IN THE STATE OF FLORIDA
THIRD DISTRICT COURT OF APPEAL

FLORIDA KEYS CITIZEN COALITION, INC., and LAST STAND, INC.
Petitioners/Appellants,

vs.

FLORIDA ADMINISTRATION COMMISSION and CITY OF MARATHON, FLORIDA,
Respondents/Appellees,
and

DEPARTMENT OF COMMUNITY AFFAIRS,
Intervenor/Appellee.

FLORIDA KEYS CITIZENS COALITION, INC., and LAST STAND, INC.,
Petitioners/Appellants,

vs.

FLORIDA ADMINISTRATION COMMISSION and MONROE COUNTY,
Respondents/Appellees,
and

DEPARTMENT OF COMMUNITY AFFAIRS,
Intervenor/Appellee

Third DCA Case No. 3D05-1800
DOAH Case No. 04-2755RP
DOAH Case No. 04-2756RP

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STATEMENT OF THE CASE AND FACTS

A. Statement of the Case

This appeal is from a Final Order of the Division of Administrative Hearings upholding the Administration Commission's (Commission) proposed rules (Rules) which amend the Monroe County (Monroe Plan) and City of Marathon (Marathon Plan) Comprehensive Plans. Appellants challenge the Rules as invalid exercises of delegated legislative authority.

Introduction

The testimony of the following witnesses is referenced throughout this Brief:

a) James Quinn, Department of Community Affairs (Department)[1] Planner in charge of planning for the Keys.

b) Ken Metcalf, Community Program Administrator of the Department. (By deposition, in evidence as Comm./DCA Ex. 56)

c) Rebecca Jetton, Keys Field Representative of the Department.

Their testimony and that of other witnesses is referred to by the witnesses name and transcript Volume and page number.

Statement of the Facts

The rules make the latest in a series of amendments to the Monroe Plan, and the Marathon Plan, stemming from the initial application of Ch. 163, F.S. to the County in the early 1990s.

[1] The Department represented the Commission below.

Pet Ex. 36 @ 4. During this "second phase"[2] of planning for the Keys - "update[ing] the plan based on lessons learned in implementing the 1986 plan" - "the Commission identified the critical planning issues as:

- maintaining acceptable hurricane evacuation capability;

- retrofit[ting] existing development and provid[ing] new development with adequate wastewater and storm water facilities….;

- determine[ing] the carrying capacity of the Keys to withstand the impacts of additional land development and modify[ing] state and local plans, regulations and programs so that the carrying capacity is not exceeded;

- provid[ing] an adequate supply of affordable housing while maintaining acceptable hurricane evacuation and protecting the environment. R 592.

The Commission found the County's initial Plan out of compliance with Ch. 163[3], and entered into a compliance agreement with the County, requiring a rewrite of the Plan based upon a "carrying capacity" approach. Quinn Vol. 2 @ 139; DCA/ County Ex. 7 @ 8. The amended Plan was also found out of compliance and was the subject of an administrative hearing. A 1996

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[2] The first phase, in the mid-1980s, involved developing, adopting, and implementing the first comprehensive plans under the Area of Critical State Concern designation. "[S]everal major problems were not adequately addressed by the 1986 plan, including maintaining evacuation capability, water quality protection, sewage treatment, stormwater treatment, and community character." R 590-591.

[3] Ch. 163 requires plans to be "in compliance" with its standards, as set forth in S. 163.3184(1)(b), F.S.

Commission Final Order found the Plan out of compliance and the Commission then adopted by rule remedial plan amendments "necessary to amend the … Plan in order to bring it into compliance with [Ch. 163] and to make it consistent with the principles for guiding development as required by Chapter 380…."[4] related to hurricane evacuation, water quality and habitat loss. Quinn, Vol. 2 @ 140; Vol. 6 @ 687, 695-96; Mar. Ex. 4 @ 15 of 67; Pattison, Vol. 8 @ 1047. The amendments limited the total and annual number of new dwelling units that could be built based on the number of homes (and thus evacuating vehicles) there could be in the Keys while maintaining a maximum 24 hour evacuation time.[5] Because the health of the marine and terrestrial systems were also known limitations on development (but not as easily quantified as hurricane evacuation times), the amendments also conditioned each year's permit allocations

[4] Mar. Ex 4. @ 15-16 of 67 (Abbot et al. v. Admin. Comm., 1997 WL 1052490 (DOAH Final Order 1997). Remedial amendments are required to bring a plan into compliance with Ch. 163. Absent a change of circumstance or other justification, their subsequent repeal causes the Plan to fall out of compliance. The same is true if they require something to be done which is then not done. Quinn Vol. 6 @ 686-87.

[5] The 1996 Commission Order ruled that the amount of development allowed in the initial Plan was "excessive because of the inability ... to evacuate people in the event of a Category 3, 4, 5 hurricane and because the ability of the near shore waters and sea grasses to sustain development had been exceeded."(Mar. Ex. 4 @ 31 of 67).

on “substantial progress” on tasks in an annual Work Program[6], making such progress a condition precedent to maintaining the existing growth rate. Quinn Vol. 6 @ 698. They required that each year, the Commission “shall determine whether…

> substantial progress has been achieved toward accomplishing the tasks of the work program. If … substantial progress has not been made, the unit cap for new residential development shall[7] be reduced by at least 20 percent for the following year.” DCA Ex. 3; Quinn Vol. 2 @ 159, 179; Vol. 6 @ 698.

The Commission found a lack of "substantial progress" in 1999 and reduced the annual permit allocation by 20% and

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[6] The Commission’s 1997 Final Order said that "[t]he work program's requirements are aggressive, requiring critical improvement early in the work program." Mar. Ex. 4 @ 40 of 67 (para 180).

[7] 1997 Final Order interpreted this provision:

> "The number of permits authorized [annually] is … conditional."(Mar. Ex. 4 @ 32 of 67(para 122)).
>
> ***
>
> "If the … Commission determines that substantial progress has not been achieved, [it] is *required* to reduce the number of authorized residential permits … by *a minimum* of 20 percent.” Id. (para 124))(emphasis added).
>
> ***
>
> “Continued development ... is conditioned upon "substantial progress" being made in completing the Work Program.” Id. (para 172).
>
> ***
>
> If the Commission … **determines that substantial progress is not being made, Policy 101.2.13 *requires* that the residential unit cap be reduced by a minimum of 20% for the subsequent year.** Id. (para. 176)(emphasis added).

extended the five-year Work Program to seven years.[8] R 592-593. After Islamorada and Marathon incorporated, the current annual allocation of residential permits is 158 for Monroe County, and 24 for Marathon. R 601.

History of the Florida Keys ACSC

The Keys were originally designated an Area of Critical State Concern (ACSC) in the 1970s. §380.0552(3),F.S.[9] The Act adopts the "Principles for Guiding Development", which mandate protection of the natural environment and character of the Keys, acceptable water quality, adequate public facility capacity and services, adequate affordable housing, a sound economic base, protection of property rights, and adequate emergency and post-disaster planning to ensure public safety. R 590; §§ 380.0552(2) & (7), F.S. The ACSC designation is reviewed annually by the Commission, which has consistently determined that that it should remain.[10] The objectives of the "Principles" remain unmet. Quinn, Vol. 2 @ 125.[11]

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[8] This appeal challenges rules proposed based on the Commission's review of progress under Year Six of the Work Program.

[9] Quinn Vol. 2 @ 116.

[10] Quinn Vol. 2 @ 123-125.

[11] The designation is "to provide for an increased state role in decisions which have a statewide impact," Monroe County v. Ambrose, 867 So.2d 707 (Fla. 3d DCA 2003). Ambrose found that Ch. 380 and its implementing plans are "significant legislation and regulations designed and enacted for the purpose of

Because of the unique and compelling ecology of the Keys, its protections must exceed those of other parts of the state. Quinn Vol. 2 @ 127; Vol. 6 @ 680-681. As stated in the Commission's 1996 Order, the Keys' environment:

> "is unique in … the world. There are four National Wildlife Refuges …, 22 threatened and endangered species and a large variety of habitat types, and a 2,800-square-nautical-mile area of waters, and … a National Marine Sanctuary. The geography, geology, hydrology and biology of the … Keys is unique …. [The ACSC] designation was imposed ... because the … the Keys should not be developed in the same manner that other areas of Florida have been and are continuing to be developed. *** [T]he environment of the … Keys is the very essence of Monroe County's economic base. The uniqueness of the environment … and the current condition of the environment must be addressed in any growth management decision …."[12]

Harm to the Keys' environment and water quality[13] harms its economy.[14] "Tourism is the economic base of the Keys." "[T]he

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preserving our most precious lands." In 1987, this Court recognized the importance of the Keys by stating that "prior to its clearing the subject property … was a high quality, mature tropical hardwood hammock …, and represented a unique genealogy not found elsewhere in North America outside of the Everglades." Harbor Course Club, Inc. v. Dep't. of Comm. Aff., 510 So. 2d 915 (Fla 3rd DCA 1987). In 1995, the Supreme Court upheld a land-use ordinance enacted to protect the endangered Florida Key deer as constitutional, ruling that "the State has a legitimate interest in protecting the natural habitat of the Keys and most especially of the Key deer." Dep't. of Comm. Aff. v. Moorman, 664 So. 2d 930, 933 (Fla. 1995).

[12] Final Order No. ACC 95 035, 1995 Florida ENV Lexis 129, (Appendix A at page 25-26).

[13] Quinn Vol. 5 @ 575-578.

[14] Quinn Vol. 2 @ 131; Vol. 3 @ 292-93.

basis for the … Keys' tourism is a healthy natural environment that supports fishing, diving, water sports, boating, bird-watching habitat, visiting endangered species habitat, and other related activities". R 589-590, 655. "[T]he marine system in the Keys is dependent on clear water with low levels of nutrients. However, … improvements with wastewater treatment … have not kept pace with [population and tourism] growth, … result[ing] in a significant degradation of water quality...." MC Ex. 8 @ ES-1; Garret Vol. 15 @ 1987-1991. Nutrients from wastewater and storm water in the Keys are the major causes. MC Ex. 8 @ ES-1; Garret Vol. 15 @ 1987-1991, 1995[15]. The 1995 Commission Order found that "the near shore waters …

> "have exceeded their capacity to absorb additional nutrient loads as a result of the current wastewater treatment practices." DCA/ Monroe Ex. 8 @ 1-4; Quinn Vol. 2 @ 141; Garret Vol. 15 @ 1954.[16] (emphasis added)

The Commission amended the Plan to require a "no net nutrient increase" standard, now known as the nutrient credit requirement. DCA/Monroe Ex. 8 @ 1-4,ES-1. New development is allowed only to the extent that its nutrient input has been

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[15] Nutrients cause algae growth which reduces the ability of sunlight to reach the bottom, harming seagrass beds, and reducing water clarity. Garret Vol. 15 @ 1987-1991.

[16] Significantly decreasing the high level of nutrients in the waters of the Keys is required to improve water quality to acceptable levels. DCA/Monroe Ex. 8 at 6-1.

offset by a reduction in nutrient input elsewhere, for example as a result of treatment facility upgrades. R 602-603.

The Keys contain unique plants and animals found nowhere else,[17] and contain over 100 listed plants and animals with "endangered," "threatened" or "of special concern" status under state or federal law, a very high number compared to other areas of world. Kruer Vol. 7 @ 862. Among the endemic[18] species that occur are Key deer, birds, white-crowned pigeons, swallow-tailed butterflies, and rare orchids. Kruer Vol. 7 @ 867. Privately

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[17] The lack of freshwater in the lower Keys resulted in unique plants and animals. Sea level rises 4,000 to 6,000 years ago isolated the Keys from the mainland, resulting in the evolution of specially adapted wildlife. The limestone geology, lack of freezing temperatures and the surrounding salt water created unique tropical island plant communities. Kruer Vol. 7 @ 861-62. The predominant upland communities are Tropical Hardwood Hammocks, unique, highly diverse, assemblages of trees and plants which occur at higher elevations throughout the Keys. While typical dense Florida forests have five or ten different species of trees and shrubs, a Keys hardwood hammock has up to 50 different trees and shrubs. Hammocks are a mixture of temperate, tropical species with Caribbean origins that are unique and found nowhere else in the world. Kruer, Vol. 7 @ 862-864. Clearing the canopy for homes or roads allows sunlight to penetrate and dry out the hammock. Kruer Vol. 7 @ 866; Jetton Vol. 9 @ 194. The other major upland communities are Pinelands, which occur only on a few islands surrounding and including Big Pine Key in the lower keys. Kruer Vol. 7 @ 862. Pinelands consist of pine trees, slash pine, and a unique variety of slash pine, that is slow growing and very old. Kruer Vol. 7 @ 865. They require periodic fires to burn out invading exotic plants, trees and shrubs that would otherwise crowd out the pine trees and related vegetation. Kruer Vol. 7 @ 862-867.

[18] Endemic species are those that occur nowhere else. If they go extinct, that subspecies or species will cease to exist. Kruer Vol. 7 @ 863.

owned habitats in the Keys are important to publicly owned and preserved lands. Resident and migratory birds utilize both large already protected areas and small privately owned patches throughout the Keys.[19] These upland habitats directly impact the health and integrity of the marine system, as their vegetation prevents storm water, silt and sediments from polluting the near shore area. Juvenile fish grow up in near shore areas and shallow seagrass beds where they are protected from predators. Kruer Vol. 7 @ 868-70. More than 50% of hardwood hammocks and pinelands have been lost to development. Kruer Vol. 7 @ 872-73.

The Carrying Capacity Study

In 1996 the Commission amended the County Plan to require the completion and implementation of a study:

> "to determine the ability of the … ecosystem, …, to withstand all impacts of additional land development activities. The analysis shall be based upon the findings adopted by the … Commission on December 12, 1995, or more recent data that may become available in the course of the study, and shall be based upon the benchmarks of, and all adverse impacts to, the Keys land and water natural systems, in addition to the impact of nutrients on marine resources. The … analysis shall consider aesthetic, socioeconomic (including sustainable tourism), quality of life and community character issues, including the concentration of population, the amount of open space, diversity of habitats, and species richness. The analysis shall reflect the interconnected nature of the … natural systems, but may consider and analyze the carrying capacity of specific islands or groups of

[19] Kruer Vol. 7 @ 952-953.

islands and specific ecosystems or habitats, including distinct parts of the Keys' marine system."[20]

By the end of Year Six of the Work Program (July 15, 2003)[21], the Plan must be amended to implement the Study[22] through, among other things, the "adoption of all necessary…

> "plan amendments to establish a rate of growth and a set of development standards that ensure that any and all new development does not exceed the carrying capacity of the … environmental and marine system to accommodate additional impacts...." Mar. Ex. 4 @ 44-45 of 67(emphasis added); Quinn Vol. 3 @ 254- 256.

Required plan amendments were also to "include a:

> "review of the ... Future Land Use Map series and changes to the map series and the … densities authorized … based upon the natural character of the land and natural resources that would be impacted by the currently authorized land uses, densities and intensities." Mar. Ex. 4 @ 44-45 of 67 (emphasis added); Quinn Vol. 3 @ 254- 256.

The Study took six years and cost six million dollars. After a formal peer review, it was completed in September 2002 and made the following findings:

a. "Development in the … Keys has surpassed the capacity of the upland habitats to withstand further development."[23]

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[20] Mar. Ex. 4 @ 44-45 of 67 (emphasis added).

[21] Another separate Year Six task was to "strengthen the protection of terrestrial habitat...." (DCA Ex 3).

[22] Implementing the Study is "at the top of the list" of importance to the work program. Quinn Vol. 3 @ 265.

[23] Originally, Keys hammocks were one continuous, long hammock, but about 50% of the upland habitats have been decimated or replaced by development, such that hammocks have been fragmented

b. "*Any* further encroachment into areas dominated by native vegetation ... would exacerbate habitat loss and fragmentation."
c. "The Lower Keys marsh rabbit and the silver rice rat, are highly restricted and likely could not withstand further habitat loss without facing extinction."
d. "Development …has surpassed the capacity of several protected species to withstand the effects of further development activities."
e. "Secondary and indirect effects of development further contribute to habitat loss and fragmentation."
f. "Any further development … would exacerbate secondary and indirect impacts to remaining habitat."
g. "Virtually every native area … is potential habitat for one or more protected species." DCA Ex. 7 @ 119; Calvo Vol. 14 @ 1893, 1929-30.

The Study made the following recommendations:

1. "**Prevent encroachment into native habitat.** [T]errestrial habitats and species have been severely affected by development and **further impacts would only exacerbate an already untenable condition."**[24]

2. "Continue and **intensify existing programs**. Many initiatives to improve environmental conditions and quality of life exist in the … Keys. They include land acquisition programs, the wastewater and stormwater master plans, … research and management activities in the … Marine Sanctuary, and restoration efforts…."

3. "**If further development is to occur, focus on redevelopment and infill.** Opportunities for additional growth with small, potentially acceptable, additional environmental impacts may occur in areas ripe for redevelopment or already disturbed." (emphasis added).

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into smaller forests, which is a major adverse impact. Calvo Vol. 14 @ 1888-89.

[24] The scientist who prepared the Study confirmed this means that "no encroachment at all in the native habitat should occur." Calvo Vol. 14 @ 1898. Mr. Quinn stated that implementing the Study means protecting all of the habitat the study says needs to be protected. Quinn Vol. 6 @ 776).

4. "Increase efforts to manage the resources. Habitat management efforts in the Keys could increase to effectively **preserve and improve the ecological values of remaining terrestrial ecosystems**." R 595.

Hurricane Evacuation

> "Monroe County and Marathon face a unique hurricane evacuation challenge. There is only one road out …, and everyone must use that road to evacuate. For a Category 3 or greater hurricane, all … of the … Keys must be evacuated because of the low elevations, the vulnerability to storm surge, and the logistics of post-disaster recovery." R 644.

The Keys are the most hurricane-prone area in the U.S., and the evacuation time is the highest in Florida. Quinn, Vol. 2 @ 147; Pet. Ex. 57; Metcalf Depo. @ 6, 66-67.[25] An evacuation time of more than 24 hours is unsafe for the Keys, subjecting residents and tourists to potential loss of life. Quinn Vol. 2 @ 131, 147, 154, 213. In its 1996 Order, the Commission found:

> "[A] 24 –hour evacuation clearance time must be achieved in Monroe County in order for the Plan to be in compliance."[26]

Thus, one of the remedial amendments made by the Commission in 1997 was a cap[27] on total future permits based on the total amount of additional development that could be allowed without

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[25] The County and state planners stated that safe hurricane evacuation is at the top of the hierarchy of issues for which government is responsible. Quinn Vol. 2 @ 154; Conaway Vol. 13 @ 1735.

[26] Dept. of Comm. Aff., *et al.* v. Monroe County, 1995 Florida ENV Lexis 129 (Order No. ACC-95-035)(App.A @ 18)(emphasis added)

[27] Quinn Vol. 2 @ 147; Pattison Vol. 8 @ 1057-1060.

exceeding a 24-hour evacuation limit. R 644. Pol. 216.1.1, states that the County "shall…

> "limit the number of permits …in order to maintain hurricane evacuation clearance times at a maximum of 24 hours." DCA Ex. 3; Mar. Ex. 6 @ 26.(emphasis added).

> Policy 101.2.1 states that the Plan:

> "shall limit the number of permits issued for new residential development ... provided that the hurricane evacuation clearance time does not exceed 24 hours …. upon completion and implementation of the master plan or by year 2002, …, Monroe County shall revise this policy to adjust the allocations based upon environmental and hurricane evacuation constraints …." DCA Ex. 3; Mar. Ex. 6 @ 19. (emphasis added).

> Pol. 16.1.18 says that "[p]rograms to…

> "reduce the number of evacuating vehicles or increase facility capacity shall not be used to increase development expectations beyond the growth allocations provided herein, except to the extent that a hurricane evacuation clearance time of 24 hours can be maintained." DCA Ex. 3; Quinn, Vol. 3 @ 335.(emphasis added).

> The 1995 Commission Order interpreted these provisions:

> "Continued development after the year 2002 will depend on Monroe County's success in achieving a 24 hour clearance time."[28]

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[28] Dept. of Comm. Aff., *et al.* v. Monroe County, 1995 Florida ENV Lexis 129 (Final Order No. ACC-95-035)(App.A @ 132,133,144, 145 (para 828)(emphasis added)(also para 925, 928, & 930)

The Commission's 1997 Final Order also interpreted these provisions[29], finding that the Plan requires that a 24-hour evacuation time be maintained[30] and that:

> "Policy 216.1.16 is intended to ensure that evacuation time will not exceed 24 hours…."[31][32]

All available permits representing the development capacity based on evacuation limits have been issued. Quinn Vol. 2 @ 149, Vol. 6 @ 703. The current evacuation clearance time is either 24 hours and 48 minutes (to the Keys' designated hurricane shelter at Florida International University), or 23 hours and 56 minutes (if measured to the beginning of the … Turnpike on the mainland). R 645. If the rules go into effect the:

> "hurricane evacuation clearance time … will be 24 hours and four minutes. This exceeds the 24-hour standard adopted by the … Commission." R 645-646.

Progress Under the Work Program

> The County's progress over the first six years of the work program was dismal, as a result of the County "dragging their feet". Quinn Vol. 2 @ 206.[33] "[T]here

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[29] The Final Order below did not mention these policies.

[30] Mar. Ex. 4 @ 55 of 67 (para 291)

[31] Mar. Ex. 4 @ 55 of 67 (para 293)

[32] This interpretation was also made in 1994 by the County Planning Director, who wrote that "[b]eyond September, 2002, additional development, if any, will be limited to that amount which can be accommodated while maintaining hurricane evacuation clearance time at or below 24 hours." Pet. Ex. 7.

[33] Approximately 2% of the work plan has been completed in 46% of the time alloted. Quinn Vol. 2 @ 179. If the County is to

were storm water outfalls, taking storm water directly into the near shore waters... that clearly were contaminated...," and each other key issue, including wastewater, habitat protection, and evacuation, remain critical problems. Quinn Vol. 2 @ 163 -64, Vol. 6 @ 706-07; Garret Vol. 15 @ 1950).

The State assessment of the County's progress for Year 6 "described difficulties and delays…. Most of the sewage treatment facilities … were not constructed and valuable upland habitat continued to be developed." R 596. The Commission "concluded that Monroe County had…

> not made substantial progress and directed the DCA 'to determine changes … necessary to the comprehensive plan to fully implement the … Work Program[,] as well as habitat protection provisions.'" R 596. (emphasis added).

DCA (the Department) negotiated a "Partnership Agreement" with the County and the municipalities, which resulted in the text of the rules. R 596-597.

The Rules

Amount and Rate of New Development

The rules did not reduce the annual permit allocation in Monroe County by a minimum of 20%, but instead allow the

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address the remaining required wastewater projects by 2010, progress will need to be greatly increased. Quinn Vol. 2 @ 178. Progress on storm water was been modest. Six years into what began as a five-year work plan, less than 50% of the necessary projects have been completed. Harrison Vol. 8 @ 1026. As a result, improvements and results that the Commission determined should occur in five years - implementation of the carrying capacity study, the wastewater and storm water master plans, and other measures - will now not occur, if at all, until after 10 years. Quinn Vol. 6 @ 713-14.

issuance of new permits beyond the 24 hour cap, and amends both plans to, among other things, (1) increase the annual rate of growth by 24%; (2) repeal the requirement to implement the Carrying capacity Study and the nutrient credit requirement; and (3) add Years 8, 9 and 10 (Monroe only) to the Work Program to list "tasks still required to complete the original Work Program." R 598-599.

In Monroe, 126 of the annual permits are for market rate homes and 71 are for affordable housing. In Marathon 24 are for market rate and 6 for affordable units. R 601-602.

The Rules also restore permits to Monroe and Marathon representing the number of permits that could have been issued since 1999 if the annual allocations had not been reduced by the Commission. They also grant to Monroe County 140 allocations, and to Marathon 65, representing those which were not issued because of a lack of nutrient credits, earmarked for affordable housing." R 602.

"Borrowing" and Repeal of Nutrient Reduction Credit Rule

The Rules allow Monroe County and Marathon to "borrow" 213 nutrient credits that are anticipated from the construction of a sewage treatment facility in Marathon. R 603-604. Also, Proposed Rule 28-20.110 allows Monroe County to borrow 41 nutrient credits for market rate units and 193 nutrient credits for affordable housing. R 604-605.

The Rules also amend the Plans to repeal the nutrient credit requirement. "Effective July 13, 2005:

> "no nutrient credits shall be required if the local government has made *satisfactory progress* as determined by the … Commission in meeting the deadlines established by the Work Program…." R 605.(emphasis added).

Future Monroe County Work Program Under The Proposed Rules

The rule adds years 8-10 of the Work Plan, identifying tasks which the County must make "substantial progress … toward accomplishing" or be subject to the minimum 20% permit reduction. "Many of the tasks [added for years Eight, Nine, and Ten] address and are related to wastewater facilities, habitat protection, affordable housing, and hurricane evacuation…." R 610. These tasks are existing tasks in the Work Plan which were not met. Conaway Vol. 13 @ 1779-80; Jetton Vol. 9 @ 1206-07; Quinn Vol 6 @ 773. If they are not done, under the rules the Commission may or may not reduce the number of permits to be issued. Quinn Vol. 3 @ 356-57.

Implementing the Carrying Capacity Study

The Rules allow direct and indirect clearing and degradation of native habitat.

STANDARD OF REVIEW

A court shall remand a case to the agency for further proceedings or set aside agency action, when (1) the agency's action depends on any finding of fact that is not supported by

competent, substantial evidence in the record. S. 120.68(7)(d), F. S.; (2) the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action 120.68(7)(d); or (3) the agency's exercise of discretion was inconsistent with agency rule, or violates a statute. 120.68(7)(e)2 & 3.

SUMMARY OF ARGUMENT

The rules are arbitrary and capricious and contravene the law implemented because they increase development even though the critical growth limits in the Keys-water quality, terrestrial habitat, and evacuation times-have been exceeded and will worsen under the rules. The rules are a major decision at a critical stage in the planning process to prevent species extinction and the collapse of the water-quality and environment-based economy in the Keys. A decade ago, the Commission determined that the State's effort to save the Keys would fail unless the critical deterioration of water quality, habitat, and evacuation capacity were stopped. It mandated that growth be limited to that which the ecosystem and infrastructure could sustain. It subjected new permits to a "no net nutrient" standard to prevent water quality from getting worse. The total number of permits to be issued in the Keys was capped based on the limited remaining evacuation capacity. The annual permitting rate was made subject to at least a 20% reduction if annual

water quality and habitat protection tasks were not done. One of these was the implementation of a habitat carrying capacity study by July of 2003. When that deadline passed, and the Commission proposed these rules (and as of the time of the hearing below) the following facts were true:

* The critical nutrient pollution in the nearshore marine system still existed.

* The capacity of native habitats to suffer any additional degradation had been exceeded.

* All of the development that could be approved within the 24 hour evacuation cap had been approved or would be before these rules became effective. The existing evacuation clearance time exceeded 24 hours.

* Insubstantial progress had been made on the entire six year work plan and on the critical year 6 tasks, including changing the development rate and standards based on the carrying capacity study.

* The five year work program originally intended to resolve these problems would take at least 10 years.

Faced with this potential loss of ecosystem function, tourism base, wildlife extinction, and loss of human life, the Commission amended the comprehensive plans to waive the 24 hour evacuation limit, *increase* the annual growth rate, and repeal

the requirements to implement the carrying capacity study and allow no more nutrient pollution.

That is why the Rules are arbitrary and capricious. They contravene the law because they exempt comprehensive plans in an ACSC from complying with Ch. 163, and because they will thwart the goals of Ch. 380. The provisions relied upon to adequately address water quality, native habitat and evacuation are facially vague and factually inadequate. The rules-based on political, not factual technical, or scientific considerations-waive rules and abandon actions necessary to save the Keys.

The claim that the Rules are valid because of some offsetting positive impact on increasing affordable housing can not be seriously maintained, as 75% of the permits are allocated to market rate housing and many options available to increase affordable housing go unused.

ARGUMENT I: THE FINAL ORDER ERRED IN RULING THAT FLORIDA'S COMPREHENSIVE PLANNING ACT DID NOT APPLY TO THE COMPREHENSIVE PLAN AMENDMENTS ADOPTED BY THE PROPOSED RULES

The Rules amend comprehensive plans, and it was error to rule that they are not required to comply with Ch. 163.[34] The ALJ

[34] Due to page limitations, Appellants have not devoted significant text of this brief to showing the non-compliance of the plan amendments with Ch. 163. The ALJ made no findings or rulings on the issue. Petitioners filed a Proposed Final Order below which, at R 495-499 sets forth each of the inconsistencies with Ch. 163 which render the plan amendments out of compliance with that Act.

found that "there is no provision in S. 380.0552, F. S., which confers authority for such review. R 664. She was persuaded by the fact that "the published notice cites S. 380.0552(9), F.S., as the specific authority for the Proposed Rules and S.380.0552, F.S., as the law implemented. R 599-600.

This is an absurd interpretation of law which thwarts legislative intent, and is contradicted by the record, including the interpretation of the Department, the agency with responsibility for enforcing the relevant laws. Current and former Department staff explained that the Rules amend local comprehensive plans, the content and substance of which are governed by Ch. 163. Quinn Vol. 2 @ 131; Pattison Vol. 8 @ 1049. It was their understanding that when the Commission adopts a rule amending a comprehensive plan in an ACSC, the amendment must comply with Ch. 163. Quinn, Vol.5 @ 565; Jetton Vol. 9 @ 1142; Pattison Vol. 8 @ 1049. The ALJ's legal theory is also negated by the text of the Monroe Plan (also applicable to Marathon), which identifies a specific Rule in Ch. 9J-5, F.A.C.[35] after each goal, objective and policy to indicate the rule provision which it implements. DCA/ County Ex. 3; Kenson, Vol. 11 @ 1593-94.

The legal requirements that apply to comprehensive plans

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[35] Ch. 9J-5, Fla. Admin Code implements Ch. 163.

from Ch. 380 consist of only the Principles for Guiding Development, set forth at S. 380.0552(7)(7), F.S., and which consist of one-half page in the statute books[36], with no implementing administrative code provisions other than the comprehensive plans and land development regulations themselves. These provisions are dramatically more limited and general than those in Ch. 163, F. S. and Rule 9J-5, FAC, which include dozens of pages of detailed minimum, substantive requirements.[37] The ALJ ruled that these requirements do not apply to the plan changes adopted by the Rules.

The purposes of Chapters 163 and 380 cannot be met if a comprehensive plan in a Critical Area does not comply with Ch. 163 and Rule 9J-5. Ch. 163 requires all plans and amendments to comply with both Ch 163 and 380. Ch. 380 defines a "local comprehensive plan" as:

> any or all local comprehensive plans or elements or portions thereof prepared, adopted, or amended pursuant to [Ch. 163, Part II] S.380.031 (10), F.S. (Emphasis added).

The plans amended by the Rules are such plans. Nothing in S. 380.05, F. S. exempts plans in Critical Areas from compliance with Ch. 163. Both laws apply:

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[36] See pages 1938-1939, Fla. Stat. Vol. 2 (2004)

[37] See pages 1396-1414, Fla. Stat. Vol. 1 (2004), and Ch.9J-5, which consists of 37 pages in the Fla. Admin. Code.

> In conformity with, and in furtherance of, the purpose of … chapter 380, it is the purpose of this act to utilize and strengthen the existing role, processes, and powers of local governments in the establishment and implementation of comprehensive planning programs to guide and control future development.@ '163.3161 (2), F. S. (emphasis added).

Finally, pursuant to ' 163.3211, Ch. 163 governs in the event of a statutory conflict:

> AWhere this act may … conflict with any other provision or provisions of law relating to local governments having authority to regulate the development of land, … this act shall govern unless the provisions of this act are met or exceeded by such other provision…. Nothing in this act is intended to withdraw or diminish any legal powers or responsibilities of state agencies or change any requirement of existing law that local regulations comply with state standards or rules.@ (emphasis added).

It ignores legislative intent to hold that the Commission can use its authority under Ch. 380 to amend a plan in a manner that does not comply with Ch. 163. It is absurd to conclude that the Legislature intended for the areas of the state with the most critical planning challenges to be exempt from Ch. 163.[38]

ARGUMENT II: THE RULES ARE ARBITRARY AND CAPRICIOUS BECAUSE THEY EXPOSE KEYS' EVACUEES TO LOSS OF LIFE

The 1997 DOAH Final Order explained that the plan:

> "was deficient in that it allowed continued development despite the inability of Monroe County to safely evacuate its population within 24 hours. This

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[38] The ACSC program is focused on specific areas facing "extraordinary" growth related concerns. David Powell, Managing Florida's Growth: The Next Generation, 21 F.S.U. Law Rev., 223,333.

deficiency has now been corrected and the hurricane evacuation time has been reduced to below 24 hours. Policy 216.1.16 is intended to insure that the evacuation time will not exceed 24 hours in the future. Maintaining an adequate evacuation time is necessary for the continued safety and welfare of the people of Monroe County." Mar. Ex. 4 @ 55 of 67 (Para 293).

The ALJ ignored this, and the fact that the ability to safely evacuate the Keys has been exceeded and is at a critical stage. She ignored that the Rules allow a violation of the growth cap described in this previous ruling, and which remains in the Plan even as amended. Mr. Quinn admitted that letting development exceed the 24 hour cap is inconsistent with the 1996 Commission Order[39], describing the *problem* that evacuation clearance time …

> exceeds *the 24-hour standard* ..., and permitting is contingent on meeting the evacuation standard. Quinn, Vol. 3 @ 318-320; Pet. Ex. 57 @ 4.(emphasis added).

He also identified potential options to resolve this *"non-compliance"*, including:

> ...***appeal permits and seek remedial actions***....
>
> ***
>
> ***cease permitting or … appeal***.(Pet. Ex. 57)(emphasis added).

Mr. Quinn consistently used the term "cap" during his testimony to characterize the Plan's evacuation provisions. Quinn Vol. 6 @ 701-703. He also said that evacuation had reached

[39] Quinn Vol. 6 @ 716-17.

a critical stage, there was no margin for error, and even minor increases in permitting would exacerbate the problem. Quinn Vol. 6 @ 757.[40]

Nevertheless, the ALJ found the Rules valid because they include a Year 8 task for a "Keys wide analysis and solution to the hurricane evacuation problem." Specifically:

> "Complete a comprehensive analysis of hurricane evacuation issues … and develop strategies to reduce actual hurricane clearance times and thereby reduce potential loss of life from hurricanes." R 612, 646, 658-659.

First, the context of this language is that, if it is not done, the Commission may or may not reduce permits by 20% the next year. Second, it does not require that any strategies developed reduce clearance times to or below 24 hours. Third, it does not require the *implementation* of any strategies. Fourth, it does not prevent new development until any such strategies developed, validated and implemented. Quinn, Vol. 3 @ 342. It allows development to continue indefinitely, with no deadline for the implementation of or demonstrated results from any actions that may result from the working group's efforts. Continued and increased development could continue for years, whether or not

[40] Mr. Quinn admitted that his use of the term non-compliance@ and raising the spectre of the cessation or reduction of permits, appealing permits, and seeking remedial actions reflects an understanding that a binding legal standard has been exceeded. Quinn Vol. 3 at 336-338.

evacuation time is ever reduced.[41]

When assessing the options for resolving the problem of exceeding the 24 hour limit, Mr. Quinn had written:

> "establish peer review committee to revisit model, assumptions and allow continuation/reduction of permitting. **Model and assumptions would be fully validated prior to any action by DCA."** Pet. Ex. 57(emphasis added).

Also, in Jan. 2004, the Department Secretary stated in a letter to the County that she "need[ed] to ensure …

> that the total number of permits proposed for allocation continue to fall within the parameters of the hearing officer's recommendations and our ability

[41] There is nothing planned or in place today that would reduce hurricane evacuation time. Quinn Vol. 2 @ 215; Metcalf Depo. @ 91-92. There is no likelihood that the working group will be able to reduce the evacuation time. Metcalf Depo. @ 106. It is speculative whether the working group will identify valid, workable strategies to reduce evacuation times, as each of the potential options has either already been rejected by the experts or is contrary to sound emergency management procedures. One asserted option is providing shelters in lieu of evacuating. But shelters are not currently available, not [a] viable option due to cost, post disaster recovery problems, and are a disincentive to evacuation.@ Pet. Ex. 57; Quinn, Vol. 3 @ 234; Vol. 4 @ 500-501. Another option is transportation system management (TSM). However, the most recent evacuation study found that ATSM will not reduce clearance time due to set up time (about 10 hours). Pet. Ex. 57; Quinn, Vol. 3 @ 321; Pet. Ex. 65 @ 55; Metcalf Depo. @ 80-81. Another option is to make different factual assumptions and re-run the evacuation model. But there are no realistic or valid changes to the factual variables in the model that would provide a significant reduction in evacuation time-unless a reduced tourist occupancy rate assumption can be justified. Metcalf Depo @ 94. However, the model already assumes that 45% of tourists have evacuated by the time a general evacuation order is given, and it is not valid to assume that this figure is likely to be reduced in the future. Quinn, Vol. 2 @ 212; Metcalf Depo. @ 82.

to safely evacuate citizens during hurricanes. Pet. Ex. 45; Quinn Vol. 3 @ 340.

However, despite the Department's views, the Rules increase the amount and annual rate of new development, choosing neither to cut the growth rate by 20%, hold it at current levels, nor cease permitting until evacuation times are reduced. Quinn Vol. 3 @ 340-42; Vol 6 @ 755-56. The Rules increase new development and thus the evacuation time beyond the 24 hour standard that was found necessary by the Commission, and will not maintain or reduce hurricane evacuation times, or protect public health, safety and welfare, and thus be out of compliance with Ch. 163.[42] Metcalf Depo. @ 89; Quinn Vol. 2 @ 163, 217; Vol. 6 @ 700-701; Pattison Vol. 8 @ 1060, 1071.[43]

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[42] Rule 9J-5.012 (3)(b)7, FAC requires that plans "[m]aintain or reduce hurricane evacuation times". It is this rule that required the 24 cap on evacuation times, which these Proposed Rules would violate. For the same reason, the plan amendments adopted by the Rules do not contain principles for hazard mitigation and protection of human life against the effects of natural disaster, including population evacuation, which take into consideration the capability to safely evacuate the density of coastal population proposed in the future land use plan element in the event of an impending natural disaster.@ S. 163.3178(2)(d),F.S. They are also inconsistent with the requirement to Acoordinate land uses with … the availability of infrastructure@. Rule 9J-5.006(3)(b)1, F.A.C.

[43] The legal and factual integrity of every comprehensive plan the Keys could cease to exist if permitting continues beyond what the government has determined to be a safe evacuation time. The total amount of development allowed in the Keys requires a consistent approach among jurisdictions... and intergovernmental coordination ...plan updates, [permit] allocations and other implementation strategies.(Pet. Ex. 57 at 4). The amount of

Given the compelling facts, allowing evacuation times to rise, and at a faster rate, is arbitrary and capricious.

ARGUMENT III: THE RULES ARE ARBITRARY AND CAPRICIOUS BECAUSE THEY ALLOW DEVELOPMENT IMPACTS TO EXCEED WATER QUALITY POLLUTION TOLERANCE LIMITS

Allowing the borrowing or awarding of nutrient credits before wastewater projects are completed, and repealing the nutrient credit requirement is arbitrary and capricious, as it will allow a net increase in the nutrient impacts into the Keys waters, worsening an already critical water quality problem. The ALJ found that:

> "Even though increased development could result in an increase in the nutrient impacts into the nearshore waters of the Florida Keys, *the adverse effect of such nutrient loading is offset by the adequate treatment of wastewater and stormwater runoff."* R 606. (emphasis added)

This finding is contradicted by another finding of the ALJ about "increased protection of water quality that *should be achieved* by the hastened construction of sewage treatment

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development allowed in the County and the cities must be coordinated to maintain a total evacuation clearance time of 24 hours or less. Every new residential unit increases the evacuation time, and the development capacity initially calculated for the County has subsequently been divided with the new cities of Marathon and Islamorada. Marathon's permit allocations, when combined with the County's and those of the other cities, can not exceed the calculated maximum number of permits available per the 24 hour limit, even if its annual allocations are relatively low. Quinn Vol. 3 at 325-327; Kenson, Vol 11 at 1618.

facilities…." R 655. It is also not supported by competent, substantial evidence, as even the experts for the Commission and the County did not make this claim. Every witness who testified on the point agreed, and it is undisputed, that:

* The purpose of the nutrient credit requirement has not been met. Planned treatment facility upgrades are not yet in place, and the critical water quality problem remains. Quinn Vol. 2 @ 145, Vol. 6 @ 706.[44]

* Currently, 95-98% of the wastewater improvements needed to bring water quality to acceptable levels remain to be made. Quinn Vol. 2 @ 204; Garret Vol. 15 @ 1950, 1998.

* All new development results in a net increase in nutrient pollution, as the currently allowed wastewater facilities do not meet the special water quality needs of the Keys and pollute the Keys' waters by increasing nutrient loads. Jetton Vol. 9 @ 1173-75; Quinn Vol. 2 @ 242-243; Vol. 6 @ 759-760; Conaway Vol. 13 @ 1776; Garret Vol. 15 @ 2002.

* Borrowing future credits allows nutrient inputs from new building even though that nutrient input has not been offset by a reduction else where. Quinn Vol. 2 @ 239.[45]

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[44] The Keys continue to experience periodic beach closures, or warnings against swimming due to water quality problems. Jetton Vol. 9 @ 1173-1175; Conaway Vol. 13 @ 1775-1776.

[45] The plan amendments adopted by the Proposed Rules do not maintain or upgrade water quality, as required by S.

Moreover, the ALJ relied upon the future completion of tasks in the work program to offset the nutrient pollution that will be caused by the development allowed by the rules. R 653-654. She also found that:

> "[*b]ased on the commitments … in the Partnership Agreement*, there is a reasonable expectation that the projects included in the Work Program of the Proposed Rules will be completed. *When completed*, the wastewater treatment facilities will provide nutrient credits. *In anticipation of the completion of the wastewater treatment facilities*, [the] Proposed Rules … restore the annual permits for new residential units to their original levels and allow previous unused [permits] to be allocated. [N]utrient credits for these allocations will be borrowed from the pool of nutrient credits that are *anticipated* from the planned construction and completion of wastewater facilities." R 606-607. (emphasis added).

It was error to find that the new development will not increase nutrient pollution even though the infrastructure improvements necessary to make this true exist only on paper – the future work plan that may or may not be fully implemented. Such a finding is not based on competent substantial evidence, as the state planners explained that there will be a net increase in nutrients into the Keys waters unless and until the wastewater facility upgrades in the future work plan are built and operating. Jetton Vol. 9 @ 1162. They also explained that the completion dates for the wastewater projects relied upon to earn the nutrient credits issued by the Rules are highly

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163.3178(2)(c), F. S.

speculative.[46]

Repeal of the NRC Requirement

The ALJ found that the repeal of the mandatory nutrient credit provision “does not automatically become effective on the date prescribed in the proposed amendments. Instead, the repeal is contingent on Monroe County's and the City of Marathon's making "satisfactory progress." She also found that the term "satisfactory" is not vague-that "satisfactory" would be given its common and ordinary meaning, which is "sufficient to meet a demand or requirement." This misreads the policy–particularly in light of the plan as a whole-and ignores the evidence. Satisfactory progress” is not defined in terms of what type or

[46] The Key West Resort Utilities project has been delayed repeatedly. Out of a potential 1,500 units, only 200 have hooked up. It does not treat to advanced wastewater treatment standards, achieving only secondary treatment, which does not adequately remove nutrients. Harrison Vol. 8 @ 996. Ms. Jetton could not even speculate about when any significant number of credits will be generated. Jetton Vol. 9 @ 1150-53. The Key Largo wastewater project, from which the proposed rule advances nutrient credits, has only progressed to the signing of the contracts. No construction has begun on the plant or collection lines, and an ambitious date to expect that homes would be hooked up is 2 years from the formal hearing in this matter. Harrison Vol. 8 @ 996; Jetton Vol. 9 @ 1155-56. Construction of the Bay Point wastewater project has just begun. The collection lines have not been extended, and an optimistic projection for construction and hookup is 18 months from the formal hearing in this matter. Harrison Vol. 8 @ 997. Ms. Jetton could only “speculate” and “guess” whether this project will have earned credits “within the next year ... if there are no unanticipated delays.” There is not a wastewater project in the Keys today that is not behind its originally planned schedule. Jetton Vol. 9 @ 1153-1155.

extent of progress must be made as a pre-condition of the repeal. But, as explained by Ms. Jetton, the word "satisfactory" is meant to be a less rigorous requirement than "substantial" progress. Jetton Vol. 9 @ 1164-65, 1172. Since it is not possible to determine what will be considered "substantial" progress on a work program task, the "less rigorous" standard of "significant" progress is even more vague. The Commission's finding of "significance" is not required to be based on any facts, reports, findings or other criteria. DCA Ex 32, 33. It is not contingent upon a demonstration that there are adequate nutrient credits to offset permit allocations to be given. Quinn Vol. 2 @ 233. The repeal does not require the adoption of an administrative rule, but simply a vote of the Commission, and it is the intent and purpose of these rules to repeal the nutrient credit requirement. Jetton Vol. 9 @ 1158-1162..

It is arbitrary and capricious to repeal the requirement where water quality has not improved to acceptable levels and the facility upgrades needed to generate nutrient credits are not in place. Given its purpose, it is arbitrary to eliminate the requirement unless and until it is no longer needed as a result of the earning of sufficient credits to offset the nutrient impacts of new development. This is particularly true given the dismal history of failed compliance with wastewater deadlines. The ALJ misunderstood the evidence and her findings

must be rejected.[47] She misunderstood the context and history of the decades'-long effort to improve sewage treatment in the Keys. The Rules are arbitrary and capricious, and the ALJs findings unsupported by the record.

The Future Wastewater Work Program

The ALJ found that Monroe County and Marathon have:

> "evidenced a willingness and commitment to provide the funding required to meet the objectives of the Principles …. Both … have included in the Proposed Rules tasks which reflect their understanding of the need to provide critical facilities, such as wastewater treatment facilities. While the need for such facilities has previously been acknowledged, the … Rules provide a specific source of revenue to provide the needed facilities. R 652.

This is not based upon competent substantial evidence. It misreads the rules, which provide no funding for wastewater projects, but simply add future funding to the list of tasks that are subject to the "substantial progress" clause. Under that very clause, in the action at issue here, the Commission did not cut the annual permit rate when the County did not make substantial progress on its work plan. The County and Marathon were already under the obligation to fully fund all projects in

[47] Severe nutrient pollution continues to exceed the capacity of the near shore waters to assimilate nutrients. Quinn Vol. 2 @ 130, 136-37, 225; Vol. 6 @ 757-58; Harrison Vol. 8 @ 1035; Jetton Vol. 9 @ 1172, 1190; Harrison Vol. 8 @ 985- 87; Garret Vol. 15 @ 1993. The pollution of the near shore waters is probably adversely affecting the coral reef. Garret Vol. 15 @ 1993-94.

the wastewater master plan. The Rules require, fund and accomplish nothing to improve wastewater facilities that was not already required by the Commission's existing rule and the comprehensive plans. The existing work plans required funding to fully implement the wastewater master plan. Quinn Vol. 2 @ 205; Vol. 6 @ 800-803; Harrison Vol. 8 @ 1006.[48] **The Rules *reduce* the amount of wastewater funding that Monroe County and Marathon are required to provide from $410 million to $300 million.** Quinn Vol. 6 @ 803-805.[49] They are arbitrary and capricious.

ARGUMENT IV: THE RULES ARE ARBITRARY AND CAPRICIOUS BECAUSE THEY ALLOW HABITAT DEGRADATION BEYOND ACCEPTABLE LIMITS IN VIOLATION OF THE EXISTING COMMISSION RULE

The Rules fail to protect habitat to implement the Carrying Capacity Study, as required by previous Commission action and the existing rule. The ALJ found that the Rules:

> "improve protection of terrestrial habitat, limit clearing of native vegetation, and provide safeguards to ensure that parcels in threatened and endangered species habitat are protected. R 654.
>
> ***
>
> "increase protection of upland habitat and require a moratorium on [permit] applications in hammocks and

[48] The work program for years one through six required everything included in the Year 7 through 10 work program, and more.

[49] The estimated cost of the existing rule requirement to fund and implement the wastewater master plan was $410 million, which exceeds the $300 million figure required by the Proposed Rules ($120 million from the County, $100 million from Marathon - and even including an estimated $80 million from the Village of Islamorada that is not part of the Proposed Rule).

pinelands, revisions to the CNA maps[50],and amendments to the … regulations. R 658.

These findings are not supported by competent, substantial evidence, as they are refuted by the text of the rules. Even though the Carrying Capacity Study found that any development in or near native habitat threatens the survival of the Keys' terrestrial ecosystem[51], the rules:

* **Provide no permanent protection to any native habitat of any size or quality.** Jetton Vol. 9 @ 1216-19; Quinn Vol. 3 @ 377-78; Conaway Vol. 13 @ 1847.

* **Exempt public facilities from the permit caps and habitat protections.** R 629-633.[52]

* **Exempt development by tax-exempt, non-profit organizations from the annual permit caps.** R 633.

* **Allows positive points, in the point system under which applications are scored to determine the distribution of permits, for "preserving" habitat for projects that will clear and build immediately adjacent to habitat.**[53][54] R 635-636. The

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[50] The policy could be met if the maps are revised to allow more development in habitat areas. Quinn Vol. 3 @ 354.

[51] Quinn Vol. 3 at 262-263; Vol. 6 @ 760.

[52] Public facilities take up much more space in a landscape than a single-family home. Jetton Vol 9 @ 1236.

[53] This is such a serious problem that DCA brought a legal Notice of Violation against the County for allowing this practice. The NOV was dismissed as part of the Partnership Agreement. Jetton

ALJ's reasoning that the limitation on "clearing" the habitat protected it from the adjacent development[55] ignored the testimony of every witness and text of every exhibit in the record,[56] as well as her own finding that a failure "to take into account secondary impact of development … has resulted in the loss of valuable habitat." R 619.

* **Allow the County to ignore the recommendations of the U.S. Fish and Wildlife Service concerning habitat values**. R637-638; Jetton Vol. 9 @ 1243-1245.

Vol. 9 @ 1250.

[54] Unless the area is not proposed for acquisition by public agencies for the purpose of resource protection. R 635. The Rule also assigns fewer negative points in the point system to projects that would impact "species of special concern" outside of areas targeted for public acquisition than for those which are so targeted. R 641-643. This distinction could invalidate those protections that due exist under a constitutional claim.

[55] R 637.

[56] Allowing development adjacent to habitat, it allows the very secondary development impacts the carrying capacity study says do substantial harm and must not be allowed. Jetton Vol. 9 @ 955, 1197-98, 1226. Under the Proposed Rules, every habitat area can be impacted by adjacent construction. Jetton Vol. 9 @ 1228-29. The testimony of all relevant witnesses agreed on the severe impacts of things such as illegal clearing, predation by feral cats and dogs, mosquito spraying, off-road vehicles, exotic plants, noise and light. Kruer Vol. 7 @ 877-881; Conaway Vol. 13 @ 1843-1845; DCA Ex. 7 @ 66.

* **Adopt County maps known to be flawed**[57] **as "prima facie evidence" of the habitat value** of lands proposed for development **when up to date state maps exist.** R639-640.[58]

The future work plans adopted by the Rules also fail to implement the Carrying Capacity Study. They are not legal standards that govern the issuance of permits, but merely set forth tasks, which, if not completed, may or may not result in a reduction of permit allocations. Unless and until the tasks are completed by the County, the existing Plans govern all County actions. Jetton Vol. 9 @ 1234-35.

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[57] The maps have not been updated for ten years and they allow development of native habitat with protected species, as they under-represent the extent of many of listed species. Jetton Vol. 9 @ 1254-55,1265; Conaway Vol. 13 @ 1793-94; Pet. Ex. 48; Kruer Vol 7 @ 894-95.

[58] The US Fish and Wildlife Service has:

"struggled with the County staff over this issue for many years. The ...Service has provided the most up to date data on the distribution of these species to both the County and the [Department]…, but County staff are resistant to accept and integrate these data into their system. The County uses antiquated data to determine the distribution of threatened and endangered species, a key component of the ROGO process. This is particularly a problem in the Upper Keys where several species such as the Florida tree snail, the Schaus Swallowtail butterfly, and the White-Crowned pigeon are not even mapped. *** If the County would incorporate the most recent data on T/E species, hardwood hammock parcels would score extremely poorly in ROGO, and speculative builders would quickly learn to avoid these attractively-priced lots. As it stands now, spec builders are buying these cheap hammock lots simply because the system still allows development." Pet. Ex. 48.

The Year 8 tasks are facially inadequate. One set of tasks is to adopt maps to guide land acquisition. R 615 -616. This provides no regulatory protection to natural habitats.[59] Another task is to adopt a temporary (1 year)[60] moratorium on clearing (but not on building adjacent to) on some native habitat in some areas, subject to significant grandfathering and exceptions. R 616-617.[61] DCA Ex 44 @ page 6 of 8; Jetton Vol. 9 @ 1228; Conaway Vol. 13 @ 1810-11. It protects only a subset of remaining hammock and pineland in the Keys, excluding lands which the Department believes should be included and protected.[62]

Another task - to "enact … overlay designations" to

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[59] Placing land on an acquisition list does not protect it as such lands are often built on before they can be acquired, a process which takes many years. Quinn Vol. 4 @ 410-11; Vol. 6 @ 782-83; Brock Vol. 10 @ 1382, 1397, 1406-1408,1414-15.

[60] It set no minimum duration. A one week moratorium would comply, and the one adopted at the time of hearing was set to expire in June 2005. DCA Ex 32, 33; Quinn Vol. 3 @ 361-62; Jetton Vol. 9 @ 1200- 01. It could expire well before adequate permanent rules are in place. During that period, the existing regulations - which continue to allow important habitat to be lost - will govern permitting decisions. Quinn Vol. 3 @ 361-367; Vol. 6 @ 736-738; Jetton Vol. 9 @ 1201; Conaway Vol. 13 @ 1815-16. Legal counsel had opined that a moratorium of up to six years would be valid. Jetton Vol. 9 @ 1217-1218; Conaway Vol. 13 @ 1819.

[61] The ordinance does not apply to the numerous types of development that is exempt from the permit cap, regardless of its habitat value, and it does not apply to several hundred "grandfathered" applications. Ex. 44; Jetton Vol. 9 @ 1179, 1224-27; Conaway Vol. 13 @ 1812-1814.

[62] Jetton Vol 9 @ 1198-1200, 1227-1232; Quinn, Vol. 3 @ 356; Vol. 6 @ 731-737, 774-776; DCA Ex. 25.

"identify areas to which future development will be directed"[63] - is no more specific than the statute[64] and existing Plan.[65] It is completely vague as to any objective or result to be accomplished.[66] Jetton, Vol. 9 @ 1207-08; Quinn Vol. 3 @ 368. Mr. Quinn stated that "it was intended that the overlay would restrict, if not prohibit, development within that hardwood hammock", but this language is not in the policy. Quinn Vol. 3 @ 368. Ms. Jetton believed the "overlay" referred to a set of "Tier Maps" that have been developed by the County, but not yet adopted or mentioned in the Proposed Rule. Jetton Vol. 9 @ 1204-05. She surmised that the overlay would apply to applications for development, but acknowledged that this is not mentioned in the language. Jetton Vol. 9 @ 1204-05. Confronted with this at

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[63] R 618-619.

[64] The existing Plan has already been found to "direct development away from environmentally sensitive land", so it is unclear how it must be changed to comply with this policy. Jetton Vol. 9 @ 1210-11. Given the detailed nature of the existing habitat standards related to habitat types, patch sizes and other characteristics of the areas to which regulations will apply, and the exact nature of the regulation (i.e. a prohibition on direct or secondary impacts, the application of negative points or open space rations, etc.), the rule provides no guidance on how the existing rules are to be changed. Quinn Vol. 3 @ 375-76.

[65] Compare to the existing Plan provisions in Appendix B

[66] Rule 9J-5.005(6), F.A.C. requires plans to set "meaningful and predictable standards for the use and development of land...." There must also be "[s]pecific measurable objectives", defined as "a specific, measurable, intermediate end that is achievable and marks progress toward a goal." Rule 9J-5.003(82), F.A.C.

hearing, she could say only that:

> A: "It's a lot easier after you write something to see the flaws in it than when you write it."
> Q: "There is a flaw here, isn't it?"
> A: "Yes. It could be more specific." Jetton Vol 9 @ 1208.

Another task is to "review or eliminate" the [habitat] index …currently used … to evaluate the environmental sensitivity of land and its suitability for development and acquisition. R 619. The state planners believe that the index, or a functional equivalent, should be revised to increase habitat protection, but the Rule does not require that it be improved or replaced if it is eliminated. Jetton Vol. 9 @ 1209-11; Quinn Vol. 3 @ 272, 368-369, 373.

Another set of tasks is for the County to adopt restrictions in the future in areas to be identified on maps that have yet to be finally drawn and formally adopt ("Conservation and Natural Areas"). R 619-620. The ALJ found that it "is *intended* to strengthen protection of habitat … [by] prohibit[ing] development *in specified areas* and …further limit[ing] clearing *in designated areas.* This allows the geographic scope of the contemplated rules to be defined in the future without stated criteria or standards.[67] It fails to

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[67] Rules that do not adequately define the geographic areas to which they apply are impermissibly vague. State v. Cumming, 365 So.2d 153 (Fla. 1978) (wildlife permit rules vague for failing to define "appropriate neighborhoods" for keeping wild animals).

permanently protect even that habitat which even the County agrees is most important to protect.

The final task is to develop a land acquisition and management plan - a verbatim re-statement of the Year 6 task that was not met. It adds nothing that is not already in the Plan. Quinn Vol. 3 @ 380-381; Vol 6 @ 802-803.[68]

The failure of the rules to permanently protect any specifically identified lands, set explicit development standards for any specified lands, or adopt more precise standards and maps that implement the carrying capacity study designed and written into law for that purpose leaves these matters to the future whim of the Commission (and local and state planners) to decide these things in the future, and suggests the same infirmity found in Merritt v. DBPR, 654 So.2d 1051 (Fla. 1st DCA 1995):

> "The rule … is thick with terms more uncertain … than the statutory language that it purports to define. The rule thus serves more to obfuscate the statutory language than to elaborate statutory criteria or standards. It is irrational to obscure terms for which the statute demands clarification by rulemaking. It is

[68] Separate and apart from the year six task, there are a number of existing provisions in the Plan that call for the implementation and funding of an acquisition program: Obj. 105.2: (County... shall implement a 20 year Land Acquisition Program); Pol. 105.2.14 (calls for the County to "identify and secure possible local sources to yield a steady source of funds...for the land acquisition program...."); Pol. 105.3 (County "shall implement its 20-Year Land Acquisition Program....") (DCA Ex. 3).

> also not rational to elaborate statutory standards to guide the discretion of the committee with a rule that depends upon the judgment of the committee members themselves for its determination. The rule is therefore arbitrary and capricious."

The state planners admitted that the habitat protection provisions in the Rules do not implement the carrying capacity study, but instead <u>delete the requirement to implement the study</u>. DCA Ex 35, 36; Quinn Vol. 3 @ 279-285, 352; Vol. 6 @ 736-37,781; Jetton Vol. 9 @ 1194-96. Ms. Jetton described this as "a major oversight". Jetton Vol. 9 @ 1194. Mr. Quinn hoped that the requirement to implement the study would still be enforceable, admitting that "this is obviously going to take an interpretation" and that this posed "an interesting legal question that I don't think anybody has ever addressed … [n]o one has ever brought that up." Quinn Vol. 3 @ 280-82; Vol. 6 @ 781. The deletion of the requirement to implement the study is without thought or rationale - the very definition of an arbitrary and capricious rule. The hope that the Study will be implemented to comply with a Proposed Rule that does not require its implementation, after an express legal requirement was ignored, is illogical and inconsistent with legal rules of interpretation, particularly after Commission's response to the failure to comply with the Year 6 requirement was to *increase* the growth rate.

At this juncture, two points must be made:

1. Adequate implementation of the carrying capacity study does not require that every native tree or shrub be preserved. Instead, all hammocks (defined by an assemblage of a variety of native west indies trees and shrubs)[69] above one[70], or even one – half, acre should be preserved unless a site specific analysis shows a lack of habitat value.[71]

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[69] Hammocks and pinelands are vegetative communities, not individual trees. Kruer Vol. 7 @ 886.

[70] Pet. Ex. 46 is a map specifically generated by County staff to implement its recommendation for the amount of habitat to be protected under the work plan. Pet. Ex. 46; Conaway Vol. 13 at 1802-1805. Planning staff also generated a set of maps based on the best available habitat indicators to depict the terrestrial habitats found by the carrying capacity study to be at risk and which are at least one acre in size. Pet. Ex. 68; Conaway Vol. 13 at 1805 -1807. These maps do not identify potential habitat parcel less than one acre in size, due to technical mapping limitations. Protecting even all of the habitat areas shown on these maps would not protect all of the remaining hammock or pineland in the Keys. Pet. Ex. 68; Conaway Vol 13 at 1807-1808.

[71] Habitats as small as one-half acre may include plants, tree and shrubs found nowhere else in the world, and are important to preserve. Kruer Vol. 7 @ 900. There are hundreds of undeveloped islands, most of them small, with hammocks of or two acres. Kruer Vol. 7 at 890. Hammocks are literally islands within islands, with naturally-occurring hammocks that are very small, on the order of an acre or two, that are very viable habitat. Kruer Vol. 7 @ 890. Hammocks of less than four-acres in size support important plants or animals, including neotropical migrant birds, that annually migrate to the Keys in the spring and fall from the continental United States to South America to the Caribbean on an annual basis, and use small hammocks for and resting along the way. Kruer Vol. 7 @ 887. Typical hammocks include trees that produce small fruits and berries, that are highly nutritious to migratory birds. White-crowned pigeons, a unique State-listed threatened bird, occur only in the Keys, and migrate annually to the Bahamas and Carribean. One hundred fifty-eight different bird species use these upland communities,

2. It is the failure of the rules to provide permanent protection to habitat of that or any size which render them arbitrary and capricious.[72]

That the habitat protections in the Proposed Rule are arbitrary is shown by the statement of Mr. Quinn, that natural areas "would be clearly the last place that I would think we should develop." Quinn Vol. 6 @ 761. It is possible to allow new development without impacting habitat, as there are 3,485 undeveloped scarified lots (without any native vegetation) with infrastructure that could be developed without adverse habitat impacts. Quinn Vol. 6 @ 761; Conaway Vol. 12 @ 1669; Kruer Vol. 7 @ 882-884; Calvo Vol. 14 @ 1908-09. The Rules arbitrarily allow development in natural areas, in blatant disregard of the explicit findings of the Carrying Capacity Study.[73]

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many migratory, and many of them year - round residents in the Keys that are totally dependent on these hammocks. Twenty eight to thirty migratory species nest in the Keys. Removing these resting and feeding sites threatens these migratory and resident species. This is of critical importance because of the large number of birds that migrate to the Keys. Kruer Vol. 7 @887-888.

[72] The County's own expert witness-the chief author of the Study- stated that a hammock has to be as small as one acre (or perhaps 1.5 acres) before it stops functioning as a hammock. Calvo Vol. 13 @ 1910. The recommendations of the US Fish and Wildlife Service were that sites of less than one acre are potential habitat for several protected species. Pet. Ex. 25.

[73] Because they allow development in terrestrial habitats that are globally imperiled and, according to the state's own study cannot suffer any further impact, the plan amendments adopted by the Rules fail to "provide for the adequate protection of native

ARGUMENT V: THE SUBSTANTIAL PROGRESS CLAUSE IS VAGUE

The rules do not say what will constitute "substantial progress" towards achieving the tasks of the work program for years 7 through 10. DCA Ex. 35, 36. Given the terms of the future Monroe Work Program, the inadequate progress under the existing work program, and the approval of a rate of growth *increase* despite a finding of insubstantial progress for Year 6, the rules are vague and invalid. The State's planners were completely unable to explain how the term would be interpreted under the Proposed Rule. Ms. Jetton described the term as meaning alternatively:

* "some progress" (Jetton Vol. 9 @ 1163).
* "a little progress" (Jetton Vol. 9 @ 1163).
* "they would have had to accomplish quite a number of the tasks" that had been set before them. (Jetton Vol. 9 @ 1165).
* "I can't quantify it as a percentage" (Jetton Vol. 9 @ 1165).
* There is no "definition that lays it out as a specific measurement. I think it's a judgment call". (Jetton Vol. 9 @ 1163).
* "I would expect someone, …, to have achieved half to 75 percent." (Jetton Vol. 9 @ 1166-1167)[74].

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vegetative communities from destruction by development". Rule 9J-5.013(2)(c)3, FAC. They also fail to Arestrict activities known to adversely affect the survival of endangered and threatened wildlife." Rule 9J-5.013(2)(c)5 FAC.

[74] This 50 to 75% standard that she expressed appears nowhere in the proposed rule. Jetton Vol. 9 @ 1168, 1170.

* Another planner in the Department could have a judgment that's different from hers as to whether at least 50% of the tasks need to be accomplished. (Jetton Vol. 9 @ 1170).

* She could not say whether it meant that "more than half the job is done" (Jetton Vol. 9 @ 1163).

* She could not say whether the term would require that 5% or 10% of the tasks have been completed. (Jetton Vol. 9 @ 1164-1165).

Nevertheless, the ALJ upheld the Rules, finding them not to be vague or vest unbridled discretion in the agency, but to establish adequate standards for agency discretion. R 665-666. She misinterprets them. The Rules rely on the completion of a future work program and the supposed incentive that a failure to make "substantial progress" on its tasks will result in a reduction of allocated permits the following year. Yet, this same clause obviously was not interpreted and applied by the Commission in that manner in this case. Under facts that will be essentially the same in Years 8 through 10 (a deficit of affordable housing and local political opposition to reducing permit allocations), the Commission found a lack of progress, failed to enforce the requirement, and increased the amount of development. It is impossible to make any reasonable projection as to what amount of what tasks the County must complete over the next 4 years, or what the number of annual permits will be

in response to any specific or approximate amount of progress on the stated tasks – which are themselves hopelessly vague. The state's planners could not explain with any coherency what tasks would be required to support a finding of "substantial progress", and agreed that even if no progress made the Commission may or may not reduce permits. The Rules lack adequate standards, and allow for the same unbridled discretion in the future that the Commission exercised with the action here on appeal. Like the rules found invalid in Barrow v. Holland, 125 So.2d 749 (Fla. 1960), one "could have read the rules … backwards and forwards and could not have obtained any information whatsoever as to just what he would have to do to [comply]." It is impossible to determine, based on these Rules, the future amount, rate, location and conditions of development or the actual progress that must be made (and by when) on the wastewater, storm water, land acquisition and other improvements, or how many permits can be issued in the future in the Keys. Rules are vague or fail to establish adequate standards for agency decisions when their terms are so vague that persons of common intelligence must necessarily guess at their meaning and differ as to their application. State of Fla. v. Cumming, 365 So.2d 153 (Fla. 1978). Ch. 120 prohibits rules that are so vague that persons of common understanding must

guess at their meaning. Southwest Fla. Water Management Dist. v. Charlotte County, 774 So.2d 903, 915 (2d DCA 2001).

ARGUMENT VI: THE RULES CONTRAVENE THE LAW IMPLEMENTED

The ALJ found that the Rules did not contravene the law implemented, which she found to be only Ch. 380, F.S. R 665. She found them to be supported by logic and necessary facts, and that they were not adopted without thought or reason, and that they were rational. R 666. After acknowledging "the continuing problems of habitat loss, unacceptable nearshore water quality, [and] lengthy hurricane evacuation"[75], she explained her view of the rationale for the Rules:

> "Rather than [prohibiting all further development in environmentally - sensitive habitat and preventing any continued development because of the hurricane evacuation problem], the … Commission attempted to take a course of action that balanced the environmental issues with property rights of landowners. The choice … to purchase environmentally-sensitive land as quickly as possible and to address hurricane evacuation in a manner that does not involve a violation of the constitution, is neither arbitrary nor capricious." R 667. [76]

[75] R 666-667.

[76] The premise that the Commission could not reduce the number of permits by 20% or retain the existing permitting rate, or that it had to increase available permits by 24% in order to avoid property rights violations is false and unsupported by the record. The existing growth caps have been upheld in court, and the Proposed Rules are not a response to recommendations of legal counsel that the current rate of growth was too low and needed to be increased in order to protect private property rights. Quinn Vol. 4 @ 423; Conaway Vol. 13 @ 1739-1740, 1759.

These findings miss two crucial points. First, the Rule continues to make the current growth rate contingent upon the substantial progress requirement for years seven, eight, nine and ten of the work program, but simply grants - in its own words - an "exception" for Year 6 when the requirement was not met. Quinn Vol. 3 @ 344-345. The substantial progress approach remains necessary to meeting the legislative intent. Quinn, Vol. 3 @ 344-345.

Second, the rules constitute the action that, by existing Commission rule, is to meet the requirements of Year Six of the Work Plan and implement the findings of the Carrying Capacity Study. As confirmed by the state's planners, increasing habitat protection incrementally, but not as much as needed to implement the carrying capacity study, is inadequate. In Ms. Jetton's words:

> "Q In your view, does the proposed rule do enough to promote these resources?
> A No, it doesn't go as far as I personally would have written it, but it's an improvement over the existing system, and in government, we seem to move in small increments." (Jetton Vol. 10 @ 1444).
>
> ***
>
> "Q As a planner working in the Keys for all these years, you know that in order to truly protect water quality in the Keys, we need substantial improvement over and above what exists today, correct?
> A Yes.
> Q As a planner with many years of experience in the Keys, you know that if we're truly going to protect the essence of the upland habitats, we need to increase the existing protections a lot, do we not?
> A Yes.

> Q So on either water quality or habitat protection, just minor change that's some level of improvement doesn't necessarily do the job under the Principles, does it?
> A No, that's completely correct. We need aggressive protection. Jetton Vol. 10 @ 1458-59.

In this regard the rules are much like the US Forest Service regulation that was invalidated in Gifford Pinchot Task Force v. U.S.F.W.S., 378 F.3d 1059 (9th Cir. 2004), amended, 387 F.3d 968 (9th Cir. 2004), because, although it protected species habitat necessary for "survival" of the spotted owl, it did not provide the additional level of protection needed for "recovery" of the species to the point where it would no longer be considered "endangered." 378 F.3d at 1069-1070. Like the Federal Endangered Species Act at issue in Gifford Pinchot Task Force, the relevant standard in the instant case has been set high by the previous Commission interpretations of Chapters 163 and 380 to the facts existent in the Keys. Those laws can only be met if water quality, habitat extent and quality and evacuation times are improved to the levels–and at the times–previously determined necessary and to meet minimum legal requirements. These rules fall short. They rely on just the type of proposals, plans and future actions which have repeatedly failed to materialize to resolve the many crises facing the Keys, allowing each to worsen. It is particularly arbitrary to increase the rate at which these problems will continue to grow, while reducing the requirements for their resolution.

On the timely, topical, and life and death issue of hurricane evacuation, Mr. Quinn had recommended, after the 24 hour cap was exceeded, that the state and local governments should "avoid any plan changes that "would make problems worse".[77] The rules, in his words, "will make matters worse." Quinn Vol. 3 @ 332, Vol. 6 @ 761.

As to the Carrying Capacity Study, its author confirmed that it does not support a rate of growth increase. Calvo Vol. 14 @ 1908-1909. Water quality is as bad or worse as it was when the Commission entered its first order on the subject a decade ago, but the rules reduce the funding requirement and allow water quality to get worse before it gets better – if it ever does. The Final Order ignores the intended effect and purpose of the 24 hour evacuation cap, the no net nutrient increase standard, and the purpose of the existing rule's requirement to implement the carrying capacity study in Year 6.

The rules increase development, and the adverse impacts to the critical environmental and evacuation problems facing the Keys. Allowing already critical problems to worsen during the pendancy of studies that might result in a remedy - is exactly the approach that was invalidated in the 1995 challenge to the original plan. In that case, the DOAH Final Order invalidated

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[77] Pet. Ex. 57; Quinn Vol. 3 @ 332.

the amount and rate of growth because it allowed the carrying capacity of the near shore waters to assimilate pollution to be exceeded while the County prepared the wastewater and storm water master plans:

> "What is not in compliance with the Act is that, …Monroe County has continued to allow development in excess of the carrying capacity of the nearshore waters … before it completes the Master Plan." [78]

The Monroe Proposed Rule requires nothing that was not already required relative to evacuation time maintenance, habitat protection, wastewater and storm water funding and construction or other actions. The additional affordable housing it provides could be provided - and to an even greater extent - in several ways not requiring an overall development increase.[79]

The planners for the state admitted that the Rules were based primarily upon the political consideration that the local governments strongly oppose a reduced rate of development and consistently seek increases. Quinn, Vol. 3 @ 270-271, 317-318; Vol. 6 @ 707-08. Ms. Jetton explained:

> "A I think we had to give them something to get anything out of them. I'm not saying it was right, I'm just saying that's the political atmosphere. We

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[78] Final Order No. ACC-95-035, 1995 Florida ENV Lexis 129 (App. A at 96,97, 99, 101 (para 497)(see also para. 498-500, 521-523, 544-546)

[79] See Argument VII

had to give them something to get them to do what they needed to do. (Jetton Vol. 10 @ 1472)"

The increased development rate, the waiver of the 24 hour evacuation cap, and the repeal of requirements to allow no net nutrient pollution and to implement the carrying capacity study were political decisions – made with no regard for the facts or the recommendations of the professional planners. As the time remaining to fulfill the legislative intent to save the Keys grows critically short, this action is the definition of arbitrary and capricious.

The Principles for Guiding Development are to:

"strengthen local government capabilities for managing land use and development so that local government is able to achieve these objectives without the continuation of the area of critical state concern designation." S. 380.0552(7)(a), F. S.

"protect shoreline and marine resources, including mangroves, coral reef formations, seagrass beds, wetlands, fish and wildlife and their habitat." S. 380.0552(7)(b) F.S.

"protect upland resources, tropical biological communities, freshwater wetlands, native tropical vegetation (for example, hardwood hammocks and pinelands), … wildlife and their habitat." S. 380.0552(7)(c), F.S

"to ensure the maximum well-being of the …Keys and its citizens through sound economic development." S. 380.0552(7)(d), F. S.

"limit the adverse impacts of development on the water quality of water throughout the Florida Keys." S. 380.0552(7)(e), F.S

"enhance natural and scenic resources, promote the aesthetic benefits of the natural environment and ensure that development is compatible with the unique historic character of the Florida Keys." 380.0552(7)(f), F.S.

"protect the historical heritage of the … Keys." S. 380.0552(7)(g), F.S.

"protect the value, efficiency, cost-effectiveness, and amortized life of existing and proposed major life investments…."S. 380.0552(7)(h), F. S.

"limit the adverse impacts of public investments on the environmental resources of the Florida Keys." S. 380.0552(7)(i), F.S

"to protect the health, safety, and welfare of the citizens of the Florida Keys and maintain the Florida Keys as a unique Florida resource." S. 380.0552(7)(l), F.S.

The Rules are inconsistent with the Principles as a whole, even considering the need for affordable housing. They do not protect shoreline and marine resources, wetlands, fish and wildlife, and their habitat. They do not protect upland resources, tropical biological communities, native tropical vegetation (hardwood hammocks and pinelands), wildlife, and their habitat. They do not enhance natural scenic resources, promote the aesthetic benefits of the natural environment, and ensure that development is compatible with the Keys' unique historic character.[80] They encourage public investment (public facilities)

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[80] The ALJ found that the Rules "do no harm to either the historic character or historical heritage of Monroe County or … Marathon." R 656. However, the only evidence is that hardwood hammocks are an important aspect of the Keys' character. Even

that would have an adverse impact on environmental resources.[81] For these reasons, the Rules are invalid exercises of delegated legislative authority and violate Subsections 120.52 (8)(c), (d), and (e), F. S.

The agency "has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority...." 120.56(1)(e) & 120.56 (2), Fla. Stat.; SFWMD v. Charlotte County, 774 So. 2d 903, 908, (Fla. 2d DCA 2001).

> "A … rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> * * *
>
> c) The rule … 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. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational;…." S. 120.52(8), F. S.

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small natural areas contribute to the Keys tropical character, even if they are not of a high ecological function. Conaway, Vol. 13 @ 1817-18.

[81] Finding of fact 167, which finds that the Monroe rule "prevents" destruction of hammock by public facilities" is not supported by competent, substantial evidence, as it is refuted by the plain terms of the Proposed Rule.

A rule is "arbitrary" and therefore invalid if it is not supported by logic or the necessary facts; a rule is "capricious" if it is adopted without thought or reason or is irrational. ' 120.52(8), Fla. Stat. Agrico Chemical Co. v. Dept. of Env. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1979). A rule is invalid if "the requirements of the rule are not appropriate to the ends specified in the legislative act". Sierra Club, et al v. St. Johns River Water Management Dist., et al, 1990 Fla. ENV LEXIS 192; 90 ER FALR 209 (DOAH 1990). In Sierra Club, rules setting size thresholds of isolated wetlands that would require a wetland and stormwater permit were found invalid because the science demonstrated that the non-regulated isolated wetlands might have significant fish and wildlife value. The permitting thresholds were an invalid exercise of delegated legislative authority:

> "because such thresholds **are not based on biological and hydrological evidence** that shows that isolated wetlands below such thresholds have minimal fish and wildlife values. **The primary legislative concern** in passing Section 373.414, **appears to have been to preserve wildlife and fish in small isolated wetlands** because they are unique as to both their ecosystems and species." (citation omitted) *** The necessary elements of the "permitting criteria" are those set forth in the subparagraphs of Subsection 373.414(1), including the establishment of one or more thresholds of isolated wetlands below which impacts on fish and wildlife or their habitat will not be considered because of minimal fish and wildlife values."

Increasing the rate of growth in the Keys when all three of its scientifically-determined growth limits are dangerously

exceeded already, and repealing or weakening the standards adopted to remedy these problems, meets these definitions.

ARGUMENT VII: AFFORDABLE HOUSING DOES NOT MAKE THE RULES VALID

The ALJ found that the need for affordable housing in the Keys justified the Rules, given that one of the Principles is "to make available adequate affordable housing for all sectors of the population of the Florida Keys." R.647, 657. See S. 380.0552(7)(j), F. S.

This is arbitrary, as 75% of the annual permits allowed by the rules are for market rate housing. Currently, and for over 10 years, only 20% of the annual residential permit allocations have been dedicated to affordable housing, despite repeated proposals that the affordable housing share be significantly increased. Quinn Vol. 3 @ 295-296; DCA Ex. 11 @ 11; Jetton Vol. 9 @ 1269, 1272-1273; Pet. Ex. 3 @ III.

Reversing the ratio of affordable to market rate would increase the yearly amount of permits for affordable housing even if the overall rate of growth remained the same or was reduced by 20%. Quinn Vol. 3 @ 296. If the rate of growth stayed the same and the ratios were reversed, 126 affordable units could be issued each year. Quinn Vol 6 @ 768. If the rate of growth were reduced by 20% and the ratio was reversed, 103 affordable units could be issued. Quinn Vol. 6 @ 768-769. Under either scenario, that far exceeds the number of affordable units

currently issued under the Plan. Quinn Vol 6 @ 769.

There are many options available in the Keys for maintaining and increasing affordable housing stock other than increasing overall development. Quinn Vol. 6 @ 747-48. The Rules allow existing mobile homes-an important part of the affordable housing stock–to be replaced with a hotel unit or a market rate house. Jetton Vol. 9 @ 1185; Quinn Vol. 6 @ 740-42; Conaway Vol. 13 @ 1825-26. At least 60 affordable units were lost this way in 2003. Conaway Vol. 13 @ 1827.

Other options for maintaining the affordable housing stock include requiring employers to provide housing, requiring new commercial development to provide a fair share of affordable housing, stopping the conversion of affordable housing stock to transient rentals. Jetton Vol 9 @ 1267-1271; Conaway Vol. 13 @ 1829; Quinn Vol. 3 @ 311-314; Vol. 6 @ 753-54; DCA Ex. 11 @ 10 & 11. Various state and federal direct subsidy and loan programs exist. Quinn Vol. 6 @ 750-753, Vol. 4 @ 495-496; Rosch Vol. 15 @ 2027-2028.

The rules are particularly arbitrary and capricious because each new market rate house and commercial development exacerbates the affordable housing need by creating the need for additional service workers and employees, and increasing competition for available land. Harrison Vol. 8 @ 1036; Swift

Vol. 10 @ 1339 - 1340; Conaway Vol. 13 @ 1820-1822; Quinn Vol 3 @ 296-300, 311-313.

The Rules do not even ensure that the "affordable" housing allowed is truly affordable because, unless housing permitted as "affordable" is deed-restricted to remain affordable, the house is eventually sold at market rates, thus becoming unavailable to families requiring affordable housing. Quinn Vol. 3 @ 304-305. Currently there is no way to ensure that affordable housing remains affordable in perpetuity, as the Plan and regulations do not require this. Quinn Vol. 3 @ 306-307. Thus, a building permit issued today that is seemingly dedicated to affordable housing under this proposed rule could subsequently become unaffordable. Quinn Vol 3 @ 306-307. That will be true for every "affordable" unit permitted under these rules unless and until the task in the year eight work program to identify ways to make "affordable" housing affordable in perpetuity is completed.[82] Quinn Vol. 3 @ 307-308. Permits may be issued under the rules as "affordable housing" even before any such mechanisms are enacted. Quinn Vol. 3 @ 305-310.

The claim that the great negative impacts on the

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[82] The Proposed Rule adopts a Year 8 task, to:

> N.Evaluate and implement strategies to ensure that affordable housing remains affordable in perpetuity for future generations. R 612.

environment and public safety allowed by the rules is necessary to provide for affordable housing is a fiction.

CONCLUSION

For the reasons explained above, the Court should enter an order finding the rules to be invalid.

Respectfully submitted this 21st day of October, 2005.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by United States mail to all parties listed below on this 21st day of October, 2005.

____

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief was prepared in accordance with the font requirements of Rule 9.100, Fla. R. App. P.

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APPENDIX A