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APR 7 1997

IN THE SUPREME COURT OF FLORIDA

Case No. 90,040
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CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN RE:

ADVISORY OPINION TO THE GOVERNOR 1996 AMENDMENT 5
(EVERGLADES)

BRIEF OF FLORIDA AUDUBON SOCIETY
AND NATIONAL AUDUBON SOCIETY

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
STATEMENT OF CASE.....	1
STATEMENT OF FACTS.....	1
ARGUMENT.....	6
CONCLUSION.....	10
TABLE OF CITATIONS.....	11
CERTIFICATE OF SERVICE.....	12

STATEMENT OF CASE

Florida Audubon Society and National Audubon Society accept the Statement of Case as set forth in the Brief of Save Our Everglades, Inc.

STATEMENT OF FACTS

Amendment 5, now known as the "Polluter Pays Amendment," was proposed by initiative and sponsored by the Save Our Everglades Committee. Nearly 800,000 Florida voters signed the petitions necessary to qualify the proposed constitutional amendment for the November 1996 ballot.

This court had the occasion to review the Polluter Pays Amendment in 1996 and cleared it for the ballot. *In Re Advisory Opinion to the Attorney General - Responsibility for Paying Costs of Water Pollution*, 681 So.2d 1124, 1130-1131 (Fla. 1996) Therein, this court stated the plain meaning of the amendment, "The

responsibility initiative makes clear that those in the Everglades Protection Area or the Everglades Agricultural Area who cause water pollution will pay for their pollution.”

The voters of Florida overwhelmingly approved the Polluter Pays Amendment at the General Election held on November 5, 1996. The Amendment took effect, as provided in the Constitution on January 7, 1997.

Shortly following the approval of the amendment by the voters, the Attorney General issued an Advisory Opinion to the South Florida Water Management District wherein he opined that the Polluter Pays Amendment was self executing.

“With the passage of constitutional amendment 5, the people of Florida have overwhelmingly dictated that those who have pollute the Everglades must be primarily responsible for paying the costs of cleaning up the Everglades.” AGO 96-92

On March 6, 1997, Governor Chiles asked the court to issue an advisory opinion on issues relating the Polluter Pays Amendment.

The voters approved the Polluter Pays Amendment following the most expensive campaign in the history of Florida. The issue was elevated to the national agenda President Clinton and Vice President

Gore who made Everglades Restoration a priority of their administration.

The historical context of the Polluter Pays amendment can be gleaned from *The Everglades: River of Grass 50th Anniversary Edition* (Pineapple Press 1997). "There are no other Everglades in the world," wrote Marjorie Stoneman Douglas in 1947. The current edition, generally known as the historical primer on the internationally known ecosystem explains the current political and legal landscape in a new Chapter 17. Pertinent parts are set forth below:

"In the half century since *The Everglades: River of Grass* was published, the Everglades' troubles worsened. p.428

Everglades National Park-opened in 1947 in an attempt to preserve a portion of the original River of Grass- has been fighting for its life. Urban development and massive diversions of water imperiled it and the ten other national parks and refuges throughout the Everglades ecosystem that provide habitat for the region's fifty-six threatened or endangered species. p. 429

* * *

In 1988, U.S. Attorney Dexter Lehtinen filed suit against the state of Florida to force the state to stop the pumping of polluted runoff from farms in

the Everglades Agricultural Area into the Everglades. The phosphorus was destroying marshes in the Arthur R. Marshall Loxahatchee National Wildlife Refuge, and ecologists feared that if the pollution wasn't stopped it would eventually threaten Everglades National Park.

The suit was finally settled in 1991 after state and federal taxpayers spent an estimated \$13 million on the legal fight. From the suit came the 1994 Everglades Forever Act, a state law that lays out a series of more than fifty restoration projects aimed at cleaning up the water flowing into the Everglades and guaranteeing that there is enough of it and that it is delivered on time.

The first phase of the Everglades Forever Act calls for the state to buy about 44,000 acres of farmland and create six large wetlands to soak up phosphorus before water flows off farms into the Everglades. In addition to starting to clean up pollution, this project would also improve the flow of water into the marshes of the conservation areas.

The price of the entire project - from designing to buying land for marshes to conducting research - will cost between \$1.5 and \$2 billion. The sugar industry is committed to paying no more than \$330 million. On the hook for most of the cost are property owners in the South Florida Water Management District and federal taxpayers.

The act was unpopular with environmentalists. They denounced it from the moment it was announced as a sweetheart deal for sugar farmers who were responsible for producing most of the pollution. Environmentalists wanted farmers to pick up the lion's share of the cleanup cost. And they wanted the cleanup done more quickly than the law required. Under the act, a rule

setting a limit on the amount of phosphorus that could be discharged into the Everglades won't be adopted by the state until 2003 and then farmers would have until 2006 to comply.

Environmentalists who called themselves the Save Our Everglades Committee wanted the sugar industry to bear the brunt of the costs. In 1996 they managed to collect enough signatures on petition to place three proposed state constitutional amendments on the ballot. The first would impose a penny tax on every pound of sugar grown in Florida to raise about \$35 million a year for cleaning up farm pollution in the northern Everglades, the second would require anyone in the Everglades Agricultural Area who pollutes the marshes to pay one hundred percent of the cleanup costs, and the third would establish an Everglades Trust Fund to ensure that money collected would be spent on the restoration.

The sugar industry - maintaining it was already paying it fair share to clean up the pollution - opposed the measure.Sugar is grown on eighty percent of the half million acre Everglades Agricultural Area, which was carved out of the marshes south of Lake Okeechobee early in this century. The agricultural are south of Lake Okeechobee dumps fifty-seven percent of the phosphorus into the Everglades, according to the water district. p.447 * * *

Between them, the two sides spent \$37.9 million on the campaign -easily the most expensive election in the state's history. ***

* * * the voters overwhelmingly passed the amendment setting up the trust fund and the so called "polluter pays" amendment. Environmentalists believe that the latter may force

the sugar industry to pay more than the \$35 million a year the penny a pound would have raised." p. 447

Florida Audubon Society, is a tax exempt non-profit organization formed in 1900, and the National Audubon Society is a New York based tax exempt non-profit organization founded in 1905. The mission of each of the organizations is protection of birds, wildlife, and their habitat through science based advocacy and education. Since the beginning of this century, the two organizations have been committed to protection and restoration of the Everglades. The organizations have a substantial interest in the questions presented to the court.

SUMMARY OF ARGUMENT

Audubon accepts the summary of argument and argument of Save Our Everglades, Inc.

ARGUMENT

The Polluter Pays amendment is self executing. It is a logical extension of Article II Section 7 of the Florida Constitution. The plain meaning of the amendment compels the view that the new constitutional provision requires those who cause pollution will pay the entire cost of abatement of that pollution.

Everglades Amendment 5, the Polluter Pays Amendment, is a logical self executing extension of Article II Section 7 of Florida's Constitution which declares it the policy of the State of Florida to protect its natural resources. In the Full Text of the Proposed Constitutional Amendment the language clearly adds a new paragraph "(b)" to a re-numbered paragraph "(a)" of Article II Section 7. Indeed, the "Summary of the Constitutional Amendment Petition Form" circulated by the sponsors clearly stated, "The Constitution currently provides the authority for the abatement of water pollution. This proposal adds a provision...." relating to pollution of the Everglades. The drafters of the Polluter Pays Amendment artfully attached it to Article II Section 7, which must now be read together:

Section 7. Natural resources and scenic beauty.

(a) It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise.

(b) Those in the Everglades Agricultural Area who cause water pollution within the Everglades Protection Area or the Everglades Agricultural Area shall be primarily responsible for paying the costs of the abatement of that pollution. For the purposes of this subsection, the terms "Everglades Protection Area" and

“Everglades Agricultural Area” shall have the meanings as defined in statutes in effect on January 1, 1996.

Article II Section 7(a) is the conceptual peg upon which the extensive body of Florida’s environment law has been based. *Department of Community Affairs v. Moorman*, 664 So.2d 930 (Fla. 1995). It is so strong a conceptual foundation that this court struck the 1994 proposed Property Rights Amendment from the ballot in part because its provisions were contrary to Article II Section 7. *Advisory Opinion to the Atty. Gen. Re: Tax Limitation* 644 So. 2d 486 (Fla. 1996).

In looking at the Constitutional Amendment, it is important to look at the historical context of the proposed amendment. This court stated in *In Re Advisory Opinion to Governor* , 276 So.2d 25 (Fla. 1973),

in construing a constitutional provision, the words should not only be given reasonable meanings according to the subject matter but in the framework of contemporary society needs and structure. Such light may be gained from historic precedent, from present facts, or from common sense. *State ex rel West v. Gray* 74 So.2d 114, p116 (Fla. 1954) Further light may be shared by examination of the purpose the provisions as intended to accomplish or the evils sought to be prevented or remedied. 276 So.2d 25 at 29.

The Polluter Pays Amendment, was proposed by initiative, signed by nearly 800,000 Florida voters and approved by 68% of the voters at the General Election held on November 5, 1996.

The plain meaning of the amendment was set forth by this court in 1996. In *In Re Advisory Opinion to the Attorney General - Responsibility for Paying Costs of Water Pollution*, 681 So.2d 1124, 1130-1131 (Fla. 1996) this court stated, "The responsibility initiative makes clear that those in the Everglades Protection Area or the Everglades Agricultural Area who cause water pollution will pay for their pollution."

The voters were educated on the effect of the proposed amendment by the most expensive campaign in the history of the state. They were able to glean from the attention given to the proposal that the Everglades is a national treasure which is in decline and now the home of many endangered species. That one of the causes of its decline is pollution from the Everglades Agricultural Area and the cost of abating that pollution greatly exceeds the contribution currently being made by agricultural interests in the EAA. It is a fair interpretation of historic fact that the voters of

Florida sought to change that with the adoption of this amendment to the constitution.

We agree with the Attorney General that the amendment is presumed to be self executing:

“With the passage of constitutional amendment 5, the people of Florida have overwhelmingly dictated that those who have polluted the Everglades must be primarily responsible for paying the costs of cleaning up the Everglades” AGO 96-92.

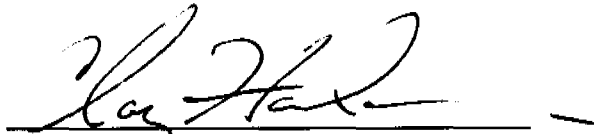
The historical context of the amendment clearly shows the intention of the voters to amend Florida’s Constitution to enhance the ability to restore the Everglades.

CONCLUSION

Audubon urges the court to accept the position of Save Our Everglades, Inc., the sponsor of the constitutional amendment. The historical context of the Polluter Pays Amendment helps to demonstrate that the constitutional amendment is self executing. By its terms as an addition to the organic law of this state, it requires those who cause pollution in the Everglades Agricultural Area or the Everglades Protection Area shall be primarily responsible for the cost of abatement of that pollution. The people of the state of Florida have overwhelmingly dictated that the entire cost of abatement of

water pollution shall be borne by those in the Everglades Agricultural Area who caused it. That is the plain meaning of the amendment as approved by the voters.

Respectfully submitted,



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TABLE OF CITATIONS

In Re Advisory Opinion to the Attorney General - Responsibility for Paying Costs of Water Pollution, 681 So.2d 1124, 1130-1131 (Fla. 1996)

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Attorney General's Opinion 96-92

Douglas, *The Everglades: River of Grass 50th Anniversary Edition* (Pineapple Press 1997).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy has been furnished by U.S.
Mail this 4th Day of April, 1997, to:

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