STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JACARANDA AT CENTRAL PARK MASTER ASSOCIATION, INC.,

Petitioner,

vs. Case No. 22-0849RX

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Respondent,

and

SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, SUWANNEE RIVER WATER MANAGEMENT DISTRICT, AND FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Intervenors.
_____/

FINAL ORDER

Pursuant to notice, a final hearing in this case was conducted before Administrative Law Judge ("ALJ") Mary Li Creasy, Division of Administrative Hearings ("DOAH"), in person in West Palm Beach, Florida, and by Zoom conference on May 16, 19, and 20, 2022.

APPEARANCES

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STATEMENT OF THE ISSUES

Whether the "public safety" phrase, contained in section 5.4.2(d), Environmental Resource Permit Applicant's Handbook Volume II, for Use Within the Geographic Limits of the South Florida Water Management District ("SFWMD Applicant Handbook Volume II") ("Side Slope Rule"), and incorporated by reference into Florida Administrative Code Rule 40E-4.091, constitutes an invalid exercise of delegated authority. Before that issue may be reached, however, it is necessary to determine whether Petitioner has standing to challenge the proposed rule.

PRELIMINARY STATEMENT

This case challenges an existing environmental resource permitting ("ERP") rule governing the design of stormwater management systems ("SWMS") under section 120.56, Florida Statutes. On March 18, 2022, Petitioner, Jacaranda at Central Park Master Association, Inc. ("Petitioner"

or "Jacaranda"), filed a petition for administrative hearing challenging the validity of two words–"public safety" (the "Challenged Phrase") in South Florida Water Management District's ("SFWMD") Side Slope Rule.

SFWMD's Side Slope Rule states that "for purposes of public safety, water quality enhancement and maintenance, all wet retention/detention areas shall be designed with side slopes no steeper than 4:1 (horizontal:vertical) from top of the bank out to a minimum depth of two feet below the control elevation or an equivalent substitute … ." The petition asserts the Challenged Phrase constitutes an invalid exercise of delegated legislative authority because: (1) SFWMD exceeded its statutory authority, (2) the rule is arbitrary, (3) the rule enlarges and modifies a law implemented, and (4) the rule is not the least costly regulatory alternative.

While it initially appeared that the case could be resolved through a summary final order, the parties agreed there were limited areas where disputed issues of material fact existed and that a final hearing was necessary. On April 7, 2022, SFWMD filed an Agreed-to Motion to Schedule the Case for Final Hearing, Modify Order of Pre-hearing Instructions, and Schedule a Case Management Conference.

On April 15, 2022, the Department of Environmental Protection ("DEP"), Southwest Florida Water Management District ("SWFWMD"), St. Johns River Water Management District ("SJRWMD"), and Suwanee River Water Management District ("SRWMD") (collectively referred to as "Intervenors") filed a Joint Motion to Intervene in this matter, which was granted on April 27, 2022.

On April 15, 2022, Jacaranda filed an amended petition. Although the amended petition was not accompanied by a motion for leave to amend, the

amended petition was accepted on April 19, 2022, and it became the operative petition for this proceeding. On April 22, 2022, SFWMD filed a motion to strike, or in the alternative, a motion in limine to preclude Jacaranda's argument that the Challenged Rule imposed regulatory costs that could be reduced by the adoption of less costly alternatives. On May 3, 2022, the motion to strike was granted.

The final hearing was held at SFWMD's headquarters in West Palm Beach and via Zoom conference on May 16, 19, and 20, 2022. Jacaranda presented the testimony of Robert M. Brown, who was accepted as an expert in biology as it relates to ERPs. Jacaranda filed videotaped direct and cross-examination testimony of Anthony Waterhouse, P.E., in lieu of live testimony. Jacaranda also called Jesse Markle, P.E., SFWMD's expert, as part of its case-in-chief. On rebuttal, Jacaranda called on Mr. Brown and Robert Higgins, P.E., who was accepted as an expert in engineering. Jacaranda's Exhibits 1 through 3 and 5 through 7 were admitted.

Respondent and Intervenors presented the testimony of the following witnesses: SFWMD presented the testimony of Jesse Markle, a professional engineer, who was accepted as an expert in stormwater engineering; DEP presented the testimony of John Coates, a professional engineer, who was accepted as an expert in engineering; SJRWMD presented the testimony of Cameron Dewey, a professional engineer, who was accepted as an expert in stormwater engineering; and SWFWMD presented the testimony of Monte Ritter, a professional engineer, who was accepted as an expert in water resources management and stormwater system design. SFWMD's Exhibits 1 through 3 and 9 through 35; DEP's Exhibits 1 through 3; SWFWMD's Exhibits 1 through 4; SJRWMD's Exhibits 1 through 9; and SRWMD's Exhibits 1 and 2 were admitted.

At the end of the hearing, the parties agreed to extend the deadline to submit proposed final orders to 30 days after the filing of the final hearing transcript. The three-volume Transcript was filed with DOAH on June 15, 2022. Respondent and Intervenors moved ore tenus to increase the page limit, set forth in Florida Administrative Code Rule 28-106.215, to 60 pages should Respondent and Intervenors decide to file a joint proposed final order, which was granted. Respondent and Intervenors later moved to increase the page limit to 80 pages, which was granted by Order dated July 11, 2022, and the parties agreed that the undersigned's time limit for issuing the Final Order was increased to 45 days after the filing of the proposed final orders given the increased page limit and the complexity of the issues presented. All parties timely filed proposed final orders, which were considered in the drafting of this Final Order. Unless otherwise indicated, citations to the Florida Statutes refer to the 2022 version.

FINDINGS OF FACT

The Parties

1. SFWMD is a government entity existing by virtue of chapter 25270, Laws of Florida (1949), and operating pursuant to chapter 373, Florida Statutes, and Florida Administrative Code Titles 40E and 62, as a multi-purpose water management district with the authority in chapter 373, part IV, to regulate the construction, operation, and maintenance of surface water/stormwater management systems, within its geographic regions, which includes the geographic region where Jacaranda's property is located.

2. DEP is the administrative agency of the State of Florida statutorily charged with, among other things, protecting Florida's water resources and exercising general supervisory authority over the water management districts. As part of DEP's performance of these duties, it administers and enforces the provisions of chapter 373, part IV, and the rules promulgated thereunder in the Florida Administrative Code.

3. The intervening water management districts are government entities operating pursuant to chapter 373 and Florida Administrative Code Titles 40B (SRWMD), 40C (SJRWMD), 40D (SWFWMD), and 62, as multi-purpose water management districts with the authority in chapter 373, part IV, to regulate the construction, operation, and maintenance of surface water management systems within their geographic regions.

4. Jacaranda is a Florida corporation, operating since the mid-1980's as a Master Homeowner's Association in Broward County, Florida. It is comprised of 12 residential homeowner's associations ("HOAs") and one commercial development. The relationship between Jacaranda and its members is set forth in the Master Declaration for Jacaranda at Central Park ("Master Declaration," Pet'r Ex. 1). There are approximately ten wet detention/retention areas (also known as stormwater ponds) among the property owned by the members of Jacaranda.

The Side Slope Rule and Challenged Phrase

5. SFWMD Applicant Handbook Volume II provides specific detailed water quality and quantity design and performance criteria for SWMS regulated by SFWMD through the ERP Program authorized under chapter 373, part IV. SFWMD Applicant Handbook Volume II explains and provides more detail on the rule criteria for stormwater quality and quantity contained in Florida Administrative Code Chapter 62-330.

6. SFWMD's Side Slope Rule states:

> Side slopes for wet retention/detention and attenuation areas – for purposes of *public safety*, water quality enhancement and maintenance, all wet retention/detention areas shall be designed with side slopes no steeper than 4:l (horizontal:vertical) from top of bank out to a minimum depth of two feet below the control elevation, or an equivalent substitute. Constructed side slopes steeper than 3.5:1 (horizontal:vertical) shall be considered a substantial deviation during the consideration of operation permit issuance. Side

> slopes shall be topsoiled, and stabilized through seeding or planting from 2 feet below to 1 foot above the control elevation to promote vegetative growth. Side slope vegetation growth survival shall be a consideration of operation permit issuance. Side slope dimensional criteria for above ground impoundments are set forth in Appendix B. (Emphasis added).

7. A wet detention/retention area is an area that is used to provide water quality treatment and attenuation of stormwater runoff from developed areas. Attenuation is storage of runoff and reduction of a discharge rate at which the runoff would otherwise leave the property. Control elevation is the lowest elevation at which water can exit the stormwater management system.

8. Runoff from lawns, roads, and other pervious and impervious surfaces flow into the stormwater ponds. They are intended to provide a place for pollutants to be collected and runoff to be treated before discharge offsite. Pollutants that sheet flow from stormwater runoff can include oils, greases, nutrients, sediment, pesticides, and particulate matter bound in sediment and fecal matter from pets and other species. For this reason, stormwater ponds are not designed for recreational purposes such as swimming, fishing, and boating.

9. The 4:1 ratio applies to the initial ERP application. SFWMD will not approve an application to construct a wet detention/retention area that proposes side slopes steeper than the 4:1 ratio. Once construction is complete, the project must be certified by a professional engineer. SFWMD's Side Slope Rule also includes a 3.5:1 ratio, allowing an operational tolerance or margin of error between the permitted 4:1 plan and how the side slope was actually constructed. SFWMD cannot accept any as-built certifications for projects with slopes steeper than 3.5:1.

10. The Challenged Phrase and the first sentence of SFWMD's Side Slope Rule have never changed. The section of the Applicant's Handbook at

issue is the same as it was in March of 1980, except the numbering has changed to 5.4.2(d).

11. After construction, the ERP originally issued to a developer is converted to an operational/maintenance ERP and transferred to whatever entity owns and/or operates the property once it is developed. However, SFWMD has no inspection and enforcement program for the Side Slope Rule after construction. There are no monitoring report requirements for stormwater ponds. In fact, SFWMD is not aware of any past enforcement action, including fines or revocation, against a permittee for failing to comply with the 4:1 side slope ratio post-construction.

12. Persuasive testimony was presented that the 4:1 side slope ratio around stormwater ponds is difficult to maintain over time due to the natural forces of erosion. Wind and wave action at the perimeter of stormwater ponds result in significant change and erosion during the lifetime of a stormwater pond.

13. SFWMD recognizes the impracticality of maintaining the 4:1 ratio over time and does not require pond slopes to be regraded if the SWMS is effectively operating and if general maintenance is possible. Anthony Waterhouse, P.E., Petitioner's expert in ERP engineering practices, testified, "While I was employed at the Water Management District I can't, I can't recall a situation where someone was required to adjust the side slope as long as the [SWMS] was functioning as intended and the entity could carry out the responsibilities for operation and maintenance."

Jacaranda's Standing

a. Responsibility as the Master Association

14. Jacaranda contends it has standing primarily because it has responsibility as the master association for the SWMS within the "common areas" of the development comprised of the 12 HOAs and the commercial development. As such, Jacaranda contends that it is subject to the requirement of the ERP and the Side Slope Rule.

15. Jacaranda's responsibilities for stormwater ponds is set forth the in the Master Declaration, section 2.11, which provides:

> 2.11 Surface Water Management System. It is acknowledged the surface water management and drainage system for the subject property is one integrated system, and accordingly shall be deemed a COMMON AREA, and an easement is hereby created over the entire SUBJECT PROPERTY for surface water drain drainage, provided however that such easement shall be subject to improvements constructed within the SUBJECT PROPERTY as permitted by controlling governmental authorities from time to time. The surface water management and drainage system of the SUBJECT PROPERTY shall be developed, operated, and maintained in conformance with the requirements of the South Florida Water Management District and/or any other controlling governmental entity. The MASTER ASSOCIATION shall maintain as a common expense the entire surface water management and drainage system for the SUBJECT PROPERTY, including but not limited to all lakes, canals, swim areas, retention areas, culverts, and related appurtenances, regardless of whether or not same are owned by the MASTER ASSOCIATION. Such maintenance shall be performed in conformance with the requirements of the South Florida Water Management District, and any other controlling governmental authority, and an easement for such maintenance is hereby created. *Such maintenance responsibility on the part of the MASTER ASSOCIATION shall not be deemed to include the maintenance of the banks of any lake or canal*, or the maintenance of any landscaping, within any property which is not COMMON AREA or which is not otherwise to be maintained by the MASTER ASSOCIATION pursuant to this declaration. (Emphasis added).

16. No testimony was offered regarding the property included within the definition of "common areas."[1] Although Jacaranda said it owned the stormwater ponds, no documentary evidence, such as deeds or plats, was admitted supporting that contention. It remains unclear whether Jacaranda is in fact the property owner of the land constituting the side slopes of the stormwater ponds permitted by SFWMD.

17. Most notably, the Master Declaration specifically excludes maintenance of side slopes from the responsibilities of Jacaranda. This was confirmed by the testimony of Charles Zusag, Petitioner's Vice President and Treasurer, who explained that maintenance and landscaping of the side slopes of stormwater ponds are the responsibility of the individual HOAs. No documentary evidence was admitted showing that Jacaranda maintained any portion of the stormwater pond. According to Mr. Zusag, "The only thing we ever do is spray for weeds and midges and mosquitos and things like that."

18. Mr. Zusag also testified that regardless of whether the Challenged Phrase was removed from the Side Slope Rule, Jacaranda would not comply due to SFWMD's history of non-enforcement.

19. No testimony or evidence was introduced to show Jacaranda was authorized to bring the rule challenge on behalf of any HOA. Neither SFWMD nor Jacaranda was able to produce any ERP issued to Jacaranda as the operating entity. Jacaranda is not the subject of a SFWMD compliance investigation or any enforcement action regarding the 4:1 side slope.

b. Financial Considerations

20. Jacaranda also argues it has standing to bring this rule challenge because its financial interests are at stake. On or about December 18, 2018, a 16-month-old child fell into an affiliated HOA development's stormwater pond, suffered catastrophic injuries, and Jacaranda and the individual HOA

[1] Jacaranda used a demonstrative exhibit at the final hearing to show the location of ponds alleged to be in the common areas for which Jacaranda has responsibility. However, it was precluded from coming into evidence because it was not timely produced during discovery to the opposing parties.

were sued. That lawsuit was settled for an undisclosed amount. The Complaint, Answer, and Order Approving Settlement/Minors Claim for *Padilla v. Jacaranda at Central Park Master Association, Inc., et al.*, Case CACE 2004464(12), 17th Judicial Circuit in and for Broward County, Florida, were granted official recognition by the undersigned pursuant to an Order issued on May 11, 2022. (*See* Exs. D, E, and F to Resp't's May 10, 2022, Joint Mot. for Off. Recognition).

21. Plaintiffs in *Padilla* asserted multiple theories of liability against the Defendants. Paragraph 25 of the Complaint states:

> Notwithstanding the duty undertaken by defendant JACARANA, it breached its duty to the minor child, by engaging in the following negligent acts or omissions:
>
> a. Failing to recognize that the property is accessed by children.
>
> b. Failing to recognize that the body/bodies of water on the property would be attractive to a minor child.
>
> c. Failing to recognize that the body/bodies of water on the property are a danger and/or probable cause of injury and/or harm to children.
>
> c [sic]. Failure to recognize that due to age, a minor is not able to understand or acknowledge the danger of a body of water on the property.
>
> d. Failing to recognize its responsibility to have safeguards in place on a property containing the attractive nuisance of a body/bodies of water to prevent the endangerment of children.
>
> e. Failure to demand its co-governing Homeowner's Associations place into effect certain safeguards and/or preventions of attractive nuisances in their communities.

22. The Complaint also makes multiple references to the planned community guidelines for the City of Plantation, Broward County, regarding a 35 percent slope into the body of water which is a danger and falling hazard. The Complaint also alleges that Jacaranda has vicarious liability for the negligence of the HOA.

23. Notably absent from the Complaint is any reference to the SFWMD's Side Slope Rule, which is the subject of this rule challenge.

24. Mr. Zusag opined that if it was not for the phrase "public safety" in the SFWMD's Side Slope Rule, it would "likely" not have been sued. This is directly contradicted by the Allegations of the Complaint itself. Jacaranda brings this rule challenge because of its concern for: (1) future personal injury liability arising from a negligence action; (2) the increased costs of insurance; and (3) the costs to repair the side slope to a 4:1 requirement.

25. Because the *Padilla* matter was settled, there was no finding of liability by a jury or court. No personal injury lawyer or expert explained the motivations for settlement. There was no evidence presented that the "public safety" phrase at issue in the instant matter created "per se" liability for Jacaranda.

26. Mr. Zusag testified that after the settlement of the personal injury lawsuit, Jacaranda's property insurance rate rose significantly, and Jacaranda had difficulty securing insurance. No evidence was presented to demonstrate any actual correlation between the lawsuit settlement and the higher insurance rates.

27. Mr. Zusag testified that the side slopes of some unidentified stormwater ponds do not presently meet the 4:1 side slope criterion. Jacaranda presented evidence that it would cost $1,425,000.00 to return the 19,000 linear feet of side slopes at the ten stormwater ponds on properties owned by its HOA members to the required 4:1 dimension. But Jacaranda is not going to comply with the 4:1 side slope requirement unless SFWMD forces it to do so.

28. Jesse Markle, P.E., the Bureau Chief of the SFWMD's ERP and Environmental Compliance Programs, testified that he is not sure who SFWMD would take enforcement action against. He would need to investigate the matter and transfer the permit into the proper operating entity's name first.

29. Given the exclusionary language of Master Declaration, section 2.11, regarding lake banks (i.e, side slopes), it is entirely speculative that Jacaranda could be subject to any future enforcement action for failing to comply with the Side Slope Rule.

30. Further, if Jacaranda is subject to enforcement, it would need to comply regardless of whether the "public safety" language is in the rule. Jacaranda has not challenged the 4:1 side slope dimension itself, and it would remain for the other stated purposes of "water quality enhancement and maintenance."

CONCLUSIONS OF LAW

31. DOAH has jurisdiction over the parties and the subject matter of this proceeding under sections 120.56, 120.60, and 120.57. DOAH has final order authority in this matter under section 120.56(1)(e).

32. Any person substantially affected by a proposed rule may challenge the rule as an invalid exercise of delegated legislative authority. § 120.56(1)(a), Fla. Stat. A party's standing in an administrative hearing is, without question, jurisdictional. *Baywood Nurseries Co., Inc. v. Dep't of Health*, Case No. 15-1694RP, FO at 74 (Fla. DOAH May 27, 2015).

33. The petitioner must demonstrate: (1) the rule or policy will result in a real or sufficiently immediate injury in fact; and (2) their substantial injury is within the zone of interest to be protected or regulated. *Agrico Chem. Co. v. Dep't of Env't Regul.*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981); *Jacoby v. Fla. Bd. of Med.*, 917 So. 2d 358, 360 (Fla. 1st DCA 2005). The first prong of the

test examines the degree of injury while the second focuses on the nature of injury. *Agrico*, 406 So. 2d at 482.

Injury in Fact

34. To meet the first prong (real and immediate injury in fact), the alleged injury must not be so speculative, remote, or irrelevant that it fails to be of sufficient immediacy. *Vill. Park Mobile Home Ass'n v. Dep't of Bus. & Pro. Regul.*, 506 So. 2d 426, 429 (Fla. 1st DCA 1987); *Int'l Jai-Alai Players Ass'n v. Fla. Pari-Mutuel Ass'n*, 561 So. 2d 1224, 1226 (Fla. 3d DCA 1990); *Fla. Bd. of Med. v. Fla. Acad. of Cosmetic Surgery, Inc*., 808 So. 2d 243, 250 (Fla. 1st DCA 2002). The alleged injury must not be based on "pure speculation or conjecture." *Ward v. Bd. of Trs. of the Internal Imp. Tr. Fund*, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995); *Jacoby*, 917 So. 2d at 360. Jacaranda must either have (a) sustained an actual injury in fact when it filed the petition; or (b) be in immediate danger of sustaining some direct injury because of SFWMD's action. *See Vill. Park*, 506 So. 2d at 430. Jacaranda's evidence failed to meet this standard.

35. Jacaranda did not identify an injury it suffered solely because of the Challenged Phrase. The only "injury" admitted into evidence was monetary in nature and that Jacaranda would be required to comply with the 4:1 side slope requirement regardless of whether the Challenged Phrase was present in the rule.

36. As to its allegations of property ownership as the basis for its standing, Jacaranda failed to meet the burden of proof to establish what it owns. While Jacaranda said it owned the stormwater ponds, no documentary, non-hearsay evidence, such as deeds or plats, was admitted supporting that contention. Despite three days of testimony, it remains unclear whether Jacaranda is in fact the property owner of the land constituting the side slopes of stormwater ponds regulated and permitted by SFWMD. SFWMD did not find a permit with Jacaranda's name on it, either as the permittee or the operating entity.

37. Jacaranda also failed to submit any evidence demonstrating it assumed responsibility for the side slopes. No documentary evidence was admitted showing that Jacaranda maintained any portion of the stormwater pond. To the contrary, the only testimony provided by Jacaranda was an admission that it does not maintain the side slopes; but rather the individual HOAs within the Jacaranda community maintain the stormwater pond side slopes.

38. The ruling in *K.M. v. Florida Department of Health* is instructive in the instant case. 237 So. 3d 1084 (Fla. 3d DCA 2017). K.M., the petitioner, suffered from a heart condition, requiring pediatric care services. *Id*. at 1086. The petitioner was a beneficiary of Florida's Children's Medical Services ("CMS") program, which provided financial assistance for necessary medical services to qualifying children. *Id*. The Florida Department of Health filed a notice of a proposed rule for the purpose of repealing a rule that required pediatric cardiac facilities approved by CMS to comply with certain standards and submit the forms required by the rule. *Id*. at 1085. In response, K.M. filed a petition challenging the validity of the proposed rule, claiming the rule repeal would result in a reduced quality of care available within the CMS program. *Id*.

39. Following testimony, the ALJ found that "K.M. failed to prove the proposed deregulation of CMS-approved pediatric cardiac facilities would, in fact, have a real or immediate effect on the quality of care available through the CMS network." *Id*. at 1086. As a result, the ALJ determined that K.M. lacked standing to challenge the rule repeal and dismissed K.M.'s Petition for lack of jurisdiction. *Id*. The Third District Court of Appeal affirmed the dismissal, finding that the record failed to establish a real and immediate specific injury to the petitioner sufficient to establish standing. *Id*. at 1088. The court specifically held that "the repeal of the Rule, on its face, does not take away the benefit of quality cardiac care. Nor is it readily apparent that, in the absence of the Rule, CMS-approved facilities and clinics will stop

providing quality pediatric cardiac services." *Id*. Thus, the petitioner failed to meet its burden in establishing that the repeal of the rule likely would result in any real and immediate injury to the petitioner, in fact, as such claim was based solely on the speculation and conjecture that the quality of care would decline as a result of the rule change. *Id*. at 1089. Similarly, Jacaranda challenges what may fairly be considered a distinction without a difference. Merely challenging the phrase "public safety" will not result in a change to the substantive standards being applied in the Side Slope Rule and, thus, does not create an injury or otherwise confer standing upon a challenger to the existing rule.

40. Any injury Jacaranda would allegedly suffer is too speculative or remote. Future permit action contemplated, but not submitted to the agency for review, does not satisfy the "real or immediate" requirement of *Agrico's* injury in fact prong. *Suncoast Waterkeeper, Inc. v. Long Bar Point, LLP*, Case Nos. 17-0795 and 17-0796, RO at 55 (Fla. DOAH Mar. 6, 2018; Fla. DEP Apr. 27, 2018). The final hearing was devoid of any testimony that Jacaranda held an ERP permit, had a pending ERP application, or that it was contemplating applying to SFWMD. Thus, Jacaranda failed to identify an injury sufficient to convey standing. *Id.*

41. A petitioner does not have to wait for enforcement action to show it will suffer an injury of sufficient immediacy. A sufficient and immediate injury exists if the challenged rule subjects the petitioner to a penalty. *Ward*, 651 So. 2d at 1237. However, in this case, the potential of an enforcement action against Jacaranda is, at best, unclear. Given Mr. Zusag's testimony that side slope maintenance is performed by other associations and the exclusion language for lake and canal bank maintenance contained in Master Declaration, section 2.11, has not demonstrated that it is exposed to enforcement by SFWMD.

42. Additionally, Jacaranda's failure to comply with the Challenged Phrase would not independently create a penalty for Jacaranda. As

Jacaranda repeatedly stated, it is not challenging the substantive 4:1 side slope criterion. The removal of the Challenged Phrase would not alleviate the requirement that any stormwater ponds in Jacaranda's care be graded consistent with the rule. Instead, the removal of the Challenged Phrase from the rule would result in absolutely no change to Jacaranda's interests as to the gravamen of the challenged rule–the side slope requirements.

43. Jacaranda claims that it was injured by the Challenged Phrase when it was sued in *Padilla*, and the Challenged Phrase was used against Jacaranda throughout the litigation because its side slopes were not maintained at 4:1. A review of the Complaint shows this is demonstrably false. The Complaint alleged that Jacaranda violated rules of the City of Plantation, not those of SFWMD.

44. It is not enough for a person to allege they were previously affected by a rule to show standing. A petitioner must demonstrate that there is a "present adverse effect" of the rule upon them. *Fla. Dep't of Offender Rehab. v. Jerry*, 353 So. 2d 1230, 1235 (Fla. 1st DCA 1978). A person may demonstrate standing based on past injury if he or she is likely to be affected by the rule again. *Jacoby*, 917 So. 2d at 360. Jacaranda is not presently involved in litigation with someone injured by Jacaranda's failure to maintain the side slopes.

45. To find an injury, Jacaranda strings together several assumptions– someone will again fall into a stormwater pond that Jacaranda either owns or has a duty to maintain, Jacaranda will fail to maintain the pond despite its duty, the person will sustain significant injuries and bring a personal injury lawsuit, and Jacaranda would likely be found liable for the injuries, not because it failed to meet its alleged (but unproved) duty to maintain a pond with a 4:1 side slope, but instead for the sole reason that the Challenged Phrase, "public safety," still remains in the rule. This is too tenuous a connection.

46. Further, the lawsuit against Jacaranda settled before the court could determine Jacaranda's liability. Therefore, the injury Jacaranda claims is limited to the claim that the Challenged Phrase somehow caused—and may again cause—Jacaranda to be sued, but not that the Challenged Phrase resulted or will result in Jacaranda being held liable. This fact further attenuates Jacaranda's illusory future injury.

47. This case is similar to *Escambia County School Board v Warren*, where Mr. Warren and a local union for school support staff challenged a school board rule that would disqualify school board employees who were convicted of a crime enumerated in section 435.04, Florida Statutes, from employment. 337 So. 3d 496, 498 (Fla. 1st DCA 2022). These employees were clearly regulated by the rule under the second prong for standing. Even though Mr. Warren had pled guilty to a felony offense under another statute, neither Mr. Warren nor any other member of the union could demonstrate that they would be disqualified from employment by the original or amended rule, Mr. Warren had been rehired and the school board's decision to deny back pay to Mr. Warren was not based on the challenged rule. *Id.* at 498. As a result, the First District Court vacated the Final Order and dismissed the petitioners' challenge for lack of standing because—much like the matter at hand here—a concrete injury did not exist. *Id*. at 499, 500.

Zone of Interest

48. As to the second element of the standing test, "the general rule regarding the zone of interest element of the substantially affected test is that such element is met where a party asserts that a statute, or a rule implementing such statute, encroaches upon an interest protected by a statute or the constitution." *Ward*, 651 So. 2d at 1238. "In the context of a rule challenge, the protected zone of interest need not be found in the enabling statute of the challenged rule itself." *Id.*; *see Fla. Med. Ass'n, Inc. v. Dep't of Pro. Regul.*, 426 So. 2d 1112, 1117–18 (Fla. 1st DCA 1983). In other words, the petitioner must establish that one or more of its interests is

protected under the statute at issue, not merely that their interests be furthered by the proceeding. *Fla. Horsemen's Benevolent & Protective Ass'n, Inc., v. Dep't of Bus. Pro. Regul.*, Case No. 19-2860RU (Fla. DOAH Apr. 7, 2020).

49. Generally, administrative proceedings do not protect against economic injuries "unless the permitting or licensing statute and/or rules contemplate consideration of such interest." *Barry Roberts & Gloria Meredith Tr. v. Julia Fondriest,* Case Nos. 20-2473, 20-2474, and 20-2535, RO at 262 (Fla. DOAH Feb. 18, 2021; Fla. DEP Apr. 5, 2021). The caselaw is clear that economic injuries do not fall within the zone of protection considered under chapter 373. *Vill. of Key Biscayne v. Dep't of Env't Prot.*, 206 So. 3d 788, 791 (Fla. 3rd DCA 2016); *Mid-Chattahoochee River Users v. Fla. Dep't of Env't Prot.*, 948 So. 2d 794, 798-99 (Fla. 1st DCA 2006); *City of Sunrise v. So. Fla. Water Mgmt. Dist.,* 615 So. 2d 746, 747 (Fla. 4th DCA 1993).

50. Jacaranda failed to satisfy *Agrico's* second prong*;* it failed to present adequate evidence that its "injury" was to an interest of the type that is protected by this type of chapter 373 proceeding sufficient to meet the zone of interest prong. *See Agrico*, 406 So. 2d at 478. The only injuries alleged by Jacaranda was that it filed the petition to avoid being sued in the future for any injury a third party may suffer and to avoid further increases to its rising insurance premiums. Avoiding liability for a personal injury lawsuit is, at its heart, an economic injury.

51. Mr. Zusag testified that Jacaranda's insurance premiums increased after it settled a personal injury lawsuit. Such an injury is clearly economic in nature is wholly unrelated to the interests protected by the rule, i.e., protection of water quality and quantity from impacts related to stormwater, and is insufficient to convey standing. Furthermore, Mr. Zusag could not say that deleting the Challenged Phrase would lower Jacaranda's insurance premiums in the future.

52. Jacaranda's cost estimate to repair the side slopes was also admitted into evidence. But, as Jacaranda repeated several times, it was not going to comply with the 4:1 side slope requirement unless SFWMD forced it to do so. And further, compliance costs are not within the zone of interest that chapter 373 seeks to protect.

53. As the Findings of Fact make clear, Jacaranda failed to meet the first prong of *Agrico*. No competent evidence was presented to establish that Jacaranda suffered a concrete, non-speculative injury. Jacaranda's argument about potential future enforcement actions by SFWMD were purely conjecture, and not supported by admissible evidence. Furthermore, to the extent that Jacaranda's standing was based on financial harm, such injuries are not within the zone of interest protected under chapter 373 and, thus, was insufficient to establish standing under the second prong in this proceeding.

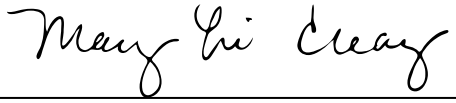
54. It is concluded, therefore, that Petitioner lacks standing to challenge the proposed rule.

55. Because Petitioners lack standing to maintain this proceeding, the undersigned is without jurisdiction to rule on the merits of the rule challenge. *See Abbott Labs. v. Mylan Pharms., Inc.*, 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that this case is dismissed for lack of jurisdiction.

DONE AND ORDERED this 2nd day of September, 2022, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of September, 2022.

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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.