Flo-Sun, Inc. vs Claude R. Kirk

JUSTICE PARIENTE IS RECUSED IN THE NEXT CASE. FLO-SUN INCORPORATED VERSUS CLAUDE R KIRK AND SUGARCANE GROWERS COOPERATIVE VERSUS CLAUDE R KIRK. THESE CASES HAVE BEEN COLORADO SOL DATED FOR ARGUMENT.

ALL RIGHT. WHO IS GOING FIRST. ARE YOU SHARING YOUR TIME WITH SOMEONE ELSE?

YOUR HONOR, NOT NECESSARILY. BUT WE WILL DIVIDE IT. THANK YOU, SIR. GOOD MORNING, YOUR HONORS. MY NAME IS JOE CLOCK. I AM THE GENERAL COUNSEL OF FLO-SUN INCORPORATED AND, ALSO, AN ATTORNEY WITH STEEL, HECTOR AND DAVIS. MY CLIENT IS HERE WITH ME AND GARY SANDS, FROM THE HOPPING GREEN FIRM IS WITH US, REPRESENTING THE COPETITIONER. YOUR HONORS, THIS CASE IS A REVIEW OF THE KIRK VERSUS US SUGAR CASE, WHICH -- VERSUS THE U.S. SUGAR CASE, WHICH CAME FROM THE FOURTH DISTRICT COURT OF APPEAL N THAT CASE WHAT HAPPENED WAS THE FOURTH DISTRICT REVERSED THE DECISION OF THE CIRCUIT JUDGE FORM THE CIRCUIT JUDGE HAD REFUSED TO ALLOW A COMMON LAW THEORY OF PUBLIC NUISANCE TO SET ASIDE THE ENTIRE BODY OF PRIMARY JURISDICTION LAW THAT EXISTS IN THE STATE OF FLORIDA. THE TRIAL JUDGE PROPERLY RULING AND CONSISTENT WITH RULINGS OF THIS COURT AND THE OTHER DISTRICT COURTS OF APPEAL IN FLORIDA, INCLUDING, INTERESTING INTERESTINGLY THE FOURTH DISTRICT, THAT WHERE MATTERS THAT WERE PECULIAR WITHIN THE ADMINISTRATIVE PURVIEW, SHOULD BE TAKEN THROUGH THAT PURVIEW, AND THE CIRCUIT COURT SHOULD NOT INTERFERE. APPARENTLY THE FOURTH DISTRICT THOUGHT, AS A DEPARTURE POINT, THAT WHERE THERE WAS AN ALLEGATION IN A COMPLAINT, NOW, RECOGNIZE, YOUR HONORS, THAT IN THE COMPLAINT THEY ACKNOWLEDGED THAT THE MATTERS THAT THEY WERE GOING BEFORE WERE WITHIN THE PURVIEW OF THE ADMINISTRATIVE AGENCIES, BUT THEY ADDED THIS ALLEGATION, AS STATED BY THE FOURTH DISTRICT. WHERE THE GOVERNMENT HAS ILLEGALLY FAILED TO ENFORCE THE APPLICABLE LAW AND REGULATIONS AND THAT AGENCY ERRORS HAVE BEEN EGREGIOUS AND DEVASTATING, AND THAT THE GOVERNMENT'S CONDUCT HAS GENERATED HUGE PROFITS USED BY THE REGULATED INDUSTRIES TO MAKE POLITICAL CONTRIBUTIONS, THAT UNDER THAT CIRCUMSTANCE YOU COULD SIMPLY IGNORE THE ENTIRE BODY OF PRIMARY JURISDICTION AND THE CIRCUIT JUDGE COULD, UNDER A DOCTRINE OF COMMON LAW SUSNEWS AND -- LAW NUISANCE, SIMPLY TAKE OVER ENTIRETY CASE.

LET'S DO AWAY WITH THE RHETORIC THAT IS DISCUSSED IN THE PLEADINGS AND GO BACK TO THE FUNDAMENTAL CONCEPTS AND EXAMINE THE STATUTE THAT IS CITED BY THE FOURTH DISTRICT THAT SEEMS TO PROVIDE THAT, NOTWITHSTANDING OTHER REMEDIES, THAT THERE WILL REMAIN A REMEDY TO A CITIZEN OF BEING ABLE TO GO TO COURT, IF HE CAN ACTUALLY DEMONSTRATE A NUISANCE EXISTS, AND COME UP WITH A VISUAL EXAMPLE, YOU KNOW, THAT MIGHT FIT INTO THAT, AND FOR INSTANCE, THAT YOU HAVE GOT THE MANUFACTURING PLANT OR WHATEVER NEXT DOOR TO A SUBDIVISION, AND THE MANUFACTURING PLANT HAS A SMOKE STACK THAT, EVERYDAY, PUSHES OUT A CONSIDERABLE DEBRIS, THAT LANDS, OKAY, ON THE ROOFTOPS AND THE YARDS AND, YOU KNOW, ALL THROUGH THE SUBDIVISION. AND THE SUBDIVISION PEOPLE HAVE GONE TO THE AGENCIES AND ASKED FOR RELIEF AND WHATEVER. AND THEY HAVEN'T BEEN SUCCESSFUL. DOESN'T THE STATUTE SUGGEST THAT THAT CITIZEN STILL RETAINS THE RIGHT TO INDIVIDUALLY GO TO COURT AND SEEK RELIEF FOR A NUISANCE?

YOU ARE ABSOLUTELY CORRECT, JUSTICE ANSTEAD.

TELL ME HOW THAT WORKS IN THE CONTEXT OF THE CASE THAT WE HAVE HERE AND THEN HOW IT FITS WITH THE EXPERTISE IN A PARTICULAR AGENCY.

YOUR HONOR, SIMPLY STATED, THE ISSUE THAT YOU JUST VERY CAREFULLY ARTICULATED, HAS TO DO WITH A PRIVATE RIGHT OF NUISANCE. THE PRIVATE RIGHT OF NUISANCE WAS RETAINED BY THE CIRCUIT JUDGE, AND THE CIRCUIT JUDGE INDICATED THAT THAT MATTER COULD GO FORWARD. THAT, YOUR HONOR, RESPECTFULLY IS NOT WHAT WE ARE HERE TODAY ON. WHAT WE ARE HERE, TODAY, ON, IS A CLAIM OF PUBLIC NUISANCE, AND WE WOULD SUGGEST RESPECTFULLY TO YOUR HONOR THAT THE STATE OF LAW IN THE STATE OF FLORIDA IS, WITH RESPECT TO PUBLIC NUISANCE, IN AN AREA THAT HAS CLEARLY BEEN RECOGNIZED IN THE PLEADINGS AS BEING ONE WITHIN THE PURVIEW OF THE ENVIRONMENTAL AGENCY, THAT THE CIRCUIT COURT MAY NOT ENTER INTO THAT DISPUTE THAT, IT MUST BE RELEGATED TO THE ADMINISTRATIVE AGENCIES, AND THAT IS THE RULE OF LAW THAT HAS BEEN ARTICULATED BY THIS COURT, UNDER THE DOCTRINE OF PRIMARY JURISDICTION, EXTENSION, FROM ABOUT --

WHERE SHOULD THE LINE BE DRAWN, IN THE HYPOTHETICAL THAT I HAVE GIVEN, WHERE THE SUBDIVISION SAYS WHAT WE WANT TO DO, REALLY, IS HAVE A CLASS ACTION. THAT IS THAT WE ACTUALLY CAN DRAW A LINE, A PHYSICAL LINE, AND SAY, YOU KNOW, WE HAVE HAD OUR OWN EXPERTS FIGURE THIS OUT, OVER A PERIOD OF TIME, AND WE CAN SEE THAT THE DEBRIS ALL FALSE JUST WITHIN THIS PARTICULAR SUBDIVISION, AND IT IS A WALLED SUBDIVISION, AND IT ALL FALLS IN THERE. WE WANT A CLASS ACTION FOR THAT SUBDIVISION.

YOUR HONOR, RESPECTFULLY, IT IS REALLY DIFFICULT TO GO THROUGH AN ANALYSIS OF WHAT IF, WHEN THE AREA OF LAW THAT YOU ARE TALKING ABOUT IS A PRIVATE RIGHT OF NUISANCE, WHICH IS NOT BEFORE THE COURT IN THIS CASE. THE ONLY ISSUES THAT ARE BEFORE THE COURT IN THIS CASE IS A PUBLIC NUISANCE, AND I WOULD SUGGEST TO YOUR HONOR RESPECTFULLY, THAT UNDER THE PUBLIC NUISANCE DOCTRINE, AS IT EXIST IN HIS THE STATE OF FLORIDA, WITH THE PRIMARY JURISDICTION DOCTRINE THAT HAS BEEN ESTABLISHED BY THIS COURT, THERE IS NOT A REMEDY IN THE CIRCUIT COURT, FAN YOU LOOK, YOUR HONOR, TO THE OCEAN RIDGE CASE, THE OPINION OF THE FOURTH DISTRICT, IT IS A VERY HELPFUL CASE, BECAUSE IT SHOWS YOU WHAT HAPPENS IF YOU GO DOWN THAT SLIPPERY SLOPE, BECAUSE WHAT HAPPENS IN THAT CASE, YOUR HONOR IF YOU RECALL, A CIRCUIT JUDGE IN PALM BEACH COUNTY TOOK IT UPON HIMSELF TO DECIDE HOW BIG AN INLET SHOULD BE AROUND BOYANT ONE BEACH, HOW BIG THE JETTY SHOULD BE, WHETHER THE SAND SHOULD BE PUMPED FROM ONE SIDE TO THE OTHER. HE HAD TWO TOWNS BEFORE HIM AT THE TIME. WHAT HE WAS DOING, YOUR HONOR, HE TOOK THREE AND-A-HALF YEARS IN THE TRIAL COURT, 36 DAYS OF TRIAL, THREE YEARS ON APPEAL, FOR IT TO BE DETERMINED THAT HE HAD NO BUSINESS BEING THERE IN THE FIRST PLACE.

NO CLASS ACTION, THEN, BY THE SUBDIVISION THAT I DESCRIBED.

THAT'S CORRECT, YOUR HONOR. THERE WASN'T. I THINK THE INTELLECTUAL EXERCISE YOU ARE GOING THROUGH IS A VERY IMPORTANT ONE, BECAUSE IT SHOWS A DISTINCTION BETWEEN A PRIVATE RIGHT OF NEWS AND AND A -- NUISANCE AND A PUBLIC RIGHT OF NUISANCE. I THINK IF YOU HAVE PEOPLE WITH A PARTICULAR INJURY, IT MAY BE DIFFERENT, BUT THAT IS NOT THE ISSUE BEFORE US. THE ISSUE BEFORE US IS WHETHER GOVERNOR KIRK CAN HAVE THE PUBLIC OF PALM BEACH COUNTY, WITH AN ENTIRE ECOSYSTEM, LOOKING AT THE COMPLAINT HERE -- --.

WHEN 24 COMES TO A PUBLIC RIGHT OF -- WHEN IT COMES TO PUBLIC RIGHT OF NUISANCE, WHY ISN'T IT A BETTER RULE AND A BETTER PUBLIC POLICY THAT THAT RIGHT STILL EXISTS, BUT IF THERE IS SOME PARTICULAR SUBJECT THAT IS WITHIN THE EXPERTISE OF THE AGENCY, THAT THE CIRCUIT COURT GET THE AGENCY TO DEAL WITH THOSE PARTICULAR SUBJECTS BEFORE MAKING A RULE SOMETHING.

YOUR HONOR, IF YOU SEE SAY COULD THE LEGISLATURE PASS SUCH A LAW, IF IT COULD. IT

WOULD FLY IN THE FACE OF 25 YEARS OF LAW THAT HAS BEEN GOING EXACTLY THE OTHER WAY. THERE ARE 4500 PAGE IN HIS THE STATUTE THAT DEAL WITH FLORIDA ENVIRONMENTAL LAW ADMINISTRATIVELY AND TWO PAGE THAT IS DEAL WITH PUBLIC STANDARDS, BUT THE FACT IS, YOUR HONOR, THAT STARTING WITH THE LEGISLATURE HAVING CREATED THIS AREA OF THE LAW AND THEN THIS COURT AND THE OTHER APPELLATE COURTS IN THE STATE OF FLORIDA, ADOPTING THE DOCTRINE OF PRIMARY JURISDICTION, WHICH IS JURISDICTIONAL, THE EXTENSION DOCTRINE THAT, SAYS --

WHAT DOES THE DOCTRINE OF PRIMARY JAURS DICTION ACTUALLY SAY?

IT SAYS, YOUR HONOR, THAT WHEN THE LEGISLATURE HAS CREATED A BODY OF LAW THAT OPPOSES THE ADMINISTRATIVE AGENCIES, THE RESPONSIBILITY FOR ENFORCING LAWS IN THE STATE OF FLORIDA, THAT THE COURTS WILL NOT ENTER UPON THAT AREA. PERIOD. THAT IS WHAT IT SAYS.

ARE WE DEALING, HERE, WITH AN ISSUE, WITH REGARD TO WHETHER A PARTY CAN PLEAD AROUND THE DOCTRINE OF PRIMARY JURISDICTION OR ARE WE DEALING WITH WHETHER THIS PLAINTIFF HAS PLED AROUND IT PROPERLY?

YOU ARE DEALING WITH BOTH, JUDGE. THE QUESTION, I THINK, ANOTHER WAY OF PHRASING YOUR QUESTION, JUDGE, WOULD BE IS THERE THE POSSIBILITY OF CREATING A FUTILITY DOCTRINE, THAT IF IT IS FUTILE TO APPROACH AN AGENCY, BECAUSE IN THEIR PLEADINGS, THEY DID NOT ALONG THAT THEY APPROACHED THE AGENCY. EYE UNDERSTAND THAT.

WHAT THEY SIMPLY ALONG WAS BASED ON PAST CON -- WHAT THEY SIMPLY ALLEGE WAS BASED ON PAST CONDUCT AND THE PEOPLE SUING, THAT THEY SHOULD BE ABLE TO GO UNDER THE CIRCUIT COURT AND HAVE THE CIRCUIT JUDGE ACT, UNDER A PUBLIC NUISANCE, AND GO FORWARD WITH THE COURT. I WOULD POINT OUT THAT, IN THE ENVIRONMENTAL CODE, THERE IS SECTION 403.412 THAT PROVIDES THAT YOU HAVE A RIGHT TO FILE A VERIFIED COMPLAINT BEFORE THE AGENCY. IF THE AGENCY DOES NOTHING, THEN YOU CAN GO INTO CIRCUIT COURT, BUT WHEN YOU GO INTO CIRCUIT COURT, YOU ARE UNDER A STATUTORY REMEDY UNDER 403.412. IT IS NOT A FREE-FOR-ALL UNDER THE PUBLIC NUISANCE LAW.

GENERALLY WHAT WE ARE LOOKING AT IS A SITUATION ACROSS THE BOARD THAT WE HAVE AN AGENCY THAT HAS THE EXPERTISE TO DEAL WITH A PARTICULAR SUBJECT MATTER BUT IT SEEMS TO ME THAT THE LAW HAS RECOGNIZED THAT, UNDER SOME CIRCUMSTANCES, AT COMMON LAW, ONE MAY BE ABLE TO PLEAD AROUND THOSE. NOW, I QUESTION, HERE, WHETHER IT HAS BEEN DONE, BECAUSE THERE ARE SUCH BROAD ALLEGATIONS, BUT FOR EXAMPLE, IF ONE WERE TO ALLEGE AND MEET THE REQUIREMENTS FOR EXAMPLE, THAT THE APA DID NOT ADEQUATELY PROVIDE A REMEDY, OR THE OTHER, ONE OF THE OTHER FOUR EXCEPTIONS, ARE YOU SUGGESTING THAT THAT IS NOT A POSSIBILITY, UNDER FLORIDA LAW AS IT EXISTS?

JUDGE, I DON'T THINK IT IS FOR THIS REASON. NUMBER ONE, UNDER THE ADMINISTRATIVE PROCEDURES, YOU CAN GO IN AND HAVE A RULE-MAKING. IF YOU DON'T THINK THAT THE RULES ARE ADEQUATE, YOU CAN GO IN AND ASK THAT THE RULES ARE CHANGED. IF YOU THINK A RULE IS NOT BEING APPLIED PROPERLY, YOU CAN GO IN AND SEEK ENFORCEMENT OF THAT RULE AND, JUDGE, THAT BECOMES BEFORE AN ADMINISTRATIVE LAW JUDGE, WHO IS FROM A SEPARATE, AS YOU KNOW, OF THE EXECUTIVE BRANCH, AND IT IS SUBJECT TO DIRECT APPEAL TO THE DISTRICT COURTS OF APPEAL. IN THIS PARTICULAR CASE, YOUR HONOR, I WOULD SAY, WITH RESPECT TO A PUBLIC NUISANCE, YOU HAVE TWO CHOICES, AND NEITHER ONE OF THEM WERE FILED BY GOVERNOR KIRK. ONE OF THEM IS TO HAVE GONE ON TO THE ADMINISTRATIVE PROCESS, WHICH HE CHOSE NOT TO DO, SIMPLY ALLEGING GENERALLY THAT THERE HAD BEEN EGREGIOUS CONDUCT IN THE PAST, OR HE COULD HAVE FILED A COMPLAINT AND DONE NOTHING AND GONE IN UNDER 403.412. BUT I THINK HE DID NEITHER ONE OF THOSE THINGS. HE WANTS TO TRY TO GO

IN AND USE THE PUBLIC NUISANCE POLICY TO CREATE A BODY OF LAW. THINK, YOUR HONORS, ABOUT THE SITUATION IN OCEAN RIDGE. SEVEN YEARS OF LITIGATION TO FIND OUT THAT IT DIDN'T BELONG THERE, AND THE STANDARD, APPARENTLY, WHERE THE FOURTH DISTRICT WENT ON A DIFFERENT PATH FROM WHERE THEY HAD IN THE OCEAN RIDGE CASE, WAS THEY TALKED ABOUT THE FACT THAT OCEAN RIDGE HADN'T BEEN DECIDED ON A MOTION TO DISMISS. IT HAD BEEN DECIDED LATER ON IN THE CASE. IF YOU READ OCEAN RIDGE, STARTING AT PAGE 87, WHICH IS THE CITE THAT THEY HAVE, YOU WILL SEE THAT THE COURT CONTINUALLY REFERRED BACK TO THE CLAIMS AND THE PLEADINGS AND HOW THEY WERE PHRASED. THE SUGGESTION THAT THE ONLY WAY TO DETERMINE WHETHER OR NOT THE DOCTRINE OF PRIMARY JURISDICTION APPLIES, IS TO GO THROUGH TRIAL, A 36-DAY TRIAL, OR TO HAVE DISCOVERY TO DETERMINE, APPARENTLY, BASED ON THE STATE OF THE FOURTH DISTRICT MIGHT NOT OPINION, WHETHER OR NOT THERE IS CORRUPTION WITHIN THE EXECUTIVE BRANCH OF GOVERNMENT, IS BOTH INAPPROPRIATE, IN TERMS OF INVADING ANOTHER CORE BRANCH OF GOVERNMENT, AND IT IS SIMPLY AN IMPROPER RULE THAT SIMPLY DEPARTS FROM THE LAW THAT THIS COURT HAS ARTICULATED SEVERAL TIMES AND WHICH HAS BEEN ARTICULATED BY EVERY DISTRICT COURT OF APPEAL, INCLUDING THE FOURTH, UNTIL THIS RECENT CASE.

WHAT IS THE SITUATION WITH REGARD TO, IF WE WOULD DETERMINE THAT THE DOCTRINE IS APPLICABLE? IS A DISMISSAL WITH PREJUDICE PROPRIETOR IS AN ABATEMENT APPROPRIATE?

IT IS A VERY GOOD QUESTION, JUDGE. IN THIS CASE A DISMISSAL WITH PREJUDICE WAS APPROPRIATE, BECAUSE ONCE YOU HAVE ALLEGED THAT THE ADMINISTRATIVE AGENCIES HAVE JURISDICTION OVER THE AREA, IF YOU DISMISSED IT WITHOUT PREJUDICE, WHAT IS HE GOING TO COME IN THE SECOND TIME AND HAVE DIFFERENT ALLEGATIONS, SAYING THAT THE AGENCY DOESN'T HAVE JURISDICTION? I MEAN, OUR EQUIVALENT RULE, UNDER THE RULES OF JUDICIAL ADMINISTRATION, I THINK IT IS 206.0-D, THE RULE SAYS YOU CAN'T DO. THAT YOU CAN'T PLAY FAST AND FREE WITH --

IT IS ABATEMENT NOT DISMISSAL.

JUDGE BUT WE ARE NOT TALKING THE DOCTRINE OF PRIMARY JURISDICTION AND EXTENSION IS NOT SIMPLY A MATTER OF THE CIRCUIT COURT SITTING AND WAITING FOR ANOTHER AGENCY TO COME OUT WITH ANOTHER ADVISORY OPINION. IT IS RULE STARTING WITH THIS COURT THAT BASICALLY SAYS THAT THIS AGENCY, WHEN IT HAS PRIMARY JURISDICTION, IT DOESN'T MEAN TEMPORARY JURISDICTION. IT DOESN'T MEAN THEY GO FIRST AND WE COME AFTER T MEANS THEY HAVE THE RIGHT TO ADJUDICATE THIS ISSUE, AND THEN IT GOES UP THROUGH THE COURTS, INCLUDING --

WHAT YOU ARE SUGGESTING IS THAT, AFTER, IF THERE IS THE -- IF THIS PRIMARY JURISDICTION IS IN THE AGENCY, THAT, AT THE END OF THE AGENCY DETERMINATION, THERE, IF THERE IS A CAUSE OF ACTION, IT WOULD BE IN THE NATURE OF A DIFFERENT TYPE OF CAUSE OF ACTION.

YOUR HONOR, WHAT I AM SAYING IS, IF IT IS A PRIVATE RIGHT OF ACTION, THEY CAN GO INTO THE CIRCUIT COURT F IT IS A PUBLIC RIGHT OF ACTION, THE EXISTENCE OF CHAPTER 403 AND THE OTHER 400 PAGES OF THE ENVIRONMENTAL REGULATIONS HAVE NOW MADE IT CLEAR THAT PUBLIC NUISANCE, BECAUSE IT INVOLVES MANY COUNTIES, INVOLVES THE ENTIRE ECOSYSTEM OF THE STATE, GOES THROUGH THE ADMINISTRATIVE AGENCIES, AND THE ONLY WAY YOU CAN GET INTO CIRCUIT COURT, I WOULD RESPECTFULLY SUGGESTION, IF YOU -- I WOULD RESPECTFULLY SUGGEST, IS IF YOU FILE A COMPLAINT, YOU CAN GO IN AND DO NOTHING OR FILE A STATUTORY REMEDY BUT NOT UNDER A REMEDY OF COMMON LAW NUISANCE. THIS COURT, YOUR HONOR, AND OTHER DISTRICTS COURTS OF APPEAL WHAT HAPPENED WITH THE CLAUSES IS THEY HAVE RECOGNIZED BY THE RULE THAT A GARDEN-VARIETY SAVINGS CLAUSE DOES NOT OVERCOME 25 YEARS OF JURISPRUDENCE BY THIS COURT AND OTHER COURTS. THE LEGISLATURE CREATED THE ADMINISTRATIVE PROCESS, AND THIS COURT HAS GONE THROUGH THE

DEVELOPMENT OF THE DOCTRINE OF PRIMARY JURISDICTION AND AND EXTENSION, SUCH THAT NOW -- AND ABSTENSION SUCH AS THAT AT THIS POINT IN TIME, THAT THE ENVIRONMENTAL LAW AS COMPLAINED BY GOVERNOR KIRK IN HIS COMPLAINT, GOVERNOR KIRK SEEKS ABOUT WATER FLOWING FROM THE LAKE, AIR POLLUTION, INJECTION WELLS. HE IS TALKING ABOUT THE ENTIRE BALL OF WAX, YOUR HONOR, AND CONSEQUENTLY THIS COURT HAS VERY WISELY RULED THAT ONCE THE LEGISLATURE HAS DECIDEDED THAT THIS BELONGS IN THE HANDS OF EXPERTS, THAT THAT IS WHERE IT BELONGS, AND THAT THIS COURT REVIEWS IT WHEN IT COMES UP THROUGH THE DISTRICT COURT OF APPEAL FROM THE ADMINISTRATIVE LAW SIDE AND NOT FROM THE CIRCUIT COURTS, AND I SUGGEST TO YOUR HONOR AND I WOULD LIKE TO RETAIN TIME, IF I COULD, THAT THE IDEA TAKE THE PROPER -- THAT THE PROPER WAY TO DECIDE WHETHER OR NOT PRIMARY JURISDICTION VESTS IN THE AGENCY IS NOT TO GO THROUGH 36 DAYS OF TRIAL AND THREE YEARS OF LITIGATION, NOR IS IT SUGGESTED TO BE WHETHER OR NOT THE EXECUTIVE BRANCH OF GOVERNMENT HAS BEEN CORRUPTED BY POLITICAL CONTRIBUTION SOMEHOW. AWAY FOR THE COURT TO SHOW THE KIND OF RESPECT THAT IT NATURALLY HAS FOR THE BRANCHES OF GOVERNMENT. I WOULD LIKE TO RESERVE TIME, IF I COULD.

YOU MAY.

MAY IT PLEASE THE COURT. MY NAME IS JACK SCAROLLO. I AM HONORED TO BE REPRESENTING FORMER GOVERNOR CLAUDE KIRK AS ONE OF THE PETITIONERS BEFORE THIS COURT. THIS CASE DOES, INDEED, PRESENT AN ISSUE OF SIGNIFICANT PUBLIC POLICY DETERMINATION. AND THAT ISSUE IS WHETHER THE JUDICIAL BRANCH OF GOVERNMENT IS OBLIGED, PURSUANT TO THE DUAL DOCTRINES OF PRIMARY JURISDICTION AND THE DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES, TO SIT OUT THE STOORD NEARLY IMPORTANT BATTLE AGAINST ENVIRONMENTAL POLLUTION, IN SPITE OF THE FACT THAT THE LEGISLATURE HAS PRONOUNCED, VERY CLEARLY, NOT ONLY AN INVITATION TO THE JUDICIAL BRANCH BUT AN ENCOURAGEMENT THAT THE JUDICIAL BRANCH REMAIN ACTIVELY INVOLVED.

WE ARE GOING TO HAVE TO END UP WITH A RULE IN THIS CASE, THOUGH, THAT WILL APPLY ACROSS THE BOARD, AND WE ALL, HOPEFULLY ARE ON JUDICIAL AND OTHER NOTICE THAT THE LEGISLATURE CREATES MANY EXECUTIVE AGENCIES THAT GO AND TAKE CARE OF PARTICULAR PROBLEMS, WHETHER IT IS A WATER MANAGEMENT DISTRICT OR WHATEVER IT MAY BE, AND POTENTIALLY, IT SEEMS TO ME THAT WE COULD END UP HERE, IF WE ACCEPT YOUR POSITION IN THIS CASE OR THE FOURTH DISTRICT'S, THAT, REALLY, THAT IS ALMOST MEANINGLESS, THEN. THAT THE LEGISLATURE IS SET UP WITH ALL OF THOSE AGENCY TO GO OUT AND DEAL WITH THESE KINDS OF PROBLEMS IN PARTICULAR AREAS OF EXPERTISE. IF THE CITIZEN CAN ALWAYS BRING A PUBLIC NUISANCE-TYPE ACTION IN THE COURTS, THEN ISN'T IT GOING TO MAKE ALL OF THAT REGULATION AND PROBLEM-SOLVING AND THE EXPERTISE OF THESE MYRIADS, THERE MUST BE THOUSANDS OF THEM BY NOW, OF AGENCIES, ALMOST IRRELEVANT, THEN, IF YOU CAN GO INTO COURT.

RESPECTFULLY, YOUR HONOR, THE ANSWER TO THAT QUESTION IS NO, AND THE IMPORTANT DEMARCATION SHALL THAT IT WAS SUGGESTED BY JUSTICE QUINCE, AND THAT IS WHEN THERE IS AN ISSUE PRESENTED BY THE -- BEFORE THE COURT WHICH CAN BE DETERMINED BY AN ADMINISTRATIVE AGENCY DECISION, THEN THE DOCTRINE OF PRIMARY JURISDICTION DOES COUNSEL THAT THE COURTS VOLUNTARILY REFRAIN FROM EXERCISING THE JURISDICTION THEY HAVE OVER THAT MATTER, TO TAKE ADVANTAGE OF THE EXPERTISE OF THE ADMINISTRATIVE AGENCY, AND --

HOW DO YOU DO THAT?

WELL, YOU DO THAT BY STAYING THE ACTION IN THE CIRCUIT COURT. AND BY ALLOWING THE ADMINISTRATIVE ACTION TO PROCEED TO A FINAL DETERMINATION. BUT WHAT THE COURTS HAVE REPEATEDLY SAID, THE SECOND DISTRICT COURT OF APPEALS HAS SAID IT. IN CHEVIN

VERSUS TAMPA ELECTRIC COMPANY AND THE SURFSIDE VERSUS COUNTY LINE LAND CASE AND THE FOURTH DISTRICT HAS SAID IT IN WETSELL VERSUS DUDA AND SONS, AND THIS COURT HAS SAID, AS WELL THAT WHERE THERE IS A PUBLIC NUISANCE CLAIM, AND IN FACT CHEFFIN AND SURFSIDE ARE BOTH PRIVATE NUISANCE CASES NOT PUBLIC NUISANCE CLAIMS, WHERE THERE IS A NUISANCE CLAIM, THAT THE PUBLIC AGENCY IS NOT DISPOSITIVE DETERMINATION OF THE CASE, BECAUSE AN ACTION WHICH IS PERFECTLY IN ACCORD WITH ADMINISTRATIVE REGULATIONS MAY NONETHELESS CONSTITUTE A PUBLIC NUISANCE. AND -- I AM SORRY.

WHERE WOULD WE GO, FOR EXAMPLE, I MEAN, YOU ARE RECOGNIZING THE DOCTRINE OF PRIMARY JURISDICTION, AS JUSTICE ANSTEAD HAS SUGGESTED. THERE IS AN ENTIRE DIVISION OF GOVERNMENT THAT WOULD WORK TOWARDS RESOLUTION OF A PROBLEM, BUT LET'S SAY, FOR EXAMPLE HE WILL, A SMOKE STACK IN REGULATIONS CAN BE NO HIGHER THAN 76 FEET NOR LOWER THAN 75 AND-A-HALF FEET. CERTAINLY IF YOU WOULD FILE A PUBLIC NUISANCE CLAIM, SUGGESTING THAT THE SMOKE STACK HAD TO BE 76 OR 77 FEET, WE WOULD HAVE SOME KIND OF CONFLICT BETWEEN THOSE RULES AND REGULATIONS ESTABLISHED FOR THE CONDUCT OF THAT ACTIVITY AND WHAT A PUBLIC NUISANCE WOULD BE. WHERE DO WE GO, UNDER THOSE CIRCUMSTANCES, AND IS THERE AN ABATEMENT SITUATION? UNDER THAT DOCTRINE.

PETITIONERS HAVE CITED MULTIPLE CASES, WHERE THERE IS A CHALLENGE TO THE APPROPRIATE OF SOME ADMINISTRATIVE REGULATION. AND THERE IS NO QUESTION. WE CONCEDE THAT, IF YOU ARE FILING A CHALLENGE TO THE APPROPRIATE OF AN ADMINISTRATIVE REGULATION, THE WAY TO DO THAT IS TO FOLLOW THE ADMINISTRATIVE PROCEEDINGS ACT. IF YOU BELIEVE --

HOW CAN YOU TELL IN THIS COMPLAINT WHAT THE COMPLAINT REALLY IS, BECAUSE GENERALLY THERE ARE BROAD ALLEGATIONS OF BAD THINGS AND POLITICAL CORRUPTION. THAT IS THE KIND OF THING THAT IS DRAWN. IT IS NOT DRAWN FROM A SCIENTIFIC PERSPECTIVE AND CERTAINTY THAT WE HAVE A CERTAIN AMOUNT OF RUN OFF AND IT CONTAINS CERTAIN ELEMENTS, X, Y AND Z. WE DON'T HAVE THOSE.

PETITIONERS HAVE TAKEN NOTICE OF THE PLEADINGS IN THE STATE OF FLORIDA. EXCUSE ME. THE RESPONDENTS HAVE. I THINK THEY HAVE PLED, ADEQUATELY, TO PLACE THE PETITIONERS ON NOTICE AS TO THE KINDS OF CONDUCT THAT THE RESPONDENTS CLAIM CONSTITUTE A PUBLIC NUISANCE, WITH YOU THEY HAVE BROUGHT A -- BUT THEY HAVE BROUGHT A PUBLIC NUISANCE CLAIM. THEY HAVE NOT BROUGHT A CLAIM FOR A VIOLATION OF ANY ADMINISTRATIVE REGULATION. THE CASES THAT THE PETITIONERS RELY ON ARE CLAIMS WHERE THERE HAS BEEN AN ASSERTION OF SOME INADEQUACY OR FAILURE TO FOLLOW AN ADMINISTRATIVE REGULATION, AND IN FACT, IN ALMOST EVERYONE OF THOSE CASES, SOME ADMINISTRATIVE PROCEEDING WAS, THEN, PENDING.

HOW ABOUT, THOUGH, THE ALLEGATION, WITH REGARD TO THE INJECTION WELLS AND THAT NOT BEING PERMITTED? WOULD THAT NOT BE SOMETHING THAT IS WITHIN THE POWER OF THE AGENCY TO EITHER PERMIT OR NOT PERMIT, AND WOULD THAT NOT BE THE REMEDY, AS TO SEEK CESSATION OF THAT ACTIVITY, PURSUANT TO A REGULATION THAT EITHER REQUIRES A PERMIT OR DOES NOT?

WELL, THE REGULATION IS THERE REQUIRING THE PERMIT. THE ALLEGATION, IN THE COMPLAINT IS THAT THE CONDUCT HAS CONTINUED FOR AN EXTENSIVE PERIOD OF TIME, WITHOUT ANY PERMIT EVER HAVING BEEN ISSUED.

AND SO THEREFORE WOULD NOT THE AGENCY CLOSE THAT OPERATION DOWN, IF IT IS IN VIOLATION OF ESTABLISHED REGULATIONS AND HAVE THE CLAIMANTS, HERE, SOUGHT TO DO THAT?

SHOULD THEY CLOSE THAT DOWN? OUR RESPONSE IS YES, THEY OUGHT TO, BUT THEY HAVEN'T, AND THE LEGISLATURE HAS VERY CLEARLY TOLD US THAT THIS IS A SHARED RESPONSIBILITY,

THAT THE PROTECTION OF THE ENVIRONMENT IS SO SIGNIFICANT. IN FACT THE LANGUAGE THAT THE LEGISLATURE USES IS THAT IT IS A MATTER OF THE HIGHEST URGENCY AND PRIORITY, AND BECAUSE IT IS A MATTER OF THE HIGHEST URGENCY AND PRIORITY, THE LEGISLATURE ENLISTS THE ASSISTANCE OF PRIVATE INITIATIVE AND ALL THREE BRANCHES OF GOVERNMENT, AND SAYS THIS IS GOING TO BE A SHARED RESPONSIBILITY. AND THE SAVINGS CLAUSE IN THIS STATUTE COULD NOT BE MORE STRONGLY WORDED THAN IT IS.

TELL ME HOW IT WORKS IN TERMS OF WE HAVE GOT THE PUBLIC SERVICE COMMISSION, AND WE HAVE GOT A PUBLIC UTILITY THAT COMES TO THE PUBLIC SERVICE COMMISSION AND THEY SAY WE WANT TO BUILD A COAL-BURNING PLANT OUT HERE IN THE MIDDLE OF NOWHERE THAT IS GOING TO POLLUTE A LITTLE BUT IT REALLY, ISN'T GOING TO AFFECT ANY HUMAN BEINGS, BECAUSE IT IS IN THE MIDDLE OF, REALLY, ABANDONED FARMLAND, WHATEVER, AND MORE THAN THAT, WITH THE DWIZ THAT ARE AVAILABLE TO US -- WITH THE DWIZ THAT ARE AVAILABLE TO US, WE -- WITH THE DEVISES THAT ARE AVAILABLE TO US, WE ARE GOING TO BE ABLE TO REDUCE IT, EVEN IF IT WAS IN DOWNTOWN MIAMI AND THEY GO THROUGH ALL OF THE PUBLIC NOTICE. EVERY ENVIRONMENTAL GROUP IN THE WORLD COMES TO THE PUBLIC SERVICE COMMISSION AND INTERVENES AND THEY HAVE ALL OF THE KNOCK DOWN DRAG OUT OR WHATEVER, AND THE PUBLIC SERVICE COMMISSION MAKES ITS DECISION, AND IT ENDS UP, YOU KNOW, PERHAPS BEING A MODIFIED KIND OF THING OR WHATEVER. AND IT TOOK THREE YEARS FOR THAT PROCESS, YOU KNOW, TO GO ON, AND EVERYBODY HAD NOTICE OF IT, AND EVERYBODY GOT INVOLVED WITH, IT AND THEN THERE IS THE ABILITY TO REVIEW THE DECISION OF THE PUBLIC SERVICE COMMISSION, AND NOW THAT IS ALL OVER. ARE YOU SAYING THAT ANY INDIVIDUAL, THEN, COULD, ALSO, AFTER THAT IS ALL OVER, CAN BRING A PUBLIC NUISANCE LAWSUIT AND GO THROUGH THAT PROCESS, ALL OVER AGAIN, IN THE COURTS? AFTER THERE HAS BEEN COURT REVIEW, REALLY, THAT CAPPED WHATEVER THE PUBLIC SERVICE COMMISSION DID?

NO, SIR. I AM NOT SAYING THAT. BAL HARBOUR --

WOULDN'T THAT BE THE LOGICAL, THOUGH, CONCLUSION FROM WHAT YOU ARE SAYING HERE? THAT THAT COULD HAPPEN AND A CITIZEN COULD BE DISSATISFIED AND SAY, WELL, I DON'T CARE WHAT THAT PUBLIC SERVICE COMMISSION SAYS. THAT STUFF THAT IS FALLING ON MY ROOF, MY WHITE ROOF, IS STILL BLACK, AND I AM NOT JUST GOING TO FILE A ACTION FOR DAMAGES, BECAUSE I BELIEVE THAT STUFF FALLS ON OTHER ROOFS, TOO, SO I AM GOING TO FILE A PUBLIC -- HELP ME WITH THAT.

WHAT THE PUBLIC SERVICE COMMISSION HAS SAID, UNDER THOSE CIRCUMSTANCES, IS WE HAVE REVIEWED WHAT YOU HAVE PROPOSED TO DO. WE HAVE REVIEWED IT IN LIGHT OF EXISTING REGULATIONS, AND WE FIND THAT, IF YOU DO A, B AND C, YOU WILL BE IN COMPLIANCE WITH THOSE EXISTING REGULATIONS. THE PUBLIC SERVICE COMMISSION DOES NOT GRANT IMMUNITY FROM SUBSEQUENT NUISANCE COMPLAINTS. THE EXISTENCE OF A PERMIT TO BUILD OR TO OPERATE IS NOT A GRANT OF IMMUNITY FROM SUBSEQUENT NUISANCE COMPLAINTS.

SO YOUR ANSWER TO MY QUESTION IS, YES, THAT CITIZEN CAN BRING A PUBLIC NUISANCE LAWSUIT AND GO THROUGH THE SAME PROCEDURE IN THE COURTS.

WELL, IT IS -- MY ANSWER IS THAT A CITIZEN CAN BRING A PUBLIC NUISANCE COMPLAINT, BUT NOT TO GO THROUGH THE SAME PROCEDURE, TO ADDRESS DIFFERENT ISSUES, AND THOSE ISSUES ARE, EVEN THOUGH YOU ARE OPERATING IN ACCORDANCE WITH THE PERMITS THAT YOU HAVE BEEN GRANTED, ARE YOU NONETHELESS CREATING A PUBLIC NUISANCE, AS A CONSEQUENCE OF YOUR OPERATION?

SO THERE CAN BE THAT SECOND REVIEW, WHATEVER, IN EVERY INSTANCE THAT ONE OF THESE AGENCY MAKES A DECISION, NOTWITHSTANDING THE JUDICIAL REVIEW THAT IS AFFORDED IN THOSE ADMINISTRATIVE PROCEEDINGS?

JUSTICE ANSTEAD, OUR POINT OF DEPARTURE IS THAT I DO NOT ACCEPT THAT IT IS THE SAME CONSIDERATION. THE PUBLIC AGENCY IS CONSIDERING COMPLIANCE WITH ADMINISTRATIVE REGULATIONS. AND THE COURTS HAVE REPEATEDLY RECOGNIZED THE SECOND DISTRICT IN COWIN, HAS EXPRESSLY STATED THAT THE F.A.C. THAT YOU COMPLY WITH ADD -- THE FACT THAT YOU COMPLY WITH ADMINISTRATIVE REGULATIONS DOES NOT MEAN THAT YOU ARE NOT CONSTITUTING A PUBLIC NUISANCE. THE ADMINISTRATIVE REGULATIONS, THEMSELVES, SAY WE ARE GIVING YOU THIS PERMIT, BUT YOU ARE STILL LIABLE FOR ANY PUBLIC NUISANCE THAT YOU MAY CREATE, AS A CONSEQUENCE OF YOUR OPERATION, EVEN IF YOU ARE OPERATING WITHIN THE TERMS OF THE PERMIT. IF YOU TAKE A LOOK AT THE LANGUAGE THAT APPEARS IN ONE OF THE RELY VAN SEXS, IT IS -- IN ONE OF THE RELEVANT SECTIONS, IT IS CHAPTER 40-E-63, IT SAYS, AND THIS IS A DIRECT QUOTE, THIS IS A PERMIT THAT DOES NOT RELIEF THE PERMITEE FROM HARM OR INJURY TO HUMAN HEALTH OR WELFARE. IT IS NOT A GRANT OF IMMUNITY.

WHAT STANDARDS IS A COURT GOING TO EMPLOYEE, THEN, IF -- TO EMPLOY, THEN, IF, AGAIN, WE GO BACK TO THE HYPOTHETICAL THAT I GAVE YOU, WHERE THE PUBLIC SERVICE COMMISSION CONCLUDES THAT THEY HAVE ADOPTED STANDARDS AND THIS IS ALL WITHIN VERY SAFE INSOFAR AS DANGERS TO HUMANS ARE CONCERNED OR WHATEVER, WHAT STANDARDS, THEN, IS A COURT GOING TO APPLY, IN ALLOWING A PUBLIC NUISANCE LAWSUIT AND TO MAKE A DETERMINATION ABOUT THAT AND TO WHETHER TO ENTER AN INJUNCTION OR TO AWARD DAMAGES? WHAT STANDARDS ARE GOING TO BE OUT THERE? IS IT GOING TO AND REASONABLE PERSON STANDARD OR WHAT STANDARDS ARE GOING TO BE APPLIED?

EXACTLY THE SAME STANDARDS THAT COURTS HAVE APPLIED HISTORICALLY, IN MAKING THE DETERMINATION, WITH REGARD TO THE EXISTENCE OF PUBLIC NUISANCE SINCE LONG BEFORE ANY OF THE ENVIRONMENTAL REGULATIONS WERE PASSED, AND THAT IS EXACTLY WHAT THE COURT SAID, IN CHEFFIN.

WHAT STANDARD IS THAT?

WHETHER, IN FACT, THIS OPERATION CONSTITUTES AN UNREASONABLE INFRINGEMENT UPON THE PROPERTY RIGHTS OF OTHER PERSONS. AND THAT IS A BALANCING TEST.

SO EVERY POWER PLANT OR FACTORY OR WHATEVER, WATER TREATMENT PLANT THAT HAS BEEN PERMITTED AND AUTHORIZEED TO OPERATE AND HAS GONE THROUGH A PROCESS LIKE THAT, IS STILL SUBJECT, IN EVERY INSTANCE, TO THAT KIND OF STANDARD?

IN EVERY INSTANCE WHERE THERE IS A REASONABLE BASIS FOR MAKING ALLEGATIONS THAT THEY ARE, IN FACT, INVADING THE PROPERTY RIGHTS OF OTHERS, THROUGH THE MANNER IN WHICH THEY ARE CONDUCTING THEIR BUSINESS, THE ANSWER TO THAT QUESTION IS YES.

SO DON'T WE END UP CONVERT AGO PRIVATE NUISANCE INTO A PUBLIC NUISANCE?

I AM SORRY. HOW DO WE END UP CONVERT SOMETHING.

SO DON'T WE END UP, THEN, WITH, REALLY, JUST A PRIVATE NUISANCE. THAT IS THAT YOU SAID IF IT INTERFERES WITH THE RIGHTS OF ANY CITIZENS, WE END UP CONVERTING A PRIVATE NUISANCE ACTION INTO A, AUTOMATICALLY, A PUBLIC NUISANCE ACTION?

NO, SIR, I THINK THAT THE EXTENT TO WHICH THOSE INVASIONS OCCUR IS THE DISTINCTION AS TO WHETHER IT IS A PRIVATE NUISANCE ACTION OR A PUBLIC NUISANCE ACTION.

HOW MANY PEEP SDEL IT HAVE TO AFFECT, THEN, BEFORE IT BECOMES A PUBLIC NUISANCE, AS TO INDIVIDUALS?

I THINK THAT IT CAN REASONABLY BE SAID THAT IT IMPACTS THE PUBLIC. I DON'T THINK THAT IS

NECESSARY TO QUANTIFY WITH NUMBERS OR A PERCENTAGE OF THE POPULATION. I THINK THAT, IF THIS IS AN OPERATION THAT IS INFRINGING UPON THE HEALTH, SAFETY, OR WELFARE OF THE GENERAL PUBLIC, THEN IT IS A PUBLIC NUISANCE CLAIM, THE SAME WAY THE CHEFFIN CASE WAS A PUBLIC NUISANCE CLAIM AND THE KOURTSES DEFEATED PRIMARY JURISDICTION -- AND THE COURTS DEFEATED PRIMARY JURISDICTION ARGUMENTS AND EXHAUSTION OF ADMINISTRATIVE REMEDY ARGUMENTS IN THAT CASE AND ALLOWED THE ATTORNEY GENERAL TO PROCEED AGAINST TAMPA ELECTRIC, FOR ITS POLLUTION OF THE AIR, IN SPITE OF THE FACT THAT THE TAMPA ELECTRIC WAS PERMITTED TO DO WHAT THEY WERE DOING. BECAUSE THE COURT SAID THAT THE COMPLAINT OF CONDITIONS EITHER EXISTS OR THEY DON'T, AND IF THEY DO, IT IS A MATTER OF LAW WHETHER THEY CONSTITUTE A NUISANCE NOW. HOW THEY EXIST, WHETHER THEY COMPLY WITH THE AGENCY'S REGULATIONS, ET CETERA, MIGHT WELL BE HIGHLY TECHNICAL MATTERS BUT THEY ARE IRRELEVANT TO THE ULTIMATE QUESTION OF WHETHER THEY CONSTITUTE A NUISANCE, AS A MATTER OF LAW.

AND YOU THINK THAT IS WHAT THE LEGISLATURE CONTEMPLATED IN THIS SAVINGS CLAUSE.

I CLEARLY DO, YOUR HONOR. I THINK THAT THE LEGISLATURE RECOGNIZED THAT THIS IS AN EXTREMELY IMPORTANT MATTER. WE WANT TO MAXIMIZE THE PROTECTION THAT IS AFFORDED AGAINST POLLUTION. WE DON'T WANT TO TAKE AWAY A POTENT WEAPON IN THE ARSENAL AGAINST POLLUTION OF THE ENVIRONMENT, BY TYING THE HANDS OF THE JUDICIARY. THERE ARE SAFEGUARDS BUILT IN AGAINST FRIVOLOUS LITIGATION. THERE ARE SAFEGUARDS THAT ARE INHERENT IN THE PROCESS BECAUSE OF THE EXPENSE OF THE LITIGATION. THIS CASE, ALONE, HAS NOW BEEN GOING ON FOR FIVE YEARS. THESE ARE NOT MATTERS THAT ARE GOING TO BE UNDERTAKEN LIGHTLY OR FRIVOLOUSLY. THEY MUST BE UNDERTAKEN WITH SUBSTANTIAL CONSIDERATION, BUT IT MAKES NO SENSE TO TAKE AWAY WHAT THE LEGISLATURE HAS MANDATED THESE COURTS CONTINUE TO ENGAGE IN, AND THAT IS PROVIDING ACCESS TO PRIVATE CITIZENS TO PERFORM THE PUBLIC TASK OF FILLING IN THOSE GAPS THAT EXIST, EVEN WHEN THERE IS COMPLIANCE WITH ADMINISTRATIVE REGULATIONS, AND WE HAVEN'T EVEN GOTTEN TO THE ALLEGATION IN HIS THE COMPLAINT ABOUT THE INEFFECTIVENESS OF THE ADMINISTRATIVE AGENCIES, BECAUSE QUITE FRANKLY, I DON'T THINK THOSE ISSUES NEED TO BE REACHED. I THINK THIS CASE CAN AND SHOULD BE DECIDED ON THE BASIS THAT THE PRIMARY JURISDICTION DOCTRINE DOES NOT APPLY, WHERE AN AGENCY DETERMINATION, IF MADE, DOES NOT RESOLVE THE ISSUE, AS TO WHETHER A NUISANCE DOES OR DOES NOT EXIST. THAT WON'T ANSWER THE QUESTION FOR US. WE CAN GO BACK TO EVERY AGENCY THAT HAS ANYTHING TO DO WITH THESE BUSINESSES. EVERY AGENCY CAN EITHER TELL US, YES, THEY ARE IN ABSOLUTE COMPLIANCE, OR, NO, THEY ARE NOT IN COMPLIANCE, AND THEY ARE VIOLATING OUR REGULATIONS, BUT THAT DOESN'T TELL US WHETHER THERE IS A NUISANCE BEING CONDUCTED, BECAUSE A LEGAL OPERATION MAY STILL BE A NUISANCE, AND AN ILLEGAL OPERATION, AN OPERATION IN VIOLATION OF THE REGULATIONS, MAY NOT BE A NUISANCE AT ALL, SO WE ARE LEFT IN THE SAME POSITION EVEN IF WE WERE TO ABATE THIS CLAIM, TO PURSUE EVERY ADMINISTRATIVE REMEDY, BEFORE EVERY ADMINISTRATIVE AGENCY. WE HAVE NOT ALLEGED VIOLATIONS OF ADMINISTRATIVE RULES. CONTRARY TO THE REPRESENTATIONS OF THE PETITIONER, BEFORE THIS COURT, THERE IS NO ALLEGATION IN THE COMPLAINT THAT THE ADMINISTRATIVE AGENCIES HAVE JURISDICTION OVER THIS NUISANCE. WE HAVE ALLEGED IN THE COMPLAINT THAT GOVERNMENT HAS BEEN AIDING AND ABETTING WHAT IS GOING ON, BY FAILING TO ENFORCE THE LAW, BUT WE HAVE NOT SAID THAT ENFORCEMENT OF THE LAW WOULD ELIMINATE THIS NUISANCE, AND WE DON'T BELIEVE THAT IT WOULD. WE THINK WE DO FALL INTO A GAP. WE THINK THIS IS THE APPROPRIATE REMEDY AND THAT THERE IS NO OTHER ADEQUATE REMEDY, BECAUSE THE ADMINISTRATIVE PROCEDURES WILL NOT ANSWER THE QUESTIONS THAT WE NEED TO HAVE ADDRESSED.

WOULD YOU AGREE THAT CHEFFIN WAS SDPIDED AT A TIME WHEN THE APA -- WAS DECIDED AT TIME WHEN THE APA WAS NOT AS FULLY DEVELOPED NOR PROTECTED AS IT IS TODAY, AND IF THAT IS THE CASE, SHOULD WE DISREGARD THOSE DIFFERENCES OR HOW WOULD YOU SUGGEST

WE DEAL WITH THOSE?

NO. THANK CLEARLY IS IMPORTANT. I THINK THE ISSUE AS TO WHETHER ADMINISTRATIVE PROCEDURES ARE ADEQUATE IS DIFFERENT, TODAY, THAN IT WAS WHEN CHEFFIN WAS BEFORE THE COURTS, BUT CHEFFIN WASN'T DECIDED ON THE BASIS OF INADEQUACY OF ADMINISTRATIVE REMEDIES. IT WAS DECIDED ON THE BASIS OF IRRELEVANCY OF ADMINISTRATIVE REMEDIES. A RECOGNITION THAT, EVEN IF YOU GO THROUGH THE ADMINISTRATIVE PROCESS, THE COURTS STILL HAVE A QUESTION TO ANSWER. SHOULD THERE BE TIMES WHEN THE COURTS SHOULD STAY PROCEEDINGS TO TAKE ADVANTAGE OF THE SPECIAL EXPERTISE OF ADMINISTRATIVE AGENCIES? BY ALL MEANS THERE WILL BE TIMES FORM THIS IS NOT ONE OF THEM, BUT THERE WILL BE TIMES WHEN THAT IS APPROPRIATE, WHEN WE WANT, WHEN THE COURTS WANT THE GUIDANCE OF ADMINISTRATIVE AGENCIES TO ASSIST THEM IN ANSWERING ULTIMATE QUESTIONS THAT NEED TO BE RESOLVED, BEFORE THE COURT CAN MAKE A FINAL DETERMINATION.

CERTAINLY, THEN, THESE, I GUESS, THESE PETITIONERS, NOW, IN THEIR PRESENT STATUS, WOULD HAVE THAT OPPORTUNITY, UNDER YOUR THEORY, AT THE TRIAL LEVEL IN THIS CASE, TO MAKE THAT PRESENTATION THAT, LOOK, THE AGENCY IS, REALLY, WHERE THIS DECISION SHOULD BE MADE AND WHAT HAPPENS THEN? IT IS ABATED OR WE STOP AND WE GO BACK INTO THE ADMINISTRATIVE FRAMEWORK?

IF, AT ANY TIME DURING THE COURSE OF THESE PROTECTION, THE PETITIONERS ARE -- COURSE OF THESE PROCEEDINGS, THE PETITIONERS ARE ABLE TO CONVINCE THE COURT THAT THE SPECIAL EXPERTISE OF THE ADMINISTRATIVE AGENCY WILL ASSIST THE COURT IN DETERMINING THE ULTIMATE ISSUES BEFORE IT, MY ANSWER TO YOUR QUESTION IS YES. WE STAY THE PROCEEDING. WE ARE A BLIND PINNED -- WE ARE OBLIGED TO PURSUE THOSE ADMINISTRATIVE REMEDIES, BUT THAT DOESN'T HAPPEN ON A MOTION TO DISMISS. THAT DOESN'T HAPPEN ON THE BASIS OF A RECORD BEFORE THIS COURT, AND THERE IS NO REVERSAL OF THE BURDEN OF PROOF HERE. THE FOURTH DCA OPINION DOES NOT SUGGEST THAT THIS MUST BE AN AFFIRMATIVE DEFENSE THAT HAS GOT TO BE PROVEN BY THE PETITIONERS. ALL THAT LANGUAGE SUGGESTS IS THAT IT MAY BE ABLE TO BE DECIDED ON A SUMMARY JUDGMENT BASIS AND THAT THEY MAY BE ABLE TO SHOW THE ABSENCE OF A JUST TISSUEABLE ISSUE -- OF A JUSTICIABLE ISSUE AS TO WHETHER THE COURTS SHOULD EXERCISE THEIR VOLUNTARY RESTRAINT AT ANY GIVEN POINT IN THE COURSE OF THESE PROCEEDINGS. I NOTE THAT MY TIME IS UP, AND I THANK YOU VERY MUCH.

THANK YOU.

THANK YOU. THE FOURTH DISTRICT SAYS, IN THE INSTANT CASE, THE DEFENDANTS ARE PROCEEDING ON A MOTION TO DISMISS, WHICH IS A DIFFERENT PROCEDURAL POSTURE. PLAINTIFFS ARE ALLEGING THAT AGENCY ERRORS HAVE BEEN SO EGREGIOUS OR DEVASTATING THAT ADMINISTRATIVE REMEDIES WOULD BE INSUFFICIENT. THAT THE GOVERNMENTAL AGENCY ENTRUSTED WITH REPUGNANT THE SOURCE AND HARM OF POLLUTANTS ARE NOT DOING THEIR JOB AND THAT ADMINISTRATIVE AGENCIES ARE OPERATING CONTRARY TO EXISTING STATUTES. ON THE CONTRARY, IF THE PLAINTIFF CAN DISPROVE THROUGH EVIDENCE, THAN IT MIGHT SERVE AS A DISPOSING OF THIS CASE. THAT TURNS THE LAW OF THE STATE OF FLORIDA ON ITS HEAD, AS FAR AS PRIMARY JURISDICTION IS CONCERNED, AND I WOULD SUGGEST, IN GOING BACK TO THE VERY INTERESTING COLORADO QI BETWEEN JUSTICE ANSTEAD AND MR. SCAAROLO WHEN YOU WERE DISCUSSING THE PFC YOUR HONOR, THE FACT IS THE EXAMPLES USED BY THIS COURT WERE VERY TELLING EXAMPLES, AND IN THE COWS OF THE PUBLIC SERVICE COMMISSION, THEY DON'T USE ADMINISTRATIVE JUDGES, BUT IN THE ENVIRONMENTAL FRAMEWORK, THEY DO. THE DEPARTMENT RULES ON THE CASE AND THEN IT GOES, BY DIRECT APPEAL, TO THE FOURTH DISTRICT COURT OF APPEAL, AND THE OTHER EXAMPLE USED, WITH REGARD TO BALL WHO ARE BORIS NOT CORRECT. THE BAL HARBOUR JUDGE RULED THAT THE PERMITTING PROBLEM IS CONCERNED, THEY HAVE TO GO UP THROUGH THE ADMINISTRATIVE AGENCY. PRIMARY JURISDICTION IS NOT A MATTER OF THE CIRCUIT COURT SAYING, OKAY, FINE. WE ARE GOING TO

STOP FOR A WHILE AND INVITE THE EXECUTIVE BRANCH OF GOVERNMENT TO COME IN AND ADVISE THE COURT ON THE LAW. THAT IS NOT WHAT PRIMARY JURISDICTION SAYS. PRIMARY JURISDICTION IS AND EXTENSION. AND EXTENSION IS A POLICY CREATED BY -- ABSTENSION IS A POLICY CREATED BY THIS COURT THAT SAYS, WHEN THE LEGISLATURE HAS PUT IN ACCORDANCE WITH THE GOVERNMENT, A REGULATION OF A BODY OF LAW, THAT IS WHERE IT IS TO STAY AND OUT OF RESPECT AND DEFERENCE, WE DON'T GO THERE. THE FOURTH DISTRICT IS SUGGEST SUGGESTING THAT THERE IS GOING TO BE A MINITRIAL ON WHETHER OR NOT THE EXECUTIVE BRANCH OF GOVERNMENT IS GOING TO BE INFLUENCED BY POLITICS. THAT, OF COURSE, IS A TOTALLY INAPPROPRIATE EXERCISE. THE SAVINGS CLAUSE THAT MR. SCAAROLO TALKS ABOUT IS IN 1967. A LOT OF WATER HAS GONE OVER THE DAM SINCE THEN, AND THE FACT OF THE MATTER IS THAT, THE LAW OF THE STATE OF FLORIDA, WITH RESPECT TO THE ADMINISTRATIVE AGENCIES AND WITH RESPECT TO PRIMARY JURISDICTION, HAS COME A LONG WAY SINCE 1967, AND I DO NOT BELIEVE THAT ANYONE WOULD SUGGEST THAT THE LEGISLATURE OF THE STATE OF FLORIDA HAD IN MIND THAT THERE WAS GOING TO BE 400 PAGES DEVOTED TO ENVIRONMENTAL REGULATION AND THE EXECUTIVE BRANCH OF GOVERNMENT, WHEN THEY PUT IN WHAT IS NOTHING MORE THAN A GARDEN VARIETY SAVINGS CLAUSE, IN WHICH THE VARIOUS DECISIONS OF DIFFERENT COURTS THAT HAVE DEALT WITH THE ISSUE HAVE SIMPLY MENTIONED THE SAVINGS CLAUSES AND MOVED RIGHT ALONG. THERE IS NO INDICATION THAT THAT IS WHAT THE LEGISLATURE HAD IN MIND.

WHAT DO YOU SAY THOUGH TO THOSE, THOUGH THAT, RAISE THE SPECTER OF THE LOVE CANALS AND THE OTHER POLLUTANTS AND SAY WE HAVE COMPLAINED TO THOSE AGENCIES FOREVER AND THE POLLUTION CONTINUED, AND -- ARE THE COURTS, THEN, ARE THE DOORS OF THE COURTHOUSE DOOR BARRED FROM THOSE PEOPLE THAT RAISE THE SPECTER OF THOSE KINDS OF SITUATIONS?

JUSTICE ANSTEAD, MAYBE IN NEW YORK BUT NOT IN FLORIDA. IN FLORIDA, YOU HAVE A PAN ONBLY OF -- A PANOPLY OF REMEDIES AVAILABLE. IF YOU CERTIFY A VERIFIED COMPLAINT AND THE AGENCY DOES NOTHING, YOU GO INTO THE CIRCUIT COURT UNDER 403.412. LET ME CLOSE WITH THIS, BECAUSE I KNOW THAT MY TIME IS RUNNING OUT. THINK OF THIS, THIS COURT HAS BEEN INVOLVED WITH ISSUANCE -- WITH ISSUES INVOLVING THE EVERGLADES. THE GOVERNMENT IS INVOLVED, THE AGENCIES ARE INVOLVED, ENVIRONMENTAL GROUPS ARE INVOLVED. EVERYONE IS INVOLVED IN THIS. THIS HAS BEEN GOING ON FOR YEARS. THERE ARE PAGES AND PAGES OF LEGISLATION AND PAGES AND PAGES OF REGULATIONS. NOW WHAT IS BEING SUGGESTED BY MR. SCAAROLO AND THE DECISIONS OF DIRK IS -- OF KIRK IS WE NEED A PANEL OF 150 FROM THE PANHANDLE TO KEY WEST THAT, ALL CAN GET INVOLVED IN THE LEGISLATURE WITH THE ADMINISTRATIVE AGENCIES. THE COURT DOESN'T WANT THAT AND THIS COURT CREATED THE PRIMARY DOCTRINE OF JURISDICTION TO PREVENT IT.

CAN I ASK JUST ONE QUESTION?

SURELY.

HOW WOULD YOU DEAL WITH THE LEGISLATIVE AMENDMENT, AFTER THE ADOPTION OF 403, THAT PASSED THE FLORIDA RIGHT TO FARM ACT AND ESSENTIALLY CREATED AFFIRMATIVE DEFENSES TO THE NUISANCE-TYPE CLAIMS, AS A PROTECTIVE DIVIDES DEVICE -- PROTECTIVE DEVICE, IF IT WERE NOT A NUISANCE AT THE TIME, IF YOU FOLLOW AGRICULTURE PRACTICES THAT, TYPE OF THING, IT SEEMS TO SUGGEST THAT MAYBE THERE STILL WAS SOME KIND OF NUISANCE CLAIM AVAILABLE AND THIS IS A LEGISLATIVE DEFENSE. WE ARE PUTTING THIS IN THERE?

I THINK THERE COULD BE, AND IF THE COURT IS INTERESTED IN THE RIGHT TO FARM ACT, MR. SAMS WOULD BE MUCH MORE ARTICULATE ON THE SUBJECT, BUT I WOULD SUGGEST THIS. I DON'T KNOW WHY IT WAS PASSED AND I DON'T KNOW EXACTLY THE IMPACT IT WOULD HAVE, BUT THE FACT OF THE MATTER IS IT DOESN'T CHANGE WHERE WE ARE TODAY. MAYBE THAT WAS

A NECESSARY STATUTE. MAYBE IT IS AN OVERREACTION. MAYBE TO SIMPLY FURTHER ARTICULATE A CHANGE OF LAW AS WE GO FORWARD BURKES THIS MUCH WE ALL KNOW. UNDER CURRENT LAW IN THE STATE OF FLORIDA, A CIRCUIT JUDGE, UPON THE BARE ALLEGATION THAT A LITIGANT IS UNHAPPY WITH THE PRIOR ACTION OF AN AGENCY, CANNOT INVITE A CIRCUIT JUDGE TO ENTER INTO A REGULATION OF THIS AREA OF THE LAW, THROUGH THE CONVENIENCE OF THE PUBLIC NUISANCE DOCTRINE. THANK YOU, YOUR HONOR.

THANK YOU, COUNSEL. THANKS TO BOTH OF YOU FOR ASSISTING US. WE WILL BE IN RECESS. THE MARSHAL: PLEASE RISE.