

**STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

In Re Florida Administrative Code Rules 40D-8.041(16) and (17)

REQUEST FOR HEARING

Pursuant to Section 373.114(2)(a), Florida Statutes, Petitioners Save the Homosassa River Alliance, Inc., Chassahowitzka River Restoration Committee, Save the Manatee Club, Inc., Brad Rimbey, Mitchell Newberger, and Priscilla Watkins, submit this Request for Hearing to determine the Southwest Florida Water Management District’s (the “**District**”) rule amendments adding Florida Administrative Code (“**FAC**”) Rules 40D-8.041(16) and (17) are inconsistent with the Water Resource Implementation Rule, and state:

AGENCY AND FILE

1. This matter relates to rule amendments adding FAC Rules 40D-8.041(16) and (17), establishing “minimum flows” for the Chassahowitzka and Homosassa Springs Systems (the “**Proposed MFLs**”). The Proposed MFLs were adopted on February 28, 2013 by the District, whose address is 2379 Broad Street, Brooksville, Florida 34604-6899. Petitioners are not aware of any other agency designation regarding this rulemaking. A copy of the Proposed MFLs adopted by the District is attached as “**Attachment A.**”

PETITIONERS AND REPRESENTATIVE

2. Petitioners are Save the Homosassa River Alliance, Inc., Chassahowitzka River Restoration Committee, Save the Manatee Club, Inc., Brad Rimbey, Mitchell Newberger, and Priscilla Watkins. All correspondence and pleadings in this proceeding

shall be served on Petitioners by service upon the undersigned at Law Office of John R. Thomas, P.A., 233 Third Street North, Suite 101, St. Petersburg, Florida 33701, who can be reached at (727) 550-9072, and will receive e-mail transmissions at jrthomasesq@gmail.com.

3. The “establishment and implementation of minimum flows and levels is a decision that is of the utmost importance to the citizens who live within the District's jurisdiction and one that will affect future generations.” *Southwest Florida Water Management Dist. v. Charlotte Cty.*, 774 So.2d 903, 923 (Fla. 2d DCA 2001)

4. The waters of the Chassahowitzka and Homosassa Springs/River Systems are classified as “Outstanding Florida Waters” (“**OFW**”) under Florida’s surface water classification system. Despite this designation, these waters are severely degraded by nitrate pollution to the extent that DEP has identified most of their segments as “impaired” segments under §33 USC 1313(d) of the Clean Water Act (“**CWA**”). Flow in these systems has been substantially below historical levels during recent years also, and water quality and quantity trends continue a downward trajectory.

5. The individual Petitioners use and enjoy the affected waters, and a substantial number of the members of the organizational Petitioners use and enjoy the affected waters, for nature observation and recreation, including, but not limited to: canoeing, kayaking, boating, snorkeling, fishing, swimming, birding, and manatee watching. Petitioners are affected persons because their use and enjoyment of the waters affected by the Proposed MFLs will be adversely impacted by the further degradation the Proposed MFLs would allow, and Petitioners are citizens whose tax dollars are being wasted by the District’s efforts that are not consistent with the law.

NOTICE OF RULE ADOPTION AND TIMELINESS

6. The District filed the rule amendments adding FAC Rules 40D-8.041(16) and (17) with the Department of State on February 28, 2013 and Petitioners were notified by Ernest L. Reddick, Esq., Assistant General Counsel, Department of State by e-mail on the same date.

7. Petitioners timely submit this Request for Hearing pursuant to Section 373.114(2)(a), Florida Statutes, which provides that:

Within 30 days after adoption of a [water management district] rule, any affected person may **request that a hearing be held before the secretary of the department, at which hearing evidence and argument may be presented relating to the consistency of the rule with the water resource implementation rule**, by filing a request for hearing with the department and serving a copy on the water management district. (emphasis in bold added)

LEGAL BACKGROUND AND NATURE OF PROPOSED RULES

8. Minimum flows rulemaking is authorized by Section 373.042, Florida Statutes, which provides:

373.042 Minimum flows and levels.—

(1) Within each section, or the water management district as a whole, the **department or the governing board shall establish** the following:

(a) Minimum flow for all surface watercourses in the area. **The minimum flow for a given watercourse shall be the limit at which further withdrawals would be significantly harmful to the water resources or ecology of the area.**

(b) Minimum water level. **The minimum water level shall be the level of groundwater in an aquifer and the level of surface water at which further withdrawals would be significantly harmful to the water resources of the area.**

The minimum flow and minimum water level **shall be calculated by the department and the governing board using the best information available**. When appropriate, minimum flows and levels may be calculated to reflect seasonal variations. **The department and the governing board shall also consider, and at their discretion may provide for, the protection of nonconsumptive uses in the establishment of minimum flows and levels.** (emphasis in bold added)

9. “The scientific methodologies for establishing minimum flows and levels under s. 373.042, and all established minimum flows and levels” must be included in District Water Management Plans developed by each Water Management District. §373.036(1), Fla. Stat. District Water Management Plans become part of the Florida Water Plan, which must also include the State’s Water Quality Standards (“**WQS**”), and the State Water Policy, now named the “Water Resource Implementation Rule.” *Id.*

10. The Water Resource Implementation Rule is codified as FAC Chapter 62-40 and is “intended to provide water resource implementation goals, objectives, and guidance for the development and review of programs, rules, and plans relating to water resources, based on statutory policies and directives in Chapters 187, 373, and 403, Florida Statutes.” FAC Rule 62-40.110(2); see also, §373.036(1)(d), Fla. Stat.

11. The Water Resource Implementation Rule “includes Surface Water Quality Standards, Chapter 62-302 and Rule 62-4.242, F.A.C.” See FAC Rule 62-40.120(1).

12. FAC Rule 62-302.200(31) defines “Water Quality Standards” as follows:

“Water quality standards” shall mean standards composed of designated present and future most beneficial uses (classification of waters), the numerical and narrative criteria applied to the specific water uses or classification, **the Florida antidegradation policy**, and the moderating provisions contained in this rule and in Chapter 62-4, F.A.C., adopted pursuant to Chapter 403, F.S. (emphasis in bold added)

13. The Department of Environmental Protection (“**DEP**”) is empowered and obligated by Section 403.061, Florida Statutes to establish WQS as part of a comprehensive water pollution prevention program, including specifically:

to control and prohibit pollution of air and water in accordance with the law and rules adopted and promulgated by it and, for this purpose, to:

.....

(6) **Exercise general supervision of the administration and enforcement of the laws, rules, and regulations pertaining to . . . water pollution.**

(7) Adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this act. **Any rule adopted pursuant to this act shall be consistent with the provisions of federal law**, if any, relating to . . . effluent limitations, pretreatment requirements, or standards of performance. . . .

(8) Issue such orders as are necessary to effectuate the control of . . . water pollution and enforce the same by all appropriate administrative and judicial proceedings.

(9) **Adopt a comprehensive program for the prevention, control, and abatement of pollution of the . . . waters** of the state, and from time to time review and modify such program as necessary.

(10) **Develop a comprehensive program for the prevention, abatement, and control of the pollution of the waters** of the state. . . . In order to effect this purpose, a **grouping of the waters into classes** may be made **in accordance with the present and future most beneficial uses**.

(11) **Establish ambient . . . water quality standards** for the state as a whole or for any part thereof, . . .

(27) **Establish rules which provide for a special category of water bodies within the state, to be referred to as “Outstanding Florida Waters,”** which water bodies shall be worthy of special protection because of their natural attributes. . . .

(28) **Perform any other act necessary to control and prohibit . . . water pollution, and to delegate any of its responsibilities, authority, and powers, other than rulemaking powers, to any state agency now or hereinafter established.**

(29) **Adopt by rule special criteria to protect Class II and Class III shellfish harvesting waters. . . .**

(34) **Adopt rules which may include stricter permitting and enforcement provisions within Outstanding Florida Waters, aquatic preserves, . . .** (emphasis in bold added)

14. Florida’s Antidegradation Policy is contained and described in FAC Rules 62-302.300, 62-302.700 and 62-4.242. Florida’s Antidegradation Policy was adopted to comply with the CWA. Florida’s Antidegradation Policy includes in relevant part:

62-302.300 Findings, Intent and Antidegradation Policy for Surface Water Quality

(1) **Article II, Section 7 of the Florida Constitution requires abatement of water pollution and conservation and protection of Florida's natural resources and scenic beauty.**

(2) **Congress, in Section 101(a)(2) of the Federal Water Pollution Control Act, as amended, declares that achievement by July 1, 1983, of water quality sufficient for the protection and propagation of fish, shellfish, and wildlife, as well as for recreation in and on the water, is an interim goal to be sought whenever attainable.** Congress further states in Section 101(a)(3), that it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited.

(3) **The present and future most beneficial uses of all waters of the State have been designated by the Department by means of the classification system set forth in this Chapter pursuant to Subsection 403.061(10), F.S. Water quality standards are established by the Department to protect these designated uses.**

....

(9) **The criteria set forth in this Chapter are minimum levels which are necessary to protect the designated uses of a water body**

....

(11) **Section 403.021, Florida Statutes, declares that the public policy of the State is to conserve the waters of the State to protect, maintain, and improve the quality thereof for public water supplies, for the propagation of wildlife, fish and other aquatic life, and for domestic, agricultural, industrial, recreational, and other beneficial uses.** It also prohibits the discharge of wastes into Florida waters without treatment necessary to protect those beneficial uses of the waters.

(12) **The Department shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources, and all cost-effective and reasonable best management practices for nonpoint source control.** For the purposes of this rule, highest statutory and regulatory requirements for new and existing point sources are those which can be achieved through imposition of effluent limits required under Sections 301(b) and 306 of the Federal Clean Water Act (as amended in 1987) and Chapter 403, F.S. For the purposes of this rule, cost-effective and reasonable best management practices for nonpoint source control are those nonpoint source controls authorized under Chapters 373 and 403, F.S., and Department rules.

(13) **The Department finds that excessive nutrients (total nitrogen and total phosphorus) constitute one of the most severe water quality problems facing the State. It shall be the Department's policy to limit the introduction of man-induced nutrients into waters of the State. Particular consideration shall be given to the protection from further nutrient enrichment of waters which are presently high in nutrient concentrations or sensitive to further nutrient concentrations and**

sensitive to further nutrient loadings. Also, particular consideration shall be given to the protection from nutrient enrichment of those presently containing very low nutrient concentrations: less than 0.3 milligrams per liter total nitrogen or less than 0.04 milligrams per liter total phosphorus.

(14) Existing uses and the level of water quality necessary to protect the existing uses shall be fully maintained and protected. Such uses may be different or more extensive than the designated use.

(15) Pollution which causes or contributes to new violations of water quality standards or to continuation of existing violations is harmful to the waters of this State and shall not be allowed. Waters having water quality below the criteria established for them shall be protected and enhanced. However, the Department shall not strive to abate natural conditions.

62-302.700 Special Protection, Outstanding Florida Waters, Outstanding National Resource Waters.

(1) It shall be the Department policy to afford the highest protection to Outstanding Florida Waters and Outstanding National Resource Waters. No degradation of water quality, other than that allowed in subsections 62-4.242(2) and (3), F.A.C., is to be permitted in Outstanding Florida Waters and Outstanding National Resource Waters, respectively, notwithstanding any other Department rules that allow water quality lowering.

62-4.242 Antidegradation Permitting Requirements; Outstanding Florida Waters; Outstanding National Resource Waters; Equitable Abatement.

....

(2) Standards Applying to Outstanding Florida Waters.

(a) No Department permit or water quality certification shall be issued for any proposed activity or discharge within an Outstanding Florida Waters, or which significantly degrades, either alone or in combination with other stationary installations, any Outstanding Florida Waters, unless the applicant affirmatively demonstrates that:

....

2. The proposed activity or discharge is clearly in the public interest, and either

a. A Department permit for the activity has been issued or an application for such permit was complete on the effective date of the Outstanding Florida Water designation; or

b. The existing ambient water quality within Outstanding Florida Waters will not be lowered as a result of the proposed activity or discharge, except on a temporary basis during construction (emphasis in bold added)

15. Section 373.103(1), Florida Statutes requires the Water Management Districts to administer and enforce all provisions of Chapter 373 consistent with the Water Resource Implementation Rule.

16. Within the Water Resource Implementation Rule, FAC Rule 62-40.430(1)(a) indicates "Water quality standards shall be enforced pursuant to Chapters 403 and 373, F.S., to protect waters of the State **from point and nonpoint sources of pollution.**" (emphasis in bold added)

17. Section 403.031(7), Florida Statutes defines "Pollution" as:

the presence in the outdoor atmosphere or waters of the state of any substances, contaminants, noise, or **manmade or human-induced impairment of air or waters or alteration of the chemical, physical, biological, or radiological integrity of air or water** in quantities or at levels which are or may be potentially harmful or injurious to human health or welfare, animal or plant life, or property or which unreasonably interfere with the enjoyment of life or property, including outdoor recreation unless authorized by applicable law. (emphasis in bold added)

See also, FAC Rule 62-302.200(21)(almost identical definition of "Pollution").

18. The CWA's definition of pollution also includes "the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water," which has been determined to encompass the effects of reduced water quantity. 33 U.S.C. § 1362(19); *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology, et al.*, 511 U.S. 700 (May 31, 1994).

19. A "point source" is defined under the CWA as any "discernible, confined and discrete conveyance ... from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Nonpoint source pollution is not defined, but is considered "the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single

discrete source." *N.W. Env't'l Def. Ctr. v. Brown*, 640 F3d 1063, 1070 (9th Cir. 2011) (citation omitted).

20. The foregoing regulatory scheme establishes that the Water Management Districts' implementation of minimum flows and levels under Section 373.042, Florida Statutes must be consistent with the Water Resource Implementation Rule, Florida's Water Quality Standards, and Florida's Antidegradation Policy. §§ 373.036 and 373.103(1), Fla. Stat.; FAC Rule 62-40.430(1)(a)

21. The requirement that MFLs comply with Florida's WQSs and Florida's Antidegradation Policy is reinforced in the Water Resource Implementation Rule's list of specific matters which must be considered in the establishment of MFLs, as follows:

62-40.473 Minimum Flows and Levels.

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

(a) Recreation in and on the water;

(b) Fish and wildlife habitats and the passage of fish;

(c) Estuarine resources;

(d) Transfer of detrital material;

(e) Maintenance of freshwater storage and supply;

(f) Aesthetic and scenic attributes;

(g) Filtration and absorption of nutrients and other pollutants;

(h) Sediment loads;

(i) Water quality; and

(j) Navigation.

(emphasis in bold added). FAC Rule 62-40.473(1)(i) explicitly requires consideration of

"water quality," and the other Rule 62-40.473(1) criteria all relate to matters that are

encompassed by the concept of water quality and/or are closely related and associated with

water quality and nonconsumptive uses.

DISTRICT IMPLEMENTATION OF MINIMUM FLOWS AND LEVELS

22. The District intends the proposed MFLs for Chassahowitzka and Homosassa Springs/River Systems to comply with Section 373.042, Florida Statutes and the Water Resource Implementation Rule, but in response to public comments urging greater protection by implementation of Florida's Antidegradation Policy to protect these Outstanding Florida Waters, the District, through its staff, said:

Water quality criteria are designed to protect a water body's designated use. Florida's anti-degradation policy, including its policy for Outstanding Florida Waters, is designed to prevent worsening of water quality from specified activities unless it is found to be in the public interest. **Florida's anti-degradation policy does not apply to water quantity decisions such as MFLs; instead, it applies to activities that incorporate a discharge of pollutants or dredge and fill activities.** (emphasis in bold added)

See *Recommended Minimum Flows for the Chassahowitzka River System, July 15, 2012* at p.98; and *Recommended Minimum Flows for the Homosassa River System, July 15, 2012* at p.183. The foregoing Reports are attached as "**Attachments B and C.**"

23. Instead of basing these OFW MFLs on the Antidegradation Policy prohibiting degradation of water quality below "ambient water quality," the District employs a minimum flows and levels methodology that first identifies ecological resources of concern that could be affected by reduced flow. For example, with respect to Chassahowitzka Springs and River, the District identified submersed aquatic vegetation, benthic macroinvertebrates, molluscs, planktonic and nektonic fish and invertebrates, salinity-based habitat, and thermal refuge habitat for manatees during critically cold periods, as ecological resources of concern.

24. Using numeric and statistical models, the District then predicts how the identified ecological resources of concern will respond to reduced flows, and predicts which

resource would likely be the most sensitive to reduced flow. Next, the District employs an unadopted rule that presumes reduced flows causing a fifteen percent or less loss of the most sensitive ecological resource or habitat will not exceed the statutory “significantly harmful” threshold and will meet the requirements for an MFL.

25. The District’s methodology results in MFLs that are less protective than Florida’s WQs and Florida’s Antidegradation Policy require for Outstanding Florida Waters.

26. The District’s methodology results in MFLs that are also not consistent with the CWA. The United States Environmental Protection Agency has advised that States that choose to develop minimum flow standards that are not based on the CWA “should ensure that those instream flow standards are consistent with the state WQs . . . should not set conditions which would be less stringent than or in conflict with the state WQs under the CWA.” See USEPA Region 4 Letter to Alabama Department of Environmental Management and attached Memorandum at numbered page 12 and discussion of “Instream Flows” on pages 9 through 13, a copy of which is attached as “**Attachment D**”.

DISPUTED ISSUES OF MATERIAL FACT

27. The material facts in dispute, which Petitioners assert in good faith and which may include good faith argument for the application, extension, modification of existing law, or the establishment of new law as necessitated by this matter, include, but are not limited to: Petitioners are not aware of any disputed issues of material fact at this time, but Petitioners reserve the right to amend this statement in the event any respondent identifies any issues of material fact that the respondent intends to dispute in this proceeding and the tribunal indicates warrant an evidentiary contest.

ULTIMATE FACTS

28. The ultimate facts, which Petitioners assert in good faith and which may include good faith argument for the application, extension, modification of existing law, or the establishment of new law as necessitated by this matter, include, but are not limited to, the Proposed MFLs are not consistent with the Water Resource Implementation Rule because the Proposed MFLs do not comply with the State's Water Quality Standards, Antidegradation Policy and the Clean Water Act.

STATUTES AND RULES

29. Petitioners are entitled to relief under and/or this Amended Petition is supported by Chapters 403, 373, and 120, Florida Statutes and Florida Administrative Code Chapters 40D-8, 28-106, 62-40, 62-302, and 62-4.242.

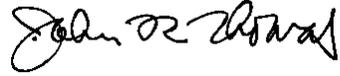
WHEREFORE, Petitioners respectfully request that a hearing be held before the Secretary of DEP, at which hearing Petitioners must be allowed to present evidence and argument relating to the Water Resource Implementation Rule inconsistency of the Southwest Florida Water Management District's February 28, 2013 amendments to FAC Rule 40D-8.041.



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Certificate of Service

I HEREBY CERTIFY that the foregoing was served via E-Mail Transmission on
March __, 2013, upon the Service List below.



JOHN R. THOMAS, ESQUIRE
LAW OFFICE OF JOHN R. THOMAS, P.A.

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