STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KEITH KOPP,	)	
Petitioner,	)	
	)	
vs.	)	Case No. 03-4086RX
	)	
SOUTH FLORIDA WATER MANAGEMENT DISTRICT,	)	
	)	
Respondent.	)	
_____	)	

FINAL ORDER

On March 19, 2004, Respondent filed a Motion for Summary Final Order. At the time, this rule-challenge case was consolidated with a related case, Keith Kopp v. South Florida Water Management District and Martin County, DOAH Case No. 04-0104.

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted a telephone conference on March 22, 2004, with the parties in both cases. During the telephone conference, the Administrative Law Judge severed the cases, pursuant to the agreement of the parties. The parties agreed to file additional materials so that the Administrative Law Judge could issue a final order in the rule-challenge case prior to the start of the five-day final hearing in DOAH Case No. 01-0104 on April 12, 2004. On April 1, 2004, Petitioner

filed a response and cross motion for summary final order. On April 2, 2004, Respondent filed its reply to Petitioner's response.

APPEARANCES

For Petitioner: Marcy I. LaHart
711 Talladega Street
West Palm Beach, Florida 33405

For Respondent: Sheryl G. Wood
General Counsel
Cecile I. Ross
Assistant General Counsel
South Florida Water Management District
3301 Gun Club Road
Mail Stop Code 1410
Post Office Box 24680
West Palm Beach, Florida 3341-4680

STATEMENT OF THE ISSUE

The issue is whether Florida Administrative Code Rules 40E-0.109(1)(a), 40E-1.511(1)(b), and 40E-1.5095 are invalid exercises of delegated legislative authority, pursuant to Section 120.52(8)(b) and (c), Florida Statutes.

PRELIMINARY STATEMENT

By Petition to Determine Invalidity of Administrative Rule dated November 4, 2003, Petitioner challenged as invalid exercises of delegated legislative authority Florida Administrative Code Rules 40E-0.109(1)(a) 40E-1.511(1)(b), and 40E-1.5095. Petitioner alleges that he has standing because Respondent rejected his request for an administrative hearing in the dispute that became DOAH Case No. 04-0104 due to his failure

to file a request for hearing within 21 days of the date of publication of the Notice of Proposed Agency Action.

In general, the petition alleges that the effect of these three challenged rules is to allow Respondent to provide constructive notice, by publication, of intended agency action, so as to bar substantially affected persons from obtaining hearings unless they request a hearing within the time allowed from the date of constructive notice.

The petition alleges that, in violation of Section 120.52(8)(b) Florida Statutes, the rules exceed the agency's grant of rulemaking authority, citation to which is required by Section 120.54(3)(a)1, Florida Statutes, and, in violation of Section 120.52(8)(c), Florida Statutes, the rules enlarge, modify, or contravene the specific law implemented, citation to which is required by Section 120.54(3)(a)1, Florida Statutes.

FINDINGS OF FACT

1. On March 8, 2003, Respondent published in The Stuart/Port St. Lucie News, a daily newspaper published in Martin County, the following notice (Published Notice):

> The South Florida Water Management District (SFWMD) Governing Board will consider, for approval, a Water Use Permit Renewal/Modification (Application 971224-8, Permit 40-00089-W) for the Martin County Utilities (Martin County Consolidated System), PO Box 9000, Stuart, FL 34995 at its March 13 2003 Governing Board Meeting.

> The Applicant has requested an annual allocation of 4,529 MG (17.41 MG on a maximum daily basis) with a permit duration of 5 years, for a Public Water Supply to service approximately 17,000 acres located in Martin County. The water will be withdrawn from the Surficial Aquifer System.
>
> A copy of the proposed agency action, a description of the project, and a staff analysis of the project, are available for inspection at the South Florida Water Management District, Environment Resource Regulation Department, 3301 Gun Club Road, West Palm Beach, FL 33406, or a copy may be obtained by contacting Ralph Peno at 561-582-9605.
>
> Interested persons may comment upon the proposed agency action and are entitled to request an Administrative Hearing regarding the proposed agency action by writing the Governing Board of the South Florida Water Management District, PO Box 24680, West Palm Beach, FL 3316, but which comments or requests must be received within 21 days from the date of this publication.
>
> Publish March 8, 2002

(The only copy of the Published Notice is a facsimile copy that is illegible in certain places. Typographical errors therefore may appear in the version set forth above, but none of the possible discrepancies would affect the outcome of this case.)

2. Petitioner and his wife own a single-family residence at 2039 Ginger Terrace, Jensen Beach, Florida. Petitioner lives in close proximity to certain lands that he claims have been adversely affected by overpumping of Martin County's wellfields.

Petitioner enjoys various recreational activities on these lands.

3. Unaware of the Published Notice on March 8, 2003, Petitioner filed his petition challenging the proposed permit to Martin County on September 25, 2003. This date was within 21 days of when Petitioner received actual notice of the proposed agency action and 21 days of the decision of Respondent's Governing Board to approve Martin County's application for a water use permit. The Governing Board did not approve and may not have considered the proposed agency action on March 13, 2003, as indicated in the Published Notice. The delay between the date on which the Published Notice announced that the Governing Board would take action on Martin County's application and the date on which the Governing Board took action was due to the time consumed by successful efforts of the Governing Board and Martin County to resolve a dispute that another party had raised with respect to the proposed permit.

4. With the challenged provisions underlined, Florida Administrative Code Rule 40E-0.109 provides:

> **40E-0.109 Point of Entry Into Proceedings and Mediation.**
> Point of entry into proceedings determining substantial interests are governed by Rule 28-106.111, F.A.C., and this section.
>
> (1)(a) "Receipt of written notice of agency decision" as set forth in Rule 28-106.111, F.A.C., means receipt of either written

notice through mail or posting that the District has or intends to take final agency action, or publication of notice that the District has or intends to take final agency action.

(b) If notice is published pursuant to this chapter, publication shall constitute constructive notice to all persons. Until notice is published, the point of entry to request a formal or informal administrative proceeding shall remain open unless actual notice is received.

(2) If the Board takes action which substantially differs from the notice of intended agency decision, the applicant or persons who may be substantially affected shall have an additional point of entry pursuant to Section 28-106.111, F.A.C., unless otherwise provided by law. The Board action is considered to substantially differ from the notice of intended agency decision when the potential impact on water resources has changed.

(3) Notwithstanding Rule 28-106.111, F.A.C., intended agency decisions or agency decisions regarding consolidated applications for Environmental Resource Permits and Use of Sovereign Submerged Lands pursuant to Section 373.427, F.S., shall provide a 14 day point of entry to file petitions for administrative hearing under Rule 28-106.111, F.A.C.

Specific Authority 120.54(5), 373.044, 373.113 FS. Law Implemented 120.54(5), 120.569, 120.57, 120.60, 373.146, 373.413, 373.427 FS. History–New 7-2-98, Amended 6-12-00

5. Challenged in its entirety, Florida Administrative Code Rule 40E-1.5095 provides:

40E-1.5095 Publication of Notice of Agency Decision or Intended Agency Decision.

> In cases where a project is determined to be of heightened public concern, or where there is the likelihood of a request for an administrative hearing, where the proposed activity is potentially harmful to the water resources of the District or contrary to the overall objectives of Chapter 373, F.S., as outlined in Section 373.016, F.S., or if objection(s) to the application has been received, the District shall publish, or require the permit applicant to publish notice of agency decision or intended agency decision in the Florida Administrative Weekly or newspapers of general circulation in the area affected by such decisions as required by Chapter 50, F.S., and shall post notice and mail copies of its notice to applicants and interested groups. Such publication may be used as evidence of constructive and sufficient notice.
>
> Specific Authority 120.54(5), 373.044, 373.113 FS. Law Implemented 120.54(5), 120.569, 120.57, 373.146, 373.413 FS. History–New 7-2-98, Amended 6-12-00.

6. With the challenged provisions underlined, Florida Administrative Code Rule 40E-1.511 provides:

> **40E-1.511 Point of Entry Into Proceedings.** Procedures regarding point of entry into proceedings determining substantial interests and mediation are set forth in the Uniform Rules of Procedure Rule 28-106.111, F.A.C. The following exceptions are applied in combination with the applicable Uniform Rules of Procedure.
>
> (1)(a) "Receipt of written notice of agency decision" as set forth in Rule 28-106.111, F.A.C., means receipt of either written notice through mail or posting that the District has or intends to take final agency action, or publication of notice that the District has or intends to take final agency action.

(b) If notice is published pursuant to this chapter, publication shall constitute constructive notice to all persons. Until notice is published, the point of entry to request a formal or informal administrative proceeding shall remain open unless actual notice is received.

(2) If the Board takes action which substantially differs from the notice of intended agency decision, the applicant or persons who may be substantially affected shall have an additional point of entry pursuant to Rule 28-106.111, F.A.C., unless otherwise provided by law. The Board action is considered to substantially differ from the notice of intended agency decision when the potential impact on water resources has changed.

(3) Notwithstanding the timeline in Rule 28-106.111, F.A.C., intended agency decisions or agency decisions regarding consolidated applications for Environmental Resource Permits and Use of Sovereign Submerged Lands pursuant to Section 373.427, F.S., shall provide a 14 day point of entry to file petitions for administrative hearing.

Specific Authority 120.54(5), 373.044, 373.113 FS. Law Implemented 120.54.

7. On March 13, 1998, Respondent published in Florida Administrative Weekly, Volume 24, Number 11, a copy of its petition to the Administration Commission for, among other things, an exception from the Uniform Rules of Procedure adopted by the Administration Commission. The petition states, in relevant part:

> i. The SFWMD seeks an exception from Rule 28-106.111(2), F.A.C., regarding notices of agency decision.
> ii. This exception is sought to clarify that "written notice of agency decision," as used in Rule 28-106.111, includes the publication of notice and posting of notice, as well as actual written notice by mail.
> iii. Chapter 373, F.S., provides the authority to require publication of notice in addition to actual or mailed written notice of an agency decision or intended agency decision. . . . Publication is required if desired by the applicant, or if the proposed project is potentially harmful to the water resources, of heightened public concern or contrary to the overall objectives of Chapter 373, F.S.
> Rule 28-106.111, F.A.C., provides for a petition requesting an administrative hearing to be filed within 21 days of receipt of "written notice" of an agency's decision. The phrase "written notice" is not defined in Rule 28-106.111, F.A.C. or elsewhere in the Uniform Rules, however, it could be narrowly interpreted as only allowing notice by mail or similar actual notice.
> Publication is an accepted legal procedure providing a clear point of entry for filing a petition. It has been recognized as a viable noticing procedure in administrative law forums. See, e.g., City of LaBelle v. Bio-Med Services, Inc., et al, 598 So. 2d 207 (Fla. 2d DCA 1991). Based on the above, this exception is necessary both to implement the authority under Chapter 373, F.S., and for the efficient operation of the SFWMD.

8. By Final Order entered March 25, 1998, the Administration Commission granted Respondent an exception from Florida Administrative Code Chapter 28-106 for proposed Rule 40E-0.511, "on the basis of implementation of statute and the

most efficient operation of the agency." During subsequent rulemaking, "Rule 40E-0.511" became the three rules that, in whole or in part, Petitioner is challenging in this case (Rules).

9. By Order of Non-Compliance with Requisite Rules and Dismissing Petition with Leave to Amend dated October 29, 2003, Respondent found Petitioner had not timely filed his initial petition because it was not filed within 21 days of the publication of the Published Notice. The Order dismissed the petition with leave to file an amended petition within 21 days.

10. Petitioner filed his First Amended Request for Administrative Hearing on November 17, 2003. Reserving all rights concerning the timeliness of the petition, Respondent, by Order dated January 7, 2004, transmitted the petition to the Division of Administrative Hearings, which designated the case as DOAH Case No. 04-0104. Pursuant to the procedures discussed during the March 22, 2004, telephone conference, Respondent and Martin County have requested a summary disposition of DOAH Case No. 04-0104, which would be granted if the Administrative Law Judge dismisses the challenge to the Rules and sustains the sufficiency of the Published Notice.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the subject matter. § 120.56(1)(a), Fla. Stat. (2003).

12. Section 120.56(1)(a) authorizes "[a]ny person substantially affected by a rule . . . [to] seek an administrative determination of the invalidity of the rule on the ground that it is an invalid exercise of delegated legislative authority."

13. Petitioner has demonstrated his standing to challenge the Rules to the extent that they authorize Respondent to provide notice by publication and to deny hearings to substantially affected persons who fail to file their petitions within 21 days after the date of the Published Notice. However, as noted below, Petitioner's standing is limited in one respect.

14. Pursuant to Section 120.56(3)(a), Petitioner bears the burden of proving by a preponderance of the evidence that the Rules are invalid.

15. Section 120.52(8)(b) and (c) provides:

> (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:

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.; [and]

(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.

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

16. Respondent derives its rulemaking authority for the Rules through Section 120.54(5), Florida Statutes, which provides:

(5) UNIFORM RULES.--

(a)1. By July 1, 1997, the Administration Commission shall adopt one or more sets of uniform rules of procedure which shall be reviewed by the committee and filed with the Department of State. Agencies must comply with the uniform rules by July 1, 1998. The uniform rules shall establish procedures that comply with the requirements of this chapter. On filing with the department, the uniform rules shall

be the rules of procedure for each agency subject to this chapter unless the Administration Commission grants an exception to the agency under this subsection.

2. An agency may seek exceptions to the uniform rules of procedure by filing a petition with the Administration Commission. The Administration Commission shall approve exceptions to the extent necessary to implement other statutes, to the extent necessary to conform to any requirement imposed as a condition precedent to receipt of federal funds or to permit persons in this state to receive tax benefits under federal law, or as required for the most efficient operation of the agency as determined by the Administration Commission. The reasons for the exceptions shall be published in the Florida Administrative Weekly.

3. Agency rules that provide exceptions to the uniform rules shall not be filed with the department unless the Administration Commission has approved the exceptions. Each agency that adopts rules that provide exceptions to the uniform rules shall publish a separate chapter in the Florida Administrative Code that delineates clearly the provisions of the agency's rules that provide exceptions to the uniform rules and specifies each alternative chosen from among those authorized by the uniform rules. Each chapter shall be organized in the same manner as the uniform rules.

(b) The uniform rules of procedure adopted by the commission pursuant to this subsection shall include, but are not limited to:

1. Uniform rules for the scheduling of public meetings, hearings, and workshops.

2. Uniform rules for use by each state agency that provide procedures for conducting public meetings, hearings, and workshops, and for taking evidence, testimony, and argument at such public meetings, hearings, and workshops, in person

and by means of communications media technology. . . .

3. Uniform rules of procedure for the filing of notice of protests and formal written protests.

4. Uniform rules of procedure for the filing of petitions for administrative hearings pursuant to s. 120.569 or s. 120.57. Such rules shall require the petition to include:

a. The identification of the petitioner.

b. A statement of when and how the petitioner received notice of the agency's action or proposed action.

c. An explanation of how the petitioner's substantial interests are or will be affected by the action or proposed action.

d. A statement of all material facts disputed by the petitioner or a statement that there are no disputed facts.

e. A statement of the ultimate facts alleged, including a statement of the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action.

f. A statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes.

g. A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the proposed action.

5. Uniform rules of procedure for the filing and prompt disposition of petitions for declaratory statements.

6. Provision of a method by which each agency head shall provide a description of the agency's organization and general course of its operations.

7. Uniform rules establishing procedures for granting or denying petitions

for variances and waivers pursuant to s. 120.542.

17. Section 120.54(5)(a)2, Florida Statutes, explicitly authorizes Respondent to seek exceptions from the Administration Commission to its Uniform Rules of Procedure. This is an authorization of rulemaking because the only means by which Respondent may implement approved exceptions to the Uniform Rules of Procedure is by rulemaking. Section 120.52(15), Florida Statutes, defines a rule, in part, as an "agency statement of general applicability that . . . describes the procedure . . . of an agency . . .."

18. In all respects, the Rules conform to the statutory rulemaking authority vested in Respondent by Section 120.54(5)(a)2, Florida Statutes. Procedures that deny hearings to substantially affected persons who fail to request hearings within 21 days after the publication of notice of intended agency action will allow Respondent to issue permits more efficiently. Under the Rules, the agency and applicant will know, three weeks after the publication of notice, whether a hearing will be necessary or whether, absent substantially different action by the Governing Board from that set forth in the published notice, the permit may issue without delay.

19. The other requirements of Section 120.54(5), Florida Statutes, have all been met. The Administration Commission has

approved the exceptions sought by Respondent and has published the grounds for granting the exceptions. The Rules pertain to procedural matters that are within the scope of the illustrative list of procedural matters set forth in Section 120.54(5)(b), Florida Statutes--specifically, Section 120.54(5)(b)3, which covers rules of procedure for the filing of notices of protest and formal written protests, presumably in bid cases, and Section 120.54(5)(b)4, which covers rules of procedure for the filing of petitions for administrative hearings.

20. Arguing that the Rules enlarge, modify, or contravene the law to be implemented, Petitioner contends that denying a request for hearing based on constructive notice by publication violates a general principle of the people's right to access to their government decision making, as generally reflected by Chapter 120, Florida Statutes. Undoubtedly, this procedure restrikes the balance between the administrative convenience of Respondent and the property interests of applicants, on the one hand, and the people's access to their government, on the other hand. But nothing in Chapter 120, Florida Statutes, categorically places the right of access to government over administrative convenience and property interests.

21. In the certificate-of-need program, for example, substantially affected persons have been denied hearings when their requests were untimely, based on published notice. See,

e.g., St. Joseph Hospital of Charlotte, Florida, Inc., Department of Health and Rehabilitative Services, 559 So. 2d 595 (Fla. 2d DCA 1989); NME Hospitals, Inc. v. Department of Health and Rehabilitative Services, 492 So. 2d 379 (Fla. 1st DCA 1985). Although the certificate-of-need program is characterized by a small and alert class of substantially affected persons--i.e., other health-care providers--Respondent cites two environmental cases involving notice by publication, in which the courts, in dicta, approve of the denial of a request for a hearing based on published notice.

22. In City of LaBelle v. Bio-Med Services, Inc., 598 So. 2d 207 (Fla. 2d DCA 1992), the court held that a request for hearing was untimely when it was filed within the required 14 days after the issuance of published notice, but not within 14 days of the receipt of actual notice. In establishing the deadline for requesting a hearing based on the receipt of actual notice, the court relied upon a rule providing that notice was effective from the earlier of the receipt of actual notice or the issuance of published notice. The court noted provisions of Section 403.815, Florida Statutes (1989), that supported the city's position that the 14 days must run from the publication of notice. In declining to rely on this statute to overturn the rule at issue, the court relied instead on former Section

120.57(1)(b)2, Florida Statutes (1989), which required agencies to give potential parties "reasonable notice."

23. In Wentworth v. Department of Environmental Protection, 771 So. 2d 1279 (Fla. 4th DCA 2000), the court held that a substantially affected person could timely request a hearing on a permit for the construction of a dock, even after the permittee had begun construction of the dock, because the permittee had failed to provide potentially affected persons, such as neighbors, with written notice or published notice of the permit. The court thus implied that the agency could have denied a hearing to substantially affected persons who filed requests for hearing within the appropriate time from when they received actual notice, but outside of the deadline stated in published notice.

24. Petitioner argues that Respondent has identified no statute that modifies Florida Administrative Code Rule 28-106.111(2). Part of the Uniform Rules of Procedure, Rule 28-106.111(2) and (4) provides, respectively, that substantially affected persons must file a request for hearing within 21 days of receipt of written notice of the agency decision and the failure to do so waives the right to a hearing. These rules, from which Respondent sought relief, are not the law to be implemented by the Rules; as used in Section 120.52(8), Florida Statutes, the law to be implemented is limited to statutes.

25. The determination of whether the Rules enlarge, modify, or contravene the law implemented is guided by the flush language of Section 120.52(8), Florida Statutes. The flush language warns that rulemaking authority is not a substitute for a "specific law to be implemented," rules must "implement or interpret the specific powers or duties granted by the enabling statute," and rules may not "implement statutory provisions setting forth general legislative intent or policy." Lastly, "[s]tatutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute."

26. Although Section 120.54(5), Florida Statutes, focuses on the rights and responsibilities of the Administration Commission, the statute is also the source of the law implemented by Respondent's Rules. Section 120.54(5)(a)2, Florida Statutes, empowers an agency to seek an exception to the Uniform Rules of Procedure and requires the Administration Commission to approve the requested exception, if any of the criteria are met. The combined power vested in the agency and duty imposed upon the Administration Commission constitute the law to be implemented by the Rules.

27. Petitioner correctly contends that no statute explicitly authorizes Respondent to adopt a rule to deny

hearings based on requests that fail to comply with deadlines set forth in published notice, at least when the substantially affected person was unaware of the intended agency action. However, Section 120.54(5), Florida Statutes, represents a broad enabling act for procedural rules. If Section 120.54(5), Florida Statutes, attempted to delineate specific procedures, which agencies could implement by rulemaking, Petitioner's argument would be more persuasive.

28. For this reason, Sections 373.146, 373.413, and 373.427, Florida Statutes, are not implemented by the Rules. At best, these statutes address notice, but do not address the relationship of the means of notice to the time within which a substantially affected person must request a hearing.

29. Section 373.146(1), Florida Statutes, merely provides how notice may be published and does not address other procedures. Specifically, this statute does not address the denial of a request for a hearing by a substantially affected person who is unaware of the intended agency action on the ground that the request is untimely under the published notice. Section 373.413, Florida Statutes, applies to the management and storage of surface waters, under Chapter 373, Part IV, Florida Statutes. In any event, the specificity of Section 373.413(3) and (4), Florida Statutes, regarding notification options precludes an interpretation of this statute as a source of the

law implemented by rules denying hearings to substantially affected persons who, unaware of the intended agency action, fail to request a hearing within the time provided by published notice. The same considerations apply to Section 373.427, Florida Statutes.

29. Two of the Rules cite Sections 120.569 and 120.57, Florida Statutes, as the law implemented. Section 120.569(1), Florida Statutes, addresses administrative procedures, but does not apply at the early stage of administrative activity governed by the Rules. When Respondent or an applicant publishes notice of intended agency action, no dispute has emerged because the agency has not yet taken the action that, but for a request for hearing, is final. As is relevant to this case, Section 120.569(1) requires only that "parties" shall be notified of an agency's order. Section 120.52(12)(b), Florida Statutes, defines a "party" as "[a]ny other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party." Obviously, Petitioner could not make an appearance in the agency activity preceding the publication of the notice of intended agency action because the crux of Petitioner's case

is that he was unaware of the agency activity until long after the expiration of the deadline for requesting a hearing.

30. Section 120.57(2)(a)1 provides: "The agency shall . . . [g]ive reasonable notice to affected persons of the action of the agency, whether proposed or already taken, or of its decision to refuse action, together with a summary of the factual, legal, and policy grounds therefor." Section 120.52(13), Florida Statutes, defines a "person" to include a natural person, such as Petitioner. Section 120.57(2)(a)1 directly addresses notice of agency action that is proposed, denied, or already taken. Reasonable notice implies timely and meaningful notice. The notice must therefore provide the recipient, if a substantially affected person, with a reasonable opportunity to request a hearing on the proposed agency action.

31. For the reasons stated above, the Published Notice is not unreasonable, even though it denies hearings to substantially affected persons who fail to learn of the intended agency action until after the time for requesting a hearing has expired. Although the time to request a hearing does not approach the timeframes encompassed by most statutes of limitation or other limitations periods and the consequences of the failure to file a request for hearing may be substantial, by the time of the Published Notice, the agency has presumably completed its work and has announced that, absent a timely filed

request for hearing, it will take the action described in the notice. As reflected in the Rules, Respondent has reasonably restruck the balance between administrative convenience and property rights, on the one hand, and people's access to government decision making, on the other hand.

32. One of the Rules cites Section 120.60, Florida Statutes, as law implemented. Section 120.60(3), Florida Statutes, requires that an agency mail notice to each person who has requested notice of agency action. Section 120.60(3), Florida Statutes, has no direct applicability to this case because Petitioner never requested notice of any intended agency action on Martin County's application. Thus, Petitioner lacks the standing to claim that the Rules enlarge, modify, or contravene this provision of Section 120.60(3), Florida Statutes, or any other law requiring that Respondent provide interested persons with written notice of intended agency action. Petitioner's standing does not allow him to raise claims that the Rules may contravene statutes requiring Respondent to give written notice to persons requesting such notice, although resolution of this matter may, in any case, first require that Respondent implement the Rules.

33. This Order is limited in another important respect. This Order has assumed that the notice of intended agency action identified by the Rules is notice that, absent a timely filed

request for hearing, the agency will take the action described in the notice. If restricted to notices that the agency intends to take, barring a timely request for a hearing, the Rules do not enlarge, modify, or contravene the law implemented.

34. Notification earlier in the agency's decision making process, if coupled with a requirement that substantially affected persons must file requests for hearing at that time, may raise questions of reasonableness under Section 120.57(2)(a)1, Florida Statutes. Early notification may raise questions of reasonableness merely by requiring substantially affected persons to incur the additional expense of earlier involvement in the administrative process than the expense that they would incur if the notice were of actual intended agency action, after otherwise-final action by the Governing Board, which, in this case, took place six months after the point at which Petitioner would have had to file his request for a hearing. Early notification may raise questions of reasonableness by denying a hearing to a substantially affected person who finds that environmental or cultural conditions changed in the interim, such as a period of little or much rain or suddenly intensified surrounding land uses, so as to affect the eligibility of the proposed activity for a permit. Early notification may raise questions of reasonableness by denying a hearing to persons who became substantially affected during the

interim between the expiration of the time to request a hearing and the "final" action taken by the Governing Board, especially if, as here, several months elapsed between the two events.

35. As Respondent observes, Petitioner has not challenged Florida Administrative Code Rules 40E-0.105(1) and 40E-1.6065(1), which provide that Respondent shall give notice of intended agency action based on the staff recommendation and prior to action taken by the Governing Board on the staff recommendation. Petitioner's arguments concerning the prematurity of the Published Notice therefore address issues in DOAH Case No. 01-0104 concerning the adequacy of the Published Notice as the basis on which to deny Petitioner a hearing on the merits in that case. In general, the issues identified in this and the preceding two paragraphs must await Respondent's implementation of the Rules.

ORDER

It is

ORDERED that the Petition to Determine Invalidity of Administrative Rule dated November 4, 2003, is dismissed.

DONE AND ORDERED this 6th day of April, 2004, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of April, 2004.

COPIES FURNISHED:

Henry Dean, Executive Director
South Florida Water Management District
3301 Gun Club Road
West Palm Beach, Florida 33416-4680

Marcy I. LaHart, Esquire
711 Talladega Street
West Palm Beach, Florida 33405

David A. Acton, Esquire
Martin County Administrative Center
2401 Southeast Monterey Road
Stuart, Florida 34996-3397

Cecile I. Ross, Assistant General Counsel
South Florida Water Management District
3301 Gun Club Road, Mail Stop Code 1410
Post Office Box 24680
West Palm Beach, Florida 33416-4680

Sheryl G. Wood, General Counsel
South Florida Water Management District
3301 Gun Club Road, Mail Stop Code 1410
Post Office Box 24680
West Palm Beach, Florida 33416-4680

NOTICE OF RIGHT OF JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.