**STATE OF FLORIDA**
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**

JACQUELINE LANE, FRIENDS OF PERDIDO BAY, INC. and JAMES LANE

Petitioners,

vs.

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION and INTERNATIONAL PAPER COMPANY,

Respondents.

_____/

DOAH Case Nos.: 08-3922
08-3923
OGC Case Nos.: 08-1964
08-2074

**PETITIONER JACQUELINE LANE'S EXCEPTIONS TO JUDGE CANTER'S RECOMMENDED ORDER DATED JANUARY 27, 2010**

Pursuant to section 120.57(1)(b) and (1), Fla. Stat., and Uniform Rule of Procedure 28-106.217, Fla. Admin. Code, Petitioner Jacqueline Lane hereby submits the following exceptions to the Recommended Order entered in this matter on January 27, 2010.

**Outstanding legal issues surrounding this case.**

1. A**. Should collateral estoppel have barred any further discussion about International Paper's ("IP") effects on the biological community in the wetland?**

The essential elements of collateral estoppel are that the parties are identical and that the particular matter was fully litigated and determined in a contest that results in a final decision. Dep't of Healthand Rehab. Servs. V. B.J.M., 656 So. 2d 906 (Fla. 1995)**.**

Under the doctrine of collateral estoppel, judgement in the first suit estops the parties from litigating in the second suit issues common to both causes of action and which were actually

adjudicated in the prior litigation. MCG v. Hillsborough County School Bd. 927 So. 2d 224 (Fla. 2006). A decision that has become final in a prior case ordinarily will be given preclusive effect under the doctrine of collateral estoppel even if it has not been subjected to appellate review. MCG v. Hillsborough County School Bd. 927 So. 2d 224 (Fla. 2006).

On August 12, 2008, Jacqueline Lane filed a Motion to Dismiss the second permit due to *res judicata*. Res judicata is the principle that "the thing has been decided" (from the 'Lectric Law Library Lexicon'). In the first paragraph of her Petition to Dismiss, Lane gives the history of proposed wetland permit and related documents. In May 2007 the same Administrative Law Judge who is presiding over the current proceedings, issued a Recommended Order, after 11 days of hearings, denying the issuance of the 'wetland' permit and related documents to IP. This Recommended Order was upheld by the Department in a final order issued August 8, 2007. A remand allowing more testimony to be entered was not granted. On January 11, 2008, IP filed another application for a permit with the Department. The new application was essentially the same application which had been previously submitted in 2002 with a few minor modifications. There were no changes to the engineering and design of the wastewater treatment system and no changes to the wetland distribution system other than removing approximately 200 acres from contact with IP's effluent. IP proposed setting aside 1200 acres for a conservation easement. There was a new report submitted about plant communities in the wetlands and a new report on the River, Marsh and Bay system by Dr. Livingston. There was no change in the quality or quantity of effluent being applied to the wetland. Both IP and DEP filed motions against my Motion to Dismiss. IP's motion filed on August 19, 2008, cites *Thomson v. Dep't of Envtl. Regulation*, 511 So. 2d 989, 991 (Fla. 1987) where a permittee was allowed to submit a second

permit application. The Court said where there are new facts and changed conditions from the first permit application, a second one would be allowed. In the Thomson case, the issues concerning denial of the first permit were not litigated as opposed to the current case where issues had been litigated. The Administrative Law Judge decided that my motion to dismiss would have been better made as a Motion to Relinquish Jurisdiction and denied that Motion on August 28, 2008.

On August 29, 2008, IP submitted its First Motion in Limine. In their motion, IP gives extensive arguments as to why the doctrine of Collateral Estoppel should apply in the second permit hearing to limit the issues in dispute. Collateral estoppel is issue preclusion whereas res judicata is claim preclusion (from 'Lectric Law library Lexicon'). On Page 8 and 9 of their Motion in Limine, IP lists the Conclusions of Law which were adopted into the Final Order. Based on what issues IP believes had already been litigated at the first hearing, IP proceeds to argue why these certain issues should not be re-litigated at a second administrative hearing. I agree with IP in so far as the doctrine of collateral estoppel should apply to issues in the second administrative hearing. However IP sought to limit only those issues which they wanted barred from re-litigation. IP did not seek to bar the issue of "whether IP had provided reasonable assurances that the mill's effluent would cause significant adverse impact on the biological community within the wetland tract".

In Petitioner Lane's response to the Motion in Limine, filed on September 9, 2008, she agreed with IP's contention that the doctrine of collateral estoppel applied to issues in the second hearing. However in addition to the issues which IP had chosen, she argued that collateral estoppel applied to IP's effects on the biological community in the wetlands, and to IP's lack of

showing that their effluent meet the antidegredation requires of Rules 62-302.300 and 62-4.242(d)1. Fla. Admin. Code. She argued that these issues had already been litigated and should not be litigated again. A material change to circumstances would not allow the doctrine of collateral estoppel to apply. She argued in her September 9, 2008 response that IP's conversion from bleached Kraft process in the first hearing to unbleached Kraft in the second hearing constituted a material change and thus should barr collateral estoppel.

On September 16, 2008, Judge Canter issued his order on IP's First Motion in Limine. The Administrative Law Judge ("ALJ") allowed the following issues to be barred: 1.Compliance schedule; 2. Sufficiency of the penalty; 3. Protection of potable water supplies and human health; 4. Scientifically valid experimental controls; 5. Waiver conditions; and 6. Past compliance. In an Order issued October 14, 2008, Judge Canter also excluded any issues dealing with the Cantonment Mill's reconfiguration to unbleached Kraft. By issuing this order, the ALJ effectively dismissed Lane's allegation that conversion of bleached to unbleached Kraft was a material change as discussed in the paragraph above. In the October 14, 2008 order, Judge Canter wrote:

> *"Petitioner contends that it is unfair to allow IP to present new information to support its project, but not allow her to present new information in opposition to the project. However, just as Petitioners are barred from re-litigating whether IP provided reasonable assurance with respect to any aspect of the project for which it was determined by the ALJ and the Department that reasonable assurance was provided, IP is barred from re-litigating whether it provided reasonable assurance with respect to any aspect of the project for which it was determined that reasonable assurance was not provided"*

Based on Judge Canter's statement above, the issue of the effect of IP's effluent on the biological community within the wetland tract should have been estopped and not allowed to be

litigated once again. Finding of Fact 154 in the Final Order (DOAH Case # 05-1609) states in part: "...., IP did not provide reasonable assurance that the proposed discharge would be assimilated so as not to cause significant adverse impact on the biological community within the wetland tract."

Finding of Fact 155 in the Final Order states in part: "When the Department issued the proposed exemption order, it did not have sufficient data and analyses regarding Tee and Wicker Lakes to determine with reasonable confidence that these water bodies would not be adversely impacted by the proposed discharge."

Finding of Fact 157 in the Final Order states in part: "Because insufficient data exists regarding baseline conditions in Tee and Wicker Lakes, IP did not provide reasonable assurance that the proposed discharge would not cause significant adverse impact on the biological community within the wetland tract."

Conclusion of Law 205 in the Final Order states: "IP did not provide reasonable assurance that the mill's effluent would be assimilated so as not to cause significant adverse impact on the biological community within the wetland tract"

Conclusion of Law 206 states: "Section 403.088(1)(e), Florida Statutes, sets forth special conditions that must be met to obtain an operation permit for a discharge that will not meet permit conditions or applicable statutes and rules. The statute requires an applicant to show, among other things, that issuing the permit will be in the public interest and the discharge will not be unreasonably destructive to the quality of the receiving waters. IP did not make an adequate showing on these two criteria".

Conclusion of Law 207 states: "Because IP did not make a sufficient demonstration that the

discharge to the wetlands would not cause significant adverse impact to the biological community within the wetland tract,....., it can not be determined that issuance of the proposed permit would be in the public interest.....Because IP did not make a sufficient showing with regard to the potential adverse impact of the proposed discharge on the biological community within the wetland tract, it is impossible to know whether any destructive effects could be reduced or eliminated by reasonable means. Therefore, IP did not meet the special permit conditions required by Section 403.088 (1)(e), Florida Statutes"

Conclusion of Law 208 states: "Because IP did not provide reasonable assurance that the proposed permit would not result in a discharge of pollution in contravention of Department standards or rules, Florida Administrative Code Rule 62-4.070(2) requires the Department to deny the permit.

It is clear from the Findings of Fact and Conclusions of Law from the August 2007 Final Order that the issue of IP's impact on the biological community within the wetland tract had been litigated. The issue of whether or not this project was in the public interest had been litigated. The issue of whether or not the project met the criteria for issuing a permit had been litigated. As a result, it is the opinion of Petitioner Lane that no new issues were raised at the 2009 administrative hearing. The ruling in the first administrative hearing to deny the permit and related documents must stand.

There was also considerable discussion during the hearings about issues which had or had not been litigated. As a result of the uncertainty about what issues had been previously litigated and what issues hadn't, confusing and unfair rulings to the Petitioners resulted. The following is an excerpt from the trial during the direct testimony of Dr. Isphording [Transcript Pages 1268,

1269, and 1270] which illustrates the point.

*"MS LANE: No, that's fine. But I thought your second – your first order, basically said that you were going to address the effects of the effluent on the wetland and Tee and Wicker Lakes. That was - - that was an issue here, number one.*

*THE COURT: Right. Well, we allowed some testimony along those lines and I'm not going to allow any more because there were some overlap where, because they were changing, I knew that the wetland system had changed. That part of the permit had changed but I didn't know all the details of it because it wasn't my job to know those until they were brought to my attention or I heard them at the hearing. Now that it's been developed, I realize there are far fewer changes than I thought to the wetland system, which means there's far fewer things that would give you new - - a reason to re-litigate - - that wouldn't be re-litigate. Another way to say it, I guess it's almost all those issues that were litigated before would have the same applicability to this wetland project because there's hardly anything different about the wetland project. They've got a conservation area; they've chopped off a part of cell s one and two. But there's - - I've discovered that there's hardly any other change to it. So, that means that all these arguments could have been made earlier about what's going on in the wetland. So I've allowed some leeway because I had said that I'm interested in what biota are out there. I didn't feel I knew enough about it and how they might be changed by the system. But, now, I see that it's going too far unfairly to allow issues that could have been litigated before, should have been litigated, sometimes were - - on several occasions were litigated before and there's no reason why the wetland project would make any change to those - - those arguments presented to me, that evidence presented to me. That's why it's come to a head. There already was arguments about what's going to happen with metals and sediment.*

*MS. LANE: There was?*

*THE COURT: Yeah. In Perdido Bay. And when you talked and we had a wetland project in which you could have said the same and probably did say the same thing is going to happen in Tee and Wicker Lakes, so it is not fair and collateral estoppel is supposed to prevent just coming back in and trying to take another shot at convincing me. That's not how it's supposed to work."*

In the above excerpt, the ALJ is limiting evidence which the petitioners wished to present about metals in the sediments of Tee and Wicker Lakes, but he allowed IP to present more evidence in support of their contention that the project was not going to have a significant adverse impact on Tee and Wicker Lakes. This was in spite of the fact that the ALJ had already ruled in the first hearing that they had not presented reasonable assurances.

Further evidence that the ALJ abused his discretion in making fair and unbiased decisions

about the application of the doctrine of collateral estoppel can be seen in his proposed recommended order. The ALJ gave weight to IP's evidence presented in their proposed recommended order in spite of the fact that most of the evidence had been presented in the first administrative hearing. In contrast, the ALJ rejected the arguments and evidence presented by petitioner Lane because he said they were barred by collateral estoppel (See Findings of Fact 47, 49 and other Findings of Fact where he apparently gave no weight to Petitioners witnesses or evidence). As a result of this unfair application of collateral estoppel to just the petitioners, the entire proceedings should be dismissed as the ALJ abused his discretion by being totally prejudicial to the respondents.

After five days of hearings and after the ALJ should have been very familiar with the changes to IP's wetland project, Petitioner Lane filed on July 13, 2009 another Motion for Summary Final Order. In her motion, Lane argued that all issues raised in the present DOAH Case 08-3922 & 3923 had already been litigated in the previous case, and no new issues had been raised. Therefore, the doctrine of collateral estoppel should have stopped the argument and the case dismissed. The previous judgement should stand unless new issues are raised. Lane listed the issues she thought had been previously litigated along with the Findings of Fact and Conclusion of Law from the Final Order in DOAH Case No. 05-1609. She also listed documents and witnesses common to both the previous case and the current case. IP wrote a response in opposition, filed on July 16, 2009. Again, they cited Thomson v. Dep't of Envtl. Regulation as the legal reason they could present more evidence. Thomson is used as a legal argument for not barring issuance of another permit application once the first permit was denied. However Petitioners are not claiming res judicata but rather collateral estoppel or issue

preclusion. If the 'new submissions' in the current case had raised new issues which had not been previously litigated and for which the ALJ had made no findings and conclusions of law, then a hearing on the new issues would be appropriate. The Thomson case did not have any litigation of issues after the first permit was denied. The use of the Thomson case would be the legal precedent for why res judicata could not be invoked. But Thomson can not be used as a legal argument against collateral estoppel.

Fairness is also at issue here. IP was allowed to invoke collateral estoppel for the issues which they consider to have been previously litigated. However, the ALJ has not allowed petitioners to limit the issues. In fact, Petitioners would argue that no new issues have been raised in the second proposed permit and therefore the entire proceedings should be dismissed.

The ALJ denied Lane's Motion for Summary Final Order on July 23, 2009.

**Second outstanding legal issue**

2. **B. Under what authority is IP relieved from meeting state standards for Specific Conductance, pH, turbidity and dissolved oxygen for nine years?**

This is an argument which Lane made in her proposed recommended order (see Paragraph 231 of Lane's recommended order) which the ALJ did not address in his recommended order. While Chapter 403.088 (2)(e) and (f) may authorize an issuance of a Consent Order and interim permit conditions, this statute does not authorize waivers, variances or exemptions from meeting water quality criteria. Since the withdrawal of the Wetland Exemption Rule 62-660.300 (1), Fla. Admin. C., there is no authorization for waivers, exemptions or variances. Florida has a series of "moderating provisions" such as Variances

(Chapter 403.201, F.S.), waivers (Rule 120.542 F.A.C) a or Site Specific Alternative Criteria ( Rule 62-302.800 (2), which IP could have sought once Rule 62-660.300 (1) was withdrawn. But these "relief mechanisms" usually require a showing that undue harm will not be done to the environment or that without granting the relief a 'hardship' will incur. There has been no showing as to why these exemptions should be granted. Finding of Fact #44 in DOAH Case 05-1609 (Recommended Order Page 22) states that the exemption from water quality criteria was given in conjunction with the experimental use of wetlands rule DOAH Case 05-1609[1]. This exemption is not available in the present case, and no exemptions from meeting water quality criteria have been issued. Therefore it is Lane's contention that IP should be prohibited from simply violating Florida standards without legal authorization.

**Lane's Exceptions to Preliminary Statement in the Recommended Order (RO)**

3. Beginning on Page 3 and continuing on Page 4 of the RO, the Judge gets confused about the Rule challenge cases and what happened when. Following is my understanding.

Case No 08-6033RU was filed by FOPB and James Lane on December 8, 2008. It was a challenge to Rules 62-660.300(1), 62-4.242, and 62-302.300(6). Petitioners claim that these rules lacked legislative authority , were vague, and vested unbridled discretion in the department. Once IP withdrew it s request for authorization to use the wetlands on May 13, 2009, the ALJ dismissed the case as moot on Rule 62-660.300(1). This occurred on May 18, 2009. Certain

[1] The DEP later gave an opinion in DOAH Case No 08-6033RU that the Wetland Exemption Rule 62-660.300 (1) F.A.C. did not relieve IP from meeting state standards. This opinion was given in DEP's Response in Opposition to International Paper Company's Cross-Motion for Order Determining Validity of Wetland Exemption Rule which was filed on March 27, 2009. Lane later filed this paper in the current proceedings on April 16, 2009 as an Appendix 'B'.

portions of the remaining rules were still open for litigation. The Judge combined the rule challenge case 08-6033RX with the present cases. Evidence was taken during the hearing on Rule 62-302.300(6). In an order on October 1, 2009, the rule was declared not vague and the case was closed.

Cases No. 09-2446RX and 09-3803RX were challenges to the Type II Site Specific Alternative Criteria Rule 62-302.800(2). The ALJ dismissed case # 09-2446RX on June 2, 2009. Case No. 09-3803RX was voluntarily dismissed on July 24, 2009 and the case was closed.

4. Page 6 of Recommended Order, First Paragraph; "Dr. Lane was accepted as an expert in marine biology with a concentration in the ecological physiology of invertebrates"; not biology and stream ecology.

**Lane's exceptions to Findings of Fact in the Recommended order**

5. Finding of Fact ("FF") #2. "IP owns and operates an integrated unbleached kraft mill in Cantonment."

6. FF#5. U.S. Highway 98 crosses the Bay....

7. FF#15. The wording in this is too strong. IP has not committed to using ECUA's effluent. Bill Evans testified that IP's use of reclaimed water from the new ECUA sewage treatment plant is not required and is not in the new ECUA permit [Transcript Page 1066]. The wording in this FF would be better - "IP may obtain...."

8. FF 26. No computer program was used to estimate the velocity of the flow. The computer program estimated removal of nutrients. Petitioners did not know where 0.25 feet per second came from; presumably a calculation. The same observation is true of the 0.6 inches of

water depth. This figure was mentioned in some documents but how it was derived, we don't know. This also was an issue which had been raised in the previous hearing and discussed (See Findings of Fact 140, and 141 from 2007 hearing). Because of collateral estoppel, this issue should be barred from this present hearing. This Finding of Fact should be struck.

9. FF 33. This Finding of Fact is not based on evidence presented at trial. At the time of the hearing IP was making 1500 tons of unbleached pulp a day and 500 tons of bleached pulp a day as testified to by Mike Steltenkamp [Transcript Page 106]. After review of the entire record there was no indication of how much bleach or other chemicals were used. This finding of fact should be struck. Also in the past hearing, the permit was modified to include the change to unbleached pulp in October 2005 (Finding of Fact 42 from 2007 Final Order). Also the ALJ in an Order dated October 14, 2008 excluded issues of the reconfiguration of the Cantonment mill from bleached to unbleached. This Finding of Fact should be struck because it refers to a barred issue.

10. FF. 34 After review of the entire record there was no evidence in the record supporting Finding of Fact 34. It is also unclear what time period the ALJ is referring to. Is he referring to the period since the last administrative hearing? This FF should be struck because the evidence is not supported by the record and it is vague. Again, if this Finding of Fact is referring to reconfiguration of the mill, it should be struck as a barred topic (see discussion above).

11. FF. 36. This Finding of Fact is not based on competent, substantial evidence. It also contradicts Finding of Fact 153 in the Final Order in Case # 05-1609. In the discussion about creeks being in the wetlands, the ALJ said that there were creeks on the Rainwater Wetlands and

one of them could be called Wicker Creek [Transcript Page 1423]. This was also a Finding of Fact at the past hearing [FF.153]. Dr. Rains testified that there was a fluvial feature on the wetland site [T. 1140]. His testimony was not rebutted by IP. Petitioners introduced picture (Exhibit #35) of stream crossings and hardened road beds where streams cross. IP's consultant Mr. Bays testified that there were Class III streams on the wetland site [T. Page 865]. Don Ray talked about Wicker Creek, a permanent creek on the wetland site which was tested for TMDL studies [T. 1428]. Finding of Fact #36 should be struck.

12. FF. 37. IP presented evidence that dissolved oxygen fluctuated. There was no evidence presented to show that pH or specific conductivity fluctuated in the wetlands or that fish are exposed to wide fluctuations in DO, specific conductivity or pH. After review of the record, this Finding of Fact is not based on competent, substantial evidence and should be struck. These issues of dissolve oxygen, pH and conductivity have also been raised in the previous hearing (See Findings of Fact 143, 144, 145, 146, 147, 150, 151, and 152 from 2007 Final Order). These issues are collateral estoppel and should not be raised again in the present hearing. This Finding of Fact should be struck on the bases that it is collateral estoppel as well.

13. FF. 41. The six percent increase in overall wetland functional value <u>includes</u> the value in 1188 acres of conservation [T. 773, Hickman]. So Finding of Fact 41 on Page 18 should read "That estimate accounts for the loss of 139 acres of wet prairie habitat, <u>and includes</u> the benefits associated with IP's conservation of S-2 habitat and other land forms outside of the effluent distribution system".

14. FF. 42. Reference to the conservation area should be barred from any findings of fact since the ALJ ruled that this was a proceeding under Chapter 403 (See conclusion of law 96) and

Ch 403 does not consider mitigation. The use of a conservation area is irrelevant. This Find of Fact should be struck.

15. FF. 44. This statement is not true and is not based on competent substantial evidence. According to Mike Steltenkamp, when IP talks about being in compliance in the future, IP means compliance only at its discharge point [T. 107 & 108]. Bill Evans, DEP's writer of this permit, testified he heard IP's claim that they can meet all permit limits [T. Page 1131] but he said that IP can meet state standards in the wetlands if a change is made to the standards [T. Page 1493]. Mike Steltenkamp testified that IP is anticipating applying for site specific alternative criteria at the end of the permit [T. Page 1635]. Bill Evans also said that IP has not said to the Department that they will meet standards after making improvements and construction of the pipeline. They are still looking at how their processes can be optimized [T. 1078]. Therefore the overwhelming evidence is that IP will not meet standards unless standards are changed. This Finding of Fact should be struck.

16. FF. 45. The ALJ's list of what IP failed to show at the previous hearing is slightly deficient. Conclusion of Law 206 says that IP did not make an adequate showing that issuing the permit would be in the public interest or that the discharge would be unreasonably destructive to the receiving waters per Section 403.088 (1)(e), Florida Statutes. IP also did not provide reasonable assurances the proposed permit would not result in discharge of pollution in contravention of Department Standards or Rules, Florida Administrative Code 62-4.070 (2) [Conclusion of Law 208]. These additional areas which were identified by the Final Order where IP did not provide reasonable assurances should be added to FF. 45.

17. FF47. This is an obvious bias and error on the part of the ALJ. The ALJ rejected my

arguments saying they were barred by collateral estoppel. In his example he mentions my arguments about physical and chemical processes that would occur if IP's effluent is discharged into wetlands. In the Final Order in DOAH Case # 05-1609, there are no Findings of Fact or Conclusions of Law about any of the petitioners showings about dissolved oxygen, TSS, BOD, water temperature or effect of the effluent on fauna in wetlands or Tee and Wicker Lakes. The issues raised by Petitioners and the evidence presented should not have been barred by collateral estoppel (see discussion in Paragraph 1 above). This is clearly an example of prejudicial error and abuse of discretion by the ALJ which are grounds for appeal. This Finding of Fact should be struck.

18. FF 48. The ALJ's facts are speculative and not based on competent substantial evidence. My testimony regarding lethal temperatures of the waters in wetlands [T 1472, 1473] was corroborated by Dr. Pruitt [T. 705, 1610, and 1615] and also by exhibits [IP#20, and Joint exhibit #7, Page 39]. There was no evidence presented to rebut my testimony or show that this was not true. This Finding of Fact should be struck.

19. FF. 49. Again the ALJ is using collateral estoppel to reject my showing about BOD and dissolved oxygen. This finding of Fact is wrong and very prejudicial. In fact, I did present oxygen data that I had taken from the wetlands [T 1465 and Petitioner's exhibit #27] in March 2009 and Tee and Wicker Lakes [T. 1475] in June 2009. Dr. White, a witness for the petitioners also took dissolved oxygen data in June 2009 in Tee and Wicker Lakes. There was no change in the effluent (that was presented at trial) from the first hearing and the small changes to the wetland design would not have influenced dissolved oxygen or BOD. However as mentioned in Paragraph 17 above, the ALJ made no Findings of Fact or Conclusions of Law in the past Final

Order about BOD and dissolved oxygen in the wetland or in Tee and Wicker Lakes. While he allowed IP's witnesses to testify about BOD and gave weight to their testimony, the ALJ did not even consider the evidence given by our witnesses about dissolved oxygen and BOD. The ALJ said that our evidence was barred by collateral estoppel. The testimony of Dr. White about the depletion of dissolved oxygen in Tee and Wicker Lakes was not rebutted. This is an abuse of discretion by the ALJ. This Finding of Fact should be struck.

20. FF. 53. This Finding of Fact is vague and most of the language is not supported by competent substantial evidence. Dr. Pruitt testified about the IP's BOD in the wetlands. Since there were no models of oxygen or a WQBEL developed for dissolved oxygen in the wetlands and Tee and Wicker Lakes [T. 1346] , there was no real 'evidence' presented about oxygen dynamics [T. 1381]. Dr. Nutter testified that the carbon added to the wetlands by IP's effluent was going to use-up oxygen [T. 486]. Mr. Bays also testified that adding IP's effluent to the wetlands would increase biological activity and add to the oxygen swings [T. 899]. Dr. Nutter said that there would be low dissolved oxygen behind the berms [T. 1543]. Adding additional water to the site would cause the soil to become saturated and reduce the oxygen [T.797 & 899]. Don Ray compared what is happening in Eleven Mile Creek today with what would happen in the wetlands [T. 1440]. Mr. Ray, in a question from the ALJ [T. 1435] said that the same constituents which are in Eleven Mile Creek would impact to a greater degree the organisms in the wetland. Currently Elevenmile Creek is impaired for, among other things, dissolved oxygen [Fact sheet 13]. Dr. Steltenkamp testified that historically IP has caused and contributed to low dissolved oxygen in Elevenmile Creek [T. 1655].

The lack of information about dissolved oxygen in Tee and Wicker Lakes presented by IP

to prove their prima facie case was even more scant. Dr. Pruitt say that IP did not predict what the level of dissolved oxygen would be once IP's effluent entered Tee and Wicker Lakes [T. 668]. Dr. Livingston could not really say how the dissolved oxygen in the lakes would be impacted by the addition of IP's effluent [T. 283]. The concentration of BOD going into the lakes from IP's effluent would be almost twice the current concentration of BOD [T. 663]. Also Pruitt's estimate of the magnitude of IP's BOD did not consider Tee and Wicker Lakes [T. 666, 667]. Pruitt was not familiar with the long-term BOD of IP's effluent [T. 671]. Bill Evans said that dissolved oxygen in Tee and Wicker Lakes would be below 5 mg/l which is typical of low dissolved oxygen in wetlands [T.1087], however the average dissolved oxygen at the background tidal stations near Tee and Wicker Lakes was 6.5 mg/l [IP#20]. Lane measured a dissolved oxygen of 5.5 mg/l in the surface waters of Tee and Wicker Lakes [T. 1475] and Dr. White measured a dissolved oxygen of 4.5 mg/l at the surface of the lakes [T. 1331]. Petitioner's witness, Dr. White presented calculations to show that IP's effluent would exert a greater demand than there is oxygen available in the lakes and dissolved oxygen would drop to 0 mg/l [T. 1352 & 1353]. The greater weight of the evidence would support this Finding of Fact . Just considering Dr. Pruitt's testimony presents a very slanted view of the argument. This Finding of Fact should be struck.

21. FF. 58. The question about specific conductance and its effect upon the organisms in the wetland is an issue which should have been barred by collateral estoppel. Findings of Fact in the 2007 Final Order which dealt with specific conductance are: 145, 146, 147, 149, 150, 151, 152, 154. Finding of Fact 154 is especially important because it states "....Because IP did not adequately address the impact of increased specific conductance levels on fish and other

organisms in the freshwater area of the wetland tract, IP did not provide reasonable assurance that the proposed discharge would be assimilated so as not to cause significant adverse impact on the biological community within the wetland tract." [2] The second sentence in FF. 58. is not based on competent substantial evidence. The whole Finding of Fact should be struck.

22. FF. 59. This reference to what happened after conversion to brown paper should be struck because this was an issue which was barred by the Judge's October 14, 2009 Order.

23. FF 62. References to the pilot wetland should have been barred from this hearing due to collateral estoppel. In the Final Order from the previous hearing there was a Finding of Fact #148 which made reference to low to moderate benthic macroinvertebrate diversity in the pilot project. Findings had already been made concerning the health of the biology in the pilot wetlands. Finding of Fact 149 from the 2007 Final Order states:

*"149. The information generated by the pilot project is ambiguous with respect to the effect of the effluent on fish and other organisms attributable to the specific conductance of the effluent, indicating both successes and failures in terms of survival rates. Moreover, the data presented from the pilot wetland project lacks sufficient detail, both with respect to the specific conductivity of the effluent applied to the wetlands and with respect to the response of salt-intolerant organisms to the specific conductivity of the effluent, to correlate the findings of the pilot project with the proposed discharge to the wetlands.'*

Petitioner Lane objected to using the Pilot study in the current administrative hearing. In the DOAH Case #05-1609, the exhibit was #40 and in the current administrative hearing the exhibit number is #62. While the ALJ did not mention this in his Findings of Fact, the pilot wetlands project showed that the paper mill effluent was detrimental to the survival of trees. After 6.5

[2]Judge Canter ruled, after asking IP for more information, that the change from bleached to unbleached had been covered at the first hearing so that there was no material change in the issues (See discussion on Page 3 above).

years, only 2.5% of the original 480 trees were alive in the wetland cells [IP# 62, page 20]. This study can hardly be used to provide reasonable assurances that the biological community in the effluent distribution system would not be adversely affected. Finding of Fact #62 should be struck because contrary findings had already been made in the previous hearing. The issue is collateral estoppel.

24. FF. 63. This is not based on competent substantial evidence. Dr. Livingston testified that Tee and Wicker Lakes are characterized by rapidly changing salinity which is important to keep out predators [T 224 & 280]. Both Dr. Nutter and Dr. Pruitt agreed that the amount of water which IP's effluent will add to the lakes will dampen the tidal fluctuation [T. 504, T. 1605]. Dr. Rains testified that there would be a more stable salinity environment in Tee and Wicker lakes [T. 1190]. The testimony given above does not equate to "no significant effect". This statement "The effect would not have a significant effect on the salinity of Tee and Wicker Lakes" is a Conclusion of Law rather than a Finding of Fact. Finding of Fact #63 should be struck because the effect of salts in IP's effluent on the wetland has already been litigated and should be barred because it is collateral estoppel.

25. FF. 64. The same argument which is given above for FF. 63 applies to FF. 64. The issue of salinity on the biota in the wetlands has already been litigated in the previous hearing. This FF. 64 should be struck because it is collateral estoppel.

26. FF 66. This statement about biological diversity is not supported by the weight of the evidence. From the testimony of Eric Hickman, 139 acres of S-2 habitat will be 100% destroyed by the application of IP's effluent to the wetland site [T. 750,751, 754, 756, 757]. There will be a significant, adverse impact to endangered plants in the wetland[T 752, 757]. Wet prairies are

extremely diverse [T. 732]. Eric Hickman predicted that most of the wetted area will turn into a slash pine swamp forest once IP's effluent was applied [T. 779]. Mr. Bays envisioned that the wetlands would become a hardwood swamp more open and not dominated by pine trees [T. 869]. This Finding of Fact should be changed to eliminate biological diversity from this sentence.

27. FF. 67. This Finding of Fact is not supported by evidence in the record. It should be struck

28. FF. 68. The last sentence of this Finding of Fact is speculative and not based on competent, substantial evidence. The lakes may be open to the public however if there are no fish in the lakes, it certainly would not be in the public interest. The last sentence of FF 68 should be struck.

29. FF. 69. There is no competent substantial evidence to support this Finding. The reason for the Consent Order is because IP can not meet Class III standards at the end of their pipe. The life of the Consent Order is for 108 months over which time Class III state standards for conductivity, dissolved oxygen, pH and turbidity do not have to be met [Consent order Page 5 and Page 23]. When IP talks about being in compliance with Class III standards, they are only taking about at their point of discharge [T. 41, 42, 56, 107, 108]. Bill Evans testified at the hearing that IP will meet Class III standards in the wetlands only if a change is made to the standards [T. 1493]. Judge Canter ruled that site specific alternative criteria are not relevant to this hearing [T 947], and can not be used as part of "reasonable assurances" [T. 95, 947]. There was testimony that Class III waters must meet minimum standards in order for life not to be harmed [T 894, 934, 1329]. IP's current discharge point of Elevenmile Creek does not meet Class III standards for nutrients, turbidity, total suspended solids, BOD, dissolved oxygen,

coliforms and unionized ammonia [Fact Sheet, attachment 5, page 12]. Judge Canter ruled that this information on Elevenmile Creek would be relevant [T. 233]. FF. 69 should be struck.

30. FF. 70. The different parts of this Finding of Fact are contradictory. The ALJ is saying that the proposed project would "not be unreasonably destructive" yet there would be substantial alteration in community structure and function, including loss of sensitive taxa and their replacement by pollution-tolerant taxa. The ALJ has already ruled in the Final Order from the first hearing that "IP had not provided reasonable assurances that their proposed discharge would be assimilated so as not to cause significant adverse impact on the biological community within the wetland tract " [Finding of Fact 154 in 2007 Final Order]. The "receiving waters" in the current permit have changed from the marine waters (of the first permit) to the fresh waters of the Class III wetlands. In Finding of Fact 145 in the 2007 Final Order, the ALJ basically said that the reason IP was going to a wetland discharge, and presumably the exemption, was to solve the "decades-long failure to meet the stricter water quality standards applicable in the fresh waters of Elevenmile Creek". So there appears to be a contradiction between the current Finding of Fact and Finding of Fact 145 from the 2007 Final Order. This Finding of Fact should be struck and barred due to collateral estoppel.

31. FF. 71. This Finding of Fact is not based on competent substantial evidence. The BOD5 and color limits came from a model developed for Perdido Bay and Lower Elevenmile Creek. WQBEL limits were not developed for the wetland tract or Tee and Wicker Lakes [Fact sheet, Joint Exhibit #3, Page 4 and attachment 4]. WQBEL's for oxygen were done for Elevenmile Creek and Perdido Bay system, but not for Tee and Wicker Lakes according to Terry Cole [T 1346]. So the WQBEL's which are being referred to in Finding of Fact 71 are for

nutrients - soluble nitrogen and total phosphate, only. Also, as Mr. Cole pointed out during the present hearing, the ALJ had already made a Finding of Fact [FF. 144 Page 60] in the past hearing concerning dissolved oxygen in the lakes [T. 1341 in present hearing]. The dissolved oxygen coming out of Tee and Wicker Lakes was assumed to be 2 mg/l [Finding of Fact 144, Page 61]. In the Livingston study [Joint Exhibit #7 Page 45], he pointed out that dissolved oxygen levels equal to or less than 2 mg/l are anoxic and will cause loss of animal populations. Furthermore, the ALJ refused to allow the Petitioners to rebut IP new evidence about WQBEL's in Tee and Wicker Lakes claiming that it was collateral estoppel [T 1343, 1344, 1345]. Because the ALJ did not specify what WQBEL's he is referring to, this Finding of Fact should be either struck or clarified. As it stands, it is too vague. It is also collateral estoppel and the Finding of Fact should be barred.

32. FF. 72. Petitioners were not allowed to submit evidence of alternative means of disposing of its wastewater [T. 1373]. However, the FOPB and James Lane proffered evidence which showed that there is technology currently available which would allow paper makers making unbleached paper to reuse nearly all of the effluent [T. 1374]. The ALJ said that this matter was collateral estoppel. Therefore this Finding of Fact is based on very a very prejudicial finding. There was a Finding of Fact in the past hearing [FF. 37] about alternative means of disposing of their wastes, therefore, again this issue is collateral estoppel and should be barred from this hearing. This Finding of Fact should be struck.

33. FF. 73. Petitioner contests the language "coming into full compliance with all water quality standards". As discussed in Paragraph 27 above, IP is most likely not going to meet state limits for Class III waters, unless site specific alternative criteria are given in the wetlands.

This same Finding of Fact was given in the 2007 Final Order [FF 78] and discussed by the ALJ in the past hearing at Finding of Fact 175 and 181. This issue of interim time necessary to complete the project is collateral estoppel. Petitioner Lane recommends that the entire Finding of Fact 73 be struck or that just the language "coming into compliance with all water quality standards" be struck.

34. FF. 74. This Finding of Fact has been amply covered in the 2007 Final Order [FF. 158, 159, 160, 161, 162, 163, 164, 167, 168, 169, 206, 207, and 208]. Therefore the issue is collateral estoppel and should not have been allowed to be re-litigated. This Finding of Fact should be struck.

35. FF. 75. This Finding of Fact about the effect on the fish and other wildlife has already been litigated in the previous hearing (see Finding of Fact 146, and the antidegredation finding 130, 131, and 132). This issue is collateral estoppel and should have been barred from re-litigation. This Finding of Fact should be struck.

36. FF. 76. This Finding of Fact has already been litigated in the previous hearing. See the above paragraph for the Findings of Fact. This issue is collateral estoppel and should have been barred from further litigation. This Finding of Fact should be struck.

37. FF. 78. This Finding of Fact is the same issue which had been previously litigated at the past hearing (see Conclusion of Law 205, 206, 207 and 208). Because the issue is collateral estoppel it should be barred from any litigation in the current hearing so that no Findings of Fact can be made on an issue which has already been decided. Further more, there was no evidence presented (competent. substantial or otherwise) that the conditions in the Consent Order resolve the Department's enforcement action against IP for past violations. This last statement that the

Consent Order resolves enforcement issues is in direct conflict to a Finding of Fact in the 2007 Final Order (46) which states: " A principal purpose of the proposed Consent Order is to impose a time schedule for the completion of corrective actions and compliance with all state standards". There is no mention of resolution of violations. The Consent Order filed in the current administrative hearing was nearly identical to the one filed in the previous hearing, except for a few changes discussing monitoring requirements. Because the Consent Orders were nearly identical, "old" issues can not be re-litigated again. The whole Finding of Fact should be struck because: 1. There is no competent substantial evidence to back up the fact that the Consent order is a resolution of enforcement actions for past violations, and 2. This issue is an "old" issue and should be barred by collateral estoppel from being raised again.

38. In short, Petitioner Lane objects to <u>all</u> Findings of Fact in this Recommended Order, 1 through 78, because all the issues covered in the Findings of Fact are issues which were previously litigated in the first hearing. Collateral Estoppel bars any issues which were or <u>could have been</u> litigated but were not at the first hearing. All Findings of Fact should be struck, especially since the ALJ applied collateral estoppel to issues and arguments raised by Petitioners but not by respondents.

**<u>Petitioner Lane's Objections to Conclusions of Law in Recommended Order</u>**

39. Conclusion of Law 87. It should be pointed out that the factual issue of whether IP's effluent would adversely affect the biological community of the effluent distribution system had already been fully litigated and a final decision made. Conclusion of Law 205 in the 2007 Final Order states: "IP did not provide reasonable assurances that the mill's effluent would be assimilated so as not to cause significant adverse impact on the biological community within the

wetland tract". This is a final decision. Likewise Conclusion of Law 207 and 208 address the fact that IP had not provided reasonable assurances. These were final decisions which were fully litigated. As the Secretary states in his conclusions (Page 20, 2007 Final Order), *"The ALJ ultimately concluded that IP failed to show the discharge would not contravene two rules pertinent to its entitlement to the permit: Rule 62-4.242(1)(b), the "antidegredation rule" and Rule 62-660.300(1)(a), the "wetland exemption rule." As explained below , I concur in these conclusions and they are adopted in this Final Order."* The wetland rule was removed from the present case, but the principals inherent in the rule were still a part of this hearing.

40. Conclusion of Law 88. There was no formal ruling to limit petitioners from discussing physical and chemical processes in the wetlands. Rather the ALJ abused his discretion by allowing these issues to be re-litigated and then accepting respondents facts and discounting Petitioners facts as collateral estoppel. If the doctrine of collateral estoppel is invoked, it should apply equally and fairly to all parties. It was not. This Conclusion of Law should be struck.

41. Conclusion of Law 89. This Conclusion of Law is not based on facts in evidence and this conclusion of law should be rejected as a final decision has already been made on this issue (See Paragraph 39 above)

42. Conclusion of Law 90. This conclusion of law is not supported by any findings of facts or facts in evidence. The ALJ completely ignored Dr. Livingston's findings that nutrients from the Bayou Marcus Wastewater Treatment Plant were having an impact on Perdido Bay [T 345, 348, 350, 352, 354, 360 and Joint exhibit #7 Page 172 and 183]. Livingston testified that his WQBELs are only protective of a small area in the mouth of Elevenmile Creek [T. 361]. All

of this was information in the record and none of it was rebutted by IP. The ALJ made no Findings of Fact on this subject so this conclusion of law should be struck.

43. Conclusion of Law 92. This conclusion is not based on weight of the evidence or facts presented at the hearing. Again the issue of the effect of IP's effluent on the wetlands has already been decided at the first hearing. Findings of Fact and Conclusions of Law (See Paragraph 39 above) have already been made and a Final decision given in the Final Order 0f August 2007.

44. Conclusion of Law 93. This is not support by facts in evidence or the Findings of Fact. As has been shown in the Conclusion of Law 220 in the 2007 Final Order, "the proposed Consent Order is also in conflict with Department statutes and rules". Also Finding of Fact 78 from the 2007 Final Order states "..."the proposed Consent Order contemplates that IP or the Department would establish alternative water quality criteria that would apply permanently in the wetland tract." As Bill Evans testified [T 1493], IP will meet standards if a change is made to the standards. This is not complying with the requirements in the permit specifically Rule 62-620.320(9) and Rule 62-302.500(2)(e). This conclusion of law should be struck.

45. Conclusions of Law 95. With regard to hydroperiod, there may be no law in Chapter 403. However with regard to water quality standards, Class III standards must be maintained in the receiving waters which are the wetlands and the streams in the wetlands. There is no evidence presented at the hearing or in the Findings of Fact to suggest that IP is not going to "cause and contribute" to violations in water quality standards in the wetlands. These violations are not permissible under Florida law. IP has been given no exemption from meeting standards in the wetlands, hence they are in plain violation of Florida law (See discussion in Paragraph 2

above). The Consent Order does not relieve IP from meeting Class III water quality standards in the receiving waters, the wetlands. This Conclusion of Law is vague, not based on facts in evidence and should be struck.

46. Conclusion of Law 96. Petitioner Lane objects to the Statement "This proceeding involves a Chapter 403 industrial wastewater discharge, which IP showed would meet all state water quality standards at the end of the compliance period.....". As I pointed out in Paragraph 44, IP will not meet all state water quality Class III unless the standards are change at the end of the compliance period. The Department's functional assessment did not demonstrate that the discharge would not be unreasonably destructive to the environment. The ALJ erred when he cited (FF 41) that there would be a 6% lift in wetland function. Page 773 of the transcript, Eric Hickman is responding to my question about the 6 percent lift. "The 6 percent lift was the overall functional unit increase, including all areas". The conservation area was also included in calculating the 6% lift. Since a Chapter 403 permit does not include conservation or mitigation areas, the functional assessment should not include the conservation area. No information was introduced at the hearing about the what the functional assessment would have been without the conservation area. Eric Hickman did testify that there would be a significant, adverse impact to endangered plants in the wetland [T 752, 757]. This Conclusion of Law should be struck beginning with the sentence "This proceeding involves a Chapter 403 industrial....." and continue until the end of the paragraph. The Findings of Fact and the weight of the evidence do not support this conclusion.

47. Conclusion of Law 100. This issue was addressed in the previous hearing and in the Finding of Fact (FF. 130,131,and 132) and Conclusions of Law (See Paragraph 39 above for

more detail) of the 2007 Final Order. Therefore, this issue has been litigated previously and a final decision issued. This issue is collateral estoppel and should be struck.

**Procedural Errors**

48. It is Petitioner Lanes contention that all issues in this hearing had already been litigated and a final decision had been in the 2007 Final Order. For that reason, all issues should be dismissed because of collateral estoppel and the ultimate recommendations in the 2007 Final Order should stand.

49. The ALJ committed substantial and procedural error by allowing the issues and arguments of respondents to be considered but dismissing issues and arguments of petitioners due to collateral estoppel. Collateral estoppel should be applied equally.

**Exceptions to the Ultimate recommendation**

50. For the foregoing reasons, Petitioner Lane requests that the Department issue a Final Order dismissing DOAH Cases 08-3922 and 08-3923 and restore the original denial of the proposed permit and Consent Order.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing has been sent by e-mail to the Department this 11th day of February, 2010 and by e-mail to:

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