STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARVIN VAUN FRANDSEN, Petitioner, vs. DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent.	)	Case No. 01-0527RX

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Charles A. Stampelos, held a final hearing in the above-styled case on May 30 and 31, 2001, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Marvin Vaun Frandsen, pro se
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For Respondent: Suzanne B. Brantley, Esquire
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STATEMENT OF THE ISSUE

At issue in this proceeding is whether the Department of Environmental Protection (Department), Division of Recreation and Parks' (Division) existing Rule 62D-2.014(18), Florida

Administrative Code (Rule), is an invalid exercise of delegated legislative authority. Specifically, the issues are whether the Division has exceeded its grant of rulemaking authority and whether the Rule is vague, fails to establish standards for Division decisions, and vests unbridled discretion in the Division.

PRELIMINARY STATEMENT

On February 5, 2001, Petitioner, Marvin Vaun Frandsen (Frandsen) filed a "Petition to Declare State Park "Free Speech" Rule Invalid." Frandsen alleged that Rule 62D-2.014(18) is an invalid exercise of delegated authority, that certain agency statements are rules and violate Section 120.54(1)(a), Florida Statutes (2000), that the Division's application of the Rule "to restrict, limit or forbid free speech activities in state parks" is invalid, and that the Rule is an unconstitutional prior restraint. (All citations to the Florida Statutes are to the 2000 version unless otherwise indicated.)

On May 22, 2001, the Department filed a Motion in Limine, and in essence, requested an order limiting Frandsen from introducing evidence regarding any "as applied" challenge to the validity of the Rule which appeared in his Petition and further to limit Frandsen's evidence regarding particular restrictions placed on Frandsen and others and activities in state parks involving nudity and the restrictions placed on nudity and the

Division's policy on nudity. In part, the Department suggested that Frandsen must file a separate petition, and necessarily with the Department, pursuant to Sections 120.569 and 120.57, Florida Statutes, in order to challenge the validity of specific agency statements (which may include agency action related to Frandsen) which may have been applied to him and which may have affected his substantial interests.

Frandsen filed a Response and also filed a Petition in Case No. 01-2067RU, challenging the legality of various agency statements "on their face and as applied" to him. The latter Petition was filed in response to the Department's Motion. The second Petition incorporated some of what was alleged in this rule challenge, with additional allegations pertaining to his "as applied" challenge. However, the second Petition was filed with the Division of Administrative Hearings in the context of a non-rule policy challenge, notwithstanding reference to Sections 120.569 and 120.57, Florida Statutes. The Petition was not filed with the Department. See Hasper v. Department of Administration, 459 So. 2d 383 (Fla. 1st DCA 1984).

The parties discussed their respective positions during a telephone hearing on May 25, 2001, and Frandsen orally withdrew his Petition filed in Case No. 01-2067RU and the Division of Administrative Hearing's file was closed.

The Motion in Limine was otherwise denied without prejudice. See Order, May 29, 2001.

Consistent with Frandsen's withdrawal of his Petition in Case No. 01-2067RU, on May 29, 2001, Frandsen filed a "Motion to Amend Petition to Narrow Scope of Claims," to exclude his challenge to agency statements as rules pursuant to Section 120.54(4)(a), Florida Statutes. The Department did not object. The Motion was granted and Frandsen's challenge to the agency statements as rules referenced in his Petition were excluded. See Order, May 29, 2001.

At hearing, Frandsen called eight witnesses: himself; Toni Anne Wyner; John C. Palm; Perry J. Smith, Park Manager IV of the Division of Recreation and Parks, Department of Environmental Protection; Michael K. Murphy, District 4 Bureau Chief of the Division of Recreation and Parks, Department of Environmental Protection; John Baust, Bureau Chief of Operational Services of the Division of Recreation and Parks, Department of Environmental Protection; Fran Mainella, Director of the Division of Recreation and Parks, Department of Environmental Protection; and Eric Miller, Bureau Chief of Park Patrol of the Division of Law Enforcement, Department of Environmental Protection.

The Department called Perry J. Smith, Michael K. Murphy, John Baust, Fran Mainella, and Eric Miller.

Frandsen offered 63 exhibits, all of which were admitted. The Department's Exhibits 1 through 4 were also admitted into evidence.

The Transcript was filed June 28, 2001. The parties stipulated to extend the time to file proposed final orders until August 27, 2001. Frandsen filed a Closing Argument and a Memorandum of Law, and each party filed a proposed final order which have been considered in the preparation of this Final Order. Frandsen also filed a Motion for Reimbursement of Costs should he prevail, which is denied based upon the disposition of this proceeding.

FINDINGS OF FACT

Frandsen

1. Frandsen is a citizen of the state of Florida who is interested in free speech activities in state parks that advance the cause of naturist activities, including recreation. Frandsen is a physicist and works for the United States Air Force, essentially as a defense scientist.

2. Frandsen's original challenge in this proceeding was directed, in part, to the Division's application of the Rule and the validity of agency statements as rules and as applied to him. Frandsen has deleted these from his challenge. This Final Order does not decide whether the Division has properly applied the Rule to Frandsen nor whether any agency statements are

invalid, nor whether the Rule is constitutionally infirm either on its face or as applied.

3. Frandsen's cause, with respect to the state park system, is to see limited, designated areas within state parks open to "clothing optional recreation, particularly beachfront recreation, where someone can sunbathe," "socialize," and "swim nude in the ocean and on the beaches as the human race has for eternity."

4. Frandsen is aware of the anti-nudity rule, Rule 62D-2.014(7)(b), but is challenging the right to be able to advocate changing the rule which prohibits nudity. For Frandsen, "[t]he issue [here] is [his] ability to exercise free speech to communicate with the public to advocate for [his] cause," in a state park. Conversely, "[t]his action does not deal with the issue of whether [Frandsen has] a constitutional right to incorporate nudity into a communication." His main concern is the absence of standards in Rule 62D-2.014(18) to channel the Division's exercise of discretion relating to time, place, and manner restrictions placed on free speech activities and also the threat of arrest if the restrictions are not complied with.

5. The Department stipulated that Frandsen has standing to challenge Rule 62D-2.014(18) as an invalid exercise of delegated legislative authority.

Department and Division

6. The Department is an agency of the state of Florida, which manages and operates state parks under its jurisdiction, pursuant to Chapter 258, Part I, Florida Statutes, through its Division of Recreation and Parks.

7. The Division has the duty "to supervise, administer, regulate, and control the operation of all public parks . . .." Section 258.004(1), Florida Statutes. Additionally, the Division "shall preserve, manage, regulate, and protect all parks and recreational areas held by the state . . .." Section 258.004(2), Florida Statutes.

8. It is the policy of the Division "[t]o promote the state park system for the use, enjoyment, and benefit of the people of Florida and visitors . . . administer the development, use and maintenance of these lands and render such public service in so doing, in such a manner as to enable the people of Florida and visitors to enjoy these values without depleting them . . .." Section 258.037, Florida Statutes.

9. "The division has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement provisions of law conferring duties on it, and the violation of any rule authorized by this section shall be a misdemeanor and punishable accordingly." Section 258.007(2), Florida Statutes.

State Parks

10. The Division manages 155 state parks, which comprise over a half a million acres. The term "state parks" is generic and includes historic sites, beach areas, river parks, parks with swimming pools, geological sites, archeological sites, and recreation areas. The parks are very diverse and offer different opportunities for visitors. The parks can range in size from just a few acres to over 25,000 acres.

11. Florida's state park system is the fourth largest in the nation. Over 16 million people visited the parks last year, which was an increase of 13 1/2 percent from the previous year.

12. The state park system is divided into five districts, each of which includes 20 to 30 parks. The Division employs over 1,000 full-time employees and approximately 300 to 500 part-time, OPS help.

13. Each district is under the supervision of a district bureau chief who is responsible for that district's employees, visitors, volunteers, and parks.

14. Individual parks or groups of parks are under the direct supervision of a park manager. Honeymoon Island State Park, which is located on the west coast of Florida in Pinellas County, is one of six main parks all managed by the same park manager. It is part of a GEO (Geographically Efficient

Operation) park, which includes 15 properties, both submerged lands and uplands, and extends through 3 counties.

15. Not every park is staffed with Division personnel at all times. For example, District 4 has approximately 25 parks with 17 park managers. In parks which are not staffed, the telephone numbers of the park manager and assistant manager are posted within the park at various locations including near the restrooms, pay phones, concessions, or camp grounds.

16. Various activities are enjoyed in state parks including: swimming, camping, hiking, boating, biking, horseback riding, wildlife viewing, snorkeling, guided tours, and picnicking. Each park offers a different number and combination of these activities. The Division's primary mission is to enable the public to enjoy outdoor-based resource recreation.

17. Through its rules, the Division regulates many activities in state parks to ensure the safety of visitors and to protect park resources, including the speed of vehicles, parking, boating, fishing, the consumption of alcoholic beverages, bathing and swimming, domestic animals, hunting, merchandising, aircraft, and commercial photography. See Rule 62D-2.014(4), (6), (7), (8), (9), (10), (12), (13), (14), (15), and (17), Florida Administrative Code.

The Rule

18. Rule 62D-2.014(18), Florida Administrative Code, provides:

> Free Speech Activities. Free speech activities include, but are not limited to, public speaking, performances, distribution of printed material, displays, and signs. Free speech activities do not include activities for commercial purposes. Any persons engaging in such activities can determine what restrictions as to time, place, and manner may apply, in any particular situation, by contacting the park manager. Free speech activities shall not create a safety hazard or interfere with any other park visitor's enjoyment of the park's natural or cultural experience. The park manager will determine the suitability of place and manner based on park visitor use patterns and other visitor activities occurring at the time of the free speech activity.

19. Rule 62D-2.014 pertains to "activities and recreation." Section 258.007(2), Florida Statutes, is cited as the specific authority for Rule 62D-2.014, including Subsection (18). Rule 62D-2.014, including Subsection (18), implements Sections 258.004, 258.007(1)-(3), 258.014, 258.016, 258.017, and 258.037, Florida Statutes.

20. The Rule was adopted in 1996 to inform the public that free speech activities are welcome in state parks. It sets broad guidelines and standards for park managers to ensure that the public's First Amendment rights are respected and not infringed. The Division felt the need for a rule "to put park

staff on notice that [First Amendment activity] is okay and it is allowable and it is acceptable." No permits have been issued for free speech activities since the mid-1990's as a result of a federal court order. See The Naturist Society, Inc. v. Fillyaw, 858 F. Supp. 1559 (S.D. 1994).

21. The Rule was not intended to be all encompassing because of the diversity of the parks. Most activities in the parks include some form of free speech activity. The term "include, but are not limited to" means anything that is covered by the First Amendment, whether it be oral, written, or symbolic conduct. The Rule applies to even a single individual wishing to engage in free speech activities as defined by the Rule, including, but not limited to the activity of "displays" and "signs."

22. The Rule states that free speech activities shall not interfere with any other park visitor's enjoyment of the park's natural or cultural experience. This means that people are free to conduct any activity they choose so long as the manner in which they do it does not infringe on other park visitors' purpose for coming to the park. For example, if an area of a particular park were known for bird watching, it would be inappropriate for someone to walk through that area playing loud music or shouting. The Rule contemplates that the Division will be diligent in protecting visitor enjoyment and safety.

23. The Rule states that free speech activities shall not create a "safety hazard." Safety hazards vary depending on the activity, area, and park involved. They can range from the dangers inherent to a large assembly of people, which would be the same in any park, to the dangers of holding a particular activity in a specific area of a specific park. The types of safety hazards a manager must consider will vary significantly with the type of activity and the park in which it takes place.

24. Park managers also consider "visitor use patterns" when determining the suitability of the time, place, and manner of a particular activity. Visitor use patterns are the different activities, which typically occur in a particular park. They vary by time of the day and the season and are therefore different day-by-day and park-by-park. For example, a visitor may tour the Gamble Plantation as a historic site, but not swim. At Honeymoon Park, people use the beach and swim. Moreover, during the summer, the use patterns at Wakulla Springs State Park for swimming are heavy, whereas the pattern for swimming decreases rapidly during the winter. Different safety concerns arise given the nature and use(s) of each park.

25. A person or group wishing to engage in free speech activities are not always able to access a park manager to determine applicable time, place, and manner restrictions

because the park manager may not be on duty during all hours and days when the park is open.

26. The Division does not decide in advance and publicly post or otherwise publicly provide generic time, place, and manner restrictions.

27. Beyond the Rule, there are no written documents, handbooks, guidelines, and policies of general application to provide guidance to the Division park managers to determine what time, place, and manner restrictions may be applied.

28. Each determination of time, place, and manner restrictions by the Division, including the resources, which may be needed to be expended to accommodate a free speech activity, is made on a case-by-case basis based upon the criteria in the Rule.

29. Because of the number of parks, their diversity, staffing issues, and the varying attendance on particular days or in particular seasons, it would be impracticable to develop a set of standard time, place, and manner restrictions for every possible activity, which may occur in every park.

30. The Rule contemplates that a park manager may consult with other personnel with the Department and the Division regarding the application of the Rule. Park managers have consulted with legal counsel prior to responding to a request or, in some cases, request legal counsel to respond directly to

the requesting person. This procedure is the norm regarding requests for "clothing optional demonstration[s]." The Department's "Office of General Counsel is consulted on all nudity issues that may involve free speech to ensure compliance with all current laws" and responses are given on a case-by-case basis in light of counsel's interpretation of the Rule, reached in conjunction with First Amendment case law.

31. The Rule does not require contact with a park manager prior to engaging in a free speech activity.

32. The Rule contemplates that the public may contact a park manager to ensure that a planned activity will not create a safety hazard or conflict with other planned activities. For example, weddings are welcomed in the state parks, although prior notification is not required. But, notification can be helpful to the park manager to determine the number of people involved and the time of day to ensure, for example, that parking is available.

33. Although the Rule does not state a time in which park managers must respond to a request for any applicable time, place, and manner restrictions, the Rule contemplates that these decisions will be made within a reasonable time. The Division expects their park managers to respond in an expeditious manner. The Division's typical practice is to respond within a 2 or 3 week period. There have been exceptions to this expectation.

The level of complexity of the inquiry may lengthen the time to respond.

34. Generally, any person dissatisfied with a response from the park manager may contact various levels of responsibility throughout the Division and Department. This process is not referred to as "an official administrative appeal." Nevertheless, any decision regarding an interpretation of a park rule or a response to an inquiry results in the formulation of agency action. Any person substantially affected by the agency action should be given a point of entry to challenge the agency action pursuant to and consistent with the procedural requirements of the APA. See Department's Proposed Final Order, page 10, paragraph 46.

CONCLUSIONS OF LAW

35. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. Section 120.56, Florida Statutes.

36. Frandsen alleges that Rule 62D-2.014(18), is an invalid exercise of legislative authority because (1) the Division has exceeded its grant of rulemaking authority under Section 120.52(8)(b), Florida Statutes, and (2) the Rule is vague, fails to establish adequate standards for Division decisions, and vests unbridled discretion in the Division under Section 120.52(8)(d), Florida Statues.

37. Frandsen has the burden of proving the invalidity of the Rule 62D-2.014(18). St. Johns River Water Management District v. Consolidated-Tomoka Land Co., 717 So. 2d 72, 76-77 (Fla. 1st DCA 1998)(Tomoka).

The standards for determining whether an existing Rule implements or interprets a specific statutory power and duty.

38. Material here, an "invalid exercise of delegated legislative authority" is:

> [an] 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 of the following applies:
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.; or
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency.

Section 120.52(8)(b)(d), Florida Statutes.

39. The "flush left," language of Section 120.52(8), Florida Statutes, provides the following standards in the closing paragraph:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have the authority to adopt a rule only because

> it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers or duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

40. This language "provides general standards to be used in determining the validity of a rule in all cases." Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 597 (Fla. 1st DCA 2000) (Save of the Manatee). This language also appears verbatim in Section 120.536(1), Florida Statutes.

41. Some digression in the legal discussion pertinent to this case is necessary in order to place the "flush left" language in context, which has been recently explained by Judge Padovano, writing for the court, in Save the Manatee, in light of 1999 amendments to the "flush left" language.

42. "In 1996, the Legislature significantly revised the Administrative Procedure Act (APA), Chapter 120, Florida Statutes, to clarify definitions and exceptions and to simplify its procedures. Notable among the 1996 amendments to the APA are amendments creating a statutory standard for rulemaking

(s.120.536(1), F.S.) and inclusion of this standard [the flush left language] in the definition of an invalid exercise of delegated legislative authority (s.120.52(8), F.S.)." See House of Representatives as Further Revised by the Committee on Governmental Rules and Regulations Final Analysis, CS/HB 107 (Chapter 99-379, Laws of Florida), June 30, 1999, Storage Name: h0107z.grr, page 2.

43. The 1996 amendments included, in material part, the "flush left" language, and provided that, "[a]n agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute." Section 120.52(8), Florida Statutes (Supp. 1996). See also Save of Manatee, 773 So. 2d at 598. This standard was discussed in several cases, including Tomoka.

44. In Tomoka, land owners challenged proposed rules of the water management district that would have added two hydrologic basins to five others within the district and would have imposed four new development standards within these basins. Administrative Law Judge Donald R. Alexander found the proposed rules to be supported by competent substantial evidence, but concluded that the statutory authority on which they were based was ". . . merely a general, nonspecific description of the agency's duties." Judge Alexander determined that the enabling statute must "detail" the powers and duties that are the subject

of the rules and, since it did not, the rules were not within the "particular powers and duties" granted by the enabling statute. Consolidated-Tomoka Land Company, et al. v. St. Johns River Water Management District, et al., DOAH Case Nos. 97-0870RP and 97-0871RP, Final Order, June 27, 1997. As a result, the proposed rules were invalidated and the decision was appealed by the water management district. The court reversed. The court determined that the proper test to determine whether a rule is a valid exercise of delegated authority pursuant to the 1996 version of the APA:

> is a functional test based on the nature of the power or duty at issue and not the level of detail in the language of the applicable statute. The question is whether the rule falls within the range of powers the Legislature has granted to the agency for the purpose of enforcing or implementing the statutes within its jurisdiction. A rule is a valid exercise of delegated legislative authority if it regulates a matter directly within the class of powers and duties identified in the statute to be implemented. This approach meets the legislative goal of restricting the agencies' authority to promulgate rules, and, at the same time, ensures that the agencies will have the authority to perform the essential functions assigned to them by the Legislature.
>
> The class of powers and duties delegated to an agency could be defined broadly or specifically depending on the Legislature's objective. For example, a statute authorizing rules pertaining to the general operating functions of an agency might be broadly stated to enable the agency to promulgate a variety of rules, all of

> which are within the general class. In contrast, a statute authorizing a regulatory rule might be narrowly tailored to restrict the agency's authority within a precise range. These decisions are ultimately within the province of the Legislature.

Tomoka, 717 So. 2d at 80-81.

45. In 1999, the Legislature considered HB 107 and SB 206 that were identical. In material part, HB 107 was written to amend the "flush left" language in Sections 120.52(8) and 120.536(1), Florida Statutes (Supp. 1996), striking the adjective "particular" and replacing it with "detailed." See House of Representatives Committee on Water and Resource Management Bill Research & Economic Impact Statement, HB 107, Dec. 21, 1998, Storage Name: h0107.wrm, page 7. However, in the enacted version of Committee Substitute for House Bill Number 107, the Legislature dropped "detailed" and "particular," and retained "specific" as the adjective before "powers and duties granted by the enabling statute."

46. In 1999, it was the express "intent of the Legislature that modifications contained in [the 1996 amendments to Sections 120.52(8) and 120.536, Florida Statutes, including the amended "flush left" language] which apply to rulemaking are to clarify the limited authority of agencies to adopt rules in accordance with chapter 96-159, Laws of Florida, and are intended to reject the class of powers and duties analysis." Chapter 99-378,

Section 1, at 2280-2281, Laws of Florida (emphasis added). "It [was] not the intent of the Legislature to reverse the result of any specific judicial decision," i.e., Tomoka. Id.

47. Thus, in 1999, the Legislature rejected the "judicial interpretation [in Tomoka] of this standard which created a functional test to determine whether a challenged agency rule is directly within the class of powers and duties identified in the statute to be implemented." House of Representatives Final Analysis, June 30, 1999, page 5 (citation omitted).

48. "The new law [enacted in 1999] gives the agencies authority to 'implement or interpret' specific powers and duties contained in the enabling statute." Save of the Manatee, 773 So. 2d at 599. The court noted, however, that:

> [a] rule that is used to implement or carry out a directive will necessarily contain language more detailed than that used in the directive itself. Likewise, the use of the term 'interpret' suggests that a rule will be more detailed than the applicable enabling statute. There would be no need for interpretation if all of the details were contained in the statute itself.
>
> It follows that the authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough. Either the enabling statute authorizes the rule at issue or it does not. As the Florida Chamber of Commerce said in its

> brief, this question is one that must be determined on a case-by-case basis.

Id. (emphasis in original).

49. In summary, the Legislature developed a standard for agencies to follow when promulgating rules. But, an agency does not have the authority to adopt a rule merely because the rule "is within the agency's class of powers and duties" because "[an] administrative rule must certainly fall within the class of powers and duties delegated to the agency, but that alone will not make a rule a valid exercise of legislative power." Save the Manatee, 772 So. 2d at 598-599. Further, the court believes the 1999 "flush left" language is unambiguous, thus justifying resort solely to a dictionary to define key terms, e.g., the term "specific." Id. at 599. Importantly, the court held that "the authority to adopt an administrative rule must be based on an explicit power or duty identified in the enabling statute." Id. (emphasis added). This explanation of the standard was re-affirmed in State of Florida, Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc., 26 Fla. L. Weekly D2240a (Fla. 1st DCA Sept. 13, 2001).

50. Stating the general standard is one thing; it is quite another to apply the standard on a case-by-case basis, as here.

The duties and powers of the Division.

51. In 1949, the Legislature enacted Chapter 25353, at 777, Laws of Florida. This Chapter created the Florida Board of Parks and Historic Memorials (Florida Board) and provided in part that "[i]t shall be the duty of the board to supervise, administer, regulate and control . . . [t]he operation of all public parks . . .." Id. Section 6, at 779. The powers of the Florida Board were separately stated. Id. Section 7, at 780.

52. The Legislature also provided several "whereas" clauses, including the statements that "WHEREAS, the conservation, development and protection of forests and forest lands is so divergent from the purpose for which the Florida Park service was created, which purpose was to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations, as to require, in the best interest of the people, that the activities be under the administration of separate agencies, and . . . WHEREAS, certain buildings, roads, trails, recreational facilities, utilities and other capital improvements are essential to the full use and enjoyment of the State Parks and are essential to their economical administration and operation." Id. "Whereas Clauses," at 777.

53. The Florida Board was also given the authority "to make and publish such rules and regulations as it may deem necessary or proper for the management and use of the parks . . . under its jurisdiction . . .." Id. Section 7, at 780.

54. In 1969, as part of the reorganization of state agencies, the Legislature created the Division of Recreation and Parks within the Department of Natural Resources. Chapter 69-106, Section 25, at 543, Laws of Florida. The Division assumed all of the functions of the Florida Board. Id. at 545.

55. In 1975, the Legislature, enacted the Florida Environmental Reorganization Act of 1975, and in part, reiterated that the Division of Recreation and Parks would be a Division within the Department of Natural Resources, Chapter 75-22, Section 13, at 51, Laws of Florida, and "shall preserve, manage, regulate and protect all parks and recreational areas held by the state . . .." Id. Section 14, at 52.

56. In 1998, the Legislature amended Section 258.007(2), Florida Statutes (1997) as follows: "(2) The division has the authority to adopt rules pursuant to ss. 120.54 and 120.536(1) to implement provisions of law conferring duties on it ~~shall make and publish such rules and regulations as it may deem necessary or proper for the management and use of the parks, monuments, and memorials under its jurisdiction~~, and the

violation of any rule ~~of the rules and regulations~~ authorized by this section shall be a misdemeanor and punishable accordingly." Chapter 98-200, Section 47, at 1842, Laws of Florida (additions are underlined; deletions are stricken through). By enacting Chapter 98-200, in part, the Legislature was "restating rulemaking authority for numerous state officers, departments, divisions, boards, and other entities" including the Division. Id. "Title," at 1828. It appears that the Legislature's goal was greater uniformity among the various general rule-enabling statutes.

57. The Legislature also repealed Section 258.011, Florida Statutes (1997) "[r]ules and regulations for certain parks," which had authorized the Division to "adopt and enforce such rules and regulations as may be necessary for the protection, utilization, development, occupancy, and use of said parks, and consistent with existing laws and with the purpose, or purposes, for which said areas were acquired, designated, and dedicated . . .." Chapter 98-200, Section 48, at 1842. The Legislature did not change the "duties" of the Division.

58. In light of the above, the Division has several statutory "duties" pursuant to Section 258.004(1) and (2), Florida Statutes:

> (1) It shall be the duty[1] of the Division of Recreation and Parks of the Department of Environmental Protection to supervise,[2]

> administer,[3] regulate,[4] and control[5] the operation[6] of all public parks. . . .
>
> (2) The Division of Recreation and Parks shall preserve,[7] manage,[8] regulate, and protect[9] all parks and recreational areas held by the state . . .

In the absence of specific statutory definitions, it can be assumed that the words describe the Division's duties according to their ordinary dictionary definitions. Save the Manatee, 773 So. 2d at 599.

59. The Legislature also stated in Section 258.037, Florida Statutes, that it is policy of the Division:

> [t]o promote the state parks system for the use, enjoyment, and benefit of the people of Florida and visitors; to acquire typical portions of the original domain of the state which will be accessible to all of the people, and of such character as to emblemize the state's natural values; conserve these natural values for all time; administer the development, use and maintenance of these lands and render such public service in so doing, in such a manner as to enable the people of Florida and visitors to enjoy these values without depleting them; to contribute materially to the development of a strong mental, moral, and physical fiber in the people; to provide for perpetual preservation of historic sites and memorials of statewide significance and interpretation of their history to the people; to contribute to the tourist appeal of Florida.

60. The issue for resolution is whether the Legislature intended the statutory "duties" to be "specific (or explicit) duties" which can be implemented or interpreted by Rule 62D-

2.014(18), and in particular, whether the Division, in promulgating Rule 62D-2.014(18), is implementing or interpreting "specific (or explicit) duties" in accordance with the "flush left" language of Sections 120.52(8) and 120.536(1), Florida Statutes. See Save the Manatee, 773 So. 2d at 599.

Rule 62D-2.014(18) does not exceed the Division's grant of rulemaking authority.

61. The Legislature granted the Division the general authority to adopt rules pursuant to Section 258.007(2), Florida Statutes, and "to implement provisions of law conferring duties on it," i.e., Section 258.004, Florida Statutes. (emphasis added). Pursuant to the "flush left" language of Section 120.52(8), Florida Statutes, this grant of rulemaking authority is necessary and has been satisfied. But, does Rule 62D-2.014(18) implement or interpret a specific or explicit statutory duty or power?

62. For over 50 years the Legislature has delegated to the Division, and its predecessor, the specific duties to supervise the operation of all public parks, to administer the operation of all public parks, to regulate the operation of all public parks, and to control the operation of all public parks. The Division also has the duty to "preserve, manage, regulate, and protect all parks and recreational areas held by the state."

63. Public parks and recreation areas include more than picturesque fields, rivers and streams, fauna, and other natural beauty; they also include benches and tables, restrooms, roadways and paths, and other physical attributes.

64. Public parks and recreation areas are frequented by people who visit parks for a myriad of reasons. Over 16 million people visited Florida State parks last year. They stroll about viewing nature at its best; they camp; they boat; they swim; they cook, either alone or in a group; they use restrooms and other facilities. Unfortunately, there are also opportunities for the public to litter, pollute the air somewhat due to vehicle traffic, or to offend, or cause physical harm, to their fellow visitor in some unexpected or perhaps intentional manner or way. While the public has the right to visit a public park, this right is not absolute.

65. Park areas can be dangerous. The park may not be able to accommodate all of the people who may wish to use the park at the same time. Some activities of the public may be liked by some and abhorred by others. There must be some authority to exercise control over the physical property of the park and public activities, which transpire within the park. The public expects that public parks will have reasonable rules, regulating the time, place, and manner in which the public can use the park and this includes free speech activities. It is not

unreasonable to assume that the Legislature understood this when the Division was granted the specific duties described herein.

66. The enumerated statutory duties, by definition, see endnotes 2-10, overlap to some degree, but each has its own special meaning. When viewed collectively, the Division has the specific statutory duty to maintain the physical property in and of the parks in an acceptable manner so that the public can enjoy these public areas and also to supervise, regulate, and control human activity in public parks, as these terms relate to the operation of the public parks. The supervision, administration, regulation, and control of the operation of the parks include the duty to place reasonable time, place, and manner restrictions on public activity, which includes free speech activity. This is the very essence for the existence of the Division. The Legislature specifically designated the Division, as the responsible state agency, to exercise these functions and to exercise its discretion in a meaningful and fair way.

67. The situation here is different from the circumstances attending the Division of Pari-Mutuel Wagering's attempt to promulgate a rule authorizing the Division of Pari-Mutuel Wagering to conduct warrantless searches of persons and places within pari-mutuel wagering facilities. See Department of Business and Professional Regulation v. Calder Race Course,

Inc., 724 So. 2d 100 (Fla. 1st DCA 1998)(approved in Save the Manatee). First, the Division of Pari-Mutuel Wagering was given the general authority to "adopt reasonable rules for the control, supervision, and direction of all . . . licensees . . .." Id. at 102. The Division of Pari-Mutuel Wagering was not given the specific statutory duty or power to "supervise, administer . . . and control the operation of all" pari-mutuel wagering facilities nor do they have the specific duty to "preserve, manage, . . . and protect" these facilities. The Division of Pari-Mutuel Wagering regulates the facilities; they are not the caretakers of the facilities, directly responsible for the operation of the facilities and the persons who frequent them. Second, the Division of Pari-Mutuel Wagering did not have the specific statutory duty or power to conduct warrantless searches. As noted by the court, the only identifiable authority in the enabling statute to empower the Division of Pari-Mutuel Wagering to conduct the searches was the Division of Pari-Mutuel Wagering's power to carry out investigations. The court rejected the adequacy of this power to support the proposed rule.

68. Rule 62D-2.014(18) implements or interprets the specific or explicit statutory duties enumerated above. Through the Rule, the Division formally advises the public of some, but not all, free speech activities. Free speech activities are not

unfettered because they cannot "create a safety hazard or interfere with any other park visitor's enjoyment of the park's natural or cultural experience." This Rule further advises the public to inquire if there are any park "restrictions as to time, place, and manner" which may be specifically applied when a free speech activity is planned. Finally, the Rule advises that "park visitor use patterns and other visitor activities occurring at the time of the free speech activity" will be considered by the park manager when called upon to "determine the suitability of place and manner" restrictions, if any.

69. This Rule broadly explains how the Division supervises, administers, regulates, and controls the operations of all the public parks regarding free speech activities and is a valid attempt to implement or interpret specific or explicit statutory duties.

70. Throughout the Petition, there are allegations that Rule 62D-2.014(18) is an unconstitutional prior restraint on free speech. Whether Rule 62D-2.014(18) is unconstitutional on its face or as applied is beyond the scope of this Final Order. The Division of Administrative Hearings does not have the jurisdiction or authority to pass on the constitutionality of an existing rule. See Key Haven Association Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund, 427 So. 2d 153 (Fla. 1982).

Rule 62D-2.014(18), Florida Administrative Code, is not vague, does not fail to establish adequate standards for Division decisions, nor vests unbridled discretion in the Division.

71. Frandsen also alleges that Rule 62D-2.014(18) is vague, fails to establish adequate standards for agency discretion, and vests unbridled discretion in the agency. Rule 62D-2.014(18) is a valid exercise of delegated legislative authority.

72. In paragraph 4 of his Petition, Frandsen alleges that Rule 62D-2.014(18) gives the Division unbridled discretion because it does not contain a time limit within which the park manager must respond to inquiries about time, place, and manner restrictions, thereby allowing the park manager to effectively limit free speech by inaction.

73. While Frandsen and others feel it is imperative to receive authority from the Division prior to conducting their proposed park activity, the Rule, on its face, does not require contact with the park manager nor expressly require a permit or license prior to conducting free speech activities. See Naturist, 858 F. Supp. at 1570-1571, regarding the former rule. The Division tries to respond expeditiously to inquiries, although some complex questions require more response time. The lack of a specific response time is not fatal. "Where a time period is not specified, courts will normally infer that a

reasonable time was intended." Kennedy v. Crawford, 479 So. 2d 758, 761 n. 5 (Fla. 3d DCA 1985). See also Roberts v. Askew, 260 So. 2d 492 (Fla. 1972). On this record, the lack of a specific time limit to respond to inquiries does not give the Division unbridled discretion. Any decision, which may arise as a result of the application of the Rule and the Division's case-by-case determinations, is subject to challenge. Hasper.

74. In paragraph 6 of his Petition, Frandsen alleges that the Rule is vague because it states that free speech activities "include, but are not limited to, public speaking, performances, distribution of printed material, displays, and signs." (emphasis in original).

75. This Rule is different from other rules because the "include, but are not limited to" language does not proscribe conduct on its face and does not describe any punishment if a person performs a free speech activity not included in the list of examples.

76. Moreover, the list of examples is not meant to exhaustive and, as interpreted by the Division, the term "include, but are not limited to" means anything that is covered by the First Amendment, whether it be oral, written, or symbolic conduct or speech. See generally Mayo v. City of Sarasota, 503 So. 2d 347, 349 (Fla. 2d DCA 1987) (applying the doctrine of ejusdem generis to a city personnel rule)("Under the doctrine of

ejusdem gereris where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase will usually be construed to refer to things of the same kind or species as those specifically enumerated.")

77. It is neither practicable nor required for the Division to list every authorized free speech activity. Any attempt at an exhaustive list would be incomplete.

78. The general test for vagueness "is whether the statute [here the Rule] gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct." State of Florida v. Pavon, 26 Fla. L. Weekly D2107a (Fla. 4th DCA Aug. 29, 2001)(citing Brown v. State, 629 So. 2d 841, 842 (Fla. 1994)). The limited list of examples of free speech activities does not make the Rule impermissibly vague.[10]

79. Frandsen alleges in paragraphs 9, 10, 11, and 12 of the Petition that the Rule vests park managers with unbridled discretion to restrict free speech activities. Essentially, Frandsen argues that the terms "safety hazard," "visitor's enjoyment" and "visitor use patterns" do not provide park managers with sufficient standards when deciding on appropriate time, place, or manner restrictions. However, these terms have definite, yet broad, meanings and park managers are in the best position to evaluate the conditions at the parks they manage and

decide on appropriate restrictions based on the proposed activity and the guidelines articulated in the Rule.

80. In addition, it is not Rule 62D-2.014(18), which gives the Division or park managers the discretion to regulate and control activities in state parks. Rather, it is Section 258.004(1)(2), Florida Statutes, that grants the Division this authority. The Division then delegated some of this authority to the park managers who are responsible for the daily operation of their parks. Therefore, this is not a case where the Rule confers unbridled discretion on the Division. A rule is not invalid "simply because [the] 'governing statutes, not the challenged rule, confer . . . discretion.'" Florida Public Service Commission v. Florida Waterworks Association, 731 So. 2d 836, 843 (Fla. 1st DCA 1999) (quoting Cortes v. Board of Regents, 655 So. 2d 132, 138 (Fla. 1st DCA 1995)). The duties of the Division specified in the statute are broad and, therefore, rulemaking latitude is similarly broad.

81. Whether a particular time, place, or manner restriction is appropriate will depend on a number of factors including such things as the park involved, the type of activity, the time of year and the time of day. In this case, it is a determination which must be made on a case-by-case basis because it is not practicable for the Division to list a set of time, place, and manner restrictions for every conceivable free

speech activity which could potentially be held in each of the 155 state parks, 365 days of the year for the foreseeable future.

82. The Florida Supreme Court has recognized and supported the principle that rules may clarify and flesh out the details of an enabling statute. Agencies utilize their expertise by creating rules to effectuate specific duties. "The Legislature itself is hardly suited to anticipate the endless variety of situations that may occur or to rigidly prescribe the conditions or solutions to the often fact-specific situations that arise. " Avatar Development Corporation v. State, 723 So. 2d 199, 204 (Fla. 1998). See also Southwest Florida Management District v. Charlotte County, 774 So. 2d 903, 917 (Fla. 3d DCA 2001) (quoting Cole Vision Corporation v. Department of Business and Professional Regulation, 688 So. 2d 404, 410 (Fla. 1st DCA 1997)("The sufficiency of a rule's standards and guidelines may depend on the subject matter dealt with and the degree of difficulty involved in articulating finite standards.") and Environmental Trust v. State, Department of Environmental Protection, 714 So. 2d 493, 498 (Fla. 1st DCA 1998)("An agency statement explaining how an existing rule of general applicability will be applied in a particular set of facts is itself not a rule. If that were true, the agency would be forced to adopt a rule for every possible variation on a theme,

and private entities could continuously attack the government for its failure to have a rule that precisely addresses the facts at issue. Instead, these matters are left for the adjudication process under section 120.57, Florida Statutes."

83. The specific time, place and manner restrictions, if any, placed on any particular activity presents a narrow question that must be addressed on a case-by-case basis. A person who believes that any imposed restrictions are inappropriate for any reason can challenge the agency action pursuant to Sections 120.569 or 120.57, Florida Statutes. Environmental Trust; Hasper.

84. Frandsen further alleges in paragraph 13 of the Petition that the Rule is invalid because it does not provide for administrative or judicial appeal of any specific time, place, or manner restrictions imposed by the Division. It is alleged that this gives the Division unbridled discretion to limit free speech. However, this is not the case and as stated above, any particular restrictions placed on a person can be challenged through the APA.

85. Based upon the foregoing, Rule 62D-2.014(18) is not vague, does not fail to establish adequate standards for Division decisions, and does not vest unbridled discretion in the Division.

DISPOSITION

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

ORDERED that the Petition to declare Rule 62D-2.014(18), Florida Administrative Code, invalid is dismissed.

DONE AND ORDERED this 26th day of September, 2001, in Tallahassee, Leon County, Florida.

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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of September, 2001.

ENDNOTES

[1]/ "Duty," means "1. An act or a course of action required of one by position, custom, law, or religion . . .. 3. A service, action, or task assigned to one esp. in the armed forces. 4. Function or work: SERVICE . . .." Webster's II New College Dictionary 352 (1999).

[2]/ "Supervise," means "To direct and watch over the work and performance of." Id. at 1107.

[3]/ "Administer," means "1. To have charge of: MANAGE . . .." Id. at 14.

[4]/ "Regulate," means "To control or direct in agreement with a rule. 2. To adjust in conformity to a requirement or specification . . .." Id. at 934.

[5]/ "Control," . . . means "1. Authority or ability to regulate, direct, or influence . . .." Id. at 246.

[6]/ "Operation," means "1. An act, process, or way of operating . . .." Id. at 767.

[7]/ "Preserve," means "1. To keep safe, as from injury or peril: PROTECT . . .." Id. at 874.

[8]/ "Manage," means "1. To direct or control the use of. 2.a. To exert control over . . .." Id. at 664.

[9]/ "Protect," means "1. To keep from harm, attack, or injury: GUARD . . .. Id. at 889.

[10]/ In McGuire v. State, 489 So. 2d 729 (Fla. 1986), the court upheld the validity of a former park clothing rule in response to a vagueness challenge. The rule provided in pertinent part: "In every bathing area all persons shall be clothed as to prevent any indecent exposure of the person. All bathing costumes shall conform to commonly accepted standards at all times." While noting that the rule could and should have been more precise, the court nevertheless held that "McGuire ha[d] failed to demonstrate that the regulation at issue [was] so vague as to fail to put her on notice that her activities were proscribed." Id. at 732.

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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 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.