

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

No. 04-21448-GOLD/MCALILEY (and consolidated cases)

MICCOSUKEE TRIBE OF INDIANS)
OF FLORIDA, a federally-recognized)
Indian Tribe; and FRIENDS OF THE)
EVERGLADES,)
)
Plaintiffs,)
)
v.)
)
UNITED STATES OF AMERICA, et al.,)
)
Defendants.)
)

NOTICE OF FILING AMENDED DETERMINATION

Defendants United States of America, et al., (collectively “EPA”) hereby give notice of filing the attached Amended Determination, prepared in compliance with the Court’s Order of April 14, 2010.

This action was brought by Plaintiffs Miccosukee Tribe of Indians and Friends of the Everglades seeking judicial review of EPA’s determination that 2003 Amendments to Florida’s Everglades Forever Act (“EFA”) were not new or revised water quality standards and EPA’s approval of Florida’s Phosphorus Rule. On July 29, 2008 the Court entered judgment in the case on motions for summary judgment. DE 323. In that decision the Court held that revisions to the EFA were

new or modified water quality standards that EPA was required to review and vacated in part EPA's approval of the Phosphorus Rule. On November 24, 2009, Plaintiffs moved for enforcement of the Court's 2008 Order. DE 357. On December 3, 2009, EPA issued a Determination disapproving the EFA Amendments and portions of the Phosphorus Rule as new or revised water quality standards. DE 360-1. On December 15, 2009, Plaintiffs filed a second motion for enforcement of the Court's 2008 Order. DE 364. The Court held an evidentiary hearing and, on April 14, 2010, the Court issued an Order granting Plaintiffs' motions in part. DE 404 ("April 14 Order"). The April 14 Order requires EPA to file an Amended Determination regarding the EFA Amendments and Phosphorus Rule by September 3, 2010. DE 404 at 44. The attached Amended Determination is issued in compliance with the Court's April 14 Order.

In the attached Amended Determination, EPA:

- (1) Revises its 2009 Determination to exclude all provisions that were stricken by the Court's April 14, 2010 Order.
- (2) Provides specific direction to the State of Florida to revise the Everglades Forever Act and the Phosphorus Rule to bring them into compliance with the requirements of the Clean Water Act.

- (3) Notifies the State of Florida that the narrative and numerical criteria for the applicable water quality standards are not being achieved in the Everglades Protection Area.
- (4) Identifies the water quality based effluent limit (“WQBEL”) that EPA has derived to ensure that the discharge from each stormwater treatment area (“STA”) meets the water quality standards for phosphorus in the Everglades Protection Area.
- (5) Identifies a set of corrective measures that EPA demonstrates would be necessary for the discharges from each STA to comply with the WQBEL. The Amended Determination allows for a short period of time, not to exceed 60 days after issuance of the Amended Determination, during which the South Florida Water Management District may suggest alternative remedial measures that would also achieve the identified water quality objectives and do so in an equivalent or shorter time frame.
- (6) Directs the Florida Department of Environmental Protection (“FDEP”) as to how it must conform the discharge permits for each STA in order to comply with the Court’s April 14 Order.

Accordingly, the Amended Determination directs FDEP to remove

from those permits all provisions that the Court has invalidated, including “all references to non-conforming elements of the Long Term Plan, the moderating provisions, and the extended compliance schedule” beyond 2006, and to require compliance with the phosphorus water quality criteria. April 14 Order at 46. The Amended Determination also instructs FDEP to incorporate the WQBEL into each STA permit, to update pollution prevention and operations plans, and to adopt enhanced monitoring requirements to better evaluate the impact of the discharges on the Everglades. The Court’s April 14 Order directs FDEP to conform the existing STA permits within 60 days of issuance of the Amended Determination.^{1/}

- (7) Notifies FDEP that compliance schedules may not be included in NPDES permits – including through State Administrative Orders or Everglades Forever Act permits – for discharges into the Everglades Protection Area.

^{1/} While the Court directed FDEP to issue conformed permits within 60 days, and EPA believes that it is possible for FDEP to do so, Florida law ordinarily allows for parties in interest to initiate an administrative appeal of any noticed permit, which automatically stays the effectiveness of a permit and can delay the process of final permit issuance. See Section 120.60, Florida Statutes.

The Amended Determination is fully consistent with the requirements of the Court's Order of April 14, except for two areas upon which EPA is awaiting an indicative ruling from the Court on EPA's motion to amend the Order pursuant to Fed. R. Civ. P. 60(b) and 62.1. DE 446. The first concerns the specific changes ordered by the Court "to correct deficiencies in the Everglades Forever Act and Phosphorus Rule." April 14 Order at 44. In Section II of the Amended Determination EPA, as instructed by the Court, directs the State of Florida to amend the Phosphorus Rule by January 1, 2011, and to amend the Everglades Forever Act by July 1, 2011. In its 60(b) motion, however, EPA moved the Court to modify its April 14 Order to permit EPA to make minor changes in the revisions required in the EFA and Phosphorus Rule. DE 446 at 19-20. The Court subsequently scheduled a hearing on EPA's 60(b) motion for October 7, 2010. DE 448. Consistent with the 60(b) motion, the Amended Determination includes EPA's modified language, which makes minor corrections to the language included in Attachments B and C to the Court's April 14 Order. As explained in its 60(b) motion, EPA believes that these minor changes are necessary to ensure that the corrected EFA and Phosphorus rule are consistent with the Clean Water Act and the Court's 2008 Order. DE 446 at 19-20. Moreover, EPA believes that the approach adopted in the Amended Determination is fully consistent with the

Court's intent, and EPA awaits further instruction from the Court in response to the 60(b) motion.

Second, as described in the 60(b) motion, EPA lacks statutory authority to comply with the Court's order that EPA partially withdraw Florida's authority to issue NPDES permits only for discharges into or within the Everglades Protection Area. DE 446 at 8-12. While EPA could initiate proceedings to withdraw Florida's entire NPDES program, as explained in the 60(b) motion, such a course would be cumbersome and likely counterproductive. The Clean Water Act requires a lengthy administrative process and a specific substantive showing before EPA may withdraw a State program and such decision could be subject to judicial challenge. Id. at 12-13. Furthermore, even if EPA could successfully withdraw Florida's entire NPDES program, the Agency would be required to devote substantial resources to permitting all discharges of pollutants throughout the State, thus diverting EPA resources from the task of addressing water quality problems in the Everglades. Id.

As described in the 60(b) motion, EPA believes that the Court's objectives could be achieved more efficiently and in a manner more consistent with EPA's statutory authority through the existing process for EPA review of State-issued permits. DE 446 at 13-15. Specifically, EPA has moved the Court to modify the

injunction prohibiting FDEP from issuing or modifying permits for discharges into the STAs (except to conform the permits pursuant to paragraph 3 of the Court's Order) to allow FDEP to issue new or modified permits provided that FDEP submit any such permits to EPA for review both before providing notice of such permitting action for public comment and after receiving public comment on the proposed permit. Id. In that pre-proposal review, EPA would ensure that the permits are consistent with the Clean Water Act, its implementing regulations, this Court's Orders, and the Amended Determination. Id. EPA believes that this approach would achieve the Court's objective of ensuring that permits issued for the discharge from each STA will achieve the necessary WQBEL in the shortest possible time and will do so in a manner consistent with EPA's statutory authority.

Given that EPA lacks the authority to partially withdraw the State's NPDES permit program, and in light of EPA's pending 60(b) motion and the upcoming hearing on that motion, EPA has not attempted to initiate program withdrawal at this time. Once the Court rules on the 60(b) motion, EPA will respond as necessary.

Ultimately, EPA has taken a comprehensive approach in the Amended Determination. EPA instructs FDEP, with specificity, how to conform the existing STA permits to not only remove references to the stricken portions of the

Everglades Forever Act and Phosphorus Rule, but also to ensure the discharges do not cause exceedances of the phosphorus criteria. To do so, EPA instructs FDEP to include a WQBEL adequate to ensure water quality compliance, updated pollution prevention and operations plans, and enhanced monitoring requirements in each STA permit, and has identified specific remedial measures necessary for each STA discharge to achieve the WQBEL. Moreover, EPA will carefully review the conformed permits to ensure compliance with the Court's Order and the Amended Determination. Given that FDEP is currently enjoined from issuing or modifying any other NPDES permits for discharges into or within the Everglades Protection Area, EPA does not believe that withholding action on permit program withdrawal in anticipation of the upcoming hearing and the Court's indicative ruling on the 60(b) motion will adversely affect the objective of achieving water quality standards in the Everglades in any way. Accordingly, EPA is awaiting the Court's indicative ruling on the 60(b) motion.

Respectfully submitted,

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September 3, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2010, a true and correct copy of the foregoing document was filed electronically with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served on the following counsel via transmission of Notices of Electronic Filing generated by CM/ECF.

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