

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PELICAN BAY FOUNDATION, INC.,

Petitioner,

vs.

Case No. 17-2570RP

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION,

Respondent,

and

THE CITY OF NAPLES FLORIDA,

Intervenor.

_____ /

FINAL ORDER OF DISMISSAL

Intervenor moved to dismiss the rule challenge petition, arguing that Petitioner cannot challenge a proposed rule for what is not in the rule. The Administrative Law Judge denied the motion, reasoning that all agency action is subject to review by substantially affected persons, and Petitioner alleged it was substantially affected by the determination of the Florida Fish and Wildlife Conservation Commission not to establish a slow speed zone in the Clam Bay system. A ruling was also made that Petitioner's claims were reviewable in a rule challenge proceeding. After further consideration, it is concluded that Intervenor's motion to dismiss was meritorious.

Section 379.2431(2)(n), Florida Statutes, authorizes the Commission to designate by rule portions of state waters which manatees inhabit periodically. The statute also authorizes the Commission to adopt rules to regulate motorboat speed within such waters to protect manatees from collisions with motorboats. The statutory wording suggests a two-part process where, first, the Commission designates the waters and, second, the Commission adopts boating restrictions for these waters if determined to be necessary. However, the record shows that the Commission does not follow a two-step process. There is only one step: the

Commission considers a waterbody's use by manatees and motorboats and establishes boat restrictions in the waterbody by rule when the Commission determines the restrictions are necessary.

Pursuant to the statute, the Commission adopted Florida Administrative Code Rule 68C-22.001(2), which sets forth "standards" that the Commission shall use in "determining whether restrictions are necessary to protect manatees or manatee habitats" in waterbodies that manatees inhabit periodically.

Petitioner contends that, in excluding Clam Pass and Outer Clam Bay from proposed rule 68C-22.023(2)(c), which identifies the waterbodies in Collier County in which a slow speed restriction will apply, the Commission did not use the best available information as mandated by section 379.2431(2). Petitioner also contends the Commission contravened this statute because the Commission based its decision not to impose a slow speed restriction for the Clam Bay system on factors that are not listed in the statute or in the Commission's rules. Petitioner does not seek to remove any of the waterbodies that are included in the proposed rule where slow speed zones will be established to protect manatees.

An administrative law judge "may declare the proposed rule wholly or partly invalid." § 120.56(2)(b), Fla. Stat. (2017). Here, there is no part of the proposed rule to declare invalid. It is not a proper remedy, and the Administrative Law Judge lacks legal authority, to undo the protection for manatees that the Commission established for several waterbodies in Collier County, when no objection has been raised regarding these waterbodies.

The two grounds raised by Petitioner for invalidating the proposed rule--that it is arbitrary and contravenes the law implemented--are not directed to anything appearing in the proposed rule. Nothing in the proposed rule is arbitrary and nothing contravenes the law implemented.

Petitioner is challenging the validity of a decision made by the Commission in the rulemaking process, which is not mentioned, described, or materially shown in the proposed rule. This situation differs from one where a party requests that something be added to a proposed rule, the addition is not adopted by the agency, and the party seeks to demonstrate that the adopted provisions are invalid without the requested

addition. Here, there is nothing in the proposed rule that is invalid due to the Clam Bay system not being included.

No reported decisional law was found involving a similar scenario. If Petitioner's challenge is in the nature of a challenge to Commission action that determined the substantial interest of Petitioner, reviewable under section 120.569, or, as seems more likely, a matter that can only be raised in a petition for rulemaking pursuant to section 120.54(7), it cannot be transformed into either by the Administrative Law Judge because the Commission would have original jurisdiction of such matters.

Accordingly, it is

ORDERED that the rule challenge petition is DISMISSED.

DONE AND ORDERED this 10th day of January, 2018, in Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
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Filed with the Clerk of the
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this 10th day of January, 2018.

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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.