STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARINE INDUSTRIES ASSOCIATION OF PALM BEACH COUNTY, INC.,

Petitioner,

Case No. 21-1661RP

vs.

FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION,

Respondent.
_____/

FINAL ORDER

A final hearing in this case was conducted in this case on August 11, 2021, by Zoom conference, before E. Gary Early, an administrative law judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUES

The issues for disposition in this case are, first, whether the proposed adoption of Florida Administrative Code Rule 68D-24.017(1)(s) (the Proposed Rule) was based on the application of an unadopted rule, as defined in section 120.52(20), Florida Statutes, and, second, if it was not, whether the Proposed Rule is an invalid exercise of delegated legislative authority, as defined in section 120.52(8).

PRELIMINARY STATEMENT

On May 21, 2021, Petitioner, Marine Industries of Palm Beach County, Inc. (Petitioner), filed a Petition for Administrative Determination of Invalidity of Proposed Rule 68D-24.017(1)(s), Florida Administrative Code. On May 26, 2021, a status conference was held at which both parties were represented. During the status conference, Petitioner indicated that it had filed a petition to initiate rulemaking with the Commission directed to an alleged unadopted rule upon which the Proposed Rule was based. That petition triggered a 30-day response period within which the Commission could initiate or decline rulemaking. By agreement of the parties, this case was placed in abeyance until June 30, 2021.

On June 25, 2021, Petitioner filed an Unopposed Motion for Leave to File First Amended Petition for Administrative Determination, along with the First Amended Petition. The First Amended Petition raised the Commission's application of the term "vessel traffic congestion," which was the basis for the Proposed Rule, as being an unadopted rule. On June 30, 2021, the Unopposed Motion was granted, and the First Amended Petition was accepted as establishing the issues for disposition in this case.

By agreement of the parties, this case was bifurcated to allow for a determination of whether the Florida Fish and Wildlife Conservation

Commission's (Commission or Respondent) application of the term "vessel traffic congestion" as the basis for the Proposed Rule constitutes an unadopted rule. The issue of whether the Proposed Rule enlarges, modifies, or contravenes the specific provisions of law implemented, or is arbitrary or capricious, and is thus an invalid exercise of delegated legislative authority, was to be deferred until disposition of the unadopted rule challenge. The hearing on the unadopted rule challenge was scheduled for August 11, 2021.

The parties filed their Joint Pre-hearing Stipulation as to the unadopted rule challenge on August 9, 2021, in which they stipulated to nine facts that would require no proof at hearing. Those facts have been incorporated herein.

The first phase of the final hearing was held on August 11, 2021, as scheduled. Without objection, Joint Exhibits 1 and 2; Petitioner's Exhibits 1 through 8; and Respondent's Exhibits 1 through 4 were received in evidence. Petitioner's Exhibit 7 is the Affidavit of Michael Kennedy, a member of Petitioner and chair of its boating and legislative issues committee, who provided, without objection, a sworn statement in lieu of live testimony in support of Petitioner's standing. Petitioner's Exhibit 8 is the deposition transcript of the Commission's agency representative, Major Robert Rowe, which is accepted as a party deposition. Both the Affidavit of Mr. Kennedy and the deposition of Major Rowe were accepted and given weight as though the statements therein were provided through live testimony at the hearing.

Respondent and Petitioner each listed Major Robert Rowe as their sole live witness, and he was called to the stand and questioned by both.

The one-volume Transcript of the final hearing was filed on September 21, 2021. The parties, having requested 20 days from the filing of the transcript

within which to file post-hearing submittals, timely filed their post-hearing submittals.

On October 20, 2021, an Interlocutory Order on Challenge to Unadopted Rule and Order Requiring Status Report (Interlocutory Order) was entered which determined "[t]hat the Commission's reliance on the vessel traffic congestion standards in rule 68D-21.004(3)(c) as the basis for the Proposed Rule constitutes an unadopted rule that violates section 120.54(1)(a); and that the Commission did not prove that rulemaking to adopt its own vessel traffic congestion standards is not feasible or practicable." The Interlocutory Order also required that the parties confer with one another as to the necessity of going forward with a hearing on the issue of whether the Proposed Rule is an invalid exercise of delegated legislative authority.

On November 3, 2021, the parties filed a Joint Status Report indicating "that a second phase of the final hearing is unnecessary on the issue of whether the Respondent's Proposed Rule - Florida Administrative Code Rule 68D24.017(1)(s) - is an invalid exercise of delegated legislative authority." The Joint Status Report further requested, in a process described in the Interlocutory Order, that the undersigned "reissue its Interlocutory Order on Challenge to Unadopted Rule as a Final Order with resultant rights of appeal pursuant to section 120.68." Finally, Petitioner requested that the undersigned retain jurisdiction to determine Petitioner's entitlement to an award of reasonable attorney's fees and costs pursuant to sections 120.595(2) and 120.595(4), Florida Statutes, and concurrently filed a separate Motion for Determination of Entitlement to Attorney's Fees and Costs in Final Order Pursuant to Section 120.595(4), Florida Statutes.

References to statutes are to Florida Statutes (2020), unless otherwise noted.

FINDINGS OF FACT

Stipulated Facts

1. The initial Petition in this case was filed on May 21, 2021, and was timely filed concerning the Proposed Rule.

2. The Proposed Rule relies on the Commission's authority to establish slow-speed boating restrictions based on "vessel traffic congestion" in section 327.46(1), Florida Statutes.

3. The Commission has adopted rules pursuant to chapter 120 that interpret and implement the term "vessel traffic congestion" as such term is used in section 327.46(1)(c) with regard to the establishment of slow-speed boating-restricted areas by municipalities and counties.

4. The Commission has not adopted any rules pursuant to chapter 120 that interpret and implement the term "vessel traffic congestion" as such term is used in section 327.46(1), with regard to the establishment of slow-speed boating-restricted areas by the Commission.[1]

5. Petitioner is a not-for-profit organization created to promote and protect the sound growth of the marine industry in Palm Beach County for the benefit and education of its members, the community, and the environment.

6. Petitioner also regularly advocates at the state and local level on issues of importance to its members, including opposing legislation and rules that negatively impact boating, such as unreasonable boating restrictions.

7. A substantial number of Petitioner's members, including individual boaters and marine sector businesses, utilize waterways in Palm Beach County including the area known as the Jupiter Narrows that is subject to the Proposed Rule.

8. The Intracoastal Waterway (ICW) within Palm Beach County is traversed frequently by many of Petitioner's members for business and

[1] The Pre-hearing Stipulation also included, as a stipulated fact, that "[t]here is no statutory mandate that the Commission must adopt such rules." Counsel for Petitioner indicated that was based on a misunderstanding of the scope of the stipulation, and it was withdrawn.

pleasure, including that portion of the ICW within the area known as the Jupiter Narrows that is subject to the Proposed Rule.

9. Petitioner's members, as boaters, are regulated by the Commission and its rules regarding boating, including boating-restricted areas and slow-speed zones as would be imposed by the Proposed Rule.

Facts Adduced at Hearing

10. The Proposed Rule, in its entirety, is as follows:

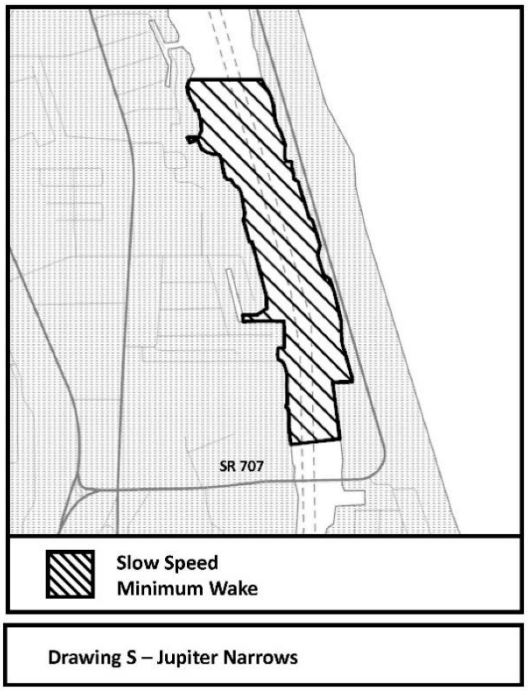
68D-24.017 Palm Beach County Boating Restricted Areas.

(1) For the purpose of regulating speed and operation of vessel traffic on the Intracoastal Waterway within Palm Beach County, Florida, the following boating restricted areas are established:

(s) Jupiter Narrows

300 feet north of the SR 707 Bridge to 4290 feet north of the SR 707 Bridge. A slow speed, minimum wake zone to be in effect from 7:00 a.m. until 9:00 p.m. on Saturdays, Sundays, and those holidays identified in Rule 68D-23.103, in and adjacent to the Florida Intracoastal Waterway, shoreline to shoreline, bounded on the south by a line drawn perpendicular to the centerline of the waterway 300 feet north of the centerline of the SR 707 (Gomez Road) Bridge, and bounded on the north by a line drawn perpendicular to the centerline of the waterway 4290 feet north of the SR 707 (Gomez Road) Bridge as depicted in drawing S.

Drawings A through R No change.



Rulemaking Authority 327.04, 327.302, 327.46 FS. Law Implemented 327.302, 327.46 FS. History–New 10-6-10, _____.

11. The sole basis for the Proposed Rule was the Commission's determination that boating-restricted areas are necessary for the Jupiter Narrows due to "vessel traffic congestion."

12. The Commission has not adopted a rule by which it identifies standards for Commission-adopted boating-restricted areas based on "vessel traffic congestion." Rather, Major Rowe testified that the Commission defines "vessel traffic congestion" for Commission-adopted boating-restricted areas by applying rule 68D-21.004, entitled "Criteria for Approval of Ordinances."

13. Rule 68D-21.004(3)(c) establishes the means and the required data for counties and municipalities to determine whether "unsafe levels of vessel traffic congestion, seasonal or year-round" warrant the adoption of local ordinances establishing slow-speed boating-restricted areas. The data used to determine vessel traffic congestion is specific and detailed. It is not simply an application of the dictionary definition of "congested." Importantly, rule 68D-21.004(3)(c) applies only to the establishment of local government ordinances. The rule does not, either expressly or by implication, apply to Commission-established boating-restricted areas.

14. Major Rowe testified that there is no bright-line rule for establishing whether a waterway is subject to vessel traffic congestion, because waterways are not uniform. Rather, they vary by width, depth, tidal influence, time of day, and time of year, among other variables.

15. The ICW extends through the Jupiter Narrows, with shallower waters extending to the shoreline on either side. Local governments do not have jurisdiction to regulate vessel traffic in the ICW. Major Rowe testified that a municipality requested that the Commission adopt a slow-speed rule for the Jupiter Narrows ICW since the municipality could not. In addition, the Commission received complaints from the public that boat traffic in the Jupiter Narrows was a danger to swimmers and other vessels in the area, though the nature and number of the complaints, in addition to their being hearsay, was not specified.

16. Major Rowe testified that the Commission did not adopt a definition of "traffic" and "congestion," "because it would have to be so general that it would be on the same level of what's already defined in the Webster's dictionary. The characteristic of the water being so varied, it would be very difficult, if not impossible, to have one single definition of congestion for every waterway in the state." Nonetheless, the Commission was capable of adopting "one single definition of congestion" that local governments must apply for all of the various and varied waterways throughout the state. Furthermore, the Commission applied rule 68D-21.004(3)(c)'s "one single definition of congestion" to determine that Jupiter Narrows is experiencing vessel traffic congestion, warranting adoption of the Proposed Rule.

17. In distinguishing how local governments are expected to determine "vessel traffic congestion" from how the Commission is expected to determine "vessel traffic congestion," Major Rowe testified that section 327.46 does not establish specific standards by which the Commission is to determine "vessel traffic congestion." Rather:

> It allows the people who do this every day in the FWC to make a decision based on what we do every day as opposed to a municipality that they might do this once every ten years. So, that's why there's a rule for the municipalities and the counties is because they are not in the waterway management business every day. We are.

Thus, despite previously admitting that the Commission applies the local government vessel-congestion standards, Major Rowe testified that "we used our in-house expertise to make those determinations."

18. The logical extension of the Commission's position is that any agency "in the business" of implementing and applying its enabling statutes would never have to adopt rules to govern and explain its actions since it operates under its expertise of applying those statutes "every day." That is not a result contemplated or authorized by section 120.52(16) ("'Rule' means each agency

statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency...."); section 120.54(1)(a) ("Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable."); or section 120.57(1)(e)1. ("An agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule....").

19. The evidence established that, despite its assertion that it is bound by no obligation to adopt or comply with any written and adopted standards, the Commission has a policy by which it "holds itself to the same standard" that has been adopted for municipal and county ordinances in rule 68D-21.004 for determining whether a waterway experiences vessel traffic congestion sufficient to warrant the creation of a boating-restricted area. That policy is unwritten. Major Rowe testified that "[i]t's the way we've always operated. We've always used the rule that we developed for the cities and the counties in order to use that as our standard as well. We feel like it's the fair thing to do. That's the way we've always operated." He further testified that *all* speed zone rules have met the rule 68D-21.004 standard. Thus, the evidence established that the Commission's application of the rule 68D-21.004(3)(c) local government standards is of general applicability.

20. The Commission's policy of applying rule 68D-21.004(3)(c) standards is not adopted by rule, and is not otherwise available to the public in written form. However, Major Rowe testified that persons interested in the issue could simply call the Commission and find out how the Commission determines vessel congestion. Although Major Rowe candidly admitted that, depending on who answered the telephone, "[t]hey would maybe get a different delivery and answer wouldn't be verbatim. It's not a script that they would get that we used the rule that we've developed for the cities and counties to apply to our own rulemaking," he felt confident that anyone

inquiring would be able to ascertain that the Commission uses the local government rule to determine vessel congestion for the Commission's boating-restricted areas. Nonetheless, he agreed that the purpose of adopting a rule is so that citizens do not have to call individual Commission employees to find out what standards the Commission applies to itself.

21. Major Rowe also indicated that the Commission had "desk procedures" regarding how its planners process ordinances. Those desk procedures were, at the time of the hearing, under development, and do not address the creation of boating-restricted areas. Such procedures were not well described, and, in any event, are not generally available to the public.

22. The evidence was conclusive that the Commission has a policy by which it applies rule 68D-21.004 in adopting its boating-restricted areas. It was equally conclusive that the policy is not written, and that the policy has not been adopted as a rule by the Commission. The Commission relied exclusively on the application of its policy to determine whether Jupiter Narrows experienced vessel traffic congestion sufficient to warrant adoption of the Proposed Rule.

23. Despite the variability in waterways, the Commission was able to establish, by rule, statewide standards for counties and municipalities to apply in determining whether waterways in their varying jurisdictions are experiencing vessel traffic congestion. That is conclusive evidence that rulemaking to adopt standards for the Commission to apply in determining whether a waterway is experiencing vessel traffic congestion is feasible and practicable under section 120.54(1)(a).

24. As to whether rulemaking is feasible, there is nothing to suggest that the Commission has not had sufficient time to acquire the knowledge and experience reasonably necessary to address standards to determine vessel traffic congestion by rulemaking; or that related matters are not sufficiently resolved to enable the Commission to address standards to determine vessel traffic congestion by rulemaking.

25. As to whether rulemaking is practicable to provide fair notice to affected persons of Commission procedures and principles, criteria, or standards for determining levels of vessel traffic congestion sufficient to impose slow-speed boating-restricted areas, there is nothing to suggest that detail or precision in the establishment of those principles, criteria, or standards is not reasonable under the circumstances. Moreover, nothing suggests that the particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication.

CONCLUSIONS OF LAW

Jurisdiction

26. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties to this proceeding. §§ 120.56(4), 120.569, and 120.57(1), Fla. Stat.

Standing

27. Section 120.56(4)(a) provides, in pertinent part, that "[a]ny person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a)."

28. In order to demonstrate standing to challenge Respondent's alleged agency statements as unadopted rules, Petitioner must meet the two-pronged test for standing in formal administrative proceedings established in the seminal case of *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). In that case, the Court held that:

> We believe that before one can be considered to have a substantial interest in the outcome of the proceeding, he must show 1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing and 2) that

> his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Id. at 482. The standing requirements described in *Agrico* are applicable to rule challenges, including unadopted rule challenges, brought pursuant to section 120.56. *Jacoby v. Fla. Bd. of Med.*, 917 So. 2d 358, 360 (Fla. 1st DCA 2005).

29. The injury necessary to support standing cannot be speculative, nonspecific, hypothetical, or lacking in immediacy or reality. *All Risk Corp. of Fla. v. State Dep't of Labor & Emp. Sec., Div. of Workers' Comp.*, 413 So. 2d 1200, 1202 (Fla. 1st DCA 1982); *Fla. Dep't of Offender Rehab. v. Jerry*, 353 So. 2d 1230, 1235 (Fla. 1st DCA 1978).

30. The standing requirement established by *Agrico* has been refined, and now stands for the proposition that standing to initiate an administrative proceeding is not dependent on the ultimate success of the challenge to a governmental action. Instead, standing requires proof that Petitioner has a substantial interest and that the interest reasonably could be affected by the proposed agency action. Whether the effect would constitute a violation of applicable law is a separate question.

> Standing is "a forward-looking concept" and "cannot 'disappear' based on the ultimate outcome of the proceeding." ... When standing is challenged during an administrative hearing, the petitioner must offer proof of the elements of standing, and it is sufficient that the petitioner demonstrate by such proof that his substantial interests "*could* reasonably be affected by ... [the] proposed activities." (emphasis in original).

Palm Beach Cnty. Envtl. Coal. v. Fla. Dep't of Envtl. Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009)(citing *Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1083 (Fla. 2d DCA 2009), and

Hamilton Cnty. Bd. of Cnty. Comm'rs v. State Dep't of Envtl. Reg., 587 So. 2d 1378 (Fla. 1st DCA 1991)).

31. If the Proposed Rule is allowed to become effective, Petitioner and its respective members would be governed by boat restrictions and speed zone created by the Proposed Rule, and therefore each is substantially affected in a manner and degree sufficient to confer administrative standing in this case. *See, e.g., Abbott Labs. v. Mylan Pharms., Inc.*, 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009); *Dep't of Prof'l Reg., Bd. of Dentistry v. Fla. Dental Hygienist Ass'n, Inc.*, 612 So. 2d 646, 651 (Fla. 1st DCA 1993); *see also Cole Vision Corp. v. Dep't of Bus. & Prof'l Reg., Bd. of Optometry*, 688 So. 2d 404, 407 (Fla. 1st DCA 1997)(recognizing that "a less demanding standard applies in a rule challenge proceeding than in an action at law, and that the standard differs from the 'substantial interest' standard of a licensure proceeding.").

32. Associations have standing to bring a rule challenge when:

> a substantial number of [the association's] members, although not necessarily a majority, are "substantially affected" by the challenged rule. Further, the subject matter of the rule must be within the association's general scope of interest and activity, and the relief requested must be the type appropriate for a trade association to receive on behalf of its members.

Fla. Home Builders Assn' v. Dep't of Labor & Emp. Sec., 412 So. 2d 351, 353-54 (Fla. 1982); *see also NAACP, Inc. v. Bd. of Regents*, 863 So. 2d 294, 298 (Fla. 2003).

33. Petitioner has standing to challenge the agency statement at issue as an unpromulgated rule. Petitioner demonstrated that a substantial number of its private and business sector members utilize waterways in Palm Beach County, including Jupiter Narrows, that is subject to the Proposed Rule. Petitioner's boating members are regulated by the Commission and its rules regarding boating, including boating-restricted areas and slow-speed zones imposed by the Proposed Rule. Thus, Petitioner meets the *Agrico* immediate

injury prong. Petitioner also meets the second prong of the *Agrico* test, as it and its members are within the zone of interest to be protected or regulated by the boating-restricted areas and slow-speed zone rules for Jupiter Narrows. *Jacoby v. Fla. Bd. of Med.*, 917 So. 2d at 360.

34. It is concluded that, based on the stipulated facts and the affidavit filed by Mr. Kennedy, Petitioner meets the standards for associational standing.

Burden of Proof

35. Petitioner has the burden of demonstrating that the agency statement regarding "vessel traffic congestion" meets the definition of a rule, and that the agency has not adopted the statement by rulemaking procedures. *S.W. Fla. Water Mgmt. Dist. v. Charlotte Cnty.*, 774 So. 2d 903, 908 (Fla. 2d DCA 2001); *see also Ag. for Pers. with Disab. v. C.B.*, 130 So. 3d 713, 717 (Fla. 1st DCA 2013).

36. The standard of proof is by a preponderance of the evidence. § 120.56(1)(e), Fla. Stat.

37. "A 'preponderance' of the evidence is defined as 'the greater weight of the evidence,' ... or evidence that 'more likely than not' tends to prove a certain proposition." *Gross v. Lyons*, 763 So. 2d 276, 280 n.1 (Fla. 2000) (citations omitted).

38. Section 120.56(4)(c) provides that "[i]f a hearing is held and the petitioner proves the allegations of the petition, the agency shall have the burden of proving that rulemaking is not feasible or not practicable under s. 120.54(1)(a)."

39. Section 120.56(4)(e) provides that "[i]f ... all or part of an unadopted rule violates s. 120.54(1)(a), the agency must immediately discontinue all reliance upon the unadopted rule or any substantially similar statement as a basis for agency action."

Standards

40. Section 120.52(16) defines a rule, in pertinent part, as:

> ... each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

41. Agencies must adopt, as rules, those statements meeting the definition of a rule. Section 120.56(4)(g) provides that:

> Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.
>
> 1. Rulemaking shall be presumed feasible unless the agency proves that:
>
> a. The agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking; or
>
> b. Related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking.
>
> 2. Rulemaking shall be presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that:
>
> a. Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or

> b. The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.

42. An "unadopted rule" is defined as an agency statement that meets the definition of the term rule, but that has not been adopted pursuant to the requirements of section 120.54. § 120.52(20), Fla. Stat.

43. An agency statement is "generally applicable" if it is intended by its own effect to create rights, or to require compliance, or otherwise have the direct and consistent effect of law. *Coventry First, LLC v. Off. of Ins. Reg.*, 38 So. 3d 200, 203 (Fla. 1st DCA 2010)(quoting *McDonald v. Dep't of Banking & Fin.*, 346 So. 2d 569, 581 (Fla. 1st DCA 1977)). Furthermore, "[w]hen deciding whether a challenged action constitutes a rule, a court analyzes the action's general applicability, requirement of compliance, or direct and consistent effect of law." *Fla. Dep't of Fin. Servs. v. Cap. Collateral Reg'l Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007), citing *Volusia Cnty. Sch. Bd. v. Volusia Home Builders Ass'n, Inc.*, 946 So. 2d 1084, 1089 (Fla. 5th DCA 2006).

44. It is well established that:

> An agency statement that "implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency" is considered a "rule." Statements that are rules cannot be enforced unless they are formally adopted in accordance with requirements set forth in chapter 120. If an agency statement meets the definition of a rule, but hasn't been adopted as a rule under chapter 120, then it is considered an "unadopted rule." Agencies may not enforce an unadopted rule against a party's substantial interests. (citations omitted).

Grabba-Leaf, LLC v. Dep't of Bus. & Prof'l Reg., 257 So. 3d 1205, 1208 (Fla 1st DCA 2018).

Analysis

45. Section 327.46(1) provides for the establishment of:

> Boating-restricted areas, including, but not limited to, restrictions of vessel speeds and vessel traffic, may be established on the waters of this state for any purpose necessary to protect the safety of the public if such restrictions are necessary based on boating accidents, visibility, hazardous currents or water levels, *vessel traffic congestion*, or other navigational hazards or to protect seagrasses on privately owned submerged lands. (emphasis added).

46. Section 327.46(1)(a) provides that the Commission "may establish boating-restricted areas by rule pursuant to chapter 120." Though the Commission has established numerous boating-restricted areas, it has not set forth standards by which it determines whether cause exists for the designation of such areas, and particularly whether those areas suffer from vessel traffic congestion.

47. Section 327.46(1)(c)2.b. provides that:

> *Municipalities and counties* have the authority to establish by ordinance the following other boating-restricted areas:
>
> * * *
>
> 2. An ordinance establishing a slow speed, minimum wake, or numerical speed limit boating-restricted area if the area is:
>
> * * *
>
> b. Subject to unsafe levels of vessel traffic congestion.

48. In order to implement section 327.46(1)(c)2.b., the Commission adopted rule 68D-21.004(3)(c), which, at the time the Proposed Rule was adopted, provided extensive and detailed standards and a procedure by which *local governments* may determine if a local water body is "[s]ubject to unsafe

levels of vessel traffic congestion, seasonal or year-round," thus warranting "[a]n ordinance establishing a 'slow speed, minimum wake' boating-restricted area or numerical speed limit boating-restricted area."

49. The Proposed Rule was adopted based solely on the Commission's determination that Jupiter Narrows was subject to unacceptable levels of vessel traffic congestion.

50. In adopting the Proposed Rule, the Commission relied exclusively on rule 68D-21.004(3)(c) local government standards for determining the degree of vessel traffic congestion warranting local speed zone ordinances as support. Rule 68D-21.004(3)(c) is, on its face, inapplicable to boating-restricted areas established by the Commission.

51. To paraphrase the First District Court of Appeal's opinion in *Florida Quarter Horse Track Association, Inc. v. Department of Business and Professional Regulation*, 133 So. 3d 1118, 1119-20 (Fla. 1st DCA 2014), so as to make that opinion analogous to the facts of this case:

> A policy which allows [the Commission to establish boating-restricted areas] by deeming that activity [to be subject to local government vessel traffic congestion standards] is without question a statement of general applicability having the force and effect of law. Florida administrative law does not allow an agency to establish such a policy stealthily …; this is equally true whether the policy is highly controversial or widely praised. To be legal and enforceable, a policy which operates as law must be formally adopted in public, through the transparent process of the rulemaking procedure set forth in section 120.54.

52. Based on the Findings of Fact, and for the reasons set forth herein, the vessel traffic congestion standards upon which the Proposed Rule is predicated, which have not been adopted by rule despite the clear ability to do so, are "rules" as defined in section 120.52(16), and are "unadopted rules" under section 120.56(4). Furthermore, rulemaking to adopt standards

applicable to Commission-established boating-restricted areas is both feasible and practicable.

ORDER

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

1. That the Commission's reliance on the vessel traffic congestion standards in rule 68D-21.004(3)(c) as the basis for the Proposed Rule constitutes an unadopted rule that violates section 120.54(1)(a); and that the Commission did not prove that rulemaking to adopt its own vessel traffic congestion standards is not feasible or practicable.

2. Pursuant to sections 120.56(4)(e) and 120.57(1)(e)1., the Commission must immediately discontinue reliance upon the unadopted vessel traffic congestion rule and any substantially similar statement until rules addressing the subject are properly adopted.

3. Petitioner's Motion for Determination of Entitlement to Attorney's Fees and Costs in Final Order Pursuant to Section 120.595(4), Florida Statutes, has been opened as a new case, DOAH Case No. 21-3366F, and further proceedings shall be governed by the Notice entered in the docket of that case.

DONE AND ORDERED this 4th day of November, 2021, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of November, 2021.

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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.