



## SOUTH FLORIDA WATER MANAGEMENT DISTRICT

3301 Gun Club Road, West Palm Beach, Florida 33406 • (561) 686-8800 • FL WATS 1-800-432-2045 • TDD (561) 697-2574  
Mailing Address: P.O. Box 24680, West Palm Beach, FL 33416-4680 • www.sfwmd.gov

May 2, 2006

Ann Cole, Clerk of the Division  
State of Florida, Division of  
Administrative Hearings  
1230 Apalachee Parkway  
Tallahassee, FL 32399-3060

Dear Ms. Cole:

**Subject: Brian DiVentura v. The Gables at Stuart and South Florida  
Water Management District, DOAH Case No. 03-2838**

FILED  
2006 MAY -4 A 11:34  
DIVISION OF  
ADMINISTRATIVE  
HEARINGS

Pursuant to subsection 120.57(1)(k), Florida Statutes, enclosed is a copy of the South Florida Water Management District's Final Order in the above referenced matter.

If you have any questions, please call me at 561.682.6259.

Sincerely,

A handwritten signature in cursive script that reads "Joyce B. Rader".

Joyce B. Rader  
Paralegal Specialist

JBR  
Enclosure

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### GOVERNING BOARD

Kevin McCarty, *Chair*  
Irela M. Bagué, *Vice-Chair*  
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Alice J. Carlson  
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Nicolás J. Gutiérrez, Jr., Esq.

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Malcolm S. Wade, Jr.

### EXECUTIVE OFFICE

Carol Ann Wehle, *Executive Director*

BEFORE THE GOVERNING BOARD OF THE  
SOUTH FLORIDA WATER MANAGEMENT DISTRICT

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APR 14 2006 9:11 AM

SOUTH FLORIDA  
WATER MANAGEMENT DISTRICT

BRIAN DIVENTURA,

Petitioner,

Order No. 2006-044 FOF-ERP

vs.

THE GABLES AT STUART and SOUTH  
FLORIDA WATER MANAGEMENT  
DISTRICT,

Respondents.

FILED  
2006 MAY -4 A 11:24  
DIVISION OF  
ADMINISTRATIVE  
HEARINGS

FINAL ORDER

This matter was presented before the Governing Board of the South Florida Water Management District on April 12, 2006, for the consideration of the Recommended Order issued on March 16, 2006, (incorporated herein, with modifications set forth below, and attached hereto as **Exhibit "A"**), by the duly-appointed Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") J. Lawrence Johnston. On March 30, 2006, pursuant to DOAH Uniform Rule 28-106.217(1), Petitioner Brian DiVentura ("Petitioner") timely filed Exceptions to Recommended Order ("Petitioner's Exceptions") (attached hereto as **Exhibit "B"**). On April 12, 2006, pursuant to DOAH Uniform Rule 28-106-217, Respondents South Florida Water Management District ("SFWMD") and The Gables at Stuart ("Gables") filed its Joint Response to Petitioner's Exceptions ("Joint Response") (attached hereto as **Exhibit "C"**).

An opportunity for oral argument was given at the April 12, 2006 Governing Board meeting, however, Brian DiVentura, pro se, was not present

and Donna Holshouser Stinson, Esq., on behalf of Respondent The Gables at Stuart, and Ashley D. Foster, Esq., on behalf of Respondent SFWMD waived oral argument.

### **Summary of the Proceedings**

E. Clark Gibson ("Gibson") filed an Environmental Resource Permit ("ERP") Application for approval of a conceptual plan for a Surface Water Management ("SWM") system to serve a 99.25-acre project of residential and commercial development known as The Gables at Stuart. Respondent SFWMD, a public corporation existing by virtue of the Laws of Florida and operating as a multi-purpose water management district based in West Palm Beach, Florida, issued a Staff Report recommending approval of Gibson's ERP Application. The Governing Board of SFWMD approved the Staff Report to issue the ERP. Petitioners the Haney Creek Greenway Group ("Greenway Group"), Keith Kopp ("Kopp") and Brian DiVentura ("DiVentura") filed a Petition challenging the intended issuance of the ERP.

SFWMD transmitted the Petition to the Division of Administrative Hearings for assignment of an ALJ. Subsequently, Gibson filed an amended application indicating The Gables at Stuart's ("The Gables") purchase of the property from Gibson. The Gables also further amended its application (the "Amended ERP").

SFWMD executed and filed with DOAH an Amended Staff Report authorizing conceptual plan approval with certain conditions for a SWM system to serve 80.71 acres of residential development, The Gables, and for 1.42 acres of the entrance road easement for a total permitted area of 82.13 acres. The

parties filed a Joint Prehearing Stipulation. Kopp voluntarily dismissed his Amended Petition and was dropped as a party.

On November 29, 2005, the ALJ conducted a final administrative hearing to determine whether SFWMD should issue the Amended ERP for conceptual approval of a SWM system to serve 80.71 acres of residential development, The Gables, and for 1.42 acres of the entrance road easement. SFWMD should only issue the Amended ERP if The Gables has provided reasonable assurances that the proposed Amended ERP complies with the relevant portions of SFWMD's ERP regulations, set forth in Part IV of Chapter 373, Fla. Stat., Chapter 40E-4, Fla. Admin. Code, *et seq.*, and the "Basis of Review for Environmental Resource Permit Applications within the South Florida Water Management District, April 2003," ("BOR") (ERP regulations and BOR will collectively be referred to as "ERP Criteria").

Based on the testimonial and documentary evidence presented at the final hearing, the ALJ determined that The Gables had provided reasonable assurances that the proposed project would comply with ERP Criteria. Therefore, on March 16, 2006, the ALJ issued a Recommended Order memorializing such determination, and recommending that SFWMD enter a final order issuing to The Gables ERP number 43-01438-P, to expire in two years, subject to the conditions set forth in the Amended Staff Report.

#### **Standard of Review**

In this case, Petitioner takes exception to several of the ALJ's Findings of Fact and one Conclusion of Law. Section 120.57(1)(I), Florida Statutes, provides

that an agency reviewing a DOAH recommended order may not reject or modify the findings of fact of an ALJ, "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." See Friends of Children v. Department of Health and Rehabilitative Services, 504 So. 2d 1345, 1347, 1348 (Fla. 1<sup>st</sup> DCA 1987). 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); Gulf Coast Elec. Co-op v. Johnson, 727 So. 2d 259, 262 (Fla. 1999). Furthermore, an agency may not create or add to findings of fact because an agency is not the trier of fact. See id. The Governing Board has determined that all of the findings of fact made by the ALJ in this case are based on competent, substantial evidence that is sufficiently relevant and material such that a reasonable mind would accept it as adequate to support the conclusion reached. Therefore, the Governing Board will not disturb any of the ALJ's Findings of Fact.

With respect to the standard of review regarding an ALJ's conclusions of law, Section 120.57(1)(l), Florida Statutes, provides that an agency may reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction" whenever the agency's interpretation is "as or more reasonable" than the interpretation made by the ALJ. See Deep Lagoon Boat Club Ltd. v. Sheridan, 784 So. 2d 1140 (Fla. 2d DCA 2001). Florida

Courts have consistently applied this section'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*. See 784 So. 2d at 1141-42. 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. See 805 So. 2d 1008, 1011 (Fla. 1<sup>st</sup> DCA 2001).

Part IV, Chapter 373 of the Florida Statutes, and Title 40E of the Florida Administrative Code, which form the basis for the ERP Criteria that the Gables' proposed permit must satisfy, provide SFWMD (and its Governing Board) with the requisite and necessary authority to require ERP Permits and impose such reasonable conditions as are necessary to ensure that the water resources of the SFWMD are protected. The Governing Board has the administrative authority and substantive expertise to exercise regulatory jurisdiction over the

administration and enforcement of ERP Criteria. Therefore, the Governing Board has substantive jurisdiction over the ALJ's conclusions of law and interpretations of administrative rules, and is authorized to reject or modify the ALJ's conclusions or interpretations if it determines that its conclusions or interpretations are "as or more reasonable" than the conclusions or interpretations made by the ALJ. The Governing Board, however, makes no such determination, and adopts the ALJ's conclusions of law in *toto*.

### **RULING ON EXCEPTIONS**

Petitioner asserted five exceptions to the ALJ's Recommended Order, and Respondents filed a Joint Response to the Exceptions. The Governing Board, having carefully considered each of the Petitioner's Exceptions and the Responses thereto, makes the following rulings:

#### **Petitioner's Exception No. 1 and No. 2**

Petitioner takes exception to the ALJ's finding that The Gables has provided reasonable assurance that (i) the wetlands in Pineapple Plantation would not be adversely affected, and (ii) the hydroperiods of the wetlands, the existing surface water storage and conveyance capabilities would not be adversely affected. Petitioner's exceptions attempt to reargue facts and ask the Governing Board to reweigh the evidence which the Governing Board is without authority to do as it is not acting in the capacity of the trier or finder of fact. Therefore, since there is competent substantial evidence supporting the findings of fact, Petitioner's exceptions 1 and 2 are rejected.

### **Petitioner's Exception No. 3**

Petitioner next takes exception to ALJ's Finding of Fact 21 that the document (proposed Exhibit P12, "A Three-Dimensional Finite-Difference Ground Water Flow Model of the Surficial Aquifer System in St. Lucie County") is not relevant to "surface water management design" arguing that such finding is not based upon competent substantial evidence. Petitioner argues that the ALJ erred in sustaining an objection to Exhibit P12 because Petitioner's rebuttal to the objection was based on factual substantial evidence. The Governing Board is without authority to overturn the ALJ's evidentiary rulings. Therefore, Petitioner's exception 3 is rejected.

### **Petitioner's Exception No. 4**

Petitioner takes exception to the ALJ's finding that The Gables explored all practicable alternatives in order to reduce or eliminate wetlands impact because such conclusion is not based on the testimony of an expert witness in the field of development planning and feasibility. Petitioner's exception attempts to reargue facts and asks the Governing Board to reweigh the evidence which the Governing Board is without authority to do as it is not acting in the capacity of the trier or finder of fact. Therefore, since there is competent substantial evidence supporting the finding of fact, Petitioner's exception 3 is rejected.

### **Petitioner's Exception No. 5**

Petitioner takes exception to the ALJ's Conclusion of Law that a *prima facie* case was established by The Gables and the District because The Gables had not provided reasonable assurances and substantial evidence that the

criteria of BOR Section 4.2.2.4 has been satisfied. However, based upon the facts found by the ALJ, the ALJ correctly concluded that reasonable assurances were provided to support the issuance of the ERP to The Gables.

**Minor Clarifications in the Recommended Order**

In the Recommended Order's Preliminary Statement, found on page 6, the following correction should be made to clarify that the Exhibits received were Exhibits 1 through 7:

"Joint Exhibits 1 through 7 were received in evidence."

On page 5 of the Recommended Order, there is a typographical error and the following correction should be made in the last sentence, second paragraph:

"The Gables also further amended its application on January 31, 2005."

On page 17 of the Recommended Order, paragraph 27 should be revised as follows:

"27. Rule 40E-4.301(1)(e) requires an applicant to provide reasonable assurances that the proposed project will not adversely affect the quality of receiving waters such that state water quality standards will be violated."

On page 18 of the Recommended Order, paragraph 31 should be revised as follows:

"31. The Gables has provided reasonable assurances to demonstrate that the project will not adversely affect the quality of receiving waters such that the State water quality standards will be violated."

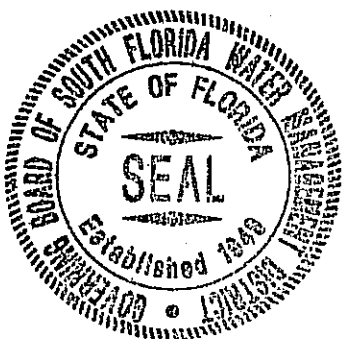
The foregoing revisions will correct clerical errors in the ALJ's Recommended Order; it will not alter the outcome of this proceeding.

## ORDER


Based upon the foregoing, the Governing Board, having considered the ALJ's Recommended Order, the Petitioner's Exceptions thereto, and Respondents' Joint Response to Petitioner's Exceptions, and being otherwise fully advised in the premises, hereby ORDERS as follows:

1. The ALJ's Recommended Order, as modified herein, is adopted *in toto* and incorporated herein; and
2. Petitioner's five Exceptions are rejected for the reasons stated herein.

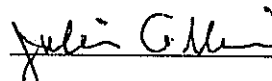
DONE AND SO ORDERED, this 12th day of April 2006, in West Palm Beach, Florida.



SOUTH FLORIDA WATER  
MANAGEMENT DISTRICT  
BY ITS GOVERNING BOARD

  
\_\_\_\_\_  
SHERYL WOOD, General Counsel

ATTEST:

BY: \_\_\_\_\_  
DATE: 4/14/06

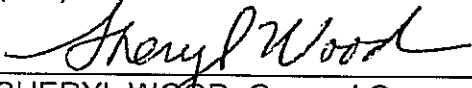
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing Final Order has been furnished this 14 day of April, 2006, via U.S. Mail to the following parties and counsel:

Donna Holshouser Stinson, Esquire  
Broad and Cassel  
Post Office Drawer 11300  
Tallahassee, Florida 32302-1300

Brian DiVentura, *pro se*  
377 Northwest Canna Way  
Jensen Beach, Florida 34957-3518

SOUTH FLORIDA WATER  
MANAGEMENT DISTRICT  
3301 Gun Club Road, MSC 1410  
West Palm Beach, FL 33401  
(561) 682-6251

  
\_\_\_\_\_  
SHERYL WOOD, General Counsel

## 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 15<sup>th</sup> 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 statute the rule is implementing;

(f) the type of action requested;

(g) the specific facts that demonstrate a substantial hardship or violation of principles 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.