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DER Regulatory Jurisdiction

James D. Dye

DER REGULATORY JURISDICTION—*Department of Environmental Regulation v. Goldring*, 477 So. 2d 532 (Fla. 1985).

I. INTRODUCTION

E. Peter Goldring (Goldring) applied to the Florida Department of Environmental Regulation (DER) in 1981 for a dredge and fill permit[1] in anticipation of mining limestone on his property in southeast Dade County.[2] The proposed project site from which Goldring anticipated excavating approximately 4.5 million cubic yards of limestone was in the middle of a vast sawgrass prairie which is part of the Everglades.[3] DER issued an "intent to deny" his application, and Goldring requested an administrative hearing.[4] The recommended order from the Division of Administrative Hearings stated that DER did not have jurisdiction over the project. The hearing officer reasoned that, under the relevant statute[5] and DER rules,[6] the presence of sawgrass, a freshwater plant,

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1. FLA. ADMIN. CODE R. 17-4.28(2) (1981):
   (2) Pursuant to Sections 403.061, 403.087, and 403.088, F.S., those dredging or filling activities which are to be conducted in, or connected directly or via an excavated water body or series of excavated water bodies to the following categories or waters of the state to their landward extent as defined by Section 17-4.28(17), F.A.C. require permit from the department prior to being undertaken: . . . (c) bays, bayous, sounds, estuaries, and natural tributaries thereto; . . .
2. Department of Envtl. Regulation v. Goldring, 477 So. 2d 532, 533 (Fla. 1985), *reh'g denied*, November 13, 1985.
3. Goldring v. Department of Envtl. Regulation, 6 Fla. Admin. L. Rep. 4141, 4144-45 (Apr. 5, 1984).
4. FLA. STAT. § 120.57 (1981).
5. FLA. STAT. § 403.817 (1981):
   (1) It is recognized that the levels of the waters of the state naturally rise and fall, depending upon tides and other hydrological, meteorological, and geological circumstances and features. The natural rise and fall of the waters is essential to good water quality, but often makes it difficult to determine the natural landward extend of the waters. Therefore, it is the intent of the Legislature that the Department of Environmental Regulation establish a method of making such determinations, based upon ecological factors which represent these fluctuations in water levels.
   (2) 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 a dominant species . . . .
6. FLA. ADMIN. CODE R. 17-4.28 (1981) provides:
   (1) Regardless of whether a permit is required, all dredging or filling activities conducted in or connected to waters of the state shall comply with

could not, by itself place the site within the landward extent of Florida Bay, a saltwater bay.[7] The hearing officer concluded that the language of the rule and the statute required the state water body to have a direct effect on the property site.[8] In its final order, however, DER rejected the recommended order, asserted jurisdiction over the site, and denied the permit.[9] Goldring appealed the final order to the Third District Court of Appeal.[10] The appellate court agreed with the hearing officer and held that DER did not have jurisdiction over Goldring's proposed mine.[11] The court's opinion stated that the rule required a two-way exchange of water between the site and Florida Bay, along with the presence of the indicator plants in order for jurisdiction to attach.[12] The fact that sawgrass, a freshwater plant, was the dominant species precluded the possibility of an exchange of salty Florida Bay water with Goldring's property.[13] The Florida Supreme Court accepted DER's appeal[14] because the district court's ruling conflicted with the First

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Chapter 17-3, F.A.C. Compliance shall be in regard to the long-term as well as the short-term effects of the projects. (2) Pursuant to Sections 403.061, 403.087, or 403.088 F.S., those dredging or filling activities which are to be conducted in, or connected directly or via an excavated water body or series of excavated water bodies to the following categories of the state to their landward extent as defined by Section 17-4.02(17), F.A.C. require permit from the department prior to being undertaken: . . . (c) bays, bayous, sounds, estuaries, and natural tributaries thereto; . . .

The department recognizes that the natural border of certain water bodies listed in this section may be difficult to establish because of seasonal fluctuation in water levels and other characteristics unique to a given terrain. The intent of the vegetation indices in Section 17-4.02(17), F.A.C., is to guide in the establishment of the border of the water bodies listed in this section. It is the intent of this rule to include in the boundaries of such water bodies areas which are customarily submerged and exchange water with a recognizable water body (i.e., areas within the landward extent of waters of the state as defined in Section 17-4.02(17)). Isolated areas which infrequently exchange water with a described water body or provide only insignificant benefit to the water quality of a water body are intended to be designated as uplands. The vegetation indices in Section 17-4.02(17), F.A.C., is presumed to accurately delineate the landward extent of such water bodies.

7. 477 So. 2d at 533.
8. 6 Fla. Admin. L. Rep. 4153.
9. 477 So. 2d at 533.
10. 452 So. 2d 968.
11. *Id.*
12. *Id.* at 970.
13. *Id.*
14. FLA. CONST. art. V., § 3(b)(3) provides that the Florida Supreme Court:
(3) May review any decision of a district court of appeal that . . . expressly and directly conflicts with a decision of another district court of appeal or

District Court of Appeal decision in *Department of Environmental Regulation v. Falls Chase Special Taxing District, Inc.*, which held that DER was unable to use ordinary high-water marks as jurisdictional boundaries.[15]

The Florida Supreme Court quashed the decision of the Third District Court of Appeal.[16] The major issue before the court was to determine the basis for DER's dredge and fill jurisdiction under chapter 403, Florida Statutes [17] and Rule 17-4.28, Florida Administrative Code.[18] The opinion by Justice McDonald held that DER has regulatory jurisdiction over an area when the dominant plant or plants[19] on the site are listed on DER's list of plant indicators[20] and the site exchanges a one-way or two-way flow of water with enumerated state waters.[21]

The court noted that the difficulty of establishing the outer reaches of state waters is reflected in the statute. Because the statute is designed to protect a public interest, the court found construction of the statute should favor the public.[22] The court also noted that deference should be given to the DER's implementation of the statute through rule making and the agency's interpretation of the statute.[23]

The supreme court emphasized that DER does not have jurisdiction over all isolated bodies of water. Both the dredge and fill jurisdiction rule[24] and the court's decision provide that an area is designated non-jurisdictional uplands when there is an infrequent water exchange between the site and state waters, or when there is an

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of the supreme court on the same question of law.

15. 424 So. 2d 787 (Fla. Dist. Ct. App. 1982). In *Falls Chase*, DER's attempt to assert jurisdiction over a lake bed based on the ordinary high-water mark was held invalid as outside the scope of its delegated authority. The Florida Supreme Court did not elaborate on where the conflict existed, but presumably the Third District Court of Appeal, by limiting jurisdiction to areas which actually exchange water with one of the eight classes of state waters, curtails DER's jurisdiction to those areas below the high-water mark, thereby conflicting with *Falls Chase*. *See infra* text accompanying notes 71-76.

16. 477 So. 2d 532.

17. FLA. STAT. § 403.817 (1981).

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

19. FLA. ADMIN. CODE. R. 17-3.021(8). For a discussion of determination of dominance, *see generally*, Smallwood, Alderman, & Dix, *The Warren S. Henderson Wetlands Protection Act of 1984: A Primer*, 1 J. Land Use & Envtl. Law 211, 222-26 (1985). [Hereinafter cited as *Henderson Act Primer*].

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

21. 477 So. 2d at 534.

22. 477 So. 2d at 534, *citing* State v. Hamilton, 388 So. 2d 561 (Fla. 1980).

23. 477 So. 2d at 534.

24. FLA. ADMIN. CODE R. 17-4.28 (1981), *see supra* note 6.

insignificant impact on state water quality.[25]

II. SIGNIFICANCE AND BACKGROUND

The *Goldring* decision is important because it provides judicial interpretation of a confusing section of DER's dredge and fill jurisdiction. Dredge and fill regulations do not apply to a property site until it has been established that the site is in or connected to waters of the state.[26] To make this determination DER uses a novel approach. Historically, Florida has regulated wetlands below the ordinary high-water mark of navigable waters.[27] In 1975, Florida discarded the ordinary high-water mark as a jurisdictional limitation and began using an index of plants which grow in and near both navigable and nonnavigable water bodies. DER's predecessor, the Department of Pollution Control, originated the concept in rule form.[28] At the time the rule was created, however, there was no statutory authority to support it. When DER was created, the legislature passed Florida Statute section 403.817 as authority for the rule.[29] Section 403.817 does not utilize water levels, but embodies a concept which recognizes that "the levels of the waters of the state naturally rise and fall" depending on the physical forces acting on the water.[30] The statute called on DER to set up a plant index to define the "landward extent of the waters of the state for regulatory purposes."[31] The index would be used to mark areas which are "characteristic of those areas subject to regular and periodic inundation by waters of the state."[32]

The administrative rule DER uses to implement the statute requires that all dredge and fill activities comply with DER regulations if those activities are "conducted in or connecting to waters of the state."[33] DER uses the vegetative index to mark the "landward extent" of the state's waters in order to determine if the subject property is connected with state waters.[34]

The current administrative rule was written in 1981 after certain semantic changes in the original rule were made following Deltona

25. 477 So. 2d at 534.
26. FLA. ADMIN. CODE R. 17-4.28(2) (1981).
27. *See Henderson Act Primer*, *supra* note 19, at 212.
28. FLA. ADMIN. CODE. R. 17-4.28 (1975).
29. *Henderson Act Primer*, *supra* note 19, at 213-14.
30. FLA. STAT. § 403.817 (1975).
31. *Id.* Waters of the state include nonnavigable, as well as navigable, waters.
32. *Id.*
33. FLA. ADMIN. CODE R. 17-4.28(1) (1975).
34. *Id.*

Corporation's attack on the rule in *Deltona Corp. v. Department of Environmental Regulation*.[35] In 1984, the statute and the rule were incorporated into the Warren S. Henderson Wetlands Protection Act[36] as the jurisdictional definition.[37]

The year 1975 could then be considered as the date wetlands regulation left the water and crawled out onto what had previously been considered land. The new scheme as used by the Department of Pollution Control, and then DER, enlarged its jurisdiction tremendously. As a result, this new concept has been attacked and extensively scrutinized by developers and bureaucrats. Of special interest in the reported cases has been the search for the meaning of the rule's "intent section." The intent of the rule is contained in the last paragraph in the rule, the "unnumbered paragraph following subsection 'g'."[38] The cases show interpretation of the rule and

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35. 2 Fla. Admin. L. Rep. 1302-A (Oct. 22, 1980) (final order entered Sept. 15, 1980). Deltona successfully challenged DER's jurisdiction by pointing out that DER's definition of its jurisdictional border technically had DER regulating activities of the lands of the state, not its waters. The borders were defined in terms of "submerged land" and "transitional zone of submerged land." In 1981, DER changed the wording of the rules from the invalid terms to the present "landward extent of the waters of the state."

36. FLA. STAT. §§ 403.91-.929 (Supp. 1984). The Warren S. Henderson Wetlands Protection Act, FLA. STAT. §§ 403.91-.929 (Supp. 1984), set up a Vegetative Index Review Committee to review the workings of the vegetative index rule and report its findings to the Governor, the President of the Senate and the Speaker of the House prior to the 1986 legislative session. The report was filed in March 1986, but is not final. The committee has asked for and received an extension for further investigation and research before a final report is filed. The committee is set to be dissolved on March 1, 1987, before which time the final report must be filed.

The report identifies six priority issues which need the committee's attention. They are mostly technical in nature, such as the advantages and disadvantages of surveying a jurisdictional line instead of relying on the vegetative index. The issue in *Goldring*, the meaning of "regular and periodic inundation," was not one of the six. The report discusses the issue briefly in an "Other Issues" section. The report identifies the conflict, that is, whether the exchange of water should be interpreted literally or impressionistically. This issue was apparently the next most mentioned problem with the vegetative index rule behind the six problems listed. The *Goldring* decision is not mentioned, but it is possible that DER will rely on the court's interpretation instead of trying to clarify the rule. However, the report notes that several committee members believe that this issue should be addressed by the committee.

The report is available from the Department of Environmental Regulation, 2600 Blairstone Road, Tallahassee, Florida 32301.

37. FLA. STAT. § 403.913 (Supp. 1984).

38. FLA. ADMIN. CODE R. 17-4(28)(2) (1981). After enumerating the categories of waters of the state which require a permit for dredging and/or filling, the intent of the rule is then stated:

> The intent of the vegetation indices in Section 17-4.02(17), F.A.C., is to guide in the establishment of the border of the water bodies listed in this section. It is the intent of this rule to include in the boundaries of such water bodies areas which are customarily submerged and exchange waters with a recognizable water body

statute have led administrative hearing officers and judges to two conclusions: that jurisdiction in nonnavigable waters or isolated wetlands, (1) depends exclusively on the presence of the plants from the vegetative index; or (2) depends on a two-way exchange of water between the site and state waters, along with the presence of the plants.[39]

Because it has been only a few years since Florida adopted a vegetative index, just four reported cases have been argued either in administrative hearings or appellate courts before *Goldring* began its climb to the supreme court.[40] These are reviewed here in order to address the difficulties in a vegetative index border.

III. THE CASES

A. *Occidental Cases*

The present rule for determining DER jurisdiction was first challenged in an administrative hearing, *Occidental Chemical Co. v. Department of Environmental Regulation.*[41] Occidental Chemi-

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(i.e., areas within the landward extent of waters of the state as defined in Section 17-4.02(17)). Isolated areas which infrequently exchange water with a described water body or provide only insignificant benefit to the water quality of a water body are intended to be designated as uplands. The vegetation indices in Section 17-4.02(17), F.A.C., is presumed to accurately delineate the landward extent of such water bodies.

39. *See, e.g.*, Department of Environmental Regulation v. Falls Chase Special Taxing District, Inc., 424 So. 2d 787 (Fla. 1st DCA 1982); Florida Mining and Materials Corp. v. Department of Envtl. Regulation, 4 Fla. Admin. L. Rep. 2230-A (Oct. 18, 1982) (final order entered Aug. 5, 1982); Occidental Chem. Co. v. Department of Envtl. Regulation, 3 Fla. Admin. L. Rep. 1-A (Jan. 12, 1982) (final order entered May 23, 1980), *aff'd per curiam*, 411 So. 2d 388 (Fla. 1st DCA 1981); Occidental Chem. Co. v. Department of Envtl. Regulation, 2 Fla. Admin. L. Rep. 1029-A (Aug. 11, 1980) (final order entered May 23, 1980), *aff'd per curiam*, 411 So. 2d 388 (Fla. 1st DCA 1981).

40. One case similar to *Goldring*, but not heard by the courts is Department of Envtl. Regulation v. Fleming, DOAH Case No. 83-3239 (Mar. 14, 1982) (final order entered June 12, 1982). The final order was entered the same day the Third District Court of Appeal rendered its decision in *Goldring*. *Fleming*, therefore, was not heard by the hearing officer or the appellate court. However, the issues and the fact patterns are similar.

The DOAH hearing officer in *Fleming* decided DER did not have jurisdiction over fresh water wetlands on Choctowahatchee Bay because DER did not establish that the dominant species were submerged *marine* plants and therefore the site could not be part of salty Choctowahatchee Bay. Secretary Tschinkel rejected the hearing officer's conclusions. Jurisdiction upgradient of a saltwater body did not depend on finding marine plants on the site. "There is no basis in either Section 403.817, Florida Statutes, or the department's implementing rule for making a distinction between saltwater and freshwater plant species." DOAH Case No. 83-3239 at 3-4.

41. 2 Fla. Admin. L. Rep. 1029-A (Aug. 11, 1980) (final order entered May 23, 1980), *aff'd per curiam*, 411 So. 2d 388 (Fla. 1st DCA 1981).

cal Co. (Occidental) challenged DER's jurisdiction over certain streambeds and an excavated channel at a phosphate mine Occidental owned in Hamilton County in an area known as the Roaring Creek Basin.[42] DER jurisdiction was asserted over Roaring Creek, a tributary of the Suwannee River, because it was a natural water body under the statutory definition[43] and various plant species listed on DER's vegetative index grew in its bed.[44] These plants consisted mostly of pond cypress, black gum, and maiden cane.[45] Occidental had challenged DER's jurisdiction over the upper part of Roaring Creek, upstream of a point where the streambed had cut deep enough into the ground so that ground water seepage kept the creek flowing "during all but the driest periods."[46] Above that point the creek depended on rainfall seeping down from its source, a cypress bayhead, and did not flow during dry periods.[47]

Occidental challenged jurisdiction for two reasons. First, the wetlands plants were confined to the streambed and were not dominant in the area. Second, the flow of water was one directional and did not exchange with a water body as defined in Rule 17-4.28(2)(g).[48] Thus, under the rule, Occidental argued, the upper creek was excluded from DER's jurisdiction.[49] The hearing officer rejected both contentions. It was determined that Occidental's method of taking a species count by a transect method showed a strong bias for upland plants since the streambed cut through an upland plateau.[50] Further, the upper part of the streambed was not excluded from DER's jurisdiction because the bed itself was "distinguishable" from the surrounding uplands during dry periods, and the only plants it contained were wetlands indicator species.[51] Because DER had found the upper streambed to be a boundary of state waters over which it had jurisdiction, it was not excluded under paragraph 17-4.28(2)(g), which excludes intermittently flowing water courses from DER jurisdiction.[52]

The crucial fact in this rule challenge was the presence of indica-

42. *Id.* at 1030-A.
43. FLA. STAT. § 403.031(3) (1979).
44. FLA. ADMIN. CODE R. 17-4.02(17) (1979).
45. 2 Fla. Admin. L. Rep. at 1032-A.
46. *Id.* at 1031-A.
47. *Id.*
48. FLA. ADMIN. CODE R. 17-4.28(2)(g) (1979).
49. 2 Fla. Admin. L. Rep. at 1034-A.
50. *Id.*
51. *Id.*
52. *Id.*

tor species from DER's list along the entire length of the streambed. Even though the facts showed the stream did not flow year round, DER was able to assert jurisdiction because the bed was wet enough to sustain wetlands plants as the dominant species. The fact that the flow from the bayhead was dependent on wet weather, and was thus irregular, did not isolate the upper portion of Roaring Creek, nor did a one-directional flow defeat jurisdiction. The hearing officer specifically found that "the term 'exchange' in the final paragraph of Rule 17-4.28(2) can include a directional flow."[53]

Arising from the same facts is another Occidental case which construes DER's jurisdictional limits.[54] Occidental again claimed DER's jurisdictional rules[55] exceeded statutory authority and were invalid "because they contain insufficient standards, thereby vesting unbridled discretion in the DER staff and subjecting citizens to arbitrary and capricious agency action."[56] The hearing officer held that the rules came within the statute's authority.[57] As to the "unnumbered paragraph following subsection 'g'," the hearing officer found that it "does not purport to be a test of jurisdiction, but rather is an attempt to describe those areas which are intended to be included or excluded from jurisdiction as described by the preceding subsections."[58]

B. Florida Mining and Materials

Despite the two Occidental cases, confusion remained over DER's jurisdiction and the exchange language of the "unnumbered paragraph following subsection 'g'." In *Florida Mining and Materials Corp. v. Department of Environmental Regulation*,[59] Florida Mining and Materials (FMM) challenged DER's jurisdiction over property it owned and wished to mine in the Everglades. FMM, like Goldring, planned to mine rock from its property and applied to DER for permits. DER issued an intent to deny,[60] and FMM requested an administrative hearing. FMM claimed that DER

53. *Id.*
54. 3 Fla. Admin. L. Rep. 1-A (Jan. 12, 1981) (final order entered May 23, 1980), *per curiam aff'd*, 411 So. 2d 388 (Fla. 1st DCA 1981).
55. FLA. ADMIN. CODE R. 17-4.02(17), (19), 17-4.28(1), (2), and (3) (1979).
56. 3 Fla. Admin. L. Rep. at 3-A.
57. *Id.*
58. *Id.*
59. 4 Fla. Admin. L. Rep. 2230-A (Oct. 18, 1982) (final order entered Aug. 5, 1982).
60. *Id.* at 2234-A.

lacked jurisdiction because its property was not located in the waters of the state.[61] The hearing officer found that DER based jurisdiction on the presence of sawgrass on FMM's property in the Everglades of western Dade County,[62] and that the sawgrass extended forty miles until it reached the Shark River.[63] Based on his findings, the hearing officer concluded DER did not have jurisdiction. Even though one of the enumerated species was found on the property, the hearing officer wrote:

> [T]he area is not 'customarily submerged' and it does not 'exchange' water with a 'recognizable water body,' i.e., the Shark River. Accordingly, the presumption in Rule 17-4.28(2) that the presence of a specified dominant species - in this case sawgrass - accurately delineates the landward extent of defined water bodies, has been successfully rebutted.[64]

In the final order, DER Secretary Victoria Tschinkel rejected the hearing officer's recommendation.[65] Secretary Tschinkel determined the site was "within the landward extent of the waters of the Shark River" and that a DER permit was needed to mine limestone.[66] She based her conclusion on the statute,[67] specifically, that the landward extent of the waters of the state are marked by indicator plants, those plants being characteristic of ones which live in wet areas.[68] Concerning the unnumbered paragraph, the secretary said it was not a test of jurisdiction, but a statement of the intent of the rule. Therefore, once the presence of the specified plants is established, then those areas supporting growth of the plants "are conclusively defined to be 'customarily submerged' and to 'exchange waters with a recognizable water body'."[69]

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61. *Id.* at 2233-A. FMM also challenged DER in matters relating to biological integrity, lead, oil and grease, and dissolved oxygen as affecting water quality.

62. *Id.* at 2236-A.

63. *Id.* at 2238-A.

64. *Id.*

65. FLA. STAT. § 120.57(9) (1981). The statute allows an agency secretary to "reject or modify the conclusions of law and interpretation of administrative rules in the recommended order" if the secretary establishes that the findings were not supported by the record.

Administrative decisions as precedence are given less weight compared to judicial proceedings. However, as illustrated by their use in this paper, they are valuable for ascertaining the intentions of an agency.

66. 4 Fla. Admin. L. Rep. at 2230-A.

67. FLA. STAT. § 403.817 (1979).

68. 4 Fla. Admin. L. Rep. at 2230-A.

69. *Id.* at 2231-A.

As an alternative method of asserting jurisdiction, the secretary stated that because there was an unbroken stretch of sawgrass from FMM's site to the Shark River, a direct connection with the river could be found as a matter of law.[70]

C. *Falls Chase*

DER's assertion of jurisdiction was overturned by the First District Court of Appeal in *Department of Environmental Regulation v. Falls Chase Special Taxing District, Inc.*[71] (Falls Chase). DER had asserted jurisdiction over Lake Lafayette near Tallahassee after the developer began to fill in parts of the lake. DER had originally intended to use the vegetative index to show jurisdiction, but switched to a theory of jurisdiction based on the ordinary high-water mark (OHWM). The court held that under section 403.817,[72] DER was precluded from using a high-water mark and that use of either the vegetative or the soil index[73] was mandatory when DER wished to assert dredge and fill jurisdiction over nonnavigable waters.[74]

Falls Chase is an aberration of DER's normal jurisdictional course. DER was unable to use the vegetative index because Lake Lafayette was at a record low level due to drought. In order to exercise jurisdiction over the site DER used the OHWM, a measure of property lines, not regulatory boundaries. The dissent by Judge Smith suggested that DER was engaged in preliminary "free form" dealing with Falls Chase over jurisdiction over the site and that Falls Chase officials were premature in going to the court system for relief prior to exhaustion of administrative remedies.[75] However, Judge Booth pointed out that DER had a survey crew at the site from April to August of 1979 establishing the OHWM,[76] thus indicating that DER may well have been preparing to assert jurisdiction based on its own location of the OHWM.

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70. *Id.*

71. 424 So. 2d 787 (Fla. 1st DCA 1982).

72. FLA. STAT. § 403.817 (1979).

73. FLA. STAT. § 403.817(2) authorizes the use of a soil index along with the vegetative index. DER has not published one to date. *See Henderson Primer, supra* note 13, at 227-229.

74. 424 So. 2d at 793. The Henderson Wetlands Act effectively overruled *Falls Chase* by providing the ordinary high-water mark as an alternative jurisdictional boundary when it is landward of the vegetative index line. *See,* FLA. STAT. § 403.913(2) (1985).

75. *Id.* at 804.

76. *Id.* at 789-790.

D. *Goldring.*

In 1981, when Goldring applied for his permit, DER in establishing its jurisdiction, used a methodology which in effect, sought the presence of an unbroken line of indicator species from the state's waters to the site.[77] However, despite a series of administrative hearings in which DER used this theory, administrative hearing officers and the judiciary continued to disagree with DER's interpretation of the language in the "unnumbered paragraph." Both the administrative hearing officer and the judges of the Third District Court of Appeal interpreted the unnumbered paragraph as requiring a two-way exchange of waters between the property site and state waters. DER continued to assert that the test for jurisdiction was "whether the site is dominated by species on the list contained in Florida Administrative Code Rule 17-4.02(17)."[78] The appellate court, interpreting the same language, stated:

> [T]he landward extent is not defined as that area upon which certain vegetation is found, but rather is that area subject to regular and periodic inundation by a water of the state as indicated by the presence of particular species common to such an area.
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> * * *
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> [T]he 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.[79]

IV. Conclusion

Goldring went to the supreme court to clear up the conflicting interpretations of the language in the "unnumbered paragraph following subsection 'g'."[80] The clarity appears less than hoped for.

An analysis of the decision and the treatment given the jurisdictional test begins with the statute, then the rule, and finally how

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77. *See, e.g.*, Occidental Chem. Corporation v. State of Fla. Dep't of Envtl. Regulation, 2 Fla. Admin. L. Rep. 1029-A, 1032-A, 1034-A. A line of listed plants grew in the bed of the disputed stream from its source to the point of intermittency. In Florida Mining and Materials Corp. v. Department of Envtl. Regulation, jurisdiction attached because sawgrass grew from the Shark River to the property site. 4 Fla. Admin. L. Rep. 223.

78. 424 So.2d at 790.

79. *Id.*

80. *Henderson Act Primer, supra* note 19, at 233.

they affected the decision. The statute is concerned with the fluctuation of water levels. It appears that the legislature wanted DER to regulate the area below the highest level that state waters rise. DER was assigned the task of establishing this zone using ecological factors which represent the fluctuation in water levels, its jurisdiction being limited to that area. Thus, the plants used by DER should be those which characteristically represent areas subject to regular and periodic inundation by the waters of the state.

DER's rule also reflects the legislative intent. The language in the rule's trouble-making "intent" section establishes jurisdiction over the wet areas which exchange waters with state waters. This is identical to the fluctuating waters concept in the statute. Areas infrequently exchanging with state waters are considered uplands and are specifically excluded under the rule.[81] The plant index is the line drawn between those areas.

There's the rub. Reliance on a vegetative index will not work as an indicator of water exchange zone because wetlands plants do not stop at the high-water mark, but creep into the water body's drainage basin. Water plants, such as those growing on Goldring's property, are not indicative of a fluctuating water level, but of wet soil. The soil may be wet for reasons other than fluctuating state waters; in Goldring's case, the ground remained wet because of rain water sheetflow across the site.[82] Hence, it appears that the legislature wanted DER to have regulatory jurisdiction over a specific zone, but chose a vehicle, a vegetative plant index, which indicates something else.

Internal contradictions in both the statute and the rule, along with a series of administrative decisions in which DER arbitrarily switched the jurisdictional test from the legislatively intended fluctuation zone to the DER intended wetlands indicator species has led to a Florida Supreme Court decision which ignores the legislative concern and strains the definition of "exchange." As a result, the opinion is internally contradictory and reflects the tension inherent in the statute and the rule. In *Goldring* the court said, "We agree that an exchange of water need not be a two-way flow; an exchange occurs wherever water meets water."[83] The facts in *Goldring* show that water did not meet water until four miles down gradient from the subject property.[84] Thus, under the first part of the

81. FLA. ADMIN. CODE R. 17-4.28(2)(g) (1979).
82. 452 So. 2d at 969.
83. 477 So. 2d at 534.
84. 6 Fla. Admin. L. Rep. 4145.

court's definition of exchange, DER could assert jurisdiction over Goldring's property because of the one-way exchange. However, if DER had to produce evidence of water meeting water, its assertion of jurisdiction would fail since the water from Goldring's property did not meet the waters of Florida Bay until it had flowed four miles down gradient.

In determining the meaning of the rule which implements the statute, Justice McDonald cited *Pan American World Airways, Inc. v. Florida Public Service Commission*[85] for the administrative law maxim that courts should give deference to rule interpretations by the agencies which administer the rules.[86] However, *Pan American* also states that courts are not required to give deference to clearly erroneous interpretations.[87] When DER began to interpret "exchange" as including a one-way flow downhill from the subject site to the state waters, it departed from the plain meaning of "exchange" in any dictionary.[88] Courts should give deference to an agency's construction, but only when the construction makes sense. When an agency interprets a rule in a clearly erroneous way, then a court owes the interpretation no deference.[89]

Unfortunately, the court's interpretation of the statute and the rule was a no-win proposition. The legislature apparently wanted a flexible test of jurisdiction, but wrote a statute with two incompatible concepts. The emphasis is on the establishment of regulatory jurisdiction over the zone of fluctuating water levels. Yet, the legislature did not choose concepts such as mean high tide or ordinary high water, which, although not definitive terms, are concepts with a certain amount of history and familiarity. Instead the legislature chose a measurement consisting of vegetative indicators. The plants do their namesake well: they indicate wetlands. They do not indicate what the legislature wanted: fluctuating water levels. The plants can live whether the water which keeps their roots moist is exchanging with state waters or is flowing downhill from a site four miles from state waters.

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85. 427 So. 2d 716 (Fla. 1983).

86. 477 So. 2d at 534.

87. 427 So. 2d at 719.

88. Exchange is always reciprocal, whether its an exchange of gifts, an exchange of gunfire, an exchange of stock, or an exchange of waters, each party gives and in return receives. *E.g.*, "The action, or an act, or reciprocal giving and receiving. . . . ," 3 The Oxford English Dictionary 376 (1979); "To give and receive in a reciprocal manner; interchange." The American Heritage Dictionary of the English Language, 457 (1979); "To barter; to swap. To part with, give or transfer for an equivalent." BLACK'S LAW DICTIONARY 505 (5th ed. 1979).

89. 427 So. 2d at 719.

The result in *Goldring* is a benefit for the public. Among the policies served by Chapter 403 is protection of the state's waters. By increasing DER's jurisdiction over much of the wetlands in Florida, the overall amount of detriment which comes with dredging and filling will be reduced. However, the way in which this policy was established was ill-flavored. It was a legislative decision as to how much territory DER should regulate. Yet, the legislature failed to indicate clearly to the courts, attorneys, developers, and environmentalists the boundaries of the policy promulgated by the statute. As a result, the boundaries had to be guessed at and eventually litigated before becoming settled. The legislature, either inadvertently or purposely, passed the task of deciding between two conflicting policies to the courts.

The result is that DER has jurisdiction over the vast majority of wetlands drainages in the state; the supreme court has given it to them.[90] The presence of plants from the wetlands indicating index is the key for DER's regulatory jurisdiction to attach. Whether or not water from state water bodies should mix or exchange with water at the subject site is a test which was lost in the muddy language of the rule and the court's decision. Now, however, the legislature has had a duty placed upon it as a result of the court's decision. The legislature must realize that the intention expressed in its statute did not result in DER exercising jurisdiction over areas in which the state's waters "rise and fall." DER has the ability to exercise jurisdiction over all wetlands which drain into the state's waters, so long as plants from the vegetative index grow there. The legislature may or may not approve of the result from the supreme court's decision, but it should clear up the language in the statute in order to reflect what it intends as the jurisdictional test for DER.

James D. Dye

90. 477 So. 2d at 534.