O/a 4-11-85

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL REGULATION,

Appellant,

vs.

E. PETER GOLDRING,

Appellee.
_____/

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CASE NO. 65,769

APPELLEE'S BRIEF ON THE MERITS

ON REVIEW FROM THE THIRD DISTRICT
COURT OF APPEAL

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STATEMENT OF THE CASE AND OF THE FACTS

The Appellee Goldring ("Goldring") is aware that an answer brief generally does not contain a statement such as this. However, Goldring had appealed more than just the jurisdictional issue to the Third District Court of Appeal. He also had sought review of the denial of a permit (assuming Department of Environmental Regulation ["DER"] jurisdiction). The Third District Court of Appeal did not rule on the entitlement to a permit, obviously as it became unnecessary to have a permit in the light of the DER's lack of jurisdiction over the subject property. In order to preserve his right to the issuance of a permit in the event that this Court finds DER jurisdiction, Goldring has included as his second issue in this brief the argument thereon.

As the facts relating to jurisdiction and to permit entitlement are separate ones the specific facts for each argument will be included in the argument sections of this brief. However, as to DER jurisdiction the controlling statute is Section 403.817, F.S., which reads (next page):

"(1) It is recognized that the levels of the waters of the state naturally rise and fall, depending upon tides and other hydrological, meteorological, and geological circumstances and features. The natural rise and fall of the waters is essential to good water quality, but often makes it difficult to determine the natural landward extent of the waters. Therefore, it is the intent of the Legislature that the Department of Environmental Regulation establish a method of making such determinations, based upon ecological factors which represent these fluctuations in water levels.

(2) In order to accomplish the legislative intent expressed in subsection (1), the department is authorized to establish by rule, pursuant to chapter 120, the method for determining the landward extent of the waters of the state for regulatory purposes. Such extent shall be defined by species of plants or soils which are characteristic of those areas subject to regular and periodic inundation by the waters of the state. The application of plant indicators to any areas shall be by dominant species. However, no landowner shall suffer any property loss or gain because of vegetation changes due to mosquito control activities conducted upon his property, provided these activities are or have been undertaken as part of a governmental mosquito control program. To the extent that certain lands have come within department jurisdiction pursuant to this section or chapter 253 solely due to insect control activities, these lands shall not be subject to permitting requirements for the discharge of dredge or fill material.

(3) Amendments adopted after April 5, 1977, to the rules of the department adopted before April 5, 1977, relating to dredging and filling and which involve additions or deletions of the vegetation or soil indices or the addition or deletion of exemptions shall be submitted in bill form to the Speaker of the House of Representatives and to the President of the Senate for their consideration and referral to the appropriate committees. Such rule amendments shall become effective only upon approval by act of the Legislature.

(4) To the extent that any plant or soil indicators are enacted into law by the Legislature for the purpose of defining the landward extent of the waters of the state for regulatory purposes, the

plant or soil indicators adopted by the department regarding areas covered by legislation shall be consistent with said legislation.

(5) The landward extent of waters as determined by the rules authorized by this section shall be for regulatory purposes only and shall have no significance with respect to sovereign ownership."

ARGUMENT (Issue no. 1)

Whether the Department of Environmental Regulation has jurisdiction over the property which is the subject of the litigation.

The DER contends as its first issue that the extent of the DER's regulatory dredge and fill jurisdiction is to be determined solely by the presence or absence of jurisdictional vegetation. No other indicia of jurisdiction exist, claims the DER, and it also claims that it has never construed the applicable statutes and rules in some other fashion. As this brief proceeds this Honorable Court will be able to observe that the statutes and regulations require more than just "jurisdictional vegetation" and that the DER has consistently construed them to require more in order for there to be DER jurisdiction. Before reaching that discussion, however, certain things should be made clear:

Although the DER's initial brief deliberately attempts to give the impression that Goldring's property is part of the vast "River of Grass" the actual jurisdictional issue below was raised by the DER's sole contention that the subject site was part of the landward extent of Florida Bay (R.0534) notwithstanding that the subject property is high and dry land ninety percent of the year and is located four and one-half miles from Florida Bay itself (R.1334). The vegetation that ostensibly gives rise to the DER's jurisdiction is sawgrass. Sawgrass, however, is a fresh water vegetation that will not survive in salt water. Florida Bay is most definitely salt water. Goldring's property is obviously not a landward (or seaward) part of Florida Bay, for if it were there

would be no sawgrass on it (R.1334).

On the other hand, the mangroves that grow well to the south of the subject property but not at all on it, may be a part of the landward extent of Florida Bay for they are brackish water plants. If mangroves were the dominant species on the subject property, or appeared there at all, the DER might have a case for jurisdiction (assuming the balance of the tests are met).

In the face of this most obvious situation the DER attempts to claim jurisdiction solely on the basis of the existence (because of rainfall only, R.0125) of fresh water dependent sawgrass. Its argument is that the statutes and rules governing DER jurisdiction call for jurisdiction to be determined solely on the basis of vegetation. The DER further claims that it has never taken a contrary position, thus when the legislature re-enacted its governing statutes it did so with the intention of retaining the DER's construction thereof that "jurisdictional vegetation" alone determines jurisdiction.

First and foremost it is time to dispel the impression given by the DER's brief that the DER has always determined jurisdiction solely on the basis of vegetation. In this very case, at the hearing before the Hearing Officer from the Department of Administrative Hearings ("DOAH") the DER's own witnesses testified unequivocally that they do not have jurisdiction solely on that basis. In the record below this Honorable Court will find the sworn testimony of DER witness Richard Lotspeich and DER witness Jeremy Craft that DER jurisdiction does not attach solely on the basis of the vegetation index. Lotspeich's testimony may be found at R.0204-0205; Craft's at R.0409-0410. At R.0204 (which is

T.206) DER witness Lotspeich testified:

> "Q. That being the predominent species of sawgrass on the Florida Rock and Sand site, and your not exercising jurisdiction, that would indicate that there is something other than simply on the species list that determines jurisdiction, is that correct?
>
> "A. That is correct. As I stated before, if the area of wetlands is totally isolated from any connection to the list of water bodies, then we do not exercise jurisdiction."

DER witness Mr. Jeremy Craft was even clearer on this matter. At R.406 (T.408) he testified:

> "A. If those plants are there*, one can pretty much assert that the area is wet, that the area is wetland because one does not find hemmed communities of those plants in areas that are not wetlands. Whether it is within our jurisdiction or not, still is a different question." (Emphasis supplied.)

What Mr. Lotspeich was referring to when he spoke of the "Florida Rock and Sand" site is an on-going rockmining operation directly across U.S. 1 from the subject site. There the DER has specifically determined that it does not have jurisdiction notwithstanding that the dominant species is sawgrass.

In fact at R.152, which is T.154, Mr. Lotspeich testified as to how the DER arrived at its conclusion that it had jurisdiction over Goldring's property:

> "Q. Can you explain how you determine--or anything else you need--how it was determined that we had jurisdiction or authorization for the permit?
>
> "A. It has been determined that we have juris-

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* A dominant species on the vegetation list.

> diction based on the fact that there is a dominance of sawgrass vegetation at the project site, and the fact that the vegetation at the project site is connected to the water to the south. In this case, that would be Florida Bay, more precisely, a little back from Barnes Sound." (Emphasis supplied.)

But even more interestingly, after devoting 37 pages of its brief to the proposition that the statutes and rules grant jurisdiction on vegetation alone and that the DER has consistently construed them in that fashion, the DER then throws its entire brief out the window by admitting that it has never so construed the statutes and rules (DER's initial brief, pages 37-38):

> "One final issue should be dealt with in this regard. In his recommended order, the hearing officer was apparently fearful that given the Department's interpretation of its rule, the Department would soon be extending its jurisdiction to "suburban fish ponds" due to the presence of water lilies, a jurisdictional species. In making that observation the hearing officer failed to consider the language of Florida Administrative Code Rule 17-4.28(2) which states:
>
> > [p]ursuant to Sections 403.061, 403.087, or 403.088, F.S., those dredging or filling activities which are to be conducted in, or connected directly or via an excavated water body or series of excavated water bodies to, the following categories of waters of the state to their landward extent as defined by Section 17-4.02(17), F.A.C. require permit from the department prior to being undertaken: (there follows a list of named water bodies).
>
> The language of the rule clearly limits the Department's jurisdiction to one of the named bodies to the extent of its jurisdictional vegetation (i.e., the landward extent) or to activities which are connected directly or via excavated water bodies to a named water body. Small, isolated pockets of water, which are not connected

> to waters of the state to their natural landward extent, are clearly out of the Department's dredge and fill jurisdiction. The Department has never acted otherwise."

In other words, jurisdictional vegetation alone does not confer jurisdiction, exactly the opposite of the DER's position before this Court, but precisely the DER's testimony before the DOAH Hearing Officer.

Also in contradiction to the Department's position that it has always looked only to vegetation for jurisdiction is State v. Falls Chase Special Taxing District, 424 So.2d 787 (Fla., 1st DCA, 1983), wherein the DER took the (obviously erroneous) position that it had jurisdiction without the jurisdictional vegetation. Therein the First District Court determined that there must be such vegetation before the DER had jurisdiction. Falls Chase is a decision that the DER insists is important here -- obviously for different reasons than the DER's alleged consistency -- because the Court there ostensibly held that vegetation alone determined DER jurisdiction. The issue before that Court, however, was not whether the DER jurisdiction was determined solely on the basis of vegetation (without looking further to some additional indicia), rather the issue was whether the DER could in the absence of jurisdictional vegetation claim jurisdiction. The First District Court determined that there must be jurisdictional vegetation. If that Court meant to say that jurisdictional vegetation alone conferred jurisdiction, then it ruled on an issue not before it. Obviously such an issue was not briefed, there being no jurisdictional vegetation at all. There was no clash of adversarial positions upon which our system relies to clarify law, thus this Honorable

Court should give no weight to such a holding, if the First District Court's holding is to be construed in the fashion the DER suggests. But the point here is that once again the DER, in Falls Chase, construed the statutes and regulations in a fashion directly contrary to the way that the DER insists in its instant brief is the only way it has ever construed them.

It being obvious that the DER has not been consistent in its construction of the applicable statutes and rules, and has construed them in fashions contrary to the way it would now have this Court construe them, it is equally obvious that the legislature's recent enactments did not put the seal of approval on the jurisdictional vegetation only theory here espoused to a Court for the first time. The DER's citations to "cases" (its brief, pages 22-23) holding that the vegetation alone confers jurisdiction are misplaced. Falls Chase has just been discussed, supra. The only other "authorities" cited for this extraordinary construction are two DER departmental decisions. In the first, Florida Mining and Materials Corp. v. State of Florida, Department of Environmental Regulation, DOAH Case no. 81-1961, 4 FALR 2230-A (1982), cited at page 2 of the DER's brief, the entire matter was settled without judicial review by the issuance of a rock mining permit, thus could hardly be considered as precedent. (See the DER Director's Order at 4 FALR 2232-A, that portion labelled "Stipulation of Issuance of Permit").

Of these two administrative matters cited, only one proceeded to Court, that of Occidental Chemical Company v. State, Department of Environmental Regulation, DOAH Case No. 77-2051 (1980). What that case was all about no one can say as the decision of the First

District Court of Appeal was a per curiam decision with no written opinion. Occidental Chemical Company v. State, Department of Environmental Regulation, 411 So.2d 388 (Fla., 1st DCA, 1981). It is doubtful that the DER is even entitled to make reference to Occidental let alone cite it as precedent. See Department of Legal Affairs v. District Court of Appeal, 434 So.2d 310 (Fla., 1983), in which this Honorable Court held specifically that a per curiam decision with no written decision has no precedential value.

Further, the Court has held it to be improper to cite to one appellate Court a per curiam decision without opinion from another appellate Court as the DER has here done.

There is no other "authority" cited by the DER for its new construction of the statutes and regulations.* The Third District Court here, however, was presented directly with briefs on the DER jurisdiction issue; it did rule directly thereon, in a clear use of accurate legal logic. It determined correctly that something more than just vegetation was required. The decision of the Third District Court is contained in the Appendix hereto at pages 1 through 5.** This Honorable Court is respectfully requested to read it once more so that it can be reminded of that decision's logical, legal correctness.

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* It remains Goldring's firm belief that there is no conflict giving rise to this Court's jurisdiction.

** It may, of course, also be found at 452 So.2d 968 (Fla., 3rd DCA, 1984).

It having been shown that the DER's ostensible "vegetation only" construction of the governing statutes has never been the case, the obvious question then arises: is there any uniform construction of the governing statute, Section 403.817, F.S.*, by the DER of which the Florida Legislature would have been aware? The obvious answer is in the affirmative and that uniform DER construction is DER Rule 17-4.28, F.A.C., which reads in pertinent part as follows: (next page)

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* Set forth in full at page 6, hereof.

(2) Pursuant to Sections 402.061, 403.087 or 403.099, F.S., those dredging or filling activities which are to be conducted in, or connected directly or via an excavated water body or series of excavated water bodies to, the following categories of waters of the state to their landward extent as defined by Section 17-4.02(17), F.A.C. require permit from the department prior to be undertaken:

(a) rivers and natural tributaries thereto;

(b) streams and natural tributaries thereto;

(c) bays, bayous, sounds, estuaries and natural tributaries thereto;

(d) natural lakes, except those owned entirely by one person. . . .

(e) Atlantic Ocean out to the seaward limit of the State's territorial boundaries;

(f) Gulf of Mexico out to the seaward limit of the State's territorial boundaries;

(g) natural tributaries to not include intermittent natural water courses which act as tributaries only following the occurance of rainfall and which normally do not contain contiguous areas of standing water.

The Department recognizes that the natural border of certain water bodies listed in this section may be difficult to establish because of seasonal fluctuations in water levels and other characteristics unique to a given terrain. The intent of the vegetation indices in Section 17-4.02(17), F.A.C., is to guide in the establishment of the border of the water bodies listed in this section. It is the intent of this rule to include in the boundaries of such water bodies areas which are customarily submerged and exchange waters with a recognizable water body (i.e., areas within the landward extent of waters of the State as defined in Section 17-4.02(17)). Isolated areas which infrequently exchange water with a described water body or provide only insignificant benefit to the water quality of a water body are intended to be designated as uplands. The vegetation indices in Section 17-4.02(17), F.A.C., presumed to accurately delineate the landward extent of such water bodies.

Rule 17-4.28, F.A.C., was specifically adopted pursuant to the authority granted to the DER by Section 403.817, F.S., the controlling legislation with which this Honorable Court is concerned.* Please see the "specific authority" paragraph of Rule 17-4.28, F.A.C. (following the body of the rule). This Rule, 17-4.28, F.A.C., is obviously the DER's official construction of Section 403.817, F.S., for it could be nothing else. Returning to the exact language of Rule 17-4.28(2), F.A.C., one cannot avoid the following excerpt:

> "The Department recognizes that the natural border of certain water bodies listed in this section may be difficult to establish because of seasonal fluctuations in water levels and other characteristics unique to a given terrain. The intent of the vegetation indices in Section 17-4.02(17), F.A.C., is to guide in the establishment of the border of the water bodies listed in this section. It is the intent of this rule to include in the boundaries of such water bodies areas which are customarily submerged and exchange waters with a recognizable water body (i.e., areas within the landward extent of waters of the state as defined in Section 17-4.02(17)). Isolated areas which infrequently exchange water with a described water body or provide only insignificant benefit to the water quality of a water body are intended to be designated as uplands. The vegetation indices in Section 17-4.02(17), F.A.C., presumed to accurately delineate the landward extent of such water bodies. (Emphases supplied.)

Thus, from this official DER rule the Florida Legislature would have been aware of the DER's construction of the governing statutory provision. All legislative re-enactments and amendments would have reconfirmed this construction, not the phantom

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* The DER agrees that Section 403.817, F.S., is the grant of authority for Rule 17-4.28, F.A.C. Please see the DER's brief, pages 1-2.

rule that the DER hopes to sell to this Court.

Reading the provisions of Rule 17-4.28, F.A.C., one readily observes that the DER's construction, which comports fully with the controlling statute, as more specifically discussed, infra, requires an exchange of waters between "list vegetated" areas and recognizable water bodies for jurisdiction to attach. It is this official construction that the Florida Legislature would have considered. It is this rule that, when read in pari materia with the other rules and the statutes, led both the Third District Court of Appeal and the DOAH Hearing Officer to conclude that the DER did not have jurisdiction in this specific case involving Goldring's property.

The DOAH Hearing Officer and the Third District Court were correct: as the subject site does not exchange waters with Florida Bay, it is not a part of the landward extent of Florida Bay, thus the DER has no jurisdiction over the subject property.

The dominant vegetation on the subject site is sawgrass, a fresh water species. As this is in the vegetation index, it is a jurisdictional indicator to which the DER looks. (If, of course, the dominant species is not on the list, the analysis ceases and there is no DER jurisdiction)*. Having found the dominant species to be sawgrass, the latter portion of Rule 17-

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* State v. Falls Chase Special Taxing District, 424 So.2d 787 (Fla., 1st DCA, 1983).

4.28, F.A.C., then becomes controlling as to jurisdiction or lack thereof. That reads, as previously discussed herein:

> "The Department recognizes that the border of certain water bodies listed in this section may be difficult to establish because of seasonal fluctuations in water levels and other characteristics unique to a given terrain. The intent of the vegetation indices in Section 17-4.02(17), F.A.C., is to guide in the establishment of the border of the water bodies listed in this section. It is the intent of this rule to include in the boundaries of such water bodies areas which are customarily submerged and exchange waters with a recognizable water body (i.e., areas within the landward extent of waters of the state as defined in Section 17-4.02(17)). Isolated areas which infrequently exchange water with a described water body or provide only insignificant benefit to the water quality of a water body are intended to be designated as uplands. The vegetation indices in Section 17-4.02(17), F.A.C., presumed to accurately delineate the landward extent of such water bodies. (Emphasis supplied.)

This provision thus contains the final tests of DER jurisdiction where the vegetation index has been met. These tests include whether the subject site exchanges water with Florida Bay. If the site does not exchange water with Florida Bay, the DER does

not have jurisdiction.

There is no factual dispute that the subject site does not exchange waters with Florida Bay, the only body of water the DER stipulated to be involved.

As previously discussed, it should be obvious to any rational person that as Florida Bay is a salt water body its landward extent can be readily measured by vegetative communities that are saline dependent, not fresh water dependent as is the subject site's vegetation.

On this point the DOAH Hearing Officer found as a fact (R.1334):

> "Florida Bay which is salt water does not exchange water with the project site which is approximately 4½ miles to the north of the Bay. If it did, sawgrass which is a fresh water aquatic plant would not be growing on Mr. Goldring's property."

As to the issue of exchange by Florida Bay and the subject site the testimony was also unequivocal. Dr. Earl Rich testified for Goldring that the subject site (R.0131):

> ". . . certainly does not receive water from Florida Bay."

Mr. Jeremy Craft for the DER went to great lengths to show a "connection"* through canals, culverts, and whatever from the

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* Which again reflects that the DER has always construed its controlling laws to require more than simply the "jurisdictional vegetation" for DER jurisdiction to attach.

subject site to "Florida Bay", but even he could not bring himself to use the words "exchange of water". In fact he candidly admitted that the direction of the flow of water was to the southeast, from the site to Florida Bay (R.0421). No one testified for the DER that Florida Bay at any time exchanges water with the subject site.

The DOAH Hearing Officer concluded as a matter of law in relation to this "exchange" issue as follows (R.1339 et seq.):

> "Petitioner contests the Department's jurisdiction over the location of his proposed mining. While conceding that sawgrass is the dominant vegetation on the location of his proposed mining, he argues that the presence of an index species is not the sine qua non of the landward extent of state waters and there must be some connection to a river, stream, or other natural water body, such as Florida Bay . . .
>
> "There is no question that Florida Bay which directly connects to the Atlantic Ocean is a state water. The question is just how far north across the land of South Florida does Florida Bay extend in its landward extent. Water bodies are dynamic. Their levels change, they create and destroy shorelines, and they even disappear suddenly. These dynamic features are recognized in Section 403.817, Florida Statutes (1981), where the Legislature stated:
>
> (1) It is recognized that the levels of the waters of the state natually rise and fall, depending upon tides and other hydrological, meteorological, and geological circumstances and features. The natural rise and fall of the waters is essential to good water quality, but often makes it difficult to determine the natural landward extent of the waters. Therefore, it is the intent of the Legislature that the Department of Environmental Regulation establish a method of making such determinations, based upon ecological factors which represent these fluctuations in water levels.
> (2) In order to accomplish the legislative intent expressed in subsection (1), the department is authorized to establish by rule, pursuant to chapter 120, the method for determining the landward extent of the waters of the state for regulatory purposes. Such extent shall be defined by species of plants or soils which are

characteristic of those areas subject to regular and periodic inundation by the waters of the state. The application of plant indicators to any areas shall be by dominant species . . .

"Since the Department's rules which define the landward extent of state waters have as their authority, Section 403.817, it is important to divine the purposes of the vegetative indices established by the statute. Paragraph (1) recognizes . . . that the levels of the waters of the state naturally rise and fall, depending upon tides and other hydrological, meteorological, and geological circumstances and features. The purpose of Section 403.817 is to determine the scope of the land over which the waters rise and fall. In paragraph (2) the statute further envisions that the defined area will be subject to regular and periodic inundation.

"The simplest model which illustrates the operation of Section 403.817 is a tidal bay. As the tides regularly and periodically rise and fall the amount of the area covered by the bay increases at high tide and decreases at low tide. The land above the low tide mark and below the high tide mark is the "landward extent" of the bay. Because the high tide mark on one day is not always the same as on the next day due to those circumstances mentioned in paragraph (1), the Legislature chose to enlist a convenient natural instrument for determining the landward extent of state water bodies. This instrument is the vegetative index.

"It is scientifically known that certain plants like to have their "feet wet" on a periodic basis. The Department of Environmental Regulation was therefore authorized to define the landward extent of state waters by using those species of plants which are characteristic to lands regularly flooded by waters of the state. The use of this instrument obviated the need for keeping impossibly detailed records on high tide marks or river flood lines.

"The most important point from Section 403.817 for this case is that the landward extent of a state water is that portion of land covered by water as the result of dynamic, regular, and periodic action from the state water body itself. The river must flood, the

tide must rise, or the stream must meander in order to create the landward extent of each water body.

"The foregoing concept is embodied in Section 17-4.28(2), Florida Administrative Code where it states:

"The department recognizes that the natural border of certain water bodies listed in this section may be difficult to establish because of seasonal fluctuations in water levels and other characteristics unique to a given terrain. . . It is the intent of this rule to include in the boundaries of such water bodies areas which are customarily submerged and exchange waters with a recognizable water body . . . Isolated areas which infrequently exchange water with a described water body or provide only insignificant benefit to water quality of the water body are intended to be designated as uplands. The vegetative indices in Section 17-4.02(17), F.A.C. [are] presumed to accurately delineate the landward extent of such water bodies."

"I conclude from the foregoing that Mr. Goldring's project site is not within the landward extent of Florida Bay.

"The site is four and one-half miles north of the recognizable edge of Florida Bay as shown on maps of the area. There is no exchange of water between the site location and the Bay. The concept of exchange does not include a one-way flow, but denotes a give and take. The dynamic action of Florida Bay has no direct effect on the water at the site. The sole source of water for the site is rainfall which either directly falls there, or flows from the northeast in a sheet flow onto the property. The water which flows off of the site is fresh water, yet Florida Bay is salt water. The sawgrass which is on Mr. Goldring's land could not very well be an index of the landward extent of Florida Bay because sawgrass is one of the fresh water species. Section 17-4.02(17), Florida Administrative Code.

"Careful consideration has been given to the Department's Final Order in Florida Mining and Minerals Corporation v. Department of Environmental Regulation, 4

> FALR 2230-A (Florida Department of Environmental Regulation, August 5, 1982). To the extent that the order can be read to suggest that the existence of an index plant, without more, automatically establishes as a matter of law the landward extent of a water body of the state, the Hearing Officer must respectfully disagree with the conclusions therein. It would be ludicrous to believe that the growing of water lilies in a suburban goldfish pond automatically makes the pond part of the landward extent of a water of the state."

The Officer subsequently recommended (R.1347):

> "Based on the foregoing Findings of Fact and Conclusions of Law, it is
>
> RECOMMENDED:
>
> That the Department of Environmental Regulation enter a Final Order determining that it is without jurisdiction over the activity for which the Petitioner has sought a permit."

Notwithstanding the DOAH Hearing Officer's well reasoned and obviously correct conclusion, the DER Director rejected the recommendation and concluded that the DER had jurisdiction. To do this, however, she had to create an entirely new and esoteric meaning to the word "exchange". She concluded that an "exchange" of waters can be "one-way" (R.1353), i.e., although the subject site gives water to the Bay, and the Bay gives none to the subject site, such falls within the meaning of the word "exchange".

The DER Director is limited to the plain meaning of the word "exchange", however. E.G., Carson v. Miller, 370 So.2d 10 (Fla., 1979). In City of Miami Beach v. Royal Castle System, Inc., 126 So.2d 595 (Fla., 3rd DCA, 1961), "plain meaning" was equated to the dictionary definition of a word.

Every dictionary definition that Goldring has been able to find defines "exchange" as a reciprocal transfer, not a "one-way" transfer. E.g., the massive Random House Dictionary of the English Language, Random House, 1969, at page 497:

> ". . . to part with for some equivalent; give up (something) for something else; change for another . . . ".

The definition contains 300+ words, yet never once eliminates reciprocity.

Webster's New Collegiate Dictionary, G. & C. Merriam Co., 1980, at page 395 states:

> "Exchange: . . . the act of giving or taking one thing in return for another. . .".

Black's Law Dictionary, 4th Edition, West Publishing Co., 1951, at page 671 devotes the entire page to different types of exchanges, yet not one of them connotes anything except reciprocal acts.

Even Florida Jurisprudence contains a definition of "exchange" (in Florida Jurisprudence, Words and Phrases, at page 282). There again reciprocity is the key.

At the time of the hearing before the DOAH Hearing Officer Goldring made it clear that in the environmental field the word "exchange" did not develop some esoteric meaning. Thus Goldring's expert environmentalist, Dr. Earl Rich, testified as to "exchange" (R.0135):

> "BY MR. FLETCHER:
>
> Q. Does that mean a giving and a taking in ecological terms.
>
> A. Yes, it does."

No testimony was presented to the contrary.

The redefining of "exchange" by the DER Director is contrary to law. As there is no exchange of waters between the subject site and the Bay or any other body of water, the DER does not have jurisdiction.

It should be noted that for the first time anywhere the DER in an exception to the DOAH Hearing Officer's Recommended Order contended DER jurisdiction because waters from the subject site "flow into the C-111 canal". The DER Secretary concluded therefore that the DER has jurisdiction (R.1354). Aside from the due process problem with this procedure* the conclusion is readily rejected for the same reasons expressed regarding Florida Bay. Water may flow into the canal from the site, but the water from the canal (which does not pass through Goldring's property and which lies miles to the south) does not flow onto Goldring's property. There is no exchange of waters with the C-111 canal, thus no "landward extent" thus no DER jurisdiction.

Although not discussed by the DOAH Hearing Officer or the Third District Court, for the obvious reason of not being necessary in the light of their decision, there is another limitation upon the DER's jurisdiction. The DER is claiming authority to regulate the quality of the water that will be in the "lake" that is not there now, but which will exist after the excavation for rock mining. However, Goldring is the sole owner of the subject site as stipulated (R.0532, Prehearing Stipulation, page 5, paragraph H2). Accordingly the proposed project is not subject

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* The Pretrial Stipulation limited the issue to Florida Bay only (R.0534).

to surface water regulation and no standards are applicable. It is not that Mr. Goldring or his site are exempted from regulation; it is that his "lake" is not included to begin with in the statutory definition of "Waters" of the state. Section 403.031(3), F.S., defines "Waters" as:

> "'Waters' shall include, but not be limited to rivers, lakes, streams, springs, impoundments, and all other waters or bodies of water, including fresh, brackish, saline, tidal, surface or underground. Waters owned entirely by one person other than the state are included only in regard to possible discharge on other property or water. Underground waters include, but are not limited to, all underground waters passing through pores of rock or soils or flowing through in channels, whether man-made or natural." (Emphasis supplied.)

The rule that the DER is attempting to enforce (Rule 17-3.121, F.A.C.) relates to surface waters and emanates from Section 403.031, F.S., (see specific authority notes to the said Rule, Vol. 7, Florida Administrative Code Annotated, p. 678). As the statutory definition of waters does not include one owner properties, this Rule cannot do so, as Rules cannot expand on statutes. Department of Transportation v. James, 403 So.2d 1066 (Fla., 4th DCA, 1981), wherein the Fourth District Court stated (at page 1068):

> "A regulatory body cannot enlarge its authority through promulgation of rules beyond the authority delegated by statute."

Just as the Rule cannot exceed the Statute, the DER administrators cannot exceed the Rule (and thus attempt to circumvent the Statute by executive fiat). Context Development Co. v. Dade County, 374 So.2d 1143 (Fla., 3rd DCA, 1979).

Further Rule 17-4.07, F.A.C., which governs permits, is also inapplicable for that prohibits only permits which are "in con-

travention of Department standards, rules or regulations". As has been seen none of the Rules can include single ownership properties as the Statute does not.*

Further, the Department cannot utilize the dredging and filling rule (Rule 17-4.28, F.A.C.) to claim some link-up to resulting surface waters for that Rule only requires:

> "(1) Regardless of whether a permit is required, all dredging or filling activities conducted in or connecting to waters of the state shall comply with Chapter 17-3, F.A.C." (Emphasis supplied.)

Two reasons stand out as to why this Rule does not apply to Goldring's property: first, "waters" of the state are defined by Statute, as shown, Section 403.031, F.S., to exclude single ownership waters and this Rule does not and cannot expand on it; and secondly, Chapter 17-3, F.A.C., springs from the same Statute, thus itself does not include single ownership properties as demonstrated, supra.

It was admitted by the DER witness Mr. Richard Lotspeich that there is this exception for lakes which are entirely in one ownership (R.0213). He apparently took the position for the DER that one ownership undug lakes are included in "waters of the state" and thus regulated, but "dug" lakes are not (R.0213). No authority for this astounding position was cited.

Without further belaboring the point, if a dug lake is not within the DER's regulatory authority because it is not one of the "waters of the state", it necessarily follows that an "undug"

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* This Rule (17-4.07) also references as specific authority Section 403.031, Florida Statutes, thus cannot include single ownership waters (Florida Administrative Code Annotated, page 693).

lake -- which is obviously not water at all -- is not one of the "waters of the state".

For all of the foregoing reasons the DOAH Hearing Officer was correct in determining that the DER does not have jurisdiction over Goldring's property and proposed activity.

There is an additional reason, however, why the DER's construction of the governing statute must be declared to be in error: the DER's position , if accepted by this Court, would create an irrebutable presumption, i.e., that certain plants are the landward extent of certain waters, when in actual fact such may not be the case.

Irrebutable (or conclusive) presumptions were for years totally prohibited by the Florida Courts. Goldstein v. Maloney, 62 Fla.198, 57 So.342 (1911); Black v. State, 77 Fla.289, 81 So.411 (1919); Atlantic Coast Line R. Co. v. Voss, 186 So.199 (Fla., 1939); Straughn v. K. and K. Land Management, Inc., 326 So.2d 421 (Fla., 1976). In all of these cases this Honorable Court consistently held that all presumptions must be rebuttable and that they cannot take the place of evidence.

However, in Bass v. General Development Corp., 374 So.2d 479 (Fla., 1979), this Honorable Court permitted conclusive presumptions to be established by statute, but circumscribed them with certain rules. In the instant matter it should first be noted that no statutory presumption exists. Second, assuming arguendo that some statutory conclusive presumption does exist (that the dominant species conclusively determines the landward extent of a water body) it would be invalid in the subject case. As stated in Bass, at footnote 4, page 484:

> "When a constitutionally preferred right or privilege is in issue, however, the more stringent due process test is invoked and the irrebutable presumption is deemed invalid 'when [it] is not necessarily or universally true in fact and when the State has reasonable alternative means of making the crucial determination'".

It is obvious that the listed vegetation can exist and dominate outside the landward extent of the bodies of water listed*; second, the DER has reasonable alternative means to make jurisdictional determinations.** Accordingly, if the right to use one's real estate is a constitutional right the DER's conclusive presumption even if statutory (which it is not) must fall as being invalid.

In numerous cases this Honorable Court has concluded that one's right to use his real estate is a constitutionally preferred right. The two most obvious decisions are Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla., 1981) and Zabel v. Pinellas County Water and Navigation Control Authority, 171 So.2d 376 (Fla., 1965). Simply put, then, the conclusive presumption put forward in the DER's brief is invalid.

In obvious anticipation of the constraints against irrebutable presumptions, the DER argued, totally without evidence in support, and totally against the DER's own testimony below, as follows (DER initial brief, pages 13-14):

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* For example, the Florida Rock and Sand site across U.S. 1 is outside the landward extent of Florida Bay, yet the dominant species are on the list (R.410-413).

** DER witness Jeremy Craft outlined the simple procedure at R.0401 et seq., even admitting that the "presumption vegetation line" is rebuttable.

> "If the lower court's construction was adopted the Department's jurisdiction would be, as the hearing officer concluded, those areas in salt waters between the low and high tide lines. In order to determine where those areas exist, permit applicants would be required to undertake a mean high water line (ordinary high water line for fresh water bodies) survey. Those surveys would entail detailed, time-consuming, expensive studies to be conducted each time someone applied for a permit to dredge or fill, or each time a dredging or filling violation occurred. To do so would defeat the purpose of the statute and the rules which implement the statute, and would relegate use of the vegetation index for jurisdictional purposes to an entirely superfluous act. The Legislature, in enacting Section 403.817, Florida Statutes, recognized that requiring such studies would place an unreasonable burden on the permit applicant or, in the case of a violation, on the State. The Legislature therefore adopted the method of using index vegetation to define the landward extent of waters of the state in order to afford both permit applicants and the state a reasonable, inexpensive, reliable means of determining where the DER's jurisdiction lies."

In the first place the Third District Court did not use a mean high water line, or a high water line, or a low water line or any other water line, test. It required simply that the language of the governing laws be met, i.e., that there be an exchange of waters as intended and as specifically called for.

Secondly, the only evidence on this point was that of DER witness Jeremy Craft as to the simplicity and ease of determining a connection with another body of water (and thus also, an exchange) (R.0401). In fact it was excruciatingly easy to determine in this case that no exchange occurs. Thus the position that the DER urges on this Court would, if accepted, render the governing statutes and regulations invalid as impermissible irrebutable pre-

sumptions.*

For all of the foregoing reasons the decision of the Third District Court should be affirmed or this proceeding be dismissed as there is no conflict in decisions.

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* Please see also Markham v. Fogg, 458 So.2d 1122 (Fla., 1984), wherein this Court recently discussed the limitations on conclusive presumptions. This Court required the reading in pari materia of the questioned statute with other provisions in order to render it non-violative under the "expense of individual determinations" test.

ARGUMENT (Issue No. 2)*

Whether Appellee is entitled to a rock mining permit from the Department of Environmental Regulation as the only substantial competent evidence before the Hearing Officer demonstrated full compliance with permit standards.

It is important to note that the DER's conclusion that Goldring's proposed activity is somehow reprehensible is not shared by Dade County's department for environmental regulation. Dade County's public environmentalists concluded that there would be no significant impact from Goldring's proposed activity (R.0554, Goldring's exhibit p. 8).

Bearing this in mind, a look at the DER's objections and the DOAH Hearing Officer's conclusions quickly reflect how insignificant the DER's objections were.**

Thus the DER contended (R.1347):

1. The state standard for dissolved oxygen content will be exceeded.

2. The Shannon-Weaver diversity index of benthic macroinvertebrates will be reduced below 75% of established background levels.

3. The turbidity standards will be violated.

4. The standards for lead, oil, etc., content will be exceeded.

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* As reflected in the Statement, supra, this issue was not ruled on by the Third District Court of Appeal, for the obvious reason that it became unnecessary in light of the holding regarding the DER's lack of jurisdiction.

** These objections all relate to the "undug" lake; i.e., what the water will be like once the non-existent lake becomes a lake.

5. The specific conductance standard will be exceeded.

6. The cumulative impact will be unlawful.

On each of these items, with the exception of number 5 above the DOAH Hearing Officer determined that Goldring met the requirements of Rule 17-4.07, F.A.C., which provides in pertinent part:

> "(1) A permit may be issued to the applicant upon such conditions as the Department may direct, only if the applicant affirmatively provides the Department with reasonable assurance based on plans, test results and other information, that the construction, expansion, modification, operation, or activity of the installation will not discharge, emit, or cause pollution in contravention of Department standards, rules or regulations."

It is this one area of specific conductance in which the Hearing Officer erred in his factual findings, for there is no substantial competent evidence supporting his conclusion. In fact Goldring did prove that the specific conductance level will not be violated.

The DER concern here with the"specific conductance" Rule related to salt water influx. DER witness Richard Lotspeich testified at R.0188-0189 that the dredging of the lake would (in his opinion) raise the chlorine content of salt water to more than 250 parts per million (PPM)* and thus create a violation of the specific conductance rule. It was therefore the chlorine content of the water expected to fill the future lake that the DER contended would violate the specific conductance rule.

Lotspeich's testimony was predicated, as will be seen, on hearsay data which also was not material to the issue.

The Hearing Officer's Recommended Order was based on a U.S.

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* The standard for drinking water.

Army Corps of Engineer's study (R.1338). The study may be informative as to limestone pits in general, but tells nothing of the specific site thus is immaterial. Further, the study, a hearsay document, was not supported by any other evidence, thus alone could not be sufficient to support the finding and is thus not substantial competent evidence. Campbell v. Central Florida Zoological Society, 432 So.2d 684 (Fla., 5th DCA, 1983); Spicer v. Metropolitan Dade County, 458 So.2d 792 (Fla., 3rd DCA, 1984).

Goldring, however, presented not a generalized and immaterial study, but presented solid empirical evidence that the chlorine content would not exceed the 250 PPM alleged by the DER.

Goldring's expert, Peter Baljet, testified (R.0054-0055):

1. That to the east, just across U.S. Highway One from the subject site lies the rock mine lake of Florida Rock and Sand, which company is doing on its property exactly what Goldring proposes on his property.

2. That the specific conductance tests on the Florida Rock and Sand lake demonstrated conclusively that the chlorine concentration ranged from 212 to 240 PPM, with none exceeding 250 PPM (the tests being done at the same depth as Goldring's lake is to be dug).

3. That since salt water intrusion (the source of the chlorrine content) flows from the east and works its way westward, it follows that Goldring's lake lying west of Florida Rock and Sand lake, would have the same or lower chlorine content (lower than 250 PPM).

As Baljet's testimony reflects (R.0055):

"Q. Now, as I understand it, salt water intrusion,

Mr. Baljet, comes from the east and works its way westward?

"A. That's correct.

"Q. Would it then be reasonable to assume that Florida Rock and Sand site would first be affected by the salinity factor before the Goldring site would?

"A. That is a logical assumption.

Simply put, since the Florida Rock and Sand site specific conductance levels are closer to the bay, the chlorine levels are higher than Goldring's site. Since Florida Rock and Sand's chlorine levels meet the test, so then do the Goldring site levels.*

At the Third District Court the DER argued that Goldring's position was largely based upon Goldring's misinterpretation of the specific conductance rule. The DER cited no legal authority for this bald assertion nor did it point to any testimony of its experts (nor could it). This contention made its first appearance there, totally unsupported, notwithstanding that Goldring's expert witness on the matter (Baljet) was subjected to cross-examination and that three DER witnesses testified subsequently.

Most importantly, Goldring's expert witness Baljet fully and clearly understood that the specific conductance rule was not limited to salt water intrusion (as the DER had contended). At

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* The DER witness Lotspeich also relied on another hearsay document, not in evidence and stricken by the Hearing Officer (R.0223-0225). Although the Officer's ruling permitted rehabilitation of the document (R.0225), none was attempted by the DER's counsel.

R.0053-0054, Mr. Baljet testified:

> "A. Well, specific conductance, of course, is the ability of a body of water to conduct the electricity that is dependant on nature and amount of oils in the water, which, in turn, represents a problem in this area as to the salinity of the particular water. I can think of other materials that people might dump in to create a high conductivity.
>
> With reference to the salinity, it should not be a problem. It is not a problem at Florida Rock and Sand."

Finally, Mr. Baljet, based on his inquiry and findings, and without objection or contravention testified (R.0058-0059):

> "Q. Is it reasonable to assume, then, that the logistic flow of salt water and the parts per million and all that Mr. Goldring's site would meet the State standard?
>
> "A. Yes."

This unequivocal evidence, based on actual empirical data meets the requirements as to Rule 17-4.07, F.A.C., which states in pertinent part:

> "(1) A permit may be issued to the applicant upon such conditions as the Department may direct, only if the applicant affirmatively provides the Department with reasonable assurance. . . "

that the proposal will not contravene Department standards, rules or regulations.

It must be remembered, again, that the DER's objection was that the specific conductor here would be salt water (R.0188-0189). In other words it is the DER's position that Goldring's proposed lake, ostensibly a part of salt water Florida Bay, would pollute that salt water bay by having some salt water in it. The absolute absurdity of that position must be evident to the reader.

Assuming that the statute and regulations are to be permitted to be applied absurdly by the DER even then it has been shown that

Goldring's project cannot possibly produce a lake with more than 250 PPM chlorine content as the mining lake due east has a lower chlorine content than that level, and such is the only substantial competent evidence on this issue. As the only basis for denial by the DER was Goldring's ostensible failure to provide a reasonable assurance as to specific conductance, and as the evidence reflects that Goldring did provide that assurance, the DER should be ordered to issue the permit (assuming, arguendo, that it has jurisdiction).

ARGUMENT (Issue No. 3)

The Third District Court of Appeal's award of attorney's fees was correct.

The DER forced Goldring to litigate for years over two absurd issues: 1) that the subject site is a portion of salt water Florida Bay because it has a fresh water species growing on it; and 2) that salt water Florida Bay can be polluted by adding salt water to it. For these reasons and these reasons standing alone that Court was justified in awarding attorney's fees to Goldring. Section 57.105, F.S., and Section 120.57(1)(b)9, F.S., each in its own way is authority under such a circumstance.

The Third District Court's order awarding fees to Goldring (A.6) makes no statement of reason nor citation of authority. However, its decision comports fully with the First District Court's gratuitous (thus obiter dicta)* analysis of the meaning of Section 120.57(1)(b)9, F.S. found in Jess Parrish Memorial Hospital v. Florida Public Employees Relations Commission, 364 So.2d 777 (Fla., 1st DCA, 1978). At page 785 Jess Parrish states several principles that lead to awards of attorney's fees, which principles are consistent with the Goldring award:

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* Obiter dicta as the First District Court stated (page 784, Jess Parrish):

> ". . . The hospital is therefore not entitled fees and costs since it is clearly not the prevailing party.
>
> "Having so concluded, however, we think it appropriate to comment upon some general principles which may be of aid to a determination, once an agency order is reversed, whether to impose fees and costs against an agency when it is acting within the scope of its adjudicatory responsibilities."

a) The agency may be liable where its employees fail to conform to pre-existing statutory and regulatory requirements.

The Third District Court here found that the agency did not conform to pre-existing statutory and regulatory requirements, witness its opinion.

b) The agency did not conform to and act consistently with the authority delegated to it.

In Goldring (A.4-5, last paragraph) the Third District Court found that the DER abused its powers and procedures in an attempt to circumvent a decision rendered by the Court.

c) The Jess Parrish principles are not all conclusive; each case must be determined individually.

The Third District Court here concluded that the word "exchange" was clearly misinterpreted by the agency in order to obtain jurisdiction (A.4). This clear error led to years of administrative and appellate proceedings (and expense) that should readily have been avoided. On a case-by-case basis this also may have been considered by the Third District Court to be one of those "additional principles" set forth by Jess Parrish.

Jess Parrish is no longer of major import, however, as Section 120.57(1)(b)9, F.S., has been amended by Section 2 of Chapter 84-173, Laws of Florida, so as to require that there by frivolousness, an abuse of process, or abuse of the agency's discretion for an attorney's fee award. The instant case fits comfortably into any of these categories in the light of the total unreasonableness of the DER's positions in relation to the site and salt water Florida Bay; salt water pollution (by drinking water!) of Florida Bay; and here its obviously less than accurate

contention, with no support in fact, that it has always construed the statutes and regulations to the effect that "jurisdictional vegetation" alone confers DER jurisdiction, when the only truth of the matter is that the DER has not done so.

CONCLUSION

Issue No. 2 of this brief reveals that the DER Secretary improperly concluded that Goldring was not entitled to a permit for his rock mining project. As has been shown this conlusion was not correct; Goldring had demonstrated full compliance with all permitting rules and standards.

However, as the DOAH Hearing Officer and the Third District Court concluded, the DER is without jurisdiction over Goldring's property and proposed activity. No permit is required.

Finally, it has been shown that the Third District Court did not abuse its discretion or violate any rule of law when it awarded attorney's fees to Goldring.

It is respectfully suggested that this Honorable Court should either dismiss this proceeding for lack of jurisdiction or should affirm the decision (A.1-5) of the Third District Court of Appeal. However, should it be determined that the DOAH Hearing Officer and the Third District Court erred and the DER has jurisdiction, then the DER should be directed to issue a rockmining permit to Goldring (as set forth in argument under issue number 2 herein).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to E. Gary Early, Esq., Twin Towers Office Bldg., 2600 Blair Stone Rd., Tallahassee, Fl. 32301, this 22 day of February, 1985.

John G. Fletcher