



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

JUN 13 2012

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Herschel T. Vinyard Jr.
Secretary
Florida Department of Environmental Protection
Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Dear Secretary Vinyard:

Thank you for your June 6, 2012, letter submitting to the U.S. Environmental Protection Agency a revised National Pollutant Discharge Elimination System (NPDES) permit, a proposed consent order, a draft framework agreement and supporting materials (the State's plan) for five Stormwater Treatment Areas (STAs) discharging into the Everglades Protection Area and operated by the South Florida Water Management District (SFWMD). I am pleased to inform you that the permit revisions address our objections to prior permits received by the EPA, and the State's plan meets the water quality goals in our September 3, 2010, Amended Determination (AD) and establishes an enforceable framework for ensuring compliance with the Clean Water Act (CWA) and its applicable regulations.

Implementation of the State's plan would represent a significant and historic milestone in restoring America's Everglades. The September 3, 2010, AD, developed in response to the April 14, 2010, order of U.S. District Court Judge Alan A. Gold, provided a comprehensive blueprint under the federal CWA for improving water quality in the Everglades, a critical building block for Everglades restoration. We applaud the State's decision to develop a detailed water quality plan that builds on and responds to the AD and to collaborate closely with the EPA in assuring that the plan is technically sound and enforceable. Due to our collective efforts, the plan establishes for the first time a science-based protective water quality-based effluent limit (WQBEL) on phosphorous discharges into the Everglades, additional water treatment projects to remove excess phosphorous to achieve that limit and a robust plan of monitoring and scientific research to confirm that water quality improvement is moving forward. Under EPA Administrator Lisa P. Jackson's leadership, and now Governor Scott's leadership, these critical measures will launch a new era in Everglades restoration that I believe will fulfill the expectations of Judge Gold, and the hopes of many others concerned about the health of the Everglades, for strong action to expedite the final necessary steps to restore Everglades water quality.

By their incorporation into the revised NPDES permit, the WQBEL, detailed project descriptions and schedule of deadlines in the State's plan would be legally binding on the SFWMD and enforceable by the State and the EPA under the CWA. The EPA intends to remain an active partner with the State in overseeing implementation of the plan through the mechanisms for consultation and reporting established in the permit and framework agreement and is committed to working with the State to assure timely completion of the remedy projects and achievement of the WQBEL. We will explore with the

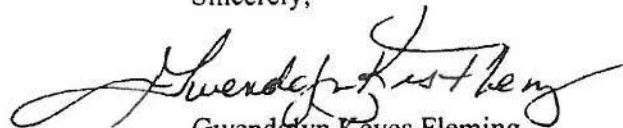
Florida Department of Environmental Protection and the SFWMD, opportunities to accelerate work called for by the plan, if practicable, so that the WQBEL might be achieved more quickly.

As you know, the Obama Administration has reinvigorated the federal government's commitment to Everglades restoration, both in terms of water quality and water quantity and distribution. The federal government is investing more than \$1.4 billion in partnership with the State including: restoration of more than 3,000 acres of the floodplains along the Kissimmee River; bridging of the Tamiami Trail to facilitate water flows to Everglades National Park; and implementation of key components of the Comprehensive Everglades Restoration Plan to deliver more clean water to the Everglades. The State's water quality plan would complement the other State and federal habitat restoration and water quantity and quality projects that together will provide for a comprehensive restoration of this international treasure.

I appreciate the many months of dedicated effort, coordination and cooperation by your staff as we worked together to reach a technical consensus on enhancements to the Governor's original water quality plan that would meet the water quality goals of the AD. This collaboration has brought us to a momentous turning point in Everglades restoration, and I know we are all eager for the work in the State's plan to begin.

Enclosed is a summary of our review of the responsiveness of the revised NPDES permit (and proposed consent order) to the EPA's objections as modified by our May 7, 2012, letter. Please note the EPA will review the draft permit when it goes to public notice to ensure it is consistent with the revised permit.

Sincerely,



Gwendolyn Keyes Fleming
Regional Administrator

Enclosure

cc: Ms. Melissa Meeker
Executive Director, South Florida Water Management District

ENCLOSURE

Environmental Protection Agency Review of the Florida Department of Environmental Protection's Revised Permit and Consent Order

On June 6, 2012, the Florida Department of Environmental Protection submitted a revised permit, a proposed consent order as well as supporting permit documents in response to our May 7, 2012, letter. That letter notified the FDEP of the modified terms by which the Stormwater Treatment Areas (STA) National Pollutant Discharge Eliminations System (NPDES) permits would need to be revised to meet our June 27, 2011, objections. On June 8, 2012, the FDEP provided a permit replacement page correcting unintended scrivener's errors in the June 6, 2012, submission that were subsequently identified by the FDEP. Based on review of the June 6 and 8 submittals and as detailed below, the revised permit submitted by the State meets the terms of the U.S. Environmental Protection Agency's objections. As a result, under Clean Water Act (CWA) Section 402(d)(4) and Title 40 of the Code of Federal Regulations (C.F.R.) at sections 123.44(h)(2) and (3), exclusive authority to issue the NPDES permit for the five STAs continues to reside with the FDEP and does not pass to the EPA. The EPA also reviewed the proposed consent order to confirm that it does not change obligations under the permit as revised to meet the objections.

The EPA understands that the FDEP intends to expeditiously proceed to public notice the revised STA NPDES permit and complete the issuance process. The EPA sees no impediment to issuance of final permits upon completion of the State's administrative process. The EPA believes that doing so is consistent with the direction in paragraph 3 of Judge Gold's April 14, 2010, order that the existing STA permits be conformed in a manner consistent with the CWA, the Court's Orders and the Amended Determination. Please note, the EPA will review the draft permit that goes to public notice to ensure it is consistent with the revised permit. Further review by the EPA under CWA Section 402(d) will be consistent with 40 C.F.R. 123.44 and section IV.B of the NPDES Memorandum of Agreement between the EPA and the FDEP.

I. Specific Objection Regarding Compliance Schedules

To eliminate this objection, the EPA specified that the revised STA permits needed to require that the total phosphorus water quality-based effluent limit (WQBEL) becomes and remains effective and enforceable on the effective date of the permits so that no compliance schedule is allowed. The EPA also specified as a requirement that the FDEP provide an explanation of its authority to issue any such revised permits under State law.

The FDEP submitted a revised permit that would authorize discharges from all five STAs. Unlike the permits submitted to the Court on November 3, 2010, by the FDEP, the revised permit explicitly would provide that the WQBEL becomes and remains effective and fully enforceable upon the date of issuance of the permit. It also would specifically provide that it becomes and remains effective and fully enforceable "during implementation of the corrective actions in Paragraph 10" of the proposed consent order. Similarly, Paragraph 9 of the proposed consent order confirms that it "does not alter the obligation to comply with the WQBEL for phosphorus in Section I.A.1 of the permit upon its effective date." Thus, the proposed consent order would not delay the effectiveness of the WQBEL. Because the corrective actions and deadlines of the consent order are expressly incorporated into the revised permit, the EPA could take action at any time the WQBEL is not met and present circumstances change, project actions and deadlines are not met or if there are other violations of the permit.

While the EPA recognizes that the FDEP would enter into an enforcement order on consent with the South Florida Water Management District (SFWMD), there is a major difference between this proposed

order and the Administrative Orders (AOs) with compliance schedules that superseded the numeric limits in the pre-existing NPDES permits. Unlike the AOs with compliance schedules, the proposed consent order would not allow for deferral of the applicability of the phosphorus WQBEL while an STA is in “stabilization.” The FDEP revised permit also would differ from previous STA permits by removing references to STA “stabilization.”

Based on the above and because the revised permit specifies that the phosphorus WQBEL becomes and remains effective and enforceable on the permit effective date, the FDEP revised permit meets this objection.

In a legal analysis accompanying its June 6, 2012, transmittal, the FDEP also responded to the EPA’s request to explain its authority to issue revised STA permits under State law. The FDEP cited several sources of statutory authority in this case, including Florida Statutes at sections 403.061(6) and (8), 403.151, 120.57(4) and 403.088(2). These provisions provide the FDEP with the authority to develop and enter into the proposed consent order to: (1) address the permit violation that is anticipated upon issuance; (2) include appropriate corrective actions and an enforceable schedule to address and resolve those violations; and (3) issue a consent order in conjunction with the permit. The FDEP also cited a State administrative law decision that upheld the assertion of this authority in a circumstance similar to the scenario proposed by the FDEP here. The FDEP has indicated that issuance of the proposed consent order with the corrective actions that are necessary to achieve permit requirements would provide the “reasonable assurance” that permit requirements will be met and thus satisfy State law permitting requirements.

II. Specific Objection Regarding “Diversion” versus “Bypass”

In its June 27, 2011, letter, the EPA objected to the provision in the permits that would have defined “diversion” as water that enters the “headworks” of each STA, but would not be treated at that facility on the grounds that this was inconsistent with the applicable “bypass” regulation in State and federal permitting regulations. The EPA also objected on the basis that unanticipated diversions, which would not have been bypasses, would not need to be reported within the appropriate time frame. In its May 7, 2012, letter, the EPA modified the terms of the objection, specifically the steps necessary to meet the objection in recognition that flows passing through the specified “gated structures” that are identified in the permits are not necessarily flows entering the “treatment facility,” i.e., the STA, for treatment. To eliminate this objection, the EPA specified that the revised permits include in the Project Description the same level of detail that is used in the most current STA NPDES permits. The EPA also stated that the revised permits needed to retain language that would disallow the use of diversions to meet the phosphorus WQBEL, would require the reporting of reasons for diversions and would require monitoring and reporting of the flow volumes and phosphorus concentrations in diversions to the Everglades. The EPA also indicated that its review of any revised permits would focus on whether the FDEP’s permit provisions provide for enforceable oversight of the permittee’s decisions by the FDEP so that there could be enforceable consequences for improper diversions.

Section VIII.22 of the revised permit defines “bypass” as “...the intentional diversion of waste streams from any portion of the treatment works.” That definition of “bypass” is consistent with State and federal regulations. The “Project Description” and “Surface Water Discharge” portions of the revised permit and pages 1 through 10 of the revised permit Fact Sheet submitted by the FDEP then specifically define where surface water enters each STA treatment cell and flow-way and provide sufficient detail regarding what constitutes each STA “facility.” Further, the “Project Description” portion of the revised permit and Permit Section I.E.10 specify those structures through which surface water would be diverted and for which treatment in each STA would not be provided. Those diversion structures are thus defined

separately from the treatment works of each STA.

As a result, the revised permit effectively defines each STA “facility” such that “diversions” constitute only water that does not enter the STA treatment works. With the clarifications to identify the treatment facility for each STA, such diversions would not be “bypasses” and the basis for the EPA’s objection no longer exists. Part I.E.10 of the revised permit also contains a provision that disallows the use of diversions to meet the phosphorus WQBEL. Permit Section I.E.10 further would require monitoring and reporting of the flow volumes and phosphorus concentrations in all diversions to the Everglades, as well as the reasons for the diversions. Thus, the FDEP revised permit meets this objection. The EPA finds that the revised permit provisions do allow for the FDEP enforceable oversight of improper diversions.

III. Specific Objection Regarding Necessary Annual Reporting Requirements

In its June 27, 2011, letter, the EPA objected to the omission of several important components of previously required annual reports, including (1) assessment of STA inflow volumes and total phosphorus loads relative to the anticipated operational envelope; (2) whether the STA operated inside or outside the operational envelope; and (3) source control implementation, performance and, if needed, schedules and strategies for further source controls. In its May 7, 2012, letter, the EPA modified the terms of the objection related to the steps necessary to meet the objection, specifically to identify alternative ways to meet some of the steps, and to delete one of the steps.

To eliminate this objection, the EPA specified that revised permits needed to include at least annual reporting mechanisms that identify what corrective actions were undertaken if a potential phosphorus WQBEL exceedance was identified during the reporting year, as well as corrective actions that would be undertaken if an exceedance did occur at the end of the reporting year. The EPA also specified that revised permits needed to require annual reporting of improvements, enhancements and other strategies applied to the STAs and regional water management systems that will be undertaken to ensure compliance with the permit. Thirdly, the EPA specified that revised permits needed to require (1) annual reporting of source control implementation (including best management practices (BMPs) in contributing Basins and (2) monitoring in Basins (other than the Everglades Agricultural Area Basin (EAA) and the C-139 Basin) that do not presently include source controls if such programs are necessary in the event that phosphorus loads to the STA from these basins limit the STA’s progress towards achieving the WQBEL. The objections stated that the revised permits also needed to require assessment of the performance of source controls and BMPs within the EAA Basin and C-139 Basin. For these two Basins, the EPA further stated that annual reports needed to include total phosphorus loads from within each Basin, describe trends, and compare current loads to those necessary to achieve the WQBEL.

Regarding the first action specified above to eliminate the objection, Permit Section I.A.6 would require mid-year reporting of the total phosphorus flow-weighted mean (FWM). If that mid-year report value exceeds the 19 parts per billion (ppb) annual FWM component of the phosphorus WQBEL, that report would include an assessment of the conditions responsible for the observed concentrations and any immediate steps to be taken to address future compliance for that STA with that component of the WQBEL. Permit Section I.A.7 further requires that if the 19 ppb component of the phosphorus WQBEL is exceeded at the end of a given water year, the annual report would include an assessment that identifies the circumstances that led to the exceedance, what actions were taken based on the mid-year report, if applicable, to address the findings of that assessment and a Recovery Plan that identifies specific strategies and milestones to address future compliance with that component of the WQBEL. Permit Sections I.A.8-10 specify analogous mid-year and annual reporting and follow-up requirements if the longer-term 13 ppb component of the phosphorus WQBEL is exceeded.

The proposed consent order would modify these reporting requirements, but would do so in a way to remain consistent with the permit revisions to meet this objection. Under the proposed consent order and permit, until the corrective actions in Paragraph 10 of the proposed consent order are completed, the consent order would require more frequent reporting than the reporting that would otherwise be required by Permit Sections I.A.6-10. The proposed consent order would require a weekly STA performance summary report that provides inflow volumes, inflow FWM total phosphorus concentrations, outflow volumes, outflow FWM total phosphorus concentrations for the prior 7-day, 28-day and 365-day period of record and inflow and outflow total phosphorus load for the prior 28-day and 365-day period of record. The weekly report would also include the 365-day loading rate, 6-month trend in outflow total phosphorus concentrations and concentration, load and flow in comparison to the period of record observed conditions. The consent order would further require that the SFWMD consult with EPA and FDEP representatives on a semi-annual basis to evaluate STA performance. The SFWMD would then determine what, if any, operational changes may be implemented to ensure compliance with the Operational and Pollution Prevention Plans. When the corrective action deadline for a given flow-path is completed, applicable reporting requirements would revert from the consent order to the permit. The EPA acknowledges subsequent communication from the FDEP that the version of Permit Section I.A.5 that is submitted for public notice will reflect a clarification on how this provision operates.

The reporting required in the revised permit, as well as the more comprehensive and frequent reporting required by the proposed consent order, is sufficiently detailed and equivalent to, or more stringent than the reporting specified by the EPA in our objection. Thus, based on review of these revised permit and proposed consent order provisions, the FDEP revised permit meets this objection.

Regarding the second action described above to eliminate the objection, Permit Section I.E.6 would require annual reporting of improvements, enhancements and/or regional water management projects initiated or completed. That Permit Section further requires annual reporting of whether revisions and/or improvements and enhancements to the facility or regional water management system are recommended, as necessary, to ensure compliance with the conditions of the permit. Because these permit provisions are sufficiently detailed and would encompass what the EPA specified in our objection, the FDEP revised permit meets this objection.

Regarding the third action described above to eliminate the objection, Permit Section I.E.6 would require annual reporting of implementation of regional activities by Basin such as BMPs, current phosphorus loads and trend analysis of flows and loads to the STAs. Since the revised permit would contain all the elements specified by the EPA, the FDEP revised permit meets this objection.

IV. Specific Objection Regarding “Early Warning” Reporting Requirements

In its June 27, 2011, letter, the EPA objected to the failure to include “early warning” reporting provisions in any water year where the annual FWM value is likely to be exceeded (because such reporting would provide a basis for mid-year corrective actions to prevent not meeting the annual FWM in the first year). The May 7, 2012, letter modified the steps necessary to meet the objection to specify that the revised permits would need to require mid-year early warnings.

As detailed in Part III above, for both phosphorus WQBEL components, the revised permit would require the reporting of mid-year early warnings, an assessment of the circumstances that contribute to anticipated phosphorus concentrations above the WQBEL, the actions taken since the mid-year early warning to address the exceedance and a Recovery Plan to re-establish achievement of the phosphorus

WQBEL. Also, as indicated in Part III above, the proposed consent order would establish even more frequent detailed weekly reporting of various STA performance parameters, semi-annual consultation of STA performance with EPA and FDEP representatives and changes as needed to Operational and Pollution Prevention Plans. As such, the FDEP revised permit meets this objection.