

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

A. DUDA AND SONS, INC.,)	
)	
Petitioner,)	
)	
vs.)	Case No. 07-3545RU
)	
ST. JOHN'S RIVER WATER)	
MANAGEMENT DISTRICT,)	
)	
Respondent.)	
_____)	

FINAL ORDER

On January 7-11 and 16-17, 2008, a formal administrative hearing was held in this case in Altamonte Springs and Tallahassee, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Kenneth G. Oertel, Esquire
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For Respondent: Timothy A. Smith, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are set out in the Petition to Determine Invalidity of Agency Rules and Agency Statement filed by A. Duda and Sons, Inc. (Duda): Count I, whether the St. Johns River Water Management District (SJRWMD) has an invalid and unadopted strategy to use various means to negate the agricultural exemption set out in Section 373.406(2), Florida Statutes; Count II, whether Section 3.4.1(b) of SJRWMD's Applicant's Handbook: Management and Storage of Surface Waters (the Handbook), which is incorporated by reference in Florida Administrative Code Rule 40C-4.091, is invalid essentially because it conflicts with the agricultural exemption set out in Section 373.406(2), Florida Statutes, and is vague; Count III, whether Rule 40C-4.041 is invalid essentially because it conflicts with the agricultural exemption set out in Section 373.406(2), Florida Statutes, and is vague; Count IV, whether certain documents--namely, all or part of The Manual of Reference Management Practices for Agricultural Activity (November 1978) (the Manual), excerpts from the Journals of the Florida House of Representatives and Senate (1984), and parts of the Model Water Code Commentary (Univ. of Florida 1972) (the Code Commentary), all of which are referred to in Section 3.4.1 of the Handbook but not filed with the Secretary of State--are invalid because they were not properly incorporated by reference under Rule 1S-1.005(2), because they conflict with the agricultural exemption set out in Section 373.406(2), Florida Statutes, and because they are vague; and Count V, whether Rule 40C-44.041 is invalid because it

conflicts with the agricultural exemption set out in Section 373.406(2), Florida Statutes, and is vague.

PRELIMINARY STATEMENT

After Duda's rule challenge was filed, SJRWMD filed an enforcement action against Duda for filling wetlands and digging ditches without a permit. Duda petitioned for a hearing, defending itself in part based on the agricultural exemption set out in Section 373.406(2), Florida Statutes. Duda's enforcement petition was referred to DOAH, given DOAH Case No. 07-4526, and consolidated for final hearing along with the rule challenge petition.

The consolidated cases were scheduled for final hearing on January 7-11 and 15-18, 2008, in Altamonte Springs. The parties filed a Joint Prehearing Stipulation on January 4, 2008.

At the final hearing, SJRWMD called: several employees, Jennifer Cope, Marc Van Heden, Karen Garrett-Krause, Peter Brown, and Jeff Elledge; a consultant with expertise interpreting aerial photographs, Peter Gottfried; and Steve Johnson, president of The Viera Company and a Duda vice-president. SJRWMD Exhibits 1, 6, 7, 9, 10, 13, 15, 17-19, 24, 26, 27, 29, 31 (pages 1406-07), 34, (pages 1519-20), 36, 37 (pages 1577-78), 46-48, 63, 76, 80 (except for the length of the ditches, which was hearsay), 100, 102, 107-110, 115, 117, 120, 121, 123, 128-137, 138 (pages 4987 and 4989), 139-141, 153 (and summary book), 154, 156, 158, 159, 163-168, 170 (except for the polygons and ditches drawn on it, which was hearsay), 171, 172, 174, 176, 177, 179, 185, and 193a-g were admitted in evidence. SJRWMD Exhibits 157, 160, 161, 162,

and 190 were officially recognized. Ruling was reserved on objections to SJRWMD Exhibits 51, 54-56, 80, 118, 124-126, and 170. Except for the hearsay objections to SJRWMD Exhibits 80 and 170, which are sustained, those objections are overruled at this time, and the exhibits are admitted in evidence.

At the final hearing, Duda called: its vice-president, Larry Beasley; retired Duda ranch manager, David Willis; professional engineer, Hassan Kamal; soil scientist, Lewis Carter; farmer and rancher, James Sartori; former Duda professional engineer, Mike Howeller; Duda professional and agricultural engineer, Pete Coultas; ecologist, William Lites; and attorney, Terry Cole. Duda also introduced the transcripts of depositions of District employees Vince Singleton (Duda Ex. 13A), Janice Unger (Duda Ex. 13B), and Victor McDaniel (Duda Ex. 13C). Duda Exhibits 1, 1A, 2-4, 13A-C, 15, 18-22, 24, 25, 28, 29, 31, 33-36, 38, 45, 52, 62 (page 2 of 4), 66-68, 71, 73, 77, and 78 were admitted in evidence. Ruling was reserved on objections to Exhibit 1 to Duda Exhibit 13C and to Duda Exhibits 46, 54-57, 59, and 91. At this time, those objections are overruled, and the exhibits are admitted in evidence.

As agreed at the end of the hearing, the consolidated cases have been severed for entry of a separate Final Order in this case, using the evidentiary record made in the consolidated final hearing. The parties ordered a Transcript, which was filed (in ten volumes) on January 29, 2008. The parties requested and were given until March 10, 2008, to file proposed final orders (PFOs), which have been considered in the preparation of this Final Order.

FINDINGS OF FACT

1. Duda clearly has standing since it is challenging the validity of SJRWMD rules and alleged rules that pertain to an enforcement action SJRWMD is bringing against Duda.

2. As reflected in the Statement of the Issues, Section 373.406(2), Florida Statutes, is at the heart of most of the issues in this case. It states:

Nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to affect the right of any person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture to alter the topography of any tract of land for purposes consistent with the practice of such occupation. However, such alteration may not be for the sole or predominant purpose of impounding or obstructing surface waters.

3. Section 3.4.1(b) of SJRWMD's Handbook states, in pertinent part, how SJRWMD interprets the exemption set out in Section 373.406(2), Florida Statutes:

In determining whether an exemption is available to a person engaged in the occupation of agriculture, silviculture, floriculture or horticulture, the following questions much be addressed:

1. Is the proposed topographic alteration consistent with the practice of agriculture, silviculture, floriculture, or horticulture?

2. Is the proposed topographic alteration for the sole or predominant purpose of impounding or obstructing surface waters?

If the first question is answered affirmatively and the second is answered negatively, an exemption under subsection 373.406(2), F.S., is available. The exemption is construed as set forth in the Conference Committee Report on CS/CS/HB 1187, Journal of the House of Representatives, May 29, 1984, page 734 and Journal of the Senate, May 28, 1984, page 475.

The District presumes that the following activities are consistent with the practice of silviculture when they are undertaken to place property into silvicultural use or to perpetuate the maintenance of property in silvicultural use. The following activities are also presumed not to be for the sole or predominant purpose of impounding or obstructing surface waters:

1. normal site preparation for planting of the tree crop;
2. planting; and
3. harvesting.

If any activity is undertaken to place the property into a use other than silviculture (for example: harvesting which is designed to clear property in preparation for commercial, industrial or residential development rather than regeneration) the activity is not considered to be consistent with the practice of silviculture and will be subject to the permitting jurisdiction of the District. Examples of activities which are considered to be for the sole or predominant purpose of impounding or obstructing surface waters because they have the effect of more than incidentally trapping, obstructing or diverting surface water are activities which create canals, ditches, culverts, impoundments or fill roads.

In determining consistency with the practice of agriculture occupations, the District will refer to the following publication: "A Manual of Reference Management Practices for Agricultural Activities (November, 1978) [.]". The following practices described in the manual are considered as having impoundment or obstruction of surface waters as a primary purpose:

1. Diversion, when such practice would cause diverted water to flow directly onto the property of another landowner
2. Floodwater Retarding Structure
3. Irrigation Pit or Regulating Reservoir
4. Pond
5. Structure for Water Control
6. Regulating Water in Drainage Systems
7. Pumping Plant for Water Control, when used for controlling water levels on land

Other practices which are described in the manual and which are constructed and operated in compliance with Soil Conservation Service standards and approved by the local Soil and Water Conservation District are presumed to be consistent with agricultural activities. Practices which are not described in the manual are presumed to be inconsistent with the practice of agriculture and a permit is required for the construction, alteration, operation, maintenance, removal, or abandonment of a system, subject to the thresholds. See Appendix H for a complete listing of agricultural practices described in the manual. A copy of the manual may be obtained by contacting the District headquarters.

4. Appendix H to the Handbook sets out brief descriptions of listed soil conservation practices for agriculture and states that those practices are described in detail in the Soil

Conservation Service's Field Office Technical Guides; it also sets out several other recognized Best Management Practices (BMPs) for agriculture. Appendix H of the Handbook is a verbatim reproduction of the part of the Manual from which it is taken. While Section 3.4.1(b) of the Handbook advises that a copy of the entire Manual may be obtained from SJRWMD, it only incorporates the parts set out verbatim in it and Appendix H.

5. The conference committee reports referred to in Section 3.4.1(b) of the Handbook recommended enactment of the Warren S. Henderson Wetlands Protection Act of 1984 (the Henderson Act), were voted on, and were approved by the House of Representatives and the Senate. Both reports stated in pertinent part:

The language contained in s. 403.913, relating to agricultural activities, shall be construed in conjunction with s. 373.406(2) to exempt from permitting only those activities defined as "agricultural activities" pursuant to this act in accordance with the Commentary to s. 4.02.(2) of the Model Water Code.

Section 403.913[now 403.927](4)(a), Florida Statutes, stated:

"Agricultural activities" includes all necessary farming and forestry operations which are normal and customary for the area, such as site preparation, clearing, fencing, contouring to prevent soil erosion, soil preparation, plowing, planting, harvesting, construction of access roads, and placement of bridges and culverts, provided such operations do not impede or divert the flow of surface waters.

6. The Commentary to Section 4.02.(2) states in pertinent part:

The intent of this subsection is to allow persons engaged in agricultural, floricultural, and horticultural operations to engage in ordinary farming and gardening

without obtaining a construction permit under §4.04. Theoretically, such operations may incidentally trap or divert some surface water. For example, by plowing a pasture a farmer is trapping and diverting surface water that would have constituted part of the runoff and eventually would have become part of the surface water of the state. Without this exemption the farmer would have theoretically been required to obtain a permit under §4.04. In addition, it would appear that all changes of topography which would alter natural runoff, such as contour plowing, would also require a construction permit under §4.04. The quantity of the water being diverted and trapped is so small that it would serve no practical purpose to require a permit for such work. In addition, the administrative burden of regulating such operations would be enormous.

7. Rule 40C-4.041 provides in pertinent part:

(1) Unless expressly exempt, an individual or general environmental resource permit must be obtained from the District under Chapter 40C-4, 40C-40, 40C-42, 40C-44 or 40C-400, F.A.C., prior to the construction, alteration, operation, maintenance, abandonment or removal of any stormwater management system, dam, impoundment, reservoir, appurtenant work or works, including dredging or filling, and for the maintenance and operation of existing agricultural surface water management systems or the construction of new agricultural surface water management systems.

8. Rule 40C-44.041 provides in pertinent part:

(1) Unless expressly exempt by Section 373.406, F.S., or Rule 40C-4.051 or 40C-44.051, F.A.C., a permit is required under this chapter for the maintenance and operation of existing agricultural surface water management systems which serve an agricultural operation as described in paragraph (a) or (b) below.

9. Other than the argument that certain agency statements are unadopted statements defined as rules, Duda's primary argument is that Section 373.406(2), Florida Statutes, is

unambiguous and that SJRWMD's interpretation of it, as reflected in its rules and statements, is contrary to the plain meaning of the unambiguous statutory language. Specifically, Duda focuses on SJRWMD's interpretation of the language "for purposes consistent with the practice of such occupation" and "not for the sole or predominant purpose of . . . obstructing surface waters." But it is concluded that SJRWMD's interpretation of the statutory language is as or more reasonable than Duda's.

10. Section 3.4.1(b) of SJRWMD's Handbook describes seven activities that are not "consistent with the practice of [the listed occupations]," including just one that may be disputed by Duda--namely: "Diversion, when such practice would cause diverted water to flow directly onto the property of another landowner." Since Duda's activities that are subject to SJRWMD's enforcement actions do not "cause diverted water to flow directly onto the property of another landowner," Duda's challenge did not focus on that part of Section 3.4.1(b) of the Handbook but rather on diversions of water that do not "cause diverted water to flow directly onto the property of another landowner." But to the extent that Duda was attacking this part of SJRWMD's interpretation, the evidence presented by Duda did not prove that diversion of water to flow directly on the property of another landowner is consistent with the practice of the listed occupations.

11. The Handbook also describes, through Appendix H, activities "presumed to be consistent with agricultural activities." Duda has no dispute with activities described in

Appendix but disputes the Handbook's statement that all other activities are "presumed to be inconsistent with the practice of agriculture." But the presumption is rebuttable, and the impact of the statements in the Handbook is to simply require proof of entitlement to the agricultural exemption for activities not listed in Appendix H in proceedings under Sections 120.569 and 120.57, Florida Statutes.

12. Duda also argues that, by its plain meaning, the word "purpose" as used in Section 373.406(2), Florida Statutes, means the actor's subjective intent, not the action's objective effect --in this case, namely, the more-than-incidental trapping or diversion of water to create canals, ditches, culverts, or fill roads. To the contrary, one of the several accepted meanings of the word "purpose" is: "**1a** : . . . an object or end to be attained : INTENTION **b** : RESOLUTION, DETERMINATION **2** : a subject under discussion or an action in course of execution." See Merriam Webster's Collegiate Dictionary 1011 (11th ed. 2005). That dictionary also identifies intention as a synonym of the first sense given for purpose and lists design and end among the additional synonyms in the synonymy paragraph after the entry for intention. See id. at 651. For a list of synonyms of the second main meaning of purpose listed in the dictionary ("an action in the course of execution"), one may turn to the second entry for purpose in the companion thesaurus likewise published by Merriam-Webster. That entry lists use in its fourth sense ("a particular service or end") and function as additional synonyms of purpose. See Merriam Webster's Collegiate Thesaurus 591 (1988). Likewise,

the dictionary lists purpose as a synonym of function in its sense as "the action for which a person or thing is specially fitted or used or for which a thing exists." See Merriam Webster's Collegiate Dictionary 507 ("function implies a definite end or purpose that the one in question serves or a particular kind of work it is intended to perform"). Broadly, these potential meanings of purpose describe an action, operation, or effect (or a function, use, or result) of a thing done, which can be observed objectively.

13. Duda also argues that, by its plain meaning, the word "obstructing surface waters" as used in Section 373.406(2), Florida Statutes, cannot mean just more-than-incidentally trapping or diverting surface waters to create canals, ditches, and culverts because those works speed or increase water flow rather than obstruct it. To the contrary, Merriam-Webster defines obstruct as "1 :to block or close up by an obstacle 2 :to hinder from passage, action, or operation : IMPEDE 3 :to cut off from sight." Treating impede as a synonym for hinder and obstruct and listing further synonyms at hinder. See Merriam Webster's Collegiate Dictionary 857. The synonymy paragraph at hinder states that the core meaning shared by obstruct and its synonyms is "to interfere with the activity or progress [of something]." Id. at 588 (emphasis added); accord, The American Heritage Dictionary 960 (defining obstruct as "1. To block or fill a passage with obstacles or an obstacle. . . . 2. To impede, retard, or interfere with; hinder"). One of these possible meanings of obstruct describes interfering with or hindering

something, including its passage, action, or operation.

14. In interpreting the word "purpose" in Section 373.406(2), Florida Statutes, it is reasonable for SJRWMD to choose the alternative meaning of an action, operation, or effect (or a function, use, or result) of a thing done, which can be observed objectively. To choose the other alternative meaning of the word would place the regulator at the mercy of the subjective intent of the person regulated and could lead to absurd results.

15. Also, in interpreting the word "obstructing" in Section 373.406(2), Florida Statutes, it is reasonable for SJRWMD to choose the alternative meaning of interfering with or hindering something, including its passage, action, or operation. First, if the word meant only blocking, obstructing would mean the same thing as impounding and would be redundant. Second, if SJRWMD chose "blocking" as the meaning the latter meaning of the word "obstructing," it would countenance draining wetlands to use the drained land for agricultural purposes. Such a result would be in direct conflict with the intent of Chapter 373 to manage and protect water resources. See Conclusion of Law 23, infra.

16. The extrinsic evidence of legislative intent supports SJRWMD's interpretation of Section 373.406(2), Florida Statutes. For that reason, SJRWMD's interpretation of the statute--as reflected in the Handbook--does not conflict with, exceed, modify, or contravene the statute; does not exceed statutory authority; is not standard-less or vague (so as to give SJRWMD unbridled discretion); is not arbitrary or capricious; and is not

unsupported by competent, substantial evidence.

17. It also was not proven that SJRWMD has an invalid and unadopted strategy to use various means to negate the agricultural exemption set out in Section 373.406(2), Florida Statutes. To the contrary, the evidence proved that SJRWMD interprets the statute validly and in accordance with the extrinsic evidence of the legislative intent.

18. Finally, in the nearly 25 years that SJRWMD has interpreted Section 373.406(2), Florida Statutes, essentially as reflected in the Handbook, the Joint Administrative Procedure Committee (JAPC) has never objected to SJRWMD's interpretation as being invalid.

CONCLUSIONS OF LAW

19. Under Section 120.56, Florida Statutes, Duda has burden in this proceeding of proving the invalidity of adopted rules and the existence of agency statements defined as rules.

20. As to Count I, as found, Duda did not prove that SJRWMD has an invalid and unadopted strategy to use various means to negate the agricultural exemption set out in Section 373.406(2), Florida Statutes. To the contrary, the evidence proved that SJRWMD intended to and did interpret the statute validly and in accordance with the extrinsic evidence of the legislative intent.

21. As to Count II, as explained by the court in Southwest Fla. Water Mgmt. Dist. v. Charlotte County, 774 So. 2d 903, 915-16 (Fla. 2d DCA 2001), 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, 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.)

22. Context guides selection of the meaning most reflective of the legislative intent when more than one meaning is possible. See, e.g., Vermilya-Brown Co. v. Connell, 335 U.S. 377, 386, 93 L.Ed. 76, 85 (1948) ("[w]ords generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers: and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves but by considering, s well, the context, the purpose of the law, and the circumstances under which the words were employed"); cf. Myers v. Hawkins, 362 So. 2d 926, 930 (Fla. 1978) (to determine plain meaning, court begins

with dictionary definitions but ultimately chooses meaning for each "term in light of the primary purpose for which it has been adopted").

23. The context of the Legislature's use of the words "purpose" and "obstruct" is a regulatory framework for controlling waters, so as to realize their full beneficial use. See § 373.016(1), Fla. Stat. (1973) (unchanged in the current statute). The overall purpose of the regulatory framework is to provide such conservation and control, through managing, conserving, protecting, and properly using water resources--and more specifically through developing and regulating "dams, impoundments, reservoirs, and other works," providing storage of water for beneficial purposes, "preventing damage from floods . . . and excessive drainage," preserving natural resources, and otherwise promoting the health, safety, and general welfare. See § 373.016(2)(a)-(g), Fla. Stat. (1972). Other provisions of the Act echoed and elaborated on this declaration of purposes, especially the protection of water resources, in requiring the establishment of a minimum flow for each watercourse and a minimum level for each surface water body and each aquifer, authorizing restrictions to protect the water resources during times of water shortage, and authorizing permit requirements and enforcement necessary to protect water resources from harm. See id. §§ 373.042, 373.129(3), 373.175, 373.219(1), 373.246; see also Village of Tequesta v. Jupiter Inlet Corp., 371 So. 2d 663, 670-71 (Fla. 1979) (chapter 373 gave DER and the districts "the responsibility to accomplish the [statute's purposes of]

conservation, protection, management, control of the waters [in] the state"). As a statute enacted to protect the public health, safety and welfare from further harm to water resources, Chapter 373 must "be liberally construed in order to effectively carry out its purposes," as the Legislature expressly stated in Section 373.616, Florida Statutes. Conversely, exemptions should be narrowly construed. See Samara Dev. Corp. v. Marlow, 556 So. 2d 1097 (Fla. 1990) (exemption is narrowly construed to prevent defeating the purpose of statute); Pal-Mar Water Management District v. Board of County Commissioners, 384 So. 2d 232, 233-34 (Fla. 4th DCA 1980) (same, for Chapter 373).

24. Finally, it has been held that the interpretations reflected in the Water Code Commentary will be accepted absent a clear indication that the Legislature intended otherwise. See Southwest Fla. Water Mgmt. Dist. v. Charlotte County, *supra*, at 912.

25. As found, Duda did not prove that SJRWMD's interpretation of Section 373.406(2), Florida Statutes--as reflected in the Handbook--conflicts with, exceeds, modifies, contravenes the statute; exceeds statutory authority; is standard-less or vague (so as to give SJRWMD unbridled discretion); is arbitrary or capricious; or is unsupported by competent, substantial evidence. To the contrary, SJRWMD's interpretation is consistent with the legislative intent, as reflected in the legislative journals, and with the Commentary to the Model Water Code.

26. In addition, SJRWMD's interpretation of Section

373.406(2), Florida Statutes, has been in effect for nearly 25 years. During that time, JAPC has not objected to it as lacking, exceeding, modifying, or conflicting with statutory authority. Courts generally defer and give great weight to agency constructions of statutes they administer. See, e.g., Florida Wildlife Federation v. Collier County, 819 So. 2d 200, 203 (Fla. 1st DCA 2002); Ameristeel Corp. v. Clark, 691 So. 473, 477 (Fla. 1997).

27. In addition, interpreting Subsection (2) of Section 373.406, Florida Statutes, as Duda suggests would make superfluous the exemption provided in Subsection (3) of that statute for "the construction, operation, or maintenance of any agricultural closed system" used to maintain the water levels within the system. If the Legislature intended for Subsection (2) to exempt drainage of surface waters onto or from a farmer's property, there would be no need for the "closed system" exemption in Subsection (3). But statutes on the same subject must be read in pari materia and harmonized so that effect is given to both. See Clines v. State, 912 So. 2d 550, 557 (Fla. 2005).

28. As to Counts III and V, Rules 40C-4.041 and 40C-44.041 state that applicable permits must be obtained unless an activity is exempt. They do not purport to interpret any exemptions. For that reason, Duda's actual complaint about those rules would pertain to their application, which is an issue for determination in proceedings under Sections 120.569 and 120.57, Florida

Statutes (such as DOAH Case No. 07-4526), not in a rule challenge.

29. As to Count IV, the substantive arguments for invalidity have been addressed and rejected in the Conclusion of Law as to Count II, supra. That leaves Duda's procedural argument that the references to the Manual, the House and Senate Journals, and the Water Code Commentary are unadopted statements defined as rules because copies of the referenced materials were not filed with the Secretary of State under Rule 1S-1.005(2).

30. As found, the Manual references actually were reproduced verbatim either in Section 3.4.1(b) (the listed practices "considered as having impoundment or obstruction of surface waters as a primary purpose") or in Appendix H of the Handbook, making it unnecessary to file a copy of the Manual with the Secretary of State. That information as to the more detailed descriptions in the Soil Conservation Service's Field Office Technical Guides was provided in Appendix H did not make the more detailed descriptions part of the rule, so as to require the filing of copies of those Guides with the Secretary of State, any more than the information that a copy of the entire Manual could be obtained from SJRWMD made the entire Manual part of the rule, so as to require its filing with the Secretary of State.

31. Not every agency statement is a rule. To be a rule, an agency statement not only must be of general applicability, it must one that "implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency" § 120.52(15), Fla. Stat. (2007). An agency

statement is a rule if it "purports in and of itself to create certain rights and adversely affect others" or serves "by its own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law." See Jenkins v. State, 855 So. 2d 1219, 1225 (Fla. 1st DCA 2003); Balsam v. Department of Health and Rehabilitative Services, 452 So. 2d 976, 977-78 (Fla. 1st DCA 1984); State Department of Administration, Division of Personnel v. Harvey, 356 So. 2d 323, 325 (Fla. 1st DCA 1977). See, e.g., SJRWMD v. Modern, Inc., 784 So. 2d 464 (Fla. 1st DCA 2001) (invalid memorandum expressly stated a policy, defined a term in the statutory exemption for "routine custodial maintenance" according to expressly labeled "basic criteria," and spelled out an expressly required procedure); Dept. of Transportation v. Blackhawk Quarry Co., 528 So. 2d 447, 450 (Fla. 5th DCA 1988) (invalid standing operating procedure stated specific criteria and requirements for acceptable cemented coquina shell and for placement on DOT's list of approved supply sources, thereby determining entitlement to participate in state projects, and thus "in and of itself create[d] certain rights and adversely affected[ed] others" and had a direct effect on suppliers); Florida State University v. Dann, 400 So. 2d 1304, 1305 (Fla. 1981) (invalid documents set out the university's merit salary procedures and were "virtually self-executing"); and Dept. of Administration v. Stevens, 344 So. 2d 290 (Fla. 1st DCA 1977) (invalid employee "bumping" guidelines were likewise "virtually self-executing").

32. The legislative journals referred to in Section

3.4.1(b) of the Handbook are not agency statements; rather, they are legislative statements. A rule stating that SJRWMD will follow the legislative intent is not required to incorporate the statement of legislative intent by reference in accordance with Rule 1S-1.005(2).

33. The Water Code Commentary is part of the statement of legislative intent. As such, it no more has to be incorporated by reference in accordance with Rule 1S-1.005(2) than the legislative journals have to.

34. Finally, agency statements that they will follow the legislative intent as expressed in the legislative journals do not prescribe law or policy or describe agency procedure or practice requirements. They do not determine or elaborate on the legislative intent beyond referencing the Legislature's own expressions of its intent.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, Duda's Petition to Determine Invalidity of Agency Rules and Agency Statement is denied.

DONE AND ORDERED this 25th day of April, 2008, in
Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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.