STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANGELO'S AGGREGATE MATERIALS, LTD.,

Petitioner,

vs.

SUWANNEE RIVER WATER MANAGEMENT DISTRICT,

Respondent.

Case No. 01-4026RU

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on January 10 and 28, 2002, in Live Oak, Florida, before the Division of Administrative Hearings, by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Daniel H. Thompson, Esquire
Berger, Davis & Singerman, P.A.
215 South Monroe Street
Suite 705
Tallahassee, Florida 32301

For Respondent: Bruce W. Robinson, Esquire
Brannon, Brown, Haley,
Robinson and Bullock, P.A.
Post Office Box 1029
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STATEMENT OF THE ISSUE

Whether Respondent's statements as set forth in the First Amended Petition to Determine Validity of Agency Statements

Defined as Rules are rules as defined in Section 120.52(15), Florida Statutes, which have not been promulgated as required by Section 120.54(1)(a), Florida Statutes.

PRELIMINARY STATEMENT

Petitioner, Angelo's Aggregate Materials, Inc. (Angelo's), filed a Petition to Determine Validity of Agency Statements Defined as Rules with the Suwannee River Water Management District (District) on or about October 19, 2001. The Petition was forwarded to the Division of Administrative Hearings and on October 23, 2001, was assigned to Lawrence P. Stevenson, Administrative Law Judge. A final hearing was scheduled for November 15, 2001, and was later rescheduled for November 16, 2001.

By order dated November 13, 2001, this case was consolidated for hearing with DOAH Case No. 01-004383RX. A Motion to Change Venue was filed and by order dated November 27, 2001, venue was changed to Live Oak, Florida. The cases were then reassigned to Administrative Law Judge, Barbara J. Staros. By agreement of the parties, the case was continued until January 10, 2002.

Petitioner filed an unopposed Motion to Amend the Petition to Determine Validity of Statements Defined as Rules. The motion was granted and the case proceeded under the First

Amended Petition to Determine Validity of Agency Statements Defined as Rules.

At hearing, Petitioner presented the testimony of two witnesses, Dennis Price and John Barnard. With the exception of Exhibit 15, Petitioner's Exhibits 1 through 22, including the deposition testimony of David Still, David Fisk, and Brett Cunningham, were admitted into evidence. Exhibit 15 was rejected.

Respondent presented the testimony of three witnesses, David Still, Brett Cunningham and David Fisk. Respondent's Exhibits 1 through 10, including the deposition testimony of Dennis Price and John Barnard, were admitted into evidence. The parties' request for official recognition of pertinent rules of the Florida Administrative Code was granted. The hearing had not concluded at the end of the day so the continuation of the hearing was scheduled for January 28, 2002.

A Transcript consisting of three volumes was filed on February 11, 2002. The parties requested more than 10 days in which to file Proposed Final Orders. That request was granted. The parties timely filed Proposed Final Orders which have been considered in the preparation of this Final Order.

While the cases were consolidated for hearing, separate final orders have been prepared addressing the challenge to the

validity of existing rules and the challenge to alleged agency statements.

FINDINGS OF FACT

1. Petitioner alleges that the following constitute agency statements defined as rules but not properly adopted as rules by the District:

a. The District considers a particular parcel of property to be located within a "floodway" within the District's regulatory jurisdiction for Works of the District (WOD) permitting on the basis of the parcel being located within a floodway established pursuant to a currently-approved Federal Emergency Management Agency (FEMA) Flood Insurance Study (FIS).

b. The District will not accept any alternative floodway boundaries that are inconsistent with those established in the FIS unless FEMA confirms that the alternative boundaries are more accurate than those obtained from the existing FIS, and FEMA approves the alternative boundaries through a formal approval process, such as a Letter of Map Revision that also requires local government concurrence.

c. If the District determines the parcel to be within its regulatory floodway, it will require an Environmental Resource Permit (ERP) application for

any development activities within the floodway, other than those entitled to a general permit under Rule 40B-4.3010, Florida Administrative Code.

d. The District will require an ERP for the activities described in paragraph "c" notwithstanding the fact that the Department is evaluating those same activities as part of an ERP application that has been submitted to the Department of Environmental Protection (Department) for the same activity in the same location under the terms of the Operating Agreement.[1/]

e. The District will evaluate an application to conduct development activities as described in paragraph "c" based upon the full range of ERP permitting criteria contained in the District's rules, even though the Department is processing an ERP application for the same activities pursuant to the Operating Agreement between the District and the Department.

f. The District's policy is to deny or to object to the issuance of any permit application to conduct commercial mining operations in the WOD composed of the Alapaha River floodway.

g. It is the policy of the District to consider any proposed development activity in a WOD, other than those eligible for a general permit under Rule 40B-4.3010, Florida Administrative Code, to have an adverse impact on the regulatory floodway, and thereby to be unpermittable by the District.

h. The District's policies against allowing development activities in WODs apply even if a professional engineer certifies under Rule 40B-4.3030, Florida Administrative Code, that the activity will not violate the conditions of issuance set forth in the rule. The policies apply because the District will consider the development activities to violate ERP permitting rules applicable to all development activities, not just those within WODs.

i. It is also the District's policy to ask the Department to deny ERP applications for development activities proposed in WODs that require ERPs even though the Department is processing the application pursuant to the Operating Agreement.

j. The District's policy is to deny ERP applications to conduct commercial mining activities in WODs as determined by the FIS, and to recommend to the Department that ERP applications to the Department

for such projects be denied, unless the applicant goes through the FEMA amendment process described in paragraph b to remove the area from the FEMA-determined floodway.

2. Each party requests that it be granted costs and attorney's fees pursuant to Section 120.595(4), Florida Statutes.

Stipulated Facts

3. Angelo's is a Florida Limited Partnership, whose address is 26400 Sherwood, Warren, Michigan 48091.

4. Respondent is an agency of the State of Florida established under Chapter 373, Florida Statutes, with its address at 9225 County Road 49, Live Oak, Florida 32060.

5. Angelo's owns property in Hamilton County approximately four miles to the east of Interstate 75 and to the north of U.S. Highway 41, immediately to the east of the Alapaha River.

6. Angelo's conducts commercial sand mining operations on a portion of its property pursuant to various agency authorizations, including an ERP issued by the Florida Department of Environmental Protection (Department), Permit No. 158176-001, and a Special Permit issued by Hamilton County, SP 98-3.

7. The ERP was issued by the Department pursuant to its authority under Chapter 373, Part IV, Florida Statutes.

Angelo's mining operations constitute a "mining project" as that term is used in Section II.A.1.e of an Operating Agreement Concerning Regulation under Part IV, Chapter 373, Florida Statutes, and Aquaculture General Permits under Section 403.814, Florida Statutes, between Suwannee River Water Management District and Department of Environmental Protection (Operating Agreement).

8. The Operating Agreement has been adopted as a District rule pursuant to Rule 40B-400.091, Florida Administrative Code.

9. Angelo's has filed with the Department an application to modify its ERP to expand its sand mining operations into an area of its property immediately to the west of its current operations (the "proposed expanded area"). Angelo's application is being processed by the Department at this time.

10. Angelo's ERP modification application is being processed by the Department under the Operating Agreement. The District has asserted permitting jurisdiction over the proposed expanded area because the proposed sand mining activities would occur in what the District asserts to be the floodway of the Alapaha. The District asserts that an ERP would be required from the District so that the District can address the WOD impacts.

11. It is the District's position that the District's review of any ERP application to undertake development

activities in a WOD would be based upon all of the ERP criteria, and not just those criteria relating to floodway conveyance referenced in Rule 40B-4.3030, Florida Administrative Code.

12. On or about November 30, 2001, the District published in the Florida Administrative Weekly a notice of its intent to adopt the FEMA Flood Insurance Rate Maps (FIRM) to delineate floodways for the purpose of its works of the district regulatory program.

Facts Based on Evidence of Record

Background/Events leading up to this dispute

13. The total amount of the subject property owned by Petitioner is approximately 560 acres. The property is generally a rolling terrain. A significant feature is a man-made berm which was placed around the perimeter of the property by a former owner, presumably to keep water off of the land during floods of the Alapaha River.

14. Dennis Price is a self-employed registered professional geologist. At one time, he was employed by the District and at another time, he was employed by Petitioner. For purposes of this proceeding, he was hired by Petitioner as a consultant for certain permitting projects including the project that gave rise to this dispute. Mr. Price met with and corresponded with the District as well as staff from the

Department over a period of two years regarding this mining project.

15. In June of 1999, the Department wrote to Mr. Price in response to a meeting. The letter noted that Petitioner intended to expand mining operations. In addition to informing Mr. Price of the Department's permit requirements, the letter referenced the District's permitting requirements:

> Mr. Still provided us with an aerial photograph showing the SRWMD's regulated floodway in the area of your mine. A copy is enclosed with the floodway line highlighted in orange. A substantial portion of your proposed expansion area will be within this floodway. The SRWMD has adopted the Alapaha River and its floodway as a works of the district. The Department adopted the SRWMD's regulations pertaining to the environmental resource permit; however, this did not include the regulations pertaining to projects within works of the district.
>
> If your permit application only includes areas outside of the floodway, a single application will have to be provided to this bureau. If you intend to expand within the floodway, a separate application will also have to be provided to the SRWMD for a works of the district permit. In either situation, the Department's Jacksonville office will review any modifications to your industrial wastewater permit. (emphasis supplied)[2/]

16. In response, Mr. Price wrote to the Department in July of 1999 and stated in pertinent part:

> Dear Mr. Neel, this letter is in response to your June 22, 1999 letter "RE: Permits for

Mining Operation". Angelo's currently has a Sand and Limestone General Permit from DEP - General Permit Number FLA011635. That permit is based on a 5 year mining plan that was presented to the DEP on January 11, 1999. The permit, my letter and the 5 year mining plan presented to DEP are enclosed. Another attachment is an aerial photo of the property showing the Regulatory Floodway line and the location of the areas to be mined under that 5 year mining plan.

The aerial photograph has superimposed upon it the location of the floodway of the Alapaha River, as determined by FEMA maps. Please note that the 5 year mining plan and the associated storage and processing areas are outside the regulatory floodway. Therefore, no works of the district permit will be needed at this time. See FAC Rule 40B-4.300(1)(a) [sic].

Future mining beyond the five year mine plan will not occur without first applying for and obtaining permits from the appropriate regulatory agency. At the present time we will only mine areas within the 5 year mine plan.

<u>We will have an engineer field locate the floodway line on the property to ensure that no mining or associated storage and process activities occur within the floodway.</u> We are requesting that the ERP permitting process remain within the DEP bureau of Mine Reclamation since the DEP has already issued a general permit for this activity and the DEP normally handles ERP's for mining operations.

We have determined that the mining area will be less than 100 acres, and based on Rule 40B-4.2020(2)(B) FAC a general permit may be applied for. We will notify you when we have a draft application prepared and would like to meet with you at your earliest

> convenience after that to discuss the permit application. (emphasis supplied)

17. In response to information which Mr. Price provided to the Department, the Department wrote to Mr. Price in December of 1999 and again addressed concerns about the area of the project in relation to the floodway line:

> Specific Item: FLOODWAY
>
> Information submitted in response to the request for additional information (RAI) dated August 12, 1999, indicates that Angelo's proposed project boundary and activities extend up to and coincide with the Floodway Line. There appears to be no set-back or buffer from the Floodway (or any other) Line. Chapter 40B-4, Florida Administrative Code (F.A.C.), contains the rules for the Suwannee River Water Management Area which were adopted by the Department of Environmental Protection. Section 40B-4.2010(2)(b)(3)(b) provides that <u>a General Permit may be issued for construction, operation, and maintenance of a surfacewater management system servicing a total project area less than 120 acres provided the system will not be located in, cross or connect to a work of the district.</u>
>
> Information submitted with this (November 12, 1999) submittal indicates that the proposed activities within the proposed project coincides with, or is so closely located to, the Floodway Line so as to indicate that the proposed activities would be considered to be connected to a work of the district. This is based upon examination of the plan views and [sic] well as cross section information that has been provided. Please provide a discussion, and drawings as may be needed, that addresses all activities along the established Floodway Line. This information should

> address all aspects of all operations along this line through the completion of reclamation activities. Be sure to address best management practices, and any proposed setbacks in the response to this request. (emphasis in original)[3/]

18. Mr. Price described the proposed project as part of the permit application which was submitted to the Department:

> Describe in general terms the proposed project, system, or activity.
>
> Angelo's Aggregate Materials, Ltd. (AAM) owns approximately 341 acres of land. The current mining site, known as the Jasper Pit, is located on a 160 acre parcel of land. <u>Of the 160 acres, only 82.45 acres are available for mining since the remainder of the property falls within the floodway boundary of the Alapaha River.</u> The 160 acre parcel has an existing berm around the entire perimeter of the property constructed in the 1950's by the previous owner. The Alapaha flood study conducted for FEMA did not take into account this berm. AAM is proposing to construct a 20' wide access road between NW 8th Boulevard and the Jasper Pit, encompassing approximately 7.22 acres. This roadway will be constructed within the limits of property owned by AAM. The stormwater management system for the roadway will consist entirely of grassed swales as covered under FDEP's swale exemption. The Jasper Pit is a sand and limestone mining operation. (emphasis supplied)

19. On August 28, 2001, David Still, the District's Director of Resource Management, wrote a letter to the Department in response to a request received by e-mail from the Department for technical assistance. Mr. Still responds to requests for technical assistance from other agencies as a

matter of routine and as contemplated by the operating agreement between the Department and the District. The letter reads as follows:

> The floodway along the Alapaha River was identified and mapped as part of a Federal Emergency Management Association (FEMA) flood study performed by the United States Army Corps of Engineers, subsequently approved by FEMA and adopted as part of the local government (Hamilton County) ordinance. Based on the above, Suwannee River Water Management District (SRWMD) then adopted the floodway as a Work of the District (WOD). There is only one floodway.
>
> SRWMD recognizes and accepts the FEMA flood study performed by the U.S. Army Corps of Engineers and local government (Hamilton County) floodway boundary as the best available information to identify the floodway boundary.
>
> There is a formal process whereby change can be made to the FEMA boundary with additional or improved information. If FEMA and Hamilton County approve a revised floodway delineation and boundary, so be it, SRWMD will recognize it, however, SRWMD will not unilaterally change a boundary resulting from a detailed federal flood insurance study. We have informed Mr. Thompson and his client of this.
>
> We consider the kind of work contemplated by the applicant (at least based on our earliest discussions with them) will cause an adverse impact to the WOD (the floodway) which of course is in conflict with the requirements of 40B-400.103(1)(h) and SRWMD 40B-4, Part III, Florida Administrative Code (F.A.C.). The District will object to the issuance of any permit in direct conflict with District rules.

> We feel the rule is clear and any conflict with 40B-400.103(1)(h), F.A.C. which the Florida Department of Environmental Protection has adopted by reference requires denial of the Environmental Resource Permit (ERP) application. Any work of this nature within a WOD is subject to the additional permitting requirements of 40B-4, Part III, F.A.C., even if the District needs to implement such requirements with a separate WOD permit.

20. Mr. Still's reference to "the applicant" in the August 28, 2001, letter is to Petitioner.

21. While Mr. Still is not the agency head, his August 28, 2001, letter clearly communicates the District's policy. Given his position in the agency and the manner in which he discussed this issue, the letter describes and communicates the District's policy on what constitutes a floodway and its boundary.

22. Mr. Still does not have final authority to make decisions on permitting within the District, as that authority rests with the governing board. In a letter written on October 10, 2001, in response to a letter from Petitioner's counsel, Mr. Still stated that District staff would recommend to their governing board that Petitioner's proposed activity is an activity within a floodway that is regulated under Chapter 40B-4, Part III, Florida Administrative Code, and that the proposed activity would adversely impact the floodway: "Therefore, as staff, we would recommend our governing board consider this activity adverse to our rules." This letter is

case specific to Petitioner. Within a few days of Mr. Still's October 10, 2001, letter, Petitioner filed its Petition to Determine Validity of Agency Statements Defined as Rules.

Other facts established by the evidence of record

23. The District uses FEMA FIRM maps as evidence of the location of the floodways in the works of the district. The District communicated this policy in Mr. Still's letter dated August 28, 2001.

24. The District will not unilaterally change the floodway delineation and boundary established by FEMA. In order for an applicant to persuade the District that a proposed activity within the FEMA floodway line is not within the District's floodway, an applicant must apply to FEMA for a map amendment or revision. The District will acknowledge that a proposed activity is not within the floodway of a work of the district only if the applicant is successful in obtaining a map amendment or revision showing that the proposed activity indeed is not within the floodway.

25. The District has applied this policy to another company which applied for a permit. That is, the District required the permit applicant to apply to FEMA for a map revision or amendment as a condition of issuance of a permit because its proposed activity was within the FEMA floodway as established by the FEMA maps.

26. Petitioner has not filed a permit application with the District regarding the proposed mining project. It is Petitioner's position that to do so would be futile.

CONCLUSIONS OF LAW

27. The Division of Administrative hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to Section 120.56(4), Florida Statutes, which reads in pertinent part:

> (4) CHALLENGING AGENCY STATEMENTS DEFINED AS RULES; SPECIAL PROVISIONS.--
>
> (a) Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state with particularity facts sufficient to show that the statement constitutes a rule under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54.

28. Section 120.52(15), Florida Statutes, defines "rule" as follows:

> (15) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. . . .

29. Section 120.54(1)(a), Florida Statutes, provides in pertinent part:

> (1) GENERAL PROVISIONS APPLICABLE TO ALL RULES OTHER THAN EMERGENCY RULES.--
>
> (a) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.

30. Petitioner has proven it has standing to challenge the alleged agency statements.

31. The burden of persuasion in a challenge to an agency statement is on Petitioner. The basis for such a challenge is that the agency statement constitutes a rule that has not been adopted by the rule-making procedure mandated by Section 120.54, Florida Statutes. Southwest Florida Water Management District v. Charlotte County, 774 So. 2d 903 (Fla. 2nd DCA 2001).

32. Petitioner's allegations of agency statements are based primarily on the August 28, 2001, letter from Mr. Still to the Department which communicated District policy.

Alleged Agency Statements a, b, f, and j

33. The District's reliance on FEMA FIRM maps to determine the floodway line within the works of the district was clearly stated to Petitioner in Mr. Still's letter of August 28, 2001.

34. Moreover, the District requires an applicant to obtain a revision or map amendment from FEMA to establish that an

activity is not within the floodway of the District. This policy was also clearly stated in Mr. Still's letter of August 28, 2001. The District has relied on this policy with at least one other company.

35. The policies of using the FEMA maps to determine the floodway line and requiring an applicant to obtain a map amendment directly from FEMA are not apparent from a review of the District's rules.

36. Petitioner has met its burden of proving that the District's policy of reliance on FEMA's determination of the floodway line to establish the District's floodway line for works of the district or alternatively, its requirement that an applicant obtain a map revision or amendment from FEMA to establish that an activity is not within a floodway of a work of the district, constitutes rules as contemplated by Section 120.52(15), Florida Statutes.

37. With this determination, the burden shifts to the District to prove that rulemaking is not feasible and practicable under Section 120.54(1)(a), Florida Statutes. A review of the record reveals that the District had not met its burden in this regard.

38. To defend itself, the District asserts that it has met the requirements of Section 120.56(4)(e), Florida Statutes, in that it proceeded, in procedural compliance, expeditiously and

in good faith to adopt rules which address the agency statements. Contrary to its assertion, the District did not meet the requirements set forth in Section 120.56(4)(e), Florida Statutes. The District published in the Florida Administrative Weekly a preliminary text of proposed rule development which incorporates by reference the Flood Insurance Rate Maps published by the National Flood Insurance Program for FEMA (the FEMA flood maps) to establish the floodway for the works of the district identified in Chapter 40B-4, Part III, Florida Administrative Code. The notice comports with the requirements of Section 120.54(2)(a), Florida Statutes. However, the District has not published proposed rules that fully comport with the requirements of Section 120.54(3)(a), Florida Statutes, as necessary. The notice that was published in the Florida Administrative Weekly contains the preliminary text of the proposed rule development, not the full text of the proposed rule. Further, the notice does not provide a summary of the proposed rule, a notice of the procedure for requesting a public hearing, or a statement of estimated regulatory costs.

<u>Alleged Agency Statements c, d, e, and i</u>

39. Mr. Still's letter of August 28, 2001, to the Department stated that any work done within a work of the district would be subject to "the additional permitting requirements of 40B-4, Part III, F.A.C., even if the District

needs to implement such requirements with a separate WOD permit."

40. As set forth in the findings of fact, the District requires an ERP for proposed sand mining activities that fall within the works of the district despite the fact that Petitioner has as ongoing ERP modification application pending with the Department. Petitioner objects to the District's requiring "double ERP's" and contends this policy is inconsistent with the Operating Agreement between the two agencies and is "illegal". Petitioner's objection goes more to the issue of the jurisdiction of the two agencies to require ERPs and whether any such requirements run contrary to the Operating Agreement between the two agencies. Petitioner's dispute with either agency concerning the jurisdiction to require an ERP permit constitutes an argument on legal interpretation, it does not involve the District's advancement of a policy without rule adoption.

41. Moreover, the District has broad statutory authority to provide for works of the district and control activities conducted within works of the district.

42. Section 373.086, Florida Statutes, provides in pertinent part:

PROVIDING FOR DISTRICT WORKS.--

(1) In order to carry out the works for the district, and for effectuating the purposes of this chapter, the governing board is authorized to clean out, straighten, enlarge, or change the course of any waterway, natural or artificial, within or without the district; to provide such canals, levees, dikes, dams, sluiceways, reservoirs, holding basins, floodways, pumping stations, bridges, highways, and other works and facilities which the board may deem necessary; to establish, maintain, and regulate water levels in all canals, lakes, rivers, channels, reservoirs, streams, or other bodies of water owned or maintained by the district; to cross any highway or railway with works of the district and to hold, control, and acquire by donation, lease, or purchase, or to condemn any land, public or private, needed for rights-of-way or other purposes, and may remove any building or other obstruction necessary for the construction, maintenance, and operation of the works; and to hold and have full control over the works and rights-of-way of the district.

(2) The works of the district shall be those adopted by the governing board of the district. The district may require or take over for operation and maintenance such works of other districts as the governing board may deem advisable under agreement with such districts.

43. Section 373.085, Florida Statutes, provides as follows:

Use of works or land by other districts or private persons.--

(1) The governing board has authority to prescribe the manner in which local works provided by other districts or by private

> persons will connect with and make use of the works or land of the district, to issue permits therefor, and to cancel the permits for noncompliance with the conditions thereof or for other cause. It is unlawful to connect with or make use of the works or land of the district without consent in writing from its governing board, and the board has authority to prevent or, if done, estop or terminate the same. The use of the works or land of the district for access is governed by this section and is not subject to the provisions of s. 704.01. However, any land or works of the district which have historically been used for public access to the ocean by means of the North New River Canal and its tributaries may not be closed for this purpose unless the district can demonstrate that significant harm to the resource would result from such public use.
>
> (2) Damage resulting from unlawful use of such works, or from violations of the conditions of permit issued by the board shall, if made by other than a public agency, be subject to such penalty as is or may be prescribed by law and in addition thereto by a date and in a manner prescribed by the board, repair of said damage to the satisfaction of said board, or deposit with said board a sum sufficient therefor, and if by a public agency, then at the expense of such agency the repair of said damage to the satisfaction of the board or the deposit with said board of a sum sufficient therefor.

44. Further, the District has existing rules which address the alleged agency statements c, d, e, and i.

45. Rule 40B-1.702(4), Florida Administrative Code, reads as follows:

> (4) A works of the district permit under Chapter 40B-4, F.A.C., must be obtained

> prior to initiating any project as outlined in (3) above within a regulatory floodway as defined by the District.

46. Rule 40B-4.1040(1)(b) and (c), Florida Administrative Code, reads as follows:

> (1) Permits are required as follows:
>
> * * *
>
> (b) Works of the district development permit prior to connecting with, placing structures or works in or across, discharging to, or other development within a work of the district.
>
> (c) When the need to obtain a works of the district development permit is in conjunction with the requirements for obtaining a surfacewater management permit, application shall be made and shall be considered by the district as part of the request for a surfacewater management permit application. Otherwise, a separate works of the district development permit must be obtained.

47. Rule 40B-4.3030, Florida Administrative Code, reads as follows:

> Conditions for Issuance of Works of the District Development Permits.
>
> (1) The district will not approve the issuance of separate permits for development in a work of the district for any proposed project that requires a district surfacewater management permit pursuant to Part II of this chapter. For such projects, development in a work of the district may be authorized as part of any surfacewater management permit issued.

(2) The district will not approve the issuance of a works of the district development permit for any work, structures, road, or other facilities which have the potential of individually or cumulatively reducing floodway conveyance or increasing water-surface elevations above the 100-year flood elevation, or increasing soil erosion. The district will presume such a facility will not reduce conveyance or increase water-surface elevations above the 100-year flood elevation or increase soil erosion if:

(a) Roads with public access are constructed and laid out in conformance with the minimum standards of local government. Where roads are not required to be paved, the applicant must provide design specifications for erosion and sediment control. Where roads are required to be paved, swales will generally be considered adequate for erosion and sediment control;
(b) Buildings in the floodway are elevated on piles without the use of fill such that the lowest structural member of the first floor of the building is at an elevation at least one foot above the 100-year flood elevation;

(c) The area below the first floor of elevated buildings is left clear and unobstructed except for the piles or stairways;

(d) A permanent elevation monument is established on the property to be developed by a surveyor. The monument shall be adequate to establish land surface and minimum buildup elevations to the nearest 1/100 of a foot;

(e) No permanent fill or other obstructions are placed above the natural grade of the ground except for minor obstructions which are less than or equal to 100 square feet of the cross-sectional area of the floodway on any building or other similar structure

provided that all such obstruction developed on any single parcel of land after the implementation date of this chapter is considered cumulatively;

(f) No activities are proposed which would result in the filling or conversion of wetlands.

(3) For any structure placed within a floodway which, because of its proposed design and method of construction, may, in the opinion of the district, result in obstruction of flows or increase in the water surface elevation of the 100-year flood, the district may require as a condition for issuance of a work of the district development permit that an engineer certify that such a structure will not obstruct flows or increase 100-year flood elevations.

(4) The following conditions shall apply to all works of the district development permits issued for development on lands subdivided after January 1, 1985:

(a) Clearing of land shall be limited [except as provided in (b) and (c) below] to that necessary to remove diseased vegetation, construct structures, associated water supply, wastewater disposal, and private driveway access facilities, and no construction, additions or reconstruction shall occur in the front 75 feet of an area immediately adjacent to a water.

(b) Clearing of vegetation within the front 75 feet immediately adjacent to a water shall be limited to that necessary to gain access or remove diseased vegetation.

(c) Harvest or regeneration of timber or agricultural crops shall not be limited provided the erosion of disturbed soils can be controlled through the use of appropriate best management practices, the seasonal

scheduling of such activities will avoid work during times of high-flood hazard, and the 75 feet immediately adjacent to and including the normally recognized bank of a water is left in its natural state as a buffer strip.

(d) As to those lands subdivided prior to January 1, 1985, the governing board shall, in cases of extreme hardship, issue works of the district development permits with exceptions to the conditions listed in Rule 40B-4.3030(4)(a) through (c).

(e) The 75-foot setback in paragraphs (a) through (d) above shall be considered a minimum depth for an undisturbed buffer. The limitations on disturbance and clearing within the buffer as set out in paragraphs (a) through (d) above shall apply, and any runoff through the buffer shall be maintained as unchannelized sheet flow. The actual depth of the setback and buffer for any land use other than single-family residential development, agriculture, or forestry shall be calculated in accordance with the methodology in: "Urban Hydrology for Small Watersheds", U.S. Department of Agriculture, Soil Conservation Service, Engineering Division, Technical Release 55, June 1986; and, "Buffer Zone Study for Suwannee River Water Management District", Dames and Moore, September 8, 1988, such that the post-development composite curve number for any one-acre area within the encroachment line does not exceed;

1. a value of 46 for areas within the encroachment line with predominantly Class A soils;

2. a value of 65 for areas within the encroachment line with predominantly Class B soils;

3. a value of 77 for areas within the encroachment line with predominantly Class C soils; or

4. a value of 82 for areas within the encroachment line with predominantly Class D soils.

48. As set forth in the findings of fact, the Operating Agreement is incorporated by reference in District Rule 40B-400.091, Florida Administrative Code.

49. Petitioner has not met its burden of proving that alleged agency statements c, d, e, and i are unadopted rules. In summary, whether the District can require ERPs, in addition to any such requirements of the Department, is an issue related to jurisdiction, not to the question of creating substantive policy. Any quarrel Petitioner has with the application of existing statutes or rules are matters more appropriately left to the adjudication process of Section 120.57, Florida Statutes. See Environmental Trust v. State Department of Environmental Protection, 714 So. 2d 493 (Fla. 1st DCA 1998).

Alleged Agency Statements g and h

50. Petitioner asserts in its First Amended Petition to Determine Validity of Agency Statements Defined as Rules that alleged agency statements g and h constitute unadopted rules that, in essence, prohibit mining in the floodway of a work of the district.

51. Petitioner bases this assertion largely on the August 28, 2001, letter written by Mr. Still to the Department which states in part that, based upon early discussions with Petitioner, the District considered the kind of work contemplated by Petitioner will cause an adverse impact to the floodway in conflict with Rule 40B-400.103(1)(h), Florida Administrative Code, and that the District will object to the issuance of any permit in direct conflict with District rules.

52. Petitioner also relies on the October 10, 2001, letter written by Mr. Still to counsel for Petitioner in which Mr. Still stated that District staff would recommend to their governing board that Petitioner's proposed activity is an activity within a floodway that is regulated under Chapter 40B-4, Part III, Florida Administrative Code, which would aversely impact the floodway, "therefore as staff, we would recommend our governing board consider this activity adverse to our rules."

53. The August 28, 2001, and October 10, 2001, letters do not single out the prohibition of mining in the floodway, but interpret existing rules in the context of Petitioner's proposed activity.

54. Rule 40B-400.103(1)(h), Florida Administrative Code, which was referenced in Mr. Still's letter, reads as follows:

> (1) In order to obtain a standard general, individual, or conceptual approval permit under this chapter or chapter 40B-4, F.A.C., an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal or abandonment of a surface water management system:
>
> * * *
>
> (h) Will not cause adverse impacts to a work of the District established pursuant to s. 373.086. . . .

55. In these communications from Mr. Still, alleged agency statements (g) and (h) analyze a valid existing rule as it applies to the proposed activities of Petitioner. Further, Mr. Still's letters clearly reference Part III of Chapter 40B-4, Florida Administrative Code, which contains the Works of the District rules and Rule 40B-400.103, Florida Administrative Code, which is entitled, "Conditions for Issuance of Permits."

56. In <u>Environmental Trust v. State Department of Environmental Protection</u>, <u>supra</u>, at 498, the court found:

> An agency statement explaining how an existing rule of general applicability will be applied in a particular set of facts is not itself 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.

57. Petitioner has not met its burden of proving that alleged agency statements (g) and (h) are unadopted rules.

ORDER

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

ORDERED:

1. The First Amended Petition to Determine Validity of Agency Statements Defined as Rules is granted as to agency statement (a) which concerns the District's reliance on the FEMA flood maps for the purpose of establishing the floodway for works of the District, and the alternative agency statement (b) which requires applicants to seek and obtain a map amendment or revision from FEMA before Respondent will accept any alternative floodway boundaries that are inconsistent with those established by the FEMA Flood Insurance Study maps.

2. The remaining allegations of the First Amended Petition to Determine Validity of Agency Statements are dismissed.

3. Jurisdiction of the Division of Administrative Hearings is retained for consideration of Petitioner's request for reasonable costs and reasonable attorney's fees pursuant to Section 120.595(4), Florida Statutes. Respondent's request for attorney's fees is denied.

DONE AND ORDERED this 12th day of April, 2002, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of April, 2002.

ENDNOTES

1/ The Operating Agreement is identified and described under the subheading, "Stipulated Facts."

2/ It is important to note that this letter contains statements by the Department, which is not a party to this dispute, about the District's rules. It does not contain policy statements of the District. The Department's letter is simply included as part of the background of events leading up to this dispute.

3/ See Endnote 2.

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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 the original notice of appeal with the Clerk of the Division of Administrative Hearings and a 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.