OA 5-4-98

91424

FILED
SID J. WHITE
FEB 16 1998
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

Treat as Original

SUPREME COURT OF FLORIDA

CASE NO. 91,424

AVATAR DEVELOPMENT CORP.
and AMIKAM TANEL,

Petitioners

vs

STATE OF FLORIDA,

Respondent

RESPONDENT'S ANSWER BRIEF

On Review of a Decision of the
Fourth District Court of Appeal

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Jonathan A. Glogau
Assistant Attorney General
Fla. Bar No. 371823
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300, ext. 4817

CERTIFICATE OF INTERESTED PARTIES

Respondent concurs in Petitioners' listing of interested parties.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

FLORIDA STATUTES

FLORIDA CONSTITUTION

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioners' statement of the case and facts.

SUMMARY OF ARGUMENT

Chapter 403 (and the particular sections thereof under challenge in this appeal) are not criminal statutes for purposes of analysis under the nondelegation doctrine. This statute is a comprehensive administrative program (also including chapter 373) for protection of the environment. As relevant to this case, the chapter provides authority for a dredge and fill permitting program. Because of the importance of ensuring compliance with this program, the legislature made willful violation of, *inter alia*, permits a misdemeanor. This decision by the legislature does not transform what is clearly an administrative program into a criminal statute.

Treated as a delegation of administrative authority, chapter 403 meets the standards for a lawful delegation of authority. The standards in the statute allow this court to determine if the agency is acting within its authority. The legislature has made the fundamental policy choices leaving only implementation to the agency.

If treated as a criminal statute, chapter 403 is still a valid delegation of authority from the legislature. Even in the criminal context, there can be delegations to administrative agencies. Such flexibility is necessary in a program such as dredge and fill where each individual project requires agency expertise in

administration of the program. The standards for such a delegation are met by chapter 403. The legislature has made the fundamental policy decisions leaving only implementation of those policies to the agency.

This statute fully informs a permit holder what the "crime" is. *Willful* violation of the terms of a permit is a misdemeanor. There is no due process violation.

Chapter 403 does not constitute a violation of Art. III, § 11(a)(4), Fla. Const. Granting of a permit with specific conditions does not constitute the making of law in any context. If it did, Petitioners' first argument would require that the law be found unconstitutional. Since the Petitioners' first argument is unavailing, their second argument here is meritless. The granting of a permit is not the passage of a special law.

The decision of the District Court below should be AFFIRMED.

ARGUMENT

THE APPEALS COURT CORRECTLY FOUND THAT §§ 403.161(1)(b) AND 403.161(5), FLA. STAT., WERE NOT UNCONSTITUTIONAL DELEGATIONS TO AN ADMINISTRATIVE AGENCY IN VIOLATION OF ART. I, § 18 AND ART. II, § 3, FLA. CONST.

The District Court below properly found that §§ 403.161(1)(b) and 403.161(5), Fla. Stat., were not invalid delegations of authority to the Department of Environmental Protection, holding:

> We conclude that the statute in question here is comparable to that upheld in *Bailey* and distinguishable from the statute disapproved of in *B.H.* We also conclude that setting terms and conditions for a permit to dredge and fill, when authorized by a legislative program which requires attention to the unique conditions of the site, is especially suitable for determination by an administrative body. Sections 403.161(1)(b) and 403.161(5) do not unconstitutionally delegate legislative authority to an administrative agency.

State v. Avatar Development Corp., 697 So.2d 561, 566 (Fla. 4th DCA 1997)

Chapter 403 Is an Administrative Program for the Protection of the Environment, Not a Criminal Statute

In *B.H. v. State*, 645 So. 2d 987 (Fla. 1994), this court suggested that there is a heightened level of scrutiny for delegations in a criminal statute, but did not articulate what that standard was. It was not necessary in *B.H.* because the court found there were **no** standards in that statute. Even if such a standard can be

found in *B.H.*, it would not apply in this case. *B.H.* involved a statute, the sole purpose of which was to define the **felony** of juvenile escape; this case involves chapter 403, Fla. Stat., clearly a statute designed to set up a regulatory structure for the protection of the environment, the willful violation of which the legislature has defined as a misdemeanor. § 403.161(5), Fla. Stat. When the purpose of the legislation is to delegate to the agency the power to define a crime, like in *B.H.*, heightened scrutiny may be appropriate. However, when the purpose of the legislation is clearly to set up a complex administrative program to accomplish valid legislative goals, the legislature can help ensure compliance with that program by making violation of the program a misdemeanor without transforming the statute into a criminal law requiring that heightened scrutiny.

In *Bailey v. Van Pelt*, 82 So. 789 (Fla. 1919), this Court was faced with a statutory scheme similar to that at issue here, and a similar claim of unconstitutionality. Chapter 7345, § 19, Laws of Florida, provided:

> Any person who shall knowingly and willfully violate or fail to keep or perform any rule or regulation of said [Livestock Sanitary] board shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not exceeding one thousand dollars ($1000), or by imprisonment not exceeding one year, or by both such fine and imprisonment.

Id. at 792. The defendant in *Bailey* was charged with failure to comply with a tick

eradication order from the Livestock Sanitary Board. Upon a writ of *habeas corpus*, the defendant claimed that the above referenced statute was an unlawful delegation of legislative power to administrative officers. *Id.* at 790. This court held:

> The authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense.

Id. at 794. The legislature had set up a regulatory program and determined it to be of such importance that violation of orders of the Board were to be punished as misdemeanors. *Bailey* has never been overruled and the settled expectations over the last 80 years has been that such a decision by the Legislature was a valid delegation of authority. In reliance on those settled expectations, the legislature has numerous times created an administrative program and determined that violation of its rules would be punished as a misdemeanor. [See brief *amicus curiae* of the Department of Environmental Protection.]

Subjecting willful violators of the administrative program to misdemeanor punishment does not transform a lawful delegation of administrative power into an unlawful delegation of legislative power. The same is true in the instant case.

> The statute and not the administrative regulation defines the offense and imposes the penalty.

Id. In the instant case, it is the statute that defines the crime - violation of the permit conditions; and it is the statute that imposes the penalty - a fine of not more than $10,000 or 6 months in jail, or both for each offense. It is the State Attorney who brings charges before a county court; the agency does not prosecute the offense before an administrative tribunal.

Chapter 403, Fla. Stat., Is a Valid Delegation of Civil Regulatory Administrative Authority

Applying the standards for delegation of legislative authority set forth in the civil case law, the provisions of chapter 403, Fla. Stat., are valid delegations of administrative authority. These standards give the DEP definitive and limited guidelines to implement the policy of the legislature through its expertise and knowledge of the environment. That policy clearly being protection of the environment from pollution, these statutory guidelines are sufficient to "enable the agency and the courts to determine whether the agency is carrying out the legislature's intent," thereby satisfying the test in *DOI v. Southeast Volusia Hosp. Dist.*, 438 So. 2d 815, 819 (Fla. 1983). These standards constitute a legislatively determined fundamental policy choice by the legislature, not an open-ended delegation of authority. *B.H. v. State*, 645 So. 2d 987, 994 (Fla. 1994).

Ch. 403, Fla. Stat., Contains Reasonably Definite Standards Showing That the Legislature Has Made the Fundamental Policy Decisions with Regard to Dredge and Fill Permitting

In the enactment of the dredge and fill permitting program within DEP, the legislature has made the fundamental policy decisions and merely left the implementation of those policies to the agency. This is a valid delegation of administrative authority.

Section 403.021, Fla. Stat., contains a legislative declaration of policy regarding prevention of pollution of the waters of the state and regulation of activities which could cause such pollution. Section 403.061(14), Fla. Stat., specifically empowers the Department to establish a permit program for any installation which may be a source of pollution and section 403.062, Fla. Stat., grants the Department general control and supervision of the waters of the State. Generally, the Department is granted authority to issue permits in section 403.087, Fla. Stat. Permits must be denied if a proposed discharge will reduce water quality below the established classification, and permits must "contain such additional conditions, requirements, and restrictions as the department deems necessary to preserve and protect the quality of the receiving waters." § 403.088(2)(c)3., Fla. Stat. The legislature even provided exceptions to the permitting requirements for

certain types of projects. § 403.813, Fla. Stat.[1]

Dredging and filling are defined in section 403.911, Fla. Stat. (1991)(now § 373.403, Fla. Stat.), as :

> (2) The Term "Dredging" means excavation, by any means, in waters. It also means the excavation, or creation, of a water body which is, or is to be, connected to waters, directly or via an excavated water body or series of excavated water bodies.
>
> (4) The term "Filling" means the deposition, by any means, of materials in waters.

The legislature provided criteria for activities in the waters of the State in section 403.918, Fla. Stat. (1991)(now 373.414, Fla. Stat.), as follows:

> (1) A permit may not be issued under ss. 403.91-403.929 unless the applicant provides the department with reasonable assurance that water quality standards will not be violated. The department, by rule, shall establish water quality criteria for wetlands within its jurisdiction, which criteria give appropriate recognition to the water quality of such wetlands in their natural state.
>
> (2) A permit may not be issued under ss. 403.91-403.929 unless the applicant provides the department with reasonable assurance that the project is not contrary to the public interest. However, for a project which significantly degrades or is within an Outstanding Florida Water, as provided by department rule, the applicant must provide reasonable assurance that the project will be clearly in the public interest.

---

[1] Some of the exempted projects must use turbidity curtains, identical to the specific condition violated by the defendants below. §§ 403.813(2)(f) and (g), Fla. Stat.

(a) In determining whether a project is not contrary to the public interest, or is clearly in the public interest, the department shall consider and balance the following criteria:

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 activity;

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 Sec. 267.061; and

7. The current condition and relative value of functions being performed by areas affected by the proposed project.

(b) If the applicant is unable to otherwise meet the criteria set forth in this subsection, the governing board or the department, in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects which may be caused by the project.

The rules of the Department flesh these standards out by providing the procedural and substantive standards that a permit applicant must meet to provide "reasonable assurances" that water quality standards will not be violated and that the project is not contrary to the public interest..

The courts have upheld several statutes with standards far more vague and less detailed than those found in these statutes as proper constitutional delegations of authority. In *Florida Gas Transmission Company v. Public Service Commission*, 635 So. 2d 941, 944 (Fla. 1994), the dispute centered on the Florida Natural Gas Transmission Pipeline Siting Act, §§ 403.9401-25, Fla. Stat. (Supp. 1992), which was enacted to ensure that construction and maintenance of the pipelines would only produce a minimal adverse effect on the environment and the public welfare. One way for the PSC to implement this legislative goal was to make the determination whether there existed a need for an additional gas pipeline in Florida. Florida Gas contended that the portion of the statute conferring authority on the PSC to determine this need based on "other matters within its jurisdiction deemed relevant to the determination of need," is so lacking in guidelines as to be an unconstitutional delegation of authority. *Id.* at 944. But the Supreme Court upheld the statute stating that the guidelines were sufficient to limit the Commission's authority and did not constitute an unbridled delegation of authority. *Id.* at 945.

A number of Florida statutes authorize regional planning councils to implement the legislature's policy of administering Development of Regional Impact (DRI) reviews and charging of fees for such reviews. §§ 160.02(12), 163.01(5)(h), 380.06(22)(c), Fla. Stat. (1983). The planning councils were to

implement the process by setting the cost for each applicant's review. The statutes' language permitting an agency to "fix and collect ... fees when appropriate" for development of regional impact applications was challenged as an unconstitutional delegation of authority. *Apalachee Reg. Planning Council v. Brown*, 546 So. 2d 451 (Fla. 1st DCA 1989) *affirmed* 560 So. 2d 782 (Fla. 1990). The *Apalachee* court upheld the delegation and stated that the statute's standards were sufficient to enable the agency and the courts to determine whether the agency is carrying out the legislature's intent. *Id.*, 546 So. 2d at 454. The court held that the fees levied were merely the implementation of a fundamental legislative policy decision. *Id.* at 453.

In *Jones v. Department of Revenue*, 523 So. 2d 1211 (Fla. 1st DCA 1988), the methodology used by the Department of Revenue in estimating the level of tax assessment in a county was challenged as an unlawful delegation of legislative authority. The intent of the statute section is to determine the amount a district is required to provide annually towards the cost of education. *Id.* at 1212. In years without in-depth assessment reviews, DOR was required by statute to estimate levels of county tax assessment based upon "the best information available, utilizing professionally accepted methodology." § 195.096(3)(b), Fla. Stat., (1987). The court approved of DOR's use of subjective methodology to determine the estimates and held that the standards set out in the statute provided sufficient guidelines to the agency and constituted a lawful delegation of authority. *Id.* at 1214.

Finally, the 4th DCA recently upheld the validity of a delegation of administrative authority in *Marine Industries v. DEP*, 672 SO. 2d 878 (Fla. 4th DCA 1996). The statutory standard for imposition of boat speed limits was in § 370.12(2)(n), Fla. Stat., which provides:

> The department may designate by rule other portions of state waters where manatees are frequently sighted and it can be assumed that manatees inhabit such waters periodically or continuously. Upon designation of such waters, the department shall adopt rules to regulate motorboat speed and operation which are necessary to protect manatees from harmful collisions with motorboats and from harassment.

Analyzing the above quoted language, this court held that:

> [T]he Department is not the lawgiver but acting as the administrator of the law. We therefore hold that the statute is not an unconstitutional delegation of legislative power to an executive agency.

The same is true in this case. Treating chapter 403 as a civil regulatory law as it should be treated, it is a valid delegation of administrative authority. The legislature's decision to subject willful violators to misdemeanor sanctions does not transform this law into a criminal law and similarly does not transform a valid delegation of administrative authority into an invalid delegation of legislative authority to define a crime. It is a valid delegation of administrative duties and the opinion below should be AFFIRMED.

§§ 403.161(1)(b) and 403.161(5), Fla. Stat., Do Not Constitute an Improper Delegation of Legislative Authority To an Administrative Agency in Violation of Art. II, § 3, Fla. Const.

Article I, § 18, Fla. Const, provides:

> No administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law.

and Article II, § 3, Fla. Const., provides:

> The powers of the State government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Should this court determine to treat the subject statute as a criminal law, then it still is a valid delegation. Even in the criminal context, this court has determined that it is for the legislature to make the fundamental policy decisions, while an agency can be relied upon to implement those decisions. *B.H.*, 645 So. 2d at 993-95. As set forth above, the legislature has made those fundamental decisions in Chapter 403 and DEP is merely implementing those decisions through its operation of the dredge and fill, and other, permitting programs. The "rule[s], regulation[s], order[s], permit[s] or certification[s]" of the department implement the decisions of the legislature.

The court below properly determined that the subject statutes do not constitute an unlawful delegation to the agency to define what a crime is. This is a combination of the requirements of Art. I, § 18 and Art. II, § 3, Fla. Const.[2] Petitioners assert what is essentially a *per se* rule prohibiting the legislature from depending on an administrative agency for the implementation of legislatively determined policy where a violation would constitute a crime. Sections 403.161(1)(b) and 403.161(5), Fla. Stat., are part of a comprehensive regulatory program governing dredge and fill operations in the waters of the State of Florida. The court below properly considered the standards governing this program to determine if the legislature set forth the fundamental policy decisions, leaving for the agency only the implementation of those policies. The Petitioners' *per se* rule is unprecedented and should not be adopted

B.H. v. State *Does Not Create a* Per Se *Rule Prohibiting an Administrative Agency from Adopting Rules Fleshing out the Legislative Definition of a Crime*

The district court properly distinguished the holding in *B.H. v. State* to find the subject statutes constitutional based on an analysis of the standards governing administrative action under chapter 403, Fla. Stat. (1991), governing dredge and fill

---

[2] Actually, the court in *B.H.* relied on Art. I, § 9 and Art. II, § 3, for the finding that the subject statute was unconstitutional. Art. I, § 9 was not at issue before the county court or the DCA below.

permitting.[3] *B.H. v. State* does not stand for the proposition that such a delegation must be unconstitutional.

In *B.H.*, this court was presented with the question of the constitutionality of § 39.061, Fla. Stat., the juvenile escape statute. The statute provided that escape from a facility of restrictiveness level VI or above was a felony. HRS was given authority to define the restrictiveness levels based on "the risk and needs of the individual child" and the number of levels were limited to six. § 39.01(61), Fla. Stat. (Supp. 1990). These restrictions were found to provide "no meaningful limitations . . . on HRS's purported authority." *B.H.*, 645 So. 2d at 994.

---

[3] The instant permit was issued pursuant to rules of the Department and Ch. 403. Fla. Stat. (1991). By Ch. 93-213, Laws of Florida, dredge and fill permitting was consolidated with Management and Storage of Surface Waters permitting under ch. 373, Fla. Stat. However, pending permits like the one at issue here were to be reviewed under the old laws pursuant to § 373.414(14), Fla Stat., which provides:

> (14) An application under the rules adopted pursuant to ss. 403.91-403.929, 1984 Supplement to the Florida Statutes 1983, as amended, [FN1] or this part for dredging and filling or other activity, which is pending on June 15, 1994, or which is submitted and complete prior to the effective date of rules adopted pursuant to subsection (9) shall be:
>
> . . .
>
> (b) Reviewed under the rules adopted pursuant to ss. 403.91-403.929, 1984 Supplement to the Florida Statutes 1983, as amended, and this part, in existence prior to the effective date of the rules adopted pursuant to subsection (9)[.]

In several places in this court's opinion, the court makes it clear that it was the *lack* of standards limiting the rulemaking authority of HRS which caused the statute to be unconstitutional.

> In the criminal law context, there also may be some degree of flexibility consistent with the non-delegation doctrine[.]
>
> [D]elegations in the criminal law context must expressly or tacitly rest on a legislatively determined fundamental policy; and the delegations also must expressly articulate reasonably definite standards of implementation that do not merely grant ***open-ended*** authority[.]
>
> Our earlier cases indicate that, in some instances, the subject matter of a statute may be such that greater discretion must be delegated. Conner, 216 So. 2d at 212. Certainly, modern society requires that administrative agencies receive some flexibility in how they use their authority, Askew, 372 So. 2d at 924, and this may be true to a lesser extent even in the criminal law context.
>
> In sum, HRS was improperly delegated and improperly assumed authority to declare what constituted the crime of juvenile escape, ***without limit.***

The court finally recognizes that the "central problem" was

> the fact that an executive agency in effect has been delegated authority to define a felony, ***without limit.***

B.H., 645 So. 2d at 993-95 (underlined emphasis in original, italics added).

Clearly, this court found the statute in *B.H.* to be unconstitutional, *not* because it

gave the agency the authority to implement the stated policies of the statute, but because the legislature failed to make the fundamental policy decisions, leaving them to HRS through an ***open-ended*** delegation ***wholly lacking*** in standards. The same cannot be said of the statutes at issue in this case.

This court condemned the statute in *B.H.* by comparing it to the unconstitutional delegation in *Conner v. Joe Hatton*, 216 So. 2d 209 (Fla. 1968). There, this court determined that, *inter alia*, the delegation to the Sec. of Agriculture to prohibit unfair trade practices was a delegation "without any rule or standard whatever" and was therefore a delegation to the agency of the power to enact the law or to determine what the law should be. *Id.* at 213. The standards in Chapter 403 set forth above clearly determine what the law is; it is only up to the agency to flesh out the requirements consistent with those standards. It cannot be seriously argued that the power to require that a dredge and fill operator inform the Department within 48 hours of its intent to commence operations or to require the deployment of a turbidity screen is the "power to make law." These are simply administrative requirements to which an applicant must conform before permission is granted to engage in the regulated activities. Comparing *B.H.* and *Conner* to the instant case provides some context for analysis of chapter 403.

A standard for legislative delegation in the criminal law context can be gleaned from *B.H.* and applied in this case. A delegation is proper in the criminal law context where the statute expressly articulates reasonably definite standards of implementation and does not merely grant open-ended authority. The statutes governing dredge and fill permitting contain such reasonably definite standards and are constitutional. (See pp. ??, *supra* and the *amicus* brief on behalf of the Department of Environmental Protection)

Although this court specifically did not address the question, when analyzing the nondelegation doctrine in criminal cases, the legislative standards in statutes *may* be subject to a closer scrutiny than in the civil arena. *B.H.*, 645 So. 2d at 993.

> In the criminal law context, there also may be some degree of flexibility consistent with the nondelegation doctrine, but only to the extent that the statute itself provides adequate notice of the prohibited conduct. Any other rule would violate due process, rendering the statute invalid on that independent basis. []
>
> This court appears never to have addressed the precise question of how extensive a role administrative agencies may take in defining the elements of crimes.[4]

[4] We need not and therefore do not address that question today, for reasons noted below.

However, this court did address a similar argument in another criminal case in *Rosslow v. State*, 401 So. 2d 1107 (Fla. 1981). There, the legislature made it a crime to transport citrus without a certificate. § 601.46(1), Fla. Stat. Exceptions were set forth in section 601.50, Fla. Stat., however the Department:

> under such precautionary rules and regulations as it may deem expedient may permit sale or shipment of citrus fruit or the canned or concentrated products thereof without the issuance of and filing of inspection certificate and without the grade being shown on the container thereof.

The law then provided four broad categories. The supreme court found:

> however, that the legislature's enactment of section 601.46, even with the exception provision contained in section 601.50, does not constitute prohibited delegation.

Rosslow, 401 So.2d at 1108.[4] The same is true here.

There is also no independent due process violation in the subject statutes. The statute makes the violation of the permit a misdemeanor. It cannot be reasonably argued that the holder of a permit is not on notice as to its requirements. In *State v. Cumming*, 365 So. 2d 153 (Fla. 1978), and *State v.*

---

[4] The ability to define exceptions is the same as the ability to define proscriptions - it allows the agency to classify certain behavior as permissible and certain behavior as prohibited.

Rawlins, 623 So. 2d 598 (Fla. 5th DCA), defendants were required to consult the administrative rules to know whether certain condict was a misdemeanor. The statute defined the crime (possession of wildlife without a permit or violation of a manatee protection boat speed limit), not the rules which provided the permit requirements or which delineated the specific speed limits. *See also*, *Bailey v. Van Pelt*, 82 So. 789, 794 (Fla. 1919)(The statute and not the administrative regulation defines the offense and imposes the penalty.)

Even agreeing for the sake of argument that there is a higher standard in the criminal context, that does not eliminate the need for administrative flexibility. *B.H.*, 645 So. 2d at 993. That such flexibility is required in the criminal context is bolstered by the fact that, even under Florida law, in the civil context, regulations such as these come within an exception to the nondelegation doctrine:

> When a statute relates to a police regulation and is necessary to protect the general welfare, morals, and safety of the public it is subject to the reasonableness standard, and not limited by precise statutory standards as required in *Askew*.

Apalachee Reg. Planning Council v. Brown, 546 So. 2d 451, 452-53 (Fla. 1st DCA 1989).[5]

---

[5] In *Askew*, the court indicated that with the passage of the Administrative Procedures Act, the need for precise articulation is lessened and the legislature

In *Cesin v. State*, 288 So. 2d 473 (Fla. 1974), the legislature delegated the authority to determine what is acceptable motorcycle headgear. The delegation provided only that "the department is authorized to approve or disapprove protective headgear and eye-protection devices required herein and to issue and enforce regulations establishing standards and specifications for the approval thereof." Based on this delegation, the supreme court stated:

> There can be no misunderstanding the purpose for which the statute was enacted. And there can be no misunderstanding as to the types of protective headgear required to be worn by motorcycle operators.

Id. at 475. The legislative standard in *Cesin*, *i.e.* "protective headgear," was sufficient to satisfy the nondelegation doctrine. Contrary to Petitioners' assertion,

---

only need state the threshold of legislative concern with the details to be added through the APA.

> Although the Court in *Sarasota County v. Barg, supra*, invalidated an act which utilized the terms "undue or unreasonable" dredging or filling and "unreasonable" destruction of natural vegetation in a manner which would be "harmful or significantly contribute" to air and water pollution, such quantitative assessments by an administrative agency are not necessarily prohibited. As suggested by the district court of appeal such "approximations of the threshold of legislative concern" are not only a practical necessity in legislation, but they are now amenable to articulation and refinement by policy statements adopted as rules under the 1974 Administrative Procedure Act, Chapter 120, Florida Statutes. The benefits of the current version of Chapter 120 were not available at the time of the *Barg* decision.

Askew v. Cross Key Waterways, 372 So. 2d 913, 919 (Fla. 1979)

the establishment of the standards for protective headgear was more than merely defining the term "protective." That delegation allowed the agency to make judgments based on its expertise. In this case, the agency must make judgments based on its expertise as to what is required on a case by case basis for the protection of the environment during dredge and fill activities.

Similarly, in *State v Cumming*, 365 So. 2d 153 (Fla. 1978), this court found that a delegation to the Game and Freshwater Fish Commission valid when violation of the Commission's rules and permits were punishable as misdemeanors. §§ 370.922(5) (1977) and 372.71 (1977)[6] Pursuant to § 372.922 the Game and Freshwater Fish Commission was charged with designating "wildlife considered to present a real or potential threat to human safety" as class II wildlife and to establish rules to ensure that permits to possess class II wildlife were "granted only to persons qualified to possess and care properly for wildlife." Furthermore, class II wildlife kept as pets had to be "maintained in sanitary

---

[6] Section 370.922(5) (1977) provided:

> Persons in violation of this section shall be punishable as provided in s. 372.71

Section 372.71(1977) provided:

> Any person violating the provisions of this chapter shall, unless otherwise provided, for the first offense be guilty of a misdemeanor of the second degree . . . and for a second or subsequent offense shall be guilty of a misdemeanor of the first degree[.]

surroundings and appropriate neighborhoods."[7] The terms "real or potential threat to human safety," "qualified to properly care for," and "appropriate neighborhoods" all require more than simple definitional rules. They all require judgements by the agency based on the agency's expertise. These judgments are analogous to the determinations that the legislature delegated to DEP in the dredge and fill statute.

The first criterion DEP must apply is whether the dredge and fill project will "adversely affect the public health, safety or welfare." The other criteria in

---

[7] Section 372.922, Fla. Stat.(1977), provided in pertinent part:

> (1) It is unlawful for any person or persons to possess any wildlife as defined in this act, whether indigenous to Florida or not, until he has obtained a permit as provided by this section from the Game and Fresh Water Fish Commission.
>
> (2) The classifications of types of wildlife and fees to be paid for the issuance of permits shall be as follows:
>
> (a) Class I--Wildlife which, because of its nature, habits, or status, shall not be possessed as a personal pet.
>
> (b) Class II--Wildlife considered to present a real or potential threat to human safety, the sum of $100 per annum.
>
> (3) The commission shall promulgate regulations defining Class I and II types of wildlife. The commission shall also establish regulations and requirements necessary to insure that permits are granted only to persons qualified to possess and care properly for wildlife and that permitted wildlife possessed as personal pets will be maintained in sanitary surroundings and appropriate neighborhoods.

§ 403.913, Fla. Stat., are at least as specific, if not more specific, than the directions to the Game and Fish Commission referenced in *Cumming*. The statutory provisions of chapter 403 are far more than a "broad policy of protecting surface water quality." Such a broad policy is set forth in Art. II, § 7, Fla. Const. Chapter 403 contains the specific considerations the agency is required to consider in the dredge and fill program and those provisions are at least as specific as those this court considered and approved in *Cumming* and *Cesin*.

The need for such flexibility in complex situations was recognized by the supreme court in DUI prosecutions in *State v. Bender*, 382 So. 2d 697, 700 (Fla. 1980):

> Although any delegation of legislative authority is open to judicial review, the practicalities of the subject matter sought to be controlled must be considered.

In *Marine Industries v. DEP*, 672 So. 2d 878, 881 (Fla. 4th DCA 1996), this court held that the provisions of the Manatee Sanctuary Act were constitutional, stating:

> The sufficiency of the standards depends on "the subject matter dealt with and the degree of difficulty involved in articulating finite standards." [] However, "[i]f the subject matter 'requires the expertise and flexibility of the agency to deal with "complex and fluid" conditions', the legislature will not be required to draft more detailed or specific legislation." (citations omitted)

The complex nature of dredge and fill permitting also requires flexibility and the

legislature properly delegated to the agency the authority to adopt administrative rules to implement the policies set forth in the legislation.

§§ 403.161(1)(b) AND 403.161(5), FLA. STAT.,
DO NOT VIOLATE ART. III, § 11(a)(4), FLA. CONST.

Petitioners' argument that making the violation of a permit a misdemeanor constitutes the passage of unconstitutional special laws is meritless. The general law makes violation of a permit a misdemeanor. That law is enforced uniformly throughout the state and that is what Petitioners here were charged with. This argument would make all Marine Fisheries Commission rules which restrict gear and fishing times differently around the state similarly unconstitutional special laws.[8] It also would have made all manatee speed limits special laws.[9] That is clearly not the case.

Petitioners' argument on this point is dependant on a determination that the agency's activities constitute making law in the first place. As set forth in the previous sections of this brief, the legislature has made the law by making the fundamental policy decisions, leaving only the implementation of those decisions

---

[8] Violation of any rule of the Marine Fisheries Commission is punished as a misdemeanor. § 370.028, Fla. Stat., referring to § 370.021(2), Fla. Stat.

[9] At the time *State v. Rawlins* was decided, violation of a manatee speed limit was a misdemeanor. § 370.12(2)(r) and (s), Fla. Stat. (1993).

to the agency. If these permits are special laws, then all permits are; that is clearly not the case.

CONCLUSION

Chapter 403 is not a criminal law. It sets up an administrative program and the delegation to the agency contains sufficiently definite standards to allow for judicial review of the agency's actions. Even in the criminal context, administrative agencies must have the flexibility to implement the legislative policies. In chapter 403, the legislature has made the fundamental policy decisions leaving only implementation of those policies to the agency. The delegation to DEP found in chapter 403 is valid under any available standard of review. The decision by the legislature to make wilful violation of the departments permits a misdemeanor does not transform the statute into an unlawful delegation of the power to define a crime. The granting of permits cannot be found to be the passage of special laws; that argument is patently meritless. The holding of the district court should be AFFIRMED.