STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANGELO'S AGGREGATE MATERIALS, LTD.,	)	
Petitioner,	)	
vs.	)	Case No. 01-4383RX
SUWANNEE RIVER WATER MANAGEMENT DISTRICT,	)	
Respondent.	)	

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
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Tallahassee, Florida 32301

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

Whether Rules 40B-1.702(4); 40B-4.1020(12) and (30); 40B-4.1030; 40B-4.1040(1)(b) and (c); 40B-4.2030(4);

40B-4.3000(1)(a); 40B-4.3010; 40B-4.3020; 40B-4.3030; 40B-4.3040; and 40B-400.103(1)(h), Florida Administrative Code, of the Suwannee River Water Management District, are an invalid exercise of delegated legislative authority for reasons described in the Second Amended Petition to Determine Validity of Rules.

PRELIMINARY STATEMENT

Petitioner, Angelo's Aggregate Materials, Inc. (Angelo's), filed a Petition to Determine Validity of Existing Rules with the Suwannee River Water Management District (District) on or about November 13, 2001. The Petition was forwarded to the Division of Administrative Hearings on November 13, 2001, and was assigned to Lawrence P. Stevenson, Administrative Law Judge.

By order dated November 13, 2001, this case was consolidated for hearing with DOAH Case No. 01-4026RU. 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's motions to amend the Petition were granted and the case proceeded under the Second Amended Petition to Determine Validity of Existing 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 on January 10, 2002, so the continuation of the hearing was rescheduled 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

Stipulated Facts

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

2. The District 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.

3. 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.

4. Angelo's conducts commercial sand mining operations on a portion of its property pursuant to various agency authorizations, including an Environmental Resource Permit (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.

5. 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 the District and the Department (Operating Agreement).

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

7. 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.

8. 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 work of the district (WOD) impacts.

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

The Challenged Rules

10. The rules or portions thereof which are challenged in this proceeding are as follows:

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.

Rule 40B-4.1020(12) and (30), Florida Administrative Code, read as follows:

> (12) "Floodway" or 'regulatory floodway" means the channel of a river, stream, or other watercourse and adjacent land areas that must be reserved in order to discharge the 100-year flood without cumulatively increasing the 100-year flood elevation more than a designated height. Unless otherwise noted, all regulatory floodways in the Suwannee River Water Management District provide for no more then one-foot rise in surface water.
>
> * * *
>
> (30) "Work of the district" means those projects and works including, but not limited to, structures, impoundments, wells, streams, and other watercourses, together with the appurtenant facilities and accompanying lands, which have been officially adopted by the governing board as works of the district. Works of the district officially adopted by the board are adopted by rule in Rule 40B-4.3000 of this chapter.

Rule 40B-4.1030, Florida Administrative Code, reads as follows:

> (1) The implementation dates of this chapter are as follows:

(a) January 1, 1986 for Rule 40B-4.1040(1)(a) which requires persons to obtain surfacewater management permits.

(b) April 1, 1986 for Rule 40B-4.1040(1)(b) and Rule 40B-4.3040 which require persons to obtain works of the district development permit if the proposed development is in one of the following areas adopted as a work of the district.

1. The Alapaha River and its floodway in Hamilton County, Florida;

2. The Aucilla River and its floodway in Jefferson, Madison, or Taylor counties, Florida;

3. The Suwannee River or its floodway in Columbia, Hamilton, Lafayette, Madison, or Suwannee counties, Florida; or

4. The Withlacoochee River and its floodway in Hamilton or Madison counties, Florida.

(c) July 1, 1986 for Rule 40B-4.1040(1)(b) or 40B-4.3040 which require persons to obtain work of the district development permit if the proposed development is in one of the following areas adopted as a work of the district.

1. The Santa Fe River and its floodway in Alachua, Bradford, Columbia, Gilchrist, Suwannee, or Union counties, Florida; or

2. The Suwannee River and its floodway in Dixie, Gilchrist, or Levy counties, Florida.

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.

Rule 40B-4.2030(4), Florida Administrative Code, reads as follows:

(4) The new surfacewater management systems or individual works shall not facilitate development in a work of the district if such developments will have the potential of reducing floodway conveyance. (emphasis supplied)

Rule 40B-4.3000(1)(a), Florida Administrative Code, reads as follows:

(1) The governing board is authorized to adopt and prescribe the manner in which persons may connect with or make use of works of the district pursuant to Section 373.085, Florida Statutes. Further, Section 373.019(15) provides that works of the district may include streams and accompanying lands as adopted by the governing board. In order to implement the non-structural flood control policy of the district, the governing board finds it is necessary to prevent any obstruction of the free flow of water of rivers and streams within the district. Therefore, the governing board does hereby adopt the

following rivers and their accompanying floodways as works of the district:

(a) The Alapaha River and its floodway in Hamilton County, Florida; . . . .

Rule 40B-4.3010, Florida Administrative Code, reads as follows:

(1) A general works of the district development permit may be granted pursuant to the procedures in Rule 40B-1.703 to any person for the development described below:

(a) Construction of a structure for single-family residential or agricultural use including the leveling of land for the foundation and associated private water supply, wastewater disposal, and driveway access which is in compliance with all applicable ordinances or rules of local government, state, and federal agencies, and which meets the requirements of this chapter.

(2) A general permit issued pursuant to this rule shall be subject to the conditions in Rule 40B-4.3030.

Rule 40B-4.3020, Florida Administrative Code, reads as follows:

Content of Works of the District Development Permit Applications.

(1) Applications for a general work of the district development permit shall be filed with the district and shall contain the following:
(a) Form 40B-4-5, "Application for General Work of the District Development Permit," Suwannee River Water Management District, 4-1-86, hereby incorporated by reference and which contains the following:

1. The applicant's name and complete address including zip code;

2. The owner's name and complete address if applicant is other than the owner;

3. If applicable, the name, complete address, phone number, and contact person of the applicant or owner;

4. Copies of all permits received from local units of government, state, or federal agencies, specifically a copy of the building or development permit issued by the appropriate unit of local government, including any variances issued thereto, and a copy of the onsite sewage disposal system permit issued by the Florida Department of Health and Rehabilitative Services under Chapter 10D-6, Florida Administrative Code;

5. A site plan to scale showing all improvements, work, or works with any conditions or limitations placed thereon; and

6. Any supporting calculations, designs, surveys, or applicable documents, which in the applicant's opinion, may support the application.

(2) Applications for individual or conceptual approval works of the district development permits shall be filed with the district and shall contain the following:

(a) Form 40B-4-4, "Application for Surfacewater Management System Construction, Alteration, Operation, Maintenance, and/or Works of the District Development", Suwannee River Water Management District, 10-1-85, hereby adopted by reference and which contains the following:

1. The applicant's name and complete address including zip code;

2. The owner's name and complete address if applicant is other than the owner;

3. If applicable, the name, complete address, phone number, and contact person of the owner.

4. General project information including:

a. The applicant's project name or identification number;

b. The project location relative to county, section, township, and range, or a metes and bounds description;

c. The total project area in acres;

d. The total land area owned or controlled by the applicant or owner which is contiguous with the project area;

e. A description of the scope of the proposed project including the land uses to be served;

f. A description of the proposed surfacewater management system or work;

g. A description of the water body or area which will receive any proposed discharges from the system; and

h. Anticipated beginning and ending date of construction or alteration.

(3) Copies of all permits received from, or applications made to, local units of government, state, or federal agencies.

(4) A site plan to scale showing all improvements, work, or works with any conditions or limitations placed thereon.

(5) Any supporting calculations, designs, surveys, or applicable legal documents,

which in the applicant's opinion, support the application.

(6) Copies of engineer or surveyor certifications required by this chapter.

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. (emphasis supplied)

Rule 40B-4.3040, Florida Administrative Code, reads as follows:

Unlawful Use of Works of the District.

(1) It shall be unlawful to connect with, place a structure in or across, or otherwise cause development to occur in a work of the district without a works of the district development permit. The district may use any remedy available to it under Chapter 120 or 373, Florida Statutes, and Chapter 40B-1, Florida Administrative Code, to cause an unpermitted development to be removed or permitted.

(2) It shall be unlawful for any permitted use to violate the provisions of Chapter 373, Florida Statutes, or this chapter, or the limiting conditions of a works of the district development permit. The district may use any remedy available to it under Chapter 120 or 373, Florida Statutes, and Chapter 40B-1, Florida Administrative Code, to cause the unpermitted use to be removed or brought into compliance with Chapter 373, Florida Statutes, and this chapter.

(3) Damage to works of the district resulting from violations specified in Rule 40B-4.3040(1) and (2) above shall be repaired by the violator to the satisfaction of the district. In lieu of making repairs, the violator may deposit with the district a sufficient sum to insure such repair.

Rule 40B-400.103(1)(h), Florida Administrative Code, 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. . . .

Facts Based Upon the Evidence of Record

History of the rules

11. Mr. David Fisk is Assistant Director of the District. At the time of the hearing, he had been employed

there for 26 and one-half years. He played a significant role in the rule adoption process of the rules that are the subject of this dispute.

12. As part of that process, the District entered into a consulting contract with an engineering, planning, and consulting firm and consulted with the U.S. Corps of Engineers and the Federal Emergency Management Agency (FEMA), to conduct what are described as the FEMA flood studies.

13. Additionally, the district commissioned an aerial photography consultant who provided a series of rectified ortho photographs of the entire floodplain of the rivers within the District, and a surveying subcontractor who provided vertical control and survey cross sections and hydrographic surveys of the rivers. The District also worked in conjunction with the United States Geological Survey to accumulate all of the hydrologic record available on flooding. The information was given to the U.S. Army Corps of Engineers who, operating under FEMA guidelines for conducting flood insurance rate studies, performed the analytical and computer modeling work to identify the flood plains and floodway boundaries.

14. The District used the amassed knowledge of maps, cross sections and surveys that were developed as part of the

FEMA flood studies as technical evidence or support for the adoption of the works of the district rules.

15. Following a series of public workshops and public hearings in 1985, the rules were adopted and became effective in 1986. None of the rules were challenged in their proposed state.

16. The District adopted the floodways of the Suwannee, Santa Fe, Alapaha, Aucilla, and Withlacoochee Rivers as works of the district. According to Mr. Fisk, the District adopted the rules pursuant to Section 373.086, Florida Statutes, which provided authority to the District to adopt district works and Section 373.085, Florida Statutes, which provided authority to regulate activities within those works.

The Floodway Line

17. Petitioner hired Mr. John Barnard, a professional civil engineer, with extensive environmental permitting experience, to look at the floodway and floodplain issues associated with Petitioner's site and project. Mr. Barnard conducted an engineering study entitled, "Floodplain Evaluation." It was Mr. Barnard's opinion that FEMA's determination of the floodway line was less than precise. Mr. Barnard used FEMA's data regarding the base flood elevation but manually changed the encroachment factor resulting in his placement of the floodway line in a different location than

determined by FEMA. Mr. Barnard acknowledged that different engineers using different encroachment factors would reach different conclusions.[1/]

18. Respondent's expert in hydrology and hydraulic engineering, Brett Cunningham, noted that the definition of floodway in Rule 40B-4.1020(12), Florida Administrative Code, is essentially the same definition that used is in the FEMA regulations and which also is commonly used across the country in environmental rules and regulations. Mr. Barnard also acknowledged that the District's definition of "floodway", as found in Rule 40B-4.1020(12), Florida Administrative Code, is fairly commonly used by environmental regulatory agencies. Moreover, it was Mr. Cunningham's opinion that the Alapaha River is a stream or watercourse within the meaning of the rule and its floodway an accompanying land.

19. In Mr. Cunningham's opinion, the FEMA flood insurance studies are widely used across the country for a variety of reasons and are typically relied upon by hydrologists and engineers to locate floodways.

20. The definition of "works of the district" in Rule 40B-1020(30), Florida Administrative Code, is taken directly from the language found in Section 373.019(23), Florida Statutes. The statutory definition includes express

references to streams and other watercourses, together with the appurtenant facilities and accompanying lands.

21. Petitioner alleges that the phrase "will not cause adverse impact to a work of the SRWMD" as found in Rule 40B-400.103(1)(h) is not clear because it does not identify what specific adverse impacts are being reviewed. While Petitioner's expert, Mr. Price, was not clear as to what the phrase means, Respondent's expert, Mr. Cunningham, understood the meaning of the phrase and noted that "adverse impact" is a phrase which is very commonplace in the rules and regulations of environmental agencies and is attributed a commonsense definition.

22. The expert engineers differed in their opinions as to the meaning of the term "potential for reducing floodway conveyance" as used in Rule 40B-4.2030(4), Florida Administrative Code. According to Petitioner's expert engineer, Mr. Barnard, "potential for reducing floodway conveyance" is not a specific term that is open to interpretation as an engineer, and that he cannot quantify what constitutes "potential." Respondent's expert, Mr. Cunningham, understood the meaning of the phrase to be any increase in floodway conveyance. It was his opinion that there was nothing about that phrase to cause confusion.

23. Rule 40B-4.3030, Florida Administrative Code, addresses conditions for issuance of works of the district development permits. Petitioner's expert Mr. Price testified that there is no quantification to what constitutes an "increase in soil erosion" as referenced in subsection (2) and linked the reference of soil erosion to a 100-year flood event referenced in the same subsection.

24. Mr. Cunningham was of the opinion that there is no need to quantify an increase in soil erosion in the rule. He noted that soil erosion is used in a common sense manner and that attempting to put a numerical limit on it is not practical and "it's not something that's done anywhere throughout the country. It's just not something that lends itself to easy quantification like flood stages do".

25. Mr. Cunningham's opinion that the words and phrases which Petitioner asserts are vague are words of common usage and understanding to persons in the field is the more persuasive testimony. This opinion is also consistent with statutory construction used by courts which will be addressed in the conclusions of law.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this

proceeding pursuant to Section 120.56(1) and (3), Florida Statutes.

27. Petitioner has proven that it has standing to challenge the rules which are the subject of this dispute.

28. The party attacking an existing agency rule has the burden to prove that the rule constitutes an invalid exercise of delegated legislative authority. Cortes v. State Board of Regents, 655 So. 2d 132 (Fla. 1st DCA 1995). The challenger's burden is a stringent one. Id.; Charity v. Florida State University, 680 So. 2d 463 (Fla. 1st DCA 1996).

29. The Second Amended Petition to Determine Validity of Existing Rules alleges that Rules 40B-1.702(4); 40B-4.1020(12) and (30); 40B-4.1030; 40B-4.1040(1)(b) and (c); 40B-4.2030(4); 40B-4.3000(1)(a); 40B-4.3010; 40B-3020; 40B-4.3030; 40B-4.3040; and 40B-400.103(1)(h), Florida Administrative Code, are an invalid exercise of delegated legislative authority within the context of Section 120.52(8), Florida Statutes.

30. Petitioner asserts that the WOD rules are without statutory authority in that the enabling statutes do not give the District specific powers or duties to implement the WOD rules; the District materially failed to follow the applicable rulemaking procedures by using FEMA and other sources without identifying the criteria or incorporating it by reference; are vague, fail to establish adequate standards

for agency decisions, or vest unbridled discretion in the District; are arbitrary or capricious, are not supported by competent substantial evidence, and impose regulatory costs that could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

31. While Petitioner argues that as a whole the WOD rules are an invalid exercise of delegated legislative authority, Petitioner focuses on certain rules or portions of rules as grounds for the alleged invalidity of the existing rules.

32. Petitioner asserts that the following words and phrases are vague and arbitrary: the definition of "floodway" in Rule 40B-4.1020(12); the definition of "work of the district" in
Rule 40B-4.1020(30); the phrase "potential of reducing floodway conveyance" in Rule 40B-4.2030(4); and the phrase "will not cause adverse impact to a work of the SRWMD" in Rule 40B-400.103(1)(h), Florida Administrative Code.

33. Petitioner asserts that the definitions of "floodway" and "works of the district" exceed the grant of rulemaking authority, enlarge, modify, or contravene the specific provisions of law implemented; fail to establish adequate standards for agency decisions, and/or vests

unbridled discretion in the District, or are arbitrary or capricious.

34. Further, Petitioner asserts that there is no quantification in Rule 40B-4.3030(2), Florida Administrative Code, as to how the prohibition of "reducing soil erosion" applies to determining whether or not an activity is permittable within a WOD; and that there are no clear criteria, standards, or guidance in the WOD rules for demonstrating compliance with the rules resulting in the District having unbridled discretion.

35. Section 120.52(8), Florida Statutes, reads as follows:

> (8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

(e) The rule is arbitrary or capricious;

(f) The rule is not supported by competent substantial evidence; or

(g) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

36. Section 373.044, Florida Statutes, reads as follows:

Rules; enforcement; availability of personnel rules.––

The governing board of the district is authorized to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this chapter. Rules and orders may be enforced by mandatory injunction or other appropriate action in the courts of the state. Rules relating to personnel matters shall be made available to the public and affected persons at no more than cost but need not be published in the Florida Administrative Code or the Florida Administrative Weekly.

37. Section 373.113, Florida Statutes, reads as follows:

Adoption of rules by the governing board.––

In administering the provisions of this chapter the governing board has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement provisions of law conferring powers or duties upon it.

38. Section 373.171, Florida Statutes, reads as follows:

(1) In order to obtain the most beneficial use of the water resources of the state and to protect the public health, safety, and welfare and the interests of the water users affected, governing boards, by action not inconsistent with the other provisions

of this law and without impairing property rights, may:

(a) Adopt rules or issue orders affecting the use of water, as conditions warrant, and forbidding the construction of new diversion facilities or wells, the initiation of new water uses, or the modification of any existing uses, diversion facilities, or storage facilities within the affected area.

(b) Regulate the use of water within the affected area by apportioning, limiting, or rotating uses of water or by preventing those uses which the governing board finds have ceased to be reasonable or beneficial.

(c) Issue orders and adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this chapter.

(2) In adopting rules and issuing orders under this law, the governing board shall act with a view to full protection of the existing rights to water in this state insofar as is consistent with the purpose of this law.

(3) No rule or order shall require any modification of existing use or disposition of water in the district unless it is shown that the use or disposition proposed to be modified is detrimental to other water users or to the water resources of the state.

(4) All rules adopted by the governing board shall be filed with the Department of State as provided in chapter 120. An information copy will be filed with the Department of Environmental Protection.

39. Section 373.019(23), Florida Statutes, reads as follows:

(23) "Works of the district" means those projects and works, including, but not limited to, structures, impoundments, wells, streams, and other watercourses, together with the appurtenant facilities and accompanying lands, which have been officially adopted by the governing board of the district as works of the district.

40. Section 373.085, Florida Statutes, reads 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.

41. 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.

Rule Challenge Analysis

Section 120.52(8)(a), Florida Statutes

42. Petitioner alleges that the agency has materially failed to follow the applicable rulemaking authority by using criteria from FEMA and other sources without identifying the criteria or incorporating any of it by reference. In the context of an analysis of the procedural requirements of rulemaking, it is not necessary for the agency to incorporate the informational source by reference.

43. The rules in question were adopted over 20 years ago. The foregoing findings of fact outline the process used by the Board in its rule adoption. There is no competent evidence in the record that Respondent failed to follow the applicable rulemaking procedures that existed at the time of the rule adoption.

Section 120.52(8)(b)and (c), Florida Statutes

44. Petitioner asserts that the District's definitions of "floodway" and "works of the district" as found in Rule 40B-4.1020(12) and (30), Florida Administrative Code, exceed its rulemaking authority and enlarge, modify or contravene the specific law implemented in violation of Section 120.52(8)(b) and (c), Florida Statutes.[2/]

45. Petitioner asserts in its Proposed Final Order that Rule 40B-4.3000, which identifies the works of the district,

is invalid because the agency has exceeded its grant of rulemaking authority and the rule enlarges, modifies, or contravenes the specific provisions of law implemented.[3/]

46. Section 373.044, Florida Statutes, authorizes the governing board of directors of the District to adopt rules to implement the provisions of Chapter 373, Florida Statutes. Section 373.171(1), Florida Statutes, contains similar language. Section 373.113, Florida Statutes, grants authority to the governing board of the District to adopt rules to implement provisions of law conferring powers or duties upon it.

47. Section 373.086(1), Florida Statutes, grants broad authority to the District in regulating its works of the district, includes a specific reference to providing such "floodways" which the board may deem necessary, and gives "full control" over the works of the district to the governing board of the water management district. Section 373.085, Florida Statutes, authorizes the governing board of water management districts 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.

48. Section 373.086(2), Florida Statutes, confers powers and duties on the governing board of the District and states

that the works of the district shall be those adopted by the governing board of the district. Moreover, the definition of "work of the district" in Rule 40B-4.1020(30), Florida Administrative Code, is taken directly from the language found in Section 373.019(23), Florida Statutes.

49. "The authority to adopt an administrative rule must be based on an explicit power or duty identified in the enabling statute . . . [T]he 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." Florida Board of Medicine, et al., v. Florida Academy of Cosmetic Surgery, Inc., et al., (emphasis in original)(27 Fla.L.Weekly D230), quoting Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000).[4/]

50. Based upon the statutory authority outlined above, the District has not exceeded its grant of rulemaking authority and the challenged rules do not enlarge, modify, or contravene the specific provisions of law implemented. Further, the challenged rules implement or interpret the specific powers and duties granted by the enabling statute.

Section 120.52(8)(d) and (e), Florida Statutes

51. Petitioner alleges that the entire body of WOD rules is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency.

52. In particular, Petitioner asserts vagueness regarding the above referenced definition of "floodway," describing the definition of floodway as "too vague for a person using standard engineering practices to determine the location of the floodway within the District's WOD."[5/]

53. The evidence suggests otherwise. The definition of "floodway" in Rule 40B-4.1020(12) is essentially the same definition that is used in the FEMA regulations and that definition is commonly used across the country in environmental rules and regulations.

54. Petitioner asserts that the phrase "potential of reducing floodway conveyance" in Rule 40B-4.2030(4), Florida Administrative Code, is vague and arbitrary in that one cannot quantify what constitutes "potential." The word "potential" has a plain and ordinary meaning: "existing in possibility: capable of development into actuality." Webster's Ninth New Collegiate Dictionary.

55. Petitioner asserts that the phrase "will not cause adverse impact" in Rule 40B-400.103(1)(h), Florida Administrative Code, is vague and arbitrary. As established

in the findings of fact, the phrase "adverse impact" is commonly used in the rules and regulations of environmental agencies.[6/]

56. An administrative rule is invalid if the rule requires the performance of an act in terms that are so vague that persons of common intelligence must guess at its meaning. Southwest Florida Water Management District v. Charlotte County, 774 So. 2d 903 (Fla. 2nd DCA 2001), citing Donato v. American Telephone & Telegraph, 767 So. 2d 1146 (Fla. 2000).

57. Where the legislature has not defined words or phrases, they must be construed in accordance with their common and ordinary meaning. "The words in a statute must be construed according to their plain and ordinary meaning, or according to the meaning assigned to the terms by the class of persons within the purview of the statute." Southwest Florida Water Management District v. Charlotte County, supra, citing Florida East Coast Industries v. Department of Community Affairs, 677 So. 2d 357 (Fla. 1st DCA 1999).

58. The words "floodway," "potential," and "adverse impact," are commonly used and understood by the class of persons within the purview of the District's enabling statutes. Moreover, "soil erosion" is used in the context of the rule in a common sense manner which does not necessitate putting a numerical limit on it.

59. Petitioner further asserts that there are insufficient criteria and standards in Rule 40B-3030(2) and (3), Florida Administrative Code, which addresses conditions for issuance of works of the district, resulting in the district having unbridled discretion.

60. Sections 373.085 and 373.086, Florida Statutes, give the District broad authority to provide for, adopt, and regulate activities of works of the district. The WOD rules implement the powers and duties conferred upon the District by the Legislature. "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 Corp. v. State, 723 So. 2d 199 (Fla. 1998).

61. The language of the challenged rules is not vague, and uses words and phrases commonly used by persons dealing with environmental regulatory agencies. The language of the challenged rules does not fail to establish adequate standards for agency decisions or vest unbridled discretion in the agency. See Humhosco, Inc. v. Department of Health and Rehabilitative Services, 476 So. 2d 258, 261 (Fla. 1st DCA 1985); and Southwest Florida Water Management District v. Charlote County, supra.

62. "A rule is 'arbitrary' if it is not supported by facts or logic, and 'capricious' only if it is irrational." Florida Board of Medicine v. Florida Academy, supra, at 18, citing Board of Clinical Laboratory Pers. v. Florida Assn. Of Blood Banks, 721 So. 2d 317, 318 (Fla. 1st DCA 1998).

63. As established in the findings of fact, the challenged rules are supported by facts and logic. The challenged rules are rational. Based upon the evidence presented, the language of the challenged rules is not arbitrary or capricious.

Section 120.52(8)(f), Florida Statutes

64. Petitioner alleges that the WOD rules are not supported by competent substantial evidence. The scope of review in this proceeding is limited to whether legally sufficient evidence exists to support the rules. An Administrative Law Judge may not independently reweigh the evidence, assess the credibility of, or substitute judgment regarding the wisdom of the rules. Florida Board of Medicine, et al., v. Florida Academy of Cosmetic Surgery, Inc.; et al., supra. Based upon the evidence of record, legally sufficient evidence exists to support all of the WOD rules. Accordingly, the WOD rules are supported by competent substantial evidence.

Section 120.52(8)(g), Florida Statutes

65. Petitioner asserts that the WOD rules impose regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives. Subsection (g) of Section 120.52(8) was added in 1996 and was not in existence in 1985 when the subject rules were adopted. A general rule of statutory construction is that a substantive statute will not operate retrospectively absent clear legislative intent to the contrary. State Farm Mutual Auto Insurance v. Laforet, 658 So. 2d 55, 61 (Fla. 1995).[7/] There is nothing in the Second Amended Petition which raises a concern that the District did not comply with the requirements that existed at the time of adoption regarding economic impact.

66. Finally, Petitioner challenges the validity of the WOD rules as applied. Those arguments will not be addressed in this order as that is beyond the scope of this proceeding. The fact that as agency may erroneously or wrongfully apply a rule does not invalidate the rule. The remedy for an erroneous application of a rule is a proceeding under Section 120.57(1), Florida Statutes.[8/] Hasper v. Department of Administration, 459 So. 2d 398 (Fla. 1st DCA 1984).

ORDER

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

ORDERED:

1. The Second Amended Petition to Determine Validity of Existing Rules is dismissed.

2. Respondent's request for attorney's fees pursuant to Section 120.595, Florida Statutes, is denied.

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

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

ENDNOTES

1/ A more detailed analysis of Mr. Barnard's methodology and conclusion will not be addressed here. Whether there is an alternative method or even a better method than that chosen by the District does not matter in a facial challenge to the validity of an existing rule. State Department of Health and Rehabilitative Services v Framat Realty, 407 So. 2d 238 (Fla. 1st DCA 1981).

2/ Petitioner's vagueness argument focused more on the definition of "floodway". While the Second Amended Petition to Determine Validity of Rules alleged the definition of

"works of the district" was vague, Petitioner's primary argument was that the definition of "works of the district" had no statutory authority.

3/ While the Second Amended Petition to Determine Invalidity of Existing Rules enumerates Rule 40B-4.3000 as part of the rule validity challenge, the ground that this rule violates (b) and (c) was not clearly alleged. In any event, the district has the statutory authority to adopt the Alapaha River as a work of the district.

4/ The Court in Florida Board of Medicine, supra, discussed the requirements of the "flush left" language of Section 120.52(8), Florida Statutes, in conjunction with its analysis of subsections (b)and (c). Accordingly, that analysis is utilized here.

5/ The Second Amended Petition alleges that the definition of "works of the district" is also vague, fails to establish adequate standards for agency decisions or vests unbridled discretion in the agency. However, in its Proposed Final Order, Petitioner focuses on subsections (b) and (c) of Section 120.52(8) as the basis of its argument regarding the invalidity of the definition of "works of the district".

6/ While the Second Amended Petition to Determine Validity of Rules alleged the definition of "works of the district" is vague, Petitioner's primary argument is that "works of the district" has no statutory authority and is, accordingly, discussed under that criterion.

7/ Compare to section 9, Chapter 96-159, Laws of Florida, which required agencies to identify each rule or portions thereof which exceeded the rulemaking authority of the flush left language of Section 102.52(8), Florida Statutes. Accordingly, the analysis of the rules herein regarding specific legislative authority was made under the "new" standard, not the one in existence at the time the rules were adopted.

8/ This is not a finding that the District erroneously or wrongfully applied its WOD rules to Petitioner or to anyone else.

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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.