01268-EPA-1011

Scott Fulton/DC/USEPA/US
03/02/2011 12:40 PM

To "Richard Windsor"
cc
bcc
Subject Fw: 316(b) Settlement Agreement

Fyi
Avi Garbow

----- Original Message -----
From: Avi Garbow
Sent: 03/02/2011 12:24 PM EST
To: "Bob Sussman" <Sussman.bob@epa.gov>; "Nancy Stoner" <Stoner.nancy@epa.gov>; Michael Goo; "Scott Fulton" <fulton.scott@epa.gov>
Subject: Fw: 316(b) Settlement Agreement

Folks,

(b)(5) Deliberative, (b)(5) Attorney-Client

[redacted]

Avi
Richard Witt

----- Original Message -----
From: Richard Witt
Sent: 03/02/2011 11:32 AM EST
To: Scott Fulton; Avi Garbow
Cc: Steven Neugeboren
Subject: Fw: 316(b) Settlement Agreement

Per below, Riverkeeper has declined the request for an extension of the 316(b) proposal deadline.

(b)(5) Deliberative

[redacted]

----- Forwarded by Richard Witt/DC/USEPA/US on 03/02/2011 10:58 AM -----

From: Reed Super <reed@superlawgroup.com>
To: "Yu, Li (USANYS)" <Li.Yu@usdoj.gov>, Richard Witt/DC/USEPA/US@EPA
Date: 03/02/2011 10:39 AM
Subject: 316(b) Settlement Agreement
Sent by: reed.super@gmail.com

Li and Richard,

I have discussed the request with my clients and they are not interested in amending the settlement agreement to extend the date for proposal.

Please let me know if you have any questions.

Regards,
Reed

Reed W. Super
SUPER LAW GROUP, LLC
131 Varick Street, Suite 1001
New York, New York 10013

212-242-2273 (direct)
212-242-2355 (main)
646-714-2644 (mobile)
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reed@superlawgroup.com

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From: Maryt Smith/DC/USEPA/US
To: Bob Sussman/DC/USEPA/US@EPA, Nancy Stoner/DC/USEPA/US@EPA
Cc: Ephraim King/DC/USEPA/US@EPA, Julie Hewitt/DC/USEPA/US@EPA, Paul Shriner/DC/USEPA/US@EPA, Tom Born/DC/USEPA/US@EPA, Erik Helm/DC/USEPA/US@EPA, MaryEllen Levine/DC/USEPA/US@EPA, Richard Witt/DC/USEPA/US@EPA, Paul Balserak/DC/USEPA/US@EPA, Sam Napolitano/DC/USEPA/US@EPA
Date: 03/02/2011 10:19 AM
Subject: 316b comments

Bob and Nancy --

(b)(5) Deliberative

Mary [redacted]

(b)(5) Deliberative

316b Draft Proposed Rule Interagency Comment Summary, 3-2-11.doc

Mary T. Smith, Director
Engineering and Analysis Division
U.S. EPA
1200 PA Ave., NW (4303T)
Washington, D.C. 20460
Phone: 202-566-1056
Fax: 202-566-1053
http://www.epa.gov/waterscience

01268-EPA-1015

Cynthia Giles-AA/DC/USEPA/US
03/05/2011 12:18 PM

To Richard Windsor
cc Bob Perciasepe, Bob Sussman, Aaron Dickerson
bcc
Subject OECA tracker

ENFORCEMENT CONFIDENTIAL

Attached is the OECA hot issues tracker for the coming two weeks.

Cynthia

(b)(5) Deliberative, (b)(5) Attorney-Client, (b)(5) Attorney Work Product

OECA HITList 3-6-11.docx

Cynthia Giles
Assistant Administrator
U.S. EPA, Office of Enforcement and Compliance Assurance
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
202-564-2440

THIS MESSAGE IS CONFIDENTIAL and may contain legally privileged information. If you receive it in error, please delete it immediately, do not copy, and notify the sender. Thank you.

01268-EPA-1028

Scott Fulton/DC/USEPA/US
03/14/2011 11:58 AM

To David McIntosh, Michael Goo, Gina McCarthy, Richard Windsor
cc
bcc
Subject Fw: Draft insert for EGU NSPS proposal

Per the Administrator's request, I am recirculating this to ensure that folks are working from the operative draft.

----- Forwarded by Scott Fulton/DC/USEPA/US on 03/14/2011 11:56 AM -----

From: Kevin McLean/DC/USEPA/US
To: Scott Fulton/DC/USEPA/US@EPA, Avi Garbow/DC/USEPA/US@EPA
Cc: Richard Ossias/DC/USEPA/US@EPA, Elliott Zenick/DC/USEPA/US@EPA, Howard Hoffman/DC/USEPA/US@EPA, Patricia Embrey/DC/USEPA/US@EPA, Peter Tsirigotis/RTP/USEPA/US@EPA, Joseph Goffman/DC/USEPA/US@EPA
Date: 03/12/2011 10:04 AM
Subject: Draft insert for EGU NSPS proposal

(b)(5) Attorney-Client, (b)(5) Deliberative

(b)(5) Attorney-Client, (b)(5) Deliberative

ghg nsps insert draft 31210am.docx

01268-EPA-1029

Scott Fulton/DC/USEPA/US
03/14/2011 07:17 PM

To Gina McCarthy, Richard Windsor
cc "Scott Fulton"
bcc
Subject Deliberative

I am attaching and reproducing below what I worked through with David and Michael. They are comfortable, as am I. Unless Lisa has a different instinct, I think this can proceed. Placement in the compliance section, rather than in a stand-alone section, strikes me as fine.

Gina - I haven't yet vetted this with my staff. Will do so, but I don't expect any issues.

Scott

(b)(5) Attorney-Client, (b)(5) Deliberative

[redacted]

(b)(5) Attorney-Client, (b)(5) Deliberative

(b)(5) Attorney-Client, (b)(5)

ex insert.doc

01268-EPA-1031

Scott Fulton/DC/USEPA/US
03/16/2011 05:06 AM

To Richard Windsor, Lawrence Elworth
cc
bcc
Subject Fw: Partially Adverse Decision in Case Reviewing Agency's 2008 CAFO Rule

My folks will providing some more analysis on this decision this morning, but it's essence is as described below.

-----Forwarded by Scott Fulton/DC/USEPA/US on 03/16/2011 05:05AM -----
To: Scott Fulton/DC/USEPA/US@EPA, Cynthia Giles-AA/DC/USEPA/US@EPA, Bob Sussman/DC/USEPA/US@EPA, Mike Shapiro/DC/USEPA/US@EPA
From: Steven Neugeboren/DC/USEPA/US
Date: 03/15/2011 02:19PM
Cc: Avi Garbow/DC/USEPA/US@EPA, Brenda Mallory/DC/USEPA/US@EPA, Joel Beauvais/DC/USEPA/US@EPA, Gregory Peck/DC/USEPA/US@EPA, Jim Hanlon/DC/USEPA/US@EPA, Adam Kushner/DC/USEPA/US@EPA, Randy Hill/DC/USEPA/US@EPA, Deborah Nagle/DC/USEPA/US@EPA, Allison Wiedeman/DC/USEPA/US@EPA, George Utting/DC/USEPA/US@EPA, Mark Pollins/DC/USEPA/US@EPA, Kate Anderson/DC/USEPA/US@EPA, Mike Fisher/DC/USEPA/US@EPA, James Morgan/DC/USEPA/US@EPA, OGC RCs and DRCs, OGC WLO, Denise Keehner/DC/USEPA/US@EPA, Rebecca Roose/DC/USEPA/US@EPA, Joseph Theis/DC/USEPA/US@EPA, Cate Tierney/DC/USEPA/US@EPA, David Drelich/DC/USEPA/US@EPA, Mike Shapiro/DC/USEPA/US@EPA, Ephraim King/DC/USEPA/US@EPA
Subject: Partially Adverse Decision in Case Reviewing Agency's 2008 CAFO Rule

(b)(5) Attorney-Client, (b)(5) Deliberative

[redacted]

[redacted]ffices and the Department of Justice our options and will be preparing a fuller summary of the decision.

A copy of the decision is attached.

[Note - Nancy Stoner is recused from involvement in this litigation.]

(See attached file: NPPC v EPA slip op 5th Cir)

Steve Neugeboren
Associate General Counsel
Water Law Office
EPA Office of General Counsel
202-564-5488

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

F I L E D
March 15, 2011

Lyle W. Cayce
Clerk

No. 08-61093

NATIONAL PORK PRODUCERS COUNCIL; AMERICAN FARM BUREAU FEDERATION; OKLAHOMA PORK COUNCIL; UNITED EGG PRODUCERS; NORTH CAROLINA PORK COUNCIL; NATIONAL CHICKEN COUNCIL; U.S. POULTRY & EGG ASSOCIATION; DAIRY BUSINESS ASSOCIATION INC; NATIONAL MILK PRODUCERS FEDERATION,

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent

Petition for Review of an Order of the
Environmental Protection Agency

Before BARKSDALE, STEWART, and SOUTHWICK, Circuit Judges.

CARL E. STEWART, Circuit Judge:

In 2003, the Environmental Protection Agency (EPA) revised its regulations, implementing the Clean Water Act's (CWA or the Act) oversight of Concentrated Animal Feeding Operations (CAFOs). Several parties challenged the 2003 revisions (hereinafter the 2003 Rule), and the Second Circuit reviewed the challenges in Waterkeeper Alliance, Inc. v. Environmental Protection Agency, 399 F.3d 486 (2d Cir. 2005). In 2008, the EPA, responding to Waterkeeper, revised its regulations (hereinafter the 2008 Rule or the Rule). Subsequently,

the Farm Petitioners[1] jointly with the Poultry Petitioners[2] filed petitions for review of the 2008 Rule with this court and the Seventh, Eighth, Ninth, Tenth, and D.C. Circuits. Shortly after the issuance of the 2008 Rule, the EPA sent guidance letters to members of Congress and to a CAFO executive (hereinafter the EPA Letters or guidance letters). The Poultry Petitioners filed a petition for review in this Circuit, challenging the EPA's procedures for issuing rules that the Poultry Petitioners allege were final. These petitions for review were consolidated by the Judicial Panel on Multi-district Litigation (JPML), pursuant to 28 U.S.C. § 2112(a)(3), and this court was randomly selected to review the parties' challenges. Subsequently, the Environmental Intervenors[3] filed a motion to intervene in support of the EPA's position. Also, the EPA filed a motion to dismiss the Poultry Petitioners' challenges to the guidance letters. We GRANT the petitions in part, DENY the petitions in part, and GRANT the EPA's motion to dismiss.

I. BACKGROUND

At issue here is the EPA's regulation of animal feeding operations (AFOs). AFOs are facilities that house, raise, and feed animals until they are ready for transport to processing facilities that prepare meat for shipment and, eventually, consumption. Because these facilities house hundreds and sometimes thousands of animals in confined spaces, they produce millions of tons of animal manure

[1] The "Farm Petitioners" are the National Pork Producers Council, American Farm Bureau Federation, United Egg Producers, North Carolina Pork Council, National Milk Producers Federation, Dairy Business Association, Inc., Oklahoma Pork Council, National Chicken Council, and U.S. Poultry & Egg Association.

[2] The "Poultry Petitioners" are the National Chicken Council, and U.S. Poultry & Egg Association. Although these parties are also "Farm Petitioners," the arguments made in the Poultry Petitioners' brief apply only to them and not the other Farm Petitioners.

[3] The "Environmental Intervenors" are the Natural Resource Defense Council, Sierra Club, and Waterkeeper Alliance.

every year.[4] The management of this manure involves the collection, storage, and eventual use of the manure's nutrients as fertilizer.[5] Following its collection, the manure is typically transported to an on-farm storage or treatment system.[6] Treated manure effluent or dry litter (chicken waste) is typically applied to cropland as fertilizer.[7] This fertilizing process is called land application.[8]

Because the improper management of this waste can pose a significant hazard to the environment, the EPA focuses much of its attention on regulating certain AFOs that meet the EPA's definition of a CAFO.[9] According to EPA regulations, CAFOs are facilities where "[a]nimals . . . have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period . . . ." 40 C.F.R. § 122.23(b)(1)(i). Our analysis of the petitioners' challenges to the 2008 Rule necessitates a discussion of the statutory and regulatory scheme underlying the EPA's oversight of CAFOs.

A. Statutory Background

In 1948, Congress enacted the Federal Water Pollution Control Act

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[4] Sara R. Reichenauer, Issuing Violations Without Tangible Evidence: Computer Modeling for Clean Water Act Enforcement, 95 IOWA L. REV. 1011, 1019 (2010).

[5] Thomas R. Head, III, Local Regulation of Animal Feeding Operations: Concerns, Limits, and Options for Southeastern States, 6 ENVTL. LAW. 503, 515 (Feb. 2000) ("In particular, animal waste must be stored while awaiting disposal. Waste typically is stored in large open-air tanks or anaerobic lagoons, which can be used to treat as well as store waste.").

[6] Id.

[7] Id. at 515–16.

[8] Id. at 516.

[9] Reichenauer, 95 IOWA L. REV. at 1019–20 ("Data suggests that agriculture is the most harmful source to our nation's waters, causing the EPA to focus much of its attention on agriculture entities, specifically CAFOs and potential CAFOs.").

(FWPCA).[10] FWPCA encouraged states to enact uniform laws to combat water pollution, recognizing "that water pollution control was primarily the responsibility of state and local governments."[11] The state-run regulation of discharges "involved a complex process in which the government was required to trace in-stream pollution back to specific discharges, and, given the difficulty of this task, enforcement was largely nonexistent."[12] The federal government's power to curtail water pollution was also limited under FWPCA. Thus, federal action against a discharger could only proceed "with the approval of state officials in the state where the discharge originated and after a complicated series of notices, warnings, hearings, and conference recommendations."[13] In 1972, FWPCA was amended to replace the state-run regulation of discharges with an obligation to obtain and comply with a federally-mandated National Pollutant Discharge Elimination System (NPDES) permit program.[14] These amendments also transformed FWPCA into what is known today as the CWA.[15]

The NPDES permit program, which is primarily articulated in 33 U.S.C. § 1342, allows the EPA to "issue a permit for the discharge of any pollutant, or combination of pollutants . . . ." 33 U.S.C. § 1342(a)(1). To be clear, the CWA prohibits the discharge of pollutants into navigable waters. 33 U.S.C. § 1311. However, if a facility requests a permit, it can discharge within certain

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[10] Jeffrey M. Gaba, Generally Illegal: NPDES General Permits Under the Clean Water Act, 31 HARV. ENVTL. L. REV. 409, 413 (2007).

[11] Kenneth M. Murchison, Learning from More than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future, 32 B.C. ENVTL. AFF. L. REV. 527, 530–31 (2005).

[12] Gaba, 31 HARV. ENVTL. L. REV. at 414.

[13] Murchison, 32 B.C. ENVTL. AFF. L. REV. at 531.

[14] Id. at 541–42.

[15] Id. at 536 n.71.

Release 2 - HQ-FOI-01268-12 All emails sent by "Richard Windsor" were sent by EPA Administrator Lisa Jackson

parameters called effluent limitations and will be deemed a point source. 33 U.S.C. §§ 1342, 1362(14). Accordingly, the point source will be regulated pursuant to the NPDES permit issued by the EPA or one of 46 States authorized to issue permits.[16] Relevant here, the definition of point source excludes "agricultural stormwater discharges." Id . § 1362(14). This occurs, for example, when rainwater comes in contact with manure and flows into navigable waters. See, e.g., Fishermen Against Destruction of Env't, Inc. v. Closter Farms, Inc. , 300 F.3d 1294, 1297 (11th Cir. 2002) (citing Concerned Area Residents for the Env't v. Southview Farm , 34 F.3d 114, 121 (2d Cir. 1994) (holding that "agricultural stormwater discharge" exemption applies to any "discharges [that] were the result of precipitation")).

If a CAFO discharges without a permit, it is strictly liable for discharging without a permit and subject to severe civil and criminal penalties. 33 U.S.C. § 1319. For example, monetary sanctions can accrue at a rate of up to $50,000 per violation, per day, for criminally negligent violations, or up to $100,000 per violation, per day, for repeated, knowing violations. Id. Criminal violators may be subject to imprisonment. 40 C.F.R. § 122.41(a)(2).

B. CAFO's Regulatory Background

The EPA enacted the first set of CAFO regulations in 1976. Since that time, the substance of these regulations, regarding CAFOs, has changed only twice, in 2003 and 2008. We discuss the applicable portions of these regulations

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[16] Currently, 46 states are authorized to administer their own permitting programs for the discharge of pollutants into navigable waters in lieu of the federally administered NPDES program. See STATE NPDES PROGRAM AUTHORITY, available at http://www.epa.gov/npdes/images/State NPDES Prog Auth.pdf. Where a state has been authorized to administer its own program, the state becomes the NPDES permit-issuing agency in lieu of the EPA. For these state programs, the EPA retains oversight and veto authority, as well as authority to enforce any violation of the CWA or of a state-issued discharge permit. See33 U.S.C. § 1342(c), (d), and (i). For purposes of this opinion, references to the EPA's implementation of the CWA or the EPA's regulations also refers to authorized states' implementation of the CWA.

below.

1. 1976 Regulations

The 1976 regulations specified that CAFOs that wanted to discharge were required to have a permit primarily based on the number of animals housed in the facility. All large CAFOs, those with 1,000 or more animals, were required to have an NPDES permit to discharge pollutants. 41 Fed. Reg. 11,458, 11,458 (Mar. 18, 1976).[17] Medium CAFOs, those with 300 to 1,000 animals, were required to have a permit if they emitted certain discharges. Id. Finally, most small CAFOs, those with 300 animals or less, generally were not required to have a permit. Id. However, the EPA could determine that a permit was required on a case-by-case basis if a small CAFO emitted certain discharges after an onsite inspection and notice. Id. Under this regulatory scheme, if a discharging CAFO was required to have a permit, but did not have one, it would be subject to civil or criminal liability.

The 1976 regulatory scheme was in place for almost thirty years. However, after being sued for failing to revise the effluent limitations for CAFO operations, the EPA revised its regulations "to address not only inadequate compliance with existing policy, but also the 'changes that have occurred in the animal production industries.'" Waterkeeper, 399 F.3d at 494 (citing 66 Fed. Reg. 2960, 2972 (Jan. 12, 2001)). Subsequently, in the 2003 Rule, the EPA shifted from a regulatory framework that explained what type of CAFO must have a permit to a broader regulatory framework that explained what type of CAFO must apply for a permit.

2. The 2003 Rule & Waterkeeper

Under the 2003 Rule, all CAFOs were required to apply for an NPDES permit whether or not they discharged. 68 Fed. Reg. 7176, 7266 (Feb. 12, 2003).

[17] For purposes of clarity, we refer to overruled regulations or regulations being challenged using the Federal Register, as opposed to the Code of Federal Regulations.

Release 2 - HQ-FOI-01268-12 All emails sent by "Richard Windsor" were sent by EPA Administrator Lisa Jackson

Specifically, every CAFO was assumed to have a "potential to discharge" and had to apply for an NPDES permit. Id. at 7266 67. However, an option built into the Rule permitted a CAFO to request from the EPA a "no potential to discharge" determination. Id. If the CAFO proved that it did not have the potential to discharge, the CAFO was not required to seek a permit. Id. The 2003 Rule also expanded the definition of exempt "agricultural stormwater discharge" to include land application discharge, if the land application comported with appropriate site-specific nutrient management practices. Id. at 7198. However, if the land application was not in compliance with those practices, the land application discharge would be an unpermitted discharge in violation of the CWA. Id. at 7197.

Furthermore, the 2003 Rule created a mandatory duty for all CAFOs, applying for a permit, to develop and implement a site-specific Nutrient Management Plan (NMP). Id. at 7176. An NMP required a CAFO to establish "best management practices" (BMPs). Id. at 7213 14. The BMPs were designed to ensure adequate storage of manure and wastewater, proper management of mortalities and chemicals, and appropriate site-specific protocols for land application. Id. at 7176. The BMPs were neither reviewed by the EPA nor were they included in the terms of a CAFO's permit to discharge.

In Waterkeeper, the Environmental Petitioners (Waterkeeper Alliance, Inc., Sierra Club, Natural Resources Defense Council, Inc., and the American Littoral Society) and the Farm Petitioners (American Farm Bureau Federation, National Chicken Council, and the National Pork Producers Council), many of whom are petitioners or intervenors in the present matter, challenged the 2003 Rule on several grounds. 399 F.3d at 497. Specifically, the petitioners challenged the 2003 Rule's duty to apply and the type of discharges subject to regulation. Id. at 504.

The Farm Petitioners asked the Second Circuit to vacate the 2003 Rule's

Release 2 - HQ-FOI-01268-12 All emails sent by "Richard Windsor" were sent by EPA Administrator Lisa Jackson

"duty to apply" because it was outside of the EPA's authority. The court agreed and held that the EPA cannot require CAFOs to apply for a permit based on a "potential to discharge." Id. at 504 06. The Second Circuit explained that the plain language of the CWA "gives the EPA jurisdiction to regulate and control only actual discharges not potential discharges, and certainly not point sources themselves." Id. at 505. In sum, the Second Circuit held that the CWA "on its face, prevents the EPA from imposing, upon CAFOs, the obligation to seek an NPDES permit or otherwise demonstrate that they have no potential to discharge." Id. at 506.

The Environmental Petitioners took issue with the 2003 Rule's exclusion of agricultural stormwater discharge, resulting from land application, from the definition of "point source discharge." They argued that the CWA requires that all discharges from a CAFO are point source discharges, "notwithstanding the fact that agricultural stormwater discharges are otherwise deemed exempt from regulation." Id. at 507. The Second Circuit disagreed. The court explained that the CWA is "ambiguous as to whether CAFO discharges can ever constitute agricultural stormwater." Id . Thus, the court examined whether the exemption for certain land application discharges was grounded in a permissible construction of the CWA. Id. The Second Circuit determined that congressional intent and its precedent supported the EPA's exclusion of agricultural stormwater discharge, resulting from land application, from designation as a point source. Id. at 507 09.

The Environmental Petitioners also argued that the 2003 Rule was unlawful because "(1) it empowers NPDES authorities to issue permits to . . . CAFOs in the absence of any meaningful review of the [NMPs] those CAFOs have developed; and (2) it fails to require that the terms of the [NMPs] be included in the NPDES permits." Id . at 498. The Second Circuit agreed and held that by failing to provide for EPA review of the NMPs, the 2003 Rule

Release 2 - HQ-FOI-01268-12 All emails sent by "Richard Windsor" were sent by EPA Administrator Lisa Jackson

violated the statutory commandments that the permitting agency must assure compliance with applicable effluent or discharge limitations. Id. at 502 03.

The parties also disputed "whether the terms of the [NMPs], themselves, constitute effluent limitations that must be included in the NPDES permits." Id. at 502. The Second Circuit held that because the 2003 Rule failed to require that the terms of NMPs be included in NPDES permits, the 2003 Rule violated the CWA. The court explained that the CWA defined effluent limitation as "'any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources . . .'" Id. at 502 (quoting 33 U.S.C. § 1362(11)). Thus, because "the requirement to develop [an NMP] constitutes a restriction on land application discharges only to the extent that the [NMP] actually imposes restrictions on land application discharges[,]" the CWA's definition of effluent limitations encompassed an NMP. Waterkeeper, 399 F.3d at 502.

3. The Present Petitions for Review: The 2008 Rule

At issue here is the 2008 Rule, the EPA's response to the Second Circuit's decision in Waterkeeper. See71 Fed. Reg. 37,744 (June 30, 2006). Also at issue are three guidance letters issued by the EPA in response to questions raised by members of the United States Congress and a farm executive about the 2008 Rule. Below, we discuss in further detail the 2008 Rule and the Farm Petitioners' and Poultry Petitioners' challenges to the 2008 Rule, as well as the Poultry Petitioners' challenge to the EPA's issuance of the guidance letters.

a. The 2008 Rule

As required by the Administrative Procedures Act (APA),[18] on June 30,

[18] The relevant portion of the APA, 5 U.S.C. § 553, requires that "[g]eneral notice of proposed rule making shall be published in the Federal Register . . . ." Id. § 553(b). Furthermore, the Rule requires:

> After notice required by this section, the agency shall give

Release 2 - HQ-FOI-01268-12 All emails sent by "Richard Windsor" were sent by EPA Administrator Lisa Jackson

2006, the EPA published a notice of proposed rulemaking (hereinafter the Proposed Rule) setting forth its response to the Second Circuit's decision in Waterkeeper. See 71 Fed. Reg. at 37,744. In place of the 2003 Rule's duty to apply for a permit, the Proposed Rule required that a CAFO owner or operator apply for a permit only if the CAFO "discharges or proposes to discharge pollutants". Id. at 37,747 (internal quotation marks omitted). Furthermore, the Proposed Rule responded to the Second Circuit's holding about the incorporation of NMP requirements into permits. Id. at 37,753 55. Specifically, the Proposed Rule required that any NPDES permit issued to a CAFO include the requirement to develop and implement an NMP, including land application requirements. Id. at 37,551. Moreover, the NMP must be submitted, in its entirety, with the CAFO's permit application, must be reviewed by the agency and the public, and must have its terms incorporated into the applicable permit as enforceable effluent limitations. Id.

The EPA received several hundred responses to the Proposed Rule. 73 Fed. Reg. 12,321-02, 12,324 (Mar. 7, 2008). Many of the comments asked the EPA to specify when a CAFO "proposes" to discharge. Id. In response, on March 7, 2008, the EPA published a supplemental notice of proposed rulemaking (hereinafter the Supplemental Proposed Rule). See generally 73 Fed. Reg. 12,321-02. The Supplemental Proposed Rule provided that a CAFO does not discharge or propose to discharge if "based on an objective assessment of the conditions at the CAFO, that the CAFO is designed, constructed, operated, and

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> interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

Id. § 553(c).

maintained in a manner such that the CAFO will not discharge ." Id . at 12,339. Furthermore, if a CAFO operator makes this showing, the operator can apply for voluntary certification. Id . The benefit of voluntary certification is that, in the event of a discharge, an unpermitted CAFO will not be liable "for violation of the duty to apply," but will still be in violation of the CWA's prohibition against unpermitted discharges. Id .

On November 20, 2008, the EPA published the 2008 Rule, which incorporates the proposed regulations in the Proposed Rule and the Supplemental Proposed Rule. See73 Fed. Reg. 70,418 (Nov. 20, 2008). In sum, the 2008 Rule clarifies the "duty to apply" liability scheme. Id . at 70,423. It reiterates that CAFOs "propose to discharge" if they are "designed, constructed, operated, or maintained such that a discharge would occur." Id . Furthermore, each CAFO operator is required to make an objective case-by-case assessment of whether it discharges or proposes to discharge, considering, among other things, climate, hydrology, topology, and the man-made aspects of the CAFO. Id . at 70,424. It further clarifies that a CAFO can be held liable for failing to apply for a permit, in addition to being held liable for the discharge itself. Id . at 70,426. The 2008 Rule also reiterates that certification is voluntary, but if a CAFO does not certify, in an enforcement proceeding for failing to apply for a permit, the CAFO would have the burden of proving that it did not propose to discharge. Id . Finally, with regard to NMPs, the 2008 Rule restates that NMPs are an enforceable part of an NPDES permit and clarifies that the terms of NMPs would remain the same as the terms articulated in the 2003 Rule. Id . at 70,443.

On December 4, 2008, the 2008 Rule became final for purposes of seeking judicial review. 73 Fed. Reg. at 70,418. As required by 33 U.S.C. § 1369(b), [19]

[19] Section 1369 provides in relevant part:

each of the Farm Petitioners and Poultry Petitioners [20] (collectively, the Farm Petitioners) timely filed petitions for review, challenging certain provisions of the 2008 Rule, in various courts of appeals, namely, this court [21] and the Seventh, [22] Eighth, [23] Ninth, [24] Tenth, [25] and District of Columbia [26] Circuits.

Because an agency is required to notify the Judicial Panel on Multi-district Litigation (JPML) if two or more petitions for review are filed that challenge an

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> (b) Review of Administrator's actions; selection of court; fees
>
> (1) Review of the Administrator's action . . . in making any determination as to a State permit program submitted under section 1342(b) of this title, []in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, [or] in issuing or denying any permit under section 1342 of this title . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial , or after such date only if such application is based solely on grounds which arose after such 120th day.

33 U.S.C. § 1369(b) (emphasis added).

[20] Although the Poultry Petitioners challenge certain provisions of the 2008 Rule jointly with the Farm Petitioners, they also filed a separate challenge to the EPA Letters. Thus, for purposes of clarity, hereinafter, references to the Farm Petitioners refer to the Farm Petitioners' and Poultry Petitioners' challenges to provisions of the 2008 Rule. References to the Poultry Petitioners refer to the Poultry Petitioners' separate challenge to the EPA Letters.

[21] Nat'l Pork Producers Council v. Envtl. Prot. Agency , No. 08-61093 (5th Cir. 2008).

[22] Dairy Bus. Ass'n Inc v. Envtl. Prot. Agency , No. 09-1574 (7th Cir. 2009); Nat'l Milk Producers Fed'n v. Envtl. Prot. Agency , 08-4166 (7th Cir. 2008).

[23] United Egg Producers v. Envtl. Prot. Agency , No. 08-3870 (8th Cir. 2008).

[24] Natural Res. v. Nat'l Pork , No. 08-75023 (9th Cir. 2008).

[25] Nat'l Pork Producers v. Envtl. Prot. Agency , No. 08-9584 (10th Cir. 2008).

[26] N.C. Pork v. Envtl. Prot. Agency , No. 08-1387 (D.C. Cir. 2008).

agency's promulgation of regulations, the EPA notified the JPML of the various challenges. 28 U.S.C. § 2112(a)(3). Subsequently, per section 2112, this court was randomly selected by the JPML, from the courts of appeals in which petitions for review were filed, to address the parties' challenges. Id. Accordingly, the petitions were consolidated and transferred to this court from our sister circuits.

On appeal, the Farm Petitioners primarily challenge the EPA's "duty to apply" for an NPDES permit, imposition of liability for failing to apply for a permit, and the EPA's regulation of a permitted CAFO's land application.

b. The EPA Letters

Shortly after the EPA issued the 2008 Rule, it issued three guidance letters, a common practice following the issuance of complex regulations. See generally Appalachian Power Co. v. Envtl. Prot. Agency , 208 F.3d 1015, 1020 (D.C. Cir. 2000). On January 16, 2009, Benjamin H. Grumbles, Assistant Administrator for the EPA's Office of Water, sent a letter to Senator Thomas R. Carper of Delaware; on the same day, Grumbles sent an identical letter to then-congressperson Michael N. Castle of Delaware; and on March 4, 2009, James D. Giattina, Director of the Water Protection Division for Region 4, sent a letter to Jeff Smith, an executive for Perdue Farms, Inc.

The guidance letters sent to the Delaware Congress members were in response to their joint letter to the EPA concerning "the status of EPA's authorization of Delaware's [state-run CAFO] program." Grumbles explained that Delaware's CAFO program was denied status because it did not comply with the CWA. Notably, the Delaware program requires a permit only if "a CAFO meets the numerical animal limit, has a discharge into waters of the state, and is in non-compliance with Delaware Nutrient Management Regulations." The guidance letters further explained the EPA's requirements for a state-run CAFO program and that these requirements were the national

floor for these programs. They also stated that the CWA prohibits the discharge of all pollutants by a CAFO. Moreover, "[t]he term pollutant is defined very broadly in the CWA . . . . Potential sources of such pollutants at a CAFO could include . . . litter released through confinement house ventilation fans." The guidance letters further explained that "any point source discharge of stormwater that comes into contact with these materials and reaches waters of the United States is a violation of the CWA unless authorized by a [permit]."

The letter sent by Giattina was in response to questions posed by Smith, regarding Smith's concern that certain EPA field offices were incorrectly interpreting the 2008 Rule. Relevant here, Smith asked whether operators of dry litter farms need to apply for a permit "because of potential runoff from the production area[, and if] so, are there examples of dry poultry litter operations having a discharge?" The letter explained that all CAFOs must have permits prior to discharging pollutants and that "pollutant" is defined broadly by the CWA and the regulations could include litter released through confinement house ventilation fans. The letter also discussed the agricultural stormwater exemption, explaining that it "applies only to precipitation-related discharges from land application areas . . . where application of manure, litter, or process wastewater is in accordance with appropriate nutrient management practices," and not to "discharges from the CAFO production area."

As required by the APA, on April 12, 2009, within 120 days of the issuance of the guidance letters, the Poultry Petitioners filed their petition for review, challenging the EPA Letters. The Poultry Petitioners argue that the EPA Letters constitute final agency actions subject to judicial review and, among other things, were required to have undergone notice and comment per the rulemaking procedures articulated in the APA. See 5 U.S.C. § 553. The EPA subsequently filed a motion to dismiss the Poultry Petitioners' claim, arguing that we do not have jurisdiction to hear challenges to guidance letters that are

Release 2 - HQ-FOI-01268-12 All emails sent by "Richard Windsor" were sent by EPA Administrator Lisa Jackson

merely articulations of current rules and regulations.

Our analysis of the Farm Petitioners' claims and Poultry Petitioners' claims proceeds as follows. Part II is divided into two parts. In subpart A, we discuss the Farm Petitioners' challenges. We GRANT the petition in part and DENY the petition in part. In subpart B, we address the Poultry Petitioners' challenge to the EPA Letters. We DISMISS their petition for lack of jurisdiction per the EPA's motion.

II. Analysis

A. Farm Petitioners' Challenges

The Farm Petitioners' challenges to the 2008 Rule can be sub-divided into two parts. First, they effectively challenge the "duty to apply" liability scheme. Second, they challenge the Rule's regulation of CAFO land application discharges. Below we address each of these challenges in turn.

1. Duty to Apply Liability Scheme

The duty-to-apply liability scheme has three parts. To begin, the 2008 Rule requires CAFOs that discharge or propose to discharge to apply for an NPDES permit the duty to apply. If a CAFO discharges and does not have a permit, the CAFO will not only be liable for discharging without a permit, but also prosecuted for failing to apply for a permit failure to apply liability. However, a CAFO can circumvent this liability if the CAFO operator can establish that the CAFO was designed, constructed, operated, and maintained in a manner such that the CAFO will not discharge. The Farm Petitioners argue that certain parts of the liability scheme are in excess of the EPA's statutory authority and other parts are violations of the APA.

Our review of the Farm Petitioners' challenges rests, for the most part, on the Second Circuit's determination in Waterkeeper and whether the EPA's actions are within the scope of its statutory authority. As such, our analysis is guided by the principles enunciated in Chevron U.S.A., Inc. v. Natural Resources

Release 2 - HQ-FOI-01268-12 All emails sent by "Richard Windsor" were sent by EPA Administrator Lisa Jackson

Defense Council, Inc., 467 U.S. 837 (1984). If Congress has "directly spoken to the precise question at issue" and "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842 43 (footnote omitted). If the court determines that the statute is silent or ambiguous with respect to the specific question at issue, then we consider "whether the agency's answer is based on a permissible construction of the statute." Id. at 843. We use the traditional tools of statutory construction to determine whether Congress has spoken to the precise point at issue. Tex. Sav. & Cmty. Bankers Ass'n v. Fed. Hous. Bd. , 201 F.3d 551, 554 (5th Cir. 2000).

We conclude that the CWA provides a comprehensive liability scheme, and the EPA's attempt to supplement this scheme is in excess of its statutory authority.

a. Duty to Apply

The 2003 Rule's "duty to apply" required all CAFOs to apply for an NPDES permit or demonstrate that they do not have the potential to discharge. 68 Fed. Reg. at 7266. In Waterkeeper, the Second Circuit held that the 2003 Rule's "duty to apply" was ultra vires because the EPA exceeded its statutory authority. Waterkeeper, 399 F.3d at 504. The court explained that the CWA is clear that the EPA can only regulate the discharge of pollutants. To support its interpretation, the Second Circuit examined the text of the Act. The court noted: (1) 33 U.S.C. § 1311(a) of the CWA "provides . . . [that] the discharge of any pollutant by any person shall be unlawful," (2) section 1311(e) of the CWA provides that "[e]ffluent limitations . . . shall be applied to all point sources of discharge of pollutants ," and (3) section 1342 of the Act gives NPDES authorities the power to issue permits authorizing the discharge of any pollutant or combination of pollutants ." Waterkeeper, 399 F.3d at 504. Accordingly, the Second Circuit concluded that

Release 2 - HQ-FOI-01268-12 All emails sent by "Richard Windsor" were sent by EPA Administrator Lisa Jackson

> in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance.

Id. at 505. The Second Circuit's decision is clear: without a discharge, the EPA has no authority and there can be no duty to apply for a permit.

The EPA's response to this part of the Waterkeeper analysis is the 2008 Rule's requirement that CAFOs that discharge and CAFOs that "propose" to discharge apply for a permit. We address the latter category first.

i. CAFOs that Propose to Discharge

Because the issues presented in Waterkeeper are similar to the issues presented here, we find the Second Circuit's analysis to be instructive and persuasive. Accordingly, we decline to uphold the EPA's requirement that CAFOs that propose to discharge apply for an NPDES permit.

At first blush it seems that the EPA, by regulating CAFOs that "propose" to discharge, is regulating CAFOs that want to discharge. However, as the Farm Petitioners' counsel explained at oral argument, the EPA's use of the term "propose" is not the same as the common understanding of the term "to form or declare a plan or intention." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1819 (8th ed. 1993). Instead, the EPA's definition of a CAFO that "proposes" to discharge is a CAFO designed, constructed, operated, and maintained in a manner such that the CAFO will discharge. Pursuant to this definition, CAFOs propose to discharge regardless of whether the operator wants to discharge or is presently discharging. This definition thus requires CAFO operators whose facilities are not discharging to apply for a permit and, as such, runs afoul of Waterkeeper, as well as Supreme Court and other well-established precedent.

Release 2 - HQ-FOI-01268-12 All emails sent by "Richard Windsor" were sent by EPA Administrator Lisa Jackson

Specifically, the Supreme Court explained:

> [T]he National Pollutant Discharge Elimination System [requires] a permit for the 'discharge of any pollutant' into the navigable waters of the United States, 33 U.S.C. § 1342(a). The triggering statutory term here is not the word 'discharge' alone, but 'discharge of a pollutant,' a phrase made narrower by its specific definition requiring an 'addition' of a pollutant to the water.

S.D. Warren Co. v. Maine Bd. of Envtl. Protection , 547 U.S. 370, 380 81 (2006). Likewise, several circuit courts have held that the scope of the EPA's authority under the CWA is strictly limited to the discharge of pollutants into navigable waters.

Notably, in the seminal case Natural Resources Defense Council, Inc. v. Environmental Protection Agency , 859 F.2d 156 (D.C. Cir. 1988), the D.C. Circuit explained more than 20 years ago that the CWA "does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction under the operative statute is limited to regulating the discharge of pollutants." Id . at 170. In Waterkeeper, the Second Circuit echoed this interpretation of the CWA and explained that "unless there is a discharge of any pollutant, there is no violation of the Act . . . ." 399 F.3d at 504. More recently, in Service Oil, Inc. v. Environmental Protection Agency , 590 F.3d 545 (8th Cir. 2009), the Eighth Circuit reiterated the scope of the EPA's regulatory authority and concluded that "[b]efore any discharge, there is no point source" and the EPA does not have any authority over a CAFO. Serv. Oil, Inc. , 590 F.3d at 550.

These cases leave no doubt that there must be an actual discharge into navigable waters to trigger the CWA's requirements and the EPA's authority. Accordingly, the EPA's authority is limited to the regulation of CAFOs that discharge. Any attempt to do otherwise exceeds the EPA's statutory authority. Accordingly, we conclude that the EPA's requirement that CAFOs that "propose"

Release 2 - HQ-FOI-01268-12 All emails sent by "Richard Windsor" were sent by EPA Administrator Lisa Jackson

to discharge apply for an NPDES permit is ultra vires and cannot be upheld.

ii. Discharging CAFOs

Although the CWA forecloses the EPA's regulation of a CAFO before there is a discharge, the question remains: Can the EPA require discharging CAFOs to apply for an NPDES permit? This analysis necessitates application of Chevron's two-step inquiry. Chevron step one requires the court to determine, if Congress, through the CWA, has spoken directly on the issue of whether the EPA can require a discharging CAFO to apply for a permit. Chevron, 467 U.S. at 842 43. As there is no language in the CWA that creates a "duty to apply" for an NPDES permit, our analysis centers on Chevron step two whether the regulation "is based on a permissible construction of the statute." Id.

We accord "deference to agencies under Chevron because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." Tex. Clinical Labs, Inc. v. Sebelius, 612 F.3d 771, 775 (5th Cir. 2010). However, a Chevron step two analysis depends on "a number of factors. These include: the consistency of the interpretation and the length of adherence to it, undisturbed by Congress; the explicitness of the congressional grant of authority to the agency, with greater deference in cases of more specific delegation; and the degree of agency expertise necessarily drawn upon in reaching its interpretation." Quarles v. St. Clair , 711 F.2d 691, 706 07 (5th Cir. 1983).

The primary purpose of the NPDES permitting scheme is to control pollution through the regulation of discharges into navigable waters. See 33 U.S.C. § 1342. Therefore, it would be counter to congressional intent for the court to hold that requiring a discharging CAFO to obtain a permit is an unreasonable construction of the Act. In fact, the text of the Act indicates that

Release 2 - HQ-FOI-01268-12 All emails sent by "Richard Windsor" were sent by EPA Administrator Lisa Jackson

a discharging CAFO must have a permit. The CWA explains that discharging without a permit is unlawful, 33 U.S.C. § 1311, and punishes such discharge with civil and criminal penalties, 33 U.S.C. § 1319. This has been the well-established statutory mandate since 1972. It logically follows that, at base, a discharging CAFO has a duty to apply for a permit.

In summary, we conclude that the EPA cannot impose a duty to apply for a permit on a CAFO that "proposes to discharge" or any CAFO before there is an actual discharge. However, it is within the EPA's province, as contemplated by the CWA, to impose a duty to apply on CAFOs that are discharging.

b. Failure to Apply Liability

The 2008 Rule provides that a CAFO can be held liable for failing to apply for a permit. The Farm Petitioners contend that the EPA does not have the authority to create this liability. We agree. As previously noted, if Congress has "directly spoken to the precise question at issue" and "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842 43 (footnote omitted). Here, the CWA is clear about when the EPA can issue compliance orders,[27] bring a civil suit for an injunction or penalties,[28] or bring criminal charges for penalties.[29] Specifically, 33 U.S.C. § 1311 allows the EPA to impose liability if it "finds that any person is in violation of any condition or limitation which implements [violations of]": the discharge[30]

[27] 33 U.S.C. § 1319(a).

[28] Id . § 1319(b).

[29] Id . § 1319(d).

[30] Id . § 1319(c).

prohibition, [31] certain water-quality based effluent limitations, [32] national standards of performance for new sources, [33] toxic and pretreatment effluent standards, [34] the EPA's information-gathering authority, [35] provisions permitting the discharge of specific aquaculture pollutants, [36] any permit condition or limitation, [37] and provisions governing the disposal or use of sewer sludge. [38] Notably absent from this list is liability for failing to apply for an NPDES permit.

Moreover, section 1319 is the only provision in the Act to provide for penalties. Assuming that the punishment for failing to apply for a permit are section 1319's penalties, the EPA still runs up against the CWA's clear articulation that only certain violations of the Act can be enforced using section 1319's penalties. See 33 U.S.C. § 1319; see, e.g., Serv. Oil, Inc., 590 F.3d at 550 ("Congress in § 1319(g)(1) granted EPA limited authority to assess administrative monetary penalties for violations of specific statutory provisions related to the core prohibition against discharging without a permit, or contrary to the terms of a permit."); Colt Indus., Inc. v. United States, 880 F.2d 1311, 1314 (Fed. Cir. 1989) ("EPA is not authorized under either the Clean Air or Clean Water [A]cts to seek compensatory damages; it is limited to injunctive relief and

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[31] Id. § 1311.

[32] Id. § 1312.

[33] Id. § 1316.

[34] Id. § 1317.

[35] Id. § 1318.

[36] Id. § 1328.

[37] Id. § 1342.

[38] Id. § 1345.

the maximum monetary penalties prescribed by 42 U.S.C. § 7413(b), and 33 U.S.C. § 1319, respectively."). Accordingly, the imposition of "failure to apply" liability is outside the bounds of the CWA's mandate.

The Eighth Circuit's analysis in Service Oil is instructive. In that case, the court examined whether the EPA can assess administrative penalties for failing to apply for an NPDES permit. As the EPA argues here, it also argued in Service Oil that section 1318, which gives the EPA its information-gathering authority, also gives the EPA power to impose liability for failing to apply for an NPDES permit. 590 F.3d at 550. The Eighth Circuit rejected this argument. In concluding that the EPA cannot assess such penalties, the court commented on the scope of the EPA's regulatory authority. The court explained that "the agency's authority to assess monetary penalties by administrative proceeding is limited to unlawful discharges of pollutants." Id. ; see also Envtl. Prot. Info. Ctr. v. Pac. Lumber Co., 469 F. Supp. 2d 803, 826 (N.D. Cal. 2007) (finding 33 U.S.C. § 1342(p) does not authorize liability for "failure to apply" for NPDES permit coverage, but only for non-compliance with permit terms).

* * *

For more than 40 years, the EPA's regulation of CAFOs was limited to CAFOs that discharge. The 2003 Rule marked the first time that the EPA sought to regulate CAFOs that do not discharge. This attempt was wholly rejected by the Second Circuit in Waterkeeper. 399 F.3d at 504. Again, with the 2008 Rule, the EPA not only attempts to regulate CAFOs that do not discharge, but also to impose liability that is in excess of its statutory authority. Although Chevron makes clear that we must give deference to the agency's interpretation of a statute, "courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with the statutory mandate or that frustrate the congressional policy underlying a statute." Tex. Power & Light Co. v. FCC , 784 F.2d 1265, 1269 (5th Cir. 1986)

Release 2 - HQ-FOI-01268-12 All emails sent by "Richard Windsor" were sent by EPA Administrator Lisa Jackson

(citations and internal quotation marks omitted); see also Buffalo Crushed Stone, Inc. v. Surface Transp. Bd. , 194 F. 3d 125, 128 29 (D.C. Cir. 1999) ("[D]eference is not without limit. We will reject an agency's interpretation if an alternative reading is compelled by the regulations' plain language . . . ." (citation and internal quotation marks omitted)).

To this end, the Supreme Court has explained: "Agencies may play the sorcerer's apprentice but not the sorcerer himself." Alexander v. Sandoval , 532 U.S. 275, 292 (2001). In other words, an agency's authority is limited to what has been authorized by Congress. See id. Here, the "duty to apply", as it applies to CAFOs that have not discharged, and the imposition of failure to apply liability is an attempt by the EPA to create from whole cloth new liability provisions. The CWA simply does not authorize this type of supplementation to its comprehensive liability scheme. Nor has Congress been compelled, since the creation of the NPDES permit program, to make any changes to the CWA, requiring a non-discharging CAFO to apply for an NPDES permit or imposing failure to apply liability. Thus, we echo the sentiments of the Second Circuit in Waterkeeper:

> While we appreciate the policy considerations underlying the EPA's approach in the CAFO Rule, however, we are without authority to permit it because it contravenes the regulatory scheme enacted by Congress . . . . To the extent that policy considerations do warrant changing the statutory scheme, such considerations address themselves to Congress, not to the courts.

Waterkeeper, 399 F.3d at 505 (citations and internal quotation marks omitted).

2. Land Application

The Farm Petitioners argue that the EPA's requirement that all NMPs

address protocols for land application exceeds the EPA's statutory authority.[39] Our analysis of this issue necessitates a brief overview of the relevant parts of the 2003 Rule and the Second Circuit's discussion of the 2003 Rule in Waterkeeper.

As previously noted, the 2003 Rule established a mandatory duty for all CAFOs applying for a permit to develop and implement an NMP, which required a CAFO to establish BMPs. The BMPs were designed to ensure adequate storage of manure and wastewater, proper management of mortalities and chemicals, and relevant here, appropriate site specific protocols for land application. See68 Fed. Reg. at 7176. However, NMPs (and thus BMPs) were not required to be part of a CAFO's NPDES permit.

In Waterkeeper, the parties disputed "whether the terms of the [NMPs], themselves, constitute effluent limitations that must be included in the NPDES permits." 399 F.3d at 502. The Second Circuit held that because the 2003 Rule failed to require that the terms of NMPs be included in NPDES permits, the 2003 Rule violated the CWA. The court explained that the CWA defined effluent limitation as "'any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources . . .'" Id . (citing 33 U.S.C. § 1362(11)). Because "the requirement to develop [an NMP] constitutes a restriction on land application discharges ," the court held, there was no doubt that the CWA's definition of effluent limitation encompassed an NMP. Waterkeeper, 399 F.3d at 502 (emphasis added). Thus, the Second Circuit concluded that the EPA must incorporate CAFOs' site-specific NMPs into their permits.

Accordingly, the 2008 Rule requires that "[a] permit issued to a CAFO

[39] As previously explained, treated manure from CAFOs is typically applied to cropland as fertilizer. This fertilizing process is called land application.

must include a requirement . . . to develop and implement" an NMP. 73 Fed. Reg. at 70,437. The Farm Petitioners argue that the EPA's response to the Second Circuit's mandate is impermissible because it allows CAFOs to regulate all land application, even if the land application is applied pursuant to an NMP. They further contend that, in violation of the CWA's jurisdictional limits and Waterkeeper, the EPA requires CAFOs that seek permit coverage only for production area discharges to apply also for coverage for land application areas.

The Farm Petitioners' arguments are problematic because they are challenging a requirement promulgated in the 2003 Rule. Thus, the Farm Petitioners' arguments had to be made within the 120-day time period for challenging rules promulgated by an agency. 33 U.S.C. § 1369(b)(1). The 120-day time limit is well-established, and this court has explained that the limitation is strictly enforced. See Tex. Mun. Power Agency v. Envtl. Prot. Agency, 799 F.2d 173, 175 (5th Cir. 1986). The only exception to this limitation is if the grounds for the challenge arose after the 120-day time period. Id. It is clear that the grounds for the challenges made by the Farm Petitioners did not arise after the 120-day time period. Notably, the Farm Petitioners, many of whom were parties in Waterkeeper, had the opportunity to respond to arguments made by other petitioners in that case, advocating that the NMP terms be included in a CAFO's permit. They did not. Thus, the Farm Petitioners' arguments, regarding NMPs and the protocols for land application, brought almost six years after they were promulgated, are time barred.

B. Poultry Petitioners' Challenges

As previously noted, after the EPA issued the 2008 Rule, it issued three guidance letters. Identical letters were sent to Senator Carper and Representative Castle. The third letter was sent to a farm executive. The Poultry Petitioners' claims center on the substance of the EPA Letters. The guidance letters state that poultry growers must apply for NPDES permits for

the releases of dust through poultry confinement house ventilation fans. The Poultry Petitioners argue that this requirement is a substantive rule because it creates new legal consequences and affects individual rights and obligations. Thus, because the EPA failed to subject this rule to proper notice and comment, as required by the APA, the Poultry Petitioners argue that this court should set aside the EPA Letters' pronouncement as unlawful. The EPA asks that we dismiss the Poultry Petitioners' claim because 33 U.S.C. § 1369(b)(1) governs whether this court has jurisdiction to review an agency action, and the EPA Letters do not fit within subsection 1369(b)(1)'s parameters. We agree and, for the following reasons, dismiss the Poultry Petitioners' claims.

The CWA establishes a bifurcated jurisdictional scheme whereby courts of appeals have jurisdiction over some categories of challenges to EPA action, and the district courts retain jurisdiction over other types of complaints. Chem. Mfrs. Ass'n v. Envtl. Prot. Agency , 870 F.2d 177, 265 (5th Cir. 1989). Specifically, 33 U.S.C. § 1369(b)(1) authorizes original jurisdiction to courts of appeals to review certain agency "final actions." [40]Relevant to the Poultry Petitioners'

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[40] Specifically, section 1369(b)(1) grants courts of appeals original jurisdiction to review agency "final actions":

> (A) in promulgating any standard of performance under section 1316 of this title,
>
> (B) in making any determination pursuant to section 1316(b)(1)(C) of this title,
>
> (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title,
>
> (D) in making any determination as to a State permit program submitted under section 1342(b) of this title,
>
> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title,
>
> (F) in issuing or denying any permit under section 1342 of this

Release 2 - HQ-FOI-01268-12 All emails sent by "Richard Windsor" were sent by EPA Administrator Lisa Jackson

claims, this court can review an agency's final action (1) approving or promulgating certain effluent limitations, § 1369(b)(1)(E), and (2) issuing or denying certain permits, § 1369(b)(1)(F).

As a threshold matter, in order for this court to have jurisdiction, the guidance letters must constitute an agency final action. The Supreme Court explained in Bennett v. Spear, 520 U.S. 154 (1997), that an agency action is final only if it meets two criteria. Id. at 177–78. First, the action must mark the "consummation" of the agency's decision-making process; it cannot be tentative or interlocutory. Id. Second, the action must be one by which "rights or obligations have been determined" or from which "legal consequences will flow." Id.

In regard to the first Bennett prong, we note that guidance letters can mark the "consummation" of an agency's decision-making process. See Her Majesty the Queen in Right of Ontario v. Envtl. Prot. Agency, 912 F.2d 1525, 1532 (D.C. Cir. 1990) (holding that the EPA's guidance letters constitute final agency actions because they "serve[d] to confirm a definitive position that has a direct and immediate impact on the parties . . . ."); Ciba-Geigy Corp. v. Envtl. Prot. Agency, 801 F.2d 430, 437 (D.C. Cir. 1986) (finding that the EPA's guidance letters constituted final agency actions because there was "no reason to believe that the EPA Director of Pesticide Programs lack[ed] authority to speak for EPA on th[e] issue or that his statement of the agency's position was only the ruling of a subordinate official that could be appealed to a higher level of EPA's hierarchy." (internal quotations omitted)). However, that the guidance letters can meet the first Bennett prong is not enough. See Bennett, 520 U.S. at 177

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title, and

(G) in promulgating any individual control strategy under section 1314(l) of this title . . .

Release 2 - HQ-FOI-01268-12 All emails sent by "Richard Windsor" were sent by EPA Administrator Lisa Jackson

("[T]wo conditions must be satisfied for agency action to be 'final' . . . ."). There must also be evidence that the guidance letters have made a substantive change in the EPA's regulation of CAFOs. See id. at 178.

To meet the second Bennett prong, the guidance letters must affect the Poultry Petitioners' rights or obligations or create new legal consequences. Id. Although the guidance letters do, as the Poultry Petitioners note, obligate them to obtain a permit if they discharge manure or litter through ventilation fans or face legal consequences, the EPA Letters neither create new legal consequences nor affect their rights or obligations. Here, the guidance letters merely restate section 1342's prohibition against discharging pollutants without an NPDES permit. Agency actions that have no effect on a party's rights or obligations are not reviewable final actions. Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs, 543 F.3d 586, 593 94 (9th Cir. 2008) (explaining that the second Bennett prong was not met where "rights and obligations remain unchanged."); Nat'l Ass'n of Home Builders v. Norton, 415 F.3d 8, 15 (D.C. Cir. 2005) ("[I]f the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review."). Moreover, an agency's actions are not reviewable when they merely reiterate what has already been established. See, e.g., Am. Paper Inst. v. Envtl. Prot. Agency, 882 F.2d 287, 289 (7th Cir. 1989) (a policy statement providing the EPA's views concerning tolerances for dioxin in permits for paper mills was not a final action, because "telegraphing your punches is not the same as delivering them"); S. Holland Metal Finishing Co. v. Browner, 97 F.3d 932, 935 37 (7th Cir. 1996) (interpretative ruling, construing regulations, was not final action); City of San Diego v. Whitman, 242 F.3d 1097, 1101 02 (9th Cir. 2001) (letter indicating that the Ocean Pollution Reduction Act of 1994, Pub. L. No. 103-431 §§ 1 2, 108 Stat. 4396 97 (1994), would apply to a city's as-yet-unfiled application to renew its NPDES permit was not a final action). The EPA Letters

Release 2 - HQ-FOI-01268-12 All emails sent by "Richard Windsor" were sent by EPA Administrator Lisa Jackson

do not change any rights or obligations and only reiterate what has been well-established since the enactment of the CWA CAFOs are prohibited from discharging pollutants without a permit. Thus, they do not meet the two-part Bennett test and are not reviewable, final agency decisions.

Accordingly, we grant the EPA's motion to dismiss because we lack jurisdiction to consider the Poultry Petitioners' challenge to the EPA Letters.

III. CONCLUSION

For the foregoing reasons, the petitions are granted in part, denied in part, and dismissed in part. We hereby vacate those provisions of the 2008 Rule that require CAFOs that propose to discharge to apply for an NPDES permit, but we uphold the provisions of the 2008 Rule that impose a duty to apply on CAFOs that are discharging. We vacate those provisions of the 2008 Rule that create liability for failing to apply for an NPDES permit. Additionally, we uphold the provisions of the 2008 Rule that allow permitting authorities to regulate a permitted CAFO's land application and include these requirements in a CAFO's NPDES permit. Finally, we dismiss the Poultry Petitioners' challenge of the guidance letters for lack of jurisdiction.

01268-EPA-1032

Seth Oster/DC/USEPA/US
03/16/2011 09:06 AM

To "Lisa Jackson"
cc
bcc
Subject Fw: REVISED draft for MATS remarks

The updated version I mentioned.
Michael Moats

----- Original Message -----
From: Michael Moats
Sent: 03/16/2011 09:04 AM EDT
To: John Millett; ellis.heidi@epa.gov; Aaron Dickerson; Marcus McClendon
Cc: Brendan Gilfillan; Dru Ealons; Gina McCarthy; Seth Oster
Subject: REVISED draft for MATS remarks

Reflecting the changes to the numbers outlined below. Please use this version, number (5).

(b)(5) Deliberative

20110316 Mercury Air Toxics (5).docx

Michael Moats
Chief Speechwriter
US EPA | Office of the Administrator
Office: 202-564-1687
Mobile: 202-527-4436

John Millett Michael -- three bullets need numbers c... 03/16/2011 08:32:43 AM

From: John Millett/DC/USEPA/US
To: Michael Moats/DC/USEPA/US@EPA
Cc: Brendan Gilfillan/DC/USEPA/US@EPA, Dru Ealons/DC/USEPA/US@EPA, Gina McCarthy/DC/USEPA/US@EPA, Seth Oster/DC/USEPA/US@EPA
Date: 03/16/2011 08:32 AM
Subject: Corrected Numbers: ACTION MATS draft

Michael -- three bullets need numbers corrected in the administrator's remarks. Sorry -- these got by me yesterday. The rest of the numbers in the remarks are correct .

(b)(5) Deliberative

[redacted]

[redacted]

[redacted]

Michael Moats File attached. Please factcheck and pr... 03/15/2011 04:09:01 PM

From: Michael Moats/DC/USEPA/US
To: Seth Oster/DC/USEPA/US@EPA, Gina McCarthy/DC/USEPA/US@EPA
Cc: John Millett/DC/USEPA/US@EPA, Brendan Gilfillan/DC/USEPA/US@EPA, Dru Ealons/DC/USEPA/US@EPA
Date: 03/15/2011 04:09 PM
Subject: ACTION MATS draft

File attached. Please factcheck and proofread and let me know ASAP if you see any flags.

(b)(5) Deliberative

[attachment "20110316 Mercury Air Toxics (2).docx" deleted by John Millett/DC/USEPA/US]

Michael Moats
Chief Speechwriter
US EPA | Office of the Administrator
Office: 202-564-1687
Mobile: 202-527-4436

01268-EPA-1042

Diane Thompson/DC/USEPA/US
03/24/2011 05:43 PM

To Michael Goo, Bob Sussman, Seth Oster, Bicky Corman
cc Richard Windsor, Bob Perciasepe, Erica Jeffries, Christopher Busch, Ann Campbell, Nena Shaw, Venu Ghanta, Mary Hanley, KarenL Martin, David McIntosh, Daniel Kanninen
bcc
Subject Materials for WH meeting

Attached is the next draft of the policy calendar for tomorrow's mtg with Nancy Ann, et al. I will be editing it further this evening. Please review for any items you think should be, but are not, included; and note any items you think are not significant enough to be included. We will put together a final draft after talking with the Administrator in the morning. Thanks

(b)(5) Deliberative

Mar-June Policy Calendar_v8_highlights.xlsx

Chris L. Busch
Special Assistant to the Chief of Staff
Office of the Administrator | US EPA
Office: (202) 250-8798
Mobile: (202) 450-0968

****

Diane E. Thompson
Chief of Staff
U. S. Environmental Protection Agency
202-564-6999

01268-EPA-1045

Bob Perciasepe/DC/USEPA/US
03/25/2011 10:55 AM

To "Seth Oster", "Richard Windsor", "Bob Sussman", "Gina McCarthy"
cc
bcc
Subject Fw: Public Release

Bob Perciasepe
Deputy Administrator
(o)202 564 4711
(c) (b) (6) Privacy

From: "Michael Bradley" [mbradley@mjbradley.com]
Sent: 03/25/2011 10:45 AM AST
To: Bob Perciasepe
Cc: "Darlene Ryan" <dryan@mjbradley.com>
Subject: FW:Public Release

Bob,

Attached is the CEG statement of support for the Utility Toxics Rule which was approved by the CEOs last night.

Michael

CEG Toxic Rule Statement Final.pdf

The Clean Energy Group
Clean Air Policy Initiative

FOR IMMEDIATE RELEASE

The Electric Industry Can Comply with the Proposed Toxics Rule with Existing, Cost-Effective Pollution Control Technologies and Compliance Will Not Compromise the Reliability of the Electric System

Washington, D.C. – March 25, 2011 – Upon our initial review, the Clean Energy Group's Clean Air Policy Initiative believes that EPA's recently proposed Toxics Rule, on the whole, is balanced and reasonable. The proposal fulfills EPA's obligations under the Clean Air Act (CAA) and will establish the first national emissions standards for hazardous air pollutants for electric utility generators. While we will continue to review the proposed rule and will be submitting comments with recommendations for the final rule, we expect compliance with the rule will promote economic growth, innovation, competitiveness, and job creation, all without compromising the reliability of our electric system.

"We appreciate EPA's efforts to engage with the electric industry in a transparent way in order to develop an effective rule consistent with requirements of the CAA," said Michael Bradley, Executive Director of the Clean Energy Group. "We also appreciate efforts to include several elements that allow for compliance flexibility such as the ability to average among units at a facility. This option will enable companies to implement cost effective compliance solutions while still ensuring the environmental benefits. We anticipate EPA's continued engagement with stakeholders so that the final rule is legally and technically sound."

Since 2000, the electric industry has been anticipating that EPA would regulate hazardous air pollutant emissions, and as a result, many companies have already taken steps to install control technologies that will allow them to comply with requirements of the rule on time. The technologies to control emissions at coal-fired power plants, including mercury and hydrochloric acid, are available and cost effective. However, if additional time is needed to install control technologies, EPA has the authority to authorize a plant up to one additional year to comply.

"We've made significant investments in technology at our plants, and they are now some of the cleanest coal plants in the U.S.," said Ralph Izzo, Chairman, President and Chief Executive Officer of Public Service Enterprise Group. "The work we did reduced hazardous air pollutants and even stimulated important economic activity. We can move forward with this rule without compromising the reliability of the electric system."

"We recently completed the installation of a major air quality control system, including scrubbers, a baghouse, and other equipment at one of our major coal facilities in Maryland," said Mayo Shattuck, Chairman, President and Chief Executive Officer of Constellation Energy Group. "Construction took 26 months, employing nearly 1,400 skilled workers. Our new system is not only reducing our SO_2 and NOx emissions in compliance with state and federal requirements, but is already helping us to achieve the other emission reductions that we anticipate will be required under the Toxics Rule."

Many companies are already making plant retirement decisions independent of the Toxics Rule due to fundamental economics related to lower electricity demand and lower natural gas prices.

"The electric industry has a proven track record of adding generating capacity and transmission solutions when and where needed and coordinating effectively to address reliability concerns," said Jack Fusco, President and Chief Executive Officer of Calpine Corporation. "In addition, existing natural gas-fired power plants have significant unutilized power production capacity to help meet demand as owners select to retire plants or schedule outages to install pollution control systems, thereby easing reliability concerns."

We look forward to working with EPA during the public comment period to ensure the timely finalization of this important rule as well as its effective implementation.

The Clean Energy Group
Clean Air Policy Initiative

The Clean Energy Group's Clean Air Policy Initiative is a coalition of electric power companies dedicated to responsible energy and environmental stewardship. The member companies are some of the nation's largest generators of electricity, with over 170,000 megawatts of electric generating capacity (including 110,000 megawatts of fossil generating capacity) throughout the U.S., and serve nearly a fifth of all U.S. electric customers. The members include Austin Energy, Avista Corporation, Calpine Corporation, Constellation Energy, Exelon Corporation, National Grid, New York Power Authority, NextEra Energy, PG&E Corporation, Public Service Enterprise Group, Inc., and Seattle City Light.

CONTACT
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01268-EPA-1046

Christopher Busch/DC/USEPA/US
03/25/2011 01:14 PM

To Seth Oster, Michael Goo, Bob Sussman, Diane Thompson
cc Richard Windsor, Bob Perciasepe, Adora Andy, Dan Kanninen
bcc
Subject Updated Policy Highlights Calendar

All,

The attached policy highlights calendar has been revised per this morning's meeting. For this afternoon's WH meeting please bring a copy for yourself and Diane will have copies for the attendees from the WH.

Thanks,

Chris

(b)(5) Deliberative

Mar-June Policy Calendar_v12_highlights.xlsx

Chris L. Busch
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Office: (202) 250-8798
Mobile: (202) 450-0968

01268-EPA-1047

Betsaida Alcantara/DC/USEPA/US
03/26/2011 10:06 AM

To "Richard Windsor", "Adora Andy", "Seth Oster"
cc
bcc
Subject Latest 316B materials

Administrator,
Here are the latest comms materials for the cooling water intake rule. These are also at the WH being reviewed.
Betsaida Alcantara

----- Original Message -----
From: Betsaida Alcantara
Sent: 03/25/2011 06:11 PM EDT
To: Bob Sussman; David McIntosh
Subject: Latest 316B materials

Here are the latest documents for 316B rollout. Please send in any comments by Monday morning. WH is still reviewing press release. I'll have the program and Nancy look at this after I have input from you and WH.

(b)(5) Deliberative

032511 - Tough Internal Qs and As (316b).docx

(b)(5) Deliberative

032311 - 316b Press Release.docx

(b)(5) Deliberative

032211- 316 b rollout plan.doc

(b)(5) Deliberative

032511 - General Internal Qs and As 316b.doc

01268-EPA-1053

Sarah Pallone/DC/USEPA/US
04/01/2011 10:56 AM

To David McIntosh
cc Arvin Ganesan, Barbara Bennett, Bicky Corman, Bob Perciasepe, Bob Sussman, Diane Thompson, Laura Vaught, Michael Goo, Richard Windsor, Seth Oster
bcc
Subject Re: ECOS in front of the Interior Environment Approps Subcommittee on April 15

To add one additional commentary, Steve Brown is from the State of Kentucky. From his bio "He worked for Kentucky's Division of Air and the Division of Permits."

Sarah Hospodor-Pallone
Deputy Associate Administrator
for Intergovernmental Relations
Office of the Administrator
202-564-7178
pallone.sarah@epa.gov

David McIntosh (b)(5) Deliberative 04/01/2011 10:40:53 AM

From: David McIntosh/DC/USEPA/US
To: Richard Windsor/DC/USEPA/US@EPA, Diane Thompson/DC/USEPA/US@EPA, Bob Perciasepe/DC/USEPA/US@EPA, Barbara Bennett/DC/USEPA/US@EPA, Bob Sussman/DC/USEPA/US@EPA, Michael Goo/DC/USEPA/US@EPA, Bicky Corman/DC/USEPA/US@EPA, Seth Oster/DC/USEPA/US@EPA
Cc: Arvin Ganesan/DC/USEPA/US@EPA, Laura Vaught/DC/USEPA/US@EPA, Sarah Pallone/DC/USEPA/US@EPA
Date: 04/01/2011 10:40 AM
Subject: ECOS in front of the Interior Environment Approps Subcommittee on April 15

(b)(5) Deliberative

4007_file_ECOS_Testimony_on_EPA_2011_Budget_to_House.doc

The Environmental Council of the States
Testimony before the
Subcommittee on Interior, Environment and Related Agencies
U.S. EPA 2011 Budget
March 19, 2010

Testimony from:

R. Steven Brown, Executive Director
Environmental Council of the States
444 North Capitol St, NW Suite 445
Washington, DC 20001
202-624-3667
sbrown@ecos.org

on behalf of the Environmental Council of the States (ECOS). The Environmental Council of the States (ECOS) is the national non-profit, non-partisan association of state and territorial environmental agency leaders.

Summary
The States' environmental agencies collectively support the President's 2011 State and Tribal Assistance Grants (STAG) budget request, and specifically support the Categorical Grants potion of that request, with the exception that we believe the Public Water System Supervision (PWSS) grant should be provided the same increase as the Clean Water Act 106 grant.

Testimony
The States are integral partners and co-regulators with the U.S. Environmental Protection Agency (EPA) in the implementation of the nation's environmental laws. States conduct on EPA's behalf most of the permitting, enforcement, inspections, monitoring, and data collection required by those federal environmental laws. In this document, the States' environmental agencies respectfully submit their collective comments on the 2011 budget proposal for the categorical grants portion of the U.S. Environmental Protection Agency's budget that supports states, tribes, and local governments, known as the State and Tribal Assistance Grants (STAG).

In the period 2004-2009, federal support for State environmental protection declined. With the passage of the American Recovery and Reinvestment Act (ARRA) and the 2010 budget, this trend reversed for the infrastructure portions of the EPA budget. States committed 100% of the safe drinking water and clean water ARRA funds within the time allotted, and exceeded the minimum requirements for expenditures on green infrastructure projects. We are grateful to Congress for the funding and proud of the States' achievements in quickly committing the infrastructure funds to important projects. We expect an excellent return in terms of both jobs and environmental compliance as a result of this investment.

However, another portion of the federal support for States has not been so fortunate. States rely on the "categorical grants" portion of the EPA STAG budget for support for the delegated and assumed programs. There are 20 categorical grants that cover the many environmental protection

programs that States conduct in partnership with EPA. During the past three-year period 2007-2009, EPA promulgated 305 new or modified rules, for which essentially no additional funding was provided to the States. In addition, EPA continues to plan about 100 more rules under development that will affect States.[1] Many of these affect States because EPA expects States to implement them and, therefore, they carry an additional workload. Some of these may carry an especially heavy cost burden as well. For example, EPA listed five of these rules as having "federalism implications" in 2009:

2020-AA47 NPDES Program Management Information Rulemaking
2040-AD39 Uniform National Discharge Standards for Vessels of the Armed Forces--Phase II
2040-AA94 National Primary Drinking Water Regulations: Radon
2050-AE81 Standards for the Management of Coal Combustion Residuals Generated by Commercial Electric Power Producers
2070-AC64 Lead-Based Paint Activities;

These rules are in various stages of development, and there are others that have not yet been so designated that will no doubt be listed by the time the 2011 budget goes into effect. There are also other rules and policies that are not listed above that States believe will have equal or greater impact on their environmental agency budgets because they are new, are major modifications, or because they regulate previously unregulated industries.

The primary concern of the States is that the number and complexity of new rules is arriving at a time when State resources are at their lowest in years. States are not opposing these rules, and may often be eager to implement them, but there is great concern among state environmental agency leaders about the resources being provided to accomplish these tasks.

EPA has reported that "for every dollar EPA Obligates, states contribute approximately 22 cents, which results in states, contributing 18% of the project cost."[2] This conclusion is based on the minimum match requirements for categorical and infrastructure grants. However, for the largest categorical grants (e.g., 106, clean air, etc.), States greatly "overmatch" the federal grant, which EPA's report does not take into account. Therefore, we find that in a typical State, 20-30% of the total categorical funding comes from EPA. The rest comes mostly from permit fees and state general funds.[3] State environmental agencies have lost a substantial amount of their funding from non-federal sources over the past year, with many states reducing staff and/or holding positions vacant.[4]

The combination of new and modified rules, declines in federal funding, and loss of state funding sources means the state-federal environmental partnership is under great strain. States are making hard decisions about which parts of federal programs they can continue to implement, and which parts they may have to ask EPA to undertake for a while.

---

[1] See Fall 2009 EPA Semiannual Regulatory Agenda, Index D and E, and previous editions.
[2] "EPA Grants – State Cost Share" via email from David Bloom to Steve Brown, February 25, 2010.
[3] State Environmental Expenditures, 2005-2008, Environmental Council of the States, March 2008.
[4] Impacts of Reductions in FY 2010 on State Environmental Agency Budgets, publication, Environmental Council of the States, March 2010. See www.ecos.org

Fortunately, States and EPA have worked to improve our communications on these matters. Part of that communication has been State input into EPA's annual budget process. In 2009, as EPA began to develop its 2011 budget, ECOS was again asked to present its STAG budget needs. Focusing on the categorical grants (largely because ARRA had just passed and had addressed the infrastructure needs), ECOS presented the "statement of needs," which outlined our assessment of the workload and the resources needed to accomplish it, with an emphasis on the largest categorical grants such as those previously listed. The resulting total for categorical grants was about double the current amount provided. However, we recognized that such a request would be very hard indeed to honor. So, we stated that our "base request is a 2% increase above 2010 appropriations to address inflation" that would be applied to every categorical grant. We also explained that new rules would need new resources, especially this year.

We were therefore pleased to see that EPA had listened to this request, and included an overall 14.3% increase for the categorical grants programs, with most receiving the 2% request and some (such as the air program and the clean water program which have new expansions) receiving larger amounts. This approach addresses some of the state needs, and is especially welcome during the current difficulties that states are facing in obtaining funding from state sources.

The primary shortcoming in the agency's budget approach is that the drinking water program was not provided any increase. Our understanding from the agency is that it believed that previous budgets had addressed these needs. However, ECOS' examination of recent categorical grants budgets does not match the agency's assessment. For example:

	Categorical Grant: Public Water System Supervision (PWSS)	PWSS annual % increase	PWSS net % increase	Comparative net increase for CWA 106	Comparative net increase for Air Quality Mgmt
2007 CR (base year)	$98,274,000	Base year	Base year	Base year	Base year
2008 actual	$97,554,000	-0.738%	-0.738%	0.937%	-1.580%
2009 actual	$99,440,100	1.897%	1.187%	0.312%	1.494%
2010 actual	$105,700,000	5.922%	7.556%	6.061%	2.874%
2011 proposed	$105,700,000	0.000%	7.556%	26.879%	40.331%

This shows that the Categorical Grant for the drinking water programs is not keeping pace with the air and water point-source programs, and did not have a "head start" over the other programs in previous years that would carry it forward into the present, as the agency seems to assert. Furthermore, the PWSS grant had been supplemented by a Homeland Security grant of nearly $6m per year that was eliminated in the 2010 budget. These duties must still be conducted, but the Homeland Security subcommittee seems unlikely to fund these activities, which means there is no funding source for them. In consideration of these facts and trends, we respectfully suggest that the PWSS categorical grant should be increased in an amount commensurate with the CWA 106 grant.

Other Considerations

ECOS notes that the proposed EPA budget has eliminated several programs added by Congress in last year's or previous years' appropriations. Our endorsement of the President's budget should not necessarily be interpreted as opposition to these programs.

01268-EPA-1054

Cynthia Giles-AA/DC/USEPA/US
04/03/2011 04:39 PM

To Richard Windsor
cc Bob Perciasepe, Bob Sussman, Aaron Dickerson
bcc
Subject OECA HIT list

Attached is OECA hot issue tracker for coming two weeks, and proposed agenda (with attachment) for one on one on April 5.

Cynthia

(b)(5) Deliberative, (b)(5) Attorney-Client, (b)(5) Attorney Work Product (b)(5) Deliberative, (b)(5) Attorney-Client, (b)(5) (b)(5) Deliberative, (b)(5) Attorney-Client, (b)(5) Attorney Work Product

OECA HITList 4-3-11.docx Giles April 5, 2011.docx Diesel_Enforcement Approach_032711.docx

Cynthia Giles
Assistant Administrator
U.S. EPA, Office of Enforcement and Compliance Assurance
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
202-564-2440

THIS MESSAGE IS CONFIDENTIAL and may contain legally privileged information. If you receive it in error, please delete it immediately, do not copy, and notify the sender. Thank you.

01268-EPA-1059

Alisha Johnson/DC/USEPA/US

04/15/2011 10:05 AM

To "Richard Windsor"
cc
bcc
Subject Fw: Wilma Subra

Brendan Gilfillan

----- Original Message -----
From: Brendan Gilfillan
Sent: 04/15/2011 10:02 AM EDT
To: Alisha Johnson
Subject: Fw: Wilma Subra

Sam Coleman

----- Original Message -----
From: Sam Coleman
Sent: 04/15/2011 09:00 AM CDT
To: Brendan Gilfillan
Cc: Alisha Johnson; David Gray; Janet Woodka; Paul Anastas; coleman.sam@epa.gov
Subject: Re: Wilma Subra

Attached are the fact sheets that CDC issued concerning VOC's. Louisiana Environmental Action Network (LEAN) has an almost weekly blog concerning health effects from the spill. NOAA/CDC conducted meetings along the coast concerning restoration and other topics. I will send the report I have under a separate email.

Final Resident Fact Sheet.pdf

Final Clinician Fact Sheet.pdf

Samuel Coleman, P.E.
Director, Superfund Division Region 6
214 665-6701
214 789-2016 (cell)
coleman.sam@epa.gov

Brendan Gilfillan Adding Sam and David. ----- Origina... 04/14/2011 10:14:55 PM

From: Brendan Gilfillan/DC/USEPA/US
To: Janet Woodka/DC/USEPA/US@EPA, Paul Anastas/DC/USEPA/US@EPA
Cc: Alisha Johnson/DC/USEPA/US@EPA, "David Gray" <Gray.David@epamail.epa.gov>, "Sam Coleman" <Coleman.Sam@epamail.epa.gov>
Date: 04/14/2011 10:14 PM
Subject: Re: Wilma Subra

Adding Sam and David.

Janet Woodka

Release 2 - HQ-FOI-01268-12 All emails sent by "Richard Windsor" were sent by EPA Administrator Lisa Jackson

Community Fact Sheet

Volatile Organic Compounds and Your Health

Some people in the Gulf have had their blood tested for volatile organic compounds (VOCs) because they were worried about exposure to chemicals after the Gulf oil spill. CDC and ATSDR are working with Gulf residents and their doctors to help them understand what the results might mean.

The Gulf oil spill had a major impact on the environment and communities. Concerns about health are understandable. CDC and state health departments tracked health effects after the spill. Some people reported short-term symptoms like throat or eye irritation, headaches, or coughs. In similar situations in other communities, people have also experienced stress or anxiety.

About VOCs

Organic compounds are chemicals that contain carbon and are found in all living things. Volatile organic compounds, or VOCs, are organic compounds that easily become vapors or gases. Volatile compounds are often known for giving things their 'smell'. VOCs are released from burning fuel, such as gasoline, wood, coal, or natural gas. They are also released from paint, glue, and other products used at home or work. Some examples of VOCs that are found in crude oil and petroleum products like gasoline are benzene, toluene, ethylbenzene and xylenes.

After the oil spill, environmental agencies sampled the air for these VOCs. They found some VOCs in the air. But the levels that were found were very low and are not likely to result in any increase in cancer risk or long term health effects.

VOCs are part of our daily lives

VOCs are very common. You can come into contact with VOCs in many ways, including:

- Pumping gasoline
- Working around burning fuel such as gas, wood, coal, or natural gas
- Breathing in paint thinners, pesticides, degreasers, or some scented candles
- Smoking cigarettes or breathing secondhand smoke
- Living near refineries, other industries, or highways

Health effects of VOCs

Most people can be around low levels of VOCs without feeling health effects.

Health effects depend on the type of VOC a person is exposed to, how long they were exposed, and how much they were exposed to. At higher levels over a long time, some VOCs can cause long-term health effects, especially to your brain, blood, or liver. Some VOCs may increase your chance of getting certain types of cancer. A person who is exposed for a short time to very high levels could feel dizzy, sleepy, or confused.

Questions about long-term health effects from low levels of exposure are very important. We are always trying to add to our knowledge about low levels of exposures and possible health effects.

VOC levels tested in air after the oil spill were well below levels related to long-term health effects. We do not know everything about low-level exposures. However, based on what we know, the likelihood of long-term health effects, including cancer, is very low.

CDC ATSDR
Centers for Disease Control and Prevention
Agency for Toxic Substances and Disease Registry

CS221524-A

Protecting yourself from VOCs

To limit exposure, you can:

- Use products that contain VOCs in open areas, so that the gases can evaporate into the air.
- Avoid direct contact with VOC products, oil, or sludge.
- If products containing VOCs are spilled on the skin, wash well with soap and water.
- Avoid smoking and avoid breathing secondhand smoke.

About blood tests for VOCs

Detection of VOCs in blood is common but test results only re ect very recent exposures. Detection means that someone has been exposed, but it does not mean a person will have health e ects from the VOCs.

CDC and ATSDR do not recommend testing your blood for VOCs. Laboratory testing for VOCs is extremely di cult and does not always give useful results.

- These chemicals only stay in the blood a short time therefore test results only re ect very recent exposures (within hours or days of testing).
- Lab tests for VOCs will not help your doctor manage your health issues.
- Lab tests cannot always tell the source of the VOC exposure, for example whether the exposure is from smoking or from oil.
- The labs must handle and store test tubes very carefully or the results will not be accurate.
- The lab must be able to detect the chemical at very small amounts – parts per trillion. Many labs do not have the ability to test for these extremely low levels accurately.

If a person has had VOC testing and is concerned about the results, he or she should discuss the results with the doctor who ordered the results.

Where to nd more information

Other good sources of accurate information about VOCs in general and the Gulf Oil Spill are

- Regional Poison Control Centers in Alabama, Florida, Louisiana, Mississippi, and Texas. To reach your nearest Poison Control Center, call 1-800-222-1222.
- State health departments.
- Association of Occupational and Environmental Clinics: http://www.aoec.org/about.htm
- Pediatric Environmental Health Specialty Units (http://aoec.org/PEHSU/index.html). These are in several university hospitals. Doctors can provide information about potential exposure to children. These units are supported by ATSDR and EPA.
- NIH Gulf health study: http://www.niehs.nih.gov/about/od/programs/gulfspill/gulfstudy/index.cfm

To learn more about volatile organic compounds:

Benzene: http://www.atsdr.cdc.gov/toxfaqs/tf.asp?id=38&tid=14

Toluene: http://www.atsdr.cdc.gov/toxfaqs/tf.asp?id=160&tid=29

Ethylbenzene: http://www.atsdr.cdc.gov/toxfaqs/TF.asp?id=382&tid=66

Xylene: http://www.atsdr.cdc.gov/toxfaqs/tf.asp?id=295&tid=53

Hexane: http://www.atsdr.cdc.gov/toxfaqs/TF.asp?id=392&tid=68

To learn more about the oil spill and your health

Light crude oil: http://emergency.cdc.gov/gulfoilspill2010/light_crude_residents.asp

How to Protect Your Health: http://emergency.cdc.gov/gulfoilspill2010/what_to_expect.asp

Release 2 - HQ-FOI-01268-12 All emails sent by "Richard Windsor" were sent by EPA Administrator Lisa Jackson

CDC/ATSDR Guidance on the Interpretation and Use of Blood Laboratory Analyses for Volatile Organic Compounds

The Centers for Disease Control and Prevention (CDC) and the Agency for Toxic Substances and Disease Registry (ATSDR) recently received reports of analyses of volatile organic compounds (VOC) in blood samples from a few Gulf Coast residents, volunteers, or workers. CDC and ATSDR guidelines issued during the Deepwater Horizon Oil Spill did not recommend the use of laboratory testing for specific chemicals to either determine exposure or guide delivery of clinical care; nonetheless, we recognize that clinicians may have offered these tests to their patients to provide reassurance or to respond to patient requests.

The Gulf oil spill had a major impact on the environment and communities, and concerns about human health are understandable. For several months CDC and state health departments tracked potential short-term health effects related to the oil spill in the affected communities. No trends in illnesses were identified by the multiple surveillance systems used. CDC surveillance did detect some complaints of non-specific symptoms such as throat irritation, eye irritation, nausea, headache and cough. Based on other oil spill disasters, symptoms related to mental or behavioral health such as anxiety, stress and depression also would reasonably be expected. For treatment and management of these symptoms, standard clinical protocols guided by the presentation of the patient are appropriate, and no laboratory testing for specific chemicals is indicated.

Volatile Organic Compounds (VOC)

VOC refers to a group of carbon-containing compounds that readily become vapor at room temperature http://toxtown.nlm.nih.gov/text_version/chemicals.php?id=31. VOCs are ubiquitous in the environment, and most people have multiple sources of exposure. People living close to refineries, chemical plants and highways will have some background exposure to VOCs. VOCs are present in and also released from burning fuel, such as gasoline, wood, coal or natural gas. Crude oil is a mixture of hydrocarbons, many of which are volatile. Other more typical sources of VOC exposure include solvents, paint thinners, degreasers, gasoline fuel additives, some scented candles, and cigarette smoke.

The VOCs that were of most concern for inhalational or direct contact exposure from the Gulf oil spill were benzene, toluene, ethylbenzene, and xylene. These VOC compounds are readily absorbed by inhalation and rapidly leave the blood to distribute to other parts of the body including adipose tissue. While each has different metabolic pathways, typically their half-lives are
bi-phasic with a very short (minutes to hour) first phase followed by a slightly longer (hours to days) second phase. Health effects vary by compound, but at air concentrations associated with large industrial accidents or inhalational self-abuse, they may cause CNS depression ranging from dizziness and confusion to loss of consciousness. Removal from exposure typically resolves these health effects. Long-term effects from chronic exposures, typically over years, can lead to hematological and nervous system effects. Benzene is a known human carcinogen and exposure increases the risk of leukemia.

During the Gulf oil spill, analyses of environmental air samples for VOCs along the Gulf shore found air concentrations that would not likely result in long term health effects to residents of Gulf coast communities. Ongoing investigations by Federal agencies such as the National Institutes of Health (NIH) will help further understand any exposures to people who helped with clean-up activities.

CDC ATSDR
Centers for Disease Control and Prevention
Agency for Toxic Substances and Disease Registry

CS221524-A

Considerations for Laboratory Testing

In commercial clinical laboratory analyses, chemicals that may be included in a VOC panel include benzene, toluene, ethylbenzene, xylene, and hexane. These chemicals have a short half life in the blood and test results only re ect very recent exposures (within hours or days) prior to testing. The laboratory tests for blood VOCs are technically di cult to perform. For example, test tubes must be prepared and stored in a speci c manner. For detecting environmental exposures, the laboratory must be equipped to perform analyses with detection limits in the parts per trillion range for these contaminants. All people have occasional exposure to VOCs from episodic exposures to common sources such as gasoline refueling, breathing vehicular exhaust, cigarette smoke, and working with paints, glues, or solvents. Activities immediately prior to collection, specimen collection locations, and roadway travel to these sites are often a source of exposure prior to blood collection. Testing without consideration of such sources or casual testing can be misleading.

As part of CDC's National Health and Nutrition Assessment Survey (NHANES), CDC's Environmental Health Laboratory measured more than 200 chemicals, including VOCs, in blood or urine of a representative sample of the U.S. population. NHANES is a continuous survey with data being released in two-year cycles. Laboratory measurements undergo extensive quality control and quality assessment review including operational tolerance limits. Stringent procedures are followed to ensure the ability for comparison with previous 2-year cycles. Data from the 2003-04 survey is published in the Fourth National Report on Human Exposure to Environmental Chemicals. http://www.cdc.gov/exposurereport/pdf/FourthReport.pdf The bio-monitoring data and information in the Report do not establish health e ects, nor do they create guidelines. Consideration should be given to comparability of laboratory techniques and the populations sampled if NHANES data is used as a reference range.

CDC/ATSDR Guidance for Laboratory Blood VOC Interpretation

If you have tested your patient for blood VOCs:

Advise/counsel patients

- The presence of a volatile chemical in their blood does not generally indicate any adverse health effect, even at levels multiple times higher than reference ranges.
- We are all commonly exposed to low-levels of VOCs from multiple sources, and laboratory testing cannot distinguish among possible sources of exposure.
- Limit or avoid exposures to sources of VOCs (e.g., crude oil, fuel, solvents, cigarette smoke). VOCs tend to rapidly leave your body; thus no treatment is necessary to remove VOCs from your blood.
- No follow-up testing for VOCs in blood is generally needed.

Review the exposure history taken at the time of testing. The exposure history should have included recent occupational and home sources of VOCs (including second hand cigarette smoke) that will influence patients' blood results.

Evaluate if other factors may influence the interpretation of the laboratory results.

- Time from exposure to sampling (the blood half life of most VOCs is typically a few hours).
- Time from sampling to analytical results (a laboratory turn-around time of days to weeks may not reflect the patient's blood level of the chemical when the results are received).
- Laboratories used for testing occupational exposures may not be suitable to detect low-level environmental exposures.
- Proper preparation and storage of samples including the inadvertent introduction of contaminants from blood collection tubes, such as the use of butyl rubber stoppers on collection tubes.

Evaluate the appropriateness of the reference comparison values.

- Reference ranges may be based on samples analyzed at that laboratory or based on published reference ranges.
- Laboratory reference ranges reflect the population tested and can differ by age, gender, race/ethnicity, location, state of health and other variables. Reference ranges from published analyses, including NHANES, may have used other laboratory procedures with different detection limits and different populations, and thus may not be directly comparable.

Treat and manage patient's symptoms and conditions according to standard clinical protocols guided by the patient's presentation.

- No treatment to 'remove' the VOC chemicals is recommended.
- No follow-up testing for laboratory blood VOC is generally recommended.
- Workers covered by OSHA who are in a medical surveillance plan should follow OSHA guidelines for bio-monitoring of specific chemicals.
- Provide advice and counseling on VOC detection in blood as described above.

For More Information

Oil Spill Clinical Guidance: http://www.bt.cdc.gov/gulfoilspill2010/oilspill_clinical.asp

For information on health and VOCs:
Benzene: http://www.atsdr.cdc.gov/toxguides/toxguide-3.pdf
Ethylbenzene: http://www.atsdr.cdc.gov/toxguides/toxguide-110.pdf
Hexane: http://www.atsdr.cdc.gov/toxfaqs/TF.asp?id=392&tid=68
Toluene: http://www.atsdr.cdc.gov/toxfaqs/tf.asp?id=160&tid=29
Xylene: http://www.atsdr.cdc.gov/toxguides/toxguide-71.pdf

Toxicological Profiles are peer reviewed summaries for more than 300 compounds, published by ATSDR: http://www.atsdr.cdc.gov/toxprofiles/index.asp

NIH Gulf health study: http://www.niehs.nih.gov/about/od/programs/gulfspill/gulfstudy/index.cfm

Fourth National Report on Human Exposure to Environmental Chemicals
http://www.cdc.gov/exposurereport/pdf/FourthReport.pdf

Case studies in Environmental Medicine:
Benzene: http://www.atsdr.cdc.gov/csem/benzene/
Toluene: http://www.atsdr.cdc.gov/csem/toluene/
Taking an Exposure History (CME Available): http://www.atsdr.cdc.gov/csem/exphistory/

Poison Control Centers: To reach your nearest Poison Control Center, call 1-800-222-1222.

Pediatric Environmental Health Specialty Units: http://aoec.org/PEHSU/index.html

For questions not addressed by these resources, please visit http://www.bt.cdc.gov/gulfoilspill2010/ or call CDC's toll-free information line, 800-CDC-INFO (800-232-4636).

TTY: (888) 232-6348, is available 24 hours a day, every day.

----- Original Message -----
From: Janet Woodka
Sent: 04/14/2011 10:45 PM EDT
To: Brendan Gilfillan; Paul Anastas
Cc: Alisha Johnson
Subject: Re: Wilma Subra

(b)(5) Deliberative

Brendan Gilfillan

----- Original Message -----
From: Brendan Gilfillan
Sent: 04/14/2011 08:22 PM EDT
To: Paul Anastas
Cc: Alisha Johnson; Janet Woodka
Subject: Re: Wilma Subra

Also adding Janet.

Brendan Gilfillan

----- Original Message -----
From: Brendan Gilfillan
Sent: 04/14/2011 08:20 PM EDT
To: Paul Anastas
Cc: Alisha Johnson
Subject: Wilma Subra

Hey Paul -

(b)(5) Deliberative

Thanks.

- Brendan

01268-EPA-1068

Scott Fulton/DC/USEPA/US
04/26/2011 12:05 PM

To Windsor.Richard, "Bob Sussman", "Bob Perciasepe", "Seth Oster", "Diane Thompson", "Arvin Ganesan"
cc "Avi Garbow"
bcc
Subject Fw: Everglades - Favorable Order from Judge Gold!

(b)(5) Attorney-Client, (b)(5) Deliberative [redacted]

Scott
Avi Garbow

----- Original Message -----
From: Avi Garbow
Sent: 04/26/2011 11:56 AM EDT
To: "Shenkman, Ethan (ENRD)" <Ethan.Shenkman@usdoj.gov>
Cc: Bob Sussman; "Moreno, Ignacia (ENRD)" <Ignacia.Moreno@usdoj.gov>; "Cruden, John (ENRD)" <John.Cruden@usdoj.gov>; "Simms, Patrice (ENRD)" <Patrice.Simms@usdoj.gov>; Scott Fulton
Subject: Re: Everglades - Favorable Order from Judge Gold!

(b)(5) Attorney-Client, (b)(5) Deliberative [redacted]

Avi

Avi Garbow
Deputy General Counsel
U.S. Environmental Protection Agency
(202) 564-1917

"Shenkman, Ethan (ENRD)" (b)(5) Attorney-Client, (b) 04/26/2011 11:51:44 AM

From: "Shenkman, Ethan (ENRD)" <Ethan.Shenkman@usdoj.gov>
To: Avi Garbow/DC/USEPA/US@EPA, Scott Fulton/DC/USEPA/US@EPA, Bob Sussman/DC/USEPA/US@EPA
Cc: "Simms, Patrice (ENRD)" <Patrice.Simms@usdoj.gov>, "Moreno, Ignacia (ENRD)" <Ignacia.Moreno@usdoj.gov>, "Cruden, John (ENRD)" <John.Cruden@usdoj.gov>
Date: 04/26/2011 11:51 AM
Subject: Everglades - Favorable Order from Judge Gold!

(b)(5) Attorney-Client, (b)(5) Deliberative [redacted]

-Ethan

Ethan G. Shenkman

Deputy Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
(202) 616-7349
ethan.shenkman@usdoj.gov

XIII. CONCLUSION

I am cognizant of the present and ongoing economic difficulties presently facing the parties and intervenors. Based on Judge Moreno's recent order, this Court is well aware of the financial hardships facing efforts to preserve the Everglades. In light of the release of additional funds as a result of the grant of the Rule 60(b)(5) relief in Case No. 88-1886, which the parties themselves recognize can be used to further the efforts to comply with the April 14, 2010 Order, there is opportunity to exercise resourceful judgment.

There is no possibility of reversing the damage that has been done to the Everglades, and there is only the chance to preserve what remains in its current state. This is nothing new to the parties. I have set forth the extensive procedural history of this case and litigation over the Everglades, the utmost importance of the Everglades as a national treasure, and the dire need to act immediately in my prior orders. See e.g. , [ECF Nos. 323, 404]. I take this opportunity now to once again reiterate and incorporate by reference the significant efforts made in those orders to emphasize just how imperative it is for the parties to focus their efforts on making real and actual steps and act on their promises and representations. In order to effectuate this Court's prior and final orders, and to avoid allowing the parties to frustrate any opportunities to do so, I have determined that a key component of this matter through the means of the permitting procedure, must now be a focus of the EPA. To not find in this manner will simply amount to sanctioning the repeated failures of non-action by the parties.

The roots of the ongoing and enduring Everglades litigation originate from a period of over one quarter century ago. This represents a serious need for the parties in this action—as well as non-parties with substantial interests in the future of the Everglades—to stop delaying. It is now, and has been for a while, time to take concrete and substantial progress toward preserving the Everglades before this national treasure is permanently destroyed to the extent of irreparable destruction.

Based on the foregoing, it is hereby ORDERED AND ADJUDGED that:

1.

In accordance with Federal Rule of Civil Procedure 62.1(a)(3), upon consideration of Defendants' Rule 60(b) Motion for Modification of Injunction

[ECF No. 446] and the responses thereto, I enter an indicative ruling that would GRANT

the Rule 60(b) Motion consistent with this Order and in accordance with the attached Indicative Order if the matter is remanded to me for that purpose by the United States Court of Appeals for the Eleventh Circuit.

2.

Friends of the Everglades' Motion for an Order Declaring the District's NPDES and EFA Permits Null and Void [ECF No. 533] is DENIED.

a.

The "conformed permit documents" filed by Florida Department of Environmental Protection ("FDEP") on November 2, 2010 are deemed submitted for purposes of review under the Memorandum of Understanding entered into between the EPA and FDEP [ECF No. 468-1].

b.

The EPA is directed to review the permits filed by the FDEP and take all necessary action to conform the permits in accordance with the instant Order and the Court's prior orders [ECF Nos. 323, 404] and in conjunction with established procedures set forth under the Memorandum of Understanding entered into between the EPA and FDEP.

c.

No later than Friday, July 1, 2011 , the parties shall submit a Joint Notice of Compliance specifically detailing the steps that have been taken in accordance with the instant Order, the Amended Determination, and the Court's prior orders [ECF Nos. 323, 404] . The Notice of Compliance shall include the EPA's description of its progress in effectuating the objectives set forth in the Amended Determination with specific explanations of what the EPA has done, what further action is necessary, and when such action

shall be accomplished. The Notice of Compliance shall set forth upcoming deadlines and actions, provide a description of pertinent meetings or discussions between representatives of each party, and indicate whether the EPA intends to pursue an enforcement action against the State. The Notice of Compliance shall include a detailed timeline of the procedures applicable to the State and EPA's actions in accordance with this Order. The text of any legislative material referenced within the Notice of Compliance shall be appended thereto.

3.

The State of Florida Department of Environmental Protection's Motion for Clarification of the Compliance Order [ECF No. 573] is GRANTED.

a.

Consistent with the language of the instant order and this Court's prior orders [ECF Nos. 323, 404] , the Department's use of Administrative Orders to establish case-specific compliance schedules in issuing conformed permits is disfavored.

b.

The Department shall exercise all reasonable means to achieve reasonable assurance without the use of Administrative Orders and individual compliance schedules for National Pollutant Discharge Elimination System permits for discharges into the Everglades.

c.

The EPA, in reviewing all permits submitted by the Department, shall similarly refrain

from approving use of Administrative Orders in conjunction with permits. The EPA shall act consistent with the standards set forth in

the Memorandum of Understanding between the EPA and the State and within the EPA's permitting and reviewing authority.

4.

Friends of the Everglades' Motion to Add South Florida Water Management District as a Party [ECF No. 477] is DENIED.

5.

Okeelanta Corporation and New Hope Sugar Company's Motion to Strike Defendant EPA's "Response" to the Court's Sua Sponte Order of September 14, 2010 and Friends of the Everglades' Notice of Filing Expert Reports [ECF No. 536] is DENIED AS MOOT.

6.

Okeelanta Corporation and New Hope Sugar Company's Corrected Motion to Strike Defendant EPA's "Response" to the Court's Sua Sponte Order of September 14, 2010 and Friends of the Everglades' Notice of Filing Expert Reports [ECF No. 537] is DENIED.

7.

No dates or requirements set forth in this Order will be extended absent a stay from the Eleventh Circuit Court of Appeals.

DONE AND ORDERED in Chambers at Miami, Florida, this 26th day of April, 2011.

From: Rave, Norman (ENRD)
Sent: Tuesday, April 26, 2011 10:38 AM
To: Mann, Martha (ENRD); Samuels, Stephen (ENRD); 'Mancusi-Ungaro.Philip@epamail.epa.gov'; sweeney.steve@epamail.epa.gov; Shenkman, Ethan (ENRD); Simms, Patrice (ENRD); Geldermann, Jay (ENRD); Saxe, Keith (ENRD); Barton, Katherine (ENRD); Hazard, Katherine (ENRD); Jones, Lisa (ENRD)
Subject: Everglades - Order from Judge Gold

(b)(5) Attorney-Client

[redacted] Norman

APPENDIX A

TABLE OF CONTENT S

I. INTRODUCTION 1

II. MOTIONS ADDRESSED IN THIS ORDER 4

III. SUMMARY OF ACTIONS TAKEN BY THIS ORDER 5

IV. FACTUAL BACKGROUND 7

A. Parties 7
B. Clean Water Act 8
C. Current factual circumstances 8

V. PROCEDURAL HISTORY 9

A. US v. SFWMD, Case No. 88-1886 10
1. 1992 Consent Decree 11
2. Everglades Forever Act 12
3. Amended Everglades Forever Act 13
4. The Phosphorous Rule 14
B. 2009 Determination 14

VI. RECENT PROCEDURAL BACKGROUND 17

A. April 14, 2010 Order 17
B. Rule 60(b) Motion 18
C. Amended Determination 18
D. December 17, 2010 hearing 20
E. Rule 60(b) Motion in US v. SFWMD, Case No. 88-1886 20
1. Special Master's Report 21
2. Hearing before Judge Moreno & Order on Rule 60(b)(5) Motion 22

VII. EPA RESPONSE TO FIRST SUA SPONTE ORDER 24

VIII. PERMITTING BACKGROUND 26

A. Permit procedures 27
B. State-issued permits 28
C. EPA-issued permits 29

D. Variance and immediate commencement of enforcement against FDEP 29

IX. JURISDICTION 30

X. LEGAL STANDARD 31

XI. PARTIES' POSITIONS ON RULE 60(B) MOTION 32

A. The EPA 32

B. Miccosukee Tribe 33

C. Friends 34

D. FDEP 34

E. New Hope 34

XII. ANALYSIS 35

A. The EPA's commitment 35

B. Whether the Amended Determination is mandatory 37

C. Necessity of immediate action 38

D. Effect of March 23, 2011 Order in Case No. 88-1886 42

E. Amended Determination 44

1. Water quality standard 46

2. Discharge limit – water quality based effluent limitation ("WQBEL") 47

F. Permitting authority 50

G. Failure to comply with April 14, 2010 Order 54

1. Conform existing permits by November 2, 2010 55

2. Amend Phosphorus Rule by January 1, 2011 56

H. Rule 60(b) Motion 57

1. Partial withdrawal of NPDES permitting program with a new injunctive provision that would apply after existing permits have been conformed 57

2. Modify Findings of Fact "that appear to equate the 10 ppb water quality criterion for phosphorus in the Everglades with WQBELs" 58

3. Modify Attachments B and C "to more closely track the 2008 Order Granting Summary Judgment and the April 14 Order" 59

I. Motion for Entry of an Order Declaring Permits Null And Void 60

J. Motion to Add SFWMD as a Party 63
1. SFWMD's response to Amended Determination..... 63
2. Applicable law..... 65
3. Analysis 65
K. Motion for Clarification of Compliance Order..... 67
L. Motion to Strike 71
XIII. CONCLUSION..... 72

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 04-21448-CIV-GOLD
(and consolidated cases)

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, a federally-recognized Indian Tribe; and FRIENDS OF THE EVERGLADES,

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.
_____/

INDICATIVE ORDER TO BE ENTERED FOLLOWING REMAND

Upon consideration of Defendants' Rule 60(b) Motion for Modification of Injunction [ECF No. 446] and the responses thereto, oral argument presented at the hearing held on December 17, 2010, and the EPA's submission of January 14, 2011 and the responses thereto, the EPA's Rule 60(b) Motion is GRANTED. The Court's April 14, 2010 Order [ECF No. 404] is hereby modified as follows:

1. Finding of Fact 4 [ECF No. 404, p. 3] is revised as follows:

4. To protect the Everglades from further significant environmental degradation, it is essential that discharges into, and within, the Everglades Protection Area not ~~exceed more than~~ result in an exceedance of the phosphorus water quality standard of 10 parts per billion ("ppb"). In federal Clean Water Act terms, the ~~10 ppb standard is referred to as a~~ "WQBELs" are the water quality based effluent limitation ~~("WQBEL")~~s necessary for discharges not to cause a violation of the 10 ppb water quality standard. See note 5, infra. The STAs currently do not meet this vital standard. At best, the State of Florida and EPA anticipate that, in 2016, the STAs may be operating with technology based effluent limitations ("TBELs"), which provide significantly less protection.

2. The following paragraphs of the injunctive relief [ECF No. 404, pp. 44-47] are revised as follows:

3. The EPA, in its Amended Determination, shall direct the State of Florida to conform all NPDES permits for STAs 1, 2, 3, 4, 5 and 6 – along with the accompanying Administrative Orders and ~~Everglades Forever Act permits~~ listed in Attachment A to this Order – to the Clean Water Act, the Summary Judgment Order and this Order so as to eliminate all references to the non-conforming elements of the Long-Term Plan, the moderating provisions and the extended compliance schedule through 2016, and to require compliance with the phosphorus narrative and numeric criterion in a manner consistent with the Clean Water Act and the forthcoming Amended Determination. All such permits shall be conformed not later than sixty (60) days of the date of the Amended Determination and shall be promptly filed with this Court.

~~4. On remand, the EPA, in its Amended Determination, shall immediately initiate and carry out its authority under Section IX of the Memorandum of Understanding to withdraw approval of the State program pertaining to the issuance of any new NPDES permits for discharges into, or within, the Everglades Protection Area, or for any further modifications to existing NPDES permits (including through State of Florida Administrative Orders) – other than to carry out the requirements of Paragraph 3, above – until such time as the State of Florida is in full compliance with the Clean Water Act, its implementing regulations, the Summary Judgment Order, this Order, and the forthcoming Amended EPA Determination.~~

~~5. Other than to carry out the requirements of Paragraph 3, above, the FDEP is enjoined from issuing any new NPDES permits, or modifications to existing NPDES permits through State of Florida Administrative Orders, Everglades Forever Act permits or otherwise for STAs that discharge into, or within, the Everglades Protection Area until such time as the State of Florida is found by the EPA and this Court to be in full compliance with the Clean Water Act, its implementing regulations, the Summary Judgment Order, and this Order. All new Administrative Orders and Everglades Forever Act permits~~ Any new or revised NPDES permits and their associated administrative orders issued under the laws of the State of Florida must conform to, and comply with, the Clean Water Act, its implementing regulations, the Summary Judgment Order, and this Order and the forthcoming Amended EPA Determination~~.~~, and must follow the procedures set forth in the Memorandum of Agreement between FDEP and EPA.

3. Attachments B and C are replaced with Attachments 1 and 2 hereto.

DONE AND ORDERED in Chambers at Miami, Florida, this _____ day of _____, 201__.

_____
THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge Jonathan Goodman
Counsel of record

373.4592 Everglades improvement and management.—

(1) FINDINGS AND INTENT.—
(a) The Legislature finds that the Everglades ecological system not only contributes to South Florida's water supply, flood control, and recreation, but serves as the habitat for diverse species of wildlife and plant life. The system is unique in the world and one of Florida's great treasures. The Everglades ecological system is endangered as a result of adverse changes in water quality, and in the quantity, distribution, and timing of flows, and, therefore, must be restored and protected.
(b) The Legislature finds that, although the district and the department have developed plans and programs for the improvement and management of the surface waters tributary to the Everglades Protection Area, implementation of those plans and programs has not been as timely as is necessary to restore and protect unique flora and fauna of the Everglades, including the Everglades National Park and the Arthur R. Marshall Loxahatchee National Wildlife Refuge. Therefore, the Legislature determines that an appropriate method to proceed with Everglades restoration and protection is to authorize the district to proceed expeditiously with implementation of the Everglades Program.
(c) The Legislature finds that, in the last decade, people have come to realize the tremendous cost the alteration of natural systems has exacted on the region. The Statement of Principles of July 1993 among the Federal Government, the South Florida Water Management District, the Department of Environmental Protection, and certain agricultural industry representatives formed a basis to bring to a close 5 years of costly litigation. That agreement should be used to begin the cleanup and renewal of the Everglades ecosystem.
(d) It is the intent of the Legislature to promote Everglades restoration and protection through certain legislative findings and determinations. The Legislature finds that waters flowing into the Everglades Protection Area contain excessive levels of phosphorus. A reduction in levels of phosphorus will benefit the ecology of the Everglades Protection Area.
(e) It is the intent of the Legislature to pursue comprehensive and innovative solutions to issues of water quality, water quantity, hydroperiod, and invasion of exotic species which face the Everglades ecosystem. The Legislature recognizes that the Everglades ecosystem must be restored both in terms of water quality and water quantity and must be preserved and protected in a manner that is long term and comprehensive. The Legislature further recognizes that the EAA and adjacent areas provide a base for an agricultural industry, which in turn provides important products, jobs, and income regionally and nationally. It is the intent of the Legislature to preserve natural values in the Everglades while also maintaining the quality of life for all residents of South Florida, including those in agriculture, and to minimize the impact on South Florida jobs, including agricultural, tourism, and natural resource-related jobs, all of which contribute to a robust regional economy.
(f) The Legislature finds that improved water supply and hydroperiod management are crucial elements to overall revitalization of the Everglades ecosystem, including Florida Bay. It is the intent of the Legislature to expedite plans and programs for improving water quantity reaching the Everglades, correcting long-standing hydroperiod problems, increasing the total quantity of water flowing through the system, providing water supply for the Everglades National Park, urban and agricultural areas, and Florida Bay, and replacing water previously available from the coastal ridge in areas of southern Dade County. Whenever possible, wasteful discharges of fresh water to tide shall be reduced, and the water shall be stored for delivery at more optimum times. Additionally, reuse and conservation measures shall be implemented consistent with law. The Legislature further recognizes that additional water storage may be an appropriate use of Lake Okeechobee.
(g) The Legislature finds that the Statement of Principles of July 1993, the Everglades Construction Project, and the regulatory requirements of this section provide a sound basis for

the state's long-term cleanup and restoration objectives for the Everglades. It is the intent of the Legislature to provide a sufficient period of time for construction, testing, and research, so that the benefits of the Everglades Construction Project will be determined and maximized prior to requiring additional measures. The Legislature finds that STAs and BMPs are currently the best available technology for achieving the interim water quality goals of the Everglades Program. A combined program of agricultural BMPs, STAs, and requirements of this section is a reasonable method of achieving interim total phosphorus discharge reductions. The Everglades Program is an appropriate foundation on which to build a long-term program to ultimately achieve restoration and protection of the Everglades Protection Area.

(h) The Everglades Construction Project represents by far the largest environmental cleanup and restoration program of this type ever undertaken, and the returns from substantial public and private investment must be maximized so that available resources are managed responsibly. To that end, the Legislature directs that the Everglades Construction Project and regulatory requirements associated with the Statement of Principles of July 1993 be pursued expeditiously, but with flexibility, so that superior technology may be utilized when available. Consistent with the implementation of the Everglades Construction Project, landowners shall be provided the maximum opportunity to provide treatment on their land.

(2) DEFINITIONS.—As used in this section:

~~(a) "Best available phosphorus reduction technology" or "BAPRT" means a combination of BMPs and STAs which includes a continuing research and monitoring program to reduce outflow concentrations of phosphorus so as to achieve the phosphorus criterion in the Everglades Protection Area.~~

(b) "Best management practice" or "BMP" means a practice or combination of practices determined by the district, in cooperation with the department, based on research, field-testing, and expert review, to be the most effective and practicable, including economic and technological considerations, on-farm means of improving water quality in agricultural discharges to a level that balances water quality improvements and agricultural productivity.

(c) "C-139 Basin" or "Basin" means those lands described in subsection (16).

(d) "Department" means the Florida Department of Environmental Protection.

(e) "District" means the South Florida Water Management District.

(f) "Everglades Agricultural Area" or "EAA" means the Everglades Agricultural Area, which are those lands described in subsection (15).

(g) “Everglades Construction Project" means the project described in the February 15, 1994, conceptual design document together with construction and operation schedules on file with the South Florida Water Management District, except as modified by this section ~~and further described in the Long Term Plan~~.

(h) "Everglades Program" means the program of projects, regulations, and research provided by this section, including the Everglades Construction Project.

(i) "Everglades Protection Area" means Water Conservation Areas 1, 2A, 2B, 3A, and 3B, the Arthur R. Marshall Loxahatchee National Wildlife Refuge, and the Everglades National Park.

~~(j) "Long Term Plan" or "Plan" means the district's "Everglades Protection Area Tributary Basins Conceptual Plan for Achieving Long Term Water Quality Goals Final Report" dated March 2003, as modified herein.~~"

(k) “Master permit" means a single permit issued to a legally responsible entity defined by rule, authorizing the construction, alteration, maintenance, or operation of multiple stormwater management systems that may be owned or operated by different persons and which provides an opportunity to achieve collective compliance with applicable department and district rules and the provisions of this section.

~~(l) "Optimization" shall mean maximizing the potential treatment effectiveness of the STAs through measures such as additional compartmentalization, improved flow control, vegetation management, or operation refinements, in combination with improvements where practicable in~~

~~urban and agricultural BMPs, and includes integration with Congressionally authorized components of the Comprehensive Everglades Restoration Plan or "CERP".~~

(m) "Phosphorus criterion" means a numeric interpretation for phosphorus of the Class III narrative nutrient criterion.

(n) "Stormwater management program" shall have the meaning set forth in s. 403.031(15).

(o) "Stormwater treatment areas" or "STAs" means those treatment areas described and depicted in the district's conceptual design document of February 15, 1994, and any modifications as provided in this section.

~~(p) "Technology based effluent limitation" or "TBEL" means the technology based treatment requirements as defined in Rule 62-650.200, Florida Administrative Code.~~

(3) EVERGLADES ~~LONG TERM~~ PHOSPHORUS CONTROL PLAN.—

(a)The Legislature finds that the Everglades Program required by this section establishes more extensive and comprehensive requirements for surface water improvement and management within the Everglades than the SWIM plan requirements provided in ss. 373.451-373.456. In order to avoid duplicative requirements, and in order to conserve the resources available to the district, the SWIM plan requirements of those sections shall not apply to the Everglades Protection Area and the EAA during the term of the Everglades Program, and the district will neither propose, nor take final agency action on, any Everglades SWIM plan for those areas until the Everglades Program is fully implemented. Funds under s. 259.101(3)(b) may be used for acquisition of lands necessary to implement the Everglades Construction Project, to the extent these funds are identified in the Statement of Principles of July 1993. The district's actions in implementing the Everglades Construction Project relating to the responsibilities of the EAA and C-139 Basin for funding and water quality compliance in the EAA and the Everglades Protection Area shall be governed by this section. Other strategies or activities in the March 1992 Everglades SWIM plan may be implemented if otherwise authorized by law.

~~(b) The Legislature finds that the most reliable means of optimizing the performance of STAs and achieving reasonable further progress in reducing phosphorus entering the Everglades Protection Area is to utilize a long term planning process. The Legislature finds that the Long-Term Plan provides the best available phosphorus reduction technology based upon a combination of the BMPs and STAs described in the Plan provided that the Plan shall seek to achieve the phosphorus criterion in the Everglades Protection Area. The pre 2006 projects identified in the Long Term Plan shall be implemented by the district without delay, and revised with the planning goal and objective of achieving the phosphorus criterion to be adopted pursuant to subparagraph (4)(e)2. in the Everglades Protection Area, and not based on any planning goal or objective in the Plan that is inconsistent with this section. Revisions to the Long Term Plan shall be incorporated through an adaptive management approach including a process development and engineering component to identify and implement incremental optimization measures for further phosphorus reductions. Revisions to the Long Term Plan shall be approved by the department. In addition, the department may propose changes to the Long Term Plan as science and environmental conditions warrant.~~

~~(c) It is the intent of the Legislature that implementation of the Long Term Plan shall be integrated and consistent with the implementation of the projects and activities in the Congressionally authorized components of the CERP so that unnecessary and duplicative costs will be avoided. Nothing in this section shall modify any existing cost share or responsibility provided for projects listed in s. 528 of the Water Resources Development Act of 1996 (110 Stat. 3769) or provided for projects listed in section 601 of the Water Resources Development Act of 2000 (114 Stat. 2572). The Legislature does not intend for the provisions of this section to diminish commitments made by the State of Florida to restore and maintain water quality in the Everglades Protection Area, including the federal lands in the settlement agreement referenced in paragraph (4)(e).~~

~~(d) The Legislature recognizes that the Long Term Plan contains an initial phase and a 10 year second phase. The Legislature intends that a review of this act at least 10 years after implementation of the initial phase is appropriate and necessary to the public interest. The review is the best way to ensure that the Everglades Protection Area is achieving state water quality standards, including phosphorus reduction, and the Long Term Plan is using the best technology available. A 10 year second phase of the Long Term Plan must be approved by the Legislature and codified in this act prior to implementation of projects, but not prior to development, review, and approval of projects by the department.~~

~~(e) The Long Term Plan shall be implemented for a initial 13 year phase (2003-2016) and shall achieve water quality standards relating to the phosphorus criterion in the Everglades Protection Area as determined by a network of monitoring stations established for this purpose. Not later than December 31, 2008, and each 5 years thereafter, the department shall review and approve incremental phosphorus reduction measures.~~

(4) EVERGLADES PROGRAM. —

(a) Everglades Construction Project.—The district shall implement the Everglades Construction Project. By the time of completion of the project, the state, district, or other governmental authority shall purchase the inholdings in the Rotenberger and such other lands necessary to achieve a 2:1 mitigation ratio for the use of Brown's Farm and other similar lands, including those needed for the STA 1 Inflow and Distribution Works. The inclusion of public lands as part of the project is for the purpose of treating waters not coming from the EAA for hydroperiod restoration. It is the intent of the Legislature that the district aggressively pursue the implementation of the Everglades Construction Project in accordance with the schedule in this subsection. The Legislature recognizes that adherence to the schedule is dependent upon factors beyond the control of the district, including the timely receipt of funds from all contributors. The district shall take all reasonable measures to complete timely performance of the schedule in this section in order to finish the Everglades Construction Project. The district shall not delay implementation of the project beyond the time delay caused by those circumstances and conditions that prevent timely performance. The district shall not levy ad valorem taxes in excess of 0.1 mill within the Okeechobee Basin for the purposes of the design, construction, and acquisition of the Everglades Construction Project. The ad valorem tax proceeds not exceeding 0.1 mill levied within the Okeechobee Basin for such purposes shall also be used for ~~design, construction, and implementation of the initial phase of the Long Term Plan, including operation and maintenance, and research for the projects and strategies in the initial phase of the Long Term Plan, and including~~ the enhancements and operation and maintenance of the Everglades Construction Project and shall be the sole direct district contribution from district ad valorem taxes appropriated or expended for the design, construction, and acquisition of the Everglades Construction Project unless the Legislature by specific amendment to this section increases the 0.1 mill ad valorem tax contribution, increases the agricultural privilege taxes, or otherwise reallocates the relative contribution by ad valorem taxpayers and taxpayers paying the agricultural privilege taxes toward the funding of the design, construction, and acquisition of the Everglades Construction Project. Notwithstanding the provisions of s. 200.069 to the contrary, any millage levied under the 0.1 mill limitation in this paragraph shall be included as a separate entry on the Notice of Proposed Property Taxes pursuant to s. 200.069. Once the STAs are completed, the district shall allow these areas to be used by the public for recreational purposes in the manner set forth in s. 373.1391(1), considering the suitability of these lands for such uses. These lands shall be made available for recreational use unless the district governing board can demonstrate that such uses are incompatible with the restoration goals of the Everglades Construction Project or the water quality and hydrological purposes of the STAs or would otherwise adversely impact the implementation of the project. The district shall give preferential consideration to the hiring of agricultural workers displaced as a result of the Everglades Construction Project, consistent with

their qualifications and abilities, for the construction and operation of these STAs. The following milestones apply to the completion of the Everglades Construction Project as depicted in the February 15, 1994, conceptual design document:

1. The district must complete the final design of the STA 1 East and West and pursue STA 1 East project components as part of a cost-shared program with the Federal Government. The district must be the local sponsor of the federal project that will include STA 1 East, and STA 1 West if so authorized by federal law;

2. Construction of STA 1 East is to be completed under the direction of the United States Army Corps of Engineers in conjunction with the currently authorized C-51 flood control project;

3. The district must complete construction of STA 1 West and STA 1 Inflow and Distribution Works under the direction of the United States Army Corps of Engineers, if the direction is authorized under federal law, in conjunction with the currently authorized C-51 flood control project;

4. The district must complete construction of STA 3/4 by October 1, 2003; ~~however, the district may modify this schedule to incorporate and accelerate enhancements to STA 3/4 as directed in the Long Term Plan;~~

5. The district must complete construction of STA 6;

~~6. The district must, by December 31, 2006, complete construction of enhancements to the Everglades Construction Project recommended in the Long Term Plan and initiate other pre-2006 strategies in the plan; and~~

6~~7~~. East Beach Water Control District, South Shore Drainage District, South Florida Conservancy District, East Shore Water Control District, and the lessee of agricultural lease number 3420 shall complete any system modifications described in the Everglades Construction Project to the extent that funds are available from the Everglades Fund. These entities shall divert the discharges described within the Everglades Construction Project within 60 days of completion of construction of the appropriate STA. Such required modifications shall be deemed to be a part of each district's plan of reclamation pursuant to chapter 298.

(b) Everglades water supply and hydroperiod improvement and restoration.—

1. A comprehensive program to revitalize the Everglades shall include programs and projects to improve the water quantity reaching the Everglades Protection Area at optimum times and improve hydroperiod deficiencies in the Everglades ecosystem. To the greatest extent possible, wasteful discharges of fresh water to tide shall be reduced, and water conservation practices and reuse measures shall be implemented by water users, consistent with law. Water supply management must include improvement of water quantity reaching the Everglades, correction of long-standing hydroperiod problems, and an increase in the total quantity of water flowing through the system. Water supply management must provide water supply for the Everglades National Park, the urban and agricultural areas, and the Florida Bay and must replace water previously available from the coastal ridge areas of southern Dade County. The Everglades Construction Project redirects some water currently lost to tide. It is an important first step in completing hydroperiod improvement.

2. The district shall operate the Everglades Construction Project as specified in the February 15, 1994, conceptual design document, to provide additional inflows to the Everglades Protection Area. The increased flow from the project shall be directed to the Everglades Protection Area as needed to achieve an average annual increase of 28 percent compared to the baseline years of 1979 to 1988. Consistent with the design of the Everglades Construction Project and without demonstratively reducing water quality benefits, the regulatory releases will be timed and distributed to the Everglades Protection Area to maximize environmental benefits.

3. The district shall operate the Everglades Construction Project in accordance with the February 15, 1994, conceptual design document to maximize the water quantity benefits and improve the hydroperiod of the Everglades Protection Area. All reductions of flow to the Everglades Protection Area from BMP implementation will be replaced. The district shall

develop a model to be used for quantifying the amount of water to be replaced. The timing and distribution of this replaced water will be directed to the Everglades Protection Area to maximize the natural balance of the Everglades Protection Area.

4. The Legislature recognizes the complexity of the Everglades watershed, as well as legal mandates under Florida and federal law. As local sponsor of the Central and Southern Florida Flood Control Project, the district must coordinate its water supply and hydroperiod programs with the Federal Government. Federal planning, research, operating guidelines, and restrictions for the Central and Southern Florida Flood Control Project now under review by federal agencies will provide important components of the district's Everglades Program. The department and district shall use their best efforts to seek the amendment of the authorized purposes of the project to include water quality protection, hydroperiod restoration, and environmental enhancement as authorized purposes of the Central and Southern Florida Flood Control Project, in addition to the existing purposes of water supply, flood protection, and allied purposes. Further, the department and the district shall use their best efforts to request that the Federal Government include in the evaluation of the regulation schedule for Lake Okeechobee a review of the regulatory releases, so as to facilitate releases of water into the Everglades Protection Area which further improve hydroperiod restoration.

5. The district, through cooperation with the federal and state agencies, shall develop other programs and methods to increase the water flow and improve the hydroperiod of the Everglades Protection Area.

6. Nothing in this section is intended to provide an allocation or reservation of water or to modify the provisions of part II. All decisions regarding allocations and reservations of water shall be governed by applicable law.

7. The district shall proceed to expeditiously implement the minimum flows and levels for the Everglades Protection Area as required by s. 373.042 and shall expeditiously complete the Lower East Coast Water Supply Plan.

(c) STA 3/4 modification.—The Everglades Program will contribute to the restoration of the Rotenberger and Holey Land tracts. The Everglades Construction Project provides a first step toward restoration by improving hydroperiod with treated water for the Rotenberger tract and by providing a source of treated water for the Holey Land. It is further the intent of the Legislature that the easternmost tract of the Holey Land, known as the "Toe of the Boot," be removed from STA 3/4 under the circumstances set forth in this paragraph. The district shall proceed to modify the Everglades Construction Project, provided that the redesign achieves at least as many environmental and hydrological benefits as are included in the original design, including treatment of waters from sources other than the EAA, and does not delay construction of STA 3/4. The district is authorized to use eminent domain to acquire alternative lands, only if such lands are located within 1 mile of the northern border of STA 3/4.

(d) Everglades research and monitoring program.—

1. The department and the district shall review and evaluate available water quality data for the Everglades Protection Area and tributary waters and identify any additional information necessary to adequately describe water quality in the Everglades Protection Area and tributary waters. The department and the district shall also initiate a research and monitoring program to generate such additional information identified and to evaluate the effectiveness of the BMPs and STAs, as they are implemented, in improving water quality and maintaining designated and existing beneficial uses of the Everglades Protection Area and tributary waters. As part of the program, the district shall monitor all discharges into the Everglades Protection Area for purposes of determining compliance with state water quality standards.

2. The research and monitoring program shall evaluate the ecological and hydrological needs of the Everglades Protection Area, including the minimum flows and levels. Consistent with such needs, the program shall also evaluate water quality standards for the Everglades Protection Area and for the canals of the EAA, so that these canals can be classified in the manner set

forth in paragraph (e) and protected as an integral part of the water management system which includes the STAs of the Everglades Construction Project and allows landowners in the EAA to achieve applicable water quality standards compliance by BMPs and STA treatment to the extent this treatment is available and effective.

3. The research and monitoring program shall include research seeking to optimize the design and operation of the STAs, including research to reduce outflow concentrations, and to identify other treatment and management methods and regulatory programs that are superior to STAs in achieving the intent and purposes of this section.

4. The research and monitoring program shall be conducted to allow the department to propose a phosphorus criterion in the Everglades Protection Area, and to evaluate existing state water quality standards applicable to the Everglades Protection Area and existing state water quality standards and classifications applicable to the EAA canals. In developing the phosphorus criterion, the department shall also consider the minimum flows and levels for the Everglades Protection Area and the district's water supply plans for the Lower East Coast.

5. Beginning January 1, 2000, the district and the department shall annually issue a peer-reviewed report regarding the research and monitoring program that summarizes all data and findings. The department shall provide copies of the report to the Governor, the President of the Senate, and the Speaker of the House of Representatives. The report shall identify water quality parameters, in addition to phosphorus, which exceed state water quality standards or are causing or contributing to adverse impacts in the Everglades Protection Area.

6. The district shall continue research seeking to optimize the design and operation of STAs and to identify other treatment and management methods that are superior to STAs in achieving optimum water quality and water quantity for the benefit of the Everglades. The district shall optimize the design and operation of the STAs described in the Everglades Construction Project prior to expanding their size. Additional methods to achieve compliance with water quality standards shall not be limited to more intensive management of the STAs.

(e) Evaluation of water quality standards.—

1. The department and the district shall employ all means practicable to complete by December 31, 1998, any additional research necessary to:

a. Numerically interpret for phosphorus the Class III narrative nutrient criterion necessary to meet water quality standards in the Everglades Protection Area; and

b. Evaluate existing water quality standards applicable to the Everglades Protection Area and EAA canals.

2. In no case shall such phosphorus criterion allow waters in the Everglades Protection Area to be altered so as to cause an imbalance in the natural populations of aquatic flora or fauna. The phosphorus criterion shall be 10 parts per billion (ppb) in the Everglades Protection Area in the event the department does not adopt by rule such criterion by December 31, 2003. However, in the event the department fails to adopt a phosphorus criterion on or before December 31, 2002, any person whose substantial interests would be affected by the rulemaking shall have the right, on or before February 28, 2003, to petition for a writ of mandamus to compel the department to adopt by rule such criterion. Venue for the mandamus action must be Leon County. The court may stay implementation of the 10 parts per billion (ppb) criterion during the pendency of the mandamus proceeding upon a demonstration by the petitioner of irreparable harm in the absence of such relief. The department's phosphorus criterion, whenever adopted, shall supersede the 10 parts per billion (ppb) criterion otherwise established by this section, but shall not be lower than the natural conditions of the Everglades Protection Area and shall take into account spatial and temporal variability. ~~The department's rule adopting a phosphorus criterion may include moderating provisions during the implementation of the initial phase of the Long-Term Plan authorizing discharges based upon BAPRT providing net improvement to impacted areas. Discharges to unimpacted areas may also be authorized by moderating provisions, which shall require BAPRT, and which must be based upon a determination by the department~~

~~that the environmental benefits of the discharge clearly outweigh potential adverse impacts and otherwise comply with antidegradation requirements. Moderating provisions authorized by this section shall not extend beyond December 2016 unless further authorized by the Legislature pursuant to paragraph (3)(d).~~

3. The department shall use the best available information to define relationships between waters discharged to, and the resulting water quality in, the Everglades Protection Area. The department or the district shall use these relationships to establish discharge limits in permits for discharges into the EAA canals and the Everglades Protection Area necessary to prevent an imbalance in the natural populations of aquatic flora or fauna in the Everglades Protection Area, and to provide a net improvement in the areas already impacted. ~~During the implementation of the initial phase of the Long Term Plan, permits issued by the department shall be based on BAPRT, and shall include technology based effluent limitations consistent with the Long Term Plan.~~ Compliance with the phosphorus criterion shall be based upon a long-term geometric mean of concentration levels to be measured at sampling stations recognized from the research to be reasonably representative of receiving waters in the Everglades Protection Area, and so located so as to assure that the Everglades Protection Area is not altered so as to cause an imbalance in natural populations of aquatic flora and fauna and to assure a net improvement in the areas already impacted. For the Everglades National Park and the Arthur R. Marshall Loxahatchee National Wildlife Refuge, the method for measuring compliance with the phosphorus criterion shall be in a manner consistent with Appendices A and B, respectively, of the settlement agreement dated July 26, 1991, entered in case No. 88-1886-Civ-Hoeveler, United States District Court for the Southern District of Florida, that recognizes and provides for incorporation of relevant research.

4. The department's evaluation of any other water quality standards must include the department's antidegradation standards and EAA canal classifications. In recognition of the special nature of the conveyance canals of the EAA, as a component of the classification process, the department is directed to formally recognize by rulemaking existing actual beneficial uses of the conveyance canals in the EAA. This shall include recognition of the Class III designated uses of recreation, propagation and maintenance of a healthy, well-balanced population of fish and wildlife, the integrated water management purposes for which the Central and Southern Florida Flood Control Project was constructed, flood control, conveyance of water to and from Lake Okeechobee for urban and agricultural water supply, Everglades hydroperiod restoration, conveyance of water to the STAs, and navigation.

(f) EAA best management practices.—

1. The district, in cooperation with the department, shall develop and implement a water quality monitoring program to evaluate the effectiveness of the BMPs in achieving and maintaining compliance with state water quality standards and restoring and maintaining designated and existing beneficial uses. The program shall include an analysis of the effectiveness of the BMPs in treating constituents that are not being significantly improved by the STAs. The monitoring program shall include monitoring of appropriate parameters at representative locations.

2. The district shall continue to require and enforce the BMP and other requirements of chapters 40E-61 and 40E-63, Florida Administrative Code, during the terms of the existing permits issued pursuant to those rules. Chapter 40E-61, Florida Administrative Code, may be amended to include the BMPs required by chapter 40E-63, Florida Administrative Code. Prior to the expiration of existing permits, and during each 5-year term of subsequent permits as provided for in this section, those rules shall be amended to implement a comprehensive program of research, testing, and implementation of BMPs that will address all water quality standards within the EAA and Everglades Protection Area. Under this program:

a. EAA landowners, through the EAA Environmental Protection District or otherwise, shall sponsor a program of BMP research with qualified experts to identify appropriate BMPs.

b. Consistent with the water quality monitoring program, BMPs will be field-tested in a sufficient number of representative sites in the EAA to reflect soil and crop types and other factors that influence BMP design and effectiveness.
c. BMPs as required for varying crops and soil types shall be included in permit conditions in the 5-year permits issued pursuant to this section.
d. The district shall conduct research in cooperation with EAA landowners to identify water quality parameters that are not being significantly improved either by the STAs or the BMPs, and to identify further BMP strategies needed to address these parameters.
3. The Legislature finds that through the implementation of the Everglades BMPs Program and the implementation of the Everglades Construction Project, reasonable further progress will be made towards addressing water quality requirements of the EAA canals and the Everglades Protection Area. Permittees within the EAA and the C-139 Basin who are in full compliance with the conditions of permits under chapters 40E-61 and 40E-63, Florida Administrative Code, have made all payments required under the Everglades Program, and are in compliance with subparagraph (a)8., if applicable, shall not be required to implement additional water quality improvement measures, prior to December 31, 2006, other than those required by subparagraph 2., with the following exceptions:
a. Nothing in this subparagraph shall limit the existing authority of the department or the district to limit or regulate discharges that pose a significant danger to the public health and safety; and
b. New land uses and new stormwater management facilities other than alterations to existing agricultural stormwater management systems for water quality improvements shall not be accorded the compliance established by this section. Permits may be required to implement improvements or alterations to existing agricultural water management systems.
4. As of December 31, 2006, all permits, including those issued prior to that date, shall require implementation of additional water quality measures, taking into account the water quality treatment actually provided by the STAs and the effectiveness of the BMPs. As of that date, no permittee's discharge shall cause or contribute to any violation of water quality standards in the Everglades Protection Area.
5. Effective immediately, landowners within the C-139 Basin shall not collectively exceed an annual average loading of phosphorus based proportionately on the historical rainfall for the C-139 Basin over the period of October 1, 1978, to September 30, 1988. New surface inflows shall not increase the annual average loading of phosphorus stated above. Provided that the C-139 Basin does not exceed this annual average loading, all landowners within the Basin shall be in compliance for that year. Compliance determinations for individual landowners within the C-139 Basin for remedial action, if the Basin is determined by the district to be out of compliance for that year, shall be based on the landowners' proportional share of the total phosphorus loading. The total phosphorus discharge load shall be determined as set forth in Appendix B2 of Rule 40E-63, Everglades Program, Florida Administrative Code.
6. The district, in cooperation with the department, shall develop and implement a water quality monitoring program to evaluate the quality of the discharge from the C-139 Basin. Upon determination by the department or the district that the C-139 Basin is exceeding any presently existing water quality standards, the district shall require landowners within the C-139 Basin to implement BMPs appropriate to the land uses within the C-139 Basin consistent with subparagraph 2. Thereafter, the provisions of subparagraphs 2.-4. shall apply to the landowners within the C-139 Basin.
(g) Monitoring and control of exotic species.—
1. The district shall establish a biological monitoring network throughout the Everglades Protection Area and shall prepare a survey of exotic species at least every 2 years.
2. In addition, the district shall establish a program to coordinate with federal, state, or other governmental entities the control of continued expansion and the removal of these exotic

species. The district's program shall give high priority to species affecting the largest areal extent within the Everglades Protection Area.
(5) ACQUISITION AND LEASE OF STATE LANDS. —
(a) As used in this subsection, the term:
1. "Available land" means land within the EAA owned by the board of trustees which is covered by any of the following leases: Numbers 3543, 3420, 1447, 1971-5, and 3433, and the southern one-third of number 2376 constituting 127 acres, more or less.
2. "Board of trustees" means the Board of Trustees of the Internal Improvement Trust Fund.
3. "Designated acre," as to any impacted farmer, means an acre of land which is designated for STAs or water retention or storage in the February 15, 1994, conceptual design document and which is owned or leased by the farmer or on which one or more agricultural products were produced which, during the period beginning October 1, 1992, and ending September 30, 1993, were processed at a facility owned by the farmer.
4. "Impacted farmer" means a producer or processor of agricultural commodities and includes subsidiaries and affiliates that have designated acres.
5. "Impacted vegetable farmer" means an impacted farmer in the EAA who uses more than 30 percent of the land farmed by that farmer, whether owned or leased, for the production of vegetables.
6. "Vegetable-area available land" means land within the EAA owned by the board of trustees which is covered by lease numbers 3422 and 1935/1935S.
(b) The Legislature declares that it is necessary for the public health and welfare that the Everglades water and water-related resources be conserved and protected. The Legislature further declares that certain lands may be needed for the treatment or storage of water prior to its release into the Everglades Protection Area. The acquisition of real property for this objective constitutes a public purpose for which public funds may be expended. In addition to other authority pursuant to this chapter to acquire real property, the governing board of the district is empowered and authorized to acquire fee title or easements by eminent domain for the limited purpose of implementing stormwater management systems, identified and described in the Everglades Construction Project or determined necessary to meet water quality requirements established by rule or permit.
(c) The Legislature determines it to be in the public interest to minimize the potential loss of land and related product supply to farmers and processors who are most affected by acquisition of land for Everglades restoration and hydroperiod purposes. Accordingly, subject to the priority established below for vegetable-area available land, impacted farmers shall have priority in the leasing of available land. An impacted farmer shall have the right to lease each parcel of available land, upon expiration of the existing lease, for a term of 20 years and at a rental rate determined by appraisal using established state procedures. For those parcels of land that have previously been competitively bid, the rental rate shall not be less than the rate the board of trustees currently receives. The board of trustees may also adjust the rental rate on an annual basis using an appropriate index, and update the appraisals at 5-year intervals. If more than one impacted farmer desires to lease a particular parcel of available land, the one that has the greatest number of designated acres shall have priority.
(d) Impacted vegetable farmers shall have priority in leasing vegetable-area available land. An impacted vegetable farmer shall have the right to lease vegetable-area available land, upon expiration of the existing lease, for a term of 20 years or a term ending August 25, 2018, whichever term first expires, and at a rental rate determined by appraisal using established state procedures. If the lessee elects, such terms may consist of an initial 5-year term, with successive options to renew at the lessee's option for additional 5-year terms. For extensions of leases on those parcels of land that have previously been competitively bid, the rental rate shall not be less than the rate the board of trustees currently receives. The board of trustees may also adjust the rental rate on an annual basis using an appropriate index, and update the

appraisals at 5-year intervals. If more than one impacted vegetable farmer desires to lease vegetable-area available land, the one that has the greatest number of designated acres shall have priority.

(e) Impacted vegetable farmers with farming operations in areas of Florida other than the EAA shall have priority in leasing suitable surplus lands, where such lands are located in the St. Johns River Water Management District and in the vicinity of the other areas where such impacted vegetable farmers operate. The suitability of such use shall be determined solely by the St. Johns River Water Management District. The St. Johns River Water Management District shall make good faith efforts to provide these impacted vegetable farmers with the opportunity to lease such suitable lands to offset their designated acres. The rental rate shall be determined by appraisal using established procedures.

(f) The corporation conducting correctional work programs under part II of chapter 946 shall be entitled to renew, for a period of 20 years, its lease with the Department of Corrections which expires June 30, 1998, which includes the utilization of land for the production of sugar cane, and which is identified as lease number 2671 with the board of trustees.

(g) Except as specified in paragraph (f), once the leases or lease extensions specified in this subsection have been granted and become effective, the trustees shall retain the authority to terminate after 9 years any such lease or lease extension upon 2 years' notice to the lessee and a finding by the trustees that the lessee has ceased to be impacted as provided in this section. In that event, the outgoing lessee is entitled to be compensated for any documented, unamortized planting costs associated with the lease and any unamortized capital costs incurred prior to the notice. In addition, the trustees may terminate such lease or lease extension if the lessee fails to comply with, and after reasonable notice and opportunity to correct or fails to correct, any material provision of the lease or its obligation under this section.

(6) EVERGLADES AGRICULTURAL PRIVILEGE TAX. —

(a) There is hereby imposed an annual Everglades agricultural privilege tax for the privilege of conducting an agricultural trade or business on:

1. All real property located within the EAA that is classified as agricultural under the provisions of chapter 193; and

2. Leasehold or other interests in real property located within the EAA owned by the United States, the state, or any agency thereof permitting the property to be used for agricultural purposes in a manner that would allow such property to be classified as agricultural under the provisions of chapter 193 if not governmentally owned, whether or not such property is actually classified as agricultural under the provisions of chapter 193.

It is hereby determined by the Legislature that the privilege of conducting an agricultural trade or business on such property constitutes a reasonable basis for imposition of the Everglades agricultural privilege tax and that logical differences exist between the agricultural use of such property and the use of other property within the EAA for residential or nonagricultural commercial use. The Everglades agricultural privilege tax shall constitute a lien against the property, or the leasehold or other interest in governmental property permitting such property to be used for agricultural purposes, described on the Everglades agricultural privilege tax roll. The lien shall be in effect from January 1 of the year the tax notice is mailed until discharged by payment and shall be equal in rank and dignity with the liens of all state, county, district, or municipal taxes and non-ad valorem assessments imposed pursuant to general law, special act, or local ordinance and shall be superior in dignity to all other liens, titles, and claims.

(b) The Everglades agricultural privilege tax, other than for leasehold or other interests in governmental property permitting such property to be used for agricultural purposes, shall be collected in the manner provided for ad valorem taxes. By September 15 of each year, the governing board of the district shall certify by resolution an Everglades agricultural privilege tax roll on compatible electronic medium to the tax collector of each county in which a portion of the EAA is located. The district shall also produce one copy of the roll in printed form which shall be

available for inspection by the public. The district shall post the Everglades agricultural privilege tax for each parcel on the roll. The tax collector shall not accept any such roll that is not certified on compatible electronic medium and that does not contain the posting of the Everglades agricultural privilege tax for each parcel. It is the responsibility of the district that such rolls be free of errors and omissions. Alterations to such rolls may be made by the executive director of the district, or a designee, up to 10 days before certification. If the tax collector or any taxpayer discovers errors or omissions on such roll, such person may request the district to file a corrected roll or a correction of the amount of any Everglades agricultural privilege tax. Other than for leasehold or other interests in governmental property permitting such property to be used for agricultural purposes, Everglades agricultural privilege taxes collected pursuant to this section shall be included in the combined notice for ad valorem taxes and non-ad valorem assessments provided for in s. 197.3635. Such Everglades agricultural privilege taxes shall be listed in the portion of the combined notice utilized for non-ad valorem assessments. A separate mailing is authorized only as a solution to the most exigent factual circumstances. However, if a tax collector cannot merge an Everglades agricultural privilege tax roll to produce such a notice, the tax collector shall mail a separate notice of Everglades agricultural privilege taxes or shall direct the district to mail such a separate notice. In deciding whether a separate mailing is necessary, the tax collector shall consider all costs to the district and taxpayers of such a separate mailing and the adverse effects to the taxpayers of delayed and multiple notices. The district shall bear all costs associated with any separate notice. Everglades agricultural privilege taxes collected pursuant to this section shall be subject to all collection provisions of chapter 197, including provisions relating to discount for early payment, prepayment by installment method, deferred payment, penalty for delinquent payment, and issuance and sale of tax certificates and tax deeds for nonpayment. Everglades agricultural privilege taxes for leasehold or other interests in property owned by the United States, the state, or any agency thereof permitting such property to be used for agricultural purposes shall be included on the notice provided pursuant to s. 196.31, a copy of which shall be provided to lessees or other interestholders registering with the district, and shall be collected from the lessee or other appropriate interestholder and remitted to the district immediately upon collection. Everglades agricultural privilege taxes included on the statement provided pursuant to s. 196.31 shall be due and collected on or prior to the next April 1 following provision of the notice. Proceeds of the Everglades agricultural privilege taxes shall be distributed by the tax collector to the district. Each tax collector shall be paid a commission equal to the actual cost of collection, not to exceed 2 percent, on the amount of Everglades agricultural privilege taxes collected and remitted. Notwithstanding any general law or special act to the contrary, Everglades agricultural privilege taxes shall not be included on the notice of proposed property taxes provided for in s. 200.069.

(c) The initial Everglades agricultural privilege tax roll shall be certified for the tax notices mailed in November 1994. Incentive credits to the Everglades agricultural privilege taxes to be included on the initial Everglades agricultural privilege tax roll, if any, shall be based upon the total phosphorus load reduction for the year ending April 30, 1993. The Everglades agricultural privilege taxes for each year shall be computed in the following manner:

1. Annual Everglades agricultural privilege taxes shall be charged for the privilege of conducting an agricultural trade or business on each acre of real property or portion thereof. The annual Everglades agricultural privilege tax shall be $24.89 per acre for the tax notices mailed in November 1994 through November 1997; $27 per acre for the tax notices mailed in November 1998 through November 2001; $31 per acre for the tax notices mailed in November 2002 through November 2005; and $35 per acre for the tax notices mailed in November 2006 through November 2013.

2. It is the intent of the Legislature to encourage the performance of best management practices to maximize the reduction of phosphorus loads at points of discharge from the EAA by

providing an incentive credit against the Everglades agricultural privilege taxes set forth in subparagraph 1. The total phosphorus load reduction shall be measured for the entire EAA by comparing the actual measured total phosphorus load attributable to the EAA for each annual period ending on April 30 to the total estimated phosphorus load that would have occurred during the 1979-1988 base period using the model for total phosphorus load determinations provided in chapter 40E-63, Florida Administrative Code, utilizing the technical information and procedures contained in Section IV-EAA Period of Record Flow and Phosphorus Load Calculations; Section V-Monitoring Requirements; and Section VI-Phosphorus Load Allocations and Compliance Calculations of the Draft Technical Document in Support of chapter 40E-63, Florida Administrative Code - Works of the District within the Everglades, March 3, 1992, and the Standard Operating Procedures for Water Quality Collection in Support of the Everglades Water Condition Report, dated February 18, 1994. The model estimates the total phosphorus load that would have occurred during the 1979-1988 base period by substituting the rainfall conditions for such annual period ending April 30 for the conditions that were used to calibrate the model for the 1979-1988 base period. The data utilized to calculate the actual loads attributable to the EAA shall be adjusted to eliminate the effect of any load and flow that were not included in the 1979-1988 base period as defined in chapter 40E-63, Florida Administrative Code. The incorporation of the method of measuring the total phosphorus load reduction provided in this subparagraph is intended to provide a legislatively approved aid to the governing board of the district in making an annual ministerial determination of any incentive credit.

3. Phosphorus load reductions calculated in the manner described in subparagraph 2. and rounded to the nearest whole percentage point for each annual period beginning on May 1 and ending on April 30 shall be used to compute incentive credits to the Everglades agricultural privilege taxes to be included on the annual tax notices mailed in November of the next ensuing calendar year. Incentive credits, if any, will reduce the Everglades agricultural privilege taxes set forth in subparagraph 1. only to the extent that the phosphorus load reduction exceeds 25 percent. Subject to subparagraph 4., the reduction of phosphorus load by each percentage point in excess of 25 percent, computed for the 12-month period ended on April 30 of the calendar year immediately preceding certification of the Everglades agricultural privilege tax, shall result in the following incentive credits: $0.33 per acre for the tax notices mailed in November 1994 through November 1997; $0.54 per acre for the tax notices mailed in November 1998 through November 2001; $0.61 per acre for the tax notices mailed in November 2002 through November 2005, and $0.65 per acre for the tax notices mailed in November 2006 through November 2013. The determination of incentive credits, if any, shall be documented by resolution of the governing board of the district adopted prior to or at the time of the adoption of its resolution certifying the annual Everglades agricultural privilege tax roll to the appropriate tax collector.

4. Notwithstanding subparagraph 3., incentive credits for the performance of best management practices shall not reduce the minimum annual Everglades agricultural privilege tax to less than $24.89 per acre, which annual Everglades agricultural privilege tax as adjusted in the manner required by paragraph (e) shall be known as the "minimum tax." To the extent that the application of incentive credits for the performance of best management practices would reduce the annual Everglades agricultural privilege tax to an amount less than the minimum tax, then the unused or excess incentive credits for the performance of best management practices shall be carried forward, on a phosphorus load percentage basis, to be applied as incentive credits in subsequent years. Any unused or excess incentive credits remaining after certification of the Everglades agricultural privilege tax roll for the tax notices mailed in November 2013 shall be canceled.

5. Notwithstanding the schedule of Everglades agricultural privilege taxes set forth in subparagraph 1., the owner, lessee, or other appropriate interestholder of any property shall be entitled to have the Everglades agricultural privilege tax for any parcel of property reduced to

the minimum tax, commencing with the tax notices mailed in November 1996 for parcels of property participating in the early baseline option as defined in chapter 40E-63, Florida Administrative Code, and with the tax notices mailed in November 1997 for parcels of property not participating in the early baseline option, upon compliance with the requirements set forth in this subparagraph. The owner, lessee, or other appropriate interestholder shall file an application with the executive director of the district prior to July 1 for consideration of reduction to the minimum tax on the Everglades agricultural privilege tax roll to be certified for the tax notice mailed in November of the same calendar year and shall have the burden of proving the reduction in phosphorus load attributable to such parcel of property. The phosphorus load reduction for each discharge structure serving the parcel shall be measured as provided in chapter 40E-63, Florida Administrative Code, and the permit issued for such property pursuant to chapter 40E-63, Florida Administrative Code. A parcel of property which has achieved the following annual phosphorus load reduction standards shall have the minimum tax included on the annual tax notice mailed in November of the next ensuing calendar year: 30 percent or more for the tax notices mailed in November 1994 through November 1997; 35 percent or more for the tax notices mailed in November 1998 through November 2001; 40 percent or more for the tax notices mailed in November 2002 through November 2005; and 45 percent or more for the tax notices mailed in November 2006 through November 2013. In addition, any parcel of property that achieves an annual flow weighted mean concentration of 50 parts per billion (ppb) of phosphorus at each discharge structure serving the property for any year ending April 30 shall have the minimum tax included on the annual tax notice mailed in November of the next ensuing calendar year. Any annual phosphorus reductions that exceed the amount necessary to have the minimum tax included on the annual tax notice for any parcel of property shall be carried forward to the subsequent years' phosphorus load reduction to determine if the minimum tax shall be included on the annual tax notice. The governing board of the district shall deny or grant the application by resolution adopted prior to or at the time of the adoption of its resolution certifying the annual Everglades agricultural privilege tax roll to the appropriate tax collector.

6. The annual Everglades agricultural privilege tax for the tax notices mailed in November 2014 through November 2016 shall be $25 per acre and for tax notices mailed in November 2017 and thereafter shall be $10 per acre.

(d) For purposes of this paragraph, "vegetable acreage" means, for each tax year, any portion of a parcel of property used for a period of not less than 8 months for the production of vegetable crops, including sweet corn, during the 12 months ended September 30 of the year preceding the tax year. Land preparation, crop rotation, and fallow periods shall not disqualify property from classification as vegetable acreage if such property is actually used for the production of vegetable crops.

1. It is hereby determined by the Legislature that vegetable farming in the EAA is subject to volatile market conditions and is particularly subject to crop loss or damage due to freezes, flooding, and drought. It is further determined by the Legislature that, due to the foregoing factors, imposition of an Everglades agricultural privilege tax upon vegetable acreage in excess of the minimum tax could create a severe economic hardship and impair the production of vegetable crops. Notwithstanding the schedule of Everglades agricultural privilege taxes set forth in subparagraph (c)1., the Everglades agricultural privilege tax for vegetable acreage shall be the minimum tax, and vegetable acreage shall not be entitled to any incentive credits.

2. If either the Governor, the President of the United States, or the United States Department of Agriculture declares the existence of a state of emergency or disaster resulting from extreme natural conditions impairing the ability of vegetable acreage to produce crops, payment of the Everglades agricultural privilege taxes imposed for the privilege of conducting an agricultural trade or business on such property shall be deferred for a period of 1 year, and all subsequent annual payments shall be deferred for the same period.

a. If the declaration occurs between April 1 and October 31, the Everglades agricultural privilege tax to be included on the next annual tax notice will be deferred to the subsequent annual tax notice.
b. If the declaration occurs between November 1 and March 31 and the Everglades agricultural privilege tax included on the most recent tax notice has not been paid, such Everglades agricultural privilege tax will be deferred to the next annual tax notice.
c. If the declaration occurs between November 1 and March 31 and the Everglades agricultural privilege tax included on the most recent tax notice has been paid, the Everglades agricultural privilege tax to be included on the next annual tax notice will be deferred to the subsequent annual tax notice.
3. In the event payment of Everglades agricultural privilege taxes is deferred pursuant to this paragraph, the district must record a notice in the official records of each county in which vegetable acreage subject to such deferment is located. The recorded notice must describe each parcel of property as to which Everglades agricultural privilege taxes have been deferred and the amount deferred for such property. If all or any portion of the property as to which Everglades agricultural privilege taxes have been deferred ceases to be classified as agricultural under the provisions of chapter 193 or otherwise subject to the Everglades agricultural privilege tax, all deferred amounts must be included on the tax notice for such property mailed in November of the first tax year for which such property is not subject to the Everglades agricultural privilege tax. After a property owner has paid all outstanding Everglades agricultural privilege taxes, including any deferred amounts, the district shall provide the property owner with a recordable instrument evidencing the payment of all outstanding amounts.
4. The owner, lessee, or other appropriate interestholder must file an application with the executive director of the district prior to July 1 for classification of a portion of the property as vegetable acreage on the Everglades agricultural privilege tax roll to be certified for the tax notice mailed in November of the same calendar year and shall have the burden of proving the number of acres used for the production of vegetable crops during the year in which incentive credits are determined and the period of such use. The governing board of the district shall deny or grant the application by resolution adopted prior to or at the time of the adoption of its resolution certifying the annual Everglades agricultural privilege tax roll to the appropriate tax collector.
5. This paragraph does not relieve vegetable acreage from the performance of best management practices specified in chapter 40E-63, Florida Administrative Code.
(e) If, for any tax year, the number of acres subject to the Everglades agricultural privilege tax is less than the number of acres included on the Everglades agricultural privilege tax roll certified for the tax notices mailed in November 1994, the minimum tax shall be subject to increase in the manner provided in this paragraph. In determining the number of acres subject to the Everglades agricultural privilege tax for purposes of this paragraph, property acquired by a not-for-profit entity for purposes of conservation and preservation, the United States, or the state, or any agency thereof, and removed from the Everglades agricultural privilege tax roll after January 1, 1994, shall be treated as subject to the tax even though no tax is imposed or due: in its entirety, for tax notices mailed prior to November 2000; to the extent its area exceeds 4 percent of the total area of property subject to the Everglades agricultural tax, for tax notices mailed in November 2000 through November 2005; and to the extent its area exceeds 8 percent of the total area of property subject to the Everglades agricultural tax, for tax notices mailed in November 2006 and thereafter. For each tax year, the district shall determine the amount, if any, by which the sum of the following exceeds $12,367,000:
1. The product of the minimum tax multiplied by the number of acres subject to the Everglades agricultural privilege tax; and
2. The ad valorem tax increment, as defined in this subparagraph.

The aggregate of such annual amounts, less any portion previously applied to eliminate or reduce future increases in the minimum tax, as described in this paragraph, shall be known as the "excess tax amount." If for any tax year, the amount computed by multiplying the minimum tax by the number of acres then subject to the Everglades agricultural privilege tax is less than $12,367,000, the excess tax amount shall be applied in the following manner. If the excess tax amount exceeds such difference, an amount equal to the difference shall be deducted from the excess tax amount and applied to eliminate any increase in the minimum tax. If such difference exceeds the excess tax amount, the excess tax amount shall be applied to reduce any increase in the minimum tax. In such event, a new minimum tax shall be computed by subtracting the remaining excess tax amount from $12,367,000 and dividing the result by the number of acres subject to the Everglades agricultural privilege tax for such tax year. For purposes of this paragraph, the "ad valorem tax increment" means 50 percent of the difference between the amount of ad valorem taxes actually imposed by the district for the immediate prior tax year against property included on the Everglades agricultural privilege tax roll certified for the tax notices mailed in November 1994 that was not subject to the Everglades agricultural privilege tax during the immediate prior tax year and the amount of ad valorem taxes that would have been imposed against such property for the immediate prior tax year if the taxable value of each acre had been equal to the average taxable value of all other land classified as agricultural within the EAA for such year; however, the ad valorem tax increment for any year shall not exceed the amount that would have been derived from such property from imposition of the minimum tax during the immediate prior tax year.

(f) Any owner, lessee, or other appropriate interestholder of property subject to the Everglades agricultural privilege tax may contest the Everglades agricultural privilege tax by filing an action in circuit court.

1. No action may be brought to contest the Everglades agricultural privilege tax after 60 days from the date the tax notice that includes the Everglades agricultural privilege tax is mailed by the tax collector. Before an action to contest the Everglades agricultural privilege tax may be brought, the taxpayer shall pay to the tax collector the amount of the Everglades agricultural privilege tax which the taxpayer admits in good faith to be owing. The tax collector shall issue a receipt for the payment, and the receipt shall be filed with the complaint. Payment of an Everglades agricultural privilege tax shall not be deemed an admission that such tax was due and shall not prejudice the right to bring a timely action to challenge such tax and seek a refund. No action to contest the Everglades agricultural privilege tax may be maintained, and such action shall be dismissed, unless all Everglades agricultural privilege taxes imposed in years after the action is brought, which the taxpayer in good faith admits to be owing, are paid before they become delinquent. The requirements of this subparagraph are jurisdictional.

2. In any action involving a challenge of the Everglades agricultural privilege tax, the court shall assess all costs. If the court finds that the amount of tax owed by the taxpayer is greater than the amount the taxpayer has in good faith admitted and paid, it shall enter judgment against the taxpayer for the deficiency and for interest on the deficiency at the rate of 12 percent per year from the date the tax became delinquent. If it finds that the amount of tax which the taxpayer has admitted to be owing is grossly disproportionate to the amount of tax found to be due and that the taxpayer's admission was not made in good faith, the court shall also assess a penalty at the rate of 25 percent of the deficiency per year from the date the tax became delinquent. The court may issue injunctions to restrain the sale of property for any Everglades agricultural privilege tax which appears to be contrary to law or equity.

(g) Notwithstanding any contrary provisions in chapter 120, or any provision of any other law, an action in circuit court shall be the exclusive remedy to challenge the assessment of an Everglades agricultural privilege tax and owners of property subject to the Everglades agricultural privilege tax shall have no right or standing to initiate administrative proceedings under chapter 120 to challenge the assessment of an Everglades agricultural privilege tax,

including specifically, and without limitation, the annual certification by the district governing board of the Everglades agricultural privilege tax roll to the appropriate tax collector, the annual calculation of any incentive credit for phosphorus level reductions, the denial of an application for exclusion from the Everglades agricultural privilege tax, the calculation of the minimum tax adjustments provided in paragraph (e), the denial of an application for reduction to the minimum tax, and the denial of any application for classification as vegetable acreage, deferment of payment for vegetable acreage, or correction of any alleged error in the Everglades agricultural privilege tax roll.

(h) In recognition of the findings set forth in subsection (1), the Legislature finds that the assessment and use of the Everglades agricultural privilege tax is a matter of concern to all areas of Florida and the Legislature intends this act to be a general law authorization of the tax within the meaning of s. 9, Art. VII of the State Constitution and that payment of the tax complies with the obligations of owners and users of land under s. 7(b), Art. II of the State Constitution.

(7) C-139 AGRICULTURAL PRIVILEGE TAX. —

(a) There is hereby imposed an annual C-139 agricultural privilege tax for the privilege of conducting an agricultural trade or business on:

1. All real property located within the C-139 Basin that is classified as agricultural under the provisions of chapter 193; and

2. Leasehold or other interests in real property located within the C-139 Basin owned by the United States, the state, or any agency thereof permitting the property to be used for agricultural purposes in a manner that would result in such property being classified as agricultural under the provisions of chapter 193 if not governmentally owned, whether or not such property is actually classified as agricultural under the provisions of chapter 193.

It is hereby determined by the Legislature that the privilege of conducting an agricultural trade or business on such property constitutes a reasonable basis for imposing the C-139 agricultural privilege tax and that logical differences exist between the agricultural use of such property and the use of other property within the C-139 Basin for residential or nonagricultural commercial use. The C-139 agricultural privilege tax shall constitute a lien against the property, or the leasehold or other interest in governmental property permitting such property to be used for agricultural purposes, described on the C-139 agricultural privilege tax roll. The lien shall be in effect from January 1 of the year the tax notice is mailed until discharged by payment and shall be equal in rank and dignity with the liens of all state, county, district, or municipal taxes and non-ad valorem assessments imposed pursuant to general law, special act, or local ordinance and shall be superior in dignity to all other liens, titles, and claims.

(b) The C-139 agricultural privilege tax, other than for leasehold or other interests in governmental property permitting such property to be used for agricultural purposes, shall be collected in the manner provided for ad valorem taxes. By September 15 of each year, the governing board of the district shall certify by resolution a C-139 agricultural privilege tax roll on compatible electronic medium to the tax collector of each county in which a portion of the C-139 Basin is located. The district shall also produce one copy of the roll in printed form which shall be available for inspection by the public. The district shall post the C-139 agricultural privilege tax for each parcel on the roll. The tax collector shall not accept any such roll that is not certified on compatible electronic medium and that does not contain the posting of the C-139 agricultural privilege tax for each parcel. It is the responsibility of the district that such rolls be free of errors and omissions. Alterations to such rolls may be made by the executive director of the district, or a designee, up to 10 days before certification. If the tax collector or any taxpayer discovers errors or omissions on such roll, such person may request the district to file a corrected roll or a correction of the amount of any C-139 agricultural privilege tax. Other than for leasehold or other interests in governmental property permitting such property to be used for agricultural purposes, C-139 agricultural privilege taxes collected pursuant to this section shall be included in the combined notice for ad valorem taxes and non-ad valorem assessments provided for in s.

197.3635. Such C-139 agricultural privilege taxes shall be listed in the portion of the combined notice utilized for non-ad valorem assessments. A separate mailing is authorized only as a solution to the most exigent factual circumstances. However, if a tax collector cannot merge a C-139 agricultural privilege tax roll to produce such a notice, the tax collector shall mail a separate notice of C-139 agricultural privilege taxes or shall direct the district to mail such a separate notice. In deciding whether a separate mailing is necessary, the tax collector shall consider all costs to the district and taxpayers of such a separate mailing and the adverse effects to the taxpayers of delayed and multiple notices. The district shall bear all costs associated with any separate notice. C-139 agricultural privilege taxes collected pursuant to this section shall be subject to all collection provisions of chapter 197, including provisions relating to discount for early payment, prepayment by installment method, deferred payment, penalty for delinquent payment, and issuance and sale of tax certificates and tax deeds for nonpayment. C-139 agricultural privilege taxes for leasehold or other interests in property owned by the United States, the state, or any agency thereof permitting such property to be used for agricultural purposes shall be included on the notice provided pursuant to s. 196.31, a copy of which shall be provided to lessees or other interestholders registering with the district, and shall be collected from the lessee or other appropriate interestholder and remitted to the district immediately upon collection. C-139 agricultural privilege taxes included on the statement provided pursuant to s. 196.31 shall be due and collected on or prior to the next April 1 following provision of the notice. Proceeds of the C-139 agricultural privilege taxes shall be distributed by the tax collector to the district. Each tax collector shall be paid a commission equal to the actual cost of collection, not to exceed 2 percent, on the amount of C-139 agricultural privilege taxes collected and remitted. Notwithstanding any general law or special act to the contrary, C-139 agricultural privilege taxes shall not be included on the notice of proposed property taxes provided in s. 200.069.

(c)1. The initial C-139 agricultural privilege tax roll shall be certified for the tax notices mailed in November 1994. The C-139 agricultural privilege taxes for the tax notices mailed in November 1994 through November 2002 shall be computed by dividing $654,656 by the number of acres included on the C-139 agricultural privilege tax roll for such year, excluding any property located within the C-139 Annex.

2. The C-139 agricultural privilege taxes for the tax notices mailed in November 2003 through 2013 shall be computed by dividing $654,656 by the number of acres included on the C-139 agricultural privilege tax roll for November 2001, excluding any property located within the C-139 Annex.

3. The C-139 agricultural privilege taxes for the tax notices mailed in November 2014 and thereafter shall be $1.80 per acre.

(d) For purposes of this paragraph, "vegetable acreage" means, for each tax year, any portion of a parcel of property used for a period of not less than 8 months for the production of vegetable crops, including sweet corn, during the 12 months ended September 30 of the year preceding the tax year. Land preparation, crop rotation, and fallow periods shall not disqualify property from classification as vegetable acreage if such property is actually used for the production of vegetable crops.

1. If either the Governor, the President of the United States, or the United States Department of Agriculture declares the existence of a state of emergency or disaster resulting from extreme natural conditions impairing the ability of vegetable acreage to produce crops, payment of the C-139 agricultural privilege taxes imposed for the privilege of conducting an agricultural trade or business on such property shall be deferred for a period of 1 year, and all subsequent annual payments shall be deferred for the same period.

a. If the declaration occurs between April 1 and October 31, the C-139 agricultural privilege tax to be included on the next annual tax notice will be deferred to the subsequent annual tax notice.

b. If the declaration occurs between November 1 and March 31 and the C-139 agricultural privilege tax included on the most recent tax notice has not been paid, such C-139 agricultural privilege tax will be deferred to the next annual tax notice.
c. If the declaration occurs between November 1 and March 31 and the C-139 agricultural privilege tax included on the most recent tax notice has been paid, the C-139 agricultural privilege tax to be included on the next annual tax notice will be deferred to the subsequent annual tax notice.
2. In the event payment of C-139 agricultural privilege taxes is deferred pursuant to this paragraph, the district must record a notice in the official records of each county in which vegetable acreage subject to such deferment is located. The recorded notice must describe each parcel of property as to which C-139 agricultural privilege taxes have been deferred and the amount deferred for such property. If all or any portion of the property as to which C-139 agricultural privilege taxes have been deferred ceases to be classified as agricultural under the provisions of chapter 193 or otherwise subject to the C-139 agricultural privilege tax, all deferred amounts must be included on the tax notice for such property mailed in November of the first tax year for which such property is not subject to the C-139 agricultural privilege tax. After a property owner has paid all outstanding C-139 agricultural privilege taxes, including any deferred amounts, the district shall provide the property owner with a recordable instrument evidencing the payment of all outstanding amounts.
3. The owner, lessee, or other appropriate interestholder shall file an application with the executive director of the district prior to July 1 for classification of a portion of the property as vegetable acreage on the C-139 agricultural privilege tax roll to be certified for the tax notice mailed in November of the same calendar year and shall have the burden of proving the number of acres used for the production of vegetable crops during the year in which incentive credits are determined and the period of such use. The governing board of the district shall deny or grant the application by resolution adopted prior to or at the time of the adoption of its resolution certifying the annual C-139 agricultural privilege tax roll to the appropriate tax collector.
4. This paragraph does not relieve vegetable acreage from the performance of best management practices specified in chapter 40E-63, Florida Administrative Code.
(e) Any owner, lessee, or other appropriate interestholder of property subject to the C-139 agricultural privilege tax may contest the C-139 agricultural privilege tax by filing an action in circuit court.
1. No action may be brought to contest the C-139 agricultural privilege tax after 60 days from the date the tax notice that includes the C-139 agricultural privilege tax is mailed by the tax collector. Before an action to contest the C-139 agricultural privilege tax may be brought, the taxpayer shall pay to the tax collector the amount of the C-139 agricultural privilege tax which the taxpayer admits in good faith to be owing. The tax collector shall issue a receipt for the payment and the receipt shall be filed with the complaint. Payment of an C-139 agricultural privilege tax shall not be deemed an admission that such tax was due and shall not prejudice the right to bring a timely action to challenge such tax and seek a refund. No action to contest the C-139 agricultural privilege tax may be maintained, and such action shall be dismissed, unless all C-139 agricultural privilege taxes imposed in years after the action is brought, which the taxpayer in good faith admits to be owing, are paid before they become delinquent. The requirements of this paragraph are jurisdictional.
2. In any action involving a challenge of the C-139 agricultural privilege tax, the court shall assess all costs. If the court finds that the amount of tax owed by the taxpayer is greater than the amount the taxpayer has in good faith admitted and paid, it shall enter judgment against the taxpayer for the deficiency and for interest on the deficiency at the rate of 12 percent per year from the date the tax became delinquent. If it finds that the amount of tax which the taxpayer has admitted to be owing is grossly disproportionate to the amount of tax found to be due and that the taxpayer's admission was not made in good faith, the court shall also assess a penalty

at the rate of 25 percent of the deficiency per year from the date the tax became delinquent. The court may issue injunctions to restrain the sale of property for any C-139 agricultural privilege tax which appears to be contrary to law or equity.

(f) Notwithstanding any contrary provisions in chapter 120, or any provision of any other law, an action in circuit court shall be the exclusive remedy to challenge the assessment of an C-139 agricultural privilege tax and owners of property subject to the C-139 agricultural privilege tax shall have no right or standing to initiate administrative proceedings under chapter 120 to challenge the assessment of an C-139 agricultural privilege tax including specifically, and without limitation, the annual certification by the district governing board of the C-139 agricultural privilege tax roll to the appropriate tax collector, the denial of an application for exclusion from the C-139 agricultural privilege tax, and the denial of any application for classification as vegetable acreage, deferment of payment for vegetable acreage, or correction of any alleged error in the C-139 agricultural privilege tax roll.

(g) In recognition of the findings set forth in subsection (1), the Legislature finds that the assessment and use of the C-139 agricultural privilege tax is a matter of concern to all areas of Florida and the Legislature intends this section to be a general law authorization of the tax within the meaning of s. 9, Art. VII of the State Constitution.

(8) SPECIAL ASSESSMENTS.—

(a) In addition to any other legally available funding mechanism, the district may create, alone or in cooperation with counties, municipalities, and special districts pursuant to s. 163.01, the Florida Interlocal Cooperation Act of 1969, one or more stormwater management system benefit areas including property located outside the EAA and the C-139 Basin, and property located within the EAA and the C-139 Basin that is not subject to the Everglades agricultural privilege tax or the C-139 agricultural privilege tax. The district may levy special assessments within said benefit areas to fund the planning, acquisition, construction, financing, operation, maintenance, and administration of stormwater management systems for the benefited areas. Any benefit area in which property owners receive substantially different levels of stormwater management system benefits shall include stormwater management system benefit subareas within which different per acreage assessments shall be levied from subarea to subarea based upon a reasonable relationship to benefits received. The assessments shall be calculated to generate sufficient funds to plan, acquire, construct, finance, operate, and maintain the stormwater management systems authorized pursuant to this section.

(b) The district may use the non-ad valorem levy, collection, and enforcement method as provided in chapter 197 for assessments levied pursuant to paragraph (a).

(c) The district shall publish notice of the certification of the non-ad valorem assessment roll pursuant to chapter 197 in a newspaper of general circulation in the counties wherein the assessment is being levied, within 1 week after the district certifies the non-ad valorem assessment roll to the tax collector pursuant to s. 197.3632(5). The assessments levied pursuant to paragraph (a) shall be final and conclusive as to each lot or parcel unless the owner thereof shall, within 90 days of certification of the non-ad valorem assessment roll pursuant to s. 197.3632(5), commence an action in circuit court. Absent such commencement of an action within such period of time by an owner of a lot or parcel, such owner shall thereafter be estopped to raise any question related to the special benefit afforded the property or the reasonableness of the amount of the assessment. Except with respect to an owner who has commenced such an action, the non-ad valorem assessment roll as finally adopted and certified by the South Florida Water Management District to the tax collector pursuant to s. 197.3632(5) shall be competent and sufficient evidence that the assessments were duly levied and that all other proceedings adequate to the adoption of the non-ad valorem assessment roll were duly held, taken, and performed as required by s. 197.3632. If any assessment is abated in whole or in part by the court, the amount by which the assessment is so reduced may, by resolution of the governing board of the district, be payable from funds of the district legally available for that

purpose, or at the discretion of the governing board of the district, assessments may be increased in the manner provided in s. 197.3632.

(d) In no event shall the amount of funds collected for stormwater management facilities pursuant to paragraph (a) exceed the cost of providing water management attributable to water quality treatment resulting from the operation of stormwater management systems of the landowners to be assessed. Such water quality treatment may be required by the plan or permits issued by the district. Prior to the imposition of assessments pursuant to paragraph (a) for construction of new stormwater management systems or the acquisition of necessary land, the district shall establish the general purpose, design, and function of the new system sufficient to make a fair and reasonable determination of the estimated costs of water management attributable to water quality treatment resulting from operation of stormwater management systems of the landowners to be assessed. This determination shall establish the proportion of the total anticipated costs attributable to the landowners. In determining the costs to be imposed by assessments, the district shall consider the extent to which nutrients originate from external sources beyond the control of the landowners to be assessed. Costs for hydroperiod restoration within the Everglades Protection Area shall be provided by funds other than those derived from the assessments. The proportion of total anticipated costs attributable to the landowners shall be apportioned to individual landowners considering the factors specified in paragraph (e). Any determination made pursuant to this paragraph or paragraph (e) may be included in the plan or permits issued by the district.

(e) In determining the amount of any assessment imposed on an individual landowner under paragraph (a), the district shall consider the quality and quantity of the stormwater discharged by the landowner, the amount of treatment provided to the landowner, and whether the landowner has provided equivalent treatment or retention prior to discharge to the district's system.

(f) No assessment shall be imposed under this section for the operation or maintenance of a stormwater management system or facility for which construction has been completed on or before July 1, 1991, except to the extent that the operation or maintenance, or any modification of such system or facility, is required to provide water quality treatment.

(g) The district shall suspend, terminate, or modify projects and funding for such projects, as appropriate, if the projects are not achieving applicable goals specified in the plan.

(h) The Legislature hereby determines that any property owner who contributes to the need for stormwater management systems and programs, as determined for each individual property owner either through the plan or through permits issued to the district or to the property owner, is deemed to benefit from such systems and programs, and such benefits are deemed to be directly proportional to the relative contribution of the property owner to such need. The Legislature also determines that the issuance of a master permit provides benefits, through the opportunity to achieve collective compliance, for all persons within the area of the master permit which may be considered by the district in the imposition of assessments under this section.

(9) PERMITS.—

(a) The Legislature finds that construction and operation of the Everglades Construction Project will benefit the water resources of the district and is consistent with the public interest. The district shall construct, maintain, and operate the Everglades Construction Project in accordance with this section.

(b) The Legislature finds that there is an immediate need to initiate cleanup and restoration of the Everglades Protection Area through the Everglades Construction Project. In recognition of this need, the district may begin construction of the Everglades Construction Project prior to final agency action, or notice of intended agency action, on any permit from the department under this section.

(c) The department may issue permits to the district to construct, operate, and maintain the Everglades Construction Project based on the criteria set forth in this section. The permits to be

issued by the department to the district under this section shall be in lieu of other permits under this part or part VIII of chapter 403, 1992 Supplement to the Florida Statutes 1991.
(d) By June 1, 1994, the district shall apply to the department for a permit or permits for the construction, operation, and maintenance of the Everglades Construction Project. The district may comply with this paragraph by amending its pending Everglades permit application.
(e) The department shall issue a permit for a term of 5 years for the construction, operation, and maintenance of the Everglades Construction Project upon the district's providing reasonable assurances that:
1. The project will be constructed, operated, and maintained in accordance with the Everglades Construction Project;
2. The BMP program set forth in paragraph (4)(f) has been implemented; and
3. The final design of the Everglades Construction Project shall minimize wetland impacts, to the maximum extent practicable and consistent with the Everglades Construction Project.
(f) At least 60 days prior to the expiration of any permit issued under this section, the district may apply for renewal for a period of 5 years.
(g) Permits issued under this section may include any standard conditions provided by department rule which are appropriate and consistent with this section.
(h) Discharges shall be allowed, provided the STAs are operated in accordance with this section, if, after a stabilization period:
1. The STAs achieve the design objectives of the Everglades Construction Project for phosphorus;
2. For water quality parameters other than phosphorus, the quality of water discharged from the STAs is of equal or better quality than inflows; and
3. Discharges from STAs do not pose a serious danger to the public health, safety, or welfare.
(i) The district may discharge from any STA into waters of the state upon issuance of final agency action authorizing such action or in accordance with s. 373.439.
(j)1. Modifications to the Everglades Construction Project shall be submitted to the department for a determination as to whether permit modification is necessary. The department shall notify the district within 30 days after receiving the submittal as to whether permit modification is necessary.
2. The Legislature recognizes that technological advances may occur during the construction of the Everglades Construction Project. If superior technology becomes available in the future which can be implemented to more effectively meet the intent and purposes of this section, the district is authorized to pursue that alternative through permit modification to the department. The department may issue or modify a permit provided that the alternative is demonstrated to be superior at achieving the restoration goals of the Everglades Construction Project considering:
a. Levels of load reduction;
b. Levels of discharge concentration reduction;
c. Water quantity, distribution, and timing for the Everglades Protection Area;
d. Compliance with water quality standards;
e. Compatibility of treated water with the balance in natural populations of aquatic flora or fauna in the Everglades Protection Area;
f. Cost-effectiveness; and
g. The schedule for implementation.
Upon issuance of permit modifications by the department, the district is authorized to use available funds to finance the modification.
3. The district shall modify projects of the Everglades Construction Project, as appropriate, if the projects are not achieving the design objectives. Modifications that are inconsistent with the permit shall require a permit modification from the department. Modifications which substitute the treatment technology must meet the requirements of subparagraph 2. Nothing in this section

shall prohibit the district from refining or modifying the final design of the project based upon the February 14, 1994, conceptual design document in accordance with standard engineering practices.

(k) By October 1, 1994, the district shall apply for a permit under this section to operate and maintain discharge structures within the control of the district which discharge into, within, or from the Everglades Protection Area and are not included in the Everglades Construction Project. The district may comply with this subsection by amending its pending permit application regarding these structures. In addition to the requirements of ss. 373.413 and 373.416, the application shall include the following:

1. Schedules and strategies for:

a. Achieving and maintaining water quality standards;

b. Evaluation of existing programs, permits, and water quality data;

c. Acquisition of lands and construction and operation of water treatment facilities, if appropriate, together with development of funding mechanisms; and

d. Development of a regulatory program to improve water quality, including identification of structures or systems requiring permits or modifications of existing permits.

2. A monitoring program to ensure the accuracy of data and measure progress toward achieving compliance with water quality standards.

(l) The department shall issue one or more permits for a term of 5 years for the operation and maintenance of structures identified by the district in paragraph (k) upon the district's demonstration of reasonable assurance that those elements identified in paragraph (k) will provide compliance with water quality standards to the maximum extent practicable and otherwise comply with the provisions of ss. 373.413 and 373.416. The department shall take agency action on the permit application by October 1, 1996. At least 60 days prior to the expiration of any permit, the district may apply for a renewal thereof for a period of 5 years.

(m) The district may apply for modification of any permit issued pursuant to this subsection, including superior technology in accordance with the procedures set forth in this subsection.

(n) The district also shall apply for a permit or modification of an existing permit, as provided in this subsection, for any new structure or for any modification of an existing structure.

(o) Except as otherwise provided in this section, nothing in this subsection shall relieve any person from the need to obtain any permit required by the department or the district pursuant to any other provision of law.

(p) The district shall publish notice of rulemaking pursuant to chapter 120 by October 1, 1991, allowing for a master permit or permits authorizing discharges from landowners within that area served by structures identified as S-5A, S-6, S-7, S-8, and S-150. For discharges within this area, the district shall not initiate any proceedings to require new permits or permit modifications for nutrient limitations prior to the adoption of the master permit rule by the governing board of the district or prior to April 1, 1992, whichever first occurs. The district's rules shall also establish conditions or requirements allowing for a single master permit for the Everglades Agricultural Area including those structures and water releases subject to chapter 40E-61, Florida Administrative Code. No later than the adoption of rules allowing for a single master permit, the department and the district shall provide appropriate procedures for incorporating into a master permit separate permits issued by the department under this chapter. The district's rules authorizing master permits for the Everglades Agricultural Area shall provide requirements consistent with this section and with interim or other permits issued by the department to the district. Such a master permit shall not preclude the requirement that individual permits be obtained for persons within the master permit area for activities not authorized by, or not in compliance with, the master permit. Nothing in this subsection shall limit the authority of the department or district to enforce existing permit requirements or existing rules, to require permits for new structures, or to develop rules for master permits for other areas. To the

greatest extent possible the department shall delegate to the district any authority necessary to implement this subsection which is not already delegated.

(10) LONG-TERM COMPLIANCE PERMITS.—By December 31, 2006, the department and the district shall take such action as may be necessary ~~to implement the pre-2006 projects and strategies of the Long-Term Plan~~ so that water delivered to the Everglades Protection Area achieves ~~in all parts of the Everglades Protection Area~~ state water quality standards, including the phosphorus criterion ~~and moderating provisions.~~, in all parts of the Everglades Protection Area.

(a) ~~By December 31, 2003, the district shall submit to the department an application for permit modification to incorporate proposed changes to the Everglades Construction Project and other district works delivering water to the Everglades Protection Area as needed to implement the pre-2006 projects and strategies of the Long-Term Plan in all permits issued by the department, including the permits issued pursuant to subsection (9). These changes shall be designed to achieve state water quality standards, including the phosphorus criterion and moderating provisions. During the implementation of the initial phase of the Long-Term Plan, permits issued by the department shall be based on BAPRT, and shall include technology-based effluent limitations consistent with the Long-Term Plan, as provided in subparagraph (4)(e)3.~~

(b) If the Everglades Construction Project or other discharges to the Everglades Protection Area are in compliance with state water quality standards, including the phosphorus criterion, the permit application shall include:

1. A plan for maintaining compliance with the phosphorus criterion in the Everglades Protection Area.
2. A plan for maintaining compliance in the Everglades Protection Area with state water quality standards other than the phosphorus criterion.

(11) APPLICABILITY OF LAWS AND WATER QUALITY STANDARDS; AUTHORITY OF DISTRICT AND DEPARTMENT.—

(a) Except as otherwise provided in this section, nothing in this section shall be construed:

1. As altering any applicable state water quality standards, laws, or district or department rules in areas impacted by this section; or
2. To restrict the authority otherwise granted the department and the district pursuant to this chapter or chapter 403, and provisions of this section shall be deemed supplemental to the authority granted pursuant to this chapter and chapter 403.

(b) Mixing zones, variances, and moderating provisions, or relief mechanisms for compliance with water quality standards as provided by department rules, shall not be permitted for discharges which are subject to paragraph (4)(f) and subject to this section, except that site specific alternative criteria may be allowed for nonphosphorus parameters if the applicant shows entitlement under applicable law. After December 31, 2006, all such relief mechanisms may be allowed for nonphosphorus parameters if otherwise provided for by applicable law.

(c) Those landowners or permittees who are not in compliance as provided in paragraph (4)(f) must meet a discharge limit for phosphorus of 50 parts per billion (ppb) unless and until some other limit has been established by department rule or order or operation of paragraph (4)(e).

(12) RIGHTS OF SEMINOLE TRIBE OF FLORIDA.—Nothing in this section is intended to diminish or alter the governmental authority and powers of the Seminole Tribe of Florida, or diminish or alter the rights of that tribe, including, but not limited to, rights under the Water Rights Compact among the Seminole Tribe of Florida, the state, and the South Florida Water Management District as enacted by Pub. L. No. 100-228, 101 Stat. 1556, and chapter 87-292, Laws of Florida, and codified in s. 285.165, and rights under any other agreement between the Seminole Tribe of Florida and the state or its agencies. No land of the Seminole Tribe of Florida shall be used for stormwater treatment without the consent of the tribe.

(13) ANNUAL REPORTS.—Beginning January 1, 1992, the district shall submit to the department, the Governor, the Speaker of the House of Representatives, the Minority Leader of the House of Representatives, the President of the Senate, and the Minority Leader of the Senate annual progress reports regarding implementation of the section. The annual report will include a summary of the water conditions in the Everglades Protection Area, the status of the impacted areas, the status of the construction of the STAs, the implementation of the BMPs, and actions taken to monitor and control exotic species. The district must prepare the report in coordination with federal and state agencies.

(14) EVERGLADES FUND.—The South Florida Water Management District is directed to separately account for all moneys used for the purpose of funding the Everglades Construction Project.

(15) DEFINITION OF EVERGLADES AGRICULTURAL AREA. —As used in this section, "Everglades Agricultural Area" or "EAA" means the following described property: BEGINNING at the intersection of the North line of Section 2, Township 41, Range 37 East, with the Easterly right-of-way line of U.S. Army Corps of Engineers' Levee D-9, in Palm Beach County, Florida; thence, easterly along said North line of said Section 2 to the Northeast corner of said Section 2; thence, northerly along the West line of Section 36, Township 40 South, Range 37 East, to the West one-quarter corner of said Section 36; thence, easterly along the East-West half section line of said Section 36 to the center of said Section 36; thence northerly along the North-South half section line of said Section 36 to the North one-quarter corner of said Section 36, said point being on the line between Palm Beach and Martin Counties; thence, easterly along said North line of said Section 36 and said line between Palm Beach and Martin Counties to the Westerly right-of-way line of the South Florida Water Management District's Levee 8 North Tieback; thence, southerly along said Westerly right-of-way line of said Levee 8 North Tieback to the Southerly right-of-way line of South Florida Water Management District's Levee 8 at a point near the Northeast corner of Section 12, Township 41 South, Range 37 East; thence, easterly along said Southerly right-of-way line of said Levee 8 to a point in Section 7, Township 41 South, Range 38 East, where said right-of-way line turns southeasterly; thence, southeasterly along the Southwesterly right-of-way line of said Levee 8 to a point near the South line of Section 8, Township 43 South, Range 40 East, where said right-of-way line turns southerly; thence, southerly along the Westerly right-of-way line of said Levee 8 to the Northerly right-of-way line of State Road 80, in Section 32, Township 43 South, Range 40 East; thence, westerly along the Northerly right-of-way line of said State Road 80 to the northeasterly extension of the Northwesterly right-of-way line of South Florida Water Management District's Levee 7; thence, southwesterly along said northeasterly extension, and along the northwesterly right-of-way line of said Levee 7 to a point near the Northwest corner of Section 3, Township 45 South, Range 39 East, where said right-of-way turns southerly; thence, southerly along the Westerly right-of-way line of said Levee 7 to the Northwesterly right-of-way line of South Florida Water Management District's Levee 6, on the East line of Section 4, Township 46 South, Range 39 East; thence, southwesterly along the Northwesterly right-of-way line of said Levee 6 to the Northerly right-of-way line of South Florida Water Management District's Levee 5, near the Southwest corner of Section 22, Township 47 South, Range 38 East; thence, westerly along said Northerly right-of-way lines of said Levee 5 and along the Northerly right-of-way line of South Florida Water Management District's Levee 4 to the Northeasterly right-of-way line of South Florida Water Management District's Levee 3 and the Northeast corner of Section 12, Township 48 South, Range 34 East; thence, northwesterly along said Northeasterly right-of-way line of said Levee 3 to a point near the Southwest corner of Section 9, Township 47 South, Range 34 East, where said right-of-way line turns northerly; thence, northerly along the Easterly right-of-way lines of said Levee 3 and South Florida Water Management District's Levee 2 to the southerly line of Section 4, Township 46 South, Range 34 East; thence, easterly along said southerly line of said Section 4 to the Southeast corner of said Section 4; thence, northerly

along the East lines of said Section 4 and Section 33, Township 45 South, Range 34 East, to the Northeast corner of said Section 33; thence, westerly along the North line of said Section 33 to said Easterly right-of-way line of said Levee 2; thence, northerly along said Easterly right-of-way lines of said Levee 2 and South Florida Water Management District's Levee 1, to the North line of Section 16, Township 44 South, Range 34 East; thence, easterly along the North lines of said Section 16 and Section 15, Township 44 South, Range 34 East, to the Northeast corner of said Section 15; thence, northerly along the West lines of Section 11 and Section 2, Township 44 South, Range 34 East, and the West lines of Section 35, Section 26 and Section 23, Township 43 South, Range 34 East to a point 25 feet north of the West quarter-corner (W1/4) of said Section 23; thence, easterly along a line that is 25 feet north and parallel to the East-West half section line of said Section 23 and Section 24 to a point that is 25 feet north of the center of said Section 24; thence, northerly along the North-South half section lines of said Section 24 and Section 13, Township 43 South, Range 34 East, to the intersection with the North right-of-way line of State Road 80A (old U.S. Highway 27); thence, westerly along said North right-of-way line of said State Road 80A (old U.S. Highway 27) to the intersection with the Southerly right-of-way line of State Road 80; thence, easterly along said Southerly right-of-way line of said State Road 80 to the intersection with the North line of Section 19, Township 43 South, Range 35 East; thence, easterly along said North line of said Section 19 to the intersection with Southerly right-of-way of U.S. Army Corps of Engineers Levee D-2; thence, easterly along said Southerly right-of-way of said Levee D-2 to the intersection with the north right-of-way line of State Road 80 (new U.S. Highway 27); thence, easterly along said North right-of-way line of said State Road 80 (new U.S. Highway 27) to the East right-of-way line of South Florida Water Management District's Levee 25 (Miami Canal); thence, North along said East right-of-way line of said Levee 25 to the said south right-of-way line of said Levee D-2; thence, easterly and northeasterly along said Southerly and Easterly right-of-way lines of said Levee D-2 and said Levee D-9 to the point of beginning.

[3](16) DEFINITION OF C-139 BASIN.—For purposes of this section:

(a) "C-139 Basin" or "Basin" means the following described property: beginning at the intersection of an easterly extension of the south bank of Deer Fence Canal with the center line of South Florida Water Management District's Levee 3 in Section 33, Township 46 South, Range 34 East, Hendry County, Florida; thence, westerly along said easterly extension and along the South bank of said Deer Fence Canal to where it intersects the center line of State Road 846 in Section 33, Township 46 South, Range 32 East; thence, departing from said top of bank to the center line of said State Road 846, westerly along said center line of said State Road 846 to the West line of Section 4, Township 47 South, Range 31 East; thence, northerly along the West line of said section 4, and along the west lines of Sections 33 and 28, Township 46 South, Range 31 East, to the northwest corner of said Section 28; thence, easterly along the North line of said Section 28 to the North one-quarter (N1/4) corner of said Section 28; thence, northerly along the West line of the Southeast one-quarter (SE1/4) of Section 21, Township 46 South, Range 31 East, to the northwest corner of said Southeast one-quarter (SE1/4) of Section 21; thence, easterly along the North line of said Southeast one-quarter (SE1/4) of Section 21 to the northeast corner of said Southeast one-quarter (SE1/4) of Section 21; thence, northerly along the East line of said Section 21 and the East line of Section 16, Township 46 South, Range 31, East, to the northeast corner thereof; thence, westerly along the North line of said Section 16, to the northwest corner thereof; thence, northerly along the West line of Sections 9 and 4, Township 46 South, Range 31, East, to the northwest corner of said Section 4; thence, westerly along the North lines of Section 5 and Section 6, Township 46 South, Range 31 East, to the South one-quarter (S1/4) corner of Section 31, Township 45 South, Range 31 East; thence, northerly to the South one-quarter (S1/4) corner of Section 30, Township 45 South, Range 31 East; thence, easterly along the South line of said Section 30 and the South lines of Sections 29 and 28, Township 45 South, Range 31 East, to the Southeast corner of said

Section 28; thence, northerly along the East line of said Section 28 and the East lines of Sections 21 and 16, Township 45 South, Range 31 East, to the Northwest corner of the Southwest one-quarter of the Southwest one-quarter (SW1/4 of the SW 1/4) of Section 15, Township 45 South, Range 31 East; thence, northeasterly to the east one-quarter (E1/4) corner of Section 15, Township 45 South, Range 31 East; thence, northerly along the East line of said Section 15, and the East line of Section 10, Township 45 South, Range 31 East, to the center line of a road in the Northeast one-quarter (NE1/4) of said Section 10; thence, generally easterly and northeasterly along the center line of said road to its intersection with the center line of State Road 832; thence, easterly along said center line of said State Road 832 to its intersection with the center line of State Road 833; thence, northerly along said center line of said State Road 833 to the north line of Section 9, Township 44 South, Range 32 East; thence, easterly along the North line of said Section 9 and the north lines of Sections 10, 11 and 12, Township 44 South, Range 32 East, to the northeast corner of Section 12, Township 44 South, Range 32 East; thence, easterly along the North line of Section 7, Township 44 South, Range 33 East, to the center line of Flaghole Drainage District Levee, as it runs to the east near the northwest corner of said Section 7, Township 44 South, Range 33 East; thence, easterly along said center line of the Flaghole Drainage District Levee to where it meets the center line of South Florida Water Management District's Levee 1 at Flag Hole Road; thence, continue easterly along said center line of said Levee 1 to where it turns south near the Northwest corner of Section 12, Township 44 South, Range 33 East; thence, Southerly along said center line of said Levee 1 to where the levee turns east near the Southwest corner of said Section 12; thence, easterly along said center line of said Levee 1 to where it turns south near the Northeast corner of Section 17, Township 44 South, Range 34 East; thence, southerly along said center line of said Levee 1 and the center line of South Florida Water Management District's Levee 2 to the intersection with the north line of Section 33, Township 45 South, Range 34 East; thence, easterly along the north line of said Section 33 to the northeast corner of said Section 33; thence, southerly along the east line of said Section 33 to the southeast corner of said Section 33; thence, southerly along the east line of Section 4, Township 46 South, Range 34 East to the southeast corner of said Section 4; thence, westerly along the south line of said Section 4 to the intersection with the centerline of South Florida Water Management District's Levee 2; thence, southerly along said Levee 2 centerline and South Florida Water Management District's Levee 3 centerline to the POINT OF BEGINNING.

(b) Sections 21, 28, and 33, Township 46 South, Range 31 East, are not included within the boundary of the C-139 Basin.

(c) If the district issues permits in accordance with all applicable rules allowing water from the "C-139 Annex" to flow into the drainage system for the C-139 Basin, the C-139 Annex shall be added to the C-139 Basin for all tax years thereafter, commencing with the next C-139 agricultural privilege tax roll certified after issuance of such permits. "C-139 Annex" means the following described property: that part of the S.E. 1/4 of Section 32, Township 46 South, Range 34 East and that portion of Sections 5 and 6, Township 47 South, Range 34 East lying west of the L-3 Canal and South of the Deer Fence Canal; all of Sections 7, 17, 18, 19, 20, 28, 29, 30, 31, 32, 33, and 34, and that portion of Sections 8, 9, 16, 21, 22, 26, 27, 35, and 36 lying south and west of the L-3 Canal, in Township 47 South, Range 34 East; and all of Sections 2, 3, 4, 5, 6, 8, 9, 10, and 11 and that portion of Section 1 lying south and west of the L-3 Canal all in Township 48 South, Range 34 East.

(17) SHORT TITLE.—This section shall be known as the "Everglades Forever Act."

History.—s. 2, ch. 91-80; ss. 1, 2, ch. 94-115; s. 273, ch. 94-356; s. 171, ch. 99-13.

[1]Note.—Repealed by s. 38, ch. 99-247.

[2]Note.—Sections 403.91-403.938 comprised part VIII of ch. 403 in 1992. Except for s. 403.927 and ss. 403.93-403.958, these sections were repealed by ss. 45, 46, ch. 93-213, or s. 18, ch. 95-145. Sections 403.93-403.936 were repealed by s. 13, ch. 95-299. The two remaining

sections from former part VIII as it was constituted in 1992, ss. 403.927 and 403.938 (transferred to s. 403.9333 by s. 12, ch. 95-299), are located in part VII of ch. 403.

[3]Note.—Section 3, ch. 96-412, provides that "[n]otwithstanding s. 373.4592(16), to the contrary, Sections 21, 28, and 33, Township 46 South, Range 31 East shall not be included within the boundary of the C-139 Basin." Section 84, ch. 96-321, contains a substantially similar provision.

62-302.540 Water Quality Standards for Phosphorus Within the Everglades Protection Area.

(1) Purpose and Scope.

~~(a) The purpose of this rule is to implement the requirements of the Everglades Forever Act by utilizing the powers and duties granted the Department under the Act and other applicable provisions of Chapter 373 and 403, F.S., to establish water quality standards for phosphorus, including a numeric phosphorus criterion, within the EPA.~~

(b) The water quality standards adopted by this rule include all of the following elements:

1. A numerical interpretation of the Class III narrative nutrient criterion for phosphorus; and

~~2. Establishment of moderating provisions for permits authorizing discharges into the EPA in compliance with water quality standards, including the numeric phosphorus criterion; and~~

3. A method for determining achievement of the numeric phosphorus criterion, which takes into consideration spatial and temporal variability, natural background conditions and confidence in laboratory results.

(2) Findings.

(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.

~~(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.~~

~~(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.~~

~~(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.~~

~~(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.~~

~~(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.~~

(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.
~~(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).~~
(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).
(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.
(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.
~~(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 subparagraphs (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.~~

(3) Definitions.
~~(a) "Best Available Phosphorus Reduction Technology" (BAPRT) shall be as defined by s. 373.4592(2)(a), F.S. BMPs shall maintain and, where practicable, improve upon the performance of urban and agricultural source controls in reducing overall phosphorus levels. Agricultural BMPs within the Everglades Agricultural Area and the C-139 Basin shall be in accordance with Rules 40E-61 and 40E-63, F.A.C. STA phosphorus reductions shall be improved through implementation of optimization measures as defined by s. 373.4592(2)(l), F.S. BAPRT may include measures intended to reduce phosphorus levels in discharges from a single basin or sub-basin, or a program designed to address discharges from multiple basins.~~
~~(b) "Long-Term Plan" shall be as defined by Section 373.4592(2)(j), F.S.~~
(c) The "Everglades Protection Area" or "EPA" shall mean Water Conservation Areas 1 (Refuge), 2A, 2B, 3A and 3B, and the Everglades National Park.
(d) "Impacted Areas" shall mean areas of the EPA where total phosphorus concentrations in the upper 10 centimeters of the soils are greater than 500 mg/kg.
(e)"District" shall mean the South Florida Water Management District.
~~(f) "Optimization" shall be as defined by Section 373.4592(2)(l), F.S.~~

(g)“Settlement Agreement” shall mean the Settlement Agreement entered in Case No. 88-1886-Civ-Hoeveler, United States District Court for the Southern District of Florida, as modified by the Omnibus Order entered in the case on April 27, 2001.
~~(h) “Technology-based effluent limitation” or “TBEL” shall be defined in Section 373.4592(2)(p), F.S.~~
(i) “Unimpacted Areas” shall mean those areas which are not “Impacted Areas”.

(4) Phosphorus Criterion.
(a) The numeric phosphorus criterion for Class III waters in the EPA shall be a long-term geometric mean of 10 ppb, but shall not be lower than the natural conditions of the EPA, and shall take into account spatial and temporal variability. Achievement of the criterion shall be determined by the methods in this subsection. Exceedences of the provisions of the subsection shall not be considered deviations from the criterion if they are attributable to the full range of natural spatial and temporal variability, statistical variability inherent in sampling and testing procedures or higher natural background conditions.
(b) Water Bodies.
Achievement of the phosphorus criterion for waters in the EPA shall be determined separately in impacted and unimpacted areas in each of the following waterbodies: Water Conservation Areas 1, 2 and 3, and the Everglades National Park.
(c) Achievement of Criterion in Everglades National Park.
Achievement of the phosphorus criterion in the Park shall be based on the methods as set forth in Appendix A of the Settlement Agreement unless the Settlement Agreement is rescinded or terminated. If the Settlement Agreement is no longer in force, achievement of the criterion shall be determined based on the method provided for the remaining EPA.
For the Park, the Department shall review data from inflows into the park at locations established pursuant to Appendix A of the Settlement Agreement and shall determine that compliance is achieved if the Department concludes that phosphorus concentration limits for inflows into the Park do not result in a violation of the limits established in Appendix A.
(d) Achievement of the Criterion in WCA-1, WCA-2 and WCA-3.
1. Achievement of the criterion in unimpacted areas in each WCA shall be determined based upon data from stations that are evenly distributed and located in freshwater open water sloughs similar to the areas from which data were obtained to derive the phosphorus criterion. Achievement of the criterion shall be determined based on data collected monthly from the network of monitoring stations in the unimpacted area. The water body will have achieved the criterion if the five year geometric mean averaged across all stations is less than or equal to 10 ppb. In order to provide protection against imbalances of aquatic flora or fauna, the following provisions must also be met:
a. The annual geometric mean average across all stations is less than or equal to 10 ppb for three of five years; and
b. The annual geometric mean averaged across all stations is less than or equal to 11 ppb; and
c. The annual geometric mean at all individual stations is less than or equal to 15 ppb. Individual station analyses are representative of only that station.
2. Achievement of the criterion shall be determined based on data collected monthly from the network of monitoring stations in the impacted area. Impacted

Areas of the water body will have achieved the criterion if the five year geometric mean averaged across all stations is less than or equal to 10 ppb. In order to provide protection against imbalances of aquatic flora or fauna, the following provisions must also be met:

a. The annual geometric mean averaged across all stations is less than or equal to 10 ppb for three of five years; and

b. The annual geometric mean averaged across all stations is less than or equal to 11 ppb; and

c. The annual geometric mean at all individual stations is less than or equal to 15 ppb. Individual station analyses are representative of only that station.

~~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.~~

Notwithstanding the definition of Impacted Area in subsection (3), individual stations in the network shall be deemed to be unimpacted for purposes of this rule if the five-year geometric mean is less than or equal to 10 ppb and the annual geometric mean is less than or equal to 15 ppb.

(e) Adjustment of Achievement Methods.

The Department shall complete a technical review of the achievement methods set forth in this subsection at a minimum of five year intervals and will report to the ERC on changes as needed. Data will be collected as necessary at stations that are evenly distributed and representative of major natural habitat types to further define the natural spatial and temporal variability and natural background of phosphorus concentrations in the EPA. As a part of the review, the Department may propose amendments to the achievement method provisions of this rule to include: (1) a hydrologic variability algorithm in a manner similar to the Settlement Agreement; and (2) implementing adjustment factors that take into account water body specific variability, including the effect of habitat types. The hydrologic variability evaluation shall be based on data from at least one climatic drought cycle and data reflecting the average interior stage of the water body on the dates of sample collection.

(f) Data Screening. Data from each monitoring station shall be evaluated prior to being used for the purposes of determining achievement of the criterion. Data shall be excluded from calculations for the purpose of determining achievement of the criterion if such data:

1. Do not comply with the requirements of Chapter 62-160, F.A.C.; or

2. Are excluded through the screening protocol set forth in the Data QualityScreening Protocol; or

3. Were collected from sites affected by extreme events such as fire, flood, drought or hurricanes, until normal conditions are restored; or

4. Where affected by localized activities caused by temporary human or natural disturbances such as airboat traffic, authorized (permitted or exempt) restoration activities, alligator holes, or bird rookeries.

5. Were sampled in years where hydrologic conditions (e.g. rainfall amount, water levels and water deliveries) were outside the range that occurred during the period (calendar years 1978-2001) used to set the phosphorus criterion.

(5) Long -Term Compliance Permit Requirements for Phosphorus Discharges into the EPA.

~~(a) In addition to meeting all other applicable permitting criteria, an applicant must provide reasonable assurance that the discharge will comply with state water quality standards as set forth in this section.~~

(b) Discharges into the EPA shall be deemed in compliance with state water quality standards upon a demonstration that:

1. Phosphorus levels in the discharges will be at or below the phosphorus criterion set forth in this rule; or

~~2. Discharges will not cause or contribute to exceedences of the phosphorus criterion in the receiving waters, the determination of which will take into account the phosphorus in the water column that is due to reflux; or~~

~~3. Discharges will comply with moderating provisions as provided in this rule.~~

(c) Discharges into the Park must not result in a violation of the concentration limits established for the Park in Appendix A of the Settlement Agreement as determined through the methodology set forth in paragraph (4).

~~(d) Discharge limits for permits allowing discharges into the EPA shall be based upon TBELs established through BAPRT and shall not require water quality based effluent limitations through 2016. Such TBELs shall be applied as effluent limitations as defined in Rule 62-302.200(10), F.A.C.~~

~~(6) Moderating Provisions. The following moderating provisions are established for discharges into or within the EPA as a part of state water quality standards applicable to the phosphorus criterion set forth in this rule:~~

~~(a) Net Improvement in Impacted Areas.~~

~~1. Until December 31, 2016, discharges into or within the EPA shall be permitted using net improvement as a moderating provision upon a demonstration by the applicant that:~~

~~a. The permittee will implement, or cause to be implemented, BAPRT, as defined by s. 373.4592(2)(a), F.S., and further provided in this section, which shall include a continued research and monitoring program designed to reduce outflow concentrations of phosphorus; and~~

~~b. The discharge is into or within an impacted area.~~

~~2. BAPRT shall use an adaptive management approach based on the best available information and data to develop and implement incremental phosphorus reduction measures with the goal of achieving the phosphorus criterion. BAPRT shall also include projects and strategies to accelerate restoration of natural conditions with regard to populations of native flora or fauna.~~

~~3. For purposes of this rule, the Long Term Plan shall constitute BAPRT. The planning goal of the Long Term Plan is to achieve compliance with the criterion set forth in subsection (4) of this rule. Implementation of BAPRT will result in net improvement in impacted areas of the EPA. The Initial Phase of the Long Term Plan shall be implemented through 2016. Revisions to the Long Term Plan shall be incorporated through an adaptive management approach including a Process Development and Engineering component to identify and implement incremental optimization measures for further phosphorus reductions.~~

~~4. The Department and the District shall propose amendments to the Long Term Plan as science and environmental conditions warrant. The Department shall approve all amendments to the Long Term Plan.~~

~~5. As part of the review of permit applications, the Department shall review proposed changes to the Long Term Plan identified through the Process Development and Engineering component of the Long Term Plan to evaluate changes necessary to comply with this rule, including the numeric phosphorus criterion. Those changes which the department deems necessary to comply with~~

~~this rule, including the numeric phosphorus criterion, shall be included as conditions of the respective permit or permits for the structures associated with the particular basin or basins involved. Until December 31, 2016, such permits shall include technology based effluent limitations consistent with the Long Term Plan.~~

~~(b) Hydropattern Restoration. Discharges into or within unimpacted areas of the EPA shall be permitted for hydropattern restoration purposes upon a demonstration by the applicant that:~~

~~1. The discharge will be able to achieve compliance with the requirements of paragraph (6)(a)1.a. above;~~

~~2. The environmental benefits of establishing the discharge clearly outweigh the potential adverse impacts that may result in the event that phosphorus levels in the discharge exceed the criterion; and~~

~~3. The discharge complies with antidegradation requirements.~~

~~(c) Existing Moderating Provisions. Nothing in this rule shall eliminate the availability of moderating provisions that may otherwise exist as a matter of law, rule or regulation.~~

(7) Document Incorporated By Reference. The following document is referenced elsewhere in this Section and is hereby incorporated by reference: Data Quality Screening Protocol, dated July 15, 2004.

(8) Contingencies. In the event any provision of this rule is challenged in any proceeding, the Commission shall immediately by notified. In the event any provision of this rule: (a) is determined to be invalid under applicable law; or (b) is disapproved by the U.S. Environmental Protection Agency under the Clean Water Act, the Department shall bring the matter back before the Commission at the earliest practicable date for reconsideration.

Specific Authority 373.043, 373.4592, 403.061 FS. Law Implemented 373.016, 373.026, 373.4592, 403.021(11), 403.061, 403.201 FS. History – New 7-15-04, Amended 5-25-05.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 04-21448-CIV-GOLD
(and consolidated cases)

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, a federally-recognized Indian Tribe; and FRIENDS OF THE EVERGLADES,

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.
_____/

OMNIBUS ORDER;
INDICATIVE RULING GRANTING DEFENDANT EPA'S RULE 60(b) MOTION FOR MODIFICATION OF INJUNCTION [ECF No. 446]; DENYING FRIENDS' MOTION FOR ORDER DECLARING PERMITS NULL AND VOID [ECF No. 533]; GRANTING FDEP'S MOTION FOR CLARIFICATION OF COMPLIANCE ORDER [ECF No. 573]; DENYING FRIENDS' MOTION TO ADD SFWMD AS A PARTY [ECF No. 477]; DENYING NEW HOPE'S MOTIONS TO STRIKE [ECF Nos. 536, 537]

I. INTRODUCTION[1]

In recent opinions, the Eleventh Circuit has acknowledged that the Everglades is a natural treasure.[2] Among the parties and intervenors in this case, there is general agreement that the Everglades represents a precious resource. However, these words cannot remain merely aspirational. They must be actualized through enforcement.

[1] To assist in reviewing the instant Order, which addresses a host of pending motions by the parties, a Table of Contents is appended to this Order as Appendix A. The Indicative Order that this Court is requested to enter, and which I purport to enter upon remand, is attached as Appendix B.

[2] See e.g., Miccosukee Tribe of Indians v. United States, 566 F.3d 1257, 1261 (11th Cir. 2009) ("As so often happens with natural treasures, people sought to control and manipulate the Everglades for their own ends.").

Elsewise, based on undisputed scientific evidence of phosphorus nutrient levels, the Everglades will cease to exist over time.[3]

The heart of this matter remains in enforcement under the Clean Water Act ("CWA"). This authority to act has been granted by Congress to the Environmental Protection Agency ("EPA") in the first instance. To its credit, the EPA now has come forth – following a lengthy history of inaction – with an Amended Determination that serves to protect the Everglades resource. What also is clear is that the State of Florida and the South Florida Water Management District ("SFWMD"), notwithstanding protests to the contrary, have not been true stewards of protecting the Everglades in recent years. The State's claim that it is being unfairly criticized is belied by, inter alia, the enactment of the Amended Everglades Forever Act ("EFA") to detrimentally change the State's previous water quality standards, the State's adoption of the disingenuous Phosphorus Rule to depart from the strictures of the original EFA, and the failure of the SFWMD to even implement its mandated duties under the EFA. Most recently, the State's resistance to the water quality standards set by the EPA is evidenced by the Governor of Florida's authorization to FDEP to petition the EPA to rescind its January

[3] See [ECF No. 404 ¶ 13] ("However, arguing that 'something is better than nothing' ignores the undeniable scientific fact that we are falling further behind, and that time is running out."). I expressly incorporate my prior orders [ECF Nos. 323, 404] by reference into this Order. See also Miccosukee Tribe of Indians of Florida v. U.S., 2008 WL 2967654 (S.D. Fla. 2008); Miccosukee Tribe of Indians of Florida v. U.S., 706 F.Supp.2d 1296, 1298 (S.D. Fla. 2010).

2009 determination that the federally-imposed numeric nutrient criteria are necessary for Florida.[4]

The primary purpose of this latest Order is to put into the hands of the EPA all the resources necessary to enforce its action plan and to implement its full power under the congressional Clean Water Act. By transferring the permitting authority to the EPA, consistent with the mandates under the Clean Water Act,[5] the objectives set forth in the Amended Determination can be achieved.

It is time now for this next significant step to occur. The EPA has represented that it wants to act. It must be given the opportunity to do so. The EPA may well have to enforce the objectives as set forth in the Amended Determination, as it has recently stated it would, through further administrative and court actions – which are apparently

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[4] Janet Zink, Governor to EPA: Water guidelines aren't necessary here, MIAMI HERALD, April 23, 2011, http://www.miamiherald.com/2011/04/22/2180947/governor-to-epa-water-guidelines.html. See also Florida Petitions EPA on clean water standards, April 22, 2011, http://www.flgov.com/2011/04/22/florida-petitions-epa-on-clean-water-standards/.

[5] See [ECF No. 404 ¶ 10] ("if the EPA Administrator 'determines that any such revised or new standard is not consistent with the applicable requirements of this Chapter [which the EPA found in its 2009 Determination], he shall . . . notify the State and specify the changes to meet such requirements.' Miss. Comm'n on Natural Res. v. Costle, 625 F.2d 1269, 1275-76 (5th Cir. 1980); 33 U.S.C. 1313(c)(3)(emphasis added). The Act also requires that 'if such changes [that comport with the Act] are not adopted by the State . . . the Administrator shall promptly prepare and prepare and publish proposed regulations setting forth a revised or new water quality standard' consistent with the Clean Water Act. Miss Comm'n on Natural Res., 625 F.2d at 1275-76; 33 U.S.C. 131 3(c)(3)-(4). There is nothing optional about these provisions, and the Court has not been provided with an adequate justification for the EPA's failure to correct the Clean Water Act violations detailed at length in the Summary Judgment Order. See Sierra Club v. Hankinson, 939 F. Supp. 865, 871 (N.D. Ga. 1996) (noting that "[w]hile . . . the Clean Water Act places 'primary reliance for developing water quality standards on the states . . . the Act requires EPA to step in when states fail to fulfill their duties under the Act.") (emphasis added) (cites and quotes omitted)").

likely since the opposing parties and intervenors are even now presently before the Eleventh Circuit seeking yet another set of appeals on various orders in this litigation.

II. MOTIONS ADDRESSED IN THIS ORDER

This cause is before the Court on Defendants United States of America, United States Environmental Protection Agency, the Administrator of the EPA, and the Regional Administrator of the EPA, Region IV's (collectively "EPA") Rule 60(b) Motion for Modification of Injunction ("Rule 60(b) Motion"). [ECF No. 446]. The following filed Responses to EPA's 60 Motion: Intervenor Defendant State of Florida ("State") Department of Environment Protection ("FDEP" or "Department") [ECF No. 466], Plaintiff Miccosukee Tribe of Indians ("the Tribe") [ECF No. 467], Plaintiff Friends of the Everglades ("Friends") [ECF No. 468], and Intervenor Defendants New Hope Sugar Company and Okeelanta Corporation (collectively "New Hope") [ECF No. 469]. The EPA filed four separate Replies to each Response ("Replies") [ECF Nos. 483-486].

Also before the Court are two motions filed by Friends. On September 17, 2010, Friends filed a Motion to Add South Florida Water Management District ("SFWMD" or "the District") as a Party [ECF No. 477], which it served on the non-party District [ECF No. 497]. On October 14, 2010, Friends filed a Notice of Non-Opposition to its Motion to Add SFWMD as a Party. [ECF No. 503].[6] On October 27, 2010, the Tribe joined in Friends' Motion to Add SFWMD as a Party. [ECF No. 507].

On December 10, 2010, Friends filed a Motion for Entry of an Order Declaring the District's NPDES and EFA Permits Null and Void. [ECF No. 533]. The FDEP and

[6] The District explained that it did not respond to Friends' Motion to Add the District as a Party because, inter alia, the District had not been served in this case.

EPA each filed a Response to Friends' Motion (collectively "Responses") [ECF Nos. 552, 553], and Friends filed a Reply in Support of its Motion ("Reply") [ECF No. 562].

Finally, New Hope filed a Corrected Motion to Strike the EPA's Response to the September 14, 2010 Sua Sponte Order and Friends' Expert Reports [ECF No. 537] and a Motion for Clarification of the Compliance Order [ECF No. 573].

I have jurisdiction pursuant to the Clean Water Act, 33 U.S.C. § 1251, et seq., and the federal Administrative Procedures Act ("APA"), 5 U.S.C. § 701, et seq. A hearing was held on December 17, 2010, wherein the parties addressed, inter alia, the EPA's Rule 60(b) Motion. Having considered the Motion, Responses, Replies, relevant submissions, record, and applicable law, I DENY Friends' Motions, DENY New Hope's Motions to Strike, GRANT New Hope's Motion for Clarification, and enter an indicative order GRANTING the EPA's Rule 60(b) Motion for the reasons set forth below.

III. SUMMARY OF ACTIONS TAKEN BY THIS ORDER

I "deem" the permits filed by FDEP as "submitted" to the EPA for purposes of review under the Memorandum of Understanding between the EPA and FDEP. I do so under my equitable and inherent powers, and as further sanctions for non-compliance. This action in turn triggers number of legal consequences. As such, the proposed Indicative Order ("Appendix B") grants the EPA's Rule 60(b) relief, which I would enter following remand, as requested in the EPA's Submission in Response to the December 17, 2010 Order. See [ECF No. 565, pp. 11-14]. To be clear, I enter a ruling granting the relief requested in the later-filed pleading as it amends the relief sought in the EPA's original Rule 60(b) Motion.

Since I deem the permits submitted for purposes of review, I deny Friends' motion seeking declaratory relief as to the permits being null and void. I also deny Friends' motion to add the District as a party because, inter alia, the EPA may take further action as necessary against the District. I also require the parties to file a Joint Notice of Compliance following this Order for the purposes of informing the Court on their efforts to comply with this Order and the purposes set forth in the Amended Determination. I grant FDEP's Motion for Clarification of Compliance Order so there is no ambiguity in my determination that Administrative Orders should not be used to prolong compliance with the CWA. Finally, I deny New Hope's Motions to Strike the EPA's response to my first sua sponte order and the expert reports filed by Friends.

Due to the complexity of this case and the various motions addressed herein, I provide the following roadmap outlining the sequence of my analysis in this Order. As an initial matter, though the parties are acquainted with this case, I find it necessary to set forth key factual and procedural background underlying this case, as well as Case No. 88-1886. This is essential to recapitulate what has occurred since my April 14, 2010 Order, examine how the current situation has arisen, and explain the reasons for the actions taken in this Order. Discussing this case's background is also imperative to put into context how significant delay and stonewalling have precluded improvements to water quality standards, keeping the Everglades at risk for decades.

Next, an overview of the permitting process is necessary in order to understand both how and why the EPA must act under its permitting authority to enforce the mandates under the Clean Water Act. With this background in mind, this Order then

addresses the Rule 60(b) Motion as it seeks to modify certain portions of the April 14, 2010 Order. I then address Friends' two motions to add SFWMD as a party and to deem the permits null and void. Finally, I address New Hope's motions seeking clarification and striking of expert reports submitted by Friends.

IV. FACTUAL BACKGROUND

My analysis of the pending motions takes into consideration the broad factual and procedural history of this case, in addition to litigation over the Everglades in general. Accordingly, it is necessary to briefly highlight key points in the timeline of litigation over the Everglades to provide the overarching framework within which I analyze the pending motions.

The Everglades consists of millions of acres comprising an extensive and unique wetlands system, providing a home for threatened and endangered wildlife species. See Miccosukee Tribe of Indians v. United States, 1998 U.S. Dist. LEXIS 15838 at *6 (S.D. Fla. Sept. 11, 1998). As defined in the 1994 EFA, the Everglades Protection Area covers approximately 3,500 square miles consisting of Everglades National Park, the Loxahatchee National Wildlife Refuge, and several Water Conservation Areas.

A. Parties

The Tribe is a federally recognized Indian Tribe whose members live and work within the Everglades. [ECF No. 147, p. 2] . Friends is an organization founded for the protection and preservation of the Everglades ecosystem, and over 4,400 members of Friends use the Everglades on a continuing basis for recreational and aesthetic purposes. [ECF No. 150, pp. 2-3] . The EPA is the federal agency charged with

enforcing the Federal Clean Water Act. Intervenor FDEP is the State's designated environmental regulatory agency. Intervenors New Hope Sugar Company and Okeelanta Corporation, together with their affiliated companies, own and farm approximately 190,000 acres within the Everglades Agricultural Area ("EAA") which borders the Everglades Protection Area. [ECF No. 19, p. 1] .

B. Clean Water Act

Congress enacted the Federal Water Pollution Control Act Amendments of 1972, the Clean Water Act ("CWA"), in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. § 1251 et seq.). "[T]he House Report on the legislation states that '[t]he word 'integrity' as used is intended to convey a concept that refers to a condition in which the natural structure and function of ecosystems is maintained.'" Sierra Club, Inc. v. Leavitt, 488 F.3d 904, 921 (11th Cir. 2007) (quoting H.R. Rep. No. 92-911, at 76 (1972)). In furtherance of those goals, the CWA bans, among other things, "the discharge of any pollutant by any person." 33 U.S.C. § 1311(a)." W. Va. Highlands Conservancy, Inc. v. Huffman, 625 F.3d 159, 162 (4th Cir. W. Va. 2010).[7]

C. Current factual circumstances

On January 5, 2011, Florida Governor Rick Scott signed Executive Order 11-01, directing all State agencies under the direction of the Governor to immediately suspend

[7] Indeed, the parties—and non-party SFWMD—are familiar with this permitting issue. In 2004, the Supreme Court issued an opinion with respect to the Tribe and Friends' citizen suit under the CWA contending that a pumping facility operated by the District required an NPDES discharge. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 99 (2004).

all rulemaking except at the direction of the Office of Fiscal Accountability and Regulatory Reform, a new office established under the Executive Order. [ECF No. 565, p. 4] (citing Executive Order 11-1, Attachment 1 at p. 2, § I). The EPA notes that the Executive Order "could further disrupt any effort by FDEP to comply with the April 14 Order. Regardless, EPA is moving forward to provide timely notice and to promulgate such standards as directed by the April 14 Order, pursuant to Clean Water Act Section 303(c)." Id. (emphasis added).

Furthermore, a recent proposal to reduce taxes for the State's water management districts to decrease their budgets by 25 percent, or approximately $100 million from the SFWMD's budget, has presented another concern for not only the District, but the parties to this litigation.[8] Compounding these recent financial predicaments are the latest departures of individuals who were administratively responsible for overseeing the processes in this litigation.[9] Simply stated, the entire situation is rapidly sliding backwards.

V. PROCEDURAL HISTORY

The instant case was filed nearly seven years ago by Plaintiff Miccosukee Tribe on June 17, 2004. [ECF No. 1].[10] In the original complaint, the Tribe filed suit to

[8] See infra fn. 29.

[9] See infra fn. 31.

[10] Ultimately, I accepted transfer and consolidated other cases filed in this District with Case No. 04-21448. See [ECF No. 25, p. 2] (accepting transfer of Friends of the Everglades v. United States, et al., Case No. 04-22072 on September 30, 2004); id. at 4 (consolidating Case No. 04-22072 into the instant case following November 5, 2004 telephonic status conference). By that same order, I granted FDEP's Motion to Intervene. Id. I also ordered the parties to file supplemental briefs regarding whether

compel Defendants to review and disapprove the amended Everglades Forever Act ("Amended EFA") and comply with the standards set forth under the CWA. Id. at ¶ 2.

On December 14, 2005, Friends filed its Second Amended Complaint alleging, inter alia, that the EPA Administrator acted arbitrarily, capriciously, and contrary to the Administrator's duties under Section 303(a)(1) of the CWA in determining that the 2003 Amendments to the State of Florida's EFA did not constitute a change in Florida water quality standards. [ECF No. 113 ¶ 34]. Friends further alleged that the Administrator acted arbitrarily and capriciously, under the APA and in violation of the CWA, by approving the State of Florida's "Phosphorous Rule." Id. While the enactment of the Amended EFA and the Phosphorus Rule have given rise to the instant suit, the origins of the litigation over the Everglades span nearly a quarter century.

A. US v. SFWMD, Case No. 88-1886

The initiation of litigation over the Everglades can be traced back to 1988, when the United States sued the FDEP and SFWMD for their failure to enforce water quality standards in the Everglades. See United States of America, et al. v. South Florida

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the issues in Case No. 88-1886 were inextricably intertwined with the issues in Case No. 04-21448. Id.

Though I asked the parties to discuss potential impact of Case No. 88-1886 at the initial stages of this litigation, I have considered the two cases in conjunction at various points of this ongoing litigation. See e.g., [ECF No. 379] (requiring Plaintiffs to brief whether remedies sought in Case No. 04-21448 relate to Everglades water quality case before Judge Moreno and whether remedies sought are potentially inconsistent with orders issued in Case No. 88-1886). Similarly, Case No. 88-1886 has addressed issues relating to the instant consolidated cases. See infra § VI.E.

On July 13, 2005, after accepting transfer of a related case, Friends of the Everglades v. United States, et al., Case No. 05-20663, I consolidated Case No. 05-20663 for pretrial and trial with Case No. 04-21448. [ECF No. 62]. On April 12, 2005, I granted New Hope's Motion to Intervene. [ECF No. 39].

Water Mgmt. Dist., 847 F. Supp. 1567, 1569 (S.D. Fla. 1992). The United States alleged that structures operated by the District released nutrient-rich farm runoff waters which contained high levels of phosphorous and contaminated the Loxahatchee National Wildlife Refuge and Everglades National Park. See id. This case is currently before the Honorable Federico A. Moreno, United States of America, et al. v. South Florida Water Mgmt. Dist., Case No. 88-1886. See infra § VI.E (discussing most recent Rule 60(b) motion in Case No. 88-1886).

1. 1992 Consent Decree

Four years after the United States brought suit, the parties entered into a settlement agreement, which the Honorable William M. Hoeveler approved as a Consent Decree in 1992. U.S. v. South Florida Water Mgmt. Dist., 847 F. Supp. at 1569. As described in my earlier Order on Defendant EPA's Motion for Partial Judgment on the Pleadings,

> In the 1992 Settlement Agreement, the State of Florida acknowledged that the Everglades contained excess nutrients that negatively affected the balance of aquatic flora and fauna in violation of the water quality standards. The 1992 Settlement Agreement established "interim and long term phosphorous concentration limits for the Park and Refuge and delineate[d] specific remedial programs designed to achieve these limits." The 1992 Settlement Agreement created a schedule for ensuring that the water in the Everglades met Florida's water quality standards no later than 2002. The 1992 Settlement Agreement required the State of Florida to take numerous actions to achieve the 2002 goal of compliance, including reducing the levels of phosphorous in the Everglades.
>
> [ECF No. 124] (internal citations omitted; emphasis added).

Thus, in 1992, the State and EPA initially agreed to commit to meeting the State's applicable water quality standards by one decade later, or in 2002. As history reveals, this commitment fell through, as the present and ongoing litigation continues.

2. Everglades Forever Act

Various entities, such as farming groups, opposed the plan to reduce phosphorous levels and claimed the proposal was unduly harsh on them. See [ECF No. 124, p. 6]. In an attempt to resolve all litigation concerning the clean-up plan, in 1994, the Florida Legislature passed the Everglades Forever Act ("EFA"), codified at Fla. Stat. § 373.4592. The EFA set forth various deadlines to reach the goals espoused therein. In particular, the EFA set the following applicable time limits:

- Effective immediately (in 1994) – landowners within the C-139 Basin shall not collectively exceed an annual average loading of phosphorus based proportionately on the historical rainfall for the C-139 Basin over the period of October 1, 1978 to September 30, 1988. Fla. Stat. § 373.4592(f)(5).

- December 31, 1998 – the Department and SFWMD shall complete any additional research necessary to numerically interpret for phosphorus the Class III narrative nutrient criterion necessary to meet water quality standards in the Everglades Protection Area and evaluate existing water quality standards applicable to the Everglades Protection Area and EAA canals. Fla. Stat. § 373.4592(e).

- December 31, 2003 – "phosphorus criterion shall be 10 parts per billion (ppb) in the Everglades Protection Area in the event the department does not adopt by rule such criterion by December 31, 2003[.]" Fla. Stat. § 373.4592(e)(2) (emphasis added).

- February 28, 2003 – if the Department fails to adopt a phosphorus criterion on or before December 31, 2002, any person whose substantial interests would be affected by the rulemaking shall have the right to petition for a writ of mandamus to compel the department to adopt by rule such criterion. Fla. Stat. § 373.4592(e)(2).

- December 31, 2006 – "all permits, including those issued prior to that date, shall require implementation of additional water quality measures, taking into account the water quality treatment actually provided by the STAs and the effectiveness of the BMPs. As of [December 31, 2006], no permittee's discharge shall cause or

contribute to any violation of water quality standards in the Everglades Protection Area." Fla. Stat. § 373.4592(f)(4) (emphasis added).

The Florida Legislature recognized in the 1994 EFA that the "Everglades ecological system is endangered as a result of adverse changes in water quality, and in the quantity, distribution and timing of flows, and, therefore, must be restored and protected." Fla. Stat. § 373.4592(1)(a) (1994). In 1994, the Florida Legislature determined that a twelve-year compliance schedule would be in accordance with promoting Florida's water quality standards.

3. Amended Everglades Forever Act

The Tribe's Second Amended Complaint alleges the following regarding the Amended EFA: In 2003, the Florida Legislature passed two bills amending the EFA ("Amended EFA"). [ECF No. 72 ¶ 48]. The Amended EFA eliminated the December 31, 2006 compliance deadline for water quality standards and levels of phosphorous for all discharges. Id. at ¶ 49. This established a substantial change in the State's water quality standards for the Everglades Protection Area and represented yet another instance of the State changing its water quality standards by allowing discharges until at least 2016. Id. at ¶¶ 53, 54.

The Tribe argued that the State "failed to notify the administrator of the EPA, as required by 33 U.S.C. § 1313(c), that by amending the 1994 EFA, the State has in effect changed water quality standards." [ECF No. 72 ¶ 66]. Accordingly, the EPA prematurely concluded that the Amended EFA was not a change to the State's water quality standards and was therefore not subject to approval or disapproval under the CWA. Id. at ¶ 73.

4. The Phosphorous Rule

Florida's Phosphorus Rule establishes water quality standards for phosphorus within the Everglades Protection Area, including a numeric phosphorus criterion. F.A.C. § 62-302.540(1)(a). The Amended EFA required the FDEP to adopt a numeric criterion for phosphorous levels to prevent an "imbalance in the natural populations of aquatic flora and fauna." [ECF No. 72 ¶ 77]; Fla. Stat. § 373.4592(4)(e)(2). The Phosphorus Rule was adopted in January 2002 while the original EFA was in force. See [ECF No. 323, fn. 19]. Following an administrative challenge, on June 17, 2004, the Phosphorus Rule was upheld by an administrative law judge, subsequently promulgated on July 15, 2004, and amended on May 25, 2005. Id. As set forth in detail in my prior orders, I determined that the EPA's approval of the Phosphorus Rule was arbitrary and capricious. See e.g., [ECF No. 323 § VI.G.1].

B. 2009 Determination

On July 29, 2008, I entered an Order Granting Summary Judgment; Closing Case. [ECF No. 323]. By this order, I "enjoin[ed] DEP from issuing permits pursuant to those sections of the Phosphorous Rule that [were] set aside, and enjoin[ed] DEP from considering blanket exemptions or variances under the current Phosphorous Rule pending compliance with the CWA and implementing regulations." Miccosukee Tribe of Indians of Florida v. U.S., 2008 WL 2967654, at *42 (S.D. Fla. 2008). Also on July 29, 2008, final judgment was entered in accordance with the Order Granting Summary Judgment; Closing Case. [ECF No. 324].[11]

[11] On August 25, 2008 and September 29, 2008, New Hope and EPA filed Notices of Appeal of my July 29, 2008 Order, respectively. [ECF Nos. 325, 338]. On December

Over one year after entry of the Order Granting Summary Judgment, on November 5, 2009, Plaintiffs filed a Corrected Motion for Civil Contempt to Compel Compliance with the Court's Order due to Defendants' failure to comply with the July 29, 2008 Summary Judgment Order. [ECF No. 357]. Plaintiffs requested that I re-open the case in order to find the EPA in contempt, citing two violations of the July 29, 2008 Summary Judgment Order: (1) the EPA's failure to issue a new determination on the Amended EFA; and (2) the EPA's failure to issue a new determination on the Phosphorus Rule. Id. at p. 1.

On December 4, 2009, the EPA responded to my Order to Show Cause and Plaintiff's Corrected Motion for Civil Contempt. [ECF No. 360]. The EPA noted that one day earlier, on December 3, 2009, the Acting Regional Administrator for EPA Region 4 signed a determination and accordingly, "Plaintiffs' motion to compel are [sic] moot." Id. at pp. 1-2. The EPA attached to its response a ten-page[12] letter from the Acting Regional Administrator to the Secretary of FDEP. The inadequacies of the EPA's Determination were previously addressed in my April 14, 2010 Order. See [ECF No. 404 ¶ 12]. Most notably, I pointed out that "[t]he 2009 Determination conspicuously fails to discuss how and when compliance will be met in conjunction with any effective Long-

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10, 2008, the Eleventh Circuit granted EPA's motion to dismiss their appeal voluntarily with prejudice. [ECF No. 341]. On March 18, 2009, the Eleventh Circuit granted the Tribe and Friends' motion to dismiss New Hope's appeal for lack of standing. [ECF No. 342].

[12] Although the correspondence is technically 11 pages, the last page fails to contain any substantive material. See [ECF No. 360-1, p. 11]. Furthermore, the first two pages of the correspondence simply summarize my July 29, 2008 Order, and it is not until the third page that the EPA actually provided a substantive analysis in response to my order. Id. at pp. 1-3.

Term Plan that provides enforceable milestones." Id. at p. 15. I criticized the fact that the EPA failed to conduct any scientific analysis with regard to the proposed purchase of the U.S. Sugar Corporation's lands as envisioned by the State in Case No. 88-1886.[13] Id. at p. 16. In sum, EPA's Determination disapproved the EFA Amendments and portions of the Phosphorus Rule as new or revised water quality standards. [ECF No. 360-1].

On December 15, 2009, Plaintiffs filed a Motion to Compel State and Federal Defendants to Comply with the Court's Order Related to Discharge Permits and for Contempt based on Defendants' failure to comply with the July 29, 2008 Summary Judgment Order. [ECF No. 364]. The basis for Plaintiffs' Motion to Compel was FDEP's violation of the July 29, 2008 Order by continuing to allow permits for discharges of pollutants and issuing new Administrative Orders ("AOs") modify existing permits, and new Everglades Forever Act ("EFA") permits. Id. at p. 1. In addition, Plaintiffs noted that the EPA ignored my July 29, 2008 Order by allowing FDEP to act in such a manner and by failing to analyze the effect of delaying compliance in the AOs issued by the State in its 2009 Determination. Id. I subsequently held a two-day evidentiary hearing on January 13, 2010 and April 5, 2010. [ECF No. 404, p. 2].

[13] Ultimately, the SFWMD purchased 26,800 acres from U.S. Sugar Corp. in October 2010. See Andy Reid, U.S. Sugar Land Bought For Everglades Restoration Could Get Leased To Another Grower, SUN SENTINEL, March 9, 2011, http://www.miamiherald.com/2011/03/09/2106749/us-sugar-land-bought-for-everglades.html#ixzz1JpIgpmwg.

VI. RECENT PROCEDURAL BACKGROUND

A. April 14, 2010 Order

The failure to comply with the Clean Water Act's mandate has brought the parties to the current juncture, approximately a quarter-century after the filing of Case No. 88-1886. Following the evidentiary hearing in the instant case, on April 14, 2010, I issued an Order Granting Plaintiffs' Motions in Part; Granting Equitable Relief; Requiring Parties to Take Action By Dates Certain ("April 14, 2010 Order"). [ECF No. 404]. The April 14, 2010 Order set forth specific findings of fact and conclusions of law with respect to protection of the Everglades, incorporating by reference my July 29, 2008 Summary Judgment Order. Id. at ¶ 9.

Ultimately, I remanded to the EPA with direction to issue an "Amended Determination." [ECF No. 404, p. 44]. I ordered that the Amended Determination establish "specific milestones" providing " an enforceable framework for ensuring compliance with the CWA." Id. at p. 45 ¶ 2 (emphasis in original). I fully reserved the Court's contempt powers in the event full compliance was not met consistent with the Order. Id. at p. 47 ¶ 10.

On June 11, 2010, the Department filed a Notice of Appeal of the April 14, 2010 Order. [ECF No. 421]. On June 24, 2010, the EPA filed its Notice of Appeal of the April 14, 2010 Order. [ECF No. 430]. On August 30, 2010, the Eleventh Circuit granted the EPA's motion to hold the multi-party appeal in abeyance pending my resolution of the EPA's instant Rule 60(b) Motion. [ECF No. 459]. Also now pending before the Eleventh Circuit is SFWMD's petition for review challenging the legality of the Amended

Determination, which was filed on December 16, 2010, one day prior to the December 17, 2010 hearing. See [ECF No. 540].

B. Rule 60(b) Motion

On July 29, 2010, Defendants filed their Rule 60(b) Motion seeking three modifications to the April 14, 2010 Order:

> (1) replacing the provision requiring EPA to partially withdraw Florida's Clean Water Act National Pollutant Discharge Elimination System ("NPDES") permitting program with a new injunctive provision that would apply after existing permits have been conformed;
>
> (2) modifying the Findings of Fact "that appear to equate the 10 parts per billion ("ppb") water quality criterion for phosphorus in the Everglades with the Water Quality Based Effluent Limits ("WQBELs");" and
>
> (3) modifying Attachments B and C "to more closely track the 2008 Order Granting Summary Judgment and the April 14 Order."

[ECF No. 446, p. 2].

Specifically, the EPA requests that I issue an "indicative order" suggesting my position with respect to amending the previously-issued compliance order which is currently before the Eleventh Circuit. The EPA claims "[it] will not be able to implement some provisions of the Court's April 14 Order because it lacks statutory authority to do so[.]" [ECF No. 446, p. 7]. Following the December 17, 2010 hearing, the EPA filed a Submission in Response to the December 17, 2010 Order suggesting modifications to the Rule 60(b) modifications. See [ECF No. 565, pp. 11-14]; see infra § XII.H.

C. Amended Determination

Subsequent to the filing of the Rule 60(b) Motion, on September 3, 2010, the EPA filed its Amended Determination. [ECF No. 458]. The Amended Determination

contained specific directions to FDEP regarding how to conform the NPDES and EFA permits. See [ECF No. 458] (Attachment "I" "Conformed STA NPDES and EFA Permits" and Attachment "J" "Rationale for Conformed STA NPDES and EFA Permits").

On September 14, 2010, I entered a sua sponte order, directing the EPA to fully address "how the specific milestones set forth in the EPA's Amended Determination are directly linked to a meaningful financing plan to accomplish the necessary land acquisition and the construction to meet the deadlines imposed. . . . and how does the EPA intend to enforce its requirements?" [ECF No. 470]. Id. at 2. On December 9, 2010, I entered a detailed Second Sua Sponte Order listing key issues and requiring the parties to be prepared to address these matters at the upcoming hearing. [ECF No. 531]. The EPA filed its Response to the Court's Sua Sponte Order of September 14, 2010 on the same day. [ECF No. 530]; see also discussion of the response infra at § XII.L.

On November 2, 2010 – sixty days after issuance of the Amended Determination – FDEP filed its Notice of Filing Conformed Permit Documents. [ECF No. 512]. FDEP provided "sample permit documents for the STAs[.]" Id. at 9. FDEP also advised the EPA that the sample permit documents were "not being submitted for any action" and were "for informational purposes only." [ECF No. 530-4] (Nov. 2, 2010 e-mail from G. Kneckt to P. Mancusi-Ungaro). FDEP stated that it "may issue permits only if it has 'reasonable assurance' at the time of issuance that the permittee can comply with all permit conditions, including the WQBEL, by the required compliance deadline." [ECF No. 512, p. 3].

D. December 17, 2010 hearing

On December 17, 2010, the parties appeared before the Court for a hearing set in accordance with the April 14, 2010 Order. See [ECF No. 543]. Following the hearing and also on December 17, 2010, I issued an Order Requiring Submission requiring the parties to "each file a Supplemental Brief setting forth how the Court should proceed with respect to the matter of conforming permits in conjunction with the State of Florida Department of Environmental Protection's ('FDEP') Notice of Filing Conformed Permit Documents [ECF No. 512]." [ECF No. 544 ¶ 1].

I also ordered the parties to file responses to FDEP's Notice of Compliance and Additional Considerations [ECF No. 539] and required FDEP to file a Supplemental Notice addressing whether FDEP must adopt the WQBEL through rule-making through the State Environmental Regulation Commission, with approval of the Florida legislature, prior to FDEP's issuance of a permit with a WQBEL. [ECF No. 544 ¶ 2]. I ordered the EPA to include any proposed additional language for its contemplated "Indicative Ruling" [ECF No. 446-3] in its response to FDEP's Notice. Id. Pursuant to the December 17, 2010 Order, the parties filed responses. See [ECF Nos. 552-557].

E. Rule 60(b) Motion in US v. SFWMD, Case No. 88-1886

On March 31, 2010, Judge Moreno ordered the construction of the Everglades Agricultural Area ("EAA") A-1 Reservoir ("Reservoir") in the absence of an amendment to the Consent Decree "to deal with changed circumstances and opportunities."[14] [ECF

[14] In ordering the construction of the Reservoir, Judge Moreno recognized that this might reactivate the case before Judge Donald M. Middlebrooks. [ECF No. 2134, p. 29]. Judge Moreno concluded: "Of course, the parties remain free to employ Rule 60(b)(5) and seek amendment of the Consent Decree to deal with changed

No. 2134, pp. 19-20] .[15] On April 28, 2010, Defendants State of Florida and SFWMD (collectively "State Parties") filed a Rule 60(b)(5) Motion[16] [ECF No. 2139] , which Judge Moreno referred to the Special Master for a Report and Recommendation. [ECF No. 2150].

1. Special Master's Report

On August 30, 2010, the Special Master filed a report recommending that construction of the Reservoir cease as follows:

> Whether framed in terms of Rules 59 or 60 of the Federal Rules of Civil Procedure, or of reconsideration of the original order sua sponte, or of due process, I should recommend that the Court refrain from ordering construction of the A-1 Reservoir as a remedy for the former Consent Decree violations in the Refuge and instead that the timing and location of water storage and water conveyance be first considered as part of the evidence on remedies at the remedies hearing that I will be holding later in 2010.
>
> [ECF No. 2200] .

The Special Master noted that my Order and the Amended Determination would affect the hearings before the Special Master to the extent that: "In several tries, the [EPA] kept figuring out ways to support the State's permits for discharges from STAs

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circumstances and opportunities." Id. In 2007, intervenors Sierra Club and the National Wildlife Federation, joined with a third environmental conservation group and brought an action before Judge Middlebrooks alleging that the Reservoir project was a CERP project that required compliance with WRDA's procedural requirements. NRDC v. Van Antwerp, Case No. 07-80444 (S.D. Fla.). On June 26, 2009, because the District had stopped construction on the Reservoir, Judge Middlebrooks dismissed the suit before him as moot, without prejudice to its refiling should construction on the Reservoir restart.

[15] All electronic case filing number citations in this section refer to Case No. 88-1886.

[16] Motion for Relief from Order on Remedies, Motion for Leave to Present Evidence on Alternative Remedial Measures in Lieu of Building the EAASR, and Rule 59(e) Motion for Modification ("Motion to Amend").

into the EAA until Judge Gold finally said, 'Enough!'" Id. at p. 53. The Special Master also recognized the critical issue of funding with respect to this issue. Id. ("And while not a conflicting position, it is a major change from 2006 and a reality that cannot be ignored: plunging revenues now severely limit the remedial choices of the District.").

The Special Master summarized my April 14, 2010 Order as follows: the United States should require the State to figure out a way to have waters entering the Everglades satisfy Florida's phosphorus numeric criterion of 10 ppb. In relation to this issue, the Special Master noted that it was clear that:

> to attempt to achieve this goal will require many more acres of additional stormwater treatment area ["STA"]—at least as many as 40,000 more acres. Compartment A-1 represents over 16,000 acres that will very likely be needed as an STA to attempt to achieve compliance with State water quality standards as approved by EPA under the Clean Water Act.
>
> [ECF No. 2200, p. 56] (emphasis in original).

Based on the testimony of Gail Mitchell of the EPA's Regional Office of Region IV, who led the team that prepared the Amended Determination, the Special Master noted that the EPA is considering Compartment A-1 as part of its proposed structure to satisfying my order. "The EAA-A1 reservoir lands are situated in the landscape within the STA-3/4 flow path so that it may be highly beneficial to be able to use those existing Florida state lands, in whole or in part, as a location for STAs to improve water quality." Id. at p. 56 (citing Ex. 201 (Mitchell Declaration, p. 2)).

2. Hearing before Judge Moreno & Order on Rule 60(b)(5) Motion

On September 17, 2010, Plaintiff United States and Defendant SFWMD each moved to adopt or join the Special Master's Report. [ECF Nos. 2206, 2207]. On

October 21, 2010, Judge Moreno held a hearing on the Report "to see whether there is sufficient changed circumstances that would allow [Judge Moreno] to rule under 60(b)(5) . . . the bottom line [being] whether it's a good idea to build this EAA 1 reservoir." [ECF No. 2230, 14:14-16]. Judge Moreno noted that "if things continuously change, and then we'll never do anything because there's always something better in the future[.]" Id. at 17:3-4.

On March 22, 2011, Judge Moreno issued an Order Adopting the August 30, 2010 Report of the Special Master and Granting the Rule 60(b)(5) Motion in Case No. 88-1886. [ECF No. 2268]. The order specifically discusses the alternate remedy as one which is "better suited to meet the requirements of the Consent Decree and the Clean Water Act as set forth in Judge Alan Gold's April 14, 2010 Order[.]" Id.

Following a series of hearings, the Special Master concluded that the Reservoir would not longer materially benefit the Loxahatchee Refuge. The Special Master determined that the Clean Water Act litigation at issue in this case represents "a change in circumstances that should be considered in deciding the State Parties' Rule 60(b)(5) motion." Id. at 5. Specifically, Judge Moreno's order notes that "[t]he United States presented testimony before the Special Master that the EPA is looking to use the Compartment A-1, the location of the Reservoir, as part of its proposed structure to meet [the April 14, 2010] order." Id. (emphasis added). In sum, reviewing the instant case and Case No. 88-1866 in conjunction, the order notes that "the Special Master concurred with the State Parties that the practical effect is that [the April 14, 2010] Order

and [Judge Moreno's] Order compelling construction of the EAA A-1 Reservoir cannot work well together." Id. at 6.

Although the two cases before the undersigned and Judge Moreno are separate, the orders entered and the progression of litigation in each respective case remain integral to the overall success of saving the Everglades. To the extent Judge Moreno's order references this case and my prior orders, the recent order in Case No. 88-1886 represents one method in progressing toward preservation of the Everglades and compliance with the orders entered in both cases, including the Consent Decree, July 29, 2008 Summary Judgment Order, and April 14, 2010 Order. Specifically, termination of the Reservoir construction will allow for freeing up funds and efforts to be directed elsewhere—with anticipation that this provides the parties with greater ability to achieve the objectives in the Amended Determination.

VII. EPA RESPONSE TO FIRST SUA SPONTE ORDER

On September 14, 2010, I entered a sua sponte order, directing the EPA to fully address "how the specific milestones set forth in the EPA's Amended Determination are directly linked to a meaningful financing plan to accomplish the necessary land acquisition and the construction to meet the deadlines imposed. . . . and how does the EPA intend to enforce its requirements?" [ECF No. 470].

EPA suggests that if permits contain compliance schedules, non-compliance will allow EPA, FDEP, or citizen plaintiffs to seek injunctive relief through enforcement proceedings. If permits do not contain compliance schedules, EPA or citizen plaintiffs can initiate an enforcement action based on non-compliance with WQBEL. The EPA

agrees with the District's $1.5 billion estimate for constructing an expanded treatment acreage facility, but believes the District can reduce costs by alternatives such as more stringent controls on sources of phosphorus. The EPA claims it is premature to engage in fact-finding on the District's financial capacity because the District can later demonstrate fiscal impossibility in a permitting proceeding or enforcement action. The EPA "has no reason to conclude that the ultimate goal of achieving expeditious cleanup of the Everglades cannot financially be achieved." [ECF No. 530, p. 4] .

The EPA explains that permits must be issued for each STA incorporating the WQBEL for phosphorus. The EPA indicates that my response to FDEP's Notice of Filing Conformed Permits [ECF No. 512] could determine whether FDEP or the EPA ultimately issue permits, how long it will take to put final permits in place, and what process will be followed. The EPA argues that once permits are in place, the Clean Water Act provides enforcement mechanisms to ensure that the District complies with requirements of the final permits.

In its response, the EPA also identifies two types of final, effective, and enforceable permits: 1) permits without compliance schedules and 2) permits with compliance schedules. The EPA's position is that once final and effective permits are in place—regardless of whether they include compliance schedules—a variety of enforcement mechanisms are available to EPA, the State, and citizen plaintiffs to ensure timely compliance with the WQBEL.

VIII. PERMITTING BACKGROUND

The State issues NPDES permits from the EPA under a "[NPDES] Memorandum of Understanding Between the State of Florida and the United States Environmental Protection Agency" [ECF No. 375-2], executed in 1995 ("Memorandum of Understanding"). See [ECF No. 380, pp. 187-88]. In Section IX of the Memorandum of Understanding, EPA acknowledges that:

> [the FDEP] has no veto authority over acts of the state legislature and therefore [EPA] reserves the right to initiate procedures for withdrawal of approval of the State program in the event that the state legislature enacts any legislation or issues any directive which substantially impairs the FDEP's ability to administer the NPDES program or to otherwise maintain compliance with NPDES program requirements.

[ECF No. 375-2, p. 181]. The Memorandum of Understanding requires that: "[i]f the terms of any permit, including any permit for which review has been waived by the EPA, are affected in any manner by administrative or court action, the Department shall immediately transmit a copy of the permit, with the changes identified to the EPA and shall allow (30) days for EPA to make written objections to the changed permit pursuant to Section 402(d) of the CWA." Id. at 14-15. The NPDES permits each contain a "re-opener clause" requiring revisions if a new effluent standard, limitation, or water quality standard issued or approved contains different conditions or is otherwise more stringent than any condition in the permits. See e.g., [ECF No. 404, p. 27].

Currently, each STA discharging into the Everglades Protection Area has a State-issued permit authorizing such discharges. [ECF No. 530, p. 16]. Each permit is accompanied by a State Administrative Order ("AO") establishing a schedule for construction, enhancement, and/or stabilization of the STAs. However, the AO also

relieves the District from having to immediately comply with the otherwise applicable WQBEL identified in the permit.

In the April 14, 2010 Order, I held that the current compliance schedules in the permits are inconsistent with the approved water quality standards. [ECF No. 404, pp. 45-46]. The April 14, 2010 Order directed FDEP to conform the permits to comply with my Orders and the Amended Determination within 60 days after issuance of the Amended Determination, i.e., by November 2, 2010. Id.

The Amended Determination describes a two-step process for implementing the WQBEL and associated remedial measures in light of my rejection of the compliance schedules in the existing Administrative Orders. The first step is to modify existing NPDES permits for STAs to incorporate revised WQBEL. The second step is to initiate administrative or judicial enforcement action if discharges from STAs do not meet WQBEL.

A. Permit procedures

The EPA has issued regulations addressing operations of NPDES permit scheme. See 40 C.F.R. § 122.1 et seq. Permits are issued by EPA or the state itself, e.g., FDEP through CWA's NPDES program. See 33 U.S.C. § 1342 (federally approved permitting system). "Regardless of the issuer, every NPDES permit is statutorily required to set forth, at the very least, 'effluent limitations," that is, certain 'restriction[s] . . . on [the] quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters.'" Waterkeeper Alliance, Inc. v. United States EPA, 399 F.3d 486, 491 (2d Cir. 2005)

(quoting S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) ("Generally speaking, the NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters.").

B. State-issued permits

For permits issued by the State, FDEP provides public notice and opportunity for comment on a draft permit. FDEP then reviews any comments and transmits proposed permit to EPA.[17] The EPA reviews and, if necessary, objects to state-issued permits. If the EPA objects within ninety days of transmittal of the permit, no permit shall issue unless the EPA's objections are resolved within specific timeframes. If the EPA's objections are not resolved, the exclusive authority to issue the permit transfers to the EPA and the EPA begins the federal permitting process.

However, if the EPA does not object to the draft permit or objections are resolved, FDEP publishes a notice of final permit issuance. Interested parties have fourteen days from publication of notice to request an administrative hearing before a State Administrative Law Judge ("ALJ"). If a hearing is requested, terms of the permit are automatically stayed pending resolution of the hearing.[18] The ALJ then issues a recommendation to the Secretary of FDEP, who may accept the recommendation or

[17] A "proposed" permit is prepared by the State after public comment. 40 C.F.R. § 122.2. A "draft" permit is prepared for public notice and comment. The EPA may agree, as it did in the Memorandum of Agreement between EPA and FDEP, to review "draft" permits rather than proposed permits. Id. at § 123.44(j).

[18] According to EPA, a hearing "can take months." [ECF No. 512, pp. 9-10] (citing Fla. Stat. § 120.60(3)). The hearing is a de novo proceeding and the ALJ reviews FDEP's action to determine whether the action is an "invalid exercise of delegated legislative authority." Fla. Stat. § 120.56(1)(a).

remand the matter to the ALJ. After the administrative process concludes, permits become effective and enforceable, but may be subject to judicial review in State court.

C. EPA-issued permits

For permits issued by the EPA, the EPA first publishes a proposed NPDES permit. The EPA then allows for public comment period of at least thirty days. The EPA responds to any significant public comments prior to issuing "final" permit decision. The EPA-issued permit is subject to federal administrative review procedures, including administrative review by the EPA's Environmental Appeals Board ("EAB")[19] which must be sought within thirty days of permit issuance.[20] Once the administrative review process is complete (including proceedings in response to any remand by the EAB), the permit becomes final and effective upon the Region's issuance of a final permit decision.

D. Variance and immediate commencement of enforcement against FDEP

The EPA identifies a third option, water quality standards variance, but disapproves this option because it would temporarily relax the State's water quality standards and the WQBEL. A variance would require a multi-faceted and lengthy process (e.g., making determinations under state law, requiring EPA review under

[19] See City of Pittsfield v. United States EPA, 614 F.3d 7 (1st Cir. 2010) (EAB did not abuse its discretion in denying city's petition seeking review of the EPA's grant of NPDES permit for wastewater treatment plant because city procedurally defaulted when its petition failed to identify its specific objections to permit or to articulate why EAB should assume jurisdiction).

[20] Contested and unseverable permit conditions are stayed during the pendency of the administrative process.

CWA, and public hearing). Finally, a variance could require amending the consent decree in Judge Moreno's case.

The EPA also notes that the enforcement option suggested by Friends—immediate commencement of an enforcement action against the District—is not available. The EPA may commence an enforcement action when someone has discharged pollutants without a permit or in violation of an existing permit pursuant to 33 U.S.C. § 1319. However, since there are existing NPDES permits for STA discharges, the EPA cannot bring an immediate enforcement action because there is no evidence that there is a violation of the existing permit terms. See 33 U.S.C. § 1342(k).

I agree with the EPA's disapproval of the variance option. I have previously set forth my stance on use of such variances. See e.g., [ECF No. 404, p. 11] ("I warned the EPA that it could not continue to ignore federal Clean Water Act requirements by pretending the State of Florida could justify its actions through 'short-term variances.'"). Any further postponement of a long-delayed process is unwarranted at this point, whether through use of variances or Administrative Orders. See infra § XII.K.

IX. JURISDICTION

A federal court must always determine whether it has jurisdiction to hear a case. See, e.g., Arbaugh v. Y & H Corp., 546 U.S. 500, 507 (2006); Bochese v. Town of Ponce Inlet, 405 F.3d 964, 975 (11th Cir. 2005) ("Indeed, it is well-settled that a federal court is obligated to inquire into subject matter jurisdiction sua sponte whenever it may be lacking."). As such, even when there is no dispute between the parties with respect

to jurisdiction, federal courts have an independent duty to ensure that subject-matter jurisdiction exists.

In the instant case, I exercise jurisdiction through equitable and inherent powers under the Clean Water Act, 33 U.S.C. § 1251, et seq., and the federal Administrative Procedures Act, 5 U.S.C. § 701, et seq. See also Weinberger v. Romero-Barcelo, 456 U.S. 305 (1983) ("read[ing] the [Clean Water Act] as permitting the exercise of a court's equitable discretion, whether the source of pollution is a private party or a federal agency, to order relief that will achieve compliance with the Act.") (emphasis in original).

X. LEGAL STANDARD

For the sake of brevity and efficiency, I expressly incorporate by reference all applicable legal standards as set forth in my prior orders with respect to my authority to enforce my prior orders and issue injunctive relief for cases brought under the APA. See e.g., [ECF No. 323 § VIII], [ECF No. 404 § III.C].[21]

Rule 60(b) provides that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding[.]" Generally, filing a notice of appeal divests the district court of jurisdiction over those aspects of the case that are the subject of the appeal. Doe v. Bush, 261 F.3d 1037, 1064 (11th Cir. 2001). However, district courts may take action "in furtherance of the appeal." Lairsey v. Advance

[21] Since this Order first addresses the EPA's Rule 60(b) Motion, the applicable legal standards as to the other motions are discussed in the respective sections of this Order. See infra §§ XII.I-L.

Abrasives Co., 542 F.2d 928, 930 (5th Cir. 1976)[22] (citations omitted). District courts may also entertain motions on matters collateral to those on appeal. Doe, 261 F.3d at 1064 (citing Weaver v. Fla. Power & Light Co., 172 F.3d 771, 773 (11th Cir. 1999)). The Eleventh Circuit has held that "district courts retain jurisdiction after the filing of a notice of appeal to entertain and deny a Rule 60(b) motion." Mahone v. Ray, 326 F.3d 1176, 1180 (11th Cir. 2003). However, in the context of granting Rule 60(b) relief,

> . . . following the filing of a notice of appeal[,] district courts do not possess jurisdiction to grant a Rule 60(b) motion. Accordingly, a district court presented with a Rule 60(b) motion after a notice of appeal has been filed should consider the motion and assess its merits. It may then deny the motion or indicate its belief that the arguments raised are meritorious.
>
> Mahone, 326 F.3d at 1180.

XI. PARTIES' POSITIONS ON RULE 60(B) MOTION

A. The EPA

The existing provision in the April 14, 2010 Order requires the EPA to partially withdraw Florida's CWA NPDES permitting program [ECF No. 404, pp. 46-47 ¶ 4] .[23] Under the EPA's proposed new provision, the following procedure would apply for new or modified NPDES permits for STA discharges: First, the State submits new permits or permit modifications prepared for proposal to the EPA for review. If necessary, the EPA makes any required corrections prior to proposal. The State, after receipt and consideration of public comment, submits permits to the EPA for review. The EPA

[22] All cases decided by the United States Court of Appeals for the Fifth Circuit before September 30, 1981 are binding precedent in the Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981).

[23] The EPA claims it is not initiating program withdrawal proceedings in the Amended Determination because of its Rule 60(b) motion. [ECF No. 458-4, p. 53] .

exercises its existing statutory authority to review permits for compliance with the CWA, implementing regulations, the Court's Orders, and the Amended Determination. If the EPA determines a permit does not conform and the EPA objects to permit, the authority to issue such permit transfers to the EPA, unless the EPA confirms in writing that the State has fully addressed the EPA's objections.

The EPA argues that "this approach should produce the same functional outcome as partial program withdrawal whereby EPA would issue the permits." [ECF No. 446, p. 10]. This new provision would apply after existing permits have been conformed pursuant to Paragraph 3 of Section III.D of the April 14, 2010 Order. The "EPA believes that federal permitting can serve as an effective tool where a state is unwilling or unable to issue permits that fully comply with all applicable Clean Water Act requirements." [ECF No. 565, p. 8]. I agree, in part because I have determined that the State is unwilling or unable to issue permits in compliance with the CWA.

B. Miccosukee Tribe

The Miccosukee Tribe argues that the Rule 60(b) motion is a further attempt to delay compliance with the EPA's legal obligations. [ECF No. 467, p. 3]. Miccosukee opposes the Motion on the basis that the Compliance Order is not a new final order from which the EPA can seek relief under Rule 60(b).[24] Miccosukee urges that even if

[24] As the EPA points out in its Reply to the Tribe's Response, Rule 60(b) states, in pertinent part, that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding[.]" As set forth in my discussion of the applicable legal standard, supra § X, since the parties have filed notices of appeal, I may indicate my belief that the arguments in the EPA's Rule 60(b) Motion are meritorious, or as the EPA has suggested, issue an indicative ruling.

Rule 60(b)(6) is applicable to the Compliance Order, the EPA cannot demonstrate the requisite "exceptional circumstances" for requested relief.

C. Friends

Friends only opposes the first form of requested relief in the EPA's Rule 60(b) Motion, requiring the EPA to withdraw the State's NPDES permitting authority within the Everglades Protection Area. Friends argues that the EPA does possess the authority to initiate proceedings to withdraw state NPDES permitting delegation on a partial, or less than a statewide, basis.[25] [ECF No. 468] .

D. FDEP

FDEP's position is that although both the EPA and FDEP believe the QBEL can be attained, the Amended Determination's QBEL cannot be effectuated immediately. [ECF No. 545, 43:3-4; 44:16-18] . Based on this, FDEP claims it cannot issue "false" permits containing the QBEL as set forth in the Amended Determination. Id. at 43:17-20. FDEP identifies the reasonable assurance required for a permit in the form of a compliance schedule. Id. at 43:23-25.

E. New Hope

New Hope opposes the first two proposed revisions offered by the EPA. [ECF No. 469] . New Hope characterizes the relief sought as a strategic move on the part of the EPA to "micromanage" the State's permitting procedures. Id. at p. 3. Although New Hope challenges my April 14, 210 order, "New Hope does not dispute that EPA must comply with the 2008 Order. However, compliance should mean issuing determinations

[25] While Friends sets forth the bases for its belief that the EPA may partially withdraw delegation to the State of the permitting programs, [ECF No. 468 § II.B] , I decline to adopt this position.

limited to the language of water quality standards that are consistent with the 2008 Order." [ECF No. 469, p. 2] .

XII. ANALYSIS

A. The EPA's commitment

The EPA's opening sentence in its Rule 60(b) Motion indicates that it is "fully committed to ensuring that the Everglades meet the water quality standards for phosphorus as quickly as possible." [ECF No. 446, p. 1] . An initial point of discussion during the December 17, 2010 hearing was the extent of the EPA's commitment to its Amended Determination. See [ECF No. 545, 15:23-16:2] ([The Court:] "But I need to ask directly how committed is the EPA now to carrying out the amended determination, fighting for its legality at the Eleventh Circuit, and immediately proceeding to its implementation . . . ."). As expressed in its recent briefing and at the December 17, 2010 hearing, ". . . [the] EPA is absolutely committed[.]" Id. at 17:6.[26]

At the December 17, 2010 hearing, I raised concerns regarding whether the EPA was prepared to unequivocally maintain its position regarding its commitment should the State attempt to dissuade EPA from carrying on its very specific responsibilities. [ECF No. 545, 20:5-13] . I pointed to two examples outside of the specific confines of this case and the Everglades. First, I noted that in Fla. Wildlife Fedn., Inc. v. Jackson, 2009 U.S. Dist. LEXIS 123651 (N.D. Fla. Dec. 30, 2009), a consent decree set numeric nutrient criteria for lakes and flowing waters in the State of Florida pursuant to Section

[26] I also take this opportunity to note that FDEP has also indicated its intent to work toward resolving the issues plaguing the Everglades. See e.g., [ECF No. 539, p. 28] ("The Department is acting expeditiously to comply with the terms of this Court's Orders. . . . and remains committed to the long-term endeavor of restoring America's Everglades.").

303(c) of the CWA. Although the final rulemaking was initiated, the State asked the EPA to delay implementation of water pollution rules because the rules would be detrimental to the state's already fragile economy. The EPA agreed to delay execution of the rules for approximately 1.5 years. I referenced another situation that arose just prior to the hearing, when the EPA announced on December 9, 2010 that it needed until July 2011 and April 2012 to further analyze studies with respect to smog and toxic emission rules that were supposed to take effect in December 2010.[27] With the backdrop of serious economic pressures in mind, I then asked the EPA if it was committed to its Amended Determination in light of these potential financial hurdles.[28] See [ECF No. 545, pp. 20-21]. As the EPA represented, it is "committed . . . to do everything that is within our authority to see that the blueprint and the Amended Determination becomes [sic] a reality . . . ." Id. at 21:10-12.[29] I also note that the first

[27] See John M. Broder and Sheryl Gay Stolberg, E.P.A. Delays Tougher Rules on Emissions, N.Y. TIMES, Dec. 9, 2010, http://www.nytimes.com/2010/12/10/science/earth/10epa.html.

[28] I note that efforts to restore the Everglades are not without financial obstacles. See e.g., Andy Reid, U.S. Sugar Land Bought for Everglades Restoration Could Get Leased to Another Grower, SUN SENTINEL, March 9, 2011, http://www.miamiherald.com/2011/03/09/2106749/us-sugar-land-bought-for-everglades.html#ixzz1JpIgpmwg (discussing proposal to cut taxes for the State's water management districts to reduce their budgets by 25 percent, or approximately $100 million from the SFWMD's budget). For this reason, an increased level of commitment from the EPA and the State is necessary, in light of the avowals to achieve compliance with the mandates of the CWA.

[29] Indeed, in response to my first sua sponte order, the EPA indicated that "[it] has no reason to believe that the necessary remedies are not fiscally achievable." See [ECF No. 532 § I.B] (agreeing with District's estimate that improvements required by Amended Determination would cost $1.5 billion). In fact, the EPA identifies alternative compliance measures to reduce costs to the District, as set forth in the Amended Determination. Id. at p. 11 (citing [ECF No. 458-1, pp. 14-15] . The EPA opines that

commitment outlined in the Memorandum of Understanding between the EPA and FDEP under Section III.B, "EPA Responsibilities," is that "EPA will commit, to the maximum extent possible, funding to the FDEP to support the FDEP's responsibilities under the NPDES program." [ECF No. 468-1, p. 6] .

B. Whether the Amended Determination is mandatory

At the hearing, the EPA represented that the Amended Determination is not entirely mandatory in that "there are different pieces" to the Amended Determination, some which are mandatory and others which "require additional regulatory steps before they can be directly enforced." [ECF No. 545, 16:25-17:3] .

It is undisputed that the parties have expended considerable efforts toward conservation of the Everglades and litigating this case. I am mindful of the correspondence between the parties, as well as the SFWMD, in coming to agreements and scheduling meetings so that the efforts to preserve the Everglades can move forward.[30] However, there remain certain roadblocks that evidence a lack of cooperation among the participants responsible for administering restoration and conservation efforts. See e.g., [ECF No. 514, p. 2] (District's November 2, 2010

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these alternatives "would likely reduce the costs of the remedies to significantly less than $1.5 billion." Id. at p. 13.

[30] See e.g., [ECF No. 541] (Letter from Carol Wehle, SFWMD Executive Director, to Gwendolyn Keyes Fleming, EPA Regional Administrator (Dec. 14, 2010) coordinating date to "sit down again and further discuss our respective concerns."); [ECF No. 560] (Letter from Carol Wehle, SFWMD Executive Director, to Gwendolyn Keyes Fleming, EPA Regional Administrator (Jan. 7, 2011) "assur[ing EPA] of the District's full commitment to facilitating a path forward" and offering availability to meet with EPA in January 2011). The parties have not submitted any filings indicating whether such meeting actually occurred or what further efforts the EPA or SFWMD have taken with respect to the plans discussed in the January 7, 2011 correspondence.

response to the Amended Determination indicating that it was "unable to commit to the Amended Determination as currently crafted and [wa]s also unable to submit an alternative[.]"). Despite some resistance, it appears that the progress that has been made can be an indication of cooperation and open channels of communication in the future. With an acknowledgement as to the work that has been done, there remains a significant road ahead. Protection of the Everglades requires a major commitment which cannot be simply pushed aside in the face of financial hardships, political opposition, or other excuses. These obstacles will always exist, but the Everglades will not—especially if the protracted pace of preservation efforts continues at the current pace.

C. Necessity of immediate action

As the Florida Legislature recognized in the Everglades Forever Act,

> The Statement of Principles of July 1993 among the Federal Government, the South Florida Water Management District, the Department of Environmental Protection, and certain agricultural industry representatives formed a basis to bring to a close 5 years of costly litigation. That agreement should be used to begin the cleanup and renewal of the Everglades ecosystem.

Fla. Stat. § 373.4592.

It is now 2011, or eighteen years after EPA, the District, and the Department recognized in 1993 that it was time to "bring to a close 5 years of costly litigation," which has now expanded to twenty-three years of costly litigation over many of the same issues that were first brought to this Court's attention in Case No. 88-1886 and reappeared in different forms in the instant case and those consolidated therein. Promises have been made, and not kept, and now the parties find themselves in a

similar situation as in 1988 when the case was brought—static and stagnant indeterminacy with respect to one of our nation's most prized and vulnerable natural resources.

As I made clear in my prior orders, it is necessary to enact and enforce the appropriate water standard and QBEL now, and to have immediate conformance of the permits for the purpose of enforcing all terms therein. The Amended Determination identifies two avenues to obtain final, effective, and enforceable permits. First, EPA could issue permits that contain the QBEL from the Amended Determination without compliance schedules for attaining the QBEL, with the assumption that the QBEL is required immediately upon the permit being effective. An alternative option is issuing permits containing the QBEL and compliance schedules for meeting the QBEL through implementation of necessary remedial measures. Under this second course, FDEP envisions a process outlined in its Notice of Compliance and Additional Considerations. [ECF No. 539]. For the reasons discussed infra, I determine that the use of compliance schedules, including Administrative Orders, will not achieve the objectives of preserving the Everglades—goals that have been overlooked in the face of recent mounting economic pressures.

The proper avenue to proceed with is the first, wherein the EPA shall issue permits without compliance schedules such that the QBEL is immediately enforceable. As discussed during the December 17, 2010, interminable time delays will force further postponements with respect to the EPA's ability to enforce the conformed permits. Under the first option, the EPA is not subject to the state law impediments and has

authority under Clean Water Act § 402(d) to issue the permits if the State submits draft permits that fail to comply with the Act. I determine that the State has submitted permits that must now be subject to the EPA's review.

FDEP's position is that it must provide "draft" permits because it cannot provide reasonable assurances required to issue conformed permits pursuant to Florida law. Essentially, the EPA's position is that until and unless FDEP provides conformed permits, the EPA is without authority to act. See [ECF No. 484, p. 4, fn. 3] . In particular, I highlight the EPA's suggestion that I deem the "conformed permit documents" filed by FDEP on November 2, 2010 to be "draft permits" for purposes of review under the Memorandum of Understanding. See [ECF No. 530, fn. 14] . The EPA has notified the FDEP that it reserved its full 90 days for review pursuant to the memorandum of agreement and Clean Water Act § 402(d). Id. Because this is the mechanism by which the EPA and the State can initiate the process of conforming the permits—since the FDEP believes the permits are without reasonable assurances—and because of the epic history of prolonging procedures to improve water quality standards in the Everglades, this is the most appropriate and efficient course of action at this time.

By presenting "conformed permit documents," FDEP has presented a situation in which the parties—and consequently, the efforts to comply with the CWA—remain in "limbo" because FDEP's position is that the filed permits are for informational purposes only and do not constitute a submission to EPA for EPA's review. The ninety-day period within which the EPA may review the permit documents would have begun on November 2, 2010 when the permits were submitted, and the EPA would have had until

January 31, 2011 to review the permits. As the EPA represented at the December 17, 2010 hearing, "EPA stands ready to do so within that period of time." As with other deadlines set in this case, that time has come and gone, and the impetus is now upon the EPA to perform the actions which it has committed itself to doing.

As this Court, other courts within this District, the Eleventh Circuit, and the Supreme Court have recognized, the efforts to save the Everglades have been long-lasting. See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. at 101-102 ("The phosphorous-related impacts of the [Central and South Florida Flood Control] Project are well known and have received a great deal of attention from state and federal authorities for more than 20 years. A number of initiatives are currently under way to reduce these impacts and thereby restore the ecological integrity of the Everglades."). At the time the hearing was originally set seven months ago in April 14, 2010, this case remained at a standstill. Since then, the Amended Determination has come into existence to serve as a stimulus for the EPA and State to act and move toward reviewing permits to ensure timely and immediate compliance with the WQBEL in the Everglades.

At the core of this matter is the issue of permitting authority, and whether the State or the EPA should step into the role of primarily issuing permits that shall enforce the mandates of the CWA. The State, and to a significant extent, the EPA, cannot merely continue to push off deadlines. This is a serious matter of national importance, the ignorance of which will result in continued and permanent degradation to a unique resource. In short, the EPA must now take the reigns of the permitting issues and take

action as to what it has committed itself to doing. The State and the EPA must work together, in conjunction with the other parties and intervenors in this action, to move forward and avoid any further standstill or delay.

The EPA has come a long way from its prior determination filed in this litigation, which was a cursory ten-page letter addressed to the FDEP and signed only subsequent to Plaintiffs' Motion for Contempt. Granted, it was not difficult to improve upon this prior determination. However, I do find that the Amended Determination represents a more committed effort on the part of the EPA to specifically comply with my April 14, 2010 Order. For this reason, it is necessary to ensure that the EPA acts within its permitting authority to take the significant and necessary steps toward the very actions it has committed itself to through the Amended Determination.

D. Effect of March 23, 2011 Order in Case No. 88-1886

The EPA fully acknowledges in the Amended Determination that whether the Reservoir must be constructed to completion depended on Judge Moreno's then-forthcoming order.[31] The EPA views the A-1 land as a way to comply with the WQBEL. See [ECF No. 458-1, p. 56] ("USEPA has considered the EAA A1 Reservoir land as an

[31] Indeed, the although EPA did mention the possibility that Judge Moreno may not adopt the Special Master's Report recommending that the construction of the A-1 Reservoir be terminated, the EPA did not fully discuss its options if Judge Moreno orders the Reservoir to be completed. See [ECF No. 458-1, pp. 36-37] (the EPA considered including an option in this Amended Determination for utilizing the A1 site as a deep reservoir in the event the Consent Decree Court rules to deny the State's motion for relief in building the A1 site as a reservoir. Such an option has been developed by USEPA and can be provided at such time that a decision to deny the State's motion is issued. . . . Based on the Special Master's Report, USEPA is including in the Amended Determination one remedy based on an STA expansion in the A1 compartment. Should the Consent Decree Court rule to deny the State's motion, the alternative remedy for A1 as a deep storage reservoir can be provided in a timely fashion.) (emphasis added).

important option for expanding STA 3/4, thereby compressing the timeframe for compliance with the WQBEL").

Although construction of the Reservoir has begun and ceased, Judge Moreno agreed with the Special Master that it is not in the best interests of the Everglades to continue or complete the Reservoir. In part, completion of the Reservoir will require improvements to canals. The parties in Judge Moreno's case propose an alternative for the A-1 area where the Reservoir is currently located, that is, a stormwater treatment area ("STA").

The EPA's proposal for the STA 2, STA 3/4 and Compartment B areas assumes that the A1 site will be utilized in full as a 15,000-acre STA, e.g., that Judge Moreno will adopt the Special Master's report, which he has now done. The EPA sets various milestones based on an assumption that Judge Moreno rules on the Reservoir issue by September 30, 2011. As set forth supra, Judge Moreno issued the Order Adopting the August 30, 2010 Report of the Special Master and Granting the Rule 60(b)(5) Motion on March 23, 2011. [Case No. 88-1886; ECF No. 2268] . Accordingly, the EPA's milestones can be immediately implemented. "EPA believes the WQBEL can be attained in STA 3/4 and Comp B NBO by December 31, 2014 if the A1 site is first utilized as an interim shallow storage reservoir [32], and later converted to an STA." [ECF No. 458-1, p. 37] . (emphasis added).

The EPA in its Amended Determination appears to hinge its proposed actions and timetable based on Judge Moreno's then-forthcoming order. See, e.g., Amended

[32] The parties in Judge Moreno's case did not focus on whether the A-1 area could be used as an interim shallow storage reservoir given its current status. EPA assumes that the A-1 site can be constructed as a shallow storage reservoir by March 13, 2014.

Determination at p. 32 ("Before any progress can be made on design and construction of an expanded STA on the A1 site, the Court in the Consent Decree Case must grant the State's motion for relief from building the site as a reservoir."), id. at pp. 33, 35 ("USEPA is assuming that a detailed design for converting the use of the A1 and part of the A2 compartments from a reservoir to a STA can begin as soon as the Consent Decree Court rules on the A1 case."); id. at p. 35 ("Before any progress can be made on design and construction of an expanded STA on the A1 site, the Court in the Consent Decree Case must grant the State's motion for relief from building the site as a reservoir."); id. at p. 50 ("USEPA is awaiting the Consent Decree Court's ultimate disposition of this matter.").

To the extent the EPA regarded Judge Moreno's order as a prerequisite to taking action, Judge Moreno has issued his order and the time to act is now. As this prerequisite has been fulfilled, there is no reason for further delay on the part of the EPA.

E. Amended Determination

In Section V of the Amended Determination, EPA discusses NPDES and EFA permits and recognizes that it has "oversight authority over the State's program to help ensure its effective implementation, including the authority to object to state permits and issue a federal permit where a state's proposed permit is outside the guidelines and requirements of the CWA." [ECF No. 458-1, p. 44] .

Here, the EPA's basis for moving for relief under Rule 60(b) is because it believes that certain elements of the April 14 Order "exceed EPA's statutory authority

and may present significant legal risk in any subsequent legal challenge." [ECF No. 446, p. 1]. Following the December 17, 2010 hearing, the EPA, in accordance with my order of the same date, proposed modifications to the requested relief in its original Rule 60(b) Motion. In order to begin the analysis of Defendants' Rule 60(b) Motion, I first examine the Amended Determination.

The directives set forth in the EPA's Amended Determination include specific instructions from the EPA to FDEP regarding how to conform the existing STA permits to ensure that the discharges do not exceed the phosphorus criteria. The EPA also directs FDEP to remove references to the stricken portions of the Everglades Forever Act and Phosphorus Rule. Further, the EPA instructs FDEP to include a QBEL adequate to ensure water quality compliance, updated pollution prevention and operation plans, and enhanced monitoring requirements in each STA permit. The EPA identifies specific remedial measures necessary for each STA discharge to achieve the desired QBEL in its Amended Determination.

The Amended Determination also indicates that levels of total phosphorus at inflows to the Loxahatchee National Wildlife Refuge and Water Conservation Areas 2 and 3 have decreased since 1980. However, the entirety of the Everglades Protection Area does not yet meet the nutrient criteria, and scientific publications conclude that the soil total phosphorus concentrations have actually worsened in portions of the Everglades Protection Area. Thus, further reductions of total phosphorus in the inflows of the Everglades are clearly necessary. The EPA, through its Amended Determination,

has instructed FDEP on how to conform existing STA permits to ensure that discharges do not cause any exceeding of the phosphorus criteria.

1. Water quality standard

The approved water quality standard is 10 parts per billion ("ppb") long-term geometric mean. I ordered the EPA to direct the State to correct certain deficiencies in the water quality standard contained both in the Phosphorus Rule and the Everglades Forever Act. The EPA has done so in the Amended Determination. Furthermore, the EPA has indicated that should the State fail to comply with the previously-set deadlines which are reiterated in the Amended Determination, "EPA will initiate the process to promulgate that water quality standard itself ." [ECF No. 545, 18:25-19:1] (emphasis added). The deadlines for correcting deficiencies in the rule and in the statute are January 1, 2011 and July 1, 2011, respectively.

Since the January 1, 2011 deadline to correct deficiencies in the rule has now come and gone, it is now time for the EPA to adhere to its word and step into the role of advancing the water quality standard. See [ECF No. 545, 19:7-14] (in the event of FDEP's failure to complete the process by January 1, 2011, "EPA is prepared to and, indeed, has already begun preparing for the process of promulgating the rule itself."). The EPA also represented at the December 17, 2010 hearing that ". . . with respect to water quality standards, the Amended Determination is mandatory." Id. at 19:15-16. The EPA explained that "the ultimate level of water quality that we want to see in the receiving waters of the Everglades . . . is not directly applicable or enforceable against dischargers." Id. at 22:7-10. According to the EPA, this requires a multi-step process

wherein the water quality standard must be translated into an effluent limitation or QBEL to be incorporated into a permit.

FDEP also urges that I "direct the parties to regard EPA's WQBEL as guidance to FDEP concerning the general approach to be considered in deriving a proper WQBEL through established State-law procedures." [ECF No. 539, p. 11]. Indeed, in December 2010, FDEP indicated that "[it] would initiate its WQBEL development process within the next few weeks , and would pursue it to completion as promptly as possible . The Department had been working for several years toward development of a WQBEL for phosphorus discharges to the Everglades." Id. (emphasis added). FDEP also noted that "in its EFA permit for STA-1E and STA-1W, issued November 2007, the Department had committed to establishing a WQBEL by December 31, 2010 , and had been working with EPA, the District and other interested stakeholders in early 2010 to develop a WQBEL prior to that date." Id. (emphasis in original; footnote omitted).

2. Discharge limit – water qua lity based effluent limitation ("WQBEL")

As defined in the Florida Administrative Code, "'[w]ater quality based effluent limitation' ("WQBEL") means an effluent limitation, which may be more stringent than a technology-based effluent limitation, that has been determined necessary by the Department to ensure that water quality standards in a receiving body of water will not be violated." F.A.C. § 62-650.200.[33] This discharge limit is the effluent limitation that applies to the STAs before they discharge into the receiving bodies in the Everglades.

[33] As discussed in the July 29, 2008 Summary Judgment order, the Amended EFA extended the applicable compliance date while simultaneously lowering the state water quality standards by compliance with the Long-Term Plan and TBELs. See [ECF No. 323 pp. 45-46] .

In order to directly apply and enforce the 10 ppb water quality standard to dischargers, the water quality standard must be converted to a QBEL. The QBEL must then be included in a permit, which would be directly applicable to those discharging pollutants into the Everglades. Enforcement of the WQBEL, vis-à-vis permits, can occur through such means as citizen suits or by the EPA and FDEP.[34]

As noted in the July 29, 2008 Summary Judgment Order, TBELs are less restrictive than the WQBELs. [ECF No. 323, pp. 47-48] . By requiring permits to include TBELs, the Amended EFA essentially allowed for issuing permits through 2016, even if neither the narrative nor the numeric phosphorus criterion is met so long as there was compliance with the Long-Term Plan and implementation of TBELs. Id. As I found in that order, the change in compliance schedule and criteria amounted to changes in state water quality standards—along with an admission that discharges would exceed 10 ppb. Id. at p. 48 (citing Fla. Stat. § 373.4592(3)(b) (2003)). The CWA requires imposition of WQBELs when TBELs are inadequate. 33 U.S.C. § 1312(a); 40 C.F.R. § 122.44(d).

On March 1, 2011, the Technical Oversight Committee ("TOC")—formed as a result of the July 11, 1991 Settlement Agreement in Case No. 88-1886—held a

[34] For example, pursuant to Section 309(a)(3) of the CWA, the EPA may "issue an order requiring such person [in violation of the CWA] to comply with [the CWA], or . . . bring a civil action in accordance with subsection (b) of this section." 33 U.S.C. § 1319(a)(3). Pursuant to Section 309(b), the EPA may file a civil action seeking injunctive relief for violations of the CWA or penalties pursuant to Section 309(d). See also 33 U.S.C. § 1319(g) (discussing EPA's ability to assess administrative penalties for violations of the CWA or a permit issued thereunder). In addition to the EPA's potential remedies, citizen suits are authorized pursuant to 33 U.S.C. § 1365 against those who are "alleged to be in violation of (A) an effluent standard or limitation . . . ." 33 U.S.C. § 365(a)(1).

Quarterly Meeting.[35] In its own words, "[t]hough TOC does not bind any party or person as an independent authority, it does provide a public forum to evaluate technical information, particularly as it relates to water quality management and compliance tracking in the Everglades Protection Area."[36] During the TOC's March 1, 2011 meeting, the Everglades National Park representative motioned "for the TOC to recommend the FDEP 'adopt, as the maximum annual discharge limit for the Refuge, the Water Quality-Based Effluent Limit identified in the USEPA's Amended Determination, dated September 3, 2010.'"[37] Following discussion and presentation, the TOC did not pass the motion to recommend that FDEP adopt the WQBEL in the EPA's Amended Determination.

At the December 17, 2010 hearing, the EPA represented that "[it] has determined that if dischargers comply with that QBEL [identified by the EPA in the Amended Determination] at the end of the pipe that we will be able to achieve the water quality standard and, in particular, the discharges from those effluent sources will not cause exceedances of the water quality standard ." [ECF No. 545, 22:15-24] (emphasis added).

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[35] Everglades Technical Oversight Committee, http://my.sfwmd.gov/portal/page/portal/xweb%20about%20us/toc (last visited April 25, 2011). The purpose of the TOC is "to review and recommend applied research, monitoring and compliance conducted pursuant to the terms of the Settlement Agreement and to consider technical advice and assistance from consultants and appropriate state and federal agencies regarding Everglades Program activities." Id.

[36] Id.

[37] See SFWMD Library & Multimedia, March 1, 2011 Meetings Archive, Minutes, http://my.sfwmd.gov/portal/pls/portal/portal_apps.repository_lib_pkg.repository_browse?p_keywords=tocmeeting20110301&p_thumbnails=no.

F. Permitting authority

The Eleventh Circuit has held that a district court's decision to vacate permits under the Administrative Procedures Act is not an abuse of discretion where the original decision to grant the permits is arbitrary and capricious. See Sierra Club v. Van Antwerp, 362 Fed. Appx. 100, 107 (11th Cir. 2010) ("After finding that the Corps's decision to grant the permits was arbitrary and capricious, the district court vacated the permits. We find that the district court did not abuse its discretion under the APA by vacating the permits."). Indeed, where a court has determined that an agency has failed to act, the court may declare as such and instruct the agency to take certain action. See Sierra Club v. Strock, 495 F. Supp. 2d 1188, 1208 (S.D. Fla. 2007) ("To be clear, this Court is not dictating what the agency's future decision should be; rather this Court has determined that the agency has failed to perform its important duties."). The CWA requires that the EPA act where the states have failed to do so. See Hankinson, Sierra Club v. Hankinson, 939 F. Supp. 865, 871-72 (N.D. Ga. 1996 ("the [CWA] requires EPA to step in when states fail to fulfill their duties under the Act.") (citations and quotations omitted).

As a preliminary matter, the Memorandum of Understanding between the EPA and FDEP sets forth that:

> EPA acknowledges that the FDEP has no veto authority over acts of the Stale legislature and therefore reserves the right to initiate procedures for withdrawal of the State NPDES program approval in the event that the State legislature enacts any legislation or issues any directive which substantially impairs the FDEP ability to administer the NPDES program or to otherwise maintain compliance with NPDES program requirements.
>
> [ECF No. 468-1, p. 29] .

Discharges under Florida law, including under the 1994 EFA and the Amended EFA, are governed by permits. The permits at issue are those that have already been issued—which I found not to comply with the CWA—and now need to be conformed. The permits are the key for enforcing and carrying out the mandates of the CWA. In order to initiate the permitting procedure, FDEP had to submit draft permits to the EPA pursuant to the Memorandum of Agreement between the EPA and FDEP.

The permits are the crux of the system involving the 10 ppb water quality standard, the applicable QBEL, and ultimately, enforcement of the permits. In order to effectuate the goals of preserving the Everglades, valid and enforceable permits must immediately be put into place. Pursuant to my order requiring supplemental briefing, the EPA filed a submission indicating that one of two options includes that "the Court to declare that FDEP's filing of sample permit documents on November 2, 2010 constituted the submission of draft permits to EPA, thus triggering EPA's review process." [ECF No. 554, p. 3]. The EPA also suggests that I can (again) "order FDEP to comply with [the] April 14 Order by submitting draft permits to EPA in accordance with the MOA, which would then trigger EPA's review of the permits, objections if appropriate, and assumption of authority to issue the permits if EPA's objections are not adequately addressed by FDEP." Id. I decline to take the EPA's second suggested route, and instead proceed with the first option "deeming" the permits submitted to best move the permitting process along in accordance with the objectives of my prior orders and the Amended Determination.

FDEP has presented a situation in which the parties remain in "limbo" because FDEP's position is that its filed permits are for informational purposes only and do not constitute a submission to the EPA for the EPA's review. The EPA sent correspondence advising FDEP that should I rule that the Department's submission constitutes draft permits submitted to for the EPA's review, the EPA preserved its rights to take the full 90 days to review. See [ECF No. 532, p. 91] (Letter from Gwendolyn Keyes Fleming, EPA Regional Administrator, to Mimi A. Drew, FDEP Secretary (Dec. 2, 2010)). Since the 90-day period would have begun on November 2, 2010 when the permits were submitted, the EPA would have had until January 31, 2011 to review the permits. The EPA represented at the December 17, 2010 hearing that "EPA stands ready to do so within that period of time." [ECF No. 545, 29:12-24] .

FDEP claims the EPA's federal permit scenario is unworkable because it would "consume an extraordinary amount of time and resources to work through the necessary federal administrative hearings, judicial review of EPA's objection, federal permit-issuance hearings, administrative appeals of EPA's permits and judicial review of decisions emanating from those appeals." [ECF No. 539, p. 16]. FDEP's suggested alternative is a state process because EPA and FDEP agree that State permits with AOs implementing case-by-case compliance schedules is lawful. FDEP points to the following benefits for a State process: final permits with firm effluent limits, fully enforceable interim obligations and milestones, shorter period of time to produce permits and results.

However, FDEP's alternative to use a state process does not solve the issues addressed in my original April 14, 2010 Order. Since AOs relieve the District from having to immediately comply with the otherwise applicable WQBEL identified in the permits, there is no guarantee SFWMD will take actions to work toward achieving the milestones set forth in the Amended Determination.

Through my exercise of equitable and inherent powers, and as a sanction for the State's non-compliance, I determine that it is necessary for the EPA to act under its authority to review the permits and initiate the long-delayed procedure of reviewing permits to conform to the CWA. The failure to use good faith to effectuate the mandates of this Court's prior orders and the Amended Determination is unacceptable. Since the EPA has represented that it was prepared to object to the permits, I find that the most efficient way to move forward is to deem the permits submitted for purposes of the EPA's review . Indeed, Friends has demonstrated that review of FDEP's submitted permits is possible. See [ECF No. 558-1] (Expert Report of Thomas E. Lodge, Ph.D., CEP comparing conformed NPDES permit offered by the EPA in Attachment I of the Amended Determination and the corresponding permit submission by FDEP).[38] Further, according to the EPA, "issuance of NPDES permits is not subject

[38] In particular, Dr. Lodge's report reveals that the FDEP omits specific language relating to compliance with the narrative phosphorus standard in the version it filed. The report indicates that "[o]mitting reference to the specific rule and the narrative standard for causing an imbalance of natural populations of flora and fauna significantly reduces protection of the Everglades." [ECF No. 558-1, p. 3] . Further, the report notes that FDEP omitted language regarding submission of Total Phosphorus samples to assess whether facilities are operating within the operational envelope in order for the District to review potential causes of exceedances in annual inflow volumes or phosphorous loads. Id. at p. 4. According to the Report, in omitting such language, it is thus

to the state-law 'reasonable assurance' constraint." [ECF No. 530, p. 23] . The EPA has gone as far to state that it "could issue permits that require immediate compliance with the WQBELs without adopting compliance schedules." Id. (emphasis added). With this framework in mind, the EPA's oversight of the permits should not be hindered by the FDEP's reasonable assurance argument because such concerns can be addressed by both FDEP and the EPA following review of the permit documents which have been filed with this Court.

The EPA's position is that it is necessary to arrive at a point where final and effective permits exist so that they can be enforced. At the December 17, 2010 hearing, the EPA suggested that the EPA, the United States through the Justice Department, citizens through citizen suits, or FDEP could bring actions to enforce the permits [ECF No. 545, 18:13-16] through a variety of "enforcement tools" such as administrative enforcement, judicial enforcement, civil penalties, and injunctive relief. Id. at 23:19-20. I determine that the permitting procedure is most appropriate through the means of the EPA at this juncture.

G. Failure to comply with April 14, 2010 Order

I could not have said it clearer in my April 14, 2010 Order that I enjoined FDEP from certain conduct and required the EPA to direct FDEP to undertake certain processes to achieve compliance with the water quality standards under the Clean Water Act. I unequivocally ordered the EPA to direct the State to take specific action. The State's response was to assert that it cannot take the action as required and thus,

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"impossible to determine whether the STA is operating within or outside of the operational envelope." Id.

to fail to fully comply with my prior Orders. Accordingly, now I must further use the equitable inherent powers as described infra and in my prior orders to put into the EPA's hands the steps to move forward.

1. Conform existing perm its by November 2, 2010

In particular, with regard to conforming the existing NPDES permits, the April 14, 2010 Order required that:

> The EPA, in its Amended Determination, shall direct the State of Florida to conform all NPDES permits for STAs I , 2, 3, 4, 5 and 6 — along with the accompanying Administrative Orders and Everglades Forever Act permits listed in Attachment A to this Order — to the Clean Water Act, the Summary Judgment Order and this Order so as to eliminate all reference to the non-conforming elements of the Long-Term Plan , the moderating provisions and the extended compliance schedule through 2016, and to require compliance with the phosphorus narrative and numeric criterion in a manner cons istent with the Clean Water Act and the forthcoming Amended Determi nation. All such permits shall be conformed not later than sixty (60) days of the date of the Amended Determination and shall be promptly f iled with this Court.
>
> [ECF No. 404, p. 46 ¶ 3] .

Accordingly, the April 14, 2010 Order unambiguously required the permits to be conformed within sixty days of the EPA's Amended Determination. In its Amended Determination, the EPA instructed the State to comply with my prior order and provided "specific direction as to what should be included in those permits." On November 2, 2010, in accordance with the time requirement of sixty days after issuance of the Amended Determination, FDEP filed a Notice of Filing Conformed Permit Documents. [ECF No. 512]. FDEP also provided the documents to the EPA, but advised the "sample permit documents" were "not being submitted for any action" and were "for informational purposes only." [ECF No. 530-4] . As Friends has pointed out, the

documents filed by FDEP are not reflective of the requirements as set forth in the EPA's Amended Determination . See [ECF No. 558, p. 7] (citing Expert Report of Thomas E. Lodge, Ph.D., CEP [ECF No. 558-1]).

2. Amend Phosphorus Rule by January 1, 2011

The April 14, 2010 Order similarly required the EPA on remand to "require the State of Florida to commence and complete rule-making for the Phosphorus Rule within 120 days from the date of the Amended Determination[.]" [ECF No. 404, pp. 44-45 ¶ 1]. In the EPA's Amended Determination, consistent with this requirement, the EPA specifically required that:

> FDEP is directed to complete its rulemaking by January 1, 2011. If FDEP has not finalized revisions to the Phosphorus Rule consistent with Attachment E by this date, USEPA will initiate rulemaking to promulgate the necessary revisions pursuant to CWA section 303(c) consistent with the Court's 2010 Order (at 44 - 45).
>
> [ECF No. 458-1 § II].

As of the date of entry of this Order, it is not clear that the State has completed the rulemaking as required by the April 14, 2010 Order and the Amended Determination. Nor is the Court aware of the EPA initiating its own rulemaking procedures now that the January 1, 2011 deadline—much like many other time limits set in this case—has elapsed.[39]

[39] The Amended Determination also required FDEP to submit its first annual report on March 1, 2011 summarizing "TP water quality, vegetation, and soils data from each transect monitoring site. The report must provide a summary of whether the TP conditions at each site are improving, worsening, or remaining unchanged." [ECF No. 458-1, p. 48]. It is not clear whether FDEP prepared this report.

H. Rule 60(b) Motion

1. Partial withdrawal of NPD ES permitting program with a new injunctive provision that would apply after existing permits have been conformed

Friends does not oppose the requested relief sought in Sections II and III of the EPA's Rule 60(b) motion and focuses on the permitting requirements in Section I. See [ECF No. 468]. The same is true for FDEP, which argues that I lack jurisdiction to grant EPA's requested relief. [ECF No. 466]. New Hope does not address the EPA's request to modify Attachments B and C. [ECF No. 469]. The Tribe opposes all three portions of the relief sought. [ECF No. 467].

The EPA seeks a new injunctive provision that would apply after existing permits have been conformed pursuant to paragraph 3 of the Amended Determination. The process envisioned by the EPA operates as follows: With respect to any new or modified NPDES permits for STA discharges, the State must submit such permits or permit modifications prepared for proposal to EPA for review and, if necessary, correction prior to proposal. The State, after receipt and consideration of public comment, submit any such permit to EPA for its review under CWA section 402(d). EPA must then exercise its existing statutory authority to review those permits for compliance with the Clean Water Act, implementing regulations, the Court's Orders, and the Amended Determination. If the EPA determines that such permit would fall "outside the requirements and guidelines" of the CWA as provided by CWA section 402(d), and the EPA objects to those permits, the authority to issue such permit would transfer to

the EPA, unless the EPA has notified the State in writing that it has promptly and adequately responded to EPA's objections.

In support of the proposed alternative structure, the EPA claims that it lacks statutory authority to effectuate a partial withdrawal of a NPDES permit program limited to one specific geographic area. [ECF No. 446 § I.A]. CWA Section 402(c)(4) provides that the EPA can lawfully withdraw Florida's authority to issue permits for the STAs only if it withdraws Florida's entire permitting program. See 33 U.S.C. § 1342(c)(4)(A) ("a State partial permit program approved under subsection (n)(3) of this section only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn[.]"). Based on the EPA's assurances that "[its] approach would leave intact and would not affect the Court's injunctive approach as described in paragraph 3 of section III.D of the April 14 Order [ECF No. 404, pp. 45-46] for existing permits, including the deadline for achieving conformance 60 days after EPA issues its Amended Determination[,]" I remind the EPA that it has set forth its commitment toward implementing the goals as delineated in the Amended Determination.

2. Modify Findings of Fact "that appear to equate the 10 ppb water quality criterion for phosphorus in the Everglades with WQBELs"

The EPA requests that I modify Finding of Fact No. 4 [ECF No. 404, p. 3] "to the extent that it mistakenly equates the WQBELs needed to ensure compliance with the phosphorus criterion with the criterion itself." [ECF No. 446, p. 16] . Specifically, the EPA seeks modification to add the following language in boldface type:

> 4. To protect the Everglades from further significant environmental degradation, it is essential that discharges into, and within, the Everglades

> Protection Area not result in an exceed ance of the phosphorus water quality standard of 10 parts per billion ("ppb"). In federal Clean Water Act terms, the "WQBELs" are the water quality based effluent limitations necessary for discharges not to cause a violation of the 10 ppb water quality standard . See note 5, infra. The STAs currently do not meet this vital standard. At best, the State of Florida and EPA anticipate that, in 2016, the STAs may be operating with technology based effluent limitations ("TBELs"), which provide significantly less protection.
>
> [ECF No. 446, p. 16] (proposed additional text in boldface).

The 10 ppb figure was derived from numerous determinations and findings that have been made a part of the record in this case. See e.g., [ECF No. 323, p. 64]. Any limitations exceeding 10 ppb would not support the goal of balancing aquatic flora and fauna in the water body. Id. (citing EPA Jan. 2005 Determination at 5). Because I determine that the EPA must step into its role of overseeing the permitting process, and the EPA has represented that modifications in the Rule 60(b) relief are necessary to accomplish the objectives in the Court's prior orders and the Amended Determination, I modify this Finding of Fact for the purpose of facilitating the EPA's ability to initiate the permitting process.

3. Modify Attachments B and C "t o more closely track the 2008 Order Granting Summary Judgment and the April 14 Order"

Finally, the EPA requests modification of Attachments B and C to the April 14 Order. [ECF No. 446 § III]. Specifically, the EPA seeks to strike certain language and retain language previously stricken from the attachments to the April 14, 2010 Order. Because I determine that these modifications would not frustrate the overall purpose of the April 14, 2010 Order, and because I find it necessary for the EPA to use its available

resources to effectuate the Amended Determination to the best of its ability, these modifications are suitable as part of the overall suite of revisions the EPA seeks.

I. Motion for Entry of an Order Declaring Permits Null And Void

Friends seeks an order declaring the District's permits null and void on the grounds that the Department failed to conform the Permits as required by my prior orders. [ECF No. 533, p. 1] . According to FDEP, "absent a ruling from this Court that the Department is not prohibited from utilizing an Administrative Order ('AO') or alternative method of providing 'reasonable assurance' of the permittee's compliance with the permit, the Conformed Permit Documents can not be issued under Florida law." [ECF No. 552, p. 3] (emphasis in original; citing [ECF Nos. 512, 539]). FDEP refers to its filing as a Notice of Filing Conformed Permit Documents [ECF No. 512]. However, these are actually not permits but rather suggestive, informative, and "drafts." Accordingly, the Tribe indicates that FDEP has not complied with my order. Because I determine that there is a preferable route to expediting the permitting process by deeming the permits submitted for purposes of the EPA's review, I find that there is no need to grant Friends' motion.

As I stated at the December 17, 2010 hearing, permits—and specifically the act of conforming permits in order to fulfill the requirements of my prior orders—are the key to this case. See [ECF No. 545, 24:15-18] ("Let's get to the heart of the matter and, that is, the issue of conforming permits and making them enforceable which is what [EPA] told [the Court] is the crucial step that we need to address."). My prior order was abundantly clear in requiring EPA to direct FDEP to conform the permits within 60 days.

In order to achieve the goal of conforming permits, the EPA has set forth two avenues to obtain final, effective and enforceable permits—with and without compliance schedules. See supra § XII.C. In light of these two proposals, I was unambiguous at the December 17, 2010 hearing when stating that

> At some point or another, I need to make clear and through some means . . . that it's this Court's position that I'm going with Option 1 because I foresee that just like the litigation that the Water Management District has started yesterday, everything that is going to happen within a state process is going to result in interminable time delays which have to run their course before EPA can act.
>
> [ECF No. 545, 26:11-18] .

The Department characterizes Friends' Motion as one that seeks a "contempt finding against the Department." [ECF No. 552, p. 2] . The Department cites the Compliance Order to argue that I did not require the Department to "issue conformed permits," but rather merely indicated that the permits needed to be "filed," which the Department has done. Id. at 2, fn. 2 (emphasis in original). The Department argues that it cannot issue the conformed permit documents under Florida law because it lacks "reasonable assurance" of the permittee's compliance with the permit. I disagree with the Department's claim that "the most expeditious and efficient means to establish enforceable effluent limitations for discharges to the Everglades is for the State to maintain primary permitting authority over the STAs." Id. at p. 4.

The EPA states that "there is no present need for the Court to declare the State permits invalid. As discussed at the December 17, 2010 hearing, other orderly and defensible procedures exist to move the permitting process forward." [ECF No. 553, p.

2].[40] I agree and the reason I decline to enter an order declaring them null and void is so they can be considered immediately reviewable and so the process may proceed swiftly.

Consistent with my April 14, 2010 Order, wherein I concluded that the State's violation of the Summary Judgment Order and consistent disregard for the requirements of the CWA in the Everglades required "responsibility for CWA compliance through the issuance of NPDES permits be returned to the EPA until such time as the State of Florida is in full compliance with the CWA," this remains the case today. The permits cannot go through the State system, for they will be forestalled and they will not comply. The EPA, however, has represented that it will be able to effectively carry out the permitting system to the stage it needs to be in for preservation of the Everglades.

The EPA noted at the December 17, 2010 hearing that if I clarify or confirm my order requiring FDEP to submit permits to EPA for review, "[F]DEP should send all of the documentation that's required under the regulations and memorandum of understanding that is supposed to accompany a draft submission to EPA so that are no further hiccups in the process." [ECF No. 545, 50:3-9] .

Because I determine that the permits have been deemed submitted, it is unnecessary for me to conclude that they are null and/or void. The wheels have been

[40] At the December 17, 2010 hearing, Friends suggested that considering FDEP's noncompliance with the April 14 Order, it may be appropriate to find that it is EPA's burden to respond without requiring any determination by the Court of whether the permits are drafts or in compliance with the Amended Determination. See [ECF No. 545, 38:13-39:2] (citing [ECF No. 484, fn. 3] ; see also [ECF No. 545, 39:13-14] ("So it would be directing the EPA to do no more than what it said it would do in its Amended Determination.").

set in motion, and the EPA is now obligated under its very own rules to initiate the permitting procedure of review, public comment, etc.

J. Motion to Add SFW MD as a Party

In my April 14, 2010 Order, I noted that

> I leave for another day, as may be necessary, to address the Court's power to impose coercive fines, including attorney's fees, to enforce its orders, and to determine if, and when, it is necessary to bring the South Florida Water Management District into these proceedings through the All Writs Act, 28 U.S.C. 1651. Such action may be necessary in the event the South Florida Water Management District takes actions in redistributing resources which preclude the construction of necessary facilities to meet phosphorus criterion, or, following the issuance of this Order, continues to govern itself by the extended 2016 compliance schedule and the invalidated provisions of the Phosphorus Rule in requesting NPDES permits.

[ECF No. 404, fn. 35] .

Friends has now moved to join the District as a party pursuant to Federal Rule of Civil Procedure 21. See [ECF No. 497] (Notice of Service of Motion to Add South Florida Water Management District as a Party upon counsel for SFWMD). As discussed supra § II, Plaintiff Miccosukee Tribe has joined in this motion. [ECF No. 507].

1. SFWMD's response to Amended Determination

The Director of the SFWMD wrote two letters to EPA officials, both dated November 2, 2010.[41] SFWMD claims that "EPA was not provided sufficient time to

[41] The Director also addressed correspondence to this Court dated September 30, 2010 which essentially states the accomplishments of the State and the District while noting that the projects and schedules in the Amended Determination are "not achievable within our existing revenue streams." [ECF No. 498, p. 5] . See also [ECF No. 527-1] (Letter from Gwendolyn Keyes Fleming, EPA Regional Administrator to Carol Wehle,

perform a comprehensive planning process" and encourages EPA to "allow for flexibility and adaptive management so that additional and appropriate planning and modifications can be made over time. It is possible that new technology, partnering opportunities or other optimization efforts will be identified interest he future that would warrant plan adaptation." [ECF No. 514-1, pp. 4-5] (emphasis added). This appears to be yet another excuse to cause further delay.[42]

In the second letter, SFWMD "declin[es] the opportunity to provide an alternative proposal for achieving the water quality targets devised by the federal government for Florida's Everglades. In the end, the District was unwilling to accept the undue and unreasonable financial burden that EPA's $2 billion proposal places on South Florida's taxpayers." [ECF No. 517-1, p. 1]. Essentially, SFWMD points to financial constraints as a reason why the Amended Determination cannot be implemented.[43]

SFWMD Executive Director (Nov. 26, 2010) responding to SFWMD's correspondence declining to submit alternative remedies).

[42] As Judge Moreno noted during the October 21, 2010 hearing in Case No. 88-1886, if the parties constantly await new or improved technology, there will be little likelihood of actual progress.

[43] This concern is reiterated in recent correspondence from the District to the EPA. See [ECF No. 581-1, p. 3] (discussing estimated cost of STAs "between $1.5 to $2 billion to South Florida taxpayers" and describing the District as "experiencing a collapse in tax revenues due to South Florida's economic and property value declines"). Friends submitted a report regarding the District's financing capacity, which New Hope has moved to strike. See [ECF Nos. 534-2, 537]. The Report was prepared in response to the November 2, 2010 letter from the Executive Director of the SFWMD to the EPA wherein the District argues that it lacks the capacity to finance the projects that the EPA has determined are necessary to achieve compliance with the CWA. [ECF No. 534-2].

2. Applicable law

Rule 21 provides that "[o]n motion or on its own, the court may at any time, on just terms, add or drop a party." "Dropping or adding a party to a lawsuit pursuant to Rule 21 is left to the sound discretion of the trial court." Lampliter Dinner Theater, Inc. v. Liberty Mut. Ins. Co., 792 F.2d 1036, 1045 (11th Cir. 1986) (citing Williams v. Hoyt, 556 F.2d 1336, 1341 (5th Cir. 1977), cert. denied, 435 U.S. 946 (1978)). "But [Rule 21] no more permits joinder of parties, than [Rule 15(d)] permits the supplementation of the record, in the circumstances here: after the trial is over, judgment has been entered, and a notice of appeal has been filed." Summers v. Earth Island Inst., 555 U.S. 483 (2009).

3. Analysis

I recognized the ability to bring the SFWMD into these proceedings pursuant to my authority under the All Writs Act, 28 U.S.C. § 1651, in my prior order, and Friends accurately notes that the language of Rule 21 indicates that I may add a party "at any time." With the framework of the All Writs Act and Rule 21 in mind, several factors guide my determination that adding the District as a party to this action is inappropriate at this time. In reviewing the pertinent actors in this case, it is clear that SFWMD must play a serious role in this matter. Friends points out that "the District, as it points out in its Petition to the Eleventh Circuit, is 'statutorily-mandated' to be a full participant in Everglades restoration including in the development and implementation of the Comprehensive Everglades Restoration Plan." [ECF No. 477, p. 5] (citing District's Petition for Writ of Prohibition or Mandamus to the District Court at 22 and Water

Resources Development Act of 2000, Public L. No. 106-541, 114 Stat. 2572 & Fla. Stat. §§ 373.1501-1502). I also agree with the Tribe's statement that "the District is in a position to frustrate the implementation of this Court's Summary Judgment Order and, more importantly, its April 14, 2010 Compliance Order." [ECF No. 507, p. 4] .

Friends' Notice of Non-Opposition to its Motion to add SFWMD as a Party indicated that no responses or objections were served to the Motion by any party, Intervenor, or by the District even though the District provided the Court with a response to EPA's Amended Determination. [ECF No. ¶ 4] (citing [ECF No. 501]). Indeed, at the Court's invitation, counsel for the District, along with the Executive Director of the District, were present at the December 17, 2010 hearing. See [ECF No. 9:15-10:1] . Counsel indicated that the Executive Director was present "for the limited purpose of responding to the Court's personal invitation and to assist the Court in any way she can within her means." Id. at 10:2-4. Counsel noted that the District has not been served nor been made a party to the instant proceeding. Id. at 10:4-7.

However, to add SFWMD as a party to this litigation would be unfitting at this time. This case was closed by entry of final judgment on July 29, 2008 following my order granting summary judgment. [ECF No. 324]. As the Miccosukee Tribe acknowledges in its joinder to Friends' Motion to Add SFWMD As a Party, the District was never named as a defendant to this action. [ECF No. 507, p. 2] . Further, the Tribe recognizes that judgment has already been entered in this case. Id. at pp. 1, 3. The parties have filed various appeals which are currently pending. The District is also

undergoing its own internal changes, which I strongly hope will not forestall preservation of the Everglades any longer.[44]

Given the current status of this closed case, the fact that various appeals are pending, and my indication that the EPA will have to pursue further enforcement actions in the event that the objectives as outlined in the Amended Determination are not executed, I determine that it is not necessary to add the District as a party in the instant matter at this stage. It is clear that the District must be involved in implementing the forthcoming measures as they relate to the Everglades. I also note that despite its status as a non-party to this action, the District has agreed to meet with representatives of the EPA. One can only hope that this is the beginning of a series of cooperative measures between the District, the EPA, and others whose role is necessary in the restoration of the Everglades.

K. Motion for Clarification of Compliance Order

FDEP filed a Motion for Clarification of the Compliance Order seeking clarification "that the Compliance Order is not intended to prohibit the Department from using Administrative Orders ('AOs') to establish case-specific compliance schedules,

[44] For example, recently, on April 14, 2011, Carol Wehle, executive director of the SFWMD, announced she will be leaving the SFWMD. Christine Stapleton and Joel Engelhardt, Water District Chief Carol Wehle Announces Sudden 'Retirement', MIAMI HERALD, April 13, 2011, http://www.miamiherald.com/2011/04/13/2166381/water-district-chief-carol-wehle.html#ixzz1JVVPj9Fq.

Similarly, the resignation (effective February 12, 2011) of Peter Silva, who appeared on behalf of the EPA at the December 17, 2010 hearing as the Assistant Administrator, should not hinder the EPA's overall responsibility for implementing the directives in the Amended Determination. Indeed, the EPA "assures the Court that Mr. Silva's recently-announced departure (effective February 12, 2011) has no bearing on this case or on EPA's continuing efforts to achieve water quality standards in the Everglades Protection Area as expeditiously as possible." [ECF No. 572, p. 2] .

which are necessary for the Department to have the reasonable assurance required to issue conformed permits pursuant to Florida law." [ECF No. 573, p. 2]. FDEP's position is that if I confirm that the April 14, 2010 Order "does not prohibit the use of AOs to enforce compliance schedules, the Department will begin the administrative process and notice the draft permits containing EPA's WQBEL." [ECF No. 566, p. 3]. FDEP then describes the administrative process of finalizing the draft permits following notice and comment, opportunity for public hearings, and any administrative challenges or judicial review. Id. However, notably, FDEP acknowledges that "[t]he same process and outcome would result from EPA's issuance of federal permits , although EPA's process in all probability would take longer to achieve final permits and compliance schedules." Id. (emphasis added).

The Tribe argues that clarification is unnecessary because both the Summary Judgment Order [ECF No. 323] and the Compliance Order [ECF No. 404] unambiguously prohibit the use of the extended compliance schedules that DEP seeks to implement here, which violate the Clean Water Act. [ECF No. 576].[45] The Tribe is correct. I have unambiguously set forth in these two key prior orders that the use of Administrative Orders is improper as they are used to further delay deadlines that have already been extended and re-extended on various occasions. For example, as the Tribe recognizes, I stated in the April 14, 2010 Order that:

> Here, the State of Florida has failed to fulfill its duties under the Act by issuing NPDES permits that do not comply with the Clean Water Act and its implementing regulations. As such, the NPDES permits – including the AOs – must be "override[n]" and/or modified as necessary to

[45] Friends' Response to FDEP's Motion for Clarification [ECF No. 579] joins in the responses filed by the Tribe [ECF No. 576] and the EPA [ECF No. 577].

> ensure compliance with the Act . Miss. Comm'n on Natural Resources, 625 F.3d at 1276 ("EPA can override state water quality standards by changing the effluent limits in NP[D]ES permits . . . "); see also Hankinson, 939 F. Supp. at 871-72. While I leave the specific "substance and manner of achieving [CWA] compliance entirely to the EPA," Alaska Center for Environment v. Browner, 20 F.3d 981, 986-87 (9th Cir. 1994), compliance must be achieved, and it appears to this Court that doing so will require the modification (or termination and re-issuance) of the violative NPDES permits (and AOs) .
>
> [ECF No. 404, p. 39] (emphasis added).

It is also necessary to distinguish the use of Administrative Orders for existing NPDES permits (and their accompanying Administrative Orders as identified in Attachment A to the April 14, 2010 Order) and the use of Administrative Orders going forward for issuing new permits. It appears that FDEP seeks clarification regarding the latter. For the sake of providing clear and express direction to all parties, I address the use of AOs in both the existing permits that must be conformed and any future permits to be issued.

As the Tribe properly notes, my prior order expressly prohibited the State from using Administrative Orders to prolong necessary compliance with the CWA. See [ECF No. 404, p. 24] ("I did not, and will not, allow the State of Florida to create a blanket variance through the guise of a 'compliance schedule' set forth in AOs without following the procedure required under the Clean Water Act and its implementing regulations."). FDEP cites language of my April 14, 2010 Order as a basis for arguing that I authorized the use of Administrative Orders. See [ECF No. 573, pp. 3-4] (citing [ECF No. 404, p. 23]. However, the FDEP ignores the very next sentence following the language of the April 14, 2010 Order which it cites, in which I noted that "[i]n this case, the compliance

deadline the EPA approved as reasonable ended on December 31, 2006." [ECF No. 404, p. 23] (emphasis in original). As set forth in Paragraph 4, I required the EPA in the Amended Determination to

> . . . immediately initiate and carry out its authority under Section IX of the Memorandum of Understanding to withdraw approval of the State program pertaining to the issuance of any new NPDES permits for discharges into, or within, the Everglades Protection Area, or for any further modifications to existing NPDES permits (including through State of Florida Administrative Orders) – other than to carry out the requirements of Paragraph 3, above – until such time as the State of Florida is in full compliance with the Clean Water Act, its implementing regulations, the Summary Judgment Order, this Order, and the forthcoming Amended EPA Determination.
>
> [ECF No. 404, p. 46] (emphasis added).

Similarly, the April 14, 2010 Order also enjoined the FDEP

> . . . from issuing any new NPDES permits, or modifications to existing NPDES permits – through State of Florida Administrative Orders, Everglades Forever Act permits or otherwise – for STAs that discharge into, or within, the Everglades Protection Area until such time as the State of Florida is found by the EPA and this Court to be in full compliance with the Clean Water Act, its implementing regulations, the Summary Judgment Order, and this Order. All new Administrative Orders and Everglades Forever Act permits issued under the laws of the State of Florida must conform to, and comply with, the Clean Water Act, its implementing regulations, the Summary Judgment Order, this Order and the forthcoming Amended EPA Determination.
>
> Id. at pp. 46-47 (emphasis added).

Moreover, as the EPA points out, the use of water quality standards variance (a position advocated by the Tribe) is similarly inappropriate to achieve the timely attainment of the WQBEL. Relaxing the water quality standards, and correspondingly, the WQBEL, represents an approach that would only serve to delay the process of compliance with the water quality standards. As such, to the extent that FDEP seeks to

use AOs to further delay the long-overdue December 31, 2006 compliance deadline approved by the EPA—whether in existing or new permits—such action is contrary to the directives of my prior orders. To be abundantly clear, the instant Order specifically determines that based on the prior use—which may arguably be characterized as abuse—of Administrative Orders to prolong the time within which compliance with the CWA must occur, the use of Administrative Orders is expressly disapproved.

L. Motion to Strike

Okeelanta Corporation and New Hope Sugar Company filed a Motion to Strike Defendant EPA's "Response" to the Court's Sua Sponte Order of September 14, 2010 and Friends of the Everglades' Notice of Filing Expert Reports [ECF No. 536] and a Corrected Motion to Strike [ECF No. 537]. As mentioned during the hearing, I appreciated the EPA's response [ECF No. 530] which was filed simultaneously with the entry of my second sua sponte order [ECF No. 531] and I found the EPA's response helpful and informative. [ECF No. 656, 24:7-9]. Indeed, it appears that the key issues were addressed following my sua sponte orders, especially with respect to the mechanisms by which I could lay groundwork for the permitting procedure to move forward.

On December 13, 2010, Friends filed a Notice of Filing Expert Reports, submitting expert materials "in partial response to the Court's Second Sua Sponte Order." [ECF No. 534]. Friends filed two expert reports, one responding to Dr. Iricanin's Technical Document Regarding the US-EPA's September 3, 2010 Amended Determination and a Report regarding the District's financing capacity in response to the

November 2, 2010 letter from the District to the EPA, alleging that the District lacks the capacity to finance the projects that the EPA has determined are necessary to achieve compliance with the Clean Water Act. Id. at Exs. A & B. I did not rely exclusively or heavily upon the expert reports to arrive at the conclusions contained within this Order, and the reports were submitted in "partial response" to my second sua sponte order which set forth a variety of issues that I wanted the parties to be prepared to address at the December 17, 2010 hearing. In sum, I do not find that New Hope has provided an adequate basis for striking these reports. The reports set forth additional background information that can serve as a basis for the parties to expand their discussions and efforts to comply with the Amended Determination and the CWA as a whole. Accordingly, there is no basis to grant New Hope's Motions to Strike as they pertain to the expert reports and especially as they seek to strike the EPA's response, and the Motions must be denied.

XIII. CONCLUSION

I am cognizant of the present and ongoing economic difficulties presently facing the parties and intervenors. Based on Judge Moreno's recent order, this Court is well aware of the financial hardships facing efforts to preserve the Everglades. In light of the release of additional funds as a result of the grant of the Rule 60(b)(5) relief in Case No. 88-1886, which the parties themselves recognize can be used to further the efforts to comply with the April 14, 2010 Order, there is opportunity to exercise resourceful judgment.

There is no possibility of reversing the damage that has been done to the Everglades, and there is only the chance to preserve what remains in its current state. This is nothing new to the parties. I have set forth the extensive procedural history of this case and litigation over the Everglades, the utmost importance of the Everglades as a national treasure, and the dire need to act immediately in my prior orders. See e.g., [ECF Nos. 323, 404]. I take this opportunity now to once again reiterate and incorporate by reference the significant efforts made in those orders to emphasize just how imperative it is for the parties to focus their efforts on making real and actual steps and act on their promises and representations. In order to effectuate this Court's prior and final orders, and to avoid allowing the parties to frustrate any opportunities to do so, I have determined that a key component of this matter through the means of the permitting procedure, must now be a focus of the EPA. To not find in this manner will simply amount to sanctioning the repeated failures of non-action by the parties.

The roots of the ongoing and enduring Everglades litigation originate from a period of over one quarter century ago. This represents a serious need for the parties in this action—as well as non-parties with substantial interests in the future of the Everglades—to stop delaying. It is now, and has been for a while, time to take concrete and substantial progress toward preserving the Everglades before this national treasure is permanently destroyed to the extent of irreparable destruction.

Based on the foregoing, it is hereby ORDERED AND ADJUDGED that:

1. In accordance with Federal Rule of Civil Procedure 62.1(a)(3), upon consideration of Defendants' Rule 60(b) Motion for Modification of Injunction

[ECF No. 446] and the responses thereto, I enter an indicative ruling that would GRANT the Rule 60(b) Motion consistent with this Order and in accordance with the attached Indicative Order if the matter is remanded to me for that purpose by the United States Court of Appeals for the Eleventh Circuit.

2. Friends of the Everglades' Motion for an Order Declaring the District's NPDES and EFA Permits Null and Void [ECF No. 533] is DENIED.

   a. The "conformed permit documents" filed by Florida Department of Environmental Protection ("FDEP") on November 2, 2010 are deemed submitted for purposes of review under the Memorandum of Understanding entered into between the EPA and FDEP [ECF No. 468-1].

   b. The EPA is directed to review the permits filed by the FDEP and take all necessary action to conform the permits in accordance with the instant Order and the Court's prior orders [ECF Nos. 323, 404] and in conjunction with established procedures set forth under the Memorandum of Understanding entered into between the EPA and FDEP.

   c. No later than Friday, July 1, 2011 , the parties shall submit a Joint Notice of Compliance specifically detailing the steps that have been taken in accordance with the instant Order, the Amended Determination, and the Court's prior orders [ECF Nos. 323, 404] . The Notice of Compliance shall include the EPA's description of its progress in effectuating the objectives set forth in the Amended Determination with specific explanations of what the EPA has done, what further action is necessary, and when such action

shall be accomplished. The Notice of Compliance shall set forth upcoming deadlines and actions, provide a description of pertinent meetings or discussions between representatives of each party, and indicate whether the EPA intends to pursue an enforcement action against the State. The Notice of Compliance shall include a detailed timeline of the procedures applicable to the State and EPA's actions in accordance with this Order. The text of any legislative material referenced within the Notice of Compliance shall be appended thereto.

3. The State of Florida Department of Environmental Protection's Motion for Clarification of the Compliance Order [ECF No. 573] is GRANTED.

a. Consistent with the language of the instant order and this Court's prior orders [ECF Nos. 323, 404], the Department's use of Administrative Orders to establish case-specific compliance schedules in issuing conformed permits is disfavored.

b. The Department shall exercise all reasonable means to achieve reasonable assurance without the use of Administrative Orders and individual compliance schedules for National Pollutant Discharge Elimination System permits for discharges into the Everglades.

c. The EPA, in reviewing all permits submitted by the Department, shall similarly refrain from approving use of Administrative Orders in conjunction with permits. The EPA shall act consistent with the standards set forth in

the Memorandum of Understanding between the EPA and the State and within the EPA's permitting and reviewing authority.

4. Friends of the Everglades' Motion to Add South Florida Water Management District as a Party [ECF No. 477] is DENIED.

5. Okeelanta Corporation and New Hope Sugar Company's Motion to Strike Defendant EPA's "Response" to the Court's Sua Sponte Order of September 14, 2010 and Friends of the Everglades' Notice of Filing Expert Reports [ECF No. 536] is DENIED AS MOOT.

6. Okeelanta Corporation and New Hope Sugar Company's Corrected Motion to Strike Defendant EPA's "Response" to the Court's Sua Sponte Order of September 14, 2010 and Friends of the Everglades' Notice of Filing Expert Reports [ECF No. 537] is DENIED.

7. No dates or requirements set forth in this Order will be extended absent a stay from the Eleventh Circuit Court of Appeals.

DONE AND ORDERED in Chambers at Miami, Florida, this 26th day of April, 2011.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc: Counsel of record
Kirk L. Burns, Counsel for South Florida Water Management District
3301 Gun Club Road, MSC 1410
West Palm Beach, Florida 33406
[courtesy copy sent from Chambers via U.S. mail]

01268-EPA-1079

Scott Fulton/DC/USEPA/US
05/04/2011 09:32 AM

To "Richard Windsor"
cc
bcc
Subject Fw: Draft OIG Report, "Procedural Review of Greenhouse Gases Endangerment Finding Data Quality Processes," (No. OPE-FY10-0017, May 3, 2011) for Agency comment.

See Gina's note below. I'll take a look this morning.
Gina McCarthy

----- Original Message -----
From: Gina McCarthy
Sent: 05/04/2011 03:21 AM EDT
To: "Bob Sussman" <Sussman.bob@EPA.GOV>; "Scott Fulton" <Fulton.Scott@EPA.GOV>; "Bob Perciasepe" <perciasepe.bob@epa.gov>
Cc: Beth Craig; Joseph Goffman
Subject: Fw: Draft OIG Report, "Procedural Review of Greenhouse Gases Endangerment Finding Data Quality Processes," (No. OPE-FY10-0017, May 3, 2011) for Agency comment.

(b)(5) Deliberative, (b)(5) Attorney-Client

[redacted]

[redacted]

Rick Beusse

----- Original Message -----
From: Rick Beusse
Sent: 05/03/2011 07:21 PM EDT
To: Gina McCarthy; Paul Anastas; Malcolm Jackson
Cc: Wade Najjum; Beth Craig; Margaret Guerriero; Dina Kruger; Rona Birnbaum; Ben DeAngelo; Joseph Goffman; Carol Holmes; David LaRoche; Nicole Owens; Al McGartland; Fred Hauchman; Neil Stiber; Nancy Wentworth; Jorge Rangel; Norman Adkins; Patrick Huber; Elizabeth Grossman; Jim Hatfield; Andrew Lavenburg; Bao Chuong; Rick Beusse
Subject: Draft OIG Report, "Procedural Review of Greenhouse Gases Endangerment Finding Data Quality Processes," (No. OPE-FY10-0017, May 3, 2011) for Agency comment.

(b)(5) Deliberative

[redacted]

[redacted]

J. Rick Beusse

for

Wade T. Najjum
Assistant Inspector General for Program Evaluation
EPA Office of Inspector General

attachment

(b)(5) Attorney-Client

GHG Endangerment Finding Draft Report for Agency comment--05-03-11.docx

01268-EPA-1081

Shawn Garvin/R3/USEPA/US
05/04/2011 05:02 PM

To Richard Windsor, Bob Perciasepe, Nancy Stoner, Seth Oster, Jeffrey Corbin, Bob Sussman, Lawrence Elworth, Janet Woodka
cc
bcc
Subject Chesapeake Bay NAS Report

FYI - Attached is the Chesapeake Bay Partnership press release regarding the National Academy of Sciences report on accountability and best management practices in the Chesapeake Bay effort. I have also included the first draft that responds to the issues in the report (which I have not read yet), a summary of the report, and links to additional information regarding the report.. Let me know if you have any questions.

Thank you - Shawn

News Release NAS Report 2011.FINAL.docx

(b)(5) Deliberative

EPA Responses to Science Based Conclusions in NAS Report v5-4-2011.docx

In addition to the response to NAS science based conclusions document, I am also providing you, for ease of reference, with the links to the:
- NAS new release announcing the report:
http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=13131
- NAS report site: http://www.nap.edu/catalog.php?record_id=13131
- NAS "Report in Brief" 4 page summary document:
http://dels.nas.edu/resources/static-assets/materials-based-on-reports/reports-in-brief/Chesapeake-Bay-Report-Brief-Final.pdf
- NAS report summary (PDF file of the first 22 pages of actual report):

NAS Summary.pdf

FOR IMMEDIATE RELEASE
Wednesday, May 4, 2011

Contact: Margaret Enloe, (410) 267-5740
menloe@chesapeakebay.net

Report from the National Academy of Sciences Reinforces New Direction Chesapeake Bay Program is Headed

Annapolis, Md. – The National Research Council of the National Academy of Sciences (NAS) pilot study, released today, supports the work that has been undertaken in the last 18 months by the Chesapeake Bay Program (CBP), who solicited this self-evaluation in 2009.

The new study, “Achieving Nutrient and Sediment Reduction Goals in the Chesapeake Bay: An Evaluation of Program Strategies and Implementation,” is constructive and generally focuses on accountability. Its purpose has been to increase understanding of the ways that the CBP can evaluate its efforts for cleaning up the Bay by achieving nutrient reduction goals.

"While supporting the program’s current efforts, the report also points out some critical challenges to consider in making decisions moving forward,” said EPA Mid-Atlantic Regional Administrator Shawn M. Garvin, Chair of the CBP’s Principle Staff Committee (PSC). "We welcome the report’s recommendations for strengthening the accountability of the Chesapeake Bay Program Partnership."

The NAS results reinforce the partnership’s work currently underway including the Bay Total Maximum Daily Load (TMDL), the Bay jurisdiction’s Watershed Implementation Plans (WIP), and the two year milestones. It also provides suggestions for strengthening processes in the areas of: tracking and accounting of Best Management Practices (BMPs); assessing milestones; adaptive management; and implementation strategies. CBP will evaluate and consider the science-based conclusions and recommendations offered by NAS in its future planning and implementation.

"Many of these findings also support Maryland's ongoing efforts,” said Maryland Department of the Environment Secretary Robert M. Summers, “particularly our work to hold ourselves accountable through the Maryland BayStat process, regular tracking of progress on our two-year milestones, and development of a strong Watershed Implementation Plan. These recommendations come at an opportune time for the Bay as we work with local jurisdictions on the details of Phase II Watershed Implementation Plans. With a renewed focus on Bay restoration at Federal, State and local levels, we believe a healthy Chesapeake Bay is finally within our sights, and we look forward to working with our partners to determine how the Academy's recommendations can help."

(Continued)

In 2008, the Executive Council of the CBP – the partnership's top-level leadership that includes the EPA Administrator, the governors of the Bay watershed states, the Mayor of Washington, D.C. and the chair of the Chesapeake Bay Commission – requested that the Program be evaluated by a nationally-recognized, independent, science organization. The NAS analysis began the following year. The purpose of the study was to evaluate the CBP implementation efforts to achieve the nutrient reduction goals for water quality in order to accelerate reaching the protection and restoration of the Chesapeake Bay. It was jointly funded by the US Environmental Protection Agency/Chesapeake Bay Program (CBP), the District of Columbia, Maryland, Pennsylvania, and Virginia.

In the process of conducting this study, NAS recognized the complexity of the Bay watershed, the equally intricate tracking systems required to accurately report on progress and the fact that CBP is in the process of better integrating its voluntary and regulatory work. The CBP partnership will provide a written response to all the recommendations within a 90 day period.

Visit CBP's website for information and a link to the NAS report: http://www.chesapeakebay.net

The Chesapeake Bay Program is a regional partnership that has coordinated and conducted the restoration of the Chesapeake Bay since 1983. Partners include the U.S. Environmental Protection Agency; the U.S. Department of Agriculture; the states of Delaware, Maryland, New York, Pennsylvania, Virginia and West Virginia; the District of Columbia; the Chesapeake Bay Commission, a tri-state legislative body; and advisory groups of citizens, scientists and local government officials.

###

Free Summary

Achieving Nutrient and Sediment Reduction Goals in the Chesapeake Bay:

Committee on the Evaluation of Chesapeake Bay Program Implementation for Nutrient Reduction to Improve Water Quality; National Research Council

ISBN: 978-0-309-21079-9, 270 pages, 6 x 9, paperback (2011)

This free summary is provided by the National Academies as part of our mission to educate the world on issues of science, engineering, and health. If you are interested in reading the full book, please visit us online at http://www.nap.edu/catalog/13131.html . You may browse and search the full, authoritative version for free; you may also purchase a print or electronic version of the book. If you have questions or just want more information about the books published by the National Academies Press, please contact our customer service department toll-free at 888-624-8373.

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Summary

The Chesapeake Bay (Figure S-1) is North America's largest and most biologically diverse estuary, as well as an important commercial and recreational resource. However, excessive amounts of nitrogen, phosphorous, and sediment from human activities and land development (e.g., agriculture, urban and suburban runoff, wastewater discharge, air pollution) have disrupted the ecosystem, causing harmful algae blooms, degraded habitats, and diminished populations of many species of fish and shellfish. In 1983, the Chesapeake Bay Program (CBP) was established, based on a cooperative partnership among the U.S. Environmental Protection Agency (EPA), the state of Maryland, the commonwealths of Pennsylvania and Virginia, and the District of Columbia, to address the extent, complexity, and sources of pollutants entering the Bay. By 2002, the states of Delaware, New York, and West Virginia committed to the CBP's water quality goals by signing a Memorandum of Understanding.

In 2008, the CBP launched a series of initiatives to increase the transparency of the program and heighten its accountability, and in 2009 an executive order[1] injected new energy into the Chesapeake Bay restoration. By 2010, a total maximum daily load (TMDL) was established by the EPA that determined the limits (maximum loads) on the amount of nitrogen, phosphorus, and sediment from point and nonpoint sources that would be necessary to attain adopted water quality standards in the Bay, and each of the Bay jurisdictions (i.e., the six states and the District of Columbia) developed watershed implementation plans outlining the pollutant control measures that would be implemented by 2025 to reach the TMDL. In addition, as part of the effort to improve the pace of progress and increase accountability in the Bay restoration, a two-year milestone strategy was introduced aimed at reducing overall pollution in the Bay by focusing on incremental, short-term commitments from each of the Bay jurisdictions.

The National Research Council (NRC) established the Committee on the Evaluation of Chesapeake Bay Program Implementation for Nutrient Reduction to Improve Water Quality in 2009 in response to a request from the EPA with funding from Virginia, Maryland, Pennsylvania, and the District of Columbia. The committee was charged to assess the framework used by the states and the CBP for tracking nutrient and sediment control practices that are

[1] Executive Order 13508.

Achieving Nutrient and Sediment Reduction Goals in the Chesapeake Bay:
http://books.nap.edu/catalog/13131.html

FIGURE S-1 The Chesapeake Bay and its watershed.
SOURCE: CBP (2008). Available at http://www.chesapeakebay.net/maps.aspx?menuitem=16825.

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BOX S-1

Statement of Task

The Water Science and Technology Board appointed a committee to undertake an evaluation of the Chesapeake Bay Program's nutrient reduction program. Specifically, the committee was to address the following questions:

Evaluation Theme I: Tracking and Accountability

1. Does tracking for implementation of nutrient and sediment point and nonpoint source pollution (including air) best management practices appear to be reliable, accurate, and consistent?

2. What tracking and accounting efforts and systems appear to be working, and not working, within each state (i.e., the six states in the watershed and DC), including federal program implementation and funding? How can the system be strategically improved to address the gaps?

3. How do these gaps and inconsistencies appear to impact reported program results?

Evaluation Theme II: Milestones

4. Is the two-year milestone strategy, and its level of implementation, likely to result in achieving the CBP nutrient and sediment reduction goals for this milestone period?

5. Have each of the states (i.e., the six states in the watershed and DC) and the federal agencies developed appropriate adaptive management strategies to ensure that CBP nutrient and sediment reduction goals will be met?

6. What improvements can be made to the development, implementation, and accounting of the strategies to ensure achieving the goals?

implemented in the Chesapeake Bay watershed and to evaluate the two-year milestone strategy. The committee was also charged to assess existing adaptive management strategies and to recommend improvements that could help the CBP meet its nutrient and sediment reduction goals (see Box S-1).

TRACKING AND ACCOUNTING

The term "tracking," as applied in the CBP, describes approaches to document the implementation of urban and agricultural nutrient and sediment reduction practices (also called best management practices, or BMPs) and nutrient technology upgrades as well as the basic associated practice characteristics. The term "tracking" describes the process of analyzing and reporting the practice information and estimating the resulting load reductions. Accurate tracking of BMPs is of paramount importance because the CBP relies upon the resulting data to estimate current and future nutrient and sediment loads to the Bay. However, many Bay jurisdictions and localities are struggling with limited resources, complex and rapidly changing data reporting mechanisms, data privacy constraints, and quality assurance/quality

control needs. Verifying the continued functioning and effectiveness of historical activities presents a significant challenge. Although state tracking and accounting programs are unlikely to be identical, the CBP has recently made strides toward common reporting goals and data requirements.

The current accounting of BMPs is not consistent across the Bay jurisdictions. Additionally, given that some source-sector BMPs are not tracked in all jurisdictions, the current accounting cannot on the whole be viewed as accurate. Although the Bay jurisdictions have a good understanding of point-source (i.e., wastewater) discharges, numerous issues affect the accuracy, reliability, and consistency of BMP reporting to the CBP. Only four of the seven Bay jurisdictions conduct any level of field verification of agricultural practices, and there are known problems with double counting that agencies are working to resolve. Only one Bay jurisdiction specifies a lifespan for practices recorded in the database, and few jurisdictions have mechanisms to identify and remove from the database practices that are no longer functioning or even in place. Current tracking systems do not account for agricultural practices that are not cost-shared by a government agency. Given these limitations, current accounting can be considered, at best, an estimate.

The committee was unable to determine the reliability and accuracy of the BMP data reported by the Bay jurisdictions. Independent (third-party) auditing of the tracking and accounting at state and local levels would be necessary to ensure the reliability and accuracy of the data reported.

The committee was not able to quantify the magnitude or the likely direction of the error introduced by BMP reporting issues. On the one hand, there is under-counting of BMPs because the jurisdictions do not currently report non-cost-shared (or voluntary) practices, although the model calibration may include the effects of some of these practices. On the other hand, there is over-counting of BMPs because few states account for the loss of BMPs when they are no longer properly maintained, functioning, or in place. Furthermore, there are errors introduced by site-level variability in BMP effectiveness, insufficient data on the location of BMPs, and discrepancies between state and CBP definitions of BMP management.

A consolidated regional BMP program to account for voluntary practices and increase geo-referencing of BMPs presents opportunities to improve the tracking and accounting process. A regional BMP program with incentives for participation as well as penalties for lack of participation has been effectively used in Florida to increase participation and improve data quality. Geo-referencing enables managers and modelers to identify the parcel-level location of BMPs, which would aid in inspecting, tracking, and assigning proper delivery ratios and BMP efficiencies, thereby improving the accuracy of the modeled estimates of nutrient and sediment loads delivered to the Bay.

Targeted monitoring programs in representative urban and agricultural watersheds and subwatersheds would provide valuable data to refine BMP efficiency estimates, particularly at the watershed scale, and thereby improve Watershed Model predictions. Current BMP load reduction efficiency estimates used in the Watershed Model are reasonable estimates of the short- to intermediate-term reduction efficiencies of newly installed BMPs at the

field scale and gross representations of the same at the watershed scale. These estimates contain significant uncertainties caused by site-specific factors, practice design, extent of maintenance, and challenges in scaling up the data from the point or field scale. Pilot studies in several sub-watersheds should be conducted to quantify BMP performance, particularly for the most common practices with the greatest uncertainty in their efficiency estimates. The CBP has recently implemented a review process to refine BMP efficiencies used in the Watershed Model based on emerging research findings.

Additional guidance from the EPA on the optimal extent of field verification of practices in relation to expected benefits would improve tracking and accounting of both cost-shared and voluntary practices. Field verification is costly, and several states have questioned its value given the resource constraints that limit BMP implementation. Although independent random, or probabilistic, verification programs increase public confidence that reported data are accurate and reliable, attention should be given to developing ways to optimize field verification efforts that enhance the reliability of the BMP data sets, perhaps through the combined use of remote sensing data, written surveys, phone calls, and in-person visits.

Electronic tracking and data transfer systems are likely to improve the quality of reporting and reduce the jurisdictions' tracking and accounting burden but may currently be contributing to delayed assessments of implementation progress. Despite the concerns in tracking and accounting noted above, a great deal of information is available, and a plausible and collective effort seems to be under way to lessen some of the hindrances to data access, collection, and standardization. However, because implementation data are now reported electronically, several jurisdictions noted that data are less accessible for assessments of statewide progress. Some Bay jurisdictions have mechanisms in place to compile progress updates as needed, but others have to wait approximately 9 months after the end of the reporting period for a summary of BMP implementation progress from the CBP. The recently launched tracking and accountability system for the TMDL (BayTAS) and ChesapeakeStat, which documents each jurisdiction's progress in a publicly accessible website, should incorporate mechanisms for more timely reporting and consolidation of federal and state data submissions. .

TWO-YEAR MILESTONES

To accelerate Bay restoration efforts and increase accountability, the CBP introduced two-year milestones in May 2009. In the past, Bay recovery goals involved decadal increments and did not identify particular strategies for achieving the necessary pollution reductions. Thus, the prior strategy was considered "a ladder without rungs" (CBP, 2009b). The two-year milestone strategy requires Bay jurisdictions to meet short-term implementation goals for nutrient and sediment reduction. The CBP envisioned that through a series of two-year milestone periods with routine assessments of the pace of progress, by 2025 the Bay jurisdictions could implement all of the nutrient and sediment control practices needed for a restored Bay, although actual Bay water quality response and recovery might lag behind the 2025 implementation target.

The two-year milestone strategy commits the states to tangible, near-term implementation goals and improves accountability and, therefore, represents an

improvement upon past CBP long-term strategies. However, the strategy, in and of itself, does not guarantee that implementation goals will be met, and consequences for nonattainment remain unclear. The two-year timeframes should encourage frequent reevaluations and adjustments for Bay jurisdictions that fall short of their intended implementation goals. However, without timely updates and synthesis of statewide progress from the CBP, some states lack the information necessary to make appropriate mid-course corrections.

CBP jurisdictions reported mixed progress toward their first two-year milestone goals. However, data were insufficient to meaningfully evaluate implementation or anticipated load reduction progress relative to the goals. The jurisdictions reported numerous efforts to control urban and agricultural nutrient and sediment loads, although they experienced greater successes in implementation of some practices than others. Without associated load reduction estimates for the implemented practices, the committee was unable to evaluate how implementation shortfalls in some areas or greater than expected progress in others affect the likelihood that the Bay jurisdictions will meet their overall nutrient load reduction goals.

The first two-year milestone goals will likely be the easiest to achieve. Not surprisingly, the states are investing in the "low-hanging fruit"—the least expensive or most cost-effective among the nutrient reduction options—for the first accounting period. Large gains have been made with advanced treatment technologies applied to large publicly-owned wastewater treatment facilities, which to date have been relatively cost-effective per pound of nutrient removed compared to land-based BMPs. Additionally, states are working to document practices implemented prior to the current milestone period but not yet credited in the Watershed Model. Available water quality improvement options during subsequent milestone periods will likely become less cost-effective. It is possible that nonstandard control strategies, especially those that do not require high capital investments (see Chapter 5), may need to be considered.

ADAPTIVE MANAGEMENT

Since 2008, the CBP has advocated for the use of adaptive management at both the state and federal levels as a way to enhance overall management of the program and to strengthen scientific support for decision making. The committee examined the partners' efforts to implement adaptive management and the potential barriers to and possible successful applications of adaptive management for nutrient and sediment reduction in the Bay watershed.

Neither the EPA nor the Bay jurisdictions exhibit a clear understanding of adaptive management and how it might be applied in pursuit of water quality goals. Reviewing activities, assessing progress toward goals, and adopting contingencies were cited as examples of adaptive management. However, effective adaptive management involves deliberate management experiments, a carefully planned monitoring program, assessment of the results,, and a process by which management decisions are modified based on new knowledge. Learning is an explicit benefit of adaptive management that is used to improve future decision making. The committee did not find convincing evidence that CBP partners had incorporated adaptive management principles into their nutrient and sediment reduction programs. Instead, the current

two-year milestone strategy approach is best characterized as an evolutionary (or trial and error) process of adaptation in which learning is serendipitous rather than an explicit objective. In the trial and error process, when failures occur, jurisdictions have limited capacity to understand why, and contingencies represent the next thing to try rather than a deliberate adaptation.

Successful application of adaptive management in the CBP requires careful assessment of uncertainties relevant to decision making, but the EPA and Bay jurisdictions have not fully analyzed uncertainties inherent in nutrient and sediment reduction efforts and water quality outcomes. Each CBP goal brings with it uncertainties, not all of which can or should be addressed through adaptive management. Therefore, the EPA and Bay jurisdictions should carefully and realistically analyze uncertainties associated with potential actions to determine which are candidates for adaptive management. Bay jurisdictions may be more successful using adaptive management for a limited number of components or for programs in smaller basins, where effects of management actions can be isolated and well-designed monitoring and evaluation can be undertaken to clearly quantify outcomes.

Targeted monitoring efforts by the states and the CBP will be required to support adaptive management. Monitoring plans need to be tailored to the specific adaptive management strategies being implemented. Presently, CBP and jurisdictional monitoring programs have not been designed to effectively support adaptive management. In addition, adaptive management will require better integration of monitoring and modeling activities. Excessive reliance on models in lieu of monitoring can magnify rather than reduce uncertainties.

Additional federal actions are needed to fully support adaptive management in the CBP. The federal accountability framework being promoted through the TMDL and the threatened consequences for failure will dampen the Bay jurisdictions' enthusiasm for adaptive management. To support adaptive management, the EPA should modify its accountability framework and offer explicit language indicating that carefully designed management experiments with appropriate monitoring, evaluation, and adaptive actions are acceptable, and that failures resulting from genuine adaptive management efforts will not be penalized. If the Bay jurisdictions perceive that the costs of failure are too high, then they may not be willing to pursue the benefits that adaptive management can offer. Additionally, federal guidance and training to the states on effective adaptive management strategies at the local or state level are needed. One or more examples of adaptive management designed and implemented at the federal level, perhaps on federal land, would be helpful to the states as they seek acceptable and effective management options.

Without sufficient flexibility of the regulatory and organizational structure within which CBP nutrient and sediment reduction efforts are undertaken, adaptive management may be problematic. Depending upon how Clean Water Act (CWA) language and TMDL rules are interpreted, opportunities for certain types of adaptations may be limited. Truly embracing adaptive management requires recognition that the TMDL, load allocations, and possibly even water quality standards might need to be modified based on what is learned through adaptive management. However, the jurisdictions may find that the formal processes required under the CWA to modify load allocations, TMDLs, or water quality standards constrain or even preclude using adaptive management. Successful application of adaptive management in the CBP will

require greater regulatory flexibility. Approaching the TMDL as a process, not an endpoint, and facilitating adaptive implementation of the TMDL is one way to provide that flexibility.

STRATEGIES FOR MEETING THE GOALS

Reaching the long-term CBP nutrient and sediment reduction goals will require substantial commitment from each of the Bay jurisdictions and likely some level of sacrifice from those who live and work in the watershed. The jurisdictions are required not only to significantly reduce current loads, but they will need to take additional actions to address future growth and development over the next 15 years. Additionally, the Bay partners will need to adapt to future changes (e.g., climate change, changing agricultural practices) that may further impact water quality and ecosystem responses and to streamlined implementation strategies. To reach the long-term load reduction goals, Bay jurisdictions and the federal government will need to prepare for the challenges ahead and consider a wide range of possible strategies, including some that are receiving little, if any, consideration today.

Success in meeting CBP goals will require careful attention to the consequences of future population levels, development patterns, agricultural production systems, and changing climate dynamics in the Bay Watershed. Nutrient and sediment management efforts are taking place in the context of a quickly changing landscape and uncertain outcomes that could significantly affect the strategies needed to attain the TMDL goals. For example, an increase in the concentration of livestock or dairy animals near processing and distribution centers would mean a greater concentration of manure nutrients in these areas than has existed in the past. Additionally, Bay jurisdictions may need to adjust future milestone efforts to larger than anticipated population and more extensive land-use development scenarios, as well as climate change influences. Further and continued study of future scenarios is warranted to help Bay partners adapt to a changing future.

Helping the public understand lag times and uncertainties associated with water quality improvements and developing program strategies to account for them are vital to sustaining public support for the program, especially if near-term Bay response does not meet expectations. Although the science and policy communities generally recognize the uncertainties inherent in water quality modeling, load projections, and practice effectiveness and expect that water quality success will lag implementation, the same may not be true of the broader public. If the public expects visible, tangible evidence of local and Bay water quality improvements in fairly short order, they will almost certainly become frustrated. In the absence of a concerted effort to engage Bay residents in a conversation about the dynamics of the Bay and how and when improvements can be expected, CBP partners should anticipate and be prepared to respond to an impatient or disillusioned public. By developing small watershed-scale monitoring efforts that highlight local-scale improvements and associated time lags in water quality as they occur, the CBP can better understand and inform the public about anticipated responses to, and expectations for, nutrient control measures.

The committee identified potential strategies that could be used by the CBP partners to help meet their long-term goals for nutrient and sediment reduction and ultimately Bay recovery.

The committee did not attempt to identify every possible strategy that could be implemented but instead focused on approaches that are not being implemented to their full potential or that may have substantial, unrealized potential in the Bay watershed. Because many of these strategies have policy or societal implications that could not be fully evaluated by the committee, the strategies are not prioritized but are offered to encourage further consideration and exploration among the CBP partners and stakeholders. Examples include:

Agricultural Strategies

- Improved and innovative manure management. Possible strategies include expanded concentrated animal feeding operation (CAFO) permitting programs, guidelines and/or regulations to control the timing and rate of manure application, innovative manure application methods, transport of manure to watersheds with the nutrient carrying capacity to accept it, alternative uses (e.g., bioenergy production), animal nutrition management to reduce nutrient loading, and limits on the extent of animal operations based on the nutrient carrying capacity of the watershed.
- Incentive-based approaches and alternative regulatory models. Several approaches have been used successfully elsewhere to increase the use of agricultural BMPs for the purpose of improving water quality. Florida developed a voluntary, incentive-based BMP program that provides regulatory relief in exchange for BMP implementation, maintenance, and reporting. Denmark's nutrient management program provides an alternative model that couples agricultural regulatory requirements with incentives and has resulted in large reductions in nutrient surpluses. The Chesapeake Bay Program could facilitate an analysis of the costs and potential effectiveness of various incentive-based and regulatory alternatives.

Urban Strategies

- Regulatory models that address stormwater, growth and development, and residential fertilizer use. Watershed-based permitting for urban stormwater can lead to cost savings if a consortium of permittees chooses to organize to distribute pollutant load allocations and contribute to monitoring and tracking efforts in their local or regional watersheds. Restrictions on nitrogen and phosphorus residential fertilizer application are cost-effective methods of nutrient load management in urban and suburban areas. Communities could also adopt regulations to restrict land-use changes that would increase nutrient loads from stormwater runoff or cap wastewater treatment plant discharges at current levels, requiring offsets for any future increases.
- Enhanced individual responsibility. Enhancing individual responsibilities, either through education and incentives or through regulations, can also contribute to the success of Bay restoration and to water quality improvements. Examples of actions that individuals can take to improve water quality include increasing application of low-impact design and residential stormwater controls, changing residential landscape management, maintaining and upgrading septic systems, and changing diets.

Cross-cutting Strategies

- Additional air pollution controls. Although the Chesapeake Bay has realized substantial benefits from the Clean Air Act, the atmosphere remains a major source of nitrogen entering the Bay. More stringent controls on nitrogen oxide (NO_x) emissions from all sources, including NO_x and agricultural ammonia emissions, will benefit both the Bay and the people who reside in its watershed.

Innovative funding models will be needed to address the expected costs of meeting Bay water quality goals. Targeting agricultural BMP cost-share programs is not always politically popular, but it can produce greater reductions at lower cost than will distributing resources broadly with little attention to water quality impact. Although nutrient trading among point and nonpoint sources is often cited as a mechanism to reach nutrient reduction goals at lower cost, its potential for reducing costs is limited. Stormwater utilities offer a viable funding mechanism to support stormwater management efforts of municipalities. Funding for monitoring will also be needed, and successful regional monitoring cooperatives in other parts of the United States may be useful models.

Establishing a Chesapeake Bay modeling laboratory would ensure that the CBP would have access to a suite of models that are at the state-of-the-art and could be used to build credibility with the scientific, engineering, and management communities. The CBP relies heavily on models for setting goals and evaluating nutrient control strategies; thus, the models are essential management tools that merit substantial investment to ensure that they can fulfill present and future needs. Currently, only a few technical professionals are fully knowledgeable of the details of the models and their development. The models are not widely used outside the CBP and, therefore, are unfamiliar to the broader scientific community. Credibility of the models is essential if the CBP goals and strategies are to be accepted and have widespread support. A Chesapeake Bay modeling laboratory would bring together academic scientists and engineers with CBP modelers to examine various competing models with similar objectives and work to enhance the quality of the simulations. An important component of the work of a modeling laboratory would be the integration of monitoring with modeling efforts. Joint research investigations focused on evaluating the success of the Bay recovery strategies could be centered in the laboratory, such as studies on the role of lag times in the observed pollutant loads and Bay responses. A close association with a research university would bring both critical review and new ideas. A laboratory could also facilitate improvements to the models to support the 2017 re-evaluation of the TMDL and the WIPs.

* * *

Recovery of the Chesapeake Bay from excessive nutrient and sediment loads will require profound changes in the Bay watershed. These changes include a greater awareness of each watershed inhabitant's contribution to the Bay nutrient load, extensive adoption of urban and agricultural nutrient control practices, and widespread willingness to balance the cost of restoration programs with the quality of life values provided by the Bay and its land uses. The CBP has taken important steps toward improving the pace of implementation and accountability, including implementing the two-year milestone strategy. However, opportunities exist to improve upon the current tracking and accounting strategies, provide support for effective

applications of adaptive management, and enhance the credibility of modeling strategies. To reach the long-term goals, Bay partners will likely need to consider innovative strategies, including some that are receiving little attention today. Meanwhile, given that nutrient legacy effects in the watershed will significantly delay the Bay's full water quality response to land-based BMPs, the CBP should help the public understand lag times and uncertainties and develop program strategies to better quantify them.

Achieving Nutrient and Sediment Reduction Goals in the Chesapeake Bay: An Evaluation of Program Strategies and Implementation

Committee on the Evaluation of Chesapeake Bay Program Implementation for Nutrient Reduction to Improve Water Quality

Water Science and Technology Board

Board on Environmental Studies and Toxicology

Division on Earth and Life Studies

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Preface

The Chesapeake Bay Program (CBP), a partnership among the U.S. Environmental Protection Agency, the six watershed states, and the District of Columbia, is working at federal, state, and local levels to restore the Chesapeake Bay ecosystem. In 1987, the CBP partners committed to reduce "controllable" phosphorus and nitrogen loadings to the Bay's main stem by 40 percent by 2000. The CBP's initial goals were modified in 1992, which led to a variety of actions directed at point and nonpoint sources of nutrient and sediment loading to the tributaries of the Bay. Unfortunately, progress has been limited and the nutrient and sediment reduction goals have not yet been attained.

During the years since the 1987 agreement, water pollution management under the Clean Water Act (CWA) shifted toward more quantitative assessments of water quality impairments. The CWA requires states and tribes to identify and maintain lists of water bodies that do not meet water quality standards and to develop total maximum daily loads (TMDLs) that the water bodies can receive and still comply with water quality standards. In 2000, the CBP partners signed an agreement that provided an alternative to developing a TMDL based on the expectation that actions would be taken that would result in the attainment of water quality standards within a 10-year period of time. However, a re-evaluation in 2007 of nutrient and sediment target loads revealed that insufficient progress had been made toward improving water quality and meeting the intent of the 2000 agreement was unlikely. In response, the CBP and the federal government launched a new era of accountability, accompanied by more aggressive approaches to controlling nutrient and sediment pollution in the Bay watershed, including the development of a TMDL for the Bay, watershed implementation plans, and a two-year milestone strategy (described in more detail in Chapter 1).

In 2009, the EPA requested that the National Research Council (NRC) evaluate and provide advice on the CBP nutrient reduction program and strategy. The EPA specifically directed the NRC to evaluate the tracking of best management practice implementation, tracking and accounting efforts, the two-year milestone strategy, and the states' and federal agencies' adaptive management strategies, and to suggest improvements to these strategies that might better attain the CBP goals (see Box S-1). The committee has not been charged to review the TMDL or the models used to develop it. To carry out this work, the NRC appointed a

multidisciplinary committee of experts to provide advice to the EPA, the six states in the Chesapeake Bay watershed, the District of Columbia, other federal agencies, and other interested parties.

Our committee is indebted to many individuals for their contributions of information and resources. Specifically, we appreciate the efforts of our committee's EPA technical liaisons—Julie Winters and Rich Batiuk—who assisted the committee with numerous requests for information and with utilizing the vast resources of agency expertise when needed. The committee also owes a debt of gratitude to the many individuals who educated our committee through their presentations at the open sessions of the committee's meetings.

The committee has been fortunate to have the support and collaboration of an excellent NRC staff. Stephanie Johnson, study director, has been an extraordinary source of information and advice and has contributed significantly to this report. Michael Stoever, research associate, has provided superb support during and between meetings and has been instrumental in producing the report. I speak for the entire committee in expressing our profound respect and gratitude.

This report was reviewed in draft form by individuals chosen for their breadth of perspectives and technical expertise in accordance with the procedures approved by the National Academies' Report Review Committee. The purpose of this independent review was to provide candid and critical comments to assist the institution in ensuring that its published report is scientifically credible and that it meets institutional standards for objectivity, evidence, and responsiveness to the study charge. The reviewer comments and draft manuscript remain confidential to protect the deliberative process. We thank the following reviewers for their helpful suggestions, all of which were considered and many of which were wholly or partly incorporated into the final report: Donald F. Boesch, University of Maryland; Mark B. David, University of Illinois; Theo A. Dillaha, Virginia Polytechnic Institute and State University; Joseph H. Harrison, Washington State University; Carlton H. Hershner, Jr., Virginia Institute of Marine Science; David H. Moreau, University of North Carolina; Sujoy B. Roy, Tetra Tech, Inc.; Thomas R. Schueler, Center for Watershed Protection; Kathleen Segerson, University of Connecticut; and Thomas W. Simpson, Water Stewardship, Inc.

Although these reviewers provided many constructive comments and suggestions, they were not asked to endorse the conclusions or recommendations nor did they see the final draft of the report before its release. The review of this report was overseen by David A. Dzombak, Carnegie Melon University, and Ken W. Potter, University of Wisconsin. Appointed by the NRC, they were responsible for making certain that an independent examination of this report was carried out in accordance with institutional procedures and that all review comments received full consideration. Responsibility for the final content of this report rests entirely with the authoring committee and the NRC.

Kenneth H. Reckhow, Chair
Committee on the Evaluation of Chesapeake Bay Program Implementation
for Nutrient Reduction to Improve Water Quality

Contents

REPORT SUMMARY 1

1 INTRODUCTION 12
Nitrogen, Phosphorus, and Sediment in the Chesapeake Bay Watershed, 14
History of Chesapeake Bay Program Restoration Efforts: 1983-2008, 28
Recent Initiatives (2008-2010), 39
Statement of Committee Task and Report Overview, 45

2 TRACKING AND ACCOUNTING 48
Tracking and Accounting Frameworks, 48
Assessment of Tracking and Accounting, 50
How Can the Tracking System be Strategically Improved?, 64
Conclusions and Recommendations, 66

3 ASSESSMENT OF THE TWO-YEAR MILESTONES 68
Context for the Committee's Analysis, 68
The Two-Year Milestone Strategy, 69
Implementation Progress in the Bay Jurisdictions, 70
Other Issues, 73
Conclusions, 73

4 ADAPTIVE MANAGEMENT 75
The Chesapeake Bay Program Focus on Adaptive Management, 75
Overview of Adaptive Management, 78
Evaluation of Adaptive Management Strategies in the Chesapeake Bay Program, 83
Conclusions and Recommendations, 95

5 STRATEGIES FOR MEETING THE GOALS 97
Challenges, 98
Strategies for Improvement, 108
Conclusions, 126

REFERENCES 130

APPENDICES

A Nitrogen, Phosphorus, and Sediment Loads by Sector 147
B Best Management Practices and Load Reduction Efficiencies Used in the Watershed Model 149
C Details on Tracking and Accounting by Jurisdiction 156
D Two-Year Milestone Implementation, 2009 -2010 172
E Water Science and Technology Board 179
F Biographical Sketches of Committee Members and Staff 180

01268-EPA-1084

Cynthia Giles-AA/DC/USEPA/US
05/09/2011 08:46 AM

To Richard Windsor
cc Bob Sussman, Nena Shaw, Aaron Dickerson
bcc
Subject Dominion meeting today

Attached is a short background paper on the Dominion settlement discussions, which we are on your calendar to discuss at the end of the day today. Apologies for the delay in getting you this - the meeting only got scheduled late on Friday.

Cynthia

(b)(5) Attorney Work Product, (b)(5) Attorney-Client, (b)(5) Deliberative

Dominion status 5-9-11.docx

Cynthia Giles
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01268-EPA-1104

Betsaida Alcantara/DC/USEPA/US
05/18/2011 11:44 AM

To Richard Windsor
cc Seth Oster
bcc
Subject Daily Show Briefing Memo

Administrator,
Here's a briefing memo for our Daily Show discussion at noon.
(b) (5) Deliberative, (b) (6) Privacy

051711 - The Daily Show Briefing Memo.docx

As discussed with Seth, here's a link to your last Daily Show appearance:

http://www.thedailyshow.com/watch/mon-april-26-2010/lisa-p--jackson

01268-EPA-1109

Betsaida Alcantara/DC/USEPA/US
05/18/2011 05:52 PM

To Richard Windsor
cc Seth Oster, Jose Lozano
bcc
Subject Updated Daily Show Memo

Administrator,
Here's the updated memo with the information we discussed earlier today. It includes punchy one liners and the talking points for the offshore drilling question. Jose and I will make sure you have a printed copy in the morning. Per your idea, I am also sending the Daily Show producer a couple of examples of recent titles of congressional hearings, i.e. "EPA Mining Policies: Assault on Appalachian Jobs - Part I and II"

(b) (5) Deliberative, (b) (6) Privacy

Updated Daily Show Briefing Memo.docx

01268-EPA-1128

Avi Garbow/DC/USEPA/US
05/26/2011 05:32 PM

To Richard Windsor, Diane Thompson, Bob Perciasepe, Bob Sussman, Gina McCarthy, Janet McCabe, Seth Oster, Jared Blumenfeld
cc Scott Fulton
bcc
Subject Avenal Court Decision (ATTORNEY-CLIENT COMMUNICATION)

Administrator,

(b)(5) Attorney-Client, (b)(5) Deliberative

[redacted]

[redacted]

[redacted]

Avi

Avi Garbow
Deputy General Counsel
U.S. Environmental Protection Agency
(202) 564-1917
----- Forwarded by Avi Garbow/DC/USEPA/US on 05/26/2011 05:04 PM -----

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Date: 05/26/2011 04:43 PM
Subject: Avenal Court Decision

(b)(5) Attorney-Client, (b)(5) Deliberative [redacted]

(b)(5) Attorney-Client, (b)(5) Deliberative

----- Forwarded by Brian Doster/DC/USEPA/US on 05/26/2011 04:37 PM -----

From: "Talbert, Stephanie (ENRD)" <Stephanie.Talbert@usdoj.gov>
To: "Vaden, Christopher (ENRD)" <Christopher.Vaden@usdoj.gov>, "Edgar, Mary (ENRD)" <Mary.Edgar@usdoj.gov>, Brian Doster/DC/USEPA/US@EPA, Julie Walters/R9/USEPA/US@EPA
Date: 05/26/2011 04:13 PM
Subject: Avenal Opinion

(b)(5) Attorney-Client

Opinionattached.

ENV_DEFENSE-#527291-v1-Avenal_Opinion.PDF

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AVENAL POWER CENTER, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civ. Action No. 10cv383 (RJL)**
	)	
U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION
(May 26 2010) [##12, 14]

Avenal Power Center, LLC ("plaintiff") brings this action against the U.S. Environmental Protection Agency ("EPA") and Lisa P. Jackson, Administrator of the EPA ("Administrator" and collectively "defendants") for violation of Section 165(c) of the Clean Air Act ("CAA"). Section 165(c) requires the EPA to grant or deny specified permit applications within one year. While the parties agree that the EPA has violated its duty to render a final decision within one year under Section 165(c), the parties disagree as to the appropriate remedy that the Court can, and should, impose. On March 16, 2011, the Court heard oral argument on this question. The EPA, in essence, argues that notwithstanding Congress' one-year statutory time limit (established in 1977) for a final agency action, the most the Administrator could now be required to do is issue a decision that is appealable to the Environmental Appeals Board ("EAB"): a review process enacted by regulation in 1992 for the assistance of the Administrator, that the EPA freely

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concedes could take anywhere from six to eighteen months, or longer, to complete. In effect, the EPA contends that this subsequently-enacted regulatory review process *trumps* Congress' one-year statutory deadline and, as such, the most that this Court can do is require the agency to issue an appealable interim decision within the one-year statutory period. Upon consideration of the parties' pleadings, including parties' supplemental briefs on this question, oral argument, and the record herein, the Court disagrees with the defendants' position and, therefore, GRANTS, in part, plaintiff's Motion for Judgment on the Pleadings, and DENIES defendants' Motion for Summary Judgment. Accordingly, it is ORDERED that the EPA Administrator issue a final, non-appealable, agency action, either granting or denying plaintiff's permit application, no later than August 27, 2011.[1]

BACKGROUND

Avenal Power Center, LLC currently seeks to develop and build a state of the art 600 megawatt natural gas-fired power plant, the Avenal Energy Project. Jt. Stips. ¶¶ 1-3, Jt. Stmt. Re. Case Mgmt, and Sched., Ex. 1 [#11]. To this end, plaintiff submitted, in February 2008 to the EPA, a Prevention of Significant Deterioration ("PSD") permit application. The application was deemed complete on March 19, 2008. *Id.* ¶¶ 3-5. Almost *two years later*, however, after an elaborate and exhaustive EPA administrative process, which included a notice and comment period and public hearing, the plaintiff

[1] The Court reserves judgment with respect to plaintiff's request for attorney's fees and costs. In addition, in light of the February 4, 2011 declaration by Regina McCarthy, Assistant Administrator of the EPA's Office of Air and Radiation, which was released after plaintiff filed its Motion, as well as subsequent briefs and oral argument, the relief sought by plaintiff has been accordingly revised.

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still had no final or foreseeable resolution to its application. As such, the plaintiff brought this action on March 9, 2010, seeking judicial relief to deal with EPA's continued violation of Congress's one-year deadline under Section 165(c) of the CAA. Compl. ¶ 28.

Initially, the EPA defended its delay by citing two unresolved issues with plaintiff's application: (1) the EPA required continued consultation with the U.S. Fish and Wildlife Service ("USFWS") to ensure compliance with the Endangered Species Act; and (2) the EPA required that plaintiff show that the Project would meet a new EPA standard for nitrogen dioxide ("NO2 Standard"). *See* Answer at 4. On September 1, 2010, however, USFWS issued a Biological Opinion that effectively mooted the first issue. Pl.'s Br. Re. Remedy, Feb. 15, 2011, ("Pl.'s Supp. Br.") at 5, n. 2 [#34]. Meanwhile, the NO2 Standard had gone into effect on April 12, 2010, and plaintiff, therefore, argued that the EPA could no longer withhold its decision on plaintiff's permit because of this new requirement. *See* Pl. Mot. J. on Pleadings at 11. Ultimately, the EPA conceded this point as well.

Indeed, on February 4, 2011, in a declaration by Regina McCarthy, Assistant Administrator of the EPA's Office of Air and Radiation, the EPA *reversed* its position on the NO2 Standard and announced that "[t]he PSD permit application submitted by Avenal in 2008 is among those PSD permit applications that EPA believes it is appropriate to grandfather from these additional [NO2 Standard] requirements, particularly in light of EPA's statutory obligation to grant or deny a complete PSD permit

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application within one year . . . ." Corr. 2d Decl. of Reginal McCarthy ("McCarthy Decl.") ¶ 6. As such, the EPA announced that it would "be able to issue a final permit decision in accordance with 40 C.F.R. § 124.15 on [plaintiff's] permit application by May 27, 2011." *Id.* ¶ 13. Unfortunately, that offer was *not* what it appeared to be!

As plaintiff appropriately points out, EPA's promise of a "final permit decision" under 40 C.F.R. § 124.15 was inherently disingenuous. It actually was only a promise to render, in effect, an "interim decision" subject to appeal before the EAB. Pl. Supp. Br. at 7. Plaintiff, as a result, was left with no choice but to seek an order from the Court imposing a deadline, no later than May 27, 2011, by which defendants would be required to render a decision on plaintiff's permit application that would constitute an actual *final* agency action, allowing plaintiff to either begin construction on the Avenal Energy Project or seek judicial review in the Federal Courts pursuant to 42 U.S.C. § 7607. *See id.* at 17. Undaunted, defendants argued that an appealable decision by a Regional Administrator is sufficient to satisfy the CAA's one-year deadline and, in any event, this Court lacks jurisdiction to impose the relief being sought by the plaintiff. *See generally* Defs.' Response to Pl. Supp. Br. For the following reasons, I disagree with the defendants' oh so clever, but unsupportable, position.

ANALYSIS

In 1977, Congress required the Administrator of the EPA to grant or deny a permit application, filed under the CAA, within one year. 42 U.S.C. § 7475(c). The Administrator retained discretion, however, as to the procedural process that an applicant

had to comply with during that one-year period. *See* 42 U.S.C. § 7601(a). For example, the Administrator could delegate his or her ultimate decision on the application to a Regional Administrator, or an Assistant Administrator, or even require an interim decision by one of her subordinates prior to making the ultimate decision herself. *See, e.g.*, 40 C.F.R. §§ 124.15, 124.19; Mar. 1, 2011, Temporary Delegation, Defs.' Resp. to Pl.'s Supp. Br., Ex. 1. In 1992, however, the Administrator decided to create an Environmental Appeals Board and delegate to it the final review of a grant or a denial of such application by a Regional Administrator. *See* 57 Fed. Reg. 5320 (Feb. 13, 1992). Unfortunately, when the Administrator created that process she failed to build into it the temporal requirement that the EAB's decision be completed within the CAA's statutorily mandated one-year period. *See* 40 C.F.R. § 124.19. As a result, the EPA put in place a review process that can and has, in this case, rendered meaningless this Congressional one-year mandate.

Unfazed, the EPA argues, in effect, that this regulatory process trumps Congress's mandate and relieves the Administrator of complying with it until the EAB renders the Agency's final decision. *See* Defs.' Resp. to Pl. Supp. Br. at 5, 9-12; *see also* Tr. 3/19/11 at 31:17-21. Indeed, EPA contends, further, that this regulatory review process creates a right to this additional level of review that cannot be – effectively – denied by a Court order that requires the Administrator to issue a final – non-appealable – decision within the Congressionally mandated one-year period. *See* Defs.' Resp. to Pl. Supp. Br. at 5, 9-12; *see also* Tr. 3/19/11 at 36:3-6. In essence, the EPA contends that Congress's

statutory mandate is subservient to EPA's regulatory review process, and as such this Court has *no* authority to require the Administrator to comply with this statutory requirement. *See* Defs.' Resp. to Pl. Supp. Br. at 9-12; *see also* Tr. 3/19/11 at 36:3-6. How absurd!

It is axiomatic that an act of Congress that is patently clear and unambiguous – such as this requirement in the CAA[2] – cannot be overridden by a regulatory process created for the convenience of an Administrator, no matter how much notice and comment preceded its creation. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Ernst & Ernst v. Hochfelder*, 425 U. S. 185, 213-14 (1978) ("The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." (internal quotations omitted)). Administrators of regulatory agencies derive their power from Congress's statutory enactments – not from their own discretionary regulatory pronouncements that are drafted for their assistance and convenience. *See North*

[2] The EPA has labored mightily to convince this Court that the temporal requirement enacted by Congress is somehow ambiguous and, therefore, this Court should defer to its interpretation under *Chevron*. *See* Defs.' Resp. to Pl.'s Supp. Br. at 13-17. Horsefeathers! The EPA's self-serving misinterpretation of Congress's mandate is too clever by half and an obvious effort to protect its regulatory process at the expense of Congress's clear intention. Put simply, that dog won't hunt.

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Carolina v. EPA, 531 F.3d 896, 922 (D.C. Cir. 2008) (citing *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)). To the extent that a regulatory process frustrates or renders meaningless a Congressional statutory mandate, it must yield to Congress's will. *See Ernst & Ernst v. Hochfelder*, 425 U. S. at 213-14; *Fed. Maritime Com. v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973); *see also Southland Royalty Co. v. Fed. Energy Admin.*, 512 F. Supp. 436, 446 (N.D. Tex. 1980). Thus, while the Administrator is welcome to avail herself of whatever assistance the EAB can provide her *within the one-year statutory period*, she cannot use that process as an excuse, or haven, to avoid statutory compliance.

Accordingly, the Administrator, in this Court's judgment, must issue a truly final decision, either granting or denying the permit in question as soon as possible. Regrettably her offer to issue an interim appealable decision by May 27, 2011 is patently inadequate as it has already exceeded Congress's mandate by some three years and undoubtedly would attenuate the process for yet another six to eighteen months. However, recognizing that the Administrator might need a brief additional period of time to determine how to best proceed vis-à-vis the existing EAB review process, the Court will extend the Administrator an additional 90 days to issue her final decision, either with or without the EAB's involvement.

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CONCLUSION

Accordingly, for the foregoing reasons, it is ORDERED that the Administrator of the EPA issue a final decision granting or denying the plaintiff's permit no later than August 27, 2011. An order consistent with this decision accompanies this Memorandum Opinion.

RICHARD J. LEON
United States District Judge

01268-EPA-1129

Jeffrey Corbin/CBP/USEPA/US

05/30/2011 07:25 PM

To Richard Windsor

cc Bob Perciasepe, Bob Sussman, Diane Thompson, Ann Campbell, Shawn Garvin

bcc

Subject EPA Roles/Responsibilities Under Ches Bay Exec Order

(b)(5) Deliberative

Greg Barranco in the Annapolis Bay Program Office deserves the thanks for pulling this together. Holler if you should want more detail or wish to discuss.

Thanks...jc

(b)(5) Deliberative

Administrator update on EO Strategy 5-31-11.docx **EO Strategy Goals and Outcomes.pptx**

Jeff Corbin
Senior Advisor to the Administrator for Chesapeake Bay and Anacostia River
U.S. EPA
(215)667-9304

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EO Strategy Goals and Outcomes

RESTORE CLEAN WATER GOAL:

Reduce nitrogen, phosphorus, sediment and other pollutants to meet Bay water quality goals for dissolved oxygen, clarity and chlorophyll-a and toxic contaminants.

WATER QUALITY OUTCOME: Meet water quality standards for dissolved oxygen, clarity/underwater grasses and chlorophyll-a in the Bay and tidal tributaries by implementing 100 percent of pollution reduction actions for nitrogen, phosphorus and sediment no later than 2025, with 60 percent of segments attaining standards by 2025.

STREAM RESTORATION OUTCOME: Improve the health of streams so that 70 percent of sampled streams throughout the Chesapeake watershed rate three, four, or five (corresponding to fair, good or excellent) as measured by the Index of Biotic Integrity, by 2025.

AGRICULTURAL CONSERVATION OUTCOME: Work with producers to apply new conservation practices on 4 million acres of agricultural working lands in high-priority watersheds by 2025 to improve water quality in the Chesapeake Bay and its tributaries.

RECOVER HABITAT GOAL:

Restore a network of land and water habitats to support priority species and to afford other public benefits, including water quality, recreational uses and scenic value across the watershed.

WETLAND RESTORATION OUTCOME: Restore 30,000 acres of tidal and non-tidal wetlands and enhance the function of an additional 150,000 acres of degraded wetlands by 2025.

FOREST BUFFER OUTCOME: Restore riparian forest buffers to 63 percent, or 181,440 miles, of the total riparian miles (stream bank and shoreline miles) in the Bay watershed by 2025.

FISH PASSAGE OUTCOME: Restore historical fish migratory routes by opening 1,000 additional stream miles by 2025, with restoration success indicated by the presence of river herring, American shad and/or American eel.

SUSTAIN FISH & WILDLIFE GOAL:

Sustain healthy populations of fish and wildlife, which contribute to a resilient ecosystem and vibrant economy.

OYSTER OUTCOME: Restore native oyster habitat and populations in 20 tributaries out of 35 to 40 candidate tributaries by 2025.

BLUE CRAB OUTCOME: Maintain sustainable blue crab interim population target of 200 million adults (1+ years old) in 2011 and develop a new population rebuilding target for 2012-2025.

BROOK TROUT OUTCOME: Restore naturally reproducing brook trout populations in headwater streams by improving 58 sub-watersheds from "reduced" classification (10-50 percent of habitat lost) to "healthy" (less than 10 percent of habitat lost) by 2025.

BLACK DUCK OUTCOME: Restore a three-year average wintering black duck population in the Chesapeake Bay watershed of 100,000 birds by 2025.

CONSERVE LAND AND INCREASE PUBLIC ACCESS

Conserve landscapes to maintain water quality, habitat, sustainable working forests, farms and maritime communities; and cultural, community and indigenous values. It will also expand public access to the Bay and its tributaries through existing and new federal, state, and local parks, refuges, reserves, trails and partner sites.

LAND CONSERVATION OUTCOME: Protect an additional 2 million acres of lands throughout the watershed currently identified as high conservation priorities at the federal, state or local level by 2025, including 695,000 acres of forest land of highest value for maintaining water quality.

PUBLIC ACCESS OUTCOME: Increase public access to the Bay and its tributaries by adding 300 new public access sites by 2025.

01268-EPA-1135

Vicki Ekstrom/DC/USEPA/US
06/06/2011 03:37 PM

To Richard Windsor
cc Adora Andy, Brendan Gilfillan, David McIntosh
bcc
Subject League of Conservation Voters

Administrator,

In your book today, as well as attached, is the speech we've prepared for the League of Conservation Voters reception tomorrow night. (b)(5) Deliberative

Let us know if you have thoughts. Thanks.

(b)(5) Deliberative

20110607 LCV (3).docx

(b)(5) Deliberative

Vicki Ekstrom
Speechwriter
US EPA, Office of the Administrator
Office: 202-564-0181
Mobile: 202-407-6251

01268-EPA-1138

Scott Fulton/DC/USEPA/US
06/07/2011 03:33 PM

To Richard Windsor
cc
bcc
Subject Fw: SIA

----- Forwarded by Scott Fulton/DC/USEPA/US on 06/07/2011 03:33 PM -----

From: Don Zinger/DC/USEPA/US
To: Scott Fulton/DC/USEPA/US@EPA
Cc: Gina McCarthy/DC/USEPA/US@EPA
Date: 06/07/2011 02:26 PM
Subject: Re: SIA

Scott,
Here is the background document we sent to the Administrator's office.

(b)(5) Attorney-Client, (b)(5) Deliberative

Event_Meeting Executive Summary for SIA 6-8-11 meeting_version5.docx

Gina McCarthy We ran it by OGC this morning and I thi... 06/07/2011 02:15:47 PM

From: Gina McCarthy/DC/USEPA/US
To: Scott Fulton/DC/USEPA/US@EPA
Cc: "Don Zinger" <Zinger.Don@EPA.GOV>
Date: 06/07/2011 02:15 PM
Subject: Re: SIA

We ran it by OGC this morning and I think wqe sent it down. I will ask Don to send it to you asap.

From: Scott Fulton
Sent: 06/07/2011 02:13 PM EDT
To: Gina McCarthy
Subject: SIA

Hi Gina - Janet said Anna Wood was working on a briefer for LPJ. Anything to look at before the 3:30? Thx

---

From: Gina McCarthy
Sent: 06/07/2011 02:03 PM EDT
To: Richard Windsor
Cc: perciasepe.bob@epa.gov; Thompson.Diane@EPA.GOV; Sussman.bob@EPA.GOV; Fulton.Scott@EPA.GOV; Michael Goo; Janet McCabe; Joseph Goffman
Subject: Hot Issue List

Here is an updated list for our meeting tomorrow. It's long, but necessarily so. Thanks

01268-EPA-1139

Brendan Gilfillan/DC/USEPA/US
06/07/2011 03:57 PM

To Richard Windsor
cc Adora Andy, Vicki Ekstrom, Alisha Johnson
bcc
Subject FINAL LCV

Administrator -

We had some late-breaking edits to these remarks - the final version is attached. Alisha will bring a copy to the event as well.

Thanks.

- Brendan

(b)(5) Deliberative

20110607 LCV (5).docx

01268-EPA-1164

Cynthia Giles-AA/DC/USEPA/US
06/11/2011 02:31 PM

To Richard Windsor
cc Bob Perciasepe, Bob Sussman, Aaron Dickerson
bcc
Subject OECA HIT list

Attached is OECA hot issues tracker (HIT) list for coming two weeks.

(b)(5) Attorney Work Product, (b)(5) Attorney-Client, (b)(5) Deliberative

OECA HITList 6-11-11.docx

Cynthia Giles
Assistant Administrator
U.S. EPA, Office of Enforcement and Compliance Assurance
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
202-564-2440

THIS MESSAGE IS CONFIDENTIAL and may contain legally privileged information. If you receive it in error, please delete it immediately, do not copy, and notify the sender. Thank you.

01268-EPA-1181

Arvin Ganesan/DC/USEPA/US

06/21/2011 09:18 AM

To Richard Windsor, Bob Perciasepe, Bob Sussman, Laura Vaught, Seth Oster, Adora Andy, Brendan Gilfillan, Lawrence Elworth, Bob Sussman

cc

bcc

Subject Clean Water Cooperative Federalism Act of 2011

Just an FYI. (b)(5) Deliberative, (b)(5) Attorney-Client

(b)(5) Attorney-Client, (b)(5) Deliberative

2011-06-16 HR 2018 Analysis - Brief.docx

(b)(5) Deliberative, (b)(5) Attorney-Client

Thanks. .

ARVIN R. GANESAN
Deputy Associate Administrator
Office of the Administrator
United States Environmental Protection Agency
Ganesan.Arvin@epa.gov
(p) 202.564.5200
(f) 202.501.1519

----- Forwarded by Arvin Ganesan/DC/USEPA/US on 06/21/2011 09:07 AM -----

From: "Copeland, Mark" <Mark.Copeland@mail.house.gov>
To: Arvin Ganesan/DC/USEPA/US@EPA
Cc: "Seiger, Ryan" <Ryan.Seiger@mail.house.gov>, "Flemma, Jean" <Jean.Flemma@mail.house.gov>
Date: 06/20/2011 09:57 AM
Subject: Clean Water Cooperative Federalism Act of 2011

Arvin □Hope you had a pleasant weekend. Wanted to touch base with you regarding a letter my boss, as Ranking Member on the Water Resources & Environment Subcommittee, dropped in the mailbox late on Friday requesting an EPA analysis of the Clean Water Cooperative Federalism Act of 2011.

Word round the campfire is that this bill may be marked up as early as Wednesday, so I□m hoping your office can provide my boss with an expedited analysis.

I appreciate your attention to this matter, and thank you in advance for your help.

Mark Copeland
Legislative Director
Rep. Tim Bishop (NY-01)

306 Cannon House Office Building
Washington, D.C. 20515
(202) 225-3826 phone
(202) 225-3143 fax
http://timbishop.house.gov/

LETTER - EPA Analysis of Clean Water Cooperative Federalism Act 11Jun17.pdf

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TIMOTHY H. BISHOP
1ST DISTRICT, NEW YORK

COMMITTEE ON THE BUDGET

COMMITTEE ON EDUCATION AND LABOR

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

Congress of the United States
House of Representatives
Washington, DC 20515–3201

225 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-3826
FAX: (202) 225-3143

3680 ROUTE 112, SUITE C
CORAM, NY 11727
(631) 696-6500
FAX: (631) 696-4520

www.house.gov/timbishop

June 17, 2011

The Honorable Lisa Jackson
Administrator
United States Environmental Protection Agency
Ariel Rios Building (1101A)
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Administrator Jackson:

On May 27, 2011, the Chairman of the Committee on Transportation & Infrastructure introduced H.R. 2018, the Clean Water Cooperative Federalism Act of 2011. This legislation makes several amendments to the regulatory authorities of the Federal Water Pollution Control Act, more commonly known as the Clean Water Act.

Recently, the House Republican leadership has noticed its intention to move H.R. 2018 through the U.S. House of Representatives sometime this summer. However, it is unclear when or if this legislation be subject to a legislative hearing or consideration in the Committee on Transportation & Infrastructure, or whether there will be a formal opportunity to review any potential impacts of this legislation on improving water quality, and on protecting human health and the environment.

Therefore, I request that the agency provide a detailed analysis of the impacts of H.R. 2018 on exiting Clean Water Act authorities, with particular emphasis on the proposed changes for establishing water quality standards sufficient to meet the requirements of the Act, as well as the changes to both the National Pollution Discharges Elimination System authorities in section 402 and the State certification authorities in section 401. In providing this analysis, please describe whether and how these changes may have an impact Federal and State efforts to restore, maintain, and improve water quality, and protect human health and the environment.

If you have any questions, please contact Mark Copeland of my staff at (202) 225-3826.

Sincerely,

Tim Bishop
MEMBER OF CONGRESS

01268-EPA-1182

Scott Fulton/DC/USEPA/US
06/21/2011 11:01 AM

To "Bob Perciasepe", "Richard Windsor"
cc
bcc
Subject Fw: Decision in Hydrofracking SDWA Imminent and Substantial Endangerment Case [WLO-7]

Fyi re the Range decision - worth a scan if you have time.
Steven Neugeboren

----- Original Message -----
From: Steven Neugeboren
Sent: 06/21/2011 10:52 AM EDT
To: Scott Fulton; Cynthia Giles-AA; Al Armendariz; Nancy Stoner; Bob Sussman
Cc: Avi Garbow; Joel Beauvais; Brenda Mallory; Carrie Wehling; Pooja Parikh; Aditi Prabhu; Catherine McCabe; Adam Kushner; Bernadette Rappold; Mark Pollins; Mike Shapiro; Gregory Peck; Cynthia Dougherty; Ann Codrington; Chitra Kumar; Anhar Karimjee; OGC RCs and DRCs; John Blevins; OGC WLO; Leia Schmidt; Jeanne Briskin
Subject: Decision in Hydrofracking SDWA Imminent and Substantial Endangerment Case [WLO-7]

The Court's Decision

(b)(5) Attorney-Client, (b)(5) Deliberative

[redacted]

(b)(5) Attorney-Client, (b)(5) Deliberative [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

If you have any questions, feel free to call me, Carrie Wehling (564-5492) or Pooja Parikh (564-0839) of the Water Law Office.

Range District Court Decision.pdf

Steve Neugeboren
Associate General Counsel
Water Law Office
EPA Office of General Counsel
202-564-5488
fax 202-564-5477

Release 2 - HQ-FOI-01268-12 All emails sent by "Richard Windsor" were sent by EPA Administrator Lisa Jackson

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUN 20 2011
CLERK, U.S. DISTRICT COURT
By _____ Deputy
9:39 A.M.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,	§	
Plaintiff,	§	**Case No. 3:11-cv-116-F**
	§	
v.	§	
	§	
RANGE PRODUCTION	§	
COMPANY ET AL.,	§	
Defendants.	§	

ORDER DENYING WITHOUT PREJUDICE
DEFENDANTS' MOTION TO DISMISS AND STAYING CASE

BEFORE THE COURT is a Motion to Dismiss filed by Defendants Range Production Company and Range Resources Corporation (collectively "Range") on March 21, 2011 (Docket No. 7). In its Motion, Range seeks to dismiss this case under Federal Rule of Civil Procedure 12(b)(1) or, alternatively, Rule 12(b)(6). Plaintiff United States of America ("the United States") filed a Response on May 9, 2011 (Docket No. 12). Range filed a Reply on May 23, 2011 (Docket No. 16). A hearing regarding this Motion was held on June 14, 2011. After considering the arguments of both parties, it is the opinion of the Court that Range's Motion should be DENIED WITHOUT PREJUDICE.[1]

I. Statutory Framework of the Safe Drinking Water Act

This action has been brought by the United States on behalf of the Environmental Protection Agency ("the EPA") to enforce an Emergency Administrative Order issued by the

[1]This resolves Docket No. 7.

EPA pursuant to its purported authority under the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f *et seq.* The SDWA was enacted "in order to protect the nation's drinking water by ensuring public water supply systems meet certain minimum national standards." *Goliad Cnty., Tex. v. Uranium Energy Corp.*, No. V-08-18, 2009 WL 1586688, at *5 (S.D. Tex. June 5, 2009) (Rainey, J.). Upon meeting prescribed requirements, states may obtain primary responsibility for administering and enforcing the standards generated by the EPA. *National Wildlife Fed'n v. E.P.A.*, 980 F.2d 765, 768 (D.C. Cir. 1992); 42 U.S.C. § 300g-2. In Texas, that authority has been obtained by the Texas Commission on Environmental Quality, with some responsibilities being in the hands of the Railroad Commission of Texas. *See* 16 T.A.C. § 3.30.

The EPA issued the Emergency Administrative Order in this case pursuant to its authority under Section 1431 of the SDWA. Section 1431 provides:

> (a) Actions authorized against imminent and substantial endangerment to health
> Notwithstanding any other provision of this subchapter, the Administrator, upon receipt of information that a contaminant which is present in or is likely to enter a public water system or an underground source of drinking water, or that there is a threatened or potential terrorist attack (or other intentional act designed to disrupt the provision of safe drinking water or to impact adversely the safety of drinking water supplied to communities and individuals), which may present an imminent and substantial endangerment to the health of persons, and that appropriate State and local authorities have not acted to protect the health of such persons, may take such actions as he may deem necessary in order to protect the health of such persons. To the extent he determines it to be practicable in light of such imminent endangerment, he shall consult with the State and local authorities in order to confirm the correctness of the information on which action proposed to be taken under this subsection is based and to ascertain the action which such authorities are or

> will be taking. The action which the Administrator may take include (but shall not be limited to) (1) issuing such orders as may be necessary to protect the health of persons who are or may be users of such system (including travelers), including orders requiring the provision of alternative water supplies by persons who caused or contributed to the endangerment, and (2) commencing a civil action for appropriate relief, including a restraining order or permanent or temporary injunction.
>
> (b) Penalties for violations; separate offenses
> Any person who violates or fails or refuses to comply with any order issued by the Administrator under subsection (a)(1) of this section may, in an action brought in the appropriate United States district court to enforce such order, be subject to a civil penalty of not to exceed $[16,500] for each day in which such violation occurs or failure to comply continues.

42 U.S.C. § 300i; 40 C.F.R. § 19.4 Table.

II. Factual and Procedural Background

Range is involved in drilling gas wells in the area of Fort Worth, Texas. In 2009, Range drilled two such wells, which were drilled vertically several thousand feet below the surface before the drill bore horizontally to finish the drilling of the well. The horizontal bores of the wells at issue are approximately one mile below the surface. These gas wells attempt to draw gas from the Barnett Shale Formation.

The EPA alleges that Range's activities have affected the water within two domestic water wells in Hood County. According to the EPA, these two wells drilled by Range are the only wells within half a mile of the domestic water wells at issue. These water wells included a domestic water well serving the home of Steven and Shyla Lipsky (collectively "Lipsky"), which was drilled to a depth of approximately 200 feet in 2005, and a domestic

water well serving the home of Mr. and Mrs. Rick Hayley ("collectively "Hayley"), which was drilled in 2002 to a depth of about 220 feet. The Lipsky well and the Hayley well are approximately 120 feet and 470 feet in horizontal distance, respectively, from one of Range's gas wells. The tracts of land owned by Lipsky and Hayley are adjacent. The EPA alleges that between September 2009 and September 2010, the Hayley residence suffered a lack of water pressure from its water supply well. The EPA also alleges that the Lipskys noticed no problems with their water quality until late 2009, after the Range wells had been drilled. However, the Complaint does not specify what information was provided to the EPA and what problems the Lipskys experienced with their water well after late 2009. According to Range's Reply brief, Mr. Lipsky informed the EPA of the issues with the water in August 2010.

In August 2010, the EPA began conducting tests upon private domestic water wells in the proximity of the Range gas wells. EPA testing conducted during the following months determined that there was a significant presence of dissolved methane and other substances dangerous to human health in the wells, and concluded that the contamination of the wells was likely to be due to gas development and production activities in the area. The state of Texas's governing body for such matters, the Railroad Commission of Texas, also investigated Range's production activities after learning of the contamination of the private water wells. During this time, the EPA was unsatisfied with the Railroad Commission of

Texas's efforts to combat Range's apparent role in the contamination of the wells, and was convinced that the Railroad Commission would not take any action against Range.

On December 7, 2010, the EPA issued an Emergency Administrative Order ("the Emergency Order") pursuant to its claimed authority under Section 1431 of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300(i). In the Emergency Order, the EPA determined that the contamination may create "an imminent and substantial endangerment to the health of persons," noting that the level of methane found in the wells could be flammable, and consumption of the benzene present in the wells could contribute to various health problems. Emergency Order, Docket No. 7-1, at ¶ 41. In a section entitled "Conclusions of Law," the Emergency Order concluded that contaminants were present in an underground source of drinking water, that Range had caused or contributed to the endangerment of persons through such contaminants, and that action taken by the EPA as proscribed in the Emergency Order was necessary to protect the health of persons. *Id.* at ¶¶ 42-49. Range was directed in the Emergency Order to (1) notify the EPA of whether it intended to comply with the Emergency Order within 24 hours; (2) provide replacement water supplies to the recipients of water from the affected water wells within 48 hours; (3) install explosivity meters at the affected dwellings within 48 hours; (4) submit a survey listing water wells within 3,000 feet of the gas wells at issue with a plan for EPA approval to sample those wells to see if they have been contaminated, including a air and water samplings; (5) submit a plan for EPA approval to conduct soil gas surveys and indoor air

concentration analysis of the dwellings served by the affected water wells within 14 days; and (6) submit a plan for EPA approval to identify gas flow pathways to the Trinity Aquifer, eliminate gas flow to the Trinity Aquifer if possible, and remediate areas of the Trinity Aquifer that have been impacted. *Id.* at ¶ 50. The Emergency Order notified Range that violation of the Emergency Order could subject it to a civil penalty of up to $16,500 per day of violation. In its Motion, Range contends that the Emergency Order, in only providing for an informal conference with no evidentiary hearing or opportunity to challenge the Emergency Order, does not provide Range with any process to challenge the EPA's findings.

On December 8, 2010, one day after the Emergency Order was issued, the Railroad Commission called a hearing to consider whether Range's operation of the gas wells caused or contributed to the contamination of the water wells. As this proceeding continued, Range informed the EPA that it disputed the validity of the Emergency Order and would not abide by some of its terms. The EPA brought this civil enforcement action on January 18, 2011, seeking injunctive relief and civil penalties against Range for its failure to comply with three of the six requirements of the Emergency Order. Range filed a petition for review of the Emergency Order with the Fifth Circuit Court of Appeals on January 20, 2011 pursuant to 42 U.S.C. § 300j-7(a)(2). Range argued to the Fifth Circuit that Section 1431 would be unconstitutional if it were construed to be a final agency action in this context, and contended

that enforcement of the Emergency Order would violate Range's due process rights. The Fifth Circuit's decision is pending.[2]

Despite its objections to the Emergency Order, Range consulted with the EPA and provided the homes whose water wells were contaminated with alternative water and installed explosivity meters, complying with the first three requirements of the Emergency Order. Range claims that this was done at the request of the Railroad Commission.[3] Range also hired experts to perform gas, water, soil-gas, and geologic tests, which Range contends demonstrate that Range is not responsible for the contamination of the water wells. Range also deposed John Blevins of the EPA on January 25, 2011, and provides his testimony in which he notes that the EPA could not be certain of Range's role in the contamination of the water wells, and that the EPA did not investigate other possible causes of the contamination. Range alleges that this deposition reveals various ways in which Range was not afforded due process. On January 19 and 20, 2011, the Railroad Commission held its hearings concerning Range's possible role in the contamination of the water wells. On March 22, 2011, the Railroad Commission issued an order in which it determined that Range had not caused and is not causing or contributing to the contamination of the water wells at issue. The Railroad

---

[2]The Fifth Circuit case, entitled, *Range Resources Corporation et al. v. United States Environmental Protection Agency*, is captioned as Case No. 11-60040.

[3]At the June 14, 2011 hearing, the parties informed the Court that Range is no longer providing alternative water or explosivity meters to the Lipsky and Hayley residences; however, in this action, the EPA has not asked for an order forcing Range to comply with these provisions of the Emergency Order.

Commission determined that the gas in the water wells was from the Strawn formation, a different source than the source that the Range gas wells were tapping that is closer in depth underground to the Lipsky and Hayley wells. Range claims that the Railroad Commission's preliminary findings are accurate, and that the contamination is due to the Strawn formation, not Range's wells attempting to tap into the Barnett formation.[4]

On January 18, 2011, the EPA filed the instant action, seeking to obtain an injunction forcing Range to comply with the terms of the Emergency Order. Noting that Range had not complied with the fourth, fifth, and sixth requirements of the Emergency Order, the EPA also seeks penalties adding up to $16,500 per day that Range has failed to comply with these terms of the Order under 42 U.S.C. § 300i(b).

III. Standard of Review

Rule 12(b)(1) permits dismissal for lack of jurisdiction over the subject matter of a claim. "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). A case may be dismissed for lack of subject matter jurisdiction based on (1) the complaint alone; (2) the complaint supplemented by undisputed facts; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Robinson v. TCI/US West*

[4]At the hearing, the EPA disputed the accuracy of the Railroad Commission's findings and questioned the accuracy of the testing methods used by the Railroad Commission.

Commc'ns Inc., 117 F.3d 900, 904 (5th Cir, 1997). The burden of establishing that the district court possesses subject matter jurisdiction rests at all times with the plaintiff. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

Rule 12(b)(6) permits dismissal of a cause of action for "failure to state a claim upon which relief may be granted." In considering a Rule 12(b)(6) motion to dismiss, a court must accept the plaintiff's allegations as true and draw all reasonable inferences in the plaintiff's favor. *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993); *Cross v. Lucius*, 713 F.2d 153, 155 (5th Cir. 1983). A motion to dismiss under Rule 12(b)(6) should be granted only if the complaint does not include "enough facts to state a claim to relief that is plausible on its face" and "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, ___ U.S. ___, ___, 129 S. Ct. 1937, 1949 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). However, a complaint will not overcome a Rule 12(b)(6) motion "if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

IV. Analysis

Range argues that enforcement at this time is premature and the controversy is not ripe, and asks the Court to dismiss this case under Rule 12(b)(1). Specifically, Range rejects the EPA's contention that it can recover damages for violations of the Emergency Order when the EPA has not been required to prove that Range actually caused the contamination of the water wells at issue. In the alternative, Range contends that the United States has failed to plead the necessary elements of an enforcement action and has failed to state a claim that is plausible on its face, and asks the Court to dismiss this case under Rule 12(b)(6). These two contentions are intertwined; Range argues that the EPA has failed to plead facts indicating that Range caused the contamination, which it contends would both be insufficient pleading under the Rule 12(b)(6) and unripe because it would not plead that the EPA had concluded that Range caused the contamination and thus would be subject to dismissal for lack of subject jurisdiction under Rule 12(b)(1).

Range first argues that an enforcement action is premature at this time because there has been no final agency action by the EPA. "Judicial review of federal agency action is governed by the requirement of Section 10(c) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 704, which provides that only 'final agency action' is subject to judicial review." *Save Barton Creek Ass'n v. Fed. Highway Admin.*, 950 F.2d 1129, 1132 (5th Cir. 1992). Range contends that because the EPA has not pleaded facts indicating that Range caused the contamination, this action cannot be brought because the controversy is not ripe. The EPA

contends that to recover civil penalties and enforce the Emergency Order, it does not need to plead that Range actually caused the contamination at issue, but need only plead that Range violated the Emergency Order. In its Complaint, the EPA asks the Court for two types of relief. First, the EPA contends that Range has failed to follow the dictates of the Emergency Order, causing imminent danger to persons. Accordingly, the EPA asks the Court to enforce the Emergency Order to prevent such danger from continuing. Second, the EPA asks the Court to levy statutory penalties against Range for its violation of the Emergency Order.

Range does not challenge the EPA's ability to issue the Emergency Order or other administrative orders. Instead, Range argues that such orders cannot be enforced without requiring the EPA to prove to the Court or another neutral decisionmaker that Range was responsible for the contamination of the Lipsky and Hayley wells. Range claims that the EPA is attempting to obtain substantial civil penalties based on Range's violation of the Emergency Order without having to prove that Range violated any statute, regulation, or other law, or that Range even caused the contamination of the water wells at issue. Range asserts that allowing the EPA to enforce the Emergency Order or to recover penalties for violation of the Emergency Order without pleading or proving of a violation of the law would be a violation of Range's due process rights. The EPA counters Range's assertions by contending that the Emergency Order was issued under emergency circumstances, in which the lack of a pre-deprivation hearing would not violate due process.

Upon the "receipt of information" that a contaminant that is present within or likely to enter a drinking water supply which will "present an imminent and substantial endangerment to the health of persons," and that state and local authorities "have not acted to protect the health of such persons," Section 1431(a) provides the EPA with two explicit options: it may either commence a civil action in district court or issue an administrative order. In this case, the EPA took the latter option by issuing the Emergency Order on December 7, 2010, with which Range only partially complied. If the subject of an administrative order does not comply with its terms, Section 1431(b) permits the EPA to file suit in district court to enforce the order and obtain damages for violation of the order. The EPA is not required to bring such an action; instead, it has discretion to determine whether it wants to enforce an administrative order through filing suit in federal court. *See Ross Incineration Servs., Inc. v. Browner*, 118 F. Supp. 2d 837, 846-47 (N.D. Ohio 2000). After Range declined to follow three of the terms of the Emergency Order, the EPA filed this action, seeking both injunctive relief and monetary damages.

The EPA's complaint seeks to obtain injunctive relief to enforce the Emergency Order and penalties for Range's failure to follow the Emergency Order. However, the EPA claims that it need only plead facts that demonstrate Range's violation of the Emergency Order, not that Range necessarily caused the contamination of the water wells. Range contends that permitting the EPA to prevail on its claims under this theory would allow for the recovery of damages for violations of an Emergency Order when the EPA has not actually proved that

the conditions necessary for issuing the Emergency Order were present at all. Such a result, according to Range, would amount to a deprivation of Range's due process rights.

As an initial matter, the EPA argues that Range has not been and will not be deprived of any interest that requires due process protection. Prior to determining whether the procedures at issue are insufficient, the Court must determine whether Range "has been deprived of a protected interest in 'liberty' or 'property.'" *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). The EPA contends that the Emergency Order has not to this point deprived Range of a protected property interest, and that the Emergency Order, if fully enforced, will not deprive Range of any protected interest without due process of law. If Range is ordered to comply with the Emergency Order and is assessed penalties as sought by the EPA in its Complaint, it could be subject to hundreds of thousands of dollars in penalties and would have to undertake costly surveys and inquiries regarding the contaminated water supply. If Range were to be forced to undertake such actions at such great cost or were subject to the penalties contemplated in the Complaint, it would be a deprivation that would implicate Range's due process rights. *See S & H Riggers and Erectors, Inc. v. Occupational Safety & Health Review Comm'n*, 659 F.2d 1273, 1281 (5th Cir. 1981) (noting that "civil penalties and substantial compliance costs" implicate due process concerns).

Additionally, the Court shall initially address a dispute between the parties over whether the EPA's Emergency Order is a "final agency action" that is ripe for review. There

are two conditions of a final agency action: (1) the action must mark the consummation of the agency's decisionmaking process, and not be of a tentative or interlocutory nature, and (2) the action must be one by which rights or obligations have been determined, or from which legal consequences will flow. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Examples of final agency actions include those that have "direct and appreciable legal consequences"; agency actions that are "purely advisory" and "in no way affect[] the legal rights of the relevant actors" are not considered final. *Bennett*, 520 U.S. at 178.

Having considered the parties arguments, it is clear to the Court that as far as "final agency action" is concerned, this dispute is ripe for review. First, the EPA issued the Emergency Order to Range, in which it ordered Range to comply with certain instructions. Because the Emergency Order was issued to Range and seeks Range's compliance, the Court is convinced that the EPA's action is the "consummation of the agency's decisionmaking process." *Bennett*, 520 U.S. at 177-78; *Jobs, Training & Servs., Inc. v. E. Tex. Council of Gov't's*, 50 F.3d 1318, 1325 (5th Cir. 1995) (noting that the characteristics of final agency actions include those that "ha[ve] the force of law and demand[] immediate compliance"). Although Range contends that the EPA has not completed its investigation because it is still conducting testing and seeking information, the Court must address the decisionmaking process, not the gathering of additional materials for this or other legal actions. There are no further appeals or inquiries to be made within the administrative process; rather, the only remaining step to be taken is to attempt to enforce the Emergency Order in federal court. *See*

Peoples Nat'l Bank v. Office of Comptroller of Currency of U.S., 362 F.3d 333, 337 (5th Cir. 2004) (determining that there was no final agency action where there were future "intra-agency" procedures and appeals that were proceeding).

Second, it is clear that legal consequences flow from the EPA's action, since Range may be subject to severe penalties and must follow the instructions of the Emergency Order if the Court grants the relief that the EPA seeks. *Alaska Dept. of Envtl. Conservation v. E.P.A.*, 540 U.S. 461, 481 n.10 (2004) (noting that an administrative order imposing new legal obligations on a targeted entity satisfies the finality requirement). The EPA has staked out its position that it need not prove that Range caused or contributed to the contamination of the Lipsky and Hayley wells; instead, it proposes that it has the authority to pursue this enforcement action because there was a possibility of danger to persons under Section 1431, and it had the authority to issue the Emergency Order, which, according to the EPA, has the force of law and Range can be assessed penalties for noncompliance. *See id.* at 483 (upholding the Ninth Circuit's determination that there was a final agency action when the "EPA had 'asserted its final position on the factual circumstances' underpinning the Agency's orders . . . , and if EPA's orders survived judicial review, Cominco could not escape the practical and legal consequences (lost costs and vulnerability to penalties) of any ADEC-permitted construction Cominco endeavored"). The EPA's Emergency Order, by which Range could be subject to substantial penalties for noncompliance and would have to undertake significant expense to comply, has the kind of legal and practical effect that is

considered to be final agency action. *See F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 243-44 (1980) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 152-53 (1967)). Accordingly, the Court holds that the EPA's issuance of the Emergency Order is a final agency action that may be reviewed by this Court.

The Court now addresses the procedural due process issue raised by Range. The EPA claims that to enforce the Emergency Order and recover the civil penalties it seeks from Range under Section 1431(b), it need only plead and prove that Range violated the Emergency Order. Range contends that accepting the EPA's theory would mean that Range could be subjected to serious penalties without ever having the opportunity to challenge the EPA's findings before the an administrative judge, this Court, or any other neutral arbiter, thus violating its right to due process. *See, e.g., Sackett v. U.S. E.P.A.*, 622 F.3d 1139, 1144 (9th Cir. 2010) (interpreting a Clean Water Act provision as only allowing an award of penalties for violation of a compliance order "only [when] those compliance orders . . . are predicated on *actual*, not alleged violations of the CWA, as found be a district court in an enforcement action according to traditional civil evidence rules and burdens of proof"); *Tennessee Valley Auth. v. Whitman*, 336 F.3d 1236, 1258 (11th Cir. 2003) (holding that a statute permitting an agency to recover severe penalties by concluding in an administrative order that the TVA had violated the statute without ever actually having to prove (1) whether a violation of the Clean Air Act took place or (2) whether the factual underpinnings of its conclusion that the TVA was liable were accurate was unconstitutional).

The EPA counters Range's assertion in two ways. First, the EPA claims that this situation is distinguishable from prior cases holding that the EPA must plead and prove its assertions in an enforcement action, *e.g. Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 664 (7th Cir. 1995), because, unlike in previous cases that did not involve emergency authority, the EPA acted in an emergency situation involving imminent danger to persons pursuant to its emergency powers. *See Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 299-300 (1981) (holding that "summary administrative action may be justified in emergency situations"); *Whitman*, 336 F.3d at 1249, 1258 n.38 (distinguishing emergency situations from non-emergency situations and observing that penalties for violations of administrative orders issued in emergency situations may be constitutionally permissible). Second, the EPA asserts that the Fifth Circuit's review of the Emergency Order satisfies the requirements of the Due Process Clause of the Fifth Amendment. *See Woods v. Fed. Home Loan Bank Bd.*, 826 F.2d 1400, 1411 (5th Cir. 1987) (in seizure of assets case, holding that "a court review of agency action under the arbitrary and capricious standard . . . is adequate to assure against the risk of mistaken deprivations"); *but see WWBITV, Inc. v. Vill. of Rouses Point*, 589 F.3d 46, 50 (2d Cir. 2009) ("Where there is an emergency requiring quick action and where meaningful pre-deprivation process would be impractical, the government is relieved of its usual obligation to provide a hearing, *as long as there is an adequate procedure in place to assess the propriety of the deprivation afterward.*") (emphasis added).

As noted at the hearing, the Court is struggling with the concept that the EPA can enforce the Emergency Order and obtain civil penalties from Range without ever having to prove to this Court, or another neutral arbiter, that Range actually caused the contamination of the Lipsky and Hayley wells, or without ever giving Range the opportunity to contest the EPA's conclusions. That being said, the Court is also impressed by the EPA's response that the statutory scheme that provides for an appeal by Defendants to the Fifth Circuit is sufficient for due process purposes.

The Court is of the opinion that this difficult issue, important though it is, need not be resolved at this time. As noted above, the Fifth Circuit is presently considering whether the Emergency Order was issued arbitrarily or capriciously. While Range may be correct that this review is insufficient to satisfy due process, and that compelling the EPA to plead and prove that Range caused or contributed to the contamination of the water wells would satisfy due process, the Fifth Circuit's pending decision may either (1) moot this action by invalidating the Emergency Order, or (2) at least provide the Court with guidance and a framework with which to proceed in this case, as it could provide the Court and the parties with the answer to whether the Fifth Circuit's review sufficiently satisfies due process. Indeed, Range has raised the argument before the Fifth Circuit that the Fifth Circuit's review of the Emergency Order under the arbitrary and capricious standard does not give Range a sufficient opportunity to challenge the EPA's factual allegations, and that the EPA must prove its allegations in an enforcement action in order to obtain the relief it seeks. If the

Fifth Circuit accepts this contention, then it would be clear that Range is entitled to an opportunity for a hearing before this Court in this enforcement action to challenge the factual contentions contained in the Emergency Order. If that is the case, then the Court's course would likely be to allow the EPA to amend the Complaint to comply with the Fifth Circuit's determination that it must plead and prove that Range caused or contributed to the contamination.

Though neither party has asked for it, the Court is of the opinion that instituting a stay of this litigation and deferring to the Fifth Circuit's evaluation of the Emergency Order is the most prudent course to take at this time. The Court has no desire to oversee proceedings about enforcement of the Emergency Order when, some time down the line, the Fifth Circuit may determine that the Emergency Order is not valid because the EPA acted arbitrarily or capriciously. Should this result come about, Range, the federal government, and the Court will have expended enormous efforts and substantial resources for naught. Accordingly, the Court is of the opinion that this case is not ripe for decision at this time; however, the Court shall not dismiss this case. Instead, the Court shall revisit the issue upon the Fifth Circuit's decision, which has the potential to provide the necessary guidance for this litigation. Until that time, the Court shall institute a stay on this litigation. Importantly, drawing upon the information before the Court, the representations of the parties at the June 14, 2011 hearing, and the fact that there has been no petition for a temporary restraining order or a preliminary injunction, it appears clear to the Court that there are no individuals or properties that are in

immediate danger and require the Court's immediate intervention. Instituting a stay would therefore not be harmful to any party or nonparty affected by this litigation. Such an action is well within the Court's inherent power to control its docket, *Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 348 (5th Cir. 2004), which includes "discretionary authority to handle [a] case in the most efficient way." *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 218 (5th Cir. 1998).

The Court does not wish for its decision to stay this action to prejudice either party in this case. Accordingly, the Court shall not award daily civil penalties sought by the EPA for continuing violation of the Emergency Order under Section 1431(b) for any day in which this litigation is subject to the stay provided for in this Order.

Conclusion

For the reasons stated above, it is ORDERED that Range's Motion to Dismiss is DENIED WITHOUT PREJUDICE. Furthermore, this litigation is hereby STAYED pending the Fifth Circuit's decision in *Range Resources Corporation et al. v. United States Environmental Protection Agency*, Case No. 11-60040, or further order of the Court.

IT IS SO ORDERED.

Signed this 20th day of June, 2011.

Royal Furgeson
Senior United States District Judge

01268-EPA-1199

Arvin Ganesan/DC/USEPA/US

06/25/2011 10:10 AM

To Richard Windsor, Mathy Stanislaus, Gina McCarthy, Bob Sussman, Bob Perciasepe, Scott Fulton, Barbara Bennett

cc

bcc

Subject Fw: Boiler MACT Language Request

Hi all:

[redacted]

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-----Forwarded by Arvin Ganesan /DC/USEPA/US on 06/25/2011 09:51AM -----

To: Arvin Ganesan /DC/USEPA/US@EPA, Ed Walsh /DC/USEPA/US@EPA
From: "Taylor, Rachael (Appropriations)" <Rachael_Taylor@appro.senate.gov>
Date: 06/24/2011 02:42PM
Subject: Boiler MACT Language Request
(See attached file: [Untitled].pdf)

Arvin, Ed -

Sending to both of you since Ed does our capability statements and Arvin has been so involved in Boiler MACT.

Attached please find a language request that we have received regarding Boiler MACT. With today's announcement the timing element of this is somewhat moot, but I still need a technical analysis of what they're asking EPA to do as part of the reconsideration process along with an analysis of EPA's position on this request.

Can you please coordinate and get me paper? Many thanks.

- [Untitled].pdf

Environmental Protection Agency

Request 10: Report Language: Boiler MACT Rule at EPA

The Committee recommends the Administrator of the U.S. Environmental Protection Agency stay for at least 15 months and re-promulgate the rules related to air emissions from industrial, commercial and institutional boilers (commonly called the "Boiler MACT rules") -- specifically, "National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters" (76 Fed. Reg. 15608 (March 21, 2011)); "Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units" (76 Fed. Reg. 15704 (March 21, 2011)); and "Identification of Non-Hazardous Secondary Materials That Are Solid Waste" (76 Fed. Reg. 15456 (March 21, 2011)).

In re-promulgating these rules, the Administrator shall ensure that the emission standards for existing and new sources established under sections 112 or 129 of the Clean Air Act, as applicable, can be met under actual operating conditions consistently and concurrently with emission standards for all other air pollutants regulated by the rule for the source category, taking into account variability in actual source performance, source design, fuels, inputs, controls, ability to measure the pollutant emissions and operating conditions. The Administrator