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.
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> **[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;
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> (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
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> (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.
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> *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 <u>will</u> 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 quality 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.
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> **[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 permits 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 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.**
>
> **[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 NPDES 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 "to 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 SFWMD 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 <u>new</u> NPDES permits** for discharges into, or within, the Everglades Protection Area, **or for any further modifications to <u>existing</u> 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]

APPENDIX A

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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

Attachment 1 – Revisions to Amended Everglades Forever Act

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.

Attachment 2 – Revisions to Phosphorus Rule

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.