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March 7, 2000

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Ms. Blanca S. Bayó
Director, Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 991754-GP

Dear Ms. Bayó:

Enclosed for filing on behalf of Buccaneer Gas Pipeline Co., L.L.C. are the original and fifteen copies of its Reply To Petitioner's Brief In Support Of Amended Petition To Initiate Rulemaking.

By copy of this letter, this document is being furnished to the parties on the attached service list.

Very truly yours,

Richard D. Melson

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CAF
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Friends of the Aquifer, Inc., to adopt rules necessary to establish safety standards and a safety regulatory program for intrastate and interstate natural gas pipelines and pipeline facilities located in Florida.	)	Docket No. 991754-GP Filed: March 7, 2000

BUCANEER'S REPLY TO PETITIONER'S BRIEF IN SUPPORT OF AMENDED PETITION TO INITIATE RULEMAKING

Intervenor, Buccaneer Gas Pipeline Co., L.L.C. ("Buccaneer"), by and through its undersigned counsel, hereby files its reply to the Brief in Support of Amended Petition to Initiate Rulemaking ("Brief") filed in this docket by the Friends of the Aquifer ("Petitioner") on February 24, 2000.[1] This reply will first summarize the two rules proposed by Petitioner and will then respond to the two points addressed in the Brief.

THE PROPOSED RULES

The Amended Petition to Initiate Rulemaking ("Amended Petition") asks the Commission to adopt two rules which Petitioner asserts are "necessary to establish safety *and environmental* standards and regulatory programs for intrastate and interstate natural gas pipelines and pipeline facilities located within the State of Florida." (Amended Petition, page 1, emphasis added).

The first proposed rule would have the Commission "accept[] the delegation" by the United States Department of Transportation ("USDOT") to regulate Florida natural gas pipelines

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[1] It is unusual for a party to file a brief of this type after the staff has filed its recommendation. Bucaneer understands the Commission's desire to be fully informed in this matter, however, and therefore offers this response.

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FPSC-RECORDS/REPORTING

and pipeline facilities under 49 U.S.C.A. §60105 [sic] and would require the Commission to proceed to propose rules necessary to ensure the safe construction and operation of such facilities. (Amended Petition, ¶12).

The second proposed rule would have the Commission "accept[] the authority granted to it" pursuant to 49 U.S.C.A. §60106 to enter into an agreement with the USDOT to implement the provisions of the Federal Hazardous Liquid Pipeline Act. (Amended Petition, ¶14).

In each case, the proposed rule states that acceptance of such delegation or authority "is necessary for the protection of persons *and the environment* from the risks of harm presented by the construction and operation of *natural gas pipelines* in Florida." (Amended Petition, ¶¶ 12, 14). The rules as proposed by Petitioner therefore appear to apply only to natural gas pipelines, not to hazardous liquid pipelines.

Putting aside momentarily the question of the Commission's statutory authority to adopt the proposed rules, neither rule serves any useful purpose. Under the regulatory scheme established by 49 U.S.C.A. §60101 *et. seq.*, if a state agency has and is exercising authority to regulate natural gas pipelines and/or hazardous liquid pipelines in a manner consistent with the federal law, then the state agency simply certifies that fact to the USDOT under §60105 and the USDOT defers to the state regulation. If no such certification is received with respect to natural gas pipelines and/or hazardous liquid pipelines, then USDOT either enters into an agreement with a state agency delegating authority to that agency under §60106 or, in the absence of an agreement, USDOT continues to enforce the federal standards.

As to natural gas pipelines, the Commission has and exercises the authority to regulate such pipelines in a manner consistent with federal law and has been so certifying to USDOT on an annual basis since 1971. (Staff Recommendation, page 4 and Attachment 3). As to hazardous

liquid pipelines, the Commission has no state law authority.[2] Thus neither rule serves any purpose not already served by the Commission's annual certification to the USDOT with respect to natural gas pipelines.

RESPONSE TO PETITIONER'S ARGUMENT

To the extent that the proposed rules could be read as requiring the Commission to exercise authority over the environmental aspects of natural gas pipelines, or over any aspect of hazardous liquid pipelines, they exceed the Commission's statutory rulemaking authority.

I. THE PSC LACKS EXPRESS STATUTORY AUTHORITY TO ADOPT RULES RELATING TO ENVIRONMENTAL ASPECTS OF NATURAL GAS PIPELINES OR TO ANY ASPECTS OF HAZARDOUS LIQUID PIPELINES, AND THERE IS NO IMPLIED POWER TO ADOPT SUCH RULES

The Commission Staff has filed recommendations with the Commission on both Petitioner's original petition to initiate rulemaking and on its Amended Petition. In each case, the Staff concluded that the Commission (i) does not have the statutory authority to adopt the rules insofar as they relate to hazardous liquid pipelines, and (ii) to the extent the Commission has jurisdiction to regulate natural gas pipelines, is it already exercising that jurisdiction and has adopted comprehensive rules. Staff's conclusion is correct and should be adopted by the Commission in the form of a denial of the Amended Petition for Rulemaking. As shown below, there is nothing in Petitioner's most recent Brief that demonstrates any flaw in the Staff's prior legal analysis.

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[2] Petitioner's proposed rules do not appear to be intended to address hazardous liquid pipelines in any event.

The argument in Part I of Petitioner's Brief is that the Commission has the implied power under Sections 368.03 and 368.05 to adopt the proposed rules, and that nothing in the recent amendments to Chapter 120 detracts from that implied authority. That analysis is simply wrong.

A. No Express Authority

When the provisions of Part I of Chapter 368 are read as a whole, the inescapable conclusion is that the chapter gives the Commission rulemaking authority only over natural gas pipelines and only for purpose of establishing and enforcing safety standards. It does not contain express authority to establish environmental standards for natural gas pipelines, or to adopt rules relating to any aspect of hazardous liquid pipelines.

In this regard:

- Section 368.01 designates the law as the "Gas Safety Law of 1967."
- Section 368.021 limits the laws applicability to gas transmission or distribution pipelines and facilities, and makes no reference to hazardous liquid pipelines.
- Section 368.03 states the detailed purpose of the statute and requires the Commission's rules and regulations to be "adequate for safety" under conditions normally encountered in the gas industry.
- Section 368.05 gives the Commission authority to enforce the "safety standards" established by the Commission pursuant to the law and to require reporting to determine whether "the safety standards prescribed by it" are being met.
- Section 368.061 establishes penalties for violation of the statute and rules and authorizes certain court proceedings to enforce the statute and rules.

Notably absent from Chapter 368 is any mention of environmental standards and any mention of hazardous liquid pipelines. The absence of environmental standards is not surprising, since the authority to adopt environmental standards is typically granted to agencies other than the Commission.

B. No Implied Authority

With the exception of the case of *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*, 717 So.2d 72 (Fla. 1st DCA, 1998) ("*Consolidated-Tomoka*"), all of the cases cited by Petitioner predate the 1996 revision of the Administrative Procedure Act ("APA"). They are thus of little use in determining the scope of the Commission's rulemaking authority under the current statute. Moreover, even *Consolidated-Tomoka* predates the 1999 amendments to Section 120.52(8), which rejected -- at least prospectively -- the "class of powers and duties analysis" relied on in that decision. As discussed below, the Commission lacks authority to adopt the proposed rules, either under the 1996 APA as interpreted by *Consolidated-Tomoka*, or under the current APA as amended in 1999.

1. 1996 APA Revisions and *Consolidated-Tomoka*

In the 1996 revisions to the APA the Legislature added so-called "flush left" language to Section 120.52(8), Florida Statutes, which states:

> 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, interpret or make specific the particular 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 or capricious, 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 the particular powers and duties conferred by the same statute.

In analyzing this revision in *Consolidated-Tomoka*, the court held that the clear and unambiguous portions of this statute meant that:

- A grant of rulemaking authority is necessary, but not alone sufficient to support a rule. The agency must also show that its rule implements a specific statute. *Id.* at 78.

- A rule is not a valid exercise of delegated legislative authority merely because it is based on an expression of legislative intent or policy. This provision is consistent with the requirement that a rule must implement a specific statute. *Id.* at 78.
- A rule is no longer valid merely because it is "reasonably related" to the purpose of the enabling legislation. In this regard, the 1996 revisions were intended to overrule prior judicial decisions. *Id.* at 78-79.

The *Consolidated-Tomoka* court then went on to determine the type of delegation that is sufficient to support a rule by construing the language that "[a]n agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute." (Emphasis added). In doing so, the court focused on the phrase "particular powers and duties." The court held that the Legislature did not intend to require a statute to contain a detailed description of the agencies' powers and duties as a prerequisite to rulemaking. Instead, the court held that the term "particular" meant that the powers and duties must be identifiable as powers and duties falling within a class of powers and duties identified in the enabling statute. *Id.* at 79-80. The court therefore announced the standard that:

> A rule is a valid exercise of delegated legislative authority if it regulates a matter directly within the class of powers and duties identified in the statute to be implemented.
>
> *Consolidated-Tomoka* at 80.

To the extent they address either the environmental impacts of natural gas pipelines, or any aspects of hazardous liquid pipelines, Petitioner's proposed rules fail the *Consolidated-Tomoka* test. The Legislature has given the Commission no powers and duties with respect to hazardous liquid pipelines. Any rule dealing with such pipelines is therefore beyond the class of powers and duties identified in Chapter 368. As to natural gas pipelines, the Legislature has given

the Commission powers and duties only with respect to gas pipeline safety regulation. Any rule dealing with the environmental aspects of such pipelines is also beyond the class of powers and duties identified in Chapter 368. In sum, the proposed rules do not purport to implement any class of powers and duties delegated to the Commission by the Legislature.

2. 1999 Amendments to Section 120.52(8) and Impact on Standard Established by *Consolidated-Tomoka*

In 1999, the Legislature enacted Chapter 99-379, Laws of Florida, which amended Section 120.52(8) as follows:

> 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 ~~or make~~ specific ~~the particular~~ 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 or 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 ~~the particular~~ powers and duties conferred by the same statute.
>
> Chapter 99-379, Section 2.

The intent of the 1999 Legislature in adopting this amendment to the "flush left" language in Section 120.52(8) was announced in Section 1 of Chapter 99-379.

> It is the intent of the Legislature that modifications in sections 2 and 3 of this act which apply to rulemaking are intended to clarify the limited authority of agencies to adopt rules in accordance with Chapter 96-159, Laws of Florida, and are intended to reject the class of powers and duties analysis. However, it is not the intent of the Legislature to reverse the result of any specific judicial decision.

Although no court has yet construed the effect of this 1999 Amendment, at least one Administrative Law Judge has construed the statute in the context of a rule challenge proceeding.

Save the Manatee Club, Inc. v. Southwest Florida Water Management District, ER FALR '00:036 (DOAH, December 9, 1999).[3] That order interpreted the 1999 amendment to mean that the "class of powers and duties analysis" conducted by the First District Court of Appeal in *Consolidated-Tomoka* may not be applied to cases arising after the effective date of such amendments. *Id.* at ¶90. The ALJ construed the Legislature's stated intent not to overrule any specific court decision to mean that the *Consolidated-Tomoka* decision remains undisturbed as to its application prior to the effective date of the 1999 amendments.[4] *Id.* In any event, the 1999 amendment means that even if a court might previously have construed Chapter 368 broadly to grant the Commission a class of powers and duties with respect to the regulation of natural gas pipelines, the only rulemaking authority the Commission has today is to implement or interpret the "specific powers and duties" granted by Chapter 368. And nothing in that chapter give the Commission *specific* powers and duties related to environmental issues or to hazardous liquid pipelines.

II. THE PSC'S EXISTING RULES ADDRESS ALL RISKS OF HARM THAT THE COMMISSION IS AUTHORIZED BY STATE LAW TO ADDRESS

Petitioner's argues in Part II of its Brief that additional rulemaking is needed because the Commission's existing rules do not address any environmental risks presented by natural gas pipelines in Florida. Petitioner suggests that consideration of such risks by state authorities is contemplated by 49 U.S.C. §60109. Petitioner's argument must be rejected for two reasons.

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[3] A copy of this order is attached for ease of reference.

[4] Another reasonable interpretation is that the changes to Section 120.52(8) may apply retroactively, but are not intended to invalidate the specific rules upheld in *Consolidated-Tomoka*.

First, §60109 does not give either USDOT or any state agency the authority to regulate environmental matters. That section requires USDOT to establish criteria (a) for operators of gas pipelines to identify each gas pipeline facility located in a high-density population area, and (b) for operators of hazardous liquid pipelines to identify pipeline facilities located in high-density population areas and certain unusually sensitive environmental areas. There is **no** reference to environmentally sensitive areas with regard to natural gas pipelines. Further, this section does not give USDOT (or any state agency) environmental regulatory authority over either gas or hazardous liquid pipelines. It merely requires the lines' location in high-density population areas or (for hazardous liquid pipelines) in environmentally sensitive areas, to be reported on an inventory record available to USDOT. §§60109(b), 60102(e). Thus, contrary to Petitioner's claim, there is no federal environmental authority to be exercised, even if the Commission had rulemaking authority under state law.

Second, as discussed in Part I above, the Legislature has delegated the Commission specific duties related to gas pipeline safety and the Commission has rulemaking authority only to implement those specific duties. That obligation has been fully discharged by the adoption of Chapter 25-12, F.A.C, which comprehensively covers all aspects of natural gas pipeline safety regulation. There simply is no authority to establish rules based on environmental considerations, even if such considerations were contemplated by federal law.

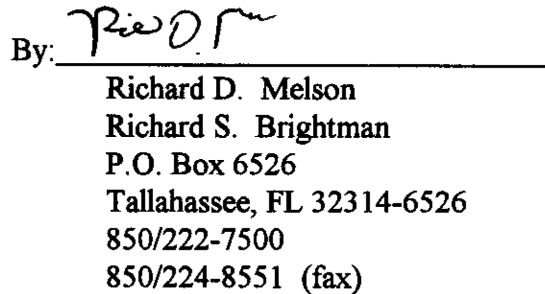
CONCLUSION

To the extent the proposed rules relate to environmental aspects of natural gas pipelines, they are beyond the Commission's rulemaking authority, which is limited to natural gas pipeline safety issues. Further, the federal laws cited by Petitioner do not contemplate either USDOT or a state agency exercising any authority over the environmental impacts of such pipelines.

Since the Commission has no statutory duties with regard to hazardous liquids pipelines, the rules are beyond the Commission's authority to the extent they purport to regulate hazardous liquids pipelines.

RESPECTFULLY SUBMITTED this 7th day of March, 2000.

HOPPING GREEN SAMS & SMITH, P.A.



By: ______________________

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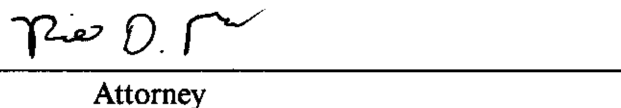
Attorneys for BUCCANEER GAS PIPELINE CO., LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was hand delivered this 7th day of March, 2000, to the following:

Christiana Moore
Division of Appeals
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399

John Folsom
424 East Call Street
Tallahassee, FL 32301



Attorney

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SAVE THE MANATEE
CLUB, INC.,

Petitioner,

ER '00:036

vs. Case No. 99-3885RX

SOUTHWEST FLORIDA
WATER MANAGEMENT
DISTRICT,

Respondent,

and

SOUTH SHORES PROPERTIES
PARTNERS, LTD.,

Intervenor.

______________________________/

FINAL ORDER

This case was heard by David M. Maloney, Administrative Law Judge of the Division of Administrative Hearings, on October 14, 1999, in Tallahassee, Florida.

APPEARANCES

For Petitioner:	Robert Goodwin, Esquire Save the Manatee Club, Inc. Suite 210 500 North Maitland Avenue Maitland, Florida 32751
	Steven A. Medina, Esquire Post Office Box 247 Fort Walton Beach, Florida 32549-0247
For Respondent:	William S. Bilenky, Esquire Karen E. West, Esquire Southwest Florida Water Management District 2379 Broad Street Brooksville, Florida 34609-6899
For Intervenor:	Frank E. Matthews, Esquire Eric T. Olsen, Esquire Post Office Box 6526 Tallahassee, Florida 32314-6526

STATEMENT OF THE ISSUES

Whether Save the Manatee Club has standing in this proceeding? Whether the exemptions in paragraphs (3), (5) and (6) of Rule 40D-4.051, Florida Administrative Code, (the Exemptions) are "invalid exercises of delegated legislative authority" as defined in paragraphs (b) and (c) of Section 120.52(8), Florida Statutes? Whether the Exemptions violate the prohibitions and restrictions on agency rulemaking contained in the last four sentences of Section 120.52(8), Florida Statutes?

PRELIMINARY STATEMENT

On September 17, 1999, Save the Manatee Club (the Club or Petitioner) filed a petition with the Division of Administrative Hearings (DOAH). Entitled "Petition for Formal Administrative Proceeding and for an Administrative Determination of the Invalidity of the Exemptions in Florida Administrative Code Rule 40D-4.051(3), (5) and (6)", the petition asks for two types of administrative hearings: the first to challenge agency action, the second to challenge provisions in rule.

The first challenge is brought under the authority of Sections 120.569 and 120.57, Florida Statutes. The Club hopes to convince the Southwest Florida Water Management District (SWFWMD or the District) to deny South Shores Property Partners, Ltd., (South Shores or the Developer) the benefit of exemptions from permit requirements and ultimately a conceptual permit. South Shores seeks the benefit of the Exemptions in order to conduct activities the Club postulates will harm the manatee and its habitat near and in Tampa Bay.

Through the second challenge, the Club, under the authority of Section 120.56(3), Florida Statutes, seeks an administrative determination of the invalidity of existing rules, namely paragraphs (3), (5) and (6) of Rule 40D-4.051, Florida Administrative Code, (the Rule). These paragraphs provide exemptions the District has decided to afford the Developer. This proceeding concerns only the latter challenge: the challenge to the rule provisions.

A second copy of the Petition was filed contemporaneously with the District. The District, in turn, referred the petition to DOAH where it has been assigned Case no. 99-4155 (currently pending before the undersigned.) As a result of the filing and the referral, Case no. 99-4155 concerns only the challenge to the decisions of the District that the Exemptions apply to South Shores and that South Shores should, therefore, receive a conceptual permit.

On September 23, 1999, the undersigned was designated as the administrative law judge to conduct the proceedings in this case. On the next day, September 24, a notice of hearing was issued setting the final hearing for October 14, 1999. (Within the next few weeks, the undersigned was also designated as the administrative law judge to conduct the proceedings in Case no. 99-4155. That case has been set for final hearing in Brooksville, commencing December 16, 1999.)

In the meantime, South Shores petitioned to intervene in this case. The District filed a motion in limine and South Shores filed a motion to strike. One of the aims of the two motions was to exclude from this proceeding any consideration of the challenge to the agency action taken by the District, and evidence relating thereto.

Following a status conference, South Shores' petition was granted subject to proof of standing to intervene at hearing. By the time of the status conference, all were aware that the single petition filed by the Club had initiated two proceedings, one at DOAH, the other through the District's referral to DOAH. The parties agreed at the conference that the two cases (albeit initiated by the same petition) should not be consolidated. The agreement rendered unnecessary any need for a ruling on South Shores motion to strike and the District's motion in limine; there is no dispute that this proceeding concerns only the challenge to the Rule's Exemptions pursuant to Section 120.56(3), Florida Statute.

On October 11, 1999, Petitioner filed a motion to amend its petition. The motion sought to amend the allegations relating to the Club's standing and to delete subparagraph (j) of paragraph 10

in the petition which related to some of the arguments for invalidating the Exemptions. The motion was granted at the commencement of the hearing on October 14. The result of the amendment by the deletion is that the Petitioner has limited its claim to the invalidity of the Exemptions. In the aftermath of the amendment, the claim is based on the definition of "invalid exercise of delegated legislative authority" contained in paragraphs (b) and (c) and the prohibitions and restrictions on agency rulemaking authority in the last four sentences of Section 120.52(8), Florida Statutes.

After its motion to amend was granted, Petitioner presented its case. It offered Exhibit nos. 1-15, all of which were admitted into evidence. It requested and received official recognition of documents marked as OR 1, 2 and 4-8. (A document marked as OR 3 was offered but withdrawn before a ruling on its recognition was made.) The testimony of Patti Thompson, staff biologist with the Club was presented. Ms. Thompson was accepted as an expert in manatee biology, particularly as it relates to Tampa Bay.

South Shores presented the testimony of Glen Cross. The District presented no evidence. No exhibits, other than those introduced by Petitioner, were offered.

The transcript of the final hearing was filed on October 22, 1999. On October 29, 1999, Petitioner filed a notice that it stipulated to the standing of South Shores to intervene in the proceeding. All parties filed proposed orders by October 29, 1999, the date established at hearing for timely filing.

FINDINGS OF FACT

a. The parties

1. Petitioner, Save the Manatee Club, Inc., is a not-for-profit corporation dedicated to protecting the manatee.

2. Respondent, The Southwest Florida Water Management District, is one of five water management districts in the State of Florida. A public corporation created pursuant to Chapter 61-691, Laws of Florida, the District's geographic boundaries encompass a number of counties or some part of them including the three counties on the shores of Tampa Bay: Hillsborough, Pinellas and Manatee. See Section 373.069(2)(d), Florida Statutes. Within this boundary, the District is generally charged with the protection of water resources and with the management and storage of surface waters of the State pursuant to Part IV, Section 373.403 et seq., Florida Statutes.

3. Intervenor, South Shores Properties Partners, Ltd., is a limited partnership composed of a subsidiary of Tampa Electric Company (TECO) and another business organization, Shimberg Cross Company, referred to by its President Glen Cross as "actually SCSS" (Tr. 133), apparently an acronym for Shimberg Cross Company. Mr. Cross' company is the general partner in the South Shores partnership. South Shores was formed in anticipation of closing on a contract entered by Shimberg Cross to purchase a parcel of real estate in Hillsborough County. The closing proceeded in January of 1998. On January 23, 1998, eight days or so before the closing, South Shores was formed as "a limited partnership organized under the laws of the State of Florida." (Petitioner's Exhibit no. 15). It succeeded to the contract rights of Shimberg Cross and then, pursuant to the closing, became the owner of the real estate subject to the contract. South Shores hopes to sell the property to Atlantic Gulf Communities, an organization that will actually develop it. If the arrangement with Atlantic Gulf Communities is not consummated, South Shores will look for another developer or develop the property itself. No matter what party (if any) is the actual developer, South Shores, as the present owner, now seeks the benefit of the Exemptions in support of a District-issued conceptual permit for development of the parcel in Hillsborough County (the Parcel).

b. The Parcel and Its Proposed Development

4. The Parcel is 720 acres in southwestern Hillsborough County. South Shores proposes to use it for a multi-phase, mixed-use project. The development project is denominated "Apollo Beach aka (sic) Bay Side" (Petitioner's Exhibit 13) on the draft of the conceptual permit attached to the District's Notice of Proposed Agency Action. Atlantic Gulf Communities calls it "Harbor Bay". (Petitioner's Exhibits 3 and 4). (It will be referred to in this order as Apollo Beach/Bay Side).

5. If all goes as planned by South Shores, the Parcel's developer (whether South Shores, Atlantic Gulf Communities, or some other party) will be able to provide the residential portion of Apollo Beach/Bay Side with direct access by boat to Tampa Bay through an existing canal system on the Parcel. For now access to the bay is blocked by an earthen berm or "plug." With the plug in place, boat access to the bay from the canals can only be achieved by means of a boat lift.

6. A lagoon is also part of South Shores' development plans for Apollo Beach/Bayside. Not yet excavated, the lagoon will allow residents to harbor boats close to their residences. If the lagoon is dug, a boat lift (different from the one necessary to allow boats to cross the plug if left in place) will be constructed to give the boats access to the canal system. With access to the canal system established, once the plug is removed, the boats will have unrestricted access to Tampa Bay.

7. In the "Abstract" section of the conceptual permit proposed for issuance by the District, the project was described as follows:

> Apollo Beach (a.k.a. Bay Side) is a proposed multi-phase, mixed use development on approximately 720.0 acres in ... Southwestern Hillsborough County. The project will include single-family and multi-family residential areas and commercial sites. The property is in close proximity to Tampa Bay, West of U.S. Highway 41 and immediately south of the existing Apollo Beach development. The site is presently undeveloped but does contain an existing manmade canal system that is tidally connected to Tampa Bay.
>
> The Applicant has demonstrated that the proposed project has an Environmental Resource Permit exemption pursuant to Chapters 40D-4.051(3)(5) and (6), F.A.C. and will only require Standard General Permits for Minor Surface Water Management Systems for the future construction in accordance with Chapter 40D-4.041(4), F.A.C. Because of this exemption, this Conceptual Permit will only review the storm water quality aspects of the project in accordance with 40D-301(2) and will not address storm water quantity issues or impacts to wetland/fish and wildlife habitats.
>
> The project will include the realignment of existing Leisley Road and the construction of a roadway system to serve the proposed residential and commercial areas. The project will also include the excavation of a "fresh water Lagoon" approximately 136 acres in size. Most of the proposed single-family residential lots will be constructed on the "Lagoon" or existing canal system. Surface water runoff from the upland portions of the project will be treated in 25 proposed

ponds or isolated wetlands prior to discharge to the "Lagoon" or existing canal system.

(Petitioner's Exhibit no. 13.)

8. The ultimate effects to manatees of the proposed development project, if completed, were described by Ms. Thompson, the Club's witness:

> A typical project such as this one will introduce a good number of powerboats into the system, in this case, Tampa Bay. And manatees are impacted by powerboats either through propeller injuries or through collision with the hull of a fast-moving boat and the results are either death or in some cases sublethal injuries that may have other consequences such as inability to reproduce, et cetera.
>
> ... [T]he very same boats can affect manatee habitat by prop scarring, boats going over sea grass beds and destroying the grasses. They also, in shallow water, kick up ... turbidity which can affect light attenuation reaching the sea grass beds. And then there are the water quality issues which have secondary impacts to the sea grass beds...

(Tr. 96). The Exemptions preliminarily afforded South Shore by the District will allow the removal of the plug in the canal system. Because removal of the plug will facilitate access to Tampa Bay by power boats harbored in the lagoon, it is the issue about the development of the Parcel that most concerns the Club in its efforts to protect manatees in Tampa Bay and elsewhere.

c. Standing of Save the Manatee Club

(i). The Manatee

9. The manatee is the "Florida State marine mammal." Section 370.12(2)(b), Florida Statutes.

10. Designated an endangered species under both federal and state law, 50 CFR s. 17.11 and Rule 39-27.003, Florida Administrative Code, the manatee is protected by the federal Endangered Species Act and by the federal Marine Mammal Protection Act. In Florida, the manatee enjoys, too, the protection of the Florida Endangered Species Act and the Florida Manatee Sanctuary Act.

11. The State of Florida has been declared to be "a refuge and sanctuary for the manatee." Id.

(ii). The Club's Purpose and Activities

12. The Club's primary purpose is to protect the manatee and its habitat through public awareness, research support and advocacy.

13. Long active in efforts to protect the manatee, the Club has achieved special status in manatee protection in Florida. In 1996, it was the recipient of a resolution by the Florida Legislature's House of Representative recognizing its endeavors on behalf of the manatee. The Club has been designated a member of the Manatee Technical Advisory Council provided by the Florida Manatee Sanctuary Act. See sub-sections (2)(p) and (4)(a) of section 370.12(2)(p) and (4)(a), Florida Statutes. The Department of Environmental Protection annually solicits recommendations from the Club regarding the use of Save the Manatee Trust Fund monies.

14. In furtherance of its efforts, the Club has frequently participated before the Division of Administrative Hearings in administrative litigation involving manatees and manatee habitat on behalf of itself and its members.

(iii). The Club's Membership

15. The Club has approximately 40,000 members. The number of individual persons who are members of the Club, however, is far in excess of this number because many members are groups that receive membership at discounted fees. For example, a family may be one member or, as is quite common, an entire elementary school classroom may be one member.

16. One-quarter of the Club's membership resides in Florida. Approximately 2,200 of the members are on the west coast of Florida with 439 in Hillsborough County, 584 in Pinellas and 165 in Manatee. The total number of members is therefore about 1,188 in the three counties whose shores are washed by Tampa Bay.

(iv). Tampa Bay

17. Tampa Bay is "prime essential manatee habitat." (Tr. 65). At least two factors make this so: the Bay's sea grass beds (manatee feeding areas) and warm water sources, particularly in winter, three of which are "power plant effluence." (Tr. 77).

18. Not surprisingly, therefore, the Club has funded long-term research on the manatee in Tampa Bay. It has "provided about ten years of financial support for aerial surveys to count manatees in Tampa Bay and determine their distribution and the health of the sea grass beds..." (Tr. 75), a research project which finished last year. This research has contributed to other manatee research in the Bay leading the Club's witness at hearing to conclude, "[t]here's no other place in the state of Florida that has as long a term, as comprehensive a [manatee] database as Tampa Bay." (Tr. 76).

19. Other activities in Tampa Bay conducted by the Club include the placement of manatee awareness signs. And the Club's staff biologist sits on the Tampa Bay Manatee Awareness Coalition established by the Tampa Bay National Estuary Program. In sum, the quality of manatee habitat in Tampa Bay is enough to make it especially important to the Club. But, its importance to the Club takes on added significance because it is the site of one of only three adoption programs the Club sponsors in Florida.

(v). The Tampa Bay Adoption Program

20. The Tampa Bay Adopt-a-Manatee Program was established in April of 1999.

21. The six manatees subject to the Tampa Bay Manatee Adoption Program (as of October 7, 1999) have been adopted by 1,229 members, 284 of which have been schools. (Petitioner's Exhibit 9). Those adopting receive a photo of the manatee, a biography, a scar pattern sheet, and a map showing their manatees' favorite habitat areas along the west coast of Florida.

22. Of the six "Tampa Bay Adoption" program manatees, five have been seen in Tampa Bay and one south of Tampa Bay in the Marco Island area. Of the five seen in the bay, four "winter at the warm water discharge area of Tampa Electric Company's power plant" (Petitioner's Exhibit No. 5, Tr. 67) where they can be observed by members of the Club and the Tampa Bay adoption program as well as by the public.

(vi). The TECO Power Plant

23. The TECO power plant area is the major warm water refuge for manatees known to frequent Tampa Bay, particularly during the winter. The waters near the plant have been observed to be the host of more than 100 manatees at one time, following the movement of cold fronts through the area.

24. The plant has a manatee-viewing center, one of the two principal places in the state for viewing manatees in the wild. The Club's membership handbook gives detailed information about how to see manatees at the TECO viewing center. During the winter months, the Club frequently directs its members to the TECO viewing center. Precisely how many individuals, either as members of the Club through a group membership or as members, themselves, actually have viewed manatees at the TECO viewing center or elsewhere in Tampa Bay was not established. Nor was any competent estimate made of how many might visit the TECO viewing center in the future.

25. The viewing center and the power plant are in the vicinity of Apollo Beach/Bay Side, the development project South Shores seeks to have approved for an Environmental Resource Permit (the ERP).

(vii). The SWFWMD ERP Program

26. Chapter 373, Florida Statutes, governs water resources in the state and sets out the powers and duties of the water management districts, including their permitting powers. Part IV of the chapter covers the management and storage of surface waters.

27. According to SWFWMD rules, "'Environmental Resource Permit' means a conceptual, individual, or general permit for a surface water management system issued pursuant to Part IV, Chapter 373, Florida Statutes." Rule 40D-4.021, Florida Administrative Code.

28. The permit issued to South Shores in this case through the application of the challenged Exemptions, is a conceptual Environmental Resource Permit. See Petitioner's Exhibit no. 13 and Rule 40D-4.021(2), Florida Administrative Code.

29. The conceptual permit preliminarily issued South Shores is one that was reviewed by the Club's staff, just as it reviews many permit applications for potential effects to manatees. Because of use of the Exemptions as proposed by the District to South Shores, however, any review the Club conducted to assure that the permit met all general permitting criteria was of no use. Much of those criteria were not applied by the District to the application.

30. If the Exemptions were not available to South Shores, the District would have to employ ERP permitting criteria to the surface water management activities associated with the development project, including removal of the plug, lagoon construction, and boat lift installation. The Exemptions, therefore, keep the Club from participating in what otherwise would be the process for the District's administrative decision on the application of those criteria. In sum, the Exemptions preempt the Club's participation in the state mechanism provided by ERP permitting criteria for assessing, inter alia, threats to the manatee and its habitat from harms associated with the proposed development project.

31. The District recognized this effect of the permit in the draft of the permit. The draft states: "Because of this Exemption, this Conceptual Permit will ... not address ... impacts to ... wildlife habitat." (Petitioner's Exhibit no. 13). The Exemptions, therefore, prevent the Club from carrying out functions useful to protection of manatee habitat, that is, participation in the District's application of wildlife habitat protection criteria. The non-application by the District of permit criteria related to wildlife habitat protection and the Club's inability to assure itself that the criteria are correctly applied poses the danger that manatee habitat will be lost, diminished or damaged. If the Club is ultimately proved right in its assertion that the manatee and its habitat will be damaged by the South Shores development without application of permitting criteria related to wildlife habitat, then the approved application increases the threat that Club members will encounter greater difficulty in observing, studying and enjoying manatees in the wild and in Tampa Bay in particular.

d. Standing of South Shores to Intervene

32. The District has no opposition to South Shores' intervention. As for the Club's position with regard to South Shores intervention, the Club stipulated to South Shores' standing to intervene in a notice filed with its proposed order.

33. South Shores benefits, moreover, from the application of the Exemptions to its proposed project. In light of not having to show compliance with permitting criteria otherwise applicable, South Shores will escape some permitting costs and therefore, enjoys economic benefit. Furthermore, by allowing South Shores to avoid the requirements of compliance with ERP permitting criteria, the Exemptions facilitate fulfillment of the obligation of South Shores to obtain a permit to develop.

e. The District's Rule-making Authority

34. The District governing board has been granted general authority by the Legislature to adopt rules to implement the provisions of Chapter 373, Florida Statutes, the Florida Water Resources Act of 1972:

> The governing board of the district is authorized to adopt rules ... to implement the provisions of law conferring powers or duties upon it.

Section 373.113, Florida Statutes. The Legislature has framed this authority in relationship to the District's power to administer the Chapter and its Part IV:

> In administering the provisions of this chapter the governing board has authority to adopt rules ... to implement provisions of law conferring powers or duties upon it.

Section 373.113, Florida Statutes.

35. In another provision in Chapter 373, the district has been given rule-making authority that exceeds the authority to implement specific provisions granted typically to most administrative agencies in Florida. This authority is broad indeed. Tied to water use in general, it is bound only by unspecified conditions as warranted:

> ... governing boards, ... may:
>
> (a) Adopt rules ... affecting the use of water, as conditions warrant, ...

Section 373.171, Florida Statutes.

f. The Exemptions: Specific Authority and Laws Implemented

36. The Exemptions are as follows:

40D-4.051 Exemptions. The following activities are exempt from [ERP] permitting under this chapter:

* * *

(3) Any project, work or activity which has received all governmental approvals necessary to begin construction and is under construction prior to October 1, 1984.

(4) Any project, work or activity which received a surface water management permit from the District prior to October 1, 1984.

* * *

(6) Any phased or long term buildout project, including a development of regional impact, planned unit development, development with a master plan or master site plan, or similar project, which has received local or regional approval prior to October 1, 1984, if:

(a) The approval process requires a specific site plan and provides for a master drainage plan approved prior to the issuance of a building permit, and

(b) The Developer has notified the District of its intention to rely upon this exemption prior to April 1, 1985.

Projects exempt under this subsection shall continue to be subject to the District's surface water management rules in effect prior to October 1, 1984.

37. As specific authority, the Rule containing the Exemptions references 373.044, 373.113, 373.149, 373.171 and 373.414(9), Florida Statutes. For "Law Implemented", the Rule lists Sections 373.406, 373.413 and 373.414(9), Florida Statutes. Section 373.414(9) is cited by the Rule both as specific authority and as one of the laws implemented.

38. The first of the statutory provisions cited by the Rule as a law implemented is Section 373.406, Florida Statutes. It reads:

373.406 Exemptions.-

The following exemptions shall apply:

(1) Nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to affect the right of any natural person to capture, discharge, and use water for purposes permitted by law.

(2) Nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to affect the right of any person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture to alter the topography of any tract of land for purposes consistent with the practice of such occupation. However, such alteration may not be for the sole or predominant purpose of impounding or obstructing surface waters.

(3) Nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to be applicable to construction, operation, or maintenance of any agricultural closed system. However, part II of this chapter shall be applicable as to the taking and discharging of water for filling, replenishing, and maintaining the water level in any such agricultural closed system. This subsection shall not be construed to eliminate the necessity to meet generally accepted engineering practices for construction, operation, and maintenance of dams, dikes, or levees.

(4) All rights and restrictions set forth in this section shall be enforced by the governing board or the Department of Environmental Protection or its successor agency, and nothing contained herein shall be construed to establish a basis for a cause of action for private litigants.

(5) The department or the governing board may by rule establish general permits for stormwater management systems which have, either singularly or cumulatively, minimal environmental impact. The department or the governing board also may establish by rule exemptions or general permits that implement interagency agreements entered into pursuant to s. 373.046, s. 378.202, s. 378.205, or s. 378.402.

(6) Any district or the department may exempt from regulation under this part those activities that the district or department determines will have only minimal or insignificant individual or cumulative adverse impacts on the water resources of the district. The district and the department are authorized to determine, on a case-by-case basis, whether a specific activity comes within this exemption. Requests to qualify for this exemption shall be submitted in writing to the district or department, and such activities shall not be commenced without a written determination from the district or department confirming that the activity qualifies for the exemption.

(7) Nothing in this part, or in any rule or order adopted under this part, may be construed to require a permit for mining activities for which an operator receives a life-of-the-mine permit under s. 378.901.

(8) Certified aquaculture activities which apply appropriate best management practices adopted pursuant to s. 597.004 are exempt from this part.

For the most part, this section sets out general classes of exemptions. And it allows the District to consider whether an activity comes within an exemption on a "case-by-case" basis. See Section 373.406(6), Florida Statutes. But, none of these "exemptions" appear to have anything to do with the grandfather protections provided by the Exemptions at issue in this proceeding. See paragraphs 93-96, below.

39. Section 373.413, Florida Statutes, in pertinent part, reads:

(1) Except for the exemptions set forth herein, the governing board or the department may require such permits and impose such reasonable conditions as are necessary to assure that the construction or alteration of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works will comply with the provisions of this part and applicable

> rules promulgated thereto and will not be harmful to the water resources of the district. The department or the governing board may delineate areas within the district wherein permits may be required.

Other than to make reference in subsection (1) to the existence of exemptions under Part IV of Chapter 373: "Except for the exemptions set forth herein ...", Section 373.413 does not deal at all with exemptions. Certainly, it does not make reference with any specificity to the subject matter of the Exemptions at issue in this proceeding.

40. Cited both as "specific authority" and "law implemented" is paragraph (9) of Section 373.414, Florida Statutes. Unlike Sections 373.406 and 373.413, it has a connection to the Exemptions at issue in this proceeding as is seen from perusal of the underscored language, below:

> (9) The department and the governing boards, on or before July 1, 1994, shall adopt rules to incorporate the provision of this section, relying primarily on the existing rules of the department and the water management districts, into the rules governing the management and storage of surface waters. Such rules shall seek to achieve a statewide, coordinated and consistent permitting approach to activities regulated under this part. Variations in permitting criteria in the rules of individual water management districts or the department shall only be provided to address differing physical or natural characteristics. Such rules adopted pursuant to this subsection shall include the special criteria adopted pursuant to s. 403.061(29) and may include the special criteria adopted pursuant to s. 403.061(35). Such rules shall include a provision requiring that a notice of intent to deny or a permit denial based upon this section shall contain an explanation of the reasons for such denial and an explanation, in general terms, of what changes, if any, are necessary to address such reasons for denial. Such rules may establish exemptions and general permits, if such exemptions and general permits do not allow significant adverse impacts to occur individually or cumulatively...

(emphasis supplied.)

g. History of the Exemptions

41. The Exemptions have been adopted twice and amended several times. One of the amendments and the second adoption followed omnibus legislation in the environmental permitting arena: the amendment in the wake of the passage of the Warren S. Henderson Wetlands Protection Act of 1984, and the second adoption in the aftermath of the Florida Environmental Reorganization Act of 1993.

(i). Amendment after the Henderson Act

42. The Warren S. Henderson Wetlands Protection Act of 1984, (the "Henderson Act", later codified as Part VII of Chapter 403, Florida Statutes) was enacted through Chapter 84-79, Laws of Florida. Approved by the Governor on June 1, 1984 and filed in the Office of the Secretary of State on the same day, (see Laws of Florida, 1984, General Acts, Vol.1, Part One, p. 224) the Act had an effective date of October 1, 1984.

43. The Henderson Act does not amend any provisions of Part IV of Chapter 373, Florida Statutes, the part of the Water Resources Act which delineates water management district authority over the program for permitting related to the management and storage of surface waters ("MSSW"). Nonetheless, between the adoption of the Henderson Act and its effective date, the District amended and adopted rules in Chapters 40D-4 and 40D-40 of the Florida Administrative Code because of the Act's passage. Rule 40D-4.011 set out the policy for the amendments and adoptions:

> (2) The rules in this chapter implement the comprehensive surface water management permit system contemplated in part IV of Chapter 373, Florida Statutes. As a result of the passage of Chapter 84-79, Laws of Florida, the Warren G. Henderson Wetlands Protection Act of 1984, the District has adopted the rules in this Chapter and Chapter 40D-40 to ensure continued protection of the water resources of the District including wetlands and other natural resources.

(Exhibit OR 4, See the page containing paragraph (2) of Rule 40D-4.011 in the exhibit.)[1]

44. Exhibit OR 4, a document officially recognized during this proceeding, is denominated "SWFWMD's Rule Amendment No. 116." The exhibit contains a letter on SWFWMD letterhead, signed by Dianne M. Lee for "J. Edward Curren, Attorney - Regulation" dated September 5, 1984. Under cover of the letter is a rule package filed by the District with the Secretary of State on September 11, 1984. Included in the package is the newly amended Rule 40D-4.051. The amended 40D-4.051 contains subparagraphs (3), (5) and (6), the Exemptions challenged in this proceeding. They are worded precisely as they remain worded today.

45. Consistent with the policy expressed in Rule 40D-4.011, Florida Administrative Code as filed in September of 1984, the effective date of the amendment to the Rule containing the Exemptions was the effective date of the Henderson Act: October 1, 1984.

46. The Exemptions contained in the amendment filed in September of 1984 are "grandfather provisions." The first two are designed to protect certain projects, work or activities from the requirements of the Henderson Act if they had governmental approvals on October 1, 1984. The third is designed to protect from the Act "phased or long term buildout project[s]" that meet certain requirements, among them receipt of governmental approvals by October 1, 1984.

47. At the time of the 1984 amendments, the Rule cited to Sections 373.044, 373.113, 373.149 and 373.171 for "Specific Authority," that is, the statutory source for the district's authority to make rules. For "Law Implemented" the Rule cited to Section 373.406, Florida Statutes. At that time, Section 373.406 contained only four subsections. These four are worded substantially the same as the first four subsections of the section today. Although Section 373.406 was the only law implemented by the Rule in 1984, the section is neither mentioned in nor part of the Henderson Act. The section, itself, does not make mention of the Henderson Act or of protection from it based on government approvals obtained by October 1, 1984. Section 373.406, Florida Statutes, in its form both immediately before and after the Henderson Act provided exemptions that appear to have nothing to do with the Exemptions challenged in this proceeding. The only connection between Section 373.406, Florida Statutes, in 1984 and the Exemptions at issue in this proceeding when amended into the Rule in 1984 appears to be the use of the term "exemptions." The

exemptions set out in the Section 373.406, Florida Statutes, as it existed in 1984, are not related to grandfather protection from the effects the Henderson Act had on the District's permitting considerations.

48. Following the amendment to the Rule containing the Exemptions, the Rule was amended further. It was amended on October 1, 1986, March 1, 1988, and January 24, 1990. None of these amendments appear to have affected the Exemptions under consideration in this proceeding. The Rule became the subject of rule promulgation by the District again, however, as a result of a second omnibus act of the Legislature in the environmental permitting arena, the Florida Environmental Reorganization Act of 1993.

(ii). The Reorganization Act of 1993

49. Nine years after the passage of the Henderson Act, the Legislature enacted the Florida Environmental Reorganization Act of 1993 (the "Reorganization Act"). Passed as Chapter 93-213, Laws of Florida, the Session Law declares its underlying policy:

> Declaration of Policy.—
>
> (1) The protection, preservation, and restoration of air, water, and other natural resources of this state are vital to the social and economic well-being and the quality of life of the citizens of this state and visitors to this state.
>
> (2) It is the policy of the Legislature:
>
> (a) To develop a consistent state policy for the protection and management of the environment and natural resources.
>
> (b) To provide efficient governmental services to the public.
>
> (c) To protect the functions of entire ecological systems through enhanced co-ordination of public land acquisition, regulatory, and planning programs.
>
> (d) To maintain and enhance the powers, duties, and responsibilities of the environmental agencies of the state in the most efficient and effective manner.
>
> (e) To streamline governmental services, providing for delivery of such services to the public in a timely, cost-efficient manner.

Section 2., Ch. 93-213, Laws of Florida. The Reorganization Act carried out this policy in a number of ways. Among these, it merged the Departments of Environmental Regulation (DER) and Natural Resources into the Department of Environmental Protection. In so doing and at the same time, it incorporated DER's dredge and fill permitting program instituted by the Henderson Act into the programs of the water management districts for the Management and Storage of Surface Waters (MSSW). The permitting program that resulted from the consolidation of DER's dredge and fill permitting program with the District's MSSW permitting program is what has been referred to in this order as the Environmental Resource Permitting or ERP program.

50. With regard to rules under the new ERP program, the Reorganization Act amended Section 373.414, Florida Statutes. Two sentences in subsection (9) of the amended section bear repeating:

> The department and the governing boards [of the water management districts], ~~on or before July 1, 1994,~~ shall adopt rules to incorporate the provisions of this section, relying primarily on the existing rules of the department and the water management districts, into the rules governing the management and storage of surface waters.
>
> * * *
>
> Such rules may establish exemptions ... if such exemptions ... do not allow significant adverse impacts to occur individually or cumulatively....

51. As discussed earlier in this order, the Henderson Act did not directly create exemptions in the District's MSSW permitting program. Nonetheless, the District through the Exemptions of Rule 40D-4.051, Florida Administrative Code, provided "grandfather" protections in the wake of the Act effective October 1, 1984. Whereas grandfather concerns were raised in front of the District after the Henderson Act, grandfather concerns and concerns about other situation that should be entitled to exemptions were raised to the Legislature during the advent of the Reorganization Act. These concerns were addressed in the Florida Environmental Reorganization Act, itself. The Act provided specific exemptions that were self-executing. Included were ones providing grandfather protection for certain activities approved under Chapter 403, Florida Statutes, (DER's dredge and fill program) from imposition of new ERP permitting criteria expected to be promulgated in the wake of the Reorganization Act. The are contained in subsections (11) through (16) of Section 373.414, Florida Statutes. None of these exemptions make reference to the Exemptions at issue in this case. Of these provisions, only one addresses activities subject to rules adopted pursuant to Part IV of Chapter 373 prior to the anticipated ERP permitting criteria:

> An application under this part for dredging and filling or other activity, which is submitted and complete prior to the effective date of [the anticipated ERP rules] shall be reviewed under the rules adopted pursuant to this part [including the Exemptions in Rule 40D-4.051] and part VIII of chapter 403 in existence prior to the effective date of the [anticipated ERP rules] and shall be acted upon by the agency which received the application, unless the applicant elects to have such activities reviewed under the [anticipated ERP rules].

Chapter 93-213, Section 30, p. 2149 of Laws of Florida, 1993, General Acts, Vol. 1, Part Two, now Section 373.414(14), Florida Statutes.[2]

h. Rule Activity in 1995

52. In observance of the mandate in the first section of Section 373.414(9), Florida Statutes, the District undertook adoption of rules "to incorporate the provisions of [Section 373.414] ... into the rules governing the management and storage of surface waters." These rules were the ERP rules anticipated by the Reorganization Act. They included the rules necessary for the District to administer under its ERP program its newfound authority over much of the dredge and fill permitting program

formerly administered by DER and now consolidated with its permitting authority in its MSSW rules.

53. Among the rules passed under the authority of the Reorganization Act's Section 373.414(9) is Rule 40D-4.051, the Rule containing the Exemptions subject to this proceeding. Filed with the Secretary of State on September 13, 1995, the adoption package for the new readopted states the following, in pertinent part:

> *40D-4.051 Exemptions*
>
> The following activities are exempt from permitting under this chapter [Individual ERPs]:
>
> (1) - (7) - No change.

(Exhibit OR 6, p. 14). The result of this adoption is that the Exemptions became part of the District's ERP Rules. They now apply to both the MSSW authority under Part IV, Chapter 373, Florida Statutes, which existed prior to the Reorganization Act, and, in a consolidated fashion, the District's authority conferred by the Reorganization Act to regulate certain dredge and fill activity formerly regulated by DER.

CONCLUSIONS OF LAW
Jurisdiction

54. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. *Section* 120.56(3), Florida Statutes.

Standing

55. The standing of South Shores has not been contested by any party. In fact, Petitioner has stipulated to South Shores standing to intervene. In the presentation of its case, South Shores demonstrated that it receives economic benefit from the Exemptions. The Club, moreover, demonstrated that the Exemptions make the permitting process easier for South Shores.

56. Standing for intervenors in rule challenge proceedings brought under Section 120.56, Florida Statutes, is governed by language in paragraph (e) of subsection (1) of that section:

> Other substantially affected person may join the proceedings as intervenors on appropriate terms which shall not unduly delay the proceedings.

South Shores is a "substantially affected person" in this case and therefore has standing to intervene.

57. The standing requirements for intervenors is similar to the standing requirement petitioners must meet in a proceeding of this kind: "A substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule." Section 120.56(3), Florida Statutes.

58. Unlike South Shores, however, as an association, the Club must meet the standing requirements for trade or professional association announced in Florida Home Builders Association v. Department of Labor and Employment Security, 412 So.2d 351 (Fla. 1982). This is true even though the Club is not a trade or professional association. The standing requirements of Florida Home Builders *were applied to a non-profit environmental* organization in Friends of the Everglades v. Board of Trustees of the Internal Improvement Trust Fund, 595 So.2d 186, (Fla. 1st DCA 1992):

> "To meet the requirements of standing under the [Administrative Procedure Act], an association must demonstrate that a substantial number of its members would have standing. See Florida Home Builders Association v. Department of Labor and Employment Security, [citation omitted].

Friends of the Everglades, above, at 188.

59. The test of standing of Florida Home Builders that an association must meet in order to seek an administrative determination of the invalidity of an existing rule is three pronged:

> [First], an association must demonstrate that a substantial number of its members, although not necessarily the majority are "*substantially affected. [Second], the* subject matter of the rule must be within the association's general scope of interest and activity, and [third] the relief requested must be of the type appropriate for a[n] association to receive on behalf of its members.

Florida Home Builders Association, above, at 353, 354.

60. Save the Manatee Club has demonstrated in this proceeding that it meets the tri-partite test of Florida Home Builders Association, as explained in paragraphs 62 to 64, below.

61. The Club argues that a significant number of its members are substantially affected by the Exemptions. The argument's base is that the Exemptions pave the way for the *removal of the plug in the canal system and* ultimately for the introduction of a significant number of power boats into the manatee feeding grounds south of Tampa Bay and the bay, itself. The Exemptions, therefore, in the Club's view, threaten the ability of those Club members who observe and study the manatee as well as conduct programs like the Tampa Bay adoption program.

62. The project, however, through the benefit of the Exemptions, may affect more than some part of the Club's membership. Although the District cannot be satisfied for sure that the manatee is protected until ERP permitting criteria are applied to the South Shores project, by paving the way for the introduction of power boats into Tampa Bay and important manatee habitat, without conducting such a review of the permitting criteria, the Exemptions pose a threat to the manatee. If the manatee and its habitat are threatened by an administrative rule to the point of significant impacts then not just some part of the Club but all of the Club's members are substantially affected by the rule. After all, the Club's purpose is to protect the manatee. The threat to the manatee posed by the Exemptions is significant. The Exemptions *will facilitate the introduction of a consequential* number of power boats into prime manatee habitat without consideration of permitting criteria designed to protect that habitat.[3] Since Exemptions threaten the manatee in a significant way, the Club is substantially affected by the Exemptions. The Club meets the first test of Florida Home Builders' Association.

63. The subject matter of the rule is within the Club's "general scope of interest and activity." The Club examines permit applications. It follows decisions of the District. And, when it finds it necessary, it participates in the decision-making process through administrative litigation over individual decisions, all in carrying out its interest in protecting the manatee. The Club meets the second test.

64. The relief requested, invalidation of the Exemptions, is appropriate relief for the Club to receive on behalf of its members because it will assist the Club in ensuring the manatee is provided the protection that ERP permitting criteria would provide but for the application of the Exemptions. The Club meets the third test.

65. Save the Manatee Club, Inc., has standing to bring this proceeding.

Burden and Standard of Proof

66. In contrast to Section 120.56(3), Florida Statutes, the provision governing challenges to proposed rules passed by the Legislature in the 1996 revision to the APA requires the petitioner to "go forward." Section 120.56(2), Florida Statutes. It then places on the agency the "burden to prove by a preponderance of the evidence that the proposed rule is not [invalid]." Section 120.56(2)(a), Florida Statutes. Section 120.56(3), Florida Statutes, governing challenges to existing rules, however, is silent as to which party carries the burden of proof and what standard of proof must be met.

67. The Club accepts that the petitioner in a 120.56(3) proceeding normally has the burden of proof. As authority for this position, it cites in its proposed final order to a trio of cases: Agrico Chemical Co. v. State, Department of Environmental Regulation, 365 So.2d 759, 763 (Fla. 1st DCA 1979); Dravo Basic Materials Co., Inc. v. State, Department of Transportation, 602 So.2d 632, 635 (Fla. 2d DCA 1992); and St. Johns River Water Management District v. Consolidated-Tomoka Land Co., below. The District and South Shores concur in this much of the Club's argument.

68. But the Club argues that its burden in this proceeding is somehow affected by language in Booker Creek Preservation, Inc. v. Southwest Florida Water Management District, 534 So.2d 419 (Fla. 5th DCA 1988) and other cases that laws exempting activities from regulation in the public interest are subject, in their application, to strict scrutiny and are not favored. Whatever authority Booker Creek and other cases might have in a proceeding challenging the District's issuance of the conceptual permit to South Shores, they have no function with regard to the burden of proof in this proceeding. The scrutiny to which "exemptions" as a class of law are subject to does nothing to affect the burden of proof in a Section 120.56(3) proceeding.

69. The standard of proof that challengers to existing rules traditionally have been required to meet is the "preponderance of evidence" standard. Department of Professional Regulation v Durrani, 455 So.2d 515 (1st DCA 1984). Whether this is the "post-1996 revision to the APA" standard in an existing rule challenge is uncertain. See Board of Clinical Laboratory Personnel v. Florida Association of Blood Banks, 721 So.2d 317 (Fla. 1st DCA 1998), an appellate decision involving a challenge to a proposed rule: "However, proof 'by a preponderance of the evidence' is not required in Florida Statutes section 120.52(8), and the ALJ erred in imposing that burden on the agency." Id., at 318. For purposes of this proceeding, both the District and South Shores agree that the Club should not have to meet a more stringent standard. See the District's PRO, at p. 9 and Intervenor's PRO at p. 11.

70. In applying the "preponderance" standard, however, it must be considered that the rules carry with them a presumption of correctness. The presumption, moreover, grows stronger each year that the Legislature (aware of the rules through the activities of its Joint Administrative Procedure Committee) has had the opportunity to take action if it regarded the rule to be an invalid exercise of its authority. Department of Administration v. Nelson, 424 So.2d 852, 858 (Fla. 1st DCA 1982); Jax Liquors, Inc. v. Department of Alcoholic Beverages and Tobacco, Department of Business Regulation, 388 So.2d 1306 (Fla. 1st DCA 1980).

71. The Club has the burden of proof in establishing that the Exemptions should be determined to be invalid. It must do so by a preponderance of the evidence in the face of a strong presumption of correctness.

The Merits

a. Subsection 120.52(8)

72. The Club claims three bases for invalidating the exemptions. All are found in Subsection 120.52(8), Florida Statutes.

73. The first two appear in paragraphs (b) and (c) of the statute. Section 120.52(8)(b) and (c), Florida Statutes, provides, in pertinent part:

> ... A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> * * *
>
> (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 provision of law implemented, citation to which is required by s. 120.54(3)(a)1.

74. The third base advanced by the Club in support of its claim of invalidity appears in the last four sentences of Section 120.52(8), Florida Statutes. Dubbed by the District in this proceeding as the "flush left language" of the statute, these four sentences read as follows:

> 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 statutes. 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 same statute.

b. The Defenses of the District and South Shores

75. With respect to the claim of invalidity under Section 120.52(8)(b), the District points to Sections 373.044, 373.113 and 373.171, Florida Statutes. These three provisions of Chapter 373, as required by the rulemaking provisions of the APA, are cited in the Rule as the "reference[s] to the specific rulemaking authority pursuant to which the rule is adopted," Section 120.54(3)(a)1., Florida Statutes. They are:

> 373.044 Rules; enforcement; availability of personnel rule.

The governing board of the district is authorized to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this chapter. Rules and orders may be enforced by mandatory injunction or other appropriate action in the courts of the state. Rules relating to personnel matters shall be made available to the public and affected persons at no more than cost but need not be published in the Florida Administrative Code or the Florida Administrative Weekly.

373.113 Adoption of rules by the governing board. In administering the provisions of this chapter the governing board has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement provisions of law conferring powers or duties upon it.

373.171 Rules.

(1) In order to obtain the most beneficial use of the water resources of the state and to protect the public health, safety, and welfare and the interests of the water users affected, governing boards, by action not inconsistent with the other provisions of this law and without impairing property rights, may:

(a) Adopt rules or issue orders affecting the use of water, as conditions warrant, and forbidding the construction of new diversion facilities or wells, the initiation of new water uses, or the modification of any existing uses, diversion facilities, or storage facilities within the affected area.

(b) Regulate the use of water within the affected area by apportioning, limiting, or rotating uses of water or by preventing those uses which the governing board finds have ceased to be reasonable or beneficial.

(c) Issue orders and adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this chapter.

(2) In adopting rules and issuing orders under this law, the governing board shall act with a view to full protection of the existing rights to water in this state insofar as is consistent with the purpose of this law.

(3) No rule or order shall require any modification of existing use or disposition of water in the district unless it is shown that the use or disposition proposed to be modified is detrimental to other water users or to the water resources of the state.

(4) All rules adopted by the governing board shall be filed with the Department of State as provided in chapter 120. An information copy will be filed with the Department of Environmental Protection.

76. On this point the District states in the "Conclusions of Law" section of its proposed order: "The cited language in Sections 373.044, 373.113 and 373.171, F.S. grants to the District the 'necessary' rulemaking authority required by Section 120.58(2), F.S." As the District recognizes, this authority could not be clearer. The District's grant of rulemaking authority is stated three times and in three ways in the statutory provisions cited above.

77. The question posed by the Club, because it is framed in terms of Section 120.52(8)(b), however, is whether that grant has been exceeded. Without construing Section 120.52(8)(b) in para materia with the other provisions in Section 120.52, and in particular with what has been referred to in the proceeding as the "flush left language", there is little question that the Exemptions do not exceed the District's grant of rulemaking authority. That grant is very broad. The District has the authority to make rules to implement the provisions of all of Chapter 373, whether in Part IV or not. Section 373.044, Florida Statutes. The District has authority by rule to "implement provisions of law (whether in Chapter 373 or elsewhere) conferring powers and duties upon it." Section 373.113, Florida Statutes. Most broadly of all, the District has the authority to "[a]dopt rules ... affecting the use of water, as conditions warrant." Section 373.171(1)(a), Florida Statutes, (emphasis supplied.)

78. In response to the two claims of invalidity based on Section 120.52(8)(c), Florida Statutes, and its "flush left language," the District makes several arguments.

79. Primarily, it points to the only statutory section cited by the Rule both as a "grant of rulemaking authority" and as a "specific provision[] of law implemented." That provision is Section 373.414(9), Florida Statutes. It allows the District to "adopt rules to incorporate the provisions of this section [passed as part of the Reorganization Act] relying primarily on the existing rules of the Department and the water management districts."

80. Next, the District points out that Section 373.414(9), Florida Statutes, further directs that "[s]uch rules shall seek to achieve a statewide, coordinated and consistent permitting approach to activities regulated under this part." No such evidence that the rules do not seek such an approach, argues the District, was presented by the Club.

81. Finally, the District points to the language in Section 373.414(9), Florida Statutes, that "[s]uch rules may establish exemptions ... if such exemptions ... do not allow significant adverse impacts to occur individually or generally." The District asserts that the Club did not present any evidence that the Exemptions allow significant adverse impacts.[3] This assertion is consistent with the District's position that it would not have tolerated the Club's presenting such evidence in this rule challenge proceeding without raising an objection since:

> ... a determination regarding the application of the challenged exemptions is not appropriately a part of this proceeding. Such a determination is a mixed question of law and fact and not a strict legal challenge to the delegation of authority to the District. Therefore, that issue is appropriately addressed in the Permit Challenge proceeding pending before DOAH in Case No. 99-4155RX.

The District's PRO, p. 9.

82. South Shores makes an additional argument in defense of the Club's claims. It points out that the permitting authority of the District is discretionary in the first place. See Section 373.413(1), Florida Statutes, which, in pertinent part, follows:

> Except for the exemptions set forth herein, the governing board may require such permits [relative to surface water storage and management]... The ... governing board may delineate areas within the district wherein permits may be required...

If the District has the authority in the first instance to require or not require permits, goes the argument of South Shores, then it

must also have the authority to provide for exemptions from permitting requirements, particularly where the enabling legislation spells out exemptions within the legislation itself and allows promulgations by rule of exemptions if they do not cause adverse impacts. As the District does, South Shores also emphasizes Section 373.414(9), Florida Statutes, as all that is needed to fend off the three claims of invalidity.

83. If the defenses raised by the District and South Shores had only to contend with the claims of the Club based on paragraphs (b) and (c) of Section 120.52(8), Florida Statutes, the District and South Shores would prevail in this proceeding. But there is another claim made by the Club. This third claim is based on the "flush left language" in Section 120.52(8).

d. The "flush left language" claim

84. The "flush left" language appeared in Section 120.52(8) following the 1996 revision of the APA as follows:

> 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, interpret or make specific the particular 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, 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 the particular powers and duties conferred by the same statute.

Section 120.52(8), Florida Statutes, (1997).

85. This language was construed in St. Johns River Water Management District v. Consolidated-Tomoka, 717 So.2d 72 (Fla. 1st DCA 1998). In that case, the First District Court of Appeal reviewed a final order of the Division of Administrative Hearings declaring invalid a series of rules proposed by the St. Johns River Water Management District. The court describes the rules in its opinion:

> In broad terms, the new rules define two areas within the District as hydrologic basins and establish more restrictive permitting and development requirements within these basins.

Id., at 75. The Court then summarized the disposition of the case by the Division of Administrative Hearings.

> Although the administrative law judge determined that the proposed rules were supported by the evidence, he concluded that most of them were invalid as a matter of law. The major theme of the final order is that the rules are an invalid exercise of legislative authority because they are not within "particular powers and duties" granted by the enabling statutes. (Citations omitted.) [Other bases of invalidity are also discussed].

Id., at 76.

86. In construing the terms "particular powers and duties," the court found the term "particular" to be ambiguous. That is, "[t]he statute could mean that the powers and duties delegated by the enabling statutes must be particular in the sense that they are identified (and therefore limited to those identified) or in the sense that they are described in detail." Id. at 79. The court then disagreed with the interpretation in the administrative law judge's final order that the Legislature intended the words "particular powers and duties" as requiring the enabling statute to "detail" the powers and duties that will be the subject matter of the rule. The court concluded instead:

> In our view, the term "particular" in section 120.52(8) restricts rulemaking authority to subjects that are directly within the class of powers and duties identified in the enabling statute. It was not designed to require a minimum level of detail in the statutory language used to describe the powers and duties.

Id. The court found support for its interpretation by construing the statutory term in para materia with other APA provisions. Most noteworthy, it opted for this view of the term "particular" in order to avoid what it felt would be an unreasonable result:

> We consider it unlikely that the Legislature intended to establish a rulemaking standard based on the level of detail in the enabling statute, because such a standard would be unworkable. The courts are bound to interpret the ambiguous statutes in the most logical and sensible way. If possible, the court must avoid an interpretation that produces an unreasonable consequence. (citation omitted). A standard based on the precision and detail of an enabling statute would produce endless litigation regarding the sufficiency of the delegated power. Section 120.52(8) provides that a rule can implement, interpret or make specific, the powers and duties granted by the enabling statute. (Emphasis added.) If follows from this statement that the enabling statute can be, and most likely will be, more general than the rule. Just how general the statute can be is not explained.
>
> * * *
>
> Consequently, it is more likely that the Legislature used the term "particular" to mean that the powers and duties must be identifiable as powers and duties falling within a class.

Id. at 79, 80. The court went on to employ the principle of statutory construction that statutes should be construed to avoid internal conflict among various statutes. In particular, the court referred to the declaration by the legislature in the APA that "rulemaking is not a matter of agency discretion." Section 120.54(1)(a), Florida Statutes. The court concluded, "[this] section[] suggest[s] that rulemaking authority is not restricted to those situations in which the enabling statute details the precise subject of a proposed rule. The legislative command directing the agency to adopt rules carries with it an implication that the agencies have authority to adopt rules, at least within the class of powers conferred by the applicable enabling statute." Id., at 80.

87. The decision of the First District in Consolidated-Tomoka was discussed with approval by the Florida Supreme Court in a decision in the area of Florida administrative law handed down just last month.

88. In Florida Department of Business and Professional Regulation, Division of Pari-mutuel Wagering v. Investment

Corporation of Palm Beach, 24 FLW SC 520, Sup. Ct. Case No. 93,952, Op. Filed November 4, 1999, the court considered an issue related to declaratory statements under the Administrative Procedure Act. Because the issue concerned the relationship between agency declaratory statements and rulemaking, the court examined Consolidated-Tomoka. Referring to the decision as Tomoka Land, the Supreme Court called it "an important case." With approval, the court quoted extensively from the Consolidated-Tomoka opinion. After a discussion of Consolidated-Tomoka and Chiles v. Department of State, 711 So.2d 151 (Fla. 1st DCA 1998), the Court drew the conclusion that these cases demonstrate that, "the Legislature will not micromanage Florida's administrative agencies...".

89. Between the decision by the *First District Court* of Appeal in Consolidated-Tomoka and the favorable light shone on that decision by the Florida Supreme Court, however, the Legislature enacted Chapter 99-379, Laws of Florida. In the enactment, the Legislature amended the "flush left language" of Section 120.52(8), Florida Statutes. The amendments (the "1999 Amendments" appear in the session law as follows:

> 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~~, or make~~ specific ~~the particular~~ 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 ~~the particular~~ powers and duties conferred by the same statute.

Chapter 99-379, Laws of Florida, Section 2. The purpose of the 1999 Legislature in amending the "flush left language" was announced in Section 1 of Chapter 99-379, Laws of Florida:

> It is the intent of the Legislature that modifications in sections 2 and 3 of this act which apply to rulemaking are to clarify the limited authority of agencies to adopt rules in accordance with chapter 96-159, Laws of Florida, and are intended to reject the class of powers and duties analysis. However, it is not the intent of the Legislature to reverse the result of any specific judicial decision.

(emphasis supplied).

90. The statement of legislative intent in Chapter 99-379, Laws of Florida, is interpreted in this order to mean that the "class of powers and duties" analysis conducted by the First District *Court of Appeal in* Consolidated-Tomoka may not be applied to cases arising after the amendments effectuated through Chapter 99-379, Laws of Florida. The Legislature made clear that it had no intent to reverse or overrule Consolidated-Tomoka. That decision of the First District Court of Appeal, therefore, remains undisturbed as to its application prior to the effective date of the 1999 amendments. But because the "flush left language" of the statute was amended in 1999 and because of the clear intent behind the 1999 Amendments, the analysis conducted in the Consolidated-Tomoka is not of any value in cases arising after the 1999 Amendments. The "class of powers and duties" analysis of the First District Court of Appeal in Consolidated-Tomoka is not applicable to this case.

e. Application of the 1999 Amendments.

91. The legislature required the District to adopt new rules to implement the Reorganization Act of 1993, and in so doing to rely on existing rules. It did so in Section 373.414(9), Florida Statutes. On this provision rests the defense of the District and much of the assistance South Shores renders to the District's cause. Is the power and duty delineated in Section 373.414(9), Florida *Statutes, specific enough to allow the District to re-adopt rules that* provided protections from the effects of the Henderson Act passed nine years earlier?

92. The question as to whether the requisite specificity has been provided by the laws implemented by the Rule becomes particularly pointed when one considers the Reorganization Act's approach to exemptions (including through operation of grandfather protections) from the effects of the Reorganization Act. In order to provide protections by exemptions, the Act sets out categories of exemptions in Section 373.414(11)-(16), Florida Statutes. In so doing, it provides specific exemptions from the effects of the 1993 Act. None of these exemptions mention the need to grandfather projects that had received approvals nine years earlier. Nor do they mention the need to grandfather from water management district permitting requirements projects that had received all necessary approvals prior to the passage of the Henderson Act.

93. The polestar of statutory construction is legislative intent. The plain meaning of statutory language is the first consideration in discerning intent. Plain meaning discerned from unambiguous language will be given effect unless the effect is absurd, ridiculous or unreasonable. Investment Corporation of Palm Beach, at 524(?). With regard to the intent of the Legislature when it passed the Reorganization Act, it is certainly possible that the Legislature meant not to carry forward exemptions for projects with approvals at least nine years old. If the Legislature was aware of Booker Creek, above it is very likely that had it meant *to carry forward the Exemptions after the Reorganization Act, it* would have done so in statute, along with the exemptions it did provide in Reorganization Act, itself, because of the length of time that had passed since the Exemptions or grandfather clauses were promulgated. About these very same Exemptions, the court wrote in Booker Creek:

> With regard to subsection (3), (4), (5) and (6) of Rule 40D-4.051, these exemptions relate to grandfathering in projects underway in 1984 when the surface water legislation was passed. It does not appear that any of these provisions would apply to projects seeking permits in 1987.

Booker Creek, above, at 424.

94. Whatever the legislative intent in regard to the Reorganization Act's effect on the Exemptions in this case, its intent is clear with regard to the 1999 amendments to Section 120.52(8), Florida Statutes: the "class of powers and duties" analysis conducted in Consolidated-Tomoka is not applicable to challenges to rules arising after the 1999 amendments.

95. The 1999 amendments to Section 120.52(8) make it clear that agencies, *including water management districts, have* limited authority to adopt rules. When administrative agencies do

so, the rules must implement powers and duties that are more detailed than a general class of power or duty provides.

96. Three statutory provisions [Sections 373.406, 373.413 and 373.416(9)] are cited in the Rule containing the Exemptions as "law implemented." (South Shores argues that another statutory provision should be considered as law implemented. To do so, however, runs afoul of the legislative mandate in Section 120.54(3)(a)1., Florida Statutes, that rules contain a citation to each law they implement. See also, Section 120.52(8)(c), Florida Statutes.) None of the three laws implemented by the Rule describe in detail any power or duty related to protection from the effects of the Henderson Act or, for that matter, grandfathering in any manner, as discussed in the next three paragraphs of this order.

97. Section 373.406, Florida Statutes, describes various activities that are not to be subject to water resource regulation, none of which relate to grandfathering. Furthermore, it authorizes the District to provide exemptions under interagency agreements. It also authorizes the District to exempt certain activities that have minimal impacts, mining activities for which a life-of-the-mine permit has been issued and certified aquaculture activities which apply appropriate best management practices. The only relationship between the Exemptions and Section 373.406 is that both use the term, "exemption."

98. Likewise, Section 373.413 makes no reference to grandfather protection in the wake of the Henderson Act. It uses the term "exemption" but modifies it with the phase "set forth herein." The exemptions referred to in Section 373.413 are exemptions set out in Chapter 373, that is, they are statutory exemptions. Neither the District nor South Shores has cited to any statutory exemptions that refer with any specificity to grandfather protection either as of October 1, 1984, or in the wake of the Henderson Act.

99. The only law implemented by the Exemptions and the Rule left for consideration is the one on which the defense in this case primarily rests: Section 373.414(9), Florida Statutes. The question recurs: is it specific enough? In Consolidated-Tomoka, above, Judge Padovano predicted that if a standard calling for analysis of the specificity of the law implemented were to become the law, there would be great difficulty for those called upon to apply it:

> A standard based on the sufficiency of detail in the language of the enabling statute would be difficult to define and even more difficult to apply. Specificity is a subjective concept that cannot be neatly divided into identifiable degrees. Moreover, the concept is one that is relative. What is specific enough in one circumstance may be too general in another. An argument could be made in nearly any case that the enabling statute is not specific enough to support the precise subject of a rule, no matter how detailed the Legislature tried to be in describing the power delegated to the agency.

Id.

100. However difficult, the standard of the 1999 Amendments must be applied in this case. The direction by the Legislature that the District adopt rules to implement the Reorganization Act in reliance on existing rules is not enough detail to justify the adoption of grandfather provisions set in place a decade earlier in the wake of the Henderson Act. The permission granted to the District that rules adopted to implement the Reorganization Act may establish exemptions if the exemptions do not allow significant adverse impacts falls into a general "class of powers and duties." Section 373.414(9), does not provide any specificity that hints at grandfather protection as of October 1, 1984, from the effects of the Henderson Act.

101. There is, quite simply, no specific power and duty cited as "law implemented" by the Rule for the Exemptions at issue in this case that satisfies the command of the legislature in the 1999 amendment to Section 120.52(8), Florida Statutes: "An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute." Section 120.52(8), Florida Statutes.

102. Given the clarity of 1999 Amendments, the intent behind them that the Consolidated-Tomoka analysis is rejected, and their effect on this proceeding, the Club has carried the burden of proving by a preponderance of the evidence in the face of a strong presumption of correctness that the Exemptions are an invalid exercise of delegated legislative authority.

ORDER

Based on the foregoing, it is hereby

ORDERED that the exemptions in paragraphs (3), (5) and (6) of Rule 40D-4.051, Florida Administrative Code, are invalid exercises of delegated legislative authority because, in violation of Section 120.52(8), Florida Statutes, they do not implement specific powers or duties in the District's enabling legislation.

DONE and ORDERED this 9th day of December, 1999, in Tallahassee, Leon County, Florida.

DAVID M. MALONEY
Administrative Law Judge
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ENDNOTES

[1] While the record is not clear in this regard, one would surmise that the rules (including the amendment that created the Exemptions in Rule 40D-4.051) were adopted because of interagency agreements between the SWFWMD and the Department of Environmental Regulation.

[2] Whether South Shores' application falls under this provision was not addressed by evidence in this proceeding. It would not be appropriate, moreover, to consider such a claim in this case. (The claim may not exist since South Shores apparently elected to have its activities reviewed under the ERP rules.) In any event, such a claim, if there is a basis for it, belongs in Case no. 99-4155, the companion case to this one challenging the issuance of the conceptual permit.

[3] Whether these concerns can be addressed in a permitting process free of the Exemptions for South Shores development project is an open question.

[4] In fact, the testimony of Ms. Patti Thompson was to the effect that the manatees will be adversely impacted in a significant way by South Shores project, in part, because of the Exemptions. This testimony is accepted only for purposes of establishing the Club's standing in this rule challenge proceeding. It is not accepted for purposes of whether the conceptual permit issued to South Shores, does allow significant impacts. That determination awaits another day and a different proceeding: one that challenges a District decision rather than a District rule.