STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY, CITY OF POMPANO BEACH, and CITY OF PLANTATION,	)	
Petitioners,	)	
and	)	Case No. 00-4520RX
JOHN M. HAIRE; PATRICIA A. HAIRE, and DR. MELVYN GREENSTEIN,	)	
Intervenors,	)	
vs.	)	
DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,	)	
Respondent.	)	

FINAL ORDER

The parties having been provided proper notice, Administrative Law Judge John G. Van Laningham of the Division of Administrative Hearings convened and completed a formal hearing of this matter on July 17, 2001, in Tallahassee, Florida, as scheduled.

APPEARANCES

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STATEMENT OF THE ISSUES

In summary, the issues for decision in this case are: (1) Whether in pari materia rule provisions in Chapter 5B-58, Florida Administrative Code, which define and make operative the term "exposed" to citrus canker disease, together constitute an invalid exercise of delegated legislative authority within the meaning of Section 120.52(8), Florida Statutes; and (2) Whether the Department's policy of removing so-called "exposed" trees located within a 1900-foot radius of infected trees is an

unpromulgated rule-by-definition in violation of Section 120.54(1)(a), Florida Statutes.

PRELIMINARY STATEMENT

On November 1, 2000, Petitioners Broward County, City of Pompano Beach, and City of Plantation ("Petitioners") filed a Petition to Determine Invalidity of Rule 5B-58.001 (the "Petition") with the Division of Administrative Hearings, initiating Case Number 00-4520RX. In their Petition, Petitioners alleged that: (1) the definition of the term "exposed," which is found in Rule 5B-58.001(1)(g) [now (1)(h)], Florida Administrative Code, exceeds the authority statutorily delegated to Respondent Department of Agriculture and Consumer Services (the "Department"); and (2) the Department is in violation of Section 120.54(1)(a), Florida Statutes, for using an unpromulgated rule-by-definition which provides that "all citrus trees within a 1,900 foot radius of an infected tree must be destroyed."

On that same day, Petitioners filed a Petition to Determine Invalidity of Emergency Rule which challenged Emergency Rule 5BER-00-4 (the “Emergency Rule Petition”), initiating Case No. 00-4521RE. In their Emergency Rule Petition, Petitioners challenged the validity of the Department's Emergency Rule 5BER-00-4 which was published in the September 29, 2000, Florida Administrative Weekly.

The two cases were consolidated and a formal hearing was originally set for November 28, 2000.

Several days prior to filing their petitions for administrative relief, Petitioners, among other plaintiffs, had brought a civil lawsuit, Case No. 00-18934(07), in the Seventeenth Judicial Circuit Court in and for Broward County, Florida, in which they had sought declaratory and injunctive relief regarding the Department's destruction of citrus trees located within Broward County. On November 17, 2000, the circuit court issued a permanent injunction that prohibited the Department "from cutting down in Broward County healthy citrus trees which have no visible symptoms of the canker but which are located within 1,900 feet of a citrus tree infected with canker."

As a result of the injunction, and in response to a motion supported by all parties, the instant proceeding was placed in abeyance pending a resolution of the Department's appeal.

On June 20, 2001, the District Court of Appeal for the Fourth District of Florida issued an opinion in which it concluded that the permanent injunction had been rendered improperly due to Petitioners' failure to exhaust their administrative remedies.

Petitioners immediately filed an emergency motion to set an expedited final hearing in this matter. The final hearing was

initially set for July 10, 2001, but was later continued without objection to July 17, 2001, to accommodate the Department's primary witness.

During the period of abatement pending the appeal in the fourth district, Emergency Rule 5BER-00-4 had lapsed. Accordingly, Case No. 4521RE was severed and the Emergency Rule Petition dismissed as moot. Also during the abatement period, various portions of Emergency Rule 5BER-00-4, including provisions relating to the Department's Immediate Final Order ("IFO") form, were adopted as revisions to existing Rule 5B-58.001, Florida Administrative Code. Petitioners sought, and on July 3, 2001, were granted, leave to file an amended petition (the "Amended Petition") to add an allegation that the IFO form constitutes an unlawful rule-by-definition.

Less than ten days before the hearing, Motions to Intervene by John and Patricia Haire and Dr. Melvyn Greenstein were granted, subject to strict limitations on their participation in the proceeding.

The parties were duly notified that the final hearing would begin at 9:00 a.m. on July 17, 2001, at the Division of Administrative Hearings in Tallahassee. All parties appeared at the scheduled time and place. Intervenor Dr. Melvyn Greenstein appeared, with counsel, by telephone. The final hearing lasted one day.

Petitioners presented two witnesses who appeared in person at the hearing: Intervenor John Haire (who also testified on behalf of himself and his wife, Intervenor Patricia Haire) and the Department's Deputy Commissioner, Craig Meyer. Petitioners presented the following additional witnesses: Gilbert MacAdam, Broward County Parks and Recreation Department Environmental Administrator, who testified through deposition; William Flaherty, Public Works Administrator for City of Pompano Beach, who testified through deposition; Jeffrey Siegel, Landscape Architect for the City of Plantation, who testified telephonically; Richard Gaskalla, the Department's Director of the Division of Plant Industry, who testified through deposition; and Dr. Jack Whiteside, a retired plant pathologist, who testified through video deposition.

In addition, Petitioners offered nine exhibits at hearing. Petitioners' Exhibits 1 through 8 were received into evidence without objection. Petitioners' Exhibit 9 was admitted into evidence over the Department's objection. Petitioner City of Plantation was permitted to, and subsequently did, submit two late-filed exhibits, marked as Plantation Exhibits A and B, which were received as well.

Intervenors John and Patricia Haire offered one exhibit, identified as Haire Exhibit 1, that was received in evidence in addition to Mr. Haire's testimony referenced above.

Intervenor Dr. Melvyn Greenstein, a resident of Miami-Dade County, testified telephonically on his own behalf and offered no exhibits.

The Department presented one witness, Craig Meyer, and also relied on the depositions and transcripts that Petitioners filed, which are described in greater detail below. Additionally, the Department offered one exhibit, identified as Respondent's Exhibit 1, which was received into evidence without objection.

At the conclusion of the hearing, the depositions and transcripts attached to and filed with Petitioners' July 17, 2001, Notice of Filing were received into evidence without objection, based on an agreement between Petitioners and the Department. The items listed in Petitioners' Notice of Filing are:

1. Deposition of Bob Crawford, former Commissioner of Agriculture, taken in the Broward County Circuit Court proceeding described above;

2. Trial testimony of Craig Meyer, given in the Broward County Circuit Court proceeding;

3. Deposition of Craig Meyer, taken in a related federal court action;

4. Deposition of Craig Meyer taken in the instant proceeding;

5. Trial Testimony of Timothy R. Gottwald, given in the Broward County Circuit Court action;

6. Deposition of Richard Gaskalla, taken in the instant proceeding;

7. Deposition (transcript and videotape) of Dr. Jack Whiteside, taken in the instant proceeding;

8. Deposition of Gilbert MacAdam, taken in the instant proceeding; and

9. Deposition of William Flaherty, taken in the instant proceeding.

After the final hearing, on July 20, 2001, Petitioners voluntarily dismissed their challenge to the IFO form.

Transcripts of the final hearing were filed on July 18 and 20, 2001. The parties timely filed proposed final orders, which were carefully considered in the preparation of this Final Order.

Petitioners requested an expedited decision because the injunction issued by the Broward County Circuit Court was expected to be vacated on July 30, 2001, and the Department is expected to resume large-scale cutting of trees shortly thereafter.

FINDINGS OF FACT

Citrus Canker Background

1. Citrus canker is a bacterial disease that afflicts citrus plants, attacking their fruits, leaves, and stems and causing defoliation, fruit drop, and loss of yield. The disease also causes blemishes on the fruit and loss of quality, which negatively affect marketability, and it can be fatal to the plant.

2. Citrus canker spreads in two ways. First, it can be transmitted through human movement, since the bacteria can, for example, attach to the equipment and clothing of lawn maintenance workers. Second, citrus canker can spread from an infected citrus tree to a previously uninfected citrus tree by wind-driven rain.

3. The Department is the state agency charged with the responsibilities of eradicating, controlling, and preventing the spread of citrus canker in Florida.

4. Although the events that have led to the instant dispute began in 1995 when the Department detected Asian strain citrus canker in Miami-Dade County near the International Airport, the Department’s earlier experience with an outbreak of the disease in the 1980’s sheds light on its recent actions; as well, these past events illuminate a presently-relevant

legislative enactment, namely, Section 581.184(2), Florida Statutes.

5. Briefly, in September 1984, the Department's field inspectors discovered a bacterial plant disease in Ward's Citrus Nursery. Samples were sent to the U.S. Department of Agriculture ("USDA") for analysis, and the federal agency mistakenly identified the bacteria as Asian strain citrus canker. On October 16, 1984, the Secretary of the USDA declared an extraordinary emergency in the State of Florida because of citrus canker. See generally Chapter 89-91, Laws of Florida; see also Department of Agriculture and Consumer Services v. Polk, 568 So. 2d 35 (Fla. 1990).

6. Then-Governor Bob Graham summoned the legislature to convene on December 6, 1984, in special session to consider, among other things, "[l]egislation relating to the research and eradication of citrus canker, indemnification for certain private losses relating to citrus canker eradication, and consideration of supplemental appropriations relating to citrus canker." 1995 Laws of Florida, Vol. I, Part One, pg. xix.

7. During the special session, the legislature enacted an appropriations bill that made funds available for inspection, control, and eradication of citrus canker, and for financial assistance to persons suffering losses because of citrus canker. See Chapter 84-547, Laws of Florida.

8. Meantime, the Department, working with the USDA, began implementing a joint federal-state citrus canker eradication program (from which the federal government later would withdraw in March 1986 due to inadequate funding). See Chapter 89-91, Laws of Florida. The Department promulgated extensive and detailed rules governing this program. These rules, set forth in Chapter 5B-49, Florida Administrative Code, took effect on March 6, 1985. Included within these rules were provisions requiring the destruction of certain commercial plants located within 125 feet in every direction from an infected plant.

9. The legislature's interest in the apparent citrus canker emergency continued beyond the December 1984 special session. During the 1985 regular session, it passed a bill that enhanced the Department's powers to respond to the perceived citrus canker threat. See Chapter 85-283, Laws of Florida. Most important to this case, the following year, 1986, the legislature enacted a law that directed the Department to "adopt rules specifying facts and circumstances that, if present, would require the destruction of plants for purposes of [stopping the spread] of citrus canker in this state." See Chapter 86-128, Laws of Florida. This rulemaking directive, which took effect July 1, 1986, is currently codified in Section 581.184(2), Florida Statutes.

10. The Department responded promptly, publishing proposed revisions to Chapter 5B-49, Florida Administrative Code, in the September 5, 1986, Florida Administrative Weekly. These proposed rules, which took effect March 4, 1987, provided clearer, more comprehensive regulations in the form of a Florida Citrus Canker Action Plan, which was incorporated by reference into the rules.

11. As it turned out, the strain of citrus canker found in Ward's Citrus Nursery was not the virulent Asian strain after all, but a nonaggressive and less dangerous type of canker later dubbed Florida Nursery strain. See Chapter 89-91, Laws of Florida.

12. After the putative emergency had ended, the Department repealed the remaining provisions of Chapter 5B-49, Florida Administrative Code, effective November 29, 1994.

The Current Crisis

13. In 1995, when the Department detected Asian strain citrus canker in Miami-Dade County, it quickly became alarmed that the disease could spread to commercial citrus groves, and accordingly implemented a new Citrus Canker Eradication Program ("Eradication Program") to eradicate and prevent the spread of citrus canker to other parts of the state.[1]

14. Since the initial detection in Miami-Dade County in 1995, the Department has found citrus canker in six additional

Florida counties: Hillsborough, Manatee, Hendry, Collier, Broward, and Palm Beach.

15. At the time of the 1995 outbreak, the Department's policy and practice was to destroy each "infected" tree and all "exposed" trees, the latter which the Department, following historical precedent, then considered to be all citrus trees within a 125-foot radius of an infected tree.

16. In November 1995, the Department commenced rulemaking to adopt regulations governing the Eradication Program. Initially taking effect January 17, 1996, the Department's citrus canker rules, found in Chapter 5B-58, Florida Administrative Code, have since been amended and revised from time to time. The Department, however, did not adopt its 125-foot radius policy as a rule, then or ever.

17. The primary methods for eradicating and controlling the spread of citrus canker pursuant to the Eradication Program are the prevention of spread by human means and the prevention of spread from infected trees to uninfected trees by wind-driven rain.

18. Chapter 5B-58, Florida Administrative Code, contains numerous, detailed provisions designed to prevent human spread of citrus canker bacteria. Petitioners do not challenge these provisions.

19. The Department also seeks to prevent the spread of the bacteria by removing trees that can host the bacteria. To that end, the Department cuts down two separate categories of trees. The removal of these trees, defined as "infected" or "exposed" to citrus canker, is foundational to the Eradication Program.

20. "Infected" trees are defined in the rule as being trees that harbor the citrus canker bacteria and express visible symptoms. See Rule 5B-58.001(1)(i), Florida Administrative Code. The Rule's definition of "infected" is substantially the same as the statutory definition of the term "infected or infested," which is located in Section 581.184(1)(a), Florida Statutes. The Department's current policy, as expressed in Rule 5B-58.001(5), is that "[a]ll citrus trees which are infected or infested shall be removed." Pursuant to this policy, the Department is removing every infected tree it finds. Petitioners do not challenge the Department's policy decision to remove all infected trees.

21. The second category of trees removed by the Department comprises those it defines as "exposed." In Rule 5B-58.001(h), the Department has defined "exposed" trees as being those that are without visible symptoms of citrus canker but which have been "[d]etermined by the department to likely harbor citrus canker bacteria because of their proximity to infected plants or probable contact with [sources of human spread]." It is the

Department's policy regarding the removal of "exposed" trees that is at the core of Petitioners' challenge.

22. In Section 581.184(3), Florida Statutes, the Department is given authority to remove healthy trees——that is, trees that are neither infected, nor exposed, nor suspected of being exposed——to create a citrus canker host-free buffer area to "retard the spread of citrus canker from known infected areas." Unlike trees that are destroyed on grounds of infection or suspected exposure to infection, however, trees removed from a rule-designated buffer area are considered valuable property, and their owners must be paid "subject to annual legislative appropriation." Id. It is undisputed that the Department is not removing any trees under its authority to establish buffer zones.

The "1900-Foot Radius Policy"

23. Despite the Department's efforts in the early years of the citrus canker outbreak discovered in 1995, the disease continued to spread into other parts of Miami-Dade County and into Broward County. In 1998, the Department commissioned Dr. Timothy R. Gottwald, a plant pathologist with the USDA, to conduct a study that would measure the distances that citrus canker could spread in South Florida. The objectives of the study, which commenced in August 1998, included:
(a) determining the amount of citrus canker spread from

bacterial hosts (foci of infection); (b) examining the spread resulting from normal and severe weather events; (c) evaluating whether the Department's then-current use of the 125-foot radius for defining and destroying "exposed" trees was adequate to control spread; and (d) providing, if necessary, evidence for any adjustment of the radius distance.

24. By December 1998, before his report was completed, Dr. Gottwald's data were sufficiently conclusive that he was able to present his study in Orlando to a group of Department officials, scientists, and citrus industry representatives. As Dr. Gottwald testified during the trial in Broward County circuit court, at that meeting in December 1998, the group reviewed his data and "came to a consensus . . . that we're using 1,900 feet," meaning that all trees within a 1900-foot radius of a diseased tree should be destroyed to prevent the further spread of citrus canker.

25. A few months later, Dr. Gottwald presented his study to the Citrus Canker Risk Assessment Group (the "Risk Assessment Group").[2] A creature of the Department, the Risk Assessment Group, as defined in Rule 5B-58.001(1)(e), Florida Administrative Code, is a committee composed of knowledgeable scientists and regulatory officials that makes recommendations for the control and eradication of citrus canker; the Director of the Division of Plant Industry appoints its members.[3]

Dr. Gottwald persuaded the Risk Assessment Group to recommend that a 1900-foot zone be employed.

26. Accordingly, in May 1999, the Risk Assessment Group recommended to the Department that all "exposed" trees, i.e. all trees within 1900 feet of an infected tree, should be destroyed in order to eradicate citrus canker.

27. Dr. Gottwald completed his preliminary report on or about October 13, 1999. Although the title of his report describes it as a draft, Dr. Gottwald's cover letter to the Department assures that the "data will not change, so for regulatory purposes this report may be useful for planning eradication/disease suppression activities."

28. In December 1999, then-Commissioner Bob Crawford approved the previous recommendation of the Risk Assessment Group, adopting on behalf of the Department a policy to remove citrus trees within 1900 feet of infected trees beginning January 1, 2000. This new policy was a bold and aggressive step——breathtaking in scope——that significantly ratcheted-up the Department's eradication efforts. To grasp its magnitude, consider that the 1900-foot radius policy entails a swath of tree destruction that encompasses approximately 262 acres for each infected tree found.

29. The science underpinning the 1900-foot radius policy has not changed materially or become more refined. After

December 1999, any scientific or technical data received by the Department has served to confirm or provide additional support for the decision to adopt the 1900-foot radius policy.

30. The parties disagree about——and the evidence is somewhat in conflict concerning——the substance of the Department's 1900-foot radius policy. Petitioners urge that the policy has two facets: (1) it determines which trees are deemed “exposed”; and (2) it dictates that all trees so identified shall be removed. Both aspects of the Department’s policy, as Petitioners describe it, can be conflated into a single statement: All trees within 1900 feet of an infected tree shall be removed. Petitioners acknowledge that the Department has, in a very few instances in commercial grove settings, spared some trees within the 1900-foot radius, but they maintain that the few exceptions which have been made do not alter the essentially mandatory nature of the Department’s removal policy as it relates to "exposed" trees.

31. The Department counters that its policy is less rigid than Petitioners would have it. While admitting that the 1900-foot radius policy determines which trees are considered “exposed,” the Department denies that all trees so identified must be removed. Instead, claims the department, the 1900-foot radius establishes a bright-line starting point that may be

adjusted outward or inward based upon the recommendations of the Risk Assessment Group.

32. The greater weight of the evidence establishes that Petitioners have correctly summarized the Department's policy. In public statements, such as press releases, in actual practice, and through the sworn testimony of its officials, the Department has made clear that its policy is, in fact, to remove all trees within 1900 feet of an infected tree, barring extraordinary circumstances that have presented only occasionally in commercial grove settings (and never, to date, in noncommercial or residential settings).

33. Indeed, the general applicability, widespread implementation, and public articulation of the Department's policy are such that three district courts of appeal have described its essence in terms substantially similar to Petitioners' allegations:

- "Trees are deemed exposed if they lie within a 1900-foot radius of an infected tree." Sapp Farms, Inc. v. Florida Department of Agriculture and Consumer Services, 761 So. 2d 347, 348 (Fla. 3d DCA 2000).
- "The Citrus Canker Risk Assessment Group has determined that in order to assure at least 99% eradication, all trees within 1900 feet of a canker-infested tree must be

destroyed." State v. Sun Gardens Citrus, LLP, 780 So. 2d 922, 924 (Fla. 2d DCA 2001)(emphasis added).

- "On January 1, 2000, Commissioner Bob Crawford adopted the recommendation of the task force [that the Department adopt a policy to destroy trees within a 1900 foot radius of a diseased tree in order to eradicate citrus canker] and the 1900 foot buffer zone policy became effective." Florida Department of Agriculture and Consumer Services v. City of Pompano Beach, 2001 WL 770096, *2 (Fla. 4th DCA July 11, 2001).

In addition, the legislature described the Department's policy indirectly in a statement of legislative findings made during the year 2000 regular session:

- "WHEREAS, the Third District Court of Appeals [sic], in Sapp Farms, Inc., v. Florida Department of Agriculture and Consumer Services, DCA Case No. 3D00-487, held that citrus trees within a certain radius of infection (originally thought to be 125 feet but now scientifically determined to be at least 1,900 feet) necessarily harbor the citrus canker bacteria and thus are diseased and have no value . . . . " Chapter 2000-308, Laws of Florida, at pg. 3226 (emphasis added).[4]

34. Thus, a preponderance of evidence persuasively establishes that the Department adopted a policy of general

applicability in December 1999 that took effect on January 1, 2000, and has been applied consistently since that time. A succinct and accurate expression of that policy, taking into account the relatively remote but nevertheless unexcluded possibility that adjustments might be made in exceptional situations in accordance with recommendations arising from the risk assessment process, emerges clearly and convincingly from the evidence as follows:

> All trees located within a 1900-foot radius (the "Presumptive Removal Zone") of any infected tree shall be removed; provided, however, that the Commissioner, after taking into consideration the recommendations of the Risk Assessment Group, may determine that some or all of the trees within the Presumptive Removal Zone need not be destroyed if such tree(s), which will be specifically identified by the Department, do not pose an imminent danger in the spread of the citrus canker disease.

This agency statement will be referred to hereinafter as the "PRZ Policy."[5]

The Department's Proposed Rule Revisions

35. Shortly before the final hearing of this matter, the Department initiated rulemaking to amend the existing provisions of Rule 5B-58.001, Florida Administrative Code.

36. The rule amendments proposed by the Department (the "Proposed Amendments"), if adopted, would, among other things:

> (a) Replace the existing definition of "exposed" found in Rule 5B-58.001(1)(h) with

> a new definition for the term “exposed to infection” and substitute the newly-defined term “exposed to infection” in place of “exposed” wherever the latter appears in the existing rule. The new definition of “exposed to infection” would be identical to the definition of the same term found in Section 581.184(1)(b), Florida Statutes;[6] and
>
> (b) Define the phrase “citrus trees harboring the citrus canker bacteria due to their proximity to infected citrus trees,” which is the determinative component of the proposed definition for the term “exposed to infection,” to mean citrus trees located within 1900 feet of an infected citrus tree.

37. The effect of these revisions would be to specify that the Department considers all trees within 1900 feet of an infected tree to be, by definition, “exposed to infection” and subject to removal. Critically, however, the Proposed Amendments do not specify the Department’s policy of general applicability, which exists in fact and has been in effect since January 1, 2000, that all trees within the 1900-foot-radius removal zone shall be destroyed except those, if any, designated by the Commissioner of Agriculture as not posing an imminent danger in the spread of the citrus canker disease.

38. Pursuant to Section 120.54(2), Florida Statutes, a Notice of Proposed Rule Development with respect to the Proposed Amendments was published in the Florida Administrative Weekly on July 6, 2001. Thereafter, on July 20, 2001, the Department caused to be published a notice of proposed rulemaking

concerning the Proposed Amendments pursuant to Section 120.54(3), Florida Statutes.

39. As of the date of the final hearing, the Department had scheduled a workshop on the Proposed Amendments to be held in Broward County on Tuesday, July 24, 2001.

40. The Department is currently engaged in the rulemaking process with respect to the Proposed Amendments both expeditiously and, as far as the record in this case shows, in good faith. For reasons that will be discussed in the following Conclusions of Law, however, the Proposed Amendments do not "address" the PRZ Policy as that term ("address") is used in Section 120.54(1)(a)1.c., Florida Statutes.

About the Challengers

41. As set forth more particularly below, Petitioners and Intervenors each own residential or noncommercial citrus trees in Broward or Miami-Dade County that are located within a citrus canker quarantine area and hence are immediately subject to the Department's PRZ Policy.[7]

42. Petitioner Broward County owns a noncommercial citrus grove that is situated in a residential area and lies within 1900 feet of other citrus trees. Broward County owns other residential citrus trees as well, including trees within 1900 feet of infected citrus trees.

43. Petitioner City of Plantation owns at least one "exposed" citrus tree that the Department has earmarked for destruction through the issuance of an IFO.

44. Intervenors John and Patricia Haire own several "exposed" residential citrus trees in Broward County; they have received an IFO notifying them that all such trees will be removed.

45. Intervenor Dr. Melvyn Greenstein owns residential citrus trees in Miami-Dade County that the Department has deemed "exposed." He, too, has received an IFO giving notice that his "exposed" citrus trees will be removed.

CONCUSIONS OF LAW

46. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.56, 120.569, and 120.57(1), Florida Statutes.

Standing

47. The Department contends that Petitioners Broward County and Pompano Beach lack standing to maintain this proceeding because, according to the Department, they have failed to prove that they are "substantially affected" by the challenged agency statement. See Section 120.56(4)(a), Florida Statutes ("Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a)."). In particular, the

Department argues that these Petitioners have failed to demonstrate that they are subject to a real and sufficiently immediate injury-in-fact as a result of the alleged statement, namely, the PRZ Policy.

48. The burden rests on Petitioners to prove their respective rights to maintain this action. To show that they are "substantially affected" by the alleged rule-by-definition, each Petitioner must establish: (a) a real and immediate injury-in-fact; and (b) that the interest invaded is arguably within the zone of interests to be protected or regulated. E.g. Lanoue v. Florida Department of Law Enforcement, 751 So. 2d 94, 96 (Fla. 1st DCA 2000). The Department does not dispute that the property interests asserted by these Petitioners are within a protected "zone of interests," and it is concluded that they are.

49. To satisfy the injury-in-fact element, "the injury must not be based on pure speculation or conjecture." Ward v. Board of Trustees of the Internal Improvement Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995).

50. These Petitioners have carried their burden on this issue. Each owns trees within a citrus canker quarantine area in Broward County. Clearly, under the Department's PRZ Policy, Petitioners' trees are presently located within a potential path of destruction, even if these trees have not already been

targeted for removal, and even if they do not all lie within 1900 feet of an infected tree. The threat of danger to these trees——indeed all citrus trees in a quarantine area——is neither speculative nor conjectural but rather real and immediate.

51. Without question, Petitioners and Intervenors have standing to maintain this proceeding.

The Existing Rules

52. Section 120.56(1)(a), Florida Statutes, 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."

53. The burden is on the challenger to show that an existing rule is an invalid exercise of delegated legislative authority within the meaning of Section 120.52(8), Florida Statutes. See Cortes v. State Board of Regents, 655 So. 2d 132, 136 (Fla. 1st DCA 1995).

54. The phrase "invalid exercise of delegated legislative authority" is defined in Section 120.52(8), Florida Statutes, as "action which goes beyond the powers, functions, and duties delegated by the Legislature." The statute then enumerates seven alternative grounds, upon any one of which a rule must be invalidated:

> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> (e) The rule is arbitrary or capricious;
>
> (f) The rule is not supported by competent substantial evidence; or
>
> (g) 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.

55. In addition to these grounds, the statute provides general standards "to be used in determining the validity of a rule in all cases." Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 597-98 (Fla. 1st DCA 2000). Contained in the closing paragraph of Section 120.52(8), Florida Statutes, these general standards consist of the following:

> 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. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

See also Section 120.536(1), Florida Statutes (reiterating these general standards regarding rulemaking authority).

56. Plainly, a grant of rulemaking authority, while essential, is not enough, without more, to authorize a rule. Rather, as summarized by the first district, the general rulemaking standards make clear that "authority to adopt an administrative rule must be based on an explicit power or duty identified in the enabling statute." Save the Manatee Club, 773 So. 2d at 599. "Either the enabling statute authorizes the rule at issue or it does not[, and] this question is one that must be determined on a case-by-case basis." Id.

57. Here, the legislature has vested the Department with rulemaking authority through several statutory grants, ranging from the broadest permissible warrant (Section 570.07(23), Florida Statutes[8]), to a duty-specific commission (Section

581.031(17), Florida Statutes), to the narrowly focused, citrus-canker-oriented charge in Section 581.184(2), Florida Statutes. Through these grants, the legislature clearly has given the Department the general rulemaking authority which is necessary, as a threshold matter, to permit the promulgation of the challenged existing rule; the determinative question, then, is whether the enabling statutes explicitly authorize the rule provisions at issue.

58. In examining the Department's specific authority to make the existing rules, Section 581.184(2) is of particular interest, not only because it deals directly with citrus canker-related rules, but also because this statute's mandatory nature distinguishes it from the other grants of rulemaking authority extended to the Department. Enacted in 1986,[9] the first sentence of Section 581.184(2)[10] requires careful scrutiny:

> In addition to the powers and duties set forth under this chapter, the department is directed to adopt rules specifying facts and circumstances that, if present, would require the destruction of plants for purposes of eradicating, controlling, or preventing the dissemination of citrus canker disease in the state. . . . Such rules shall be in effect for any period during which, in the judgment of the Commissioner of Agriculture, there is the threat of the spread disease in the state.

Section 581.184(2), Florida Statutes (emphasis added). The legislature's use of the verb "direct" (in passive form) in this

statute plainly manifests an intent to command the Department to act——and connotes the legislature's expectation that the Department will obey. This, then, is more than a mere grant of authority to make rules; it is also, according to its plain language, an order that requires compliance.

59. By directing (rather than simply authorizing) the Department to promulgate rules specifying facts and circumstances that, if present, would require the destruction of plants to control citrus canker, the legislature effectively, albeit indirectly, placed a qualification——which will be discussed in due course below——on the broad "mandate and grant of authority to deal with problems such as the one at hand"[11] found in Section 581.031(17), Florida Statutes. It is this latter section that delegates to the Department the state's power to destroy plants in the interests of controlling citrus canker (among other plant pests).[12] Section 581.031(17) provides:

> The Department has the following powers and duties:
>
> * * *
>
> (17) To supervise, or cause to be supervised, the treatment, cutting, and destruction of plants, plant parts, fruit, soil, containers, equipment, and other articles capable of harboring plant pests, noxious weeds, or arthropods, if they are infested or located in an area which may be suspected of being infested or infected due to its proximity to a known infestation, or

> if they were reasonably exposed to infestation, to prevent or control the dissemination of or to eradicate plant pests, noxious weeds, or arthropods, and to make rules governing these procedures.[13]

60. As the final clause of Section 581.031(17) makes clear, at the time the legislature directed the Department to adopt rules relating to citrus canker,[14] the Department already had the power to adopt rules implementing and interpreting that statute's specific grant of legislative authority to oversee the destruction of plants infected by or infested with plant pests, or suspected of being infected, or exposed to infestation—— including rules specifying the facts and circumstances under which plants would be destroyed to control citrus canker (a major plant pest). Thus, the first sentence of Section 581.184(2) conferred no new rulemaking authority or regulatory jurisdiction upon the Department.

61. Instead, when in 1986 the legislature enacted the bill that ultimately became Section 581.184(2), Florida Statutes, it imposed a new duty on the Department: the obligation to develop, and adopt as rules, statements of general applicability setting forth, clearly and precisely, facts and circumstances requiring the destruction of plants for purposes of controlling citrus canker. While the Department, if left to its own devices, might have elected to specify such facts and circumstances on a case-by-case basis through adjudication,

eschewing the articulation of generally applicable principles (and hence evading the burden of rulemaking), with the passage of the law that is now Section 581.184(2), the legislature took that option away from the agency.

62. The legislature's rulemaking directive to the Department had (and continues to have) profound consequences for the Department's regulatory authority because, as a matter of law——and as the legislature is presumed to have known when it gave the command——the rules required by Section 581.184(2) necessarily will control the Department's exercise of its power and duty to destroy plants for purposes of citrus canker eradication. See Cleveland Clinic Florida Hospital v. Agency for Health Care Administration, 679 So. 2d 1237, 1242 (Fla. 1st DCA 1996), rev. denied, 695 So. 2d 701 (1997)(agencies must follow their own rules.) Accordingly, by ordering the Department to adopt particular rules, the legislature purposefully qualified the Department's authority under Section 581.031(17)——not by diminishing that authority (no power was taken away), but by requiring that the authority be carried out pursuant to certain pre-determined and publicly available guidelines.

63. It follows, then, that the scope of the Department's rulemaking authority with regard to citrus canker eradication must be determined based on a reading together of Sections

581.031(17) and 581.184(2), which are, on the common subject of citrus canker, in pari materia;[15] these enabling statutes, taken as a whole, either authorize the Department's existing rules, or they do not. See Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000). If the Department's existing rules fail to comply with the rulemaking directive of Section 581.184(2), then, to the extent of the deficiency, the Department has exceeded its rulemaking authority, by adopting rules that would permit the Department to exercise its power and duty to destroy plants in the absence of legislatively mandated (though Department devised) guidelines. Obviously, therefore, the legislative intent behind the 1986 rulemaking directive is crucial.

64. The plain and unambiguous statutory language is determinative, as it should be, and reveals several important points about the legislative mindset. First, as just mentioned, but to repeat for emphasis, the legislature clearly intended that the Department's citrus canker eradication program be implemented according to, and hence to that extent be governed by, rules specifying the generally applicable facts and circumstances that will require plant destruction. In this regard, it is significant that the legislature did not direct the Department to adopt rules specifying "factors" or "variables" to consider in deciding whether a plant should be

destroyed, nor did it mandate that the desired rules specify facts that "might" require the destruction of plants, depending on the presence of other, non-specified circumstances or at the Department's discretion; rather, the plain language of the statute leaves room for only one contingency: whether the rule-prescribed facts and circumstances exist. When those facts and circumstances are present, the destruction of plants will be required, not as a discretionary matter, but as a function of the statutorily compelled regulatory framework.[16]

65. Second, the legislature evidently concluded that the adoption of rules specifying facts and circumstances that would require the destruction of plants in the interests of eradicating citrus canker was, in 1986, feasible and practicable, for it did not condition the directive to make rules on the later concurrence of these or any other factors. Then, as now, whenever the legislature adopts an act that "requires implementation of the act by rules of an agency . . . , such rules shall be drafted and formally proposed . . . within 180 days after the effective date of the act, unless the provisions of the act provide otherwise." See Section 120.54(12), Florida Statutes (1985). Having said nothing to the contrary, the legislature intended that the Department complete its assigned rulemaking task within 180 days.

66. Third, although this might go without saying, the legislature clearly intended that the Department do more in its rules than merely restate the language in Section 581.031(17) that confers the agency's powers and duties. That is, because the statute itself already provided (and continues to provide) unambiguously that the Department has the power and duty to supervise the destruction of a plant if the plant is (1) infested; or (2) suspected of being infested or infected due to its proximity to a known infestation; or (3) reasonably exposed to infestation, a rule that simply repeats or paraphrases these statutorily prescribed categories of plants subject to destruction would serve no useful purpose, and so the legislature, being presumed to have had a useful goal in mind, must have intended that the compulsory, rule-specified "facts and circumstances" be more explicit than the existing statute. As the First District Court of Appeal explained (in describing agencies' rulemaking authority generally):

> [Agencies have authority] to "implement or interpret" specific powers and duties contained in the enabling statute. A rule that is used to implement or carry out a directive will necessarily contain language more detailed than that used in the directive itself. Likewise, the use of the term "interpret" suggests that a rule will be more detailed than the applicable enabling statute. There would be no need for interpretation if all the details were contained in the statute itself.

Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000)(emphasis added). In sum, the legislature plainly intended that the Department "flesh out" the broad legislative policy articulated in Section 581.031(17) by formulating specific facts and circumstances pertinent to citrus canker eradication.

67. In addition to examining the plain statutory language, a complete and accurate understanding of the legislative intent is facilitated by the knowledge that before the 1986 regular legislative session began, the Department had adopted a number of rules prescribing detailed guidelines for citrus canker eradication and treatments. First published, as proposed rules, on January 25, 1985, in Volume 11, Number 4, of the Florida Administrative Weekly, Chapter 5B-49, Florida Administrative Code, consisting of Rules 5B-49.01 through 5B-49.21, took effect on March 6, 1985. See Florida Administrative Weekly, Vol. 11, No. 8, at pg. 663 (Feb. 22, 1985). These rules were published in the 1985 Annual Supplement to the Florida Administrative Code Annotated, Volume 2, Titles 4, 5, which was issued about the time the 1986 legislature convened.[17] The legislature is presumed to have been aware of and familiar with these then-existing rules at the time it directed the Department to adopt rules specifying the facts and circumstances that would

require the destruction of plants in connection with citrus canker eradication.

68. That the legislature directed the Department to make the rules described in Section 581.184(2), with knowledge that the Department recently had promulgated extensive rules on the very subject of the legislative directive, is telling. Presumably aware of the Department's then-existing citrus canker rules, the legislature must have determined that those rules did not adequately specify the facts and circumstances that, if present, would require the destruction of plants. This observation is as self-evident as the common-sense converse proposition: If the legislature had been completely satisfied with Chapter 5B-49, Florida Administrative Code, as it existed at the time of the 1986 session, then the rulemaking directive not only would have been unnecessary, but also, by gratuitously ordering the Department to write additional or amended rules where none were needed or wanted, it would have engendered a potential for mischief.

69. It is presumed that the legislature did not intend to put the Department to a pointless task but rather desired that the Department supplement its then-existing rules with missing information that the legislature deemed necessary for inclusion within them. With that in mind, the rules that existed as of the 1986 legislative session stand as a benchmark, for whatever

else the legislature meant by "rules specifying facts and circumstances," it surely meant rules that would set forth the required information with greater clarity and precision than had been done to date (i.e. mid-1986).[18]

70. Turning now to the existing rules to determine whether the challenged provisions are valid or not, it will be seen, initially, that Chapter 5B-58, Florida Administrative Code, specifies surprisingly few facts and circumstances that, if present, would require the destruction of plants. There are, to be precise, only two. The first such circumstance is the one most expected: "All citrus trees which are infected or infested shall be removed." Rule 5B-58.001(5)(a), Florida Administrative Code. The term "infected" is defined as "[h]arboring citrus canker bacteria and expressing visible symptoms." Rule 5B-58.001(1)(i), Florida Administrative Code. Thus, in other words, if a knowledgeable person can tell just by looking at a plant that it is suffering from citrus canker infection, that plant will be destroyed. Petitioners have not challenged the provisions dealing with the destruction of visibly infected or infested trees.

71. The other circumstance is found in Rule 5B-58.001(15), Florida Administrative Code, which provides that "[c]itrus plants in containers found in quarantine areas will be confiscated immediately and destroyed without compensation,"

unless such storage is authorized under one of two narrow exceptions stated in the same subsection. Petitioners have not challenged these provisions either.

72. The bone of contention, of course, concerns the facts and circumstances under which trees not visibly affected by citrus canker bacteria will be destroyed. On this subject, the existing rule is notably non-committal and evasive. It says, in the fourth sentence of Rule 5B-58.001(5)(a), Florida Administrative Code, that "[t]he decision to remove exposed trees will take into consideration the recommendations of the Citrus Canker Risk Assessment Group." (Emphasis added). Although the rule fails to specify any facts and circumstances that would require the removal of "exposed" trees, the implications are that every "exposed" tree is subject to destruction at the discretion of the Department, and that the Department is inclined to exercise its discretion in favor of destruction.[19]

73. The critical term "exposed," which is made to operate through and hence must be read in conjunction with the just-quoted sentence of Rule 5B-58.001(5)(a), is defined in the rule to mean:

> [1] Determined by the department [2] to likely harbor citrus canker bacteria [3] because of [a] proximity to infected plants, or [b] probable contact with personnel, or regulated articles, or other articles that

> may have been contaminated with bacteria that cause citrus canker, [4] but not expressing visible symptoms.

Rule 5B-58.001(1)(h), Florida Administrative Code (bracketed numbers and letters added). Petitioners complain that this definition constitutes an invalid exercise of delegated legislative authority. They are correct.

74. The rule's definition of "exposed" is constructed of four parts. The first clause——"[d]etermined by the department"——makes plain that the Department is the exclusive arbiter of the evidence, the decision-maker. The second clause is a summary statement of the conclusion that the Department must make and frames the ultimate issue for the Department's determination thusly: whether a plant is likely to harbor citrus canker bacteria. The third part, ushered in by the words "because of," purports to set out the factual premises upon which the Department will base its decision. It consists of two clauses, call them (a) the "proximity clause" and (b) the "probable contact" clause. The fourth and final clause confirms that all plants not visibly suffering from citrus canker (which set consists of all plants not "infected" therewith) are subject to being deemed "exposed."

75. As the introductory words "because of" suggest, the third clause is the only structural component of this definition that could plausibly satisfy the rulemaking directive to specify

dispositive facts and circumstances. The others make no genuine attempt. To begin, the first clause plainly does not set forth a specific fact and circumstance that would require the destruction of plants. Continuing, the second clause also does not comply with the directive, for reasons that, while equally compelling, are perhaps less plain. Consider whether, if a person were asked to specify facts and circumstances that, if present, would require a finding of negligence, the following would be responsive: a likely failure to have used reasonable care. The answer obviously is "no," because the statement does not, in and of itself, describe a particular factual scenario that can be perceived by the senses; it reflects, rather, a judgment about facts observed but not specified.[20] The same is true of the phrase "likely [to] harbor citrus canker bacteria;" it fails to specify a particular factual occurrence capable of objective observation and instead reflects a judgment about perceivable facts. Skipping over the third part momentarily, the fourth clause, unlike the first two, does express a fact—— but it is not one that, if present without more, would require the destruction of plants.

76. Whether the proximity and probable contact clauses that comprise the "exposed" definition's third part comply with the legislative directive requires a closer look. The starting point is Section 581.184(2), Florida Statutes. When, as here,

the statute in question does not contain a specific definition of its terms, it is assumed that the words contained therein were used according to their ordinary dictionary definitions. See Save the Manatee Club, 773 So. 2d at 599 (citing WFTV, Inc. v. Wilken, 675 So. 2d 674 (Fla. 4th DCA 1996)). The ordinary meaning of the verb “specify” is “to name or state explicitly[21] or in detail.” See Merriam-Webster’s Online Collegiate® Dictionary (hereafter Merriam-Webster’s)(http://www.m-w.com/). The term "fact," as used in everyday discourse, denotes “information presented as having objective reality.” Id. "Circumstance" commonly means "a condition, fact, or event accompanying, conditioning, or determining another: an essential or inevitable concomitant." Id.

77. Putting these common definitions of ordinary words together, it becomes apparent that the directive in Section 581.184(2), Florida Statutes——to "specify[] facts and circumstances"——requires the Department to state explicitly, that is, with clarity and precision and thus without vagueness or room for doubt, particular pieces of information having objective reality (i.e. that describe perceivable scenarios) which, if found to exist in the real world, will require the destruction of plants.

78. Against this statutory backdrop the subject definition's shortcomings stand out in bold relief. The phrase

“proximity to infected plants” does not have intrinsic objective reality; it does not, without more, communicate information that is observable, provable, or falsifiable; it is not, therefore, a “fact.”[22] While the phrase may, in a loose sense, describe a “circumstance,” it cannot seriously be contended that “proximity to infected plants” is meaningfully precise or explicit, as the statute requires; in fact, it is neither, being instead both elastic and malleable, an empty vessel for the Department to fill with content at its sole discretion. Indeed, for all that appears in the rule, “proximity” might be ten (or 1900) feet, or ten miles, or ten thousand miles, depending on the unstated facts and circumstances.

79. At bottom, a conclusion of “proximity to infected plants” constitutes a subjective judgment or opinion that must be based upon objective facts and circumstances, in the same way that the judgment whether a plant is "likely [to] harbor citrus canker bacteria" also requires a factual foundation upon which to rest. The puzzle piece missing from the existing rule is the description of facts and circumstances that, if present, would require that conclusions of "proximity"——and hence "likelihood"——be drawn. The definition allows the Department to reach the ultimate conclusion ("likely [to] harbor citrus canker bacteria") based upon an opinion ("proximity to infected

plants") grounded upon unspecified facts and circumstances. This deficiency is fatal to the rule's validity.

80. The probable contact clause contains greater detail but is likewise defective. It says that the Department may consider a plant "exposed" if the plant has probably come into contact with a possibly contaminated person or thing. The problem with this provision is that it is vague and leaves too much unsaid; it fails to set forth facts and circumstances upon which the Department will base determinations of probable contact and possible contamination. It does not, in short, "specify[] facts and circumstances that, if present, would require the destruction of plants," as required by Section 581.184(2), Florida Statutes.

81. In view of these flaws in the definition of "exposed," it is evident that, while the Department has announced in Rule 5B-58.001(5)(a) its intent and power to destroy potentially all trees that are not visibly affected by citrus canker bacteria, it has failed to specify the facts and circumstances under which it will remove such trees, despite a clear legislative directive to articulate those facts and circumstances, precisely and in detail, in its rules. Instead of submitting itself to pre-determined guidelines of its own making, as directed by the legislature, the Department has promulgated a rule that, with regard to "exposed" trees, retains maximum——indeed, essentially

unfettered——discretion. The plainest and most egregious example of this is the proximity clause. Nothing in the existing rules would prevent the Department from declaring that the entire state of Florida is exposed to citrus canker because of proximity to infected plants and thereupon commencing to destroy every fruit tree in the state.

82. As the plain language of Section 581.184(2), Florida Statutes, makes clear, the legislature intended and expected a more explicit and informative rule. Contrary to the legislative directive, the rule's definition of "exposed," as well as the fourth sentence of Rule 5B-58.001(5)(a), Florida Administrative Code, which expresses the Department's intent to destroy some or all "exposed" trees (but only after listening to the Risk Assessment Group's non-binding recommendations), do nothing whatsoever to "flesh out" Section 581.031(17), Florida Statutes. At best, the Department has merely restated its statutory duty to oversee the destruction of plants "located in an area which may be suspected of being infested or infected due to its proximity to a known infestation" or "reasonably exposed to infestation." Id. This is inadequate.[23]

83. Reinforcing these conclusions is an examination of the citrus canker rules that were in effect at the time the legislature enacted the law that is now codified at Section 581.184(2), Florida Statutes. As it existed in mid-1986,

Chapter 5B-49, Florida Administrative Code, was far more detailed and explicit regarding the facts and circumstances under which plants would be destroyed than is the present rule. See, e.g., Rules 5B-49.09 (provisions for eradication of citrus canker); 5B-49.10 (requirements for greenhouses, slathouses, shadehouses or bench-growing facilities); 5B-49.11 (requirements for ornamental nurseries, dooryard citrus nurseries, stock dealers or agents); 5B-49.13 (requirements for public and private properties not considered to be commercial citrus groves, nurseries, stock dealers, or agent establishments), Florida Administrative Code Annotated, Vol. 2, pp. 167-69 (1985 Supp.) These rules even contained a precursor to the unpromulgated 1900-foot radius policy now under attack: a 125-foot radius rule that applied under certain circumstances. See, e.g., Rules 5B-49.09(2)(b); 5B-49.11(1), Florida Administrative Code Annotated, Vol. 2, pp. 167-68 (1985 Supp.).

84. These relatively detailed citrus canker rules were already in effect when the legislature directed the Department to make rules specifying facts and circumstances that would require the destruction of plants. From that it can only be presumed that the legislature wanted more detailed rules on the subject of plant destruction. By any reasonable measure, however, existing Chapter 5B-58, Florida Administrative Code, is less detailed and explicit than the citrus canker rules which

the legislature, by directing the adoption of specific rules, implicitly deemed imprecise. This confirms the conclusion that existing Rule 5B-58.001, as it relates to the destruction of "exposed" plants, fails to satisfy the legislative directive to make particular citrus canker rules.

85. The existing rule is not saved by its enumeration of two dozen or so "variables" that the Risk Assessment Group is supposed to consider in formulating its non-binding recommendation to the Department whether to remove "exposed" trees. Rule 5B-58.001(5)(a) states, in pertinent part:

> In developing [its] recommendations, the Citrus Canker Risk Assessment Group will take the following variables into consideration: property type, cultivar, cultivar susceptibility, tree size and age, size of block, tree spacing, horticultural condition, tree distribution, tree density, weather events, wind breaks, movement factors, disease strain, exposure, infection age, infection distribution, disease incidence, Asian citrus leafminer damage, survey access, security of property, sanitation, management practices, closeness of other host properties, and closeness of other infected properties.

These "variables" provide at most a patina of precision. On inspection, it is clear that the rule merely sets forth a laundry list of potentially relevant factors that conveys little more information than if the rule had simply stated that the Risk Assessment Group will consider all pertinent data.

86. Moreover, Section 581.184(2) requires dispositive "facts and circumstances," not "variables" for consideration. Listing two dozen unweighted factors for an agency-appointed committee to consider in making a non-binding recommendation is a far cry from "specifying facts and circumstances that, if present, would require the destruction of plants for purposes of eradicating . . . citrus canker[.]" Section 581.184(2), Florida Statutes.

87. Finally, and most important, the Risk Assessment Group is not the Department, and its recommendations, according to Rule 5B-58.001(5)(a), need only be "take[n] into consideration" by the Department in making a decision whether to order the destruction of an "exposed" tree. The Rule pointedly does not require the Department to consider the "variables" (or any other objective criteria) either in determining whether a tree is "exposed" or in deciding to remove an "exposed" tree.

88. The bottom line is that the risk assessment provisions and the definition of "exposed," taken together, do not communicate the information required by Section 581.184(2), Florida Statutes, with anything approaching the intended clarity, precision, and detail. In connection with "exposed" trees (a set that potentially includes all citrus trees in the state that are not visibly affected by citrus canker bacteria), the Department has failed to implement its citrus canker

eradication program according to the kind of specific rules that the legislature intended be in place. For that reason, the enabling statutes do not authorize either Rule 5B-58.001(1)(h) or the fourth sentence of Rule 5B-58.001(5)(a), Florida Administrative Code, which implements the "exposed" definition.[24] Accordingly, these provisions are invalid exercises of delegated legislative authority. See Section 120.52(8)(b), Florida Statutes.

89. In addition to being unauthorized by the enabling statutes, the fourth sentence of Rule 5B-58.001(5)(a), Florida Administrative Code, is invalid for an independent reason: it "fails to establish adequate standards for agency decisions, [and] vests unbridled discretion in the agency." Section 120.52(8)(d), Florida Statutes.

90. The leading case on rule-engendered standardless discretion is Cortes v. State Board of Regents, 655 So. 2d 132 (Fla. 1st DCA 1995). There, a rule was challenged that granted university presidents not only (1) the exclusive power to decide, upon being presented with a petition signed by at least a majority of the student body requesting such action, whether to authorize the collection of fees for funding "public interest research groups," but also (2) the "sole discretion" to determine by which of two rule-prescribed means students would be required to assent to the fee, if approved: either a

positive checkoff or a negative checkoff on the registration card. Id. at 135. The court held that the enabling statutes authorized the rule to the extent it empowered university presidents to decide, in the first instance, whether to allow the collection of such student fees at their respective institutions. Id. at 140.

91. The court reached a different conclusion, however, regarding the rule's grant of unbridled presidential discretion to decide between the two different methods of obtaining students' consent to pay the fee. The court's analysis is instructive and warrants a lengthy quotation:

> In one respect, however, the challenged rule itself confers unguided discretion on university presidents that they did not have before the rule was promulgated, viz., the "sole discretion" to decide between a "positive checkoff" and a "negative checkoff." While student contributions are no novelty as a source of funds for student activities, the rule calls certain mechanics into being. Until the rule was adopted, university presidents had no need to choose between "positive" and "negative checkoffs," which [the rule] now requires, under circumstances specified in the rule.
>
> An administrative rule which creates discretion not articulated in the statute it implements must specify the basis on which the discretion is to be exercised. Otherwise the "lack of . . . standards . . . for the exercise of discretion vested under the . . . rule renders it incapable of understanding . . . and incapable of application in a manner susceptible of review." Staten v. Couch, 507 So. 2d 702

> (Fla. 1st DCA 1987). Because a reviewing "court shall not substitute its judgment for that of the agency on an issue of discretion," § 120.68(12), Fla. Stat. (1993), an agency rule that confers standardless discretion insulates agency action from judicial scrutiny. By statute, a rule or part of a rule which "fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency," § 120.52(8)(d), Fla. Stat. (1983), is invalid.
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> * * *
>
> [T]he rule [under review] "fails to establish adequate standards for agency decisions," . . . for or against employing the "negative checkoff," i.e., collecting "donations" from registering students unless they expressly decline to contribute. In this one respect, [the challenged rule] itself "vests unbridled discretion in the agency."
>
> [The challenged rule] is devoid of any standards purporting to guide this exercise of discretion. No such standards are implicit in the statutes implemented. Even students who have signed a petition will not necessarily be alerted that a "negative checkoff" choice must be made when they register for classes. [The rule] supplies no principled basis on which a university president can decide whether a registering student's failure to indicate otherwise should be taken as a decision to contribute to the funding of a public interest research organization. No statute creates the "negative checkoff" device or requires that it be sprung on entering freshmen or other unwary registrants.

Id. at 138-39; see also Florida Public Service Commission v. Florida Waterworks Association, 731 So. 2d 836, 843 (Fla. 1st

DCA 1999)(distinguishing Cortes and upholding proposed rule against attack because, unlike the rule in Cortes, it did not create discretion not articulated in the enabling statute). In Cortes, the court invalidated the negative checkoff option, and thereby effectively eliminated the rule's unlawful delegation of unfettered discretion. Cortes, 655 So. 2d at 140.

92. Like the rule at issue in Cortes, sentence number four in Rule 5B-58.001(5)(a), Florida Administrative Code, confers unguided discretion on the Department that it did not have before the rule was promulgated, namely, the discretion to accept or reject the Risk Assessment Group's recommendations concerning whether to destroy "exposed" trees. Similar to the negative checkoff device, no statute creates the Risk Assessment Group or requires the Department to consider that committee's recommendations. Just as the board in Cortez created by rule discretion for university presidents that was not articulated in the enabling statute, so too the Department, having created the Risk Assessment Group and devised a non-binding risk assessment process, has conferred upon itself a new and exclusively rule-based discretionary power.

93. Consequently, to be valid, the Department's Rule must specify the bases upon which the newly-created discretion is to be exercised. See Section 120,52(8)(d), Florida Statutes. The existing Rule is devoid of standards purporting to guide this

exercise of discretion, however, and no standards are implicit in the enabling statutes. The Rule supplies no principled basis on which the Department can decide, for example, whether to override the Risk Assessment Group's recommendation that a tree be spared or, conversely, to reject its advice that a tree be cut down. The fourth sentence of Rule 5B-58.001(5)(a) must be invalidated because it confers standardless discretion and thereby unlawfully insulates the Department from judicial scrutiny. Cortes, 655 So. 2d at 138.

94. This unlawful grant of discretion is particularly troublesome in light of the context in which it is exercised. The Department wields its power to destroy trees in furtherance of the Eradication Program pursuant to immediate final orders premised on the conclusion that the targeted trees are a source of immediate public danger. Because the exigency of the situation precludes the development of a traditional trial-level record, appellate review is somewhat limited, as the first district explained:

> When an agency enters an immediate final order as a result of a determination that there exists an immediate danger to the public health, safety, or welfare, [appellate] review will determine whether the order recites with particularity the facts underlying such finding.

Denney v. Conner, 462 So. 2d 534, 535-36 (Fla. 1st DCA 1985); see also Nordmann v. Florida Department of Agriculture and

Consumer Services, 473 So. 2d 278, 279 (Fla. 5th DCA 1985)("Appellate review centers on the particularity with which the order recites the factual findings"). Plainly, the Department is shielded from searching judicial review simply by virtue of the type of decision it is making——and that shield would remain difficult to penetrate even if the rule were filled with adequate standards to guide the agency's discretion. The existing Rule's conspicuous failure to specify the bases upon which the Department's extraordinarily broad discretion in these matters is to be exercised, however, results, intolerably, in the Department being doubly insulated from judicial scrutiny, to the point of being practically immune.

95. The absence of meaningful appellate review in these circumstances led an obviously fed-up panel of the Third District Court of Appeal to vent its frustration recently in Markus v. Florida Department of Agriculture and Consumer Services, 785 So. 2d 595 (Fla. 3d DCA 2001), a homeowners' appeal from an immediate final order pursuant to which their three fruit trees were destroyed. In a seething opinion, the court wrote:

> Property owners as well as judicial tribunals are struggling with the issue of how and why the Department of Agriculture embarked on its dogged obliteration of the healthy back (or front) yard citrus tree. The frustrations of challenging this policy, either in a Chapter 120 proceeding or before

> this court, are staggering. Both infected and condemned trees are removed and ground into dust before any meaningful action can be taken by the property owner. The "final agency order" is nothing but a "Dear Resident" form from the Department of Agriculture. A "record on appeal" is an oxymoron. There is no record. Hence there is no meaningful appeal. We find that situation unacceptable as a mater of law, policy, and principle, yet we must affirm.

Id. at 596 (emphasis added).

96. Requiring the Department to promulgate rules setting forth principled grounds upon which to exercise its considerable discretion whether to follow the Risk Assessment Group's recommendations will provide meaningful opportunities, through the rulemaking and rule challenge procedures, for public comment and input, legislative oversight, and, ultimately, judicial scrutiny, based on a complete evidentiary record developed in a Chapter 120 proceeding, of the Department's heretofore hidden factual and policy premises. Such vehicles for accountability are the very least the law should (and does) demand of an executive branch agency that has been vested with enormous discretion to implement a program capable of summarily depriving large numbers of citizens of their private property.

The Rule-By-Definition

97. The burden of proof is on the party seeking to prove the affirmative of an issue unless a statute provides otherwise. Florida Department of Transportation v. J.W.C. Company, Inc.,

396 So. 2d 778, 786-87 (Fla. 1st DCA 1981). In a proceeding under Section 120.56(4) to determine a violation of Section 120.54(1)(a), Florida Statutes, therefore, the burden is on the petitioner to establish by a preponderance of evidence: (1) the substance of the agency statement; (2) facts sufficient to show that the statement constitutes a rule-by-definition; and (3) that the agency has not adopted the statement according to the rulemaking procedures. Section 120.56(4)(a), Florida Statutes. If the petitioner meets its burden, then the agency must carry the burden of proving that rulemaking is not feasible and practicable as provided in Section 120.54(1)(a). Section 120.56(4)(b), Florida Statutes.

98. Section 120.52(15), Florida Statutes, defines the term "rule" to mean "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule."

99. A statement is a rule if it has the effect of a rule regardless whether the agency calls it a rule. In determining whether a statement meets the statutory definition of a rule, the important question is: What consequences does this

statement cause within its field of operation? As the Court of Appeal, First District, explained, the

> breadth of the definition in Section 120.52(1[5]) indicates that the legislature intended the term to cover a great variety of agency statements regardless of how the agency designates them. Any agency statement is a rule if it "purports in and of itself to create certain rights and adversely affect others," [State Department of Administration v.] Stevens, 344 So. 2d [290,] 296 [(Fla. 1st DCA 1977)], or serves "by [its] own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law." McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 581 (Fla. 1st DCA 1977).

State Department of Administration v. Harvey, 356 So. 2d 323, 325 (Fla. 1st DCA 1978); see also Amos v. Department of Health and Rehabilitative Services, 444 So. 2d 43, 46 (Fla. 1st DCA 1983). Because the focus is on effect rather than form, a statement need not be in writing to be a rule-by-definition. See Department of Highway Safety and Motor Vehicles v. Schluter, 705 So. 2d 81, 84 (Fla. 1st DCA 1998).

100. Given the circumstances of this case, it is instructive to take special note that the definition of “rule” expressly includes statements of general applicability that implement or interpret law. An agency’s interpretation of a statute that gives the statute a meaning not readily apparent from its literal reading and purports to create rights, require

compliance, or otherwise have the direct and consistent effect of law, is a rule. See Beverly Enterprises-Florida, Inc. v. Department of Health and Rehabilitative Services, 573 So. 2d 19, 22 (Fla. 1st DCA 1990); St. Francis Hospital, Inc. v. Department of Health and Rehabilitative Services, 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989).

101. As set forth in the Findings of Fact, Petitioners have proved, by the required quantum of evidence, that the Department adopted and has implemented a statement of general applicability which has been denominated herein, for convenience, the PRZ Policy.[25]

102. The PRZ Policy is, ironically, the kind of rule that Section 581.184(2), Florida Statutes, requires, because (unlike the Department's adopted rules) it specifies facts and circumstances that, if present, would require the destruction of asymptomatic plants for purposes of eradicating citrus canker. That the PRZ Policy includes an exception under which some trees within the Presumptive Removal Zone might be spared does not diminish its general applicability or dampen its effect, which is that of a rule. Rules often have exceptions; there is nothing novel about that, just as there is nothing extraordinary about rule provisions, such as the PRZ Policy's exception, that authorize a discretionary act.[26]

103. In addition, the PRZ Policy implements, and constitutes the Department's interpretation of, Section 581.031(17), Florida Statutes, bringing rigor to the inexact statutory phrase: "area which may be suspected of being infested or infected due to its proximity to a known infestation." The wisdom of this interpretation is not presently before the undersigned. The unavoidable conclusion regarding this interpretation, however, is that it gives the statute a meaning which is not readily apparent from a literal reading thereof and, moreover, requires compliance, adversely affects the rights of property owners, and has the direct and consistent effect of law.

104. In sum, the PRZ Policy falls squarely within the meaning of the term "rule" as defined in Section 120.52(1); it is, put simply, a rule-by-definition.

105. According to Section 120.54(1)(a), “[r]ulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 [such as the PRZ Policy] shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.” (Emphasis added).

106. Once Petitioners met their obligation at hearing to prove that the challenged statement is a rule-by-definition, it became the Department’s burden to prove that adopting the PRZ

Policy as a rule would have been either unfeasible or impracticable. Section 120.56(4)(b), Florida Statutes.

107. The Department failed to rebut by a preponderance of evidence the presumption, established in Section 120.54(1)(a)2., Florida Statutes, that rulemaking is practicable. Accordingly, it has been presumed that rulemaking was in fact practicable as of January 1, 2000, when the PRZ Policy took effect.

108. In contrast, the Department did prove that it is currently using the rulemaking process expeditiously and in good faith to adopt rules that articulate the PRZ Policy in part, as discussed below. Thus, in accordance with Section 120.54(1)(a)1.c., Florida Statutes, the Department arguably rebutted the statutory prescription that rulemaking "shall be presumed feasible."

109. The Proposed Amendments to Chapter 5B-58, Florida Administrative Code, effectively incorporate so much of the PRZ Policy as deems trees within a 1900-foot radius of an infected tree to be "exposed" (or, in the proposed rule's terminology, "exposed to infection") and hence subject to destruction.

110. The Proposed Amendments do not, however, address that part of the PRZ Policy which requires the destruction of all trees located within the Presumptive Removal Zone except those designated by the Commissioner as posing a less-than-imminent danger. Indeed, the invalid fourth sentence of Rule 5B-

58.001(5) would subsist substantially intact, save only for the substitution of the term "exposed to infection" for "exposed," after adoption of the Proposed Amendments. Thus, the Proposed Amendments are silent on a crucial aspect of the PRZ Policy.

111. To rebut the presumption of feasibility pursuant to Section 120.54(1)(a)1.c., Florida Statutes, an agency must show that it "is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement." Whether an agency that it is actively attempting to adopt rules which address some portion of a rule-by-definition, as the Department is doing, should be found to have rebutted the presumption of feasibility is the question.

112. Guidance on this issue is found in a closely related statutory provision, Section 120.56(4)(e), Florida Statutes, which provides in relevant part:

> Prior to entry of a final order that all or part of an agency statement violates s. 120.54(1)(a), if an agency publishes, pursuant to s. 120.54(3)(a), proposed rules which address the statement and proceeds expeditiously and in good faith to adopt rules which address the statement, the agency shall be permitted to rely upon the statement <u>or a substantially similar statement</u> as a basis for agency action if the statement meets the requirements of s. 120.57(1)(e).

(Emphasis added). The "substantially similar" statement upon which an agency in such circumstances is permitted to rely

should be found, presumably, within its proposed rules. (Why should the agency be allowed to apply a third variation on the same theme?) Sections 120.54(1)(a)1.c. and 120.56(4)(e), being in pari materia, should be construed together to achieve a unified legislative purpose. Accordingly, it is concluded that, for a proposed rule to "address" an agency statement for purposes of Section 120.54(1)(a)1.c., it must be, if not identical, at least "substantially similar" to the statement.

113. The proposed revisions to Chapter 5B-58.001, Florida Administrative Code, do not, taken as a whole, constitute a statement "substantially similar" to the PRZ Policy. The missing component——which specifies the requirement that trees in the Presumptive Removal Zone be destroyed unless exempted by the Commissioner's discretionary act——is fundamental to the rule-by-definition. Without it, the Proposed Amendments fail to articulate——to "address"——the Department's generally applicable policy.

114. As a result, the Department has failed to rebut the presumption of feasibility.

115. The outcome would be the same, however, even if the Department were given the benefit of a decision that its proposed rule revisions "address" the challenged agency statement for purposes of Section 120.54(1)(a)1.c., Florida Statutes.

116. The reason is that, in this alternative ruling, all the Department has done is erase the presumption of feasibility to which Petitioners otherwise would be entitled in aid of their proof. Evidence that an agency is currently engaged in rulemaking with regard to a statement is not, without more than the Department showed, the equivalent of proof that the agency began the rulemaking process as soon as feasible.[27] And an agency that belatedly has commenced rulemaking on a statement of general applicability is no less in violation of Section 120.54(1)(a), Florida Statutes, than one that has not begun at all——although the consequences of a violation may be less severe for the dilatory, as opposed to the recalcitrant, agency. See Section 120.54(4)(e), Florida Statutes. Naturally, however, without the benefit of the presumption, the burden returns to the challenger to establish that the agency failed to timely (i.e. as soon as feasible) begin to adopt the statement as a rule.[28]

117. In this case, the evidence showed that the Department feasibly could have started to adopt the PRZ Policy as a rule as early as December 1999, if not sooner. It is concluded that rulemaking was feasible as of, and not later than, January 1, 2000, the date upon which the PRZ Policy took effect.[29]

118. In short, the Department's current rulemaking efforts are not only too little for it to benefit from Section

120.54(1)(a)1.c., Florida Statutes, but also come too late to avoid a finding that Section 120.54(1)(a) has been violated. Consequently, it is concluded that the Department has violated Section 120.54(1)(a), Florida Statutes, in connection with the PRZ Policy.

Attorneys' Fees and Costs

119. Section 120.595(4)(a), Florida Statutes, provides that "[u]pon entry of a final order that all or part of an agency statement violates s. 120.54(1)(a), the administrative law judge shall award reasonable costs and reasonable attorneys' fees to the petitioner, unless the agency demonstrates that the statement is required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds."

120. The Department has not proved the applicability of an exception to the mandate that attorneys' fees and costs be awarded to the successful petitioner in a Section 120.56(4) proceeding. Accordingly, it is hereby determined that Petitioners are entitled to recover a reasonable sum for the attorneys' fees and costs they have incurred in the prosecution of this action. The amount of the award shall be determined by separate order.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Rule 5B-58.001(h), Florida Administrative Code, which defines the term "exposed," together with the interrelated fourth sentence of Rule 5B-58.001(5)(a), which puts the term "exposed" to use, collectively constitute an invalid exercise of delegated legislative authority.

It is further ORDERED that the following policy statement of the Department is a rule-by-definition that has not been adopted under, and therefore violates, Section 120.54, Florida Statutes:

> All trees located within a 1900-foot radius (the "Presumptive Removal Zone") of any infected tree shall be removed; provided, however, that the Commissioner, after taking into consideration the recommendations of the Risk Assessment Group, may determine that some or all of the trees within the Presumptive Removal Zone need not be destroyed if such tree(s), which will be specifically identified by the Department, do not pose an imminent danger in the spread of the citrus canker disease.

Jurisdiction is retained to conduct further proceedings as necessary to award attorneys' fees and costs to Petitioners pursuant to Section 120.595(4)(a), Florida Statutes.

DONE AND ORDERED this 31st day of July, 2001, in Tallahassee, Leon County, Florida.

JOHN G. VAN LANINGHAM
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of July, 2001.

ENDNOTES

[1]/ While there are other strains of citrus canker, the Eradication Program is concerned only with Asian strain citrus canker. Unless otherwise indicated, all further references in this Final Order to citrus canker are to Asian strain citrus canker.

[2]/ At this time, the Risk Assessment Group had not yet been denominated as such by rule; that would occur later, in November 2000. See Florida Administrative Weekly, Vol. 26, No. 45, at pg. 5281 (Nov. 9, 2000). In 1999, the group was being referred to as the Citrus Canker Technical Advisory Task Force. Because the task force became the Risk Assessment Group, the text uses the present-day terminology to avoid confusion.

[3]/ According to the rule, the Risk Assessment Group is "[a] group of scientists and regulatory officials with knowledge of citrus canker disease and its eradication appointed by the director to make biologically sound recommendations for the control and eradication of citrus canker from the state. Risk assessments are science-based evaluations. The risk assessment group provides scientific opinion and recommendations on control and eradication strategies and other issues upon request for assistance from the Citrus Canker Eradication Program." Rule 5B-58.001(1)(e), Florida Administrative Code.

[4]/ The legislature clearly overstated the holding of Sapp Farms, which does not, by any stretch of the legal imagination, stand for the proposition attributed to it. Nevertheless, the legislature's "finding" sheds light on the Department's policy and its fundamentally mandatory nature, for no one, including Petitioners, disagrees that trees which are "diseased and have no value" must be removed. Of course, whether trees located within the 1900-foot radius are "necessarily" diseased and hence worthless is a hotly contested issue.

[5]/ PRZ is an acronym for Presumptive Removal Zone.

[6]/ Section 581.184(1)(b), Florida Statutes, defines the term "exposed to infection" to mean "citrus trees harboring the citrus canker bacteria due to their proximity to infected citrus trees, and which do not yet exhibit visible symptoms of the disease but which will develop symptoms over time, at which point such trees will have infected other citrus trees."

[7]/ All populated areas of Broward and Miami-Dade Counties fall within the Department's quarantine.

[8]/ Section 570.07(23), Florida Statutes, provides the Department with authority "[t]o adopt rules pursuant to ss. 120.536(1) and 120.54 to implement provisions of law conferring duties upon it."

[9]/ See Chapter 86-128, Laws of Florida.

[10]/ As originally enacted, Section 581.184, Florida Statutes, consisted of a single, unnumbered paragraph. See Section 581.184, Florida Statutes (1987). That original paragraph, as passed in 1986, now comprises subsection (2) of present-day Section 581.184.

[11]/ Denney v. Conner, 462 So. 2d 534, 537 (Fla. 1st DCA 1985).

[12]/ Indeed, it may be observed that although Section 581.184(2) clearly authorizes and requires the adoption of rules relating to the destruction of plants for purposes of controlling citrus canker, it does not actually delegate the authority to destroy plants. That particular power and duty is conferred by Section 581.031(17); the rules that Section 581.184(2) authorizes and requires implement and interpret (and, therefore, govern the exercise of) the powers conferred in Section 581.031(17).

[13]/ This statute, the Fourth District Court of Appeal recently observed, confers upon the Department "colorable statutory authority" to adopt the "1900 foot buffer zone policy" that is the concern of Petitioners' Section 120.56(4) challenge. Florida Department of Agriculture and Consumer Services v. City of Pompano Beach, 2001 WL 770096, *5 (Fla. 4th DCA July 11, 2001). The court expressly declined to reach the question whether the 1900-foot policy constitutes an unpromulgated, and hence illegal, rule-by-definition. Id. at *7.

[14]/ Committee Substitute for House Bill No. 1226 (Chapter 86-128, Laws of Florida) was approved by the Governor on June 20, 1986, and took effect July 1, 1986.

[15]/ See, e.g., Mehl v. State, 632 So. 2d 593, 595 (Fla. 1993)(separate statutory provisions that are in pari materia should be construed to express a unified legislative purpose); Lincoln v. Florida Parole Commission, 643 So. 2d 668, 671 (Fla. 1st DCA 1994)(statutes on same subject and having same general purpose should be construed in pari materia).

[16]/ The legislature did not limit the Department's wide discretion to decide upon and define the facts and circumstances that, if present, would require the destruction of plants. Indeed, the Department plainly was expected to exercise its broad discretion in making the policy choices necessary to formulate the required rules. At the same time, the legislature must have intended that the resulting rules, upon taking effect, would supplant the Department's discretion within the field of their operation. Needless to say, the Department's discretion to require the destruction of plants under circumstances not contemplated by a rule would subsist; however, as in all cases where an agency makes a decision affecting somebody's substantial interests based on non-rule policies, the Department (if challenged) would need to prove the accuracy of its factual premises and rationality of its policy choices. Compare McDonald v. Department of Banking and Finance, 346 So. 2d 569, 583 (Fla. 1st DCA 1977)(as far as they go, rules displace proof and policy debates in 120.57 proceedings), with Anheuser-Busch, Inc. v. Department of Business Regulation, 393 So. 2d 1177, 1182 (Fla. 1st DCA 1981)(disadvantages of policymaking by adjudication include agency's burden of proving every factual premise and policy choice undergirding its order).

[17]/ The volume that resides in the collection of the Florida State University Law Library is date-stamped “received” on March 13, 1986.

[18]/ And, indeed, the Department responded to the legislature's rulemaking directive as would be expected: by adopting clearer and more comprehensive regulations. See Paragraph 10, supra.

[19]/ The rule tips the agency's hand by describing the decision as being "to remove exposed trees"——not whether to remove exposed trees, which would have showed fewer cards. In this way, the rule subtly but unmistakably conveys the impression that destruction is the desired and almost certain fate of "exposed" trees. If this effect is doubted, consider whether the rule would have a different connotation if the word "spare" had been used in the place of "remove," so that the sentence would read: The decision to spare exposed trees will take into consideration the recommendations of the Risk Assessment Group.

[20]/ A witness can observe a car run a red light at a high rate of speed; he cannot, however, see a "failure to exercise reasonable care." Whether speeding through a red light is determined ultimately to be such depends on the meaning of "reasonable care" and perhaps other circumstances as well. (If the car is an ambulance racing to the hospital with siren blaring, for example, it may not be unreasonable for the driver to run the red light.)

[21]/ The term “explicit” means “fully revealed or expressed without vagueness, implication, or ambiguity: leaving no question as to meaning or intent <explicit instructions>.” See Merriam-Webster's.

[22]/ Obviously, the distance between two plants may be observed and measured; it is a fact. But whether the perceived or measured distance is sufficiently close to be considered "in proximity" for purposes of the "exposed" definition depends on other information (not expressed in the Rule) besides measurable distance.

[23]/ The legislature, of course, would have had no reason to direct the Department to make a rule stating that it might remove trees “because of proximity to infected plants” or "probable contact" with contaminated articles; the statute already said as much.

[24]/ Again, the fourth sentence of Rule 5B-58.001(5)(a), Florida Administrative Code, reads: "The decision to remove exposed trees will take into consideration the recommendations of the Citrus Canker Risk Assessment Group."

[25]/ Although the evidence at hearing showed that the Department's policy statement regarding the 1900-foot-radius removal zone is, in fact, qualified by an extremely narrow and rarely invoked exception which Petitioners did not describe in their Amended Petition, this case is clearly distinguishable from, and hence is not controlled by, Aloha Utilities, Inc. v. Public Service Commission, 723 So. 2d 919 (Fla. 1st DCA 1999). There, the court held that allegations attacking statements of procedure "unknown" to the petitioners had failed to meet the threshold pleading requirements necessary to put the agency on notice regarding what statements were under challenge as unadopted rules. Id. at 921. Here, in stark contrast, Petitioners described the alleged rule-by-definition in their Amended Petition in terms that have been used publicly by the Department itself, not to mention the courts. Needless to say, the Department was adequately apprised of the content of the statement that Petitioners have challenged.

[26]/ Whether the PRZ Policy, if proposed or adopted formally as a rule, would be invalid for conferring unbridled discretion or for lack of adequate standards, see Section 120.52(8)(d), Florida Statutes, is not a question currently before the undersigned.

[27]/ As should be obvious, the fact that an agency is now making rules does not as a matter of reason or logic suggest, much less compel, the conclusion that rulemaking could not feasibly have started any sooner.

[28]/ Although the legislature did not specify in Section 120.54(1)(a)1.c., Florida Statutes, the point in time when rulemaking is not presumed feasible upon proof of current rulemaking efforts, the implicit answer is arrived at by deductive reasoning. First, the legislature plainly did not mean that current rulemaking proves present infeasibility, for that would be patently illogical. Second, it is likewise not reasonable to conclude that the legislature meant for current rulemaking efforts to be deemed proof that rulemaking was infeasible up to the point when the agency started to make rules, because that would create a reverse presumption, namely, that current rulemaking requires a finding that the agency

commenced the process as soon as feasible. Not only does such a presumption defy reason and logic (because the presumed fact does not follow from the basic fact), but also it is to be assumed that if the legislature had intended to make current rulemaking a complete defense to a Section 120.56(4) proceeding, it would simply have said so directly and not through the circumlocution of a presumption-defeating reverse presumption. The remaining interpretation, in contrast to the other possibilities, is both reasonable and sensible: If the agency is currently making rules that address a challenged statement, then it will not be presumed (as it otherwise would be) that the agency failed to commence rulemaking as soon as feasible. Rather, in that event, the challenger will be required to prove the agency's unlawful delay, as though the presumption of feasibility had never existed.

[29]/ This case is distinguishable from St. Johns Water Management District v. Modern, Inc., 784 So. 2d 464 (Fla. 1st DCA 2001), in which the court reversed a finding that the agency had failed to meet the "good faith" requirement of Section 120.54(1)(a)1.c., Florida Statutes, because the Department, though currently making rules in good faith, did not, in fact, begin doing so as soon as feasible, in violation of Section 120.54(1)(a). In its very brief opinion, the court in St. Johns did not discuss whether, much less hold that, current, good faith rulemaking creates a presumption (or compels the conclusion) that the agency started the process on time——an interpretation of Section 120.54(1)(a)1.c. that is untenable. See note 28, supra.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.