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THE WARREN S. HENDERSON WETLANDS PROTECTION ACT OF 1984: A PRIMER

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I. INTRODUCTION

Wetlands have been called Florida's "soul" by some and a nuisance by others.¹ Between 1850 and 1973 an estimated twelve million acres — sixty percent of the state's wetlands — were destroyed.² It also has been estimated that forty percent of south Florida's wetlands were destroyed in the brief period between 1970 and 1973.³ Much of the loss of Florida's wetlands occurred before the value of wetlands was appreciated; today it is no longer debatable that wetlands perform functions which provide significant benefits to the public.

The Warren S. Henderson Wetlands Protection Act of 1984 (the Act),⁴ which became effective on October 1, 1984,⁵ is Florida's first law directed specifically at the preservation and protection of the state's remaining wetlands. Dredge and fill operations, which previously had required permits because they are a source of water pollution,⁶ now are permitted under specific authority of the Act. This article reviews regulation of dredging and filling in the State of Florida under the Act. Because the Act provides for the "grandfathering" of many activities, it is necessary to review the Act and the prior regulatory scheme to analyze the current regulatory framework.

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1. *Wetlands: Florida's Soul*. 6 FLORIDA'S ENVTL. NEWS 3 (Oct. 1983) (available in the Department of Environmental Regulation library).

2. *Id.*

3. *Id.*

4. FLA. STAT. §§ 403.91-403.929 (Supp. 1984).

5. FLA. STAT. § 403.913 (Supp. 1984).

6. See FLA. STAT. § 403.021 (1983).

II. THE REGULATORY SCHEME PRIOR TO OCTOBER 1, 1984

The common law practice of regulating public activities in navigable waters can be traced to Elizabethan England. The public trust doctrine stood for the proposition that the sovereign owned the lands under tidal waters.⁷ A distinction later developed between the ownership of tidal lands and their use and control. Eventually it became settled that ownership of submerged tidal lands vested in the sovereign or its grantees, but where ownership was transferred the sovereign would retain the use and control of the land in trust for the public.⁸ The public trust doctrine was incorporated into American jurisprudence along with much of the English common law.

The Florida Legislature, in enacting the Riparian Act of 1856, sought to grant unqualified title to owners of land adjacent to submerged lands.⁹ However, subsequent court decisions construing this act under the public trust doctrine, limited the landowner's rights in the submerged lands.¹⁰ From the early 1900's through the 1950's, the state passed laws granting and limiting ownership rights to submerged or partially submerged lands.¹¹ In 1951 the Trustees of the Internal Improvement Fund (Trustees) acquired title to almost all the sovereignty tidal bottom land not already conveyed.¹² However, the Trustees could regulate the filling of these bottom lands only by refusing to sell land to a potential filer. This option was rarely exercised.¹³

Florida's first regulatory permitting scheme involving submerged lands came about in 1957 through the adoption of sections 253.123 and 253.124, Florida Statutes.¹⁴ The regulatory scheme began with regulation concerning navigation and ultimately included protection of habitat and aquatic resources. No dredging or filling which would add to or extend existing lands or islands could be undertaken without local governmental approval and a permit from the Governor and Cabinet sitting as the Trustees.¹⁵

7. F. MALONEY, S. PLAGER, & F. BALDWIN, JR., *WATER LAW AND ADMINISTRATION: THE FLORIDA EXPERIENCE*, ch. 12 § 122.1(b) (1968) [hereinafter cited as MALONEY].

8. *Id.* at 354-56.

9. 1856 Fla. Laws ch. 791.

10. See *Broward v. Mabry*, 58 Fla. 398, 50 So. 826 (Fla. 1909); *State v. Black River Phosphate Co.*, 32 Fla. 82, 13 So. 640 (Fla. 1893); see also 1856 Fla. Laws ch. 791.

11. MALONEY, *supra* note 7, at 355-68.

12. 1951 Fla. Laws ch. 26776.

13. MALONEY, *supra* note 7, at 368.

14. FLA. STAT. §§ 253.123, 253.124 (1957).

15. *Id.*

Chapter 403, the Florida Air Pollution Control Law, was also enacted in 1957.¹⁶ This act, later expanded to regulate the pollution of water,¹⁷ was administered by a series of agencies, beginning with the Florida Air Pollution Control Commission in 1957 and ending with the State of Florida Department of Environmental Regulation (DER). In 1975, the State of Florida Department of Pollution Control recognized that activities above the mean or ordinary high-water level could cause water pollution and adopted a vegetative index that created two zones wherein dredging and filling would be regulated. The first zone, "submerged land," was indicated by the presence of certain plant species as a dominant plant community.¹⁸ The second zone extended landward to an area called the "transitional zone" of a submerged land.¹⁹ A compromise between regulated interests and environmentalists limited regulation in the transitional zone to activities in the waterward quarter or the first fifty feet of the transitional zone, whichever was greater.²⁰

In connection with the vegetative index, the Department of Pollution Control passed a dredge and fill rule. The rule provided that any activities involving dredging or filling to be conducted in, or connected directly or indirectly to certain listed waters required a dredge and fill permit.²¹ Those waters include lakes, rivers, streams, the Atlantic Ocean, and the Gulf of Mexico.

The vegetative index and dredge and fill rules were the subject of an administrative procedures committee objection in 1975. The Joint Administrative Procedures Committee was concerned that the Department of Pollution Control did not have the statutory authority to promulgate rules defining "waters," which would establish the department's jurisdiction.²² When DER succeeded the Department of Pollution Control,²³ DER opted to avoid further problems associated with this objection by seeking the passage of what is now section 403.817 to legitimate the vegetative index. The

16. FLA. STAT. ch. 403 (1957).

17. FLA. STAT. ch. 403 (1967).

18. FLA. ADMIN. CODE R. 17-4.02(17) (1975).

19. FLA. ADMIN. CODE R. 17-4.02(19) (1975).

20. FLA. ADMIN. CODE R. 17-4.02(17) (1981).

21. FLA. ADMIN. CODE R. 17-4.28 (1975).

22. 1 Fla. Admin. Weekly 28 (July 18, 1975).

23. The vegetative index and dredge and fill rules were enacted in 1975, immediately prior to the Environmental Reorganization Act of that year. That act mandated the dissolution of the Department of Pollution Control and the creation of a new department, DER. The legislation also split the duties and the staff of the Trustees between DER and the Department of Natural Resources.

statute also required that all amendments to the rule be approved by legislative act.²⁴

The rule operated for almost five years before it was attacked. In 1980, two rule challenges were filed. The Deltona Corporation attacked the regulation of what it considered "land" as opposed to "water."²⁵ The second challenge, filed by Occidental Chemical Company, involved the application of jurisdiction in the upper reaches of a stream.²⁶ The hearing officer in *Deltona Corp. v. Department of Environmental Regulation* held DER did not have the authority to regulate lands as opposed to waters.²⁷ It was evident from the decision, however, that the hearing officer believed that the problem was merely one of semantics. Accordingly, DER altered the rule in 1981, changing "submerged land" and "transitional zone of submerged land" to "landward extent of waters of the state" as indicated by the presence of submerged or transitional species.²⁸

The first hearing in *Occidental Chemical Co. v. Department of Environmental Regulation* involved a jurisdictional challenge under section 120.57;²⁹ the other was a section 120.56 rule challenge proceeding.³⁰ The jurisdictional controversy arose as the result of the existence of a provision in the rule which noted that tributaries did not include "intermittent water courses which act as tributaries only following the occurrence of rainfall and which normally do not contain contiguous areas of standing water."³¹ The hearing officer held that jurisdiction existed in the stream from its headwater to its mouth, and the fact that there was a point of intermittency in this stream below the headwater did not preclude DER from exercising its jurisdiction.³² In the companion rule challenge, DER's interpretation of the rule was also upheld.³³

Occidental became a landmark case and the focus of legislative

24. FLA. STAT. § 403.817(3) (1983).

25. *Deltona Corp. v. Department of Env'tl. Regulation*, 2 Fla. Admin. L. Rep. 1302-A (Oct. 22, 1980) (final order entered Sept. 15, 1980).

26. *Occidental Chem. Co. v. Department of Env'tl. Regulation*, 3 Fla. Admin. L. Rep. 1-A (Jan. 12, 1981) (final order entered Nov. 26, 1980), *aff'd*, 411 So. 2d 388 (Fla. 1st DCA 1981).

27. 2 Fla. Admin. L. Rep. at 1305.

28. FLA. ADMIN. CODE R. 17-4.02(17) (1982).

29. *Occidental Chem. Co. v. Department of Env'tl. Regulation*, 2 Fla. Admin. L. Rep. 1029-A (Aug. 11, 1980) (final order entered May 23, 1980) *aff'd*, 411 So. 2d 388 (Fla. 1st DCA 1981).

30. 3 Fla. Admin. L. Rep. at 1-A (1981).

31. FLA. ADMIN. CODE R. 17-4.28(g) (1975).

32. *Deltona*, 2 Fla. Admin. L. Rep. at 1034-A.

33. *Occidental*, 3 Fla. Admin. L. Rep. at 3-A, 4-A.

attention.³⁴ Opponents of DER's action claimed that *Occidental* allowed DER to expand its jurisdiction beyond the original intention of the 1975 rule. Representatives of the development community lobbied the legislature to review the *Occidental* interpretation of jurisdiction.

Representatives of environmental interests had long been concerned about the lack of any formal wetlands policy or wetlands protection legislation. Prior to the Act, DER had indirectly protected wetlands and wildlife. Because marshes and swamps perform certain water quality functions, the regulatory process protected marshes and swamps where a developer could not show that water quality standards would not be violated.³⁵ However, the fact that the swamp or marsh also might be a valuable wetlands habitat was merely incidental. This incidental regulation became the subject of a rule challenge in the *Occidental* case. Calling it a "phantom rule," *Occidental Chemical Company* challenged the agency's incidental wetlands protection practice. The hearing officer, however, found no basis for this claim and upheld the DER's interpretation of the rule.³⁶

In 1982 and 1983 efforts were made by the State of Florida Game and Fresh Water Fish Commission (GFWFC), with the assistance of DER, to pass a wildlife preservation act.³⁷ This act did not pass, but in 1983 significant action by the legislature did occur. Immediately after the conclusion of the 1983 Legislative Session, committees were appointed to study the wetlands issue. Senator Patrick Neal, Chairman of the Senate Natural Resources Committee, appointed a blue ribbon committee of citizens, representing environmental and development interests, and staff members of three state agencies — DER, GFWFC, and the State of Florida Department of Natural Resources (DNR). The Select Senate Committee held meetings throughout the state, taking testimony and reviewing possible language for a new wetlands act. In the House of Representatives, the House Natural Resources Committee, headed by Representative Jon Mills, initiated a two-day wetlands symposium which called upon interested groups and members of the scientific community to make presentations regarding the status of wetlands and wetlands regulation in the State of Florida.

34. See Alderman, *Phosphate, Dredge and Fill and the Constitutionality of Chapter 403: The Occidental Cases*, 56 FLA. BAR J. 543 (1982).

35. FLA. ADMIN. CODE R. 17-4.28(3) (1982).

36. *Occidental*, 3 Fla. Admin. L. Rep. at 4-A.

37. See Fla. S. 639 (1982); Fla. H.R. 362 (1982); Fla. S. 28 (1982); Fla. S. 285 (1983).

The list of issues brought to the Select Senate Committee included items which had been debated among various interest groups for years. To some extent, the issues could be considered unfinished business from the Environmental Reorganization Act of 1975. It became obvious that addressing the concerns of the divergent groups while developing a workable regulatory scheme would be very difficult.

The principal focus of the environmental groups was the inclusion of a wetlands policy statement. Within the issue rested the basic question of which wetlands should be protected. Some considered a classification scheme to be the answer. Representatives of mining interests were very concerned about the expansive jurisdiction resulting from the *Occidental* decisions. The protection of nontidal water bodies during droughts was another issue. A critical issue to DER was a standardization of the permitting test; the existing scheme which provided two separate jurisdictional lines and several different permitting tests was complicated and confusing.³⁸ Other problems which were discussed included the length of time required to process applications for consent to use state lands; the inconsistencies in the local government approval requirements; the process of appeal of certain final department decisions to the Trustees; and federal-state coordination.

Mitigation was a significant issue to all of the special interest groups. Out of this issue, many questions arose: Should DER be allowed to consider on-site mitigation or off-site mitigation in issuing pollution permits? If mitigation was a valid consideration, what should be allowed? Would the payment of certain fees into a fund be an acceptable form of mitigation?

Toward the end of 1983 it became evident that some of the changes being discussed would have a significant impact on regulation of agricultural activities. The agricultural issue became a "make it or break it" issue for the legislation. Representatives of DER met with representatives of agricultural interests and worked on a compromise which made passage of the bill possible.³⁹

In light of previous unsuccessful efforts to pass wetlands protection legislation, the Act is a masterwork of compromise. It is too early to determine exactly how the Act will affect each interest. The impact on wetlands and the meaning of many of the Act's sec-

38. FLA. ADMIN. CODE R. 17-4.02, 17-4.28, 17-4.29 (1982).

39. See FLA. STAT. § 403.927 (Supp. 1984), which transfers dredge and fill regulatory authority over farming and forestry activities to the water management districts.

tions remain to be seen. Even representatives of DER can only speculate as to the extent of change in jurisdictional area brought about by the adoption of the vegetative index. One thing, however, is clear: habitat protection above the mean and ordinary high-water lines no longer will be incidental to water quality control.

A. *Jurisdiction Over Activities*

The activities regulated by the Act are dredging and filling "in, on, or over surface waters, unless exempted by statute or department rule."⁴⁰ The definitions of both dredging and filling are expansive. "Dredging" is defined as "excavation, by any means, in waters," including the excavation or creation of a water body which is or will be connected to waters.⁴¹ What constitutes excavation may not always be clear. "Filling" is the "deposition, by any means, of materials in water."⁴²

During the drafting process, "construction" was deleted from the list of regulated activities. This deletion raises questions as to which activities were intended to be regulated. For example, did the legislature intend that construction which did not fall within the definition of dredge and fill need not be regulated or did it feel that the Act had given such expansive definitions to the terms dredge and fill that any construction would necessarily require permitting as dredge and fill?

The dredge and fill definitions require that activities occur in water in order to be regulated. However, the Act expressly prohibits dredge or fill activities from taking place in, on, or over waters without a permit.⁴³ This raises the question of whether a bridge or pipeline which is suspended over waters, but which has no supports in the water, is to be considered filling that takes place over water or is precluded from being considered filling so long as the materials are not deposited in the water.

The most plausible explanation is that the legislature intended DER to have jurisdiction over activities that take place in and on waters. Filling cannot occur unless materials are deposited in waters. If the legislature intended that a permit be required for activities *over* waters, it could have defined fill so as to include over-water activities.

40. FLA. STAT. § 403.913(1) (Supp. 1984).

41. FLA. STAT. § 403.911(2) (Supp. 1984).

42. FLA. STAT. § 403.911(4) (Supp. 1984).

43. FLA. STAT. § 403.913(1) (Supp. 1984).

B. Geographical Jurisdiction

The Act makes numerous changes in the way DER's geographical jurisdiction is determined. In general, the changes can be expected to greatly expand the extent of DER's jurisdiction, although there are two instances—intermittent streams⁴⁴ and certain upland ditches⁴⁵—in which jurisdiction may actually be limited.

Under previously existing law, DER's jurisdiction varied depending on whether the proposed project was being evaluated under chapter 253 or 403. Dredge and fill jurisdiction under chapter 253 extended to navigable waters and submerged lands,⁴⁶ while jurisdiction under chapter 403 included the landward extent of waters⁴⁷ as defined in section 403.031(3)⁴⁸ and limited by rule.⁴⁹

The Act eliminates the distinction between navigable waters and other waters. Section 403.913(1) provides that permits will be required for dredging or filling in "surface waters" unless exempted by statute or rule.⁵⁰ In general, the landward extent of surface waters will still be determined by dominance of wetlands vegetation. In some situations, however, jurisdiction may be based on the mean or ordinary high-water line.⁵¹ Hydric soils also will play a more important role in determining jurisdiction under the Act.

In the past, DER's jurisdiction determinations had usually been made in the field in consultation with the applicant without any need for detailed scientific studies. It is expected that this practice will continue under the Act, although for several reasons, determinations may occasionally be much more complicated than in the past. First, both the new statutory and rule provisions are much more detailed than under prior law. Second, there are a number of complicated provisions in the Act which are intended to limit DER's jurisdiction in certain circumstances.⁵² Finally, because of

44. FLA. STAT. § 403.913(5) (Supp. 1984).

45. FLA. STAT. § 403.913(4) (Supp. 1984).

46. FLA. STAT. §§ 253.123, 253.124 (1983).

47. FLA. STAT. § 403.817(2) (1983).

48. FLA. STAT. § 403.031(3) (1983) defines "waters" to "include, but not be limited to, rivers, lakes, streams, springs, impoundments, and all other waters or bodies of water, including fresh, brackish, saline, tidal, surface or underground waters. Waters owned entirely by one person other than the state are included only in regard to possible discharge on other property or water."

49. FLA. ADMIN. CODE R. 17-4.28(2) (Supp. 1984).

50. FLA. STAT. § 403.913(1) (Supp. 1984).

51. FLA. STAT. § 403.913(2) (Supp. 1984).

52. See FLA. STAT. §§ 403.8171(5), 403.913(4), (5) (Supp. 1984).

grandfather clauses,⁵³ pre-Henderson Act jurisdictional provisions will continue to apply to many types of projects.

C. *Jurisdiction Prior to the Wetlands Act*

Jurisdiction under chapter 403 is over waters as defined in section 403.031(3).⁵⁴ The legislature recognized that water levels naturally rise and fall, often making it difficult to determine the natural landward extent of water for regulatory purposes.⁵⁵ Section 403.817 provides for DER to develop a method for making such jurisdictional determinations by use of plant indicators or soil types which are characteristic of areas subject to inundation by the waters of the state.⁵⁶

Rule 17-4.28(2) describes the waters which are subject to dredge and fill jurisdiction pursuant to chapter 403.⁵⁷ Permits are required for those dredging or filling activities to be conducted in, connected directly to, or via excavated water bodies to certain listed categories of waters:

1. Rivers and natural tributaries thereto;
2. Streams and natural tributaries thereto;
3. Bays, bayous, sounds, estuaries, and natural tributaries thereto;
4. Natural lakes, except those owned entirely by one person and except those that become dry each year and are without standing water;
5. Lakes of more than ten acres of water area and a maximum average depth of two feet existing throughout the year;
6. The Atlantic Ocean out to the seaward limit of the state's territorial boundaries; and
7. The Gulf of Mexico out to the seaward limit of the state's territorial boundaries.⁵⁸

The rule goes on to explain that tributaries do not include intermittent natural watercourses which act as tributaries only following the occurrence of rainfall and normally do not contain contiguous areas of standing water.⁵⁹

The landward extent of these waters is determined by the pres-

53. FLA. STAT. § 403.913(6), (8) (Supp. 1984).

54. FLA. STAT. § 403.031(3) (Supp. 1984).

55. FLA. STAT. § 403.817(1) (1983).

56. FLA. STAT. § 403.817(2) (1983).

57. FLA. ADMIN. CODE R. 17-4.28(2) (Supp. 1984).

58. FLA. ADMIN. CODE R. 17-4.28(2)(a)-(f) (Supp. 1984).

59. FLA. ADMIN. CODE R. 17-4.28(2)(g) (Supp. 1984).

ence of submerged or transitional vegetation as dominant plant species.⁶⁰ "Dominance," as used in defining the landward extent of waters of the state, means "the presence of species or communities in greater numbers, biomass, or areal extent than competing species or communities, or a scientifically accepted tendency of species or communities to achieve such a status under existing or reasonably anticipated conditions."⁶¹

The interpretation of this definition of dominance was at issue in *Residential Communities of America, Inc. v. Department of Environmental Regulation*,⁶² where a developer sought to construct an earthen berm within a dry lake bed. The surface of the berm was dominated by dog fennel, a plant species intolerant of water. Based on the dominance of this species, DER disclaimed jurisdiction. Intervenors then sought a formal administrative hearing asserting that DER did have jurisdiction. The hearing officer found that DER did have jurisdiction to regulate activities in this area because of the presence of large numbers of subterranean tubers of various species of water tolerant plants. The large number of these species was found to constitute dominance. Although DER adopted these findings, the First District Court of Appeal rejected the final order on the ground that there was not sufficient evidence in the record to support the findings of fact.⁶³ The court did not reach the legal issue of whether dormant tubers could be used to establish a tendency toward dominance.

While chapter 403 provides broad jurisdiction over waters, jurisdiction under chapter 253 is limited to regulation of activities in navigable waters.⁶⁴ The navigable waters of the state are waters overlying the original sovereignty lands, those submerged lands which passed from the United States to the State of Florida by right of its sovereignty upon achieving statehood in 1845.⁶⁵ If the water body is navigable, DER has jurisdiction regardless of the current ownership of the bottom.⁶⁶

The Supreme Court of Florida in *Odom v. Deltona Corp.*,⁶⁷ found that the Florida test of navigability was similar, if not iden-

60. FLA. ADMIN. CODE R. 17-4.02(17) (Supp. 1984).

61. FLA. ADMIN. CODE R. 17-3.021(8) (1982).

62. 448 So. 2d 1155 (Fla. 1st DCA 1984).

63. *Id.* at 1156.

64. FLA. STAT. §§ 253.123, 253.124 (1983).

65. FLA. STAT. § 253.12 (1983).

66. *Gies v. Fischer*, 146 So. 2d 361 (Fla. 1962).

67. 341 So. 2d 977 (Fla. 1976).

tical, to the federal title test. In applying the federal title test, the water body would be considered navigable if it were susceptible to navigation for commerce in its natural and ordinary condition by any customary mode of trade or travel at the date of Florida's admission to the Union.⁶⁸ The court also noted that the existence of a meander line gives rise to a presumption of navigability.⁶⁹ This presumption becomes significant where a mean high-water line cannot be determined for chapter 253 jurisdictional purposes,⁷⁰ allowing DER to substitute the meander line for the mean high-water line.⁷¹

Jurisdiction under chapter 253 also extends to activities which connect artificially created navigable or nonnavigable water bodies to natural navigable waters where the connection involves construction (dredging and filling) below the line of mean or ordinary high-water line of the natural water body.⁷² The issue of whether chapter 253 jurisdiction extends to dredge and fill activities in artificially created navigable bodies which have no connection to natural navigable water was first addressed in *Jefferson National Bank at Sunny Isles v. Metropolitan Dade County*.⁷³ This case involved an action for declaratory judgment with respect to chapter 253 jurisdiction over filling activities in Bella Vista Bay, an artificially created navigable water body bordering and contiguous to the navigable waters of the Intercoastal Waterway in Dade County. In reviewing sections 253.123 and 253.124, the Third District Court of Appeal held that filling an artificially created waterway required a permit.⁷⁴

The court later confirmed, but partially limited, this application of chapter 253 in *State Board of Trustees of the Internal Improvement Fund v. Sea-Air Estates, Inc.*,⁷⁵ in which the Trustees sought an injunction to require the defendant to replace dredged

68. *Id.* at 988, (citing *Utah v. United States*, 403 U.S. 9, 10 (1971)).

69. *Id.* See also *McDowell v. Trustees*, 90 So. 2d 715 (Fla. 1956).

70. FLA. STAT. § 253.1221 (1983). This provision limits DER's jurisdiction in navigable waters to the line of mean high-water in tidal areas and ordinary high-water in nontidal areas.

71. See *Florida Bd. of Trustees of the Internal Improvement Trust Fund v. Wakulla Silver Springs Co.*, 362 So. 2d 706, 712 (Fla. 3d DCA 1978) in which the court relied on the meanderline as the boundary line since there was no other course or distance presented into evidence.

72. FLA. STAT. § 253.124 (1983).

73. 271 So. 2d 207 (Fla. 3d DCA 1972).

74. *Id.* at 213. The court found that section 253.124, Florida Statutes (1983) made no distinction between natural and artificially created navigable waterways.

75. 327 So. 2d 823 (Fla. 3d DCA 1976).

material. The court carved out an exception to the permitting requirements in section 253.123(1) for dredging projects in artificially created navigable waters owned by the parties undertaking the project.⁷⁶

D. Jurisdiction Under the Wetlands Act

Under the Act, navigability is no longer a basis for asserting dredge and fill jurisdiction. Instead, the jurisdictional scheme of chapter 403, which relies on a vegetative or soils index, was retained.

1. Vegetation

On January 24, 1984, the Environmental Regulation Commission, the standard-setting body for DER, adopted a new vegetative index, Rule 17-4.022, Florida Administration Code.⁷⁷ This rule was presented to the legislature for review and ratification as required by section 403.817.⁷⁸ As amended and approved by the legislature, the vegetative index rule constitutes one of the most significant changes under the Act. It can be expected to result in substantial increases in DER's jurisdiction. When the vegetative index was first adopted in 1975, it was a reasonably accurate reflection of wetlands conditions in tidally influenced areas. However, in freshwater wetlands, such as riverine floodplains, the index was inadequate. In addition, the rule limited DER's jurisdiction in the transitional zone to the first fifty feet or the waterward quarter of the area, whichever was greater.⁷⁹

The new rule greatly expands the lists of plant species used to determine jurisdiction.⁸⁰ The plant species adopted by the Environmental Regulation Commission are divided into submerged species (those requiring saturated soil conditions to grow), transitional species (those which could grow in either saturated or dry soil conditions), and upland species (any species not on one of the other two lists). The legislature removed from the transitional list five controversial species: punk tree, a species of titi, buckwheat tree, cabbage palm, and Brazilian pepper.⁸¹ In determining jurisdiction, these species are not to "be considered submerged, transi-

76. *Id.* at 825.

77. FLA. ADMIN. CODE R. 17-4.022 (Supp. 1984).

78. FLA. STAT. § 403.817(3) (1983).

79. FLA. ADMIN. CODE R. 17-4.02(17) (1982).

80. FLA. ADMIN. CODE R. 17-4.022 (Supp. 1984).

81. FLA. ADMIN. CODE R. 17-4.022(4) (Supp. 1984).

tional or upland species."⁸² The jurisdictional determination is to be made without regard to those species, basing jurisdiction on the "remaining plant species or other indicators of regular and periodic inundation."⁸³

The practical effect of expanding the plant species lists will be a dramatic expansion of jurisdiction. However, it is not yet possible to make a general statement about how great that increase will be. In some cases there may be no appreciable change in the line; in others there may be a tremendous increase in jurisdiction. It is expected that the greatest increases will occur in freshwater areas in central and north Florida.

The limitation on jurisdiction in the transitional zone has been eliminated under the new rule. In fact, the concept of a transitional *zone* has been eliminated. The rule still contains a list of transitional species, but those species are to be considered in conjunction with submerged species in determining jurisdiction. In most areas, this change will have little effect since the extent of the transitional zone generally does not exceed fifty feet. In areas like coasts with low energy tidal action, the transitional zone may be very wide.

In addition to the plant species lists, the new rule contains formulas for determining the extent of jurisdiction and a methodology for doing transects where jurisdiction cannot be determined visually.⁸⁴ Under the previous rule, DER jurisdiction was based on dominance of plant species on the lists.⁸⁵ Dominance was defined to mean the presence of submerged or transitional species "in greater numbers, biomass, or areal extent than competing species. . . ."⁸⁶ Under the new rule, as under the previous rule, jurisdiction begins with a water body⁸⁷ and is then traced landward using the vegetative index.⁸⁸ The new rule differs from the old in that generally only the top strata of plants are considered and the percentage of wetlands species is determined based on the areal extent only. As an illustration, the canopy⁸⁹ would be used to determine jurisdiction in a forested floodplain area, and in a marsh

82. FLA. ADMIN. CODE R. 17-4.022(5) (Supp. 1984).

83. *Id.*

84. FLA. ADMIN. CODE R. 17-4.022(1)(c) (Supp. 1984).

85. FLA. ADMIN. CODE R. 17-4.02(17) (1982).

86. FLA. ADMIN. CODE R. 17-3.021(8) (1982).

87. FLA. ADMIN. CODE R. 17-4.022(1) (Supp. 1984).

88. *Id.*

89. FLA. ADMIN. CODE R. 17-4.022(1) (Supp. 1984) defines "canopy" to include "all woody plants with a trunk 4 inches or greater in diameter at breast height (dbh)."

system, groundcover⁹⁰ would be used.

There are two instances in which the top stratum is not used. First, if that stratum constitutes less than ten percent of areal extent, another stratum will be chosen.⁹¹ Second, if the top stratum is "not indicative of normal hydrologic conditions" a lower stratum may be used.⁹² For example, the area around a lake may be vegetated by cypress trees, a wetlands indicator, while the groundcover might be dominated by upland species. If the lake level has been permanently lowered, the cypress trees might not be affected even though they are no longer within the landward extent of the lake. In this situation, the groundcover, rather than the cypress trees, would be more reflective of the normal hydrologic conditions. In any case, the party asserting that a stratum other than the top stratum is more representative bears the burden of establishing that fact.⁹³ If both DER and the applicant agree, strata may be combined.⁹⁴ In this case visual methods of determining jurisdiction cannot be used. Instead, transects must be run using the methodology contained in the rule, and the figures obtained for each stratum will be combined and divided by the number of strata used.⁹⁵ When more than one stratum is used, certain species will be added to the submerged and transitional species lists.⁹⁶

After it is determined which stratum should be used, the next step is to evaluate the species present at the site. There are three situations in which DER will have jurisdiction. The first and simplest situation is when the combined areal extent of the submerged and transitional species is greater than fifty percent and the areal extent of submerged species is greater than the areal extent of the upland species.⁹⁷ This can be expressed as a formula with "S" representing submerged species, "T" representing transitional species, and "U" representing uplands species. Then:

$$\begin{aligned} \text{jurisdiction} &= S + T > 50\% \text{ and} \\ &S > 10\% \text{ and} \\ &S > U \end{aligned}$$

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. FLA. ADMIN. CODE R. 17-4.022(1)(d) (Supp. 1984).

95. *Id.*

96. FLA. ADMIN. CODE R. 17-4.022(1)(d), (2), (3) (Supp. 1984).

97. FLA. ADMIN. CODE R. 17-4.022(1)(a) (Supp. 1984).

In the second situation, DER has jurisdiction where the combined areal extent of submerged and transitional species is greater than eighty percent, the areal extent of submerged species is less than ten percent, the areal extent of uplands species is less than ten percent, and there are other indicators of regular and periodic inundation.⁹⁸ The formula for this can be expressed:

$$\begin{aligned} \text{jurisdiction} = & S + T > 80\% \text{ and} \\ & S < 10\% \text{ and} \\ & U < 10\% \text{ and} \\ & \text{other indicators present} \end{aligned}$$

Jurisdiction in this situation is more difficult to determine because of the great numbers of transitional species which can survive in saturated soils but do not generally require saturated soils conditions. Therefore, some evidence of other indicators of regular and periodic inundation must exist. The rule identifies certain factors that may be considered, such as hydrology, swollen buttresses, or lichen lines.⁹⁹ This is not intended to be an exhaustive list. Factors such as soils may be used on a case by case basis as indicators of inundation. The rule places the burden of establishing regular and periodic indicators on DER.¹⁰⁰

The third situation involves a jurisdiction determination in an area vegetated by any of the five species removed from the transitional list by the legislature. Since these species may no longer be considered submerged, transitional, or uplands species, jurisdiction will be based on the other species at the site and other indicators of regular and periodic inundation.¹⁰¹

Another new feature of the revised rule is the addition of a methodology to be used where visual or aerial photo-interpretation determinations are inappropriate.¹⁰² The methodology varies depending on whether the canopy, subcanopy, or groundcover is used, and by mutual agreement, a methodology different from the one specified in the rule may be used.¹⁰³

Because the vegetative index significantly increased DER jurisdiction, it was one of the most controversial matters before the legislature. In addition, the technical nature of the rule makes it a

98. FLA. ADMIN. CODE R. 17-4.022(1)(b) (Supp. 1984).

99. FLA. ADMIN. CODE R. 17-4.022(1)(b)(4) (Supp. 1984).

100. *Id.*

101. FLA. ADMIN. CODE R. 17-4.022(5) (Supp. 1984).

102. FLA. ADMIN. CODE R. 17-4.022(1)(c) (Supp. 1984).

103. FLA. ADMIN. CODE R. 17-4.022(1)(d) (Supp. 1984).

difficult subject in the legislative forum. The legislature dealt with these problems by creating a Vegetative Index Review Committee. The committee has nine members: three to be appointed by the Governor, three by the President of the Senate, and three by the Speaker of the House. The responsibilities of the committee include review of the rule's implementation. The committee is to report to the legislature by March 1, 1986, with recommendations for changes to the rule.

The legislature also imposed several limitations on DER's jurisdiction because of the uncertain increase in jurisdiction under the new list.¹⁰⁴ First, except in waters which are saline or brackish or in rivers whose major source of flow is from springs, the landward extent of waters shall not exceed the elevation of the ten-year recurring flood event.¹⁰⁵ Second, jurisdiction is limited to an area with water standing or flowing for more than thirty consecutive days per year, calculated on an average annual basis.¹⁰⁶ In neither case may the limit operate to reduce DER's jurisdiction beyond the jurisdiction that existed prior to the rule change.

There has been no real attempt to correlate the ten-year flood line with the vegetative index. In the absence of detailed research on the relationship of these two indicators, some inferences may be drawn from a limited study conducted by DER of several sites in central Florida. In this study the old and new vegetative indices were compared with the hydric soils line and the mean annual flood line.¹⁰⁷ The results showed a high ratio of correlation between hydric soils and the new vegetative index. The mean annual flood line, however, was sometimes landward of the line based on the new index and sometimes waterward of the line based on the old index. It is questionable whether the ten-year flood line would correlate any closer with the vegetation line.

Applicants have the option of using the ten-year flood line to limit DER's jurisdiction.¹⁰⁸ An applicant choosing this alternative bears the burden of establishing the flood line. Because of the cost and complexity of mapping a flood plain elevation, it seems unlikely that many applicants will take advantage of this option.

Overall, the new vegetative index rule establishes a system for determining jurisdiction that is potentially much more complicated

104. FLA. STAT. § 403.8171(5) (Supp. 1984).

105. *Id.*

106. *Id.*

107. DER Memorandum from Lisa Grant to Suzanne Walker (April 6, 1984).

108. FLA. STAT. § 403.8171(5) (Supp. 1984).

than the old rule. It seems likely that the rule will be reconsidered and perhaps amended during the 1986 legislative session following the report of the Vegetative Index Review Committee.

2. Hydric Soils

Since section 403.817 first became effective in 1977, DER has had the statutory authority to adopt a soils index similar to the vegetative indices.¹⁰⁹ To date, no rule has been proposed to implement this authority.

The primary advantage of using hydric soils as an indicator of regular and periodic inundation is their relative permanence. Many factors can cause water levels to rise and fall. When water levels are lower than normal for an extended period of time, it is not unusual for changes in vegetation to occur as species that are dependent on saturated soils disappear. These temporary conditions would not affect hydric soils. Consequently, soils may more accurately reflect the "normal" or "average" conditions at a site over an extended period of time than would vegetation.

On the other hand, this advantage increases the difficulty of developing a soils index to be used for regulatory purposes, as large portions of the state at one time or another have been inundated on a regular basis. Moreover, many areas which had been drained in the past, and are not presently within DER's dredge and fill jurisdiction, may still have hydric soils present. The task of rule development is also complicated by the fact that hydric soils vary greatly across the state. As a result, the regulatory agencies which use soils to establish jurisdiction generally have different soils indices for different geographical areas.¹¹⁰

Although there is as yet no rule there is at least one situation in which the presence of hydric soils may be relevant under the present regulatory scheme. Under chapter 403, DER has jurisdiction over "waters" such as rivers, streams, and lakes.¹¹¹ There are no statutory or regulatory definitions of these terms, however. It is not surprising that litigation often arises over whether a particular water body is a river or stream.¹¹² In this type of controversy, the

109. FLA. STAT. § 403.817(2) (1983).

110. See Applicant's Handbook, Management and Storage of Surface Waters 82-86 (Dec. 7, 1983) (in which the St. Johns River Water Management District's rules use soil as a basis for establishing jurisdiction) (available from the St. Johns Water Management District) [hereinafter cited as Applicant's Handbook].

111. See FLA. STAT. § 403.031(3) (1983).

112. See *Occidental*, 2 Fla. Admin. L. Rep. at 1029-A; 3 Fla. Admin. L. Rep. at 1-A.

presence of hydric soils may be considered as an indicator of the existence of a water body.

Soils are addressed in several different provisions of the Act. Section 403.913(3) gives a permit applicant, or a person requesting a jurisdictional determination, the option of requesting that DER use soils in conjunction with vegetation in assessing jurisdiction.¹¹³ This option is not available to DER or third parties. In theory, soils would be used only to limit, not expand, DER's jurisdiction. In practice, however, it is very unlikely that limitation will occur because jurisdiction based on soils will be at least as broad as jurisdiction based on vegetation alone in almost every case. As a result, this provision will probably not be used frequently, if at all. Another potential disadvantage for permit applicants who use this option is that a request to DER to make a soils assessment tolls the time for DER to act on the permit application.¹¹⁴ The time does not begin to run again until DER receives information to be provided by the United States Soil Conservation Service (SCS). Since the Act imposes no time limit on SCS to perform its assessment, the permitting time frame could be extended indefinitely.

In the case where a soils assessment is conducted, its results are not necessarily determinative. The Act provides that the results are merely presumptive as to either a determination confirming or rejecting jurisdiction.¹¹⁵ The Act does not state which factors, if any, might be used to rebut this presumption. The amended vegetative index provides for the use of other indicators of regular and periodic inundation, such as lichen lines and buttressed trunks, in certain circumstances.¹¹⁶ Whether these indicators could also be used to rebut a soils assessment presumption remains to be seen.

Another unanswered question with respect to the implementation of this section of the Act is which list of hydric soils to use in making the soils assessment. Section 403.913(3) does not specifically address DER's authority to adopt a rule establishing a soils index.¹¹⁷ There is, however, general rulemaking authority under section 403.912 to implement the provisions of the Act.¹¹⁸

In the interim, it will be necessary to refer to some type of list of hydric soils when an applicant requests a soils assessment. SCS is

113. FLA. STAT. § 403.913(3) (Supp. 1984).

114. *Id.*

115. *Id.*

116. FLA. ADMIN. CODE R. 17-4.022(b)(4) (Supp. 1984).

117. FLA. STAT. § 403.913(3) (Supp. 1984).

118. FLA. STAT. § 403.912(1) (Supp. 1984).

currently conducting a soils mapping program and will publish a soils survey for each county after the mapping is completed. SCS has provided DER with a list of hydric soils for use in determining jurisdiction for regulatory purposes. The major drawback to relying on this list is that it changes periodically as new soils are discovered and the mapping program continues.

In recognition of the difficulty of developing a comprehensive statewide list of hydric soils for regulatory purposes, the legislature directed DER to work with SCS, the State of Florida Department of Agriculture and Consumer Services, and the Institute of Food and Agricultural Sciences at the University of Florida on the development of a soils index.¹¹⁹ The results of the joint study are to be reported to the legislature during the 1986 legislative session. It does not appear likely that DER will propose a soils index prior to the 1986 legislative session. For DER to adopt a soils index, it must be submitted to the legislature in bill form for approval before it can become effective.¹²⁰ Any soils index proposed prior to the joint study report would probably be considered by the legislature to be premature.

One final situation in which soils may be used to establish jurisdiction is addressed in Rule 17-4.022(1)(b) and (5).¹²¹ Subsection (1)(b) provides that in an area vegetated with more than eighty percent transitional species and less than ten percent of either submerged or upland species, DER may use "such factors as hydrology, swollen buttresses, lichen lines, or other indicators that the area is subject to regular and periodic inundation" to establish its jurisdiction.¹²² Hydric soils are not specifically mentioned as one of the factors to be considered, but neither are they specifically eliminated from consideration. It seems likely that, on a case by case basis, soils will be used by DER as one indicator of regular and periodic inundation. Similarly, the subsection (5) provides for the use of other indicators to determine jurisdiction in areas vegetated by any of the five listed species which are not considered to be submerged, transitional, or upland species.¹²³

119. 1984 Fla. Laws. ch. 84-79, § 14.

120. FLA. STAT. § 403.817(3) (1983).

121. FLA. ADMIN. CODE R. 17-4.022(1)(b), (5) (Supp. 1984).

122. FLA. ADMIN. CODE R. 17-4.022(1)(b) (Supp. 1984).

123. FLA. ADMIN. CODE R. 17-4.022(5) (Supp. 1984).

3. Use of Mean or Ordinary High-Water Line

As an alternative to the vegetative index, the Act allows DER to assert jurisdiction to the ordinary or mean high-water line of waters where that line is landward of the line of jurisdiction as determined using the vegetative index.¹²⁴ This provision was a direct response by the legislature to the decision of the First District Court of Appeal in *Department of Environmental Regulation v. Falls Chase Special Taxing District*.¹²⁵ The proposed Falls Chase development was to be located on Lake Lafayette, a nonmeandered lake in Leon County. When the developer began placing fill below the ordinary high-water line, DER issued a cease and desist order. Jurisdiction was asserted under chapter 403. At commencement of the action, the water level in the lake was well below the ordinary high-water line, as it had been for some time. The area in question was not dominated by vegetation on DER's vegetative index. The circuit court held that section 403.817(2) provided the sole basis upon which DER could assert jurisdiction under chapter 403,¹²⁶ and there was no inherent authority under chapter 403 to use an ordinary high-water line where the requisite vegetation was not dominant. On appeal, the First District Court of Appeal affirmed the circuit court decision.

The significance of this decision becomes apparent in times of prolonged drought like that of 1971 and 1972. Across the state, lake levels began to drop dramatically. As water levels receded, wetlands vegetation frequently died out or became dormant, significantly decreasing the geographical extent of DER's jurisdiction under chapter 403. As a result, dredge and fill activities were conducted without a chapter 403 permit in many areas that had a history of flooding and the strong probability of future flooding. The threat of similar permit avoidance will be eliminated with the recent authorization of a jurisdictional alternative to the vegetative index.

124. FLA. STAT. § 403.913(2) (Supp. 1984). The section provides: "The landward extent of waters shall be determined as provided in s. 403.817, except that the department may exert its jurisdiction to the ordinary or mean high-water line of waters whenever the landward extent, if determined in accordance with Rule 17-4.022, Florida Administrative Code, occurs waterward of the ordinary or mean high water line. The determinations made pursuant to this subsection shall be to establish the regulatory jurisdiction of the department and are not intended to be a delineation of the boundaries of lands for purposes of title."

125. 424 So. 2d 787 (Fla. 1st DCA 1982).

126. *Falls Chase Special Taxing District v. Department of Env'tl. Regulation*, Case nos. 23-20, 23-21, 23-22, 23-23 (Fla. 2d Cir. Ct. 1977).

It is clear from reading section 403.817(2) that the legislature intended to address the problem of naturally rising and falling waters even without the Act.¹²⁷ The transient nature of many types of vegetation, particularly herbaceous species, makes the vegetative index an inadequate mechanism for dealing with drought situations when water levels fall and remain lower than normal for extended periods of time. While section 403.817(2) provides for the alternative use of soils to determine jurisdiction, a soils index has never been adopted by DER.

Where an ordinary high-water line will be used to determine jurisdiction, a survey must be conducted by a registered land surveyor, as is presently required under chapter 253.¹²⁸ Such a survey would be used only for the purpose of establishing a jurisdictional boundary for purposes of DER's regulatory scheme and would not be used to establish any line of ownership between the state and individuals or between adjoining land owners.¹²⁹ The mean high-water line may also be used as an alternative jurisdiction line, but it is not expected that it will be used with any frequency since the prolonged drought problems experienced in freshwater bodies would not occur in tidal water bodies.

4. The Everglades—Big Cypress—Fakahatchee Strand

One issue of particular concern to DER prior to the 1984 legislative session was jurisdiction over dredge and fill activities in the area commonly referred to as the Everglades. In several administrative cases, DER's jurisdiction in this area was called into question. DER's final orders have consistently affirmed its authority to regulate dredging and filling in portions of the Everglades that are connected to waters of the state. The Act includes provisions intended to clarify the extent of DER's jurisdiction.

In *Florida Mining and Materials Corp. v. Department of Environmental Regulation*,¹³⁰ DER proposed to deny a permit for rock mining in the East Everglades. DER asserted jurisdiction over the

127. FLA. STAT. § 403.817(2) (1983) provides: "In order to accomplish the legislative intent expressed in subsection (1), the department is authorized to establish by rule, pursuant to chapter 120, the method for determining the landward extent of the waters of the state for regulatory purposes. Such extent shall be defined by species of plants or soils which are characteristic of those areas subject to regular and periodic inundation by the waters of the state. The application of plant indicators to any areas shall be by dominant species. . . ."

128. FLA. STAT. § 253.37 (1983) prohibits the practice of land surveying by any person not registered as a land surveyor pursuant to chapter 472, Florida Statutes (1983).

129. FLA. STAT. § 403.917(2) (Supp. 1984).

130. 4 Fla. Admin. L. Rep. 2230-A (Oct. 18, 1982) (final order entered Aug 5, 1982).

site based on section 403.817 and Rule 17-4.02(17). The facts were undisputed that sawgrass, a species listed on the vegetative index, was the dominant vegetation on the project site and that a sawgrass prairie connected the site with the waters of the Shark River. DER asserted that the site was within the landward extent of the Shark River. The hearing officer agreed, but concluded that the existence of sawgrass created only a presumption of jurisdiction. He further concluded that DER's rule created a separate test of jurisdiction—whether an area was “customarily submerged” and “exchange[d] waters with ‘a recognizable water body.’”¹³¹ Since there was surface water on the site only ten percent of the year, the hearing officer determined that the project site was not customarily submerged and did not exchange water with the Shark River. DER rejected this reasoning in its final order, holding that the existence of a continuous line of vegetation conclusively established DER's jurisdiction.¹³² It should be noted that the hearing officer's reasoning was contrary to that of the *Occidental* hearing officer who held that the rule did *not* create a rebuttable presumption.¹³³

A line of reasoning similar to that embraced in *Florida Mining and Materials* led the hearing officer in *Goldring v. Department of Environmental Regulation*¹³⁴ to hold that DER lacked jurisdiction over a seventy-acre site in the East Everglades. In *Goldring*, DER claimed that the site was within the landward extent of Florida Bay. Again, the project site was part of a vast sawgrass prairie that extended to the bay. The hearing officer concluded that the site did not exchange water with the bay since the bay is a saltwater body and sawgrass is a freshwater species. This result was reached based on an interpretation of section 403.817 and Rule 17-4.28(2) as requiring a two-way exchange of waters. Essentially, this narrow construction of the statute and rule would allow DER to assert jurisdiction only over areas affected by a tidal exchange or periodic flooding, such as a riverine flood plain, and could severely limit jurisdiction in areas such as freshwater marshes.¹³⁵ This conclusion

131. *Id.* at 2230-A.

132. *Id.* at 2231-A.

133. See *Occidental*, 3 Fla. Admin. L. Rep. at 3-A.

134. 6 Fla. Admin. L. Rep. 4135-A (July 23, 1984) (final order entered May 24, 1984).

135. *Department of Env'tl. Regulation v. Fleming*, DOAH Case No. 83-3239 (final order entered June 12, 1984), which raised this same issue as to a north Florida freshwater marsh. The hearing officer in *Fleming* found that DER lacked jurisdiction over a marsh connected to the bay. As in *Goldring*, DER rejected this conclusion in its final order.

was rejected in DER's final order wherein DER reaffirmed its position that the term "exchange" included a one-way exchange of waters.¹³⁶

In both *Goldring* and *Florida Mining and Materials*, a crucial issue seemed to be whether the project sites exchanged waters with a listed water body. Both hearing officers concluded that the legislature had not intended to give DER jurisdiction over areas of the Everglades which were not regularly flooded or affected by tidal action. The legislature attempted to resolve any confusion on this point by amending section 403.031(12) to list an area of the Everglades — Big Cypress — Fakahatchee Strand as a "water."¹³⁷ The area is defined by a detailed legal description of the boundary.¹³⁸

The intent of the legislature was to affirm DER's existing jurisdiction in this area without expanding it. The Act provides that areas within the described boundary, but which would not otherwise be in DER's jurisdiction as determined under the amended vegetative index rule, are excluded from jurisdiction.¹³⁹ Conversely, areas outside the boundary which are not connected to it by another water body, or as determined under the amended vegetative index rule, are excluded from DER's jurisdiction.¹⁴⁰ Although the boundary line does not establish a line of jurisdiction, it may serve as the starting point for determining jurisdiction.

In June of 1984, subsequent to the signing of the Act by Governor Graham, the Third District Court of Appeal issued its decision in the *Goldring* case.¹⁴¹ The court reversed DER's final order, holding that DER lacked jurisdiction over the site. In reaching this result, the court observed that "it is clear that the word 'exchange' in the rule must contemplate a flow of water from the water of the state to the site. That water flows in the opposite direction does not trigger the agency's right to regulate."¹⁴² The court also interpreted the statutory language authorizing a vegetative index; it appears DER's jurisdiction is necessarily limited to areas that are regularly flooded by the rise of water from a listed water body such as a lake or stream.¹⁴³

136. *Goldring*, 6 Fla. Admin. L. Rep. at 4136-A.

137. FLA. STAT. § 403.031(12) (Supp. 1984).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Goldring v. Department of Env'tl. Regulation*, 452 So. 2d 968 (Fla. 3d DCA 1984), cert. granted, ___So. 2d___ (1985).

142. *Id.* at 970.

143. *Id.* It is expected that the Supreme Court of Florida will resolve this controversy

For all practical purposes under *Goldring*, "regular and periodic inundation" becomes synonymous with flooding in inland areas and tidal exchange in coastal areas. DER, on the other hand, has continued to maintain that regular and periodic inundation includes inundation from sources such as natural seepage areas along streams and rivers, saturation by groundwater, and rainfall in areas such as the *Goldring* project site.¹⁴⁴

Unfortunately, because of the timing of the court's decision in *Goldring*,¹⁴⁵ not all the questions raised in it and *Florida Mining and Materials* have been answered by the Act. It seems certain that areas within the boundary described in the Act which are vegetated by wetlands species are jurisdictional since they are a part of a "water." Less clear is the status of areas outside the boundary which are dominated by species on the vegetative index. Under the language of the Act, these areas would be within the landward extent of the Everglades, a named water body.¹⁴⁶ Under the reasoning of *Goldring*, such areas would not be subject to DER jurisdiction because they do not "exchange" waters with the Everglades in the sense that the third district uses the term. It should be remembered that the court reached its conclusion as to exchange based on an interpretation of the language of section 403.817, which was not amended by the Act. At least with respect to the Everglades and contiguous areas, the legislative intent to confer jurisdiction on DER seems clear. Therefore, a strong argument can be made that the *Goldring* decision cannot be applied to limit jurisdiction to areas within the defined boundary.

III. EXEMPTIONS, DELEGATIONS AND GRANDFATHER CLAUSES

One of the factors making the Act complicated and potentially difficult to apply is the variety of provisions either exempting or providing special treatment for certain activities. The Act itself contains only two outright exemptions for certain upland drainage ditches and intermittent streams.¹⁴⁷ Additionally, a number of minor activities previously exempted by the legislature, such as certain small docks and maintenance of existing structures, will con-

when it considers *Goldring*.

144. See *Fleming*, DOAH Case No. 83-3239 (final order entered June 12, 1984).

145. The district court's decision was not issued until June 12, 1984, after the adjournment of the 1984 legislature.

146. See FLA. STAT. § 403.031(12) (Supp. 1984).

147. FLA. STAT. § 403.913(4), (5) (Supp. 1984).

tinue to be exempt.¹⁴⁸ All of these exemptions are reflected in the new rules adopted by DER pursuant to part VIII of chapter 403.¹⁴⁹

A. *Exemptions and Delegations*

In addition to the existing exemptions, section 403.913(4) exempts construction of, and dredging and filling in, certain irrigation and drainage ditches constructed in uplands.¹⁵⁰ Previously, DER had required permits for such activities when the ditch was connected to any water of the state, including another ditch or artificial water body.

This appears to be a fairly substantial exemption. When one considers the numerous limitations contained in the statute, there is some question as to how often it will come into play. First, the exemption is only available in areas where DER has formally delegated stormwater permitting to a water management district.¹⁵¹ At this time, only two of the five water management districts, the South Florida and Southwest Florida Water Management Districts, have received such delegation.¹⁵² Second, the exemption does not apply to ditches which are connected to Outstanding Florida Waters,¹⁵³ Class I or Class II waters,¹⁵⁴ or waters described in sections 403.031(12)(a) and (b), essentially the Everglades — Big Cypress — Fakahatchee Strand area and adjacent jurisdictional areas.¹⁵⁵ As a result of these restrictions, there are large areas which would not qualify for the exemption. Third, the exemption is limited to ditches that are normally no deeper than three feet and where the connection to other waters of the state is no greater than thirty-five square feet in total cross-sectional area.¹⁵⁶ It should be noted that the depth restriction is not absolute, allowing some flexibility in areas of the state with variant topography.

The exemption does not authorize dredging in any waters other than the described ditches.¹⁵⁷ Accordingly, dredging which con-

148. FLA. ADMIN. CODE R. 17-4.04 (Supp. 1984).

149. FLA. ADMIN. CODE R. 17-12.050 (Supp. 1984).

150. FLA. STAT. § 403.913(4) (Supp. 1984).

151. *Id.*

152. FLA. ADMIN. CODE R. 17-25.09 (Supp. 1983).

153. FLA. ADMIN. CODE R. 17-3.041 (Supp. 1983) lists the water bodies which have been designated Outstanding Florida Waters.

154. FLA. ADMIN. CODE R. 17-3.161 (1982).

155. FLA. STAT. § 403.031(12)(a)-(b) (Supp. 1984).

156. FLA. STAT. § 403.913(4) (Supp. 1984).

157. *Id.*

nects an upland ditch to other waters of the state would require a permit. Construction of a ditch connecting isolated nonjurisdictional wetlands could take place without a DER permit. Similarly, connection of an upland ditch to another upland ditch would not require a permit. Where an exemption is authorized, it should be remembered that ditches exempted from dredge and fill permitting requirements under this section remain waters of the state for all other regulatory purposes under chapter 403.¹⁵⁸ For example, a sewage treatment plant discharging effluents in such a ditch would be required to obtain a permit under section 403.087 or 403.088.

The second exemption under the Act provides that waters for purposes of dredge and fill permitting shall not include certain intermittent streams and tributaries.¹⁵⁹ Under already existing DER rules "intermittent natural water courses which act as tributaries only following the occurrence of rainfall and which normally do not contain contiguous areas of standing water" are exempt from jurisdiction.¹⁶⁰ This provision had been interpreted to exempt only those water courses which are intermittent for the entire length of the water course.¹⁶¹ Under this interpretation, jurisdiction was asserted over an entire water course where only a portion of the tributary could be classified as intermittent. This practice has been changed by the Act. Section 403.913(5) provides that "[t]hose portions of a stream or tributary which are intermittent and are located upstream of all nonintermittent portions of the stream or tributary shall not be subject to dredge and fill permitting."¹⁶² According to this provision, DER may have jurisdiction only over a portion of a stream. Under the existing rule the entire stream would have been either wholly within or without DER jurisdiction.

An intermittent portion of a stream would not be exempt if it is located downstream of a nonintermittent portion or if there is a continuation of jurisdiction based on the vegetative index or other factors contained in Rule 17-4.022. Since DER may continue to assert jurisdiction based on vegetation, the impact of the intermittent stream exemption may not be as broad as some observers had anticipated. This is particularly true with the legislative approval of an expanded vegetative index.¹⁶³

158. See FLA. ADMIN. CODE R. 17-3.161 (Supp. 1983).

159. FLA. STAT. § 403.914(5) (Supp. 1984).

160. FLA. ADMIN. CODE R. 17-4.28(2)(g) (Supp. 1984).

161. *Occidental*, 2 Fla. Admin. L. Rep. at 1029-A.

162. FLA. STAT. § 403.913(5) (Supp. 1984).

163. 1984 Fla. Laws ch. 84-79, § 9.

One provision of the Act that has been variously described both as an exemption and a delegation is section 403.927.¹⁶⁴ This so-called agricultural exemption is neither a complete exemption nor delegation. The provision exempts agricultural activities and agricultural water management systems, both of which are defined in the Act,¹⁶⁵ from the requirements of section 403.087 and part VIII of chapter 403. This does not mean, however, that DER has no authority to regulate in the agricultural arena. The definitions of agricultural activities and agricultural water management systems are not all inclusive. For example, agricultural drainage or irrigation ditches which are not "permitted pursuant to chapter 373 or which are exempt from the permitting provisions of that chapter" do not fall within the definition of agricultural water management systems.¹⁶⁶ If a ditch fails to meet this criterion, it would not be exempt from the permitting requirements of chapter 403. At the time of the Act's enactment, only two of the water management districts had fully implemented the provisions of chapter 373 with respect to agricultural water management systems.¹⁶⁷ In the rest of the state, such systems were neither permitted nor exempt under chapter 373, and continued to be subject to regulation by DER. Since adoption of this act, however, all of the remaining water management districts have adopted regulatory programs and subsequently will have sole responsibility for permitting agricultural ditches. The definition of "agricultural activities" may be read to leave certain activities within the jurisdiction of DER. Section 403.927(4)(a) provides that agricultural activities include "all normal and necessary farming and forestry operations which are normal and customary for the area, such as site preparation, clearing, fencing, contouring to prevent soil erosion, soil preparation, plowing, planting, harvesting, construction of access roads, and placement of bridges and culverts, provided such operations do not impede or divert the flow of surface waters."¹⁶⁸ The types of activities enumerated in this definition are similar in nature and limited to the types of operations necessary to plant and harvest a crop. Arguably, processing operations and activities such as feed lots would

164. FLA. STAT. § 403.927 (Supp. 1984).

165. FLA. STAT. § 403.927(4)(a)-(b) (Supp. 1984).

166. FLA. STAT. § 403.927(4)(b) (Supp. 1984).

167. See Fla. Admin. Code R. 40C, 40E (Supp. 1983). Both the South Florida Water Management District and the St. Johns Water Management District have adopted rules pursuant to Fla. Stat. ch. 373, part IV (1983).

168. FLA. STAT. § 403.927(4)(a) (Supp. 1984).

not fall within the definition and would continue to be regulated by DER.

The Act specifically provides that DER may continue to permit the ultimate discharge from agricultural water management systems to other waters of the state.¹⁶⁹ Although DER might maintain that water management systems technically remain waters of the state, the Act exempts them from the requirement that they meet DER water quality standards.¹⁷⁰ Nonetheless, water quality standards must be met at the point of discharge from the system,¹⁷¹ making it important that the systems are properly designed and constructed to assure this ultimate compliance with standards.

The complicating factor is that the design and construction of activities requiring permits will be reviewed by the water management districts, and not DER. Section 403.927(1) states that it is the legislature's intent for such review to take place "under authority granted to water management districts."¹⁷² With the single exception of authority to regulate groundwater impacts, section 403.927 does not grant any additional substantive authority to the districts. Instead, the districts are to use their existing powers under chapter 373, particularly part IV which governs the management and storage of surface waters.

Under part IV of chapter 373, the water management districts are authorized to require permits for the construction, alteration, maintenance, and operation of any dam, impoundment, reservoir, appurtenant work, or works.¹⁷³ However, there is a significant exception to this authority. Section 373.406(2) provides that nothing in this chapter or any rule adopted thereunder shall:

[a]ffect the right of any person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture to alter the topography of any tract of land for purposes consistent with the practice of such occupation. However, such alteration may not be for the sole or predominant purpose of impounding or obstructing surface waters.¹⁷⁴

Since the Act exempts "agricultural activities" from regulation by

169. FLA. STAT. § 403.927(2) (Supp. 1984).

170. *Id.*

171. *Id.*

172. FLA. STAT. § 403.927(1) (Supp. 1984).

173. FLA. STAT. §§ 373.413, 373.416 (1983).

174. FLA. STAT. § 373.406(2) (1983).

DER and section 373.406(2) appears to exempt some of those same activities from regulation under chapter 373, the construction of this provision became a major issue during the legislative session.

The legislature's intent on this point is reflected in the Journal of the House of Representatives which states:

[t]he language contained in s.[403.927] shall be construed in conjunction with s.373.406(2) to exempt from permitting only those activities defined as 'agricultural activities' pursuant to this act in accordance with the Commentary to s. 4.02(2) of the Model Water Code.¹⁷⁵

This statement of intent reflects the fact that the language of section 373.406(2) is substantially identical to the corresponding provision of the Model Water Code.¹⁷⁶ The commentary to the code indicates that the exemption is to be construed rather narrowly.¹⁷⁷ Of specific concern to the drafters of the code was the possibility that certain activities undertaken in the course of ordinary farming operations, such as plowing of a pasture, could incidentally trap or divert a small amount of surface water. The commentary makes clear that it was not the intent of the drafters to require a surface water management permit where the amount of water being diverted is small and the diversion is merely incidental.

Conversely, activities which are intended to divert or obstruct the flow of water, such as drainage ditches and culverts, would not fall within the statutory exemption. Only one of the five water management districts has attempted to enumerate activities which may be exempt under section 373.406(2). The St. Johns River Water Management District has identified fifty-nine agricultural practices that are presumed to be consistent with the practice of agriculture, thereby constituting exempt activities.¹⁷⁸ Under the district's interpretation of its rule, this presumption would not apply when the activities are conducted in wetlands.¹⁷⁹

For agricultural operations that are subject to the permitting re-

175. CONFERENCE COMMITTEE REPORT ON CS/CS/HB 1187, JOURNAL OF THE HOUSE OF REPRESENTATIVES, May 29, 1984, at 733. See also CONFERENCE COMMITTEE REPORT ON CS/CS/HB 1187, JOURNAL OF THE SENATE, May 28, 1984, at 483 [hereinafter cited as SENATE REPORT].

176. MALONEY, *supra* note 7, at § 4.02(2).

177. *Id.*

178. Applicant's Handbook, *supra* note 110, at app. H.

179. St. Johns River Water Management District Memorandum from Kathryn Mennella to Henry Dean (July 6, 1984).

quirements of chapter 373, the statutory standard of review is broad. For construction or alteration permits, the permit applicant must demonstrate that the project "will not be harmful to the water resources of the district."¹⁸⁰ For operation and maintenance permits, there is the additional requirement that the project "not be inconsistent with the overall objectives of the district."¹⁸¹ In implementing these provisions, the water management districts have adopted rules that take into consideration water quality and natural resource impacts, as well as water quantity impacts.¹⁸² The permitting criteria contained in these rules are similar in many respects to the criteria contained in the Act. For example, the rules generally require consideration of impacts on fish and wildlife, water quality, navigation, and the public health and safety,¹⁸³ as does section 403.918.¹⁸⁴

The Act appears to establish one additional criterion for permitting done by the water management districts. It provides that the groundwater impacts of agricultural activities and agricultural water management systems shall be regulated by the water management districts.¹⁸⁵ The brevity of this provision leaves a number of questions unanswered. First, it is unclear what specific standards will be used to evaluate impacts on groundwater quality. The water management districts presently do not have such standards. In assessing impacts on surface water quality, the water management districts currently use the water quality standards promulgated by DER.¹⁸⁶ Presumably, the same approach could be used for groundwater.

Another question involves the effect of this provision on agricultural practices that are exempt from chapter 373 regulation. Since the exemption applies only to chapter 373 and regulations adopted pursuant to that chapter, it is possible that the groundwater impacts of even exempt activities may be reviewed by water management districts under their chapter 403 authority over groundwater.

Finally, the Act does not indicate whether any regulation of groundwater is left to DER. This could be particularly significant

180. FLA. STAT. § 373.413(1) (1983).

181. FLA. STAT. § 373.416(1) (1983).

182. See FLA. ADMIN. CODE R. 40C-4.301(1), 40E-4.301(1) (Supp. 1983).

183. See FLA. ADMIN. CODE R. 40C-4.301(1), 40E-4.301(1) (Supp. 1983).

184. FLA. STAT. § 403.927(2) (Supp. 1984).

185. FLA. STAT. § 403.927(1) (Supp. 1984).

186. See FLA. ADMIN. CODE R. 40E-4.301(1)(c) (Supp. 1983); see also Applicant's Handbook, *supra* note 110, at 41.

where unpermitted activities, such as the application of pesticides, have resulted in violations of water quality standards.

The provisions of section 403.927 apply only so long as the land is used for agricultural purposes.¹⁸⁷ Upon conversion of the land to other purposes, the provisions of chapter 403 will again apply. While the conversion itself does not require a permit, any subsequent dredging and filling activities would require a permit unless otherwise exempt.¹⁸⁸ In addition, water quality standards within the water management system would apply immediately upon conversion and the owner of the property would become subject to possible enforcement action by DER for any such violations.

B. Grandfather Clauses

The Act contains several grandfather clauses specific to particular types of activities and one general grandfather clause.

The general provision provides that an application which was complete prior to the effective date of the Act (October 1, 1984) shall not be reviewed under the criteria of the Act.¹⁸⁹ The permit applicant, however, may choose to come under part VIII. If the applicant chooses to exercise this option, all of the provisions of the Act will apply.

The decision as to whether to have an application reviewed under the Act or under the existing provisions of chapters 253 and 403 should be made carefully. In many cases, it will be more advantageous for an applicant to be reviewed under the old provisions. There are, however, many valid reasons for choosing to have the Act apply. For example, where water quality standards are being violated, the Act specifically allows new projects to be constructed under certain circumstances.¹⁹⁰ Some changes in the re-

187. FLA. STAT. § 403.927(3) (Supp. 1984).

188. *Id.* This section provides: "If land served by a water management system is converted to a use other than an agricultural use, the water management system, or the portion of the system which serves that land, will be subject to the provisions of this chapter."

189. FLA. STAT. § 403.905(9) (Supp. 1984).

190. FLA. STAT. § 403.906(18)(b) (Supp. 1984) provides: "If the applicant is unable to otherwise meet the criteria set forth in this subsection, 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. If the applicant is unable to meet water quality standards because existing ambient water quality does not meet standards, the department shall consider mitigation measures proposed by or acceptable to the applicant that cause net improvement of the water quality in the receiving body of water for those parameters which do not meet standards. Reclamation and restoration programs conducted pursuant to section 211.32 may be considered as mitigation to the extent that they restore or improve the water quality and the type, nature, and function of biological systems

view procedures may also be advantageous to the permit applicant such as elimination of the local government approval requirement¹⁹¹ and separation of the requirement for DNR approval from DER permitting review.¹⁹² In addition, the public interest test applied to some projects may be less strenuous under the Act.¹⁹³ These benefits must be balanced against the potential disadvantages of delay and differences in permitting criteria on a case by case basis.

Section 403.913 contains two similar grandfather clauses for certain residential developments and mining activities. Paragraph (6) of that section applies to residential developments that meet any of the following criteria. First are those developments registered for sale pursuant to chapter 498 subsequent to January 1, 1970, where thirty percent of the lots in the subdivision have been sold. The lots in these developments must have been approved by the Department of Business Regulation for sale as homesites.

The second category includes residential developments for which a development order has been issued pursuant to chapter 380. While a development that has received a master plan development order under section 380.06(20) would qualify under this grandfather clause,¹⁹⁴ developments which have received a determination of vested rights probably would not. Finally, certain residential developments which are exempt from the registration requirements of chapter 498 would qualify.¹⁹⁵ Although these exempt developments are not required to comply with the registration provisions, they must meet other requirements. Under sections 498.025(2)(a) and (4)(a), the development must, among other things, have all drainage structures and fill necessary to prevent flooding, and must also have paved roads and approved domestic water supply and sewage disposal facilities.

For any developments meeting these criteria, jurisdictional determinations shall continue to be made under the law as it existed prior to January 24, 1984. Moreover, for a period of one year after

present at the site prior to the commencement of mining activities."

191. FLA. STAT. § 403.916 (Supp. 1984).

192. 1984 Fla. Laws ch. 84-79, § 12.

193. FLA. STAT. § 253.123(3)(a) (1983) prohibits certain dredging activities absent a showing of the "public interest which will be served by such works." Under FLA. STAT. §§ 253.123, 253.124 (1983), the test was whether the project would be contrary to the public interest. The Act adopts the latter test for all projects. See 1984 Fla. Laws ch. 84-79, § 1.

194. See Statement of Intent on CS/CS/HB 1187, the Water Resources Protection Act, JOURNAL OF THE SENATE, May 24, 1984, at 412.

195. FLA. STAT. § 498.025(2)(a), (4)(a) (1983).

the adoption by rule of new permitting criteria, permits for such developments shall be reviewed using the criteria in existence as of January 24, 1984.

This provision is not self-implementing. Instead, any person who believes his development falls within one of the enumerated categories must notify DER that he intends to take advantage of this provision within 180 days after DER publishes notice of the existence of this provision. Where individual lots have already been sold, the developer can assert the qualifications for the entire development to protect lot owners who might not be aware of the law.¹⁹⁶ This could be of particular significance for individuals residing outside the state who have purchased lots for future use.

While all of these provisions apply only to residential developments, it is not necessary for the entire development to be residential in nature. The requirement has been interpreted to apply to developments that are primarily residential in nature, even where the development may include some commercial and industrial components.¹⁹⁷

Sand, limerock, and limestone mining activities have a grandfather provision in the Act similar to the one for residential developments.¹⁹⁸ The provision is limited to those mining activities that are presently permitted by DER or in compliance with all DER rules or those mines which DER has previously determined to be outside its jurisdiction. The major difference between this provision and the one governing residential developments is that sand, limerock, and limestone mining activities become subject to DER's expanded jurisdiction ten years after the effective date of the Act.¹⁹⁹ For planning purposes, land must be acquired well in advance of actual mining activities. The provision does not apply to any lands acquired after June 1, 1984.²⁰⁰ Moreover, the mining activity must be continuous and conducted on lands contiguous to mining operations ongoing as of the effective date of the Act.

In addition to the grandfather clauses contained in the Act itself, there is also one in the vegetative index rule adopted by the Environmental Regulation Commission on January 25, 1984²⁰¹ and ap-

196. See SENATE REPORT, *supra* note 175.

197. *Id.*

198. FLA. STAT. § 403.913(8) (Supp. 1984).

199. *Id.*

200. *Id.*

201. FLA. ADMIN. CODE R. 17-4.022(7) (Supp. 1984).

proved by the legislature.²⁰² That provision applies only to jurisdictional determinations made pursuant to section 403.817 and the vegetative index. Rule 17-4.022(7) provides that an area for which DER has made a written jurisdictional determination prior to October 1, 1984, shall not be subject to DER's expanded jurisdiction if it meets certain other criteria. The written document may be in narrative form or a line displayed on a map, drawing, or aerial photograph.²⁰³ To be valid, the determination must have been based on a site visit to the area, and the written document must have been signed by a DER employee in the course of his official duties.²⁰⁴ Finally, the document must be submitted to DER for validation within six months after the effective date of the Act.²⁰⁵

C. Delegations

The Act amends section 403.812 relating to delegation of stormwater permitting to the water management districts in two respects.²⁰⁶ First, it repeals the mandatory delegation enacted during the 1983 legislative session under the Water Quality Assurance Act. That legislation required that stormwater permitting be delegated to the South Florida and Southwest Florida Water Management Districts no later than October 1, 1984. That delegation is now permissive and is based upon a finding that the water management district is financially and technically capable of implementing the delegation.²⁰⁷ As a practical matter, stormwater permitting has already been delegated to both of these districts so the only real impact of this amendment is to give DER the authority to rescind a delegation in the future if necessary.

The major change to section 403.812 is a provision that is intended to delineate the division of authority over dredge and fill activities between DER and water management districts when stormwater permitting has been delegated. The Act provides that DER may not require a dredge and fill permit for activities which are "required for the connection of stormwater management facilities to waters and which are incidental to the construction of such facilities."²⁰⁸ The term "incidental" is not defined or explained in

202. 1984 Fla. Laws ch. 84-79, § 9.

203. FLA. ADMIN. CODE R. 17-4.022(8) (Supp. 1984).

204. *Id.*

205. *Id.*

206. FLA. STAT. § 403.912 (Supp. 1984).

207. FLA. STAT. § 403.812(1) (Supp. 1984)

208. *Id.*

the Act. Thus, in theory, incidental activities could include anything from construction of a large canal system to the simple removal of a plug between a stormwater system and waters of the state. The limits on this provision will be defined through implementation and rulemaking by DER.

The amendment to section 403.812 also excludes certain artificial stormwater treatment facilities from the definition of "waters" for purposes of dredge and fill regulations.²⁰⁹ This exemption does not apply to discharges into such systems.

D. Special Consideration

One final provision to be discussed here does not fall neatly under any of the previous categories of exemptions, delegations, or grandfather clauses. Section 403.913(7) applies to residential developments approved for sale pursuant to chapter 498 that do not qualify under the grandfather clause contained in section 403.913(6). The provision, which is modeled on a DER rule no longer in effect,²¹⁰ requires DER to give "special consideration" to the dredge and fill permit applications for certain developments. The application of this section is limited to situations where the permit applicant has incurred contractual obligations under a land sales contract related to the dredge and fill project and has made a continuing bona fide effort to fulfill those obligations.²¹¹ DER is not required to take any specific action with respect to such applications so long as special consideration is given to them. Presumably, this could range from doing nothing to grandfathering applications under provisions in effect prior to the Act. As with several provisions discussed above, the applicant must assert the applicability of this section to his project within 180 days after DER notices its existence.²¹² Failure to do so constitutes a waiver of any potential benefits.²¹³

209. *Id.*

210. See FLA. ADMIN. CODE R. 17-4.28(7) (Supp. 1983).

211. FLA. STAT. § 403.913(7) (Supp. 1984).

212. *Id.*

213. *Id.*

IV. PERMITTING CRITERIA

A. *Pre-Henderson Act Standards for Permit Issuance and Denial Under Chapter 403 Florida Statutes*

Rule 17-4.28(3) applies the permitting requirements of chapter 403 to dredging and filling activities. The rule provides that an applicant for a dredge and fill permit must affirmatively provide reasonable assurances that the short-term and long-term effects of the activity involved will not result in violations of water quality criteria, standards, requirements, and provisions of Rule 17-3. Rule 17-3 includes a listing of classes of waters divided by beneficial use. Each class has listed criteria which are expected to be maintained in order to retain the degree of protection desired. Regardless of whether a permit is required, all dredging and filling activities must be undertaken so as to comply with the water quality standards of Rule 17-3.²¹⁴

B. *Pre-Henderson Act Standards for Issuance and Denial of Permits Under Chapter 253, Florida Statutes*

Sections 253.123 and 253.124 established the permitting requirements for dredging and filling activities in the navigable waters of the state. Removal of sand, rock, or earth from the navigable waters by dredging, pumping, digging, or other means was only permitted for purposes specified in section 253.123(2), subject to prior receipt of a valid permit. Construction of islands or extensions of existing lands or islands in the navigable waters was permitted only upon issuance of a DER permit which in turn could not be issued unless the local governmental body asserting jurisdiction over the area had first approved the application or waived its right to do so.²¹⁵ The test for dredging and filling under sections 253.123 and 253.124 were indeed complicated. Section 253.123 provided that there shall be no removal of sand, rock, or earth from the navigable waters by dredging, pumping, digging, or any other means, except:

- a. for the construction, improvement or maintenance of navigation channels and drainage and water control facilities;

214. FLA. ADMIN. CODE R. 17-4.28(1) (Supp. 1984).

215. See FLA. STAT. §§ 253.1245, 253.124, 253.125 (1983); see also *Askew v. Taylor*, 199 So. 2d 72 (Fla. 1st DCA 1984).

- b. for the construction of trenches for the burial or installation of water, sewer, gas oil, gasoline, fuel, electric, telegraph or telephone lines, cables or mains;
- c. for the operation of sand transfer plants and for the placement of sand dredged from navigation channels on beaches; and
- d. for other purposes, but only when the department has determined that such removal will not interfere with the conservation of fish, marine and other wildlife, or other natural resources to such an extent as to be contrary to public interest; and will not result in the destruction of oyster beds, clam beds, or marine productivity to such an extent as to be contrary to the public interest.

Relative to paragraphs (a) and (b) above, the test was merely a showing of the public interest which would be served by such works. The test for paragraph (c) was not specifically defined. However, section 253.123 appears to have indicated that you could not remove sand, rock, or earth from the navigable waters of the state without a construction permit issued pursuant to section 253.124.

Under section 253.124 any person, firm, or corporation desiring to construct islands or add to or extend existing lands or islands bordering on or in the navigable waters was required to obtain a permit before engaging in such construction. The test for filling in the navigable waters was a "cut and paste" attempt generated in the years 1957, 1961, 1967, 1969, 1970, 1971, 1972, 1978, 1982, and 1983. The test began with a concern for harmful obstruction or alteration to the natural flow of the navigable water. Accordingly, the first part of the test for issuance of a permit was that the project must not cause a harmful obstruction to or alteration of the natural flow of the navigable water and that no harmful or increased erosion, shoaling of channels, or additional stagnant areas of waters would be created.²¹⁶ No material injury or monetary damage to adjoining land was allowable.²¹⁷ This was the test that existed prior to the era of environmental awareness. To this test, a semicolon was attached and the following, all inclusive sentences were tacked on:

[h]owever, prior to the issuance of such permit, the Department or other authorized body shall determine whether the granting of

216. FLA. STAT. § 254.124(2) (1983).

217. *Id.*

such permit and the construction to be done pursuant thereto would interfere with the conservation of fish, marine and other wildlife, or other natural resources to such an extent as to be contrary to the public interest and whether the destruction of oyster beds, clam beds, or marine productivity, including, but not limited to, destruction of natural marine habitats, grass flats suitable as nursery or feeding grounds for marine life, including established marine soils suitable for producing plant growth of the type useful as nursery or feeding grounds for marine life, will result there from to such an extent as to be contrary to public interest. The Department shall also consider other factors affecting the public interest.²¹⁸

Although that language has changed somewhat over the years, the basic test has remained the same. This provision, when considered in light of the procedural safeguards required, was held to be not so vague as to result in an unconstitutional delegation of legislative power.²¹⁹ The breadth of the geographical area to which this test would be applied was enunciated in *Shablowski v. State*.²²⁰

C. Permitting Procedures

The procedure for obtaining a dredge and fill permit pursuant to chapters 253 and 403, is set out in Rule 17-4. If DER intends to deny the permit, the applicant must be notified within ninety days after receipt of the completed application of his right to challenge the proposed action by requesting a hearing pursuant to section 120.57.²²¹ The intent to deny letter that is sent to the applicant explains which rules would be violated, precluding permitting of the proposed activity. DER may amend its reasons for permit denial prior to and during the administrative hearing.²²² However, an applicant may properly request a continuance to prepare to meet any new evidence.

If the application submitted is incomplete, DER must request the additional information needed within thirty days.²²³ Once the application is complete DER has ninety days to either approve the permit or notify the applicant of its intent to deny.²²⁴ Failure to

218. *Id.*

219. *Albrecht v. State*, 407 So. 2d 210 (Fla. 2d DCA 1981).

220. 370 So. 2d 50 (Fla. 1st DCA 1979).

221. FLA. ADMIN. CODE R. 17-4.28(11)(e) (Supp. 1984).

222. *DeCarion v. Department of Env'tl. Regulation*, 445 So. 2d 619 (Fla. 1st DCA 1984).

223. FLA. ADMIN. CODE R. 17.4.28(11)(a) (Supp. 1984).

224. FLA. STAT. §§ 403.0876, 120.60 (1983).

comply with this ninety day deadline can result in the issuance of the permit by default.²²⁵ For an applicant to qualify for a default permit, ninety days must have run from the date that the application was complete or from the date that the applicant notifies DER in writing requesting that processing of the permit begin.²²⁶

D. Scope of Review

An applicant for a dredge and fill permit under the pre-Henderson Act scheme was required to comply with the applicable provisions of Rules 17-4.28 and 17-4.29. These sections incorporated parts of Rule 17-3 and define the standards for permit review. The permissible scope of review regarding the environmental impacts of a project was addressed in *del Campo v. Department of Environmental Regulation*.²²⁷ In *del Campo*, a developer, Ortega Island, Inc., sought a permit from DER to construct a bridge to Ortega Island. Local residents and the Florida Wildlife Federation objected to the issuance of the permit because of the possible environmental impacts of the planned residential construction. At the hearing,²²⁸ the hearing officer did not permit the introduction of evidence of the environmental impacts of the residential development on the island. He found that the permit for the bridge had to be evaluated on its own merits. DER adopted this portion in its final order. The district court reversed this holding and found that DER had erred in limiting the scope of the hearing. The court based its decision on the possibility of waste that could occur if DER granted permits for the bridge, but later it or some other governmental entity refused to allow development of the island.

At least one court has found that consideration by DER of the future acts by governmental entities is neither authorized or required. In *Council of Lower Keys v. Charley Toppino & Sons*,²²⁹ the Third District Court Of Appeal affirmed the final order of DER wherein it concluded that it was not authorized to deny or modify a permit because of alleged non-compliance with local zoning ordinances, land use restrictions, or long range development plans. This view was followed in *Maloney v. Curtis*²³⁰ where the

225. FLA. ADMIN. CODE R. 17.4.28(11)(e) (Supp. 1984).

226. *Doheny v. Grove Isle, Ltd.*, 442 So. 2d 96 (Fla. 1st DCA 1983).

227. 452 So. 2d 1004 (Fla. 1st DCA 1984).

228. See FLA. STAT. § 120.57 (1983), which provides for hearings for agency decisions affecting substantial interests.

229. 429 So. 2d 67 (Fla. 3d DCA 1983).

230. 5 Fla. Admin. L. Rep. 686-A (April 18, 1983) (final order entered February 4, 1983).

court held that local zoning be considered only when mandated by statute.

Though there are ample factors upon which to distinguish these cases, it appears that the scope of factors to be reviewed in the first district is far broader than those in the third district. Resolution of this conflict is essential for uniform application of the statute.

E. Permitting Under the Act

The dredge and fill permitting scheme under the Act combines old and new substantive provisions, changes certain permitting procedures, and codifies several DER practices that were not previously addressed by statute or rule.

One of the major purposes of the Act was to merge the permitting provisions of chapters 253 and 403 to create a single permitting system. While there was overlapping jurisdiction under the two statutes, the existence of two distinct sets of permitting criteria created needless confusion. Moreover, under chapter 253 there were several instances in which the permitting standard differed depending on whether the project involved dredging or filling.²³¹ These inconsistencies made the permitting process difficult for applicants to understand and for DER to apply.

In some respects, the permitting process will still be complicated under the Act; however, it is much less likely that a single project will be subject to more than one set of criteria.

1. Standards for Issuance or Denial of Permits

The Act establishes what is essentially a two part test for permitting. Under the first part of the test, the permit applicant must provide DER with reasonable assurances that the project will not result in violations of applicable water quality standards.²³² There is only one exception to this requirement. If existing ambient water quality is already lower than the standard, DER is required to consider mitigation measures proposed by or acceptable to the applicant that would result in a net improvement in water quality for the parameters being violated.²³³

Prior to passage of the Act, DER could not issue a permit for a project that would cause or contribute to a violation of water qual-

231. See *supra* note 193. See also Fla. Stat. § 253.1245 (1983) which required local government approval only for filling projects.

232. FLA. STAT. § 403.918(1) (Supp. 1984).

233. FLA. STAT. § 403.918(2) (Supp. 1984).

ity standards.²³⁴ While mitigation was recognized by DER in some circumstance, it could not be used to offset water quality violations. In this respect, the Act makes a major departure from previous practice. The philosophy of chapter 403 required that the quality of waters not meeting standards be improved to the point that all violations were eliminated before any new projects were permitted. In theory, it will be more difficult for DER under the Act to improve the quality of polluted waters. It should be remembered, however, that the Act allows mitigation of water quality violations only for dredge and fill activities.²³⁵ Other discharges of pollutants will continue to be subject to existing requirements of chapter 403.

The other major change affecting water quality is the requirement in the Act that DER adopt rules establishing water quality criteria for wetlands "which give appropriate recognition to the water quality of such wetlands in their natural state."²³⁶ This provision recognizes that for certain parameters, dissolved oxygen, for example, natural background water quality in wetlands may be different than in areas of open water. Previously, no such distinction was made.

The second part of the two part permitting test requires the applicant to demonstrate that his project is not contrary to the public interest, or in the case of a project that is in or which may significantly degrade an Outstanding Florida Water, that it is clearly in the public interest.²³⁷ Public interest is not a term that is defined anywhere in the statute. The Act does, however, enumerate the factors to be considered by DER in determining whether a project is in the public interest.²³⁸

Several of the criteria are substantially identical to the criteria contained in sections 253.123 and 253.124. Specifically, DER is to consider whether the project will adversely affect the conservation of fish and wildlife and their habitats; whether it will adversely affect navigation or cause erosion or shoaling; and whether it will adversely affect marine productivity.²³⁹ While the language is not identical to that contained in chapter 253 the legislature recognized that the standard for permit review was to be essentially the same and that DER's interpretation of the new criteria would be

234. FLA. STAT. § 403.088(2)(b) (1983).

235. FLA. STAT. § 403.918(b) (Supp. 1984).

236. FLA. STAT. § 403.918(2) (Supp. 1984).

237. *Id.*

238. *Id.*

239. FLA. STAT. § 403.918(2)(a)(2)-(4) (Supp. 1984).

consistent with existing case law and agency practice construing section 253.124.²⁴⁰

During the legislative session, concern was expressed about how DER would apply the fish and wildlife criterion. At issue was whether an insignificant adverse impact on fish and wildlife or habitat would be a sufficient basis for denial of a permit. The expression of the legislative intent on this point indicates that some reduction in the ecological value of an area is acceptable.²⁴¹ The permitting test calls for a balancing of all the factors listed in the statute.

Under existing provisions of chapter 253 no mention is made of threatened or endangered species. The Act specifically recognizes that these species and their habitats should be considered in the permit review.²⁴² Generally, a much smaller impact may be significant where an endangered or threatened species is affected.

The Act does not refer to or incorporate any specific list of threatened or endangered species. Both the state²⁴³ and federal government²⁴⁴ have lists of such species, and it is likely that these lists will serve as a starting point. However, there may be additional species that could qualify as endangered or threatened.

In addition to the old chapter 253 criteria, the Act contains two criteria that have been considered by DER in practice, even though they are neither found in chapters 253 and 403 nor in DER rules. These factors are the "current condition and relative value of functions being performed by areas affected by the proposed activity"²⁴⁵ and "whether the project will be of a temporary or permanent nature."²⁴⁶ The requirement that DER consider the condition and value of affected wetlands recognizes that not all wetlands contribute the same value in terms of either water quality, habitat, or other important functions. A severely stressed wetland, for example, may make little or no contribution to the water quality of an adjacent water body. The evaluation of the condition and value of any particular wetland will be done on a case by case basis during the permitting process. The requirement that DER consider whether a project is permanent or temporary in nature simply rec-

240. See SENATE REPORT, *supra* note 175.

241. See SENATE REPORT, *supra* note 175.

242. FLA. STAT. § 403.918(2)(a)(2) (Supp. 1984).

243. FLA. ADMIN. CODE R. 39-27.03 (Supp. 1983).

244. 50 C.F.R. § 17.1 (1983).

245. FLA. STAT. § 403.918(2)(a)(7) (Supp. 1984).

246. FLA. STAT. § 403.918(2)(a)(5) (Supp. 1984).

ognizes that each project will have both short and long term impacts. Where an area is restored or reclaimed after the dredging or filling activity is complete, the long term impacts of the activity can often be mitigated. Reclamation of mining sites has long been required under other statutory provisions,²⁴⁷ but other types of sites may be restored as well.

Finally, the Act contains several permitting criteria that were not contained in either chapter 253 or chapter 403. DER shall consider whether the project will adversely affect the public health, safety, or welfare, or the property of others;²⁴⁸ whether the project will adversely affect fishing or recreational values;²⁴⁹ and whether the project will affect significant historical or archaeological resources.²⁵⁰

Perhaps the most interesting of these criteria is the requirement that DER consider the impacts on the property of others. Since this criterion is essentially new,²⁵¹ there is neither agency practice to rely on in predicting how DER will apply the criterion nor any legislative history to provide guidance to DER.

Several obvious questions arise concerning the interpretation of this provision. The first question concerns the types of adverse effects on property that should be considered. On one end of the spectrum, the consideration might be limited to adverse environmental impacts such as reduction of downstream water quality or erosion of adjacent shoreline. To a great extent, however, these impacts would already be considered under other provisions of section 403.918(2). On the other end of the spectrum, a very broad construction of the statutes might allow DER to consider such non-environmental impacts as aesthetics, economics, or riparian rights. If riparian rights are intended to be protected, would they exist in an artificial water body which might not otherwise have riparian rights?

Presumably, the legislature intended that the consideration of the impacts on the property of others be an additional, independent criterion. It seems unlikely, though, that an extremely broad interpretation of this provision would be sustained by the courts. A

247. See FLA. STAT. ch. 211 (1983).

248. FLA. STAT. § 403.918(2)(a)(1) (Supp. 1984).

249. FLA. STAT. § 403.918(2)(a)(4) (Supp. 1984).

250. FLA. STAT. § 403.918(2)(a)(6) (Supp. 1984).

251. FLA. STAT. § 253.124(2) (1983), *repealed* by 1984 Fla. Laws ch. 84-79, § 1, which required DER to consider whether proposed filling would cause "material injury or monetary damage to adjoining land."

similar issue was presented to the First District Court of Appeal in *Doheny v. Grove Isle, Ltd.*²⁵² That case involved DER's construction of Rule 17-4.242, the Outstanding Florida Waters (OFW) rule, which required that projects within or significantly affecting an OFW be clearly in the public interest. In making its public interest determination, DER had considered factors that were not directly related to the environmental impacts of the project. The *Grove Isle* court rejected that interpretation of the rule.

Once a proposed project has been reviewed under the two part test — water quality standards and public interest — and is found to be in violation of those criteria, one further review must take place. The Act requires DER to consider "measures proposed by or acceptable to the applicant to mitigate adverse effects which may be caused by the project."²⁵³ DER does not have to make a mitigation proposal, and the permit applicant does not have to agree to any proposal made by DER.²⁵⁴

Neither chapter 253 nor chapter 403 specifically recognized the concept of mitigation prior to adoption of the Act. It was not unusual, however, for DER to accept mitigation proposals from applicants. In a paper prepared for Senator Neal's citizens' task force, DER described its previous activities in the area of mitigation.²⁵⁵ Generally, DER has been favorably disposed to mitigation proposals that improve existing stressed wetlands, create new wetlands from uplands, create wetlands from areas of open water, or restore affected wetlands after use.

As a practical matter, DER has expressed some concerns with the concept of mitigation.²⁵⁶ The most serious of these concerns involves the experimental nature of many restoration techniques. While many projects creating or restoring wetlands have been undertaken, sufficient time may not have elapsed to determine their success.

Certain legal problems have also been identified regarding mitigation. Since restoration projects are generally long-term ventures and dredge and fill permits have traditionally been limited to five years or less, questions have arisen about how to legally bind permit applicants to programs requiring more than five years to com-

252. 442 So. 2d 966 (Fla. 1st DCA 1983).

253. FLA. STAT. § 403.918(2) (Supp. 1984).

254. FLA. STAT. § 403.918(2)(a)(7) (Supp. 1984).

255. Memorandum, The Department of Environmental Regulation's Consideration of Mitigation in Permitting Decisions, Nov. 1, 1983. [hereinafter cited as Memorandum].

256. *Id.*

plete. Several mechanisms have been used.

By rule, DER requires a permit applicant to post a bond under certain circumstances.²⁵⁷ In other cases, DER has required a separate agreement between the applicant and DER to address the mitigation agreement.²⁵⁸ The Act makes no attempt to define mitigation or identify those actions that would be acceptable. This is hardly surprising since a mitigation proposal that is acceptable in one case might be entirely unacceptable in another. The only clear limitation on DER's discretion is that water quality violations may be mitigated only where such violations already exist and the project results in a net improvement in water quality. Thus the question to be asked with respect to any mitigation proposal is whether it changes the balance in the public interest test enough to make the project permissible.

Since DER's initial determination of whether a project is not contrary to the public interest or, in the case of an OFW, is clearly in the public interest, is limited to an assessment of criteria listed in subsections 403.918(2)(a)(1)-(7), an argument may be made that the acceptability of a mitigation proposal should be judged by these same criteria. Moreover, the Act seems to limit DER's consideration to proposals to mitigate those particular adverse effects that will result from the project.

What types of actions, then, might be considered as mitigation? There appears to be four general categories: the restoration or creation of some resource; minimization of the impacts of the project, perhaps through redesign; preservation of a valuable or unique resource; and payment of money.

The first category is probably the simplest. If an applicant who wishes to perform dredging or filling in a wetland area can either restore that area or another impacted wetland or create a new wetland area of comparable value and function, a permit that might otherwise be denied may be issued. This type of mitigation has been accepted by DER in the past. New wetlands can be created either by scraping down upland areas to an elevation that would support wetlands vegetation or by shallowing deep water aquatic areas to create a littoral zone. In the past, there has been no standard ratio required of wetlands created to wetlands destroyed. To tip the public interest test in his favor, however, an applicant might be required to meet more than a one to one ratio. In some

257. FLA. ADMIN. CODE R. 17-4.11 (Supp. 1984).

258. See Memorandum, *supra* note 255.

instances a two to one or even greater ratio might be necessary.²⁵⁹ Long-term monitoring requirements are almost certain to be imposed to assure the success of the restoration or wetlands creation project.

The minimization of project impacts has been common practice among permit applicants. Traditionally, this has not been considered as mitigation, however.²⁶⁰ Generally, acceptable mitigation projects have involved the creation of some benefit to offset adverse environmental impacts, as opposed to simply reducing the adverse impacts.

A proposal to preserve certain resources in return for a permit to destroy or impact other resources might be considered mitigation under certain circumstances. It is likely, however, that such a proposal would receive closer scrutiny from DER than the first type of mitigation discussed. For example, a proposal to preserve a wetlands area that was already subject to stringent regulatory restraints on development would probably be given little weight.

The most common methods of reaching a binding agreement for preservation of an area are conservation easements, specific deed restrictions which restrict the use to which the property can be put, or donations of land to the state or some other entity.

The final category of mitigation proposals involves the donation of money. The money may be unrestricted or earmarked for a special purpose. This type of proposal would seem to raise the greatest number of problems. The most common objection is that it gives the appearance that the applicant is buying a permit, particularly where there is no indication that the money is being used to correct problems caused by the proposed project.

In applying the new statutory language it can be expected that DER will rely on its past experience in the area of mitigation. On the other hand, there may well be increased pressure from permit applicants for DER to consider new and untested areas of mitigation since the legislature has recognized the concept.

The focus of this discussion thus far has been on the impacts to be expected from the particular project for which a permit is being sought. DER's scope of review under the Act is much broader than this, however. Section 403.919 mandates that DER consider the combined impacts of many activities in making its permitting decisions. The purpose of this section is to assure the equitable distri-

259. *Id.*

260. *Id.*

bution of the resource — in this case, the wetlands. It is in direct contrast to the first come, first served approach to permitting under which the first applicant for a permit in a certain area could conceivably use up all the available resources.

Under the Act, DER is required to consider not only the activity for which the permit is being sought, but also any existing projects; projects which are under construction or projects for which a jurisdictional determination has been requested; projects which have been approved, are under review, or are vested pursuant to section 380.06 governing developments of regional impacts; and any other projects which DER reasonably expects to be located within its jurisdiction based upon land use restrictions and regulations.²⁶¹

In many respects, this provision is similar to DER's practice under chapters 253 and 403 of considering cumulative impacts in reviewing permit applications. While that practice was never addressed by rule or statute, it was recognized and applied in many administrative proceedings. Since it is likely that DER will be guided by its past practice in interpreting the equitable distribution provision, it is worth reviewing the way in which the cumulative impact doctrine has been used.

The term cumulative impact has actually been used to describe several distinct types of situations. The application that appears to be most similar to the equitable distribution concept involves a situation where surrounding circumstances suggest that a number of permit applications for similar kinds of activities in the same geographical area will be filed. An example of this situation is *Rossetter v. Department of Environmental Regulation*²⁶² in which DER denied an application for the dredging of a boat basin adjacent to an existing dock even though the single project would have only a small adverse impact on the water body. It was known, however, that there were many private docks in the area and there had been inquiries from other property owners about dredging channels or boat basins. The pending application was denied on the basis of expected cumulative impacts of dredging several boat basins in the same part of the water body. As an alternative, DER suggested extending the boat docks into deeper water to provide access.

This same rationale has been used to deny permits for stilt houses,²⁶³ dredging access channels to docks,²⁶⁴ and filling to create

261. FLA. STAT. § 403.919(3) (Supp. 1984).

262. 5 Fla. Admin L. Rep. 1195-A (July 25, 1983) (final order entered May 11, 1983).

263. *Leeson v. Department of Env'tl. Regulation*, DOAH Case No. 75-2042 (final order entered May 10, 1976).

beachfront along a lake.²⁶⁵ Generally, although the particular activity for which a permit is sought may be unacceptable, other alternatives may be available to reduce the environmental impacts of each individual project and allow a larger number of projects to be constructed in the long run.

A slightly different situation occurs where the activity for which a permit is sought is only part of a larger plan of development or can be expected to generate further development or secondary impacts. For example, in *Kyle Brothers Land Co. v. Department of Environmental Regulation*,²⁶⁶ DER denied an application to remove plugs in two canals in a platted subdivision to connect them to another water body. The permit was denied because of expected impacts from future residential development to take place around the canal system.

DER's authority to consider such impacts was recognized by the First District Court of Appeal in *del Campo*.²⁶⁷ The facts of that case present a typical example of the kind of situation in which secondary or cumulative impacts may be considered. The applicant wished to construct a bridge to an island which would have been subsequently developed. While the impacts from the bridge construction were minimal, the court required DER to consider possible future impacts of developing the island.

While the Act makes this authority more specific, it does not answer all the questions about how the permit applications will be reviewed. One issue that will arise in each case is the geographical extent of the area to be considered. Generally, DER has limited its consideration to a portion of a water body such as a segment of a river or a small discrete water body such as a small lake. Even though the Act does not impose any geographical limit, it is logical to assume that some limit would be imposed by the courts. At a minimum there should be some connection or relationship between the adverse environmental impacts of the projects being considered and the geographic area considered.

DER must also decide on a case by case basis what projects "may reasonably be expected to be located" within its jurisdiction

264. *Hodges v. Department of Env'tl. Regulation*, DOAH Case No. 79-2326 (final order entered Apr. 17, 1980).

265. See *Johnstone v. Department of Env'tl. Regulation*, DOAH Case No. 76-2127 (final order entered May 24, 1977); *Lauthain v. Department of Env'tl. Regulation*, DOAH Case No. 76-1960 (final order entered May 17, 1977).

266. DOAH Case No. 76-607 (final order entered January 20, 1977).

267. 452 So. 2d 1004.

and thus be considered in the permitting decision. In the past, DER has consistently declined to consider future activities that were too remote or speculative in nature.²⁶⁸ The Act does address this issue by requiring that the project being considered be one for which a permit or jurisdictional determination has been requested; that it be vested, under review, or approved pursuant to section 380.06; or that there is some reason to expect that such a project will be built based on land use regulations.²⁶⁹ This still leaves DER a great deal of flexibility, since the land use regulations in an area may be very broad. Thus, the issue of whether a future use is speculative is still relevant.

In the past, DER has not routinely considered cumulative impacts. It appears, however, that under the Act the possibility of such impacts must be considered since the statutory language is mandatory.²⁷⁰ In light of the court's directive in *del Campo*,²⁷¹ however, this may not represent a significant change.

In both the areas of mitigation of potential adverse impacts and the consideration of cumulative impacts, the Act provides specific authority for practices already adopted by DER. It should be expected, however, that these doctrines will be further developed through implementation of the new statutory language.

2. Permitting Procedure Under the Henderson Act

In addition to addressing substantive issues, the Act makes a number of significant changes in permitting procedures, including provisions affecting the length of permits and coordination of DER permitting activities with other state and local government agencies.

Prior to adoption of the Act, dredge and fill permits issued under either chapter 253 or chapter 403 were limited to a maximum term of five years.²⁷² However, that five-year term did not begin to run until the applicant had received all other necessary local, state, or federal authorizations for the project. Thus, in practice, many DER permits were valid for much longer than five years from the date of issuance. Since there was no practical way to track the activities of all the other governmental entities that

268. See *Florida Mining and Materials*, 4 Fla. Admin. L. Rep. at 2230-A.

269. FLA. STAT. § 403.919 (Supp. 1984).

270. FLA. STAT. § 403.919(2) (Supp. 1984).

271. 452 So. 2d. at 1004.

272. FLA. STAT. § 253.124(4) (1983).

might be involved, DER was unable to determine when a particular construction permit would expire. An applicant could apply for an extension of his permit for up to three years for good cause by showing that he had used due diligence to complete the work on time.

The Act makes substantial changes in this process. The basic permit term has been increased from a period not to exceed five years to a period not to exceed ten years.²⁷³ This does not mean, however, that all permits will now be issued for the full ten-year period. Instead, in determining the appropriate length of the permit, DER has indicated that it will consider the type and extent of the project.²⁷⁴ If the project can reasonably be completed within six months, the permit will be issued for six months. Moreover, since the applicant bears the burden of providing reasonable assurances that he is entitled to a permit, he must provide adequate information to accurately assess the impacts from the proposed dredging or filling. The longer the term of the permit sought, the more information is likely to be required to properly assess the potential impacts.

In the past, when DER has issued a permit for less than the maximum statutory term, the permittee has been able to obtain an extension, where necessary, up to the full five-year term. It is expected that this will continue to be permissible.

Permits issued under the Act will become effective upon execution by DER,²⁷⁵ and the permit term shall begin to run at that point. The permit term is no longer linked to obtaining authorizations from other governmental agencies. As a result, a permit applicant would be well-advised to either obtain other necessary authorizations prior to applying for a DER permit or calculate into the permit term requested the time it is expected to take to obtain those authorizations. The latter alternative may be more difficult since many of those other permitting agencies are not subject to any restrictions on the time they have taken to evaluate permit applications.

Permits for periods of time in excess of ten years may be obtained in certain circumstances.²⁷⁶ An applicant probably faces a greater burden, however, in justifying the need for a longer term permit. He must establish that the proposed activity cannot be

273. FLA. STAT. § 403.913(8) (Supp. 1984).

274. FLA. ADMIN. CODE R. 17-12.072 (Supp. 1984).

275. *Id.*

276. FLA. STAT. § 403.921(1)(a) (Supp. 1984).

completed within ten years of commencement of construction or that, if the applicant obtained a series of shorter term permits, DER might not be able to assess accurately the total impact of the project.²⁷⁷ In addition, the applicant must be prepared to provide sufficient information to assess the impacts for the full term of the permit. If these requirements are met, DER may issue a permit for a period of up to twenty-five years.²⁷⁸

Because of the large number of projects seeking twenty-five year permits and the greater amount of information which must be evaluated, the Act provides a longer period of time for DER to review such applications.²⁷⁹ The provisions of section 120.60(2) establishing a ninety-day time frame for acting on license applications will not apply when the applicant seeks a permit for longer than ten years. The Act allows DER to establish an appropriate time frame by rule, not to exceed 135 days from receipt of a complete application.²⁸⁰ The thirty-day time in which DER may request additional information from the applicant has not been changed.²⁸¹

The application fee that may be charged for longer term permits has also been increased from a maximum of \$1000 to a maximum of \$25,000. By rule, DER has adopted a fee schedule for dredge and fill permits issued for a period of time in excess of five years which establishes a sliding scale.²⁸²

Under prior regulatory provisions, permits issued for a five-year period could be renewed or extended.²⁸³ The request for permit renewal or extension provided DER with the opportunity to review the project for compliance with applicable rules and statutes and make any necessary changes in the permit. Since that opportunity is less likely to be available with longer term permits, the Act establishes a process by which DER can review these permits.²⁸⁴ The review is intended to ensure that the applicant is meeting all permit conditions and to adjust those permit conditions to reflect any applicable rule changes since the project was last reviewed. Permits must be reviewed every five years, except that rule changes

277. FLA. STAT. § 403.921(1)(a) (Supp. 1984).

278. *Id.*

279. FLA. STAT. § 403.921(1)(b) (Supp. 1984).

280. *Id.*

281. FLA. STAT. § 403.0876 (1983).

282. FLA. ADMIN. CODE R. 17-12.060(13) (Supp. 1984).

283. FLA. ADMIN. CODE R. 17-4.09 (Supp. 1984).

284. FLA. STAT. § 403.921(1)(c) (Supp. 1984).

shall not be applied to a permit issued for more than ten years until the end of the first ten-year period if the permittee has acted in reliance on the permit. Inevitably, questions will arise regarding what constitutes reliance. Presumably, the permittee will have to demonstrate some action such as commencement of construction or commitment of financial resources.

Neither the ten year nor twenty-five year permit provisions apply to permits issued pursuant to sections 403.816 or 403.813(1)(f). Those provisions govern, respectively, the maintenance dredging of certain deepwater ports and the maintenance dredging of certain canals, channels, and other structures. In each case, chapter 403 already provides for permits longer than five years.

Another major area of change under the Act involves the participation of local governments in DER's permitting process. Prior to adoption of the Act there were two separate statutory provisions governing such participation.

Section 403.182 establishes a process by which local pollution control programs can be approved by DER and receive delegation of certain functions under chapter 403. That process remains unchanged. At the present time, there are a number of approved local programs; however, no local government has been delegated dredge and fill permitting authority by DER.

Section 253.1245 governing local government control over fill projects in navigable waters within their jurisdiction has been repealed by the Act.²⁸⁵ That provision gave local governments the right to veto such projects if they objected within the statutory time frame after receiving a copy of the permit application from DER. That veto power has been eliminated.

Under the Act, DER is required to forward copies of applications for both dredging and filling permits to each county and municipality having jurisdiction.²⁸⁶ The local government then has a limited amount of time — fourteen days for short form projects and sixty days for standard form projects — to review the applications and file objections. DER is not required to deny a permit solely on the basis of a local government objection.²⁸⁷ Local governments, however, have standing under the Act to request an administrative hearing on DER's issuance of a permit, pursuant to section 120.57.²⁸⁸ As a practical matter, this right already existed

285. 1984 Fla. Laws 1984 ch. 84-79, § 15.

286. FLA. STAT. § 403.916(1) (Supp. 1984).

287. FLA. STAT. § 403.916(2) (Supp. 1984).

288. *Id.*

under section 403.412(5) since political subdivisions and municipalities are specifically listed as entities which have standing to intervene in DER licensing actions.²⁸⁹

One unusual aspect of section 403.916 is that it appears to unintentionally limit authority of local governments to adopt their own dredge and fill regulatory programs. Section 403.916(3) provides that nothing in part VIII of chapter 403 shall be construed to preclude a local government from adopting its own program "provided the local government program is first approved by the department pursuant to section 403.182." Prior to this change local governments were free to institute dredge and fill programs on the local level without obtaining DER approval. Clearly, future local "dredge and fill" programs must obtain DER approval. It is less clear, however, whether existing local programs must also obtain approval or whether they are grandfathered. A strong argument can be made, since the Act speaks in terms of local governments "adopting" programs, that only future programs must obtain approval. It is also unclear what type of regulatory program would constitute a dredge and fill program requiring approval. For example, many local storm water ordinances contain dredge and fill related provisions but are not dredge and fill programs. Presumably, only those aspects of a local program affecting dredge and fill would require approval.

Overall, it appears that the authority of local governments has been increased slightly in the area of dredging projects since there was no provision under prior law for local government review of such projects. With respect to fill projects in navigable waters, however, the Act actually reduces the authority of local government.

There have also been substantial amendments to the provisions of chapter 253 governing projects involving the use of state owned lands.²⁹⁰ Historically, DER had been prohibited from issuing any permit involving the use of state owned or sovereignty lands until the permit applicant received consent to use those lands from the Trustees.²⁹¹ DNR had taken the position that the granting or denial of such consent was a proprietary action and not subject to the

289. See *Manasota-88, Inc. v. Department of Env'tl. Regulation*, 441 So. 2d 1109 (Fla. 1st DCA 1983), in which the court held that section 403.412(5), Florida Statutes (1983), allowed intervention in a proceeding on a DER permitting decision at any time after issuance of an intent letter.

290. FLA. STAT. §§ 403.922, 253.03, 253.04, 253.77 (Supp. 1984).

291. FLA. STAT. § 253.77 (Supp. 1984).

licensing time clocks of section 120.60(2). As a result, there were often significant delays involved in processing requests for consent. Since the DER permit could not be issued until consent was obtained from the Trustees, issuance of dredge and fill permits was also frequently delayed. Generally, applications for DER permits were processed but held incomplete pending receipt of approval from the Trustees.

Section 253.77 has been amended to eliminate the link between DER permitting and consent to use state owned lands. Persons who wish to use sovereignty or other state lands must still obtain approval from the Trustees prior to commencing any activity. That approval, however, is independent of any permitting action taken by DER.

Any permit issued by DER must be conditioned upon the applicant obtaining the necessary consent from the Trustees.²⁹² Issuance of a DER permit does not authorize the permittee to begin construction before obtaining Trustee approval.

There are a number of applications pending before DER that are being held incomplete solely on the basis of lack of consent to use state owned lands. DER has taken the position that, as of the effective date of the Act, those applications will automatically become complete and will be processed in accordance with the permitting time clock of section 120.60(2).

The Act makes two other changes in the process of obtaining approval to use state lands. First, it requires that applications for approval be submitted to the Trustees for final approval or denial within ninety days after the submittal of a complete application.²⁹³ Unlike section 120.60(2), however, failure to meet the ninety day deadline will not result in an approval by default. Instead, DNR must notify the Trustees of any applications which have not been reviewed in the ninety day period and the reasons for the delay. The Act also grants the Trustees the authority to assess administrative penalties of up to \$10,000 per day for willful violations of chapter 253, including unauthorized use of state owned lands.²⁹⁴

3. Special Provisions

In 1975 the legislature enacted the Florida Aquatic Preserve Act

292. FLA. STAT. § 403.922 (Supp. 1984).

293. FLA. STAT. § 253.03(13) (Supp. 1984).

294. FLA. STAT. § 253.04(2) (Supp. 1984).

of 1975.²⁹⁵ This act and its amendments designated certain submerged lands and the associated waters as biological, aesthetic, or scientific aquatic preserves. Special standards apply to the uses, sales, leases, or transfers of interests in sovereignty lands or to activities undertaken in conjunction with uses, sales, leases, or transfer of interests in sovereignty lands.²⁹⁶ Among the activities upon which special restrictions are imposed are dredge and fill activities, drilling, excavation and spoil disposal. Anyone wishing to undertake such an activity on sovereignty lands must submit an application to DNR and submit to DER any permit applications required by its rules.

The Act clarifies DER's authority to adopt standards governing dredging and filling in aquatic preserves. Section 403.912 of the Act provides that DER may adopt more stringent permitting and enforcement standards within aquatic preserves.

This authority also applies to Outstanding Florida Waters, Areas of Critical State Concern, and areas subject to resource management plans adopted by the Governor and Cabinet pursuant to chapter 380. In the latter case, the more stringent rules apply only to waters particularly identified by the Governor and Cabinet as needing additional protection, and they may not be inconsistent with applicable rules adopted for the management of such areas.

In the past, waters within Areas of Critical State Concern or resource management planning areas have not been treated differently from any other areas unless they were also aquatic preserves or unless an OFW was affected.

V. ENFORCEMENT

A. *Pre-Henderson Act Provisions*

1. Chapter 253, Florida Statutes

Under chapter 253, enforcement was cumbersome and somewhat ineffective. The Trustees, the local governing body, or any aggrieved person had the power to enforce the provisions of the law by appropriate suit in equity. DER and the Trustees were given the authority to direct the abutting upland owner to remove any

295. FLA. STAT. §§ 258.35-258.46 (1983).

296. See FLA. STAT. § 258.42 (1983); FLA. ADMIN. CODE R. 16Q-20.04, 16Q-20.05 (Supp. 1983).

fill created in violation of the statute. If the abutting upland owner failed to remove such fill, DER or Trustees were authorized to remove it at their own expense and the cost would become a lien upon the property. Provisions of the statute which included criminal penalties for violations thereof were held unconstitutional in the case of *Odom v. Deltona Corp.*²⁹⁷

2. Chapter 403, Florida Statutes

Chapter 403 has a much broader enforcement base than chapter 253. Section 403.121 gives DER the option to pursue administrative or judicial remedies. An administrative remedy is commenced by the filing of a notice of violation. Alleged violators are given the right to an administrative hearing pursuant to the provisions of section 120.57. The proceeding culminates in the issuance of a final order which is enforceable under the provisions of section 120.59. DER does, however, have the option to go directly into court to seek injunctive relief or civil penalties. Damages may be obtained either through the judicial or administrative processes. However, a circuit court may refuse to enforce a DER order if it is found to be an inappropriate remedy, even though that remedy is within DER's range of discretion.²⁹⁸

B. Legislative Changes

Under the Act, the statute combines provisions of both chapters 253 and 403. Not only does DER have the authority to seek administrative and judicial relief, but it also has the capability of placing a lien on the property involved in unauthorized dredging or filling.²⁹⁹ The distinction between navigable and non-navigable waters has been eliminated.

VI. JURISDICTIONAL DECLARATORY STATEMENTS

The Act provides a unique procedure for obtaining an assessment of DER's jurisdiction on a particular piece of property. Under the Act, an entity having an interest in property may petition for a jurisdictional declaratory statement. The applicant for such a jurisdictional declaratory statement would provide the agency with certain documents showing the area involved. Repre-

297. 341 So. 2d 977 (Fla. 1977).

298. Department of Env'tl. Regulation v. Brown, 449 So. 2d 908 (Fla. 3d DCA 1984).

299. FLA. STAT. § 403.924(4) (Supp. 1984).

sentatives of DER would then visit the site and identify those areas which are subject to DER jurisdiction. This determination would be valid for a period of two years. If an applicant opted to challenge the agency's determination, it could do so through a hearing pursuant to section 120.57. Any substantially affected person, whether or not an owner or holder of a property interest, could also challenge DER's action. The ability of the applicant to withdraw the application remains an option until the time the agency issues its final order. The benefit of this jurisdictional declaratory statement process is that the developer or other property owner may obtain an idea of the area over which DER will assert its jurisdiction prior to application for permits. This enables the developer to make plans for the property without having to generate a final project scheme. DER's determination must be completed within sixty days after receipt of the complete application. The determination is binding for a period of twenty-four months, so long as physical conditions on the site do not result in a change in jurisdiction during that time.

In the past, DER has issued both binding and non-binding jurisdictional determinations on an informal basis at no charge. It is expected that that practice will continue to some extent. There are still incentives, however, to use the new jurisdictional declaratory statement process. The primary advantage is that the determination must be made within a limited time frame, while informal determinations are not subject to that restriction.

VII. MISCELLANEOUS

A. *Wetlands Monitoring System*

The system devised to monitor Florida's wetlands uses a three pronged approach. It requires DER to map the location and acreage of all wetlands; to identify the impacts on and losses of wetlands due to permitted activities, exempt activities and natural conditions; and to compile and maintain a statistical record of all action taken on permits, the areas permitted to be disturbed, and the acreage preserved or restored through mitigation.³⁰⁰ This monitoring will encompass all wetlands regardless of DER's regulatory jurisdiction. The information gathered is to be compiled into a yearly report for the legislature which, "shall not be used for regu-

300. FLA. STAT. § 403.929(1)(c) (Supp. 1984).

latory purposes."³⁰¹

DER has been allocated \$50,000 to accomplish the mapping of the wetlands. DER has contracted with DOT to provide LAND-SAT photography of the state. These satellite photographs should provide the desired information.

Statistics on the number of permits issued and denied and the amount of acreage disturbed were already kept by DER. The acreage preserved by mitigation will have to be monitored through the permitting process. The water management districts have agreed to keep statistics on the activities that they regulate.

B. "Whereas" Language

One of the main concerns of environmental groups' during the drafting process was the inclusion of the "whereas" language. This language precedes the enacting clause and, although present on the enrolled bill and in the Laws of Florida, will not appear as part of the statute in subsequent volumes of the Florida Statutes. The whereas clauses are an expression of legislative intent that the courts may use in interpreting the intent of this legislation when it is found to be ambiguous.³⁰² Although, this section provides for a balancing of state preservation and environmental interests with private and economic interests, it is clear that the balance is to be tipped in favor of the environmental concerns.

C. Permits for Deepwater Ports

Sections 403.061 and 403.816 were amended to include St. Petersburg among the deepwater ports permitted pursuant to those sections.³⁰³

D. Duties of the Property Appraiser

Before applying for a permit under sections 403.91-403.929, the applicant should first consider the tax consequences. Section

301. FLA. STAT. § 403.929 (Supp. 1984).

302. See generally 1A Sutherland, Statutory Construction § 20.03 (4th ed. 1972), which discusses the whereas clause: "The preamble to a statute is a prefatory explanation or statement, often commencing with the word 'whereas,' which purports to state the reason or occasion for making a law or to explain in general terms the policy of the enactment. It customarily precedes the enacting clause in the text of the bill, for which reason it frequently has been said to be no part of the law . . . The function of the preamble is to supply reasons and explanations and not to confer power or determine rights. Hence it cannot be given the effect of enlarging the scope or effect of a statute."

303. FLA. STAT. §§ 403.021(9)(b), 403.61(26)(b), 403.816(4) (Supp. 1984).

193.023, requires DER to provide the property appraiser with a copy of the final agency action relating to the issuance or denial of the permit.³⁰⁴ The property appraiser must consider this issuance or denial in valuing the property but only to the landward extent of the property. This section does not apply in two situations:

1. If the property owner had no reasonable basis of expecting approval of the permit application;
2. The permit was denied because of an incomplete filing, failure to meet an applicable deadline, or failing to comply with administrative or procedural requirements.

These two exemptions are aimed at preventing a rash of applications for permits by property owners seeking a permit denial so that they might receive a more favorable tax appraisal (for example, a property owner that applies for a permit to construct a multi-story hotel, an eighteen hole golf course and accompanying health spa in the middle of the Everglades). Although such an applicant might argue that he had a reasonable basis for expecting permit approval it is likely that an objective test was envisioned. The second exemption prevents those applicants for a permit from relying on their own lack of diligence in seeking the permit to obtain more favorable tax treatment.

E. Peat Mining

The Act creates a restoration requirement permit system for the mining of peat and peat soils. Permits issued for peat mining must require the applicant to institute and complete a reclamation project for the mining area which includes the following factors:

- a. Control of the physical and chemical quality of the water draining from the mining area;
- b. Soil stabilization, including contouring and vegetation;
- c. Elimination of health and safety hazards;
- d. Conservation and preservation of remaining natural resources; and
- e. A time schedule for the completion of the program and the various phases thereof.³⁰⁵

This section exempts from the restoration requirement those who mine less than five acres a year and those engaged in peat mining activities for the agricultural use of peat. Permits may still be required for peat mining if occurring within surface waters, and

304. FLA. STAT. § 193.015 (Supp. 1984).

305. FLA. STAT. § 403.265 (Supp. 1984).

all reasonable permit conditions may be imposed based on applicable rules and statutes.

VIII. CONCLUSION

As with any complex piece of legislation, it will take a number of years before the full impact of the Act is appreciated. What can be said with certainty is that wetlands regulation in Florida will be much more complicated now that DER's jurisdiction is more extensive. The effect of other provisions of the Act, such as the new permitting criteria, will become clearer as DER applies the Act in specific permitting decisions and implements it through rulemaking. But even at this early date it seems clear that the Warren S. Henderson Wetlands Protection Act of 1984 can truly be called a landmark piece of legislation.