IN THE SUPREME COURT
STATE OF FLORIDA

LEGAL ENVIRONMENTAL ASSISTANCE FOUNDATION, INC., Petitioner, vs. BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA, Respondent.	CASE NO. 83,039

ON THE CERTIFIED QUESTION FROM THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
CASE NO. 92-3200

INITIAL BRIEF OF PETITIONER

DAVID A. LUDDER
ATTORNEY FOR PETITIONER
Fla. Bar No. 0799998
LEGAL ENVIRONMENTAL
ASSISTANCE FOUNDATION, INC.
1115 North Gadsden Street
Tallahassee, Florida 32303
(904) 681-2591

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ISSUE PRESENTED FOR REVIEW

Under existing Florida Law, not limited to the State's EPA-Approved Underground Injection Control Program, where a holder of an exploratory well construction and testing permit has made a timely application for an injection well operating permit, does the construction and testing permit continue in effect past its expiration date until the Florida Department of Environmental Regulation has acted on the pending application?

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings and Disposition in Court Below

LEAF filed a complaint in the United States District Court for the Middle District of Florida on July 22, 1991 seeking declaratory and injunctive relief against the Board of County Commissioners of Brevard County, Florida ("the Board") for the underground injection of treated domestic wastewaters without a valid permit since December 20, 1988 in violation of the U. S. Environmental Protection Agency - approved underground injection control program for the State of Florida.[1]

On July 1, 1992, LEAF filed a Motion for Partial Summary Judgment on the issue of liability alone, deferring the issue of relief to a later time.[2] In Defendant's Response and Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment filed on July 13, 1992, the Board requested "that this Court enter its judgment in favor of Defendant ... based upon an Order of Final Summary Judgment ... ."[3] On November 6, 1992, the

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[1]Complaint, R1-1-1. All record references are in accordance with the convention followed by the United States Court of Appeals for the Eleventh Circuit. The first letter and number ("R1") refers to the volume, the second number ("-1-") refers to the document number, and the final number ("1") refers to the page number within the document.

[2]Plaintiff's Motion for Partial Summary Judgment, R1-16-1.

[3]Defendant's Response and Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, R1-21-13.

Court granted the Board's request for summary judgment and denied LEAF's Motion for Partial Summary Judgment.[4]

LEAF timely filed a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit which, on January 12, 1994, certified a question of Florida law that is determinative of the cause, but unanswered by controlling precedent of the Supreme Court of Florida.

II. Statement of Facts

In late 1974, Congress enacted the Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1660 (codified as amended at 42 U.S.C. §§ 300f - 300j-26 (1988)), Part C of which addresses the protection of underground sources of drinking water. To protect present and potential underground sources of drinking water from endangerment caused by underground injection of wastes, Congress mandated the establishment of a regulatory program to be administered by the U.S. Environmental Protection Agency ("EPA") or a State if EPA approval of the State program is obtained. 42 U.S.C. § 300h-1 (1988). Among the minimum requirements which Congress demanded be included in this regulatory program is a requirement that underground injection which is not authorized by a permit be prohibited. 42 U.S.C. § 300h(b)(1)(A) (1988).[5]

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[4]Order, R2-38-1; Judgment, R2-39-1.

[5]In addition, Congress demanded that the permit applicant bear the burden of satisfying the state that the proposed injection will not endanger drinking water sources. 42 U.S.C. § 300h(b)(1)(B)(1988).

Thus, permitting of underground injection activities is a fundamental component of the regulatory scheme to prevent endangerment of underground sources of drinking water. Moreover, Congress intended that "actual contamination of drinking water [should not be] a prerequisite either for the establishment of regulations or permit requirements or for the enforcement thereof." H. R. Rep. No. 93-1185, 93rd Cong., 2d Sess. at 32, reprinted in 1974 U.S. Code Cong. & Ad. News at 6484.

Pursuant to 42 U.S.C. § 300h-1 (1982) (current version in 42 U.S.C. § 300h-1 (1988)), the EPA Administrator published notice of his approval of the underground injection control program of the Florida Department of Environmental Regulation in the Federal Register on February 7, 1983.[6] The effective date of the EPA-approved Florida underground injection control program was March 9, 1983.[7]

During the period from December 20, 1988 through April 26, 1989, the Florida underground injection control program included Fla. Admin. Code R. 17-28.11 through 17-28.64 (Supp. 1982).

Fla. Admin. Code R. 17-28.31 (Supp. 1982) provided inter alia:

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[6]Joint Pretrial Stipulation, R2-27-8. See also 48 Fed. Reg. 5556 (1983).

[7]Joint Pretrial Stipulation, R2-27-8. See also 49 Fed. Reg. 20203 (1984).

(1) General Prohibitions
(a) Effective no later than the effective date of this rule, any underground injection through a Class I or III well is prohibited, except as authorized by permit.[8]

Fla. Admin. Code Ch. 17-28 (Supp. 1982) provided for three types of Class I injection well[9] permits: (1) Class I Exploratory Well Construction and Testing Permit [Fla. Admin. Code R. 17-28.32 (Supp. 1982)]; (2) Class I Test/Injection Well Construction and Testing Permit [Fla. Admin. Code R. 17-28.33 (Supp. 1982)]; and (3) Class I Injection Well Operating Permit [Fla. Admin. Code R. 17-28.34 (Supp. 1982)].[10] The application requirements for each type of permit were different.[11]

Fla. Admin. Code R. 17-28.31, -28.32, -28.33, and -28.34 (Supp. 1982) were subsequently renumbered as R. 17-28.310,

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[8]Joint Pretrial Stipulation, R2-27-8.

[9]A Class I injection well includes "municipal (publicly or privately owned) disposal wells which inject fluids beneath the lowermost formation containing, within one-quarter mile of the well bore, an underground source of drinking water." Fla. Admin. Code R. 17-28.13(1)(a)2. (Supp. 1982) certified by Florida Secretary of State, R1-16(folder exhibit)-4.

[10]Joint Pretrial Stipulation, R2-27-8; Fla. Admin. Code R. 17-28.32, -28.33, -28.34 (Supp. 1982) certified by Florida Secretary of State, R1-16(folder exhibit)-16, -17.

[11]Compare Fla. Admin. Code R. 17-28.32(3) (Supp. 1982) with 17-28.33(2) (Supp. 1982) and 17-28.34(1)(c) (Supp. 1982) certified by Florida Secretary of State, R1-16(folder exhibit) -16, -17.

-28.320, -28.330, and -28.340 respectively, but otherwise remained unchanged.[12]

In 1974, the Florida Legislature passed the Administrative Procedure Act, Ch. 74-310, § 1, at 952, Laws of Fla.[13] Section 120.60(3) thereof provided:

> When a licensee has made timely and sufficient application for the renewal of a license which does not automatically expire by statute, the existing license shall not expire until the application has been finally acted upon by the agency, and, in case the application is denied or the terms of the license are limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

Section 120.60(3) of the Administrative Procedure Act as enacted in 1974 has since been renumbered as § 120.60(6), but has otherwise not been materially changed.[14]

On August 31, 1988, Fla. Admin. Code R. 17-4.090 was adopted. It provides inter alia:

> (1) Renewals. Prior to sixty days before the expiration of any Department operation permit, the permittee shall apply for a renewal of a permit on forms and in a manner prescribed by the Department. . . . When the application for renewal is timely and sufficient, the existing permit will remain in effect

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[12]Joint Pretrial Stipulation, R2-27-9; Compare Fla. Admin. Code R. 17-28.31, -28.32, -28.33, and -28.34 (Supp. 1982) certified by Florida Secretary of State, R1-16 (folder exhibit) -15 through -18, with Fla. Admin. Code R. 17-28.310, -28.320, -28.330, and -28.340 certified by Florida Secretary of State, R1-16(folder exhibit)-19 through -22.

[13]Ch. 74-310, § 1, at 952, Laws of Fla. certified by Florida Secretary of State, R1-16(folder exhibit)-1.

[14]An "and" was changed to an "or" by Ch. 77-174, § 1, at 719, Laws of Fla.

> until the renewal application has been finally acted upon by the Department or, if there is court review of the Department's final agency action, until a later date as required by Section 120.60, F.S.[15]

On or about December 21, 1982, the Board of County Commissioners of Brevard County, Florida ("the Board") submitted an application for a Class I Exploratory Well Construction and Testing Permit to the Florida Department of Environmental Regulation.[16] The stated purpose of the well, to be constructed at the Board's South Beaches Regional Wastewater Treatment Plant, was for exploration and injection testing.[17]

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[15]Joint Pretrial Stipulation, R2-27-9. In an opinion issued by the Florida Department of Environmental Regulation's Office of General Counsel on February 4, 1991 regarding a factual situation similar to the present one, it stated that "Rule 17-4.090 is based on Section 120.60(6), Florida Statutes." Affidavit of Doug MacLaughlin, R1-23-Exhibit IV.

An earlier version of the rule, numbered Fla. Admin. Code R. 17-4.09 (1982), provided inter alia:

> (1) Renewals. Prior to sixty days before expiration of any Department permit, the permittee shall apply for a renewal of a permit on forms and in a manner prescribed by the Department.

Joint Pretrial Stipulation, R2-27-9.

[16]Joint Pretrial Stipulation, R-2-27-10; Defendant's Response to Plaintiff's Second Request for Admissions, R1-16(folder exhibit)-1 at ¶ 3; Affidavit of Richard H. Martens, R1-25-2; Affidavit of Doug MacLaughlin, R1-23-2.

[17]Affidavit of Richard H. Martens, R1-25-2 and Exhibit "1." See also Fla. Admin. Code R. 17-28.32(1) (Supp. 1982) certified by Secretary of State, R1-16(folder exhibit)-16 ("An exploratory well . . . is drilled for the specific purpose of obtaining sufficient information to determine the feasibility of underground injection at the proposed site.").

On or about December 23, 1983, the Florida Department of Environmental Regulation issued Permit No. UD05-64536 to the Board for the construction of a Class I Exploratory Test Injection Well at the South Beaches Regional Wastewater Treatment Plant.[18] Permit No. UD05-64536 contained an initial expiration date of January 1, 1985.[19] The expiration date of Permit No. UD05-64536 was modified several times, the final modification extending the expiration date to December 20, 1988.[20] Permit No. UD05-64536 also contained the following condition:

> Water for injection testing must come from the Indian River. Sewage effluent shall not be used during the injection tests.[21]

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[18]Joint Pretrial Stipulation, R2-27-10; Defendant's Response to Plaintiff's First Request for Admissions, R1-16(folder exhibit)-1 at ¶1; Defendant's Response to Plaintiff's Second Request for Admissions, R1-16(folder exhibit)-2 at ¶4; Affidavit of Richard H. Martens, R1-25-2; Affidavit of Doug MacLaughlin, R1-28-2.

[19]Joint Pretrial Stipulation, R2-27-10; Defendant's Response to Plaintiff's First Request for Admissions, R1-16(folder exhibit)-1 at ¶2; Defendant's Response to Plaintiff's Second Request for Admissions, R1-16(folder exhibit)-2 at ¶4; Affidavit of Richard H. Martens, R1-25-2.

[20]Joint Pretrial Stipulation, R2-27-10, -11; Defendant's Response to Plaintiff's First Request for Admissions, R1-16(folder exhibit)-2 at ¶s 3, 4, 5, 6; Defendant's Response to Plaintiff's Second Request for Admissions, R1-16(folder exhibit)-2 at ¶s 8, 11, 13, 15; Affidavit of Doug MacLaughlin, R1-25-2; Affidavit of Richard H. Martens, R1-25-2.

[21]Affidavit of Richard H. Martens, R1-25-2 and Exhibit "2"; Official Records of Brevard County Utility Services Department certified by Richard H. Martens, R1-16(folder exhibit)-12.

On or about December 29, 1986, the Board submitted an application for a Class I Injection Well Operating Permit for the injection well at the South Beaches Regional Wastewater Treatment Plant.[22] The purpose of the application was to obtain authorization to use the injection well at the South Beaches Regional Wastewater Treatment Plant for the disposal of secondary treated domestic wastewater (sewage).[23] The application indicates that the project is "new" rather than "existing."[24]

The Florida Department of Environmental Regulation has neither granted nor denied the Board's application for a Class I Injection Well Operating Permit.[25] The Florida Department of Environmental Regulation has been hesitant to grant the permit in part because of unresolved concerns that the geologic stratum separating the zone of injected waste deposition from the overlying Floridan Aquifer may not have the properties necessary to adequately confine the injected waste in the zone of intended

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[22]Joint Pretrial Stipulation, R2-27-11; Defendant's Response to Plaintiff's Second Request for Admissions, R1-16(folder exhibit)-3; Affidavit of Richard H. Martens, R1-25-3; Affidavit of Doug MacLaughlin, R1-23-2.

[23]Affidavit of Richard H. Martens, R1-25-3 and Exhibit "4."

[24]Id.

[25]Joint Pretrial Stipulation, R2-27-11; Defendant's Response to Plaintiff's Second Request for Admissions, R1-16(folder exhibit)-3; Affidavit of Richard H. Martens, R1-25-3; Affidavit of Doug MacLaughlin, R1-23-2.

deposition and may not prevent migration of the waste into underground sources of drinking water.[26]

Nevertheless, in a letter to the Board dated February 26, 1987, the Florida Department of Environmental Regulation confirmed its earlier verbal approval to begin utilizing the Class I well for injection of treated domestic wastewaters (sewage).[27] The Board has used the Class I deep injection well at the South Beaches Regional Wastewater Treatment Plant to dispose of treated wastewaters by injection into the subsurface

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[26]E.g. Letter from Carlos Rivero deAguilar, Florida Department of Environmental Regulation, to Chuck Striffler, Brevard County Utility Services, dated June 20, 1989, Dep. Cynthia Valencic at Exhibit P-2 ("As you are aware, although the county has applied for an operate permit for this well, water quality variations in the monitor well system have halted the processing of this permit application."); Letter from Carlos Rivero de-Aguilar, Florida Department of Environmental Regulation, to Lawrence S. Sims, Geraghty and Miller, dated May 29, 1990, Dep. Cynthia Valencic at Exhibit P-4 ("This application has been held in abeyance while variations in water quality in the existing monitoring well were investigated."); Memorandum from Marian Fugitt, Florida Department of Environmental Regulation, to Carlos Rivero deAguilar, Florida Department of Environmental Regulation, dated July 30, 1991, Dep. Cynthia Valencic at Exhibit P-6 ("Since IW-1 at the South Beaches facility has been operating for four years and the issue of adequate confinement remains unresolved, we feel that the Department should not issue a construction or operation permit for this injection well.").

[27]Defendant's Request to Plaintiff's First Request for Admission, R1-16(folder exhibit)-2 at ¶ 4 and "Attachment C." This approval did not constitute the grant of the Board's application for a Class I Injection Well Operating Permit. See Joint Pretrial Stipulation, R2-27-11; Defendant's Response to Plaintiff's Second Request for Admissions, R1-16(folder exhibit)-3 at ¶ 23; Affidavit of Richard H. Martens, R1-25-3; Affidavit of Doug MacLaughlin, R1-23-2.

on an intermittent basis, but not less often than every month since December 1988.[28]

In 1992 the Florida Geologic Survey published a report in which it concludes that dramatic changes in water quality in the Lower Floridan Aquifer near the Board's Class I injection well are attributed to the vertical migration of injected waste across the geologic stratum separating the zone of injected waste deposition from the overlying Lower Floridan Aquifer.[29] The Survey also concludes that no geologic stratum separates the Lower Floridan Aquifer from the Upper Floridan Aquifer in the area of the Board's Class I injection well[30] and that lateral flow of groundwater in the Floridan Aquifer is generally south to southeast.[31] Finally, the Survey concludes that the geologic stratum separating the Upper Floridan Aquifer from the Surficial Aquifer may, in some locations, be breached due to sinkhole activity or erosion, thereby allowing hydraulic communication

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[28]Joint Pretrial Stipulation, R1-27-12; Defendant's Response to Plaintiff's Second Request for Admissions, R1-16(folder exhibit)-3 at ¶ 19.

[29]Geologic Framework of the Lower Floridan Aquifer System, Brevard County, Florida, Volume I (1992), R1-16(folder exhibit) -91.

[30]Id., R1-16(folder exhibit)-52, -61.

[31]Id., R1-16(folder exhibit)-51.

between the two aquifers.[32] The Surficial Aquifer is regarded as an important source of drinking water by the Survey.[33]

After reviewing several documents suggesting that the Board's Class I Exploratory Well Construction and Testing permit was not valid after December 20, 1988,[34] LEAF submitted a letter to the Florida Department of Environmental Regulation seeking records concerning the Department's position with regard to the operation of a well after its permit expiration date.[35] An

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[32]Id., R1-16(folder exhibit)-47, -51.

[33]Id., R1-16(folder exhibit)-45, -46.

[34]E.g. Letter from Carlos Rivero deAguilar, Florida Department of Environmental Regulation, to Chuck Striffler, Brevard County, dated June 20, 1989, Dep. Cynthia Valencic at Exhibit P-2 ("[T]he South Beaches Injection Well System has been operating without a valid Department Permit since December 1988 when the term of the existing Injection Well Construction Permit (No. UD05-64536) expired at the end of the maximum allottable 5 year period."); Letter from R.H. Martens, Brevard County, to Alex Alexander, Florida Department of Environmental Regulation, dated April 18, 1991, Dep. Cynthia Valencic at Exhibit P-3 ("We are anxious to return the South Beaches injection well to permitted status . . .."); Letter from Carlos de-Aguilar, Florida Department of Environmental Regulation, to Lawrence S. Sims, Geraghty and Miller, Inc., dated May 29, 1990, Dep. Cynthia Valencic at Exhibit P-4 ("Issuance of this permit will not only authorize the construction of the new monitor well but will serve to return the well system operation under a valid DER permit."); Memorandum from Rodney S. Dehan, Florida Department of Environmental Regulation, to Doug MacLaughlin, Florida Department of Environmental Regulation, dated January 7, 1991, Dep. Cynthia Valencic at Exhibit D-2 ("Rule 17-4.090(1), F.A.C., seems to be limited to renewals of operation permits. It appears that this would not allow the operation of the well under the construction permit to be legally authorized beyond the expiration date of the construction permit even if the operation permit application was received more than 60 days prior to the expiration of the construction permit.").

[35]Affidavit of Charles C. Aller, R1-24-1 and Exhibit I.

official of the Florida Department of Environmental Regulation replied that "[i]n the example of the [Board's] South Beaches facility, the construction permit expired on December 20, 1988, however, since an operation permit application was submitted to the Department on December 30, 1986, operational testing may continue as the construction permit conditions remain in effect due to the submittal of a timely application."[36]

This position was based on an earlier opinion by an attorney employed by the Florida Department of Environmental Regulation concerning a different injection well.[37] In that attorney's opinion, "[a]pplying for an operation permit can be considered seeking 'renewal' of a construction permit." The attorney reasoned as follows:

> Rule 17-4.090 is based on Section 120.60(6), Florida Statutes. That statute states that when a licensee has made timely and sufficient application for renewal of a license, the existing license shall not expire until the application has been finally acted upon by the agency. Since a construction permit usually includes approval to operate for a short period of time, applying for an operation permit is seeking renewal of the construction permit.[38]

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[36]Letter from Charles C. Aller, Florida Department of Environmental Regulation, to Andy Smith, LEAF, dated July 26, 1991, Dep. Cynthia Valencic at Exhibit D-3; Affidavit of Charles C. Aller, R1-24-1.

[37]Affidavit of Doug MacLaughlin, R1-23-4.

[38]Id. at Exhibit IV.

SUMMARY OF ARGUMENT

The plain language of § 120.60(6), Fla. Stat. (1993),[39] extends the expiration date of existing permits only when an application for "renewal" is timely submitted. The Board's application for a Class I Injection Well Operating Permit was not an application for "renewal" of its Class I Exploratory Well Construction and Testing Permit, but rather an application for a new and different permit. Accordingly, the Board's Class I Well Construction and Testing Permit expired on December 20, 1988.

In addition, the legislative history of § 120.60(6), Fla. Stat. (1993), clearly demonstrates that the Legislature deliberately omitted language which would have extended the expiration date of an existing permit when an application for a new and different permit was timely submitted if the activity authorized by the permits was of a continuing nature. The administrative construction of § 120.60(6) relied upon by the Board seeks to restore in the law that language deliberately omitted by the Legislature. Accordingly, the administrative construction of § 120.60(6), Fla. Stat. (1993), is clearly erroneous and the expiration date of the Board's Class I Exploratory Well Construction and Testing Permit was not extended.

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[39]Section 120.60(6), Fla. Stat. (1991), is identical to § 120.60(6) (1993).

Fla. Admin. Code R. 17-4.090(1) is based on § 120.60(6), Fla. Stat. (1993), and contains similar language. By its terms, it is also limited in its application to the "renewal" of existing permits. Thus, like § 120.60(6), Fla. Stat. (1993), it does not operate to extend the expiration date of an existing permit when the application submitted is for a new and different permit. In addition, Fla. Admin. Code R. 17-4.090(1) is, by its express terms, limited in its application to "operation" permits and thus does not provide authority for the extension of an expiring "construction" permit.

ARGUMENT

I.

Section 120.60(6), Fla. Stat. (1993) does not continue the Board's Class I Exploratory Well Construction and Testing Permit in effect after its expiration date merely because the Board submitted an application for a Class I Injection Well Operating Permit.

The Florida law which addresses the continuation of expiring permits is contained in the Administrative Procedure Act, specifically § 120.60(6), Fla. Stat. (1993). Its interpretation and application to the facts sub judice are required to determine whether the Board's Class I Exploratory Well Construction and Testing Permit has remained effective after its expiration date.

The Florida Supreme Court has approached issues of statutory construction by attempting to ascertain and give effect to legislative intent. "Statutes are construed to effectuate the intent of the legislature in light of public policy." White v. Pepsico, Inc., 568 So.2d 886, 889 (Fla. 1990) (citing State v. Webb, 398 So.2d 820, 824 (Fla. 1981)). "[Legislative] intent is determined primarily from the language of the statute [and] the plain meaning of the statutory language is the first consideration." St. Petersburg Bank and Trust v. Hamm, 414 So.2d 1071, 1073 (Fla. 1982). "When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the

rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." A.R. Douglass, Inc. v. McRainey, 102 Fla. 1141, 1144, 137 So. 157, 159 (1931). Accord, Streeter v. Sullivan, 509 So.2d 268, 271 (Fla. 1987). "Administrative construction of a statute, the legislative history of its enactment and other extraneous matters are properly considered only in the construction of a statute of doubtful meaning." Florida State Racing Commission v. McLaughlin, 102 So.2d 574, 576-577 (Fla. 1958). Accord, Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So.2d 879, 882 (Fla. 1983) (per curiam).

A. The plain meaning of § 120.60(6) is that existing permits continue in effect after their expiration dates only if an application for renewal of the existing permit has been made.

The Florida Administrative Procedure Act, § 120.60(6), Fla. Stat. (1993), provides inter alia:

> When a licensee has made timely and sufficient application for the renewal of a license which does not automatically expire by statute, the existing license shall not expire until the application has been finally acted upon by the agency, or in case the application is denied or the terms of the license are limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.[40]

This provision extends the expiration date of a permit only if an application for "renewal" of the permit has been timely made. The plain meaning of the term "renewal" is "something renewed;

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[40]Joint Pretrial Stipulation, R2-27-12.

[as] an expiring agreement ... renewed for an additional period," Webster's Third New International Dictionary (unabridged ed. 1971); or making valid for a further period. See The New Lexicon Webster's Dictionary (1989 ed.). Thus, this provision does not provide for the extension of the expiration date of an existing permit where an application for the issuance of a different permit has been made.

The Board's application for issuance of a "Class I Injection Well Operating Permit" was not an application for "renewal" of its "Class I Exploratory Well Construction and Testing Permit." This conclusion is supported by a review of the application itself. Among other things, it describes the project status as "new" rather than "existing;" it describes the type of permit application as "Class I Well Operating Permit" rather than "Class I Exploratory Well Construction and Testing Permit;" and it describes the type of well as "Test/Injection Well" rather than "Exploratory Well."[41] Perhaps more importantly however, the Board's application for a Class I Injection Well Operating Permit sought authority for the "[i]njection of secondary treated domestic wastewater" whereas the Class I Exploratory Well Construction and Testing Permit authorized only the construction of an exploratory well and injection testing using water from the Indian River.[42]

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[41]Affidavit of Richard H. Martens, R1-25-3 and Exhibit "4."

[42]Affidavit of Richard H. Martens, R1-25-2 and Exhibit "2."

Since the Board's application for a Class I Injection Well Operating Permit was not an application for "renewal" of its Class I Exploratory Well Construction and Testing Permit, the clear and unambiguous language of § 120.60(6), Fla. Stat. (1993), dictates that the Board's permit did not continue in effect after its expiration date (December 20, 1988).

B. The history of § 120.60(6) demonstrates legislative intent to preclude existing permits from continuing in effect after their expiration dates if an application for a new permit has been made, even where the activity is of a continuing nature.

The Board however, contends that the provisions of § 120.60(6), Fla. Stat. (1993), extend the expiration date of a permit when an application for a different permit is made and the activity authorized by the existing and different permits is of a continuing nature. To reach this result, the language of § 120.60(6) must be found to be ambiguous because this result is not plainly evident from the language of the statute.

"It is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided ... ." State v. Webb, 398 So.2d 820, 824 (Fla. 1981). If a statute is even slightly ambiguous, judicial examination of legislative history and statutory construction principles is necessary. Streeter v. Sullivan, 509 So.2d 268, 271 (Fla. 1987). Legislative intent can be especially illuminated by tracing the legislative history of an act, Speights v. State, 414 So.2d 574, 574 (Fla. 1st DCA 1982), and examination of

amendments to bills introduced into the legislature. E.g. Magaw v. State, 537 So.2d 564, 566-67 (Fla. 1989). Thus, in 49 Fla. Jur. 2d Statutes § 161 (1984) it is stated:

> Amendments made, or proposed and defeated, may throw light on the construction of the act as finally passed, and may properly be taken into consideration. ... In general, a change of language of a bill during the course of its adoption indicates an intention to enact a provision different from that called for by the original language. Thus, the omission on final enactment of a clause of the original bill as introduced is strong evidence that the legislature did not intend the requirement imposed by the clause.

Accord, Florida ex rel. Finlayson v. Amos, 76 Fla. 26, 79 So. 433 (1918); Ellis v. N.G.N. of Tampa, Inc., 561 So.2d 1209 (Fla. 2d DCA 1990) (per curiam), quashed on other grounds, 586 So.2d 1042 (Fla. 1991). But cf. Piezo Technology v. Smith, 413 So.2d 121 (Fla. 1st DCA 1982), approved, 427 So.2d 182 (Fla. 1983) (deletion of language which is mere surplusage should not be construed to alter intent).

The legislative history of § 120.60(6), Fla. Stat. (1993), unequivocally supports LEAF's interpretation and refutes the Board's interpretation. Although language supporting the Board's view was considered by the Legislature, it was omitted in the final enactment of the Administrative Procedure Act.

In early 1973, the Florida Law Revision Council decided to undertake a total revision of the 1961 Administrative Procedure Act as a major project for submission to the 1974 legislature. 1 A.J. England & L.H. Levinson, Florida Administrative Practice Manual, Ch. 1, at 3 (1979). The final draft Administrative

Procedure Act revisions were submitted to the Council on March 1, 1974, 3 A.J. England & L. H. Levinson, Florida Administrative Practice Manual, Appendix B (1979), and contained the following language with regard to license renewals:

> When a licensee has made timely and sufficient application for the renewal of a license which does not automatically expire by operation of law, or for a new license with reference to any activity of a continuing nature, the existing license shall not expire until the application has been finally acted upon by the agency and, if the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

Id., Appendix C, at 13 (emphasis added). The Reporter's Comments on this provision indicate that its source was the "Revised Model Act § 14." Id., Appendix D, at 22. The model State Administrative Procedure Act (1961) § 14 provided inter alia:

> When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

Model State Administrative Procedure Acts, 1961 Act § 14, 15 U.L.A. 294 (1990) (emphasis added). Thus, the Florida Law Revision Council's recommendation to the Legislature was that an existing license should not expire when an application for a new license has been submitted and the activity which is authorized is of a continuing nature.

While the Florida Law Revision Council was preparing its recommended revisions to the Administrative Procedure Act, parallel efforts were undertaken by the Government Operations Committee of the Florida House of Representatives. By March 1974, the House Government Operations Committee and the Florida Law Revision Council reached a substantial consensus on a draft of a completely revised Administrative Procedure Act. 1 A.J. England & L.H. Levinson, Florida Administrative Practice Manual, Ch. 1, at 4 (1979). The result was the introduction of H.R. 2672, 1974 Reg. Sess., which contained pertinent language virtually identical to that recommended by the Florida Law Revision Council. It provided:

> When a licensee has made timely and sufficient application for the renewal of a license or for a new license with reference to any activity of a continuing nature, the existing license shall not expire until the application has been finally acted upon by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

(Emphasis added).[43]

Subsequently, the Government Operations Committee amended H.R. 2672 with a substitute bill which omitted the underscored language of the original bill quoted above. It stated:

> When a licensee has made timely and sufficient application for the renewal of a license which does not automatically expire by statute, the existing license shall not expire until the application has

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[43]H.R. 2672, 1974 Reg. Sess., certified by Florida State Archives, R1-16(folder exhibit)-17.

> been finally acted upon by the agency, and, in case the application is denied or the terms of the license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.[44]

This bill, as amended, passed the House on April 17, 1974[45] but died in the Senate.[46]

The Senate passed a completely different bill, S. 892, 1974 Reg. Sess., based on a recommendation of the Senate Rules Committee and designed mainly to subject agency rulemaking to more stringent legislative control.[47] 1 A.J. England & L. H. Levinson, Florida Administrative Practice Manual, Ch. 1, at 4 (1979). The House amended the bill to contain language similar to that which was included in the committee substitute for H.R. 2672.[48] The Senate however, refused to concur in the amendment.[49]

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[44]Committee Substitute for H.R. 2672, 1974 Reg. Sess., certified by Florida State Archives, R1-16(folder exhibit)-22.

[45]Journal of the House of Representatives, April 17, 1974 certified by Florida State Archives, R1-16(folder exhibit)-355, -356.

[46]Journal of the House Representatives, 1974 Reg. Sess., Index certified by Florida State Archives, R1-16(folder exhibit)-1540.

[47]Journal of the Senate, April 14, 1974 certified by Florida State Archives, R1-16(folder exhibit)-399; Committee Substitute for S. 892, 1974 Reg. Sess., R1-16(folder exhibit)-1.

[48]Journal of the House of Representatives, May 24, 1974 certified by Florida State Archives, R1-16(folder exhibit)-912.

[49]Journal of the Senate, May 27, 1974 certified by Florida State Archives, R1-16(folder exhibit)-563.

A conference committee reached agreement on a substitute bill which passed the legislature on the last day of the 1974 regular session.[50] Enacted as Ch. 74-310, § 1, at 952, Laws of Fla.,[51] the relevant final language is virtually identical to that which exists today in § 120.60(6), Fla. Stat. (1993). As enacted, § 120.60(6) omits the language "or for a new license with reference to any activity of a continuing nature" which appeared in earlier bills considered by the Legislature. Thus, the legislative history of § 120.60(6) clearly establishes that the Legislature did not intend that an application for a new and different permit would extend the expiration date of an existing permit, even where the activity authorized by the permit is of a continuing nature. The Florida Legislature intended only that an application for "renewal" of an existing permit would extend the expiration date of the existing permit.

Accordingly, the Board's application for a Class I Injection Well Operating Permit did not continue in effect its Class I Exploratory Well Construction and Testing Permit beyond December 20, 1988.

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[50]Journal of the Senate, May 31, 1974 certified by Florida State Archives, R1-16(folder exhibit)-914; Journal of the House of Representatives, May 31, 1974 certified by Florida State Archives, R1-16(folder exhibit)-1335.

[51]Ch. 74-310, § 1, at 952, Laws of Fla. certified by Florida Secretary of State, R1-16(folder exhibit)-1.

C. The administrative construction of § 120.60(6) contradicts the plain meaning and legislative intent of § 120.60(6) and is not entitled to deference.

The Board relies on an interpretation of § 120.60(6), Fla. Stat. (1993), by an attorney employed at the Florida Department of Environmental Regulation to support its argument that an application for Class I Injection Well Operating Permit extends the expiration date of its Class I Exploratory Well Construction and Testing Permit.[52] That attorney opined: "Since a construction permit usually includes approval to operate for a short period of time, applying for an operation permit is seeking renewal of the construction permit."[53] The opinion seeks to allow an application for a new and different permit to

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[52]The Board also refers to a July 26, 1991 administrative interpretation by Charles C. Aller, Chief of the Bureau of Drinking Water and Ground Water Resources, Florida Department of Environmental Regulation. Affidavit of Charles C. Aller, R1-24-Exhibit II. Mr. Aller's interpretation is derived from the February 4, 1991 opinion of Doug MacLaughlin and adds nothing of significance to Mr. MacLaughlin's opinion.

[53]In the opinion of the attorney, the construction permit must authorize operation in order for an application for an operation permit to extend the expiration date of the construction permit. The Board's Class I Exploratory Well Construction and Testing Permit did not authorize operation, but merely testing with river water. It expressly prohibited the use of treated domestic wastewaters for injection testing. Affidavit of Richard H. Martens, R1-25-2 and Exhibit "2." Subsequent to issuance of the Class I Exploratory Well Construction and Testing Permit, the Florida Department of Environmental Regulation issued a letter to the Board confirming its earlier verbal approval to begin injection. Defendant's Response to Plaintiff's First Request for Admissions, R-16(folder exhibit)-2 and "Attachment C."

extend the expiration date of an existing permit if the activity authorized by both permits is of a continuing nature.

An administrative interpretation of a statute which is contrary to the plain and unequivocal language of a legislative act is clearly erroneous and should be accorded no deference. Southwestern Utilities Services Co. v. Redding, 131 So. 1 (Fla. 1961). Similarly, an administrative interpretation of a statute which is inconsistent with legislative intent is entitled to no deference. Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So.2d 987, 989 (Fla. 1985). Such interpretations are to be set aside. Perkins v. Department of Health and Rehabilitative Services, District IV, 452 So.2d 1007, 1008 (Fla. 1st DCA 1984). Accord, Sans Souci v. Division of Florida Land Sales and Condominiums, 421 So.2d 623, 626 (Fla. 1st DCA 1982).

The opinion of the attorney at the Florida Department of Environmental Regulation is clearly inconsistent with the legislative intent of § 120.60(6), Fla. Stat. (1993), as manifested by the express language of the statute and its legislative history. The opinion not only reflects no consideration of the relevant legislative history, but it seeks to restore in the law that very language contained in H.R. 2672, 1974 Reg. Sess. (and the Florida Law Revision Council's draft and the Model Administrative Procedure Act) which the

Legislature deliberately omitted in the passage of Ch. 74-310, § 1, at 952, Laws of Fla.

In Florida ex rel. Finlayson v. Amos, 76 Fla. 26, 79 So. 433 (1918), the Court was also presented with an administrative construction of a statute which was inconsistent with amendments to the legislative bill which finally became law. The Court rejected the administrative construction saying:

> It was through no mere inadvertence that the Legislature [amended the bill], because the amendment was first considered and adopted by the House, next considered and rejected by the Senate, then considered by a conference committee composed of members of both houses, and thereafter adopted by the Senate upon recommendation of the conference committee.
>
> The ruling of the Comptroller nullifies the amendment and restores to the bill that part of it which the Legislature rejected after most thorough consideration. If the amendment had not been adopted, the Comptroller's interpretation would be correct, but he ignores the amendment, and interprets the law as if it had passed as originally introduced in the Senate. There is no authority for a department of the government charged with the execution of a law, to restore a provision which the Legislature strikes from the Act when in progress of its passage. Whatever the Legislature does within its constitutional authority, no other department of the government may change, modify, alter or amend.

Id. at 35, 79 So. at 435. Just like the Comptroller's interpretation in Amos, the administrative interpretation here must fail because it is clearly inconsistent with the legislative intent of § 120.60(6), Fla. Stat. (1993).

The interpretation of § 120.60(6), Fla. Stat. (1993), by the attorney in the Florida Department of Environmental Regulation must be disregarded for two additional reasons.

While the interpretations of administrative officers with special expertise, who are charged to administer a law, are entitled to judicial deference, Raffield v. State, 565 So.2d 704 (Fla. 1990), cert. denied, 498 U.S. 1025 (1991); see also Samara Development Corp. v. Marlow, 556 So.2d 1097 (Fla. 1990); Department of Environmental Regulation v. Goldring, 477 So.2d 532 (Fla. 1985); Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983); Gay v. Canada Dry Bottling Company of Florida, 59 So.2d 788 (Fla. 1952), such deference is not appropriate where the administrative officer's interpretation does not require special expertise and the court is equally competent to interpret the law, State Department of Insurance v. Insurance Services Office, 434 So.2d 908, 912 n.6 (Fla. 1st DCA 1983), petition for review denied, 444 So.2d 416 (Fla. 1984); Dion v. Secretary of Health and Human Services, 823 F.2d 669, 673 (1st Cir. 1987); Glaxo Operations UK Limited v. Quigg, 894 F.2d 392, 399 (Fed. Cir. 1990); Hill v. National Transportation Safety Board, 886 F.2d 1275, 1278 (10th Cir. 1989), or where the statute is administered by many government agencies. Reporters Committee for Freedom of Press v. United States Department of Justice, 816 F.2d 730, 734 (D.C. Cir. 1987), rev'd on other grounds, 489 U.S. 749 (1989); Anderson v. Department of Health and Human Services, 907 F.2d 936, 951 n.19 (10th Cir. 1990). See also, Defense Criminal Investigative Service (DCIS), Department of Defense

(DOD) v. Federal Labor Relations Authority, 855 F.2d 93, 97-98 (3d Cir. 1988)(no deference for agency interpretation of statute other than its own); Department of Treasury v. Federal Labor Relations Authority, 837 F.2d 1163, 1167 (D.C. Cir. 1988)(no deference for agency interpretation of statute it is not entrusted to administer); Linemaster Switch Corporation v. United States Environmental Protection Agency, 938 F.2d 1299, 1303 (D.C. Cir. 1991)(deference not appropriate unless statute explicitly or implicitly evidences intent to delegate interpretive authority); Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-844 (1984)(deference is appropriate where statute evidences explicit or implicit intent to delegate policy formulation powers to agency).

The attorney at the Florida Department of Environmental Regulation, like other officials of the Department, may well have expertise useful in interpreting environmental statutes which the Department is charged to enforce. However, in interpreting the Administrative Procedure Act, his expertise is no greater than that of the judiciary. Moreover, the Administrative Procedure Act was intended to apply to all state agencies unless specifically exempted under the Act. Roberson v. Florida Parole & Probation Commission, 444 So.2d 917 (Fla. 1983). The Legislature did not intend to delegate to officials of the Florida Department of Environmental Regulation any unique authority to interpret terminology in the Administrative

Procedure Act. Accordingly, the administrative interpretation of § 120.60(6), Fla. Stat. (1993), by an attorney at the Florida Department of Environmental Regulation is not entitled to any special weight.

II.

The plain meaning and intent of Fla. Admin. Code R. 17-4.090(1) is that the Board's Class I Exploratory Well Construction and Testing Permit does not continue in effect after its expiration date merely because the Board made an application for a Class I Injection Well Operating Permit.

Fla. Admin. Code R. 17-4.090(1) provides inter alia:

> (1) Renewals. Prior to sixty days before the expiration of any Department operation permit, the permittee shall apply for a renewal of a permit as forms and in a manner prescribed by the Department ... When the application for renewal is timely and sufficient, the existing permit will remain in effect until the renewal application has been finally acted upon by the Department or, if there is court review of the Department's final agency action, until a later date as required by Section 120.60, F.S.

(Emphasis added).

The plain meaning of the term "renewal" is "something renewed; [as] an expiring agreement ... renewal for an additional period," Webster's Third New International Dictionary (unabridged ed. 1971); or making valid for a further period. See New Lexicon Webster's Dictionary (1989 ed.). The Board's application for a Class I Injection Well Operating Permit is an application for an entirely new and different permit, not an application to make the Class I Exploratory Well Construction and Testing Permit valid for a further period. The different nature of these permits is illustrated by, among other things, the fact that the Class I Exploratory Well Construction and Testing Permit authorizes construction of an exploratory well

and injection testing using only water from the Indian River[54] whereas the application for a Class I Injection Well Operating Permit states that the proposed use of the well is for "[i]njection of secondary treated domestic wastewater."[55] In addition, in its application for a Class I Injection Well Operating Permit, the Board describes the project status as "new" rather than "existing;" describes the type of permit application as a "Class I Well Operating Permit" rather than a "Class I Exploratory Well Construction and Testing Permit;" and describes the type of well as a "Test/Injection Well" rather than an "Exploratory Well."[56] Thus, the Board's application for a Class I Injection Well Operating Permit is not an application for "renewal" of the Board's Class I Exploratory Well Construction and Testing Permit.

On February 4, 1991, an attorney for the Florida Department of Environmental Regulation responded to a request for an opinion interpreting Fla. Admin. Code R. 17-4.090.[57] That

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[54]Affidavit of Richard H. Martens, R1-25-2 and Exhibit "2."

[55]Affidavit of Richard H. Martins, R1-25-3 and Exhibit "4."

[56]Id.

[57]Interestingly, the request by Rodney DeHan, Assistant Chief of the Bureau of Drinking Water and Ground Water Standards, notes:

> Rule 17-4.090(1), F.A.C., seems to be limited to renewals of operation permits. It appears that this would not allow the operation of the well under the construction permit to be legally authorized beyond the expiration date of the construction permit even if

opinion concerned a different facility, different permit and different permit application, but nevertheless factually similar circumstances. The opinion states:

> Basically, your question was whether applying for the initial operation permit 60 days prior to expiration of a construction permit can be considered a timely "renewal" request as described in Fla. Admin. Code Rule 17-4.090. If this is true, then according to the Rule the applicant's construction permit would remain in effect until DER acted on the operation permit application, even if the DER final action on the application occurred after the listed expiration date of the construction permit.
>
> The answer is yes. Applying for an operation permit can be considered seeking "renewal" of a construction permit.
>
> Rule 17-4.090 is based on Section 120.60(6), Florida Statutes. That statute states that when a licensee has made timely and sufficient application for renewal of a license, the existing license shall not expire until the action has been finally acted upon by the agency. Since a construction permit usually includes approval to operate for a short period of time, applying for an operation permit is seeking renewal of the construction permit.

The attorney's opinion, allegedly based on § 120.60(6), Fla. Stat. (1993), is that if the application for a new permit is with reference to an activity of a continuing nature which has been authorized under the existing permit, the expiration date of the existing permit is extended. This interpretation of § 120.60(6), Fla. Stat. (1993), conflicts with the plain meaning

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> the operation permit application was received more than 60 days prior to the expiration of the construction permit.

Memorandum from Rodney DeHan to Doug MacLaughlin, dated January 7, 1991, Dep. Cynthia Valencic at Exhibit D-2.

of the language used in the statute and the legislative history of the statute. It seeks to restore language in the law which was deliberately omitted by the Legislature.[58] Thus the attorney's interpretation of Fla. Admin. Code R. 17-4.090(1) is not persuasive.

Finally, the attorney's opinion fails to recognize that the plain language of Fla. Admin. Code R. 17-4.090(1) speaks only to expiring "operation" permits, not expiring "construction" permits.[59] The distinction between operation and construction permits is recognized throughout the rules of the Florida Department of Environmental Regulation, and should not be ignored in R. 17-4.090(1).[60]

Accordingly, Fla. Admin. Code R. 17-4.090(1) has no application to the facts presented in this case and does not

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[58]See Argument supra at pp. 25-27.

[59]Of course, notwithstanding that R. 17-4.090(1) is limited to operation permits, a construction permit might be extended under § 120.60(6), Fla. Stat. (1993), if an application for renewal of that construction permit was timely submitted.

[60]E.g., compare, Fla. Admin. Code R. 17-4.210 (construction permit necessary for construction of any installation or facility which is expected to be a source of air or water pollution) and R. 17-28.320 (exploratory well construction permit) and R. 17-28.330 (test/injection well construction permit) with R. 17-4.220 (applicants for operation permits must note construction deviations from conditions of construction permit) and R. 17-4.240 (persons intending to discharge wastes into waters must apply for operation permit) and R. 17-28.340 (injection well operating permit). See also Fla. Admin. Code R. 17-4.050 (fees for processing construction permit applications and operation permit applications).

operate to extend the expiration date of the Board's Class I Exploratory Well Construction and Testing Permit.

CONCLUSION

Based upon the foregoing authorities and argument, the answer to the certified question presented by the United States Court of Appeals for the Eleventh Circuit should be in the negative, i.e. a timely application for a Class I Injection Well Operating Permit does not continue in effect a Class I Exploratory Well Construction and Testing Permit beyond its expiration date.

Respectfully submitted,

DAVID A. LUDDER
Attorney for Petitioner
Fla. Bar No. 0799998
LEGAL ENVIRONMENTAL
ASSISTANCE FOUNDATION, INC.
1115 North Gadsden Street
Tallahassee, Florida 32303
(904) 681-2591

CERTIFICATE OF SERVICE

I, David A. Ludder, hereby certify that I have served a copy of the foregoing Initial Brief of Petitioner upon Respondent Board of County Commissioners of Brevard County, Florida by placing the same in the United States mail, postage prepaid, and addressed to:

Nina L. Boniske, Esquire
Office of Brevard County Attorney
2725 St. Johns Street, Building C
Melbourne, Florida 32940

Done this 2d day of February, 1994.

David A. Ludder