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

REPLY BRIEF OF PETITIONER

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RESPONSE TO RESPONDENT'S STATEMENT OF FACTS

Respondent Board of County Commissioners of Brevard County, Florida ("the Board") has appended to and discussed in its Answer Brief a Notice of Consent Order and Consent Order. Neither of these documents are included in the record transmitted to this Court by the United States Court of Appeals. Accordingly, Petitioner, Legal Environmental Assistance Foundation, Inc. ("LEAF") has filed a Motion to Strike Portions of Answer Brief of Respondent and to Require Filing of Amended Answer Brief.

LEAF also objects to other portions of the Board's Statement of Facts which are not supported by the record or are mere conclusions or speculation on the part of counsel. For example, the Board states that migration of treated sewage into the aquifer above the injection zone is "not considered an environmental threat" but merely a "technical violation." Answer Brief at 7 n.25. Nothing in the record supports this statement. Nor is this statement of fact relevant to the Court's determination of the certified question.

The Board also claims that "execution of the Consent Order concluded the DER's action on the County's application" for a Class I Injection Well Operating Permit. Answer Brief at 7 n.27. Again, nothing in the record supports this statement.[1]

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[1] The Consent Order actually calls for the Board to withdraw its pending application and to surrender its construction permit. Consent Order at ¶ 8. Thus, the Department of Environmental Protection has taken no action on the Board's application.

Additionally, the Board claims that "[t]hrough the present date, the [Department of Environmental Protection] has never requested the County to stop injecting treated wastewater into the well." Answer Brief at 4 n.13. Again, this statement refers to facts which are not part of the record and which are not relevant to the Court's determination of the certified question.

Finally, the Board claims that the Department of Environmental Protection "would not have allowed the injection of effluent, i.e. treated wastewater; unless the [Department] considered the County's well as an 'injection' well rather than an 'exploratory' well ...." Answer Brief at 3 n.8. This statement is mere speculation by counsel and not supported by the record.

ARGUMENT

I.

Rule 17-4.090(1) DOES NOT PROVIDE FOR THE CONTINUATION OF AN EXISTING CONSTRUCTION PERMIT UPON SUBMISSION OF AN APPLICATION FOR A NEW OPERATING PERMIT.

The Board suggests that "the focus of this Court's attention should be directed toward the manner in which the DER has interpreted its rules and regulations concerning the permitting of underground injection wells in the State of Florida" rather than on § 120.60(6), Fla. Stat. (1993).[2] Answer Brief at 28. The Board relies upon Rule 17-4.090(1) and the administrative interpretation thereof in support of its argument that its Class I Exploratory Well Construction and Testing Permit continued in effect after its expiration date because the Board submitted an application for a Class I Injection Well Operating Permit.[3]

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[2] The Board does not contest LEAF's argument that § 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. Answer Brief at 26-28. The plain language and legislative history of § 120.60(6) reveal that it should not be construed to allow an existing permit to continue in effect after its expiration date merely because an application for a new and different permit has been submitted. Moreover, the legislative history of § 120.60(6) demonstrates that an application for a new permit "with reference to an activity of a continuing nature" does not continue the existing permit in effect after its expiration date.

[3] The Board devoted considerable space in its Answer Brief to making the argument that its Class I Exploratory Well Construction and Testing Permit was converted to a Class I Test/Injection Well Construction and Testing Permit. Although neither the United States District Court nor the United States Court of Appeals made any such finding of fact (the only permit which the record reflects the Board possessed was a Class I Exploratory Well Construction and Testing Permit), such fact is immaterial to the issues presented. A Class I Test/Injection Well Construction and Testing Permit is distinctly different from a Class I Injection Well Operating

A. The plain and unambiguous meaning of the language in Rule 17-4.090(1) precludes its application to construction permits or applications for new permits.

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

> ***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. A ***renewal*** application shall be timely and sufficient. If the ***renewal*** application is submitted at a later date, it will not be considered timely and sufficient unless it is submitted and made complete prior to the expiration of the ***operation permit***. When the application for ***renewal*** is timely and sufficient, the existing permit shall remain in effect until the ***renewal*** application has been finally acted upon by the Department or, there is court review of the Department's final agency action, until a later date is required by Section 120.60, F.S. [Emphasis added.]

For purposes of construing all provisions of Fla. Admin. Code Ch. 17-4, an "operation permit" is expressly defined as "the legal authorization granted by the Department to operate or maintain any installation for a specified period of time." Fla. Admin. Code R. 17-4.020(8).[4] An "operation permit" is clearly distinguished from a "construction permit" which is expressly defined as "the legal authorization granted by the Department to construct, expand, modify, or make alterations to any installation and to temporarily operate and test such new or modified installations." Fla. Admin.

Permit. Compare Fla. Admin. Code R. 17-28.330 with R 17-28.340. A Class I Test/Injection Well Construction and Testing Permit is not an "operation permit" and an application for a Class I Injection Well Operating Permit is not an application for renewal of a Class I Test/Injection Well Construction and Testing Permit.

[4] For example, a Class I Injection Well Operating Permit. Fla. Admin. Code R. 17-28.340.

Code R. 17-4.020(4).[5] When a definition of a word or phrase is provided in administrative rules, that meaning must be ascribed to the word or phrase whenever it is repeated in the rules unless a contrary intent clearly appears. Cf. Nicholson v. State, 600 So.2d 1101, 1103 (Fla.), cert. denied, ___ U.S. ___, 113 S. Ct. 625 (1992) (construction of statutory language). To suggest, as the Board does, that for purposes of construing Rule 17-4.090(1) an "operation permit" includes a "construction permit" would require a disregard of the express definitions of those terms and their intended differentiation. The mention of only "operation permit[s]" in Rule 17-4.090(1) clearly implies the exclusion of "construction permit[s]."[6] Thus, Rule 17-4.090(1) operates only to continue in effect expiring "operation permit[s]." The Board admits, as it must, that its only permit was a "construction permit,"[7] not an operation permit. Thus, Rule 17-4.090(1) cannot serve to extend the expiration date of the Board's construction permit.

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[5] For example, a Class I Exploratory Well Construction and Testing Permit. Fla. Admin. Code R. 17-28.320.

[6] This rule of construction finds expression in the phrase "*expressio unius est exclusio alterius*." It appears that the construction of Rule 17-4.090(1) by agency officials was based more on what they wanted the Rule to say that on what the Rule actually does say. "If, ... the rule as it reads has proved impractical in operation, it can be amended pursuant to established rulemaking procedures. Absent such amendment, expedience cannot be permitted to dictate its terms." Boca Raton Artificial Kidney Center, Inc. v. Department of Health and Rehabilitative Services, 493 So.2d 1055, 1057 (Fla. 1st DCA 1986).

[7] This is so whether the permit was a Class I Exploratory Well Construction and Testing Permit or a Class I Test/Injection Well Construction and Testing Permit.

The plain and unambiguous language of Rule 17-4.090(1) also limits its application to the renewal of operation permits. "The general rule of construction is that words not expressly defined are given their plain and ordinary meaning." Metropolitan Dade County v. Green, 596 So.2d 458 (Fla. 1992). "If necessary, the plain and ordinary meaning of the word can be ascertained by reference to a dictionary." Green v. State, 604 So.2d 471, 473 (Fla. 1992). The plain and ordinary meaning of the term "renewal" is "something renewed; [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 New Lexicon Webster's Dictionary (1989 ed.). Thus, an application for renewal of an existing permit is to be distinguished from an application for a new permit. As the Board itself has said, "[t]he plain meaning of the term 'new' is something 'used for the first time ... different and distinct from what was before.'" Answer Brief at 13 (citing American Heritage Dictionary (1983 ed.)). Thus, Rule 17-4.090(1) operates only to continue in effect certain permits which are being renewed. The Board admits, as it must, that the application it submitted to the Department was for a new Class I Injection Well Operating Permit, not a "renewal" of its existing construction permit. Accordingly, under Rule 17-4.090(1), the submission of an application for a new

operation permit does not continue in effect an existing construction permit.[8]

B. The administrative construction of Rule 17-4.090(1) is clearly erroneous.

As discussed above, the plain and unambiguous language of Rule 17-4.090(1) limits its application to the pending renewal of operation permits. There being no ambiguity in the rule, interpretation thereof is not necessary or appropriate. Eager v. Florida Keys Aqueduct Authority, 580 So.2d 771, 772 (Fla. 3d DCA) (per curiam), review denied, 591 So.2d 181 (Fla. 1991). Accordingly, all interpretations of Rule 17-4.090(1) should be disregarded and the plain and unambiguous meaning should be given effect.

The administrative construction of Rule 17-4.090(1) is that it applies not only to operation permits but also to construction permits and not only to permit renewal applications but also to new

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[8] Although the Board asserts that Rule 17-4.090(1) "is based upon Section 403.087, Fla. Stat.," Answer Brief at 21, in 1991, an attorney employed by the Florida Department of Environmental Regulation issued an opinion in which he stated that "Rule 17-4.090 is based on Section 120.60(6), Florida Statutes." Affidavit of Doug MacLaughlin, R1-23-4 at Exhibit IV. Indeed, both the "specific authority" for and "law implemented" by Rule 17-4.090 include § 120.60(6), Fla. Stat. Accordingly, Rule 17-4.090(1) should be construed consistently with § 120.60(6) unless a contrary intent clearly appears. Section 120.60(6) clearly allows an existing permit to continue in effect after its expiration date only if a sufficient application for renewal of that permit has been timely submitted. See Initial Brief of Petitioner at 17-19. Moreover, the fact that an application is submitted for a new and different permit "with reference to an activity of a continuing nature" is not sufficient to continue an existing permit in effect under § 120.60(6). See Initial Brief of Petitioner at 19-24.

permit applications.[9] This construction is contrary to the plain and unequivocal language of the rule and is clearly erroneous and should be rejected. Eager v. Florida Keys Aqueduct Authority, 580 So.2d 771, 772 (Fla. 3d DCA) (per curiam), review denied, 591 So.2d 181 (Fla. 1991); Kearse v. Department of Health and Rehabilitative Services, 474 So. 2d 819, 820 (Fla. 1st DCA 1985); Boca Raton Artificial Kidney Center, Inc. v. Department of Health and Rehabilitative Services, 493 So.2d 1055, 1057 (Fla. 1st DCA 1986); Woodly v. Department of Health and Rehabilitative Services, District 3, Lake County AFDC, 505 So.2d 676, 678 (Fla. 1st DCA 1987).

C. Section 403.087, Fla. Stat. (1993) does not illuminate the meaning of Rule 17-4.090(1).

The Board argues that the Department's construction of Rule 17-4.090(1) should be sustained on the basis that § 403.087, Fla. Stat. (1993), grants the Department broad authority over the management of permits. This argument misses the fundamental issue now pending before the Court. The question in this case is not whether the Department has the statutory authority to adopt rules allowing expiring construction permits to continue in effect because an application for an operation permit has been submitted, but rather the question is whether the language adopted by the Department in Rule 17-4.090(1) in fact does allow expiring

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[9] The Board relies upon a single interpretation of Rule 17-4.090(1) by three different agency officials. However, an erroneous construction, no matter how often repeated and no matter by whom spoken, remains an erroneous construction which should be rejected.

construction permits to continue in effect because an application for an operation permit has been submitted. The answer to the latter question is no. Thus, § 403.087, Fla. Stat. (1993), fails to offer any support for the interpretation of Rule 17-4.090(1) advocated by the Board.

II.
Rule 17-4.210(3) AND 17-28.330(3)(a) DO NOT ADDRESS THE CONTINUATION OF AN EXISTING CONSTRUCTION PERMIT UPON SUBMISSION OF AN APPLICATION FOR A NEW OPERATING PERMIT.

The Board suggests that because Rules 17-4.210(3) and 17-28.330(3)(a) allow for the temporary operation of installations covered by a construction permit for purposes of testing, Rule 17-4.090(1) should be construed to continue the operational testing phase of a construction permit in effect after the expiration date if an application for an operation permit has been submitted. Stated another way, the Board suggests that if the application for an operation permit is "with reference to an activity of a continuing nature" authorized by an existing construction permit, e.g. operational testing, then the construction permit should continue in effect.

This construction should be rejected for several reasons. First, neither Rule 17-4.210(3) nor Rule 17-28.330(3)(a) offer any aid in the interpretation of Rule 17-4.090(1) or in any way address authorization to continue operation after the permit expiration date. They merely state that a construction permit includes authority to temporarily operate for purposes of testing.[10]

Second, Rule 17-4.090(1) is based on § 120.60(6), Fla. Stat. (1993), and is intended to implement § 120.60(6), Fla. Stat. (1993).[11] Thus, it should be construed consistently with the

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[10] Rule 17-28.330(3)(a) is not applicable to the Board's Class I Exploratory Well Construction and Testing Permit.

[11] Affidavit of Doug MacLaughlin, R1-23-4 at Exhibit IV ("based on Section 120.60(6)"); Fla. Admin. Code R. 17-4.090(1) ("laws implemented" include § 120.60(6)).

intent of § 120.60(6). The legislative history of § 120.60(6) clearly demonstrates that it was not intended to continue in effect an expiring permit when an application for a new and different permit has been submitted, even if the new permit is "with reference to an activity of a continuing nature" authorized by the expiring permit. See Initial Brief of Petitioner at 19-24.

Third, the construction disregards the clear intent of Fla. Admin. Code Ch. 17-4 to distinguish between an "operation permit" and a "construction permit" and to employ that distinction in Rule 17-4.090(1). See Fla. Admin. Code R. 17-4.020(4) and -4.020(8). Only "operation permit[s]" may be continued in effect under Rule 17-4.090(1). "[C]onstruction permit[s]" - even those which include authority to temporarily operate for purposes of testing - are not addressed by Rule 17-4.090(1).

CONCLUSION

Based upon the foregoing and previously submitted 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,

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CERTIFICATE OF SERVICE

I, David A. Ludder, hereby certify that I have served a copy of the foregoing Reply 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:

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2725 St. Johns Street, Building C
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Done this 17th day of March, 1994.

David A. Ludder

DAVID A. LUDDER