

**Attachment D –
USEPA’s 2009 Determination with Strikeout Text**



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4

ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

December 3, 2009

Michael W. Sole
Secretary
Florida Department of Environmental Protection
Mail Station 10
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Dear Mr. Sole:

The U.S. Environmental Protection Agency (USEPA) Region 4 has completed its review of certain provisions of Florida Administrative Code Chapter 62-302.540, (Phosphorus Rule), and the 2003 amendments to the Everglades Forever Act (EFAA), Florida Statute 373.4592, pursuant to the requirements of Section 303(c) of the Clean Water Act (CWA or Act). USEPA is taking this action in response to a remand from the District Court in Miccosukee Tribe of Indians of Florida and Friends of the Everglades vs. USA, Case No. 1:04-cv-21448-ASG (S.D.Fla.).

Court's Order

On July 29, 2008, the United States District Court, Southern District of Florida, issued a 101-page order granting partial summary judgment for the plaintiffs and partial summary judgment for the defendants. This order closed a suite of consolidated cases brought against the USEPA by the Miccosukee Tribe of Indians of Florida (Tribe) and the Friends of the Everglades (FOE). Both the Tribe and FOE had separately sought review of USEPA's determination that the EFAA were not new or revised water quality standards subject to review under section 303(c) of the CWA and sought to have the Court order USEPA to disapprove those amendments. The Tribe and FOE also alleged that USEPA's actions approving parts of the Phosphorus Rule as new or revised water quality standards were arbitrary and capricious and that USEPA should have disapproved those provisions. Lastly, the Tribe and FOE sought review of USEPA's determination that other parts of the Phosphorus Rule were not new or revised water quality standards. The Court issued one decision addressing the consolidated cases.

Regarding the plaintiffs' challenges to USEPA's determination on the EFAA, the Court granted summary judgment for the plaintiffs and determined the EFAA were new or revised water quality standards. The Court ordered USEPA "to comply with its duty under the Clean Water Act to approve or disapprove those changes consistent with the findings and conclusions" set forth in the Court's Order. Order at 99 (para. 1). USEPA's action today regarding the EFAA complies with the Court's Order.

Regarding the plaintiffs' challenges to USEPA's determinations related to the Phosphorus Rule, the Court granted summary judgment, in part, and denied it in part, for the Tribe and FOE. Order at 99 (para. 3). The Court affirmed USEPA's determinations approving

the numeric criterion for phosphorus and the implementation methodology (the four-part test) as meeting the requirements of the CWA. Order at 99 (para. 6). The Court concluded that subsections (4)(d)(2)(c)¹, (5)(b)(3), 5(d), and 6 of the Phosphorus Rule do not meet the provisions of the CWA and the Court declared them invalid. The Court set aside USEPA's determinations approving these subsections. Order at 100 (para. 6). The Court also set aside USEPA's determinations that subsections (1), (2), and (5)(a)-(c) were not changes to water quality standards and ordered USEPA on remand "to comply with its duty under the Clean Water Act to approve or disapprove those changes in a manner consistent with the findings and conclusions" of the Court. Order at 100 (para. 8). USEPA's action today regarding the Phosphorus Rule complies with the Court's Order.

Finally, the Court issued the following orders:

1. "[T]he [US]EPA shall require the State of Florida to meet the requirements of the Clean Water Act, and its implementing regulations, in a manner consistent with this Order, prior to USEPA's or DEP's approval of any subsequent variance to the Phosphorus Criterion as established by subsections 4(a) (c) (d)(1) and (2) [with the exception of the "no action" provision], and 5(a)(b)(1), or (2) of the Phosphorus Rule." Order at 100 (para. 7).

2. The parties were to file electronic copies of the full March 2003 and October 2003 Long-Term Plans with the Clerk of Court within 30 days of the Order. Order at 99 (para. 5). USEPA complied with this provision of the Order on August 28, 2008.

3. Florida Department of Environmental Protection (FDEP) is enjoined from issuing any permits for discharges in, or within, the Everglades Protection Area (EPA) under subsection (5)(b)(3), 5(d) and (6) of the Phosphorus Rule, and the "no action" provision of subsection (4)(d)(2)(c). ~~USEPA understands that FDEP is complying with this provision of the Order. FDEP has not issued any permits utilizing these provisions of the Phosphorus Rule and has indicated they do not plan to.~~²

USEPA's Decisions in Response to the Court's Order

Everglades Forever Act Amendments

¹ Subsection (4)(d)(2)(c) is the fourth prong of the four-part test. The Court's focus appears to be the following sentence in the paragraph that follows this provision: "If these limits are not met, no action shall be required, provided that the net improvement or hydropattern restoration provisions of subsection (6) below are met." Throughout the Order, the Court refers to this provision as the "no-action" or "escape clause." Order at 82, 85, and 97. Therefore, for purposes of this determination, reference to Subsection (4)(d)(2)(c) and Subsection (4)(d)(2) refer to the sentence quoted above in this footnote, and not the fourth prong of the four-part test.

² FDEP issued National Pollutant Discharge Elimination System (NPDES) permits for Stormwater Treatment Areas (STA) 2, 5, and 6 on September 4, 2007, while this case was pending. ~~Those permits included water quality based effluent limits ("WQBELs"), compliance schedules, and interim limits. The permits did not include moderating provisions or variances. This approach is consistent with the Court's statements concerning "authorizing compliance schedules in individual permits on a case-by-case basis." (Order at 45-46).~~ The permits were not challenged by any parties and became effective at the end of the notice period.

The Court found the amendments to subsection (3) changed the compliance date for meeting the phosphorus criterion from December 31, 2006, to December 31, 2016. In its Order, the Court stated that “it is my view that the Florida Legislature, in 2003, by adopting the State’s draft Long-Term Plan, as proposed by the South Florida Water Management District’s Governing Board, changed water quality standards under the Federal Clean Water Act, and violated its fundamental commitment and promise to protect the Everglades, by extending the December 31, 2006, compliance deadline for meeting the phosphorus criterion for at least 10 more years.” Order at 2. The Court found that the EFAA “is a mandate that the state of Florida ‘implement’ the Long-Term Plan, which constitutes moderating provisions and a compliance schedule that removes the December 31, 2006 deadline and substitutes ‘an initial phase’ through 2016.” Order at 45. The Court then noted that “[t]he ‘effect’ of the amended EFA, therefore, is to replace the narrative and the numeric phosphorus criterion with an escape clause that allows non-compliance, by virtue of an extended compliance date, and during the extension, a lesser state water quality standard of compliance, namely compliance with the Long-Term Plan and [Technology Based Effluent Limits] ‘TBELs,’”(emphasis in original). Order at 46.

In reviewing the EFAA, the Court applied the methodology articulated by the Court of Appeals for the Eleventh Circuit in FPIRG v. USEPA, 386 F.3d. 1070 (11th. Cir. 2004) and looked at the effect of the amendments to the EFA on the state’s water quality standards. Order at 37-38.³ Thus, the Court’s focus was generally on the effect these amendments had on the date for compliance, not on every amendment to the EFAA. The Court did identify provisions of the EFAA related to the Long-Term Plan and the moderating provisions as being new or revised state water quality standards. Order at 43-48. In responding to the Court’s Order, USEPA has reviewed the entire EFAA following the Eleventh Circuit’s approach and this court’s approach, and reviewed the effects the EFAA had on state water quality standards.

USEPA also reviewed any specific provisions in the EFAA that related to the change in the compliance schedule and moderating provisions. During this review USEPA considered the amendments to subsection (3), including paragraphs (3)(b), (3)(c), (3)(d), and (3)(e) related to the Long-Term Plan. USEPA also reviewed the definitions related to Best Available Phosphorus Reduction Technology (BAPRT) (para. (2)(a)), the Long-Term Plan (para. (2)(i)), and references to the Long-Term Plan in para. (2)(g), and the definition of TBEL in para. (2)(p). USEPA also reviewed references to the Long-Term Plan in para. (4)(a), and subparas. (4)(a)(4), and (4)(a)(6). Today’s determination addresses these provisions.

USEPA previously approved a portion of the original (pre-amendment) EFA as a compliance schedule for achieving water quality standards. Order at 29-32. In that review, USEPA reviewed the entire EFA and focused on the strict requirements of the EFA including the default criterion, the deadline for setting a numeric criterion, the timelines, funding mechanisms, consistency with the 1991 Settlement Agreement in US v. SFWMD⁴, the strict endpoint requiring compliance with the numeric criterion, and whether the criterion could be met, among other factors. Order at 30, fn 17. At that time, USEPA approved subsection (4)(f) as a

³ The Court also focused on the “accepted principles of statutory construction” and applied this principle to give meaning to the full statute read together, not individual provisions. Order at 39, and 41-42.

⁴ United States v. South Florida Water Management District et al, Case No. 88-1886-Civ-Moreno, (S.D. Fla.).

compliance schedule implementing a water quality standard through December 31, 2006, based on the specific requirements contained in the EFA, consistency with the 1992 Consent Decree, the ability to achieve the criterion, and the finality of the deadline for achieving the criterion.

During our current review, USEPA reviewed the Long-Term Plan and BAPRT and determined that it cannot be approved as a compliance schedule implementing water quality standards. The Long-Term Plan is intended to identify the BAPRT that exists both now and in the future as additional treatment technologies. It is not intended to demonstrate whether the deadline could be met or whether 10 more years of elevated discharges would be protective. Order at 58, fn 43. The Long-Term Plan does not include sufficient information to determine its effect on designated uses nor does it offer the detailed finality the unamended EFA provided and is therefore not approvable as a new or revised water quality standard. Accordingly, USEPA is disapproving the amendments to subsection (3), including paragraphs (3)(b), (3)(c), (3)(d), and (3)(e), and other provisions of the EFAA identified above that relate to the Long-Term Plan and that modify the compliance date as new or revised water quality standards.⁵ With these amendments to the EFA related to the compliance schedules disapproved the compliance date contained in (4)(f) and (10)(a), *i.e.*, December 31, 2006, is unchanged from the unamended EFA requirements.

USEPA also reviewed the EFAA sections authorizing moderating provisions. The Court found that such moderating provisions (variances) in sub-paragraph (4)(e)(2) were self-implementing and thus were new or revised state water quality standards that USEPA must review under section 303(c) of the CWA. Order at 53-54. Consistent with the Court's order, USEPA has reviewed sub-paragraphs (4)(e)(2) and (4)(e)(3), and subsection (10) in the EFAA related to the moderating provisions. Because these provisions have the effect of removing a designated use without demonstrating that it is infeasible to attain the use as required by 40 CFR §131.10(g), USEPA determines that the EFAA provisions related to moderating provisions do not comply with the CWA and USEPA's implementing regulations. They are therefore disapproved as new or revised water quality standards. These provisions are not in effect as water quality standards for CWA purposes.

Phosphorus Rule

The Court also ruled that USEPA acted arbitrarily and capriciously in determining that subsections (1), (2), 5(a)-(c) of the Phosphorus Rule do not constitute changes to Florida's water quality standards under the CWA. Order at 90. The Court specifically noted that USEPA should have

“reviewed the interrelationship between subsections 5(d) and 6 with the following specific sections of the Phosphorus Rule: (i) subsection (1)(b)(2) (establishing moderating provisions as an element of water quality standards); (ii) subsection

⁵ This disapproval includes the definitions related to BAPRT (para. (2)(a)), the Long-Term Plan (para. (2)(i)), and references to the Long-Term Plan in para. (2)(g), the definition of TBEL in para. (2)(p), and the references to the Long-Term Plan in para. (4)(a), and subparas. (4)(a)(4), and (4)(a)(6), to the extent these definitions relate to or apply to the change in the compliance schedule implementing water quality standards or the moderating provision disapproved in this determination.

(2)(e)(2)(h)[sic] (providing that the Long-Term Plan accomplishes BAPRT); (iii) subsection (2)(e)(1) [sic] finding that the Rule must incorporate a flexible approach towards application of the numeric criterion); (iv) subsection (3)(a), (b), (c), (d), (h), and (i) (establishing definitions directly applicable to changes in water quality standards); and (v) subsection 5(a), (b)(2) and (c)(which, when taken together, permit discharges as moderating provisions).” Order at 90.

In this review, USEPA reviewed the specific provisions identified above by the Court, as new or revised water quality standards. However, USEPA also reviewed the balance of subsections (1), (2), and (5)(a) - (c) looking at the interrelationship with subsections (5)(d) and 6 as well as reviewing these provisions in general. USEPA’s review of these provisions was complicated by the fact that many of these provisions are applicable to parts of the Phosphorus Rule for which the Court upheld USEPA’s approval, while some of the same provisions are applicable to portions of the Phosphorus Rule for which the Court vacated USEPA’s approval. As a result, for this review, in some cases USEPA focused its approval/disapproval on the application and use of the provision, not the provision itself. In sum, USEPA is disapproving the use of portions of subsections (1), (2), and (5)(a) - (c) which are, therefore, not in effect as water quality standards for CWA purposes.

Subsection (1), “Purpose and Scope.” This subsection includes two provisions, described below:

Subsection (1) Paragraph (a) describes the purpose of the Phosphorus Rule as implementing the requirements of the EFAA utilizing FDEP’s authority under the EFAA and other Florida statutes “to establish water quality standards for phosphorus, including a numeric criterion, within the EPA.” To the extent that Paragraph (1)(a) is applicable to the numeric criterion itself, USEPA is approving the Paragraph. USEPA’s approval is consistent with its earlier approval of the criterion and implementing methodology which the Court upheld. Since the definition of “water quality standards” under state law also includes moderating provisions, to the extent Paragraph (1)(a) is applicable to the moderating provisions contained in subsection (6) of the Phosphorus Rule, USEPA is disapproving Paragraph (1)(a), consistent with the Court’s Order which found subsection (6) of the Phosphorus Rule to be invalid and set aside USEPA’s prior approval.

Subsection (1) Paragraph (b) identifies three elements of water quality standards adopted by the Phosphorus Rule. Subparagraphs (1)(b)1 and 3 identify the numeric criterion itself and the methodology for measuring the criterion in the EPA (the four-part test). Because these two subparagraphs relate to provisions of the Phosphorus Rule that USEPA had previously approved on January 24, and July 27, 2005, and the Court upheld, USEPA is approving Subparagraphs (1)(b)1 and 3 as new or revised water quality standards. This approval is consistent with the Court’s Order upholding USEPA’s approval of the criterion and implementing methodology. Subparagraph (1)(b)2 identifies “[t]he establishment of moderating provisions for permits authorizing discharges into the EPA in compliance with water quality standards, including the numeric phosphorus criterion ...” as a water quality standard adopted by the Phosphorus Rule. USEPA is disapproving this subparagraph because it applies to the establishment of moderating provisions. As discussed above, subsection (6) of the Phosphorus

Rule is the provision that authorizes the use of moderating provisions. The Court found this section to be invalid and set aside USEPA's prior approval (see discussion below).

Subsection (2), "Findings." This subsection identifies 12 specific "Findings" made by the Florida Environmental Regulation Commission (ERC), many of which are factual statements and express the views of the ERC during the establishment of the Phosphorus Rule. Although appropriate for that purpose, many of these statements are unrelated to water quality standards, are not new or revised criteria and have no effect on water quality standards. As noted above, the Court specifically identified certain paragraphs in the Findings to be changes in Florida water quality standards. In doing so, the Court suggested USEPA should have reviewed Subsection (2)(h) and (1) which directly interrelate with subsections 5(d) and 6 as changes in Florida water quality standards. Order at 90. However, to be consistent with the Court's general statements that Subsection (2) was a new or revised water quality standard, USEPA has also reviewed each provision looking at how those provisions interrelate with subsections 5(d) and 6.

In summary, unless specifically identified below as approved, USEPA is not approving the Findings as water quality standards. Therefore these provisions are not in effect as water quality standards under the CWA. Further, USEPA is specifically disapproving the paragraphs identified below that are directly related to the moderating provisions and other disapproved parts of the Rule. These provisions are not applicable for CWA purposes.

Subsection (2), Paragraph (a) "The Legislature, in adopting the Everglades Forever Act, recognized that the EPA must be restored both in terms of water quantity and water quality." The Court did not specifically identify this provision as a new or revised water quality standard. Upon review, USEPA does not find this to be a new or revised standard as it is not related to the Long-Term Plan, moderating provisions or changes to the compliance date.

Subsection (2), Paragraph (b) "Best Management Practices (BMPs) have reduced phosphorus loads from the Everglades Agricultural Area to the EPA by more than twice the amount required by existing rules. Stormwater Treatment Areas (STAs) have reduced phosphorus concentrations to less than the goal of 50 ppb established in the Everglades Forever Act." The Court did not specifically identify this paragraph as a new or revised water quality standard. However, to the extent identifying the goal of 50 parts per billion (ppb) modifies the numeric criterion or narrative criterion, or changes the date for compliance it is disapproved as a new or revised water quality standard.

Subsection (2), Paragraph (c) "While a significant percentage of the EPA currently meets the numeric phosphorus criterion, further efforts are required to achieve the criterion in the remaining impacted areas of the EPA." The Court did not specifically identify this provision as a new or revised water quality standards and it does not appear to be a change to any current water quality standards. This is merely an expression by the ERC that additional work is needed to restore the Everglades. However, since this paragraph recognizes that parts of the Everglades are impacted, to the extent this paragraph is related to the net improvement moderating provision this is disapproved as a new or revised water quality standard.

Subsection (2), Paragraph (d) "Even as water quality continues to improve, restoration will be a long-term process because of historic phosphorus accumulations found in sediments within

impacted areas. This phosphorus can diffuse back into the water column, a phenomenon the Department recognizes as reflux.” The Court did not specifically identify this paragraph as a new or revised water quality standard and as a general statement it does not appear to be a new or revised water quality standard. However, to the extent the reference to restoration being a long-term process is linked to the disapproved extension of the compliance schedule implementing water quality standards, this provision is specifically disapproved as a new or revised water quality standard.

Subsection (2), Paragraph (e) “The Basin-Specific Feasibility Studies completed by the District considered environmental factors, implementation cost, scheduling, and technical factors in evaluating measures to reduce phosphorus levels entering the EPA. These studies and other information provided to the Commission show that:

1. At this time, chemical treatment technology is not cost-effective for treating discharges entering the EPA and poses the potential for adverse environmental effects.

2. Optimization of the existing STAs, in combination with BMPs, is currently the most cost-effective and environmentally preferable means to achieve further phosphorus reductions to the EPA, and to restore impacted areas. The effectiveness of such measures should be determined and maximized prior to requiring additional measures. Optimization shall take into consideration viable vegetative technologies, including Periphyton-based STAs that are found to be cost-effective and environmentally acceptable.”

The Court did not specifically identify this provision as a new or revised water quality standard. This provision focuses on evaluating and optimizing measures to reduce phosphorus. Although not specifically linked to the Long-Term Plan, it is related to the same approach. Therefore, to the extent this provision is related to the Long-Term Plan it is disapproved as a new or revised water quality standard.

Subsection (2), Paragraph (f) “The District and the Department recognize that STA and BMP optimization requires a sustained commitment to construct, implement, stabilize and measure phosphorus reduction benefits.” The Court did not specifically identify this paragraph as a new or revised water quality standard and as a general statement concerning commitment to restore the Everglades it does not appear to be a new or revised water quality standard. However, to the extent the reference to a sustained commitment is a long term process is related to the Long-Term Plan or the disapproved extension of the compliance schedule this provision is specifically disapproved.

Subsection (2), Paragraph (g) “The Comprehensive Everglades Restoration Plan (CERP) contains projects that will affect the flows and phosphorus levels entering the EPA. Achievement of water quality standards for water quality projects required under the Everglades Forever Act can be most effectively and efficiently attained when integrated with CERP projects.” This provision is a linkage to CERP, a larger suite of projects focused on restoration of a broader geographic area. Upon review, USEPA does not find this to be a new or revised

water quality standard as it is not related to the Long-Term Plan, moderating provisions or changes to the compliance date.

Subsection (2), Paragraph (h) “The Long-Term Plan constitutes a comprehensive program to optimize the STAs and BMPs to achieve further phosphorus reductions and thereby accomplish implementation of Best Available Phosphorus Reduction Technology (BAPRT).” Subsection (2) paragraph (h) identifies the Long-Term Plan (LTP) as the best means to further reduce phosphorus and implement BAPRT. USEPA is disapproving this paragraph as a change to the water quality standards consistent with the disapproval of the LTP itself discussed in this determination. As discussed above, the LTP does not provide the level of information needed and finality necessary to approve it as a compliance schedule implementing water quality standards.

Subsection (2), Paragraph (i) “It is the intent of the Commission that implementation of this rule will fulfill commitments made by the State of Florida to restore and maintain water quality in the EPA, while, at the same time, fulfill the States obligations under the Settlement Agreement to achieve the long-term phosphorus concentration levels and discharge limits established in that Agreement for the Loxahatchee National Wildlife Refuge (Refuge) and the Everglades National Park (Park).” This provision expresses the intent of the ERC and the Court did not specifically identify it as a new or revised water quality standard. Upon review, USEPA does not find this to be a new or revised water quality standard as it is not related to the LTP, moderating provisions or changes to the compliance date.

Subsection (2), Paragraph (j) “Establishment of the numeric phosphorus criterion, based upon analyses conducted primarily in freshwater open water slough systems, assumed that preservation of the balance of the native flora and fauna in these open water slough systems would protect other communities of native vegetation in the EPA. Further research should be conducted in other habitat types to further evaluate the natural variability in those habitat types.” This provision is directly related to the derivation of the numeric criterion and is approved as new or revised water quality standard consistent with USEPA’s approval of the numeric criterion.

Subsection (2), Paragraph (k) “The Commission has received substantial testimony regarding mercury and its impact on the EPA. The Commission encourages all interested parties to continue research efforts on the effects of mercury.” The Court did not specifically identify this provision as a new or revised water quality standard. Upon review, USEPA does not find this to be a new or revised standard as it is not related to the LTP, moderating provisions or changes to the compliance date.

Subsection (2), Paragraph (l) “The Commission finds that this rule must incorporate a flexible approach towards the application of the numeric phosphorus criterion for phosphorus in order to guide the implementation of phosphorus reductions in the Everglades Protection Area. Chapter 403, F.S., the Everglades Forever Act and U.S. Environmental Protection Agency regulations set forth at 40 CFR Part 131 include general policies that authorize such flexibility under appropriate circumstances, including those described in paragraphs (c) through (h) and (k) above. The Commission has exercised this authority by including in this rule both a numeric

interpretation of the phosphorus criterion and the various other standard setting provisions of this rule, including the permitting and moderating provisions.” Paragraph (l) discusses flexible policies to implement the phosphorus criterion and references state law and USEPA’s regulations as the basis for policies implementing water quality standards. This paragraph also discusses the numeric criterion which the Court upheld USEPA’s approval of, as well as permitting and moderating provisions which the Court found to be invalid and set aside USEPA’s approval. USEPA is approving paragraph (l) to the limited extent that it is applicable to implementation of the numeric criterion and implementing methodology approved by USEPA and upheld by the Court. USEPA is disapproving paragraph (l) to the extent it is applicable to the permitting provisions and moderating provisions the Court found inconsistent with the CWA.

Subsection (3), “Definitions.” The Court ordered USEPA to review the following specific definitions that it found were directly applicable to changes in water quality standards: subsection (3), paragraphs (a), (b), (c), (d), (h) and (i). Order at 90. Paragraph 3(a) defines “BAPRT,” paragraph (b) defines the “Long-Term Plan,” paragraph (d) defines “impacted areas,” and paragraph 3(h) defines “TBEL.” These definitions are directly related to provisions in the Phosphorus Rule that USEPA is disapproving and therefore are also disapproved and not in effect for CWA purposes. Paragraph (i) defines “unimpacted areas” as those areas that are not “impacted areas.” To the extent the reference to “impacted areas” applies to the use of moderating provisions that USEPA is disapproving, this definition is also disapproved and not in effect for CWA purposes. Paragraph (c) defines the EPA and has no direct effect on water quality standards other than to provide the geographic scope of applicability for the numeric phosphorus criterion. In sum, to the extent these definitions relate to the disapproved portions of the phosphorus rule they are disapproved.

Subsection (5), “Long-Term Compliance Permit Requirements for Phosphorus Discharges into the EPA.” The Court also set aside USEPA’s finding that paragraphs (a) – (c) were not new or revised water quality standards and ordered USEPA to approve or disapprove these provisions pursuant to the CWA.

Subsection (5), Paragraph (a) provides that in addition to meeting all other applicable permitting criteria, an applicant must provide reasonable assurance that a discharge will comply with state water quality standards as set forth in this section (i.e., Rule 62-302.540). USEPA is approving this paragraph to the extent it is applicable to a discharger needing to comply with the water quality criterion for phosphorus and implementing methodology that USEPA has approved in 2005 under Rule 62-302.540 and which the Court upheld. While USEPA would not generally view this type of permitting provision as a new or revised water quality standard, consistent with the Court’s decision, USEPA has reviewed this paragraph and is taking this approval action pursuant to section 303(c). USEPA believes its approval, as limited to the extent the paragraph is applicable to the otherwise approved criterion, is reasonable because the provision serves the goal of attaining the approved criterion. To the extent that the term “state water quality standards as set forth in this section” includes the moderating provisions and other disapproved provisions of Rule 62-302.540, USEPA is disapproving this paragraph, USEPA’s disapproval reflects the fact that it would not be appropriate to approve the paragraph to the extent it related to or would serve to support provisions of Rule 62-302.540 the Court has found to be invalid.

Subsection (5), Paragraph (b) provides three independent bases for discharges to be deemed in compliance with state water quality standards. Subparagraph (b)1 applies to discharges at or below the numeric criterion. This subparagraph requires compliance with the criterion as approved by USEPA and upheld by the Court. USEPA therefore is approving subparagraph (b)1. Subparagraph (b)2 provides that the effect from phosphorus being released from sediments be considered in determining whether discharges cause or contribute to exceedances of the phosphorus criterion. This provision does not directly modify the protectiveness of the underlying criterion. However, the Court specifically linked this provision to the disapproved moderating provisions. Order at 90. Our understanding of the Court's opinion is that to the extent it is linked to the moderating provision it is a change in water quality standards and USEPA is disapproving it. Subparagraph (b)3 allows for compliance to be demonstrated with the disapproved moderating provisions. USEPA is disapproving both of these subparagraphs as inconsistent with the CWA since they change the underlying criterion without demonstrating that the revised criterion continues to protect the designated use.

Subsection (5), Paragraph (c) incorporates the in-flow limits identified in Appendix A to the 1991 Settlement Agreement into the Phosphorus Rule as the basis for determining compliance. Since those limits were designed to achieve ambient levels within the Park below the 10 ppb criterion, this paragraph has the effect of providing a level of protection below 10 ppb. It is therefore approved because it is consistent with and supportive of USEPA's approval (which the Court upheld) of the phosphorus criterion.

Subsections (4)(d)(2)(c), (5)(d), and (6). The Court also invalidated specific sections of the Phosphorus Rule that were previously approved by USEPA as new water quality standards. The sections of USEPA's approval vacated by the Court are as follows: (4)(d)(2)(c)⁶, (5)(d), and (6). To the extent further action by USEPA is required on these provisions, they are disapproved, and thus are no longer applicable for any CWA purpose.

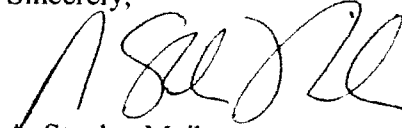
As noted above, the State of Florida has agreed to comply with the Court's remand identified above as item 3. To ensure consistency with the remand as directed by the Court, USEPA hereby requires "the State of Florida to meet the requirements of the Clean Water Act, and its implementing regulations, in a manner consistent with this Order, prior to USEPA's or DEP's approval of any subsequent variance to the Phosphorus Criterion as established by subsections (4)(a), (c), (d)(1) and (2) [with the exception of the "no action" provision], and (5)(a)(b)(1) or (2) of the Phosphorus Rule." Order at 100 (para 7).

Lastly, the provisions that USEPA is disapproving today had the effect of being less protective than the numeric criterion. The provisions that USEPA is disapproving today and the provisions that the Court declared invalid are no longer in effect for CWA purposes. The USEPA approved criterion and implementing methodology remain in effect for CWA purposes. ~~Because the criterion and implementing methodology are fully protective of the designated use, there is no need for the state of Florida or USEPA to take any further action pursuant to CWA section 303(e).~~

⁶ See fn 1 above.

If you have any questions concerning this letter or USEPA's action, please contact me at (404) 562-8357 or Jim Giattina at (404) 562-9470.

Sincerely,

A handwritten signature in black ink, appearing to read "A Stanley Meiburg". The signature is fluid and cursive, with the first name "A" being particularly prominent.

A. Stanley Meiburg
Acting Regional Administrator

