

O/A 4-11-85

BEFORE THE SUPREME COURT
FOR THE STATE OF FLORIDA

CASE NO. 65,769

DEPARTMENT OF ENVIRONMENTAL
REGULATION,

Appellant,

vs.

E. PETER GOLDRING,

Appellee.

FILED

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On Appeal From The Third District Court Of Appeal Of Florida
Case No. 83-2880

BRIEF OF AMICUS CURIAE
METROPOLITAN DADE COUNTY

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STATEMENT OF THE CASE AND FACTS

Metropolitan Dade County, appearing as Amicus Curiae, adopts as its own the Statement Of Facts And Case as set forth in the Initial Brief of Appellant, Department of Environmental Regulation.

ARGUMENT

THE LOWER COURT'S DECISION IS CONTRARY TO THE LEGISLATIVE PURPOSE IN ENACTING CHAPTER 403, THE FLORIDA AIR AND POLLUTION CONTROL ACT

The instant case presents what is ostensibly a narrow legal question of statutory construction, susceptible of resolution by recourse to rules of statutory construction. These rules and their proper application to the provisions of the statute and rules involved in the case at bar have been ably set forth in Appellant's Initial Brief and therefore will not be repeated here. Such rules of construction are, of course, designed to guide the Court in its quest to determine and effectuate the intent of the Legislature. In the instant case, however, a factual understanding of the environmental system of which the subject site is a part is of equal importance to such an inquiry. Only with an understanding of this environmental system can the Court properly gauge the scope of the legislative acts that were passed to protect that environmental system.

The subject site is part of a vast, hydrologically connected ecosystem extending south from the Kissimmee River basin into Lake Okeechobee and then into the Everglades and finally to the Florida Bay and Gulf of Mexico. It is a single environmental ecosystem; the key being water. The water slowly follows its southernly route as a thin sheet of surface water, known as sheet-flow. This sheet-flow extends over vast regions through the center of South Florida during the winter rainy season. The expansive area traveled by sheet-flow performs several critical roles in South Florida's life support systems:

1. Flood Storage; providing a flood storage area for Dade and Monroe Counties, retaining large quantities of surface water during flood periods.
2. Water Quantity; serving as a water recharge area for the Biscayne Aquifer which is the sole source of drinking water for Dade and Monroe Counties.
3. Water Quality; acting as a natural filter system to maintain a high degree of water quality to the Biscayne Aquifer and prevents salt water intrusion from Biscayne Bay.
4. Surface Water Supply; supplying surface water flow to Everglades National Park.
5. Wildlife Habitat; in addition to providing habitat for numerous species, such wetland areas provide the first link in the estuarine food chain, providing detrital input to connected fresh and brackish waters.

There can be no doubt that the Florida Legislature intended to include this vast, hydrologically connected ecosystem within the broad umbrella of protection provided by Chapter 403, The Florida Air And Water Pollution Control Act. Section 403.021 states this intent in the broadest possible terms:

(1) The pollution of the air and waters of this state constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish and other aquatic life, and impairs domestic, agricultural, industrial, recreational, and other beneficial uses of air and water.

(2) It is declared to be the public police of this state to conserve the waters of the state and to protect, maintain, and improve the quality thereof for public water supplies, for the propagation of wildlife, fish and other aquatic life, and for domestic, agricultural, industrial, recreational, and other beneficial uses,...

* * *

(5) It is hereby declared that the prevention, abatement, and control of the pollution of the air and waters of this state are affected with a public interest, and the provisions of this act are enacted in the exercise of the police powers of this state for the purpose of protecting the health, peace, safety, and general welfare of the people of this state.

(6) The legislature finds and declares that control, regulation, and abatement of the activities which are causing or may cause pollution of the air or water resources in the state and which are or may be detrimental to human, animal, aquatic, or plant life, or to property, or unreasonably interfere with the comfortable enjoyment of life or property be increased to insure conservation of natural resources, to insure a continued safe environment, to insure purity of air and water, to insure domestic water supplies, to insure protection and preservation of the public health, safety, welfare, and economic well-being, to insure and provide for recreational and wildlife needs as the population increases and the economy expands, and to insure a continuing growth of the economy and industrial development.

Section 403.817 provides the regulatory mechanism by which the Legislature sought to implement the policies expressed under Section 403.021 for the protection of water quality. Consistent with the legislative intent expressed in Section 403.021 and the remedial nature of the Act, all courts and administrative tribunals that previously considered Section 403.817 construed that

section broadly. (See, Appellant's Initial Brief, page 22 and cases cited therein). To do otherwise would be to ignore the practical consequences of the hydrological connection that exists between such wetlands and the water bodies which they nourish. It would serve only to treat the symptoms of pollution, rather than the cause, thereby frustrating the expressed legislative purpose of protecting these resources.

A broad reading of Section 403.817 is also supported by the federal experience under The Clean Water Act, 33 U.S.C. §1311, et seq. The Clean Water Act is the federal counterpart of the state statute under consideration and its broad objective is "to restore and maintain the chemical, physical and biological integrity of the nation's waters". Section 101(a), 33 U.S.C. 1251(a). The operative section of the Clean Water Act is §301, 33 U.S.C. §1311, which prohibits the discharge of pollutants into navigable waters, except when in compliance with various sections of the Act. "Navigable Waters" means "waters of the United States". 33 U.S.C. §1362(7).

One of the sections with which compliance is required is §404, 33 U.S.C. §1344, which establishes a program for the issuance of dredge and fill permits to be administered by the United States Army Corps of Engineers (hereinafter referred to as the "Corps"). In this regard, the Corps is the federal counterpart of the State's Department of Environmental Regulation. In implementing the legislative mandate of the Clean Water Act, the Corps has promulgated the regulations found in 33 C.F.R., parts 320 through 329. For purposes of comparison to the State rules under

consideration, the pertinent federal regulations are as follows:

The term 'waters of the United States' means: tributaries to navigable waters of the United States including adjacent wetlands... 33 C.F.R. part 323.2(a)(3).

The term 'wetlands' means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient enough to support a prevalence of vegetation typically adapted for life in saturated soil conditions. 33 C.F.R. part 323.2(c). (emphasis supplied)

Although the Act speaks in terms of "navigable waters", the regulations implementing the broad mandate of Congress to protect those waters have defined the "waters of the United States" in terms of "adjacent wetlands", so as to include much more than navigable waters of the United States. The federal judiciary has demonstrated its comprehensive and pragmatic understanding of the intent of the Clean Water Act through its affirmation of the Corps' broad regulatory jurisdiction over wetlands that are hydrologically connected to navigable waters. Avoyelles Sportmen's League v. Alexander, 511 F.Supp. 278 (W.D. La. 1981); Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir. 1978); U.S. v. Ashland Oil and Transportation Co., 504 F.2d 1317 (6th Cir. 1974); U.S. v. Holland, 373 F.Supp. 665 (N.D. Fla. 1974). These decisions are based upon the recognition that any effort to preserve the integrity of the nation's waters requires regulation of sources of pollution other than "navigable" streams, rivers, etc.

A recent federal case which is particularly instructive for purposes of comparison to the case under consideration is U.S. v. Carter, 12 ELR 20682 (S.D. Fla.

1982). In that case, the Corps brought suit under the Clean Water Act against landowners for dredge and fill violations on sites located only a few miles to the northwest of the Goldring site. The Court upheld the Corps regulatory jurisdiction of the sites finding that the areas were wetlands and that "a surface water connection exists between the subject properties, Florida Bay, and the Gulf of Mexico". Id. at 20683. The Court based its determination that the areas were wetlands upon the prevalence of the same wetlands specie, sawgrass, which is the prevalent vegetation at the Goldring site. In upholding the Corps exercise of jurisdiction over the sites the Court observed that, "The Clean Water Act... is a comprehensive effort by Congress to restore, and to maintain, the chemical, physical and biological integrity of the nation's waters". Id. Whereupon, the Court broadly interpreted the regulations promulgated by the Corps to accomplish that Congressional purpose.

Similarly, the state legislature's purpose of protecting the water quality of the state's water resources is just as broadly and unambiguously expressed in §403.021(1), (2), (5) and (6), and §403.817(1), Fla.Stat. (1983). In fact, this legislative purpose was recently reaffirmed by the enactment of the Water Quality Assurance Act of 1983 and the Warren S. Henderson Wetlands Protection Act of 1984. In fact, the latter Act defined "wetlands" in terms of those areas within the State DER's regulatory jurisdiction under §403.817, Fla.Stat. (1983). At the time of that Act's enactment (prior to the lower court's decision in this case), the only existing judicial and administrative decisions supported the State DER's

assertion of regulatory jurisdiction pursuant to the vegetative index promulgated under Florida Administrative Code, Rule 17-4.02(17). There could be no more obvious statement of legislative approval of the State DER's implementation of §403.817. In fact, the 1984 Legislature not only ratified the State DER's determination of jurisdiction based on dominant vegetation, it expanded that jurisdiction. See, §§403.91 - 403.929, Fla.Stat. (1984).

Since the cornerstone of the Wetlands Protection Act of 1984 is its definition of "wetlands", to permit the lower court's narrow reading of §403.817 to stand would effectively gut that Act and remove vast areas of environmentally sensitive wetlands from the State DER's dredge and fill jurisdiction. This, of course, would serve only to frustrate the very legislative purpose behind the enactment of these laws.

CONCLUSION

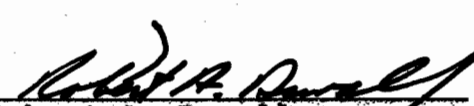
When construing a statute the primary task of the court is to determine and give effect to the legislative intent. Chapter 403, the Florida Air and Water Pollution Control Act, is a comprehensive effort by the legislature to provide for the restoration and protection of the air and water resources of Florida. In contrast to the broad, remedial nature of Chapter 403, the Third District Court of Appeals' restrictive interpretation of §403.817, Fla.Stat. (1983), serves only to frustrate the very legislative purpose of enacting the law.

This Court is respectfully urged to reverse the Third District Court of Appeals' decision and, instead, follow the approach taken by all courts and administrative tribunals that have previously considered the scope of the State DER's jurisdiction under §403.817. This same approach was taken by the federal judiciary in determining the scope of the Corps' regulatory jurisdiction under the Clean Water Act. This Court, too, should be guided by the same desire to effectuate the intent and policies clearly expressed by the state legislature and reject the lower court's myopic reading of the Act.

Respectfully submitted,

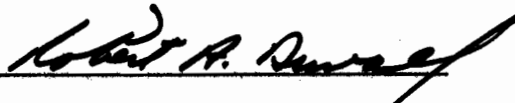
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF AMICUS CURIAE METROPOLITAN DADE COUNTY was hand delivered to JOHN G. FLETCHER, Esquire, 7600 Red Road, South Miami, FL 33143-5484; and was mailed to E. GARY EARLY, Assistant General Counsel, State of Florida Department of Environmental Regulation, Twin Towers Office Building, 2600 Blair Stone Road, Tallahassee, FL 32301, on this 26th day of February, 1985.


Assistant County Attorney