

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE SIERRA CLUB, INC., and the)
FLORIDA WILDLIFE FEDERATION, INC.,)
)
Petitioners,)
)
vs.) CASE NO. 90-5835RX
)
ST. JOHNS RIVER WATER)
MANAGEMENT DISTRICT,)
)
Respondent,)
)
and)
)
E. I. DU PONT DE NEMOURS &)
COMPANY (INC.) and ASSOCIATED)
MINERALS (USA) INC.,)
)
Intervenors.)
_____)

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Mary Clark, held a formal hearing in the above-styled case on October 16, 1990, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Peter B. Belmont, Esquire
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For Respondent: Wayne E. Flowers, Esquire
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For Intervenors: Frank E. Matthews, Esquire
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STATEMENT OF THE ISSUES

This is a challenge to certain administrative rules adopted by the St. Johns River Water Management District relating to permitting criteria for isolated wetlands.

Section 373.414, F.S. mandates that permitting criteria for isolated wetlands be adopted by water management districts, by rule, by March 31, 1987. The statute also includes four more specific requirements for those rules.

Petitioners contend that St. Johns River Water Management District Rule Chapter 40C-4, F.A.C. and the Applicant's Handbook, Management and Storage of Surface Waters, adopted as a rule by reference, fail to comply with the statutory mandate and are an invalid exercise of delegated legislative authority by the District.

Respondent, St. Johns River Water Management District, contends that its rules comply with Section 373.414, F.S.. St. Johns River Water Management District contests the standing of Petitioner, the Florida Wildlife Federation, Inc.

Intervenors, E.I. Du Pont De Nemours and Company, Inc. and Associated Minerals (USA), Inc., support the District's position and contest the standing of both Petitioners.

PRELIMINARY STATEMENT

On September 19, 1990, Petitioners, the Sierra Club, Inc., (Sierra) and the Florida Wildlife Federation, Inc., (FWF) filed their petition pursuant to Section 120.56, F.S., challenging the validity of certain existing rules of the Respondent, St. Johns River Water Management District.

E. I. Du Pont De Nemours and Company, Inc., and Associated Minerals (USA), Inc., filed a petition to intervene in the proceeding on October 15, 1990. Intervention was granted, without objection, at the commencement of the hearing; however, participation was limited to cross-examination of witnesses.

Also at the commencement of the hearing, and without objection, Respondent's request for official recognition was granted for the following: Chapters 373 and 378, F.S.; Chapters 16C-37, 40C-1 and 40C-4, F.A.C.; Rules 39-27.003 and 39-27.004, F.A.C.; and Part I, Part II, Section 16, Subsections 18.0, 18.1, 18.2, and 18.3 of Section 18, and Appendix K of the document, Applicant's Handbook: Management and Storage of Surface Water, as incorporated by reference in Rule 40C-4.091, F.A.C..

In support of its petition, Petitioners presented the following witnesses: Joseph Travis, qualified as an expert in the ecology of isolated wetlands; Paul Moler, qualified as an expert in wildlife biology, herpetology and the ecology of isolated wetlands; John Palis, qualified as an expert in zoology; Laurie Anne McDonald, qualified as an expert in zoology and ecology; and Richard Farren.

The District presented the following witnesses: Jeffrey Elledge, qualified as an expert in surface water management and the District's permitting requirements for surface water management systems; Gregory L. Daugherty, qualified as an expert in mine reclamation; and Lawrence Gerry and Glenn Lowe, Jr., both qualified as experts in wetlands ecology and the application of the District's management and storage of surface waters rules as they relate to wetlands.

Petitioners' exhibit #1, and Respondent's exhibits #1-4 were received in evidence.

A transcript of the proceeding was filed on October 30, 1990, and the parties submitted their proposed final orders on November 15, 1990. Findings of Fact recommended by the parties are separately addressed in the attached appendix.

FINDINGS OF FACT

1. Petitioner, Sierra Club, Inc., (Sierra) is a non-profit corporation registered to do business within the state of Florida. It is an international organization, with regional committees, state chapters, and local regional groups. The Florida chapter has 15 regional groups, several of which are located within the jurisdictional boundaries of the St. Johns River Water Management District (SJRWMD). About 6,000 members live within the boundaries of the SJRWMD.

2. The overall purpose of Sierra is to explore, enjoy and protect the natural resources of the earth. Sierra commonly offers outings for the enjoyment and education of its members and the general public. These involve traveling, hiking, birdwatching and other wildlife observation. Part of the outings program includes hiking and viewing of isolated wetlands and wildlife dependent on those wetlands. These outings take place within the SJRWMD.

3. Some Sierra members are actively involved in work related to isolated wetlands, including studies, consulting, and managing of wetlands, some of which are located within the SJRWMD.

4. The Florida Wildlife Federation, Inc. (FWF) is a non-profit corporation registered to do business in the state of Florida. It is comprised of organizations and individual members who support the wise use and management of Florida's natural resources. Sportsmen and naturalists who belong to the club are involved in hunting, fishing, hiking, birdwatching, nature photography and other activities loosely called "naturalizing". These activities take place within SJRWMD boundaries and rely on wildlife species which live in, or are dependent upon, isolated wetlands. FWF attracts membership by publicity of its existence and purpose directed to sportsmen and naturalists.

5. Respondent, SJRWMD, is a political subdivision of the state of Florida, with the authority to regulate, through its permitting process, the management and storage of surface waters (MSSW) within its designated geographical boundaries, pursuant to Part IV of Chapter 373, F.S.

Prior to adoption of the administrative rules in issue in this proceeding, the Florida Department of Environmental Regulation (DER) delegated to Respondent the responsibility for administration of its stormwater rule.

6. Intervenors conduct heavy metal mining operations within the District. These mining operations are regulated pursuant to Chapter 40C-4, F.A.C. and the Applicant's Handbook. Virtually all mining activities exceed existing permitting thresholds and all District wetland criteria apply to the activities.

7. Since 1983, SJRWMD has been regulating wetlands and wetland MSSW impacts, including isolated wetlands, throughout its 19-county area. The rules adopted in 1983 included all wetlands, both isolated and non-isolated.

8. In 1986, the legislature created Section 373.414, F.S., which provided as follows:

373.414 Wetlands.--

(1) By March 31, 1987, for those water management districts to which the department has delegated the responsibility for administration of its stormwater rule, each district shall adopt a rule which establishes specific permitting criteria for certain small isolated wetlands which are not within the jurisdiction of the department for purposes of regulation of dredging and filling. The rule shall include:

(a) One or more size thresholds of isolated wetlands below which impacts on fish and wildlife and their habitats will not be considered. These thresholds shall be based on biological and hydrological evidence that shows the fish and wildlife values of such areas to be minimal;

(b) Criteria for review of fish and wildlife and their habitats for isolated wetlands larger than the minimum size;

(c) Criteria for the protection of threatened and endangered species in isolated wetlands regardless of size and land use; and

(d) Provisions for consideration of the cumulative and offsite impacts of a project or projects.

(2) This section does not affect the authority of the water management districts to regulate impacts on water quality and water quantity.

(3) Until a water management district has adopted a rule to implement the provisions of subsection (1), review of fish and wildlife impacts in small isolated wetlands shall be limited to:

(a) Wetlands that are 5 acres in size or larger; or

(b) Wetlands that are used by a federal or state designated threatened or endangered species; or

(c) Wetlands located within an area of critical state concern designated pursuant to chapter 380; or

(d) Wetlands that are less than 5 acres in size having a cumulative total acreage greater than 30 percent of the total acreage proposed for development, within a development project greater than 40 acres in size.

Section 373.414(3), F.S. (1986) was repealed effective March 31, 1987, the deadline by which the districts were to have their own isolated wetlands rules in place. Sections 373.414(1) and (2), F.S. remain in effect.

9. "Wetlands" is defined in SJRWMD's MSSW rule as:

...hydrologically sensitive areas which are identified by being inundated or saturated by surface or groundwater with a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

Rule 40C-4.021(11), F.A.C.

This definition is repeated in Section 10.7.3 of the Applicant's Handbook.

10. Section 10.7.3 also provides:

Wetlands are important components of the water resource because they serve as spawning, nursery and feeding habitats for many species of fish and wildlife, and because they provide important flood storage and water quality benefits. Not all wetlands provide these benefits, nor do they provide them to the same extent. A wide array of physical and chemical factors affect the functioning of any wetland community.

* * *

11. Small isolated wetlands are totally unique biological systems. They are not small versions of large wetlands. They play two major roles in animal ecology: to harbor diverse species that use the habitat for their entire life cycle, and to provide a productive resource for transient species.

If a wetland is truly isolated, its fish population is generally limited to the smaller-bodied, smaller-mouthed varieties which are limited in their predatory abilities. This permits the abundance of amphibians and invertebrates not found in larger, more permanent wetlands where the fish would rapidly decimate the population.

Amphibians are a cornerstone of the vertebrate food chain. They are food for a variety of snakes, which in turn, are food for hawks.

Wading birds find easy prey as the isolated wetlands begin drying up and contracting. The entire cycle of the pond, from fully wet to dry, is significant.

12. *Ambystoma tigrinum* (tiger salamanders) are hatched and raised in isolated wetlands; they leave, and must return to breed in the same pond. They have a strong homing instinct. Ignorant of intervening events, they are often found spending their honeymoon dodging cars on an apartment complex pavement, seeking in vain the pond of their birth.

13. The SJRWMD adopted Chapter 40C-4, F.A.C. and its Applicant's Handbook to regulate the construction, operation, alteration, removal or abandonment of surface water management systems, to insure that those activities will not harm the water resources of the District and insure that they are consistent with the objectives of the District. Activities which do not meet certain thresholds established in Rule 40C-4.041, F.A.C. do not require a District MSSW permit, including those activities impacting an isolated wetland.

The threshold provisions pre-date Section 373.414, F.S. and still apply. The threshold provisions of Rule 40C-4.041(2)(b), F.A.C., challenged by Petitioners, state as follows:

40C-4.041 Permit Required.

* * *

(b) An individual or general permit is required prior to the construction, alteration, operation, maintenance, abandonment or removal of a surface water management system which:

1. Is capable of impounding a volume of water of forty or more acre feet; or
2. Serves a project with a total land area equal to or exceeding forty acres; or
3. Serves a project with a total land area equal to or exceeding ten acres, when any part of the project is located within the Wekiva River Hydrologic Basin north of State Road 436; or
4. Provides for the placement of twelve or more acres of impervious surface which constitutes 40 or more percent of the total land area; or
5. Provides for the placement of one half acre or more of impervious surface, when any of the impervious surface is located within the Wekiva river Hydrologic Basin north of State Road 436; or
6. Contains a traversing work which traverses:
 - a. A stream or other watercourse with a drainage area of five or more square miles upstream from the traversing work; or
 - b. An impoundment with more than ten acres of surface area; or
7. Contains a surface water management system which serves an area of five or more contiguous acres of a hydrologically sensitive area with a direct hydrologic connection to:
 - a. A stream or other watercourse with a drainage area of five or more square miles; or
 - b. An impoundment with no outfall, which is not wholly owned by the applicant and which is ten acres or greater in size; or
 - c. A hydrologically sensitive area not wholly owned by the applicant.

8. Is wholly or partially located within the Wekiva River Hydrologic Basin's Riparian Habitat Protection Zone as described in paragraph 40C-41.063(3)(e).

The same threshold provisions are contained in Section 3.3.1, Applicant's Handbook, also challenged by Petitioners.

14. In 1987, after passage of Section 373.414, F.S. the District amended its wetland regulations to provide that all wetlands would be evaluated, regardless of size, within the already-established permit thresholds:

A wide variety of wetland habitats exist within the St. Johns River Water Management District. The functions which these habitats serve are dependent on many factors. Biological and hydrological evidence demonstrate that size is not the single determinant of wetland value. Since the District bases its evaluation on wetland functions, the District will review impacts to all wetlands (a zero acre threshold will be employed) in reviewing impacts to fish and wildlife and their habitats for systems requiring a permit from the District.

* * *

10.7.5 Wetland Evaluation
Applicant's Handbook

15. As the result of an objection by the Joint Administrative Procedures Committee (JAPC) stating that the District had failed to comply with Section 373.414(1)(a), F.S., the District amended the zero acre review threshold for isolated wetlands and adopted a 0.5 acre review threshold, based upon biological investigations indicating that wetlands below this size have minimal fish and wildlife value. In all applications for MSSW permits under Chapter 40C-4, the District reviews impacts to isolated wetlands unless those wetlands are less than 0.5 acre in size and are not used by threatened or endangered species.

No permit application, however, is required for projects under the thresholds described in paragraph 13, above, even though those projects might include wetlands larger than 0.5 acres.

Staff of the SJRWMD concedes that the non-regulated isolated wetlands might have significant value and agrees with Petitioner's experts that isolated wetlands found in projects below the Rule 40C-4.041(2)(b), F.A.C. thresholds (called "get-in-the-door" thresholds) could have more than minimal fish and wildlife value.

16. Petitioners challenge the entire Chapter 40C-4, F.A.C. and Applicant's Handbook for non-compliance with Section 373.414(1)(d), F.S. The SJRWMD does not consider, and nothing in its rules require consideration of, cumulative impacts of a series of isolated wetlands included in below-threshold projects even though there could be a negative cumulative impact from the loss of those wetlands.

17. Petitioners challenge section 10.7.4 Wetland Review Criteria, Applicants Handbook, to the extent that it may limit consideration of impacts to isolated wetlands to off-site aquatic and wetland dependent species, unless threatened or endangered species are involved. This section provides in pertinent part:

10.7.4 Wetland Review Criteria

In determining whether a system will meet the objective contained in Paragraph 9.1.1(j) and that part of the criterion contained in Paragraph 10.2.1(e) regarding hydrologically related environmental functions, the District will, except when threatened or endangered species are involved, consider only the impacts to off-site aquatic and wetland dependent species relative to the functions currently being provided by the wetland to these types of fish and wildlife.

This assessment of off-site impacts is based upon a review of pertinent scientific literature, soils and hydrologic information, and a general understanding of the ecological resources of the site. Generally, site specific biological data collection is not required. An applicant must provide reasonable assurance that a proposed system will not cause adverse off-site changes in:

- (a) the habitat of an aquatic and wetland dependent species,
- (b) the abundance and diversity of aquatic and wetland dependent species, and
- (c) the food sources of aquatic and wetland dependent species.

The only exception to limiting review of a system under this Subsection to off-site impacts is where wetlands are used or reasonable scientific judgement would indicate use by threatened or endangered species listed in Sections 39-27.003 and 39-27.004, F.A.C., which are aquatic or wetland dependent. In this instance, both off-site and on-site impacts will be assessed.

18. Petitioners also challenge section 16.1.3(a), Applicant's Handbook, to the extent that it may limit mitigation requirements to off-site impacts. If a project as initially proposed is subject to Respondent's surface water permitting requirements, and as initially proposed fails to meet wetland review criteria, mitigation may be considered as a means of bringing the proposed project within permitting requirements. The challenged portion provides:

16.1.3 Mitigation

- (a) Mitigation is defined here as action or actions taken to offset the adverse effects of a system on off-site functions and in the care of threatened or endangered species, to offset the adverse effects of a system on on-site and off-site functions.

Although there may be a difference in degree of functions performed by isolated wetlands on site, as compared to the degree of functions performed by isolated wetlands off-site, the difference is negligible. Adverse ecological effects on-site will also be felt off-site. In developing its criteria SJRWMD staff could not conceive of a situation where a functioning wetland or isolated wetland would be eliminated and not have an off-site impact.

19. Finally, Petitioners challenge the last paragraph of Section 16.1.4, Applicant's Handbook, related to mitigation for mining projects that fall under the jurisdiction of the Department of Natural Resources (DNR) pursuant to section 378.601, F.S. (heavy mineral extraction). Section 16.1.4, Wetland Creation, Applicant's Handbook, provides guidelines to be used to estimate the extent of wetland creation which may mitigate for the destruction of a unit of wetland. The challenged portion of the section provides:

For lands and mining activities that fall under the jurisdiction of the Florida Department of Natural Resources pursuant to section 378.601, F.S. mitigation or compensation plans that are consistent with the land reclamation policies and criteria approved by that agency will be considered by the District as satisfactory mitigation. (emphasis added).

20. The District is not required to allow mitigation if impacts are so substantial that they cannot be offset. If the District does not consider a DNR reclamation plan as sufficient, the District applies its wetland review criteria in section 10.7.4, Applicant's Handbook. For heavy mineral mining, DNR requires one-to-one mitigation for every wetland, regardless of type, that is disturbed by the zoning activity, and the restoration of wildlife habitat, including threatened or endangered species. Heavy mineral mining, in contrast to other mining such as phosphate, has far less impact on the environment. This is reflected in the success which has been experienced in restoring wetlands disturbed by heavy mineral mining.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings (DOAH) has jurisdiction in this matter pursuant to section 120.56, F.S., which provides, in pertinent part,

(1) Any person substantially affected by a rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

. . .

22. Both petitioners in this action are corporations, and are, therefore, "persons", pursuant to Section 1.01(3), F.S.

Petitioners are also "substantially affected". They established that progressive or cumulative loss of isolated wetlands will result in adverse impacts throughout the food chain. Those impacts will substantially affect these organizations, which exist for the purpose of promoting the use and management of Florida's natural resources and for the purpose of exploring,

enjoying and protecting the natural resources of the earth. Loss of resources will directly and substantially affect the organizations' ability to attract and maintain their membership. Petitioners have a legitimate corporate interest in the rule.

As corporations, Petitioners are distinguishable from the petitioner in *Florida Home Builders Assn. v. Department of Labor*, 412 So.2d 351 (Fla. 1982). In that case, the Court looked beyond the association itself to its members, a substantial number of whom were determined to be "substantially affected". Thus, standing for the association was derived from the standing of its members. Assuming that the standing principles formulated in *Homebuilders*, supra, are applicable, Petitioners also demonstrated that a substantial number of their members, although not necessarily a majority, are substantially affected by the challenged rule.

23. "Invalid exercise of delegated legislative authority" is defined in Section 120.52(8), F.S. as:

. . . 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;

(a) The agency has materially failed to follow the applicable rulemaking procedures set forth in s. 120.54;

(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; or

(e) The rule is arbitrary or capricious.

24. Those who seek to invalidate the proposed rules have the burden of showing that:

. . . the agency, if it adopts the rule, would exceed its authority; that the requirements of the rule are not appropriate to the ends specified in the legislative act; that the requirements contained in the rule are not reasonably related to the purpose of the enabling legislation or that the proposed rule or the requirements thereof are arbitrary and capricious. *Agrico Chemical Co. v. State Dept. of Environmental Regulation*, 365 So.2d 760,763 (Fla. 1st DCA 1979)

25. An agency has wide discretion in its rulemaking authority. *Austin v. Department of Health and Rehabilitative Services*, 495 So.2d 777 (Fla. 1st DCA 1986). When an agency construes a statute in its charge in a permissible way, that interpretation must be sustained even though another may be possible, or even, in the view of some preferable. *HRS v. Framat Realty, Inc.*, 407 So.2d 238, 241 (Fla. 1st DCA 1981), *Little Munyon Island v. Dept. of Environmental Regulation*, 492 So.2d 735 (Fla. 1st DCA 1986).

26. Petitioners have partially met their burden of proof. They assert that the thresholds in Paragraph 40C-4.041(2)(b), F.A.C., are an invalid exercise of delegated legislative authority because such thresholds are not based on biological and hydrological evidence that shows that isolated wetlands below such thresholds have minimal fish and wildlife values. "The primary legislative concern in passing Section 373.414, appears to have been to preserve wildlife and fish in small isolated wetlands because they are unique as to both their ecosystems and species." *Booker Creek Preservation, Inc. v. Southwest Florida Water Management District*, 534 So.2d 419, 424 (Fla. 5th DCA 1988), rev. den. 542 So.2d 1334 (1989). The District was required "to adopt a rule which establishes specific permitting criteria for certain small isolated wetlands . . ." Subsection 373.414(1), F.S. (Emphasis added). The necessary elements of the "permitting criteria" are those set forth in the subparagraphs of Subsection 373.414(1), including the establishment of one or more thresholds of isolated wetlands below which impacts on fish and wildlife or their habitat will not be considered because of minimal fish and wildlife values. Paragraph 373.414(1)(a), F.S.

27. The District has been regulating impacts to isolated wetlands since 1983. To fulfill the requirement of Section 373.414, F.S., the District amended its "permitting criteria" in the wetland review criteria section of its Applicant's Handbook. The District adopted a 0.5 acre isolated wetland threshold with the reasonable presumption that isolated wetlands below such threshold have minimal fish and wildlife values. Section 10.7.4, Applicant's Handbook. This threshold was established by biological and hydrological evidence which was not disputed in this proceedings.

The problem, however, is that the District has simply grafted its isolated wetlands threshold onto its existing permitting thresholds in Rule 40C-4.041(2)(b), F.A.C. and Section 3.3.1 Applicant's Handbook. The result is that fewer isolated wetlands are subject to District review than were prior to the adoption of the 0.5 acre threshold. If, as argued by the District, the 0.5 acre threshold is meaningful, and biologically and hydrologically appropriate, then the considerably larger thresholds, which are applied first, are not consistent with the requirements of Section 373.414, F.S. Isolated wetlands which are over 0.5 acre in size, which have more than minimal fish and wildlife values, but are in projects beneath the primary thresholds, will not be protected.

28. In *Booker Creek Preservation, Inc.*, supra, the isolated wetlands rule adopted by the Southwest Florida Water Management District (SWFWMD) was challenged by several environmental groups, including the Petitioner, Sierra Club, on the grounds that SWFWMD had improperly provided exemptions to their isolated wetlands rule. In striking down a majority of the exemptions set forth in the challenged rule, the court held that Section 373.414 contains only one express exemption: wetlands within the jurisdiction of the Department of Environmental Regulation for the purposes of regulation of dredging and filling. *Booker Creek Preservation, Inc.*, at 423. The court stated that water management districts are without authority to vary the impact of Section 373.414 by creating waivers or exemptions. *Booker Creek Preservation, Inc.*, at 423.

Whether styled a "threshold" or "exemption", the District's rules at Section 40C-4.041(2)(b), F.A.C. and 3.3.1 Applicant's Handbook, as applied to isolated wetlands, exclude from District review some isolated wetlands intended for protection under Section 373.414, F.S. For that reason, Section 40C-4.041(2)(b), F.A.C. and its provision in the Applicant's Handbook, contravene the requirement of the statute and are invalid.

29. Similarly, the challenged rules fail to provide for the consideration of cumulative impacts of a project or projects, as required by Section 373.414(1)(d), F.S.

While "cumulative impacts" is not defined, a legislative example is included in Section 373.414(3)(d), F.S., which governed review by water management districts until March 31, 1987, the date by which their own rules were to be adopted. This subsection required review of sub-threshold isolated wetlands when their cumulative total acreage exceeded 30 percent of total project acreage within projects greater than 40 acres in size.

The District was not required to adopt this same standard, but is required to adopt some standard for review of cumulative impacts.

A Section 120.56, F.S. proceeding cannot be used to attack what a rule does not say, unless the rule contravenes the statute it purports to implement by removing a requirement which is textually mandated in the statute. Such a rule would contravene its implementing statute and be invalid under Section 120.52(8)(c), F.S., *Krisher v. Department of Lottery*, 10 FALR 2465, 2469 (Final Order by Hearing Officer, William R. Dorsey, Jr., March 31, 1988).

SJRWMD argues that it does consider cumulative impacts, because each project that is permitted by the District cannot have adverse impacts and does not allow residual impacts which are not mitigated. Still, the District does not review any impacts to isolated wetlands by sub-threshold projects, nor impacts to sub-threshold wetlands within permitted projects, no matter how substantial their cumulative size, unless threatened or endangered species are impacted.

30. Petitioners have failed to prove their assertion that the challenged rules contravene Section 373.414(1)(b), F.S. because the review criteria and mitigation requirements only apply to off-site impacts to fish and wildlife, unless threatened or endangered species are present. The evidence in this proceeding established that virtually all on-site impact will also be felt off-site. Even if the District may not have gone far enough in its regulation, deference must be accorded its application and interpretation of its rules.

31. Similar deference is accorded the District's interpretations of Section 16.1.4, Applicant's Handbook. A heavy mineral mining activity subject to District MSSW permitting and requiring mitigation under the rule may provide mitigation sufficient for the purposes of Chapter 373, F.S., if the mitigation is consistent with the land reclamation policies and criteria approved by DNR under Chapter 16C-37, F.A.C. Sierra Club argues that such plans and DNR rules do not address threatened and endangered species in isolated wetlands, cumulative and off-site impacts, and restoration of isolated wetlands as required under Section 373.414, F.S. The uncontradicted evidence established that the restoration requirements of DNR Rule 16C-37, F.A.C. is applicable to all wetlands, whether contiguous or isolated. See Rule 16C-37.002(16), F.A.C. Heavy mineral mining activities are required to restore every acre of wetland that is disturbed, and the restoration must address habitat for threatened and

endangered species. See Rule 16C-37.008(5) and (6), F.A.C. Furthermore, under Sections 10.7.4 (last paragraph), 16.1.3(a) and 16.1.4, Applicant's Handbook, if impacts to functions provided by isolated wetlands to threatened or endangered species are of such a type or nature that they cannot be offset or mitigated, the District does not accept a DNR approved plan as sufficient to meet the wetland review criteria. In such case, the rules allow the District discretion to apply the wetland review criteria in Section 10.7.4, Applicant's Handbook. Accordingly, the last paragraph of Section 16.1.4, Applicant's Handbook, does not contravene the plain language of Section 373.414, F.S.

ORDER

Based on the foregoing, it is hereby,

ORDERED:

1. Petitioners' challenge to rule 40C-4.041(2)(b), F.A.C., and Section 3.3.1 Applicant's Handbook, as applied to isolated wetlands, is sustained, and those rules are invalid.

2. Petitioners' challenge to Chapter 40C-4, F.A.C. and to the Applicant's Handbook, for failure to include provisions for the consideration of cumulative impacts of a project or projects on isolated wetlands, is sustained, and those rules are invalid.

3. Petitioners' challenges to Section 10.7.4, Section 16.1.3(a), and Section 16.1.4, Applicant's Handbook, as related to the failure to include on site impacts and certain mitigation requirements are dismissed.

DONE AND ORDERED this 18th day of December, 1990, in Tallahassee, Leon County, Florida.

MARY CLARK
Hearing Officer
Division of Administrative Hearings
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Filed with the Clerk of the Division
of Administrative Hearings this 18th
day of December, 1990.

APPENDIX TO FINAL ORDER

Findings of Fact Proposed by Petitioners

1. Adopted in paragraph 1.
2. Adopted in paragraph 2.
3. Adopted in paragraph 3.
4. Adopted in paragraph 4.
- 5.-11. Adopted in substance in paragraphs 11 and 12; however, it was not established that wetlands as small as .25 acre should be regulated.
- 12.-14. Adopted in summary in paragraph 15.
(no #13 in proposed order)
15. Rejected as unnecessary.
16. Rejected as contrary to the weight of evidence.
17. Adopted in paragraph 18.
18. Rejected as unnecessary.
19. Adopted in paragraph 13.
20. Adopted in paragraph 5.

Findings of Fact Proposed by Respondent

1. Adopted in paragraphs 1-3.
2. Adopted in paragraph 4.
- 3.-4. Adopted in paragraph 5.
5. Adopted in paragraph 8.
6. Rejected as unnecessary.
- 7.-8. Adopted in paragraph 13.
9. Adopted in paragraph 7.
10. Adopted in paragraph 14.
11. Adopted in paragraph 15.
12. Adopted in paragraph 18.
13. Rejected as cumulative and unnecessary.
14. Rejected as immaterial. The sub-threshold cumulative impacts are not addressed.
15. Adopted in paragraph 19.

Findings of Fact Proposed by Intervenors

1. Adopted in part in paragraphs 1 and 2, otherwise rejected as immaterial.
2. Adopted in part in paragraph 4, otherwise rejected as immaterial.
- 3.-5. Adopted in substance in paragraphs 6 and 20.

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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 RULE 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.