STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| DANIEL METSCH,<br><br>Petitioner,<br><br>vs.<br><br>DEPARTMENT OF TRANSPORTATION,<br><br>Respondent. | ) | Case No. 08-6353RX |

# FINAL ORDER

Pursuant to notice, a formal hearing was held in this case before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on March 2, 2009, by video teleconferencing between sites in Lauderdale Lakes and Tallahassee, Florida, where the undersigned presided.

## APPEARANCES

For Petitioners: Lawrence R. Metsch, Esquire
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For Respondent: Bruce R. Conroy
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## STATEMENT OF THE ISSUE

The issue in this case is whether paragraphs (2)(a) and (5), of Florida Administrative Code Rule 14-100.004, constitute an invalid exercise of delegated legislative authority because these paragraphs of the Rule enlarge, modify, or contravene the law implemented and are arbitrary and capricious.

## PRELIMINARY STATEMENT

On December 18, 2008, Petitioner Daniel Metsch filed a Petition Seeking Administrative Determination of the Invalidity of Agency Rule (hereinafter referred to as the "Petition") with the Division of Administrative Hearings. Petitioner's challenge was designated DOAH Case No. 08-6353RX by Order of Assignment entered by Robert S. Cohen, Chief Judge of the Division of Administrative Hearings, on December 18, 2008, and was assigned to the undersigned.

By Notice of Hearing entered December 22, 2008, after consultation with the parties, the final hearing was scheduled for January 9, 2009. An Order of Pre-Hearing Instructions and an Order Directing Filing of Exhibits was entered simultaneously with the Notice of Hearing. These Orders required, in part, that, "[n]o later than three days before the scheduled hearing . . . ," an exhibit list and all exhibits the parties intended to offer at hearing were to be exchanged and filed with the

Division of Administrative Hearings, along with a list of all witnesses the parties intended to call at the final hearing.

On December 31, 2008, a Joint Motion to Continue was filed. That Motion was granted by an Order entered January 6, 2009. The final hearing was rescheduled for March 2, 2009.

On February 25, 2009, Respondent, as ordered, filed a list of the witnesses it intended to call, a list of Respondent's Exhibits, and a copy of all of Respondent's Exhibits. Petitioner did not comply with the Order Directing Filing of Exhibits or the Order of Pre-Hearing Instructions.

On February 27, 2009, Lawrence R. Metsch, Esquire, filed a Notice of Appearance on behalf of Petitioner. While an exhibit list was also filed, no witness list or exhibits were provided by Petitioner.

Due to inadequacies in the Petition, at the commencement of the final hearing, Petitioner was required to specify precisely what portions of the definition of an "invalid exercise of delegated legislative authority" found in Section 120.52(8), Florida Statutes (2008), Petitioner was contending the challenged paragraphs of the rule come within. Petitioner represented that he was challenging the rule pursuant to Section 120.52(8)(c) and (e), Florida Statutes (2008).

Although Petitioner had not notified Respondent of the names of any witnesses, Petitioner requested leave to testify,

limiting his testimony to evidence in support of his standing. Finding no prejudice to Respondent, Petitioner's request was granted. Petitioner offered no exhibits. Respondent presented the testimony of Debora Rivera, P.E., Rory J. Santana, P.E., PTOE, and Edward T. Denham, AICP, who was accepted without objection as an expert in transportation planning and policy planning. Respondent also had admitted Respondent's Exhibits numbered 1 through 13.

On April 8, 2009, a Notice of Filing Transcript was issued informing the parties that the one-volume Transcript of the final hearing had been filed. The parties were also informed that their proposed final orders were to be filed on or before May 8, 2009.

Petitioner filed Petitioner's Proposed Final Order on April 6, 2009, even though the parties had requested leave to file their proposed orders on or before 30 days after the Transcript was filed. Respondent filed Respondent's Proposed Order on May 8, 2009. Both Proposed Orders have been fully considered in preparing this Final Order.

All references to the Florida Statutes in this Final Order are to the 2008 version.

<u>FINDINGS OF FACT</u>

A. <u>The Parties</u>.

1. Respondent Department of Transportation (hereinafter referred to as the "Department"), is the state agency responsible for, among other things, broad authority over the State's transportation system, including, but not limited to, planning, acquiring, leasing, constructing, maintaining, and operating toll facilities in Florida and fixing and collecting tolls and other charges for travel on any such facilities.

2. Petitioner, Daniel Metsch, his spouse, and their two minor children (hereinafter collectively referred to as the "Metsch Family") are residents of Hollywood, Broward County, Florida.

3. Mr. Metsch is employed in Key Biscayne, Miami-Dade County, Florida, and Mrs. Metsch is employed at the University of Miami in Miami, Miami-Dade County, Florida.

4. The Metsch's two minor children attend pre-school at the University of Miami in Miami, Miami-Dade County, Florida.

5. The Metsch Family travels in a single motor vehicle from Broward County to Miami-Dade County each weekday morning, and from Miami-Dade County and Broward County each weekday afternoon. The Metsch Family utilizes, in part, portions of Interstate 95 to which the challenged rules apply, for these trips.

6. Mr. Metsch applied for an exemption from the payment of tolls for the use of newly created "High Occupancy Toll" (hereinafter referred to as "HOT") lanes on Interstate 95 (hereinafter referred to as "I-95). His application for exemption was denied because the Metsch Family, while qualifying for use of previously designated High Occupancy Vehicle (hereinafter referred to as "HOV") lanes on Interstate 95, does not meet the criteria for any exemption from paying tolls for use of HOT lanes. By denying the Metsch Family an exemption from the payment of tolls for their use of HOT lanes along their commuter route, Mr. Metsch will suffer an adverse financial impact unless he travels by alternative routes or uses general purpose lanes on I-95 rather than HOT lanes. Choosing to travel on such alternative routes or using general purpose lanes on I-95 will cause delays in the Metsch Family commute each weekday morning and afternoon.

B. The Challenged Paragraphs of the Rule.

7. Mr. Metsch has challenged portions of Florida Administrative Code Rule 14-100.004 (hereinafter referred to as the "Rule"), which provides in pertinent part, the following, with the challenged portions (hereinafter referred to as the "Challenged Paragraphs") underlined:

> The provisions of this section apply to the express lanes on I-95 in Miami-Dade and Broward County.

(1) Purpose. To address congestion and to offer travel-choice options to motorists in South Florida, the 95 Express project implements a combination of tolling, technology, travel demand management and transit elements into a single project along the Interstate 95 corridor from just south SR 112/I-195 in Miami-Dade County to just north of I-595 in Broward County. Tolls will be collected electronically. Toll exemptions are allowed for certain vehicle types as specified in this section. Both the tolls and toll exemptions are intended to provide incentives for increased vehicle occupancy, shift in travel demand, and overall congestion relief.

(2) Exemptions. Tolls shall be collected from all vehicles using the express lanes, unless a valid exemption applies. The following qualify for an exemption from payment of tolls on 95 Express:

(a) Carpools with three or more occupants, registered in the manner described in subsection (5) below;

. . . .

(5) Decals will be provided for the following vehicles eligible for an exemption from payment of tolls for use of the express lanes: registered 3+ passenger carpools, registered ILEV and hybrid vehicles and registered South Florida Vanpools. 3+ passenger carpools means at least three commuters traveling to and from work in one vehicle and properly registered by [South Florida Commuter Services] as a 3+ passenger carpool. . . .

C. The Law Implemented.

8. The Department designated the following statutory provisions as the "law implemented" by the Rule: "316.0741,

316.1001, 316.640(1), 334.044(16), 335.02(3), 338.155(1), 338.165(7), 338.231 F.S."

D. The Adoption of the Rule.

9. The Rule and the Challenged Paragraphs were adopted by the Department as part of its effort to implement a pilot project instituted by the Department and other entities in an effort to reduce traffic congestion along I-95 in the South Florida area. The pilot project involves the portion of I-95 between downtown Miami and what is known as the Golden Glades Interchange (where State Road 826 and I-95 intersect). Before the project was implemented, this portion of I-95 was made up of four general lanes of the use of all vehicles and one HOV lane for vehicles occupied by two or more individuals running to the north and the same number and type of lanes running to the south. Prior to instituting the pilot project and the adoption of the Rule, this portion of I-95 was congested to the point of breakdown of the facility during morning and afternoon rush hours.

10. Because of the near break-down state of I-95, especially in the south Florida area, the Department had been looking for solutions to traffic congestion for a number of years. At the same time, the U.S. Department of Transportation (hereinafter referred to as the "USDOT") and other federal organizations responsible for the federal highway system, were

studying the problem, which exists throughout the United States, and were seeking innovative solutions to highway congestion.

11. In April of 2007, the Department, along with interested local entities, submitted a proposal to the USDOT, described generally as the "I-95 Express Project." The Department's I-95 Express Project proposal, along with proposals from four other United States cities, was accepted in August 2007.

12. On September 18, 2007, the USDOT formally accepted the proposed I-95 Express Project by entering into an Urban Partnership Agreement. The project is summarized as follows in the "Executive Summary" of the Urban Partnership Agreement, Respondent's Exhibit 9:

> This Urban Partnership Agreement sets forth an agreement in principle between the U.S. Department of Transportation (the "Department") and the Department's Miami-Area Urban Partner, comprised of the Florida Department of Transportation ("FDOT"), the Miami-Dade Metropolitan Planning Organization, the Broward Metropolitan Planning Organization, Miami-Dade Transit, Broward County Transit, the Miami-Dade Expressway Authority, and the Florida Turnpike Enterprise. Under this agreement, the Urban Partner agrees to <u>(i) convert not less than 21 miles of two (one in each direction) high-occupancy vehicle ("HOV") lanes along I-95 from I-395 in Miami to I-595 in Fort Lauderdale into variably-priced high-occupancy toll ("HOT") lanes; (ii) re-stripe portions of I-95 from I-395 in Miami to I-595 in Fort Lauderdale to create two additional HOT lanes (one in each</u>

direction); (iii) expand transit capacity to enhance current express bus services and implement new Bus Rapid Transit ("BRT") service within the HOT lanes, east-west on Hollywood/Pines Boulevard in Broward County, and between Broward and Miami-Dade Counties on US 441/SR7 and SR 817 (University Drive); and (iv) improve the Golden Glades multi-modal park-n-ride transit facility in Miami-Dade County. In addition, the Urban Partner agrees that all projects will be in operation by certain deadlines, the latest of which is September 30, 2009. In exchange for these commitments, the Department intends to allocate $62.9 million in Federal grant funding for the HOV-to-HOT conversion and bus services according to the terms of a grant agreement (or series of grant agreements) to be negotiated by the Department and the Urban Partner. The Urban Partner will be responsible for funding the improvements to the Golden Gates transit facility. (Emphasis added.)

13. The project moved expeditiously, with a request for proposal seeking a contractor for the lane changes being issued in December 2007, the selection of a contractor in January 2008, construction of the project commencing in February 2008, the completion of the conversion of the I-95 HOV to two HOT lanes in July 2008, and placement of the project under tolling by December 2008.

14. Of relevance to this matter, the I-95 Express Project created two HOT lanes in each direction which are equipped with sensors that allow the real-time measurement of use and the speed of automobiles in the HOT. That information is used to calculate the amount of the toll to be charged based upon the

premises that the higher the use of the facility, the higher the cost that should be charged.

15. The Rule allows any vehicle to utilize the HOT at any time, including the vehicle utilized by the Metsch Family. Pursuant to the Challenged Paragraphs, however, vehicles, like the Metsch Family vehicle, which are not occupied by three or more “commuters,” will be assessed the then currently calculated toll charge, which is always displayed electronically so that vehicle drivers can made a decision as to whether utilizing an HOT is worth the toll they may be assessed for such use. The rationale for the imposition of a toll charge on vehicles with fewer than three commuters, like the Metsch Family and others who have the option of utilizing a HOT but do not fall within any exemption from payment of a toll, is that those not qualifying for an exemption place a greater strain on the facility (by having fewer individuals in the vehicle who could otherwise be driving their own vehicles on the facility if they were not in the exempt vehicle) and should pay a greater fee for its use. A vehicle occupied by three or more commuters potentially is reducing the number of vehicles on I-95 by the number of commuters in the vehicle in excess of the driver, while the Metsch Family only represents the reduction of one potential additional vehicle from use of the facility.

16. The Department, through its adoption of the Rule and, in particular the Challenged Paragraphs, is attempting to influence use of the facility by vehicle drivers who may potentially use I-95, especially during peak use times of the facility. By allowing an exemption for use of the HOT to vehicles in which there are three or more commuters (and through rapid transit alternatives), it is expected that more commuters will choose to car pool or use rapid transit, taking their vehicles off of I-95, and consequently reducing the number of vehicles using the facility. Unfortunately for the Metsch Family, their two minor children do nothing to reduce use of the facility.

17. At best, the evidence presented by Mr. Metsch may have shown the Rule could be improved (by expanding the definition of those who may be considered for purposes of obtaining an exemption from tolls for use of a HOT from "commuters" to persons having a driver's license), Mr. Metsch did not prove that the Challenged Paragraphs or any other portion of the Rule are not supported by logic or reason or are irrational.

18. Finally, the evidence failed to prove that the Challenged Paragraphs establish or govern the use of a HOV. Instead, the Challenged Paragraphs simply describe the circumstances under which vehicles utilizing two designated

lanes of I-95 will be subject to the payment of a toll and the circumstances for which an exemption may be obtained.

CONCLUSIONS OF LAW

A. Jurisdiction.

19. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.56(1) and (3), Florida Statutes.

B. Standing.

20. Only "substantially affected persons" may challenge the facial validity of existing rules pursuant to Section 120.56(1) and (3), Florida Statutes. Mr. Metsch was, therefore, as a threshold issue, required to prove he is "substantially affected" by the Challenged Paragraphs to institute the instant proceeding. See Department of Professional Regulation, Board of Medical Examiners v. Durrani, 455 So. 2d 515 (Fla. 1st DCA 1984).

21. In order to prove that he is "substantially affected," Mr. Metsch was required to specifically prove (a) a real and sufficiently immediate injury in fact; and (b) that his alleged interest is arguably within the "zone of interest" to be protected or regulated. See Ward v. Board of Trustees of the Internal Improvement Trust Fund, 651 So. 2d 1236 (Fla. 4th DCA

1995). The Department has argued unconvincingly that Mr. Metsch has failed to prove either prong of the foregoing test.

22. The Challenged Paragraphs, by excluding the Metsch Family from exemption from the payment of tolls, places a financial burden on Mr. Metsch for the use of a portion of the road system in Florida, causing an immediate financial injury.

C. Petitioner's Challenge.

23. Section 120.56(1) and (3), Florida Statutes, provides in part the following:

> (1) GENERAL PROCEDURES FOR CHALLENGING THE VALIDITY OF A RULE OR A PROPOSED RULE.—
>
> (a) Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.
>
> (b) The petition seeking an administrative determination must state with particularity the provisions alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity and facts sufficient to show that the person challenging a rule is substantially affected by it, or that the person challenging a proposed rule would be substantially affected by it.
>
> . . . .
>
> (3) CHALLENGING EXISTING RULES; SPECIAL PROVISIONS.--
>
> (a) A substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time

> during the existence of the rule. The petitioner has a burden of proving by a preponderance of the evidence that the existing rule is an invalid exercise of delegated legislative authority as to the objections raised.
>
> (b) The administrative law judge may declare all or part of a rule invalid. The rule or part thereof declared invalid shall become void when the time for filing an appeal expires. The agency whose rule has been declared invalid in whole or part shall give notice of the decision in the Florida Administrative Weekly in the first available issue after the rule has become void.

24. An existing rule may be challenged pursuant to Section 120.56, Florida Statutes, only on the ground that it is an "invalid exercise of delegated legislative authority." See Schiffman v. Department of Professional Regulation, Board of Pharmacy, 581 So. 2d 1375, 1379 (Fla. 1st DCA 1991); and Lewis Oil Co., Inc. v. Alachua County, 496 So. 2d 184, 189 (Fla. 1st DCA 1986).

25. As the First District Court of Appeal observed in Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 597-98 (Fla. 1st DCA 2000):

> This phrase ["invalid exercise of delegated legislative authority," as used in Section 120.56, Florida Statutes] is defined in section 120.52(8), Florida Statutes, as an "action that goes beyond the powers, functions, and duties delegated by the Legislature." Section 120.52(8) then lists seven circumstances in which a rule is an invalid exercise of delegated legislative authority:

> . . . .
>
> In addition to the seven enumerated grounds for challenging a rule, section 120.52(8) provides a set of general standards to be used in determining the validity of a rule in all cases. These standards are contained in the closing paragraph of the statute. . . .

26. In the instant case, Mr. Metsch contends that the Challenged Paragraphs are an "invalid exercise of delegated legislative authority," within the meaning of Subsections (8)(c) and (e) of Section 120.52, Florida Statutes, which provide as follows:

> "Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> . . . .
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
>
> . . . .
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational;

27. In Petitioner's Proposed Final Order, Mr. Metsch phrases the point of his challenge as follows:

> Is Rule 14-100.004(5), Florida Administrative Code, an "invalid exercise of delegated legislative authority" because it requires that a "3+ carpool" consist of three (3) "commuters", rather than three (3) "occupants"?

D. The Law Implemented.

28. In Petitioner's Proposed Final Order, Mr. Metsch only addresses one provision cited by the Department as the law implemented by the Rule: Section 316.0741, Florida Statutes, which provides, in pertinent part, the following:

> (1) As used in this section, the term:
>
> (a) "High-occupancy-vehicle lane" or "HOV lane" means a lane of a public roadway designated for use by vehicles in which there is more than one occupant unless otherwise authorized by federal law.
>
> . . . .
>
> (2) The number of persons who must be in a vehicle to qualify for legal use of the HOV lane and the hours during which the lane will serve as an HOV lane, if it is not designated as such on a full-time basis, must also be indicated on a traffic control device.
>
> (3) Except as provided in subsection (4), a vehicle may not be driven in an HOV lane if the vehicle is occupied by fewer than the number of occupants indicated by a traffic control device. A driver who violates this section shall be cited for a moving violation, punishable as provided in chapter 318.
>
> . . . .

> (5) The department shall issue a decal and registration certificate, to be renewed annually, reflecting the HOV lane designation on vehicles meeting the criteria in subsection (4) authorizing driving in an HOV lane at any time. The department may charge a fee for a decal, not to exceed the costs of designing, producing, and distributing each decal, or $5, whichever is less. The proceeds from sale of the decals shall be deposited in the Highway Safety Operating Trust Fund. The department may, for reasons of operation and management of HOV facilities, limit or discontinue issuance of decals for the use of HOV facilities by hybrid and low-emission and energy-efficient vehicles, regardless of occupancy, if it has been determined by the Department of Transportation that the facilities are degraded as defined by 23 U.S.C. s. 166(d)(2).
>
> . . . .
>
> (7) The department may adopt rules necessary to administer this section.

29. Relying upon Section 316.0741(1)(a), Florida Statutes, Mr. Metsch goes on to argue that this provision, by referring to an "occupant" in defining a HOV, prohibits the Department from basing the imposition of tolls in a HOT upon a "commuter." Mr. Metsch's argument is misplaced for several reasons.

30. First, Section 316.0741(1)(a), Florida Statutes, is nothing more than a definition. It does not prescribe any duty or action on the part of the Department. For example, Section 316.0741(1)(a), Florida Statutes, does not say that "the Department may only establish HOV's on interstate roads in

Florida as defined in this section" or contain any other similar proscription or prescription.

31. More importantly, Mr. Metsch mischaracterizes what the Challenged Paragraphs actually do and the authority therefore. The Rule, in part, provides for the creation of a portion of a road facility for which a toll will be imposed (referred to as a HOT), and the Challenged Paragraphs describe one of the circumstances under which the toll will not be imposed. A HOT, which neither party has cited a Florida definition for, is not, however, a HOV by statutory or rule definition. Therefore, even though, as Mr. Metsch correctly argues, a HOV may by definition be required to be based upon the number of occupants utilizing a lane, that definition has no application to a HOT.

32. Because the Department is not creating or regulating a HOV through its adoption of the Rule, it is Section 334.044, Florida Statutes, and not Section 316.0741(1)(a), Florida Statutes, which authorizes the Department to adopt the Challenged Paragraphs. Section 334.044, Florida Statutes, establishes the Department's broad "powers and duties." Subsection (16) provides the following broad Department power and duty with regard to the imposition of tolls:

> To plan, acquire, lease, construct, maintain, and operate toll facilities; to authorize the issuance and refunding of bonds, and to fix and collect tolls or other charges for travel on any such facilities.

Sections 316.640, 316.1001, and 338.155, Florida Statutes, provide additional authority to the Department with regard to tolls and toll facilities.

33. The Challenged Paragraphs implement and interpret "specific powers and duties" granted to the Department by the Legislature with regard to the tolls in Florida. See Board of Trustees of Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So. 2d 696, 701 (Fla. 1st DCA 2001). The Challenged Paragraphs establish the circumstances under which tolls will and will not be imposed as part of the I-95 Express Project.

34. Mr. Metsch has, therefore, failed to prove that the Challenged Paragraphs "enlarge, modify, or contravene the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1." as alleged in his Petition and as argued in Petitioner's Proposed Final Order.

E. Rationale for the Challenged Paragraphs; Are the Challenged Paragraphs Arbitrary or Capricious?

35. A rule is considered arbitrary if it is not supported by logic or reason; it is capricious if it is irrational and not supported by reason. Agrico Chemical Company v. Department of Environmental Regulation, 365 So. 2d 759, 763, (Fla. 1st DCA 1978), cert. denied, 376 So. 2d 74 (Fla. 1979).

36. The Department described in detail the genesis of, and the rational behind, the Rule and, in particular the Challenged Paragraphs. While Mr. Metsch may have proved and the Department may have conceded how the Rule could be improved (by expanding the definition of those entitled to an exemption from tolls for use of a HOT), Mr. Metsch did not prove that the Challenged Paragraphs are not supported by logic or reason or are irrational and not supported by reason.

37. Mr. Metsch has, therefore, failed to prove that the Challenged Paragraphs are "arbitrary or capricious" as alleged in his Petition and as argued in Petitioner's Proposed Final Order.

ORDER

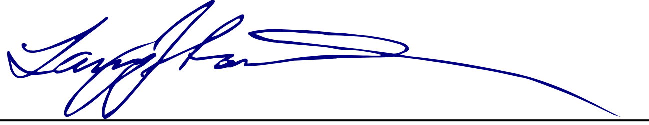
Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED:

1. Daniel Metsch failed to prove that Florida Administrative Code Rule 14-100.004(2)(a) and (5), constitute an invalid exercise of delegated legislative authority because the Challenged Paragraphs enlarge, modify, or contravene the law implemented, or are arbitrary and capricious; and

2. Mr. Metsch's Seeking Administrative Determination of the Invalidity of Agency Rule is DISMISSED.

DONE AND ORDERED this 9th day of June, 2009, 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 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.