IN THE SUPREME COURT OF FLORIDA
Case No. SC09-713

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

Appellant,

v.

COY A. KOONTZ, etc.,

Appellees.

BRIEF OF AUDUBON AS AMICI CURIAE IN SUPPORT OF APPELLANT ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

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INTEREST OF AMICUS CURIAE

The National Audubon Society, Inc., d/b/a Audubon of Florida, and Florida Audubon Society, Inc., d/b/a Audubon of Florida (collectively, "Audubon"), have a significant interest in this Court's review of *St. Johns River Water Management District v. Koontz*, 5 So. 3d 8 (Fla. 5th DCA 2009). Audubon's mission is to conserve and restore natural ecosystems. Its approach to conservation is comprehensive and solution-oriented, utilizing science, advocacy, sanctuary management, and grassroots leadership. Audubon has an interest in this case because, if upheld, the lower court's ruling will reduce environmental groups' access and therefore their ability to meaningfully participate in determining the necessary wetland mitigation for individual permits. In addition, the outcome of this case will directly impact the efficacy of wetland mitigation regulations in Florida and thus the ability of Audubon to successfully conserve and restore Florida's natural ecosystems. As such, Audubon respectfully urges this court to reverse the Fifth District Court of Appeal's decision.

SUMMARY OF THE ARGUMENT

Audubon supports the St. Johns Water Management District's ("District") position regarding the lower court's erroneous expansion of takings law in Florida. However, Audubon specifically files this amicus brief to address the procedural impact the lower court's decision will have on environmental groups and on Audubon's mission to conserve Florida's ecosystems.

Chapter 120 of the Florida Statutes, the Administrative Procedure Act, establishes an administrative procedure to determine the rights of those affected by a proposed or final agency action. Under Florida law, established environmental groups have "automatic standing" to intervene in administrative actions. In the case below, had the permit applicant gone through the Chapter 120 process, Audubon would have had standing to intervene, unlike circuit court where the Florida Rules of Civil Procedure do not provide environmental groups with preferential standing. Under the Fifth District Court of Appeal's ruling, applicants for certain environmental permits would now be able to both circumvent the administrative process and Florida's environmental groups, by proceeding directly to circuit court. Furthermore, if left to stand, the lower court's ruling will have a chilling effect on an agency's desire and ability to negotiate effective wetland mitigation requirements.

ARGUMENT

I. Wetlands and wetland mitigation are critical components of Florida's environment and conservation thereof.

The permits sought in the instant case were Management and Storage of Surface Water and "dredge and fill" permits, cumulatively referred to as Environmental Resource Permits. (R9: 1501-65, 1579-1612). In an attempt to curb losses due to degradation or conversion, the Environmental Resource Permitting program seeks to ensure "no net loss" of wetland and surface water functions, unless the proposed activity is balanced by mitigation. *See* § 373.414(1)(b), Fla. Stat. The "no net loss" goal of wetland mitigation can be achieved through several approaches: wetland restoration, which involves the return of a degraded wetland or upland to its original or previous un-degraded wetland state; wetland creation which involves the conversion of a previously non-wetland area to wetland; or, the protection of wetland functions through environmental easements. Wetlands have enormous ecological, environmental and economic value, and as such, each approach seeks to prevent the loss of function or ecosystem services provided by wetlands. *See* Fla. Admin. Code R. 62-345 (establishing the Uniform Mitigation Assessment Method).

Notably, before dealing with the complexities of wetland mitigation, a permit applicant must first attempt to avoid and minimize impacts to a wetland, for instance, through placement of the proposed activity. *See* 373.414, Fla. Stat.; Fla.

Admin. Code R. 40E-4.301(3). Thus, wetland mitigation is not a one-size-fits-all process. It is important to recognize that there may be multiple mitigation options for a project depending on how various factors are weighed or are valued by the parties involved. For this reason, cooperation between permittees and regulatory agencies is needed in developing mitigation plans.

II. The Fifth District Court of Appeal's decision should be reversed because it will have a chilling effect on the environmental community's participation in wetland mitigation decisions.

a. The lower court's ruling removes the environmental community's seat from the permitting table.

As discussed above, wetlands are one of the most productive and vulnerable ecosystems in Florida. An important part of Audubon's conservation efforts regarding wetlands is advocating for the correct application and implementation of wetland mitigation regulations. In order to ensure that mitigation requirements associated with a permit application are sufficient to compensate for lost ecosystem services[1], Audubon has challenged permitting decisions of Florida's water management districts through Florida's Administrative Procedure Act (APA). *See e.g. National Audubon Society, Inc., et.al. v. South Florida Water Management District and I.M. Collier, J.V.*, DOAH Case No. 06-4157, *Recommended Order*, (DOAH July 24, 2007). Importantly, the Florida legislature has ensured that

[1] The products and services humans receive from functioning ecosystems.

established environmental groups may insert themselves into the environmental permitting process through the (APA). *See* § 403.412(6), Fla. Stat. (2008); § 120.569, Fla. Stat. (2008); § 120.57, Fla. Stat. (2008). This unique right of entry, often referred to as "automatic standing[2]" is an important part of Florida's environmental regulatory regime, in that it allows the permitting agency, the permittee, and environmental groups to work together through an administrative hearing prior to the final action on a permit. This preferential treatment does not exist in the Rule 1.230 of the Florida Rules of Civil Procedure governing interventions in civil cases. *See Racing Properties, L.P. v. Baldwin*, 885 So. 2d 881 (Fla. 3d DCA 2004)(commenting that the interest that entitles a person to intervention must be direct and immediate).

In the instant case, the Appellee challenged the wetland mitigation requirements associated with development of his property located within the Econlockhatchee River Hydrologic Basin. *See* Fla. Admin. Code R. 40C-41.011 (establishing additional protections for the Econlockhatchee River Hydrologic Basin). Instead of challenging the District in an administrative forum pursuant to Chapter 120 of the Florida Statutes, Appellee instead brought an action in circuit court pursuant to Section 373.617 of the Florida Statutes. As explained in *Key*

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[2] *See* Lawerence E. Sellers, Jr., and Cathy M. Sellers, *"Intervene" Means "Intervene": The Florida Legislature Revises Citizen Standing Under F.S. §403.412(5)*, Fla. Bar. J. LXXVI (Nov. 2002).

Haven Associated Enters., Inc. v. Bd. of Trustees of the Internal Improvement Trust Fund, 427 So. 2d 153 (Fla. 1982) and *Department of Environmental Regulation v. Bowen*, 472 So. 2d 460 (Fla. 1985), where a challenging party is questioning the validity of required mitigation associated with a permit, the applicant must exhaust all administrative procedures if challenging the substance of the required mitigation.

In *Key Haven,* this Court found that the developer/permit applicant had to exhaust all administrative remedies before instituting an action in circuit court for inverse condemnation. *Id*. At 455. While in *Bowen* the Court made clear "in accord with the general policy against requiring exhaustion of administrative remedies where administrative remedies would be useless, and where the parties are willing to accept the final agency action as *procedurally and substantively correct*," challenging an agency's decision as a takings in circuit court is allowed. *Bowen v. Department of Environmental Regulation*, 448 So. 2d 566, 569 (Fla. 2d DCA 1984)(adopted by *Department of Environmental Regulation v. Bowen*, 472 So. 2d 460 (Fla. 1985))(emphasis added).

Wisely tailored, these rulings ensure that where a permit applicant's challenge is aimed at the procedure and substance of the required mitigation the debate is channeled through the administrative process of Chapter 120 of the Florida Statutes. This allows environmental groups such as Audubon to join the

debate between the permit applicant and the permitting agency in front of an administrative law judge well-versed in the permitting process. This process forces together those with the most knowledge of the science, procedure, and policy regarding permitting issues such as wetland mitigation. Not only does this result in better, more informed decisions regarding complicated environmental permitting issues, but it also protects Florida's already burdened court system from being overrun with fact intensive, complicated permit challenges.

If allowed to stand, the Fifth District Court's ruling will short circuit this well thought out system, allowing any disgruntled permit applicant to shroud their challenge of a mitigation requirement in the thin veil of a takings claim. If permit applicants are allowed to bypass Florida's administrative process and make *de facto* challenges of mitigation requirements in Circuit Court, Florida's environmental groups will no longer have an equal seat at the table and the permitting process of Florida's environmental agencies will suffer.

b. Allowing *de facto* challenges to mitigation requirements in Circuit Court will lead to a less uniform, less creative, and less effective permitting process.

Secondary to usurping administrative review, the decision of the Fifth District Court of Appeal will prevent Florida's environmental regulators from engaging in a collaborative permitting process that is critical to wetland mitigation plans. The administrative review mentioned above is augmented by an agency's

early collaboration and cooperation with a permittee in the case of wetland mitigation. Because mitigating the impacts on a wetland can be accomplished through a variety and combination of means, two-way communication between a permitee and the permitor is critical for the efficient and successful creation of a mitigation plan. As noted in by Judge Griffin in her dissent, "[i]t will [now] be too risky for a governmental agency to make offers for conditional permit approvals or to offer a trade of benefits out of fear that the offer might be rejected and the condition later found to have lacked adequate nexus or proportionality." *Koontz* at 21 (Griffin, J., dissenting). This fear will result in a less collaborative and successful permitting process, to the detriment of Florida's ecosystems.

CONCLUSION

While certainly unintended, if left to stand the holding in *Koontz* will remove the role Florida's environmental groups now have in overseeing wetland mitigation permitting decisions. Thus, for the foregoing reasons the decision of the Fifth District Court of Appeal -- allowing the Appellee to circumvent the established administrative process and holding Appellant liable for an exactions taking - - should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to the following, this _____ day of December, 2009:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been typed using the Times New Roman 14-point font, and therefore complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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