STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NORTHERN PALM BEACH COUNTY WATER CONTROL DISTRICT, SOUTH INDIAN RIVER WATER CONTROL DISTRICT, and PALM BEACH COUNTY, Petitioners, and HOBE-ST. LUCIE CONSERVANCY DISTRICT, Intervenor, vs. LOXAHATCHEE RIVER ENVIRONMENTAL CONTROL DISTRICT, Respondent.	)	CASE NOS. 94-0718RP 94-0765RP 94-0766RP

FINAL ORDER

Pursuant to notice, a formal hearing was conducted in this case at West Palm Beach, Florida, on June 29, 1994, before Michael M. Parrish, a duly designated Hearing Officer of the Division of Administrative Hearings. Appearances for the parties at the formal hearing were as follows:

APPEARANCES

For Petitioner Northern Palm Beach County Water Control District	Betsy S. Burden, Esquire CALDWELL & PACETTI 324 Royal Palm Way Palm Beach, Florida 33480
For Petitioner South Indian River Water Control District	Charles Chillingworth, Esquire KENNEDY & CHILLINGWORTH, P.A. 2090 Palm Beach Lakes Boulevard Suite 800 West Palm Beach, Florida 33409
For Petitioner Palm Beach County	Heidi Juhl, Esquire Assistant County Attorney Palm Beach County Post Office Box 1989 West Palm Beach, Florida 33402-1989
For Intervenor Hobe-St. Lucie Conservancy District	Betsy S. Burden, Esquire CALDWELL & PACETTI 324 Royal Palm Way Palm Beach, Florida 33480

For Respondent	W. Jay Hunston, Jr., Esquire
Loxahatchee River	DeSANTIS, GASKILL & HUNSTON
Environmental	11891 U.S. Highway One
Control District	North Palm Beach, Florida 33408

STATEMENT OF THE ISSUES

This is a rule challenge proceeding initiated pursuant to Section 120.54(4), Florida Statutes, as construed by the court in Dept. of Health and Rehabilitative Services v. Florida Medical Center, 578 So.2d 351 (Fla. 1st DCA 1991), in which the Petitioners and the Intervenor challenge the validity of portions of the Respondent's proposed rule 31-16 on the grounds that certain changes to the proposed rule were beyond the scope of the changes authorized by Section 120.54(13)(b), Florida Statutes.

PRELIMINARY STATEMENT

This proceeding was heard on issues raised in Amended Petitions 1/ filed by Northern Palm Beach County Water Control District ("Northern District"), South Indian River Water Control District ("South District"), and Palm Beach County ("County"), all of which seek a determination of the invalidity of certain changes made by the Respondent, Loxahatchee River Environmental Control District ("Loxahatchee"), to its proposed rule 31-16. The three cases were consolidated for hearing. Shortly before the formal hearing, the Hobe-St. Lucie Conservancy District ("Hobe-St. Lucie") filed a petition seeking to intervene in the consolidated proceeding. Leave to intervene was granted at the beginning of the formal hearing on June 29, 1994.

During the course of the formal hearing on June 29, 1994, all parties presented testimony and offered exhibits. The Petitioners had nine exhibits marked for identification of which eight were offered in evidence and seven were received in evidence. 2/ The Respondent offered four exhibits, all of which were received in evidence. The Petitioners presented the testimony of five witnesses, one of which was recalled as a witness by the Respondent. At the conclusion of the formal hearing the parties decided not to order a transcript of the hearing. The parties requested, and were granted, twenty days from the date of the formal hearing within which to file their proposed final orders.

Petitioner Northern District and Intervenor Hobe-St. Lucie filed a joint proposal containing proposed findings of fact and conclusions of law. Petitioner County filed a proposal that incorporated the proposal filed by Northern District and also included supplemental proposed findings of fact and conclusions of law. Petitioner South District filed a document in which it stated that it had no objection to the proposals submitted by the other Petitioners, but offered no proposed findings of fact or conclusions of law of its own. The Respondent filed a proposed final order containing proposed findings of fact and conclusions of law. The parties' post-hearing proposals have all been carefully considered during the preparation of this Final Order. All proposed findings of fact submitted by all parties are specifically addressed in the appendix hereto.

FINDINGS OF FACT

1. The Respondent, Loxahatchee, is a local unit of government created by Chapter 71-822, Special Acts of Florida, as amended, which provides Loxahatchee with powers and duties with respect to sewage disposal, solid waste management,

discharge of storm drainage, water supply drainage, and water supply within geographical boundaries set forth in the Act. The geographical boundaries of Loxahatchee are described in the title of the Act as being "generally defined as the Loxahatchee River basin." Loxahatchee's administrative offices are located in the Town of Jupiter, Palm Beach County, Florida.

2. Petitioner Northern District is an independent Special District whose administrative offices are located in the City of Palm Beach Gardens, Palm Beach County, Florida.

3. Petitioner South District is a water control district organized and existing under Chapter 298, Florida Statutes, with administrative offices located in Palm Beach County, Florida.

4. Petitioner County is a political subdivision of the State of Florida with administrative offices in the City of West Palm Beach, Palm Beach County, Florida.

5. Intervenor Hobe-St. Lucie is an independent Special District which maintains its administrative offices in the City of Hobe Sound, Martin County, Florida.

6. Briefly summarized, the subject proposed rule provides for a stormwater management, or river enhancement, program by which Loxahatchee would take a three-tiered approach to managing stormwater discharges, beginning with planning, monitoring, inspection, mapping, information gathering, and public education, followed by operation and maintenance activities, and then by retro-fitting or construction of capital improvements. Inasmuch as stormwater is a threat to the quality of the Loxahatchee River, the purpose of the subject proposed rule is the prevention of pollution of the river by stormwater discharges and the enhancement of the river.

7. On December 3, 1993, Loxahatchee's Notice of Proposed Rulemaking with respect to Rule 31-16 was published in the Florida Administrative Weekly, Volume 19, No. 48.

8. Loxahatchee revised Rule 31-16 on January 3, 1994, and distributed approximately eighty copies of the rule as revised to neighboring governmental entities (including the Petitioners), the Joint Administrative Procedures Committee, and other interested parties on or about January 5, 1994.

9. In a letter dated January 7, 1994, addressed to Loxahatchee's legal counsel, a staff attorney with the Joint Administrative Procedures Committee commented on Rule 31-16 as revised on January 3, 1994, and itemized several potential objections to specific provisions of the rule. With regard to Section 31-16.002(6), the Committee staff attorney wrote:

> The rule provides in part that the district "may" cooperatively assist with the operation and maintenance of systems. However, no criteria are described to apprise the reader of the factors governing the district's decision of whether or not to render assistance. Thus, the district may or may not assist based upon the whim or caprice of the decision-maker. The use of the word "may" in this manner renders the rule vague

> and accords the district unbridled discretion in the matter. See, section 120.52(8)(d), F.S., and Barrow v. Holland, 125 So.2d 749 (Fla. 1960).
>
> The rule also provides that an owner may voluntarily give a system to the district "provided the District accepts said system." This language is potentially objectionable for the reasons described above. Therefore, the rule should be amended to describe standards and criteria governing the district's decision of whether or not to accept a system.

10. With regard to Section 31-16.002(7) of the rule, the Committee staff attorney wrote:

> The use of the word "may" in the last sentence is potentially objectionable for the reasons described above.
>
> The term "and/or" is vague. Compare, Health Clubs, Inc. v. State, 338 So.2d 1324 (Fla. 4th DCA 1976).
>
> The phrase "where needed and not otherwise provided for" is vague and should be explained.

11. With regard Section 31-16.002(8) of the rule, the Committee staff attorney wrote that "[t]he term 'proper regulatory authorities' should be defined," and with regard to Section 31- 16.003(1)(f) of the rule, he wrote that "[t]he term 'and/or' is vague."

12. With regard to Section 31-16.003(7) of the rule, the Committee staff attorney wrote:

> Please describe the statutory authority supporting this section.
>
> Assuming statutory authority exists, the following comments apply: The term "and/or" is vague. In addition, the use of the term "may" renders the rule vague and accords the district unbridled discretion in deciding whether or not to enter into an interlocal agreement. The rule should be amended to describe the circumstances governing when the district will enter into such an agreement.

13. Finally, with regard Section 31-16.003(9) of the rule, the Committee staff attorney wrote:

> Please describe the statutory authority supporting the assertion that the fees may be collected by entities other than the district.
>
> The statement "or by such other methods that the Governing Board determines are fair and reasonable" is vague and accords the board unbridled discretion in deciding the matter.

14. At its regular meeting immediately following the public hearing held on January 20, 1994, Loxahatchee approved and adopted revisions to its proposed Rule 31-16 which included the changes which are the subject of the challenges in this proceeding.

15. A "red-lined" version of Rule 31-16, in which deletions from the rule made between January 3 and January 20, 1994, appear as struck-through text surrounded by brackets and additions to the rule made between January 3 and January 20, 1994, appear as bold and underlined text, was prepared by Loxahatchee's staff. This red lined version was distributed to the Board members at Loxahatchee's regular board meeting held on January 20, 1994. The revised version of Rule 31-16 (Respondent's Exhibit 3) was adopted by Loxahatchee at its Board meeting on January 20, 1994.

16. The rule challenge petitions in these consolidated cases were filed on the following dates: Northern District filed its petition on February 9, 1994; South District and County filed their petitions on February 10, 1994.

17. The first change to the subject rule which is being challenged in this proceeding is the change in Rule 31-16.001, Paragraphs 4 and 5, and in Rule 31-16.002(2)(e), from the term "watershed" to the term "basin." During the process leading up to the drafting of the subject rules, the citizen advisory group liked the term "watershed" and that term found its way into early drafts of the rule. The use of the term "watershed" was intended to refer to the geographic area over which Loxahatchee has jurisdiction. 3/ The change to the term "basin" was made to clarify that intent, because the title to the Act creating Loxahatchee describes its boundaries as "generally defined as the Loxahatchee River basin."

18. The second change to the subject rule which is being challenged in this proceeding is the addition of the words "the ground and surface water" in Rule 31-16.002(2)(e). The reason for this change in the rule was to make a more specific statement of what Loxahatchee intended to monitor. Although the staff of the Joint Administrative Procedures Committee had not specifically addressed this portion of the rule, the Committee staff had suggested that other provisions of the rule be made more specific. 19. The third change to the subject rule which is being challenged in this proceeding is the addition of the following underscored language in Rule 31-16.002(3)(a):

> Where operation and maintenance are not being performed in accordance with the Regulatory Authority standards, education and assistance

will be made available to the owner and operator in order for there to be better operation and maintenance.

The change represented by the underscored language was made in response to a proposed objection by the legal staff of the Joint Administrative Procedures Committee. The objection was to the effect that the original language of the rule paragraph in which the change was made failed to contain "factors governing the district's decision of whether or not to render assistance," which failure, in the opinion of the Committee legal staff, "renders the rule vague and accords the district unbridled discretion in the matter."

20. The fourth change to the subject rule which is being challenged in this proceeding are the following changes in Rule 31- 16.003(5): 4/

> * Where the District [[can assist]] assists with the funding for operation and maintenance, or where the District assumes the operation and maintenance of a private system, the District [[may[[<<will>> collect an Operation and Maintenance Fee, in an amount to be mutually agreed to by Interlocal [[Agreement/Contract]] <<Agreement with a Public agency, or by Contract with a private entity>>, or to be established by subsequent amendment of this Rule.

* Note: In the above quotation, language added to the proposed rule text is within the <<>>; deleted language is within the [[]].

The changes in the rule language quoted immediately above were made in response to proposed objections by the legal staff of the Joint Administrative Procedures Committee.

21. The fifth change to the subject rule which is being challenged in this proceeding is the change in the definition of "Exempt Property" contained in Rule 31-16.003(1)(c). A portion of the definition was changed from "that property which is determined by the Governing Board to be exempt from the payment," to "that property not subject to the payment." Although the legal staff of the Joint Administrative Procedures Committee did not comment on this specific portion of the rule, the change in the language of Rule 31-16.003(1)(c) was in response to proposed objections to other portions of the rule in which the Committee legal staff had criticized language authorizing the Governing Board or the District to take action without establishing criteria for the authorized action.

22. The sixth change to the subject rule which is being challenged in this proceeding is the addition of a definition of the term "Regulatory Authority" at Rule 16-31.003(1)(f). This change to the rule was made in response to a proposed objection by the legal staff of the Joint Administrative Procedures Committee.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. See Sections 120.54 and

120.57(1), Florida Statutes, and Dept. of Health and Rehabilitative Services v. Florida Medical Center, 578 So.2d 351 (Fla. 1st DCA 1991).

24. To facilitate an understanding of the conclusions which follow, it must be kept in mind that this is not an ordinary statutory rule challenge proceeding under Section 120.54(4), Florida Statutes. Rather, this is an extraordinary rule challenge proceeding based on a court-created narrow opportunity to challenge changes to a proposed rule after the expiration of the 21-day period during which challenges to proposed rules are permitted under the language of Section 120.54. This narrow opportunity was first described in Dept. of Health and Rehabilitative Services v. Florida Medical Center, 578 So.2d 351 (Fla. 1st DCA 1991). 5/ In the Florida Medical Center case ("F.M.C. case") two rule challenge petitioners filed timely challenges to the proposed rules at issue there. Following negotiations with those two petitioners, the agency agreed to make substantive changes to the proposed rules and "[u]pon the changes being made, the petitioners voluntarily dismissed their petitions." (F.M.C. at 353) Thereafter, more than 90 days after the original notice of intent to adopt rules, the agency published notice of the changes in the Florida Administrative Weekly. What happened next is described as follows at page 353 of F.M.C.:

> Within 21 days following the notice of the change in the proposed rule, the appellees . . . petitioned, pursuant to Section 120.54(4), for an administrative determination of invalidity of the proposed rule as changed. Appellees contended that the changes were an invalid exercise of delegated legislative authority, because they were in excess of the authority given to agencies by Section 120.54(13)(b), Florida Statutes, to change proposed rules. That subsection authorizes agencies to make changes during the course of the rulemaking process without the necessity of beginning the process anew, so long as the changes (1) are supported by the record of public hearings held on the rule, (2) are merely technical and do not affect the substance of the rule, (3) are in response to written material contained in the record and submitted to the agency within 21 days following the first publication of notice of the proposed rule, or (4) are in response to a proposed objection by the Administrative Procedures Committee. It was the appellees' contention that none of the statutorily enumerated bases for change had been present when appellant decided to change the proposed rule, and that, in order to lawfully adopt the proposed rule as changed, the appellant was obligated to begin a new rulemaking process. Relying upon Section 120.54(4)(b), Florida Statutes, appellant contended that the appellees' petitions were untimely, because they had not been filed within 21 days following the first notice of proposed rulemaking. The Hearing Officer found,

> however, that the appellant's changes to the proposed rule had exceeded the authority given by Section 120.54(13)(b), and thus could not be made unless substantially affected persons were given a point of entry to challenge the proposed rule as changed. Since the appellees had been deprived of a point of entry, but had filed their petitions within 21 days following their first notice of the improper changes, the hearing officer found their petitions to be timely under Section 120.54(4). He therefore determined that the rule, which had been filed by the appellant on July 18, 1988, and which had purportedly become effective on August 7, 1988, was an invalid exercise of delegated legislative authority. (Emphasis added)

25. The F.M.C. court ultimately agreed with the hearing officer and explained its holding as follows, at page 355:

> Accordingly, we hold that a substantially affected person is entitled to initiate a Section 120.54(4) validity challenge within 21 days following notice of a change in a proposed rule. Such challenge must be limited to an assertion that the agency has acted in excess of its delegated legislative authority to change a proposed rule. If the petitioner prevails in his challenge, the agency must either withdraw the change or reinitiate the rulemaking process. Because the appellees were substantially affected persons who filed their Section 120.54(4) petitions within 21 days following notice of the changes, and because the basis for their challenge was alleged noncompliance by the appellant with Section 120.54(13)(b), we hold that the appellees' petitions were timely. (Emphasis added)

26. All three of the rule challenge petitions in this proceeding were filed beyond the 21-day period described in Section 120.54(4), Florida Statutes, but all three appear to have been filed within the court-created 21-day period described in the F.M.C. case. Such being the case, all three petitions appear to be timely challenges of the type described in the F.M.C. case. At this point it is important to reiterate, in the words of the F.M.C. court: "Such challenge must be limited to an assertion that the agency has acted in excess of its delegated legislative authority to change a proposed rule." (Emphasis added)

27. Legislative authority for agencies to change proposed rules is found at Section 120.54(13)(b), Florida Statutes, which authorizes changes to be made for any of the following four reasons: 7/

> (1) "[Such changes in the rule as are supported by the record of public hearings held on the rule. . . ."

(2) "[T]echnical changes which do not affect the substance of the rule. . . ."
(3) "[C]hanges in response to written material relating to the rule received by the agency within 21 days after the notice and made a part of the record of the proceeding. . . ."
(4) "[C]hanges in response to a proposed objection by the committee."

28. The evidence in this case is insufficient to establish that any of the challenged changes to the proposed rule "are supported by the record of public hearings held on the rule." The exhibits received in evidence are insufficient to show that any specific change resulted from the proceedings at any public hearing on the rule.

29. Similarly, the evidence in this case is insufficient to establish that any of the challenged changes to the proposed rule were "in response to written material relating to the rule received by the agency within 21 days after the notice and made a part of the record of the proceeding." The exhibits received in evidence are insufficient to show that any specific change resulted from any such written material.

30. However, some of the challenged changes to the proposed rule are "technical changes which do not affect the substance of the rule." In this category are the changes in Rule 31-16.001, Paragraphs 4 and 5, and in Rule 31-16.002(2)(e) described in Paragraph 17, above, regarding the change from "watershed" to "basin." The intent of both terms was to refer to the geographical jurisdiction of Loxahatchee and the change makes that intent more clear. Also in this category is the change in Rule 31-16.002(2)(e) described in Paragraph 18, above, regarding the addition of the words "the ground and surface water." The purpose and effect of this change was to clarify, rather than to change, what Loxahatchee intended to do.

31. As discussed in the foregoing Findings of Fact, all of the other four challenged changes to the rule (the changes described in Paragraphs 19 through 22, above) are "changes in response to a proposed objection by the committee."

32. Inasmuch as all of the challenged changes to the subject rule come within the scope of one of the four reasons for change authorized by Section 120.54(13)(b), Florida Statutes, the Petitioners have failed to demonstrate the invalidity of any of the challenged changes. Accordingly, it is ORDERED:

That all of the petitions in these three consolidated cases are hereby dismissed and all relief requested in those petitions is hereby denied.

DONE AND ORDERED this 31st day of August, 1994, at Tallahassee, Leon County, Florida.

MICHAEL M. PARRISH, 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 31st day of August, 1994.

ENDNOTES

1/ By order dated March 16, 1994, the original petitions in all three of these consolidated cases were dismissed with leave to amend. The original petitions were dismissed because they attempted to raise issues beyond those permitted in this type of unique proceeding and because they failed to comply with the "particularity" and the "sufficiency" requirements of Section 120.54(4)(b), Florida Statutes.

2/ The following exhibits offered by the Petitioners were received in evidence: 1, 2, 3, 4, 5, 7, and 9. An objection to Petitioners' Exhibit 6 was sustained. Petitioners' Exhibit 8 was marked for identification, but was not offered.

3/ As shown at the hearing, the term "watershed" can have other technical meanings. Nevertheless, in its more general sense, the term "watershed" may also be interpreted in the manner in which the citizen advisory group intended.

4/ Struck-through text indicates deletions from original proposed rule text. Underscored text indicates additions to original proposed rule text. *

* Note: In the ACCESS Document, language added to the text is within the <<>>; deleted language is within the [[]].

5/ The nature and effect of the Florida Medical Center case was discussed in the recent Final Order in Northern Palm Beach County Water Control District v. Loxahatchee River Environmental Control District, DOAH Case No. 94-0301RP (Final Order issued February 2, 1994). Some of that discussion has been incorporated into this order. The Final Order in Case No. 94-0301RP is presently pending appellate review.

6/ Section 120.54(13)(b), Florida Statutes, reads as follows, in pertinent part:

> (b) After the notice required in subsection (1) and prior to adoption, the agency may withdraw the rule in whole or in part or may make such changes in the rule as are supported by the record of public hearings held on the rule, technical changes which do not affect the substance of the rule, changes in response to written material relating to the rule received by the agency within 21 days after the notice and made a part of the record of the proceeding, or changes in response to a proposed objection by the committee.

APPENDIX

The following are the specific rulings on all proposed findings of fact submitted by all parties.

Findings submitted by Northern District and Hobe-St. Lucie:

Paragraph 1: Accepted in substance.
Paragraphs 2, 3, and 4: Rejected as subordinate and unnecessary details about matters that are not at issue here.
Paragraph 5: Accepted in substance.
Paragraph 6: Rejected as subordinate and unnecessary details about matters that are not at issue here.
Paragraphs 7, 8, 9, and 10: Accepted in substance.

Findings submitted by South District:

(None submitted.)

Supplemental findings submitted by County:

Paragraph 1: Rejected as subordinate and unnecessary details about matters that are not at issue here.
Paragraph 2: Accepted.
Paragraphs 3, 4, and 5: Rejected as summaries of testimony, rather than proposed findings of fact based on evidence in the record. Further, Paragraph 3 is rejected as incorrect (because Petitioner's Exhibit 7 is a resume) and as being too vague to serve any useful purpose.
Paragraph 6: Accepted.

Findings submitted by Loxahatchee:

Paragraph 1: First two sentences accepted. The remainder of this paragraph is rejected as subordinate and unnecessary details.
Paragraph 2: First sentence accepted in substance. The remainder of this paragraph is rejected as subordinate and unnecessary details.
Paragraphs 3, 4, and 5: Accepted in substance.
Paragraphs 6, 7, 8, and 9: Rejected as subordinate and unnecessary details about matters that are not at issue here.
Paragraph 10: Accepted.
Paragraphs 11, 12, and 13: Rejected as subordinate and unnecessary details about matters that are not at issue here.
Paragraph 14: Accepted.
Paragraph 15: Rejected as not supported by competent substantial evidence and as contrary to the greater weight of the evidence. (Loxahatchee did not continue to consider and discuss the proposed rule "over the next few months" following December 3, 1993, because it revised the rule on January 3, 1994, and adopted the rule on January 20, 1994.)
Paragraphs 16 and 17: Accepted in substance.
Paragraphs 18, 19, and 20: Rejected as subordinate and unnecessary details and as irrelevant because the comment, input, discussion, and concerns mentioned in these paragraphs are not "supported by the record of public hearings held on the rule" and are not "written material . . . made a part of the record of the [rulemaking] proceeding."
Paragraph 21: Accepted in substance with a number of subordinate and unnecessary details omitted for the reasons discussed in the immediately preceding paragraph of this appendix.
Paragraphs 22 and 23: Accepted.
Paragraph 24: Rejected as subordinate and unnecessary details.
Paragraph 25: Accepted.

COPIES FURNISHED:

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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.