of the rule and the Council's "intent" may be readily gleamed from its notice of proposed rulemaking, federal comparison statement, and economic impact statement. As stated in the Council's notice of proposed rule making:

> PURPOSE AND EFFECT: The rule is being amended for the purpose of replacing the Comprehensive Regional Policy Plan (CRPP) previously adopted by reference, with a new version in which a policy in the mining chapter and its associated implementation strategies have been changed. The effect of the amendment will be to remove a prohibition on mining in areas that are environmentally sensitive or historically significant.
>
> * * *
>
> SUMMARY OF THE ESTIMATE OF ECONOMIC IMPACT: Opportunities for economic benefit from resource extraction will be afforded land owners and the mining industry in environmentally sensitive areas... Costs will be borne by the general public as a result of lost environmental functions and values.... (Emphasis added)

As stated in the Council's federal comparison statement:

> The revised policy is less restrictive than the current federal wetlands policy of avoiding impacts where there are alternatives, and requiring that unavoidable

> impacts be fully offset in order to achieve a goal of no net loss as defined by acreage and function.

And, as stated in the council's economic impact statement:

> A potential for economic benefit from resource extract ions will be created in environmentally sensitive areas where the CRPP restricts other development activities. Costs will occur in the form of lower water quality and the loss of wildlife habitat and other functions presently provided by the sites where mining will be allowed.
>
> * * *
>
> Expectation of benefits and costs to affected parties is based on the assumption that at least some local governments in the region will choose not to be more stringent than the CRPP, and will therefore permit mining where consistency with the Regional Plan would previously have required its prohibition.

11. While not conceding that any inconsistency exists between the proposed amendments and the state comprehensive plan, the Council suggests that, if any inconsistency exists, other existing policies within its plan obviate any inconsistency. In support of its argument, the Council points primarily to policies 14.1.1.1, 14.1.1.3, and 14.3.1.6. An examination of such policies, as well as the Council's entire comprehensive plan, demonstrates, however, that no other policy or policies cure the inconsistency that exists between the proposed amendments and the state comprehensive plan.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Sections 120.54(4) and 186.508(3), Florida Statutes.

13. Pertinent to this proceeding, Section 120.54(4)(a), Florida Statutes, provides:

> Any substantially affected person may seek an administrative determination of the invalidity of any proposed rule on the ground that the proposed rule is an invalid exercise of delegated legislative authority.

The Department, a state department created pursuant to Section 120.18, Florida Statutes, is a person as defined by Section 120.52(13), Florida Statutes. Accordingly, the Department has standing to maintain this action provided it can demonstrate that it is substantially affected by the proposed rule

14. To demonstrate that it is substantially affected by the proposed rule, the Department must establish that, as a consequence of the proposed rule, it will suffer injury in fact, and that the injury is one that is subject to protection in the proceeding by virtue of a rule, statute or constitutional

provision. Florida Medical Association, Inc. v. Department of Professional Regulation, 426 So.2d 1112 (Fla. 1st DCA 1983). Further, the injury must not be speculative, nonspecific and hypothetical, and lacking in immediacy and reality. Florida Department of Offender Rehabilitation v. Jerry, 353 So.2d 1230 (Fla. 1st DCA 1978). Here, for the reasons set forth in the findings of fact, the Department, as the state land planning agency under the provisions of Chapter 163, Part II, Florida Statutes, has, as a matter of law, demonstrated standing to challenge a regional comprehensive policy plan that is inconsistent with the state comprehensive plan.

15. To prevail in this case, the burden is upon the Department to demonstrate that the proposed rules are an invalid exercise of delegated legislative authority. An invalid exercise of delegated legislative authority is defined by Section 120.52(8), Florida Statutes, as follows:

> "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one or more of the following apply:
>
> * * *
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(7);
> (c) The rule enlarges, modifies, or contravenes, the specific provisions of law implemented, citation to which is required by s. 120.54(7);
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency....

16. Pertinent to this case, Section 186.507(1), Florida Statutes, provides:

> A comprehensive regional policy plan. shall be consistent with and shall further, the state comprehensive plan; and shall implement and accurately reflect the goals and policies of the state comprehensive plan....

17. As heretofore noted in the findings of fact, the state comprehensive plan policy on mining "prohibit[s] resource extraction which will result in an adverse effect on environmentally sensitive areas of the state which cannot be restored." Section 187.201(14), Florida Statutes. The Council's proposed rules do not, however, prohibit mining in environmentally sensitive areas that cannot be "restored" but, rather, only prohibit such activities if the area cannot be "reclaimed or restored to a beneficial use." Since "reclaimed or restored to a beneficial use" are not words that are synonymous with "restored," but in fact impose a significantly lower standard for mining activities in environmentally sensitive areas, the proposed rules are not consistent with, and do not implement and accurately reflect the policies of the state comprehensive plan that relate to the protection of environmentally sensitive areas and, more

particularly, the policy of the state comprehensive plan that prohibits resource extraction in such areas unless they can be restored.

18. Under the circumstances, it is concluded that the proposed rules are an invalid exercise of delegated legislative authority. Section 120.52(8)(b), (c) and (d), Florida Statutes.

CONCLUSION

Based on the foregoing findings of fact and conclusions of law, it is

ORDERED that the proposed amendments to Rule 29E-11.001, Florida Administrative Code, are invalid.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this 30th day of October 1989.

WILLIAM J. KENDRICK
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of October 1989.

Appendix

The Department's proposed findings of fact are addressed as follows:

1. Addressed in paragraph 1.
2. Supported by competent proof, but not necessary to the result reached.
3. Addressed in paragraph 2.
4. Supported by competent proof, but not necessary to the result reached.
5. Addressed in paragraph 3.
6. Supported by competent proof, but not necessary to the result reached.
7-9. Addressed in paragraph 1.
10. Supported by competent proof, but not necessary to the result reached.
11-12. Not shown to be relevant.
13. Addressed in paragraph 5.
14. Addressed in paragraph 6.
15-16. Addressed in paragraph 7.
17. Addressed in paragraph 8.
18-21. Addressed in paragraph 10.
22-26. Addressed in paragraph 8.
27-28. Addressed in paragraphs 9 and 10.
29. Addressed in paragraph 2.
30-32. Addressed in paragraphs 8-10, otherwise rejected as not necessary to the result reached.
33-37. Addressed in paragraph 11.
38. Addressed in paragraphs 8-10.

The Commission's proposed findings of fact are addressed as follows:

1. Rejected as not a finding of fact. Addressed, however, in paragraphs 7-10.
2. Addressed in paragraph 11.
3. Rejected as not supported by competent proof. See paragraphs 9-10.
4. Addressed in paragraph 8.
5. Addressed in paragraphs 7-9.
6. Addressed in paragraph 8.
7. Addressed in paragraphs 8 and 11.
8. Addressed in paragraph 1, and paragraphs 2-3 of the conclusions of law.
9-10. Addressed in paragraphs 6 and 7 of the conclusions of law.

COPIES FURNISHED:

Richard J. Grosso, Esquire
C. Laurence Keesey, Esquire
Department of Community Affairs
2740 Centerview Drive
Tallahassee, Florida 32399-2100

Phil Trovillo, Esquire
Withlacoochee Regional Planning
Council
1241 Southwest Tenth Street
Ocala, Florida 32674-2798

Thomas G. Pelham, Secretary
Department of Community Affairs
2740 Centerview Drive
Tallahassee, Florida 32399-2100

Liz Cloud, Chief
Bureau of Administrative Code
Room 1802, The Capitol
Tallahassee, Florida 32399-0250

Carroll Webb, Executive Director
Administrative Procedures Committee
120 Holland Building
Tallahassee, Florida 32399-1300 Case No. 89-3566RP

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68. FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DIVISION OF ADMINISTRATIVE HEARINGS AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.