UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
LEAD CASE NO. 04-21448-CIV-GOLD
(CONSOLIDATED WITH 04-CV-22072, 05-CV-20663)

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*

Defendants.

FRIENDS OF THE EVERGLADES,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*

Defendants.

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ORDER GRANTING PLAINTIFFS' MOTIONS [DE 357]; [DE 364] IN PART; GRANTING EQUITABLE RELIEF; REQUIRING PARTIES TO TAKE ACTION BY DATES CERTAIN

I. Introduction

Plaintiffs, the Miccosukee Tribe of Indians of Florida ("the Tribe") and Friends of the Everglades ("Friends"), have filed various motions for contempt or to otherwise compel the State and Federal Defendants to comply with this Court's July 29, 2008 Summary Judgment Order[1] **[DE 357, 364]**. The Tribe and Friends, as well as Defendant the United

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[1] In an Order entered on July 29, 2008 **[DE 323]** ("the Summary Judgment Order"), I concluded that the Environmental Protection Agency ("EPA") acted contrary to the Federal Clean Water Act, 33 U.S.C. § 1251, *et. seq.* ("CWA") or ("Clean Water Act") and the Federal Administrative Procedures

States Environmental Protection Agency ("the EPA")[2] and the Intervenor Defendants – i.e., the Florida Department of Environmental Protection ("FDEP"), New Hope Sugar Company and Okeelanta Corporation – have submitted numerous filings, exhibits, and memoranda in support of their varying positions. *See, e.g.,* **[DE 360, 363, 366, 371, 372, 375, 377, 387, 389, 390, 391, 392, 393, and 395]**. A two-day evidentiary hearing was held on January 13 and April 5, 2010 ("Contempt Hearing"). For the reasons that follow, I grant the Plaintiffs' motions in part, impose further equitable relief, and require compliance with the milestones set forth in this Order.

II. Findings of Fact

1. The Nation and the State of Florida have recognized the Everglades as a national treasure which requires our utmost protection. After years of study, the State of Florida has determined that the best technology available to protect the remaining Everglades is through the use of Storm Water Treatment Areas, which filter upstream discharges before they enter the Everglades Protection Area.

2. Upstream discharges containing high levels of phosphorus and other nutrient

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Act. 5 U.S.C. § 701, *et. seq.* ("APA") or ("Administrative Procedures Act") when it determined that the 2003 amendments to Florida's Everglades Forever Act and the accompanying Phosphorus Rule did not change water quality standards in the Everglades Protection Area. I remanded with direction to the EPA, and enjoined the FDEP from granting permits that allowed discharges into, or within, the Everglades Protection Area based on the invalidated provisions and from otherwise enforcing the invalidated provisions. *See generally, Miccosukee Tribe of Indians of Florida v. United States*, 2008 WL 2967654 (S.D. Fla. July 29, 2008) (cited throughout as "**[DE 323]**").

[2] The Tribe and Friends have brought consolidated cases against the United States, the United States Environmental Protection Agency, the Administrator of the EPA, and the Regional Administrator of the EPA, Region IV. All are collectively referred to in this Order as "the EPA."

pollutants enter the Everglades Protection Area[3] through six existing Storm Water Treatment Areas ("STAs") known as STA-1W, STA-1E, STA-2, STA-3/4, STA 5 and STA-6. The purpose of the STAs is to remove phosphorus and other nutrients from the upstream waters before they enter the Everglades Protection Area.[4]

3. While the State of Florida and the United States have spent considerable resources on constructing the STAs, the STAs have only managed to slow, but not stop, the rate of destruction within the Everglades Protection Area. The hard reality is that ongoing destruction due to pollution within the Everglades Protection Area continues to this day at an alarming rate.

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 10 parts per billion of phosphorus ("ppb"). In federal Clean Water Act terms, the 10 ppb standard is referred to as a water quality based effluent limitation ("WQBEL"). *See* note 5, *infra.* The STAs currently do not meet this vital standard. At best, the State of Florida and the EPA anticipate that, in 2016, the STAs may be operating with technology based effluent limitations ("TBELs"), which provide significantly less protection.[5]

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[3] The Everglades Protection Area (as defined in the 1994 EFA) covers approximately 3,500 square miles and consists of the Everglades National Park, the Loxahatchee National Wildlife Refuge and Water Conservation Areas 2A, 2B, 3A and 3B. **[DE 323, p. 5]**.

[4] As summarized at the Contempt Hearing by expert witness Dr. Terry Rice, the purpose of the STAs was to " . . . meet the criteria which would stop the destruction of the Everglades." **[DE 380, p. 58]**.

[5] Mr. Michael Phillip Coram, from the FDEP, testified that TBELs establish the minimal level of treatment required for any particular category or source pollutant from an industrial facility. **[DE 380, p. 144]**. WQBELs – also referred to as QBELs – are water quality based effluent limitations

5. According to the 2010 South Florida Environmental Report, as confirmed by expert testimony at the Contempt Hearing, all the STAs allow significant discharges into the Everglades Protection Area that exceed the 10 ppb limitation. **[DE 375-1]**. Specifically, for the period of May 1, 2008 through April 30, 2009, the flow-weighted mean outflow for total phosphorus was as follows: 21 at STA -1E; 36 at STA-1W, 18 at STA-2, 13 at STA 3/4, 56 at STA 5, and 93 at STA-6. STA 1E is the largest of the six STAs.[6] *Id.* at 3. All of the STAs, except STAs 3 and 4, operate in the "Stabilization Phase," which will end when the respective STA achieves the annual total phosphorus limits as defined in the TBELs. STAs 3 and 4 are in the "Routine Operations Phase." *Id.* at 5. But even the lesser protection of TBELs do not apply until the STA is in the "Routine Operations Phase." *Id.* In other words, there are currently **no** effluent limitation limits in effect **at all** for STAs 1E, 1W, 2, 5 and 6. *See id.*

6. In 2005, the EPA prepared a comprehensive study of the Everglades known as the REMAP Report. According to REMAP, the extent, and rate, of destruction of the Everglades has increased from 1995 - 2005, with the percentage of Everglades Protection Area soils affected by phosphorous jumping from 33.7 percent to 49.3 percent during that ten-year period. **[DE 380, pp. 43, 241]**. EPA has not updated its report since 2005. There are no available studies and related mapping of the Everglades Protection Area that accurately locates and measures the current rate of decline and the additional areas

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necessary for discharges not to cause a violation of water quality standards. *Id.* at 147.

[6] The STAs were constructed without a final numeric phosphorus standard in place. They initially were designed to meet 50 ppb in the first phase (by 1996). This was later changed so that the STAs would meet 50 ppb by 2002, and that all STAs would be retrofitted to meet the numeric phosphorus criteria by December 31, 2006. This has not occurred.

affected.[7] Nonetheless, data extrapolated from the STA discharges supports the expert conclusions at the Contempt Hearing that the rate of destruction of the Everglades due to excessive phosphorus discharge is significant, grave, and unacceptable.[8] As explained by

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[7] Mr. Frank L. Nearhoof, of the FDEP, has been working on Everglades related issues since the early 1990's, including on the STAs and their associated state and federal permitting. He disagrees with Drs. Rice and Jones that the loss of the Everglades from phosphorus intrusion is "irretrievable." **[DE 380, p. 241]**. I give little weight to his testimony, as it is contrary to the greater weight of scientific evidence as presented by Dr. Terry L. Rice and Dr. Ronald D. Jones, whom I find more qualified to offer expert opinions. Mr. Nearhoof holds only a Master of Science in Oceanography. His acceptance as an expert has been limited to statistical evaluation of water quality data.

Mr. Nearhoof acknowledged at the Contempt Hearing that FDEP has not completed any scientific studies with the STAs in place to determine the anticipated soil phosphorus levels through 2009. I inquired: ". . . if that 49.3 percent figure continued to move significantly higher even with the STAs in place, that would be real grounds for concern?" Mr. Nearhoof responded: "Yes, your Honor, I believe it is." **[DE 380, p. 242]**. He then conceded that FDEP has done no computer modeling to ascertain the effect of additional phosphorus intrusion through 2016. I further inquired: "But isn't it necessary to have an overall study of the potential effects of the 2016 date based on what has been occurring so far to know whether or not the Everglades is as endangered as you have heard from other witnesses?" Mr. Nearhoof responded: "Yes. We do actually have . . . that research is ongoing . . . I do not think we are exactly flying in the dark, but I can't give you like much complicated science." *Id.* at 243-44. I then asked Mr. Nearhoof about the consequences of being wrong: **"If you are wrong, [aren't] the consequences [] pretty dire out there . . . ?"** He answered: "I think you will have – **yes, they would have further impacts which would be highly undesirable in a system we are trying very, very hard to protect** and the State of Florida has remained committed to this even in tough economic times and, again, we are working very hard at it. **Unfortunately, we have not solved the scientific problem just yet.**" *Id.* at 245 (emphasis added).

[8] Dr. Terry Rice, the former head of the Army Corps of Engineers in Jacksonville, Florida, testified at the Contempt Hearing that the Everglades is currently experiencing significant destruction because the State of Florida is not meeting the agreed-upon criteria to protect it. He stated: " . . . I do believe that is grave and I think that has been confirmed not just by the Miccosukee Tribe of Indians . . . but [also by] the National Academy of Sciences, [which] just put out a report in September 2008 that said if we didn't stop this irreversible damage, there may be no Everglades to save soon." **[DE 380, p. 65]**.

Dr. Ronald D. Jones, an acknowledged Everglades expert, confirmed this conclusion. I find his testimony credible and persuasive. He stated at the Contempt Hearing, in response to the question of what is happening today to the Everglades: "The destruction continues. The study that we did for REMAP shows the increase in soil concentrations of phosphorus over a ten-year time. It has increased by 50 percent. . . . [C]attails are continuing to expand in the Everglades and once

Dr. Terry Rice at the Contempt Hearing,

> So, we have now increased by 30 percent the amount of the Everglades that has been irreversibly damaged. If we allow continual discharge of this pollutant into the Everglades, into impacted areas which expand into unimpacted areas which become laden with phosphorus, that is irreversible damage. In my mind, that is unreasonable given the fact that it supposed to be stopped. We are supposed to be restoring the Everglades, not just stopping it and we haven't even stopped the damage, yet.
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> **[DE 380, pp. 42-43]**.

7. The State of Florida, in the 1994 Everglades Forever Act, Section 373.4592, Florida Statutes, committed itself to a twelve-year construction program to fix the problem and to meet the 10 ppb standard. The Everglades Forever Act assured that "**in no case**" shall the State's 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 and fauna. Fla. Stat. § 373.4592(4)(e)(2), Florida Statutes (1994). The EPA, in 1999, accepted the State of Florida at its word and so has the United States District Court for the Southern District of Florida. In hearing after hearing, promises have been made that if an extension until December 31, 2006 was granted, the deadline would be met.

8. By 2003, it was apparent to all that the State's promise would not be met. Rather than directly saying this, the State of Florida, with the approval of the EPA, departed

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you get cattails, those are the markers on the grave of the Everglades. **They don't go away, the damage is permanent and it is very important that we get the pollution stopped as soon as possible and that is just not happening**." *Id.* at 86 (emphasis added).

When asked if the current discharges from the STAs were "destroying the quality of the receiving water," he restated: **"[The] destruction continues. The water that is coming out of the STAs . . . even when they meet the final technology based standard [as compared to meeting the numeric Phosphorus Criteria] . . . will continue to destroy the Everglades**." *Id.* at 90 (emphasis added).

from prior commitments by changing the state law to move the target date for compliance from December 31, 2006[9] to 2016, and by loosening the standards for compliance through "moderating provisions." It did so by legislation and rule-making that was so complex as to be incomprehensible to lay persons. None of the governmental agencies involved directly told the public the hard truth: we have not solved the problem, we do not know for sure when the problem will be solved, and we do not know if the Everglades will survive by the time we can meet the 10 ppb standard (if at all).[10] If any clarity has come from the Contempt Hearing, it is this: any meaningful effort to save the Everglades will take continued will, focused expertise, and a "heavy lift" in difficult economic times.[11]

9. In my Order Granting Summary Judgment **[DE 323]**,[12] which is now final, I spent 101 pages addressing the parties' numerous cross-motions for summary judgement which went to the legality of the State of Florida's 2004 Amendments to the Everglades Forever Act, the State's adoption of the implementing "Phosphorus Rule," and the EPA's illegal determinations under the Federal Clean Water Act. As I explained at length in the

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[9] The date of 2016 was the estimated date when many of the Everglades construction projects were anticipated to be completed. **[DE 380, pp 234-35]**.

[11] In a column entitled *Falling Further Behind*, Bob Herbert recently wrote that "[s]chools, highways, the electric grid, water systems, ports, dams, levees-the list can seem endless-have to be maintained, upgraded, rebuilt or replaced if the U.S. is to remain a first-class nation with a first-class economy over the next several decades . . . . But these systems have to be paid for, and right now there are not enough people at the higher echelons of government trying to figure out the best ways to raise the enormous amounts of money that will be required, and the most responsible ways of spending that money. And there are not enough leaders explaining to the public how heavy this lift will be, and why it is so necessary, and what sacrifices will be required to get the job done properly." Bob Herbert, Op-Ed., *Falling Further Behind*, N.Y. Times, Feb. 20, 2010.

[12] I incorporate my Summary Judgment Order **[DE 323]** by reference into this Order.

Summary Judgment Order, the effect of the state law was to postpone the enforcement of WQBELs until the year 2016. I unequivocally concluded that this was unacceptable and contrary to the federal Clean Water Act.

The length of the Summary Judgment Order was a function of the complexity of the issues addressed and the matters at stake. After much discussion, I concluded that the State of Florida and the EPA violated the Clean Water Act in failing to protect the Florida Everglades. I told the EPA and the State of Florida the bottom-line: that *de facto* suspension of enforcement and compliance with state water quality standards for an indeterminable period is a result that cannot be permitted under the Clean Water Act. I required each to act in a manner consistent with the Clean Water Act and **with the findings and conclusions** set forth in the Order.[13]

10. I first address the EPA's actions subsequent to the issuance of the Summary Judgment Order. Although I unambiguously ordered the EPA to require the State of Florida to comply with the Clean Water Act in a manner consistent with the Order, the EPA's recent 2009 Determination has failed to do so. Instead, the EPA has chosen to read the Order in the narrowest possible of terms by picking and choosing isolated phrases. The EPA then relies on its own narrow interpretation of these phrases to avoid compliance. I express in the strongest possible terms my frustration and disappointment.

Even independent of the Summary Judgment Order, the Clean Water Act itself

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I concluded that the Amendments to the Everglades Forever Act changed Florida's previous water quality standards. I ordered the EPA to approve or disapprove those changes in a manner consistent with the findings and conclusions set forth in the Order. **[DE 323, p. 99]**. With respect to the Phosphorus Rule, I ordered the EPA on remand to comply with its duty under the Clean Water Act to approve or disapprove the changes addressed in a manner consistent with the findings and conclusions of the Order. *Id.* at 100.

"**requires** EPA to determine whether [a] standard is 'consistent with' the Act's requirements" and provides that 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. § 1313(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.[14] *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).

11. Before addressing the EPA's 2009 Determination (discussed in Paragraph 12 below), I return to the Summary Judgment Order and review my findings and conclusions,

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[14] It also bears mentioning that "EPA can override state water quality standards by changing the effluent limits in NP[D]ES permits whenever a source interferes with water quality." *Miss Comm'n on Natural Res.*, 625 F.3d at 1276. This important principle is discussed in more detail in my Conclusions of Law. *See* Section III(B), *supra.*

with which the EPA was required to comply. Despite its length, the Summary Judgment Order was clear and to the point. I found and concluded that the compliance deadline of December 31, 2006 for the narrative and nutrient phosphorus standards in the Everglades had come and gone. I told the EPA that it acted arbitrarily and capriciously by allowing the State of Florida to extend the December 31, 2006 compliance deadline for meeting the phosphorus criterion for ten more years. I stated:

> Contrary to the Environmental Protection Agency's written Determinations, it is my view that the Florida Legislature, in 2003, by adopting the State's draft Long-Term Plan, as proposed by the South Florida Water Management District's Governing Board, changed water quality standards under the Federal Clean Water Act, and violated its fundamental commitment and promise to protect the Everglades, by extending the December 31, 2006 compliance deadline for meeting the phosphorus criterion for at least ten more years. Turning a 'blind eye,' the United States Environmental Protection Agency ("EPA") concluded that there was no change in water quality standards. The EPA is patently wrong and acted arbitrarily and capriciously in reaching its conclusion. It did so by simply reading the words of specific sections of the Amended Everglades Forever Act ("Amended EFA"), rather than by connecting the dots to analyze its true effect. Its review is nothing more than a repeated imprimatur, *i.e.* acceptance without independent analysis, based on the State of Florida's representation that the EFA Amendments did not change water quality standards.
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> **[DE 323, pp. 2-3]**.

I told the EPA it had to consider the "effects of these changes on the Everglades Protection Area as a whole, and on the requisite 'propagation and maintenance of a healthy, well-balanced population of fish and wildlife,' as required for Class III Florida waters." *Id.* at 3. I warned the EPA that it could not reserve its CWA review by "kicking the can down the road to individual permits." *Id.* Quoting from the First Circuit's decision in *Debois v. Dep't of Agric.*, 102 F.3d 1273, 1300 (1st Cir. 1996), I explained:

> Simply put, the CWA provides a federal floor, not a ceiling, on environmental

> protection. If a state seeks to provide a standard that is less stringent than the federal Clean Water Act's floor, or seeks to apply a standard in a way that is otherwise invalid under federal law, then federal agencies and federal courts are obligated to resolve the application of the federal Clean Water Act in any case that properly comes before it.
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> **[DE 323, pp. 78-79]**.

I criticized the EPA for not complying with the CWA because "the EPA [did] not consider, in its 2003 Determination, whether the new Amended [Everglades Forever Act] deadline can be met, or whether reliable scientific evidence demonstrates that the Everglades can withstand ten more years of discharges that are not protective." *Id.* at 58-59 n. 43. I noted that "instead of addressing the hard questions, the EPA arbitrarily concluded that the deadline did not change." *Id.* at 77. 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." I directly said;

> The EPA arbitrarily characterizes the type of variance under the [Phosphorus] Rule as "short-term," but that is in direct contradiction to the fact that the variance procedure under the Rule is to be applied for a period of at least 10 years, though 2016. It is irrational to consider this "short-term" when, at the same time, the EPA categorically acknowledges that any discharge above the 10 ppb standard is not protective of the Everglades. Besides, as we have seen the total cumulative **blanket variance** since the enactment of the EFA is 22 years.
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> *Id.* at 67 n. 49 (emphasis added).

I made clear to the EPA – in no uncertain terms – that its conclusions were arbitrary, capricious and not in accordance with law. I directly stated that the State of Florida's reliance on moderating provisions and an extended 2016 compliance schedule, without first performing a "use attainability analysis," was a **blanket variance** and contrary to the Clean Water Act. *Id.* at 70. I told the EPA "[its] conclusions are not in accordance with law

because the CWA does not allow State water quality standards to be replaced with 'across-the-board' technology based effluent limitations, regardless of results, **with an open-ended compliance schedule**." *Id.* at 43 (emphasis added). I said that "the 'effect' of the Amended EFA . . . is to replace the narrative and numeric phosphorus criterion with an **escape clause** that allows non-compliance, by virtue of both an extended compliance date, and during the extension, a lesser state water quality standard of compliance, namely compliance with the Long-Term Plan and 'TBELs.' " *Id.* at 46 (emphasis added). I then set aside the EPA's 2003 Determination, striking down the "*de facto* moratorium," directing the EPA to enforce the CWA, and stated as follows:

> For all these reasons, the Amended EFA changes Florida's water quality standards by authorizing continuing violations of the narrative and numeric criterion for phosphorus and other nutrients. By allowing continued harmful discharges of nutrients into the Everglades, the Amended EFA also violates the state's anti-degradation policy. The results of the EPA's position is to vacate its prior 1999 Determination and to ensure that the *de facto* suspension of enforcement and compliance with state water quality standards will continue for an indeterminable period, **a result that cannot be permitted under the CWA**."
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> **The EPA has condoned, without requisite analysis, a *de facto* moratorium on compliance with the phosphorus criterion for an entire class of dischargers who implement BAPRT at least through 2016.** The extension and expansion of this compliance schedule through the Amended EFA and the Rule beyond the December 31, 2006 date, as previously approved by the EPA, is a change to water quality just as the original 1994 EFA compliance schedule constituted a change. The EPA had a duty to analyze whether the ten additional years (or more) to meet the 10 ppb phosphorus criterion was "reasonable" under the CWA, just as it did in its 1999 Determination on the significant delay wrought by the 1994 EFA, which at the time it was passed allowed twelve years for compliance. At that time, the EPA addressed the question "[d]oes Florida's narrative nutrient criterion, as amended by by the compliance schedule, still satisfy CWA section 303(c)(2)(A) and 20 C.F.R 131.11?" and [d]oes the record support the compliance schedule as reasonable?" This same question is still pertinent

and unanswered in terms of the Amended EFA and Phosphorus Rule.

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> Finally, in its Rule Determination, the EPA fails to mention, let alone consider, the cumulative impact on the phosphorus criterion, the designated use, and the anti-degradation policy of allowing such discharges based on TBELs into the Everglades Protection Area for another ten years, including from farmer permittees within the EAA and the C-139 Basin. In fact, the EPA never considers the effect of subsection 5(d) . . . which allowed farmers to pollute through 2006 and now, by virtue of the Amended EFA and this Rule provision, allows farmers, directly or indirectly, to further discharge into the Everglades Protection Area based upon TBELs establishing through BAPRT without regard to water quality standards through 2016. The significant concerns voiced in Judge Davis' Order, and evaluated in EPA's 1999 Determination have simply dropped off EPA's current radar screen.

Id. at 58, 77-78.

12. The Summary Judgment Order was entered on July 29, 2008 **[DE 323]**. The EPA did not act by issuing a new "Determination of CWA Compliance" until the Tribe and Friends filed a motion for contempt on November 4, 2009 **[DE 356]**. The Tribe's motion was filed **more than one year** after the EPA voluntarily dismissed its appeal before the Eleventh Circuit Court of Appeals and **more than one and one-half years after I entered the Summary Judgment Order**, in which I expressed great frustration that the failure to comply with the Clean Water Act's mandate had lasted for 22 years and was inexcusable. It has now lasted for more than 24 years.

So, what did the EPA do in its 2009 Determination? One thing it did do was to determine that the December 31, 2006 date remains "unchanged" from the "unamended EFA requirements." **[DE 360-1, p. 4]**. It "disapproved" the provisions of the Amended EFA, the Phosphorus Rule and the Long-Term Plan that modified the compliance date. It did specifically conclude, consistent with my Order, that the Long-Term Plan "... **does not**

provide the level of information needed and finality necessary to approve it as a compliance schedule implementing water quality standards." *Id.* at 8 (emphasis added). Further, the EPA determined that the Amended EFA and Phosphorus Rule provisions relating to "moderating provisions" do not comply with the Clean Water Act and the EPA's implementing regulations "[b]ecause these provisions have the effect of removing a designated use without demonstrating that it is infeasible to attain the use as required by 40 CFR §131.10(g) . . . ." *Id.* Notably, it required the State of Florida ". . . to meet the requirements of the Clean Water Act, and its implementing regulations in a manner consistent with this Order, prior to the USEPA's or DEP's approval of any subsequent variance to the Phosphorus Criterion . . . " *Id.* at 10.

I take no issue with this part of the 2009 Determination. In effect, the EPA places the State of Florida in the same position it was in before the Amended EFA and the adoption of the Phosphorus Rule. It declared that the provisions that the Court declared invalid "are no longer in effect for CWA purposes," and told the State of Florida its Long-Term Plan was "disapproved" because it contained "inadequate information" needed and "finality necessary" to approve it as a compliance schedule. *Id.* at 10.

What did the EPA not do? Quite amazingly, the EPA then backed away from doing **anything else** consistent with the Summary Judgment Order, even though I ordered the EPA to " . . . comply with its duty under the Clean Water Act to approve or disapprove those changes **in a manner consistent with the findings and conclusions set forth** in this Order." **[DE 323, p. 99]** (emphasis added). Instead, the EPA concluded, at the end of its 2009 Determination, that "[b]ecause the criterion and implementing methodology

remain in effect for CWA purposes, **there is no need for the state of Florida or USEPA to take any further action pursuant to CWA section 303(c)." [DE 360-1, p. 10]** (emphasis added).

Simply stated, the EPA has failed to analyze the "effect" of the State of Florida's non-compliance and specify the changes necessary for compliance.[15] To say that there is no need for the State of Florida or the EPA to take any further action under the CWA is to abrogate all responsibility under the CWA. It is also directly contrary to EPA's own position taken in its 1999 Determination, in which it required the State of Florida to provide an "**enforceable framework**" which "**ensured**" that the numeric criteria for phosphorus would be met by December 31, 2006 "if not sooner if possible." EPA Sept. 15, 1999 Determination at 9, n. 15 [EFA-AR-8] (emphasis added). The EPA's most recent 2009 Determination now leaves the situation in the Everglades "rudderless."

Nowhere within the 2009 Determination does the EPA again mandate an "enforceable framework" to "ensure compliance," or even acknowledge that the State of Florida is out of compliance with the narrative and nutrient standards in the Everglades since December 31, 2006. The 2009 Determination conspicuously fails to discuss how and when compliance will be met in conjunction with any effective Long-Term Plan that provides enforceable milestones. What remains in the Long-Term Plan is the construction

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[15] In the Summary Judgment Order, I cited to Eleventh Circuit case law establishing that I have the authority to carefully review the "*effect*" of the Amendments to the EFA "on the water quality standards of the Florida." **[DE 323, pp. 37-38]**. On remand, I required the EPA to do no less in requiring the State to comply with the federal Clean Water Act. It is incredible to me that the EPA has chosen not to do so given that its own REMAP Report clearly shows the damage that has occurred from failure to meet the phosphorus criterion.

elements. But even these elements may be affected, if not indefinitely postponed, by the proposed purchase of the U.S. Sugar Corporation's lands as envisioned by the State of Florida. *See United States of America v. South Florida Water Management District*, Case No.: 88-CV-1886-FAM, **[DE 2134, pp. 1-2]** (S.D. Fla. Mar. 31, 2010). No scientific analysis has been conducted to determine if such a purchase, and the related postponement of construction projects to finance it, would either further or hinder achievement of the now mandatory Phosphorus Criteria.

In other words, after all of this litigation, and more than one year after the date of the Summary Judgment Order, the EPA belatedly issued a 2009 Determination that **merely summarizes the provisions of the Amended EFA and the Phosphorus Rule held invalid by the Court**, without providing in any clear, specific and comprehensive instructions to the State of Florida, the FDEP and the South Florida Water Management District as to what the State needs to do to comply with the Summary Judgment Order, its own 2009 Determination, and the CWA. Nowhere in the 2009 Determination does EPA even require the State of Florida to regularly measure the cumulative impacts and effects of non-compliance in the interim.

13. In the meantime, the FDEP continues to issue STA permits to the South Florida Water Management District which offer only marginal protection. The State of Florida, through its Department of Environmental Regulation – and with the blessing of the EPA – justifies non-compliance by falling back on its mantra, now echoed over the past 24 years, that some progress, through "adaptive management," is better than no progress at

all.[16] FDEP's trump card is that if the permits for STA retrofitting are denied, phosphorus would simply continue to increase in the Everglades at a faster rate through the non-retrofitted STAs. In effect, its position throughout these proceedings can be summarized as "some progress is better than no progress at all." The FDEP argues that over a billion dollars has been spent on "cutting-edge technology" and that substantial phosphorus removal already has occurred. 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. As Dr. Rice put it, "[a]daptive management is not an excuse for never accomplishing anything." **[DE 380, p. 61]**. To the contrary, "adaptive management" was intended to provide engineering flexibility to in order "to **meet** [the] deadline [of] December 31, 2006" – it was never intended as an excuse for avoiding it. *Id.* (emphasis added).

14. I turn now to the specifics of the motions before me. In the Summary Judgment Order, I enjoined FDEP "from issuing permits pursuant to those sections of the Phosphorus Rule that I have set aside, and enjoin[ed] FDEP from considering blanket exemptions or variances under the current Phosphorus Rule pending compliance with the CWA and its implementing regulations." **[DE 323, p. 97]**. I further enjoined FDEP "from **enforcing** the 'no action' provision in subsection 4 of the Phosphorus Rule, and from **utilizing** subsection 4 and 5(b)(3) of the Phosphorus Rule to avoid the 10 ppb phosphorus numeric criterion as otherwise established by the Phosphorus Rule." *Id.* (emphasis added). I also "enjoin[ed]

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[16] The FDEP correctly points out that the STAs include over 45,000 acres of treatment area, and an additional 12,000 acres is scheduled to be in place by the end of this calender year. Improvements to the STAs 5 and 6, which are incorporated in prior permits, would allow for the expansion of these two STAs to further improve phosphorus removal performance.

[FDEP] from granting any permits for discharges in, or within, the Everglades Protection Area under subsections 5(b)(3), 5(d) and 6 of the Phosphorus Rule, or the 'no action' provision of subsection 4(d)(2)(c)." *Id.* at 100.

15. The FDEP justifies the continuing violations by relying on invalid provisions that were included in prior permits, even though I also enjoined the FDEP from "enforcing" or "utilizing" those provisions that the Court found invalid **in addition to** prohibiting the future reliance on those provisions. *Id.* at 97. The Summary Judgment Order never condoned the use of State of Florida Administrative Orders that have the same effect as the invalidated portions of the Phosphorus Rule and the Amended EFA. Although the Administrative Orders issued by the FDEP do not specifically cite to the invalidated provisions of the Phosphorus Rule, they nevertheless rely upon the Long-Term Plan as BAPRT which, in turn, provides for TBELs as moderating provisions and for the extended compliance schedule through 2016.

16. The FDEP's new Administrative Orders contain discharge provisions, amend the NPDES permits, and replace the original Administrative Orders issued when the NPDES permits were first issued. A review of these Administrative Orders,[17] and the FDEP's new Everglades Forever Act permits, demonstrates that they contain the disapproved moderating provisions and compliance schedule. Although adopted via separate but

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[17] Annexed to this Order as **"Attachment A"** is a summary of the STA permits at issue. In its 2009 determination, the EPA identified three NPDES permits issued for STAs 2, 5, and 6 on September 4, 2007 as being "consistent with" the Summary Judgment Order. **[DE 360-1, p. 2 n. 2]**. The EPA failed to recognize that the State of Florida had issued Administrative Orders ("AOs") in 2009, after the issuance of the Summary Judgment Order, that amended those NPDES permits. In addition, the State issued new EFA permits (pursuant to Section 373.4592, Florida Statutes), that are governed by the Administrative Orders. The relevant portions of the permits and Administrative Orders are attached as Exhibits to Plaintiffs' Reply in Support of its Motion for Contempt **[DE 363]**.

strikingly similar Administrative Orders for the STAs, the extended compliance schedule is a blanket variance that allows the discharger not to meet the 10 ppb phosphorus criterion through 2016 by relying on BAPRT (i.e., the Long-Term Plan). This extended deadline (i.e., through 2016) was adopted in every permit issued for discharge to the Everglades Protection Area both before, and after, the Summary Judgment Order. These Administrative Orders do exactly what Section 5(d) of the Phosphorus Rule sought to do even though I enjoined its use.[18]

17. More specifically, on March 17, 2009, following the issuance of the Summary Judgment Order, the FDEP issued Administrative Order AO-010-EV for Stormwater Treatment Area 2 (STA-2) "Establishing a Compliance Schedule Pursuant to Sections 403.088(2)(f), 403.061(8), 403.151 and 373.5492, Florida Statutes." **[DE 363-2, p. 1]**. It did so pursuant to its authority to administer Florida's National Pollution Discharge Elimination System Program (NPDES). *Id.* The Administrative Order recites Florida law relative to the Amended EFA, the Long Term Plan, and the Phosphorus Rule (which I invalidated, in part, in the Summary Judgment Order).

The new Administrative Order for STA-2 contains provisions which are mirrored in the Administrative Orders later issued by FDEP for STAs 5 and 6. *Compare* **[DE 363-2]** *with* **[DE 363-4]**. Part II of the Administrative Order includes numerous "findings" which reference the Long-Term Plan as the basis for extending the compliance date through

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[18] Subsection 5(d) provided, in pertinent part, that "[d]ischarge limits for permits allowing discharges into the [Everglades Protection Area] shall be based upon TBELs established through BAPRT and shall not require water quality based upon effluent limitations through 2016." **[DE 323, p. 66]** (citing F.A.C. § 62-302.540(5)(d)).

2016 and allowing for the use of TBELs as moderating provisions. The Administrative Order relies on Florida Statute § 403.088 as the basis for its authority to do so. **[DE 363-2, ¶ ¶ 7-15]**. Part III(II) of the Administrative Order establishes the "interim discharge limits," and Part III(III) establishes December 31, 2016 as a "reasonable time" for compliance. *Id.* at 8-11. It further "orders," in Paragraph 17, that "this Administrative Order, upon issuance, shall supersede and replaces the originally issued [Administrative Order]." *Id.* at 5.

More specifically, the FDEP recognized in Paragraph 8 that a 10 parts per billion numeric criterion for phosphorus exists for the Everglades Protection Area, "as approved by the EPA in 2005." *Id.* at 2. Without reference to this Court's Summary Judgment Order, or the injunction entered against it, the AO states that ". . . discharges may not be able to immediately achieve the permit effluent limit. **This Order provides a reasonable period of time for the District to achieve compliance with the permit effluent limit**." *Id.* at ¶ ¶ 8, 28.[19] (emphasis added).

Ignoring the plain language of the Summary Judgment Order, FDEP justified a compliance date of 2016 by stating, among other grounds, that "[p]ost-2006 improvements, enhancements, and strategies, which will continue through 2016, are also included in the Long Term Plan." *See* **[DE 363-2, at ¶ 10]**. In Paragraph 16 of the AO, FDEP states that

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[19] The Administrative Orders require that the discharges from the STAs "shall meet TBELS based upon BAPRT," and recognize BAPRT as the Long Term Plan. **[DE 363-2, at ¶ ¶ 7, 23]**; **[DE 363-4 at ¶ ¶ 7, 23]**. Discharges need only meet TBELS based upon BAPRT during stabilization, per the Long-Term Plan. *Id.* This directly mirrors the "no action" provision of Section 4(d)(2)(c) of the Phosphorus Rule, which I invalidated and which the EPA, in its 2009 Determination, declared invalid. In addition, contrary to the EPA's position, neither of the AOs for the STA 2 and 5/6 permits has an enforceable WQBEL; they only claim that one will be developed. *Id.* at ¶ 21. Instead, discharges to the Everglades Protection Area that comply with the conditions of the AO, "shall not be deemed in violation of water quality standards." *Id.* at ¶ 30.

"[I]n lieu of the annual average discharge limitation [for phosphorus required in the NPDES Permit for STA 2] the permittee [South Florida Water Management District] shall comply with . . . the conditions as set forth in this Order." Paragraph 17 then states: "This Administrative Order, upon issuance, shall supersede and replace [prior AOs]. Only those discharges authorized by NPDES Permits [for STA 2] are authorized through this Order." The 2009 AOs issued by FDEP only require the permittee in all cases (i.e., the South Florida Water Management District) to comply with the "reporting requirements and conditions" set forth in the AOs in lieu of the annual average discharge limitation for phosphorus. *See, e.g.,* **[DE 363-2, at ¶ 16]**; **[DE 363-4 at ¶ 16]**.

In sum, I find that these AO provisions are in direct conflict with my injunction against FDEP. Moreover, contrary to the directives contained Summary Judgment Order, the AOs for the STA 2 and 5/6 permits contain many of the provisions of subsections 5(c), 5(d) and 6 of the Phosphorus Rule – as well as certain provisions of the Amended EFA – that were expressly invalidated in the Summary Judgment Order.[20]

18. Identical Administrative Orders were issued by FDEP for Storm Water Treatment Areas 5 and 6 on January 29, 2009. **[DE 363-4]**.

19. In its 2009 Determination, the EPA recognizes, in a footnote, that FDEP issued NPDES permits for Stormwater Treatment Areas 2, 5 and 6 on September 4, 2007, while this case was pending. **[DE 360-1, p. 2 n.2]**. The EPA acknowledges that "[t]hose permits included water quality based effluent limits ('WQBELs'), compliance schedules, and interim

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[20] For instance, the discharge limit is established through a TBEL formula that is based on the Long-Term Plan as BAPRT. **[DE 363-4 at ¶ ¶ 23, 24, Tables 3, 4, 5, 6]**; **[DE 363-2 at ¶ 23, 24, Tables 3 and 4]**.

limits." *Id.* Despite the fact that the accompanying Administrative Orders issued with the NDEPS permits specifically allow for moderating provisions and a compliance schedule through 2016, the EPA – contrary to my finding that moderating provisions and the 2016 extended compliance schedule constitute "blanket variances," – concluded that "[t]he [State's] permits did **not** include moderating provisions or variances." *Id.* This conclusion is patently incorrect and is stricken. The 2009 Determination then states that "this approach is **consistent** with the Court's statements concerning 'authorizing compliance schedules in individual permits on a case by case basis.'" *Id.* (quoting **[DE 323, pp. 45-46]**) (emphasis added). Again, the EPA is wrong.[21]

I find that the EPA and the FDEP have read out-of-context, and incorrectly rely upon, a single phrase in the Summary Judgment Order to improperly justify moderating provisions and an extended compliance schedule in the subject STA permits. The EPA and the FDEP reached this conclusion notwithstanding that, on remand, I ordered that, as a condition to granting an extension of the compliance schedule, the State of Florida would have to undertake a "use attainability analysis" in accordance with the Clean Water Act and its implementing regulations if the State planned to downgrade or create subcategories of

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[21] The Summary Judgment Order stated in full: "The Amended EFA, then, is a mandate that the State of Florida 'implement' the Long-Term Plan, which itself includes moderating provisions and a compliance schedule that removes the December 31, 2006 deadline and substitutes 'an initial phase' though 2016. The heart of the matter is that the new compliance schedule is legislatively incorporated into water quality standards that dischargers who meet the statutory requirements, *as opposed to authorizing compliance schedules in individual permits on a case-by-case basis.* The 'effect' of the Amended EFA, therefore, is to replace the narrative and numeric phosphorus criterion with an escape clause that allows non-compliance by virtue of both an extended compliance date, and, during the extension, a **lesser** state water quality standard of compliance, namely, compliance with the Long-Term Plan and 'TBESs.' The lesser quality is then mandated for future permits for discharges into the Everglades Protection Area." **[DE 323, pp. 45-46]**.

use subsequent to the December 31, 2006 deadline. To date, the State has not undertaken any such study.

Moreover, as I discussed in the Summary Judgment Order, a compliance schedule may be allowed only under limited circumstances, on a case-by-case basis during the permitting process, if certain criteria are met. *See, e.g.,* 40 C.F.R. 122.47 (allowing for limited schedules of compliance); *see also* 40 C.F.R. 124.51(b), 124.52, 124.62. In this case, the compliance deadline the EPA approved as reasonable **ended** on December 31, 2006. In the Summary Judgment Order, I ordered the EPA " . . . to require the State of Florida to meet the requirements of the Clean Water Act, and its implementing regulations, in a manner consistent with this Order, prior to FDEP's or EPA's approval of any **subsequent** variance to the Phosphorus Criterion . . . ." **[DE 323, p. 100]**. As such, before the FDEP could approve any further variances in new AOs, it was required to perform a use attainability analysis for the discharges into the Everglades Protection Area from STAs 1E, 1W, 2, 3/4, 5 and 6, because those discharges continue to exceed the Phosphorus Criterion.[22]

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[22] For instance, Section II(5) of the Administrative Order for STA 1E provides that: (i) "At the end of the stabilization period, discharges . . . shall meet technology based effluent limitations (TBELs) in accordance with Section 373.4592(10)(a), F.S."; (ii) "Based on . . . BAPRT . . . an initial TBEL for phosphorus of a long-term flow-weighted mean of 50 ppb"; (iii) "Under the State's Long-Term Plan, the goal is to achieve the 10 ppb phosphorus criterion . . . through the interative adaptive implementation process set forth in the Long-Term Plan"; (iv) "The initial 50 ppb TBEL will be revised as appropriate, consistent with the iterative implementation of BAPRT, until such time as the TBEL can achieve compliance with the 10 ppb phosphorus criterion." **[DE 363-6, pp. 6-7]**.

In the Administrative Order for STA 2, Paragraph 23 provides: "23. During the Routine and Stabilization Phase, exceedances of the TBEL may occur; however, the STA shall be deemed in compliance with this Order and the permits(s), as long as the actions described in this condition and Paragraph 19 of this Order are being taken in conjunction with all other applicable permit conditions not modified by this Order." **[DE 363-2, ¶ 23]**.

Thus, it is clear that the EPA's 2009 Determination is inconsistent with, and in violation of, the Summary Judgment Order, as no use attainability analyses have been conducted. **[DE 380, p. 35]**. I did not recognize, or otherwise allow for, an "escape clause" by way of "individual permits," which effectively negate the remainder of the 101-page Summary Judgment Order. 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. Operating under the assumption that such tactics are permissible, the EPA concluded in its 2009 Determination that the FDEP is in compliance with the terms of the Court's injunction related to the issuance of the NPDES permits.[23] I strike this conclusion.

20. In the Summary Judgment Order, I discussed, at length, that the South Florida Water Management District was statutorily obligated, by December 31, 2006, to take such actions to implement the pre-2006 projects and strategies of the Long Term Plan so that

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Similar provisions are included in Administrative Orders for STA 3, 4 5 and 6. For example, in Administrative Orders for STAs 3 and 4: (i) "8. Although the NPDES permit for STA-3/4 . . . requires compliance with the water quality criterion for phosphorus . . . these standards may not be immediately achieved by STA-3/4 discharges"; (ii) "The Florida Legislature has declared the combination of Stormwater Treatment Areas (STAs) and Best Management Practices (BMPs) to be the best available technology for achieving the interim goals of the Everglades restoration program, pursuant to Section 373.4592(a)(g) of the EFA"; (iii) "12. Post Stabilization Operations . . . discharges from STA-3/4 . . . shall meet an annual flow-weighted average total phosphorus concentrations at the outflow stations of less than or equal to 76 ppb for each water year . . . . In addition, the discharges shall not exceed . . . . 50 ppb for three or more consecutive years"; and (iv) "13. Long Term Compliance. Pursuant to Subsection 373.4592(10)(a) of the EFA, the District shall submit to the Department a permit modification to incorporate proposed changes to the Everglades Construction Project and NPDES Permit . . . by December 31, 2003."

[23] The EPA stated that it " . . . understands that FDEP is complying with this provision of the Order .... [and] has not issued any permits utilizing these provisions of the Phosphorus Rule and has indicated they do not plan to." **[DE 360-1, p. 2]**. This language is stricken.

water delivered to the Everglades Protection Area achieves the phosphorus criterion. Not only that, **by December 31, 2003**, the South Florida Water Management District was required under subsection 10(a) of the Amended EFA to submit an application for **permit modification to achieve state water quality standards including the phosphorus criterion.** None of this has occurred.

The South Florida Water Management District has not taken any action to meet Clean Water Act requirements by filing for – and obtaining – permit modifications to bring existing permits for STAs 1E, 1W, and 3/4 into compliance. In fact, the South Florida Water Management District has chosen to ignore this Court's Summary Judgment Order. This was made clear at the Contempt Hearing. Tracey Piccone, Chief Consulting Engineer, testified that the District has done nothing to comply and still follows the prior Phosphorus Rule, which I invalidated, in significant part. In preparing key portions of the 2010 draft report to the Florida Legislature on the Florida Everglades, Ms. Piccone, a principal author, stated that "it **didn't click** that I was saying something that went against your order." **[DE 380, p.112]** (emphasis added). Indeed, the South Florida Water Management District has failed to officially report to the Florida Legislature that its key Amended EFA provisions, and the implementing Phosphorus Rule, are contrary to the Clean Water Act. The FDEP has also neglected to officially report these facts, and the EPA, in its 2009 Determination, has not instructed them to do so. While Plaintiffs request that I bring the South Florida Water Management District into this case as a party, I decline to do so **at this time**. Instead, I will require the EPA, on remand, to mandate permit modifications consistent with the Everglades Forever Act and the federal Clean Water Act.

21. The State of Florida issues NPDES permits from the EPA under a "National Pollutant Discharge Elimination System Memorandum of Understanding Between the State of Florida and the United States Environmental Protection Agency" **[DE 375-2]**, executed in 1995 ("Memorandum of Understanding"). *See* **[DE 380, pp. 187-88]**. Prior to the Memorandum of Understanding, the EPA would issue NPDES permits to permit the actual discharge of pollutants from a "point source" and the State of Florida would issue separate permits under state law. *Id.* at 141-42. The STAs fall under the "default" category of industrial NPDES permits. *Id.*

After the Memorandum of Understanding was executed, EPA's role was to review the draft permit and state if it had any comments or objections. *Id.* at 162, 199. In the event of objections, the State is given a period of time how it will resolve the objection. *Id.* If Florida does not resolve the objection within a period of time, the authority for the permit passes to the EPA. *Id* at 199.

EPA claims that it lacks authority to require a state to revoke or modify a permit that was previously issued, or to object to any state-issued permit that is not part of the state's NPDES program. *Id.* at 200.[24] The EPA's position is contrary to the Clean Water Act's

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[24] At the Contempt Hearing, Mr. Marshall L. Hyatt, an EPA environmental scientist and technical authority on NPDES, stated, as I have heard often before, that the Clean Water Act allows the use of compliance schedules if a water quality based effluent limit cannot be "immediately" achieved, and that compliance schedules are not "extraordinary." **[DE 380, p. 201]**. Otherwise, Mr. Hyatt's testimony plows old ground and is not consistent with the Summary Judgment Order or even the 2009 EPA Determination. For reasons unclear to me, if not short of astonishing, Mr. Hyatt was completely unaware of the Summary Judgment Order and of the EPA's 2009 Determination. *Id.* at 212. I inquired: "Wouldn't be of some interest to you in terms of whatever testimony you are giving to me to see what I wrote about these matters that now have been addressed by your own agency, as compared to your opinion?" Mr. Hyatt: "It would be, your Honor." The Court: "Why haven't you done that to prepare your testimony today?" Mr. Hyatt: "I thought my role in this case was to provide an interpretation of the permits and the administrative orders that were sent to

implementing regulations, *see supra* at III(b), the Memorandum of Understanding, and the "re-opener" provisions of the NPDES permits.

In Section IX of the Memorandum of Understanding, the EPA acknowledges that the "[FDEP] has no veto authority over acts of the state legislature and therefore [the 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." **[DE 375-2, p.18]** (emphasis added). 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 Setion 402(d) of the CWA." *Id.* at 14-15.

Moreover, the NPDES permits each contain a "re-opener clause" that requires 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.*, **[Jan. 13, 2010 Hearing, Pl.'s Ex. 17 at ¶ VII(E)]**.[25]

EPA." *Id.* at 215-16. I find Mr. Hyatt's testimony to be of little value other than to confirm that no enforceable water quality based effluent limitation standards exits for the Everglades Protection Area and will not be in effect until 2016. *Id.* at 265. We are now long past whether Florida's amended date of 2016 for compliance is lawful and "routine."

[25] The "Reopener Clause" provides that "[t]he permit shall be revised, or alternatively, revoked and reissued . . . to comply with any applicable effluent standard or limitation issued or approved under Sections 301(b)(2)(c) and (D), 304(b)(2), and 307(a)(2) of the Clean Water Act, as amended, if the

Notwithstanding the findings and conclusions set forth in the Summary Judgment Order regarding the actions of the Florida Legislature in the Amended Everglades Forever Act, as further recognized by the EPA in its 2009 Determination, the EPA has taken no steps to initiate procedures for withdrawal of approval of the State program as it pertains to NPDES permitting vis-a-vis the Everglades Protection Area. Nor has the EPA required the State of Florida to revise outstanding STA NPDES permits based on this Court's Summary Judgment Order, Section IV(I) of the Memorandum of Understanding, the "re-opener clauses" contained in the NPDES permits issued by the State of Florida, or the CWA's implementing regulations.

22. Because the State of Florida has violated the Summary Judgment Order and evidenced a consistent disregard for the requirements of the CWA in the Everglades Protection Area, it is essential that 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 (as shall be determined by the EPA and this Court following further evidentiary hearing). Furthermore, prior violations of the CWA in NPDES permits issued by the State of Florida must be rectified to prevent further destruction of the Everglades, and future NPDES permits for discharges into, or within, the Everglades Protection Area must be issued in accordance with the CWA and its implementing regulations, as interpreted by this Court. State permitting authority may not be used to

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effluent standard, limitation, or water quality standard so issued or approved: (a) contains different conditions or is otherwise more stringent than any condition in the permit; or . . . (2) [T]he permit may be reopened to adjust effluent limitations or monitoring requirements should future water quality based effluent limitation (WQBEL) determinations, water quality studies, Department approved changes in water quality standards, or other information show a need for a different limitation or monitoring requirement." *See, e.g.,* **[Jan. 13, 2010 Hearing, Pl.'s Ex. 17 at ¶ VII(E)]**.

trump federal CWA requirements under the guise of state-issued AOs or EFA permits. A key component to the re-issuance of prior NPDES permits – and the issuance of new NDPES permits for discharges into, or within, the Everglades Protection Area – must be an enforceable framework that "ensures" compliance with the Phosphorus Criterion. This is no more than what the EPA demanded in 1999 and later abandoned in its subsequent Amended EFA and Phosphorus Rule Determinations. It is the primary focus of this Order that the EPA again mandate such a framework with specific directions upon remand.

23. There has been considerable discussion in the briefing as to the relationship between this case and the case pending before the Honorable Federico A. Moreno, styled *United States of America v. South Florida Water Management District,* Case No.: 88-CV-1886-FAM (S.D. Fla.) ("the Moreno Case"). To be sure, both cases directly concern the problems facing the Everglades. The crucial distinction is that the Moreno Case turns on a consent decree created pursuant to *State law* – not the Clean Water Act. Thus, while the Federal Clean Water Act implications here subsume certain matters pertinent to the Moreno Case, this federal statutory action – which concerns the entire Everglades Protection Area – casts a wider net

Both cases address, however, a crucial similarity: the fact that the December 31, 2006 deadline promised in the Consent Decree and mandated in the EPA 1999 Determination has not been met. It is because the State of Florida has failed to meet the deadline, and, instead, attempted to extend it and override the Consent Decree by virtue of the Amended EFA and Phosphorus Rule, that both Judge Moreno and I find ourselves in these enforcement proceedings. While the parallel proceedings share certain features, they are not identical, nor are the available remedies the same, though careful

consideration should be given to accomplishing related goals in a manner consistent with the Congressional mandate set forth in the CWA. [26]

What is crucial is that the deadlines in both cases again be reconciled. The EPA ignores any mention of the Moreno Case in its 2009 Determination, although the EPA considered the Consent Decree at length in its 1999 Determination. In fact, the EPA 1999 Determination found that the extension of the December 31, 2006 deadline was justified, in part, under the federal Clean Water Act because the parties had agreed to amend the compliance date to December 31, 2006 under the Consent Decree. **[DE 323, p. 30 n. 17]**. It again is time for the EPA to reconcile the obligations and commitments under the Consent Decree – to which the United States is a party – with the Amended Determination mandating CWA compliance. The time has long past for the parties to attempt to "whip-saw" between the two cases for whatever leverage is convenient at the moment.

I commend my colleague, Judge Moreno, for his "Order Granting Motion to Adopt the Special Master's Report, Motion Seeking Declaration of Violations, and Motion for Declaration of Breach of Commitments," entered on March 31, 2010. *See United States of America v. South Florida Water Management District*, Case No.: 88-CV-1886-FAM, **[DE 2134]** (S.D. Fla. Mar. 31, 2010). He has set in motion a procedure that will address many of the challenges alluded to in these proceedings, including how the State of Florida intends to meet its construction obligations under the Long-Term Plan if monies are diverted to

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[26] "A consent decree must be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law." *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 387 (1992). The same reasoning applies if federal statutory obligations are more restrictive than the terms of a consent decree. Thus, the Consent Decree should work hand-in-hand to ensure consistence and compliance with the Clean Water Act.

purchase U.S. Sugar Corporation lands, and the need to formulate "realistic deadlines" to implement the Consent Decree. He has directed the Special Master to address "admitted violations," including the failure to meet phosphorus limits.

It is the intent of this Court to use its enforcement powers under the Clean Water Act to work in conjunction with, and complement – if not exceed – the goals included in the Consent Decree. I echo Judge Moreno, who quotes from Judge William M. Hoeveler in the original 1992 Consent Decree, that "[t]he time has come, indeed has passed, when admitted problems facing the Everglades must be addressed." *Id.* at 1.

III. Conclusions of Law

A. Glacial Slowness of the EPA as the State of Florida Violates the CWA

Congress passed the Federal Water Pollution Control Act ("the Clean Water Act" or "CWA") in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251. In order to achieve that objective, Congress declared it a "national goal" that "the discharge of pollutants into the navigable waters be eliminated by 1985." *Id.* When Congress expresses its intent, that intent is of utmost importance. In such a situation, the court's role is to enforce the legislative will when called upon to do so. *TVA v. Hill*, 437 U.S. 153, 194 (1978).

EPA's regulatory program for water protection focuses on two potential sources of pollution: point sources and non-point sources. Point source pollution was addressed in the 1972 amendments to the Act, through which Congress prohibited the discharge of any pollutant from any point source into certain waters unless that discharge complies with the Act's specific requirements. 33 U.S.C. § § 1311(a), 1362(12). Under this approach,

compliance is focused on technology-based controls for limiting the discharge of pollutants through the National Pollution Discharge Elimination System ("NPDES") permit process.

While it is correct the CWA envisioned "short-term" and "long-term" goals for compliance, such goals, at most, can mean a few years, not decades. *Hankinson*, 939 F. Supp. at 867 (expressing frustration with state of Georgia's failure to comply with CWA for over sixteen years and ordering EPA to take certain steps to ensure prompt compliance). The EPA set a deadline for the State of Florida to comply with the CWA for pollutant discharges into the Everglades Protection Area by December 31, 2006. This date represented a compromise that was reluctantly accepted by the Courts of this District. *See United States of America v. South Florida Water Management District*, Case No.: 88-CV-1886-FAM, **[DE 226]** (S.D. Fla.) (Hoeveler, J.)("By modifying this extended schedule, the Court fully expects that the parties will achieve compliance as mandated by the Modified Consent Decree and the EFA."); *Friends of the Everglades v. United States,* Case No.: 00-CV-0935-PAS, **[DE 77, p. 21]** (S.D. Fla. Oct. 18, 2001) (Seitz, J.)[Case No. 00-CV-935, DE 77] ("Like EPA, the Court anticipates that the state will continue to implement all necessary measures to ensure that the Everglades will be Class III waters by December 31, 2006.").

The EPA's 2009 Determination does not fully comply with the Summary Judgment Order. I ordered the EPA to approve or disapprove changes in the Amended EFA and the Phosphorus Rule in a manner consistent with the Court's findings and conclusions. The EPA simply continues to repeat words, this time of the Summary Judgment Order, without addressing the glaring CWA violations or requiring the State to comply with the existing water quality standards, including the narrative standard for nutrients, the anti-degradation

policy, and the numeric Phosphorus Criterion in the remaining portions of the Rule upheld by this Court. The EPA's 2009 Determination, while re-establishing the December 31, 2006 compliance date, nonetheless found " . . . no need for the State of Florida or USEPA to take any further action pursuant to the CWA Section 303(c) [codified at 33 U.S.C. § 1313(c)]." **[DE 360-1, p. 10]**.

The 2009 Determination inexplicably ignores that the December 31, 2006 compliance date has come and gone by more than three years. It provides no direction to the State of Florida regarding its non-compliance. The net result is to leave compliance "open-ended" for what may be yet another generation.

I conclude that the EPA has failed to proceed with the utmost diligence required to discharge its statutory duty. It has chosen to "drag its feet" on issuing the Court-ordered Determination while allowing the State of Florida to continue to rely on old permits, and issue new AOs that are laden with "avoidance mechanisms." This dereliction of duty is contrary to the Clean Water Act. Nothing can justify a schedule so slow as to defeat the CWA's goals; yet this is precisely what the EPA's inaction vis-a-vis the State of Florida's phosphorous practices has done. *Idaho Sportsmen's Coalition v. Browner*, 951 F.Supp. 962, 967 (W.D. Wash. 1996)("Although Courts have allowed additional time when CWA deadlines are missed, nothing in the law could justify so glacial a pace."); *see also Hankinson*, 939 F. Supp. at 867. To accept the EPA's position of further, indefinite, and virtually open-ended extension of the time for compliance, without a showing of evident impossibility, would effectively repeal the clearly expressed Congressional mandate.

Under the CWA, the EPA has a mandatory duty to act, particularly after concluding

in the 2009 Determination that " . . . the provisions that the Court declared invalid are no longer in effect for CWA purposes . . . . " **[DE 360-1, p. 10]**. It is obligated to require the State of Florida to establish the **manner and method** of obtaining enforceable WQBELs within a time certain. *See Hankinson*, 939 F. Supp. at 871-72 (cites and quotes omitted) (noting that "the [CWA] requires EPA to step in when states fail to fulfill their duties under the Act."); *Miss. Comm'n on Natural Res.*, 625 F.2d at 1275-76 (noting that CWA requires that "if such changes [that comport with the CWA] are not adopted by the State . . . the Administrator **shall** promptly prepare and prepare and publish proposed regulations" consistent with the CWA) (cites and quotes omitted) (emphasis added); *Southern Ohio Coal Co. v. Office of Surface Min., Reclamation and Enforcement, Dept. of the Interior,* 20 F.3d 1418, 1428 (6th Cir. 1994) (noting the EPA must "ensure [state programs'] compliance with federal standards . . . [and] must either issue a compliance order or bring a civil enforcement action seeking appropriate relief" whenever the agency learns of a "violation of the CWA or a NPDES permit"). I am not ordering the EPA to do what is impossible. It already had determined the December 31, 2006 was a reasonable compliance deadline. It now must enforce what has been unreasonably delayed. Its inaction is arbitrary and capricious, contrary to the CWA, and in violation of the Summary Judgment Order.[27]

B. The EPA's and FDEP's Arguments to Avoid Enforcement Are Without Merit.

Although the EPA and the FDEP claim that the State has not issued any permits that

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[27] In light of these conclusions, I may now compel the EPA to perform the action unlawfully withheld or unreasonably delayed, and may also set aside its failure to act as an abuse of discretion. 5 U.S.C. § 706(1)-(2); *Idaho Sportsmen*, 951 F.Supp. at 967.

uses the invalidated provisions of the Amended EFA,[28] I unequivocally conclude that the Administrative Orders issued for Stormwater Treatment Areas 2, 5 and 6, and the pre-existing permits contain the disapproved provisions on moderating provisions and an extended compliance schedule through 2016. The new AOs for the STA 2 and STA 5/6 NPDES permits, and the new EFA permits, rely on the Long-Term Plan moderating provisions and the extended 2016 compliance schedule.

The AOs for STAs 2 and 5/6 amend the permits to allow the TBEL, which is above 10 ppb and not enforceable until 2016. I will not permit the EPA to allow the State of Florida to circumvent the mandate of the Summary Judgment Order through the use of AOs that rely on the impermissible escape clauses in the Amended EFA and the Phosphorus Rule. I categorically reject the argument that the FDEP did not violate the Summary Judgment Order because it issued only amended "Administrative Orders," and not the "permits" to the South Florida Water Management District. Notably, the FDEP's own witness candidly admitted that the "administrative orders" are inextricably bound up with the State's NDEPS issued permits.[29] The District's March 2009 South Florida Environmental Report, which was

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[28] The EPA states in its 2009 Determination that "USEPA understands that FDEP is complying with this provision of the Order." **[DE 360-1, p. 2]**. The EPA then claims that "FDEP has not issued any permits utilizing these provisions of the Phosphorus Rule and has indicated that they do not plan to do so." *Id.* The EPA Determination further states that the NPDES permits issued for STA 2, 5 and 6, while this case was pending, "did not include moderating provisions or variances." *Id.* at 2 n. 2. These findings are arbitrary and capricious and contrary to both law and the greater weight of the evidence presented at the Contempt Hearing. The 2009 Determination conducts no analysis of the AOs that amended the permits and fails to provide any basis whatsoever for the conclusory assertion that the permits do not include moderating provisions or an extended compliance date.

[29] Mr. Phillip Coram, the Deputy Director of the Division of Water Resource Management with the Florida Department of Environmental Regulation, also testified that Administrative Orders are considered part-and-parcel of the NPDES permits, although he stated that he could only testify "generally" and lacked specific knowledge about the STA permits and Administrative Orders at

presented to the State Legislature, also acknowledges that "the long-term **permits issued by the FDEP include administrative orders**, which provide an adequate period of time for the District to achieve the newly adopted numeric phosphorus criterion." **[DE 380, p. 115]** (emphasis added).[30]

The FDEP next argues that, while the NDPDES program requires QBELs, the State's accompanying Administrative Order may continue to grant relief from any violation **under state law**. **[DE 380, p. 169]**. The short answer is that Florida law does not trump the federal Clean Water Act. The FDEP has not been delegated, nor could it be delegated, any power authority under the Memorandum of Understanding to violate the federal law.[31] *Southern Ohio Coal Co.,* 20 F.3d at 1428 (noting the EPA must "ensure [state programs'] compliance with federal standards . . . [and] must either issue a compliance order or bring a civil enforcement action seeking appropriate relief" whenever the agency learns of a

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issue. **[DE 380, p. 150]**.

[30] EPA's witness, Mr. Marshall L. Hyatt, also confirmed that the State of Florida's Administrative Orders, which supersede prior Administrative Orders, are "integral part[s] of the NPDES permit[s]." **[DE 380, p. 218]**. Similarly, district courts from outside of this Circuit have recognized that extrinsic documents can be incorporated into an NPDES permit by reference. *See Carson Harbor Village, Ltd. v. Unocal Corp.,* 990 F. Supp. 1188, 1197 (C.D. Cal. 1997), rev'd on other grounds, 270 F.3d 863 (9th Cir. 2001) (indicating that provisions from extrinsic documents can be incorporated by reference into an NPDES permit).

[31] Plaintiffs' Exhibit 21 from the January 13, 2010 hearing, the "Statement of Legal Authority for Florida's National Pollutant Discharge Elimination System (NPDES) System," was a part of the State of Florida's application to the EPA for delegated approval. **[DE 380, p. 180]**. It makes clear that the FDEP may adopt rules necessary to implement the NPDES permitting program "in accordance with federal law." *Id.* at 180-81. The legislature has also expressed its preference for consistency, as demonstrated in Section 403.0885(2), Florida Statutes, which demands harmony between state and federal law, providing that other sections of Chapter 403 apply to NPDES discharges *only if* such provisions "do not conflict with federal requirements."

"violation of the CWA or a NPDES permit."); *Hankinson*, 939 F. Supp. at 872 (concluding that EPA may not take actions – or fail to take actions – that allow states to violate the Clean Water Act).

When FDEP issues an NDPES permit (and an accompanying Administrative Order) it stands in the shoes of the EPA and must meet federal requirements.[32] *See Southern Ohio Coal Co.,* 20 F.3d at 1428 (stating that the Clean Water Act allows "a state [to] administer the NPDES permit program within its borders" only if the "state program meets federal criteria set forth in the CWA and implementing regulations"). As such, FDEP it may not violate the federal Clean Water Act any more than the EPA can ignore federal Clean Water Act requirements in its Determinations on the Amended Everglades Forever Act and Phosphorus Rule. In the Summary Judgment Order, I specifically held that "[t]he provisions [implementing BAPRT and not requiring specific discharge limits for phosphorus] are also in direct conflict with the express mandate of the CWA, which requires imposition of WQBELs when TBELs are inadequate." **[DE 323, p. 67]** (citing 33 U.S.C. § 1312(a); 40 C.F.R. § 122.44(d)).

The FDEP justifies its action by relying on the testimony of Mr. Phillip Michael Coram, the Deputy Director for the Division of Water Resource Management of the Department of Environmental Regulation, who conceded that he had been assuming the permissibility of the extended compliance schedules, **[DE 380, p. 171]** (". . . both Florida law . . . and I think federal law also in the regulations allow compliance schedules and giving permittees a

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The Court questioned: "You have another hat, don't you? You are performing, in effect, a function that would otherwise have to be performed by a federal agency? Mr. Coram: "That is correct." The Court: "So, you have a federal hat on as well as a state hat, don't you?" Mr. Coram: "Yes . . . yes, I see it that way." **[DE 380, pp. 184-185]**.

period of time to come into compliance. So, in that case, I don't believe the compliance schedules are inconsistent [with federal law].)." Despite this mistaken assumption, Mr. Coram correctly acknowledged upon further examination that where the Court and the EPA have determined that federal law is inconsistent with state law, the permits issued pursuant to the inconsistent state law must be brought into compliance with federal law:

> **Q**: So, what do you do in terms of what has been issued on these permits, including administrative orders that relied on something that you thought was right, but now is wrong?
> **A**: Well, I couldn't rely on them any more.
> **Q**: Do you issue more administrative orders relying on them?
> **A:** No, I don't think you could issue the administrative orders relying on provisions that the Court has determined to be invalid. I don't think --
> **Q**: What is your responsibility now?
> **A**: On the new administrative orders, they would have to be consistent.
> **Q**: That is your view?
> **A**: That is my view. The permits, typically what happens is they are changed at the time of permit renewal. That's been my experience, that they are changed at the time of permit renewal.
> **Q**: So, it is not a matter of making something retroactive. It is bringing something into compliance. In other words, if you have a new standard that is in effect at the time of the new administrative order, then that new standard has to be applied?
> **A**: Yes, sir.
> **Q**: Even if the permit was issued with an old administrative order in the past. Is that a fair statement.
> **A**: That is a fair statement.

The notion that previously-issued NPDES permits found to be violative of the Clean Water Act must be brought into compliance with federal law is not a novel one, and I unequivocally reject the suggestion that the violative AOs – which are incorporated into the NPDES permits at issue – cannot be disturbed. *See* 40 C.F.R. 122.62(a) (noting that, "if cause exists," NPDES permits can be "modif[ied] or revoke[d] and reissue[d]" and citing, *inter alia*, availability of "new information . . . [that] was not available at the time of permit issuance . . . [that] would have justified the application of different permit conditions" as a

cause for "modification or termination"); *see also* 40 C.F.R. 122.64(a) (listing "causes for terminating a[n] [NPDES] permit during its term" and noting that an NPDES permit can be terminated if "the permitted activity endangers . . . the environment and can only be regulated to acceptable levels by permit modification or termination").[33] While I recognize that the "Clean Water Act places primary reliance for developing water quality standards on the states," the states remain accountable for ensuring compliance, and "the Act requires EPA to step in when states fail to fulfill their duties under the Act." *Hankinson*, 939 F. Supp. at 871-72 (cites and quotes omitted). 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 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).

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[33] "States are required to adopt equivalent procedures for permit modification [and termination]." *Culbertson v. Cotas American, Inc.*, 913 F. Supp. 1572 (N.D. Ga. 1995) (citing 40 C.F.R. § 123.25).

C. The Court's Power to Enforce

A court has the power to enforce its orders.[34] *Citronelle-Mobile Gathering, Inc. v. Watkins,* 943 F.2d 1297, 1301 (11th Cir. 1991)(citing *Shillitani v. United States*, 384 U.S. 364 (1966)). Compliance with a court's order is mandatory. *Mercer v. Mitchell,* 908 F.2d 763, 787 (11th Cir. 1990). In devising a remedy to enforce its orders, a court faces "the difficult task of avoiding both remedies that may be too intrusive . . . and those that may prove ineffectual." *N.A.A.C. v. Sec'y Hous. & Urban Deve.,* 817 F.2d 149, 159 (1st Cir. 1987). While I concur with Plaintiffs that I can enforce my orders by means of contempt, I can also resort to my equitable powers to accomplish the same purposes before imposing civil sanctions calibrated to coerce compliance.[35] While I am prepared to take that step, if necessary, I turn one more time to my equitable and inherent powers under the Clean Water Act and the federal Administrative Procedures Act.

In the Summary Judgment Order, which is now the law of the case, I invoked my equitable powers due to the "rare circumstances" of the case, and because of the

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[34] I reject FDEP's contention that the Court lacks jurisdiction over it, especially given that the Summary Judgment Order is now law of the case. Although FDEP was an intervenor in the case, as I have previously explained, "[an] intervenor is treated as if [it] were an original party and has equal standing with the original parties." *Bayside Ford Truck Sales, Inc. v. Ford Motor Co. (In re Ford Motor Co.)*, 471 F.3d 1233, 1246 (11th Cir. 2006)(quoting *Marcaida v. Rasco,* 569 F.2d 828, 831 (5th Cir. 1978).

[35] 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.

intransigence of the EPA and the State of Florida to follow the Congressional mandate set forth in the CWA. **[DE 323, pp. 92-93]**. I explained:

> Federal law does not authorize anything like a twenty-two year compliance schedule, which is what the 1994 EFA, the Amended EFA and the Phosphorus Rule now allow with regard to achieving the narrative and numeric phosphorus criterion (the original EFA took effect in 1994 but compliance is not contemplated until 2016) (footnote omitted). The actions included in the 1994 EFA, coupled with its schedule of construction projects, were intended to result in the attainment by December 31, 2006, of the level of water quality as established by the narrative criterion and the later the default numeric phosphorus criterion. Prior to its latest round of Determinations, the EPA had consistently found that the attainment by 2006 was necessary to protect and maintain the designated uses of the Everglades system. Both this District Court and the Eleventh Circuit Court of Appeals relied on these assurances to affirm the reasons for extension.
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> Any further delay in enforcement must necessarily raise heightened concerns, if not skepticism, and result in careful judicial scrutiny. Such scrutiny appears warranted when it was the EPA itself, just a few years previously, that concluded that the "reasonableness and acceptability" of the initial 12 year schedule promulgated by the 1994 EFA assumed that the December 31, 2006, deadline would be met, and that "there was an enforceable framework that 'ensured' the numeric water quality criterion for phosphorus would be met by the December 31, 2006, deadline in the EFA or sooner if possible." EPA Sept. 15, 1999 Determination, at 9, n. 15 (emphasis added) [EFA-AR-8]. **I now conclude that any further undue delay through endless, undirected rounds of remands to EPA to do its duty, which it steadfastly has refused to do, is, alone, insufficient, and that it is imperative that this Court exercise its equitable powers to avoid environmental injury to the Everglades through the implementation of the Amended EFA and the Phosphorus Rule as a result of the use of blanket exemptions.**
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> **[DE 323, pp. 92-93]**.

In "rare circumstances" it can be appropriate for "the court to conduct its own inquiry, reach its own conclusion, and order more intrusive relief." *Nat'l Tresury Employees Union v. Horner,* 854 F.2d 490, 500 (D.C.Cir. 1988). After reviewing the evidence presented at the Contempt Hearing, I conclude that this case presents one of those "rare circumstances."

When an agency "does not reasonably accommodate the policies of a statute or reaches a decision that is 'not one that Congress would have sanctioned,' . . . a reviewing court must intervene to enforce the policy decisions made by Congress." *Environmental Defense Fund v. EPA*, 852 F.2d 1316, 1326 (D.C.Cir.1988) (citations omitted), cert. denied, 489 U.S. 1011, 109 S.Ct. 1120, 103 L.Ed.2d 183 (1989). This general rule applies with equal force to the EPA in the context of the Clean Water Act, as the United States Supreme Court expressly recognized in *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 318, 102 S. Ct. 1798, 72 L.E.2d 91 (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).

In the wake of *Weinberger*, a number of appellate and district courts throughout the country acknowledged and affirmed the broad equitable and remedial powers vested in district courts to ensure compliance with the Clean Water Act. For example, in *Alaska Center for the Environment v. Browner*, 20 F.3d 981, 986-87 (9th Cir. 1994), the Ninth Circuit recognized the district court's remedial powers to remedy an "established wrong" under the Clean Water Act where there was a thirteen-year delay in implementing a compliant TMDL program in Alaska. The Ninth Circuit stated:

> In its published opinion in *ACE II*, the district court explained the remedial action it ordered, fully addressing the same contention the EPA raises in this appeal. The EPA argues that the district court exceeded its remedial powers under § 505 of the CWA when it ordered the EPA "to submit to the court its report" on the adequacy of water quality monitoring in Alaska, and to "propose a [long-term] schedule for the establishment of TMDLs" for Alaskan waters. ACE II, 796 F. Supp. at 1381. The EPA stresses that the language of the CWA does not specifically require it to prepare or present a report on water quality monitoring, and further contends that the statute relegates the pace at which TMDLs shall be established entirely to the EPA's discretion.

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> **The district court has broad latitude in fashioning equitable relief when necessary to remedy an established wrong. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982). In this case the established wrong is the failure of the EPA to take any steps to establish the TMDLs mandated by Congress for more than a decade. In tailoring the relief granted, the district court correctly recognized that in order to bring about any progress toward achieving the congressional objectives of the CWA, the EPA would have to be directed to take specific steps. In selecting the remedy that it did, the district court acted with great restraint in requiring only that steps undeniably necessary to the development of TMDLs in Alaska be accomplished by deadlines that are far more lenient than those contained within the CWA itself.**
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> *Id.* at 986 (emphasis added).

Cases from within this Circuit have reached similar conclusions vis-a-vis courts' equitable and remedial powers pursuant to the Act. In *Sierra Club v. Hankinson*, the district court found that the State of Georgia had – for over sixteen years – failed to comply with the TMDL requirements of the Clean Water Act. 939 F. Supp. at 867. The court concluded that the EPA's failure to disapprove of Georgia's non-compliance violated the Administrative Procedures Act, and that the EPA's failure to promulgate compliant TMDLs violated the Clean Water Act because "the Act requires the EPA to step in when states fail to fulfill their duties under the Act." 939 F. Supp. at 872. In granting summary judgment in favor of Plaintiffs, the *Hankinson* court noted that the "[Clean Water Act] allows a district court to order the relief it considers necessary to secure *prompt compliance* with the Act," and subsequently "ordered the EPA to issue complete TMDLs on a relatively strict five-year schedule." 939 F. Supp. at 868 (cites and quotes omitted) (emphasis added); *Sierra Club v. Hankinson*, 351 F.3d 1358, 1360 (11th Cir. 2003). Having found a clear and continuing

violation of the Clean Water Act, I now apply my equitable powers to accomplish the difficult task of "order[ing] the relief [I] consider[] necessary to secure *prompt compliance* with the Act." *Hankinson,* 939 F. Supp. 868.

D. Actions Necessary to Remedy an Established Wrong

Similar to the *Alaska Center* case, the "established wrong" here is the failure of the EPA and the State of Florida to comply with the CWA for more than two decades. In tailoring the relief granted here, the EPA and the FDEP are directed to take specific set forth below to immediately carry out the mandate I already have issued. In selecting the remedy, I conclude that these steps are undeniably necessary to the development and implementation of WQBELs for the Everglades Protection Area. In issuing general directives to ensure compliance with the CWA, I, **at this time**, leave to the EPA the specific substance and manner of achieving compliance. I am prepared, however, to take such additional steps as necessary – and retain jurisdiction to do so – in the event the EPA and the FDEP again fail to act in accordance with the Summary Judgment Order and this Order.

The steps are:

1. On remand, the EPA shall issue an Amended Determination ("Amended Determination") **not later than Friday, September 3, 2010** that meets the requirements of this paragraph and the paragraphs that follow. The Amended Determination shall specifically direct the State of Florida to correct the deficiencies in the Amended EFA and the Phosphorus Rule that have been invalidated in a manner consistent with **Attachments B and C to this Order**. The EPA shall 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 and shall require amendments to the Amended EFA to be enacted

by July 1, 2011. In the event the State of Florida fails to timely act, the EPA shall provide timely notice, and the EPA Administrator "shall promulgate such standard[s]" pursuant to 33 U.S.C. § 1313(c).

2. The EPA Administrator, through the Amended Determination, shall notify the State of Florida that it is out-of-compliance with the narrative and nutrient standards for the Everglades Protection Area. The Amended Determination shall provide clear, specific and comprehensive instructions to the State of Florida on the manner and method to obtain enforceable WQBELS within a time certain, consistent with the Clean Water Act and its implementing regulations, the Summary Judgment Order and this Order. The Amended Determination shall specify without equivocation that compliance must occur in accordance with **specific milestones to be established in the Amended Determination** that provides an **enforceable framework for ensuring compliance** with the CWA and its applicable regulations. Furthermore, it shall require the State of Florida to measure on a yearly basis the cumulative impacts and effects of phosphorus intrusion beyond the 10 ppb standard within the Everglades Protection Area until such time as full compliance with the 10 ppb standard is achieved. I underscore that the EPA must establish **specific milestones** to ensure that the State of Florida does not continue to ignore, and improperly extend, the compliance deadline for meeting the phosphorus narrative and numeric criterion in the Everglades Protection Area.

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 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.

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 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.

6. In order to assure compliance with this Order, the Court will retain jurisdiction and will set a date by which the EPA must report on the the manner and method of obtaining enforceable WQBELs within a time certain within the Everglades Protection Area. The Defendants are hereby placed on notice that failure to comply with the terms of this Order will not be tolerated, and that in the event of such a failure, the Court will promptly issue an Order to Show Cause why the EPA and FDEP Administrators should not be held in civil contempt and subjected to appropriate sanctions.

7. The EPA Administrator, the EPA Regional Administrator for Region IV, and the Executive Director of the FDEP shall personally appear before this Court on **Thursday, October 7, 2010 at 9:00 am** to report to the Court on compliance with this Order. The Executive Director of the South Florida Water Management District is invited to appear on that time and date to discuss the District's efforts to conform the Long-Term Plan with the EPA's Amended Determination and its compliance with permit modifications to achieve state water quality standards including the phosphorus criterion.

8. All provisions of the 2009 Determination which have been stricken by this Order shall be excluded from the Amended Determination.

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

10. The Court reserves to fully exercise its contempt powers in the event full compliance is not met consistent with this Order.

11. Plaintiff's Motions **[DE 357]; [DE 364]** are GRANTED IN PART AND DENIED IN PART in accordance with the terms of this Order.

DONE AND ORDERED in Chambers at Miami, Florida this 14th day of April, 2010.

HON. ALAN S. GOLD
U.S. DISTRICT JUDGE

cc
Counsel of Record
Magistrate Judge McAliley
Executive Director of the South Florida Water Management District
The EPA Administrator
The EPA Administrator of Region IV
The Executive Director of the State of Florida Department of Environmental Protection

ATTACHMENT A

Table 1: Summary of All STA Permits

STA	NPDES Permit	EFA Permit	Administrative Order?	Post SJ Opinion (7/29/08)?
STA 1E	FL0304549-001 8/30/05 to 8/30/10	0279449-001 11/16/07 to 11/15/12 Combines 1E & 1W operations	AO-009-EV (8/30/05) Amends NPDES	No
STA 1W	FL0177962-001 5/11/99 to 5/10/04 **Expired**	0279449-001 11/16/07 to 11/14/12 Combines 1E & 1W operations	AO-001-EV (4/13/99) Amends NPDES	No
STA 2	FL0177946-003 9/4/07 to 9/4/12	0126704-008 3/17/09 to 3/17/14 Includes construction of Compartment B	AO-010-EV (3/17/09) Amends NPDES, EFA	Yes
STA 3/4	FL0300195-001 1/9/04 to 1/9/09 **Expired**	0192895 1/9/04 to 1//09 **Expired**	AO: AL-007-EV (1/9/04) Amends NPDES, EFA	No
STA 5	FL0177954-003 9/4/07 to 9/4/12	0131842-006 1/29/09 to 1/29/14 Combines operations of STA 5 & 6 Includes construction of Compartment C	AO-011-EV (1/29/09) Amends EFA, NPDES Combines operations of STA 5 & 6	Yes
STA 6	P: FL0473804-001 9/4/07 to 9/4/12	0236905-001 9/4/07 to 9/4/12 Construction of STA 6 0131842-006-GL 1/29/09 to 1/29/14 Combines operation of STA 5 & 6 Includes construction of Compartment C	AO-011-EV (1/29/09) Amends EFA, NPDES Combines operation of STA 5 & 6	Yes

ATTACHMENT B

Select Year: 2009 Go

The 2009 Florida Statutes

Title XXVIII	Chapter 373	View Entire Chapter
NATURAL RESOURCES; CONSERVATION, RECLAMATION, AND USE	WATER RESOURCES	

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 Miami-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 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 s. 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 an 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~~

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 Miami-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 March 1, 2006, as part of the consolidated annual report required by s. 373.036(7), 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 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)7., 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 November 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.~~

~~(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

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 ($W^1/_4$) 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.

(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 ($N^1/_4$) corner of said Section 28; thence, northerly along the West line of the Southeast one-quarter ($SE^1/_4$) of Section 21, Township 46

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 March 1, 2006, as part of the consolidated annual report required by s. 373.036(7), the district shall report on 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 as part of the consolidated annual report required by s. 373.036(7).

(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

South, Range 31 East, to the northwest corner of said Southeast one-quarter ($SE^1/_4$) of Section 21; thence, easterly along the North line of said Southeast one-quarter ($SE^1/_4$) of Section 21 to the northeast corner of said Southeast one-quarter ($SE^1/_4$) 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 ($S^1/_4$) corner of Section 31, Township 45 South, Range 31 East; thence, northerly to the South one-quarter ($S^1/_4$) 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 ($SW^1/_4$ of the SW $^1/_4$) of Section 15, Township 45 South, Range 31 East; thence, northeasterly to the east one-quarter ($E^1/_4$) 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 ($NE^1/_4$) 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; s. 1, ch. 2003-12; s. 18, ch. 2003-394; s. 42, ch. 2005-2; s. 12, ch. 2005-36; s. 86, ch. 2008-4.

ATTACHMENT C

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;

~~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 water bodies: 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 Quality Screening 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 moderatig 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.