

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RAINBOW RIVER CONSERVATION,
INC.; MICHELLE BLASINGAME;
GRETCHEN MARTIN; SENATOR DENNIS
JONES; GORDON HART; AND WILLIAM
VIBBERT,

Petitioners,

vs.

Case No. 19-2517RP

SOUTHWEST FLORIDA WATER
MANAGEMENT DISTRICT,

Respondent.

_____ /

FINAL ORDER

On June 10 through 12, 2019, Administrative Law Judge Robert J. Telfer III, of the Florida Division of Administrative Hearings (Division), conducted a duly-noticed hearing in Brooksville, Florida.

APPEARANCES

For Petitioner: Jane West, Esquire
Laurel Tallent, Qualified Representative
Jane West Law, P.L.
24 Cathedral Place, Suite 504
St. Augustine, Florida 32084

Douglas Harold MacLaughlin, Esquire
319 Greenwood Drive
West Palm Beach, Florida 33405

For Respondent: Adrienne Ellen Vining, Esquire
Christopher Tumminia, Esquire
Michael Roy Bray, Esquire
Hillary Anne Ryan, Esquire
Southwest Florida Water Management District
7601 U.S. Highway 301 North
Tampa, Florida 33637-6759

STATEMENT OF THE ISSUE

Whether proposed Florida Administrative Code Rule 40D-8.041(22), which establishes a minimum flow level for the Rainbow River System, is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On May 14, 2019, Petitioners Rainbow River Conservation, Inc., Michelle Blasingame, Senator Dennis Jones, and William Vibbert (Petitioners), and Gordon Hart and Gretchen Martin, filed a Petition to Invalidate Proposed Rule 40D-8.041(22) of the Southwest Florida Water Management District (District).^{1/} The Petition sought a determination that proposed Florida Administrative Code Rule 40D-8.041(22), was an invalid exercise of delegated legislative authority, pursuant to section 120.56(2), Florida Statutes (2019). On May 15, 2019, the Division's Chief Judge issued an Order of Assignment and an Amended Order of Assignment, which assigned this matter to Administrative Law Judge (ALJ) Lawrence P. Stevenson. On May 16, 2019, Judge Stevenson conducted a pre-hearing conference, and on May 17, 2019, due to a conflict resulting in Judge Stevenson's

unavailability, the Division issued a Notice of Transfer, assigning this matter to the undersigned.

On May 20, 2019, Petitioners filed an Amended Petition to Invalidate Proposed Rule 40D-8.041(22) of the Southwest Florida Water Management District (Amended Petition). On May 21, 2019, the undersigned issued an Order to Show Cause, which accepted the Amended Petition as a motion for leave to amend petition pursuant to Florida Administrative Code Rule 28-106.202, and provided the District the opportunity to show cause why the motion for leave to amend should not be granted. The District timely responded to the Order to Show Cause, arguing in opposition to the Amended Petition. On May 24, 2019, the undersigned issued an Order Granting Leave to Amend, which accepted the Amended Petition as establishing the issues in this matter.^{2/}

The parties engaged in substantial discovery leading up to the final hearing. On June 6, 2019, the District filed a Motion in Limine Regarding the Withlacoochee River, and a Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Cause of Action. On June 7, 2019, the District filed the following motions: (a) Motion in Limine Concerning the Expert Testimony of James Gross; (b) Motion in Limine Regarding the Florida Department of Environmental Protection's (DEP) Total Maximum Daily Load; (c) Amended Motion in Limine Concerning the Expert Testimony of James Gross; (d) Motion for Official

Recognition; (e) Motion to Dismiss for Petitioners' Lack of Standing; (f) Motion in Limine Concerning the Expert Testimony of Bob Knight; and (g) Unopposed Motion for Official Recognition. The Petitioners responded in opposition to the District's motions filed on June 6 and 7, and, as will be discussed in further detail below, the undersigned considered all pending motions at the commencement of the final hearing on June 10, 2019.

On June 7, 2019, the parties filed their Joint Pre-hearing Stipulation, which included issues of fact and law remaining for disposition. The Joint Pre-hearing Stipulation constitutes "the final agreed-upon 'executive summary' as to what the impending trial is about and the specific issues that remain on the table." Palm Beach Polo Holdings, Inc. v. Broward Marine, Inc., 174 So. 3d 1037 (Fla. 4th DCA 2015). "Pretrial stipulations prescribing the issues on which a case is to be tried are binding upon the parties and the court, and should be strictly enforced." Broche v. Cohn, 987 So. 2d 124, 127 (Fla. 4th DCA 2008)(citations omitted). The issues of fact and law identified in the Joint Pre-hearing Stipulation are as follows:

G. A concise statement of those issues which remain to be litigated:

Agreed Issues:

1. Whether the Northern District Model Version 4 or 5 is the best information available to determine the impact of water

withdrawals on the flow in the Rainbow River System.

2. Whether the failure to address the impact of algal accumulation and its relationship to flow before adoption of Proposed Rule 40D-8.041(22), F.A.C., was arbitrary, and contravenes the law it is implementing, Section 373.042, F.S.

3. Whether the failure to address the unexplained decrease in flow that has been occurring since the year 2000 before the adoption of this Proposed Rule is arbitrary.

4. Whether the failure to cap current levels of withdrawal in the springshed until water quality impacts related to flow are adequately addressed in the Rainbow River System, an Outstanding Florida Water in which no water quality degradation is to occur, is arbitrary.

5. Whether Petitioners have standing.

Petitioners' Issues:

6. Whether Rule 40D-8.041(22)(c), F.A.C., is vague and vests unbridled discretion in the District regarding the amount of flow in the Rainbow River System that can be reduced due to withdrawals and still be in compliance with the Minimum Flow.

7. Whether the Northern District Model Version 4 or 5 used to establish the proposed Minimum Flow misrepresent[s] Rainbow Springs historic flows.

8. Whether the proposed Minimum Flow misuses a regional model to estimate local groundwater impact.

9. Whether the period of record used to calculate historical flows of the Rainbow River is arbitrary or the best information available.

10. Whether the failure to address nutrient pollution and its relationship to flow before adoption of Proposed Rule 40D-8.041(22), F.A.C., was arbitrary, and contravenes the law it is implementing, Section 373.042, F.S.

11. Whether the failure to cap current levels of withdrawal in the springshed until water quality impacts related to flow are adequately addressed in the Rainbow River System is arbitrary.

12. Whether any water quality degradation of an Outstanding Florida Water is permitted by the Proposed Rule 40D-8.041(22), F.A.C.

13. Whether the failure to consider water resource values pursuant to the State Water Resource Implementation Rule (Chapter 62-40.473, F.A.C.) was arbitrary.

H. A concise statement of those issues of law which remain for determination by the Administrative Law Judge:

1. Whether the Petitioners have standing.

2. Whether Rule 40D-8.041(22), F.A.C., is an invalid exercise of delegated legislative authority pursuant to Section 120.52(8)(c), (d), and (e), F.S.

3. Whether Rule 40D-8.041(22)(c), F.A.C., is vague and vests unbridled discretion in the District.

4. Whether Rule 40D-8.041(22)(4) and (5), F.A.C., clearly contravene the law the proposed rule is implementing, Section 373.0421(2), F.S.

The undersigned conducted a final hearing from June 10 through 12, 2019. At the outset of the final hearing on June 10, 2019, the undersigned considered the pre-hearing motions that the

District filed on June 6 and 7, 2019, as well as the Petitioners' Unopposed Motion for Official Recognition.

With respect to the District's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Cause of Action, the undersigned denied the motion without prejudice, allowing the parties to address the issues raised during the final hearing. Similarly, with respect to the District's Motion to Dismiss for Lack of Standing, the undersigned also denied the motion without prejudice, noting that section 120.56(2)(a), explicitly provides that "[t]he petitioner has the burden to prove by a preponderance of the evidence that the petitioner would be substantially affected by the proposed rule[,]” and ruling that the parties would have the opportunity to present evidence and address standing during the final hearing.

With respect to the Petitioners' and District's motions for official recognition, the undersigned granted both motions and took official recognition of chapter 2016-116, Laws of Florida (2016), and In re: Florida Administrative Code Rules 40D-8.041(16) and 40D-8.041(17), OGC Case No. 13-0914 (Fla. Dep't of Env. Prot. Nov. 25, 2014).

With respect to the District's Motion in Limine Regarding the Withlacoochee River, the District contended that evidence concerning the proposed minimum flow level (MFL) for the Withlacoochee River, which connects to the Rainbow River, was not

relevant to the ultimate determination of whether the proposed MFL for the Rainbow River System is an invalid exercise of delegated legislative authority. The undersigned denied the motion, noting that while the pending rule challenge concerned the MFL for the Rainbow River System, a reading of section 373.042(1), Florida Statutes, which provides that "[t]he minimum flow for a given watercourse is the limit at which further withdrawals would be significantly harmful to the water resources or ecology of the area[,]” and section 373.0421(1), which provides that the District “shall consider changes and structural alterations to watersheds, surface waters, and aquifers and the effects of such changes or alterations have had, and the constraints such changes or alterations have placed, on the hydrology of an affected watershed, surface water, or aquifer [,]” provided a potential basis for consideration of evidence of the MFL for the Withlacoochee River area, and that the undersigned could hear evidence of the effect of the MFL for the Rainbow River System as provided under section 373.0421(1), but ultimately differentiate between the changes and structural alterations to the Rainbow River System and the Withlacoochee River area.

With respect to the District’s Motion in Limine regarding DEP’s Total Maximum Daily Load, the District noted that DEP has designated a portion of the Rainbow River System as impaired for

nitrate pursuant to Florida Administrative Code Chapter 62-303, and Florida Administrative Code Rule 62-304.604(1). The District argued that this impairment determination is irrelevant to the standards utilized in its development of the MFL for the Rainbow River System. The undersigned, again referencing sections 373.042 and 373.0421, denied the motion, noting that while it was unclear whether evidence of impairment for nitrates was relevant to a determination of whether the proposed MFL for the Rainbow River System is an invalid exercise of delegated legislative authority, it was premature at the commencement of the final hearing to exclude such evidence.

Finally, with respect to the District's Motion in Limine Concerning the Expert Testimony of Bob Knight and Amended Motion in Limine Concerning the Expert Testimony of James Gross, the undersigned entertained the District's objections to these proposed experts under the standards enunciated in section 90.702, Florida Statutes, and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). SDI Quarry v. Gateway Estates Park Condo Ass'n, 249 So. 3d 1287, 1293 (Fla. 1st DCA 2018). The undersigned ruled that the Petitioners may proffer Dr. Knight and Mr. Gross as experts, and the District would then have the opportunity to voir dire each witness as to the requisite elements for expert testimony, which are: (1) the expert must be qualified to

testify competently regarding the matter he or she intends to address; (2) the methodology must be reliable; and (3) the testimony must assist the trier of fact through the application of scientific, technical, or specialized expertise to understand the evidence; and that the undersigned would then rule on whether to qualify each witness as an expert.^{3/}

After the consideration of these motions, the undersigned conducted the final hearing. Petitioners presented the testimony of Michelle Blasingame, William Vibbert, Senator Dennis Jones, Dr. Burton Eno, and the expert testimony of Mr. Gross, Dr. Knight, and Michael Flannery.^{4/} The undersigned accepted into evidence Petitioner's Exhibits 9, 10, 16 through 21, 40, 59, 92, 101, 102, 112, and 128 through 139. The District presented the expert testimony of Doug Leeper, Ron Basso, and Dr. Christopher Anastasiou.^{5/} The undersigned accepted into evidence Respondent's Exhibits 1 through 18, 22, 23, 25 through 37, 39 through 51, 57, 58, 64, 67, 70 through 72, and 75. Additionally, during the early portions of the testimony of Mr. Gross, the District objected to Mr. Gross's reading of a purported script of questions and answers. Upon further investigation, the undersigned requested that Mr. Gross not read from the script; the undersigned accepted into evidence as Joint Exhibit 1 those portions of his script that he consulted during this early portion of his testimony. At the close of the hearing, and at

the request of the parties, the time for submitting proposed final orders was extended to 30 days from the date of the filing of the transcript.

On June 26, 2019, the District filed an Unopposed Motion to Modify Proposed Final Order Page Limitation, which requested that the parties be allowed to exceed the 40 page limit for post-hearing submittals established in rule 28-106.215 and submit proposed final orders up to 80 pages in length. Given the complexity of the issues involved, the undersigned granted this motion in a June 27, 2019, Order Granting Respondents' Unopposed Motion to Modify Proposed Final Order Page Limitation.

The six-volume Transcript of the final hearing was filed with the Division on July 9, 2019. On July 26, 2019, 17 days later, the District filed an Emergency Motion for Case Management Conference that disclosed numerous inaccuracies with the Transcript. The undersigned conducted a telephonic case management conference with the parties and court reporters on July 30, 2019, in which the undersigned ordered the parties to submit errata sheets to the court reporters no later than August 15, 2019, directed the court reporters to review the errata sheets and audio recordings of the final hearing to produce an amended transcript, and ordered the parties to file proposed final orders no later than two weeks after the court reporters filed the amended transcript with the Division.^{6/}

The six-volume Amended Transcript of the final hearing was filed with the Division on September 4, 2019. The parties thereafter filed proposed final orders on September 18, 2019, which the undersigned considered in the preparation of this Final Order.

All references are to the 2019 codification of the Florida Statutes unless otherwise indicated.

FINDINGS OF FACT

The Parties

1. The District is a governmental entity created by and operating pursuant to chapter 373 as a multi-purpose water management district. The District has the authority and duty to adopt MFLs consistent with the provisions of chapter 373, part I.

2. Michelle Blasingame owns a home and has permanently resided on the Rainbow River since 2007 (about 75 feet from the water's edge), approximately two-and-a-half miles from its headwaters. Ms. Blasingame testified that she uses the Rainbow River almost daily, engaging in activities such as snorkeling, scuba diving, swimming, boating, kayaking, fishing, and viewing the wildlife of the Rainbow River. Ms. Blasingame further testified that she is a member of Rainbow River Conservation, Inc. (RRC), and testified at a public hearing concerning the development of rule 40D-8.041(22).

3. William Vibbert resides in Rainbow Springs Villages, and lives approximately one-quarter mile from the Rainbow River. Mr. Vibbert is a retired parks manager with experience in resource management. He observes the Rainbow River every day and uses it several times a week for snorkeling, swimming, boating, underwater photography, and fishing. He is a board member of RRC. Mr. Vibbert testified and provided written comments concerning the development of rule 40D-8.041(22).

4. Dennis Jones is a retired Florida State Senator who has resided permanently on the Rainbow River since 2012, with 400 feet of river frontage. Senator Jones is a member of RRC. He testified that he and his family use the river every day for boating, paddle boarding, swimming, fishing, underwater photography, and aesthetic enjoyment.

5. Ms. Blasingame, Mr. Vibbert, and Senator Jones all testified that they have observed, over the years, the deterioration of the Rainbow River System, with conditions such as increased nutrients, algae, invasive plants, and a reduction in water clarity and wildlife. Each attributed this deterioration to a decrease in flow levels of the Rainbow River.

6. Dr. Burton Eno, president of RRC, testified on RRC's behalf. RRC's mission is to protect the Rainbow River and its environment. It has approximately 230 to 240 members. Dr. Eno testified that RRC, with its members' participation, carries out

many projects in support of its mission, including: an annual river clean-up that it has conducted for over 30 years; constructing and maintaining 50 wood duck boxes on the Rainbow River; providing educational booths at various events; assisting in a fourth grade education program at Rainbow Springs State Park; and assisting the Florida Springs Institute's Citizen Science Spring Watch project through collecting water quality and fish population baseline data. Dr. Eno also testified that an average of 150 of RRC's members participate in its annual Rainbow River cleanup.

7. Dr. Eno testified that RRC actively participated in the rulemaking process concerning rule 40D-8.041(22), providing written and oral comments about declining flows in the Rainbow River System.

The Rainbow River System and Rainbow Springs Group

8. The Rainbow River System is located in southwestern Marion County, adjacent to the City of Dunnellon.

9. The Rainbow Springs Group forms the headwaters of the Rainbow River, which flows 5.7 miles south into the Withlacoochee River, upstream and to the east of Lake Rousseau. Downstream of Lake Rousseau, the Withlacoochee River continues west and discharges into the Gulf of Mexico near Yankeetown.

10. The Rainbow River is the fourth largest spring-fed river in Florida. The Rainbow River Springs Group is considered

a first-magnitude springs system, meaning that it discharges water at a rate of, on average, more than 100 cubic feet per second (cfs).

11. The Rainbow River System is also designated as an Outstanding Florida Water under rule 62-302.700(1) and (9), an Aquatic Preserve under section 258.39(32), Florida Statutes, and a Surface Water Improvement and Management Priority under rule 62-43.030. At the federal level, Rainbow Springs is designated as a National Natural Landmark.

12. The Rainbow Springs Springshed is the groundwater-contributing area to Rainbow Springs' flow.^{7/} The Rainbow Springs Springshed averages 741 square miles and is largely located in eastern Levy, western Marion, and southern Alachua counties.

13. Spring flow provides the dominant flow in the Rainbow River System. From 1931 through May 2015, the main annual spring flow in the Rainbow Springs Group was 690 cfs, or 446 million gallons per day.

14. The Rainbow River is a major recreation area in Florida, for activities such as: kayaking; canoeing; boating; tubing; swimming; snorkeling; scuba diving; fishing; and sightseeing. As the Rainbow River System is almost entirely groundwater-supplied, land-use activities in its springshed can affect the quality and quantity of groundwater entering the system. Over time, significant changes in land use throughout

the springshed have negatively affected spring flow, water quality, fish and wildlife habitat, and the overall health of the Rainbow River System. Approximately 38 percent of land use within the Rainbow River Springshed is devoted to agricultural uses (such as horses, cattle, row crops, and nursery operations). Approximately 29 percent of land use within the Rainbow River Springshed is upland forests. Approximately 14 percent of land use within the Rainbow River Springshed consists of residential areas.

Floridan Aquifer

15. The Floridan Aquifer System is a limestone carbonate aquifer, generally 1,000 to 2,000 feet thick, that is one of the most productive freshwater aquifer systems in the world. It exists over virtually the entire state of Florida, as well as portions of Georgia and South Carolina. Major cities throughout Florida utilize the Floridan Aquifer for their water supply.

16. A spring is a natural opening in the limestone where groundwater discharges from the aquifer. The springs that fall within the District's jurisdiction, including the Rainbow Springs Group, are mostly considered unconfined, meaning the aquifer opens to the surface with little to no clay separating the surficial sand from the underlying limestone.

17. The principal factor that drives spring flow is the water level elevation in the Upper Floridan Aquifer. Mr. Basso

testified that the higher the water levels are in the aquifer, the greater the spring flow.

18. The Rainbow Springs Springshed contains surficial sands on top of limestone with little clay separating those sands from the top of the limestone; as a result, rainfall infiltrates the Rainbow River Springshed quickly with little runoff. Rainfall that infiltrates the springshed combines with carbon dioxide (in the air and soil) to form a weak carbonic acid, which dissolves the limestone over time as it seeps into the aquifer, creating karst geology, and opens conduits and caverns.

19. "Recharge" to an aquifer refers to the natural replenishment of the aquifer through rainfall. The karst geology and unconfined nature of the Upper Floridan Aquifer results in a recharge rate of 15 inches per year.

Minimum Flow Levels

20. Section 373.042 requires the District to establish an MFL for all surface watercourses within the District's jurisdictional boundaries.

21. An MFL is "the limit at which further withdrawals would be significantly harmful to the water resources or ecology of the area." § 373.042(1)(a), Fla. Stat.

22. Section 373.042(1) further provides that an MFL "shall be calculated by the . . . governing board using the best information available."

23. Rule 40D-8.011(5) further provides, in part:

Minimum Flows and Levels prescribed in Chapter 40D-8, F.A.C., are based on the best information available at the time the Flow or Level was established. The best available information in any particular case will vary in type, scope, duration, quantity and quality and may be less than optimally desired. In addition, in many instances the establishment of a Minimum Flow or Level requires development of methodologies that previously did not exist and so are applied for the first time in establishing the Minimum Flow or Level.

24. Section 373.0421(1)(a) provides that the District's governing board, in developing MFLs "shall consider changes and structural alterations to watersheds, surface waters, and aquifers and the effects such changes or alterations have had, and the constraints such changes or alterations have placed, on the hydrology of an affected watershed, surface water, or aquifer, provided that nothing in this paragraph shall allow significant harm as provided in s. 373.042(1) caused by withdrawals."

25. Rule 62-40.473, also known as the State Water Resource Implementation Rule, provides, in part:

(1) In establishing minimum flows and levels pursuant to Sections 373.042 and 373.0421, F.S., consideration shall be given [to] natural seasonal fluctuations in water flows or levels, nonconsumptive uses, and environmental values associated with coastal, estuarine, riverine, spring, aquatic, and wetlands ecology, including:

- (a) Recreation in and on the water;
- (b) Fish and wildlife habitats and the passage of fish;
- (c) Estuarine resources;
- (d) Transfer of detrital material;
- (e) Maintenance of freshwater storage and supply;
- (f) Aesthetic and scenic attributes;
- (g) Filtration and absorption of nutrients and other pollutants;
- (h) Sediment loads;
- (i) Water quality; and
- (j) Navigation.

26. Rule 40D-8.011(4), states that MFLs "are used in water resource planning, as one of the criteria in evaluating applications for water use permits under Chapter 40D-2, F.A.C., and, in the design, construction and management of surface water management systems as specified in subsection 40D-8.031(13), F.A.C."

Proposed Florida Administrative Code Rule 40(D)-8.041(22)

27. On March 26, 2019, the District's governing board approved proposed rule language that amended rule 40D-8.041(22), to establish an MFL for the Rainbow River System.

28. On April 11, 2019, the District published a Notice of Proposed Rule in the Florida Administrative Register, which

contained proposed Florida Administrative Code Rule 40D-8.041(22)
(Proposed Rule).

29. The Proposed Rule 40D-8.041(22) states as follows:

(22) Minimum Flow for the Rainbow River System.

(a) For purposes of this rule, the Rainbow River System includes the watercourse from the Rainbow Springs Group headsprings to the Withlacoochee River, including tributaries, and all named and unnamed springs that discharge to the river.

(b) The Minimum Flow for the Rainbow River System is 95% of the natural flow as measured at the United States Geological Survey Rainbow River at Dunnellon, FL Gage No. 02313100. Natural flow is defined for the purpose of this rule as the flow that would exist in the absence of water withdrawal impacts. The Minimum Flow is based on a 5% reduction from the natural flow of 683 cubic feet per second, which was adjusted for groundwater withdrawals using hydrologic modeling for the period of record from 1965-2015 at the United States Geological Survey Rainbow River at Dunnellon, FL Gage No. 02313100.

(c) Status assessments for the Minimum Flow for the Rainbow River System will be completed to determine whether the flow is below or projected to fall below the Minimum Flow. Each status assessment is independent from and not a determination of water use permit compliance or environmental resource permit compliance. Permit compliance is a regulatory function that is not within the scope of this subsection. As part of each status assessment, the District will use the following approach:

1. The District will evaluate the Minimum Flow annually to determine the extent to

which the flow of the Rainbow River System has been reduced due to withdrawals as of the date of each status assessment at the United States Geological Survey Rainbow River at Dunnellon, FL Gage No. 02313100. The annual evaluation will be completed through a review of:

- (a) flow data;
- (b) water withdrawals;
- (c) aquifer water levels;
- (d) rainfall data; and
- (e) hydrologic modeling.

2. The District will also evaluate the Minimum Flow every five years as part of the regional water supply planning process. This evaluation will include the use of hydrologic modeling.

3. If the Minimum Flow is being met based on the annual evaluation or the evaluation performed as part of the regional water supply planning process, then no further actions are required beyond continued monitoring.

4. If the annual evaluation indicates the flow is below the Minimum Flow, or if the flow is projected to fall below the Minimum Flow within 20 years based on the evaluation performed as a part of the regional water supply planning process, the District will conduct a causation analysis to evaluate the potential causes of impacts on the Rainbow River System.

5. Based on the causation analysis, the District will re-evaluate the Minimum Flow for the Rainbow River System, or adopt a recovery or prevention strategy consistent with the provisions of Section 373.0421(2), F.S.

(d) The District will re-evaluate the Minimum Flow by December 2027.

30. On May 1, 2019, Petitioners timely filed a request for a public hearing, pursuant to section 120.54(3)(c). The District conducted a public hearing on May 9, 2019.

Development of Proposed Rule

31. Doug Leeper, the District's MFLs program lead, testified as to the District's development of the Proposed Rule. He testified that the District's approach involved compilation and collection of data to "develop the best available information for use in" the MFL determination.

32. Mr. Leeper stated that another initial step in this approach is to develop a baseline flow record, alternatively referred to as a natural flow record. He explained that the purpose of developing a baseline flow record is to identify a long-term flow record that could serve as the baseline for additional minimum flow analysis. He further explained that the District developed the baseline flow record to adjust for any withdrawal impacts through time.

33. Mr. Leeper stated:

That baseline flow record serves sort of as a starting point for the minimum flow analysis. It basically reflects the flow, again, we expect in the absence of withdrawals. That starting point is then used in the District's approach to minimum flow development that we refer to as a percent of flow approach, basically involves using the starting point

baseline flow record, looking at reductions in flow from that baseline flow record, and then determining how that would affect the ecosystem, the river in this case, river-spring system.

To do that type of assessment, we need criteria or metrics that are sensitive to flow reductions, or at least are associated with flow reductions that we can then use to gauge how the system will change as flows are reduced in a percentage manner.

When we're developing these criteria metrics, we like to develop, if we can, multiple criteria metrics. And if possible, choose to develop metrics associated with different ranges of flows that are sensitive to flow changes that address the flow or hydrologic regime of the flow in water body.

So now we've developed a baseline flow record. We want to use a percent of flow approach when we've identified the metrics. We can then start implementing the approach in reducing the flows to see how the metrics respond in accordance with flow reductions. And, again, these metrics are developed to address the full range of flows associated with the water body, and they're based upon consideration of the environmental values that each water management district must consider when establishing a minimum flow level.

So we've got the baseline flow record. We've got the percent of flow, we've got the metrics. We again, this is basically a modeling exercise. We're looking at how the environment will respond to flow reductions. And we have a goal in mind when we're conducting the flow reductions, and this that we don't want to see, or we try and identify the flow change associated with maintaining 85 percent of the metric, whatever the metric corresponds with.

34. The District's use of the 15 percent reduction of flow, (or, as Mr. Leeper described, maintaining 85 percent of the metric), was to define "significant harm" as that term is used in section 373.042 and as it would pertain to the MFL for the Rainbow River system. Further, the District intended to protect the resources associated with the full hydrologic regime of the system through the use of the "metric" of 15 percent reduction of flow.

35. Additionally, a peer review panel independently evaluated the data, assumptions, and methodologies that the District used to assign the recommended MFL. It concluded that the District's methodology "meets the requirement of the statute. . . ." ^{8/}

36. In developing the MFL, the District considered the 10 environmental values listed in rule 62-40.473(1).

37. With respect to "[r]ecreation in and on the water," as referenced in rule 62-40.473(1)(a), the District summarized available information on recreational use of the Rainbow River System, including published reports documenting extent and types of use. The District considered recreation in connection with its percent of flow methodology to evaluate changes in water levels and how those changes would affect inundation of floodplain wetlands.

38. With respect to "[f]ish and wildlife habitats and the passage of fish," as referenced in rule 62-40.473(1)(b), the District assessed this value in several ways, including assessing water depths associated with fish passage to ensure that the minimum flow would neither exceed nor fall below those depths. The District also studied changes in fish habitat and macroinvertebrate availability , and continues to collect information to characterize the fish that actually live in, use, and reproduce in the Rainbow River System.

39. Because the Rainbow River System is not an estuarine resource, the District did not consider "[e]stuarine resources," as referenced in rule 62-40.473(1)(c).^{9/}

40. For the "[t]ransfer of detrital material" factor, as referenced in rule 62-40.473(1)(d), the movement of detrital material (which is dead organic material), through the Rainbow River System is important to its ecosystem, as it is the basis for most of the food web. The District considered this transfer as part of the full hydrologic regime, and specifically through its examination of inundation floodplain habitats and inundation of woody habitat.

41. With respect to "[m]aintenance of freshwater storage and supply," as referenced in rule 62-40.473(1)(e), the District calculates the assessment of withdrawal impacts that affect flows in the Rainbow River System, and used that information to adjust

the flow record to reflect conditions or flow record that withdrawals would not impact.

42. For "[a]esthetic and scenic attributes," as referenced in rule 62-40.473(1)(f), Mr. Leeper stated that this is an "important environmental value for the Rainbow River System." The District considered this value through associating the maintenance of the preservation of the natural habitats that occur within the Rainbow River System through the development of minimum flows and levels.

43. For "[f]iltration and absorption of nutrients and other pollutants," as referenced in rule 62-40.473(1)(g), the District considered this value in the context of water quality (another value referenced in the State Water Resource Implementation Rule), including the nutrient nitrogen.

44. With respect to "[s]ediment loads," as referenced in rule 62-40.473(1)(h), the District considered this value as part of its characterization of the topography of the floodplain river channel of the river system, as part of its characterization of substrates in river channels, and also through the District's habitat-based minimum flow approach intended to protect full hydrologic regime.

45. For "[w]ater quality," as referenced in rule 62-40.473(1)(i), the District considered this value. This Final

Order discusses the District's consideration of this factor in paragraphs 66 through 77.

46. For "[n]avigation," as referenced in rule 62-40.473(1)(j), the District considered this value in conjunction with similar values associated with recreational use.

Issues From The Joint Pre-Hearing Stipulation^{10/}

A.

1. Whether the Northern District Model Version 4 or 5 is the best information available to determine the impact of water withdrawals on the flow in the Rainbow River System.

* * *

7. Whether the Northern District Model Version 4 or 5 used to establish the proposed Minimum Flow misrepresent[s] Rainbow Springs historic flows.

8. Whether the proposed Minimum Flow misuses a regional model to estimate local groundwater impact.

9. Whether the period of record used to calculate historical flows of the Rainbow River is arbitrary or the best information available. (Emphasis added.)

47. Petitioners have asserted that: (a) the District's use of the Northern District Model (NDM), as opposed to a water budget analysis, was not the best information available to determine the impact of water withdrawals on the flow in the Rainbow River System, misrepresented historic flows of Rainbow River Springs, and ultimately resulted in an erroneous estimate

of local groundwater impact; and (b) the District's period of record (1965-2015) was arbitrary, as it should have used the available historical record of flows of the Rainbow River dating back to 1930. As these issues overlap and are related, the undersigned has combined them for purposes of making findings of fact.

48. To establish a minimum flow, the District must determine at what point significant harm to the Rainbow River System will occur as a result of groundwater withdrawals.

49. One of the first steps that the District took in developing the MFL was to develop a record of flow that reflects no impacts from groundwater withdrawals, i.e., the natural flow record or the baseline flow record. To determine the natural flow, the District adjusted the historical flow record for the Rainbow River for groundwater withdrawals using a groundwater flow model, which predicts the impacts of groundwater withdrawals on flow within a river system.

50. The District utilized a groundwater flow model known as the NDM to determine current and projected groundwater withdrawal impacts on flow in the Rainbow River. HydroGeologic, Inc. (HydroGeologic), first developed the NDM in 2008, and has refined it several times since. HydroGeologic completed the NDM Version 4.0 in 2013, which expanded the NDM to the north and east into the St. John's River, as well to the west to extend

approximately five miles offshore in the Gulf of Mexico. The NDM Version 4.0 did not undergo a peer review.

51. HydroGeologic completed the NDM Version 5.0 that was used in developing the Rainbow River MFL in 2016. The NDM Version 5.0 underwent a successful peer review, although the reviewers offered numerous comments and concerns on a variety of issues.

52. The NDM is a three-dimensional model that: is made up of grids that are 2,500 feet by 2,500 feet; contains seven layers representing geologic and hydrogeologic units; and covers an area of 8,500 square miles, including the northern portion of the District.

53. The District used the NDM to analyze the cumulative effect of thousands of well uses, and assess those impacts over the entire Rainbow River System. Mr. Basso testified that "one of the big efforts" with the NDM was to make sure that it fit the hydrogeology of the Rainbow River System area, as most of it represents an area of unconfined Upper Floridan Aquifer. The District's decision to use the NDM (a regional model) was to allow the District to assess the cumulative effect of thousands of well users, which was something a more localized model could not do effectively.

54. Mr. Basso explained how the District calibrated the NDM Version 5.0:

[O]nce we construct and build the model, we do what we call a calibration phase. . . . [NDM Version 5.0] was calibrated to average 1995 conditions and then it was calibrated from 1996 through 2006 on a monthly basis, and then there were calibration targets assigned by layer or by major aquifer. Those were like—when we look at all the wells in the Upper Floridan Aquifer by groundwater basin, we wanted kind of a mean error of less than 4-feet in the groundwater basin, and that was primarily the focus of this model. And then we wanted to match spring-flows with a total of within 10%, but we also wanted to match individual magnitude of first-order spring-flows within 5%. And so we met those regional calibration statistics and then for 2010 once you calibrate the model it's deemed calibrated, you do what we call the verification. . . . [Y]ou just look at a different period of time outside the calibration period and you run the model to see how it performs for simulating water levels or simulating flows and that was done for calendar year 2010 condition for this model, and the calibration statistics were slightly worse but they were within acceptable ranges during that verification period. . . .

55. Prior to the availability of the NDM Version 5.0, the District used the NDM Version 4.0 to predict groundwater withdrawal impacts to develop the natural flow record for the Rainbow River System. The District began its assessment for the Proposed Rule, using the NDM Version 4.0, with the year 1965, assuming no impact from groundwater withdrawals, and adjusted this assessment using the results from the NDM Version 4.0 to arrive at an impact from groundwater withdrawals of 1.1 percent

reduction in flow in 1995, which increased to 1.7 percent in 2010.

56. The District then used the NDM Version 5.0 to determine the projected impact of groundwater withdrawals on the Rainbow River System flow to the year 2035, and determined that withdrawals would result in a 2.5 percent reduction in flow, but with conservation and reuse programs that the District planned to implement, the reduction in flow in 2035 would be two percent.

57. The District used a water budget (which experts for Petitioners referred to as a water mass balance model) to complement its model analysis. The water budget relies on "empirical" measures (rain, evapotranspiration, pumping, spring discharge, and groundwater storage) to estimate the impacts of groundwater withdrawals on spring flows.^{11/} Water budgets have limitations, and require several assumptions—notably, in such an analysis, the District aligned the area of the water budget with natural flow divides, which for the Rainbow River System is the springshed. In a 2015 water budget analyses for the Rainbow River Springshed, the District determined that the total groundwater use was 21.5 million gallons per day which, after adjusting for water that is not consumptively used, resulted in a reduction in flow of 2.2 percent. This water budget analysis verified the NDM results of a one to two percent reduction in flow based on groundwater withdrawals.

58. Based on the results of the NDM, as well as the water budget analysis, the District calculated that groundwater withdrawal impacts on the Rainbow River System have resulted in a one to two percent reduction in flow from its 1965 "no impact" rate. The evidence established that the Rainbow River System has experienced a 20 percent overall reduction in flow since 1965. The District has attributed that reduction to rainfall variation, as opposed to groundwater withdrawal. The evidence was persuasive that spring flow is lower after 2000, but not because of groundwater withdrawals, as current groundwater use is the lowest since the mid-1990's, due to water conservation and slower population growth. Instead, the evidence suggests that the lower spring flow is because of lower rainfall. Based on the NDM predictions of a one to two percent reduction in flow because of groundwater withdrawals, which the District projected to increase to 2.5 percent in 2035, the District chose a recommended minimum flow allowance of five percent.

59. The District selected 1965 as the starting point for the period of record because it believed that time period had zero impacts from groundwater withdrawal in the Rainbow River System. The starting year 1965 is also when daily flow record information from the main Rainbow River gage maintained by the United States Geological Survey (USGS) is available, which was necessary for the District's analysis. Specifically, the

District analyzed daily flow record information from the USGS Rainbow River at Dunnellon, Florida Gage No. 02313100.

60. The long-term gaged flow during the time period between 1965 and 2015 was 677 cfs. The District adjusted the gaged flow record for groundwater impacts from 1965 to 2015 by accounting for flow reductions of 1.1 percent in 1995 that increased to 1.7 percent in 2010 based on the simulation of pumping conditions using the NDM Version 4.0. From 1995 to 2010, the District linearly-interpolated flow impacts from 1.1 percent to 1.7 percent. From 2011 to 2015, the District used a flow impact of 1.7 percent to adjust the gaged flows. These adjustments resulted in a long-term average of 683 cfs, adjusted for groundwater withdrawals from 1965 to 2015 at Florida Gage No. 02313100.

61. Petitioners' experts testified that the two versions of the NDM the District used contained numerous limitations that resulted in errors in the estimation of flow in the Rainbow River System. Dr. Knight testified that the errors in the NDM resulted in an underestimation of flows in the Rainbow River System of over 60 percent.

62. Dr. Knight also testified that the use of a water balance model (or water budget) better estimates the impact of groundwater withdrawals on the Rainbow River System than the NDM. Dr. Knight testified that he conducted a water budget analysis of

the Rainbow River System, which predicted an approximately 11 percent reduction in flow from groundwater impacts.

63. Petitioners also presented expert testimony, through Dr. Knight, that the period of record the District used to calculate historic flows, which commenced in 1965, led to incorrect results in the calculation of the baseline flow. He further testified that data dating back to the 1920's was available and would have provided a better data set for such a calculation.

64. The preponderance of the evidence establishes that the District's use of the NDM Versions 4.0 and 5.0 to assess groundwater withdrawal impacts on the Rainbow River System, in the calculation of the MFL, was the best information available to develop the Proposed Rule, and is supported by facts and logic. The District did not act irrationally, or without thought or reason, in its assessment of groundwater withdrawal impacts.

65. Similarly, while the positions of both parties as to the appropriate period of record have merit, the issue in this proceeding is not whether one position is more meritorious than the other but whether the District's determination of what period would provide the "best" information was arbitrary and capricious. The preponderance of the evidence establishes that the period of record that the District selected was supported by facts and logic. The District did not act irrationally, or

without thought or reason, in selecting the period of record between 1965 and 2015.

B.

2. Whether the failure to address the impact of algal accumulation and its relationship to flow before adoption of Proposed Rule 40D-8.041(22), F.A.C., was arbitrary, and contravenes the law it is implementing, Section 373.042, F.S.

* * *

10. Whether the failure to address nutrient pollution and its relationship to flow before adoption of Proposed Rule 40D-8.041(22), F.A.C., was arbitrary, and contravenes the law it is implementing, Section 373.042, F.S.

* * *

13. Whether the failure to consider water resource values pursuant to the State Water Resource Implementation Rule (Chapter 62-40.473, F.A.C.) was arbitrary.
(Emphasis added.)

66. Petitioners have asserted that the District inadequately addressed the requirement in the State Water Resource Implementation Rule "to weigh environmental and human water resource values when developing MFLs to determine if significant harm would occur as a result of the MFL," and that the District failed to give appropriate weight to peer reviewer's concerns about the ecological impact of filamentous algae. Petitioners further contend that the District failed to adequately address "water resource" values, in the context of the

State Water Resource Implementation Rule, because it failed to consider the impact of algal accumulation and its relationship to flow in the adoption of the Proposed Rule. Because issues 2, 10, and 13 of the Joint Pre-hearing Stipulation overlap and are related, the undersigned has combined them for making findings of fact.

67. Both parties presented evidence that the Rainbow River System contains algae, and in particular, the following three categories of algae: phytoplankton; epiphytic; and benthic, or filamentous.^{12/} Petitioners contend that the presence of filamentous algae in the Rainbow River System compromises many of the 10 water resources that are identified in the State Water Resource Implementation Rule. Petitioners further contend that the District's failure to address the impact of algal accumulation and nutrient pollution and its relationship to flow in this context was arbitrary, and contravenes the Proposed Rule's implementing law, section 373.042.

68. Dr. Knight, on behalf of the Petitioners, testified that he has observed a link between water velocities in streams and the persistence of filamentous algae. Above certain threshold velocity values, filamentous algae are likely to be dislodged and washed out of the spring and river system. He testified that these threshold velocity values are directly related to flow values.

69. Dr. Anastasiou testified, on behalf of the District, that various conditions lead to the growth of algae. He stated that there is a relationship between nitrates and filamentous algae, but that this relationship has only been confirmed in a laboratory. His testimony, supported by evidence of record, established that disturbance in the Rainbow River System plays a significant role in algae distribution. Sediment characteristics and sunlight (and the lack thereof caused by canopy cover) also affects the occurrence and distribution of algae.

70. Dr. Anastasiou also testified that he believes there is a relationship between velocity and the abundance of algae in the Rainbow River but that the extent of that relationship was not clear to the District. The District is studying this issue, undertaking several data-collecting methods to measure velocity and attempting to correlate that to algal accumulations.

71. At this point, the District is unable to build an MFL criteria based on any relationship between velocity and algal accumulation, because it is "still way too early in the process" to make that determination.

72. The undersigned finds that a preponderance of the evidence established that a relationship between algal accumulation and flow velocity exists.

73. However, the Petitioner's challenge to the Proposed Rule concerns, in part, whether the District used the best

information available in developing the MFL that is in the Proposed Rule. Rule 40D-8.011(5) requires the District to use the best information available at the time it establishes the MFL.

74. The preponderance of the evidence established that the existing information regarding the relationship between algal accumulation and flow velocity is not sufficient to enable the District to incorporate any such criteria into the development of an MFL. Accordingly, the preponderance of the evidence establishes that the District's decision to not attempt to utilize any criteria of this relationship in developing the MFL was supported by facts and logic. The District did not act irrationally, or without thought or reason, in doing so.

75. Although not explicitly required under section 373.042(6)(b), the District acknowledged the MFL Proposed Rule peer review report's note that one major ecological change observed in the Rainbow River System was the accumulation of filamentous algae and the commensurate decline in submerged aquatic vegetation. The peer review report further states that "while the provenance of these ecological changes is not entirely clear, and likely a response to several overlapping stressors, one emerging theme in the springs literature is that flow velocity plays a significant role in algal cover." The peer

review panel recommended that the District's minimum flow report explicitly mention this emerging theme.

76. The District responded to the peer review report's recommendation by acknowledging its concerns regarding water quality, and revising the minimum flow report to include the changes that the peer review panel recommended. At the public meeting where the District approved the final minimum flow report with the peer review report's recommendation, the chair of the peer review panel stated that the District adequately addressed the peer review panel's comments.

77. The preponderance of the evidence established that the District used the best information available in developing the Proposed Rule, and gave weight to the peer review report (although section 373.042(6)(b) did not obligate the District to do so). The District's decision to not address the impact of algal accumulation and its relationship to flow before adoption of the Proposed Rule was therefore not arbitrary and did not contravene section 373.042.^{13/}

C.

3. Whether the failure to address the unexplained decrease in flow that has been occurring since the year 2000 before the adoption of this Proposed Rule is arbitrary.

78. Petitioners contend that the District's failure to address the Rainbow River System's low flow between 2000 and

2015, prior to adoption of the Proposed Rule, demonstrates limitations with its reliance on the NDM and is, therefore, arbitrary.

79. The USGS flow record for the Rainbow River System indicates a low flow period between 2000 and 2015. The District did not believe that low rainfall was the cause of this low flow.^{14/}

80. The evidence is persuasive that groundwater withdrawals were also not the cause of this low flow, as the District has not observed a decrease in the monitoring well water levels, but rather, the monitoring well water levels have remained relatively flat or have risen slightly during this period. According to Mr. Basso, "there is something else in the system that's affecting the discharge at that system."

81. Mr. Basso speculated that this reduction could be the result of aquatic vegetation and invasive Hydrilla damming the Rainbow River System. The District plans to study this issue during its reevaluation of the MFL, and has recently funded the installation of another flow measuring station on the Rainbow River, which will provide additional data to reevaluate this issue.

82. The preponderance of the evidence established that the District used the best information available in developing the Proposed Rule, and showed that the cause of the low flow period

between 2000 and 2015 was poorly understood, but was not the direct result of groundwater withdrawals. The District did not act irrationally, or without thought or reason, in its decision to not address this unexplained decrease in flow prior to its adoption of the Proposed Rule.

D.

4. Whether the failure to cap current levels of withdrawal in the springshed until water quality impacts related to flow are adequately addressed in the Rainbow River System, an Outstanding Florida Water in which no water quality degradation is to occur, is arbitrary.

* * *

11. Whether the failure to cap current levels of withdrawal in the springshed until water quality impacts related to flow are adequately addressed in the Rainbow River System is arbitrary.

83. Petitioners contend that the District's failure to cap current levels of withdrawal in the Rainbow River Springshed until water quality impacts related to flow are adequately addressed in the Rainbow River System, which is an Outstanding Florida Water in which no water quality degradation is to occur pursuant to rule 62-302.700, is arbitrary.

84. The evidence and testimony presented at the final hearing established, by a preponderance of the evidence, that there are certain water quality issues in the Rainbow River System that have resulted in DEP declaring that the Rainbow River

System is impaired for nitrates, and requiring DEP to develop a Total Maximum Daily Load and Basin Action Management Plan.

85. The undersigned finds that the antidegradation policy applicable to an Outstanding Florida Water, established in rule 62-302.700, is a component of state water quality standards implemented through DEP permitting programs, and does not apply to the District's development of the MFL.

86. The preponderance of the evidence established that the District considered water quality, as part of its analysis under rule 62-40.473(1), and determined that the MFL in the Proposed Rule would not negatively affect water quality in the Rainbow River System or impair its designated use. Based on this analysis, the District did not act irrationally, or without thought or reason, in its decision to not cap current levels of withdrawal in its adoption of the Proposed Rule.

E.

6. Whether Rule 40D-8.041(22), F.A.C., is vague and vests unbridled discretion in the District regarding the amount of flow in the Rainbow River System that can be reduced due to withdrawals and still be in compliance with the Minimum Flow. (Emphasis added.)

87. Petitioners contend that it is not clear how the District intends to define "minimum flow" in the Proposed Rule, particularly concerning the time frame and period of record for critical flow terms.

88. Petitioners additionally contend that the Proposed Rule is unclear as to what the minimum flow represents and the resource protection it provides; for instance, Petitioners contend that a single natural baseline flow and minimum flow for the entire Rainbow River System is contrary to the practice of other water management districts, which uses multiple minimum flows in their rules. Mr. Flannery testified, on behalf of Petitioners, that a single minimum flow for the Rainbow River System would not protect its flow regime, and is a deviation from how the District has formulated MFL rules in the past. Petitioners contend that these deficiencies render the Proposed Rule vague.

89. As found previously, the preponderance of the evidence establishes that the District's development of the Proposed Rule, through the use of the NDM Versions 4.0 and 5.0 to assess groundwater withdrawal impacts on the Rainbow River System, in the calculation of the MFL, was the best information available to develop the Proposed Rule, and is supported by facts and logic. The District did not act irrationally, or without thought or reason, in its development of the Proposed Rule.

90. Mr. Basso testified that, pursuant to subsection (c) of the Proposed Rule, the District will complete status assessments of the minimum flow for the Rainbow River System, and evaluate minimum flows every five years as part of its regional water

supply planning process. He testified that if the minimum flow established in the Proposed Rule is being met during the status assessments and evaluations, then the District will take no further action.

91. He also explained that if the status assessments or evaluations reveal that the flow is below the minimum flow, or if flow is projected to fall below the minimum flow, the District intends to conduct a detailed causation analysis to evaluate the potential causes of impacts on the Rainbow River System. Based on the causation analysis, the District will reevaluate the minimum flow for the Rainbow River System, or adopt a recovery or prevention strategy consistent with the provisions of section 373.0421(2).

92. The preponderance of the evidence establishes that the Proposed Rule provides sufficient detail to ascertain how the District defines minimum flow, and how it will assess whether the minimum flow for the Rainbow River System is being met. However, as addressed in the Conclusions of Law, the Proposed Rule's implementation of a causation analysis to allow the District to reevaluate the minimum flow prior to the adoption of a recovery or prevention strategy consistent with section 373.0421(2), requires additional legal analysis.

F.

12. Whether any water quality degradation of an Outstanding Florida Water is permitted by Proposed Rule 40D-8.041(22), F.A.C.
(Emphasis added.)

93. The undersigned notes that Petitioners did not directly address this issue in its Proposed Final Order.

94. The undersigned reiterates the finding that the antidegradation policy applicable to an Outstanding Florida Water, established in rule 62-302.700, is a component of state water quality standards implemented through DEP permitting programs, and does not apply to the District's development of the MFL.

95. As previously found, the preponderance of the evidence established that the District considered water quality as part of its analysis under rule 62-40.473(1), and determined that the MFL in the Proposed Rule would not negatively affect water quality in the Rainbow River System or impair its designated use.

CONCLUSIONS OF LAW

96. The Division has jurisdiction over the subject matter and the parties to this proceeding in accordance with sections 120.54, 120.56, and 373.042(7).

97. Section 120.56(1)(e) describes the nature of a proposed rule challenge proceeding:

Hearings under this section shall be de novo in nature. The standard of proof shall be the preponderance of the evidence. Hearings

shall be conducted in the same manner as provided in ss. 120.569 and 120.57, except that the administrative law judge's order shall be final agency action.

98. Section 120.56(2)(a), which also concerns a proposed rule challenge proceeding, states, in pertinent part:

The petitioner has the burden to prove by a preponderance of the evidence that the petitioner would be substantially affected by the proposed rule. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority to the objections raised.

Standing^{15/}

99. The standard for standing in a rule challenge proceeding is less demanding than in an action brought under section 120.57. The ability to challenge a rule "was intended to create an opportunity for a citizen-initiated check on rule making that exceeded delegated statutory authority." Dep't of Prof'l Reg., Bd. of Dentistry v. Fla. Dental Hygienist Ass'n, Inc., 612 So. 2d 646, 652 (Fla. 1st DCA 1993)(quoting Patricia A. Dore, Access to Florida Administrative Proceedings, 13 Fla. St. U. L. Rev. 965, 1014 (1986)).

100. Section 120.52(13)(b) provides that a party to an administrative proceeding is "any person . . . whose substantial interests will be affected by the proposed agency action. . . ."

101. The nature of the interests that can furnish the basis for standing to challenge a proposed rule are those that would be

protected or regulated by the proposed rule. See Abbott Labs. v. Mylan Pharms., Inc., 15 So. 3d 642 (Fla. 1st DCA 2009).

102. A party is substantially affected if the rule will: (a) result in a real or immediate injury in fact, and (b) the alleged interest is within the zone of interest to be protected or regulated. See Jacoby v. Fla. Bd. of Med., 917 So. 2d 358, 360 (Fla. 1st DCA 2005).

103. To satisfy the sufficiently real and immediate injury in fact element, an injury must not be based on pure speculation or conjecture. See Off. of Ins. Reg. v. Secure Enters., LLC, 124 So. 3d 332, 336 (Fla. 1st DCA 2013).

104. An MFL is the limit at which further withdrawals would be significantly harmful to the water resources or ecology of the area. The individual Petitioners (Ms. Blasingame, Senator Jones, and Mr. Vibbert), established that the nature of the interests they identified as concerns through testimony and evidence are those that the Proposed Rule would protect.

105. The undersigned concludes that the Proposed Rule substantially affects the individual Petitioners (Ms. Blasingame, Senator Jones, and Mr. Vibbert), and that they therefore have standing to challenge it. See, e.g., S.W. Fla. Water Mgmt. Dist. v. Charlotte Cty., 774 So. 2d 903, 923 (Fla. 2d DCA 2001) (“we recognize that the establishment and implementation of minimum flows and levels is a decision that is of the utmost importance

to the citizens who live within the District's jurisdiction and one that will affect future generations.").

106. For an association, such as RRC, to establish standing as a party (i.e., associational standing), it must prove that a substantial number of its members, but not necessarily a majority, have a substantial interest that reasonably could be affected; that the subject matter of the proposed activity is within the general scope of the interests and activities for which the organization was created; and that the relief requested is of the type appropriate for the organization to receive on behalf of its members. See Fla. Home Builders Ass'n v. Dep't of Labor & Emp. Sec., 412 So. 2d 351, 353, 354 (Fla. 1982). See also NAACP, Inc. v. Fla. Bd. of Regents, 863 So. 2d 294 (Fla. 2003).

107. In NAACP, the Florida Supreme Court applied the test for associational standing enunciated in Florida Home Builders Association, to conclude that amendments to rules that would eliminate certain affirmative action policies by Florida's state universities had an "obvious" impact on African-American students, as compared to nonminority students. See NAACP, 863 So. 2d at 299. The NAACP court found that a "substantial number of the association's members were both prospective applicants to the State University System and were minorities that would obviously be affected by any change in policy concerning minority

admissions." Id. Based on these findings, the NAACP court held that "the association has demonstrated a sufficient impact on its student members as genuine prospective candidates for admission to the state university system to meet the requirement of substantial impact." Id. at 300.

108. In Board of Dentistry, an association of Florida dental hygienists challenged a proposed rule that designated the Alabama Dental Hygiene Program as an approved dental hygiene college within the meaning of the licensing statute. See Bd. of Dentistry, 612 So. 2d at 647, 648. The court, in determining that the appellee had standing, noted that it required "no flight of imagination to reason that if the rule would produce a flood of lesser-trained hygienists, presumably available for employment for less compensation, this would have an economic impact on the existing pool of more highly-trained individuals." Id. at 649. The court further found that "those hygienists who are already qualified, licensed and practicing in Florida have a sufficient interest in maintaining the levels of education and competence required for licensing to afford them standing to challenge an unauthorized encroachment upon their practice." Id. at 651. The court determined that the "professional and economic interests" of current dental hygienists were directly affected, and concluded that the association had standing to challenge the rule.

109. In Rosenzweig v. Department of Transportation, 979 So. 2d 1050 (Fla. 1st DCA 2008), an individual, and two organizations devoted to bicyclists, challenged the Department of Transportation's (DOT) implementation of a statute pertaining to the design and placement of bicycle lanes in conjunction with the resurfacing, restoration, and rehabilitation of State Road 1A in Palm Beach County. See Id. at 1052. DOT challenged the appellants' standing, relying on decisions concerning whether taxpayers could challenge the decision of a legislative body to make an expenditure. See Id. at 1053. The court, noting that one of the legislative purposes of the Administrative Procedure Act, was to expand public access to the activities of governmental agencies. The court held:

The statute . . . sets forth a policy for incorporating bicycle lanes in construction and reconstruction projects, and it further delineates situations where the Department need not establish the bicycle lanes. § 335.065, Fla. Stat. The statute's straightforward purpose is to regulate the placement of bicycle and pedestrian ways. Reason dictates that a bicycle organization, like appellants, can demonstrate that a substantial number of its members will be affected by the Department's decisions relating to the construction of bicycle paths.

Id. at 1054.

110. The undersigned concludes that RRC has established that a substantial number of its members have a substantial

interest that the Proposed Rule could reasonably affect, that the subject matter of the Proposed Rule (i.e., the District's establishment of an MFL for the Rainbow River System) is within the general scope of the interests and activities for which the RRC was created, and that the relief requested is of the type appropriate for the RRC to receive on behalf of its members.

Dr. Eno testified that RRC's membership roster includes a substantial number of individuals who reside on or near the Rainbow River System. He also testified that a substantial number of its members appear and participate in numerous activities that are dedicated to the conservation of the Rainbow River System. He further testified that a substantial number of its members actively participated in the hearings concerning the District's promulgation of the Proposed Rule.

111. The undersigned also concludes that Petitioners have established, by a preponderance of the evidence, the "real or immediate injury in fact" requirement for standing in a rule challenge proceeding, and rejects the District's contentions that because an MFL is "a mere planning tool" that does not authorize water withdrawal, the Petitioners cannot establish an injury. The District's argument on this point is essentially that MFL's could never be challenged. The undersigned notes that the plain language of section 373.042(7) provides for the possibility of

the instant type of rule challenge concerning the establishment of an MFL.

112. With respect to the "real or immediate injury in fact," the undersigned notes that in Office of Insurance Regulation v. Secure Enterprises, LLC, 124 So. 3d 332, 337-38 (Fla. 1st DCA 2013), the court found that the appellees lacked standing in a rule challenge proceeding, under the "real or immediate injury in fact" element, because the alleged injury was speculative and based on conjecture. The Id. court, in reversing an ALJ's conclusion that a petitioner had standing in a rule challenge, noted that the ALJ found that injury in fact "may be *inferred* from the *likelihood* . . . [that the rule's effect] would '*likely cause*' Appellee economic injury." Secure Enterprises, 124 So. 3d at 339. The court held that such findings confirmed that petitioners failed to show that the rules and forms at issue resulted in a "real or immediate" injury in fact sufficient to satisfy the substantially affected test. See Id.

113. The testimony of the individual Petitioners, and Dr. Eno, established, by a preponderance of the evidence, that a substantial number of Petitioners live on and actively use the Rainbow River, participate in activities dedicated to the conservation of the Rainbow River System, and otherwise testified to their sincere beliefs that a reduction in minimum flows on the Rainbow River System would affect these activities and efforts.

The undersigned concludes that the instant matter is more akin to Rosenzweig, in which the court found that "those seriously involved in bicycling" have standing to challenge DOT's interpretation of a statute that specifically related to bicycle lanes.^{16/}

Nature Of The Proceeding And Burden Of Proof

114. This is a de novo proceeding. See § 120.56(1)(e).

115. A proposed rule is not presumed to be valid or invalid. See § 120.56(2)(c). As previously stated, Petitioners have the burden to prove by a preponderance of the evidence that Petitioners would be substantially affected by the Proposed Rule. Further, Petitioners have the burden of going forward by establishing a factual basis for the objections to the Proposed Rule. See St. Johns Water Mgmt. Dist. v. Consol.-Tomoka Land Co., 717 So. 2d 72, 76 (Fla. 1st DCA 1988). Based on the Findings of Fact, the undersigned concludes that the Petitioners met the burden of going forward in this proceeding.

116. The District then has the burden to prove by a preponderance of the evidence that the Proposed Rule is not an invalid exercise of delegated legislative authority to the objections raised.

117. Petitioners' challenge to the Proposed Rule is facial, not "as-applied." See Fairfield Cmty. v. Fla. Land & Water Adj. Comm'n, 522 So. 2d 1012, 1014 (Fla. 1st DCA 1988) (holding that

the purpose of a rule challenge is to determine the facial validity of the rule, not to determine their validity as applied to specific facts).

118. Section 120.52(8) defines an "invalid exercise of delegated legislative authority." Those provisions reasonably related to the issues of fact and law, identified in the Joint Pre-hearing Stipulation, establish that a rule is an invalid exercise of delegated legislative authority under the following circumstances:

(8) "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:

(a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;

(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.;

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

(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; or

(f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

Issues Of Law For Disposition^{17/}

A. Whether Rule 40D-8.041(22), F.A.C., is an invalid exercise of delegated legislative authority pursuant to Section 120.52(8)(c), (d), and (e), F.S.^{18/}

119. An "arbitrary" decision is one not supported by facts or logic. A "capricious" action is one taken irrationally, without thought or reason. § 120.52(8)(e), Fla. Stat. See Bd. of Clinical Lab. Personnel v. Fla. Ass'n of Blood Banks, 721 So. 2d 317, 318 (Fla. 1st DCA 1998)(citing Bd. of Trustees of the

Int. Imp. Trust Fund v. Levy, 656 So. 2d 1359, 1362 (Fla. 1st DCA 1995)).

120. The validity of a proposed rule does not turn on whether it represents the best means to accomplish the agency's purposes, but rather, whether it is based on facts, logic, and reason. See Levy, 656 So. 2d at 1364.

121. The District established, by a preponderance of the evidence, that its use of the NDM Versions 4.0 and 5.0 to assess groundwater impacts on the Rainbow River System, in the calculation of the MFL, was the best information available to developed the Proposed Rule, and was not arbitrary.

122. The District established, by a preponderance of the evidence, that its utilization of the period of record of flows from 1965-2015 in establishing and evaluating the proposed minimum flow was not arbitrary.

123. The District established, by a preponderance of the evidence, that its decision to forego an analysis of the impact of algal accumulation and its relationship to flow was not arbitrary.

124. The District established, by a preponderance of the evidence, that its decision to forego an analysis of nutrient pollution and its relationship to flow before adoption of the Proposed Rule was not arbitrary.

125. The District established, by a preponderance of the evidence, that its failure to consider water resource values pursuant to the State Water Resource Implementation Rule was not arbitrary.

126. The District established, by a preponderance of the evidence, that its decision to forego further analysis of the unexplained decrease in flow in the Rainbow River since the year 2000 was not arbitrary.

127. The District established, by a preponderance of the evidence, that its decision to not cap current levels of withdrawals in the Rainbow River Springshed was not arbitrary.

128. The District established, by a preponderance of the evidence, that the Proposed Rule was supported by facts and logic, and was not taken irrationally, or without thought or reason.

129. The District demonstrated that it used the best available science in calculating the MFL, pursuant to section 373.04(1)(b). Evidence that the District conducted extensive scientific studies, hosted numerous workshops, responded to valid public comments, had its efforts positively peer-reviewed, and incorporated these efforts into the drafting of the Proposed Rule supports the undersigned's conclusion that the District did not act despotically or irrationally. See St.

Joseph Land & Dev. Co. v. Fla. Dep't. of Nat. Res., 596 So. 2d 137, 139 (Fla. 1st DCA 1992).

B. Whether Rule 40D-8.041(22), F.A.C., is vague and vests unbridled discretion in the District.

130. In State v. Peter R. Brown Const., Inc., 108 So. 3d 723, 728 (Fla. 1st DCA 2013), the court held that an administrative rule is invalid under section 120.52(8)(d) if:

[I]t forbids or requires the performance of an act in terms that are so vague that persons of common intelligence must guess at its meaning and differ as to its application. Generally, where words or phrases are not defined, they must be given their common and ordinary meaning.

131. The District established, by a preponderance of the evidence, that the Proposed Rule provides sufficient detail to ascertain how the District defines minimum flow, and how it will assess whether the minimum flow for the Rainbow River System is being met. The Proposed Rule does not fail to establish adequate standards for the District's decision, and does not vest unbridled discretion in the District. The undersigned thus concludes that the Proposed Rule is not vague.

C. Whether Rule 40D-8.041(22)(c)4. and 5., F.A.C., clearly contravene the law the proposed rule is implementing, Section 373.0421(2), F.S.

132. Section 120.52(8)(c) provides that a proposed rule is an invalid exercise of delegated legislative authority when it

enlarges, modifies, or contravenes the provisions of the law implemented.

133. Section 373.042(1)(a) requires water management districts to establish a minimum flow for all surface watercourses in the area and provides that the minimum flow is the limit at which further withdrawals would be significantly harmful to water resources or ecology of the area.

134. Pursuant to section 373.042(1)(a), and as detailed in the Proposed Rule, the District established a proposed minimum flow for the Rainbow River System utilizing the best information available that delineated the limit at which further withdrawals would be significantly harmful to the water resources and ecology of the Rainbow River System. The undersigned concludes that the District's establishment of the proposed minimum flow in the Proposed Rule did not modify, contravene, or enlarge the provisions of section 373.042(1)(a).

135. That does not end the analysis. Section 373.042(2) provides, in pertinent part, as follows:

If a minimum flow or minimum water level has been established for a water body pursuant to s. 373.042, and the existing flow or water level in the water body falls below, or is projected to fall within 20 years below, the applicable minimum flow or minimum water level, the department or governing board shall expeditiously adopt a recovery or prevention strategy. A recovery or prevention strategy shall include the development of additional water supplies and

other actions, consistent with the authority granted by this chapter, to:

(a) Achieve recovery to the established minimum flow or minimum water level as soon as practicable; or

(b) Prevent the existing flow or water level from falling below the established minimum flow or minimum water level.

The recovery or prevention strategy must include a phased-in approach or timetable which will allow for the provision of sufficient water supplies for all existing and projected reasonable-beneficial uses, including development of additional water supplies and implementation of conservation and other efficiency measures concurrent with and, to the maximum extent practical, to offset reductions in permitted withdrawals, consistent with this chapter. The recovery or prevention strategy may not rely solely on water shortage restrictions declared pursuant to s. 373.175 or 2. 373.246.

136. Petitioners contend that rule 40D-8.041(22)(c)4. and 5. contravene section 373.0421(2) because these subsections of the Proposed Rule do not specifically provide, consistent with the requirements of section 373.0421(2), that if the existing flow falls below, or is projected to fall below the MFL, the District shall expeditiously adopt a recovery or prevention strategy.

137. Rule 40D-8.041(22)(c)4. and 5. state as follows:

4. If the annual evaluation indicates the flow is below the Minimum Flow, or if the flow is projected to fall below the Minimum Flow within 20 years based on the evaluation performed as part of the regional water

supply process, the District will conduct a causation analysis to evaluate the potential causes of impacts on the Rainbow River System.

5. Based on the causation analysis, the District will re-evaluate the Minimum Flow for the Rainbow River System, or adopt a recovery or prevention strategy consistent with the provisions of Section 373.0421(2), F.S.

138. The District contends that it has established, by a preponderance of the evidence, and through "common sense," that it must understand why an MFL is being violated before it can undertake a recovery or prevention strategy. Thus, it claims that its implementation of a causation analysis in subsection (c)4., and its discretion to either rely on its causation analysis or adopt a recovery or prevention strategy consistent with section 373.0421(2) in subsection (c)5., constitutes a valid exercise of delegated legislative authority.

139. The undersigned concludes that the mandatory language of section 373.0421(2), which states that if the existing flow falls below the minimum flow, or is projected to fall below within 20 years, the District "shall expeditiously adopt a recovery or prevention strategy[,]" precludes the District's injection of an indefinite (as to time and scope) "causation" analysis, as well as the District's discretion to rely on its causation analysis in lieu of adopting the mandatory provisions of section 373.0421(2).^{19/}

140. The plain language of section 373.0421(2), particularly its use of "shall" and "expeditiously," with respect to the adoption of a recovery or prevention strategy after a governing board determines that the existing flow falls below the minimum flow, or is projected to fall below within 20 years, is dispositive of this issue. The District's attempt to inject a causation analysis, and to provide itself the discretion to rely on its causation analysis or proceed under section 373.0421(2), contravenes section 373.0421(2)'s mandatory requirements.

141. Pursuant to 120.56(2)(b), the undersigned "may declare the proposed rule wholly or partly invalid." The undersigned concludes that those portions of subsection (c)4. and 5. of the Proposed Rule that allow the District to "conduct a causation analysis to evaluate the potential causes of impacts on the Rainbow River System," and "[b]ased on the causation analysis [to] re-evaluate the minimum flow of the Rainbow River System" are invalid, pursuant to section 120.52(8)(c), because they modify or contravene the specific provisions of the law implemented, i.e. section 373.042(21). It would seem a simple resolution to have the Proposed Rule track the mandatory language of the statute. It is, however, not within the authority of the undersigned to assume authorship of the District's rule.

142. However, the undersigned concludes that the remaining provisions of the Proposed Rule are valid.

143. The undersigned also denies the District's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that proposed Florida Administrative Code Rule 40D-8.041(22) is, in part, an invalid exercise of delegated legislative authority. Consistent with paragraphs 139 through 141 of the undersigned's Conclusions of Law, those portions of rule 40D-8.041(22)(c)4. and 5., which allow for the expeditious adoption of a recovery or prevention strategy to be deferred or even dropped based on an ultra vires causation analysis shall not be adopted. However, the remaining portions of rule 40D-8.041(22) are valid. Therefore, the Amended Petition to Invalidate Proposed Rule 40D-8.041(22) of the Southwest Florida Water Management District is GRANTED, in part, and DENIED, in part.

DONE AND ORDERED this 31st day of January, 2020, in
Tallahassee, Leon County, Florida.



ROBERT J. TELFER III
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of January, 2020.

ENDNOTES

^{1/} On June 3, 2019, Gordon Hart filed a Notice of Voluntary Dismissal with Prejudice, and on June 6, 2019, Gretchen Martin filed a Notice of Voluntary Dismissal with Prejudice.

^{2/} On May 24, 2019, Petitioners filed a Motion for View, requesting the undersigned to view and tour the Rainbow River via a glass-bottom boat. On June 3, 2019, the undersigned entered an Order Denying Petitioners' Motion for View, concluding that a view of the Rainbow River and surrounding area was not necessary to the undersigned's determination of whether Proposed Florida Administrative Code Rule 40D-8.041(22) is an invalid exercise of delegated legislative authority.

^{3/} Ultimately, applying section 90.702 and Daubert, the undersigned accepted Mr. Gross as an expert in geology, Florida hydrology, and MFL models. The undersigned accepted Dr. Knight as an expert in springs ecology, wetlands ecology and management, modeling and statistical analysis, Florida minimum flows and levels, and water quality. Further, the undersigned finds that the expert testimony of Mr. Gross and Dr. Knight is evidence of a type commonly relied upon in cases of this sort, and is, therefore, admissible, subject to a determination of weight. See § 120.569(2)(g), Fla. Stat. The undersigned therefore denies the

District's Amended Motion in Limine Concerning the Expert Testimony of James Gross, as well as the District's Motion in Limine Concerning the Expert Testimony of Dr. Robert Knight.

^{4/} The undersigned accepted Mr. Flannery as an expert in MFL rulemaking.

^{5/} The undersigned accepted Mr. Leeper as an expert in aquatic ecology and MFLs. The undersigned accepted Mr. Basso, over Petitioner's objection pursuant to section 90.702 and Daubert, as an expert in hydroecology, groundwater flow models, and groundwater science hydrogeologic evaluation of groundwater impacts. The undersigned accepted Dr. Anastasiou as an expert in water quality and submerged aquatic vegetation.

^{6/} Additionally, and as noted in the Post-Hearing Case Management Order, the parties agreed to waive the time limit for rendering a final order in this proceeding, pursuant to section 373.042(7).

^{7/} "Springshed" means the area within the groundwater and surface water basins which contribute, based upon all relevant facts, circumstances, and data, to the discharge of a spring as defined by potentiometric surface maps and surface watershed boundaries. See § 373.802(6), Fla. Stat.

^{8/} The peer review panel also noted that the 15 percent threshold for "significant harm" was "unproven and needs defensible confirmation and validation[,] and recommended that "additional discussion and guidance be provided by the District with regard to how the District interprets the threshold of 'significant harm' when assigning a minimum flow. . . ."

^{9/} Mr. Leeper noted that the District's definition of estuarine resources includes where freshwater and seawater mix, which creates a unique chemistry and environment that supports a unique assemblage of organisms. Mr. Leeper stated that "we consider this value through characterization under the Rainbow River System itself and understanding the organisms and the chemistry of that system and determined that it's not the estuarine resource."

^{10/} The undersigned has grouped repetitive and/or related issues of fact that the parties identified in the Joint Pre-hearing Stipulation (and has identified these issues by the number(s) assigned in the Joint Pre-hearing Stipulation) for purposes of making pertinent findings of fact related to those issues.

^{11/} In a simple water budget analysis, the amount of recharge in an aquifer is equal to the rainfall, less evapotranspiration (the amount of rain that evaporates off of the land surface or that plants use before entering the water table), less runoff. In an internally drained area such as the Rainbow River springshed, runoff is eliminated from the water budget equation, meaning recharge equals rainfall less evapotranspiration.

^{12/} The parties also introduced into evidence numerous photographs that depict various forms of algae in the Rainbow River System.

^{13/} In City of Sanibel, et al. v. South Florida Water Management District, DOAH Case No. 18-5114RP (Fla. DOAH March 8, 2019), ALJ Ffolkes found that a proposed rule challenge is not the proper forum to determine whether a proposed rule is consistent with the Water Resource Implementation Rule, and that such a determination is within the exclusive jurisdiction of DEP pursuant to section 373.114(2). The undersigned agrees with this finding.

^{14/} The District presented testimony and evidence that the flow levels in the Rainbow River System have increased substantially since 2018.

^{15/} In the Joint Pre-hearing Stipulation, the parties identified "[w]hether Petitioners have standing," in agreed issue 5, as well as an issue of law.

^{16/} Accordingly, the undersigned denies the District's Motion to Dismiss for Lack of Standing.

^{17/} The parties identified the following issues of law in the Joint Pre-hearing Stipulation.

^{18/} As the remaining issues of law identified in the Joint Pre-hearing Stipulation concern vagueness (section 120.52(8)(d)) and whether the Proposed Rule contravenes the law implemented (section 120.52(8)(c)), the undersigned will consider Petitioner's contention that the Proposed Rule is arbitrary or capricious in this subsection.

^{19/} The undersigned also notes that section 373.805(3), which concerns "Outstanding Florida Springs," similarly imposes a mandatory requirement on the District if low existing flows are determined. It states that if the District determines that the spring has fallen below, or is projected to fall below within 20

years, the adopted minimum flow, the District "shall expeditiously adopt a recovery or prevention strategy." Section 373.805(4) further provides minimum, specific steps the District "must" include in the recovery or prevention strategy.

COPIES FURNISHED:

Douglas Harold MacLaughlin, Esquire
319 Greenwood Drive
West Palm Beach, Florida 33405
(eServed)

Jane West, Esquire
Jane West Law, P.L.
Suite 504
24 Cathedral Place
St. Augustine, Florida 32084
(eServed)

Karen W. West, Esquire
Southwest Florida Water Management District
7601 U. S. Highway 301 North
Tampa, Florida 33637
(eServed)

Adrienne Ellen Vining, Esquire
Southwest Florida Water Management District
7601 U.S. Highway 301 North
Tampa, Florida 33637-6759
(eServed)

Christopher Tumminia, Esquire
Southwest Florida Water Management District
7601 U.S. Highway 301 North
Tampa, Florida 33637-6759
(eServed)

Michael Roy Bray, Esquire
Southwest Florida Water Management District
7601 U.S. Highway 301 North
Tampa, Florida 33637-6759
(eServed)

Hillary Anne Ryan, Esquire
Southwest Florida Water Management District
7601 U.S. Highway 301 North
Tampa, Florida 33637-6759
(eServed)

Laurel Tallent, Qualified Representative
Jane West Law, P.L.
Suite 504
24 Cathedral Place
St. Augustine, Florida 32084

Brian Armstrong, P.G., Executive Director
Southwest Florida Water Management District
2379 Broad Street
Brooksville, Florida 34604-6899
(eServed)

Ken Plante, Coordinator
Joint Administrative Procedures Committee
Room 680, Pepper Building
111 West Madison Street
Tallahassee, Florida 32399-1400
(eServed)

Ernest Reddick, Program Administrator
Anya Grosenbaugh
Florida Administrative Code & Register
Department of State
R. A. Gray Building
500 South Bronough Street
Tallahassee, Florida 32399-0250
(eServed)

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.