

BUY™

SELL™

SHOP™



Downloaded From
www.TextBookDiscrimination.com



SELL YOUR OWN SAMPLES

(help others get the justice that they deserve)



BUY™

SELL™

SHOP™

www.TextBookDiscrimination.com

Get ***Booked Up*** on Justice!

© TBD Corporation. All Rights Reserved.

**DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
THIRD DISTRICT**

Consolidated Case Nos. 3D16-2129 and 3D16-2440

THE SEMINOLE TRIBE OF FLORIDA
and CITY OF MIAMI,
Appellants,

v.

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL
PROTECTION and FLORIDA ENVIRONMENTAL
REGULATION COMMISSION,
Appellees.

APPELLANT, THE SEMINOLE TRIBE OF FLORIDA'S INITIAL BRIEF

Consolidated DOAH Case Nos. 16-4431RP; 16-4836RP, 16-4875RP; 16-4912 RP

Amy Taylor Petrick
Florida Bar No. 0315590
Email: apetrick@llw-law.com; bpennington@llw-law.com.
Andrew J. Baumann
Florida Bar No. 0070640
Email: abaumann@llw-law.com; mlozada@llw-law.com.
Rachael B. Santana
Florida Bar No. 0107677
Email: rsantana@llw-law.com; cblackwell@llw-law.com.
Christopher D. Johns
Florida Bar No. 120107
Email: cjohns@llw-law.com; nlewis@llw-law.com
LEWIS LONGMAN & WALKER P.A.
515 North Flagler Drive, Suite 1500
West Palm Beach, FL 33401
Telephone: (561) 640-0820/Fax: (561) 640-8202

Counsel for Appellant, The Seminole Tribe of Florida

TABLE OF CONTENTS

	<u>Page(s)</u>
Table of Citations.....	iii
Statement of the Case and Facts	1
Summary of the Argument.....	22
Argument.....	23
I. Standard of Review.....	23
II. Whether the Administrative Law Judge Erred in Dismissing With Prejudice Appellant The Seminole Tribe of Florida’s Petition for a Determination of the Invalidity of Proposed Florida Administrative Code Rule 62-302.530, Where the Notice Failed to Adequately Notify The Public, Including The Seminole Tribe of Florida, of the Substance of the Proposed Rule And Violated Section 120.54, Florida Statutes, Requiring a Short and Plain Statement of the Purpose and Effect of the Rule, and Florida Administrative Code Rule 1-1.011 Governing Formatting of Proposed Rules	24
III. Whether the Administrative Law Judge Erred in Dismissing with Prejudice Appellant The Seminole Tribe of Florida’s Petition for a Determination of the Invalidity of Proposed Florida Administrative Code Rule 62-302.530, Where Appellee Department of Environmental Protection filed a Notice of Change/Withdrawal That Informed the Public for the First Time of Material Changes Proposed by the Proposed Rule Less Than Twenty Days Prior to the Filing of Appellant Seminole Tribe of Florida’s Petition.....	32
IV. Whether the Administrative Law Judge Erred in Dismissing with Prejudice Appellant The Seminole Tribe of Florida’s Petition for a Determination of the Invalidity of Proposed Florida Administrative Code Rule 62-302.530, Where the Petition was Filed within Twenty Days of Appellee Department of Environmental Protection’s Revised Statement of Estimated Regulatory Costs, Consistent with Section 120.56, Florida Statutes	34

A. The Administrative Law Judge Erred in Refusing to Apply the Statement of Estimated Regulatory Costs Window for Filing an Administrative Petition Challenging Proposed Florida Administrative Code Rule 62-302.530, Because the Department of Environmental Protection’s Filing on August 4, 2016, Constituted a Revised Statement of Estimated Regulatory Costs	35
B. The Administrative Law Judge Erred in Holding that the Twenty-Day Window to File An Administrative Petition in Response to the Publication of a Revised Statement of Estimated Regulatory Costs Was Available Only to Those Persons Who Were Adversely Affected by the Revised Statement of Estimated Regulatory Costs.....	41
Conclusion	44
Certificate of Service	46
Certificate of Compliance	46

TABLE OF CITATIONS

CASES

<i>Amos v. Department of Health and Rehabilitative Services, District IV</i> 444 So. 2d 43, 47 (Fla. 1st DCA 1984)	26
<i>Assoc. Industries of Florida, Inc. v. Dep't of Env'tl. Prot.</i> DOAH Case No. 16-6889RP at 17 (Fla. D.O.A.H. Dec. 30 2016)	37
<i>Daniels v. Florida Department of Health</i> 898 So. 2d 61, 64 (Fla. 2005)	44
<i>Florida Home Builders Ass'n v. Dep't of Labor and Employment Sec.</i> 412 So. 2d 351, 352-353 (Fla. 1982)	38
<i>Florida League of Cities, Inc. v. Administration Commission</i> 586 So. 2d 397, 413 (Fla. 1st DCA 2008)	26, 34
<i>Florida Wildlife Federation v. Jackson</i> 853 F.Supp. 2d 1138, 1144 (N.D. Fla. 2012)	2
<i>Ft. Myers Real Estate Holdings, LLC v. Dept. of Bus. and Prof. Reg., Div. of Parimutuel Wagering</i> 53 So. 3d 1158, 1161 (Fla. 1st DCA 2011)	24
<i>Henry v. State Dep't of Admin., Div. of Ret.</i> 431 So. 2d 677, 680 (Fla. 1st DCA 1983)	27
<i>Joyner v. Roberts</i> 642 So. 2d 826 (Fla. 1st DCA 1994)	27, 29
<i>Keys Citizens for Responsible Government, Inc., v. Florida Keys Aqueduct Authority</i> 795 So. 2d 940, 948 (Fla. 2001)	25
<i>McDonald v. Department of Banking and Fin.</i> 346 So. 2d 569, 580 (Fla. 1st DCA 1977)	26
<i>NAACP, Inc. v. Florida Bd of Regents</i> 863 So. 2d 294, 297-98 (Fla. 2003)	44

<i>Palumbo v. Moore</i>	
777 So. 2d 1177, 1178 (Fla. 5th DCA 2001).....	23
<i>Sterman v. Florida State University Board of Regents</i>	
414 So. 2d 1102 (Fla. 1st DCA 1982).....	26
<i>Wahlquist v. School Board of Liberty County</i>	
423 So. 2d 471, 473 (Fla. 1st DCA 1982).....	26
<i>Wilson v. Pest Control Comm'n of Fla.</i>	
199 So. 2d 777, 780 (Fla. 4th DCA 1967)	26

FLORIDA STATUTES

Section 20.255(6).....	6
Section 120.52(8)(a).....	42
Section 120.52(8)(f)	37, 43
Section 120.54.....	13, 14, 24
Section 120.54(1)(d)	39, 40
Section 120.54(2)(a).....	32
Section 120.54(3)(a)(1).....	32
Section 120.54(3)(a)(2).....	20
Section 120.54(3)(b)	37
Section 120.54(3)(d)	11, 33, 37
Section 120.54(3)(e)(5).....	18, 29
Section 120.541.....	15, 35, 37, 38
Section 120.541(1)	41

Section 120.541(1)(a).....	36, 38-40
Section 120.541(1)(a), (c)	35
Section 120.541(1)(c).....	36
Section 120.541(1)(d).....	16, 35, 43
Section 120.541(1)(f)	42
Section 120.541(1)(f) and (g)	41, 43, 44
Section 120.541(1)(g)	43
Section 120.545.....	5
Section 120.545(1)(a)(d)&(i).....	5
Section 120.545(1)(i).....	6, 29
Section 120.55(1)(b)	6
Section 120.56.....	16
Section 120.56(1)(c).....	12, 27
Section 120.56(2)	10, 21, 33
Section 120.56(2)(a).....	10, 11, 15, 23, 35, 36, 41-44
Chapter 403	2

FLORIDA ADMINISTRATIVE CODE

Florida Administrative Code Rule 1-1.009	12
Florida Administrative Code Rule 1-1.009(11).....	33
Florida Administrative Code Rule 1-1.011	24

Florida Administrative Code Rule 1-1.011(3)(c)(2).....	6, 29
Florida Administrative Code Rule 1-1.011(5)(a)	33
Florida Administrative Code Chapter 62-302	2, 3
Florida Administrative Code Rule 62-302.400	2, 4, 14, 17
Florida Administrative Code Rule 62-302.530	2-7, 14, 17, 24, 31, 32, 34, 35

FLORIDA RULES OF CIVIL PROCEDURE

OTHER

25 U.S.C. 476.....	1
33 U.S.C. 303(c)(1).....	2
33 U.S.C. 1377(e)	2
Section 16 of the Indian Reorganization Act of 1934	1
Florida Joint Legislative Rule 4.1	5

STATEMENT OF THE CASE AND FACTS

Appellant the Seminole Tribe of Florida (“the Seminole Tribe”) is a federally-recognized Indian Tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934. (25 U.S.C. §476, as amended); (R-0044).¹ The Seminole Tribe has a formalized interest in over 100,000 acres of land in Florida, such as the Big Cypress, Brighton, and Immokalee Reservations², as well as the Seminole Tribe’s Tamiami Trail Homesite within the Big Cypress National Preserve. (R-0020; R-0040). In addition to the rights afforded to the Seminole Tribe on its several Reservations, the Seminole Tribe reserved to itself through a Settlement Agreement with the State of Florida, among others, usual and customary rights in the Big Cypress National Preserve and Addition Lands, Everglades National Park, the Big Cypress Area, and WCA-3A. (*Id.*). These usual and customary rights were codified in State and Federal law, as the geographic extent of the reserved rights go beyond the borders of the Seminole Tribe’s Reservations, and explicitly reserved to the Seminole Tribe hunting, fishing, trapping, and frogging rights on a subsistence basis. (R-0781; R-0786; R-0787; R-0788; R-0790-0791).

¹ Citation to the Record on Appeal will be noted as “(R-0000)” for the record and “(T. P:ln-ln)” for citation to the Hearing Transcript.

² While not expressly referenced in the Petition, these lands also include the Hollywood, Fort Pierce, and Tampa Reservations.

Additionally, the Seminole Tribe has “Treatment as State” status under the Clean Water Act for the Big Cypress and Brighton Reservations and may promulgate its own water quality criteria for the protection of human health on those reservation lands. 33 U.S.C. § 1377(e); (R-0040). Like the Seminole Tribe, the State of Florida is authorized to implement the federal Clean Water Act through water quality criteria under Chapter 403, Florida Statutes. *See Florida Wildlife Federation v. Jackson*, 853 F.Supp. 2d 1138, 1144 (N.D. Fla. 2012). Water quality criteria have three components: a designated use for each water body, water quality criteria to protect those designated uses, and an anti-degradation component. *Id.* at 1144-1145. Florida Administrative Code Chapter 62-302 authorizes the Florida Department of Environmental Protection (“DEP”) to classify all surface waters within Florida, to initiate and update human-health criteria for water quality criteria in order to protect the classified uses of surface waters, and to set out an anti-degradation policy. Both the Seminole Tribe and the State of Florida are required under the Clean Water Act to complete a triennial review of existing human health criteria. 33 U.S.C. 303(c)(1).

On June 30, 2016, DEP published in the Florida Administrative Register a Notice of Proposed Rule³ identifying Florida Administrative Code Rule 62-302.400 “Classification of Surface Waters, Usage, Reclassification, Classified Waters” and

³ Florida Administrative Code Rule 62-302.530 is no longer a proposed rule and is currently in effect. However, for the purposes of the Initial Brief, the rule will be described as proposed.

Florida Administrative Code Rule 62-302.530 “Table: Surface Water Quality Criteria” as the subject of the Notice. (R-0195). The Rule articulated the following under the heading, “Purpose and Effect,” for the proposed rule changes:

The proposed revisions to the human health-based surface water quality criteria in Chapter 62-302, F.A.C., are designed to ensure that Floridians can safely eat Florida fish and drink local tap water. The revisions are based on updated scientific information, including more recent fish and drinking water consumption rate information, updated toxicological information, and revised methods to estimate bioaccumulation of pollutants in fish. Additionally, in accordance with the requirements of paragraph 403.061(29)(b) and paragraphs 403.861(21)(a) and (b), Florida Statutes, enacted under Chapter 2016-01, Laws of Florida, the Department is proposing to establish a new sub-classification of surface waters (Class I-Treated, Treated Potable Water Supplies) and to reclassify seven surface waters into the new sub-classification.

(R-0195-0196). A Summary of Statement of Estimated Regulatory Costs (“SERC”) and Legislative Ratification was also published, indicating that DEP had “determined that this will have an adverse impact on small business or likely increase directly or indirectly regulatory costs in excess of \$200,000 in the aggregate within one year after the implementation of the rule. A SERC has been prepared by the Agency.” (*Id.*). The Summary of the SERC invited “[a]ny person who wishes to provide . . . a proposal for a lower cost regulatory alternative” to do so “in writing within 21 days of [the] notice.” (*Id.*).

The June 30, 2016, Notice also advised that a hearing would be held before the Florida Environmental Regulation Commission (“ERC”) on July 26, 2016, at the

DEP offices in Tallahassee, Florida. (*Id.*). The Notice incorporated the full text of the changes for Florida Administrative Code Rule 62-302.400. (R-0196-0198). For Florida Administrative Code Rule 62-302.530, the Notice incorporated an unannotated version of a table that “contains both numeric and narrative surface water quality criteria to be applied except within zones of mixing.” (R-0198).

The table identified chemicals in the far left column, and set forth numeric or narrative limits for chemicals in surface water bodies in the remaining columns, based on the designated class of the water body. (*Id.*). The published table contained both underlined and strike-through text. (*Id.*). The table’s format was substantially reorganized, however, there was no textual or narrative cue to the reader to indicate whether an underlined chemical was newly added to the table, or whether the underlined chemical was simply relocated from another part of the table. (*Id.*). Likewise, it was unclear to the reader whether chemicals listed in strike-through text were simply relocated to another part of the table or whether the strike-through text meant that a chemical was entirely removed from the table and, thus, would no longer be regulated under the proposed rule. (*Id.*). Similarly, while a criteria may have been listed in underlined format, there was no typographical or textual cue to indicate whether the criteria had been increased or decreased from the operative 1992 water quality standard. (*Id.*). The Purpose and Effect description in the June 30, 2016, Notice also failed to indicate whether water quality criteria were being

added for the first time, removed from regulation, or were changing the level of contaminant permissible in Florida's waters, merely lumping all potential categories into the term "proposed revisions". (R-0050).

On July 20, 2016, the Joint Administrative Procedures Committee ("JAPC"), sent a letter to DEP, representing its initial review of the rule package as advertised on June 30, 2016. (R-0320). JAPC is a joint standing committee of the Florida Legislature created by Florida Joint Legislative Rule 4.1 and authorized by Section 120.545, Florida Statutes, to review proposed agency rules and provide comments and objections to rules. JAPC provides comments and objections on topics such as whether the rule is an invalid exercise of delegated legislative authority, whether the rule is in a proper form, and whether the rule "could be made less complex or more easily comprehensible to the general public." §120.545(1)(a)(d)&(i) Fla. Stat. (2016).

In its July 20, 2016 review letter, JAPC informed DEP that the proposed amendments to Florida Administrative Code Rule 62-302.530, reorganized the table to list parameters alphabetically, but did not inform the reader of the reorganization, as required by administrative rule. (R-0320). JAPC observed that this flaw "seriously handicapped" the reader's ability to compare "the measures of parameters from the former measure at the former location, and new measure at the new location." (*Id.*). JAPC advised DEP that the manner in which the table was

published violated Florida Administrative Code Rule 1.011(3)(c)(2), of the Department of State, concluding that “[t]he rule amendments to this table are incomprehensible to members of the general public in violation of s. 120.545(1)(i), F.S.” (R-0322). DEP chose not to address JAPC’s letter prior to the July 26, 2016, ERC hearing in which the water quality criteria were approved by a vote of 3 to 2⁴.

Instead, on August 4, 2016, after the close of the public hearing and after the ERC’s vote to approve the water quality criteria, DEP filed a document with the heading “Notice of Change/Withdrawal” in the Florida Administrative Register.⁵ (R-0319). The document had an internal title, “Notice of Correction,” and stated that “the correction is in response to comments submitted by the Joint Administrative Procedures Committee in a letter dated July 20, 2016.” (*Id.*). The Notice amended its summary of the rule to indicate “. . . the Department has reorganized the criteria in the rule 62-302.530, F.A.C. table to be in alphabetical order for clarity.” (*Id.*). The

⁴ As a procedural matter, the ERC shall be comprised of seven commission members and “provide reasonable representation from all sections of the state.” §20.255(6), Fla. Stat. (2016). The ERC is intended to be a representative body of the citizens of Florida in voting on environmental matters of significance to the state. Without representatives of local government and the environment, the ERC was not representative of the citizens of Florida. (R-0244).

⁵ The electronic version of the Notice on the Florida Administrative Register website reflected both the titles “Notice of Change/Withdrawal” and, below that, “Notice of Correction.” (R-0319). The paper version of the Florida Administrative Register only reflected the title “Notice of Correction.” (R-0296-0297). Section 120.55(1)(b), Florida Statutes, identifies the electronic version, not the paper copy, as the official publication.

Notice further advised that “[t]he department has prepared an annotated version of the table in rule 62-302.530, F.A.C., that provides cross references to the original location of the criteria in the table and identifies which criteria are new.” (*Id.*). The Notice then listed a DEP website where the annotated table could be viewed by the public. (*Id.*).

The August 4, 2016, Notice was the first published notice that informed the reader that the proposed rule reorganized the table alphabetically. (*Id.*). The August 4, 2016, Notice was also the first published notice that informed the reader that the proposed rule added new criteria to the existing water quality criteria. (*Id.*). Cross-reference to the annotated table in the August 4, Notice was the first time the reader and the public were put on notice, in any form, that limits on certain categories of chemicals were proposed to be removed, such as for “Polycyclic Aromatic Hydrocarbons” (“PAHs”). (R-0073). Since 1992, ten of the chemicals within the category of “PAHs” had been governed by limits that applied to the total for the ten (10) PAHs combined, with the category-wide cap providing that the combined chemicals could not exceed 0.0028 microgram annual average. (R-0097). The annotated table advised the reader for the first time that “these parameters are now listed individually” while showing the old category-wide limits in strike-through text. (*Id.*). The same is true for a category of chemicals referred to as

“Halomethanes,” and a category of chemicals referred to as “Total chlorinated phenols and chlorinated chresols.” (R-0339; R-0349).

Neither the June 30, 2016, Notice, nor the August 4, 2016, Notice, alerted the reader that three chemicals are dropped from the table entirely: Acenaphthylene; Benzo(ghi)perylene; and Phenanthrene, which were part of the chemical category called PAHs that was regulated in the 1992 version of the rule. (R-0050; R-0296). To the contrary, while the annotated table advised the reader that individual chemicals fitting within the PAHs category are “now listed individually”, a careful and time consuming review of the annotated table and its notes reveals that these three chemicals do not, in fact, reappear anywhere within the reorganized table. (R-0069).

The August 4, 2016, Notice also stated,

[t]he summary of the statement of estimated regulatory costs (SERC) . . . is being revised to include the following: The department has revised the SERC to reflect that a lower cost regulatory alternative (LCRA) to revise certain criteria for the new Class-I treated designated use was received on July 21, 2016, but was immediately withdrawn. A copy of the revised SERC, noting the LCRA and its withdrawal, may be obtained by contacting [DEP]....and is available for public viewing at the following website:
<http://www.dep.state.fl.us/water/wqssp/health.htm>.

(R-0296-0297).

The Seminole Tribe of Florida’s Petition for Administrative Determination of Invalidity of Proposed Rule Revisions was filed with the Division of Administrative

Hearings (“DOAH”) on August 5, 2016, alleging that the ERC hearing was held with less than the Administrative Procedure Act’s (“APA”) permitted timeframe of twenty-eight (28) days between the notice and hearing, and that the proposed rule was arbitrary and capricious because it failed to properly account for the subsistence practices of the Seminole Tribe in setting health-related water quality criteria. (R-0022). The case was assigned to DOAH Administrative Law Judge (“ALJ”) Bram D.E. Canter, on August 8, 2016, who set the matter for a hearing scheduled September 6 and 7, 2016. (R-0027; R-0030). The Seminole Tribe of Florida filed a request for leave to amend its Petition for Administrative Determination of Invalidity of Proposed Rule Revisions on August 12, 2016, and a substitute Motion for Leave to Amend on August 24, 2016. (R-0049; R-0406). The proposed amended Petition alleged that the petition was timely, because it was originally filed within twenty (20) days of the August 4, 2016, notice of change. (R-0412). Only after an initial case management conference, the setting of a hearing date, and the Seminole Tribe’s Motion for Leave to File an Amended Petition did DEP argue that the Seminole Tribe’s Petition was untimely. (R-0030; R-0032; R-0040).

The DOAH website time-stamped the Seminole Tribe’s filing of the initial Petition at 5:02 p.m. on August 5 and, therefore, DEP raised the argument that the Petition was actually filed on August 8, 2016. (R-0025). On August 15, 2016, DEP filed a Motion to Dismiss the Seminole Tribe’s Petition as untimely because August

8, 2016, was not within the jurisdictional ten (10) days from the ERC hearing. (R0107-0108). The Department also filed a Response in opposition of the Seminole Tribe of Florida's Motion for Leave to Amend its Petition, claiming that the untimeliness of the original petition barred further pleadings in the matter. (R-0188).

On August 19, 2016, the City of Miami moved to intervene⁶ in the case, alleging that the Department failed to comply with procedural requirements under the Florida Statutes, and the proposed rule was arbitrary and capricious because it loosened restrictions on carcinogens in Florida surface waters without justifying the need for increased levels of toxins or increased health risks to Floridians. (R-0119). The City of Miami asserted that the Seminole Tribe of Florida's petition was "timely filed within 20 days of the Notice of Correction and the revised SERC, per the requirements of Section 120.56(2), Florida Statutes." (R-0124).

On August 23, 2016, Florida Pulp and Paper Association Environmental Affairs, Inc. ("Pulp and Paper"), filed a Petition for Administrative Determination of Invalidity of Proposed Rule revisions directed at the same rule. (R-0365). Pulp and Paper alleged that its petition was timely because it was "filed within 20 days of the Notice of Change, and within 20 days after a revised statement of estimated regulatory costs, pursuant to Section 120.56(2)(a), Fla. Stat." (R-0367). On August

⁶ The City of Miami filed an independent petition for administrative determination of invalidity, in addition the motion to intervene. (R-0124; R-0240).

25, 2016, Martin County filed a Petition for Administrative Determination of Invalidity of Proposed Rule Revisions, contending that its Petition was timely because it was filed “within 20 days of the Notice of Change, pursuant to Section 120.56(2)(a), Fla. Stat., albeit after 5:00 p.m.” (R-0500). DEP subsequently filed a Motion to Dismiss against each of the other Petitioners. (R- 0663; R-0687; R-0944).

The Seminole Tribe filed a response in opposition to DEP’s Motion to Dismiss, contending that even though the Petition stated it was timely because it was filed within ten days of the ERC hearing, the Petition was also timely because it was filed within twenty days of the August 4, 2016, Notice of Change. (R-0311). The Seminole Tribe explained that Section 120.56(2)(a), Florida Statutes, provides four different windows for filing an administrative challenge: 1) twenty-one (21) days after the publication of notice; 2) ten (10) days after the public hearing; 3) twenty (20) days after the filing of a statement of estimated regulatory costs or revised statement of estimated regulatory costs; and 4) twenty (20) days after the publication of a notice required by Section 120.54(3)(d), Florida Statutes. (R-0312). In the case of the proposed rule at issue, the August 4, 2016, Notice of Change/Withdrawal constituted a “notice required by Section 120.54(3)(d).” (*Id.*). Therefore, the Seminole Tribe’s filing of the Petition – even if it was treated as having been filed on August 8, 2016, was timely. Alternatively, the Seminole Tribe argued that the August 4, 2016, Notice was actually the first notice of the Rule that comported with

due process, because it was the first notice that gave the public an actual indication of what the proposed rule purported to do. (R-0317, ¶15).

On August 29, 2016, the Seminole Tribe filed the DOAH equivalent of a Motion for Summary Judgment, called a Motion for Summary Final Order, over DEP's failure to follow the applicable rulemaking procedures which is presumed to be material under Section 120.56(1)(c), Florida Statutes. (R-0753; 0757). Further the Seminole Tribe argued that the substantial interests of the Seminole Tribe and the fairness of the proceedings had been impaired by DEP's failures to clearly notice the public over the content of the rule. (R-0757).

DEP requested oral argument on its Motion to Dismiss, and a hearing was scheduled for September 6, 2016, at 9:00 a.m. (R-0359; R-0959). At the hearing, DEP took the position that, although the Notice of Change/Correction filed on August 4, 2016, was filed in response to JAPC's comments and changed the Summary of the Rule, it did not constitute a Notice of Change for point of entry purposes, because it did not add, delete, or rephrase language in the table that formed the proposed rule. (T. 15:6-11; 16:1-3). DEP's counsel indicated that a Notice of Correction is a permissible form of notice under Department of State's Florida Administrative Code Rule 1-1.009, distinguishable from a Notice of Change. (T. 18:6-25, 19:4-7). Accordingly, DEP concluded that the Notice of Change did not trigger a new filing window for any of the Petitioners and, therefore, all petitions

were due on August 5, 2016, by 5:00 p.m. (T. 20:18-21:18). Because none of the Petitions were filed by that date and time, all were subject to dismissal, according to DEP. (*Id.*).

Counsel for the Seminole Tribe of Florida explained that the original June 30, 2016, Notice should not be treated as having triggered the time for filing at all, because the notice failed to provide adequate notice to the public of both the purpose and effect of the Rule, as required by Section 120.54, Florida Statutes. (T. 28:7-31:17). Counsel observed that the June 30, 2016, Notice did not indicate that chemicals were being added to the list of regulated chemicals, that the category-wide limitations for chemicals were being removed in their entirety, or that the proposed table had been reorganized to read alphabetically. (*Id.*). It was not until the August 4, 2016, Notice of Correction that the public was advised of the annotated table, which purported to give directory signals to the reader indicating the outcome of the strike-through/underline text. (T. 32:3-14). Worse, neither the June 30, 2016 Notice, nor the August 4, 2016, Notice alerted the public to the removal of three chemicals from the regulations in their entirety. (T. 40:5-41:19). Thus, it would be a violation of due process for the Seminole Tribe's right to petition to be foreclosed the day after the annotated table was first published. (T. 41:20-42:11).

The ALJ responded that the Seminole Tribe's petition did not indicate a lack of understanding of the Rule, but instead, stated that the Seminole Tribe did not like

the Rule. (T. 28:3-6). Counsel for the Seminole Tribe reminded the ALJ that the Tribe had moved for leave to amend because of the difficulty of formulating a coherent petition less than two days after the August 4, Notice was published. (T. 28:7-15).

Petitioner Pulp & Paper added its concern that the two rules in Chapter 62 being changed, Florida Administrative Code Rule 62-302.400 and Florida Administrative Code Rule 62-302.530, were treated as a single rule-making effort for much of the regulatory process until the time of the Notice of Change, when the two rules were treated separately for the first time by DEP for notice purposes. (T. 45:5-25).

Pulp and Paper also explained that, while the Department of State may distinguish between a Notice of Correction and a Notice of Change, no such distinction exists within Section 120.54, Florida Statutes for point of entry purposes. (T. 46:1-47:3). Addressing DEP's argument that Section 120.54, Florida Statutes, only distinguishes between technical and non-technical changes, Pulp and Paper observed that technical changes are made through a notice to JAPC – a process that DEP did not follow. (T. 46:23-47:23). Instead, DEP made this change in the Florida Administrative Register, as required for nontechnical changes, a tacit admission on DEP's part that the change was nontechnical in nature. (*Id.*).

Pulp and Paper also noted that DEP issued a revised Statement of Estimated Regulatory Cost (“SERC”), creating yet another point of entry. While DEP contended that the revised SERC only acknowledged that a Lower Cost Regulatory Alternative (“LCRA”) had been filed and withdrawn, counsel for Pulp and Paper reasoned that Chapter 120, Florida Statutes, does not distinguish between different kinds of revised SERCs in articulating the conditions under which a revised SERC creates a new point of entry. (T. 69:2-18).

Counsel for the City of Miami concurred, explaining to the Court that Section 120.56(2)(a), Florida Statutes, makes clear that there is no such thing as limited standing. (T. 71:10-72:24). Instead, the statute defines four triggers for an administrative point of entry and separately indicates that a petitioner must be substantially affected. (*Id.*). The statutory language makes no link between the event that triggered the point of entry and the basis for the petitioner’s claim that it has been substantially affected. (*Id.*). Accordingly, the City of Miami reasoned that the revised SERC was a legitimate basis for declaring the petitions timely, even if the petitions did not raise substantive challenges to the revised SERC itself. (*Id.*).

DEP countered that the revised SERC required to respond to the Lower Cost Regulatory Alternative was not required to be published in the Federal Administrative Register, but instead Section 120.541, Florida Statutes, only required the revised SERC to be sent to the party that initially proposed the LCRA and to be

posted on the DEP website, a fact that DEP argued suggested that the Legislature did not intend for this type of revised SERC to create a new point of entry for any substantially affected persons to challenge the substantive merits of the rule. (T. 77:11-78:13). Counsel for Pulp and Paper responded that Section 120.56, Florida Statutes, does not reference the form of publication for the revised SERC but, instead, only identifies the triggering event as the date the revised SERC was made available as provided by Section 120.541(1)(d), Florida Statutes; consequently, the manner of publication is irrelevant to the point of entry analysis. (T. 78:22-79:6). The ALJ commented that he could “see both sides of very reasonable arguments being made on that particular point.” (T. 79:9-11).

Counsel for Pulp and Paper then observed that the revised table would take “not just hours but days. . . to pull [] apart to see if any of [the] changes were new” and that even the moving of a single decimal point can have a huge impact on a rule of this nature. (T. 80:23-81:24).

The ALJ asked each Petitioner “what actually happened with your client? They didn’t know and then they knew. What was your story?” (T. 82:20-83:1). Pulp and Paper explained that it went to the ERC hearing on July 26th when both rules were being treated as a single rulemaking, but didn’t have time to get client authorization and prepare an adequate petition between the August 4, Notice, which was the first time the rules were being treated differently, and the August 5th

deadline being advocated by DEP. (T. 85:2-12). Pulp and Paper had expected that anticipated changes to Florida Administrative Code Rule 62-302.400 would also create a point of entry for Florida Administrative Code Rule 62-302.530, because the rules were treated as a single-rulemaking until the August 4, Notice. (T. 85:14-19).

Martin County's counsel indicated that the County was aware of rulemaking efforts for the human health criteria in 2012 through email alerts provided by DEP to parties on its list serve. (T. 85:23-86:11). The County staff also were aware of and attended a public workshop scheduled in Stuart, Florida. (T. 86:12-16). The County also sent a representative to the July 26 ERC hearing in Tallahassee. (T. 87:9-12). However, the flaws in DEP's notices obfuscated the issue sufficiently to confuse the County as to the effect of the rule change and its impact on the County's interests. (T. 87:17-91:23).

One of the flaws the County articulated during oral argument was the requirement that there be twenty-eight (28) days between the initial notice of proposed rulemaking and the intended action. (T. 89:12-15). The County interpreted "intended action" as the vote of the ERC on the proposed rule; however, DEP took the position that "the intended action" did not occur until the rule was adopted through filing with the Department of State. (T. 92:18-93:3).

Responding to the court's question regarding what happened with the client, counsel for the City of Miami advised the ALJ that the City was not aware of the rule until "late in the game" in the summer, and sent a letter complaining that an opportunity to participate in the public meetings had not been afforded to the Miami area, even though it is a very populous area. (R-0294; T. 105:9-106:11). Counsel for the City of Miami also explained that DEP had publicly indicated that the rule would be voted on by ERC "in early fall" before changing the hearing date to sometime in July (T. 106:12-21). Because the local leaders in Miami had complained about the process, they did not expect the rule-making to move forward without a response by DEP to their concerns and request for a workshop in South Florida, which did not occur. (T. 107:6-15).

In closing argument, counsel for the Seminole Tribe maintained that DEP violated the rule about how to publish proposed rule changes with strike-through and underline text, which prevented the June 30, Notice from being understood by both the public and the petitioners. (T. 115:15-116:20). Counsel also observed that Section 120.54(3)(e)(5), Florida Statutes, directs agencies who make a mistake in the rulemaking process to withdraw and re-notice the proposed rule. (T. 115:7-117:20). Counsel also moved *ore tenus* for the right to amend the petition to allege any of the jurisdictional grounds raised by the other Petitioners as well, to the extent

the Court found them persuasive, since the Seminole Tribe was the first to file a petition in the case. (T. 118:13-18).

After the completion of closing arguments, the Court abated discovery until the Court decided the question of timeliness. (T. 124:8-14). Because the Court had expressed surprise that no prior cases had addressed some of the technical procedural arguments being made, and asked counsel for the parties whether they knew of cases on point, the Seminole Tribe filed a Notice of Filing Supplemental Authority on September 9, 2016, listing the issues of Intended Action, Purpose and Effect, and Legislative Intent in Rulemaking with case citations and accompanying parentheticals. (R-1168). DEP filed a Motion to Strike the Notice of Filing Supplemental Authority on September 12, 2016, claiming that such notice was unauthorized. (R-1192). The Seminole Tribe filed a response the following day. (R-1196).

On September 13, 2016, the ALJ entered an Order dismissing all of the petitions. (R-1208-1209). In the Order, the ALJ found that the Seminole Tribe's petition, having been filed electronically at 5:02 p.m. on August 5, 2016, is deemed filed the next business day, which was August 8, 2016. (R-1203). Because the petition was therefore filed more than ten (10) days after the ERC hearing on July 26, 2016, the Court concluded that it was untimely. (*Id.*).

In support of his decision to apply the ten day timeframe for the filing of a petition on the proposed rule, the ALJ concluded that the “contention that the effect of the proposed rule [] could not be determined from the notice in the Register is unpersuasive.” (R-1204). The ALJ held that, while “the strike-through/underline version is difficult to read and difficult to use for comparing existing water quality criteria with proposed criteria,” the JAPC was engaging in hyperbole to refer to it as “incomprehensible.” (*Id.*).

The ALJ then made the factual finding that “all petitioners knew that human health-based surface water quality criteria were being changed by DEP” and “the Seminole Tribe and Florida Pulp and Paper were able to comprehend [the rule] and to determine that the rule would adversely affect their substantial interests.” (*Id.*). The ALJ held that if a person is unclear as to whether a proposed rule would adversely affect his/her substantial interests, the person should make reasonable inquiry and then file a petition even if they are still confused. (R-1205).

The ALJ also rejected the argument that the ERC hearing was required to be held no less than twenty-eight (28) days after the original rule notice on June 30, because Section 120.54(3)(a)(2), Florida Statutes, states, “The notice shall be published in the Florida Administrative Register not less than 28 days prior to the intended action.” (*Id.*). The ALJ seemingly accepted DEP’s argument that “intended action” in this context meant the adoption of the rule through filing with the

Department of State, rather than the ERC's vote to approve the rule. (*Id.*). Regardless, the ALJ held that such arguments were required to be raised in a timely petition and do not toll the deadline for filing a petition. (*Id.*).

As to whether the Notice of Change/Notice of Correction qualified as a separate trigger for the filing of the petition, the ALJ again adopted DEP's position, holding that a "notice of correction" which is explicitly recognized in the rules of the Department of State, the agency responsible for publishing the Register, is not the same as a non-technical change to a proposed rule as contemplated by Section 120.56(2), Florida Statutes. (R-1206).

Regarding the Revised SERC, the ALJ ruled that only persons who are substantially affected by a Revised SERC are entitled to avail themselves of the point of entry provided by the issuance of a Revised SERC. (R-1207). In any event, the ALJ held that DEP made a mistake in calling the Revised SERC a Revised SERC because there was no change to the SERC that had an impact on the estimated costs of the rule. (R-1208). The ALJ issued a corrected Order of Dismissal the same day, correcting a typographical error on page 7 of the Order. (R-1212-1222).

On September 30, 2016, the Seminole Tribe timely filed its Notice of Appeal in the Second District Court of Appeal in and for the State of Florida. (R-1223). The Seminole Tribe also filed a Motion to Stay on the same day, which was denied by the Court on October 10, 2016. (R-1226; R-1368). Thereafter, the Seminole Tribe

of Florida moved to transfer the case to the Third District Court of Appeal and to consolidate the case with the City of Miami's appeal of the same order of dismissal⁷.

SUMMARY OF THE ARGUMENT

DEP's violations regarding the rules governing public notice have deprived the Seminole Tribe of its right to challenge DEP's revisions to the human health-based surface water quality criteria as a proposed rule, and thus deprived the Seminole Tribe of the preferential standard of review for proposed rules, as compared to the standard applicable to an existing rule challenge. DEP's original notice did not indicate to the reader that the proposed rule table was being reorganized alphabetically, that certain chemicals were added, that certain chemicals were deleted, that certain chemical limits were changed and that category-wide caps on chemicals were removed in favor of individual chemical limits. These failures made the Rule, in the words of JAPC, incomprehensible to the reader. DEP waited until the day before the ten-day deadline for filing a petition before it filed the August 4, 2016, Notice which, for the first time made some progress on remedying the notice failures identified earlier by JAPC. The August 4, 2016, Notice was published under the heading "Notice of Change" and stated within it that DEP had issued a revised SERC.

⁷ Pulp and Paper filed its own appeal in the First District Court of Appeal in Case Number 1D16-4610, which remains pending.

However, when it came time to honor the right of substantially affected parties to avail themselves of the points of entry created when an agency publishes a notice of change and a Revised SERC, DEP disavowed that the August 4 publication was either a notice of change or a Revised SERC. This change of position, which was accepted by the ALJ, is not consonant with the rules governing either notices of change or Revised SERCs. Similarly, the ALJ's conclusion that only persons substantially affected by the contents of a Revised SERC can avail themselves of the point of entry created by the filing of a Revised SERC, conflates the concept of timeliness and standing and contravenes the plain language of Section 120.56(2)(a), Florida Statutes. Such an interpretation needlessly shoehorns public access to the administrative process into a cramped boot despite the well-established principle that the Legislature intended to create expansive public access under the APA. Therefore, Appellant The Seminole Tribe of Florida was entitled to have its petition treated as timely and seeks reversal of the ALJ's order and remand of the case for further proceedings.

ARGUMENT

I. Standard of Review

Generally, the standard of review for the dismissal of a claim is *de novo*. *Palumbo v. Moore*, 777 So. 2d 1177, 1178 (Fla. 5th DCA 2001). Likewise, courts have held that the decision as to whether an administrative petition should be

dismissed for lack of standing is reviewed *de novo*. *Ft. Myers Real Estate Holdings, LLC v. Dept. of Bus. and Prof. Reg., Div. of Parimutuel Wagering*, 53 So. 3d 1158, 1161 (Fla. 1st DCA 2011). Accordingly, the ALJ's decision to dismiss the Seminole Tribe's petition for untimeliness must also be reviewed *de novo*.

II. Whether the Administrative Law Judge Erred in Dismissing With Prejudice Appellant, The Seminole Tribe of Florida's Petition for a Determination of the Invalidity of Proposed Florida Administrative Code Rule 62-302.530, Where the Notice Failed to Adequately Notify The Public, Including The Seminole Tribe of Florida, of the Substance of the Proposed Rule And Violated Section 120.54, Florida Statutes, Requiring a Short and Plain Statement of the Purpose and Effect of the Rule, and Florida Administrative Code Rule 1-1.011 Governing Formatting of Proposed Rules.

It is undisputed that the June 30, Notice of rulemaking failed to advise the public in narrative text that chemicals had been removed from the table, that chemicals had been added to the table, that categorical limits had been removed from the table, or which restrictions on chemicals were removed, added, or made more or less stringent. It is similarly undisputed that the summary of the proposed rule did not expressly identify an "effect" from the proposed rule. The proposed rule also did not advise the public that the new table had been reorganized alphabetically. Therefore, an interested member of the public would have had to resort to reviewing the 13-page table in its strike-through/underline format to see if the person could determine the ultimate fate of a particular chemical parameter or a categorical limit

without understanding the reorganized format of the table or the intended effect of the changes.

The Seminole Tribe alleged below and contends now that the difficulty of understanding what the proposed table actually did to the regulation of chemicals in Florida's surface waters, which effect human health, delayed its ability to timely file a proper petition to challenge the proposed rule. The ALJ did not take evidence on the question of whether the procedural flaws, which are virtually uncontested in this case, actually caused a delay in the filing of the petitions by the Seminole Tribe, and the three other petitioners who filed after the Seminole Tribe. Instead, the ALJ assumed without evidence that the Seminole Tribe understood the June 30, Notice or should, even if it did not understand, have filed a timely petition in an abundance of caution without ultimately knowing whether its substantial interests were affected. This conclusion ignores not only the pleading requirements in Section 120.56, Florida Statutes, mandating the articulation of specific facts supporting the claim that a petitioner is specially affected by a proposed rule. The ALJ's position also turns the obligation of notice on its head, placing the burden of clarifying obscure agency action on the public, rather than on the agency. In so doing, the ALJ's conclusion constitutes reversible error.

One of the most important goals of rule adoption is fair notice to the public of the agency's intended action. *See Keys Citizens for Responsible Government, Inc., v.*

Florida Keys Aqueduct Authority, 795 So. 2d 940, 948 (Fla. 2001)(“the notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.”) Indeed, the APA as a whole “is intended to afford due process to parties whose legal rights, duties, privileges or immunities may be determined by administrative action on agency level.” See *Wilson v. Pest Control Comm'n of Fla.*, 199 So. 2d 777, 780 (Fla. 4th DCA 1967). The notion of fair notice in rulemaking was described by the First District Court of Appeal in *McDonald v. Department of Banking and Fin.*, 346 So. 2d 569, 580 (Fla. 1st DCA 1977), as “clos[ing] the gap between what the agency and its staff know about the agency’s law and policy and what an outsider can know.” (internal citations omitted). See also *Florida League of Cities, Inc. v. Administration Commission*, 586 So. 2d 397, 413 (Fla. 1st DCA 2008)(holding that the requirement for adequate notice is designed to assure fairness of agency action); *Amos v. Department of Health and Rehabilitative Services, District IV*, 444 So. 2d 43, 47 (Fla. 1st DCA 1984) (finding that fairness in administrative proceedings requires that affected persons be given adequate and full notice).

It is equally well established that notice of agency action “which does not inform the affected party of his right[s]..... is inadequate to “trigger” the commencement of the administrative process.” *Wahlquist v. School Board of Liberty County*, 423 So. 2d 471, 473 (Fla. 1st DCA 1982); *Sterman v. Florida State University Board of Regents*, 414

So. 2d 1102 (Fla. 1st DCA 1982). While the requirement of a “clear point of entry” is most commonly seen in the administrative permitting and licensing contexts, this same logic regarding a clear point of entry applies equally to the adequacy of notice provided during the rulemaking process. Thus, if notice is substantively inadequate, it is irrelevant whether the recipient had actual knowledge of it. *Henry v. State Dep't of Admin., Div. of Ret.*, 431 So. 2d 677, 680 (Fla. 1st DCA 1983).

In a Proposed Rule challenge, the agency’s failure to follow the rulemaking procedures and requirements of the APA is *presumed* to be material. §120.56(1)(c) Fla. Stat. (2016)(emphasis added). While the agency has the opportunity to rebut this presumption, DEP must demonstrate that the substantial interests of the Seminole Tribe and the fairness of the proceedings were not impaired by DEP’s procedural lapses. *Id.* In this case, because the failure to follow the rulemaking procedures prevented the Seminole Tribe from having a meaningful opportunity to evaluate the effect of the Proposed Rule and to be heard on the matter, DEP cannot overcome the presumption.

A similar conclusion was reached in the context of tax assessment rules in the case of *Joyner v. Roberts*, 642 So. 2d 826 (Fla. 1st DCA 1994). In *Joyner*, the First District Court of Appeal reviewed an order dismissing with prejudice a complaint contesting a tax assessment that was filed sixty-seven (67) days after Duval County’s tax roll was certified. The Court reversed the order of dismissal, holding that the

property appraiser's failure to *adhere strictly to the notice provisions in the statute prevented the running of the sixty-day jurisdictional period* for filing a challenge to a tax assessment. The Court reasoned that allowing the sixty-day jurisdictional timeframe to run before notice was perfected in strict adherence with the statutory provisions “would make gratuitous the notice provision” of the statute. *Id.* at 827.

The Court explained,

Despite the mandatory language, the notice requirement would be meaningless under appellee's interpretation because the only potential plaintiffs having standing to challenge the defective notice—those whose assessments were allegedly improper and who did not bring suit within 60 days—would be barred from the courts.

Id. at 827-828.

The same logic applies to the decision in this case. The ALJ held that the procedural lapses by DEP, which hampered the Seminole Tribe's ability to participate in the process, could only be raised in a timely petition. Thus, the only challenge to DEP's lapses in rulemaking notice and procedure, must be brought by someone who was *not* impaired or hampered by the flawed procedure. Parties who were actually harmed by DEP's procedural “irregularities” regarding adequate notice are the very same parties who were unable to fully understand the effect of the Proposed Rule and make a meaningful decision in a timely fashion as to whether to challenge the Proposed Rule. This type of moebius loop is exactly the kind of wrong without a

remedy that the *Joyner* opinion rejected and that Section 120.54(3)(e)(5), Florida Statutes, is designed to avoid.

While the ALJ determined the rule was “difficult to read” and “difficult to use for comparing existing water quality criteria with proposed criteria,” the ALJ rejected the Seminole Tribe’s due process claims because the ALJ did not agree with JAPC that the Proposed Rule was “incomprehensible.” Though JAPC’s strong language in its letter alerting DEP to its procedural errors is powerful evidence that DEP both violated its procedural mandate and did so knowingly, incomprehensibility is not the test. Rather, the APA’s notice provision *require* all notices to be drafted in “readable language.” §120.545(1)(i), Fla. Stat. (2016). A notice is readable if it “avoids the use of obscure words and unnecessarily long or complicated constructions” and “avoids the use of unnecessary technical or specialized language that is understood only by members of particular trades or professions.” *Id.*

The administrative rules governing implementation of the APA’s notice provisions also require strike-through and underlining font type to be handled in a particular way so as to aid readability, and mandates that reorganized rules, like the Proposed Rule, must be identified as such to the reader. Fla. Admin. Code R. 1-1.011(3)(c)(2). The case at bar is exactly the kind of case for which rules regarding strike-through and underline conventions and notices regarding reorganized rules exist. The original table contained a sea of stricken and underlined text that left the

reader with no clear direction as to how to determine what changes were being proposed for specific chemicals.

DEP obviously understood it needed to clarify the Proposed Rule in order for the public to understand both its actual text and its effect, as reflected by its publication of an annotated table, which DEP characterized as a response to JAPC's concerns, and which explained to the public for the first time which chemicals were new, which chemicals were merely relocated, and which chemicals had updated quantitative criteria from the 1992 version of the rule. One must question why, if DEP thought the proper response to JAPC's concerns was the publication of an annotated table, DEP waited until after the ERC voted and until one day before the challenge period had run to publish a new, more comprehensible version of the Proposed Rule.

Yet even the new, annotated version of the table failed to alert anyone to the fact that the criteria for 3 toxic chemicals: Acenaphthylene; Benzo(ghi)perylene; and Phenanthrene, which were part of the chemical category group "PAHs," were completely removed. Instead, the table affirmatively misled the public by suggesting the chemicals were located elsewhere within the table when they were not. Or, in the alternative, considering the complexity and significant reorganization of the table, it is possible that DEP did not actually realize that those three chemicals were not ultimately reinserted into the reorganized table. Whether intended or unintended, the

omission of these three criteria constitutes deregulation of water quality criteria known to have human health-related impacts without justification or notice to the public, and perhaps without the realization of DEP during the rulemaking process.

The Seminole Tribe's claim that DEP's notices were deficient does not turn on procedural niceties that had no practical effect in the real world. Confusion about the meaning of the table *did* have a very real impact on the Seminole Tribe and impaired the Seminole Tribe's ability to timely prosecute its rights. The ALJ's summary conclusion that the Seminole Tribe "[was] able to comprehend proposed rule 62-302.530 and to determine that the rule would adversely affect their substantial interests" (R-1216) had no evidentiary basis and was improper at the motion to dismiss stage. The Seminole Tribe's petition was filed *after* the clarifying language of the August 4th notice and, so, does not reflect any level of comprehension of the June 30, Notice, contrary to the ALJ's apparent assumption. What does reflect the Seminole Tribe's comprehension of the June 30th Notice is the Seminole Tribe's inability to file its petition within the ten (10) day timeframe from the ERC hearing.

One of the other notice requirements that was clearly violated in this case was the requirement that a short plain statement of both the purpose *and the effect* of the Proposed Rule be published in a readable format. In defining notice requirements as part of Florida's APA, the Legislature clearly envisioned that notice would be sufficient to inform the *general public* of the import of a proposed rule, rather than

only sophisticated actors like lawyers and environmental administrative law judges. To that end, Sections 120.54(2)(a) and 120.54(3)(a)(1), Florida Statutes, mandate that a notice for proposed rulemaking contain “a short, plain explanation of the purpose *and effect* of the proposed rule.” There is no question that *none* of the notices issued in this case included a statement of the effect of the Proposed Rule.

While the ALJ considered unpersuasive the notion that the effect “could not be determined from the notice in the Register,” the statutory requirement does not merely require that the effect be determinable from the notice language. Rather, the Legislature mandated that an actual “short, plain” statement of the effect of the Proposed Rule be included in the notice. §120.54(2)(a) Fla. Stat. (2016). The ALJ’s conversion of the agency’s obligation to provide certain information within the notice itself to an obligation on the part of the reader to dissect a mass of complicated tables in which the movement of a single decimal place may have substantial health-related impacts and divine the potential effect of the Proposed Rule departs from the plain language of the APA and must be reversed.

III. Whether the Administrative Law Judge Erred in Dismissing with Prejudice Appellant The Seminole Tribe of Florida’s Petition for a Determination of the Invalidity of Proposed Florida Administrative Code Rule 62-302.530, Where Appellee Department of Environmental Protection filed a Notice of Change/Withdrawal That Informed the Public for the First Time of Material Changes Proposed by the Proposed Rule Less Than Twenty Days Prior to the Filing of Appellant Seminole Tribe of Florida’s Petition.

DEP argued, and the ALJ accepted, that a Notice of Correction could be issued and published in the Florida Administrative Register under the heading Notice of Change, without triggering the timeframe for filing a petition called for when a Notice of Change is issued by an agency, under Section 120.56(2), Florida Statutes. The ALJ's acceptance of this argument was error.

Section 120.54(3)(d), Florida Statutes, contemplates three possibilities after an initial notice of proposed rulemaking is issued—a technical change; a non-technical change; or a notice of no change. If a technical change is made or no change is made, the agency is required to send a notice to that effect to JAPC. *Id.* If a nontechnical change is made, the agency is required to file a Notice of Change in the Florida Administrative Register. *Id.* In this case, the agency chose to file a Notice of Change with a subheading “Notice of Correction” in the Florida Administrative Register. By choosing the notification process mandated for nontechnical changes, DEP essentially confessed that the notice constituted a Notice of Change for which publication was required, as provided for in Section 120.56(2), Florida Statutes.

The ALJ found significant the fact that the Florida Administrative Code Rule 1-1.009(11), separately defines notice of correction and notice of change. However, Florida Administrative Code Rule 1-1.011(5)(a), which lists the mandatory formats for publication in the Florida Administrative Register contains no format for a notice of correction; instead, it only shows a format for a notice of change. Accordingly, a

notice of correction must be filed under the heading “notice of change.” To require the agency to file a “notice of correction” under the heading “notice of change,” while at the same time distinguishing between the two notices for the purposes of determining the timeframes within which the public may file a petition, creates a trap for the unwary in contravention of the entire purpose of the APA. *See Florida League of Cities, Inc. v. Administration Commission*, 586 So. 2d 397, 414 (Fla. 1st DCA 1991)(holding “notice of final agency action is intended to create a clear point of entry, not a trap for the unwary.”)

IV. Whether the Administrative Law Judge Erred in Dismissing with Prejudice Appellant The Seminole Tribe of Florida’s Petition for a Determination of the Invalidity of Proposed Florida Administrative Code Rule 62-302.530, Where the Petition was Filed within Twenty Days of Appellee Department of Environmental Protection’s Revised Statement of Estimated Regulatory Costs, Consistent with Section 120.56, Florida Statutes.

The ALJ refused to recognize the twenty (20) day timeframe for filing a petition from the date of the August 4 publication of a Revised SERC because the ALJ accepted DEP’s contention that the August 4 publication did not constitute a Revised SERC for point of entry purposes, and because—even if the August 4 publication was a Revised SERC—none of the petitioners could avail themselves of this point of entry because none of the petitioners substantively challenged the merits of the Revised SERC. Both of these conclusions insert barriers into the law that do not

exist within the plain terms of the statute and, must therefore be reversed, as more fully discussed below.

A. The Administrative Law Judge Erred in Refusing to Apply the Statement of Estimated Regulatory Costs Window for Filing an Administrative Petition Challenging Proposed Florida Administrative Code Rule 62-302.530, Because the Department of Environmental Protection's Filing on August 4, 2016, Constituted a Revised Statement of Estimated Regulatory Costs

The Administrative Law Judge erred in concluding that the Revised SERC was not a revision within the meaning of the rule governing the timing for filing a petition. Section 120.56(2)(a), Florida Statutes, creates a point of entry for a petitioner to challenge a proposed rule's validity "after the [SERC] or revised [SERC], if applicable, has been prepared and made available as provided in s. 120.541(1)(d)" Section 120.541(1)(d), Florida Statutes, in turn, requires that "an agency that is required to revise a [SERC] shall provide the statement to the person who submitted the [LCRA] and to the committee and shall provide notice on the agency's website that it is available to the public." Section 120.541, Florida Statutes, creates three situations where an agency is required to revise a SERC. An agency must revise a SERC when the agency adopts a LCRA, when it rejects a LCRA, or when a subsequent change to a proposed rule increases the rule's regulatory costs. §§120.541(1)(a), (c), Fla. Stat. (2016). Thus, when an agency revises a SERC and makes it available after any one of those three scenarios, it triggers a point of entry to file a petition under Section 120.56(2)(a), Florida Statutes.

In this case, DEP's August 4, Notice stated:

The summary of the statement of estimated regulatory cost (SERC) in the department's Notice of Proposed Rule is also being revised to include the following: The department *has revised the SERC* to reflect that a lower cost regulatory alternative (LCRA) to revise certain criteria for the new Class-I treated designated use was received on July 21, 2016, but was immediately withdrawn. A copy of the revised SERC, noting the LCRA and its withdrawal, may be obtained by contacting Eric Shaw . . . and is available for public viewing at the following website: <http://www.dep.state.fl.us/water/wqssp/health.htm>.

(R-0319)(Emphasis added).

DEP, having rejected a proposed LCRA because it was withdrawn, was required under Section 120.541(1)(a), Florida Statutes, to revise its SERC and make it available to the public. Indeed, as the Notice above shows, that is exactly what DEP did, by revising the SERC and providing a way for the public to view the revised SERC on their website and to get a copy by contacting a DEP staff member.⁸ Thus, when DEP published the August 4, Notice making the revised SERC available to the public, it triggered a point of entry under Section 120.56(2)(a), Florida Statutes.

The ALJ's analysis on this point erred because it narrowly focused on the Section 120.541(1)(c), Florida Statutes, revision requirement. By doing so, the ALJ ignored the two other situations, mentioned above, when SERC revisions are also required. Section 120.541(1)(c), Florida Statutes, states, "The agency shall revise a

⁸ The record does not reflect whether DEP separately provided a copy of the revised SERC to the person who submitted the LCRA or to the committee.

statement of estimated regulatory costs if any change to the rule made under s. 120.54(3)(d)⁹ increases the regulatory costs of the rule.” This language led the ALJ to conclude, “the ‘revision’ contemplated by Section 120.541 is a revision to the estimated costs, not a change in the narrative accompanying the estimated costs that has no effect on the costs.” (R-1219). As shown above, however, Section 120.541, Florida Statutes, definitively contemplates a broader definition of “revision” that includes instances when estimated regulatory costs do not change and only the narrative changes, namely when an agency rejects a LCRA.

There is good reason to allow an agency’s rejection of a LCRA and subsequent revision of the SERC to constitute a revision that triggers a point of entry, because it allows a party to challenge an agency’s improper rejection of a LCRA. An agency is limited by statute in the reasons it can reject a LCRA, and rejection of a LCRA based on improper reasons constitutes an invalid exercise of delegated legislative authority. § 120.52(8)(f), Fla. Stat. (2016); *see Assoc. Industries of Florida, Inc. v. Dep’t of Env’tl. Prot.*, DOAH Case No. 16-6889RP at 17 (Fla. D.O.A.H. Dec. 30 2016) (reasoning that Section 120.541, Florida Statutes, “requires an agency’s stated reasons for rejecting a LCRA to amount to” one of two statutorily enumerated

⁹ The ALJ’s Corrected Order of Dismissal mistakenly referenced Section 120.54(3)(b), Florida Statutes, here, the subsection devoted to special matters to be considered in rule adoption, rather than 120.54(3)(d), the subsection covering changes to rules.

propositions). The ALJ's narrow interpretation of what constitutes a "revision" would completely foreclose a challenge to a proposed rule when an agency improperly rejects a LCRA if the agency waits (as DEP nearly did in this case) until all other points of entry have closed before it revises and makes the LCRA available as required. The ALJ's analysis narrowly defines "revision" counter to the plain language of Section 120.541, Florida Statutes. The effect of such a definition would be to constrain access to the administrative process undermining a governing principle of the Florida APA. *See Florida Home Builders Ass'n v. Dep't of Labor and Employment Sec.*, 412 So. 2d 351, 352-353 (Fla. 1982) ("Expansion of public access to the activities of governmental agencies was one of the major legislative purposes of the new Administrative Procedure Act."). The ALJ's interpretation, therefore, cannot stand.

Finally, it is true that the LCRA that triggered this requirement for DEP was withdrawn a short time after it was submitted, but that fact alone is of no consequence to whether the LCRA's submission triggered the requirement for DEP to revise the SERC. Section 120.541(1)(a), Florida Statutes, simply states, "Upon submission of the [LCRA], the agency shall. . . revise its prior [SERC], and either adopt the alternative or provide a statement of the reasons for rejecting the alternative in favor of the proposed rule." The requirement is not conditioned upon whether the LCRA had been subsequently withdrawn.

There are very good reasons—both statutory and practical—why this revision requirement does not depend upon whether a duly submitted LCRA was subsequently withdrawn. Section 120.54(1)(d), Florida Statutes, creates a general mandate that Florida’s agencies must adopt regulations “among the alternative approaches to any regulatory objective” that impose the least amount of additional costs on the regulated community while still substantially accomplishing the statutory objectives. The provisions found in Section 120.541(1)(a), Florida Statutes, allowing substantially affected parties to submit LCRAs and requiring agencies to respond to such submissions, give life and teeth to the mandate set forth in Section 120.54(1)(d), Florida Statutes. Enlisting the regulated public to submit more efficient regulatory options and forcing agencies to pay attention to those ideas, as Section 120.541(1)(a), Florida Statutes, requires, makes sense, because an agency may not always be able to come up with the cheapest or most innovative regulatory schemes from its limited perspective as a regulator.

Notably, Section 120.54(1)(d), Florida Statutes, does not contain language qualifying the mandate by limiting agencies’ consideration to only those regulatory alternatives submitted, but not withdrawn. Moreover, to allow an agency to ignore an alternative regulatory approach once it has been brought to the agency’s attention simply because the party that submitted the idea in a LCRA wanted it withdrawn—even if it was withdrawn shortly after the idea was submitted—would undermine the

legislative mandate for agencies to pursue those regulatory regimes which impose the least costs on the regulated public. An alternative regulatory regime does not cease to exist as an alternative simply because the party that breathed life into it withdraws it. To not pursue a regulatory alternative that actually did impose less costs on the regulated public while achieving the legislative objective would be a huge disservice to the regulated community and would run counter to the clear intent of the mandate in Section 120.54(1)(d), Florida Statutes.

When DEP received the LCRA in this case, it had two options. It could choose not to respond—the fact that the LCRA was immediately withdrawn is strong evidence it was not a good-faith submission and, therefore, did not require a response under Section 120.541(1)(a)—or it could revise the SERC and make it available to the public. DEP clearly thought it had a duty to respond to this LCRA submission, because it chose to revise the SERC, and to make it available to the public as the statute requires. To allow an agency subsequently determine that a SERC was not revised for point of entry purposes despite the fact that the agency revised the SERC, announced to the public that it revised a SERC, and then made an actual revised SERC available to the public, as DEP did here, creates a dangerous precedent where a substantially affected party could miss its opportunity to challenge a proposed rule simply because it relied on the agency’s statements and actions and reasonably

thought it had a longer point of entry to file its petition. The most sensible conclusion here is that DEP's actions did create a point of entry to challenge the rule.

B. The Administrative Law Judge Erred in Holding that the Twenty-Day Window to File An Administrative Petition in Response to the Publication of a Revised Statement of Estimated Regulatory Costs Was Available Only to Those Persons Who Were Adversely Affected by the Revised Statement of Estimated Regulatory Costs.

The ALJ further reasoned in rejecting petitioners' SERC-window arguments that it "would be inconsistent" with Section 120.541(1), Florida Statutes, if a revised SERC triggered a point of entry for any petitioner, rather than only for a petitioner who was substantially affected by the revision of the SERC itself. (R-0374). Similar to Appellants' argument as to what constitutes a "revised SERC," the language in Section 120.56(2)(a), Florida Statutes, that creates the point of entry for filing a petition after the issuance of a revised SERC contains no limitation on who may use that point of entry. Nor is there an inconsistency between Sections 120.541(1)(f) and (g), Florida Statutes, which limit standing for specific types of challenges to petitioners who are substantially affected by a rule's regulatory costs, and Section 120.56(2)(a), Florida Statutes, which creates points of entry for petitions challenging a proposed rule.

At oral argument on DEP's Motions to Dismiss, counsel for the City of Miami argued¹⁰ that DEP's position to limit petitioners' point of entry based on the substantive nature of the claim was to conflate the requirements of standing with a point of entry for challenge. (T. 71:10-14). Section 120.56(2)(a), Florida Statutes, provides four different timeframes or points of entry for a party to file an administrative petition challenging a proposed rule. This rulemaking provision determines whether or not a petition will be considered timely under the statute. (T. 71:15-17). The ALJ then has to make a separate jurisdictional determination of standing, in which the petitioner has the burden to prove by a preponderance of the evidence whether the petitioner will be substantially affected under the proposed rule. Section 120.56(2)(a), Florida Statutes, does not require the petitioner to prove by a preponderance of the evidence that the petitioner is substantially affected by the four points of entry for jurisdictional timeframes.

Section 120.541(1)(f), Florida Statutes, provides,

An agency's failure to prepare a statement of estimated regulatory costs or to respond to a written lower cost regulatory alternative may not be raised in a proceeding challenging the validity of a rule pursuant to s. 120.52(8)(a), unless: 1. Raised in a petition filed no later than 1 year after the effective date of the rule; and 2) raised by a person whose substantial interests are affected by the rule's regulatory costs.

¹⁰ As noted in the Statement of Facts, the Seminole Tribe adopted the arguments of its co-Petitioners *ore tenus*.

Section 120.541(1)(g), Florida Statutes, contains similar timing and standing limitations for claims brought under Section 120.52(8)(f), Florida Statutes. These limitations are separate and distinct from the points of entry for petitions challenging a proposed rule created by Section 120.56(2)(a), Florida Statutes. The provisions make no reference to the point of entry triggered by the publishing of a SERC or revised SERC, either. Moreover, the point of entry language simply states, “A petition alleging the invalidity of a proposed rule shall be filed . . . within 20 days after the . . . revised [SERC] . . . has been prepared and made available as provided in s. 120.541(1)(d)” § 120.56(2)(a), Fla. Stat. (2016). It contains none of the qualifying language used in Sections 120.541(1)(f) and (g), Florida Statutes, nor even a reference to those sections. It is logically consistent—and perfectly conceivable—that the legislature would limit standing in challenges that are based upon a rule’s regulatory costs and at the same time create more expansive access to the administrative process as a whole by granting an additional point of entry to any substantially affected party when an agency publishes or revises a SERC.

While the ALJ expressed doubt that the Legislature intended for the filing of a revised SERC to reopen the window to challenge the rule as a whole (T. 78:14-17), such consideration of legislative intent is inappropriate where the language of the statute is unambiguous. The Florida Supreme Court has stated, “When the statute is clear and unambiguous, courts will not look behind the statute’s plain language

for legislative intent or resort to rules of statutory construction to ascertain intent.” *Daniels v. Florida Department of Health*, 898 So. 2d 61, 64 (Fla. 2005). Furthermore, the Florida legislature knew how to limit access to the SERC-revision point of entry to only those persons affected by a rule’s regulatory costs, because it did so in plain, clear terms in Sections 120.541(1)(f) and (g), Florida Statutes to limit standing in SERC-based rule challenges. The omission of such language in Section 120.56(2)(a), Florida Statutes, coupled with the section’s clear, unambiguous language, could not create a stronger indication that the SERC-revision point of entry is not limited in the way standing for SERC-based rule challenges is. Moreover, even if legislative intent must be resorted to, it should be recalled that “a key purpose of the APA was to expand rather than restrict public participation in the administrative process.” See *NAACP, Inc. v. Florida Bd of Regents*, 863 So. 2d 294, 297-98 (Fla. 2003). The ALJ’s restrictive interpretation of Section 120.56(2)(a), Florida Statutes, therefore runs counter to the statute’s plain language, the APA’s grammatical construction, and a fundamental purpose of the APA and, thus, must be rejected.

CONCLUSION

DEP’s behavior in this Rulemaking effort has consistently violated the APA’s mandate to fair and full participation by the interested members of the public in the rulemaking process. That this proposed rule involves exposure of the public, and

particularly Members of the Seminole Tribe to cancer and other life-threatening illnesses as a result of water-dependent uses, only magnifies the harm.

The APA makes clear that when procedural rules are violated, the rule process must start over. If the ALJ's ruling is left to stand, DEP will only be further incentivized to cut procedural corners because it will decrease the likelihood that interested members of the public will be able to raise procedural errors in a timely fashion in the proposed rule context, where the standard of review places the burden of justifying the rule on the agency. The plain language of the statute does not justify such an outcome and this Court should not accept such an outcome in light of the Legislature's clear expression of a desire to make the administrative rulemaking process transparent and inclusive.

Respectfully submitted this 22nd day February, 2017.

/s/ Amy Taylor Petrick

Andrew J. Baumann

Florida Bar No. 0070640

Primary Email: abaumann@llw-law.com

Secondary Email: mlozada@llw-law.com

Amy Taylor Petrick

Florida Bar No. 0315590

Primary Email: ataylor@llw-law.com

Secondary Email: bpennington@llw-law.com

Rachael B. Santana

Florida Bar No. 0107677

Primary Email: rsantana@llw-law.com

Secondary Email: cblackwell@llw-law.com

Christopher D. Johns

Florida Bar No. 120107

Primary Email: [cjohs@llw-law.com](mailto:cjohns@llw-law.com)

Secondary Email: nlewis@llw-law.com
LEWIS, LONGMAN & WALKER, P.A.
515 North Flagler Drive, Suite 1500
West Palm Beach, FL 33401
Telephone: (561) 640-0820
Facsimile: (561) 640-8202

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of February, 2016, a true and correct copy of the foregoing has been furnished via email to:

Robert A. Williams, Esq.
Chief Deputy General Counsel
robert.a.williams@dep.state.fl.us
Francine Ffolkes, Esq.
Administrative Law Counsel
Francine.ffolkes@dep.state.fl.us
Florida Department of Environmental
Protection
3900 Commonwealth Blvd
Mail Station 35
Tallahassee, FL 32399-3000

*Counsel for Appellees, Department of
Environmental Protection and
Environmental Regulation Commission*

Kerri L. McNulty, Esq.
Assistant City Attorney
Primary e-mail: klmcnulty@miamigov.com
Secondary e-mail: Yillescas@miamigov.com
Forrest L. Andrews, Esq.
Assistant City Attorney
Primary e-mail: flandrewsjr@miamigov.com
Secondary e-mail: DBailey@miamigov.com
The City of Miami
444 S.W. 2nd Avenue
Miami, Florida 33130

Counsel for City of Miami

/s/ Amy Taylor Petrick

Amy Taylor Petrick, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Amy Taylor Petrick

Amy Taylor Petrick, Esq.

BUY™

SELL™

SHOP™



Downloaded From
www.TextBookDiscrimination.com



SELL YOUR OWN SAMPLES

(help others get the justice that they deserve)



BUY™

SELL™

SHOP™

www.TextBookDiscrimination.com

Get ***Booked Up*** on Justice!

© TBD Corporation. All Rights Reserved.