

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

WILLIAM THOMAS,

Petitioner,

v.

DOAH CASE No.:

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION,

Respondent.

_____ /

**PETITION FOR ADMINISTRATIVE HEARING
CHALLENGING PROPOSED RULE 68C-22.016**

Petitioner, William Thomas, by and through the undersigned counsel, pursuant to Sections 120.56, 120.569, and 379.2431(2), Florida Statutes, and Rules 28-106.201 and 68C-22.001 of the Florida Administrative Code (FAC), petitions for an administrative determination that Proposed Rule 68C-22.016 of the FAC is an invalid exercise of delegated legislative authority. In support thereof, the Petitioner states:

AFFECTED AGENCY

1. The Respondent agency's name, address, and file or identification number are as follows:

Florida Fish and Wildlife Conservation Commission (FWC)
620 South Meridian Street
Tallahassee, Florida 32399-1600

PETITIONER

2. The name, address, and telephone number of the Petitioner's representative are as follows:

Mark Miller
Christina M. Martin
Pacific Legal Foundation
8645 N Military Trail
Suite 511
Palm Beach Gardens, Florida 33410
Telephone: (561) 691-5000
E-mail: mm@pacificlegal.org; cmm@pacificlegal.org

SUBSTANTIAL INTERESTS AFFECTED

3. FWC originally published the Notice of Proposed Rule on December 22, 2014. The text of the Proposed Rule excluded from coverage two basins in the Indian Rocks Beach area, which have historically been used for water sports activities. Specifically, the Proposed Rule identified the two basins to be excluded as follows:
 - a. The basin between 20th Avenue and Harbor Drive, west of a line that bears 6° from a point (approximate latitude 27° 54' 17.4" North, approximate longitude 82° 50' 31.9" West) on the shoreline of the peninsula that contains 20th Avenue Parkway; and
 - b. The basins between 12th Avenue and 20th Avenue, west of a line that bears 46° from a point (approximate latitude 27° 53' 51.2" North, approximate longitude 82° 50' 26.1" West) on the shoreline of the peninsula that contains 12th Avenue to the shoreline of the peninsula that contains 20th Avenue.

These two areas will hereinafter be referred to as the "Basins."

4. The exclusion of the two Basins allowed their continued use for motorized recreational boating activities.
5. Petitioner was not prevented from using the Basins for motorized recreational boating activities and was not otherwise substantially affected by the Notice of Proposed Rule.

6. In June, 2015, the FWC changed course and recommended that the Proposed Rule include the Basins, contrary to the text of the Proposed Rule as initially proposed.
7. FWC published its Notice of Change to the Proposed Rule on July 23, 2015.
8. The challenged Notice of Change proposes to add language to Rule 68C-22.016, FAC, designating two basins within Indian Rocks Beach as a slow speed zone from April to October purportedly to provide manatees additional protection.
9. Designating an area as “slow speed” requires boats to be “[c]ompletely off plane . . . fully settled into the water and . . . proceeding at a reasonable and prudent speed with little or no wake” according to Rule 68C-22.002(4), FAC.
10. Designating the Basins at issue as “slow speed” zones eliminates the potential for motorized boating recreational activities in the area.
11. Petitioner William Thomas owns real property located at 470 20th Avenue, Indian Rocks Beach, Florida 33785. Thomas owns jet skis and a boat that he regularly uses in both Basins for motorized boating recreational activities, including wakeboarding, waterskiing, and other water sports which depend upon the operation of boats on plane and in a manner that produces a wake. Thomas bought the boat and jet skis specifically to use in the two Basins. As a result of the Proposed Rule, Thomas will lose his right to enjoy recreational use of his boat and jet skis in the Basins.
12. Thomas’s property value depends substantially on reasonable access to and use of navigable Florida waterways by motorboat without undue delay or unduly restricted access zones.

13. Thomas relies upon reasonable access to Florida waters for recreational purposes on Florida waterways. Thomas has significant, protectable interests related to this administrative challenge.
14. Thomas will be adversely affected by the FWC's adoption of this Proposed Rule change.
15. The relief requested by Thomas is the appropriate type of relief for him to receive.

Timely Notice

16. This Petition is filed within 20 days of publication of the modified rule, as required by Section 120.56(2), Florida Statutes.

Jurisdiction

17. Pursuant to Section 120.56(2), Florida Statutes, a substantially affected person may seek an administrative determination of the invalidity of a proposed rule within 20 days after the Notice of Change.
18. As recounted above, Petitioner Thomas is a substantially affected person.
19. The Division of Administrative Hearings has jurisdiction to determine whether the Proposed Rule is invalid pursuant to Section 120.56 of the Florida Statutes.

Proposed Rule Challenged

20. Proposed Rule 68C-22.016 of the Florida Administrative Code is not supported by the minimum standards laid forth in the Manatee Sanctuary Act, Section 379.2431(2), Florida Statutes, which provides that the FWC may not impose speed zones in a water unless manatees are frequently sighted in that water and the best available science supports the conclusion that manatees inhabit the waters periodically.

Laws Implemented

21. The Proposed Rule purports to implement Section 379.2431(2) of the Florida Statutes—the Florida Manatee Sanctuary Act.

Factual Background

22. The FWC started its evaluation of the waters of Pinellas County in 2012.
23. In 2014, FWC staff sent a recommended rule to a Local Rule Review Committee (LRRC), composed of County residents, as required by the Manatee Sanctuary Act. The LRRC voted 7-2 to exclude from the speed regulations the two Basins used for water sports around Indian River Beach.
24. In response to the LRRC's decision, the FWC staff agreed with that recommendation, stating in its subsequent response to the LRRC's final report that "documented manatee use was relatively low in both areas compared to the rest of the area."
25. Based on staff recommendation, and the FWC's conclusion that the area had "low" manatee use compared to the surrounding areas, the original Proposed Rule excluded both Basins from the speed regulations.
26. On November 12, 2014, the City Commission of Indian Rocks Beach debated the Proposed Rule by the FWC and ultimately sent a letter to the FWC requesting that the FWC add the Basins to the manatee slow zone. The City had no manatee-related scientific basis or authority to support this request. It is a political body, not a scientific body.
27. Based on the City's request, the FWC staff recommended regulating the two Basins as slow zones. The FWC agreed to the modification, and it published the modified Proposed Rule on July 23, 2015.

Disputed Issues of Fact and Law

28. The Proposed Rule exceeds the Department's grant of rulemaking authority and constitutes an invalid exercise of delegated legislative authority pursuant to Section 120.52(8) of the Florida Statutes, because it enlarges, modifies, or contravenes the specific provisions of law in the Manatee Sanctuary Act; and is arbitrary and capricious.
29. The Manatee Sanctuary Act provides the enabling authority to regulate boat speeds in waters inhabited by manatees. The Act specifically provides, "It is not the intent of the Legislature to permit the commission to post and regulate boat speeds generally throughout the waters of the state, thereby unduly interfering with the rights of fishers, boaters, and water skiers using the areas for recreational and commercial purposes." § 379.2431(2)(k), Fla. Stat.
30. The Manatee Sanctuary Act provides authority to regulate waters not specifically listed by name in the Act. But the FWC may only regulate motorboat speed and operation in those "portions of state waters where manatees are frequently sighted and the best available scientific information, as well as other available, relevant, and reliable information, which may include but is not limited to, manatee surveys, observations, available studies of food sources, and water depths, supports the conclusion that manatees inhabit such waters periodically." § 379.2431(n), Fla. Stat.
31. The Manatee Sanctuary Act does not list the two waters at issue here, thus when FWC regulates those waters it must show that "manatees are frequently sighted and the best available scientific evidence . . . supports the conclusion that manatees inhabit such waters periodically."

32. Here, rather than claiming that manatees were frequently sighted, or that the water areas were travel corridors, the FWC said it was an area where “manatee use was relatively low.”
33. The FWC’s surveys reveal that manatee sightings were not frequent.
34. Moreover, the best available science, including the state’s manatee surveys, observations, and available studies of food sources, did not support the conclusion that manatees inhabit such waters periodically.
35. Thomas disputes all facts necessary to establish that the Proposed Rule change meets the criteria of Rule 68C-22.001, FAC, without unduly restricting “the rights of fishers, boaters, and water skiers using the areas for recreational and commercial purposes” as set forth in Section 379.2431(2)(k), Florida Statutes.

Ultimate Fact and Law

36. The Proposed Rule is an invalid exercise of delegated legislative authority as that term is defined in Section 120.52(8), Florida Statutes.

Rules and Statutes Entitling Petitioner to Relief

37. The rules and statutes entitling Petitioner to relief include, but are not necessarily limited to, Section 379.2431(2), Florida Statutes (2014), and Chapter 68C-22, FAC.

Attorney’s Fees and Costs

38. Petitioner has retained the undersigned counsel.
39. Petitioner is entitled to the recovery of its attorney’s fees under Section 120.595(2), Florida Statutes.

Relief Requested

WHEREFORE, Petitioner respectfully requests that the Division of Administrative Hearings:

- a) Initiate a formal Section 120.56, Florida Statutes, proceeding and assign this matter to an Administrative Law Judge for a hearing;
- b) Conduct a formal hearing on this Petition pursuant to Sections 120.56, 120.569, and 120.57, Florida Statutes;
- c) Issue a final order finding the Proposed Rule is an invalid exercise of delegated legislative authority;
- d) Award the Petitioner its costs and attorney's fees incurred in this action; and,
- e) Provide the Petitioner such other relief the Administrative Law Judge deems appropriate.

Respectfully submitted this 11th day of August, 2015.

By: /s/ Mark Miller
Mark Miller
Christina M. Martin
PACIFIC LEGAL FOUNDATION
8645 N Military Trail
Suite 511
Palm Beach Gardens, Florida 33410
Telephone: (561) 691-5000
E-mail: mm@pacificlegal.org
cmm@pacificlegal.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition was electronically filed using the eALJ electronic filing system, on August 11, 2015, and served via electronic mail upon the following:

Kaitlyn McCown, Agency Clerk and Records Management Liaison Officer
Florida Fish and Wildlife Conservation Commission
620 South Meridian Street
Tallahassee, FL 32399-1600
E-mail: Efile@MyFWC.com

Joint Administrative Procedures Committee
680 Pepper Building
111 W. Madison Street,
Tallahassee, FL 32399-1400
E-mail: joint.admin.procedures@leg.state.fl.us

/s/ Mark Miller

MARK MILLER