IN THE SUPREME COURT OF THE STATE OF FLORIDA

DEPARTMENT OF ENVIRONMENTAL REGULATION,

Petitioner,

vs. CASE NO. 65,769

E. PETER GOLDRING,

Respondent.
_____/

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

APPELLANT'S BRIEF ON JURISDICTION

E. GARY EARLY
Assistant General Counsel
State of Florida Department
of Environmental Regulation
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32301
Telephone: (904) 488-9730

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PREFACE

Petitioner Department of Environmental Regulation will be referred to as "the Department". Respondent E. Peter Goldring will be referred to as "Goldring". References to the "District Court," unless otherwise specified, shall mean the District Court of Appeal, Third District of Florida. References to "DOAH" shall mean the Division of Administrative Hearings.

STATEMENT OF THE CASE

The question being brought before this Court is the most important environmental issue raised since the Department was created in 1975. The District Court's construction given to the Department's rule regarding its authority to regulate dredge and fill activities gravely jeopardizes the Department's ability to protect waters of the state and the quality of those waters. Dredging or filling in waters can have irreversible devastating effect on water quality. A most critical factor in determining whether such an activity is to be conducted in an area within the Department's regulatory jurisdiction is whether it is within the landward extent of waters of the state. The legislature instructed that the landward extent of waters of the state "shall be defined by species of plants," in §403.817, Fla. Stat. (1983). The Department has listed the plant species which define the landward extent of waters of the state in Florida Administrative Code Rule 17-4.02(17). The District Court has held that

regardless of the existence of indicator plant species, there must be water flowing back and forth between open waters and the vegetated area. That idea is contrary to the laws of nature for most Florida waters. As water usually flows downhill, there is generally only a one way flow. However, as that water from the vegetated areas does enter and mix with the open waters, the one way flow constitutes an exchange for purposes of Florida Administrative Code Rule 17-4.28.

The District Court's decision essentially limits the Department's regulatory jurisdiction to intertidal areas in salt waters and within the seasonal flood plain in fresh waters. The decision not only removes the Everglades from the Department's regulatory jurisdiction but also greatly diminishes the Department's jurisdiction in the headwaters of streams, high salt marshes, many freshwater marshes, groundwater seepage areas and most freshwater swamps. These are the very areas which by filtering and cleansing water before it enters the waters of the state maintain the purity of Florida's abundant water resources. Removal of those areas from the Department's regulatory jurisdiction would be devastating to the State's attempts to protect water quality. The Department does not believe that the legislature intended to remove the vast "river of grass" known as the Everglades, as well as the other equally important water recharge, water cleansing and wildlife habitat areas from the Department's jurisdiction. It was certainly not the intent of the Department to do so by operation of its own rule.

Goldring applied to the Department for a dredge and fill permit under Chapter 403, Florida Statutes, to mine limestone in Dade County, Florida, in the midst of a vast sawgrass prairie. The plant species which dominates the area, sawgrass, is listed in the vegetative index in Florida Administrative Code Rule 17-4.02(17). The sawgrass extends continuously for a distance of approximately 4 1/2 miles where it intersects the mangroves which fringe Florida Bay. Mangroves are also listed in the rule.

The Department timely processed the application and issued a notice of intent to deny the application. Goldring filed a request for administrative hearing. A hearing officer from DOAH conducted the hearing and submitted a Recommended Order to the Department. The Recommended Order found that the proposed rock mine would cause a violation of state water quality standards, but that the Department had no regulatory jurisdiction over the waters in question as there was not two way flow, i.e. flow from Florida Bay to the site as well as from the site to Florida Bay.

In the Final Order the Secretary found that the hearing officer misinterpreted the Department's rules. The order noted that the site was dominated by species on the vegetative index and that indicator vegetation extended to the mangrove fringe of Florida Bay. Based on the dominance of wetland vegetation the Department asserted jurisdiction and denied the permit based on the projected violation of state water quality standards.

Goldring appealed the Department's order. The District Court construed Section 403.817, Florida Statutes, and Florida

Administrative Code Rule 17-4.28 to mean that the landward extent of waters of the state is not defined by jurisdictional plant species. The District Court held that the Department must make a finding as to the extent of tidal or floodwater levels (i.e. areas in which there is two way flow) and limit its jurisdiction to that line even if the waters as measured by the jurisdictional vegetation extended further upland. The Department now seeks discretionary review of that decision of the District Court, pursuant to Rule 9.030(a)(2)(A)(iv), Fla. R. App. P..

ISSUE

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL DIRECTLY AND EXPRESSLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW.

I. The decision of the District Court in Goldring, which holds that the Department's jurisdiction is determined by a line which bears no relationship to the presence of listed indicator vegetation conflicts with the decision of the First District Court of Appeal in State of Florida Department of Environmental Regulation v. Falls Chase Special Taxing District, et al., 424 So.2d 787 (Fla. 1st DCA 1983).

In Falls Chase the court first acknowleged the Department's enabling legislation 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 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 determination, 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. (emphasis in original) Falls Chase at 791.

The Court in Falls Chase then went on to hold that:

> The Legislature, in the above statute, 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 District Court in the instant case has relegated the existence of jurisdictional vegetation to a secondary consideration in determining the landward extent of waters of the state. The District Court held that:

> . . . the landward extent is not defined as that area upon which certain vegetation is found, but rather is that area subject to regular and periodic inundation by a water of the state as indicated by the presence of particular species common to such an area. Thus, as the hearing officer correctly pointed out:
>
> > 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 presence of an index species is but a way of measuring the action of state waters.

The conflict in the Falls Chase and Goldring decisions is clear. Falls Chase, in referencing the legislative instruction to define the landward extent of waters of the state, held that existence or non-existence of jurisdictional plant species alone determines whether or not the Department has jurisdiction over an area. Goldring on the other hand, misinterprets Florida

Administrative Code Rule 17-4.28 which states the Department's intent to include in the boundaries of a water body "areas which are customarily submerged and exchange waters with a recognizable water body." The District Court construed that language as requiring the Department to first locate the edge of a water body, i.e. the high water line or the edge of the seasonal floodplain, and then determine if jurisdictional vegetation extended to that point. If jurisdictional vegetation extends past the high water line or floodplain, then that vegetation is to be ignored.

The District Court acknowleged in its opinion that vegetation provides a good indication of areas which are periodically inundated, and that the purpose of the statute and rule is to obviate the need for scientific measurements regarding the water's edge. The court then, however, held that the landward extent of waters of the state shall not be defined by species of plants. That ruling by the District Court is clearly in conflict with the decision in Falls Chase, which holds that "only plant or soil indices be used to define the limits of DER jurisdiction ... ." Falls Chase at 793.

II. The decision of the District Court in Goldring, holding that the Department incorrectly interpreted §403.817, Fla. Stat. (1983) and its own rule conflicts with the decision of the First District Court of Appeal in Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College, 425 So.2d 133 (Fla. 1st DCA 1983). In Palm Beach Junior College the First District Court of Appeal held that:

> The standard to be applied on review of the construction of a statue that an agency is charged to enforce is ordinarily to accord substantial deference to it and decline to overturn it, except for the most cogent reasons, or unless clearly erroneous, unreasonable, or in conflict with some provision of the state's constitution or the plain intent of the statute.... The judiciary must not, and we shall not overly restrict the range of an agency's interpretive powers. Permissible interpretations of a statute must and will be sustained, though other interpretations are possible and may even seem preferable according to some views. Palm Beach Junior College at 136.

The District Court in the instant case acknowleged that treating jurisdictional vegetation as a conclusive indication of the landward extent of a water body is a possible construction of the statute. The District Court then went to the Department's own rule to show that the Department could not have intended that the rule be applied in the manner in which the Department had applied it continuously since 1975.

Section 403.817, Florida Statutes, reads in part as follows:

> 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 vegetative index, which is a list of species of wetland plants, has been established by rule. The Department's

construction of that statute in defining the landward extent of waters of the state by species of plants is clearly permissible upon a reading of the statute. The fact that the District Court may have prefered a different construction based upon its understanding of the legislative intent does not constitute sufficient grounds for reversal of the Department's order. This case thereby directly conflicts with Palm Beach Junior College.

III. The decision of the District Court in Goldring in granting Goldring $5000.00 in attorney's fees conflicts with the decision of the First District Court of Appeal in Jess Parrish Memorial Hospital v. Florida Public Employees Relations Commission et al., 364 So.2d 777 (Fla. 1st DCA 1978).

In Jess Parrish the First District Court of Appeal established guidelines regarding the grant of attorney's fees. The First District Court of Appeal held:

> 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. 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. Jess Parrish at 784-5.

In the instant case, regardless of the correctness of its actions, the Department was complying with long standing agency practice, and with what it believed to be the mandate of the court in Falls Chase, supra, when it exerted jurisdiction over Goldring's property. see e.g. Occidental Chemical Co. v. DER, DOAH Case No. 77-2051, Final Order entered July 7, 1981; aff'd per curiam 411 So.2d 388 (Fla. 1st DCA 1981) (appendix 2). If the Department was incorrect, it was due solely to an erroneous interpretation of a provision of law. The fact the Department fully complied with all of the requirements of Chapter 120, Florida Statutes, indicate that there were no material errors in procedure which impaired either the fairness of the proceeding or the correctness of the action. An award of attorney's fees, whether discretionary or not, should be based upon some factor other than a failure to prevail in litigation which has been brought in good faith. This case directly conflicts with the Jess Parrish case.

WHEREFORE, Appellant State of Florida Department of Environmental Regulation petitions this court to accept discretionary jurisidiction over this cause and to entertain argument thereon.

Respectfully submitted,

E. GARY EARLY
Assistant General Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and five true copies of the foregoing APPELLANT'S BRIEF ON JURISDICTION have been hand delivered on this date to the Clerk of the Supreme Court and a true and correct copy of the same by United States Mail to John G. Fletcher, Esquire, Suite 222, 7600 Red Road, South Miami, Florida 33143, on this 27 day of August, 1984.

E. GARY EARLY
Assistant General Counsel

State of Florida Department
of Environmental Regulation
2600 Blair Stone Road
Tallahassee, Florida 32301
Telephone: (904) 48-9730