



Florida Department of Environmental Protection

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3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Rick Scott
Governor

Jennifer Carroll
Lt. Governor

Herschel T. Vinyard Jr.
Secretary

June 5, 2012

Ms. Gwendolyn Keyes Fleming
Regional Administrator
U.S. Environmental Protection Agency
Region IV
61 Forsyth Street, SW
Atlanta, Georgia 30303-8960

Dear Ms. Fleming:

The Florida Department of Environmental Protection is pleased to submit the attached revised National Pollutant Discharge Elimination System permit, and associated consent order, to authorize the operation of 57,000 acres of stormwater treatment areas in the heart of the Everglades ecosystem. Enclosed you will also find the department's response to your May 7, 2012, letter. This revised permit, consent order and accompanying technical plan represent a significant and historic milestone toward restoring America's Everglades.

Under the leadership of Governor Rick Scott, scientists at the department and the South Florida Water Management District worked to develop a scientifically-sound and technically feasible course of action that resolves a long-standing and long-recognized environmental challenge. After months of collaborative dialogue with the U.S. Environmental Protection Agency, we have determined a rigorous and enforceable path for fully achieving stringent water quality requirements and delivering measureable and permanent results for the Everglades.

I would like to express Florida's gratitude to you and your staff for your coordination and cooperation as we worked together to assess and enhance the plan. We appreciate your staff's valuable technical input to the state's proposed approach. These combined efforts resulted in a comprehensive and economically feasible plan for constructing and implementing an array of storage and treatment facilities over an aggressive timeframe.

In accordance with the permit and consent order, the district will invest an estimated \$880 million to construct 6,500 acres of new stormwater treatment areas and 110,000 acre-feet of new water storage. These projects will work in conjunction with existing and newly completed treatment facilities to capture, store and treat water to ultra-low levels of phosphorus before discharging it to the Everglades Protection Area.

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With milestones for project construction and completion, and enforcement mechanisms to ensure these milestones are met, the district will complete key components of the plan within six years. By 2016, more than 90 percent of the required storage will be constructed, with 90 percent of all storage and treatment operating within 10 years. This enforceable and practical schedule recognizes the realities associated with planning, designing, permitting and building such massive, state-of-the-art projects, while also allowing time for maturation and optimization of these natural biological systems. The comprehensive set of projects reflected in the consent order will ensure the district fully achieves the stringent water quality requirements for the ecosystem.

The State of Florida continues to recognize the importance of the Everglades to the state's environment, economy and way of life. To protect the Everglades' unique make-up of flora and fauna, the state of Florida passed the Everglades Forever Act in 1994. As part of this historic legislation, the district constructed 36,000 acres of treatment areas and the department established a stringent phosphorus water quality criterion. While the state's historic \$1.8 billion investment in water quality improvements and significant private sector investment has delivered significant results, these additional actions will achieve the ambient water quality standard established for the Everglades Protection Area.

This regulatory package represents the best, science-based roadmap for achieving Everglades water quality requirements. Through feasible and economically-sound actions, it both protects the interests of the Everglades and those of Florida's taxpayers. The state is confident in its ability to implement and enforce this plan, which when completed, will contribute to the success of all other state and federal Everglades restoration efforts in the years to come. If you have any questions, please do not hesitate to call me personally.

Sincerely,

A handwritten signature in black ink, appearing to read "Herschel T. Vinyard Jr.", written over a white background.

Herschel T. Vinyard Jr.
Secretary

Enclosure

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

FDEP RESPONSE

Consistent with the requirements of the Clean Water Act, its implementing regulations and the Memorandum of Agreement executed between the Department and USEPA with regard to the State's approved NPDES Program, the following responses are proffered by the Department as conditions and requirements which will satisfy the June 27, 2011, objections, as modified by the May 7, 2012, correspondence.

I. Specific Objection Regarding Compliance Schedules

USEPA objected to the Department's continuing use of NPDES permits with accompanying Administrative Orders (AOs). To resolve the objection, USEPA required the Department to: 1) revise the draft permits to "require that the total phosphorus water quality based effluent limit (WQBEL) becomes effective and enforceable on the effective date of the permits so that no compliance schedule is allowed[;]" and 2) "provide an explanation of its authority to issue such revised permits under State law."

Actions Taken by the Department to Address the Specific Objection

Although the Department disagrees with USEPA's legal reasoning for this objection, the Department is addressing the objection by including in the consolidated revised permit a WQBEL for total phosphorus that is effective and enforceable upon the effective date of the permit (see Section I.A.1. in attached permit).

The Department has clear legal authority to include WQBELs in NPDES permits where technology-based limits may be insufficient to attain water quality standards in the receiving waters. See Fla. Admin. Code Ch. 62-650. When a permittee is unable to immediately comply with a permit condition, the Department has various regulatory options in dealing with non-compliance. One option is to deny the permit. Here, denial of the NPDES permit would result in the closure of the STAs, which would result in significant environmental harm to the Everglades. As such, it is clearly in the public interest to allow the continued operation of the STAs while the projects necessary to attain the WQBEL are constructed and fully operational.

The Department intends to issue the revised permit and accompanying enforcement Consent Order to authorize STA discharges during the period the plan is being implemented. The Department has broad statutory authority to use such a regulatory mechanism in this context. See, e.g., §§ 403.061(6) and (8), 403.151, 403.088(2) and 120.57(4), Fla. Stat. The use of Consent Orders in conjunction with permits to authorize continuing NPDES discharges in situations similar to the one at hand, have been upheld in legal proceedings. See *Lane v. International Paper and DEP*, 2010 WL 333011 (DOAH Jan. 27, 2010), modified in part on other grounds by Case Nos. 08-1964, 08-2074 (DEP March 10, 2010). The Department's legal authority in this context is explained in more detail in

a legal opinion issued by the Department's General Counsel on June 5, 2012 to Region 4's Office of Water Legal Support, a copy of which is attached and incorporated by reference.

II. Specific Objection Regarding "Diversion" versus "Bypass"

USEPA objected to provisions in the permit that were believed to have allowed water that entered the STA head works to be diverted around and/or away from the STAs, thus constituting a bypass. USEPA's May 7, 2012, letter reaffirmed this objection; however, it also modified the steps necessary to address the objection. As such, USEPA's prescribed actions to address this objection consisted of 1) modifying the Project Description to contain sufficient level of detail to distinguish between the facility and the diversion structures; 2) revising permits to include language that prohibits the use of diversions for the purpose of achieving the WQBEL; and, 3) revising permits to include reporting requirements for diversion flow volumes, concentrations and reasons for diversions to the Everglades. USEPA indicated, as part of their May 7, 2012, letter, that their focus would be on whether provisions of the revised permits provide for enforceable oversight of the permittee's decision-making and enforceable consequences for improper diversions.

Actions Taken by the Department to Address the Specific Objection

To avoid any confusion as to what constitutes a "diversion" versus "bypass", the Department has defined, in detail, the actual treatment facility (see "Project Description" and "Surface Water Discharge" Sections of attached permit). The NPDES permit and associated fact sheet include detailed descriptions of the treatment facility, diversion, inflow and discharge structures. Further details are included in the attached NPDES permit "Project Description" and "Surface Water Discharge" sections; Sections 1.b, 1.c., and 1.d. of the NPDES permit Fact Sheet; and the accompanying STA Figures 1 through 5. Section I.E.10 of the NPDES permit has also been modified to include language that strictly prohibits the use of diversions for the purpose of meeting the WQBEL.

In addition to the modifications listed above, the Department proposes to include monitoring and reporting requirements as part of the State issued Everglades Forever Act permit in order to capture diversion volumes and phosphorus concentrations, and to evaluate the reasoning behind any diversions. These requirements will allow for the Department to adequately assess the permittee's decision-making regarding the appropriateness of the diversion. Such information will allow the Department to determine whether improper diversions have occurred and whether an enforcement action is necessary. The Department believes these changes address USEPA's objection as prescribed in the May 7, 2012, letter.

III. Specific Objection Regarding Necessary Annual Reporting Requirements

USEPA specifically objected to what they believed was a lack of sufficient annual reporting provisions to evaluate the proper operation and maintenance of the STAs, to assure that reported data were representative of the discharge, and to evaluate the impact of the discharge on the Everglades. To eliminate the objection, the June 27, 2011, letter prescribed specific steps necessary to address these objections. However, in their May 7, 2012, letter the USEPA acknowledges that alternative steps may be taken to address the objection outside of what was previously prescribed. Such alternative steps would need to assure: 1) monitoring of the STA operation to forecast and prevent overloading, and 2) inclusion of reporting requirements for STA operation and maintenance that would facilitate prevention of discharge concentrations that may result in an exceedance of the WQBEL prior to the end of the water year. Specifically, USEPA required that permits must include, at a minimum "annual reporting mechanisms that identify what corrective actions were undertaken if a potential phosphorus WQBEL exceedance did occur" and "annual reporting of improvements, enhancements, and strategies to the STAs and regional water management systems undertaken to ensure compliance with the permit."

In addition to the requirements above, the USEPA indicated that the actions necessary to address items III. c-e of their objection remained unchanged. These included annual reporting for source control implementation, assessments as to the performance of such controls in the C-139 and Everglades Agricultural Area Basins, and basin-wide monitoring in basins contributing to the surface water inflows to the STAs. USEPA, however, modified the terms of their June 27, 2011, letter to eliminate the requirement for additional source control implementation, assuming the Department took such actions as prescribed by USEPA to address Specific Objection I.

Actions Taken by the Department to Address the Specific Objection

The Department has, as part of the attached revised permit, included conditions that require 1) monthly discharge monitoring reports; 2) semi-annual assessments and reports on facility performance with regard to concentration levels and flows; 3) identification of operational and maintenance activities that may be taken by the permittee to address a potential exceedance of the WQBEL (both annual and long-term); 4) an annual assessment and compliance review on an accelerated schedule (July versus March); and, 5) the development and implementation of Recovery Plans to ensure continual efforts to maintain compliance are being implemented (See Sections I.E.4 and I.A.5 through I.A.10 of the NPDES permit). These requirements provide for an enhanced operational monitoring procedure that requires reports and assessments at strategic intervals to identify actions the permittee may undertake to enhance STA performance prior to the conclusion of the compliance period and avoid potential exceedances of the WQBEL. The conditions identified above also provide for reporting

of prior year corrective action implementation and identification of corrective actions that shall be implemented if an exceedance did occur.

The Department has also included specific reporting requirements in Section I.E.6 of the permit to be addressed as part of the annual South Florida Environmental Report (SFER), including: the status of the implementation of activities required by the permit, Department-issued enforcement or consent orders and regional activities by basin (e.g., best management practices implementation), including current phosphorus loads and trend analyses of flows and loads to the facilities; facility design modifications which may affect the activities required by the permit; improvements, enhancements, and/or regional water management projects that have been initiated and/or completed within the previous year; implementation status of facility recovery plans in accordance with Section I.A.7, I.A.9 and I.A.10, and/or following a major event outside the control of the permittee (e.g., hurricane) which has affected the operational status or the ability to satisfy the requirements of the permit; and information as to whether revisions and/or improvements and enhancements to the facility or regional water management system are recommended to ensure compliance with the conditions of this permit. These changes fully address USEPA's objection with regard to items in Section III of the May 7, 2012, letter.

In addition to the reporting requirements described above, the permittee is also independently required by Florida law to implement the responsibilities assigned to it through Rule 40E-63, Fla. Admin. Code. This Rule requires the implementation of a District-run program to assess and enforce source control implementation within the EAA and C-139 Basins. A specific requirement of this program includes an annual assessment of flows and loads throughout the Basin, an assessment that the District reports on annually through the SFER.

IV. Specific Objection Regarding "Early Warning" Reporting Requirements

USEPA based their specific objection on NPDES permit regulations that require the ability to evaluate whether a treatment facility is being properly operated and maintained on an ongoing basis and that there is sufficient data representative of the monitored activity. As a result of its May 7, 2012, letter, USEPA indicated that a permit requirement for mid-year early warnings that would allow for adaptive responses and corrective actions in all water years would meet this objection.

Actions Taken by the Department to Address the Specific Objection

The Department has, as part of the attached revised permit, included "early warning" conditions such as: 1) monthly discharge monitoring reports; 2) semi-annual assessments and reports on facility performance with regard to concentration levels and flows; and, 3) identification of operational and maintenance activities that may be taken

by the permittee to address a potential exceedance of the WQBEL (both annual and long-term). For more detail, please see Sections I.A.5 through I.A.10 of the NPDES permit. These requirements provide for an enhanced operational monitoring procedure that requires reports and assessments at strategic intervals and provides for the identification of actions that the permittee may undertake to enhance STA performance prior to the conclusion of the compliance period and avoid potential exceedances of the WQBEL. These conditions address USEPA's objection.

Based on the information presented above, the attached revised NPDES permit and accompanying Consent Order, and the coordination of our revised responses with USEPA staff, the Department is confident it has not only addressed USEPA's specific objections, but when viewed in concert with the enforceable framework and the State's plan for addressing water quality, has also laid out a roadmap for a feasible, economically sound series of corrective actions to address water quality in discharges from the STAs to the Everglades Protection Area. The Department is confident in its ability to enforce this plan through State-issued permits, which will set the stage for the remaining restoration efforts under the Comprehensive Everglades Restoration Plan. If you have any questions or concerns, please do not hesitate to call me personally.



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June 5, 2012

Philip G. Mancusi-Ungaro, Esq.
Office of Water Legal Support
United States Environmental Protection Agency
Region 4
Atlanta Federal Center
61 Forsyth Street
Atlanta, Georgia 30303-8960

Dear Mr. Mancusi-Ungaro:

As requested by EPA, the following legal opinion addresses EPA's questions raised during our recent meetings in regard to the Everglades NPDES permits.

Questions Presented

This opinion addresses questions raised by EPA relating to the Department's authority under Florida law to enter into enforceable Consent Orders with responsible parties to resolve enforcement matters involving violations of State water quality standards by those parties. More specifically, it addresses EPA's questions related to: 1) Whether the Department possesses sufficient statutory authority under Florida law to enter into one or more Consent Orders with the South Florida Water Management District (SFWMD or "the District") to resolve existing and prospective violations of State water quality standards in the Everglades Protection Area (EvPA) resulting from excessive phosphorus in discharges to the EvPA from the Everglades Stormwater Treatment Areas (STAs), which are operated by SFWMD for the purpose of phosphorus removal from waters entering the EvPA from upstream sources via structures and conveyances owned and operated by SFWMD; 2) whether such Consent Order(s) can provide the necessary reasonable assurance required under Florida law for the issuance of permits under state law (specifically including but not limited to Everglades Forever Act and NPDES permits) for construction of and/or discharge from the STAs (existing, new and/or modified) and, where applicable, related appurtenances such as reservoirs and flow equalization basins; and 3) whether, in our opinion, the use of Consent Orders in connection with the issuance of Department permits is permissible in light of the prohibition against the use of Administrative Orders (AOs) and moderating provisions

by Judge Gold in the consolidated cases pending before him in the Southern District of Florida.¹

Short Answers

The short answer to all of these questions is "Yes." As detailed below, the Department has full authority to enter into and enforce Consent Orders of this type, and where such Consent Orders contain a mandate for the construction and operation of projects designed to achieve water quality standards and associated WQBELs at the earliest achievable date, according to an enforceable schedule set forth in the Consent Order for constructing and operating such projects, they provide the necessary reasonable assurance under Florida law for the issuance of construction and/or operating permits. Consent Orders are one of the primary enforcement tools used by the Department to resolve environmental and water quality violations, including obtaining injunctive relief from the courts and the assessment and collection of monetary penalties in appropriate cases. AOs are typically used for the primary purpose of being able to issue a permit to the permittee under circumstances where the permit would otherwise be denied. Because Consent Orders are enforcement orders and have stand-alone capability for this purpose, we believe the court should be receptive to their use in connection with discharge permits in the current circumstances.

Discussion and Analysis

1) Statutory Authorization for and Use of Consent Orders by the Department

Consent orders are specifically authorized under multiple provisions of Florida law. Section 403.061, Florida Statutes, which sets forth the powers and duties of the Department, provides in relevant part:

The Department shall have the power and the duty to control and prohibit pollution of air and water in accordance with the law and rules adopted and promulgated by it, and, for this purpose, to:

* * * *

(6) Exercise general supervision of the administration and enforcement of the laws, rules, and regulations pertaining to . . . water pollution.

* * * *

(8) Issue such orders as are necessary to effectuate the control of . . . water pollution and enforce the same by all appropriate administrative and judicial proceedings.

Likewise, Section 403.151, Florida Statutes, provides that "All rules or orders of the department which require action to comply with standards adopted by it, or orders to

¹ Miccosukee Tribe of Indians of Florida, et al. v. United States of America, et al., Case No. 04-21448-CIV-GOLD (and consolidated cases) (S.D. Fla.).

comply with any provisions of this act, may specify a reasonable time for such compliance." Additionally, Paragraphs 403.088(2)(e) and (f), Florida Statutes, allow for the issuance of an order, which can be a consent order, associated with a wastewater discharge permit upon the demonstration of one of six statutory criteria.² Finally, in addition to the powers and duties set forth above, Florida's Administrative Procedure Act provides, in Subsection 120.57(4), Florida Statutes: "Unless precluded by law, informal disposition may be made of any proceeding³ by stipulation, agreed settlement, or consent order." Each of the foregoing laws provides independent statutory authority for the entry of a consent order by the Department to address violations and resolve enforcement matters.

Consent orders are final orders of the Department to which the Respondent "consents," thereby waiving the Respondent's right to challenge the terms of the consent order, except as provided in Subsection 120.69(5), Florida Statutes.⁴ Besides being an agency

² The relevant provisions of Section 403.088, Florida Statutes provide as follows:

403.088 Water pollution operation permits; conditions. —

* * * *

(2)(d) No operation permit shall be renewed or issued if the department finds that the discharge will not comply with permit conditions or applicable statutes and rules.

(e) However, if the discharge will not meet permit conditions or applicable statutes and rules, the department may issue, renew, revise, or reissue the operation permit if:

1. The applicant is constructing, installing, or placing into operation, or has submitted plans and a reasonable schedule for constructing, installing, or placing into operation, an approved pollution abatement facility or alternative waste disposal system;
2. The applicant needs permission to pollute the waters within the state for a period of time necessary to complete research, planning, construction, installation, or operation of an approved and acceptable pollution abatement facility or alternative waste disposal system;
3. There is no present, reasonable, alternative means of disposing of the waste other than by discharging it into the waters of the state;
4. The granting of an operation permit will be in the public interest;
5. The discharge will not be unreasonably destructive to the quality of the receiving waters; or
6. A water quality credit trade that meets the requirements of s. 403.067.

(f) A permit issued, renewed, or reissued pursuant to paragraph (e) shall be accompanied by an order establishing a schedule for achieving compliance with all permit conditions. Such permit may require compliance with the accompanying order.

³ Initiation of formal enforcement proceedings is not a condition precedent to the issuance of a consent order pursuant to this statute or pursuant to the authorities cited from Chapter 403.

⁴ Subsection 120.69(5), Florida Statutes provides in pertinent part:

(5) In any enforcement proceeding the respondent may assert as a defense the invalidity of any relevant statute, the inapplicability of the administrative determination to respondent, compliance by the respondent, the inappropriateness of the remedy sought by the agency, or any combination of the foregoing.

order, consent orders also act as contractual settlement agreements. See Phibro Resources Corp. v. State, Dep't of Environmental Regulation, 579 So.2d 118, 123 (Fla. 1st DCA 1991) (A consent order is "a final agency order wherein all parties and the Department, by negotiation, have arrived at a mutually acceptable resolution of alleged violations of law for the purpose of achieving full and expeditious compliance with . . . Florida Statutes, and Department rules promulgated thereunder.").

A challenge to a consent order, as a practical matter, thus can only come from a third party. As an agency order, third parties may have standing under Section 120.569, Florida Statutes, to challenge the issuance of a consent order, if the third party meets the test set forth in Agrico Chemical Co. v. Dep't of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981). But see, M.A.B.E. Properties, Inc. v. Dep't of Environmental Regulation, Final Order at 4-5 (DEP 2011). By use of a consent order, the substantive nature of this challenge is somewhat limited. The applicable burden of proof applied in a third-party challenge to a consent order is "whether DEP abused its enforcement discretion in agreeing to the settlement." Lambou v. Dep't of Env'tl. Protection, Final Order at 4 (DEP 2003); see also Lambou v. Dep't of Env'tl. Protection, Recommended Order at 58 (DOAH 1992); Abbanat v. Reynolds and DER, Final Order at 4 (DER 1987); Sarasota County v. Dep't of Env'tl. Regulation and Falconer, Final Order at 2 (DER 1987). "The abuse of discretion standard does not turn on whether the consent order embodies the best possible settlement or even whether a better settlement could have been reached but, rather whether the settlement that was reached was reasonable under the circumstances." Lambou, Final Order at 5. In determining whether the Department reasonably exercised its enforcement discretion in the consent order, the factors to be considered include, but are not limited to, the nature of the violation, the availability of Department resources, the Department's enforcement priorities and the relative harm caused by allowing the corrective actions in the consent order compared to not allowing for the corrective actions in the consent order. Id. at 5, citing Sarasota County, Final Order; Abbanat, Final Order at 4.

Consent orders are most commonly used to resolve environmental violations, existing or prospective⁵, and may include appropriate corrective actions to redress the violations. Williams v. Moeller, 1986 WL 32866, *3 - *4 (DER 1986). In the case of existing violations, the consent order typically acknowledges past violations and mandates projects and enhancements that are designed specifically to redress those

⁵ For instance, consent orders may be used in circumstances where a change in law or conditions results in a situation where the respondent knows it will be out of compliance in the future or that it will be unable to comply with the time deadlines for meeting new requirements. In addition, the Department has issued "prospective purchaser agreements" as consent orders that allow for the resolution of future environmental violations. These consent orders grant persons intending to purchase contaminated property additional time, beyond the timeframes set forth in Department rule, to perform cleanup activities at the site they will be purchasing.

violations. In the case of prospective violations, the consent order will direct the actions necessary to avoid them and the time frame for doing so.

In mandating corrective actions, an enforcement consent order may authorize discharges even though the discharges would not immediately comply with all permit conditions or applicable statutes and rules. If the consent order's corrective actions are necessary for achievement of particular permit requirements, the consent order may be issued, in conjunction or association with a permit, as a means of supplying the necessary reasonable assurance that would otherwise be lacking for stand-alone permit issuance. See Lane v. International Paper and DEP, Final Order, (OGC Case No. 08-1964 and 08-2074, March 12, 2010) (Upholding a consent order accompanying a permit that otherwise lacked reasonable assurance for independent permit issuance).⁶

2) Use of Consent Orders as a Means for Providing Reasonable Assurance for the Issuance of Permits

Based on the foregoing authorities, it is clear that a consent order is primarily an enforcement document used to address existing and/or prospective enforcement violations, and a consent order can typically stand alone without a permit; however, a consent order can also be issued in conjunction with a permit as the "accompanying order" referenced in Section 403.088(2)(f), Florida Statutes. A consent order can also be used at a later time from the time it was issued (sometimes substantially later) to provide reasonable assurance for a subsequently issued permit under Section 403.088 (assuming the desired permit conditions are consistent with the requirements and schedules in the consent order; otherwise the consent order may have to be amended if circumstances such as new technology, new plans, etc. have changed in the interim). AOs, on the other hand, are more limited in their applicability and purposes, and AOs under Section 403.088 are typically used only in the circumstances set forth in Paragraphs 403.088(2)(e) and (2)(f), Florida Statutes, for the primary purpose of being able to issue a permit to the permittee under circumstances where the permit would otherwise be denied. Typically, their primary purpose is to establish a schedule for achieving compliance with all permit conditions. While they are clearly enforceable, they are not usually intended as a "front-line" enforcement document, but are primarily used, under the circumstances in Section 403.088(2)(e), to enable a discharge to be permitted; thus AOs also function to provide a "permit shield" to the permittee for noncompliant sources under the circumstances set forth in the statute.

⁶ Due to the availability of other mechanisms (such as administrative orders and variances, here not available under Judge Gold's orders) typically at the Department's disposal to authorize activities in situations where the necessary reasonable assurance for permit issuance would otherwise be lacking, the Department normally has little need to use a consent order in this fashion, and only occasionally does so. Nevertheless, consent orders are well recognized mechanisms under Florida law for bringing noncompliant sources into compliance, and they can be a useful alternative vehicle to authorize discharge permits where immediate compliance with all permit conditions is not anticipated.

3) Relationship of Issues Addressed in this Opinion to the Court's Rulings in the Judge Gold Case

In his Omnibus Order issued April 26, 2011, Judge Gold clarified and reiterated his earlier findings and rulings (from his July 29, 2008 and April 14, 2010 Orders) prohibiting and invalidating the use of AOs with compliance schedules in connection with state-issued permits for construction and operation of the STAs. Among other things, Judge Gold emphasized that the existing and proposed AOs and compliance schedules unnecessarily prolonged compliance with the applicable water quality criteria for phosphorus in the EvPA, and thus had the effect of being a "blanket variance" that authorized continuing violations of the Clean Water Act (CWA) in discharges from the STAs to the EvPA. In this regard, the following findings by the court are relevant:

Currently, each STA discharging into the Everglades Protection Area has a State-issued permit authorizing such discharges. [ECF No. 530, p. 16]. Each permit is accompanied by a State Administrative Order ("AO") establishing a schedule for construction, enhancement, and/or stabilization of the STAs. However, the AO also relieves the District from having to immediately comply with the otherwise applicable WQBEL identified in the permit.

* * * *

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

(Omnibus Order at 26-27.)⁷

⁷ It should be noted, as discussed in text *infra*, that a properly constructed consent order could begin the enforcement process while the WQBEL is being developed (instead of afterwards), and it could mandate compliance with the WQBEL when the projects designed to achieve the WQBEL, which would be set out in the consent order, are completed and operational. Meanwhile, design and construction of those projects could be mandated to begin immediately, which would eliminate steps in the permitting/enforcement process and result in achievement of the WQBEL at the earliest possible date. This would eliminate, as much as possible, Judge Gold's objections to the use of AOs as an approach that only delays compliance with the deadline for achieving water quality standards:

Relaxing the water quality standards, and correspondingly, the WQBEL, represents an approach that would only serve to delay the process of compliance with the water quality standards. As such, to the extent that FDEP seeks to use AOs to further delay the long-overdue December 31, 2006 compliance deadline approved by the EPA – whether in existing or new permits – such action is contrary to the directives of my prior orders. To

Judge Gold also noted the necessity of cooperation among the parties in order to avoid further delays:

The State, and to a significant extent, the EPA, cannot merely continue to push off deadlines. . . . The State and the EPA must work together, in conjunction with the other parties and intervenors in this action, to move forward and avoid any further standstill or delay.

(Id. At 41-42.)

In the decretal portion of the Omnibus Order granting the Department's Motion for Clarification, the court stated:

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

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

c. The EPA, in reviewing all permits submitted by the Department, shall similarly refrain from approving use of Administrative Orders in conjunction with permits. The EPA shall act consistent with the standards set forth in the Memorandum of Understanding between the EPA and the State and within the EPA's permitting and reviewing authority.

(Id. at 75-76.)

From the foregoing, it seems clear that the Court was primarily concerned with what it perceived to be unnecessary delays in achieving compliance with water quality standards for phosphorus, and hindrance of effective enforcement of those water quality standards, that were being facilitated by the Department's use of AOs with compliance schedules. The court also appeared to consider that EPA's available

be abundantly clear, the instant Order specifically determines that based on the prior use—which may arguably be characterized as abuse—of Administrative Orders to prolong the time within which compliance with the CWA must occur, the use of Administrative Orders is expressly disapproved.

(Id. at 70-71.)

enforcement remedies under the CWA would provide options that would not be available under Florida law:

As I made clear in my prior orders, it is necessary to enact and enforce the appropriate water standard and QBEL now, and to have immediate conformance of the permits for the purpose of enforcing all terms therein. (*Id.* at 39.)

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

³⁴ For example, pursuant to Section 309(a)(3) of the CWA, the EPA may "issue an order requiring such person [in violation of the CWA] to comply with [the CWA], or . . . bring a civil action in accordance with subsection (b) of this section." 33 U.S.C. § 1319(a)(3). Pursuant to Section 309(b), the EPA may file a civil action seeking injunctive relief for violations of the CWA or penalties pursuant to Section 309(d). See also 33 U.S.C. § 1319(g) (discussing EPA's ability to assess administrative penalties for violations of the CWA or a permit issued thereunder). In addition to the EPA's potential remedies, citizen suits are authorized pursuant to 33 U.S.C. § 1365 against those who are "alleged to be in violation of (A) an effluent standard or limitation" 33 U.S.C. § 365(a)(1). (*Id.* at 48.)

However, as noted in the subsequent text discussion, Florida has analogous enforcement remedies in the State courts for all of EPA's remedies cited by Judge Gold. See Sections 403.121, .131, .141 and .161, Florida Statutes. In fact, the adequacy of equivalent State enforcement remedies was a necessary prerequisite for the approval of Florida's program as an authorized NPDES program, as reflected in the MOA between the Department and EPA.

It is our opinion that Consent Orders are not subject to these articulated objections. First of all, a Consent Order is a primary, "front-line" enforcement document that is regularly used by the Department to immediately address enforcement violations, and as such, it can typically stand alone without a permit. However, a Consent Order can also be issued contemporaneously with a permit as the "accompanying order" referenced in Section 403.088(2)(f) to authorize discharges; alternatively, it can also be used at a later date from the time it was issued to provide reasonable assurance for a subsequently issued permit authorizing discharges. If a Consent Order is violated, it

can be administratively enforced by the Department or, as is more often the case, directly by a Circuit Court in an action brought by the Department in state court for injunctive relief (including emergency relief where appropriate), as well as for the imposition of statutory penalties, damages and costs. See Sections 403.121, .131, .141 and .161, Florida Statutes. A Consent Order may also provide for the imposition of stipulated penalties, damages and costs under circumstances specified in the Order. It may also be enforced by means of a citizen's suit under Section 403.412, Florida Statutes, if the Department fails to take timely action to enforce its provisions. Thus, a Consent Order fully addresses the enforcement concerns articulated by Judge Gold.

Second, Consent Orders (and likewise other enforcement remedies available to the Department) were not prohibited, disapproved, or disfavored by Judge Gold in his orders. Indeed, it seems clear that one of his concerns was the potential interference with effective enforcement of the achievement of water quality standards that he perceived resulted or could result from the use of variances, moderating provisions, and AOs with extended compliance schedules. Therefore, we would consider a properly constructed Consent Order as *removing* potential impediments to the process of achieving compliance with water quality standards,⁸ because the enforcement process and procedures, and most of the underlying factual determinations, would already be in place and agreed to by the Respondent.

Third, a Consent Order would, by definition, have the advance agreement of the permittee (the District) to the terms and underlying facts set forth in the Consent Order, thus limiting challenges to it and substantially expediting enforcement litigation, should that become necessary. A Consent Order would also meet Judge Gold's directive, in the 2011 Omnibus Order, regarding participation by the District in implementing necessary remedial measures ("It is clear that the District must be involved in implementing the forthcoming measures as they relate to the Everglades." *Id.* at 67.).

If the Department and EPA are able to agree that the Department has adequately addressed EPA's pending objections to the permits "deemed" submitted to EPA in the Omnibus Order, the Department would of course be willing, if necessary, to seek (jointly with EPA, and with participation by the District and the Intervenors) the Court's approval of the procedures discussed herein.

⁸ As Judge Gold stated in the April 14, 2010 Order: "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." *Id.* at 28-29 (quotation marks by the court).

Summary and Conclusions

Based on the foregoing analysis of Judge Gold's Orders, as well as applicable statutes and case law, it is the opinion of the Office of General Counsel of the Department that:

- 1) The Department has full authority under Florida law to enter into and enforce Consent Orders to resolve violations of water quality standards and related enforcement matters. Such Consent Orders can and often do contain a mandate for the construction and operation of projects designed to achieve water quality standards and associated WQBELs at the earliest achievable date, according to an enforceable schedule set forth in the Consent Order for constructing and operating such projects. More particularly, the Department possesses sufficient statutory authority under Florida law to enter into one or more Consent Orders with SFWMD to address and resolve violations of State water quality standards in the EvPA resulting from excessive phosphorus in discharges to the EvPA from the Everglades STAs.
- 2) In the circumstances described above, where such Consent Order contains a mandate for the construction and operation of projects designed to achieve water quality standards and associated WQBELs at the earliest achievable date, according to an enforceable schedule set forth in the Consent Order for constructing and operating such projects, the Consent Order provides the necessary reasonable assurance under Florida law for the issuance of a construction and/or operating permits. The permit may be issued contemporaneously with the Consent Order, or at a later date (such as after completion of construction of a required treatment project, but prior to discharge from that project).
- 3) Consent Orders are distinguishable in a number of respects from AOs and moderating provisions, and recognizing and emphasizing these differences should persuade the court that use of Consent Orders in conjunction with discharge permits is a viable and expeditious means of achieving compliance with water quality standards in the Everglades at the earliest achievable date. Consent Orders are one of the primary enforcement tools used by the Department to resolve environmental and water quality violations, including obtaining injunctive relief from the courts and the assessment and collection of monetary penalties in appropriate cases. AOs, on the other hand, are typically used for the primary purpose of being able to issue a permit to the permittee under statutorily specified circumstances where the permit would otherwise be denied. Because Consent Orders are enforcement orders and have stand-alone capability for this purpose, we believe the court would approve of their use in connection with discharge permits in the current circumstances.

Philip G. Mancusi-Ungaro, Esq.

June 5, 2012

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I hope that this opinion and analysis are helpful. If you have any questions or need any further information, please do not hesitate to contact me by e-mail or at (850) 245-2295.

Sincerely,



Thomas M. Beason

General Counsel