COLLABORATIVE RULEMAKING IN THE WORLD OF WATER MANAGEMENT: A VIABLE ALTERNATIVE TO THE COMMAND-AND-CONTROL MODEL?

DANIEL P. FERNANDEZ, J.D.*

I. INTRODUCTION

Administrative regulation has permeated the modern American landscape, and likewise, often has given rise to conflict. Agencies have traditionally used what has been called the "command-and-control" model for rulemaking.[1] According to one commentator

Under this model, the agency promulgates or commands, the rules and controls compliance with those commands through legal sanctions. Traditional rulemaking reflects a top-down approach where decision making is centralized at the administrative agency. One assumption underlying traditional command-and-control rulemaking is that the agency is in the best position to craft regulations due to the expertise of its people. Whatever its benefits,

* Daniel P. Fernandez is an Associate Professor at Florida Gulf Coast University.

1. Michelle Kwon, *Easing Regulatory Bottlenecks with Collaborative Rulemaking,* 69 ADMIN. L. REV. 585, 601 (2017) (citing OFFICE OF VICE PRESIDENT AL GORE, IMPROVING REGULATORY SYSTEMS, ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW (1994)) ("One of the major problems is that regulatory programs rely too heavily on traditional command-and-control regulation rather than on more innovative, market-oriented mechanisms that allow regulated entities greater flexibility in meeting regulatory objectives.").

the traditional approach to rulemaking" overburdens agencies and undervalues the capacity of nongovernmental groups to participate in governance."[2]

One salient example is water use regulation and the business of sorting out competing uses for this precious resource in various parts of the United States. Water supplies are diminished and threatened with demand outpacing supply, especially in more heavily populated areas. The Apalachicola-Chattahoochee-Flint (ACF) river dispute among Alabama, Florida, and Georgia is a case in point.[3]

The ACF River Basin consists of the Apalachicola, Chattahoochee, and Flint rivers.[4] This river basin has been the site of an ongoing legal battle between Alabama, Georgia, and Florida since the 1970s.[5] This battle centers on the conflicting demands for water from the ACF River Basin.[6] Severe drought throughout the 1980's, combined with the explosion of growth experienced by the city of Atlanta, led these three states to assert their respective interests in the ACF River Basin's water, resulting in a "…complex web of litigation [that] is ongoing with seemingly no end in sight."[7]

In a rulemaking context, the Southwest Florida Water Management District (SWFWMD) adopted rules for an area of stressed groundwater resources called the Southern Water Use Caution Area (SWUCA).[8] And on March 19, 2008 the Florida House Environmental Preservation Committee favorably moved a bill that would allow SWFWMD to initiate in the SWUCA one of its "…biggest ever projects to raise water levels, clean rivers and

2. *Id.* (citing Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L J. 1, 9 (1982)); *see also* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 13 (1997).

3. *See, e.g.,* FLA. DEP'T OF ENVTL. PROTECTION, *Apalachicola-Chattahoochee-Flint River System*, https://web.archive.org/web/20110223135924/http://www.dep.state.fl.us:80/mainpage/acf/default.htm (last updated Dec. 15, 2008), For the latest judicial pronouncement in this litigation, see Florida v. Georgia, 138 S. Ct. 2502 (2018).

4. *Id.*

5. *Id.*

6. *Id.*

7. Steffen LoCascio, *The Apalachicola-Chattahoochee-Flint River Dispute: Atlanta vs. Apalachicola, Water Apportionments' Real Version of David vs. Goliath,* 30 J. LAND USE 331, 332 (2015).

8. FLA. ADMIN. CODE ANN. r. 40D-2.801(3) (b); *see also* SW. FLA. WATER MGMT. DIST., *District Approves SWUCA Recovery Strategy*, (Mar. 31, 2006), https://www.swfwmd.state.fl.us/about/newsroom/news/district-approves-swuca-recovery-strategy.

build reservoirs . . . ." [9] The process of adopting rules related to the SWUCA involved a lengthy and intensive entanglement of litigation.[10]

In the Tampa Bay area, litigation erupted over SWFWMD's attempted restriction of the water supply for the City of St. Petersburg and the West Coast Regional Water Supply Authority. The litigation came to be known as "the Tampa Bay Water Wars" or the "Four Wellfields case."[11] The embittered and expensive conflict encompassed over five years of litigation but was ultimately settled after a ruling by an administrative law judge. [12]

Administrative agencies have an array of mechanisms available to implement their enabling laws. Yet, traditional rulemaking has often led to litigation in the form of rule challenges, appeals of permit denials, and contested enforcement proceedings. The traditional approach to rulemaking and implementation of policy seems fraught with conflict that is divisive rather than collaborative, and can be an expensive and lengthy digression from the original purpose of enacting the rule.

To provide sufficient background, and illustrate the complexity, the discussion will first provide an overview of traditional rulemaking under the Florida Administrative Procedure Act,[13] including timeframes and points of entry for participation in rulemaking and rule challenges. Then the article will conclude with an examination of the novel and developing area of collaborative rulemaking in the context of water resource management and regulation in an area designated the Central Florida Water Initiative (CFWI).

---

9. Fla. HB 1415 (2008); *See* Nicola M. White, *Major Water Restoration Project Moves Forward*, THE TAMPA TRIBUNE (Mar. 20, 2008), https://www.tbo.com/news/metro/2008/mar/20/me-major-qawater-restoration-project-moves-forward-ar-138830/.

10. *See* Sw. Fla. Water Mgmt. Dist. v. Charlotte Cty., 774 So. 2d 903 (Fla. 2d DCA 2001).

11. Kevin E. Regan, *Balancing Public Water Supply and Adverse Environmental Impacts Under Florida Water Law: From Water Wars Towards Adaptive Management*, 19 J. LAND USE & ENVTL. L. 123, 124 (2003).

12. W. Coast Reg'l Water Supply Auth., v. Sw. Fla. Water Mgmt Dist., Case No. 95-1520 (DOAH May 29, 1997); *Amended and Restated Interlocal Agreement Reorganizing the West Coast Regional Water Supply Authority* (Mar. 16, 1998), http://ufdc.ufl.edu/WL00003978/00001*; see also, Governing Board Renews Tampa Bay Water Consolidated Permit,* SW. FLA. WATER MGMT. DIST. (Jan. 25, 2011), https://www.swfwmd.state.fl.us/about/newsroom/news/governing-board-renews-tampa-bay-water-consolidated-permit; *see also* TAMPA BAY WATER, *History of Tampa Bay Water*, http://www.tampabaywater.org/history-of-tampa-bay-water.aspx (last visited Jan. 16, 2019).

13. FLA. STAT. ch. 120 (2017).

II. RULE ADOPTION PROCEDURES

The development and adoption of rules in Florida is governed by the Florida Administrative Procedure Act (APA).[14] Two general provisions worth noting seek to limit the cost of administrative agency rules on regulated persons.

First, administrative agencies are required to choose among alternative approaches to regulatory objectives that do not "impose regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives."[15] Second, before adopting, amending, or repealing a rule, administrative agencies must consider the impact of rules on small businesses (defined in Section 288.703, Florida Statutes) and the impact on small counties and cities.[16] These requirements may provide an affected party with support for proposing "less costly alternatives that substantially accomplish the statutory objectives."[17]

A. Rule Development

Previously, it was typical for administrative agencies to devote significant time to developing a proposed rule before formally publishing and vetting it in the public domain. However, the Florida Legislature has endeavored to give the public an opportunity to participate in the formulation and drafting of rules.[18] The law provides that, before providing notice of a proposed rule, an agency must give notice of rule development in the Florida Administrative Register (FAR).[19]

B. Workshops

Even prior to the statutory requirement that agencies must publish notice of rule development, agencies often held workshops to receive comments, especially from the affected public, and to answer questions. However, under the current APA, an agency must hold public workshops in various areas of the state for rule development if an affected person makes a request in writing.[20] The exception to this requirement is where the agency head

14. FLA. STAT. §120.54 (2017); *see also,* FLA. ADMIN. CODE ANN. r. 28-102 (2013).
15. §120.54(1)(d).
16. § 120.54(3)(b)2. a.; FLA. STAT. § 288.703(6) (2018).
17. § 120.54(1)(d).
18. § 120.54(2)(a).
19. *Id.*
20. § 120.54(2)(c).

explains in writing why a workshop is unnecessary.[21] Not less than fourteen days advance notice of the rule development workshop must be provided in the FAR.[22] It would not be necessary to request a workshop if the agency has already scheduled a series of workshops on its own initiative.

C. Negotiated Rulemaking

Administrative agencies also may use negotiated rulemaking to develop and adopt rules.[23] The APA encourages agencies to consider this approach "when complex rules are being drafted or strong opposition to the rules is anticipated."[24] The rulemaking effort may be conducted by a "balanced committee of interested persons."[25] If an agency intends to use this process, it must publish notice in the FAR and allow an opportunity for interested persons to participate.[26] Very few cases discuss negotiated rulemaking.[27] This likely results because the majority of administrative rules are enacted through traditional rulemaking.[28] Also, several of the negotiated rulemaking factors are statutorily precluded from supporting a rule challenge.[29]

D. Notice of Intent to Adopt Rule

An administrative agency begins the formal rulemaking process when it gives notice of its intent to adopt, amend, or repeal a rule.[30] The publication of this notice opens the point of entry for more formal participation in the rulemaking process as well as any rule challenge as discussed below.[31] The notice must contain the following:

1. An explanation of the purpose and effect of the proposed action;
2. The full text of the proposed rule, including a summary;

---

21. *Id.*
22. *Id.*
23. § 120.54(2)(d)1.
24. *Id.*
25. *Id.*
26. § 120.54(2)(d) 2. For a more extensive discussion of negotiated rulemaking, *see* Gregory L. Pitt, Jr., *An Introduction to Negotiated Rulemaking*, 91 FLA. B. J. 50 (March 2017).
27. *Id.* at 51.
28. *Id.*
29. *See* § 120.54(2)(d)3.
30. § 120.54(3)(a).
31. *See, e.g.,* Fla. Pulp & Paper Assoc. Envtl. Affairs, Inc. v. Dep't of Envtl. Protection, 223 So. 3d 417 (Fla. 1st DCA 2017) (citing State, Dept. of Health & Rehabilitative Services v. Alice P., 367 So. 2d 1045 (Fla. 1st DCA 1979)).

3. A reference to the specific rulemaking authority;

4. A reference to the law being implemented, interpreted, or made specific;

5. A summary of the agency's statement of the estimated regulatory costs, if one has been prepared;

6. "[A] statement that any person who wishes to provide the agency with information regarding the statement of estimated regulatory costs, or to provide a proposal for a lower cost regulatory alternative [per Section 120.541(1), Florida Statutes], must do so in writing within [twenty-one] days after publication of the notice;"[32] and

7. The procedure for requesting a public hearing.[33]

The notice must be published in the FAR at least twenty-eight days prior to the rule adoption date, and mailed to all persons named in the rule and all persons who, not less than fourteen days prior to the mailing, have made requests of the agency for advance notice of its proceedings.[34] Additionally, notice must be given to "those particular classes of persons to whom the intended action is directed." [35]

E. Hearings

Agencies on their own initiative may schedule a public hearing for rule adoption. However, an affected person has a point of entry within twenty-one days after the publication of the notice of intent to adopt a proposed rule in which to request a hearing or to "present evidence and argument on all issues under consideration."[36] Generally, these proceedings are legislative in nature rather than adversarial as with a rule challenge proceeding.[37] The agency must consider and make part of the rulemaking record "[a]ny material[s] pertinent to the issues under consideration" that have been submitted within twenty-one days after publication of notice or submitted at the public hearing.[38]

32. § 120.54(3)(a)(1).
33. *Id.*
34. § 120.54(3)(a)2-3.
35. § 120.54(3)(a)3.
36. § 120.54(3)(c)1.
37. *Compare* § 120.54(3)(c)1, *with* § 120.54(3)(c)2.
38. § 120.54(3)(c)1.

F. "Draw-Out" Proceedings

While they are not common, there is a provision in the APA for what is commonly referred to as a "draw out" proceeding.[39] This occurs when a person participating in the rulemaking proceedings timely asserts that their interests will be affected by the proceedings and that the proceedings do not provide an adequate opportunity to protect those interests.[40] In this scenario, if the agency agrees that the rulemaking proceeding is not adequate to protect the person's interests, the proceeding is suspended and a separate proceeding is convened.[41] The rulemaking proceeding resumes once the "draw out" proceeding concludes.[42] It would be incumbent upon a party to the rulemaking to evaluate any special circumstances that would justify seeking a "draw out" proceeding, especially since the agency makes the determination whether the rulemaking proceeding is adequate to protect the person's interests.[43] The participant should weigh the utility of a "draw out" compared to participation in the scheduled rulemaking process.

G. Modification or Withdrawal of Proposed Rules

If an agency does not change a proposed rule after the final public hearing, or after the time for requesting a hearing has expired, the agency must file a notice to that effect with the Joint Administrative Procedures Committee of the Florida Legislature (JAPC) at least seven days prior to filing the rule for adoption.[44] Substantive changes to the proposed rule must be supported by the record of the public hearing, must be in response to material received on or before the date of the final public hearing, or must be in response to a proposed objection by the JAPC.[45] If the agency makes substantive changes, it must provide a notice of change, at least twenty-one days prior to filing the rule for adoption, to any person who requests it in writing and to the JAPC.[46] Additionally, the notice of change must be published in the FAR at least twenty-one days before filing.[47]

---

39. § 120.54(3)(c)2.; *see also* Sarasota Surf Vacation Rentals, Inc. v. Dep't of Rev., 437 So. 2d 786 (Fla. 2d DCA 1983).
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. § 120.54(3)(d)1.
45. *Id.*
46. *Id.*
47. *Id.*

After the formal notice, but prior to adoption, an agency may withdraw a rule in whole or in part.[48] Once a rule is adopted, but not yet effective, an agency may withdraw or modify a rule only under specific circumstances such as in response to an objection by the JAPC, or to extend the effective date if notified by the JAPC that it is considering an objection.[49] An agency must publish notice to withdraw or modify a rule in the same manner as the original notice of rulemaking.[50]

H. Filing for Adoption and Effective Date

If a government entity falls within the definition of an "agency" under the APA, it that must publish its rules in the Florida Administrative Code (F.A.C.).[51] Accordingly, an agency must submit to the Department of State copies of the proposed rule, a summary of the rule and any hearings held on it, and a "detailed written statement of the facts and circumstances justifying the rule."[52] A proposed rule may not be filed for adoption less than twenty-eight days nor more than ninety days after the agency publishes notice of intent to adopt the rule.[53] Publication of a notice of change prior to expiration of the time to file the rule extends the time in which a rule must be filed for adoption to forty-five days after the date of publication.[54] If a notice of public hearing is published prior to the deadline for filing for adoption, the period in which a rule must be filed for adoption is extended to forty-five days after the adjournment of the final hearing on the rule, twenty-one days after receipt of all material authorized to be submitted at the hearing, or twenty-one days after receipt of the transcript (if one is made), whichever timeframe is the latest.[55] The ninety-day period may also be extended when regulatory alternatives are offered by the rules ombudsman.[56]

I. Effect of Rule Challenge

The filing of a rule challenge petition tolls the 90-day rule adoption period until sixty days after the administrative law judge files the final order with the clerk or until sixty days after

48. § 120.54(3)(d)2.
49. § 120.54(3)(d)3.
50. § 120.54(3)(d)4.
51. § 120.54(3)(e)1.
52. *Id.*
53. §120.54(3)(e)2.
54. *Id.*
55. *Id.*
56. § 120.54(3)(b)2(b)(II).

subsequent judicial review is complete. [57] A proposed rule is deemed to be adopted when it is filed with the Department of State and becomes effective twenty days after being filed, on a later date specified in the rule, on a date required by statute, or upon ratification by the Legislature.[58]

III. RULE CHALLENGES

The APA provides that "[a]ny person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority."[59] Other substantially affected persons may be allowed to join the proceedings as intervenors "on appropriate terms which shall not unduly delay the proceedings."[60] The term "substantially affected" generally means that challengers must show they will suffer a substantial and immediate "injury in fact" within the "zone of interest" protected by the challenged rule or statute.[61]

A. Invalid Exercise of Delegated Legislative Authority

The term "invalid exercise of delegated legislative authority" is defined as an "action that goes beyond the powers, functions, and duties delegated by the Legislature."[62] The courts and the Florida Legislature have volleyed back and forth to define this concept.[63] As a result, the current APA contains specific criteria for determining whether a proposed or existing rule is an invalid exercise of delegated legislative authority.[64] A rule is invalid if any one of the following criteria applies:

- The agency has materially failed to follow the applicable rulemaking procedures or requirements;
- The agency has exceeded its grant of rulemaking authority (citation to statutory authority is required by Section 120.54(3)(a)1., F.S.);

---

57. § 120.54(3)(e)2.
58. § 120.54(3)(e)6.
59. *Id.* § 120.56(1)(a).
60. *Id.* § 120.56(1)(e).
61. *See*, *e.g.,* Fla. Med. Ass'n, Inc. v. Dep't. of Prof'l. Regulation, 426 So. 2d 1112 (Fla. 1st DCA 1983); State Dept. of Health & Rehab. Services v. Alice P., 367 So. 2d 1045 (Fla. 1st DCA 1979).
62. § 120.52(8).
63. *See, e.g.*, McDonald v. Dep't. of Banking and Fin., 346 So. 2d. 569 (Fla. 1st DCA 1977); Sw. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000).
64. § 120.52(8).

- The rule enlarges, modifies, or contravenes the specific provisions of law implemented (citation to specific law implemented is required by Section 120.54(3) (a)1., F.S.);
- The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
- The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts. A rule is capricious if it is adopted without thought or reason or is irrational; or
- The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.[65]

The law further limits agency discretion, as follows:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy.[66]

For many years, the courts afforded an agency broad discretion in implementation of its enabling legislation.[67] However, the current statutory language is the culmination of legislative and judicial efforts to rein in that discretion.[68] These limitations on agency discretion may be useful for one attempting to invalidate all or part of a proposed rule on the grounds that the agency lacks specific statutory authority.[69]

The rule challenge petition must be filed with the Division of Administrative Hearings (DOAH). [70] The petition must state:

1. The particular provisions alleged to be invalid and a statement of the facts or grounds for the alleged invalidity.

---

65. *Id.*
66. *Id.*
67. *See, e.g.*, McDonald, 346 So 2d. 569.
68. *See, e.g.*, Save the Manatee Club, Inc., 773 So. 2d 594.
69. *Id.*
70. § 120.56(1)(c).

2. Facts sufficient to show that the petitioner is substantially affected by the challenged adopted rule or would be substantially affected by the proposed rule. [71]

Unlike the legislative type rulemaking hearings, rule challenge hearings are conducted before an Administrative Law Judge (ALJ) as adjudicatory proceedings under Sections 120.569 and 120.57, F.S. [72] The ALJ's decision is final agency action.[73] Within ten days after the petition is filed with DOAH, the case is assigned to an ALJ who, absent a continuance for good cause shown or withdrawal of the petition, must conduct the hearing within thirty days. [74] The ALJ must render a decision within thirty days after the hearing. [75]

The point(s) of entry for challenging a proposed rule are as follows:

- Within twenty-one days of publication of notice of intent to adopt a rule;
- Within ten days after a final public hearing on a proposed rule;
- Within twenty days after the preparation of a statement of regulatory costs (if required); or
- Within twenty days after publication of a notice of modification to a proposed rule. [76]

These deadlines are considered jurisdictional and late petitions are dismissed.[77]

An analysis of the statutory timeframes for rule challenges illustrates that the points of entry for a particular rule will depend on the actions of the agency. The two most significant trigger points generally involve the date of publication of notice of intent to adopt a rule and the date of the final rule adoption hearing. Essentially, the APA gives prospective rule challengers at least two "bites at the apple." In challenging a proposed rule, the rule challenge petition may be filed immediately after the agency publishes its notice of intent to adopt the rule. However, it is often advisable to continue to provide input to the agency staff. If requested amendments are not adopted, then a rule challenge may be filed after the rule adoption hearing.

---

71. § 120.56(1)(b).
72. § 120.56(1)(e).
73. *Id*.
74. § 120.56(1)(c).
75. §120.56(1) (d).
76. § 120.56(2)(a).
77. *Cf.* State, Dept. of Health & Rehabilitative Services v. Alice P., 367 So. 2d 1045 (Fla. 1st DCA 1979).

Any person substantially affected by a change in a proposed rule may challenge the validity of a rule change. And, even if the person is not substantially affected by the proposed rule as originally noticed, the petitioner is not limited to challenging only the proposed change. [78]

Prior to the 1996 APA revisions, the burden was on the challenger to prove the invalidity of a proposed or existing rule by a preponderance of the evidence.[79] The courts generally gave "great weight" to the agency's interpretation of a statute that it was charged with implementing.[80] Some courts clothed a contested rule with a "presumption" of correctness.[81] However, during the 1996 legislative session, the presumption of correctness was reversed and new standards for challenging rules were adopted. [82]

Under the current APA, proposed rules are neither presumed valid nor invalid. [83] Rather, the petitioner has the burden of going forward and the agency has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority.[84] Accordingly, an agency defending such a rule challenge must prove that its rule does not fall into the criteria listed in Section 120.52(8), F.S. Conversely, in a challenge to an existing agency rule, the petitioner has "the burden of proving by a preponderance of the

---

78. § 120.56(2)(a).

79. *See, e.g.*, St. Johns River Water Mgmt. Dist. v. Consolidated-Tomoka Land Co., 717 So. 2d 72 (Fla. 1st DCA 1998)

> As a preliminary matter, we note that the Legislature has changed the burden of persuasion in proceedings to challenge a proposed administrative rule. Before the 1996 revision of the Administrative Procedure Act, the courts had held that a rule was presumed to be valid, and that the party challenging a rule has the burden of establishing that it is invalid. *See Agrico Chem. Co. v. State, Dept. of Envtl. Regulation,* 365 So.2d 759 (Fla. 1st DCA 1978); *Dravo Basic Materials Co., Inc. v. State, Department of Transp.,* 602 So.2d 632 (Fla. 2d DCA 1992). Although these principles continue to apply in a proceeding to challenge an existing rule, *see* section 120.56(3), as well as a proceeding to challenge an agency statement defined as a rule, *see* section 120.56(4), the burden of persuasion is now reversed in a proceeding under section 120.56(2) to challenge a proposed rule.

see also, Sw. Fla. Water Mgmt. Dist. V. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000).

80. *See, e.g.*, Woodley v. Dept. of Health and Rehab. Services, 505 So. 2d 676 (Fla. 1st DCA 1987).

81. *See, e.g.*, Dept. of Health and Rehab. Services v. Framat Realty, Inc., 407 So. 2d 238 (Fla. 1st DCA 1981).

82. Act effective Oct. 1, 1996, ch. 96-159, § 16, 1996 Fla. Laws 180 (codified at FLA. STAT. § 120.56(2)(a).) ("The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised.").

83. § 120.56(2)(c).

84. § 120.56(2)(a).

evidence that the existing rule is an invalid exercise of delegated legislative authority as to the objections raised." [85]

While a failure to challenge a proposed rule does not preclude the option of challenging the rule after it is adopted, strategy considerations revolve around the presumptions and burdens carried by the respective parties. As noted above, a petitioner challenging an existing rule carries the burden of proof that the rule is invalid.[86] Conversely, in a challenge to a proposed rule, the agency has the burden of proving by a preponderance of the evidence that proposed rule is not an invalid exercise of delegated legislative authority.[87] Thus, it may be more difficult to overturn an existing rule than a proposed rule.

The ALJ may declare the proposed rule "wholly or partly invalid."[88] An agency may not file a challenged rule for adoption until the ALJ has rendered a decision, and no proposed rule that has been declared invalid may be adopted. [89] As noted previously, the ALJ's determination on the question of invalidity is final agency action.[90] This is significant relative to an appeal, since judicial review of the ALJ's final order is available to either the agency or the challenging party, i.e., any party who is "adversely affected by final agency action."[91] Judicial review may be initiated by filing a notice of appeal within thirty days after the rendition of the order being appealed.[92] However, unlike the situation with final agency action on a permitting or compliance matter, failure to challenge a proposed rule does not constitute failure to exhaust administrative remedies.[93]

IV. COLLABORATIVE RULEMAKING

A. The Central Florida Water Initiative

It is apparent that the traditional "command-and-control" rulemaking may engender extensive and expensive litigation without really effectuating the intent of the rulemaking effort. For example, a water supply with questionable sustainability has serious ramifications for all users of water, including public supply, industry, and agriculture. Thus, there is likelihood of

85. § 120.56(3)(a).
86. *Id.*
87. § 120.56(2)(a).
88. § 120.56(2)(b).
89. *Id.*
90. § 120.56(1)(e).
91. § 120.68(1).
92. § 120.68(2)(a).
93. § 120.56(1)(e).

conflict among competing and potential users of this precious resource, coupled with risk to the sustainability of the resource. In 2006, Florida's three largest water management districts [94] concluded that in a region where these districts' boundaries meet, the growth in public water supply over the next 20 years within the area from traditional groundwater sources is not sustainable. Recent water supply plan updates and permitting experience confirms that if traditional groundwater sources continue to be developed to meet growing public water supply demands in the area, harm to the water resources (rivers, streams, lakes, wetlands and aquifer quality) will occur.[95]

Accordingly, in 2006 the three districts developed an Action Plan[96] to facilitate coordination among the districts for water supply planning and water resource regulation in what became known as the Central Florida Coordination Area (CFCA).[97] The CFCA is an area with shared water management district boundaries.[98] Portions of the regulatory component of the Action Plan were put in place through adoption of amendments to existing water use permitting rules.[99] Rulemaking workshops were held throughout 2007 with the first set of rules adopted by the three districts in December 2007.[100] These initial rules were intended to be an interim measure and were scheduled to sunset in December 2012.[101] Development of long-term rules began in 2008.[102]

The CFCA evolved into the Central Florida Water Initiative (CFWI).[103] The CFWI builds on the prior work of the CFCA.[104] Historically, the three districts worked independently to plan for, manage, and resolve water resource issues.[105] However, in an area such as the CFWI, the decisions of one district can impact the water resources of another. Today, the districts are working

94. These entities are the St. Johns River, Southwest Florida, and South Florida water management districts.

95. SW. FLA. AND ST. JOHNS RIVER WATER MGMT. DISTS., *Recommended Action Plan for the Central Florida Coordination Area South Florida*, (Sept. 18, 2006), https://cfwiwater.com/pdfs/CFCA_Action_Plan_9-18-06.pdf.

96. *Id.*

97. FLA. STAT. § 373.0465(2)(a) (2017). This area includes Polk, Orange, Osceola, and Seminole counties, as well as southern Lake County.

98. § 373.0465(1)(b) (2017); *see also Recommended Action Plan*, *supra* note 95.

99. *Recommended Action Plan*, *supra* note 95.

100. *Id.*

101. *Id.*

102. *Id.*

103. §373.0465; CENT. FLA. WATER INITIATIVE, *Overview of the Central Florida Water Initiative*, https://cfwiwater.com/overview.html (last visited Jan. 16, 2019) (discussing policy history of the water management districts in the CFWI).

104. *Overview of the Central Florida Water* Initiative, *supra* note 103.

105. *Id.*

collaboratively with other agencies and stakeholders to implement effective and consistent water resource planning, development and management through the CFWI.[106] The CFWI is a collaborative water supply planning effort among the state's three largest water management districts, the Florida Department of Environmental Protection (DEP), the Florida Department of Agriculture and Consumer Services (DACS) and water utilities, environmental groups, business organizations, agricultural communities and other stakeholders.[107] The area involves five counties, including Orange, Osceola, Polk, Seminole and southern Lake County.[108] Portions of the St. Johns River, South Florida, and Southwest Florida water management districts converge in the CFWI.[109]

The guiding principles for the CFWI are to:

- Identify sustainable quantities of traditional groundwater sources available for water supplies that can be used without causing unacceptable harm to the water resources and associated natural systems.
- Develop strategies to meet water demands that are in excess of the sustainable yield of existing traditional groundwater sources.
- Establish consistent rules for the three water management districts that meet their collective goals and implement the results of the Central Florida Water Initiative.[110]

Those involved in the CFWI face several regional water supply challenges. This includes reaching sustainable groundwater limits, the existence of competing demands on the water resources, and overlapping regulatory programs.[111] The CFWI includes a various working groups including a regulatory team formed to develop consistent rules for the three water management districts.[112] The focus of the regulatory framework is to develop appropriate water management strategies that "reflect a balanced approach between public interest considerations, permitted water user rights and sustainability of the water resources."[113]

In 2016, the Florida Legislature weighed in by adopting Section 373.0465, Florida Statutes.[114] This new section within the

---

106. § 373.0465(1)(c); *see also, Overview of the Central Florida Water* Initiative, *supra* note 103.

107. § 373.0465(1)(c); *see also What is CFWI?*, CENT. FLA. WATER INITIATIVE, https://cfwiwater.com/what_is_CFWI.html (last visited Jan. 16, 2019).

108. § 373.0465(2)(a).

109. § 373.0465(1)(b).

110. *What is CFWI?*, *supra* note 106.

111. *Id.*

112. CENTRAL FLORIDA WATER INITIATIVE, *Regulatory*, https://cfwiwater.com/regulatory.html (last visited Jan. 16, 2019).

113. *Id.; see, e.g.,* FLA. ADMIN. CODE ANN. r. 40D-2.321 & 40D-801; *see also* § 373.0465.

114. Act effective July 1, 2016, ch. 2016-1, § 7, 2016 Fla. Laws 14.

Florida Water Resources Act,[115] raises to the statutory level the work of the CFCA and CFWI.[116] The legislative findings include a statement that "that the Floridan Aquifer system is locally approaching the sustainable limits of use."[117] And, the collaborative participants "are exploring the need to develop sources of water to meet the long-term water needs of the area."[118] The statute also acknowledges the need for "a unified process to address the current and long-term water supply needs of Central Florida without causing harm to the water resources and associated natural systems."[119] The law not only approves but mandates the collaborative process among the various government entities involved in the CFWI to:

1. Provide for a continuation of the collaborative process in the CFWI Area among the state agencies, affected water management districts, regional public water supply utilities, and other stakeholders;

2. Build upon the guiding principles and goals set forth in the CFWI Guiding Document of January 30, 2015, and the work that has already been accomplished by the CFWI participants;

3. Develop and implement, as set forth in the CFWI Guiding Document of January 30, 2015, a single multidistrict regional water supply plan, including any needed recovery or prevention strategies and a list of water supply development projects or water resource projects; and

4. Provide for a single hydrologic planning model to assess the availability of groundwater in the CFWI.[120]

The DEP, in consultation with the water management districts and the DACS, must adopt uniform rules for application within the CFWI Area.[121] Once the DEP adopts the rules, the water management districts are to implement the rules without further rulemaking pursuant to section 120.54 of the Florida Statutes. [122] The rules adopted by the DEP for the CFWI area are to be treated as the rules of the water management districts.[123] This is a novel approach in the world of rulemaking and incorporates one of the key concepts of environmental dispute resolution, that is,

115. FLA. STAT. ch. 373 (2017).
116. § 373.0465(1).
117. § 373.0465(1)(b).
118. *Id.*
119. § 373.0465(1)(c).
120. § 373.0465(2)(b).
121. §373.0465(2)(d).
122. § 373.0465(2)(e).
123. *Id.*

expansive stakeholder involvement.[124]

On December 30, 2016, the DEP published its notice of rulemaking in the FAR,[125] proposing a new set of rules specific to the CFWI.[126] The CFWI rule development is being handled by the DEP's Office of Water Policy Rulemaking.[127] While the DEP has held some workshops, the CFWI rules have not yet been adopted.[128]

V. CONCLUSION

The traditional "command-and-control" model for administrative regulation quite often has ignited litigation either challenging a proposed or final rule, or its implementation. In the area of water resources protection, allocation, and regulation, traditional rulemaking has resulted in conflicts, such as the SWUCA rule challenge litigation,[129] and the Tampa Bay Water Wars litigation.[130] Implementation of water policy is not conducive to a single geo-political arena.[131] Water does not observe political boundaries, and, competing demands for water requires a balancing of interests.[132] In today's complex world, command-and-control rulemaking often seems to be an inefficient, and sometimes ineffective, mechanism for accomplishing the purpose of the rules being challenged. Yet, the concept of collaborative rulemaking stands in stark contrast. The efforts of the DEP, in consultation with the water management districts and the DACS, provides a novel and positive approach to minimizing, and possibly avoiding, the contentiousness, expense, and inefficiency of traditional rulemaking in the CFWI. While the proposed DEP rules are intended to apply only in the CFWI, they may ultimately serve as

---

124. Lucia A. Silecchia, *Conflict and Laudato Si': Ten Principles for Environmental Dispute Resolution,* 33 J. LAND USE & ENVTL. L 61 (2017).

125. 42 Fla. Admin. Reg. 252, Notice: 18424197 (Dec. 30, 2016).

126. FLA. ADMIN. CODE ANN. r. 62-41.300-305 (proposed).

127. FLA. DEP'T OF ENVTL. PROTECTION, *Office of Water Policy Rulemaking*, https://floridadep.gov/water-policy/water-policy/content/office-water-policy-rulemaking#Central%20Florida%20Water%20Initiative (last modified Apr. 20, 2018).

128. *See* 42 Fla. Admin. Reg. 252, Notice: 18424197 (Dec. 30, 2016).

129. *See* Sw. Fla. Water Mgmt. Dist. v. Charlotte Cty., 774 So. 2d 903 (Fla. 2d DCA 2001).

130. W. Coast Reg'l Water Supply Auth., Nos. 95-1520, (Fla. Div. Admin. Hearings May 29, 1997) (recommended order); a copy of the Interlocal Agreement may be found at: http://ufdc.ufl.edu/WL00003978/00001 (last visited Jan. 16, 2019)*; see also* SW. FLA. WATER MGMT. DIST.*, Governing Board Renews Tampa Bay Water Consolidated Permit* (Jan. 25, 2011), https://www.swfwmd.state.fl.us/about/newsroom/news/governing-board-renews-tampa-bay-water-consolidated-permit (last visited Jan. 16, 2019); TAMPA BAY WATER, *Tampa Bay Water History*, http://www.tampabaywater.org/history-of-tampa-bay-water.aspx (last visited Jan. 16, 2019).

131. Silecchia, *supra* note 124.

132. *Id.*

a rulemaking model for the entire state. Perhaps this novel process will open the door to collaborative rulemaking in other complex areas. Based on the CFWI experience, administrative agencies have the potential to effectuate policies through collaborative processes, with expansive stakeholder involvement, instead of using the "command-and-control" rulemaking model and its associated potential for litigation.