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DIVISION OF ADMINISTRATIVE HEARINGS

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SO. FLA. WATER MGT. DISTRICT

BEFORE THE GOVERNING BOARD OF THE
SOUTH FLORIDA WATER MANAGEMENT DISTRICT

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Petitioner,

v.

BERRYMAN & HENIGAR, INC.,

Respondent.
_____/

SFWMD ORDER NO. 2003-106
DOAH CASE NO. 02-4286

JLJ-CLOS

FINAL ORDER

This matter was presented before the Governing Board of the South Florida Water Management District (SFWMD) on July 10, 2003, for the consideration of the Recommended Order issued May 12, 2003 (attached and incorporated hereto as Exhibit A), by Administrative Law Judge (ALJ) J. Lawrence Johnston. Petitioner, SFWMD timely filed Exceptions to the Recommended Order on May 27, 2003. Respondent, Berryman & Henigar, Inc. (BHI) did not file any Exceptions to the Recommended Order. Oral argument was presented at the Governing Board meeting by Ms. Catherine M. Linton, Esq. on behalf of SFWMD, and Mr. R. Dean Cannon, Esq. on behalf of BHI.

Summary of Recommended Order

An administrative hearing was conducted on February 10-11, 2003, to determine whether the Minority Business Enterprise (MBE) certification issued by the SFWMD to BHI should be revoked.[1] The case centered around three key issues: (1) whether or not BHI is "an independently

[1] This decertification proceeding followed an earlier decision by SFWMD regarding the MBE certification of Everglades Survey Joint Venture (ESJV). At or about late 2001, ESJV sought MBE certification in the surveying field, with BHI as the qualifying minority member. An administrative

owned and operated business concern" under the rules governing MBE certification; (2) whether or not BHI is an "affiliate of a non-minority business" or shares (on an individual or combined basis) common resources with a non-minority person or business concern in the same or an associated field; and (3) whether or not BHI has more than 200 full-time employees, as defined under the rules governing MBE certification.

Based on the testimony and evidence presented, the ALJ issued a Recommended Order on May 12, 2003, recommending that the SFWMD enter a final order ordering that BHI's MBE certification not be revoked.

Standard of Review

Subsection 120.57(1)(l), Florida Statutes, provides that an agency reviewing a Division of Administrative Hearings (DOAH) recommended order may not reject or modify the findings of fact of an administrative law judge, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." Florida law defines "competent substantial evidence" as "such evidence as is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1975). Furthermore, an agency may not create or add to findings of fact because an agency is not the trier of

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hearing was conducted before Administrative Law Judge Donald R. Alexander, who found that ESJV failed to meet all requirements for MBE certification because Mr. Berryman did not hold a surveyor's license. Although not necessary to the decision, however, ALJ Alexander's Recommended Order found that ESJV otherwise met the MBE certification requirements and SFWMD entered a Final Order adopting the ALJ's findings.

fact. See Friends of Children v. Department of Health and Rehabilitative Services, 504 So. 2d 1345, 1347, 1348 (Fla. 1st DCA 1987).

In this case, SFWMD does not take exception to any of the ALJ's findings of fact. SFWMD only takes exception to three of the ALJ's conclusions of law. Subsection 120.57(1)(l), Florida Statutes provides that an agency may reject or modify an administrative law judge's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction" whenever the agency's interpretations is "as or more reasonable" than the interpretation made by the ALJ. Florida Courts have consistently applied this subsection's "substantive jurisdiction limitation" to prohibit an agency from reviewing conclusions of law that are based upon the ALJ's application of legal concepts such as collateral estoppel, *res judicata*, hearsay, but not from reviewing conclusions of law that are based upon the ALJ's application of an agency's administrative rules or procedures. For example, in Deep Lagoon Boat Club Ltd. v. Sheridan, the Second District Court of Appeal held that the scope of the Secretary of the Department of Environmental Protection's review of an ALJ's conclusions of law did not extend to the legal concepts of collateral estoppel and *res judicata*. 784 So. 2d 1140, 1141-42 (Fla. 2d DCA 2001). The court explained that the Legislature intended to limit the scope of agency's review to those matters within the agency's "administrative authority" or "substantive expertise." Id. at 1142, n.2. Similarly, in Barfield v. Department of Health, the First District Court of Appeal held that determining whether certain documents were inadmissible hearsay in a dentistry licensing case was not within the Board of Dentistry's substantive expertise. 805 So. 2d 1008, 1011 (Fla. 1st DCA 2001).

In this case, SFWMD does not take exception to any of the ALJ's conclusions of law that are based upon the application of legal concepts such as hearsay. SFWMD only takes exception to three

conclusions of law that solely interpret and apply the rules and procedures outlined in Chapter 40E-7 of the Florida Administrative Code, also known as the Supplier Diversity & Outreach MBE Contracting Rule ("Chapter 40E-7")." Undisputedly, the Legislature clearly expressed its intent to vest the SFWMD with substantive jurisdiction over conclusions regarding its own minority business enterprise program. Specifically, Section 373.607, Florida Statutes empowers each water management district to implement the recommendations from any study conducted pursuant to chapter 91-162, Laws of Florida, in order to achieve minority business enterprise procurement goals. Pursuant to this statute, the SFWMD conducted a Minority Business Availability and Utilization Study developed by MGT of America, Inc. See Rule 40E-7.611(1), Fla. Admin. Code. This study recommended the establishment of certain policies and procedures designed to remedy documented disparities in the SFWMD's contracting and the present effects of past marketplace discrimination. See id. Those policies and procedures have been adopted into Chapter 40E-7, which, among other things, outlines MBE certification. See generally Chapter 40E-7, Fla. Admin. Code. Precisely, Chapter 40E-7 provides that the SFWMD shall have authority to "accept, review, approve, and deny applications for MBE certification . . . [and] decertify, suspend and/or debar firms pursuant to Rule 40E-7.664, F.A.C." See Rule 40E-7.653(1), Fla. Admin. Code. Accordingly, SFWMD has substantive jurisdiction to review the ALJ's conclusions of law that interpret and apply the rules and procedures outlined in Chapter 40E-7.

RULINGS ON EXCEPTIONS

SFWMD's Exception No. 1

SFWMD takes exception to Conclusion of Law No. 23, in which the ALJ concludes that BHI is at least fifty-one percent (51%) owned by a minority person.

As previously stated, entitlement to certification under the SFWMD's MBE program is governed by Chapter 40E-7. Rule 40E-7.621(11) defines an MBE "as defined in Section 288.703(2), F.S." Rule 40E-7.621(11), Fla. Admin. Code. Section 288.703(2), Florida Statutes states:

> any **small business** concern . . . which is domiciled in Florida, and **which is at least 51-percent-owned by minority persons** who are members of an insular group that is of a particular racial, ethnic, or gender makeup or national origin, which has been subjected historically to disparate treatment due to identification in and with that group resulting in an underrepresentation of commercial enterprises under the group's control, and whose management and daily operations are controlled by such persons.

288.703(2), Fla. Stat. (emphasis added). Both Rule 40E-7.621(20) and Section 288.703(1) define a "small business" as:

> an independently owned and operated business concern that employs 200 or fewer permanent full-time employees and that, together with its affiliates, has a net worth of not more than $5 million or firm based in this state which has a Small Business Administration 8(a) certification. As applicable to sole proprietorships, the $5 million net worth requirement shall include both personal and business investments.

Rule 40E-7.621(20), Fla. Admin. Code; 288.703(1), Fla. Stat. In conformity with the foregoing definitions, Chapter 40E-7 sets forth the following criteria, which an applicant business must meet in order to apply for certification as a small minority business enterprise: (1) at least 51%

ownership by minority persons who are permanent residents of Florida; (2) independent ownership and operation; (3) no affiliation or resource sharing with a non-minority business; (4) net worth, together with its affiliates, of less than five million dollars; and (5) less than two-hundred or fewer permanent, full-time employees. See Rule 40E-7.653(6)-(7), Fla. Admin. Code.[2]

In Conclusion of Law Number 23, the ALJ states that BHI meets the "at least 51% ownership by minority persons who are permanent residents of Florida" criteria because Mr. Berryman, a minority person, owns 77% of the stock of BHE – the holding company that owns 100% of the stock of BHI. Therefore, the ALJ concluded that Mr. Berryman "is in actual and complete control of BHI."

SFWMD takes exception to Conclusion of Law Number 23 and takes the position that BHE, not Mr. Berryman, owns BHI, and therefore, because a holding company is not a person, BHI is not at least fifty-one percent owned by a minority person. Also, according to SFWMD, because the statutory and rule language regarding minority ownership is clear and unambiguous, the statute cannot be second-guessed.

SFWMD's position, however, is inconsistent with Chapter 40E-7's language. Specifically, Rule 40E-7.653(3) provides that:

> the ownership exercised by minority persons shall be real, substantial, and continuing, **and shall go beyond mere pro forma ownership of the firm as reflected in its ownership documents.** In its analysis, the District may also consider the transferal of ownership percentages with no exchange of capital at fair market value.

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2 In addition to these enumerated five criteria, Chapter 40E-7 imposes additional requirements upon an applicant business in order to qualify for minority business enterprise certification. See generally Chapter 40E-7, Fla. Admin. Code. However, these additional requirements are not discussed herein because they are not at issue.

Rule 40E-7.653(3), Fla. Admin. Code. Rule 40E-7.653(4) further provides that SFWMD will disregard the applicant's ownership structure if (i) a transfer of ownership is made within a related immediate family group from a non-minority person to a minority person in order to meet the criteria or (ii) the minority person on whom eligibility is based owns 51% of the applicant firm for less than two years and the previous majority ownership interest in the firm was by a non-minority. See Rule 40E-7.653(4), Fla. Admin. Code.

Clearly, Chapter 40E-7's language supports a conclusion that SFWMD is looking beyond mere ownership structure to determine who is in actual control of the business. Therefore, contrary to SFWMD's contentions, the ALJ did not "completely ignore the requirement that a minority business be at least fifty-one percent (51%) owned by a minority person, and went straight to interpreting the terms 'independently owned and operated,' which encompass additional requirements under Petitioner's Rule." Rather, the ALJ recognized that Chapter 40E-7 mandates more than a cursory look at an applicant's corporate structure. Chapter 40E-7 mandates an analysis of the substance of a corporate structure in order to satisfy itself that the "ownership exercised by minority persons shall be real, substantial, and continuing." In that regard, the ALJ had to look beyond the mere form of BHI's corporate structure and determine whether Mr. Berryman is truly exercising "real, substantial, and continuing" ownership over BHI. In this case, Mr. Berryman, owns 77% of BHE – a holding company that owns 100% of BHI. Essentially, therefore, Mr. Berryman owns 100% of BHI. The fact that, on paper, Mr. Berryman's ownership of BHI is one-step removed is not of consequence. Accordingly, the Governing Board adopts the ALJ's ultimate determination in Conclusion of Law No. 23.

SFWMD also takes exception to Conclusion of Law No. 24, in which the ALJ concludes that BHI meets the "independent ownership and operation" as that term is defined in Rule 40E-7.621(9). The term "independently operated" is defined in Rule 40E-7.621(9) as follows:

> not dependent on the support, influence, guidance, control or not subject to restriction, modification or limitation from a non-minority, except for customary business auxiliary serves, e.g. legal, banking, etc.

Rule 40E-7.621(9), Fla. Admin. Code. The ALJ concluded, and we agree, that "BHI is not dependent upon any 'non-minority' so as to be disqualified under Rule 40E-7.653(6)(a)."

SFWMD, however, argues that although the ALJ looked at whether BHI met the criteria for "independently operated", he did not determine whether BHI was "independently owned." Furthermore, SFWMD takes the position that in order to establish that BHI was "independently owned" it must demonstrate that it has no affiliation with a non-minority business and is not sharing resources therewith. This contention is illogical because it would require an applicant to prove this criteria twice.

Furthermore, SFWMD's proposed interpretation of the "independently operated and owned" criteria contradicts the very language of the Rule. Specifically, Rule 40E-7.653(6)(a) states:

> In assessing business independence, the District shall consider all relevant factors, including the date the firm was established, the adequacy of its resources, and the degree to which financial, managerial and operational relationships exist with other persons or business concerns. For purposes of this Rule, the District's consideration of such financial relationships, managerial or operational relationships shall not be affected by arrangements made out of necessity or due to the business' inability to secure traditional capitalization through banks, lending institutions or others.

Rule 40E-7.653(6)(a), Fla. Admin. Code. This Rule makes no mention that the applicant is required to prove no affiliation and resource-sharing with a non-minority business in order to meet

the "independent ownership" requirement. Rather, this Rule clearly sets forth the "relevant factors" that the SFWMD "shall consider" in order to demonstrate "independent ownership and control." In considering the factors set forth in Rule 40E-7.653(6)(a), the ALJ had the benefit of hearing all of the evidence and the ability to judge the credibility of all of the witnesses. Having done so, the ALJ concluded that "BHI is not dependent upon any 'non-minority' so as to be disqualified under Rule 40E-7.653(6)(a)." Accordingly, we adopt the ALJ's Conclusion of Law No. 24 and reject SFWMD's Exception No. 1 entirely.

Additionally, we note that even if BHI had to demonstrate that it has no affiliation with a non-minority business or sharing certain commons elements therewith in order to establish independent ownership and operation (it does not), BHI could still demonstrate independent ownership and operation. See SFWMD's Exception No. 2.

SFWMD's Exception No. 2

SFWMD takes exception to the ALJ's Conclusion of Law No. 27, in which the ALJ determined that BHI met the "no affiliation or resource sharing with a non-minority business" criteria because BHI's affiliation and resource sharing with BHI California does not disqualify BHI from MBE certification even though BHI California could not itself qualify for MBE certification. In seeking BHI's MBE decertification, SFWMD argued that BHI California, a California company with which BHI is affiliated and shares resources, is a "non-minority business" or "non-minority person or business concern" because BHI California could not meet the definition of "Minority Business Enterprise" set forth in Rule 40E-7.621(11) and Section 288.703(2), Florida Statutes.

In rejecting SFWMD's argument, the ALJ explained that had Rules 40E-7.621(2) and 40E-7.621(11) defined a "non-minority business" or "non-minority person or business concern" as an

entity that does not qualify as a "minority business entity," then BHI would not be eligible for MBE certification due to its affiliation and resource sharing with BHI California. However, the ALJ concluded that "neither of those rules defines 'non-minority business' or 'non-minority person or business concern' in the context of Rule 40E-7.653(6)(b)[,]" and that the use of different terms in Rules 40E-7.621(2) and (11) and 40E-7.653(6)(b) "is strong evidence that different meanings are intended." The ALJ suggested that the language used in Rule 40E-7.653(6)(b) (*i.e.*, "non-minority business" and "non-minority person or business concern") "is more like the term 'non-minority' used in Rule 40E-7.621(9) [sic]."[3] Finally, the ALJ notes that the purpose of Rules 40E-7.653 and 40E-7.621(13) is "to avoid certification of a purported minority applicant actually under the control of another who is not a minority." In doing so, the ALJ implies that certifying BHI as an MBE will not contravene the purpose of those Rules because it is an undisputed fact that BHI is not under the control of a non-minority person, and BHI's affiliation and resource sharing with BHI California does not change that fact.

The Governing Board rejects SFWMD's Exception No. 2 and adopts the ALJ's ultimate determination in Conclusion of Law No. 27 that BHI's affiliation and resource sharing with BHI California does not disqualify BHI from MBE certification because BHI California is not a "non-minority business" or "non minority business concern" as those terms are used in Rule 40E-7.653(6)(b). The Governing Board, however, sets forth below its own analysis and reasoning in support of such determination.

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[3] The Governing Board believes the ALJ intended to refer to subsection (13) of Rule 40E-7.621, which defines "non-minority" person.

In its Exception to Conclusion of Law 27, SFWMD agrees with the ALJ that SFWMD does not specifically define "non-minority business" but disagrees that such term has the same meaning as the defined term "non-minority" because "non-minority" speaks only to persons and not to businesses. Indeed, "'Non-minority' means any person who does not meet the eligibility requirements of a minority person related to ethnicity, race or gender, permanent Florida residency or origins, even though such person has self-designated to be a member of a statutorily designated ethnic, racial or gender group." Rule 40E-7.621(13), Fla. Admin. Code (emphasis added). SFWMD explains that because the Rule requires that an MBE be owned by a minority person and that such MBE not be affiliated or share resources with a non-minority person or business concern, the Rule distinguishes between a non-minority person and a non-minority business. The Governing Board agrees with SFWMD on this point only. SFWMD's remaining arguments in support of its Exception to Conclusion of Law No. 27 are without merit.

SFWMD next argues that because it has defined "Minority Business Enterprise" in Rule 40E-7.621(11) (by adopting the definition of "minority business enterprise" set forth in Florida Statutes Section 288.703(2)), a business that does not meet such definition is a "non-minority business." SFWMD then attempts to demonstrate that BHI California fails to meet the criteria set forth in both Section 288.703(2) and Rule 40E-7.621(11) and therefore, concluded that because BHI California does not meet this definition, BHI is an affiliate of, and shares resources with a non-minority business, thereby failing the criteria. This argument simply does not hold water.

Chapter 40E-7 does not define "minority business". Rather, it defines "Minority Business Enterprise" or "MBE", which is an entirely different term of art than "minority business" for purposes of MBE certification. Indeed, the whole purpose of this MBE certification proceeding is to determine

whether BHI is entitled to be certified as an MBE. BHI California is not seeking MBE certification. Therefore, BHI California need not satisfy the criteria set forth in Rule 40E-7.621(11) and (12) and § 288.703(1) and (2), Florida Statutes. Instead, BHI California need only qualify as a "non-minority business" or "non-minority business concern", as those terms are used and intended by SFWMD in Rule 40E-7.653(6)(b).

The terms "non-minority business" and "non-minority business concern" and the term "non-minority," as that term modifies the terms "business" and "business concern" in Rule 40E-7.653(6)(b), are not defined in Chapter 40E-7. Therefore, those terms must be construed according to their common meaning, as set forth in a dictionary. Indeed, as SFWMD insists in Exception No. 2, "the general rule is that where the legislature has not defined words or phrases used in a statute, they must be 'construed in accordance with [their] common and ordinary meaning.'" '[T]he plain and ordinary meaning of [a] word can be ascertained by reference to a dictionary.'" Gordon v. Regier, 839 So. 2d 715, 718 (Fla. 2d DCA 2003) (citations omitted) (citing Donato v. American Tel. & Tel. Co., 767 So. 2d 1146 (Fla. 2000) and Green v. State, 604 So. 2d 471 (Fla. 1992)). Having referred to a dictionary to ascertain the plain and ordinary meaning of "minority", "non-minority", "business", and "business concern", the Governing Board concludes that the term "minority" was not intended to mean domiciled in Florida (and thus "non-minority" was not intended to mean not domiciled in Florida), and "business" (which has the same meaning as "business concern") was not intended to mean business employing 200 or less full-time permanent employees. Thus, "non-minority business" was not intended to mean business that is not domiciled in Florida, with more than 200 full-time permanent employees. In fact, the dictionary definitions of those terms do not include most of the

restrictive criteria set forth in Rule 40E-7.621(12) and (13) and § 288.703(1) and (2), Florida Statutes.

Most dictionaries define "minority" (as that term is used in this proceeding) as a group differing, especially in race, religion, or ethnic background, from the majority of a population, and define "business" as a commercial, mercantile, or industrial enterprise or activity engaged in as a means of livelihood. See, e.g., MERRIAM-WEBSTER DICTIONARY - ONLINE (2002) (www.m-w.com/dictionary.htm). However, these definitions do not give meaning to the combined term "minority business" because a commercial, mercantile, or industrial enterprise cannot be a member of a particular race, religion, or ethnic background. Therefore, in order to construe the term "minority business" according to its plain and ordinary meaning as that term is used in the context of Rule 40E-7.653(6)(b) and MBE certification proceedings in general, the Governing Board must borrow limited portions of Rule 40E-7.621(12)'s definition of "minority person" and Section 288.703(2)'s definition of "minority business enterprise." Accordingly, the Governing Board concludes that the term "minority business" was intended to mean a business organized to engage in commercial transactions, which is at least 51-percent-owned, and whose management and daily operations are controlled, by minority persons, who are members of one of the insular groups listed in Rule 40E-7.621(12)(a) - (e), which are of a particular racial, ethnic, or gender makeup or national origin that has been subjected historically to disparate treatment due to identification in and with that group resulting in an underrepresentation of commercial enterprises under the group's control. The Governing Board further concludes that the terms "non-minority business" and "non-minority business concern" were intended to refer to a business that does not meet the foregoing definition of "minority business".

Applying the foregoing conclusions regarding the meaning of "minority business", "non-minority business" and "non-minority business concern", the Governing Board finds that BHI California is a minority business and, thus, not a non-minority business or business concern, for purposes of Rule 40E-7.653(6)(b). Indeed, it is undisputed that BHI California is a business organized to engage in commercial transactions, which is at least 51-percent-owned, and whose management and daily operations are controlled, by a minority person (i.e., Mr. Berryman) who is a member of one of the insular groups listed in Rule 40E-7.621(12)(a) - (e) (i.e., Asian-American). Therefore, BHI's affiliation and resource sharing with BHI California does not preclude BHI from establishing that it is a "small minority business concern," under Rule 40E-7.653(6)(a) and (b), and entitled to MBE certification. See Rule 40E-7.653(6), Fla. Admin. Code.

The foregoing conclusions are entirely consistent with Chapter 40E-7 and, in fact, advance the purpose of, and the policy underlying, Chapter 40E-7. Rule 40E-7.611 outlines the objective of, and policy underlying, Chapter 40E-7:

> (1) The rules under this Part establish policies and procedures designed to remedy documented disparities in District contracting and the present effects of past marketplace discrimination. . . .
>
> (2) It is the objective of the District to provide incentives to increase the participation of MBEs which are experiencing the effects of marketplace discrimination and have sought to do business in the District's relevant market area.

Rule 40E-7.611, Fla. Admin. Code. This Rule clearly reveals SFWMD's intent to assist MBEs to grow and prosper as business enterprises. A business' growth and prosperity often depends on its corporate structure and affiliations with other businesses and its efficient utilization of resources. For instance, BHI's affiliation and resource sharing with BHI California allows it to

conserve its resources, minimize expenses, and reap certain tax benefits. BHI should not be punished for its business savvy and creativity in structuring its business and forming alliances with companies outside the State of Florida, which are more than 51-percent-owned, and whose management and daily operations are controlled, by the same minority person who owns more than 51 percent of, and controls, BHI. An MBE's affiliation and resource sharing with such out-of-state minority companies facilitates the growth and prosperity of the MBE, while still preserving the integrity of MBE Certification and its purpose of assisting minorities and minority owned and controlled businesses.[4] Decertifying BHI for its affiliation and resource sharing with BHI California would defeat the very purpose of, and policy underlying, MBE Certification.

[4] SFWMD states that "[O]ne purpose in not allowing minority businesses to share resources with non-minority businesses in the same or similar field is to avoid 'fronts'," which SFWMD defines as "non-minority businesses, acting in the capacity of minority businesses." SFWMD suggests that BHI's affiliation and resource sharing with BHI California, which SFWMD insists is a non-minority business, confers a competitive advantage upon BHI that other MBEs do not receive. However, because, as demonstrated above, BHI California is not a non-minority business, BHI's affiliation and resource sharing with that company does not violate the Rule's proscription of fronts, or provide BHI with an unfair competitive advantage.

ORDER

Based on the foregoing, the Governing Board, having considered the Recommended Order, the Exceptions and Responses of the parties and the oral argument presented, and being otherwise fully advised in the premises, hereby **ORDERS** that:

1. The Recommended Order as modified herein is hereby adopted *in toto*;
2. SFWMD's Exceptions to Conclusions of Law Nos.23, 24 and 27 are rejected.
3. BHI's MBE Certification shall not be revoked.

NOTICE OF RIGHTS

Section 120.569(1), Fla. Stat. (1997), requires that "each notice shall inform the recipient of any administrative hearing or judicial review that is available under this section, s. 120.57, or s. 120.68; shall indicate the procedure which must be followed to obtain the hearing or judicial review, and shall state the time limits which apply." Please note that this Notice of Rights is not intended to provide legal advice. Not all the legal proceedings detailed below may be an applicable or appropriate remedy. You may wish to consult an attorney regarding your legal rights.

Petition for Administrative Proceedings

1. A person whose substantial interests are affected by the South Florida Water Management District's (SFWMD) action has the right to request an administrative hearing on that action. The affected person may request either a formal or an informal hearing, as set forth below. A point of entry into administrative proceedings is governed by Rules 28-106.111 and 40E-1.511, Fla. Admin. Code, (also published as an exception to the Uniform Rules of Procedure as Rule 40E-0.109), as set forth below. Petitions are deemed filed upon receipt of the original documents by the SFWMD Clerk.

a. Formal Administrative Hearing: If a genuine issue(s) of material fact is in dispute, the affected person seeking a formal hearing on a SFWMD decision which does or may determine their substantial interests shall file a petition for hearing pursuant to Sections 120.569 and 120.57(1), Fla. Stat. or for mediation pursuant to Section 120.573, Fla. Stat. within 21 days, except as provided in subsections c. and d. below, of either written notice through mail or posting or publication of notice that the SFWMD has or intends to take final agency action. Petitions must substantially comply with the requirements of Rule 28-106.201(2), Fla. Admin. Code, a copy of the which is attached to this Notice of Rights.

b. Informal Administrative Hearing: If there are no issues of material fact in dispute, the affected person seeking an informal hearing on a SFWMD decision which does or may determine their substantial interests shall file a petition for hearing pursuant to Sections 120.569 and 120.57(2), Fla. Stat. or for mediation pursuant to Section 120.573, Fla. Stat. within 21 days, except as provided in subsections c. and d. below, of either written notice through mail or posting or publication of notice that the SFWMD has or intends to take final agency action. Petitions must substantially comply with the requirements of Rule 28-106.301(2), Fla. Admin. Code, a copy of the which is attached to this Notice of Rights.

c. Administrative Complaint and Order: If a Respondent objects to a SFWMD Administrative Complaint and Order, pursuant to Section 373.119, Fla. Stat. (1997), the person named in the Administrative Complaint and Order may file a petition for a hearing no later than 14 days after the date such order is served. Petitions must substantially comply with the requirements of either subsection a. or b. above.

d. State Lands Environmental Resource Permit: Pursuant to Section 373.427, Fla. Stat., and Rule 40E-1.511(3), Fla. Admin. Code (also published as an exception to the Uniform Rules of Procedure as Rule 40E-0.109(2)(c)), a petition objecting to the SFWMD's agency action regarding consolidated applications for Environmental Resource Permits and Use of Sovereign Submerged Lands (SLERPs), must be filed within 14 days of the notice of consolidated intent to grant or deny the SLERP. Petitions must substantially comply with the requirements of either subsection a. or b. above.

e. Emergency Authorization and Order: A person whose substantial interests are affected by a SFWMD Emergency Authorization and Order, has a right to file a petition under Sections 120.569, 120.57(1), and 120.57(2), Fla. Stat., as provided in subsections a. and b. above. However, the person, or the agent of the person responsible for causing or contributing to the emergency conditions shall take whatever action necessary to cause immediate compliance with the terms of the Emergency Authorization and Order.

f. Order for Emergency Action: A person whose substantial interests are affected by a SFWMD Order for Emergency Action has a right to file a petition pursuant to Rules 28-107.005 and 40E-1.611, Fla. Admin. Code, copies of which are attached to this Notice of Rights, and Section 373.119(3), Fla. Stat., for a hearing on the Order. Any subsequent agency action or proposed agency action to initiate a formal revocation proceeding shall be separately noticed pursuant to section g. below.

g. Permit Suspension, Revocation, Annulment, and Withdrawal: If the SFWMD issues an administrative complaint to suspend, revoke, annul, or withdraw a permit, the permittee may request a hearing to be conducted in accordance with Sections 120.569 and 120.57, Fla. Stat., within 21 days of either written notice through mail or posting or publication of notice that the SFWMD has or intends to take final agency action. Petitions must substantially comply with the requirements of Rule 28-107.004(3), Fla. Admin. Code, a copy of the which is attached to this Notice of Rights.

2. Because the administrative hearing process is designed to formulate final agency action, the filing of a petition means that the SFWMD's final action may be different from the position taken by it previously. Persons whose substantial interests may be affected by

any such final decision of the SFWMD shall have, pursuant to Rule 40E-1.511(2), Fla. Admin. Code (also published as an exception to the Uniform Rules of Procedure as Rule 40E-0.109(2)(c)), an additional 21 days from the date of receipt of notice of said decision to request an administrative hearing. However, the scope of the administrative hearing shall be limited to the substantial deviation.

3. Pursuant to Rule 40E-1.511(4), Fla. Admin. Code, substantially affected persons entitled to a hearing pursuant to Section 120.57(1), Fla. Stat., may waive their right to such a hearing and request an informal hearing before the Governing Board pursuant to Section 120.57(2), Fla. Stat., which may be granted at the option of the Governing Board.

4. Pursuant to Rule 28-106.111(3), Fla. Admin. Code, persons may file with the SFWMD a request for extension of time for filing a petition. The SFWMD, for good cause shown, may grant the extension. The request for extension must contain a certificate that the petitioner has consulted with all other parties, if any, concerning the extension and that the SFWMD and all other parties agree to the extension.

CIRCUIT COURT

5. Pursuant to Section 373.617, Fla. Stat., any substantially affected person who claims that final agency action of the SFWMD relating to permit decisions constitutes an unconstitutional taking of property without just compensation may seek judicial review of the action in circuit court by filing a civil action in the circuit court in the judicial circuit in which the affected property is located within 90 days of the rendering of the SFWMD's final agency action.

6. Pursuant to Section 403.412, Fla. Stat., any citizen of Florida may bring an action for injunctive relief against the SFWMD to compel the SFWMD to enforce the laws of Chapter 373, Fla. Stat., and Title 40E, Fla. Admin. Code. The complaining party must file with the SFWMD Clerk a verified complaint setting forth the facts upon which the complaint is based and the manner in which the complaining party is affected. If the SFWMD does not take appropriate action on the complaint within 30 days of receipt, the complaining party may then file a civil suit for injunctive relief in the 15th Judicial Circuit in and for Palm Beach County or circuit court in the county where the cause of action allegedly occurred.

7. Pursuant to Section 373.433, Fla. Stat., a private citizen of Florida may file suit in circuit court to require the abatement of any stormwater management system, dam, impoundment, reservoir, appurtenant work or works that violate the provisions of Chapter 373, Fla. Stat.

DISTRICT COURT OF APPEAL

8. Pursuant to Section 120.68, Fla. Stat., a party who is adversely affected by final SFWMD action may seek judicial review of the SFWMD's final decision by filing a notice of appeal pursuant to Florida Rule of Appellate Procedure 9.110 in the Fourth District Court of Appeal or in the appellate district where a party resides and filing a second copy of the notice with the SFWMD Clerk within 30 days of rendering of the final SFWMD action.

LAND AND WATER ADJUDICATORY COMMISSION

9. A party to a "proceeding below" may seek review by the Land and Water Adjudicatory Commission (LAWAC) of SFWMD's final agency action to determine if such action is consistent with the provisions and purposes of Chapter 373, Fla. Stat. Pursuant to Section 373.114, Fla. Stat., and Rules 42-2.013 and 42-2.0132, Fla. Admin. Code, a request for review of (a) an order or rule of the SFWMD must be filed with LAWAC within 20 days after rendition of the order or adoption of the rule sought to be reviewed; (b) an order of the Department of Environmental Protection (DEP) requiring amendment or repeal of a SFWMD rule must be filed with LAWAC within 30 days of rendition of the DEP's order, and (c) a SFWMD order entered pursuant to a formal administrative hearing under Section 120.57(1), Fla. Stat., must be filed no later than 20 days after rendition of the SFWMD's final order. Simultaneous with filing, a copy of the request for review must be served on the DEP Secretary, any person named in the SFWMD or DEP final order, and all parties to the proceeding below. A copy of Rule 42-2.013, Fla. Admin. Code is attached to this Notice of Rights.

PRIVATE PROPERTY RIGHTS PROTECTION ACT

10. A property owner who alleges a specific action of the SFWMD has inordinately burdened an existing use of the real property, or a vested right to a specific use of the real property, may file a claim in the circuit court where the real property is located within 1 year of the SFWMD action pursuant to the procedures set forth in Subsection 70.001(4)(a), Fla. Stat.

LAND USE AND ENVIRONMENTAL DISPUTE RESOLUTION

11. A property owner who alleges that a SFWMD development order (as that term is defined in Section 70.51(2)(a), Fla. Stat. to include permits) or SFWMD enforcement action is unreasonable, or unfairly burdens the use of the real property, may file a request for relief with the SFWMD within 30 days of receipt of the SFWMD's order or notice of agency action pursuant to the procedures set forth in Subsections 70.51(4) and (6), Fla. Stat.

MEDIATION

12. A person whose substantial interests are, or may be, affected by the SFWMD's action may choose mediation as an alternative remedy under Section 120.573, Fla. Stat. Pursuant to Rule 28-106.111(2), Fla. Admin. Code, the petition for mediation shall be filed within 21 days of either written notice through mail or posting or

publication of notice that the SFWMD has or intends to take final agency action. Choosing mediation will not adversely affect the right to an administrative hearing if mediation does not result in settlement.

Pursuant to Rule 28-106.402, Fla. Admin. Code, the contents of the petition for mediation shall contain the following information:

(1) the name, address, and telephone number of the person requesting mediation and that person's representative, if any;

(2) a statement of the preliminary agency action;

(3) an explanation of how the person's substantial interests will be affected by the agency determination; and

(4) a statement of relief sought.

As provided in Section 120.573, Fla. Stat. (1997), the timely agreement of all the parties to mediate will toll the time limitations imposed by Sections 120.569 and 120.57, Fla. Stat., for requesting and holding an administrative hearing. Unless otherwise agreed by the parties, the mediation must be concluded within 60 days of the execution of the agreement. If mediation results in settlement of the dispute, the SFWMD must enter a final order incorporating the agreement of the parties. Persons whose substantial interest will be affected by such a modified agency decision have a right to petition for hearing within 21 days of receipt of the final order in accordance with the requirements of Sections 120.569 and 120.57, Fla. Stat., and SFWMD Rule 28-106.201(2), Fla. Admin. Code. If mediation terminates without settlement of the dispute, the SFWMD shall notify all parties in writing that the administrative hearing process under Sections 120.569 and 120.57, Fla. Stat., remain available for disposition of the dispute, and the notice will specify the deadlines that then will apply for challenging the agency action.

VARIANCES AND WAIVERS

13. A person who is subject to regulation pursuant to a SFWMD rule and believes the application of that rule will create a substantial hardship or will violate principles of fairness (as those terms are defined in Subsection 120.542(2), Fla. Stat.) and can demonstrate that the purpose of the underlying statute will be or has been achieved by other means, may file a petition with the SFWMD Clerk requesting a variance from or waiver of the SFWMD rule. Applying for a variance or waiver does not substitute or extend the time for filing a petition for an administrative hearing or exercising any other right that a person may have concerning the SFWMD's action. Pursuant to Rule 28-104.002(2), Fla. Admin. Code, the petition must include the following information:

(a) the caption shall read:
Petition for (Variance from) or (Waiver of) Rule (Citation)

(b) The name, address, telephone number and any facsimile number of the petitioner;

(c) The name, address telephone number and any facsimile number of the attorney or qualified representative of the petitioner, (if any);

(d) the applicable rule or portion of the rule;

(e) the citation to the statue the rule is implementing;

(f) the type of action requested;

(g) the specific facts that demonstrate a substantial hardship or violation of principals of fairness that would justify a waiver or variance for the petitioner;

(h) the reason why the variance or the waiver requested would serve the purposes of the underlying statute; and

(i) a statement of whether the variance or waiver is permanent or temporary, If the variance or waiver is temporary, the petition shall include the dates indicating the duration of the requested variance or waiver.

A person requesting an emergency variance from or waiver of a SFWMD rule must clearly so state in the caption of the petition. In addition to the requirements of Section 120.542(5), Fla. Stat. pursuant to Rule 28-104.004(2), Fla. Admin. Code, the petition must also include:

a) the specific facts that make the situation an emergency; and

b) the specific facts to show that the petitioner will suffer immediate adverse effect unless the variance or waiver is issued by the SFWMD more expeditiously than the applicable timeframes set forth in Section 120.542, Fla. Stat.

WAIVER OF RIGHTS

14. Failure to observe the relevant time frames prescribed above will constitute a waiver of such right.

28-106.201 INITIATION OF PROCEEDINGS
(INVOLVING DISPUTED ISSUES OF MATERIAL FACT)

(2) All petitions filed under these rules shall contain:

(a) The name and address of each agency affected and each agency's file or identification number, if known;

(b) The name, address, and telephone number of the petitioner; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding, and an explanation of how the petitioner's substantial interests will be affected by the agency determination;

(c) A statement of when and how the petitioner received notice of the agency decision;

(d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;

(e) A concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief; and

(f) A demand for relief.

28-106.301 INITIATION OF PROCEEDINGS
(NOT INVOLVING DISPUTED ISSUES OF MATERIAL FACT)

(2) All petitions filed under these rules shall contain:

(a) The name and address of each agency affected and each agency's file or identification number, if known;

(b) The name, address, and telephone number of the petitioner; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding, and an explanation of how the petitioner's substantial interests will be affected by the agency determination;

(c) A statement of when and how the petitioner received notice of the agency decision;

(d) A concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief; and

(e) A demand for relief.

28-107.004 SUSPENSION, REVOCATION, ANNULMENT, OR WITHDRAWAL

(3) Requests for hearing filed in accordance with this rule shall include:

(a) The name and address of the party making the request, for purposes of service;

(b) A statement that the party is requesting a hearing involving disputed issues of material fact, or a hearing not involving disputed issues of material fact; and

(c) A reference to the notice, order to show cause, administrative complaint, or other communication that the party has received from the agency.

42-2.013 REQUEST FOR REVIEW PURSUANT TO SECTION 373.114 OR 373.217

(1) In any proceeding arising under Chapter 373, F.S., review by the Florida Land and Water Adjudicatory Commission may be initiated by the Department or a party by filing a request for such review with the Secretary of the Commission and serving a copy on any person named in the rule or order, and on all parties to the proceeding which resulted in the order sought to be reviewed. A certificate of service showing completion of service as required by this subsection shall be a requirement for a determination of sufficiency under Rule 42-2.0132. Failure to file the request with the Commission within the time period provided in Rule 42-2.0132 shall result in dismissal of the request for review.

(2) The request for review shall identify the rule or order requested to be reviewed, the proceeding in which the rule or order was entered and the nature of the rule or order. A copy of the rule or order sought to be reviewed shall be attached. The request for review shall state with particularity:

(a) How the order or rule conflicts with the requirements, provisions and purposes of Chapter 373, F.S., or rules duly adopted thereunder;

(b) How the rule or order sought to be reviewed affects the interests of the party seeking review;

(c) The oral or written statement, sworn or unsworn, which was submitted to the agency concerning the matter to be reviewed and the date and location of the statement, if the individual or entity requesting the review has not participated in a proceeding previously instituted pursuant to Chapter 120, F.S., on the order for which review is sought;

(d) If review of an order is being sought, whether and how the activity authorized by the order would substantially affect natural resources of statewide or regional significance, or whether the order raises issues of policy, statutory interpretation, or rule interpretation that have regional or statewide significance from a standpoint of agency precedent, and all the factual bases in the record which the petitioner claims support such determination(s); and

(e) The action requested to be taken by the Commission as a result of the review, whether to rescind or modify the order, or remand the proceeding to the water management district for further action, or to require the water management district to initiate rulemaking to adopt, amend or repeal a rule.

28-107.005 EMERGENCY ACTION

(1) If the agency finds that immediate serious danger to the public health, safety, or welfare requires emergency action, the agency shall summarily suspend, limit, or restrict a license.

(2) the 14-day notice requirement of Section 120.569(2)(b), F. S., does not apply and shall not be construed to prevent a hearing at the earliest time practicable upon request of an aggrieved party.

(3) Unless otherwise provided by law, within 20 days after emergency action taken pursuant to paragraph (1) of this rule, the agency shall initiate a formal suspension or revocation proceeding in compliance with Sections 120.569, 120.57. and 120.60, F.S.

40E-1.611 EMERGENCY ACTION

(1) An emergency exists when immediate action is necessary to protect public health, safety or welfare; the health of animals, fish or aquatic life; the works of the District; a public water supply, or recreational, commercial, industrial, agricultural or other reasonable uses of land and water resources.

(2) The Executive Director may employ the resources of the District to take whatever remedial action necessary to alleviate the emergency condition without the issuance of an emergency order, or in the event an emergency order has been issued, after the expiration of the requisite time for compliance with that order.

DONE AND SO ORDERED, this 10th day of July, in West Palm Beach Florida.

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT
BY ITS GOVERNING BOARD

SHERYL WOOD, General Counsel

ATTEST:

BY:
DATE: 7-23-03

Legal Form Approved
Tew Cardenas LLP
Board Counsel fo Governing Board

By: Santiago D. Echemendia

Certificate of Service

I HEREBY CERTIFY that on this 23rd day of July 2003, true and correct copies of the foregoing have been furnished to the following:

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Administrative Law Judge
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