IN THE SUPREME COURT OF FLORIDA

FLO-SUN, INCORPORATED, OKEELANTA CORPORATION, and SUGAR CANE GROWERS COOPERATIVE OF FLORIDA, Petitioners, vs. FORMER GOVERNOR CLAUDE R. KIRK, individually and in the name of the State of Florida, et al., Respondents.	)	Case Nos. 95,044 95,045

On Petitions to Review a Decision of
The District Court of Appeal, Fourth District

INITIAL BRIEF OF PETITIONERS FLO-SUN INCORPORATED, OKEELANTA CORPORATION AND SUGAR CANE GROWERS COOPERATIVE OF FLORIDA, INCLUDING APPENDIX

STEEL HECTOR & DAVIS, LLP
Joseph P. Klock, Jr.
Fla. Bar. No. 156678
Gabriel E. Nieto
Fla. Bar. No. 147559
200 S. Biscayne Blvd.
Suite 4000
Miami, FL 33131-2398
(305) 577-2877
(305) 577-4452 fax.

Attorneys for Petitioners Flo-Sun Incorporated and Okeelanta Corporation

HOPPING GREEN SAMS & SMITH, P.A.
Gary P. Sams
Fla. Bar No. 134594
123 South Calhoun Street
Post Office Box 6526
Tallahassee, FL 32314
(850) 222-7500
(850) 224-8551 fax.

Attorneys for Petitioner Sugar Cane Growers Cooperative of Florida

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The undersigned certifies that the type size and style used in this brief is Courier 12-Point non-proportionately spaced.

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LIST OF ABBREVIATIONS USED IN THIS BRIEF

A-___	The Appendix to this brief.
APA	The Administrative Procedure Act, Chapter 120, Florida Statutes (1999).
Defendants	Defendants/Petitioners, Flo-Sun, Inc., Okeelanta Corporation and Sugar Cane Growers Cooperative of Florida and their co-defendants below, United States Sugar Corporation, et. al.
DEP	The Florida Department of Environmental Protection
EFA	The Everglades Forever Act, section 373.4592, Florida Statutes (1999).
EPA	The United States Environmental Protection Agency
F.A.C.	The Florida Administrative Code
Petitioners	Petitioners Flo-Sun, Inc., Okeelanta Corporation and Sugar Cane Growers Cooperative of Florida.
Plaintiffs	Plaintiffs/Respondents, Former Governor Claude R. Kirk, et al.
SFWMD	The South Florida Water Management District

STATEMENT OF THE ISSUE FOR REVIEW

Whether the doctrine of primary jurisdiction compels dismissal of a complaint that seeks to divert large-scale environmental controversies from executive agency regulatory jurisdiction to public nuisance adjudication in circuit court, when the complaint acknowledges agency jurisdiction, alleges agency failure to enforce existing law and makes general allegations of governmental complicity, but makes no allegation that the complainants presented the claimed violations of existing law to an appropriate agency and does not explain why administrative remedies would be inadequate to address the complainants' claims.

STATEMENT OF THE CASE AND OF THE FACTS

A. The Plaintiffs' Complaint

This case began with a public nuisance complaint filed in the Fifteenth Judicial Circuit against Defendants, sugar growers and processors (and a sugar by-product processor) by several private plaintiffs, including former Governor Claude Kirk (1967-71) who purports to sue "in the name of the state." (A-3, p. 1)

The complaint broadly alleges that Defendants' agricultural operations have caused environmental harm, including:[1]

[1] Plaintiffs also allege bodily injuries, personal discomfort and property damage, presumably to satisfy the requirement that a private individual must show special injury to maintain a public nuisance action. (A-3, p. 6) Because Plaintiffs traveled exclusively under a public nuisance theory, the trial court expressed no opinion on the legal sufficiency of any claim an individual plaintiff might bring separately to recover for alleged

- "devastation of air, land and water quality;"
- "pollution of public lands including particularly the recreational facilities of the Everglades National Park and Loxahatchee National Wildlife Refuge;" and
- "interference with and injury to a well-balanced and healthy population of native fish, reptiles, fowl and other wildlife." (A-3, p. 6)

Claiming that Defendants' activities are prohibited by existing laws and constitute a public nuisance, Plaintiffs seek injunctive relief to shut down Defendants' agricultural and related operations. (A-3, p. 6-7)

Although the complaint acknowledges administrative agency jurisdiction (A-3, p. 5) and alleges that the complained-of activities are prohibited by existing laws (Id.), the Plaintiffs have not:

- Alleged any attempt to present their claims to a regulatory agency;
- Alleged any denial of access to administrative remedies; or
- Explained why available administrative remedies are legally inadequate to remedy violations of the laws.

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personal injuries or property damage. (A-2, p. 12) Indeed, the order dismissing Plaintiffs' public nuisance complaint with prejudice does not preclude any plaintiff from bringing suit for redress of private harm. Id. Consequently, if this Court orders the reinstatement of the trial court's decision dismissing this action with prejudice, as defendants urge, then no private right of any plaintiff will be extinguished.

The sole justification stated in the complaint for not seeking available administrative remedies is that:

> Government from the local municipal level to the Federal level has aided and abetted in the creation and maintenance of the nuisance complained of by failing to enforce existing laws prohibiting and regulating Defendants' offensive conduct and by providing direct and indirect economic subsidies. (A-3, p. 5-6)

Based solely upon this allegation, Plaintiffs conclude that "the judicial branch alone has the will, the authority, the power and the independence to abate this ongoing nuisance." (A-3, p. 6)

B. The Environmental Regulatory System

To protect the public health and the natural environment from air and water pollution, the Florida Legislature and United States Congress, aided by various regulatory agencies, have devised extensive environmental statutes and regulations.[2] These statutes and regulatory programs are administered and enforced by various executive agencies,[3] including the Florida Department of

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[2] See, e.g., the Florida Air and Water Pollution Control Act, chapter 403, Florida Statutes, and the implementing regulations in title 62, of the Florida Administrative Code (F.A.C.); chapter 373, Florida Statutes and the implementing regulations in titles 62 and 40E, F.A.C.; chapter 376, Florida Statutes; the Clear Water Act, 33 U.S.C. § 1251, et seq.; the Clean Air Act, 42 U.S.C. § 7401, et. seq., and the implementing regulations in 40 C.F.R. Part 52 and chapter 62-204, F.A.C.; chapter 590, Florida Statutes and the implementing regulations in chapter 5I-2, F.A.C. (A more complete list of the state rules and statutes regulating the Defendants' activities is found in the Appendix at Tab 4).

[3] State agencies play the central role in this system. Much of the federal authority to regulate pollution has been delegated to the state under the federal Clean Air and Clean Water Acts, subject to oversight and enforcement authority retained by EPA. See, as to air pollution, 42 U.S.C. § 7410, 40 C.F.R. §§ 52.520 - 52.536; 60 Fed. Reg. 49343 (Sept. 25, 1995); §§ 403.061 (35) and

Environmental Protection (DEP), the South Florida Water Management District (SFWMD), the Florida Department of Agriculture and Consumer Services, Division of Forestry and the United States Environmental Protection Agency (EPA) and other federal agencies.

The Florida Administrative Procedure Act (APA), chapter 120, Florida Statutes (1999), provides the procedural framework under which the state's environmental statutes are implemented and the interests of affected parties are protected. Under the APA:

- Any person adversely affected by proposed agency action is entitled to a hearing. § 120.569, Fla. Stat.
- When facts are in dispute, the agency must provide a trial-like, evidentiary hearing. § 120.57(1), Fla. Stat.; Fla. Admin. Code R. 28-106.201-.217. Such hearings are conducted before an independent administrative law judge, whose factual findings are conclusive if supported by evidence. § 120.57(1), Fla. Stat.
- All agency decisions are subject to judicial review in the district courts of appeal. § 120.68, Fla. Stat. And, when the appellate court finds that an agency has grossly abused its discretion, the agency is penalized by having

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403.0872, Fla. Stat. (1999); and, as to water pollution 33 U.S.C. § 1313; 60 Fed. Reg. 25718 (May 12, 1995); §§ 403.061(31), 403.067, and 403.0885 Fla. Stat. (1999). Additionally, the environmental regulatory authority of local governments is subject to oversight by DEP. See, § 403.182, Fla. Stat. (1999).

to pay attorneys' fees and costs to the prevailing parties. § 120.595, Fla. Stat.

- All agencies must promulgate as rules any policies that implement, interpret or prescribe law. § 120.54(1)(a), Fla. Stat. Such rules are binding on both the regulated parties and the agency itself. See Legal Environmental Assistance Foundation, Inc. v. Board of County Commissioners of Brevard County, 642 So. 2d 1081, 1084 (Fla. 1994).
- Any person with a substantial interest can petition an agency to adopt, modify or repeal a rule. § 120.54(7), Fla. Stat. If the petition is denied, appeal to the district courts is available. § 120.68, Fla. Stat.

Additionally, any person can petition an agency to compel enforcement of the environmental laws. §§ 373.136 and 403.412, Fla. Stat. (1999). And, if the agency refuses to act, private enforcement remedies are available against the agency and/or the regulated entities. Id. Similar protection is afforded by the "citizen suit" provisions of various federal environmental statutes. See e.g., 33 U.S.C. § 1365(a); 42 U.S.C. § 7604.

Finally, the state and federal governments have devised a detailed plan to restore the Everglades, the Everglades Forever Act (EFA), which is jointly administered by DEP and SFWMD. § 373.4592, Fla. Stat. (1999) The EFA specifically addresses discharges from the Everglades Agricultural Area, where

Defendants' farms are located, and is designed to provide "comprehensive and innovative solutions to issues of water quality, water quantity, hydroperiod, and invasion of exotic species which face the Everglades ecosystem." § 373.4592(1)(e), Fla. Stat. (1999)

Moreover, the EFA was expressly intended to "bring to close 5 years of costly litigation" over the impact of agriculture to the everglades. § 373.4592(1)(c), Fla. Stat. (1999) The enactment of the EFA in 1994 followed years of extensive negotiations between state and federal agencies and private parties, exhaustive public hearings, and detailed scientific studies by state and federal agencies. § 373.4592(1)(c), Fla. Stat. (1999)

C. The Motion to Dismiss and the Trial Court's Order

Petitioners filed a motion to dismiss the public nuisance complaint in the trial court based in part upon the primary jurisdiction of executive agencies and the Plaintiffs' failure to employ available administrative remedies. In its 12-page order of dismissal, the circuit court reviewed the prevailing environmental statutes and concluded that "all of the activities alleged by the Plaintiffs . . . are subject to comprehensive regulation under an extensive system of laws and implementing regulations, which imbue the responsible departments and agencies of the Executive Branch with enforcement powers" and "the Executive Branch of state government is fully capable of

addressing the environmental issues raised by Plaintiffs . . ." (A-2, p. 3, 6) The court also found that the EFA specifically addresses issues raised in the complaint, providing "specific technical findings and . . . a detailed plan for restoration of the Everglades." (A-2, p. 5)

The circuit court found that administrative remedies were available and adequate, noting specifically that any person may petition an agency to enforce the law or initiate rulemaking and all agency decisions are subject to judicial review. (A-2, P. 4-5). In view of the availability of these remedies and the Legislature's allocation of jurisdiction to executive agencies, the circuit court determined that constitutional separation of powers and prudential concerns precluded it from taking jurisdiction:

> If Plaintiffs were granted the relief prayed for in their Amended Complaint, the result would be to have this Court substitute its judgement for that of the Florida Legislature, the Florida Department of Environmental Protection, the Florida Department of Agriculture and Consumer Services, and other state and federal agencies as it relates to the environmental laws, rules, regulations and standards under which Defendants' activities are controlled and regulated. This would require the Court to make decisions and set standards with regard to numerous areas of environmental regulation, responsibility for which has been delegated to various state and federal regulatory agencies, and would further require this Court to develop the resources and special expertise which these agencies possess to control air and water pollution and to protect the environment and the public health of South Florida. The simple fact is that the judicial branch is neither possessed of the technical expertise nor would it be appropriate for it to entertain jurisdiction over a public nuisance complaint such as the one pleaded by Plaintiffs here. To do so would

> create a substantial risk of inconsistent requirements among the separate branches of state and federal government and would allow claims to be advanced which are not cognizable in this Court under controlling case law. (A-2, p. 8)

In dismissing the complaint with prejudice, the trial court expressly limited its ruling to the only cause of action plaintiffs pleaded: public nuisance. Thus, the trial court's order "does not preclude Plaintiffs from bringing "any individual, private right action they may have for personal injury or property damage allegedly resulting from the activities of the Defendants. . . ." (A-2, p. 12)

D. The Appeal to the Fourth District Court of Appeal.

Plaintiffs appealed to the Fourth District which, in a <u>per curiam</u> decision, reversed on February 3, 1999. <u>Kirk v. United States Sugar Corp.</u>, 726 So. 2d 822 (Fla. 4th DCA 1999). Limiting its consideration of primary jurisdiction to an examination of the four corners of the complaint, the Fourth District found Plaintiffs' general allegation of past enforcement failures sufficient to supplant the requirements of primary jurisdiction:

> Plaintiffs are alleging that agency errors have been so egregious or devastating that administrative remedies would be insufficient; that the governmental agencies entrusted with preventing the sort of pollutants and harm allegedly caused by Defendants are not doing their job; and that Defendants are operating in a manner contrary to existing statutes and regulations. Taking these allegations as true, as a court must do on a motion to dismiss, the trial court erred in determining that the doctrine of primary jurisdiction applies to bar Plaintiffs' public nuisance suit at this juncture.

Kirk, 726 So. 2d at 825. Treating primary jurisdiction as an affirmative defense, the court continued:

> If Defendants can later disprove Plaintiffs' allegations through record evidence, then the doctrine of primary jurisdiction might serve as a basis for disposing of this case. Id.

While the Fourth District expressly relied upon the allegation of agency enforcement failures, it pointed to no allegation that Plaintiffs ever submitted their claims to the agencies. The court also did not discuss why the APA and section 403.412, Florida Statutes, would be legally inadequate to remedy violations of existing laws. Instead, deeming itself bound by the allegations of the complaint, the Fourth District set aside any concern over separation of powers and reversed, holding that:

- General allegations of governmental complicity and failure to enforce the law are sufficient to preclude application of primary jurisdiction; Id.
- These allegations shift the burden to the Defendants to prove that the agencies have been adequately performing their duties. Until government is proved to have acted properly, there is no requirement of prior resort to administrative remedies. Id.

The Petitioners now seek review in this Court, based on conflict of the Fourth District decision with the prior decisions of this Court and of the First and Third Districts.

SUMMARY OF THE ARGUMENT

The decision below departs from clear precedent and recasts the policy and application of primary jurisdiction in a fashion that defeats its twin purposes of preventing interference in the regulatory role of the executive branch and avoiding duplicative waste of judicial resources. Turning a blind eye to the true nature of the case before it, the Fourth District:

(A) mechanically applied a rigid notice pleading standard to test the sufficiency of a complaint that seeks to divert large-scale environmental controversies from the executive agencies to public nuisance adjudication in the circuit court; and

(B) allowed conclusory allegations of general disagreement with past agency decisions to defeat the well-settled requirement of presenting such matters to the appropriate agency before seeking judicial relief. Kirk, 726 So. 2d at 825 (A-1).

Under the Fourth District's rationale, if a complaint simply alleges that agencies have not been enforcing the law due to "complicity" with regulated parties, the requirements of primary jurisdiction do not apply until that allegation is disproved. Id. Thus, absent proof that government has been adequately performing its duties, the longstanding requirement of prior resort to administrative remedies is nullified, and the entire legislative regulatory scheme and administrative enforcement

mechanism can be replaced by circuit court adjudication under general public nuisance precepts. Id.

The Fourth District's holdings cast aside two decades of established judicial policy--based upon the separation of powers--of not prematurely interfering with executive decision-making. This policy, embodied in the doctrine of primary jurisdiction, requires parties to utilize available administrative remedies, before seeking relief in the courts. State ex. rel. Department of General Services v. Willis, 344 So. 2d 580, 590 (Fla. 1st DCA 1977); Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 427 So. 2d 153, 156-57 (Fla. 1982).

As this Court has noted, "if administrative agencies are to function and endure as viable institutions," courts must refrain from "promiscuous intervention" in their affairs. Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So. 2d 695, 698-99 (Fla. 1978). Thus, trial court intervention into areas of executive jurisdiction is justified only when there is no adequate administrative remedy. Ample case law makes clear that allegations challenging the "timeliness and efficacy of agency action" or the propriety of agency application of statutory and regulatory standards are, without more, insufficient to demonstrate that administrative remedies are inadequate and may be bypassed. Communities Financial Corp. v. Florida Department of Environmental Regulation, 416 So. 2d 813,

816-17 (Fla. 1st DCA 1982). To the contrary, where available administrative remedies have not been pursued, a court should not presume those remedies inadequate merely because a complaint takes issue with how an agency has acted in the past. Id.; Department of Environmental Protection v. PZ Construction Co., Inc., 633 So. 2d 76, 78-79 (Fla. 3d DCA 1994).

In the instant case, existing laws and regulations extensively regulate the activities complained of, specifically to prevent "public nuisance" or environmental or ecological harm. § 403.021(1), Fla. Stat. (1999). In other words, the legislative and executive branches have created a regulatory system to deal with the very harm Plaintiffs allege. Within that system, enforcement and implementation authority is allocated to the executive branch, with the judiciary sitting in a review capacity.

The Legislature has also created ample safeguards to insure that the administrative enforcement system works. The APA and section 403.412, Florida Statutes (1999), protect against the government "complicity" that Plaintiffs allege through formal hearings with trial-type procedures and independent fact finders, appeals from agency decisions directly to the district courts of appeal, and private enforcement action in the circuit courts when agencies refuse to enforce the law. Plaintiffs simply chose not to avail themselves of these remedies and instead attempt to bypass the entire regulatory system by suing in circuit court

under public nuisance principles.

Even if one subscribes to Plaintiffs' cynical notion that regulators can become the captives of the regulated, it must be recognized that the regulatory system itself protects against arbitrary or improper agency decision making. Plaintiffs' claim that only a set of standards identified, administered and enforced by the courts under the rubric of public nuisance law can protect the general public misconstrues the legislative scheme, offends contemporary principles of jurisprudence, and flies in the face of the separation of powers principles which this Court has historically guarded.

ARGUMENT

THE FOURTH DISTRICT DECISION VITIATES ESTABLISHED PRINCIPLES OF PRIMARY JURISDICTION AND SEPARATION OF POWERS BY SUPPLANTING THE ENVIRONMENTAL REGULATORY ROLE OF EXECUTIVE AGENCIES IN FAVOR OF PUBLIC NUISANCE ADJUDICATION IN THE CIRCUIT COURTS, AND SHOULD BE REVERSED.

A. Abrogating primary jurisdiction requirements based solely upon Plaintiffs' expressed dissatisfaction with past government decisions, the Fourth District decision conflicts with settled precedents and ignores the numerous safeguards and remedies of the APA.

The Fourth District expressly acknowledged that the Plaintiffs' broad environmental claims are within the regulatory jurisdiction of executive agencies. Kirk, 726 So. 2d at 825. Nevertheless, it allowed the public nuisance claims to go forward because the Plaintiffs alleged, in the court's words, that governmental agencies are not "doing their job" and past agency

errors were "egregious and devastating."[4] Id. at 825. Nowhere is it alleged that Plaintiffs ever brought their claims to an appropriate agency, much less that any agency ever refused to provide Plaintiffs a remedy. And nowhere is it explained (in either the complaint or the Fourth District's opinion) why the APA, which provides for independent administrative law judges and judicial review in the district courts of appeal, cannot remedy the alleged agency errors. Instead, the Plaintiffs almost fawningly allege that "the judicial branch alone has the will, the authority, the power and the independence to abate this ongoing nuisance." (A-3, p. 6)

Because the Plaintiffs never presented their issues to any agency, it cannot be contended that government has refused to act or refused to listen. At most, the complaint demonstrates that the agencies have not been as active as Plaintiffs would have wished. However, mere dissatisfaction or preference for another branch of government does not suffice to bypass agency jurisdiction. To the contrary, it is axiomatic that an attempt to invoke administrative remedies must be made and the issues must be presented to the agency with subject matter jurisdiction

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[4] More precisely, the complaint alleged that government "has aided and abetted in the creation and maintenance of the nuisance complained of by failing to enforce existing laws prohibiting and regulating Defendants' offensive conduct . . . ." The complaint actually contains no allegation that past agency errors were "egregious and devastating." Apparently, the Fourth District was moved by the spirit of Plaintiffs' pleadings.

before review in the courts is sought.[5]

Other than in the Fourth District, a complaint that seeks to bypass agency primary jurisdiction must demonstrate either that the agency cannot or will not consider the complainants' claims or that the agency has acted improperly, and that the APA provides no adequate remedy. Willis, 344 So. 2d at 591; Communities Financial, 416 So. 2d at 816-17; PZ Construction, 633 So. 2d at 78-79.

The key is that primary jurisdiction applies unless it is demonstrated that there is no adequate APA remedy:

> (1) the complaint must demonstrate some compelling reason why the APA . . . does not avail the complainants in their grievance against the agency; or (2) the complaint must allege a lack of general authority in the agency and, if it is shown that the APA has no remedy for it; or (3) illegal conduct by the agency must be shown and, if it is shown, that the APA cannot remedy the illegality; or (4) agency ignorance of the law, the facts, or the public good must be shown, and if any of that is the case, that the [APA] provides no remedy; or (5) a claim must be made that the agency ignores or refuses to recognize related or substantial interest and refuses to afford a hearing or otherwise refuses to recognize that the complainants' grievance is cognizable administratively.

Communities Financial, 416 So. 2d at 816, citing Willis, 344 So. 2d at 591. This Court has plainly recognized that the burden is on "the party seeking to bypass usual administrative channels

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[5] Key Haven, 427 So. 2d at 158; Willis, 344 So. 2d at 589-90; Communities Financial, 416 So. 2d at 816-17; Florida Soc'y of Newspaper Eds., Inc. v. Florida Pub. Serv. Comm'n, 543 So. 2d 1262, 1266 (Fla. 1st DCA 1989), rev. denied, 551 So. 2d 461 (Fla. 1989); Bal Harbour Village v. City of North Miami, 678 So. 2d 356, 364 (Fla. 3d DCA 1996); PZ Construction, 633 So. 2d at 78-79.

[to] demonstrate that no adequate remedy remains available under chapter 120." Gulf Pines, 361 So. 2d at 699. The Fourth District's shifting of the burden to Defendants just as plainly violates this principle.

Willis,[6] the leading Florida decision on primary jurisdiction, makes clear that the requisite lack of a remedy will rarely exist under the modern APA:

> There is of course a wealth of [pre-APA] precedent requiring judicial deference to administrative remedies. . . . Forceful as those authorities are, they weighed administrative processes and remedies which were primitive in comparison to those available under the Administrative Procedure Act of 1974. Those decisions could not have calculated the adequacy, as we must, of an administrative process which subjects every agency action to immediate or potential scrutiny; which assures notice and opportunity to be heard on virtually every important question before the agency; which provides independent hearing officers as fact finders in the formulation of particularly sensitive administrative decisions; which requires written findings and conclusions on impact issues; which assures prompt administrative action; and which provides judicial review of final, even of interlocutory, orders affecting a party's interests.
>
> The [APA's] impressive arsenal of varied and abundant remedies for administrative error requires judicial freshening of the doctrines of primary jurisdiction and exhaustion of remedies, and greater judicial deference to the legislative scheme.

Willis, 344 So. 2d 589-590 (internal citations omitted).

Plaintiffs' complaint falls far short of the standard for judicial intervention. Id. There is no contention here that the

[6] The First District's seminal decision in Willis was approved twice by this Court in Key Haven, supra, and Gulf Pines, supra.

APA does not provide a remedy, that there is a lack of authority on the part of the agencies or that any agency has ever ignored Plaintiffs’ grievances or refused to provide a hearing. And, while there are vague allusions to government complicity and alleged failures to enforce existing laws, such allegations do not establish that administrative remedies are inadequate. Indeed, other district courts have expressly rejected the argument that alleged defects in "the timeliness and efficacy of agency action and the propriety of [the agency] applying certain statutory and regulatory standards" render administrative remedies inadequate and justify trial court intervention. <u>Communities Financial</u>, 416 So. 2d at 816-17; <u>PZ Construction</u>, 633 So. 2d at 78-79. In the First District’s words, "such an allegation, without more, undermines the very purposes of the APA, for it presupposes that a circuit court is a more appropriate forum for resolution of disputes which are particularly within the administrative agency’s expertise." <u>Communities Financial</u>, 416 So. 2d at 816-17.

Recognizing the vast protections of the APA, First and Third District precedents correctly require an <u>actual attempt</u> to invoke administrative remedies:

> [T]he absence of any claim that [the agency] refused to afford [the plaintiffs] an administrative hearing or otherwise refused to recognize that their grievances were administratively cognizable undermines the very assertion that the APA has no adequate remedy. . . . Since [administrative] avenues of relief were not pursued, we cannot conclude that the remedies of the administrative process are inadequate.

Communities Financial, 416 So. 2d at 816; accord, Florida Soc'y of Newspaper Eds., 543 So. 2d at 1266 n. 10; St. Joe Paper Company v. Florida Department of Natural Resources, 536 So. 2d 1119, 1125 (Fla. 1st DCA 1988); PZ Construction, 633 So. 2d at 78-79.

The Fourth District decision tosses into the judicial ashcan this established requirement of making and pleading a good-faith attempt to seek administrative relief. Based on mere expressed disagreement with past government action, the Fourth District requires the judiciary to clash with and potentially override the executive branch expertise, systems, and mechanisms for resolving public environmental matters, without the executive even being given a chance to correct its alleged past errors. This Court has condemned such disrespect for a coordinate branch of government. See Key Haven, 427 So.2d at 157-58

The Fourth District also failed to recognize that the comprehensive and detailed laws and regulations which govern Defendants' activities were designed to remedy the very harm alleged by Plaintiffs. Finding that unregulated "pollution of the air and waters . . . constitutes a menace to public health and welfare, creates public nuisances, [and] is harmful to wildlife and fish . . .," the Legislature created Chapter 403, Florida Statutes, specifically so that pollution would no longer

create “public nuisances” or harm public health or ecological values.[7] § 403.021(1), Fla. Stat. (1999).

The resulting regulatory scheme does just that. It extensively controls pollutant discharges, requires comprehensive permitting of pollution sources, sets air and water quality standards, and in the EFA sets forth a detailed plan for restoration of the Everglades and control of impacts to it from nearby agriculture.[8] (A-4) These statutes, along with their federal counterparts, are implemented by thousands of pages of extensive, scientifically detailed regulations of DEP, SFWMD and EPA. (See A-4)

Plaintiffs' theory that all of government (federal, state and local) is in complicity with Defendants due to “enormous political contributions”[9] and, therefore, only the courts can

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[7] Recognizing the express intent of Chapter 403 to abate public nuisances caused by unregulated environmental activities, the First District Court of Appeal has held that issues of environmental pollution should no longer be dealt with under public nuisance principles. State v. SCM Glidco Organics Corporation, 592 So. 2d 710 (Fla. 1st DCA 1992).

[8] As part of this plan, in section 373.4592(l)(g), Florida Statutes (1999), the Legislature created the Everglades Construction Project, the largest environmental cleanup program ever undertaken.

[9] The allegation that political contributions equate to political corruption is legally insufficient. Political contribution is a constitutional right and a completely legal activity. State v. Dodd, 561 So. 2d 263 (Fla. 1990); see also, Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990) ("the use of funds to support a political candidate is 'speech'; independent campaign expenditures constitute 'political expression' at the core of our electoral process and the First Amendment freedoms"). Moreover, political contributions are made in judicial

provide relief, strains credibility and ignores the safeguards of the APA.[10] Moreover, it fails to recognize that although the environmental statutes allocate primary enforcement powers to the executive branch, citizens may bring their own enforcement actions after presentation of the issue to the appropriate agency. §§ 373.136(3) and 403.412(2), Fla. Stat. (1999); 33 U.S.C. § 1365(a).

To reach the conclusion that only general public nuisance precepts identified, administered and enforced by trial courts can remedy the alleged environmental harm, one must ignore altogether the ability of citizens to challenge agency decisions, pursue rulemaking initiatives under the APA and bring citizen enforcement actions. Moreover, one must also presume that not only the agencies, but the independent administrative law judges and the reviewing judges of the district courts of appeal will "aid and abet" the alleged nuisance. This proposition is not

races as well as executive and legislative ones, and such an activity does neither disqualify a judge, (MacKenzie v. Super Kids Bargain Store, Inc., 565 So.2d 1332, 1335 (Fla. 1990)) nor corrupt him or her.

[10] While states generally have primary responsibility for environmental regulation (see supra n.3), such regulation is subject to EPA oversight and concurrent federal jurisdiction allowing the federal government to enforce both the federal environmental laws and the state implementing standards. See, Aminiol, U.S.A., Inc. v. California State Water Resources Bd., 674 F.2d 1227, 1229-30 (9th Cir. 1982); 33 U.S.C. § 1342(h). Thus, for Plaintiffs' conspiracy theory to hold true, federal officials at EPA and the United States Justice Department would also need to share in the alleged "complicity."

only preposterous, but contrary to a wealth of administrative and judicial precedent.

B. Well-Established Principles of Constitutional Separation of Powers, as Well as Judicial Policy Considerations, Preclude Trial Courts From Supplanting Executive Agency Jurisdiction as the Fourth District Requires.

The ultimate effect of the decision below will be a trial of government each time a private plaintiff seeks, with similar general allegations, to bypass primary jurisdiction. In each case, the regulated party will be required to prove that government is functioning, that the laws have been enforced, and that those laws are not the product of undue political influence -- all, of course, to demonstrate that the court ought not be acting in the first place. In other words, circuit judges within the Fourth District are now available to actively supervise the other branches of government.[11] And if the judicial branch finds they have not "done their job," it must create a new regulatory framework to govern the particular group of defendants.

Moreover, as each decision will be made on an ad hoc basis, by various trial judges, and based on general common-law "public nuisance" precepts, there will be "a substantial risk of inconsistent requirements among the separate branches of state and federal government." (A-2, p. 8) And, even if in a

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[11] If the complaint also suggests that the Legislature is not "doing its job," it would obviously raise a political question that it not amenable to judicial review. See Coalition for Adequacy in School Funding v. Chiles, 680 So. 2d 400 (Fla. 1996); Article II, section 7, Florida Constitution.

particular trial the government is found not to have committed the alleged impropriety, both the court and the parties will have needlessly expended considerable time and money preparing and trying a case in which hundreds or thousands of past agency decisions spanning several decades are potentially at issue, all so that the court can decide whether or not to take jurisdiction.[12]

This result is clearly at odds with the precedents of this Court:

- "Judicial intervention in the decision making function of the executive branch must be restrained in order to support the integrity of the administrative process and to allow the executive branch to carry out its responsibilities as a co-equal branch of government." Key Haven, 427 So. 2d at 157;

- "If administrative agencies are to function and endure as viable institutions, courts must refrain from 'promiscuous intervention' in agency affairs 'except for the most urgent reasons'. . . .[T]he circuit court should refrain from entertaining declaratory suits except in the most extraordinary cases, where the party seeking to bypass usual administrative channels can demonstrate that no adequate remedy remains available under chapter 120." Gulf Pines, 361 So. 2d at 698-99; see also, Odham v. Foremost Diaries, Inc., 128 So. 2d 586, 593 (Fla. 1961).

Indeed it is contrary to every modern primary jurisdiction case known to Petitioners' counsel, including those of the Fourth District itself, of which the following are merely examples:

[12]Ignoring for the moment the inappropriateness of bypassing and snubbing the other branches of government, is there a sense in the Fourth District that the courts are under-utilized?

- Where jurisdiction over a matter is allocated to an executive agency, primary jurisdiction requires courts to defer to the agency's special expertise and the role of the judiciary is "restricted under section 120.68 to review to the agency's final order." South Lake Worth Inlet District v. Town of Ocean Ridge, 633 So. 2d 79, 86 (Fla. 4th DCA 1994). "An agency's primary jurisdiction cannot be transferred . . .to the judicial forum. . .simply by artful pleading of public nuisance claims." Id. at 88-89.
- Dismissal of pollution claims is required under the doctrine of primary jurisdiction; a court must defer to environmental agencies on matters that are within their jurisdiction. Bal Harbour, 678 So. 2d at 364.
- Primary jurisdiction counsels abstention in areas, otherwise cognizable in the courts, that are within the special competence of an administrative body. It precludes trial court jurisdiction over such matters unless the complainant shows "that remedies available under the [APA] are inadequate." Willis, 344 So. 2d at 591.
- Where there has been no attempt to invoke available administrative remedies, a court cannot conclude that they are inadequate. Florida Soc'y of Newspaper Eds., 543 So. 2d at 1266; St. Joe Paper, 536 So. 2d at 1125. Communities Financial, 416 So. 2d at 816.

In Gulf Pines and Key Haven, this Court recognized the need for the judiciary to respect the executive's status as a co-equal branch of government by deferring to the special expertise of regulatory agencies. See Key Haven, 427 So. 2d 157; Willis, 344 So. 2d 589-90. These and other primary jurisdiction cases are ultimately based upon separation of powers mandate of article II, section 3, Florida Constitution,[13] which compels courts to avoid undue interference with the executive branch by requiring parties to seek redress through administrative channels before invoking the jurisdiction of the courts. Gulf Pines, 361 So. 2d at 699; Willis, 344 So. 2d at 590. The decision below flies in the face of these principles of deference and comity, requiring courts to "promiscuously intervene" in (indeed, to wholly supplant) agency jurisdiction upon the barest allegation of disagreement with past agency action, without the agency so much as being given the chance to review and correct the alleged error.

C. The Fourth District Inappropriately Relied on Outdated Case Law to Supplant Agency Primary Jurisdiction.

The Fourth District's reliance upon State ex. rel. Shevin v. Tampa Electric Company, 291 So. 2d 45 (Fla. 2d DCA 1974), to determine that a trial court may apply nuisance law to supplant

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[13] Article II, section 3 provides that "[t]he powers of 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." This Court has zealously insisted on strict adherence to the separation of powers. See Chiles v. Children, A, B, C, D, E, & F, 589 So. 2d 260 (Fla. 1991).

agency primary jurisdiction is misplaced. Shevin was decided on March 26, 1974, before enactment of the modern APA, and thus, the judges there did not consider the ample remedies which that statute would soon after provide. It is clearly superceded by later case law.

The Willis court noted that the enactment of the 1974 APA was a watershed event in Florida administrative law, which required courts to rethink the deference previously granted to administrative agencies:

> The [1974 APA's] impressive arsenal of varied and abundant remedies for administrative error requires judicial freshening of the doctrines of primary jurisdiction and exhaustion of remedies, and greater judicial deference to the legislative scheme.

344 So. 2d at 590. Willis thus chronicled a new era of heightened judicial deference to the Legislature's allocation of jurisdiction to the executive agencies. Accordingly, if Shevin is illustrative of judicial thinking prior to the enactment of the modern APA, it serves as an interesting historic note, but obviously has no bearing on the deference now paid to regulatory agencies based on the later-enacted, comprehensive administrative remedies recognized in Willis.

Modern case law confirms that primary jurisdiction precludes consideration of the broad environmental issues raised in this case. See Bal Harbour Village v. City of North Miami, 678 So. 2d at 363-64 (Fla. 3d DCA 1996) (applying primary jurisdiction to public nuisance case raising environmental issues); Ocean Ridge,

633 So. 2d at 88 (same); see also, New England Legal Foundation v. Costle, 666 F.2d 30, 33 (2d Cir. 1981) (applying primary jurisdiction to a public nuisance complaint directed at environmental issues regulated by EPA).

D. Statutory Savings Clauses Do Not Undermine Primary Jurisdiction, a Judge-Made Policy of Judicial Self-Restraint Based on Constitutional And Prudential Considerations.

Below and in their briefs on jurisdiction, Plaintiffs, attempting to avoid the obvious import of primary jurisdiction, principally relied upon the "cumulative remedies" savings clause of section 403.191, Florida Statutes (1999), which preserves equitable, common law and statutory remedies to suppress nuisances or abate pollution. However, as shown by numerous state and federal decisions, statutory savings clauses and cumulative remedies provisions do not override constitutionally based policies of judicial deference and self-restraint. New England Legal Foundation, 666 F.2d at 33 n.3 (expressly rejecting argument that savings clause allowed consideration of a public nuisance complaint raising broad environmental issues); City of Milwaukee v. Illinois, 451 U.S. 304, 329 (1981); Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 446 (1907); see also, Ocean Ridge, 633 So. 2d at 90-91 (applying primary jurisdiction based on regulatory system in chapter 161, Florida Statutes, which contains a savings clause in section 161.201); Bal Harbour, 678 So. 2d at 364 (applying primary jurisdiction based on chapter 403 regulatory system, despite the savings

clause in section 403.191).

Indeed, the very case in which the United States Supreme Court created the doctrine of primary jurisdiction expressly rejected the argument that statutory cumulative remedies provisions limit its application. Abilene, 204 U.S. at 446; see also, Farmers Insurance Exchange v. The Superior Court of Los Angeles County, 826 P.2d 730, 735-37, 739-42 (Cal. 1992) (en banc) (Analyzing Abilene and applying primary jurisdiction doctrine notwithstanding a savings clause).

As the Willis court explained:

> The general power to enjoin thus continues, but it continues subject to judicial restrictions upon its use which require prior resort to and exhaustion of administrative remedies when they are available and adequate. Odham v. Foremost Dairies, Inc., 128 So. 2d 586 (Fla.1961); Northeast Airlines, Inc. v. Weiss, 113 So. 2d 884 (Fla.3d DCA 1951). The companion doctrines of primary jurisdiction and exhaustion of remedies are not statutory creatures but judicial, together constituting 'a doctrine of self limitation which the courts have evolved, in marking out the boundary lines between areas of administrative and judicial action.' 2 F. Cooper, STATE ADMINISTRATIVE LAW 573 (1965). . . . . Even though the legislative power may not presume to characterize an adequate administrative remedy as 'exclusive,' courts will so regard it.

Willis, 344 So. 2d at 589 (emphasis added); accord, Key Haven, 427 So. 2d at 157; Gulf Pines, 361 So. 2d at 699.

Although statutory cumulative remedies provisions may purport to permit a court to act, they certainly do not require judicial action. It cannot be seriously contended that judicial policies of self-limitation, deference and comity, founded on the separation of powers required by article II, section 3 of the

Florida Constitution, are defeated by such provisions.

CONCLUSION

The decision of the District Court below must be reversed to restore the careful balance struck by this and other courts to define the boundaries of executive and judicial jurisdiction and thereby effectuate the separation of powers mandate of article II, section 3 of the Florida Constitution. These previously well-settled principles are eviscerated by the Fourth District's contrived and mechanical application of a notice pleading standard to deem allegations of general frustration with past government decisions a sufficient basis to bypass the requirement of presenting administrative law matters to the executive agencies allocated jurisdiction by the Legislature. In every other judicial district in the state, a plaintiff must give the appropriate agency an opportunity to act before seeking relief in the courts.

The scheme of administrative law, agency regulation, and agency adjudication under the APA is an available and adequate forum for Plaintiffs' issues. A circuit court simply should not be required or allowed to serve as a super regulator of environmental laws whenever it is approached by a plaintiff who is dissatisfied with past administrative action but has never attempted to participate in the administrative process despite clear opportunities to do so. This Court should eschew a rule that offends a coordinate branch of government and necessitates

expenditure of enormous amounts of trial court time conducting a far-reaching inquiry into the wisdom of past executive and legislative decisions, just so that the court may determine that it ought not have taken jurisdiction in the first place.

The Fourth District decision should be quashed with directions to reinstate the decision of the Circuit Court of the Fifteenth Judicial Circuit.

Respectfully submitted this 7th day of February 2000.

STEEL HECTOR & DAVIS, LLP
Joseph P. Klock, Jr.
Fla. Bar. No. 156678
Gabriel E. Nieto
Fla. Bar. No. 147559
200 S. Biscayne Blvd.
Suite 4000
Miami, FL 33131-2398
(305) 577-7000
(305) 577-7001 fax

Attorneys for Petitioners
Flo-Sun, Inc. and Okeelanta Corporation

By:________________________
Joseph P. Klock, Jr.
Gabriel E. Nieto

HOPPING GREEN SAMS & SMITH, P.A.
Gary P. Sams
Fla. Bar No. 134594
123 South Calhoun Street
Post Office Box 6526
Tallahassee, FL 32314
(850) 222-7500
(850) 224-8551 fax

Attorneys for Petitioner
Sugar Cane Growers Cooperative of Florida.

By:_____________________________
Gary P. Sams

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of February 2000, a true and correct copy of the foregoing Petitioners' Initial Brief was furnished by U. S. Mail, postage prepaid, to:

Russell S. Bohn, Esquire
Edna L. Caruso
Caruso Burlington Bohn & Compiani, P.A.
1615 Forum Place, Suite 3A
West Palm Beach, FL 33401

Jack Scarola, Esquire
Searcy Denney Scarola Barnhart & Shipley, P.A.
Post Office Drawer 3626
West Palm Beach, FL 33402

Thomas J. Guilday
Vikki R. Shirley
Huey Guilday & Tucker, P.A.
Post Office Box 1794
Tallahassee, FL 32302-1794

Robert T. Scott
Jack J. Aiello
Gunster Yoakley Valdes-Fauli & Stewart, P.A.
777 South Flagler Drive, Suite 500 East
Post Office Box 4587
West Palm Beach, FL 33402-4587

____
Gabriel E. Nieto

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