ORIGINAL

IN THE SUPREME COURT OF FLORIDA

THE STATE OF FLORIDA AND THE SEVERAL PROPERTY OWNERS, TAXPAYERS **AND** CITIZENS OF THE STATE OF FLORIDA, INCLUDING NON-RESIDENTS OWNING PROPERTY OR SUBJECT TO TAXATION THEREIN, AND **OTHERS** HAVING OR CLAIMING ANY RIGHT, TITLE OR INTEREST IN PROPERTY TO BE AFFECTED BY THE ISSUANCE OF THE BONDS HEREIN DESCRIBED, OR TO BE AFFECTED THEREBY, Defendants/Appellants, **VS.** INLAND PROTECTION FINANCING **CORPORATION,** a not for profit public benefits corporation, Plaintiff/Appellee.	CASE NO. 90,332

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By _____
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Appeal of Final Judgment of Bond Validation in Favor of Appellee Entered by the Circuit Court, Second Judicial Circuit in and for Leon County, Florida

BRIEF OF APPELLEE
INLAND **PROTECTION FINANCING CORPORATION**

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SUMMARY OF ARGUMENT

The Circuit court correctly validated the bonds to be issued by Appellee, Inland Protection Financing Corporation (the "Corporation"). The Corporation clearly has standing to bring this validation proceeding by virtue of the statutory mandate contained in Sections 376.30-376.319, Florida Statutes, as amended (the "Act").

The proceeds of the bonds to be issued by the Corporation will be used to assist the Department in the payment of reimbursement obligations incurred to finance the rehabilitation of surface and groundwaters of the state polluted by discharges from petroleum storage tanks, which constitutes a paramount public purpose, as found by the legislature in the Act, obviating any question of violation of the lending of credit provisions of Article VII, Section 10 of the Florida Constitution.

The Corporation is not the State of Florida or a state agency, and, as specifically enunciated by the legislature in the Act, the proposed bonds *are* not debts or obligations of the state. Therefore, the provisions of Article VII, Section 11 of the Florida Constitution, dealing with conditions for issuance of state revenue bonds, are not applicable here. Even if the provisions of Article VII, Section 11 are deemed applicable, the proposed bond issuance would not violate Article VII, Section 11 of the Florida Constitution. No state taxes are or *can* be pledged to payment of the bonds, since payment of the bonds under the Service Contract (A 25-33) is subject to annual appropriation of the legislature. Payment of the bonds is thus not "derived from state tax revenues" since no bondholder can coerce the levy of state taxes in the event payments under the Service Contract are insufficient to cover debt service on the bonds. Remediating contamination in the state's endangered lands and waters is a clearly established capital project, also obviating any violation of that requirement in Article VII, Section 11 of the Florida Constitution.

ADDENDUM TO APPELLANT'S STATEMENT OF THE FACTS

Appellee (the "Corporation") concurs generally with the narrative Statement of Facts set out by the State Attorney/Appellant in his brief. However, there are certain facts missing from his Statement which bear on the issues before the Court. The first is the finding of the legislature in the Act as to the critical nature of the contamination problem in the state's waters and the danger spills and escapes of pollutants pose to the health and welfare of the state's citizens. The Florida Legislature finds and declares in the Act that "the preservation of surface and groundwaters is a matter of the highest urgency and priority, as these waters provide the primary source for potable water in this state." § 376.30(1)(b), Fla. Stat. The legislature also declares that "The storage, transportation and disposal of pollutants and hazardous substances within the jurisdiction of the state and state waters is a hazardous undertaking (§ 376.30(2)(a), Ha. Stat.); and that "Spills, discharges and escapes of pollutants and hazardous substances ... pose threats of great danger and damage to the environment of the state, to the citizens of the state, and to other interests deriving livelihood from the state." § 376.30(2)(b), Fla. Stat. The legislature also finds that "such hazards have occurred in the past, are occurring now and present future threats of potentially catastrophic proportions, all of which are expressly declared by the legislature to be inimical to the paramount interests of the state.' § 376.30(2)(c), Fla. Stat.; and "where contamination of the ground or surface water has occurred, remedial measures have often been delayed for long periods . . . and that such delays result in the continuation and intensification of the threat to the public health, safety and welfare; in greater damage to the environment; and in significantly higher costs to contain and remove the contamination." § 376.3071(1)(c), Fla. Stat.

The important second fact, only touched upon by Appellant, is that no state taxes are pledged to the payment of bonds. Although monies of the Department of Environmental

Protection (the "Department") that it utilizes to make payments under the Service Contract are derived from the Inland Protection Trust Fund created by Section 376.3071(3), Florida Statutes (the "Trust Fund"), it is only the Service Contract and its provisions that bondholders can look to for payment of the bonds, and payments under the Service Contract are subject to annual appropriation by the legislature. The "subject to annual appropriation" clause in the Service Contract has great bearing on the legal issues discussed in this case.

At the validation hearing, the Corporation presented the testimony of Michael Sole, Bureau Chief of the Bureau of Petroleum Storage Systems in the Division of Wastewater Management of the Department, who testified, among other things, that hazards from spills, discharges and escapes of pollutants pose great danger and damage to the environment and to citizens, and are potentially of catastrophic proportions (T 14), that remedial measures are being delayed by reason of use of most of available monies to pay existing reimbursement claims, and that the subject financing program would allow the Department to go forward with its program of cleaning up new contamination sites, especially high risk sites, not now being addressed (T 16-19). Mr. Sole testified that there are 15,000 contaminated surface or groundwater sites in the state requiring remediation (T 16).

After Mr. Sole, the Corporation presented the testimony of Thomas Beenck, Secretary of the Corporation, who identified the exhibits admitted in evidence, the applicable ones of which are contained in the Appendix to Appellant's brief. (T 20-21; A1-89).

At the conclusion of the hearing the State Attorney advised the trial court that he bad no witnesses (T 24) and he raised no disputed facts or arguments of law.

The circuit court's judgment addressed and found in favor of the Corporation on every issue raised by the State Attorney in his answer and in his brief on appeal.

ARGUMENT

Summarized into specific subject matters in the sequence of the State Attorney's argument in his brief, Appellee responds as follows (Appellee is herein referred to as the "Corporation"):

I. The Complaint is sufficient to authorize validation of the bonds, in that the Corporation has standing under Chapter 75, Florida Statutes to seek validation.

II. The issuance of the bonds will not constitute an unauthorized pledging of credit or taxing power to aid private persons or entities, under Article VII, Section 10 of the Florida Constitution.

III. The issuance of the bonds by the Corporation is not violative of Article VII, Section 11 of the Florida Constitution in that the Corporation is not an agency of the state and its bonds do not fall under the category of revenue bonds issued by the state or its agencies, as described in Article VII, Section 11(d). Even if the bonds are deemed state revenue bonds, the conditions for issuance of state revenue bonds are complied with for the following reasons:

A. Article VII, Section 11(d) of the Florida Constitution is not violated, since payments made by the Department to the Corporation pursuant to the terms of the Service Contract are subject to annual appropriation and state tax revenue is not pledged to payment of the bonds.

B. Article VII, Section 11(a) of the Florida Constitution is not violated because the bonds do not pledge the full faith and credit and taxing power of the state, and therefore do not require an approving referendum.

C. Even if the bonds are deemed state bonds, the proposed use of the proceeds of the bonds constitutes a fixed capital outlay project as required by Article VII, Section 11(d) of the Florida Constitution.

DISCUSSION

I. THE CORPORATION HAS STANDING TO BRING THIS ACTION UNDER CHAPTER 75, FLORIDA STATUTES TO SEEK VALIDATION OF THE BONDS.

Chapter 75, Florida Statutes, entitled "Bond Validation", has been in existence since 1915, and Section 75.02, Florida Statutes, enumerates the plaintiffs who may initiate proceedings thereunder. A public benefits corporation, such as the Corporation, is not one of the plaintiffs described in Section 75.02. The legislature obviously knew this in 1996 when it amended the Act to provide:

> "(10) The corporation shall validate obligations to be incurred pursuant to subsection (5) and the validity and enforceability of any service contracts providing for payments pledged to the payment thereof by proceedings under Chapter 75. The validation complaint shall be filed only in the Circuit Court for Leon County. The notice required to be published by s.75.06 shall be published in Leon County and the complaint and order of the Circuit Court shall be served only on the State Attorney for the Second Judicial Circuit. Sections 75.04(2) and 75.06(2) shall not apply to a complaint for validation filed as authorized in this subsection. The validation of at least the first obligations incurred pursuant to subsection (5) shall be appealed to the Supreme Court, to be handled on an expedited basis." § 376.3075(10), Fla. Stat.

Where statutes are in apparent conflict with each other, they are to be construed in harmony with each other, and, unless the meaning is absolutely clear, not in a way that would invalidate or conflict with one another. State v. Parsons, 569 So.2d 437 (Fla. 1990). Both Chapters 75 and Section 376.3075(10), Florida Statutes are acts of the legislature. Because Section 376.3075(10) is the later enactment, it is the latest expression of legislative will and should be accorded deference over any arguably conflicting provision in chapter 75. McKendry v. State, 641 So.2d 45 (Fla. 1994).

The Corporation has standing to bring this bond validation proceeding under Chapter 75, notwithstanding that a public benefits corporation is not among the "plaintiffs" listed in Section

75.02, because the legislature has clearly stated in Section 376.3075(10) that it intends *that* the public benefits corporation avail itself of the provisions of Chapter 75, Florida Statutes.

II. ISSUANCE OF THE BONDS WILL NOT CONSTITUTE *AN* UNAUTHORIZED PLEDGING OF CREDIT OR TAXING POWER TO *AID* PRIVATE PERSONS OR ENTITIES, UNDER ARTICLE VII, SECTION 10 OF THE FLORIDA CONSTITUTION.

Article VII, Sections 10 and 11(a) of the Florida Constitution prohibit the state from pledging its credit or its taxing power except in certain circumstances. The Act specifically provides that the bonds to be issued by the Corporation "shall not constitute a debt or obligation of the state or a pledge of the faith and credit or taxing power of the state, but shall be payable from and secured by payments made by the department under the service contract pursuant to Section 376.3071(4)(o)." § 376.3075(5), Fla. Stat. Such payments are subject to annual appropriation. § 376.3075(4), Fla. Stat. No bondholder can coerce the state's taxing power to require the State of Florida to channel monies into the Service Contract for the payment of principal and interest on the Corporation's bonds. As will be further discussed herein, a pledge of the state's taxing power occurs only where the holders of the bonds *can* compel the state to levy taxes to pay the bond obligations. State v. City of Miami Beach Redevelopment Agency, 392 So.2d 875,898 (Fla. 1981); State v. School Board of Sarasota County, 561 So.2d 549 (Ha. 1990); State v. Brevard County, 539 So.2d 461 (Fla. 1989); See also Leon County v. State, 165 So.666 (Fla. 1936). The declared intent of the legislature clearly eliminates any potential conflict between the Corporation's issuance of bonds and Article VII, Sections 10 and 11 with regard to the state pledging its taxing power.

Article VII, Section 10 of the Florida Constitution prohibits the state from giving or lending its credit *to* aid any private corporation or person. This so-called "lending of credit" prohibition has *been the* subject of extensive Florida court rulings. At the heart of these cases

is the ruling by this Court that the state does not improperly use its taxing power or pledge its public credit to aid private enterprise where there is a paramount public purpose served. Northern Palm Beach County Water Control District v. State, 604 So.2d 440 (Fla. 1992); State v. Inter-American Center Authority, 281 So.2d 201 (Fla. 1973); State v. Housing Finance Authority of Polk County, 376 So.2d 1158,1160 (Fla. 1979); State v. City of Miami, 379 So.2d 651 (Fla. 1980); Linscott v. Orange County Industrial Development Authority, 443 So.2d 97 (Fla. 1983).

The constitutional prohibition against pledging public credit to private enterprise first appeared in the Constitution of 1885 under Article IX, Section 10. Since the 1968 revision to the Florida Constitution it has been contained in Article VII, Section 10. Since 1968, the interpretation of Article VII, Section 10 of the Florida Constitution has undergone extensive liberalization in connection with the permitted degree of involvement by private parties with respect to facilities financed by public bonds and the allowance of the use of public tax dollars. Such liberalization commenced in 1968 with the adoption of an amendment to *the* predecessor provision which permitted the issuance of bonds by certain public bodies to finance capital projects for airports, port facilities, industrial plants and manufacturing facilities to be occupied or operated by any private person pursuant to contract or lease entered into with the public body issuing the bonds, provided that the bonds were payable solely from the revenue derived from the operation of such projects.

The trend toward liberalization proceeded further as this Court continued to exclude from the restrictions of the lending of credit clause of Article VII, Section 10, bonds issued for certain private use facilities involving private educational facilities, Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 304 (Fla. 1971), private health facilities, Wald v. Sarasota County Health Facilities Authority, 360 So.2d 763 (Fla. 1978) and private housing,

State v. Housing Finance Authority of Polk County Florida, 376 So.2d 1158 (Fla. 1979), provided that such bonds were payable solely from the revenues of the facilities financed by the bonds. In these cases, this Court found no impermissible lending of credit to benefit a private person, notwithstanding the fact that these additional types of projects were not specifically enumerated in the amendment to Article VII, Section 10. See also *Linscott*, 443 So.2d 97 (regional headquarters facility for private corporation).

This Court further recognized exceptions to the restrictions of the lending of credit clause in contexts other than those involving the liberalizing amendment to Article VII, Section 10 discussed above and the related liberalization in doctrine occurring under *Nohrr*, *Wald*, *Housing Finance Authority of Polk County and Linscott*. Thus, in State v. Miami Beach Redevelopment Agency, 392 So.2d 875 (Fla. 1981) this Court held that *the* issuance of bonds and use of public funds through tax increment financing to finance the acquisition, clearance and improvement of slums or blighted urban areas, in contemplation of substantial private and commercial uses after redevelopment, was constitutional under Article VII, Section 10 of the Constitution. Thus began the precedent of authorizing the utilization of public tax dollars for financing private ventures if a paramount public purpose could be shown. In Northern Palm Beach County Water Control District v. State, 604 So.2d 440 (Fla. 1992) a drainage district tax was *utilized to* raise revenue to pay bonds issued for the financing of on-site road improvements in a private development.

Thus, even if public tax dollars are involved and private enterprise is benefitted, this Court has allowed use of public tax dollars if the project serves a "paramount public purpose." Northern Palm Beach County Water Control District, ibid at 441-442, and *Miami Beach*, supra.

If public tax dollars are not involved, it is enough to show that only a "public purpose" is served. See *Linscott*, 443 So.2d at 101.

This Court has applied the "paramount public purpose" or "public purpose" doctrine in many contexts where private enterprise is benefitted. See State v. Osceola County Industrial Development Authority, 424 So.2d 739 (Fla. 1982) (affirmed revenue bond issue for constructing a lodging facility in connection with a "tourism facility"); State v. Orange County Industrial Development Authority, 417 So.2d 959 (Ha. 1982) (affirmed revenue bond issue to construct a privately owned hotel in connection with convention/civic center); State v. Leon County, 410 So.2d 1346 (Fla. 1982) (affirmed revenue bond issue to construct a privately owned convention center hotel); State v. Volusia County Industrial Development Authority, 400 So.2d 1222 (Fla. 1981) (affirmed revenue bond issue to acquire and expand nursing home which would then be sold to a private company); State v. City of Miami, 379 So.2d 651 (Fla. 1980) (affirmed revenue bond issue for construction of convention center/parking garage using in part, non-ad valorem revenues of the city); Northern Palm Beach County Water Control District, ibid 604 So.2d 440,441 (use of drainage district tax to pay bonds for construction of roads in a private development); State v. Inter-American Center Authority, 281 So.2d (Fla. 1973) (use of Dade County non-ad valorem tax dollars to aid in development of the Interama project); State of Florida v. Florida Development Finance Corporation, 650 So.2d 14 (Fla. 1995) (where Department of Transportation Trust Funds are used in part). Gradually, the distinction between paramount public purpose and public purpose has fallen away. See *Linscott*, 443 So.2d at 101.

There can be no doubt that in the case at bar, the preservation of the groundwaters and inland surface waters of the state is a paramount public purpose, and it is so stated several times in the Act. See, e.g. § 376.3071(1)(e), Fla. Stat. The fulfillment of the purposes of the

Corporation is stated to promote "the health, safety and general welfare of the people of the state and serves . . . a paramount public purpose." § 376.3075(8), Fla. Stat.

The state, on many occasions, and on a continuing basis, utilizes public tax dollars to contract for services with private entities to perform what the state considers to be a public purpose, for instance: The Department of Children and Families contracts with private physicians, private hospitals and private community mental health centers for mental health services and drug programs, and with private programs for developmentally disabled individuals; the Department of Transportation contracts with private architects and engineers for their services; the Department of Management Services also contracts for private architectural and engineering services; many juvenile justice programs are contracted out to private corporations for early intervention programs; and the state contracts with private entities for the construction and operation of certain privately owned prisons and other privately owned correctional institutions.

In the matter here before the Court, the bondholders may only look to the Service Contract for payment of the Bonds. Those monies are subject to annual appropriation, and no bondholder *can* coerce the state to use its taxing power to pay the bonds if monies under the Service Contract *are* insufficient to do so. Even if it is determined that public tax dollars are utilized, the use of bond proceeds for payment by the Corporation to private landowners to remediate surface or groundwater contamination has been determined by the legislature in the Act to be a paramount public purpose; and utilization of public tax dollars for a paramount

public purpose, even though benefitting private enterprise, has been upheld by this Court, as noted above, on many occasions in many varied Contexts.'

The lending of credit to private persons should not really be an issue in the case at bar. Here, there is a clear distinction between a program benefitting the general public (i.e. cleaning up contamination in the state's surface and groundwater) and a program benefitting only one developer. Where else can it be so clearly shown that the general public is the beneficiary by the cleaning up of pollutants in the state's surface and groundwater? In addition to this case, the Circuit Court of Leon County accepted the very same proposition in the State of Florida v. Florida Hurricane Catastrophe Fund Finance Corporation, Case No. 89,332, pending in this Court on a statutorily mandated appeal, where it was apparent that repairing hurricane damage in the general community is a paramount public purpose, even though the bond funds flow to individual homeowners to accomplish that purpose.

The paramount public purpose that the legislature finds is fulfilled by the Act is not that backlogged claimants will get paid faster, as Appellant alleges, but that new high risk contamination sites can be dealt with because of additional monks made available by the Corporation's leveraged financing (T 16-19). Again, the legislature in the Act states that it is a paramount public purpose to create the Corporation "to provide for the expeditious supply of safe and reliable alternative sources of potable water to affected persons and to provide a means for investigation and cleanup of contamination sites without delay." § 376.3071(1)(d), Fla. Stat. See also all other legislative findings under § 376.3071(1), Fla. Stat.

'The existing program under the Act already grants public tax dollars in the Trust Fund directly to private owners and/or their contractors as reimbursement for groundwater contamination cleanup.

It is clear that issuance of the bonds by the Corporation will not conflict with Article VII, Section 10 or Section 11(a) of the Florida Constitution.

III. THE ISSUANCE OF THE BONDS BY THE CORPORATION IS NOT VIOLATIVE OF ARTICLE VII, SECTION 11 OF THE FLORIDA CONSTITUTION IN THAT THE CORPORATION IS NOT *AN* AGENCY OF THE STATE AND ITS BONDS DO NOT FALL UNDER THE CATEGORY OF REVENUE BONDS ISSUED BY THE STATE OR ITS AGENCIES, AS DESCRIBED IN ARTICLE VII, SECTION 11(d) OF THE FLORIDA CONSTITUTION.

Article VII, Section 11(d) of the Florida Constitution relating to revenue bonds issued by the state or its agencies provides:

> "Revenue bonds may be issued by the state or its agencies without a vote of the electors to finance or refinance the cost of state fixed capital outlay projects authorized by law, and purposes incidental thereto, and shall be payable solely from funds derived directly from sources other than state tax revenues."

The Corporation's bonds or evidences of indebtedness are not to be issued by the state or its agencies. Although the Corporation was created by the legislature, it is nonetheless a legal entity separate and distinct from the State of Florida and its agencies. The legislature endowed the Corporation with all the powers granted to corporations under chapters 607 and 617, Florida Statutes, including the power to issue bonds, incur debt and other obligations, and to engage in other transactions. § 607.0302 (General Powers), Fla. Stat.; Ch. 617, § 617.0302, (Corporate Powers), Fla. Stat.

Florida has a long *history* of creating entities for public and quasi-public purposes, on both a state and local level. Whether labeled a corporation, association, authority or some other designation, the ability of the legislature to establish such entities to serve a public purpose has been recognized *as* a valid exercise of legislative authority. See, e.g., State v. Florida Development Finance Corporation, 650 So.2d 14 (Fla. 1995); O'Malley v. Florida Ins. Guaranty Association, 257 So.2d 9 (Fla. 1971); In re Advisory Opinion to the Governor - State Revenue

Cap, 658 So.2d 77,80 (Fla. 1995). In In re Advisory Opinion to the Governor -- State Revenue Cap, supra, this Court determined that the Joint Underwriting Association (JUA), a creature of the legislature like the Corporation, was not a state entity. In O'Malley, supra, this Court stated that "The utilization of a public corporation as a means of implementing the objectives of the legislation appears in nowise to violate the State Constitution."

This is not the first time that the Florida Legislature has recognized specialized corporations with bond powers, separate and apart from state agency status. The Florida Development Finance Corporation (FDFC) was created by Section 288.9602, Florida Statutes, in 1993, as a "public instrumentality" with the power to issue revenue bonds. The bonds were *the* subject of a Chapter 75 proceeding and were held valid because they did not pledge the state or public credit. The FDFC, the corporation issuing the bonds, was a hybrid entity. See *State* v. Florida Development Finance Corporation, supra, where the Court stated it was a "corporate and political entity and an instrumentality of local government" with power to issue revenue bonds for capital projects. As part of the Hurricane Insurance Affordability and Availability Act of 1996, the Florida Hurricane Catastrophe Fund Finance Corporation was created in 1996 by Section 215.555(6)(c)2.a, Florida Statutes as a public benefits corporation. The statute specifically authorizes that corporation to issue revenue bonds. As noted above, these bonds were also the subject of a validation proceeding in the Circuit Court of Leon County which is also pending on appeal (by statutory requirement) before this Court in Case No. 89,332. The circuit court held *that the* Florida Hurricane Catastrophe Fund Finance Corporation was not a state agency.

Public benefits corporations were recognized by name by the Florida Legislature in 1984 with the adoption of Chapter 84-321, Laws of Florida, enacted, in part, as Section 216.015, Florida Statutes, entitled the "Capital Facilities Planning and Budgeting Act." This act

recognized the urgent need of repair, expansion and replacement of much of the infrastructure of the state and recognized the need for coordination "among the various branches of state government, local government, and public benefit Corporations." Section 216.015(2)(b), Fla. Stat. (emphasis added). The statute implicitly recognizes that the public benefit corporations are separate and distinct from "the various branches of state government" and local governments, since public benefit corporations are mentioned separate from and in addition to such branches of state and local government, The 1984 legislation was the first step in a comprehensive capital facilities planning and budgeting process, and the use of public benefit corporations was expressly recognized as part of this process.

Thus in 1984 the legislature recognized public benefit corporations and their appropriate relationship with capital asset improvements, and since then the legislature has created at least three public benefit corporations and given all three power to issue revenue bonds. It is noteworthy that the legislature has chosen public benefit corporations to issue revenue bonds in regard to both hurricane disaster protection and petroleum contamination cleanup, two of the most critical environmental and health threats to the state and its residents and to the state's critical capital assets.

Although the Florida Constitution does not define the term 'agency" or "agency of the state", the term "agency" has been defined under various Florida Statutes. Section 20.03(11), defining "agency' within the context of the structure of the executive branch of the state, states that an "agency," as the context requires, "means an official, officer, commission, authority, council, committee, department, division, bureau, board, section, or another unit or entity of government." In Section 768.28(2), in the context of statutes regarding sovereign immunity, the state waives sovereign immunity from liability for torts for the state and its agencies and subdivisions, defined to include . . . "the executive departments, the legislature, the judicial

branch, . . . and the independent establishments of the state . . .; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities . . ."

In Chapter 288, Part IX, Florida Statutes. regarding the Florida Development Finance Corporation, Section 288.9603(11) defines "**public agency**" as

> "a political subdivision. agency, or officer of this state or of any state of the United States, including, but not limited to, state, government, county, city, school district, single and multipurpose special district, single and multipurpose public authority, metropolitan or consolidated government, an independently elected county officer, any agency of the United States Government, and any similar entity of any other state of the United states."

As noted above, in State v. Florida Development Finance Corporation, supra, the Court stated that bonds issued by the Florida Development Finance Corporation were not bonds of the state or any local government, and that the bonds were not a debt of the state or any local agency.

The fact that a statute creating a public benefits corporation states that it is an "instrumentality" of the state is not determinative of whether the corporation is a state agency or subdivision of the state. "Instrumentality" is a reference to the fact that the entity was created by the state. In addition to those listed above, there are a number of similar definitions of agencies throughout the Florida Statutes. Such definitions are useful as indicators of the legislature's view of what constitutes a "state agency." The legislature has in the past indicated that an entity is an "agency of the state" where it deemed it appropriate, see, e.g., Section 240.551(5), Fla. Stat. (stating that the Florida Prepaid Postsecondary Education Expense Program is to be administered as an agency of the state); Section 288.9604, (creating the Florida Development Finance Corporation and not designating it as such); Section 215.555(6)(c) (creating the Florida Hurricane Catastrophe Fund Finance Corporation and not designating it as such); and the Act, the subject of this case (creating the Inland Protection Financing Corporation and not designating it as such).

In addition to specific statutory language, the Attorney General has had occasion to interpret the meaning of "state agencies or subdivisions" as used in Section 768.28(2), Florida Statutes. The Attorney General has opined that district mental health boards (1978 Op. Atty. Gen. Fla., Op. No. 78-106), the Canal Authority of the State of Florida (1979 Op. Atty. Gen. Fla., Op. No. 79-13), the Duval County Research and Development Authority (1989 Op. Atty. Gen. Fla., Op. No. 89-22) and Withlacoochee Work Force Development Authority, Inc. (1995 Op. Atty. Gen. Fla., Op. No. 95-44) are "state agencies or subdivisions" within the meaning of Section 768.28(2), Florida Statutes. When faced with an entity quite similar to the Withlacoochee Work Force Development Authority, however, the State Attorney General opined that the Volusia City-County Water Supply Cooperative is not within the term "state agencies or subdivisions (1993 Op. Atty. Gen. Fla., Op. No. 93-24). In that opinion, the Attorney General was unable to conclude that the water supply cooperative acts primarily as an agency of the water supply cooperative's members (cities and counties). The fact that the cities and counties (i) retained the right to act outside the cooperative on matters relating to the purpose of the cooperative and (ii) retained certain approval rights was cited as persuasive in this finding.

The Attorney General opinions cited above collectively support the proposition that the more autonomy and exclusivity of function (i.e. the creating entity or entities do not retain the right to act within the purpose of the new entity) granted to an entity, the more likely that entity is a "state agency or subdivision." In the instance of the Corporation, the legislature finds that it was necessary to provide for the creation of a "non-profit public benefit corporation as an instrumentality of the state" to assist in performing Department functions provided in the Act. § 376.3071(1), Fla. Stat. The legislature did not designate the Corporation as a "state agency," "agency of the state," "state agency or subdivision" or "public agency" to exclusively take over this task of paying reimbursement obligations. There is no exclusivity of function, i.e., it is not

the only entity that can pay reimbursement obligations. The Department can elect not to use the bond financing program of the Corporation and continue to pay existing reimbursement obligations itself with available monies. The legislature has not taken away the reimbursement function of the Department and placed it entirely in the hands of the Corporation. The state has merely provided an alternative mechanism for paying reimbursement obligations, which the Department can determine to use or not use. As a matter of fact, the Department is currently continuing to pay a portion of existing reimbursement obligations (T 18). The Corporation exists merely to "assist" the Department and that is exactly what the Act says. Thus, the Corporation, like the Volusia City-County Water Supply Cooperative relative to its city/county members, and like the Florida Hurricane Catastrophe Fund Finance Corporation and the Florida Development Finance Corporation, does not act as an agency of the state.

A. Even if the bonds are deemed state revenue bonds, Article VII, Section 11(d) of the Florida Constitution is not violated, in that payments made by the Department to the Corporation under the Service Contract to pay debt service on the bonds are subject to annual appropriation and state tax revenue is not pledged to payment of the bonds.

Should this Court deem the Corporation to be a state agency, bonds or evidences of indebtedness issued by the Corporation still are not state revenue bonds within the meaning of Article VII, Section 11(d) of the Florida Constitution. The legislature has proclaimed to the world that &hebonds of the Corporation are not debts or obligations of the state or its agencies. Section 376.3075(5), Florida Statutes states:

> (5) "The corporation may issue and incur notes, bonds, certificates of indebtedness, or other obligations or evidences of indebtedness payable from and secured by amounts payable to the corporation by the department under a service contract entered into pursuant to subsection (4) for the purpose of paying, purchasing, or settling existing reimbursement obligations. . . . Any such indebtedness of the corporation shall not constitute a debt or obligation of the state or a pledge of the faith and credit or taxing Dower of the state, but shall be payable from and secured

by payments made by the department under the service contract pursuant to s.376.3071(4)(o). (Emphasis added).

The section of the Florida Statutes alluded to in the above citation, 376.3071(4)(o), specifically states that payments under the Service Contract are subject to annual appropriation by the legislature.

The critical test as to whether an obligation is payable from tax revenues is whether a bondholder would have the right, if funds were insufficient to meet bond obligations, to compel by judicial action the levy of taxes or other revenue. State v. City of Miami Beach Redevelopment Agency, 392 So.2d 875, 898 (Fla. 1981) (herein "*Miami* Beach"); State v. School Board of Sarasota County, 561 So.2d 549 (Fla. 1990) (herein "*Sarasota*"); State v. Brevard County, 539 So.2d 461 (Fla. 1989) (herein, *"Brevard"*); see also Florida Department of Health and Rehabilitative Services v. Southern Energy, Ltd., 493 So.2d 1082 (1st DCA 1986) (herein, *"HRS v. Southern Energy"*); See also Leon County v. State, 165 So.666 (Fla. 1936). Put another way, the test is whether the holder of any bonds may coerce the state's taxing power by requiring the channeling of monies into the Service Contract sufficient to pay their bonds each year. Clearly, the bondholder does not have that right in this matter. Both the Act and the Service Contract provide that monies available under the Service Contract are subject to annual appropriation by the legislature. As noted by a review of the following cases, this Court has held, in interpreting "subject to annual appropriation" obligations, that when bonds or other evidences of indebtedness are not supported by a pledge of a tax revenue source, *they are* not "payable" from that tax revenue source.

In *Miami* Beach, the bonds of the city were payable from a trust fund, which received, among other sources, public funds measured by a level of ad valorem tax levied by *the* City of Miami Beach pursuant to Section 163.387, Florida Statutes (the tax increment financing law).

The only obligation of the city was to appropriate annually a sum equal to the property tax increment on the property. In concluding that the issuance of the bonds by the city without approval of the voters did not violate Article VII, Section 12 (requiring a referendum when a local government issues bonds payable from ad valorem taxation), this Court said, in part:

> "What is critical to the constitutionality of the bonds is that, after the sale of bonds, a bondholder would have no right, if the redevelopment trust fund were insufficient to meet the bond obligations and the available resources of the county or city were insufficient to allow for the promised contributions, to compel by judicial action the levy of ad valorem taxation. Under the statute authorizing this bond financing the governing bodies are not obliged nor can they be compelled to levy any ad valorem taxes in any year. The only obligation is to appropriate a sum equal to any tax increment generated in a particular year from the ordinary, general levy of ad valorem taxes otherwise made in the city and county that year. Issuance of these bonds without approval of the voters of Dade County and the City of Miami Beach, consequently, does not transgress Article VII, Section 12." *Miami Beach* at *898.*

In *Sarasota*, the school boards of Sarasota, Collier and Orange Counties entered into agreements providing for the lease of school board lands to a not-for-profit corporation for the construction of schools, and an annual leaseback of the facilities to the respective school boards. The lease payments supported the issuance of certificates of indebtedness on behalf of the respective school boards by the not-for-profit corporations. Monies to pay the certificates under the lease contract were subject to annual appropriation by the respective school boards, and the boards could not be compelled to make payments. The issue presented was whether a referendum is required by Article VII, Section 12 of the Florida Constitution, which authorizes school districts to issue bonds or certificates of indebtedness payable from ad valorem taxation only after a referendum.

This Court stated:

> "We conclude that because *these* obligations *are* not supported by the pledge of ad valorem taxation, they are not 'payable from ad

valorem taxation' within the meaning of Article VII, Section 12, and referendum approval is not required.

In *State v. Miami Beach Redevelopment Agency,* 392 So.2d 875 (Fla. 1980), we interpreted the words 'payable from ad valorem taxation' in Article VII, Section 12 and held that a referendum is not required when there is no direct pledge of the ad valorem taxing power. We noted that although contributions may come from ad valorem *tax* revenues: 'What is critical to the constitutionality of the bonds is that, after the sale of the bonds, a bondholder would have no right, if [funds] were insufficient to meet the bond obligations ... to compel by judicial action the levy of ad valorem taxation.... [T]he governing bodies are not obliged nor *can* they be compelled to levy any ad valorem taxes in any year.' Id. at *898-99.* The agreements here, as in *Miami Beach,* although supported in part by ad valorem revenues, expressly provide that neither the bondholders nor anyone else *can* compel use of the ad valorem taxing power to service the bonds.

In *State v. Brevard County*, 539 So.2d 461 (Fla.1989), we interpreted the 'maturing more than twelve months after issuance' language of Article VII, Section 12. The *Brevard* agreements provided traditional lease remedies and preserved the county's right, in adopting its annual budget, to terminate the lease without further obligation. We held that Article VII, Section 12 was not violated. As in *Brevard*, the agreements here give the boards freedom to decide anew each year, burdened only by lease penalties, whether to appropriate funds for the lease payments." *Sarasota at 552.*

In *Brevard*, another "subject to appropriation" case relied upon and cited in *Sarasota*, above, the County had the right in adopting its annual budget to not appropriate annually on the lease contract and terminate the lease without further obligation. The lease payments supported payment of the outstanding indebtedness issued on behalf of the School Board (as the Service Contract payments in the instant *case* support payment of the Corporation's evidences of indebtedness). This Court again interpreted *the* words "payable from ad valorem taxation" in Article VII, Section 12 and held a referendum was not required because there was no direct pledge of the taxing power. This Court stated in part:

> "Functionally, the County's obligation can most accurately be characterized as a one-year lease with annual "renewal options" in favor of the County. During its budget deliberations for each year, the County will have the option to "renew" the Lease for an additional year by appropriating sufficient *funds to* make the scheduled Lease payments."
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> . . .
>
> "Not only is there no covenant to maintain revenue-generating services, the county, in adopting its budget on an annual basis, preserves its right to decide to terminate the lease without further obligation." Brevard at *462,* 463.

In holding that an approving referendum was not required, this Court in Brevard and *Sarasota* concluded that the obligations involved were not bonds or certificates of indebtedness "payable from ad valorem taxation" within the meaning of Article VII, Section 12, because such taxes were not pledged to payment of the bonds.

The reasoning of the Court in *Miami* Beach, *Sarasota* and *Brevard* interpreting Article VII, Section 12, logically carries over to the interpretation of Article VII, Section 11(d) in determining whether the obligations before this Court are "payable" from state tax revenues. As in Article VII, Section 12, if the obligations are not supported by the pledge of state tax revenues (under section 12 by a pledge of ad valorem taxation) they are not "payable" from state tax revenues. It is the "subject to annual appropriation" provision that makes the difference.

As in *Miami* Beach, *Sarasota* and *Brevard,* if sums required to meet payments on the bonds are not appropriated to the Department, a bondholder cannot compel the legislature to *make* such appropriation. The state cannot be coerced into using its taxing power to provide payment to bondholders because state tax revenues *are* not pledged to payment of the bonds. As in *Sarasota* and *Brevard*, monies required to pay the bonds are subject *to* annual appropriation. The state is not pledging any "state tax revenues" or any other permanent payment to the bonds of the Corporation except that which may be made available on a year-by-year basis under the Service Contract. It must be held, therefore, that the obligations proposed

to be issued by the Corporation cannot be bonds that are payable from state tax revenues. The Act itself proclaims that fact: the indebtedness of the Corporation "shall not constitute a debt or obligation of the state or a pledge of the faith and credit or *taxing* power of the state, but shall be payable from and secured by payments made by the department under the Service Contract pursuant to S.376.3071(4)(o)." § 376.3075(5), Fla. Stat. The Section cited by the Act, Section 376.3071(4)(o) states: "payments of amounts payable under any Service Contract entered into by the department pursuant to Section 376.3075, *[are]* subject to annual appropriation by the Legislature".

In Section 376.3075(4), the Act enunciates clearly the nature of the obligation of the Department under the Service Contract:

> "In compliance with provisions of s. 287.0641, and other applicable provisions of law, the obligations of the department under such service contracts shall not constitute a general obligation of the state or a pledge of the faith and credit or taxing power of the state nor shall such obligations be construed in any manner as an obligation of the State Board of Administration or entities for which it invests funds, other than the department as provided in this section, but shall be payable solely from amounts available in the Inland Protection Trust Fund, subject to annual appropriation (emphasis added). In compliance with this subsection and s. 287.0582, the service contract shall expressly include the following statement: "The State of Florida's performance and obligation to pay under this contract is contingent upon an annual appropriation by the legislature."

Note that this section, in describing the obligation of the Department under the Service Contract, states that the obligation must be in compliance with provisions of Section 287.0641, Florida Statutes. That section states:

> "**Agreement not debt or pledge of faith or credit of state, -** No agreement entered into pursuant to s. 287.064 shall establish a debt of the state or shall be a pledge of the faith and credit of the state; nor shall any agreement be a liability or obligation of the state except from appropriated funds. All agreements, however, may

> be automatically renewable at the end of each fiscal year, subject to sufficient annual appropriations.

The agreements referred to in Section 287.064, to which the Service Contract is made analogous by the reference in Section 376.3075(4), cited above, are for deferred payment financing contracts. The Act, by making reference to Section 287.064, likens the nature of the Department's obligations under the Service Contract to a deferred payment financing contract under Section 287.064, which contracts "may be automatically renewable at the end of each fiscal year, subject to sufficient annual appropriations." Section 376.3075(4) goes further to state that in compliance with Section 287.0582, the Service Contract shall expressly include (and does include) the following statement:

> "the State of Florida's performance and obligation to pay under this contract is contingent upon an annual appropriation by the Legislature."

In *HRS v. Southern Energy*, supra, the First District Court of Appeal had before it a contract for the provision of wood fuel pellets by Guaranty Fuels to the Department of Health and Rehabilitative Services ("HRS") for an energy project, which contract contained a clause that payment by HRS was "subject to appropriation" by the legislature. Guaranty Fuels assigned the contract to Southern Energy, Ltd. ("SEL"). Guaranty Fuels had constructed an $8.5 million plant in Florida to manufacture the wood pellets. HRS terminated payments under the contract, and SEL sued for enforcement, claiming, among other things, equitable estoppel. The First District held that the "subject to appropriation" clause rendered the contract cancelable at the end of each year, and that Southern Energy could not enforce the contract when no appropriation was made by the legislature. The court stated in part:

> *"In United Faculty of Florida v. Board of Regents,* 365 So.2d 1073 (Fla. 1st DCA 1979), this court held that the legislature's failure to completely fund a salary contract between the union and the Board of Regents rendered the contract unenforceable to the extent it was not funded. The opinion states: 'That the legislature might not provide full funding

for the collective bargaining agreement was a contingency well known to the parties before, during, and after negotiations.'

. . .

The record reveals some but not all of the necessary facts to support equitable estoppel, HRS benefitted from the contemplated continuity of the contract. SEL relied upon the contract in constructing its plant in Florida, and in readying itself to perform at the quantity levels conditionally stated in the contract. SEL knew, however, that the contract provided those terms were subject to appropriation in future years, and has agreed that HRS fully performed its obligation to seek full appropriation. Constitutional and statutory provisions manage separation of powers and legislative supremacy in the particular context before us. Under these circumstances, HRS cannot be required to pay damages for failure to accept delivery of materials under a contract for which no appropriation was made, when the appropriation act limiting such expenditure has not been invalidated, Equitable estoppel is accordingly inappropriate as to future purchases not funded." *HRS v. Southern Energy* at 1084

The bonds to be issued by the Corporation are nothing more than certificates of participation in the Service Contract, payable, as in *Sarasota* and *Brevurd,* from sums that are subject to annual appropriation under a contract (a lease in *Sarasota* and *Brevard*) that is functionally a one year contract with annual "renewal options" depending on the availability of revenue. As noted by this Court in *Sarasota* and *Brevurd* and as stated in Section 287.0641, Florida Statutes (which is cited and relied upon in Section 376.3075 of the Act), an evidence of indebtedness which is renewable from year to year, depending on appropriation is functionally a one year obligation and is not deemed a "debt of the *state."* § 287.0641, Fla. Stat.; see *Brevard,* supra, *Sarasota,* supra and *HRS v.* Southern Energy, supra. Thus, such an obligation cannot be deemed to be a state revenue bond under Article VII, Section 11(d) of the Florida Constitution.

Appellant, in its brief, argues that the +"subjectto annual appropriation" clause is meaningless here because the state will be under "significant compulsion" to make each annual appropriation, in order to avoid default on the bonds, since a resulting default would adversely

affect the states's credit standing. By reason of this, Appellant argues, the "discretion" in the state to make or not make the Service Contract payments is "illusory", Such a "significant compulsion" did not prevent this Court in *Miami Beach, Sarasota,* and *Brevard*, all involving bonds or certificates of indebtedness issued by or on behalf of a governmental authority, from ruling that the "subject to appropriation" clause was the critical legal test as to the constitutionality of the bonds or certificates of indebtedness, and that because payment of the bonds or certificates were subject to annual appropriation, they were not deemed "payable from ad valorem taxation" within the meaning of Article VII, Section 12. And such "illusory discretion" did not prevent the First District from ruling in *HRS v.* Southern Energy that there was no equitable estoppel or impairment of contract even though the state ceased payment on the contract after the payee had built an $8.5 million plant to perform under the contract, It is not "illusory discretion" or "significant compulsion" that counts. It is the legal right of the legislature to appropriate or not appropriate the payments that makes the difference.

The three cases cited by Appellant for his "significant compulsion" argument, on page 11 of Appellant's Brief, were not cases involving contracts subject to annual appropriation and are thus not on point.

The legislature in its sole sovereign discretion, can modify, restructure or abolish the Inland Protection Trust Fund in any year, thereby cutting off or reducing payments pursuant to the Service Contract. Because of the "subject to annual appropriation" clause, no bondholder could legally challenge the non-payment. It should be noted that the Trust Fund is not exempted

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[2] Boykin v. River Junction, 121 Fla 902, 164 *So. 558* (Fla. 1935) (mortgage subject to foreclosure); State v. Halifax Hospital District, 159 So.2d 231 (Fla. 1963)(pledge of gross revenues including ad valorem taxes and covenant to use ad valorem taxes); County of Volusia v. State, 417 So.2d 968 (Fla. 1982) (pledge of non-ad valorem revenues and covenant to maintain services).

from the state's Sunset Review Act under Section 215.3206, Florida Statutes, which makes trust funds subject to review and possible termination after such review, on a scheduled date applicable to each *trust* fund. The Inland Protection Trust Fund is scheduled for its next review in the year 2000. See Chapter *95-39,* Laws of Florida (under which the Trust Fund was last reviewed). Such sunset review could result in a cancellation of the Trust Fund, in the legislature's discretion. No bondholder can legally raise the defense of impairment of contract because each bondholder is placed on notice of the "subject *to* annual appropriation" clause in the Service Contract and the sunset review provisions of the Florida Statutes.[3]

B. Even if the bonds are deemed state revenue bonds, Article VII, Section 11(a) is not violated because the bonds will not pledge the full faith and credit and taxing power of the state, and therefore do not require an approving referendum.

We incorporate under this section the arguments made in section A above, which are equally applicable here. It is clear that state tax revenues are not pledged to payment of the bonds, when the payments are subject to annual appropriation and the legislature may *modify* or terminate the entire inland protection financing trust program at the end of any given year, as noted above.

Thus, if the bonds are deemed state bonds, Article VII, Section 11 is not violated because the bonds would be revenue bonds payable solely from sources other *than* state *tax* revenues. In order to properly understand the nature of the revenue bonds permitted to be issued under Article VII, Section 11(d), it is necessary to briefly review *the* history of *state* revenue bond financing.

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[3]It should be noted that SEC disclosure requirements, to which the bond issuance is subject by law, routinely mandates disclosure of such provisions to potential investors.

The commentary on the 1968 Constitution prepared by Talbot D'Alemberte notes that the 1885 Constitution on its face severely limited the issuance of state bonds. Indeed, under the 1885 Constitution, state bonds could only be issued to repel invasion or suppress insurrection. 26A Florida Statutes Annotated 95 (1995). Nonetheless, the legislature authorized, and the Supreme Court validated in numerous cases, revenue bonds for capital facilities payable from "rents" paid by state agencies which were derived from state tax revenue sources, Id. at 96. The Florida Development Commission was created and issued bonds payable from rents received from the state and its agencies. See State v. Florida Development Commission, 211 So.2d 8 (Fla. 1968)

The 1968 constitutional revision first specifically addressed state revenue bonds. Prior to the 1984 amendments, Article VII, Section 11(d) [then Section 11(c) of the 1968 Constitution] read as follows:

> Revenue bonds may be issued by the state or its agencies without a vote of the electors to finance or refinance the cost of capital outlay projects, and shall be payable solely from funds derived from sources other than state tax revenues or rents or fees paid from state tax revenues.

This language explicitly prohibited the issuance of bonds payable from "rents" or "fees". Accordingly, in 1969 the Florida Development Commission was deactivated and its functions transferred to the newly created Division of Bond Finance and to the State Board of Administration. See Chapter 69-230, Laws of Florida.

The 1984 amendments redesignated Section 11(c) of Article VII in the 1968 Constitution to Article VII, Section 11(d) and made significant changes to the wording of the subsection. The word "directly" was inserted into the phrase "from funds derived from sources other than state tax revenues" so that the phrase now reads "from funds derived directly from sources other than state tax revenues". The phrase "or rents or fees paid from state tax revenues" was dropped.

The Corporation's bonds will be paid from amounts received under the Service Contract (in the nature of a fee for services to be performed by the Corporation for the Department) and thus are payable from funds derived directly from sources other than state tax revenues. That the fees paid under the Service Contract originate as state tax revenues is not a bar to validity of the bonds because the prohibition of paying bonds from "rents or fees paid from state tax revenues" is no longer in the constitutional provision. As discussed above, the "subject to appropriation" nature of payments under the Service Contract obviates the argument that the bonds are payable from state tax revenues. Accordingly, even if the Corporation's bonds are bonds of a state agency, the bonds are valid revenue bonds under Article VII, Section 11(d).

C. Even if it should be deemed that the Corporation's bonds are *state* bonds, the proposed use of the proceeds of the bonds constitutes a state fixed capital outlay project as required by Article VII, Section 11(d) of the Florida Constitution.

It has already been determined from the above analysis that state taxes are not pledged to payment of the bonds. The only question remaining, if the bonds are deemed state bonds, is whether the bonds are issued for a "fixed capital outlay project".

There is no question that the state's underground and inland surface waters are considered as one of the state's most cherished and vital capital assets. See § 373.016(1), Fla. Stat., where it is stated that "The waters in the state are among its basic resources." The remediation, restoration and preservation of the surface and groundwaters has been established in the Act as "a matter of the *highest* urgency and priority, as these waters provide the primary source for potable water in this state." See § 376.30(1)(b), Fla. Stat.

It has long been accepted that the lands and waters of the state are capital assets which are the proper subject for a state bond program. The acquisition of environmentally endangered lands, waters, ecosystems, natural areas and recreation areas for conservation by means of bond financing is the subject of Chapter *259,* Florida Statutes. Throughout Chapter *259* the term

"lands" includes the lands and associated natural resources, endangered waters, water resources, surface waters, groundwaters and ecosystems. Section 259.032(3) states in part:

> "(3) The Governor and Cabinet sitting as the Board of Trustees of the Internal Development Trust Fund, may allocate *the* moneys from the fund in any one year *to* acquire the fee or any lesser interest in lands for the following public purposes:
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> . . .
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> (d) To conserve, protect, manage, or restore important ecosystems, landscapes, and forests, if the protection and conservation of such lands is necessary to enhance or protect significant surface water, groundwater, coastal, recreational, timber, or fish or wildlife resources which cannot otherwise be accomplished though local and state regulatory programs;" (emphasis added).

and in Section 259.032(11)(a):

> "(11)(a) The legislature recognizes that acquiring lands pursuant to this chapter serves the public interest by protecting land, air, and water resources which contribute to the public health and welfare, providing areas for natural resource based recreation and ensuring the survival of unique and irreplaceable plant and animal species." (Emphasis added).

Additionally, the entire Chapter 373, Florida Statutes is dedicated to the management, conservation and preservation of "waters in the state." (§ 373.019(8), Fla. Stat.), including "groundwater" and "surface water" (§ 373.019(9) and (10), Fla. Stat.). Part V of Chapter 373 deals with the financing of the acquisition or preservation of the state's water resources by the various water management districts, through taxation and bond financing.

If the acquisition and preservation of lands and waters is deemed by the state to be a capital project for the purpose of protection and conservation, it follows that the restoration of contaminated lands and waters for protection and conservation is likewise a capital project. The preservation, restoration and remediation of these waters is a capital project, just as the repair or restoration of a public road or bridge is a capital project, repair and restoration of capital

assets having been the subject of bond financing on a regular basis in Florida at all governmental levels.

Appellant cites Section 216.011(n), Florida Statutes that defines "fixed capital outlay" for planning and budgeting purposes and argues *that* the definition in that section excludes the project here. But the very opposite is true. "Fixed capital outlay" in that section means, in part, "real property (land, . . . including appurtenances . . ."). That is exactly what the capital project is in this *case* and that is the subject matter of the Act. The protection of lands in the Act includes of necessity waters within and part of the lands; as discussed above, the state has clearly deemed waters part of the lands wherein waters are situate, since both lands and waters together are the subject matter of Chapters *259* and 373, Florida Statutes. The two are inextricably linked. When one refers to a lake for acquisition or restoration, what is the bottom of the lake if not the land itself? Acquisition or restoration of endangered lands and waters clearly contemplates both as one. *See* Chapters *259* and 373, Fla. Stats.

Thus, any question regarding the clearly established law making this a financing of a capital asset must be laid to rest.

CONCLUSION

The circuit court properly validated the bonds and the Service Contract. The Corporation has statutory standing to bring the action below. The Corporation is not the state or a state agency. The issuance of the bonds do not pledge the state's taxing power and, serving a paramount public purpose, do not violate the lending of credit prohibition of Article VII, Section 10 of the Florida Constitution. In the event the Corporation is deemed an agency of the state, the proposed bond issuance does not violate Article VII, Section 11(d) of the Florida Constitution, in that payment of the bonds under the Service Contract is subject to annual appropriation by the legislature; there is no pledge of any state tax revenues to payment of the bonds, and there is no a debt or obligation as contemplated by said constitutional provisions. Specific statutory pronouncements in the Act confirm these conclusions. The bonds, being issued to restore and remediate the state's lands and waters from contamination, will finance clearly established capital projects.

This Court should affirm the final judgment of the circuit court validating issuance of the bonds by the Corporation and affirming the validity and enforceability of the Service Contract.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail to the Honorable William N. Meggs, State Attorney for the Second Judicial Circuit, Attention: C.W. Goodwin, Esq., Leon County Courthouse, Tallahassee, Florida, this 26th day of May, 1997.

Of Counsel