STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ASSOCIATION OF FLORIDA COMMUNITY DEVELOPERS,	)	
Petitioner,	)	
and	)	
FLORIDA HOME BUILDERS ASSOCIATION,	)	
Intervenor,	)	
vs.	)	Case Nos. 04-0880RP
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondent,	)	
and	)	
ST. JOHNS RIVER WATER MANAGEMENT DISTRICT; SOUTH FLORIDA WATER MANAGEMENT DISTRICT; FLORIDA AUDUBON SOCIETY, INC., NATIONAL AUDUBON SOCIETY; THE EVERGLADES FOUNDATION, INC.; AND CONSERVANCY OF SOUTHWEST FLORIDA, INC.,	)	
Intervenors.	)	

FINAL ORDER

The final hearing in this case was held on December 12, 2005, in Tallahassee, Florida, before Bram D. E. Canter,

Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

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For Intervenors Florida Audubon Society, Inc., National Audubon Society, Everglades Foundation, Inc., and Conservancy of Southwest Florida, Inc. ("Environmental Groups"):

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STATEMENT OF THE ISSUE

The issue for determination in this case is whether proposed rules 62-40.410(3) and 62-40.474, in whole or in part, are invalid exercises of delegated legislative authority within the meaning of Section 120.52(8), Florida Statutes (2005).[1]

PRELIMINARY STATEMENT

On December 20, 2002, DEP published a Notice of Proposed Rulemaking in the Florida Administrative Weekly (F.A.W.) for various provisions of Florida Administrative Code Chapter 62-40, entitled "Water Resource Implementation Rule" (WRIR). Notices of changes to the proposed rules were published in three subsequent issues of the F.A.W.

Several rule challenge petitions were filed in response to DEP's notices. DOAH opened a case for each petition. The cases were consolidated for hearing. Following the withdrawal of several petitions, the sole remaining rule challenge was the one filed by AFCD on March 15, 2004.

FHBA intervened in support of AFCD's petition. AFCD and FHBA will be referred to collectively in this Final Order as "Petitioners." The City of Sunrise intervened in support of AFCD's petition, but subsequently withdrew from the case. SFWMD, SJRWMD, and the Environmental Groups intervened in support of the validity of the proposed rules.

In order to facilitate discussion among the parties and the possible resolution of their disputes, the case was placed in abeyance for more than a year. When the discussions proved unsuccessful in resolving the dispute, the case was set for hearing.

The Petition to Intervene filed by the National Park Conservation Association (NPCA) on November 17, 2005, and its subsequent amended petition to intervene, were dismissed as untimely, lacking sufficient factual allegations to demonstrate that NPCA would be substantially affected by the proposed rules, and because its interests were already represented by several other parties in the case.

Petitioners challenge the validity of proposed rules 62-40.410(3) and 62-40.474. The substantive provisions being challenged are in rule 62-40.474, entitled "Reservations of Water." Rule 62-40.410(3) was challenged by Petitioners because it provides in part that "[r]eservations shall be established in accordance with section 62-40.474, F.A.C." Petitioners contend that the proposed rules are invalid exercise of delegated legislative authority under Sections 120.52(8)(b), (c), (d), and (e), Florida Statutes.

A Joint Motion For Summary Final Order was filed by DEP and SFWMD and a Joint Counter-Motion For Summary Final Order was filed by AFCD and FHBA. Oral argument was heard on the motions on September 22, 2005, in Tallahassee, Florida, and a Transcript of the oral argument was filed with DOAH. The joint motion of DEP and SFWMD was granted with respect to the claim that DEP exceeded its grant of rulemaking authority. In all other respects, the joint motion of DEP and SFWMD was denied. The

joint counter-motion of AFCD and FHBA was denied, and the case proceeded to final hearing.

At the final hearing, Petitioners presented the testimony of Ross McWilliams, accepted as an expert in biology, environmental permitting, and wetland systems; and Brian Winchester, accepted as an expert in ecology, Florida natural systems, Florida fish and wildlife, wetland hydroecology, and restoration ecology. Petitioners' Exhibits 1 through 4 were accepted into evidence. AFCD's unopposed request for official recognition of A Model Water Code (1971), by Frank Maloney et al., was granted.

DEP presented the testimony of Janet Llewellyn, accepted as an expert in wetlands ecology, assessing impacts on aquatic and wetlands systems, water quality protection and management, water management policies, and regional water supply planning. DEP's Exhibit A was accepted into evidence. The Environmental Groups presented the testimony of Dr. Mark Kraus, accepted as an expert in ecology, wetlands ecology, and restoration ecology. Their Exhibit A was accepted into evidence.

The one-volume Transcript of the final hearing was filed with DOAH. The parties filed proposed final orders which have been carefully considered in the preparation of this Final Order.

FINDINGS OF FACT

The Parties

1. AFCD is a non-profit association representing 52 companies, including land developers, property owners, and other professionals involved in the planning, design, licensing, construction, and marketing of master-planned communities with multiple land uses, including residential uses, throughout the State of Florida. AFCD was established for the purpose of advancing the commercial and residential land development projects of its members, including informing state government policy makers and regulators about current issues affecting the community development industry.

2. FHBA is a trade association working to promote and protect Florida's residential construction industry. FHBA's activities on behalf of its members include monitoring public policy and working with state agencies on environmental and land use regulations affecting the residential construction industry.

3. The Environmental Groups are not-for-profit corporations whose principle activities include advocacy for the protection of Florida's fish and wildlife. They have thousands of members who live near and use Florida waters for recreational, educational and other purposes.

4. SFWMD and SJRWMD are regional agencies that are authorized by statute to make water reservations within their

respective jurisdictions. Any rule they adopt to create a water reservation will be subject to review by DEP to determine whether it is consistent with the proposed rule.

The Proposed Rules

5. On December 20, 2002, DEP published a Notice of Proposed Rulemaking in the F.A.W. for various provisions of the WRIR. Notices of changes were also published in the F.A.W. on February 21, 2003, August 15, 2003, and February 27, 2004. The version of the rules at issue in this case was published in the August 15, 2003, issue of the F.A.W.

6. DEP held nine rule development workshops around the State and one public rule adoption hearing for the proposed rules.

7. DEP solicited comments from the public and stakeholders, including local governments, regional water supply authorities, water utility organizations and water management districts throughout the rulemaking process.

8. Proposed rule 62-40.474 provides as follows:

> (1) The governing board or the department, by rule, may reserve water from use by permit applicants, pursuant to section 373.223(4), F.S., in such locations and quantities, and for such seasons of the year, as in its judgment may be required for the protection of fish and wildlife or the public health and safety. Such reservations shall be subject to periodic review at least every five years, and revised if necessary in light of changed conditions. However, all presently existing legal uses of water

shall be protected so long as such use is not contrary to the public interest.

(a) Reservations may be used for the protection of fish and wildlife to:

1. Aid in a recovery or prevention strategy for a water resource with an established minimum flow or level;

2. Aid in the restoration of natural systems which provide fish and wildlife habitat;

3. Protect flows or levels that support fish and wildlife before harm occurs;

4. Protect fish and wildlife within an Outstanding Florida Water, an Aquatic Preserve, a state park, or other publicly owned conservation land with significant ecological value; or

5. Prevent withdrawals in any other circumstance required to protect fish and wildlife.

(b) Reservations may be used for the protection of public health and safety to:

1. Prevent sinkhole formation;

2. Prevent or decrease saltwater intrusion;

3. Prevent the movement or withdrawal of groundwater pollutants; or

4. Prevent withdrawals in any other circumstance required to protect public health and safety.

(2) Reservations shall, to the extent practical, clearly describe the location, quantity, timing, and distribution of the water reserved.

(3) Reservations can be adopted prospectively for water quantities anticipated to be made available. When water is reserved prospectively, the reservation rule shall state when the quantities are anticipated to become available and how the reserved quantities will be adjusted if the actual water made available is different than the quantity anticipated.

(4) The District shall conduct an independent scientific peer review of all scientific or technical data, methodologies, and models, including all scientific and technical assumptions employed in each model, used to establish a reservation if the District determines such a review is needed. As part of its determination of the necessity of conducting a peer review, the District shall consider whether a substantially affected person has requested such a review.

Specific Authority 373.026(7), 373.043, 403.036(1)(d), 373.171, FS. Law Implemented 373.023, 373.026, 373.036(1)(d), 373.042, 373.046, 373.103, 373.106, 373.171, 373.175, 373.1961, 373.223, 373.246, 373.418, 373.451, 373.453, 403.0891, FS.
History - New ___

9. The proposed change to rule 62-40.410(3), indicated by underscoring, provides:

Water may be reserved from permit use in such locations and quantities, and for such seasons of the year, as is required for the protection of fish and wildlife or the public health or safety. Such reservations shall be subject to periodic review and revision in light of changed conditions. However, all presently existing legal users of water shall be protected so long as such use is not contrary to the public interest.

> Reservations shall be established in accordance with section 62-40.474, F.A.C.
>
> Specific Authority 373.026(7), 373.043, 373.036(1)(d), 373.171, FS. Law Implemented 373.023, 373.026, 373.036(1)(d), 373.042, 373.0421, 373.103, 373.171, 373.175, 373.1961, 373.223, 373.233, 373.246, 373.250, 403.064, 403.0891, FS. History -- New 7-20-95, Amended.

The validity of the proposed change to rule 62-40.410(3) is derivative of, and dependent on, the validity of proposed rule 62-40.474. Therefore, the discussion that follows will focus on proposed rule 62-40.474, and references to "the proposed rule" will mean rule 62-40.474.

Water Reservations

10. Section 373.223(4), Florida Statutes, provides:

> The governing board or the department, by regulation, may reserve from use by permit applicants, water in such locations and quantities, and for such seasons of the year, as in its judgment may be required for the protection of fish and wildlife or the public health and safety. Such reservations shall be subject to periodic review and revision in the light of changed conditions. However, all presently existing legal uses of water shall be protected so long as such use is not contrary to the public interest.

11. Water reservations are important for what they enable--the protection of fish and wildlife or the public health and safety, but they are also important for what they preclude--use of the reserved water by any water use permit applicant.

12. DEP does not believe the challenged rule is necessary to enable the water management districts to make reservations of water. DEP's purpose in enacting the rule is to provide goals, objectives, and guidance to the water management districts regarding water reservations. The proposed rule is intended to provide examples of "the types of situations that may be appropriate for the use of reservations."

13. The proposed rule does not establish a water reservation. Each reservation of water must be accomplished through the adoption of a rule by a water management district or by DEP.

14. There has been only one water reservation ever made pursuant to Section 373.223(4), Florida Statutes. It was made by SJRWMD in 1994 and is codified in Florida Administrative Code Rule 40C-2.302:

> The Governing Board finds that reserving a certain portion of the surface water flow through Prairie Creek and Camps Canal south of Newnans Lake in Alachua County, Florida, is necessary in order to protect the fish and wildlife which utilize the Paynes Prairie State Preserve, in Alachua County, Florida. The Board therefore reserves from use by permit applicants that portion of surface water flow in Prairie Creek and Camps Canal that drains by gravity through an existing multiple culvert structure into Paynes Prairie. This reservation is for an average flow of 35 cubic feet per second (23 million gallons per day) representing approximately forty-five percent (45%) of

> the calculated historic flow of surface water through Paynes Creek and Camps Canal.

15. Section 373.223(4), Florida Statutes, was part of the original Florida Water Resources Act of 1972 ("the 1972 Act"). Ch. 72-299, § 3, Laws of Fla. The wording of the subsection is unchanged since its enactment in 1972.

16. Much of the 1972 Act was derived, verbatim, from A Model Water Code, drafted at the University of Florida College of Law between 1967 and 1971 by Dean Frank Maloney, Professor Richard Ausness, and Professor J. Scott Morris. Maloney, et al., A Model Water Code, Univ. of Fla. Press (1971). However, the Legislature did not adopt the exact wording of the water reservation provision that was offered in A Model Water Code.

17. In A Model Water Code, water was to be reserved when "required to implement a provision of the State Water Plan." Id. at 21, 181. The State Water Plan was composed of a State Water Use Plan and a State Water Quality Plan. Id. at 9. The following commentary accompanied the water reservation provision in A Model Water Code:

> This provision is designed to integrate the operation of the permit system with the State Water Use Plan and State Water Quality Plan. Under this subsection, the governing board by regulation may set aside a fixed quantity of water; no future permit application can be made for water reserved in this fashion. [This provision] would be

> of particular value in connection with the maintenance of water quality standards, as it would provide a margin of safety during periods of low flow.

Id. at 181.

18. The State Water Plan was to address many subjects, including minimum flows and levels, water supply development, water quality improvement, environmental protection, conservation and recreation. By providing that water could be reserved when "required to implement a provision of the State Water Plan," A Model Water Code contemplated that water could be reserved to address any of these subjects.

19. Although the 1972 Legislature provided for a comprehensive plan similar to the State Water Plan, it did not make reference to the plan in Section 373.223(4), Florida Statutes (1972). The reason the Legislature chose not to use the wording "when required to implement a provision of the State Water Plan" in A Model Water Code but, instead chose to use "when required to protect fish and wildlife or the public health and safety" in Section 373.223(4), Florida Statutes, is not explained in any exhibit in the record or in any primary or secondary source cited in the briefs of the parties. It remains a matter of speculation.

20. Petitioners believe that it is clear from the Legislature's choice of words that it intended to strictly limit

the circumstances in which a reservation would be used. Petitioners believe that other, more specific findings about what the 1972 Legislature would have considered an inappropriate use of a water reservation can be inferred from the Legislature's decision not to use the wording proposed in A Model Water Code.

21. After considerable thought and review of the commentary in A Model Water Code and the provisions of the 1972 Act, it is concluded that there is an insufficient basis to make findings of fact regarding the 1972 Legislature's intent in not using the exact wording from A Model Water Code in Section 373.223(4), Florida Statutes. Petitioners' theory of the Legislature's intent is plausible, but is not the only plausible theory. The only certainty is that, from the alternatives considered by the 1972 Legislature, it chose to express the purposes for which water can be reserved as "protection of fish and wildlife or the public health and safety."

22. There are three other references in Chapter 373, Florida Statutes, to water reservations. None were a part of the 1972 Act. Section 373.0361(2)(a)2., Florida Statutes, directs that water reservations be taken into account in proposals for alternative water supply projects. Section 373.0361(2)(h), Florida Statutes, requires regional water supply plans of the water management districts to include a listing of

"Reservations adopted by rule pursuant to s. 373.223(4) within each planning region." Section 373.470(3)(c), Florida Statutes, refers to the use of water reservations in conjunction with restoration of the Everglades.

23. Much of the argument and testimony in this case addressed Petitioners' contention that the proposed rule's provision for the use of water reservations "to aid in the restoration of natural systems" went far beyond "protection of fish and wildlife," the purpose stated in Section 373.223(4), Florida Statutes. References were made to the dictionary definitions of "protection" and "restoration" and all the expert witnesses offered opinions about their meanings.

24. The term "protection" is not defined in Chapter 373, Florida Statutes, or in any DEP rule. The dictionary meaning of "protect" is to shield or defend against danger or injury; to cover or shield something from exposure, injury or destruction; to maintain the status or integrity of something; to guard. "Protection" is the act of protecting or the state of being protected. See, e.g., The New Lexicon Webster's Dictionary of the English Language, 803 (1988); Merriam Webster's Collegiate Dictionary, 938 10th Ed. (1996).

25. DEP does not interpret the phrase "protection of fish and wildlife" in Section 373.223(4), Florida Statutes, as limited to keeping alive only those specific fish and wildlife

organisms existing at the time a water reservation is established. DEP witness Janet Llewellyn testified that DEP has consistently interpreted this phrase to mean ensuring a healthy and sustainable, native fish and wildlife community; one that can remain healthy and viable through natural cycles of drought, flood, and population variation. Petitioners' experts did not dispute DEP's interpretation of "protection of fish and wildlife" to include the concepts of "native" species and species "communities." Petitioners contend, however, that the statute should be interpreted to apply only to existing, native fish and wildlife communities.

26. The term "restore" is not defined in Chapter 373, Florida Statutes, or in any DEP rule. The dictionary meaning of "restore" is to put back or bring back into an original or former state or condition. "Restoration" is the act of restoring or the condition of being restored. See, e.g., The New Lexicon Webster's Dictionary of the English Language, 834 (1988); Merriam Webster's Collegiate Dictionary, 998 10th Ed. (1996).

27. DEP intends the word "restoration," as used in the proposed rule, to have its common meaning.

28. All the experts who testified in this case acknowledged that "protection" and "restoration" are different concepts and they each articulated an understanding of the

meaning of these terms that was consistent with the dictionary meanings of the terms.

29. The experts differed, however, in how they applied the terms "protection" and "restoration" to examples of environmental improvement activities. In general, Petitioners' experts thought a relatively clear line could be drawn between protection and restoration activities. The experts presented by DEP and Audubon, on the other hand, stated that the concepts are often overlapping and are not mutually exclusive.

30. Petitioners' experts believe that when a project will have results that include more than maintenance of the current state, such as increasing numbers of organisms, increasing diversity, increasing habitat, or improving water quality, then the activity is no longer "protection," and becomes "restoration." In contrast, the DEP and Audubon experts believe that environmental conditions must sometimes be restored in order to protect existing fish and wildlife.

31. DEP agrees that protection is not the same thing as restoration. It is DEP's position that the proposed rule cannot authorize, for example, the reservation of water for restoration of habitat or ground or surface water levels, except to the "extent needed for the protection of fish and wildlife or public health and safety." DEP agrees that a water reservation cannot

be used "merely because restoration is desired." Ms. Llewellyn explained further:

> When a water management district initiates rulemaking to adopt a reservation, if the reservation is in aid of any restoration, the district will have to show that the aid to such restoration is no more than necessary to protect fish and wildlife or public health and safety.

32. Ms. Llewellyn gave examples of how a reservation could be properly used as part of a restoration project to protect fish and wildlife. She stated that an estuary that previously supported a healthy population of oysters could be adversely affected by reduced inflows of fresh water due to diversions of water from the drainage basin which have increased the salinity of the water in the estuary. The water management district might construct a reservoir to store water in the rainy season for release in the dry season to keep salinities in the estuary at the proper level to protect the health of oysters. In this example, it is inferred that Ms. Llewellyn intended to convey that the release of reservoir water in the dry season would constitute restoration of a previously existing volume of freshwater inflow to the estuary, or restoration of the salinity level that would exist if the diversions had not occurred.

33. The more persuasive evidence in the record supports a finding that, in the context of the comprehensive water resources program established in Chapter 373, Florida Statutes,

protection and restoration are not mutually exclusive terms and it is possible to take action that meets the dictionary definition of restoration, but which does no more than protect (ensure the health and sustainability of) existing fish and wildlife communities.

34. A restoration project could go beyond "protection" of fish and wildlife if, rather than merely restoring an environmental condition required for the health and sustainability of existing fish and wildlife communities, the project resulted in significantly larger fish and wildlife communities. Whether water reserved to restore an environmental condition is required for the protection of fish and wildlife depends on the particular circumstances involved.

CONCLUSIONS OF LAW

Jurisdiction

35. The Division of Administrative Hearings has subject matter jurisdiction in this proceeding pursuant to Section 120.56, Florida Statutes.

Standing

36. Subsection 120.56(1)(a), Florida Statutes, provides, in part, that any person substantially affected by a proposed rule may seek an administrative determination of the invalidity of the proposed rule on the ground that the rule is an invalid

exercise of delegated legislative authority, as defined in Section 120.52(8), Florida Statutes.

37. The parties stipulated to the factual allegations concerning standing contained in the rule challenge petition and the petitions to intervene. Those allegations show that AFCD and FHBA are substantially affected persons with standing to challenge the proposed rule. SWFWMD, SJRWMD, and the Environmental Groups are substantially affected persons with standing to participate as parties.

Rule Challenges, In General

38. In a rule challenge proceeding, a proposed rule is not presumed to be valid or invalid. § 120.56(2)(c), Fla. Stat.

39. A proposed rule may not be invalidated simply because it does not appear to be the wisest or best choice for accomplishing the agency's objective. See Board of Trustees of Internal Improvement Trust Fund v. Levy, 656 So. 2d 1359, 1364 (Fla. 1st DCA 1995). On the other hand, a rule is not valid simply because it has a laudable purpose.

40. A rule challenge proceeding under Section 120.56, Florida Statutes, constitutes a challenge to the facial validity of the rule and is not to determine the validity of a rule as applied to specific facts. Fairfield Communities v. Florida Land and Water Adjudicatory Commission, 522 So. 2d 1012, 1014 (Fla. 1st DCA 1988).

41. A party challenging a proposed rule has the burden of going forward to show "with particularity the objections to the proposed rule and the reasons that the proposed rule is an invalid exercise of delegated legislative authority." § 120.56(2)(a), Fla. Stat. If the challenger meets the burden of going forward, the agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. Id.

The Challenge to Proposed Rule 62-40.474

42. Petitioners met their burden of going forward with evidence and argument to support the objections to section (1)(a) of proposed rule 62-40.474, pertaining to the use of water reservations for the protection of fish and wildlife; and section (3) of the proposed rule, pertaining to the adoption of water reservations prospectively. Therefore, the burden shifted to DEP to prove by a preponderance of the evidence that these provisions of the proposed rule were not invalid on the grounds raised by Petitioners.

43. Petitioners did not go forward with evidence or argument to show "with particularity" the invalidity of section (1)(b) of the proposed rule, pertaining to the use of water reservations for the protection of public health and safety; section (2), which requires specificity in the description of

water reservations; or section (4), which requires independent scientific peer review. However, to the extent Petitioners' evidence and argument directed at the other provisions of the proposed rule has some general application to the provisions cited in this paragraph, the sufficiency of that evidence and argument is addressed below.

44. Petitioners' challenge is limited to whether the proposed rule is invalid on the grounds stated in Sections 120.52(8)(b), (c), (d), and (e), Florida Statutes. The Conclusions of Law that follow are organized according to the four grounds of invalidity asserted by Petitioners.

I. Whether DEP has Exceeded Its Grant of Rulemaking Authority

45. The "flush left" paragraph of Section 120.52(8), Florida Statutes, provides:

> 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.

46. Section 120.536(1), Florida Statutes, repeats this legislative directive that an agency cannot rely solely on its general rulemaking authority to promulgate a rule.

47. The wording in the flush left paragraph in Section 120.52(8), Florida Statutes, was revised by the Florida Legislature in 1999 to add the admonition that an agency "may only adopt rules that implement or interpret the specific powers and duties granted," and is not authorized to adopt rules simply because they are "within the agency's class of powers and duties." The statute was amended in response to St. Johns River Water management District v. Consolidated-Tomoka Land Co., 717 So. 2d 72 (Fla. 1st DCA 1998), which held that a rule is a valid exercise of delegated legislative authority "if it regulates a matter directly within the class of powers and duties identified in the statute to be implemented." Id. at 80; See Southwest Florida Water Management Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000).

48. In Save the Manatee Club, the court noted the amendment to the flush left paragraph of Section 120.52(8), Florida Statutes, and held that "the authority to adopt an administrative rule must be based on an explicit power or duty

identified in the enabling statute." Id. at 599. The court explained further:

> It follows that the authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough. Either the enabling statute authorizes the rule at issue or it does not.

Id.

49. Three of the statutes cited in proposed rule 62-40.474, as specific authority for the rule, are Section 373.026(7), Florida Statutes, which grants DEP general supervisory authority over the water management districts; Section 373.043, Florida Statutes, which grants general rulemaking authority to DEP; and Section 373.171, Florida Statutes, which grants general rulemaking authority to the governing boards of the water management districts. These are not specific grants of rulemaking authority for the proposed rule.

50. The fourth statute cited as specific authority for the proposed rule is Section 373.036(1)(d), Florida Statutes, which requires DEP to prepare and maintain a Florida Water Plan in cooperation with the water management districts, regional water supply authorities, and other entities. A required element of the Florida Water Plan is the WRIR:

> (d) Goals, objectives, and guidance for the development and review of programs, rules, and plans relating to water resources, based on statutory policies and directives. The state water policy rule, renamed the water resource implementation rule pursuant to s. 373.019(20), shall serve as this part of the plan. Amendments or additions to this part of the Florida water plan shall be adopted by the department as part of the water resource implementation rule. In accordance with s. 373.114, the department shall review rules of the water management districts for consistency with this rule. Amendments to the water resource implementation rule must be adopted by the secretary of the department and be submitted to the President of the Senate and the Speaker of the House of Representatives within 7 days after publication in the Florida Administrative Weekly. Amendments shall not become effective until the conclusion of the next regular session of the Legislature following their adoption. (Emphasis added.)

51. Section 373.019(23), Florida Statutes, defines the WRIR, in part, as "the rule authorized by s. 373.036."

52. DEP has adopted the WRIR as Florida Administrative Code Chapter 62-40. The proposed rule challenged in this case would be part of the WRIR. Conforming to the standard set forth in Save the Manatee Club, the proposed rule implements an explicit statutory power or duty--the power and duty of DEP to adopt and amend the WRIR.

53. Petitioners contend that Section 373.036(1), Florida Statutes, is not a sufficient grant of rulemaking authority for the proposed rules. They urge an interpretation of the flush

left paragraph of Section 120.52(8), Florida Statutes, and the holding in Save the Manatee Club, which would require, in essence, a specific grant of rulemaking authority for every substantive word and effect of the proposed rule. Such an interpretation, however, would render superfluous the other ground for invalidity of a rule stated in Section 120.52(8)(c), Florida Statutes, that the rule "enlarges, modifies, or contravenes the specific provisions of law implemented."

54. Section 120.52(8)(b), Florida Statutes, addresses the grant of rulemaking authority in the enabling statute. Section 120.52(8)(c), Florida Statutes, addresses the law that is being implemented. These are different subjects and may involve different statutes. Section 120.52(8), Florida Statutes, contemplates that there could be a proposed rule for which there is a specific grant of rulemaking authority, but the rule is still an invalid exercise of delegated legislative authority because it enlarges, modifies or contravenes the specific provisions of the law implemented. The distinction between Sections 120.52(8)(b) and 120.52(8)(c), Florida Statutes, is lost if a grant of rulemaking authority can be deemed insufficient because the rule enlarges, modifies or contravenes the law implemented.

55. Section 373.036(1), Florida Statutes, grants specific authority to DEP to adopt and amend goals, objectives, and

guidance for inclusion in the WRIR. That is what DEP is attempting to do with the proposed rule that is challenged in this case. DEP has met its burden to show that the proposed rule is not an invalid exercise of delegated legislative authority on the ground that the agency has exceeded its grant of rulemaking authority.

56. Petitioners assert that the statute authorizing water reservations, Section 373.223(4), Florida Statutes, is self-executing, and the Legislature did not intend for there to be rules adopted to interpret and implement this statute. The authority cited for this argument is not persuasive and there is no hint in Section 373.036(1)(d), Florida Statutes, that guidance on water reservations was to be excluded from the WRIR.

II. Whether the Proposed Rule Enlarges, Modifies, or Contravenes the Specific Provisions of Law Implemented

57. Petitioners claim that proposed rule 62-40.474 is an invalid exercise of delegated legislative authority under Section 120.52(8)(c), Florida Statutes, because the proposed rule enlarges, modifies or contravenes the specific law implemented. Before addressing the various examples of water reservations that are challenged on this ground by Petitioners, the phrase that introduces the examples must be addressed. DEP changed the draft rule at some point in the rulemaking process, apparently in response to the claim that the examples enlarge

the specific law implemented. DEP changed the introductory phrase of proposed rule 62-40.474(1)(a) to read, "Reservations may be used for the protection of fish and wildlife to . . . ," which is then followed by the examples.

58. The introductory phrase expresses a purpose (protection of fish and wildlife), and each example expresses a purpose (such as restoration of a natural system). DEP intends the introductory phrase to limit the use of water reservations in all the examples that follow to the overarching purpose of protection of fish and wildlife. In all circumstances, the water reservation must be required for the protection of fish and wildlife.

59. Although the proposed rule could be written more cogently, Section 120.52(8), Florida Statutes, does make failing to write a proposed rule more cogently a ground for invalidating the rule. DEP's interpretation of the wording of proposed rule in this respect is reasonable.

A. Reservations to Aid in a Recovery or Prevention Strategy

60. Proposed rule 62-40.474(1)(a)1. provides that reservations may be used "for the protection of fish and wildlife to . . . [a]id in a recovery or prevention strategy for a water resource with an established minimum flow or level."

61. Minimum flows for surface watercourses and minimum levels for groundwater (MFLs) are established by the water management districts to identify the point at which further withdrawals would be "significantly harmful" to the water resources or ecology of the area. § 373.042(1), Fla. Stat. Harm to the water resources can include harm to fish and wildlife.

62. The "recovery or prevention strategy" referred to in the proposed rule means the strategy derived from Section 373.042(2), Florida Statutes, which provides:

> If the existing flow or level in a waterbody is below, or is projected to fall within 20 years below, the applicable minimum flow or level established pursuant to s. 373.042, the department or governing board, as part of the regional water supply plan described in s. 373.0361, shall expeditiously implement a recovery or prevention strategy, which includes the development of additional water supplies and other actions, consistent with the authority granted by this chapter, to:
>
> (a) Achieve recovery to the established minimum flow or level as soon as practicable; or
>
> (b) Prevent the existing flow or level from falling below the established minimum flow or level.
>
> The recovery or prevention strategy shall include phasing or a timetable which will allow for the provision of sufficient water supplies for all existing and projected reasonable-beneficial uses, including development of additional water supplies and

> implementation of conservation and other efficiency measures concurrent with, to the extent practical, and to offset, reductions in permitted withdrawals, consistent with the provisions of this chapter.

63. In Florida Administrative Code Rule 62-40.473(2), DEP previously indicated how a water reservation might be considered in conjunction with establishment and maintenance of MFLs and how it could contribute to MFL objectives:

> Water bodies experience variations in water flows and levels that often contribute to significant functions of the system, such as those described in subsection 62-40.473(1), F.A.C. Minimum flows and levels should be expressed as multiple flows or levels defining a minimum hydrologic regime, to the extent practical and necessary to establish the limit beyond which further withdrawals would be significantly harmful to the water resources or the ecology of the area as provided in Section 373.042(1), F.S. However, a minimum flow or level need not be expressed as multiple flows or levels if other resource protection tools, such as reservations implemented to protect fish and wildlife or public health and safety, that provide equivalent or greater protection of the hydrologic regime of the water body, are developed and adopted in coordination with the minimum flow or level. (Emphasis added.)

64. DEP's acknowledges that it would not be an appropriate use of a water reservation to aid in a recovery or prevention strategy if the reservation is not required for the protection of fish and wildlife. The proposed rule provides no guidance for the identification of the kinds of recovery or prevention

strategies for which a water reservation would not be appropriate.

65. There is no express prohibition in Section 373.223(4), Florida Statutes, against the reservation of water in conjunction with a recovery or prevention strategy. As long as the water reservation is required for the protection of fish and wildlife or the public health and safety, the statute is satisfied. There are no other explicit or implicit restrictions placed on the contexts in which water might be reserved.

66. In urging that Section 373.223(4), Florida Statutes, be interpreted to prohibit the use of water reservation in aid of a recovery or prevention strategy, Petitioners rely heavily on the 1972 Legislature's decision not to use the reference to the State Water Plan as suggested by the authors of A Model Water Code. Although the commentary of A Model Water Code has provided helpful insight into the Legislature's intent regarding provisions of the 1972 Act that were derived from the model code (see, e.g., Southwest Florida Water Management District v. Charlotte County, 774 So. 2d 903, 907 (Fla. 2d DCA 2001), rev. den., 800 So. 2d 615 (Fla. 2001)), the commentary does not address, of course, what the 1972 Legislature changed. The undersigned was unable to discern the "clear" intent of the 1972 Legislature not to integrate the protection of fish and wildlife via water reservations with the other programs created in the

1972 Act, such as the establishment of MFLs for the protection of water resources.

67. The flush left paragraph of Section 120.52(8), Florida Statutes, acknowledges the authority of administrative agencies to adopt rules that interpret the specific powers and duties granted by the laws they implement. The term "rule" is defined in Section 120.52(15), Florida Statutes, as a "statement of general applicability that implements, interprets, or prescribes law or policy."

68. In Sierra Club v. St. Johns River Water Management District, 816 So. 2d 687, 692 (Fla. 5th DCA 2002), the court stated, "Logic dictates that the closer the rule tracks the statute, the less likely it modifies or contravenes the statute. The language need not be identical, however, as there would be no need for the rule."

69. When an agency clothed with authority to implement a statute construes the statute in a permissible way, that interpretation must be sustained even though another interpretation is possible or even, in the view of some, preferable. Humhosco, Inc. v. Dept. of Health and Rehab. Services, 476 So. 2d 258, 261 (Fla. 1st DCA 1985).

70. Discretion and deference are to be accorded an agency in the interpretation of a statute that it administers and should be upheld when it is within the range of permissible

interpretations. Public Employees Relations Comm'n v. Dade County Police Benevolent Ass'n., 467 So. 2d 987 (Fla. 1985), Board of Podiatric Medicine v. Florida Medical Association 779 So. 2d 658 (Fla. 1st DCA 2001).

71. DEP's interpretation of Section 373.223(4), Florida Statutes, and the MFL provisions of Chapter 373, Florida Statutes, as allowing the application of these authorities to be integrated as long as the water reservation is required for the protection of fish and wildlife, is a permissible interpretation of the statute.

72. By providing that water reservations can be used to aid in a prevention or recovery strategy for an established minimum flow or level, proposed rule 62-40.474 does not enlarge, modify or contravene the specific provisions of law implemented.

B. Reservations to Aid in the Restoration of Natural Systems

73. Proposed rule 62-40.474(1)(a)2. provides that reservations may be used "for the protection of fish and wildlife to . . . [a]id in the restoration of natural systems which provide fish and wildlife habitat." Petitioners contend this provision enlarges, modifies or contravenes Section 373.223(4), Florida Statutes, because the term "natural systems" is broader than the term "fish and wildlife," and the latter term does not include habitat.

74. The term "natural systems" is defined in Florida Administrative Code Rule 62.40.210(19) as "an ecological system supporting aquatic and wetland-dependent natural resources, including fish and aquatic and wetland-dependent wildlife habitat." According to this definition, a natural system includes fish and wildlife habitat. It was not disputed by DEP that "natural systems" has a broader meaning than "fish and wildlife." The relevant issue, however, is whether the proposed rule would allow water to be reserved under circumstances where the reservation is not required for the protection of fish and wildlife, which would contravene the specific law implemented.

75. The words "restore" and "restoration" were not used in any provision of A Model Water Code or in any provision of the 1972 Act.

76. There is express statutory authority to use a water reservation in conjunction with restoration of the Everglades. Section 373.470, Florida Statutes, entitled "Everglades Restoration," provides in subsection (3)(c):

> Prior to executing a project cooperation agreement with the Corps for the construction of a project component, the district, in cooperation with the Corps, shall complete a project implementation report to address the project component's economic and environmental benefits, engineering feasibility, and other factors provided in section 373.1501 sufficient to allow the district to obtain approval under s. 373.026. Each project implementation

> report shall also identify the increase in water supplies resulting from the project component. The additional water supply shall be allocated or reserved by the district under Chapter 373. (Emphasis added.)

77. DEP asserts that the reference to a water reservation in Section 373.470(3)(c), Florida Statutes, confirms that Section 373.223(4), Florida Statutes, grants authority to reserve water in aid of restoration. Petitioners argue that the grant of authority in Section 373.470(3)(c), Florida Statutes, is unique to the Everglades, where restoration is a statutory objective, and does not extend to other water bodies where there is no similar explicit linkage between reserving water and restoration.

78. There is nothing in Section 373.470(3)(c), Florida Statutes, that indicates a different meaning should be ascribed to the phrase "protection of fish and wildlife" in Section 373.223(4), Florida Statutes, than the meaning that the phrase had before the enactment of Section 373.470(3)(c), Florida Statutes. More specifically, the mention of water reservations in Section 373.470(3)(c), Florida Statutes, does not mean the term "protection" in Section 373.223(4), Florida Statutes, can be construed to mean "restoration."

79. However, Section 373.470(3)(c), Florida Statutes, provides a legislative example of how a water reservation can be

used in aid of the restoration of a natural system. By doing so, it lends support to DEP's interpretation of Section 373.223(4), Florida Statutes, which would allow water reservations to be used in aid of other restoration projects when the reservation is required for the protection of fish and wildlife.

80. Because the proposed rule uses the terms "restoration" and "natural system" to implement a statute that uses the terms "protection" and "fish and wildlife," a conflict could arise under circumstances where the reservation might aid in a restoration effort, but not be required for the protection of fish and wildlife. The conflict could arise if the objective of the restoration was something other than, or more than, ensuring the health and sustainability of existing, native fish and wildlife communities. DEP admitted that it would sometimes be difficult to determine whether a water reservation in aid of restoration of a natural system would be appropriate. The proposed rule provides no guidance on how to deal with this potential conflict.

81. There is no express prohibition in Section 373.223(4), Florida Statutes, against the reservation of water in conjunction with the restoration of a natural system, as long as the reservation is required for protection of fish and wildlife or the public health and safety. DEP's interpretation of the

statute as allowing for the use of water reservations to aid in the restoration of natural systems other than the Everglades when "required for the protection of fish and wildlife" is a reasonable one.

82. For the same reasons set forth in the earlier discussion regarding the use of water reservations in aid of a prevention or recovery strategy, it is concluded that the proposed rule's provision for the use of water reservations to aid in restoration of a natural system is not facially invalid because the proposed rule limits the use of the water reservation to circumstances when the reservation is required for the protection of fish and wildlife.

83. By providing that water reservations can be used to aid in the restoration of a natural system that provides fish and wildlife habitat, proposed rule 62-40.474 does not enlarge, modify or contravene the specific law implemented.

C. Reservations to Protect Flows or Levels Before Harm Occurs

84. Proposed rule 62-40.474(1)(a)3. provides that reservations may be used "for the protection of fish and wildlife to . . . [p]rotect flows or levels that support fish and wildlife before harm occurs."

85. In explaining DEP's intent with this particular provision, Ms. Llewellyn stated that the prevention of "harm" is

the objective of the water use permitting process, but water could be reserved to ensure sufficient water to maintain the fish and wildlife rather than solely relying on permitting to prevent harm.[2]

86. There is no limitation expressed in Section 373.223(4), Florida Statutes, with regard to the circumstances in which water can be reserved as long as the reservation is required for protection of fish and wildlife or the public health and safety. For the same reasons set forth in the previous discussion, it is concluded that the proposed rule's provision for the use of water reservations to protect flows or levels that support fish and wildlife before harm occurs is not facially invalid because the proposed rule limits the use of the water reservation to circumstances when the reservation is required for the protection of fish and wildlife.

87. By providing that water reservations can be used to protect flows or levels that support fish and wildlife before harm occurs, proposed rule 62-40.474 does not enlarge, modify or contravene the specific provisions of law implemented.

D. Reservations for Outstanding Florida Waters, etc.

88. Proposed rule 62-40.474(1)(a)4. provides that reservations may be used "for the protection of fish and wildlife to . . . [p]rotect fish and wildlife within an Outstanding Florida Water, an Aquatic Preserve, a state park, or

other publicly owned conservation land with significant ecological value."

89. Petitioners object to this provision of the proposed rule because they believe it enlarges the use of water reservations beyond the statutory purpose of protection of fish and wildlife. However, because the proposed rule limits the reservation of water to situations where the reservation is required for the protection of fish and wildlife, the proposed rule's articulation of the types of water bodies and designated public lands where water reservations might be used does not enlarge, modify, or contravene the specific provisions of law implemented.

E. Reservations in Any Other Circumstances

90. Proposed rule 62-40.474(1)(a)4. provides that water reservations may be used "for the protection of fish and wildlife to . . . [p]revent withdrawals in any other circumstance required to protect fish and wildlife."

91. Petitioners contend that this provision of the proposed rule enlarges, "without limit," the circumstances under which water might be reserved. Although the wording in the proposed rule is very broad (and somewhat circuitous), it is no broader than the grant of authority in the enabling statute.

92. Section 373.223(4), Florida Statutes, grants discretion to DEP or a governing board of a water management

district to reserve water from use by permit applicants whenever, "as in its judgment," the reservation is required for the protection of fish and wildlife. There is no material difference between this wording in the statute and the wording, "in any . . . circumstance required to protect fish and wildlife," in the proposed rule. Therefore, this provision does not enlarge, modify, or contravene the specific provisions of law implemented.

F. Reservations Adopted Prospectively

93. Proposed rule 62-40.474(3) provides:

> Reservations can be adopted prospectively for water quantities anticipated to be made available. When water is reserved prospectively, the reservation rule shall state when the quantities are anticipated to become available and how the reserved quantities will be adjusted if the actual water made available is different than the quantity anticipated.

94. DEP explained that the purpose of this provision is to assure that when a water development project is implemented for the purpose of providing water for the protection of fish and wildlife or public health and safety, "the water doesn't get allocated to permit applicants before it can be used for its intended purpose." When water is reserved prospectively, the rule identifies the additional information that must be included in the specific reservation rule.

95. There is nothing in Section 373.223(4), Florida Statutes, to indicate that water reservations could not apply to water anticipated from future water projects. In Chapter 373, Florida Statutes, there is a strong emphasis placed on water supply planning. Planning, by definition, is forward-looking. DEP's interpretation of Section 373.223(4), Florida Statutes, to allow water to be reserved prospectively complements the planning process.

96. In this regard, the commentary in A Model Water Code is helpful. The reservation of water to be produced by a future water development project is a specific example given in A Model Water Code for how a water reservation can be beneficially used.

> Another application of the reservation power is to allow for future water development projects. A potential project may be conceived of long before actual need arises, and a large and comprehensive project may be contemplated years before final developments are contemplated. Such projects may be jeopardized if less desirable uses are permitted to utilize the same water source.

A Model Water Code at 107.

97. An agency's interpretation of a statute it is charged with administering should be upheld unless it is clearly erroneous. See Wallace Corp. v. City of Miami Beach, 793 So. 2d 1134, 1140 (Fla. 1st DCA 2001). DEP's interpretation of Section 373.223(4) Florida Statutes, to allow for the reservation of

water supplies anticipated to be developed in the future, is not clearly erroneous.

98. This provision of the proposed rule which allows water reservations to be adopted prospectively does not enlarge, modify, or contravene the specific provisions of law implemented.

III. Whether the Proposed Rule is Vague

99. Petitioners claim that proposed rule 62-40.474 is an invalid exercise of delegated legislative authority under Section 120.52(8)(d), Florida Statutes, because the proposed rule is vague, fails to establish adequate standards for agency decisions, and vests unbridled discretion in the agency. Petitioners contend that the wording used in the proposed rule is vague and in some cases contradictory. They object that some terms are not defined and could be construed in different ways. Petitioners believe the proposed rule has no standards to guide agency decisions, and the result will be the use of water reservation under circumstances not authorized by Section 373.223(4), Florida Statutes.

100. Section 373.223(4), Florida Statutes, allows water to be reserved in any and all circumstances where the reservation is required for the protection of fish and wildlife or the public health and safety. All the unanswered questions that Petitioners contend are raised by the examples given in the

proposed rule are also raised and unanswered by the statute that the rule implements.[3] The standards Petitioners claim are missing from the proposed rule, such as standards to determine whether a water reservation is "required for the protection of fish and wildlife," are also missing from the statute.

101. 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. Donato v. American Tel. & Tel. Co., 767 So. 2d 1146 (Fla. 2000). The plain and ordinary meaning of a word may be ascertained by reference to a dictionary. Green v. State, 604 So. 2d 471 (Fla. 1992). However, as explained by the court in Charlotte County, there are variations on the general rule regarding words being given their plain meaning.

> The supreme court has stated that "consideration must be accorded not only to the literal and usual meaning of the words, but also to their meaning and effect on the objectives and purposes of the statute's enactment." Florida Birth-Related Neurological Injury Compensation Ass'n v. Division of Administrative Hearings, 686 So.2d 1349, 1354 (Fla. 1997). The supreme court has also held that words in a statute "must be construed according to their plain and ordinary meaning, or according to the meaning assigned to the terms by the class of persons within the purview of the statute." Florida East Coast Industries v. Department of Community Affairs, 677 So.2d 357, 362 (Fla. 1st DCA 1996), Sneed v. State, 736 So.2d 1274, 1276 (Fla. 4th DCA 1999)(quoting Green v. Bock Laundry Mach.

> Co., 490 U.S. 504 U.S. 504, 527, 104 L. Ed. 2d 557, 109 S. Ct. 1981 (1989)), held that "the meaning of terms on the statute books ought to be determined . . . on the basis of which meaning is (1) most in accord with context and ordinary usage . . . and (2) most compatible with the surrounding body of law into which the provision must be integrated." (Other citations omitted.)

Charlotte County, 774 So. 2d at 915-16.

102. DEP's interpretation of the term "fish and wildlife" to mean native fish and wildlife communities is a reasonable interpretation. The interpretation is not inconsistent with the dictionary definition of the words, but includes refinements that more accurately reflect the accepted technical or scientific meaning for the term in the context in which it appears--a statute dealing with water resources.

103. DEP's interpretation of "protection" to mean ensuring the health and sustainability of fish and wildlife communities through natural cycles of drought, flood, and population variation, is a reasonable one. The interpretation is not inconsistent with the dictionary definition of the word "protection", but includes refinements that more accurately reflect the accepted technical or scientific meaning for the term in the context in which it appears.

104. It would be very difficult to establish standards that could determine for all future scenarios whether a project is "required for the protection of fish and wildlife." The

determination requires a case-by-case analysis of numerous factors. The determination will require the application of scientific judgment to complex technical data. Experience in the making of water reservations, which could assist in the establishment of rule standards, is currently lacking.

105. Whether a rule is vague or fails to establish adequate standards depends in part on whether the subject matter involves complex, site-specific considerations that are not amenable to specific standards. Charlotte County, 774 So. 2d at 913.

106. The field of environmental regulation has been acknowledged in several court decisions as one requiring rules that allow flexibility in dealing with the "infinite variety" of situations that can occur. E.g., Avatar Development Corp. v. State, 723 So. 2d 199 (Fla. 1998); Albrecht v. Dept. of Envtl. Regulation, 353 So. 2d 883 (Fla. 1st DCA 1977); State v. Hamilton, 388 So. 2d 561 (Fla. 1980); Ameraquatic, Inc. v. Dept. of Natural Resources, 651 So. 2d 114 (Fla. 1st DCA 1995).

107. Petitioners' arguments on the ground of vagueness deal substantially with how the proposed rule might cause a future water reservation to be made that is not required for the protection of fish and wildlife as required by Section 373.223(4), Florida Statutes. When courts are called upon to determine the constitutionality of a statute, the statute will

be upheld when it can be interpreted constitutionally, even if there is another interpretation possible that would violate the Constitution. See, e.g., Florida Dept. of Revenue v. City of Gainesville, __ So.2d __ 30, Fla. L. Weekly S829 (Fla. December 8, 2005). Similarly, if proposed rule 62-40.474 can be interpreted and applied by DEP in a manner that is consistent with the specific authority implemented, the fact that it could be interpreted or applied in another way that would cause it to be an invalid exercise of delegated legislative authority does not require the rule to be invalidated. See Hasper v. Dept. of Administration, 459 So. 2d 398, 400 (Fla 1st DCA 1984).

108. The remedy for an erroneous application of the proposed rule is in a proceeding pursuant to Section 120.56, Florida Statutes, at the time a water management district attempts to establish a specific water reservation by rule. In such a proceeding, the factual circumstances which gave rise to the dispute will no longer be a matter of speculation.

109. Petitioners cite Cortes v. Board of Regents, 655 So. 2d 132 (Fla. 1st DCA 1995), in support of their argument that when a rule creates discretion not articulated in the statute it implements, the rule must specify the basis on which the discretion is to be exercised. However, the discretion created in the proposed rule 62-40.474 is no greater than the discretion articulated in the statute it implements; to reserve

water whenever, in the judgment of the water management districts, the reservation is required for the protection of fish and wildlife or the public health and safety. An administrative rule cannot be invalidated simply because it reflects the broad discretion conferred on the agency by the law implemented. Id. at 137.

110. The reservation of water in any particular set of circumstances will require the application of scientific judgment to unique and complex technical data; the lack of specific guidelines in the rule for the determination of whether a reservation is required for the protection of fish and wildlife does not cause the proposed rule to be invalid for vagueness.

IV. Whether the Proposed Rule is Arbitrary or Capricious

111. Section 120.52(8)(e), Florida Statutes, provides that a rule is an invalid exercise of delegated legislative authority if it is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; it is capricious if it is adopted without thought or reason or is irrational. Id.

112. Petitioners claim the proposed rule is illogical because it is unnecessary. Lack of necessity is not a ground for invalidating a rule under Section 120.52(8)(e), Florida Statutes.

113. Petitioners assert that there has been no recent enactment by the Florida Legislature that justifies the proposed rule or the need for guidance on water reservations. DEP's reasons for proposing rule 62-40.474, because it expected the water management districts to begin reserving water and questions were arising about how to use water reservations, are not illogical reasons for proposing the rule at this time.

114. The proposed rule is not irrational. In proposing this rule, DEP is attempting to perform a duty imposed by the Legislature to provide goals, objectives, and guidance for the development and review of programs, rules, and plans relating to water resources.

115. Petitioners argue that the proposed rule is arbitrary and capricious because the examples of water reservations in the proposed rule "were not based on particular scientific or technical data or in consultation with persons or entities with substantive knowledge, but simply based on the 'collective experience' of the authors." This claim is contrary to the record evidence which shows that the rulemaking process included many public workshops held to receive input from knowledgeable persons. Furthermore, the principle author of the proposed rule, Ms. Llewellyn, has expertise in scientific fields directly relevant to water reservations.

116. Finally, Petitioners argue that the proposed rule is arbitrary and capricious because it does not address the needs of the consumptive water users who will not be able to obtain a permit for water that has been reserved. This argument is rejected simply on the basis that a rule pertaining to a subject is not required to address all matters related to the subject. In addition, Section 373.223(4), Florida Statutes, is also silent on the needs of water users. This statute, however, is one piece of a comprehensive and complex water resources program created in Chapter 373, Florida Statutes, which includes specific provisions for meeting the future water needs of all water users.

117. DEP met its burden to demonstrate by a preponderance of the evidence that proposed rule 62-40.474 is not an invalid exercise of delegated legislative authority on the ground of vagueness.

118. Petitioners' concerns about the rule are not entirely unreasonable. The proposed rule could have been written more cogently to convey the meaning intended by DEP and could have provided more meaningful guidance to the water management districts in their adoption of water reservations. Nevertheless, this is a challenge to the facial validity of the proposed rule. Because the proposed rule incorporates the sole statutory criterion that water can only be reserved when

required for the protection of fish and wildlife or the public health and safety, the rule is facially valid.

ORDER

For the reasons set forth above, it is

ORDERED that proposed rules 62-40.410(3) and 62-40.474 are not invalid exercises of delegated legislative authority.

DONE AND ORDERED this 24th day of February, 2006, in Tallahassee, Leon County, Florida.

BRAM D. E. CANTER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of February, 2006.

ENDNOTES

[1/] Unless otherwise indicated, all references to the Florida Statutes are to Florida Statutes (2005). The petition was originally filed in 2003, but the applicable provisions of Chapters 120 and 373, Florida Statutes, have not changed.

[2/] DEP believes this approach could provide more certainty for water users. Of course, certainty is not appreciated by water users when it means certainty that water will not be available for their use.

[3/] Petitioners ask: "[T]o what time period or condition should a system be restored? Can water be reserved in one place to be used in another? Is the reservation to protect existing fish and wildlife or desired future populations of other fish and wildlife? Should a salt water system be restored to its historical fresh water condition, regardless of its effect on existing salt water fish and wildlife within the system? What species of fish and wildlife should be given priority over the existing species when restoring or recovering a system? How is a balance struck between future users, fish and wildlife, and future sources of water?"

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.