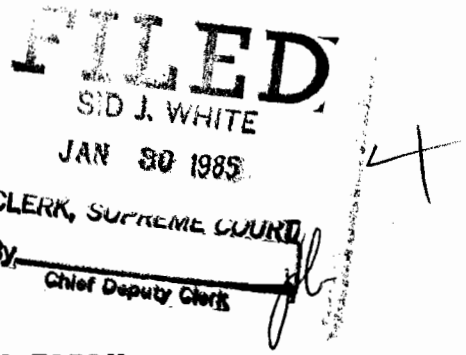
D/a 4-11-85

BEFORE THE SUPREME COURT
FOR THE STATE OF FLORIDA

DEPARTMENT OF ENVIRONMENTAL REGULATION, Appellant, vs. E. PETER GOLDRING, Appellee.	)	CASE NO. 65,769 APPEAL FROM DISTRICT COURT OF APPEAL, THIRD DISTRICT - NO. 83-2880

INITIAL BRIEF OF APPELLANT DEPARTMENT OF ENVIRONMENTAL REGULATION



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STATEMENT OF THE CASE AND FACTS

This case comes before this honorable Court on appeal from a decision from the Third District Court of Appeal. The facts of the case are as follows.

On June 15, 1981, Appellee, E. Peter Goldring (hereafter "Appellee" or "Goldring") applied to Appellant, State of Florida Department of Environmental Regulation (hereafter "Department") for a permit to mine limestone on property owned by Appellee. The site of the mining is in south Dade county, and is within the area known as the Everglades. The site is dominated by the plant species Cladium jamaicensis, commonly known as sawgrass. The sawgrass extends from Appellee's site to the point at which it merges with the mangroves which fringe Florida Bay. The site is completely submerged by water for approximately ten percent of the year. The source of water on the site is rainwater which both falls directly on the state and flows from the northwest in a sheet flow across the site. The waters flow from the site to the southeast, and eventually reach the waters of Florida Bay. Waters from Florida Bay do not flow uphill to the site.

The Department determines the extent of its jurisdiction by the presence or absence of wetland vegetation. The rules by which the Department fixes the boundaries of its jurisdiction are Fla. Admin. Code Rules 17-4.02(17) and 17-4.28(2). The statutory authorization for promulgation of the rules is Section 403.817,

Florida Statutes. The effect of the statute and rules will be addressed in the body of the brief.

Appellee proposes to excavate approximately 4,500,000 cubic yards of limestone from a seventy acre pit to be dug at the site. At the conclusion of the mining, the pit will be approximately 62 feet deep and will be filled with fresh water. The water in the pit will violate state water quality standards for specific conductance. During the period of excavation a haul road will be constructed to allow transport of trucks and equipment to the site from U.S. Highway One. The haul road will be constructed over areas currently dominated by sawgrass.

After submission of the application, the Department processed the application and, on February 19, 1982, issued a notice of intent to deny the permit application. The grounds for denial of the application were the destruction of approximately 70 acres of Everglades wetlands, the direct point of access into the Biscayne aquifer which would result from the pit and the anticipated violations of state water quality standards resulting from both the mining activities and from the resulting pit.

On January 10, 1983, the administrative hearing was held in this matter before a hearing officer from the Division of Administrative Hearings. The hearing officer concluded that the limestone pit would not meet the state water quality standard for specific conductance. The hearing officer went on to conclude that the site of the pit was not within the Department's regulatory jurisdiction.

The basis for the hearing officer's conclusion that the site was not within the Department's jurisdiction was based in large part on the perceived legislative intent of Section 403.817, Florida Statutes. He stated that Section 403.817, Florida Statutes, meant to define the Department's jurisdiction as those areas in which a river floods, the tide rises or a stream meanders. The hearing officer concluded that in a body of water such as Florida Bay, the Department's jurisdiction would be defined by that area above the low tide mark and below the high tide mark, irrespective of the presence of the jurisdictional plant species. The hearing officer further found that the Department's rule evidences the intent of the Department to include within its jurisdiction areas which exchange waters with recognizable water bodies. Since the waters of Florida Bay do not flow upstream to the site, thereby setting up two-way flow or "exchange" the hearing officer found that the Department did not have jurisdiction over the mining site.

The hearing officer's recommended order was transmitted to the Department for final agency action. The Secretary of the Department, in her Final Order, rejected the conclusions of the hearing officer that the Department did not have jurisdiction on the mining site. The Final Order stated that the Department's jurisdiction was governed by the plain language of Section 403.817, Florida Statutes, and therefore the limit of jurisdiction is defined by the species of plants listed in the Department's rules. The Final Order found that the existance of two way water

flow (i.e., water flowing from the site to Florida Bay and vice versa) was irrelevant to the water quality benefit provided by the waters at the site and rejected the hearing officer's interpretation of "exchange" as being necessarily two-directional. Based on the violations of the state water quality standard, the Final Order denied the application.

Appellee timely appealed the Final Order to the Third District Court of Appeal. The Third DCA reversed the Final Order and held that Section 403.817, Florida Statutes did not mean that vegetation was to define the Department's jurisdiction but rather another method was to be used, presumably the area between the low tide and high tide lines as suggested by the hearing officer.

The Department appealed the opinion of the Third District Court of Appeal to this Court, which accepted discretionary conflict jurisdiction on January 10, 1985.

SUMMARY OF ARGUMENT

The legislature, in Section 403.817, directed the Department to formulate a method, to be based on ecological characteristics, by which the Department is to define its regulatory dredge and fill jurisdiction. The legislature further directed that the method for defining the Department's regulatory jurisdiction is to be by the presence of species of plants which are normally found in areas subject to inundation.

In accordance with the legislative directive, the Department has a rule which sets forth the list of wetland plant species. The Department's jurisdiction is determined by the presence or absence of the jurisdictional plant species. Both the statute and rule have been consistently interpreted and applied by the Department for a number of years. In addition, the legislature, the judiciary and administrative precedent have accepted and affirmed the method by which the Department determines the extent of its dredge and fill jurisdiction.

The lower court has incorrectly held that the Department's dredge and fill jurisdiction is not defined by species of wetland plants, but rather on some ill-defined high tide or flood plain line. The lower court offered no guidance as to how the determination of jurisdiction was to be made.

The lower court's decision was based primarily on its perception of the legislative intent of Section 403.817, Florida Statutes, and not on the plain language of the statute. The decision was also based on a statement of the Department's intent

in an unnumbered paragraph following the Department's rule. It did not give any effect to the operative language of the rule. Finally, the lower court failed to take into account legislative actions bearing directly on the proper construction to be given to the statute and the rule.

The lower court's decision conflicts directly with the language of the statute and the rules, fails to properly construe the statute and the rules, and should be reversed by this Court.

I. THE EXTENT OF THE DEPARTMENT'S REGULATORY DREDGE AND FILL JURISDICTION IS TO BE DETERMINED BY THE PRESENCE OR ABSENCE OF JURISDICTIONAL VEGETATION

"There are no other Everglades in the world"
Majorie Stoneman Douglas, The Everglades:
River of Grass, at 1 (1947).

The statement quoted above emphasizes the importance of the case before this Court. This case conerns the ability of the Department to regulate dredging and filling within that river of grass known as the Everglades. The potential impact of unrestrained dredging and filling both on the water quality within the Everglades and its receiving water bodies and on the creatures which exist in this delicate ecological system is immense. However, the fact that this particular case arises out of the Everglades should not diminish the statewide importance of the decision which ultimately must be rendered in this case. The opinion of the lower court affects not only the Everglades, but also any wetland area in the state which forms the headwaters of or otherwise provides flow into an open water body. The essential value of these wetlands to the health and welfare of the citizens of Florida has been recognized by the legislature. To limit the Department's jurisdiction to the area below the high tide line in saline waters, and within the flood plain in fresh waters, as the lower court decision would do, would eliminate the Department's ability to regulate potentially harmful and destructive activities in a multitude of marshes, swamps, bayheads, headwaters, recharge areas, groundwater seepage areas, and other wetland areas. It shall be the position of the Department throughout this brief

that, considering the importance of these areas to the water quality and ecological well being of the state, neither the legislature nor the Department could have intended such a result, and that such a result would be contrary to plain language of the statutes and rules on the subject.

A. Introduction

The Department offers here, in the way of background information, a brief overview of the permitting process.

The Department's authority to require permits for dredge and fill projects is based on whether the Department has regulatory dredge and fill jurisdiction on a parcel of property. The method by which the Department determines its jurisdiction is the subject of this case and will be addressed in the sections following this introduction.

Once it is found that the Department has regulatory dredge and fill jurisdiction, one looks at the proposed activity to determine if the activity contemplates either "dredging" or "filling." If the activity constitutes dredging, as it does in this case, or filling, then a permit will be required.

When a permit application is submitted to the Department, the Department processes it within the time frames set forth in Chapter 120, Florida Statutes. If it is determined that the dredging or filling will not violate state water quality standards, the Department issues the permit. If it is anticipated that the project will violate state water quality standards, the Department denies the permit. A permit denial is a denial only of the specific application made. It does not preclude an applicant form reapplying for a substantially modified activity or for an entirely new activity.

B. The Language of the Statute

Since the Department was created in 1975, it has determined the extent of its dredge and fill jurisdiction based on the distribution of certain species of vegetation. The particular species used to determine jurisdiction were selected due to the fact that they are characteristic of areas which are regularly inundated or saturated. The statutory authority for the Department to promulgate the species list, which is known as the "vegetation index" is contained in Section 403.817, Florida Statutes, which states:

> (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 deter mine the natural landward extent of the waters. Therefore, it is the intent of the Legislature that the Department of Environ mental Regulation establish a method of making such determinations, based upon eco logical factors which represent these fluc tuations 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 ... (e.s.)

The statute provides that the landward extent of waters of the state for regulatory purposes shall be defined by dominant species

of certain plants. The word "define" means "[t]o mark the limits of; to determine with precision or to exhibit clearly the boundaries of ...," Webster's New International Dictionary of the English Language, Second Edition, 688 (1957), or "to fix or establish the limits," or "to mark the limits of," Black's Law Dictionary 510 (Rev. 4th ed. 1968). Since words of common usage in statutes should be construed in their plain and ordinary sense, Citizens of State vs. Public Service Commission, 425 So.2d 535 (Fla. 1982); Accord, State vs. Cormier, 375 So.2d 852 (Fla. 1979), it follows that the rule conclusively defines and establishes the extent and limits of waters for regulatory purposes. The Department's interpretation of the statute fits the facts of this case. The record reflects that Appellee's property is completely submerged for approximately ten percent of the year, every year. The sawgrass growing on Appellee's property is in an area subject to regular and periodic inundation. The word "regular" is defined as "steady or uniform in course, practice or occurence; not subject to unexplained or irrational variation; returning or recurring at stated or fixed times or uniform intervals...." Webster's, supra at 2099. The word "periodic" is defined as "[c]haracterized by periods, occurring at regular stated times; acting, happening, or appearing at fixed intervals...." Websters, supra at 1821. Since Appellee's property is completely under water for a certain amount of time each year, the sawgrass growing on Appellee's property is in an area subject to regular and periodic inundation.

The Court below held that "[w]hile upon quick perusal it might appear that the presence of an index species is a conclusive indication of the landward extent of a water body, a closer reading of the statute indicates that such was not the intent." Goldring v. Department of Environmental Regulation, 452 So.2d 968, 970 (Fla. 3d DCA 1984). The Court's interpretation of the statute was that, although a reading of the statutory language might lead one to the conclusion that vegetation was to fix the extent of the Department's jurisdiction, the legislative intent was clearly that a line other than the vegetational limit be used.

This Court has repeatedly and consistently held that "[w]hile legislative intent controls construction of statutes in Florida, ... that intent is determined primarily from the language of the statute .... The plain meaning of the statutory language is the first consideration." St. Petersburg Bank and Trust Company v. Hamm, 414 So.2d 1071 (Fla. 1982); Accord, S.R.G. Corporation v. Department of Revenue, 365 So.2d 687, 689 (Fla. 1978). The Department disputes the lower court's construction of the legislative intent, in that the legislative intent may not conflict with the express language of the statute. To this end, this Court has held:

> In matters requiring statutory construction, courts always seek to effectuate legislative intent. Where the words selected by the legislature are clear and unambiguous, however, judicial interpretation is not appropriate to displace the expressed intent .... It is neither the function nor prerogative of the courts to speculate on constructions more or less reasonable, when the language itself conveys an unequivocal meaning.

Heredia v. Allstate Insurance Company, 358 So.2d 1353, 1354-1355, (Fla. 1978); Accord, Citizens of State v. Public Service Commission, 425 So.2d 534 (Fla. 1982).

In this case, the statute acknowleges that changes in water levels make it difficult to determine the natural landward extent of waters of the state. The statute also expresses the legislature's intent that the Department is to establish a method of determining the landward extent of waters subject to the Department's regulatory jurisdiction. The statute then goes on to state that "[i]n order to accomplish the legislative intent" regarding the boundary of the Department's jurisdiction, the boundary "shall be defined by species of plants ...." § 403.817(2) Fla. Stat. The language of the statute clearly and unequivocally sets forth the precise method of setting the Department's jurisdiction. 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. The lower court erred, in going beyond the clear statutory language and imposing a separate jurisdictional test based upon the lower court's interpretation of the legislative intent.

C. Construction of the Statute

Aside from the clear statutory language, extrinsic aids to statutory construction support the assertion that the extent of the Department's dredge and fill permitting jurisdiction is based solely upon the existence of jurisdictional species of vegetation.

It should first be noted that this Court has specifically held that Chapter 403, Florida Statutes, is "intented to operate in the public interest." State v. Hamilton, 388 So.2d 563 (Fla. 1980). As such the statute is to be liberally construed. Ibid.

In determining the construction to be given a statute, one must examine the entire statute under consideration, including "the evil to be corrected, the language of the act, including its title, the history of its enactment and the state of the law already in existence bearing on the subject." State v. Webb, 398 So.2d 820, 824 (Fla. 1981); Accord, State v. Gale Distributors, Inc., 349 So.2d 150 (Fla. 1977). The statute in question here, the Florida Air and Water Pollution Control Act, Chapter 403, Florida Statutes, is intended in significant part to protect the quality of Florida's abundant, yet constantly threatened water resources. In enacting Chapter 403, the Legislature, in Section 403.021, Florida Statutes, made the following observations:

> (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 policy 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.

The language of Section 403.817(1), Florida Statutes (quoted previously) embodies the public policy as established by the legislature that good water quality be maintained. Given the legislative pronouncements of policy and intent, and the fact that Chapter 403 is to be liberally construed, it is absurd for the lower court to hold, as it did in this case, that the legislature intended for

the Department's jurisdiction to be so conservatively and narrowly construed as to remove from its jurisdiction not only a wetland as vast and crucial to the well being of Florida as the Everglades, but also the countless acres of swamps, freshwater marshes, high salt marshes, bayheads and other wetlands which are vital to the protection of Florida's water resources and ultimately to the health and welfare of the citizens of Florida.

In addition to the expressions of policy and intent from the legislature, the construction given to Chapter 403, Florida Statutes, by the Department is entitled to great judicial deference. Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815, 820 (Fla. 1983). This Court has consistently held that:

> We have long recognized that the administrative construction of a statute by an agency or body responsible for the statute's administration is entitled to great weight and should not be overturned unless clearly erroneous. Pan American World Airways v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983).

The lower court apparently felt that the Department improperly construed Section 403.817, Florida Statutes. The Department asserts that the operative language of the statute is that which instructs the Department to define the landward extent of waters of the state by vegetational species. Regardless of the construction to be given to Section 403.817(1), Florida Statutes, the express language of Section 403.817(2) makes the Department's construction of the statute at worst a permissible one. In

Department of Administration v. Nelson, 424 So.2d 852, 858 (Fla. 1st DCA 1982), the First District Court of Appeal held:

> [W]e have repeatedly held that when the agency committed with statutory authority to implement a statute has construed the statute in a permissible way under APA disciplines, that interpretation will be sustained though another interpretation may be possible.

Given the language of the statute, the Department's interpretation is permissible even though, using other language in the statute, the lower court may have preferred a different construction.

The question of whether vegetational species are to define the limits of the Department's jurisdiction has been considered by the First District Court of Appeal in State v. Falls Chase Special Taxing District, 424 So.2d 787 (Fla. 1st DCA 1983); pet. rev. den., 436 So.2d 98 (Fla. 1983). The court in Falls Chase held:

> The Legislature, in the above statute, (Section 403.817) requires the Department to establish a method of determining the natural landward extent of waters of the state by identification of vegetation or soils, a method which takes into account natural fluctuations in water levels. The Legislature also carefully circumscribed the manner in which DER is to exercise the power granted and specified: (1) The natural landward extent of waters is to be identified by ecological factors, specifically plant or soil characteristics of areas subject to regular and periodic inundation. (emphasis in original) Id., at 791.

And:

> As shown above, the statute mandates the specific methods to be used in determining DER regulatory jurisdiction over the landward extent of water bodies in the state. So determined was the Legislature that only aquatic plant or soil indices be used to define the limits of DER jurisdiction and

> that these indices, once established, remain constant, that Section 403.817(3) further provides DER may neither add nor delete a single plant or soil without specific prior legislative approval. (emphasis added) Id., at 793.

The fact that the First District Court of Appeal has found the use of the vegetative index to be the only acceptable method of defining jurisdiction under Chapter 403, Florida Statutes, would indicate that the Department's reliance on the index to define jurisdiction is at worst a permissible construction of the statute. As such, that construction should be granted great weight and deference.

The lower court's construction of Section 403.817, Florida Statutes, in the instant case was based in large part on the court's perception of the legislative intent of the statute.

It is important that Section 403.817, Florida Statutes actually adopted the Department's preexisting jurisdictional rules, as well as providing the statutory authorization for these rules. In October of 1975, the Department promulgated several rules concerning the use of certain vegetational species in determining dredge and fill regulatory jurisdiction. See Fla. Admin. Code Rules 17-4.02 and 17-4.28. Those rules exist in essentially the same form today.

The Joint Administrative Procedures Committee filed an Objection Report to these rules in 1975. See Florida Administrative Weekly, Vol. 1, Number 28, p. 27. The Committee objected to the rules because they questioned whether the Department had the statutory authority to promulgate such rules.

Although the Department never acquiesced in the Committee's objections, it nevertheless supported a series of bills during the 1977 legislative session which would grant specific statutory authority under which the Department could maintain its existing rule. The Florida Legislature granted this authority when it passed Committee Substitute for House Bill Number 1142, which became Chapter 77-170, Laws of Florida and which was ultimately codified as Section 403.817, Florida Statutes.

Following the passage of Chapter 77-170, Laws of Florida, the Joint Administrative Procedures Committee withdrew its objection to the above-mentioned rules in Chapter 17-4, Florida Administrative Code. See Florida Administrative Weekly, Vol. 3, Number 30, p. 18.

It is therefore clear that not only did the legislature intend that the Department's dredge and fill permitting jurisdiction was to be defined by species of vegetation, but that the preexisting Department rule was to constitute the precise method of defining jurisdiction.

A further measure of the intent of the legislature is whether there has been any subsequent legislation which affects Section 403.817, Florida Statutes. In that respect this Court has held that "the court has the right and duty, in arriving at the correct meaning of a prior statute, to consider subsequent legislation." Parker v. State, 406 So.2d 1089 (Fla. 1981). In this case, the legislature has made a number of recent pronouncements regarding

the Department's jurisdiction and the effect of Section 403.817, Florida Statutes.

On June 1, 1984, twelve (12) days prior to the lower court's decision in this case, Governor Bob Graham signed into law the "Warren S. Henderson Wetlands Protection Act of 1984" (the Act). The pertinent language of the Act, codified as Sections 403.8171 and 403.91-403.929, Florida Statutes, ratified the provisions of Section 403.817, Florida Statutes, and in fact expanded the vegetation index by adding more than three hundred species of plants. Section 403.8171(5) states that the Department may extend its jurisdiction beyond the line of jurisdictional vegetation to the water elevation of a 1 in 10 year storm event, but that "the provisions of this subsection shall not operate to reduce the landward extent of the jurisdiction of the department as such jurisdiction existed prior to January 24, 1984. (e.s.).

Other pertinent expressions of legislative acceptance of the Department's construction of Section 403.817, Florida Statutes include:

> 403.911(7)
> For purposes of dredge and fill permitting activities, by the Department, "wetlands" are defined as those areas within the jurisdiction of the department pursuant to s. 403.817.
>
> 403.913(2)
> The landward extent of waters shall be determined as provided in s. 403.817....
>
> 403.913(6)
> ... A development or activity which

> meets any of these conditions shall continue to be regulated pursuant to the dredge and fill jurisdiction of the department as such jurisdiction existed prior to January 24, 1984. (e.s.).

403.913(8)

> ... Such sand, limerock, or limestone mining activity shall continue to be regulated pursuant to the dredge and fill jurisdiction of the department as such jurisdiction existed prior to January 24, 1984....

At the time the Act was signed into law, the only existing judicial and/or administrative interpretations of Section 403.817 supported the Department's construction of the statute that species listed in the vegetational index are to be used to define the extent of the Department's dredge and fill permitting jurisdiction. The cases, not including the Department's Final Order in this case, are:

1) State v. Falls Chase Special Taxing District, 424 So.2d 787 (Fla. 1st DCA 1983); pet. rev. den. 436 So.2d 98 (Fla. 1983);
2) Florida Mining and Materials Corporation v. State of Florida Department of Environmental Regulation, 4 FALR 2230-A (Final Order entered August 5, 1982);
3) Occidental Chemical Company v. State of Florida Department of Environmental Regulation, DOAH Case No. 80-895R (Final Order entered November 26, 1980), aff'd per curiam 411 So.2d 388 (Fla. 1st DCA 1981), and;
4) Occidental Chemical Company v. State of Florida Department of Environmental Regulation, DOAH Case No.

77-2051 (Final Order entered July 7, 1981), aff'd per curiam 411 So.2d 388 (Fla. 1st DCA 1981).

There were, at the time the Act was signed into law, no administrative or judicial opinions to the contrary. For the Court's convenience, the above-cited cases are included in the appendix to this brief as Exhibits 1, 2, 3 and 4.

When the legislature enacts or reenacts a statute, it is clearly presumed to be cognizant of the construction given a statute by the judiciary or by the administrators of a statute. Gulfstream Park Racing Association, Inc. v. Department of Business Regulation, 441 So.2d 627 (Fla. 1983); Williams v. Jones, 326 So.2d 425 (Fla. 1976); State ex rel. Szabo Food Services, Inc. of North Carolina v. Dickinson, 286 So.2d 529 (Fla. 1974); Peninsular Supply Company v. C.B. Day Realty of Florida, Inc., 423 So.2d 500 (Fla. 3d DCA 1982). In that regard this Court has held that:

> When the legislature reenacts a statute which has a judicial construction placed upon it, it is presumed that the legislature is aware of the construction and intends to adopt it, absent a clear expression to the contrary. Gulfstream Park Racing Asso., supra at 628.

With regard to the legislature's knowledge of an administrative ageny's construction of a statute, this Court has held that:

> When the legislature reenacts a statute it is presumed to know and adopt the construction placed thereon by the State tax administrators. State ex rel. Szabo Food Services, Inc., supra at 531.

Additionally, the Third District Court of Appeal has held that:

> When the legislature reenacts a statute, it is presumed to know and adopt the construction placed thereon by courts or administra-

> tors, except to the extent to which the new enactment differs from prior constructions. (e.s.) Peninsular Supply Company, supra at 502.

It is clear from the above-cited statutory language that the legislature adopted the Department's construction of Section 403.817, Florida Statutes. The construction placed on Section 403.817, Florida Statutes, by the lower court is clearly erroneous, defeats the purpose of the statute as a whole, and must be overturned by this Court.

D. The Language of the Rule

In conformity with the legislature's directive as contained in Section 403.817, Florida Statutes, the Department defined by rule "landward extent of waters of the state". That rule, Florida Administrative Code Rule 17-4.02(17) states:

> "Landward extent of waters of the state" is, pursuant to Section 403.817, F.S., that portion of a surface water body indicated by the presence of one or a combination of the following as the dominant species:

Following that portion of the rule, 52 species of plants are listed. The rule then continues:

> or that portion of a surface water body up to the waterward first fifty (50) feet or the waterward quarter (1/4) of the entire area, whichever is greater, where one or a combination of the following are the dominant species:

Following that portion of the rule, 22 species of plants are listed. The combined list of 74 species is commonly referred to as the "vegetation index."

In addition to the definition of "landward extent" adopted in Florida Administrative Code Rule 17-4.02(17), the DER has adopted Florida Administrative Code Rule 17-4.28(2), commonly referred to as the "dredge and fill rule." This rule states that a permit from the DER will be required before dredging and filling activities can take place in certain categories of waters of the state, to their landward extent as defined by Florida Administrative Code Rule 17-4.02(17). The categories of waters of the state are listed in subsections (a) through (f) of the Florida Administrative Code Rule 17-4.28(2). This dredge and fill rule, along with

the definition of "landward extent" adopted in Florida Administrative Code Rule 17-4.02(17), is the tool by which the DER establishes dredge and fill jurisdictional lines pursuant to Chapter 403, Florida Statutes.

Application of these rules for making a determination of DER jurisdiction begins with a search for one of the categories of waters listed in Florida Administrative Code Rule 17-4.28(2). In this case, the water body is Florida Bay; bays are listed in Florida Administrative Code Rule 17-4.28(2)(c) as one of the above-referenced categories.

Once a water body is identified, the borders of the water body are then ascertained by means of dominant species of vegetation from the vegetation index. In defining the landward limit of a water body, vegetation cannot be divorced from the water body since vegetation forms the very borders of these waters pursuant to Section 403.817, Florida Statutes. In this case, a broad swath of sawgrass extends in an unbroken line from Florida Bay to the proposed site of Mr. Goldring's rock pit. That sawgrass is part of the vast sawgrass plain known as "the Everglades."

When Florida Administrative Code Rule 17-4.28(2) was adopted by the Pollution Control Board ("the Board"), the Board included after the last subsection of the rule an unnumbered, unlettered paragraph which is a statement of the Board's intent in adopting Florida Administrative Code Rule 17-4.28(2). The wording of the intent paragraph was later slightly altered to reflect an

amendment to the definition of "landward extent" in Florida Administrative Code Rule 17-4.02(17), and now reads as follows:

> 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 the 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., are presumed to accurately delineate the landward extent of such water bodies.

The Department has <u>never</u> construed this intent language as applying a separate test of jurisdiction. The unnumbered paragraph has, since 1975, consistently been construed as the Board's intent that areas which are "customarily submerged" and "exchange water with a recognizable water body" are to be defined by the presence or absence of plants listed in the vegetation index. A hearing officer of the Division of Administrative Hearings has upheld this interpretation in a rule challenge proceeding, concluding as a matter of law that the intent paragraph " . . . does not purport to be a test of jurisdiction, but rather an attempt to describe those areas which are intended to be included or excluded from jurisdiction as described by the preceeding subsections

[17-4.28(2)(a)-(g)]." Occidental Chemical Company v. Department of Environmental Regulation, DOAH Case No. 80-895R (Final Order entered November 26, 1980) at 11, aff'd per curiam 411 So.2d 388 (Fla. 1st DCA, 1981). The Department used the vegetative index in the instant case just as the legislature prescribed and the rules require; i.e., to define the limits of the Department's jurisdiction.

It should be noted that when the Department has attempted to define its Chapter 403, Florida Statutes, dredge and fill permitting jurisdiction in a manner inconsistent with the landward line of vegetation, the attempt has been rebuffed by the courts. See State of Florida Department of Environmental Regulation v. Fallschase Special Taxing District, et al., 424 So.2d 787 (Fla. 1st DCA 1983).

E. Construction of the Rule

It is significant that the Department's rules relating to its dredge and fill jurisdiction, Fla. Admin. Code Rules 17-4.02 and 17-4.28, have existed since 1975 in essentially their present form. See Appendix Exhibit 4. Since adoption of the rules, the Department has consistently interpreted them to mean that the species of plants listed in the vegetation index define the landward extent of a water body. Since 1975, the legislature has had the opportunity to indicate its disagreement by statute if the Department's construction did not comport with the legislative intent. It has not done so.

In fact, Chapter 77-170, Laws of Florida (Section 403.817, Florida Statutes) was enacted subsequent to the adoption of Florida Administrative Code Rules 17-4.02 and 17-4.28, and provided the legislative authorization for the Department's pre-existing jurisdictional rules. Had the legislature not agreed with either the rule or the Department's construction of the rule, it could easily have clarified its actual intent by amending Section 403.817, Florida Statutes.

The legislature recently had yet another opportunity to raise objections to the Department's jurisdictional rules or to the Department's construction of Section 403.817, Florida Statutes. On June 1, 1984, the Warren S. Henderson Wetlands Protection Act (the Act) was signed into law. The Act contains several statements regarding the Department's jurisdiction and the methods for

determining jurisdiction which indicate the legislature's acquiescence in and acceptance of the Department's jurisdictional criteria. Those provisions have been quoted previously in this brief. An important aspect of the provisions is that certain activities regulated by the Department were "grandfathered" under the old jurisdictional rules and "shall continue to be regulated pursuant to the dredge and fill jurisdiction of the department as such jurisdiction existed prior to January 24, 1984." (e.s.) See Sections 403.913(6) and 403.913(8), Florida Statutes. Additionally, the Act provides that "[d]redge and fill permit applications related to such activities shall be reviewed by the Department using the existing permit criteria set forth in Rule 17-4, Florida Administrative Code, as of January 24, 1984, for 12 months after Department adopts a rule implementing ss. 403.91-403.929 ...." See Section 403.913(8), Florida Statutes.

It is clear from the legislative actions taken in 1977 and 1984 regarding the Department's method of determining jurisdiction that the legislature has fully adopted and approved that method. The legislature was certainly cognizant of the way in which the Department determines the extent of its jurisdiction. At the time of the enactment of the Act, the only construction of the Department's jurisdictional rules was that contained in Falls Chase, supra, the three administrative cases cited earlier in this brief, and in the Final Order in the instant case. No other construction existed. Again, it is presumed that the legislature knows and adopts an agency's construction of a statute when it reenacts or

references that statute. See, State ex rel. Szabo Food Services, Inc. of North Carolina v. Dickinson, 286 So.2d 529 (Fla. 1974). It would follow that if the legislature references a preexisting agency rule in the body of a statute, it must have known and adopted the agency's construction of that rule. Unlike the courts of this state, the California courts have dealt with the issue of legislative ratification of agency rules. The California Court of Appeal, Fourth District, has held:

> "[t]he rules and procedures have received express legislative recognition and approval which has served to ratify the rules as they existed at the time of such approval. From that time forward the existing rules must be considered as valid and binding. Yeoman v. Department of Motor Vehicles, 273 Cal. App.2d 71 (4th Ct. App. 1969).

The adoption of the California policy regarding ratification of rules would be in accord with previous opinions from this Court and numerous lower courts on the related issue of ratification of an agency's interpretation of a statute.

Aside from the legislative ratification of the Department's jurisdictional rules, the Court should also consider the construction given the rules by the Department itself. The jurisdictional rules in question, Fla. Admin. Code Rules 17-4.02(17) and 17-4.28 have been in effect in basically their present form since 1975. As indicated by the Final Orders in Occidental Chemical Company v. State of Florida Department of Environmental Regulation, DOAH Case No. 77-2051 (Final Order entered July 7, 1981); Occidental Chemical Company v. State of Florida Department of Environmental Regulation, DOAH Case No.

80-895R (Final Order entered November 26, 1980), aff'd per curiam 411 So.2d 388 (Fla. 1st DCA 1981); Florida Mining and Materials Corporation v. State of Florida Department of Environmental Regulation, 4 FALR 2230-A (Final Order entered August 5, 1982); and the Final Order in the instant case, the Department's construction of its jurisdictional rules has remained consistent.

This Court has had occasion to consider the scope of judicial deference which a court is to give an agency's construction of its own rule. In Pan American World Airways v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983) this Court held:

> We have long recognized that the administrative construction of a statute by an agency or body responsible for the statute's administration is entitled to great weight and should not be overturned unless clearly erroneous. State ex rel. Biscayne Kennel Club v. Board of Business Regulation of Department of Business Regulation, 276 So.2d 823 (Fla. 1973). The same deference has been accorded to rules which have been in effect over an extended period and to the meaning assigned to them by officials charged with their administration. State Department of Commerce, Division of Labor v. Matthews Corporation, 358 So.2d 256 (Fla. 1st DCA 1978). Administrative agency expertise in regulatory interpretation has been similarly acknowledged in the federal courts. In Curtis v. Taylor, 625 F.2d 645, 654 (5th Cir.), modified, rehearing denied, 648 F.2d 946 (5th Cir. 1980), the circuit court of appeals held that an agency's interpretation of a regulation it has promulgated is entitled to deference when the meaning of the regulation is not clear. The fifth circuit has also concluded that if an agency's interpretation of its own regulation is merely one of several reasonable alternatives, it must stand even though it may not appear as reasonable as some other alternative. Expedient Services, Inc. v.

Weaver, 614 F.2d 56 (5th Cir. 1980). Pan American, supra at 719-720.

Also, the United States Supreme Court has held that "[i]n construing administrative regulations, 'the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" United States v. Larionoff, 431 U.S. 864, 97 S.Ct. 2130 (1977).

The Department's construction of Section 403.817, Florida Statutes, and Florida Administrative Code Rules 17-4.02(17) and 17-4.28(2) concerning the definition and determination of the landward extent of waters of the state as applied in the case is well within the range of possible constructions and this construction has been consistently followed by the agency since the time of the promulgation of the rules in question. Therefore, the agency's construction of these rules should be given deference by this Court.

On the other hand, the lower court's construction of Florida Administrative Code Rule 17-4.28(2) would cause the rule to conflict with the plain meaning of the statute. The lower court's construction of that rule would have the Department define "landward extent of waters of the state" by a method other than by species of plants listed in the vegetation index. The express language of the statute requires that the Department define its jurisdiction by species of plants listed in the vegetation index. In such a situation, the clear terms of the statute must prevail

over the lower court's construction of the rule. Nicholas v. Wainwright, 152 So.2d 458 (Fla. 1963). The court in this case should harmonize the intent language in the rule with the clear directive of the legislature.

The lower court based much of its opinion - that the Department's jurisdiction is not defined by the species of plants listed in the vegetative index - on its interpretation of that portion of the unnumbered intent paragraph which states "[i]t 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))." The lower court held that this provision meant that water had to flow from a named water body to the area in question and then flow back again before the Department may assert dredge and fill jurisdiction over that area. The lower court's reasoning in this regard is flawed in several respects.

The extremely narrow construction of this single phrase in the Department's jurisdictional rules serves in this case to defeat the purpose of both those rules and of Chapter 403, Florida Statutes. The overriding concern in all dredge and fill cases is protection of water quality in state waters. The Department's construction of these rules enables the Department to properly exert its jurisdiction in areas which are ecologically linked to a water of the state by wetland vegetation. As stated previously, the species of plants on the vegetation index were chosen for

the fact that they tend to grow only in areas which are either submerged or saturated for a biologically significant portion of the year. As such they constitute the "ecological factors" contemplated by the statute. The legislature recognized that for that portion of the year in which the property is submerged the water will flow down gradient until it ultimately reaches a water body named in Florida Administrative Code Rule 17-4.28. There the water from the site mixes with that of the bay and affects the quality of those waters. Simply because waters from the bay do not flow back to the site does not change the fact that the water quality of the bay is affected by waters from the site. The effect of the lower court's decision would be that a person could, by dredging and filling in the jurisdictionally vegetated areas, significantly degrade the quality of the water reaching the water body, without the Department having any regulatory control over that activity. Likewise a person could, by filling, construct a dam through the wetland vegetation thereby cutting off the flow of clean waters from upstream vegetated areas to the open water body. In an estuarine system, where the dilution of seawater by fresh waters and the supply of nutrients from upgradient areas is vital to the spawning and nursery areas of fish and wildlife, such an activity would be disastrous.

Given the fact that the purpose of Chapter 403, Florida Statutes, and the Department's rules is to protect the quality of waters and the natural resources of the state, and given the fact that Chapter 403, Florida Statutes, was created to be in the pub-

lic interest and should therefore be liberally construed, see State v. Hamilton, 388 So.2d 563 (Fla. 1980), to allow a person to degrade state waters with impunity based upon a single phrase in the intent language of a rule is certainly an absurd and unreasonable construction of that rule. General axioms of statutory construction require that interpretations of statutes which would lead to an absurd or unreasonable result be avoided. State v. Webb, 398 So.2d 820 (Fla. 1981). The same rules of construction which apply to statutes apply also to rules. 1 Fla. Jur. 2d, Administrative Law Section 57.

Vegetation is considered significant in defining the limits of a water body not only for its ability to biologically indicate those areas subject to regular and periodic inundation, and for the ease by which the edge of a water body may be located using vegetation, but also because of the effect the vegetation itself has on water quality. The hearing officer noted in the recommended order that sawgrass has the effect of cleansing the water that passes through it. That is true of each of the species on the vegetation index, which of course define the boundaries of all water bodies in the state. The wetland vegetation surrounding water bodies traps and absorbs pollutants washed down from surrounding upland areas. Waters which flow through the vegetation are purer upon discharge into the open water body than it would have been if it had not filtered through the vegetation. This effect is commonly known as the "kidney effect."

Since the intent of Chapter 403, Florida Statutes, is to protect and maintain the waters of the state, it is logical that the vegetation which serves to protect and maintain the quality of those waters should be included within the boundaries of the waters. Much as a human relies upon the efficient functioning of the kidneys to remove wastes from the body, a water body relies upon its vegetational buffer to remove wastes from surrounding uplands. Removal of the vegetational buffer places a sentence of eventual biological death on the water body.

The effect of the lower court's decision in this case would be to remove the Department's jurisdiction in much of a water body's vegetational buffer. In this case, for instance, the decision has the effect of removing the Everglades from the Department's jurisdiction. The disastrous effect of unrestricted dredging and filling in the Everglades is easily imaginable. Of equal or greater magnitude, however, would be the effect of the loss of countless acres of swamp, marsh, bayheads etc. associated with other water bodies which could result from the lower court's decision. Given the intent of Chapter 403 and the rules of the Department, the lower court's construction is absurd and unreasonable and should be rejected by this Court. State v. Webb, supra.

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 water 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.

II. THE LOWER COURT'S AWARD OF ATTORNEY'S FEES IN THIS CASE WAS IMPROPER AND SHOULD BE REVERSED

The lower court in this case awarded Appellee five thousand dollars ($5,000.00) in attorney's fees in this case. The entire text of the court's award is as follows:

> Upon consideration, the motion for attorney's fees filed by counsel for appellant is granted, and John G. Fletcher is allowed $5,000.00 as compensation for the services of said attorney in this court.

Appellee's motion for attorney's fees requested the award pursuant to Sections 57.105 and 120.57, Florida Statutes. It is not apparent from either the opinion of the court or the order granting fees under which provision the fee was awarded. Under either provision the award was improper.

There have been no allegations, nor could there be, that there have been any material errors in procedure in this case. Appellee was granted a hearing on his permit denial, which resulted in a recommended order. The Department overturned the conclusion of law in the recommended order which held that the Department had no jurisdiction over Appellee's property. That action by the agency was taken in absolute conformity with both prior agency precedent (see Occidental Chemical Company, supra and Florida Mining and Materials Corporation, supra) and judicial mandate (see State v. Falls Chase Special Taxing District, supra).

It is clear that an award of attorney's fees, pursuant to Section 57.105, Florida Statutes, is not proper in this case. That section states:

> [t]he court shall award a reasonable attorney's fee to the prevailing party in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party.

With respect to that section, this Court has held that:

> As a prerequisite to an award of attorney's fees under section 57.105, the court must find "a complete absence of a justiciable issue of either law or fact raised by the losing party." Allen v. Estate of Dutton, 384 So.2d 171 (Fla. 5th DCA 1980), interpreted this phrase to mean a total or absolute lack of a justiciable issue, which is tantamount to a finding that the action is frivolous. The district court held that "a trial court must find that the action is so clearly devoid of merit both of the facts and the law as to be completely untenable." (citations omitted) Whitten v. Progressive Casualty Insurance Company, 410 So.2d 501, 505 (Fla. 1982).

There has been no such finding in this case. The Court went on to define what would constitute a frivolous appeal. The Court, in adopting Treat v. State ex rel. Mitton, 163 So. 883 (Fla. 1935), held that:

> A frivolous appeal is not merely one that is likely to be unsuccessful. It is one that is so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect whatsoever that it can ever succeed. It must be one so clearly untenable, or the insufficiency of which is so manifest on a bare inspection of the record and assignments of error, that its character may be determined without argument or research. An appeal is not frivolous where a substantial justiciable question can be spelled out of it, or from any part of it, even though such question is unlikely to be decided other than as the lower court decided it, i.e., against appellant or plaintiff in error. Whitten, supra at 505.

It is clear from a review of the record in this case that justiciable issues have been raised, regardless of the ultimate resolution of those issues.

The lower court's award of attorney's fees is likewise improper if awarded pursuant to Section 120.57, Florida Statutes. The provision for the award of attorneys fees pursuant to Section 120.57(1)(b)9. states:

> In the event a court reverses the order of an agency, the court in its discretion may award attorney's fees and costs to the aggrieved prevailing party.

Although the award pursuant to that section is discretionary, the courts which have dealt with the issue have held that there must be some basis, other than the failure to prevail in litigation, for the award of attorney's fees. For example, the First District Court of Appeal has dealt with the issue of attorney's fees under 120.57(1)(b)9. and has held that:

> While § 120.57(1)(b)(9) does not at present impose any requirement of bad faith or maliciousness as a condition to an award, we would be reluctant to impose fees and costs against an agency if, for example, its order was reversed only because it had erroneously interpreted a provision of law.... We feel, as to those circumstances, there are appropriate sanctions set forth in 120.68, including setting aside or modifying the agency action or remanding the agency action without imposing the additional sanctions of fees and costs against the agency.... [W]e conclude that an agency's actions may more often be subject to the harsher sanctions of fees and costs if either the fairness of the proceedings or the correctness of the action was impaired by material error in procedure or by a failure to follow prescribed procedure. (e.s.) Jess Parrish Memorial Hos-

pital v. Florida Public Employees Relations Commission et al., 364 So.2d 777 (Fla. 1st DCA 1977).

In this case, the lower court overturned the Department's final order due to the Department's supposedly erroneous construction of the provisions of law relating to its jurisdiction.

The Third District Court of Appeal has made a statement of sound judicial policy relating to an award of attorney's fees. While the statement is aimed at an award pursuant to Section 57.105, F.S., the reasoning is certainly applicable in awards pursuant to Section 120.57, Florida Statutes. The Third DCA stated that:

> [a]lthough the existing law did not support Parkway's position, the hospital asserted what was, at least, an obviously good faith, soundly-based, and non-frivolous attempt to change it. ... any less stringent predicate [than frivolousness] for the recovery of attorneys' fees would have a chilling effect on parties who, for example, may unsuccessfully attempt to raise questions of first impression and may deter the future growth of the law by exacting a price for today's unavailing efforts seeking its change. Parkway General Hospital, Inc. v. Stern, 400 So.2d 166, 167-168 (Fla. 3rd DCA 1981).

Finally it is significant that the legislature has, in the last session, codified the existing case law regarding the proper standard for an award of attorney's fees in an amendment to Section 120.57(1)(b)9., Florida Statutes. That section now states:

> When there is an appeal, the court in its discretion may award reasonable attorney's fees and costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process or that the agency action which

precipitated the appeal was a gross abuse of the agency's discretion.

Based on the foregoing, this Court should reverse the lower court's award of attorney's fees.

CONCLUSION

It is clear from foregoing argument that the Department's Final Order in this case properly applied the Department's dredge and fill jurisdiction to Appellee's property. The lower court, in reversing the Final Order, incorrectly construed both the jurisdictional statute and the Department's implementing rule. The legal effect of the lower court's opinion would be to ignore the direct language of the statute and rule in favor of an incorrectly preceived legislative intent. The practical effect of the opinion would be the potential destruction of countless acres of invaluable and irreplaceable wetlands. In addition, the lower court's award of attorney's fees was apparently based on no more than Appellants failure to prevail in litigation before the lower court. Both as a matter of judicial precedent and of sound policy, the lower court's award of fees should be reversed in the absence of a finding of frivolousness or of a material error in procedure which affected the fairness of the proceeding.

For the reasons set forth in the body of this brief, Appellant, State of Florida Department of Environmental Regulation respectfully requests that this honorable Court reverse the opinion of the Third District Court of Appeal and reinstate the Department's Final Order in this case.

Respectfully submitted,

E. GARY EARLY
Assistant General Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing INITIAL BRIEF OF APPELLANT, DEPARTMENT OF ENVIRONMENTAL REGULATION, were filed with Clerk's Office of the Supreme Court of the State of Florida, and a true copy of the same was served by U.S. Mail on John G. Fletcher, Esquire, 7600 Red Road, South Miami, Florida 33143-5484, on this 30th day of January 1985.

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