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SUPREME COURT OF FLORIDA
Case No. 91,424

AVATAR DEVELOPMENT CORP.
and AMIKAM TANEL,

Petitioners,

v.

STATE OF FLORIDA,

Respondent,
______________________/

On Appeal of a Petition for Review From the
Fourth District Court of Appeal

ANSWER BRIEF OF AMICUS CURIAE STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

Respectfully Submitted,

Department of Environmental
Protection

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PRELIMINARY STATEMENT

The Appendix contains eight diagrams of typical wetlands in Florida, the Permit at issue in this case, a partial list of Florida statutes in which the Legislature established that a violation of a rule or permit is a misdemeanor, and a copy of Part I of Chapter 17-312, Florida Administrative Code which was in effect at the time the Permit was issued.

All statutory references are to the 1997 version of Florida Statutes, unless otherwise noted.

The following definitions apply in this brief:

"DEP" or "Department" means the State of Florida Department of Environmental Protection.

"DER" means the State of Florida Department of Environmental Regulation, one of the predecessor agencies to DEP.

"WMDs" means Water Management Districts.

"Permit" means DEP dredge and fill permit Number 062094129 issued to the defendants which is at issue in this case.

"App." means Appendix.

STATEMENT OF THE FACTS AND CASE

DEP adopts the statement of the facts and case in the Petitioners' brief but adds the following information.

Avatar Development Corporation applied for a permit to conduct dredge and fill activities in wetlands[1] in Broward County, and the Permit was issued. Although the Permittee Avatar had the right under Chapter 120, Florida Statutes, to challenge any terms of the Permit, it did not do so, but accepted the Permit as written.

The Permit was not mandatory; in other words, Avatar was not required to undertake the work authorized by the Permit. However, once the work was commenced, the Permittee was obligated by Section 403.161(1)(b) to comply with all its terms and conditions.

Specific condition #5 on page 6 (App. 10) of the Permit required floating turbidity screens to be installed prior to the commencement of any construction. Turbidity is a measure of particles in the water which prevent light from penetrating the water column. Turbid water prevents plants from growing which in turn affects the health of the aquatic ecosystem. When the particles settle out of the water column, they can smother benthic organisms. Numerical standards for water quality have been adopted by rule. The turbidity standard is now found in Rule 62-302.530(70), F.A.C. Turbidity screens allow water to pass but filter out much of the particulate matter. Turbidity is a common problem in dredge and fill projects because soil is dislodged from the uplands surrounding the waterbody or the sediments in the waterbody are discharged to the water column.

[1] The term "wetland" was broadly defined in Section 403.911(7), Florida Statutes (1991), to include all waters within the Department's dredge and fill jurisdiction. In this case the activity was performed in a man-made canal system tributary to the Intracoastal Waterway.

SUMMARY OF THE ARGUMENT

Florida's wetlands are complicated and varied ecosystems. Their protection is mandated by the Florida Constitution. They cannot be properly managed through rigid statutory provisions. The Legislature had no choice but to establish a flexible scheme which provides for the application of engineering and scientific principles to individual dredge and fill projects through permits.

The specific statutes authorizing issuance of such permits ratified the Department's dredge and fill rules and required the Department to use those rules in the processing of the specific permit application at issue in this case. This ratification gave the Department's rules special status as legislatively-approved interpretations of statutory policies and guidelines. The statutes and rules provided the Department with extensive guidance and limitations on the exercise of its authority.

The statutes and ratified rules must be viewed in the context of the constitutional provision requiring environmental protection, Legislative policy pronouncements, and the entire dredge and fill regulatory scheme. An examination of the statutes makes it clear that the Legislature placed definite limits on the Department's authority to issue dredge and fill permits and set specific standards to guide discretion.

Many regulatory programs in Florida establish that a violation of rules or permits constitute misdemeanors. The broad interpretation advocated by the Petitioners would have an substantial effect on many regulatory programs in Florida.

ARGUMENT

INTRODUCTION

As Florida nears the end of the century, it is faced with a myriad of environmental challenges: maintaining clean air and clean water, providing high quality drinking water, and generally ensuring the continuation of natural qualities that make Florida unique. The pressure of explosive population growth with its attendant development strains the state's remaining wetland resources. Balancing wetland protection and growth presents one of the most complicated problems given to the Department by the Legislature.

Virtually every image of Florida is imbued with or related to surface waters or wetlands. From families playing in the surf to the water skiers at Cypress Gardens to quiet images of cypress trees festooned with Spanish moss, much of our quality of life is tied to the protection of surface waters and wetlands. They are an integral part of our commercial, recreational and esthetic life.

This environmental ethic is so strong in this state that it is memorialized in our Constitution. Article II, Section 7 provides:

> (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.

This provision of the Constitution cannot be dismissed lightly. It is an accurate and important reflection of the attitudes of Florida's citizens.

The Nature of Wetlands in Florida

At one time, approximately 50% of Florida was covered with wetlands.[2] Once development of the state commenced, extensive ditching and draining reduced that coverage to approximately 25% to 30%. The wetlands which remain are diverse. Even with a cursory understanding of the state, it is easy to see that topography, climate and wetlands of South Florida are remarkably different from those in North Florida. *In Swamp Song: A natural history of Florida's swamps*, Ron Larson characterizes freshwater forested wetlands as follows:

> Florida has many kinds of wetlands. Knowing more about them makes them more fascinating. Florida's wetlands can be divided into two broad categories: marshes (and glades like Florida's Everglades), where grasses, sedges, reeds, and other herbaceous plants are prevalent, and forested wetlands, where trees are prevalent. Forested wetlands in turn can be divided into two categories: swamps and hydric hammocks. Swamps and hammocks are seasonally flooded forests.
>
> Swamps are divided into two categories: estuarine and freshwater. Estuarine swamps occur near the ocean and are dominated by mangroves—one of the few trees tolerant of salt water. In Florida there are three types of freshwater swamps: depression swamps, river swamps, and strands. Depression swamps occur in low areas that are flooded primarily by rain rather than runoff. Water also percolates from surrounding higher ground, or, in the case of large depression swamps such as the Okefenokee, streams feed into the depression. Six categories of depression swamps are recognized: basin swamps, shrub bogs, bayheads, cypress domes, gum swamps, and Carolina bays. . . .
>
> River swamps are found along rivers and creeks and are also known as floodplain swamps. They are inundated during periods of high runoff. . . . There are two types of river swamps in Florida: alluvial and blackwater.

[2] J. Fretwell, J. Williams, and P. Redman, National Water Summary on Wetland Resources, United States Geological Survey, 1996, p. 153.

> Strands are swamps that in some respects occupy an intermediate position between depression swamps and river swamps. . . .
>
> Swamps are usually fairly easy to identify. Hydric hammocks are more difficult. . . . Because hammock soils are usually fully saturated, however, [hydric hammocks] are indeed forested wetlands.[3]

This extended quote demonstrates the immense variety in freshwater forested wetlands. It doesn't address the types of herbaceous (non-forested) freshwater or estuarine wetlands. Simplified cross-section diagrams of eight wetlands described by Larson are included in the Appendix. (App. 1-4.) As these diagrams demonstrate, each forested wetland type supports a different upland and wetland plant community. The ecosystems encompassed in a wetland are not simply a typical wetland plant community. The "wetland" ecosystem is a complicated system which includes all of the animals which live in or use the wetland. Wetland ecology is further complicated by the dynamic interaction of the plants and animals to rainfall, surface water runoff, and cycles of flood, drought and fire.

The United States Geological Survey summarized the benefits of Florida's wetlands recently in its National Water Summary on Wetland Resources:

> Florida's wetlands have considerable economic and environmental value. In river basins, flood-plain wetlands reduce downstream flood damages by retaining overflows in backwater ponds and depressions. Organic soils in many wetlands can store large quantities of water and release it slowly to plants during drought. Wetlands can filter out and accumulate pollutants from surface water—some cypress depressions in Florida have been used specifically for wastewater treatment. Many rare or endangered plant

[3] R. Larson, Swamp Song: A Natural History of Florida's Swamps, 1995, pp. 1-2.

> and animal species, such as the insectivorous white-top pitcherplant and the snail kite, live in Florida wetlands. Wetlands provide breeding and feeding grounds for resident and migratory birds. Coastal wetlands such as salt marshes, mangrove swamps, and seagrass beds are nursery areas for sea turtles and economically important species such as shrimp, blue crab, oyster, mullet, spotted seatrout, and red drum.[4]

The proper understanding, much less management, of wetlands requires special expertise. Wetlands do not lend themselves to broadly applicable statutes as the Petitioners imply. The diversity of Florida's wetlands, coupled with the constitutional mandate and development pressures demands a flexible approach.

This special expertise needed to fully consider all of the issues raised in wetland impacts is vividly presented by the First District Court of Appeal in Florida Power Corp. v. State, Dept. of Environmental Regulation, 638 So.2d 545 (Fla. 1st DCA 1994). This case involved the clearcutting of a corridor through the Reedy Creek Swamp by Florida Power Corporation for the installation of a power line. The clearcutting changed the mature hardwood swamp into a herbaceous marsh. While the total acreage of wetlands remained the same, the Court upheld the Department's finding that there are important differences between these types of wetlands; that not all wetlands have the same value; and that the values can only be properly evaluated after intensive scientific investigation and analysis. The Court listed some of the things the Department had to consider in the permit application:

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[4] J. Fretwell, J. Williams, and P. Redman, National Water Summary on Wetland Resources, United States Geological Survey, 1996, p. 153.

> In making the latter determination [of whether the project is contrary to the public interest], however, DER must consider not only the impact of the ICP project, but also "the impact of projects which are existing or under construction or for which permits or jurisdictional determinations have been sought" and "the impact of projects which are under review, approved, or vested pursuant to s. 380.06, or other projects which may reasonably be expected to be located within the jurisdictional extent of waters, based upon land use restrictions and regulations. Sec. 403.919, Fla. Stat. (1989). Florida Power Corp., 638 So.2d at 562.

The Legislature has responded to the competing pressures of environmental protection and land development by creating a comprehensive, flexible statutory scheme which weighs the interests to be protected and fostered. The scheme relies almost exclusively on a permitting system through which persons who desire to impact protected wetlands must methodically demonstrate through the application of engineering and scientific principles that they have met the statutory criteria for issuance of a permit. These engineering and scientific principles are applied to the specific wetland affected by the proposed project. Because of the unique size, shape, composition, function and impact of every wetland, projects must be designed with those unique characteristics in mind. These are not projects which can properly be undertaken with a generic permit.

The Legislature had several options. It could have taken a cookie-cutter approach and established comprehensive mandatory permit conditions which would have been applicable in all cases. It could have required that North Florida cypressheads be treated the same as South Florida sawgrass prairies. It could have filled pages and pages of statute books with permit

conditions to cover all possible biological, hydrological, and engineering conditions. Or it could have decreed that all wetlands are protected, or that no wetlands are protected. But these options would have monopolized the Legislature's time for years or been an abrogation of its responsibility. Instead, the Legislature exercised its prerogative and delegated, within strict policy limits and with specific guidance, the responsibility to implement the guidance and policy in particular cases to the expertise in the Department.

As described in the following section, this was not a *carte blanche* delegation to the Department.

I. THE LEGISLATURE SPECIFICALLY APPROVED THE RULES UNDER WHICH THIS PERMIT WAS ISSUED.

The statutes and rules involved in this case are part of a larger interrelated web of wetland and water quality protection legislation, which, in turn are part of the overall program of environmental protection in Florida.

The Permit involved in this case, like all permits issued in the Department, was issued under statutory authority and pursuant to a comprehensive set of regulations. Unlike most permits, however, this particular Permit was issued at a time when the Department's dredge and fill rules were undergoing a transition. The rule and statutory basis for issuance of the Permit requires a description of the repeal and concurrent preservation of the underlying statutory authorization.

Prior to 1993, the Department's dredge and fill rules apropos to this action were authorized in Part VIII of Chapter 403, Florida Statutes. The

short title of Part VIII was the "Warren S. Henderson Wetlands Protection Act of 1984" commonly referred to as the Henderson Act. Section 403.912(1) (1991) authorized DER to "adopt rules to carry out the provisions of ss. 403.91-403.929, including appropriate regulatory provisions governing activities in waters to their landward extent." The legislative charge was to use polices in all of the statutes in the Henderson Act along with other "appropriate regulatory provisions" to guide the Department in developing the rules. These rules were promulgated and contained in Chapter 17-312, F.A.C. (App. 27)[5]

In 1993, in an effort to integrate surface water quality protection issues (dredge and fill) with water quantity control issues (stormwater and surface water management), the Legislature passed Ch. 93-213, Laws of Florida, effective May 12, 1993, which repealed most of the Henderson Act, and transferred many of its provisions to Chapter 373, Florida Statutes.

Section 373.414(9) (1993), required the Department and WMDs to adopt uniform rules by July 1, 1994. However, while the uniform rules were being developed and going through the Chapter 120, Florida Statutes, rule-making process, the existing Department rules had to remain in effect. Otherwise the constitutional and statutory mandate to protect water quality through regulation of activities in wetlands would be utterly defeated. The

[5] In 1994, the title of most of the Department's rules was changed from Title 17 to Title 62, Florida Administrative Code.

legislature recognized and solved this problem by ratifying and authorizing the Department's dredge and fill rules through a number of savings clauses.

While the uniform rules were adopted by July 1, 1994, they were not immediately effective because of numerous rule challenges, which were consolidated and tried before the Division of Administrative Hearings. In an extensive Final Order, the hearing officer upheld Chapter 62-312, F.A.C. This Final Order was appealed and was affirmed, per curium, by the Fourth District Court of Appeals. St. Joe Paper Co. v. Suwannee River Water Management District, 674 So.2d 141 (Fla. 4th DCA 1996). One of the arguments put forth by the challengers and rejected by the court was that the authorizing legislation represented an unconstitutional delegation of authority.

The new uniform rules became effective October 3, 1995. Until that date, the existing Department dredge and fill rules were saved in §373.414(9) (1993), which provided that until the new uniform rules were in effect, the existing DEP rules were "deemed authorized under this part and shall remain in full force and effect." The WMDs and DEP retained the authority to amend those rules. This section explicitly adopts, approves and ratifies the rules under which the Department issued Avatar's Permit. Thus, the Legislature affirmed the Department's interpretation of statutory policy, as manifested in the existing dredge and fill rules in Chapter 17-312, F.A.C.

In §373.414(14) (1993), the Legislature required the Department to continue to process dredge and fill permit applications under existing rules until the uniform rules were effective:

> An application under this part for dredging and filling or other activity, which is submitted and complete prior to the effective date of rules adopted pursuant to subsection (9) **shall be reviewed under the rules adopted pursuant to this part and part VIII of chapter 403 in existence prior to the effective date of the rules adopted pursuant to subsection (9)** and shall be acted upon by the agency which received the application, unless the applicant elects to have such activities reviewed under the rules of this part as amended in accordance with subsection (9). (Emphasis supplied.)

Existing permits and permits issued prior to the effective date of the uniform rules are subject to the savings provision of §403.811 which provides:

> Permits or other orders addressing dredging and filling in, on, or over waters of the state issued pursuant to this chapter or s.373.414(9) before the effective date of rules adopted under s.373.414(9) and permits or other orders issued in accordance with s.373.414(13), (14), (15), and (16) shall remain valid through the duration specified in the permit or order, unless revoked by the agency issuing the permit. . . . A violation of a permit or other order addressing dredging or filling issued pursuant to this chapter is punishable by a civil penalty as provided in s. 403.141 or a criminal penalty as provided in s. 403.161.

In sum, Ch. 93-213 repealed the underlying statutory basis for the Department's existing dredge and fill regulatory program in Chapter 403, but transferred the standards and guidelines to Chapter 373, and passed several saving provisions to allow the existing program to operate unaffected by the repeal until the uniform rules were effective. Section 373.414(9) (1993) ratified and "deemed authorized" the existing dredge and fill rules in Chapter

17-312, F.A.C.; §373.414(14) (1993) obligated the Department to review applications and issue dredge and fill permits under the ratified rules; and §403.811 (1993) validated existing dredge and fill permits issued under the Henderson Act, and gave specific notice that permits issued after the enactment of §373.414(14) (1993) and prior to the effective date of the uniform rules would be subject to §403.161.

These are the rules and statutes under which Avatar's Permit was issued.

II. CHAPTER 403 CONTAINS ADEQUATE GUIDELINES AND STANDARDS TO LIMIT THE DEPARTMENT'S DISCRETION IN IMPLEMENTING A WETLANDS REGULATORY PROGRAM

A. The specific statutory and rule provisions authorizing the Department to issue this Permit contain sufficiently specific standards.

Prior to May 12, 1993, §403.913, delineated the instances in which DER could require a dredge and fill permit. The legislative criteria for issuing dredge and fill permits was found in §403.918(1991). Under §403.918(1991), a project was permittable if it was found not to violate water quality standards, and to be "not contrary to the public interest," however, in certain special waters, the project had to be "in the public interest" to be permitted. Section 403.918(2)(a)(1991) specified seven criteria which the agency had to consider and balance in deciding whether a project was not contrary to the public interest.

Those criteria were:

1. Whether the project will adversely affect the public health, safety, or welfare or the property of others;

2. Whether the project will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

3. Whether the project will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. Whether the project will adversely affect the fishing or recreational values or marine productivity in the vicinity of the project;

5. Whether the project will be of a temporary or permanent nature;

6. Whether the project will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and

7. The current condition and relative value of functions being performed by areas affected by the proposed activity.[6]

If the project failed the seven-prong test, §403.918(2)(b)(1991) directed the Department to consider measures proposed by the applicant to mitigate the adverse impacts of the project. In this case, the Permit contains mitigation in the form of the creation "of a 0.40 ac[re] mangrove area fronted by 270 linear f[ee]t of riprap." (App. 5)

Section 373.414(14) (1993) required the Department to refer to the dredge and fill rules in processing permit applications. Rule 17-312.060, **Procedures to Obtain a Permit**, (App. 45) [ratified by §373.414(4)] provides in pertinent part in section (10) that:

> During the processing of the permit application, the Department shall determine whether or not the application, as submitted, meets the criteria contained in Sections 403.918(1) and (2)(a) 1.-7. and 403.919, F.S. If the project, as designed, fails to meet the permitting criteria, the Department shall discuss with the applicant any

[6] These criteria are now contained in §373.414(1), Florida Statutes.

modifications to the project that may bring the project into compliance with the permitting criteria. The applicant shall respond to the Department, in writing, as to whether or not the identified modification to the proposed project is practicable and whether the applicant will make the identified modification. The term "modification" shall not be construed as including the alternative of not implementing the project in some form. When the Department determines that the project, as submitted or modified, fails to meet the criteria contained in Sections 403.918(1) and (2)(a)1.-7. and 403.919, F.S., the applicant may propose mitigation measures to the Department as provided in Chapter 17-312, Part III, F.A.C.)

Thus, the ratified rules required the Department to refer to the repealed statutory provisions in 403.918 (1991) for processing permits.

Rule 17-312.080, **Standards for Issuance or Denial of a Permit,** (App. 52) [also ratified by §373.414(9) (1993)] contains a detailed exposition of what an applicant had to demonstrate to obtain a permit, and the provisions which could be included in a permit. In particular, Rule 17-312.080(4) provided that "A permit may contain specific conditions reasonably necessary to assure compliance with Section 403.918(2), F.S." (App. 52)

As stated above, in addition to meeting the seven-prong public interest test, the applicant for a permit had to provide the Department with reasonable assurance that water quality standards would not be violated. Rule 17-312.060(10), F.A.C. and Section 403.918(1)(1991). The Department regulates water quality under Section 403.088. Section 403.088(1) provides that no person may discharge into waters without authorization any waste which reduces the quality of the receiving water below the classification established for it by the Department.

The classification of waters is authorized in §403.061(10) (1993). These classifications are now found in Chapter 62-302.600, F.A.C. Section 403.061 provides initially the Department has the power and duty to control and prohibit pollution in accordance with law and rules promulgated by it. Section 403.061(10)(1993) requires the Department to "Develop a comprehensive program for the prevention, abatement, and control of the pollution of the waters of the state."

The Department was also granted authority under §403.061(9)(1993) to "Adopt a comprehensive program for the prevention, control, and abatement of pollution of the air and waters of the state, ..." The specific water quality standards are set pursuant to §403.061(11)(1993) which provides that the Department will "Establish ambient air quality and water quality standards for the state as a whole or for any party thereof. . . ." Section 403.062 provides:

> The department and its agents shall have general control and supervision over underground water, lakes, rivers, streams, canals, ditches, and coastal waters under the jurisdiction of the state insofar as their pollution may affect the public health or impair the interest of the public or persons lawfully using them.

The Legislature provided sundry statutory and ratified rule provisions to guide and limit the Department in issuing this Permit.

B. The Permitting Provisions Should be Read in the Context of the Legislature's Declarations of Policy.

If any question arises as to the applicability of the nondelegation doctrine, the court should look at the context in which the regulatory

program was established. The reasonableness of a legislative delegation must be read in the context of the problem being addressed. Clark v. State, 395 So.2d 525, 528 (Fla. 1981). Article II, Section 7 of the Florida Constitution provides a forceful statement of the will of the people of Florida with respect to environmental protection and the regulation of activities affecting the state's air and water quality.

In its preamble to the Henderson Act (Chapter 84-79, Laws of Florida, which provided the statutory basis for enacting the rules and issuing the Permit in this case) the Legislature said:

> WHEREAS, Florida's wetlands are a major component of the essential characteristics that make this state an attractive place to live. . ., and
>
> WHEREAS, . . . continued elimination or disturbance of wetlands in an uncontrolled manner will cause extensive damage to the economic and recreational values which Florida's remaining wetlands provide, and
>
> WHEREAS, it is the policy of this state to establish reasonable regulatory programs which provide for the preservation and protection of Florida's remaining wetlands. . . .

*   *   *

The Legislature expanded on the Article II, Section 7 provision with declarations and policy statements set forth in §403.021. Section 403.021(1)(1993) provided:

> The pollution of the air and waters of this state constitutes a menace to public health and welfare; creates public nuisances; is harmful to wildlife and fish and other aquatic life; and impairs domestic, agricultural, industrial, recreational, and other beneficial uses of air and water.

Section 403.021(2)(1993) provides that the public policy of the state is to conserve and protect the quality of the waters of the state "for the propagation of wildlife and fish and other aquatic life, and for domestic, agricultural, industrial, recreational, and other beneficial uses. . . .

Section 403.021(5)(1993) provided:

> It is hereby declared that the prevention, abatement, and control of the pollution of the air and waters of this state are affected with a public interest, and the provisions of this act are enacted in the exercise of the police powers of this state for the purpose of protecting the health, peace, safety, and general welfare of the people of this state.

Section 403.021(6)(1993) provided:

> The Legislature finds and declares that control, regulation, and abatement of the activities which are causing or may cause pollution of the air or water resources in the state and which are or may be detrimental to human, animal, aquatic, or plant life, or to property, or unreasonably interfere with the comfortable enjoyment of life or property be increased to ensure conservation of natural resources; to ensure a continued safe environment; to ensure purity of air and water; to ensure domestic water supplies; to ensure protection and preservation of the public health, safety, welfare, and economic well-being; to ensure and provide for recreational and wildlife needs as the population increases and the economy expands; and to ensure a continuing growth of the economy and industrial development.

The Henderson Act preamble and the policy declarations in Section 403.021(1993) highlight the importance the Legislature placed on adequate protection of the state's water resources, and the need for wetlands and the functions provided by those wetlands and other waterbodies.

Chapter 93-213, Laws of Florida, served in part to consolidate the surface water management and dredge and fill regulation programs of the

WMDs and the Department. The preamble to Ch. 93-213 reiterates the need for protection of Florida's environment and natural resources through "a comprehensive policy for protecting and conserving its environment and natural resources."

Prior to the enactment of Ch. 93-213, Laws of Florida, Part IV of Chapter 373 concerned the management and storage of surface waters. Section 373.414 provided for the regulation by the WMDs of isolated wetlands not regulated by DEP. Sections 373.016(2), again set forth the Legislature's concerns about the proper management of the waters coupled with the protection of the natural resources and promotion of the public's health, safety and welfare.

Section 373.016(2), provided:

> (3) The Legislature recognizes that the water resource problems of the state vary from region to region, both in magnitude and complexity. It is therefore the intent of the Legislature to vest in the Department of Environmental Regulation or its successor agency the power and responsibility to accomplish the conservation, protection, management, and control of the waters of the state and with sufficient flexibility and discretion to accomplish these ends. . . .

The declarations of the Legislature concerning the scope, complexity, and inter-relatedness of surface water, ground water and wetlands protection coupled with the explicit public, health, safety and general welfare impacts demonstrate the underlying dredge and fill permitting statutes are just one cog in the comprehensive and complex machinery of environmental protection.

C. The Permitting Provisions Should Also be Read in the Context of the Entire Dredge and Fill Regulatory Program.

In addition to the provisions concerning only permit issuance, the Legislature has spoken often and at length on delineating the Department's authority in dredge and fill issues. Section 403.918(2)(b)(1991) contains a detailed description of mitigation which may be available to a permit applicant to save a project if it does not otherwise meet the "not contrary to the public interest" test.

Under §403.813 (1991), the legislature described which dredge and fill permits could be issued by the Department's district offices. That section also designated the projects which could be permitted with "short-form applications," and established 17 dredge and fill activities which were specifically exempted from permitting. In §403.813(2)(f)(1991) the legislature exempted maintenance dredging of existing canals "provided that control devices are utilized to prevent turbidity." In §403.813(2)(g)(1991) the legislature exempted maintenance of existing insect control structures so long as turbidity control devices were used.

In addition to the specific criteria, sections 403.916, 403.918, 403.92, 403.921, 403.923 and 403.925(1991) concern different aspects of permitting. Section 403.816(1991) contained special provisions for maintenance dredging of permitted navigation channels, port harbors, turning basins, harbor berths, and beach restoration projects. Sections 403.918(3), (4) and (5)(1991) described the use of wetlands for natural stormwater and

domestic waste treatment, and the special protection to be afforded estuaries and lagoons from the destruction caused by vertical seawalls.

In addition to the permitting program, the legislature delegated other responsibilities which concerned wetlands and water quality protection. Section 403.913(1991) delineated a number of areas in which the Department could not assert its dredge and fill jurisdiction. Section 403.914(1991) authorized the Department to provide dredge and fill jurisdictional statements to landowners.

Sections 403.93 through 403.938(1991) concerned the regulation of the alteration of mangroves, including permit requirements, exceptions, restoration requirements, enforcement provisions and variance relief. Section 403.933(1991) provided that the permitting criteria for mangrove alteration "shall be based solely upon the dredge and fill permit criteria set forth in this chapter."

The extensive recitation of statute, rule and constitutional provisions proves the Legislature recognized the imperative need for protecting the water resources of the state. It also placed limits on the Department's discretion while at the same time appreciating the complexity and variability inherent in dredge and fill regulation. The balance it struck satisfies the constitutional requirements of Article II, Section 3, of the Florida Constitution.

D. The Specific Conditions of the Permit Were Reasonable Interpretations by the Department of the Statutes and Rules.

Turning to the specific conditions of the Permit at issue in this case, it is clear there was sufficient statutory and rule guidance for their inclusion in the Permit. As described above, Rule 17-312.080(4), F.A.C., provided that "A permit may contain specific conditions reasonably necessary to assure compliance with Section 403.918, F.S." (App. 52)

Specific Condition #3 (App. 9) which required 48 hour notice prior to commencing work meets the criteria of Rule 17-312.080(4) as a "condition necessary to assure compliance" with the statute. By getting prior notice, the Department has the opportunity to observe the actions of the permittee to ensure the permit is not violated. The case at bar demonstrates the necessity for the notice provision in preventing violations of the statute.

Specific Condition #5 (App. 10) which required turbidity screens also meets the criteria of Rule 17-312.080(4) as a "condition necessary to assure compliance" with the statute.

Even without the special status of the ratified dredge and fill rules in this case, the specific conditions are reasonable under the enabling statutes. Section 403.021(6) requires the Department to "Exercise general supervision of the administration and enforcement of the laws, rules and regulations pertaining to air and water pollution." Section 403.021(8) requires the Department to "Issue such orders as are necessary to effectuate the control

of air and water pollution and enforce the same by all appropriate administrative and judicial proceedings."

The legislative policy and direction to the Department is to enforce the environmental laws and strive to prevent pollution. The two specific conditions at issue in this case are merely exercises of ministerial discretion in the exercise of this general grant of authority.

III. SECTIONS 403.161(1)(B) AND 403.161(5) DO NOT CONSTITUTE AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY.

Comparing the legislative pronouncements and enunciated policies, and the level of detail in establishing the permitting criteria and permitting exemptions to the situations presented in this Court's prior decisions in Conner v. Joe Hatton, 216 So.2d 209 (Fla. 1981), B.H. v. State, 645 So.2d 987 (Fla. 1994), State v. Cumming , 365 So.2d 153 (Fla. 1978), and Clark v. State, supra, it is clear that delegation to the Department achieves the limitations on delegated discretion necessary to satisfy constitutional requirements.

Rosslow v. State, 401 So.2d 1107 (Fla. 1981), provides a good example of the circumstance under which a legislative regulatory scheme has satisfied the constitutional requirements. It also is a case which is most analogous to the case at bar. In Rosslow, the defendant was charged criminally with transporting citrus fruit without an appropriate certificate issued by the Department of Citrus. Section 601.46(1), Florida Statutes, made it unlawful for any person to transport fresh citrus fruit without a

certificate of inspection. Violation of this section was made a misdemeanor in §601.72. Notwithstanding the outright ban in §601.46(1), the Legislature had given the Department of Citrus the authority to enact rules "as it may deem expedient" to permit the sale or transport of citrus fruit without a certificate of inspection under certain limitations.

Rosslow argued that delegation of the power to exempt certain categories of fruit from the certificate requirement was unconstitutional because the Department was deciding which acts would constitute a crime. In analyzing the issue, the Supreme Court pointed out that §601.46(1) "explicitly sets forth what constitutes unlawful action under the section, transporting citrus without an inspection certificate." Rosslow at 1108. The second step in the Supreme Court's analysis was to examine the statutory policy for deciding which activities could be exempted by the Department of Citrus from the certificate requirements. The majority decided the statute "sufficiently defines and limits the authority of the Department of Citrus in creating exceptions to the certificate requirements to meet all constitutional mandates." Rosslow at 1108.

This is virtually identical to the situation at bar. Section 403.161(1)(b) provides that "It shall be a violation of this chapter, and it shall be prohibited for any person . . . (b) . . . to violate or fail to comply with any rule, regulation, order, permit . . . issued by the department pursuant to its lawful authority." Under the environmental permitting scheme, no person is

allowed to pollute without a permit, just as in Rosslow, no person is allowed to transport citrus without a certificate. As in Rosslow, the elements of the violation are specifically set forth in the 403.161(1)(b): Any person failing to comply with a permit issued by the Department pursuant to its lawful authority is guilty of a violation of Chapter 403.

Section 403.161(5), Florida Statutes, establishes the concomitant criminal liability. It provides that any person who willfully commits a violation of 403.161(1)(b), Florida Statutes, is guilty of a first degree misdemeanor. The Legislature has established the elements of this crime as: Any person willfully failing to comply with a permit issued by the Department pursuant to its lawful authority is guilty of a misdemeanor.

The second prong of the Rosslow analysis requires a determination of legislative limits placed on DEP's authority to permit dredge and fill activities. The trial court should have taken the time to analyze DEP's underlying statutory authority. As described in the Statement of the Facts and Case, the situation presented here is different from most in that the Legislature actually authorized DEP's dredge and fill permitting and regulatory program as enacted through DEP's rules. That authorization gave those rules a special status, an endorsement by the Legislature that the implementation of the underlying statutes by DEP was an appropriate implementation of the legislative policy. There can be no other interpretation of the effect of the legislative ratification. Otherwise, one would have to find the Legislature

approved rules without knowing whether they properly implemented the policies in the Henderson Act or worse, the Legislature approved the rules while actually disapproving of the way the Henderson Act was implemented. Either option is untenable.

IV. THE NARROW INTERPRETATION OF THE NON-DELEGATION DOCTRINE ADVOCATED BY THE PETITIONERS WOULD HAVE FAR-REACHING EFFECTS ON THE ENFORCEMENT OF REGULATORY PROGRAMS IN FLORIDA

The Department did a cursory search of Florida Statutes (1995) and found numerous provisions in which the Legislature established violations of permits and rules as misdemeanors. A list of those provisions is included in the Appendix. (App.79) The sheer volume alone of statutes potentially affected by this case does not address the question of whether each of these statutes meets constitutional constraints. That question must be analyzed on a case by case basis. However, this list is included merely to emphasize the magnitude of the issue and to highlight that the permitting structure established by the Legislature is not unique to the Department.

Further, the Legislature has decided that civil enforcement remedies such as injunctive relief, damages, civil penalties, damages or permit revocation, are not sufficient to ensure compliance with these regulatory programs. In some cases the threat of civil enforcement does not provide enough incentive. The panoply of civil and criminal enforcement options is needed in order to meet the mandate for environmental protection in our constitution,.

CONCLUSION

Wetlands are a unique and integral part of Florida. Dredging and filling those wetlands in a manner which minimizes impacts and furthers constitutional mandates is a complicated issue. It can only be properly accomplished through the flexible, case-by-case application of legislative standards. The limitations imposed by the Legislature on the Department's discretion coupled with the myriad statutory and constitutional policy statements provide more than sufficient guidance to the Department in implementing the dredge and fill program.

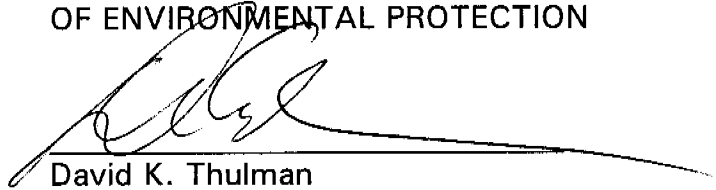
Although the provisions cited in this brief concerning the ratification of the Department's rules and the guidance given to the Department are complicated, the alleged violations in this case were simple and straightforward: the defendants failed to give the Department proper notice and failed to install the required turbidity curtains.

For the reasons state above, the decision of the Fourth District Court of Appeal should be affirmed.

CERTIFICATE OF SERVICE

I certify a copy of the foregoing was sent by U.S. Mail on February 16th, 1998, to Jonathan A. Glogau, PL-01, The Capitol, Tallahassee FL 32399-1050,; James P. McLane, 675 Broward County Courthouse, Ft. Lauderdale FL 33301; and Samuel S. Fields, P.O. Box 1900, Ft. Lauderdale FL 33302.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



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