

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CONSERVANCY OF SOUTHWEST  
FLORIDA, INC.,

Petitioner,

vs.

Case No. 14-1329RP

SOUTH FLORIDA WATER MANAGEMENT  
DISTRICT,

Respondent.

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SUMMARY FINAL ORDER

At the request of the parties, the scheduled final hearing was canceled and the case was submitted to Bram D.E. Canter, Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), for summary final order pursuant to section 120.57(1)(h), Florida Statutes (2013).

APPEARANCES

For Petitioner: Marcy I. LaHart, Esquire  
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For Respondent: Jennifer D. Bokankowitz, Esquire  
Elizabeth D. Ross, Esquire  
South Florida Water Management District  
Mail Stop Code 1410  
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STATEMENT OF THE ISSUE

The issue to be determined in this case is whether proposed Florida Administrative Code Rule 40E-10.041(3)(d) of the South Florida Water Management District ("the District") is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On February 26, 2014, the District published in the Florida Administrative Register a notice of the District's proposal to amend several rules in order to create a water reservation for a Comprehensive Everglades Restoration Plan ("CERP") project known as the Caloosahatchee River (C-43) West Basin Storage Reservoir. Among the rules to be amended is rule 40E-10.041.

Petitioner Conservancy of Southwest Florida, Inc. ("the Conservancy"), filed at DOAH a timely challenge to proposed rule 40E-10.041(3)(d). The District moved to dismiss the rule challenge, asserting that the Conservancy lacked standing because its alleged injury was too remote. That motion was denied. The Parties then jointly moved for a continuance of the final hearing, stating their intent to file motions for summary final order pursuant to section 120.57(1)(h). Motions for summary final order were then filed, as well as responses thereto.

In support of its motion, the Conservancy submitted the affidavits of Rob Moher, Rae Ann Wessel, Ralf Brooks, James Felabaum, John Hall, JoAnn Johansen, Kelly Rhoades,

Stephanie Goforth, Van Williams, Lynn Slabaugh, Patricia Schroeder, Dennis Brown, Tucker Tyler, Heidi Tomblyn, Philip Gresh, Amber Crooks, Kathleen Adams, Julianne Thomas, Wendy Larson, John Cassani, James Murray, Nicole Johnson, Raven Lamoreaux, and Franklin Adams. The District relied solely on the pleadings to support its motion.

#### FINDINGS OF FACT

1. The Conservancy is a non-profit Florida corporation with its offices in Naples, Florida. It has 6,200 members residing in Southwest Florida. The mission of the Conservancy is to protect the environment and natural resources of Southwest Florida. The Caloosahatchee River is an important focus of the Conservancy's organizational activities and objectives.

2. A substantial number of the members of the Conservancy use the Caloosahatchee River for drinking water, boating, fishing, wildlife observation, and scientific research.

3. The proposed rules create a prospective reservation of water in the not-yet-operational Caloosahatchee River (C-43) West Basin Reservoir "for fish and wildlife."

4. The Conservancy's interests would be substantially affected by the proposed reservation.

5. The District is a regional water management agency created, granted powers, and assigned duties under chapter 373,

Florida Statutes (2013). It is headquartered in West Palm Beach, Florida.

6. Proposed rule 40E-10.041(3) states:

(3) Caloosahatchee River (C-43) West Basin Storage Reservoir:

- (a) All surface water contained within and released, via operation, from the Caloosahatchee River (C-43) West Basin Storage Reservoir is reserved from allocation.
- (b) The water reserved under this paragraph will be available for fish and wildlife upon a formal determination of the Governing Board, pursuant to state and federal law, that the Caloosahatchee River (C-43) West Basin Storage Reservoir is operational.
- (c) The reservation contained within this subsection and the criteria contained in section 3.11.4 of the Applicant's Handbook for Water Use Permit Applications within the South Florida Water Management District, incorporated by reference in Rule 40E-2.091, F.A.C., shall be revised in light of changed conditions or new information prior to the approval described in paragraph (3)(b) above.
- (d) Pursuant to subsection 373.223(4), F.S., presently existing legal uses for the duration of a permit existing on [RULE ADOPTION DATE] are not contrary to the public interest.

7. The Conservancy challenges only paragraph (3)(d), contending that it modifies or contravenes the implementing statute, section 373.223(4).

CONCLUSIONS OF LAW

8. Any person substantially affected by 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. § 120.56(1)(a), Fla. Stat.

9. Section 120.52(8) defines the term "invalid exercise of delegated legislative authority" as action that goes beyond the powers, functions, and duties delegated by the Legislature and sets forth seven grounds for invalidity. The Conservancy invokes only section 120.52(8)(c): The rule enlarges, modifies, or contravenes the specific provisions of law implemented.

10. The Conservancy contends that proposed rule 40E-10.401(3)(d) modifies or contravenes section 373.223(4):

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. The Conservancy also alleges violations of the minimum flow for the Caloosahatchee River that was established by the District pursuant to section 373.042 and attempts to show how the proposed rule would worsen the situation. However, the

Conservancy did not claim in its petition that the proposed rule contravenes section 373.042.

12. Furthermore, the protection of existing legal uses afforded by section 373.223(4) is confined to the context of a reservation of water. Nothing in section 373.223(4) shows a legislative intent to protect a permitted use in a situation where a use causes or contributes to the violation of an established minimum flow. Whether and, if so, to what extent a permitted use is protected in the context of a violation of a minimum flow must be determined from the application of the statutes and rules that govern minimum flows.

13. A party may move for summary final order when there is no genuine issue as to any material fact. § 120.57(1)(h), Fla. Stat. The Administrative Law Judge has determined from the pleadings and affidavits that no genuine issue as to any material fact exists and that the parties are entitled as a matter of law to the entry of a final order.

14. The petitioner has the burden of going forward. § 120.56(2)(a), Fla. Stat. The Conservancy met this burden.

15. The agency then has the burden to prove by preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. Id.

16. The proposed rule is not presumed to be valid or invalid. § 120.56(2)(c), Fla. Stat.

17. On its face, proposed rule 40E-10.401(3)(d), by declaring existing permitted uses are not contrary to the public interest for the "duration of a permit," modifies section 373.223(4), which protects existing legal water uses "so long as such use is not contrary to the public interest."

18. Section 373.223(4) was a part of the Florida Water Resources Act of 1972, which was substantially derived from A Model Water Code, Maloney, Ausness, and Morris (Univ. of Fla. Press 1972). Section 2.02(3) of the model code stated:

The governing board 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 to implement a provision of the State Water Plan. Such reservations shall be subject to periodic review and revision in the light of changed conditions; provided, however, that all presently existing legal uses of water shall be protected.

19. The authors' commentary to this section in A Model Water Code does not elaborate on the intent of the second sentence regarding the protection of existing uses. However, the plain meaning of this section of the model code was to protect existing water uses from reduction or interference as a result of the water reservation. Because no temporal limitation on this protection is expressed, the protection was for the term of the

legal use, which for permitted water uses would be the duration of the permit.

20. Not content with the language recommended in A Model Water Code, the Florida Legislature in 1972 added the phrase "so long as such use is not contrary to the public interest." No legislative history was provided by the parties and none may exist to explain why this phrase was added. The Legislature chose to use "so long as," a phrase that does not commonly appear in the statutes and which has a temporal meaning of now and hereafter.

21. The plain meaning of section 373.223(4) is to protect a permitted water use from the effect of a reservation of water only if such use remains not contrary to the public interest.

22. Proposed rule 40E-10.401(3)(d) modifies and contravenes section 373.223(4) by granting greater protection to a permitted water use than is granted by the statute. Under circumstances where a permitted water use becomes contrary to the public interest and no longer "protected" under the statute, the proposed rule would maintain the protection.

23. The District argues that even though the proposed rule declares existing permitted uses not contrary to the public interest "for the duration of the permit," the District can still "amend the determination" in the future if justified by changed conditions. However, after adoption of the proposed rule, the



District could not determine a permitted use was contrary to the public interest without amending the rule. An otherwise invalid rule is not "saved" by an agency's ability to amend the rule in the future.

24. Also unpersuasive is the District's argument that there are other statutes and District rules which allow for a determination, for other reasons, that an existing water use is inconsistent with the public interest. An otherwise invalid rule is not saved because it is contradicted or offset by other laws.

25. The District's interpretation of section 373.223(4) is clearly erroneous.

26. The District contends that the Conservancy's interpretation of section 373.223(4) "would prohibit the District from making a determination that existing legal uses are not contrary to the public interest," which the District asserts would render the reference in the statute meaningless. First, it is noted the statute does not require action (by order or rule) by a water management district to determine that one or more existing water uses are not contrary to the public interest. Existing legal uses are presumed not contrary to the public interest unless and until the District determines otherwise. Although not required to do so, the District can make a "not contrary" determination, but the determination cannot be made

prospectively for the duration of the permit for the reasons already explained above.

27. Section 373.223(4) only states that so long as an existing legal use is not contrary to the public interest, it is protected from the effect of the water reservation. How an existing use is determined to be contrary to the public interest and the consequences of the determination are not addressed in the statute. However, because the determination would be agency action, it would be subject to the procedures and rights established in chapter 120.

28. The District argues that this is just what it is doing by adopting a rule pursuant to section 120.54 to declare existing permitted uses to be not contrary to the public use. However, as explained above, the District went too far when it made the determination effective for the duration of the existing permits.

29. The District failed to prove by a preponderance of the evidence that proposed rule 40E-10.401(3)(d) is a valid exercise of delegated legislative authority.

#### CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is determined that proposed Florida Administrative Code Rule 40E-10.041(3)(d) is an invalid exercise of delegated legislative authority.

DONE AND ORDERED this 25th day of April, 2014, in  
Tallahassee, Leon County, Florida.



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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 25th day of April, 2014.

COPIES FURNISHED:

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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 administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.