

February 14, 2023

Special Master Hon. John M. Barkett
Shook Hardy & Bacon
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By Electronic Mail

Re: *United States v. South Florida Water Management District*, S.D. Fla. No. 88-1886
(Everglades Consent Decree)

Dear Special Master Barkett:

This letter is in response to your request for a report from the parties' counsel addressing the current timeline for remedies for the Water Year (WY) 2019 exceedance of the long-term limit for Shark River Slough. This letter is provided for informational purposes and does not waive any claim, defense, or argument on the part of any party.

At its meeting on December 13, 2022, the Technical Oversight Committee (TOC) discussed a recent memorandum from the Consent Decree "principals"¹ (December Memo) that addressed the ongoing efforts of the principal-led S-333 Working Group to study the WY 2019 exceedance. During the meeting, you expressed concern about the timeline for the Working Group process and asked the parties' counsel to send you a joint report addressing how the December Memo relates to compliance with the Consent Decree's requirement for "additional remedies" when there are exceedances of the phosphorus limits in Appendix A.² You requested the report by January 9, 2023, but at the request of the parties, you extended the deadline to February 14, 2023.

This letter reflects the agreement of the United States, SFWMD, and FDEP, that the current Working Group process is consistent with the Consent Decree.

¹ The principals referenced herein are the Superintendent of the National Park (Park), the Manager of the Loxahatchee National Wildlife Refuge, the District Engineer for the U.S. Army Corps of Engineers, Jacksonville District (Corps), the Executive Director of the South Florida Water Management District (SFWMD), and the Secretary of Florida Department of Environmental Protection (FDEP)). The Consent Decree identifies these five officials as those entitled to receive notice of potential disputes under Paragraph 19.

² The Consent Decree states that when there are exceedances of the phosphorus limits, "additional remedies will be taken" such as "expansion of [stormwater treatment areas (STAs)], more intensive management of STAs, a more stringent [Everglades Agricultural Area] regulatory program, or a combination of the above," but "[t]he State parties shall not implement more intensive management of the STAs as the sole additional remedy." Appendix C, at C-4. *See also* Decree ¶ 10B.

Background

In August 2020, the TOC confirmed that the final data for WY 2019 showed that the flow-weighted mean for phosphorus entering Shark River Slough exceeded the long-term limit in Appendix A. The TOC reached a “general consensus” that the exceedance did not appear to be the result of data error or an extraordinary natural phenomenon. But, in order to gain a better understanding of the factors contributing to the exceedance, the TOC did not make a recommendation as to the need for additional remedies.

SFWMD’s analysis of the data indicated that the WY 2019 exceedance might be related to disturbance of phosphorus-laden sediments near the S-333/S-333N complex, with less contribution from the STAs or nonpoint source pollution entering the Everglades Protection Area on a regional basis. However, additional technical analysis would be needed to establish causation and identify suitable remedial actions.

In October 2020, the principals sent a memorandum to the TOC agreeing that the WY 2019 exceedance was related to a localized phenomenon of phosphorus release and transport linked to patterns of canal stage and flow and less related to phosphorus coming from the Everglades Agricultural Area. The drivers of the phosphorus release (*i.e.*, “localized drivers”) are thought to be sediment disturbance or related dynamics in the vicinity of the S-333/S-333N structures or the nearby reaches of the L-29 and L-67A canals. Until these localized drivers are better understood and the spatial extent of the sedimentation problem is determined, the appropriate actions to redress the localized drivers are unclear.

The principals established the S-333 Working Group, which is composed of experts from each agency, to study the issue and make recommendations. The Park’s TOC representative is a member of the Working Group, and the TOC representatives for the Corps and the Refuge have also been active participants in the Working Group’s discussions.

Working Group Process

The Working Group’s first assignment was to address data needs and establish a direction for its investigation. In February 2021, following a series of technical team meetings, the Working Group recommended two studies: a sediment study and a hydrodynamic study. The principals endorsed the recommendations from the Working Group in March 2021, and they provided additional agency staff support and funding to execute the studies. The Working Group vetted the scope of both studies, and the agencies then entered into contracts for the technical work.

The Park is funding and conducting the sediment study. The purpose of this study is to characterize the sediments in the area of the S-333/S-333N complex and the nearby reaches of the L-29 and L-67A canals. One component of the study is to perform an experimental effort for estimating sediment bed-volume. The Park has completed the data-collection phase of this component and is preparing its interpretation of the results, along with recommendations. A second component of the study is to characterize sediments and floc in the canals and the marsh adjacent to the Park. This study is expected to conclude with data analysis and a report in June 2023. A third component of the study is to quantify nutrient concentrations in the canals to assess their contribution to phosphorus loading into the Park. This component of the study is anticipated to be completed in March 2023. These study components are proceeding under the direction of the Park

Superintendent and the Park’s TOC Representative. The Park expects to report its findings and recommendations to the Working Group in June 2023.

SFWMD is funding and conducting the hydrodynamic study. The purpose of this study is to model different flow scenarios and the potential effect on sediment entrainment. SFWMD’s modeling may be refined based on the data gathered in the Park’s sediment study. SFWMD also expects to present its findings and recommendations to the Working Group in June 2023.

Once it receives the findings and recommendations from the Park and SFWMD, the Working Group will develop a consensus recommendation for actions to address any characteristics of the sediment and/or localized canal or water control structure hydrodynamics that may be causing or contributing to exceedances.³ That recommendation is expected no later than September 2023.

The principals anticipate that they will jointly determine an appropriate future course of action regarding any additional remedy based on the Working Group recommendation and that they will advise the TOC of that determination in the fall of 2023.

Compliance with the Consent Decree

Counsel for the United States and counsel for the State Parties agree that the current Working Group process is consistent with the Consent Decree and is an appropriate step toward responding to the WY 2019 exceedance. The Consent Decree calls for a collaborative, science-based approach to restoring water quality. Remedies for exceedances should also be based on science, including data-driven characterization of the factors contributing to the exceedances. That principle applies to both litigated and voluntary remedies. Here, the agencies have chosen to cooperate in conducting a scientific investigation outside of an adversarial litigation context, thereby conserving the resources of the parties and the Court. The total time from the determination of the WY 2019 exceedance (in August 2020) to a recommendation for action (in fall of 2023) would likely be shorter than the time needed for a litigated remedy.

The Special Master also asked counsel to address whether Restoration Strategies has any bearing on the current Working Group process. The short answer is that it does not. The principals referenced Restoration Strategies in their December Memo as an acknowledgment of the significant ongoing projects and activities by SFWMD and FDEP to improve water quality discharging from the upstream STAs. The TOC has concluded that upstream remedies in “addition” to these projects are not necessary at present. The aim of the Working Group is to address the sediment and flow characteristics around the S-333/S-333N complex that may have contributed to the WY 2019 exceedance but are not being addressed by Restoration Strategies projects.

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³ In May 2022, the TOC determined that there had been an exceedance of the long-term limit for Shark River Slough in WY 2021. The TOC and the Principals have agreed that the WY 2021 exceedance shows sufficient similarity to the WY 2019 exceedance, such that any recommendations as to a remedy for the WY 2019 exceedance will likely inform the identification of a remedy for the WY 2021 exceedance.

Respectfully submitted,

/s/ Judith E. Coleman

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