IN THE SUPREME COURT
STATE OF FLORIDA

PAUL AND ELLEN THOMSON, Petitioners, vs. STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION, Respondent.	Case No.: 69,483 Appeal From the District Court of Appeal, First District Case Nos. A2-337 and BD-330

ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

LAWS OF FLORIDA

RULES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Respondent, State of Florida Department of Environmental Regulation, agrees with the chronology of events set forth by Petitioners in their initial brief. While the Department objects to the characterization of certain events and the inclusion of argument in the statement of the case and facts, those problems do not warrant submission of a separate statement setting forth areas of disagreement.

SUMMARY OF ARGUMENT

This case squarely presents the question of the Department's obligation to reprocess environmental permit applications when substantially similar projects have been found to have adverse environmental impacts. While several peripheral issues have been raised, the primary issue is whether and in what circumstances res judicata applies to bar relitigation of previously determined facts.

In this case, the Department denied a permit application which had been submitted by Petitioners. The application was for a covered overwater structure and a walkway or pier which connected it to an existing deck. The structure and pier were found to have adverse impacts on existing seagrass beds and on established marine soils capable of sustaining further seagrass growth. The Department's notice of denial set forth a full and complete notice of Petitioners' due process rights which included a clear opportunity for Petitioners to request a hearing to contest any of the facts presented in the notice. Petitioners failed to exercise their right to a hearing. When no request for hearing was received, the Department issued its Final Order which incorporated the findings made in the notice. That Final Order constitutes an adjudication on the merits for those findings.

The fact that Petitioners failed to exercise their due process rights does not lessen the fact that a fair opportunity for hearing was provided.

Petitioners subsequently submitted an application which included some changes in the project's configuration which Petitioners contend were intended to address one of the issues determined in the first order. Those changes did not address the impact of the pier on existing seagrasses or the project's overall impact on productive marine soils. Petitioners submitted a seagrass survey to support their contention that the covered structure would no longer be located directly over existing seagrass beds. However, the survey does not extend into the area covered by the pier. Since the first notice found that the pier would destroy existing seagrasses located beneath it, and since the pier was not changed in any respect, that independent basis for denial remains unchanged. In addition, Petitioners made no changes to the project which would lessen in any way its impact on marine soils. Therefore, that independent basis for denial remains unchanged.

Petitioners have raised the issue of whether the Department was in error by denying them a formal proceeding pursuant to Section 120.57(1), Florida Statutes based on their request for development of a record. As set forth in further detail herein, the only logical and rational interpretation of the Department's rule regarding development of a record is that it authorizes a definition of those materials which are to be included in the record. It is not an independent mechanism to request a hearing when a case is on appeal.

Petitioners' final three arguments concern the basis for this Court's exercise of jurisdiction in this case. The Department maintains that there are no issues of law set forth in the lower court opinion which conflict with any opinion of this Court or of the lower courts.

In conclusion, the Department's actions in this case met or exceeded the requirements of law. The full range of due process protections were afforded to Petitioners. Petitioners now attempt to have another try at relitigating previously adjudicated issues. The Department's application of res judicata was appropriate.

ARGUMENT ONE

PETITIONERS WERE PROVIDED WITH THE FULL RANGE OF PROCEDURAL DUE PROCESS PROTECTIONS REQUIRED BY LAW, THUS MAKING AN APPLICATION OF RES JUDICATA APPROPRIATE.

Petitioners allege in their brief that the Department failed to provide them with the elements of due process which would allow for a fair opportunity for hearing in the first permitting proceeding, thereby making inappropriate the Department's application of res judicata to the second permit application. In their Initial Brief they state:

> [b]ut is there a requirement for fair and impartial opportunity or hearing? (sic) Such a requirement is not found in the Rules of the Department of Environmental Regulation, nor is it found in Chapter 120.57, Florida Statutes, 1985. A review of cases decided under Chapter 403, Florida Statutes, does not reveal such a mandate.

Initial Brief of Petitioner at 5.

Petitioners' assertion is not only facially incorrect but also completely disregards the record in this case. To assert that Chapter 120, Florida Statutes does not require due process in any proceeding and that relevant case law does not affirm that requirement is ludicrous. See Sections 120.57(1)(b)2 and 120.60(3); Manasota-88 vs. State of Florida Department of Environmental Regulation, 417 So.2d 846 (Fla. 1st DCA 1982); Henry vs. State Department of Administration, 431 So.2d 677 (Fla 1st DCA 1983).

A review of the Department's actions in the initial permitting proceeding clearly demonstrates that Petitioners were afforded a fair opportunity to be heard.

The Department's notice of intent to deny Petitioners' dredge and fill permit in the first proceeding contained the following provision:

> This intent to deny and the final agency order denying the above application shall be adopted and issued by the Department unless you file an appropriate petition for an administrative hearing pursuant to the provisions of Section 120.57, F.S. At such formal hearing all parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and others, to file exceptions to any order or hearing officer's recommended order, and to be represented by counsel.
>
> Any petition for a hearing must comply with the requirements of Section 28-5.201, F.A.C. (copy enclosed), and be filed with the General Counsel of the Department of Environmental Regulation at 2600 Blair Stone Road, Twin Towers Office Building, Tallahassee, Florida 32301, with a copy to this office, within fourteen (14) days from receipt of this letter. Petitions which are not filed in accordance with the above provisions may be subject to dismissal.

(R-0041-0042)

The quoted notice fully and completely informed Petitioners of their due process rights to a fact-finding administrative hearing. It informed them when, where, how and with whom to file a request for a hearing. It further informed them that Petitioners' failure to follow the instructions would lead to the dismissal of an action. It is difficult to conceive of a notice which could more adequately inform a person of his or her rights.

The First District Court of Appeal expressly found that the facts presented in this case demonstrate that Petitioners received adequate notice. The court held:

> In the present case appellants received formal notice that they might obtain a hearing upon their initial permit application by filing a timely request. Appellants were thereby afforded a fair opportunity for a hearing, and the conclusive effect of DER's initial adjudication is thus not vitiated by appellants' decision not to request a hearing.

Thomson vs. State Department of Environmental Regulation, 493 So.2d 1032, 1034 (Fla 1st DCA 1986).

The fact that Petitioners declined to utilize the available point of entry does not take away from the fact that such a clear point of entry was provided. The situation presented in this case is similar to that presented in Mohican Valley, Inc. v. Division of Land Sales and Condominiums, 441 So.2d 1126 (Fla. 1st DCA 1983). In that case, Mohican was provided with a clear point of entry into the administrative hearing process. Although it initiated some contact with the Division, Mohican failed to request a hearing as provided in the notice. The court held that as long as a party is provided with a clear point of entry, it is not error to enter a final order if the party fails to take advantage of the point of entry.

Given the fact that a clear, readily understandable notice was provided, an examination should be made as to whether the

individual elements which comprise procedural due process were each set forth in the Department's notice. Those elements are:

1) due notice;

2) a fair opportunity to be heard in person and through counsel;

3) the right to present evidence; and

4) the right to cross examine adverse witnesses.

Coral Reef Nurseries, Inc. v. The Babcock Co., 410 So.2d 648, 652 (Fla. 3d DCA 1982).

By comparing those elements of procedural due process with the notice given by the Department, it is apparent that due process was provided in the initial permitting action. The procedural safeguards provided in Chapter 120, Florida Statutes and the rules of the Department were followed by the Department and provided in full to Petitioners.

Although there was not a hearing on the matter, Petitioners were given the opportunity to request a hearing. When the time expired for requesting a hearing, the grounds for denial set forth in the Department's notice of intent to deny the permit became final and binding. The waiver of a hearing and subsequent entry of a final order in this matter is similar to a default judgment in that the final order was issued on the merits of the intent to deny. A default is sufficient to trigger the effects of res judicata in a subsequent proceeding.

As far back as 1926, the Florida Supreme Court stated:

> The foundation principle upon which the doctrine of res judicata rests is that parties ought not to be permitted to litigate the same issue more than once; that, when a right or fact has been judicially tried and determined by a court of competent jurisdiction, or an opportunity for such trial has been given, the judgment of the court, so long as it remains unreversed, should be conclusive upon the parties, and those in privity with them in law or estate. (e.s.)

Hay v. Salisbury, 109 So. 617 (Fla. 1926)

Those principles are equally as vibrant today.

In conclusion, it is clear that the Department did not deny Petitioners' due process by denying the initial permit application. The procedural safeguards set forth in Chapter 120, Florida Statutes, and the rules of the Department were followed by the Department and provided in full to Petitioners. That fact that Petitioners chose to ignore those safeguards does not affect the appropriateness of the Department's actions. The denial of the initial application was correct, and constitutes sufficient grounds for denial of the substantially identical second application.

Petitioners, in Argument One of their initial brief introduce a peripheral issue which, although without merit, requires a response here. Petitioners state that the Department's rule which addresses the criteria for authorized representation required the Department to ascertain whether Petitioners' representative was qualified. That rule, Florida Administrative Code Rule 17-103.020(2), which was promulgated in response to this Court's opinion in The Florida Bar v. Moses, 380 So.2d 412 (Fla. 1980), reads in pertinent part as follows:

> If a party is not represented by an attorney, or does not appear on his own behalf, the presiding officer, as early as possible in the proceedings, but prior to the final hearing, shall make diligent inquiry of the representative under oath, to assure that the representative is qualified to appear in the agency proceeding and capable of preserving the rights of the party. (e.s.)

It is clear that what is meant by the term "proceeding" is a "formal proceeding" as set forth in Section 120.57(1), Fla. Stat. or an "informal proceeding" as set forth in Section 120.57(2), Fla. Stat.

Petitioners argue that it was error for the Department not to make inquiry regarding their representative. What Petitioners fail to acknowledge is that there was never a "proceeding" through which the Department could make such an inquiry. Petitioners never requested a proceeding, therefore no inquiry was made. Petitioners' argument, if adopted, would mean that the Department is required to make a qualifications inquiry anytime a notice of intent is issued, a phone call answered or a letter responded to. Such is clearly not the intent of a "Moses" inquiry.

ARGUMENT TWO

PETITIONERS' SECOND PERMIT APPLICATION IS SUBSTANTIALLY IDENTICAL TO THE FIRST APPLICATION.

Petitioners assert that their second permit application differed in such a scale from the first as to make an application of res judicata inappropriate. A review of the record confirms that the determination of the applicability of res judicata by the Department, and the affirmation of that determation by the First District Court of Appeal, was appropriate.

Petitioners' second permit application did change the configuration of the overwater structure to some degree. The changes were made presumably to avoid the current location of the seagrass beds in the area of the overwater platform. Assuming the survey is correct and to scale, Petitioners have established that the platform would clear the seagrass beds by a foot or two. Further assuming that the degree of clearance from existing grassbeds eliminates the impact of the platform's shading on those existing grassbeds, the cogent question in terms of whether res judicata is applicable to the second application becomes "what has <u>not</u> changed?"

The Department's initial notice of intent found that the overwater platform <u>and</u> the pier which connects it to the mainland were to be constructed over seagrasses, and that the shading from those structures would destroy the seagrasses. Even if the shading considerations are eliminated from the covered structure, Petitioners have made no changes to the pier which would alter

its affect on the grasses. The seagrass survey, touted by Petitioners as mandating a different conclusion, does not extend into the area covered by the pier. (R-0049) Therefore, Petitioners have shown no changed circumstances regarding the area to be covered by the pier which would justify a determination other than denial.

Perhaps as important as the seagrass shading issue is the question of whether Petitioners addressed issues other than the seagrass issue in the second application, which issues were bases for denial of the first application. The first notice of denial contained, as a separate ground for denial of the permit, the fact that the project would be contrary to the public interest due to the adverse effect on established marine soils capable of substaining seagrass growth. While marine bottoms and soils may, as Petitioners assert, be ubiquitous (Initial Brief of Petitioners, at 9), marine soils capable of supporting seagrasses are not. Those soils must be firm enough to support submerged root systems yet contain enough organic matter to support growth. The first notice of intent made the specific finding that the established marine soils in the area would be adversely impacted. Petitioners attempt to relegate this important, statutory basis for denial to mere "boiler plate." The fact is that, just as areas of present seagrass growth are important, and in fact became the areas of primary concern in the first notice of denial, those areas adjacent to seagrasses which are capable of being productive areas are likewise ecologically significant.

Petitioners made no effort whatsoever to change any portion of their project to address the issue of its impact on the established marine soils. The Department's second notice of intent reflected the fact that no changes where made by finding that "[a]s with the previous application . . . the proposed roofed platform and walkway will be located over and near marine bottom capable of supporting seagrasses . . . and eliminate the potential for seagrasses to grow in the area." (e.s.) (R-0050)

Rather than creating a new basis for denial, as Petitioners would have the court believe, the second notice merely points to the basis for denial of the first application. The lower Court's majority opinion recognized that Petitioners made no changes to the project which would change the project's impact on the marine soils. The Court stated:

> . . . We find no record deficiency affecting the dispositive issues as to substantial identity of the two proposals with respect to the stated interference with "natural marine habitats . . . and established marine soil" spelled out in the original notice of intent. . .

Thomson, supra at 1035, fn.4 .

In the dissenting opinion in the lower court, Judge Zehmer states that the Department's application of res judicata to the second permit application "was erroneous because disputed material issues of fact remained to be resolved in a Section 120.57(1) formal hearing which, if resolved in Appellant's favor would render the defense of res judicata inapplicable." Thomson, supra at 1037. It is clear from reading the dissent that Judge Zehmer felt that the changes made in the configuration

of the overwater structure were sufficient to allow for the relitigation of the project's overall environmental impact. However, even if all potentially disputed issues of fact arising from the modification are resolved in Petitioners' favor, it is still apparent that the changes are not substantial, and the application of res judicata is still appropriate.

The majority opinion of the First DCA holds that while the record indicates a portion of the project was changed, that the project as a whole showed no significant changes which would allow relitigation of the issues. The court held:

> We conclude that in the circumstances presented, DER was not precluded from applying the doctrine of res judicata merely because of minor design modification to the proposed platform, inasmuch as the affected water quality standards, and conservation interests which served as an independent basis for the initial permit denial, were considered as impacted by the project in its entirety.

Thomson, supra at 1035.

It is clear that Petitioners made no changes in their second application which addressed the pier's impact on existing seagrass beds or the effects of the project as a whole on the established and productive marine soils in the area. Petitioners filed no timely objections to the findings of adverse impact in the first notice of denial. Those finding are, therefore, deemed no longer in controversy between Petitioners and the Department. Metro-Dade County Board of County Commissioners v. Rockmatt Corporation, 231 So.2d 41 (Fla. 3d DCA 1970).

In this forum, Petitioners clearly have the burden of showing that the Department's application of res judicata was

erroneous. The Third District Court of Appeal has held that "[t]he determination of the applicability of the res judicata doctrine is primarily within the province of the administrative body considering the matter in question, and that body's determination may only be overturned upon a showing of a complete absence of any justification therefor." Coral Reef Nurseries, Inc. v. Babcock Co., 410 So.2d 648, 655 (Fla. 3rd DCA 1982). The court in Coral Reef went on to approve the following language: "Even if the application is closely similar to a previous one, it is within the discretion of the Board whether to reject the application on the ground of res judicata, and the exercise of that discretion may not be overturned on appeal in the absence of a showing of unreasonableness." Id. at 655.

Appellants have not demonstrated that the Department's denial of their second permit application, on the basis of res judicata, was made with a complete absence of justification. In fact, competent substantial evidence in the record clearly supports the denial based on res judicata. Petitioners, in their Initial Brief, address only the minor changes made to the roofed platform design, and never address the issue of the pier's impact on the existing seagrass beds or the project's impact on established marine soils. As both of those components of the project were expected to violate state standards, failure to change the project in any way to address those impacts was, in and of itself, sufficient reason for the Department to deny the Petitioner's second permit application. Petitioners have shown no changed conditions or new facts concerning the project site

which would change the project's overall environmental impact. Petitioners have, therefore, met none of the criteria set forth in their own brief to avoid the application of res judicata in this case. There must at some point be an end to the processing and reprocessing of permit applications. The Department has denied Petitioners' project on valid environmental grounds once already. Until Petitioners make some substantial change to the application, or until they show some changed circumstances or conditions in the area which would lead the Department to a different result, the prior grounds for permit denial remain effective. The Department's action was, therefore, proper and appropriate in this case.

ARGUMENT THREE

THE DEPARTMENT PROPERLY CONSTRUED ITS RULE REGARDING RECORD DEVELOPMENT IN A NON-HEARING APPEAL.

Petitioners argue that they were entitled to an opportunity to have a Section 120.57(1), F.S., formal hearing on their second permit application after entry of the Final Order on that application and the filing of a notice of appeal. The argument is without merit. The basis of their argument is a provision of the Department's rules which serves to establish those materials which will constitute "the record" for appellate purposes when no hearing has been held.

It should be noted that the rule, Florida Administrative Code Rule 17-103.330(3), applies only to appeals to the Board of Trustees of the Internal Improvement Trust Fund (BTIITF). Petitioners' appeal of its Chapter 253 issues to the BTIITF was dismissed due to the fact that the legislature stripped the BTIITF of its appellate jurisdiction when it repealed Section 253.76, Fla. Stat. See Chapter 84-79 §15 Laws of Fla. Although Petitioners have appealed the dismissal, they have not maintained the propriety of the dismisssl as an isssue.

Petitioners have misconstrued Florida Administrative Code Rule 17-103.330(3), as allowing any person who has waived a hearing to still be entitled to a hearing simply by filing a notice of appeal. The Department's rule regarding development of a record in a non-hearing appeal read, in 1984, as follows:

> If no record was developed pursuant to Section 120.57, Florida Statutes, prior to the final agency action, then a request for the development of a record shall accompany the notice of appeal. Such a request should state which method of developing a record pursuant to Section 120.57, Florida Statutes, is desired. Either a formal or informal proceeding or informal disposition, agreed settlement or consent order. Thereupon the times for further prosecution of the appeal shall be tolled until the requested record has been completely developed. Until such record has been completely developed the appeal shall not be deemed received by the board.

The only reasonable and logical interpretation which can be given to that rule is that when there has been no administrative hearing prior to the appeal of a Final Order, the party may choose the material which the Department must use in compiling the record. The record material may be developed through a formal hearing (i.e. those materials listed in Section 120.57(1)(b)5.), through an informal hearing (i.e. those materials listed in Section 120.57(2)(b)), or through agreement by the parties pursuant to stipulation, agreed settlement or consent order.

In this case the Petitioners chose to define the record as those materials, if any, which are listed in the Section 120.57(1), Fla. Stat. definition of the record. However, they would have the rule construed to mean that they are now entitled to a full 120.57(1), Fla. Stat. hearing. Appellant's position, if adopted by this Court, would mean that whenever any person, either a permit applicant or a third party, fails to request a hearing in a timely fashion, that person would still be entitled to a full evidenciary hearing during the appellate process. Such

a interpretation of the rule would make a mockery of the specific time frames which Chapter 120 provides to persons requesting a hearing and leads to the absurd result of waiving the right to a hearing while simultaneously retaining the right to a hearing. An interpretation of a statute which leads to an absurd or unreasonable result should be avoided. Agrico Chemical Company v. State of Florida Department of Environmental Regulation, 365 So.2d 759 (Fla. 1st DCA 1978); State v. Webb, 398 So.2d 820 (Fla. 1981). The same rules of construction which apply to statutes also apply to rules. 1 Fla. Jur. 2d, Administrative Law Section 57.

The Department has interpreted its procedural rule in a reasonable way. The interpretation given to the rule by the agency charged with administering the rule should be afforded great deference. See e.g.. State Department of Health and Rehabilitative Services v. Framat Realty Inc., 407 So.2d 238 (Fla. 1st DCA 1981). The logical interpretation of the rule, and that which is consistent with the specific language and intent of the rule, is that when there has been no hearing, the party may choose the definition of "the record" which the Department must use in compiling the record.

In conclusion, the Department properly interpreted its rule regarding development of the record. All of the pertinent materials which were used by the Department in arriving at its decision to apply the doctrine of res judicata to the second application are contained in the record. Therefore, the action of the Department is appropriate and should be upheld.

ARGUMENT FOUR

THE INSTANT CASE DOES NOT CONFLICT WITH CORAL REEF NURSERIES, INC. V. THE BABCOCK COMPANY.

Petitioners assert, as they did in Argument I of the Initial Brief, that the Department deprived them of a fair opportunity to be heard in the initial permit proceeding thereby causing this case to conflict with Coral Reef Nurseries v. The Babcock Company, 410 So.2d 648 (Fla. 3d DCA 1982). They claim "[t]he majority opinion in the Court below dismissed the fairness issue in a footnote . . ." Initial Brief of Petitioners at 11. The question of whether a fair opportunity to be heard was provided in the initial proceeding was not only adequately briefed by the parties but was directly and expressly addressed in the lower court opinion. The First District Court of Appeal held that:

> A fair opportunity to be heard is generally an element of the procedural due process necessary for the applicability of the doctrine of administrative res judicata. See Coral Reef Nurseries, Inc. v. Babcock Co., 410 So.2d 648 (Fla. 3d DCA 1982). But it is the opportunity to be heard, rather than an actual hearing, which is critical. Cf., Litt v. Jarson, 97 So.2d 46 (Fla. 3d DCA 1957). In the present case appellants received formal notice that they might obtain a hearing upon their initial permit application by filing a timely request. Appelants were thereby afforded a fair opportunity for a hearing and the conclusive effect of DER's initial adjudication is thus not vitiated by appelants' decision not to request a hearing.

Thomson, supra at 1034.

The Court below exercised its review authority on the direct appeal of the final order to find that competent substantial

evidence existed to support the finding that a fair opportunity for hearing was provided. That determination was properly within the District Court of Appeal's direct appellate jurisdiction under Florida Rules of Appelate Procedure 9.030(a)(1). Clark v. Department of Professional Regulation, Board of Medical Examiners, 463 So.2d 328 (Fla. 5th DCA 1985, pet for rev.den. 475 So.2d 693 (Fla. 1985). The lower court's majority opinion specifically found the law in Coral Reef to be applicable to this case. Coral Reef held that one must be provided with a fair opportunity for hearing before res judicata will apply. The lower court in this case likewise held that one must be provided with a fair opportunity for hearing before res judicata will apply. It is not the purpose of this Court's discretionary conflict jurisdiction to determine whether factual issues which have been resolved on direct appeal are supported by competent substantial evidence or whether consistent cases are correct. Rather it is to make a determination as to conflicting issues of law. There are no conflicting issues of law in this case. Therefore, this Court should decline to exercise its discretionary conflict jurisdiction based on any alleged conflict between the lower court opinion in this case and the Coral Reef case.

ARGUMENT FIVE

THE INSTANT CASE DOES NOT CONFLICT WITH MATTHEWS V. STATE EX REL. ST. ANDREWS BAY TRANSPORTATION COMPANY.

Petitioners assert that the proposition of law as presented in Matthews v. State ex rel. St. Andrews Bay Transportation Company, 11 Fla. 587, 149 So. 684 (Fla. 1933), that substantially changed circumstances will justify a re-examination of issues already litigated, is in conflict with the issues of law propounded in the court below. Petitioners again erroneously assert that the Department's concerns with the impacts of the pier on existing seagrasses and the adverse impact of the projects on the productive marine soils amount only to "boilerplate" and should therefore be ignored. While it is true that concerns regarding marine soils are based on a specific legislative directive rather than a rule, that fact should give those concerns more weight, not less. The court below, in a proper exercise of its appellate review authority, specifically held that the Department's factual finding that changes made to the project in Petitioners' second application were not substantial was supported by competent, substantial evidence. The court stated that "[w]e conclude that in the circumstances presented, DER was not precluded from applying the doctrine of res judicata merely because of minor design modifications to the proposed platform . . ." (e.s.) Thomson supra at 1035. The court went on to state that "[w]e find no

record deficiency affecting the dispositive issues as to substantial identity of the two proposals. . ." Thomson supra at 1035 fn.4. The lower court specifically acknowledged, as provided in Matthews, that had the circumstances significantly changed, the application of res judicata would have been inappropriate. The conclusion was, however, that the circumstances had not been significantly changed. Clearly there are no issues of law enunciated in the lower court opinion which conflict with the Matthews opinion.

The Department again asserts that it is not the purpose of this Court's discretionary conflict jurisdiction to determine whether factual issues which have been addressed on direct appeal are supported by competent substantial evidence or to determine the correctness of consistent opinions. It is to resolve conflicting issues of law. There are no conflicting issues of law in this case. Therefore, this Court should decline to exercise its discretionary conflict jurisdiction based on any alleged conflict between the lower court opinion in this case and the Matthews case.

ARGUMENT SIX

THE INSTANT CASE DOES NOT CONFLICT WITH UNIVERSAL CONSTRUCTION COMPANY V. CITY OF FT. LAUDERDALE OR WITH STATE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES v. LAPLANTE.

Petitioners argue that this case conflicts with the cases of Universal Construction v. City of Ft. Lauderdale, 68 So.2d 366 (Fla. 1953) and State Department of Health and Rehabilitative Services v. LaPlante., 470 So. 2d 832 (Fla. 2d DCA 1985).

In Universal Construction this Court stated that res judicata may be waived if its application would constitute an unjustice. In that case, one party was to be unjustly enriched at the expense of the other. This case does not involve a breach of fundamental fairness. Rather, it is a case in which Petitioners' first application was denied on valid environmental grounds. They have since shown no changed circumstances or new facts which substantially change the project's environmental impact. Until Petitioners make some substantial changes to the project which address the bases for denial, or until they show some changed circumstances or conditions in the area which would lead to a different result, the ground for permit denial remain effective. It is hardly a breach of fundamental fairness for the Department to deny a permit application for a project which will cause violations of the Department's rules and its enabling legislation. Therefore, no conflict exists between this case and Universal Construction.

In LaPlante, the Second District Court of Appeal held that "the trial judge erred in applying the doctrine of res judicata, since there had been no clear-cut former adjudication." LaPlante, supra at 834. In this case there was a clear-cut former adjudication. After due notice of the grounds for denial and opportunity for hearing, a final order which went to the merits of the proposal was entered. Therefore, this case does not conflict with LaPlante.

One final point in Petitioners' Argument Six should be addressed here. Petitioners state that "[b]oth Respondent, and the First District Court of Appeal, provide administrative hearings to third party intervenors at the drop of a hat . . ." This reflects Petitioners' fundamental misunderstanding of what the Department must provide to a person affected by agency action. The Department is not requred to provide an administrative hearing to any affected person. The Department is required to provide a full and complete notice of the opportunity for a person to request a hearing, which notice must inform the person of the right to request a hearing and of any steps which must be taken in such a request. The Department met or exceeded all such requirements in this case.

This case clearly does not conflict with LaPlante, as a final adjudication of the issues on the merits was made. It also does not conflict with Universal Construction as no breach of fundamental fairness was involved. This is not a case of lack of fundamental fairness. Rather it is a case in which permit

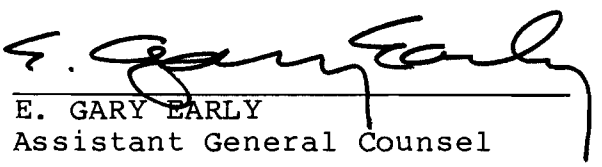
applicants, unhappy at the fact their project has been found to have adverse environmental impacts, attempt to relitigate facts no longer in dispute. Therefore, this Court should decline to exercise its discretionary conflict jurisdiction based on any alleged conflict between the lower court opinion and the Universal Construction or LaPlante cases.

CONCLUSION

The Department's actions in this case were factually appropriate and were taken with complete notice and provision of due process rights. The decision in this case was made in complete conformity with opinions rendered by this Court and by various lower courts in Florida. The "administrative fast shuffle" Petitioners complain of consists of no more or less than the Department fully complying with all elements of procedural due process as set forth in Chapter 120 and relevant case law. Therefore, this Court should decline to accept jurisdiction over this case based on any alleged conflict between this case and any of the cases cited by Petitioner.

If the Court chooses to accept jurisdiction over this case, the Departments' denial, in the absence of substantial changes in the project which would change its overall impact, should be upheld by this Court. Petitioners seem to imply in their conclusion that their ownership of the submerged bottoms gives them license to violate environmental laws. While ownership releases Petitioners from certain requirements, it does not release Petitioners from the requirement of meeting water quality standards and minimizing impacts on fish, wildlife, marine soils, and habitat. Petitioners' project was properly denied due to its negative environmental impact. That denial should be affirmed.

Respectfully submitted,

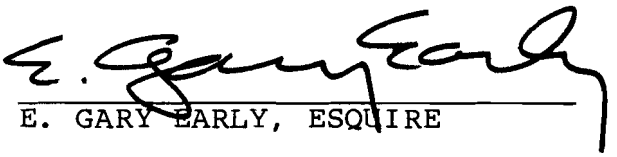


E. GARY EARLY
Assistant General Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT an original and seven copies of the foregoing has been sent by U.S. Mail to Honorable Sid J. White, Clerk, Supreme Court of Florida, Tallahassee, Florida 32301, and a true and complete copy to Robert A. Routa, Esquire, Roberts, Egan, Routa, P.A., Post Office Box 1386, Tallahassee, Florida 32301; this 13 day of April, 1987 in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL REGULATION



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