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March 10, 2010

*<u>Via Facsimile & Electronic Mail</u>*

Governing Board Members
SFWMD Governing Board, 2122
P.O. Box 24680
West Palm Beach, Florida 33416-4680

Dear Governing Board Members:

On behalf of our client, Florida Crystals Corporation, we provide the following comments to Agenda Item No. 41, the proposed extension of the bond validation deadline in the U.S. Sugar purchase and sale agreement.

Florida Crystals has a vested interest in Everglades restoration, because they recognize that the continuation of their business depends on it. As a business, they look at Everglades restoration matters pragmatically, not politically. Florida Crystals has supported and will continue to support efforts that are scientifically sound and can be practically accomplished.

Some have attempted to minimize Florida Crystals' objections by characterizing the company as an obstructionist to Everglades restoration. Such attempts may be useful political rhetoric, but are not true. Those paid advocates conveniently forget many of the facts:

- Florida Crystals was the first and only sugar company to sign the settlement agreement with the Federal government in 1994 to advance restoration.

- Florida Crystals was instrumental in the adoption of the Everglades Forever Act that resulted in the construction of 40,000 acres of stormwater treatment areas, the only projects that have provided meaningful results for the Everglades. Florida Crystals and other EAA farmers have paid nearly $200 million dollars to construct these storm water treatment areas.

- Florida played a leading role in the conclusion of the Talisman land acquisition that resulted in the state acquiring more than 50,000 additional acres contiguous to the water conservation areas and ideally suited for Everglades restoration projects.

- Florida Crystals has cooperated with the District and other stakeholders on numerous other matters important to Everglades restoration throughout the last 20 years.

Florida Crystals does not support the current proposal to acquire U.S. Sugar's land because it is not in the best interests of Everglades restoration. The District already owns tens of thousands of acres of land that have no funding for restoration projects. Owning land does not restore the Everglades -- constructing projects does.

The Everglades are not served by this proposal to spend the limited available resources to purchase more land (and arguably the wrong land) instead of building projects that have been agreed upon by all stakeholders. Rather, it will set Everglades restoration back for decades. The setback will not only adversely affect the ability to restore the Everglades, but also the future of sustainable agriculture in the entire region – the livelihood of all farmers, including Florida Crystals.

The District is at a critical crossroads in the U.S. Sugar transaction. It now has a unique opportunity to reconsider a deal that will strain its resources, lead inevitably to increased taxes, and sacrifice true progress on restoration. The proposed extension would give away important contractual rights, as we explain in the attached memorandum.

We ask that the District carefully consider the legal implications of the actions it is asked to take in light of the attached memorandum.

Very truly yours,

Joseph P. Klock, Jr.

RASCO KLOCK

REININGER PEREZ ESQUENAZI VIGIL NIETO

**TO:** GOVERNING BOARD OF THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT

**FROM:** JOSEPH P. KLOCK, JR AND GABRIEL NIETO

**SUBJECT:** PROPOSED EXTENSION OF USSC VALIDATION DEADLINE; AGENDA ITEM NO. 41

**DATE:** MARCH 10, 2010

**CC:** SHERYL WOODS, GENERAL COUNSEL

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On March 11, 2010, the District will take up Agenda Item No. 41, the proposed extension of the bond validation deadline for the US Sugar land acquisition (the "US Sugar Acquisition"). For the reasons we describe below, it would be a grave error to extend the deadline.

## I. Key USSC Agreement Provisions

The December 2008 agreement had a broad financial contingency provision. It required an affirmative determination by the District, as a condition to closing:

> *BUYER, in its sole and absolute discretion, is satisfied that the amount of debt and debt service necessary to finance this transaction shall not adversely affect the capacity of BUYER to continue to fulfill its statutory, contractual, and other legal obligations and mandates based on its historical and projected operations.*

Under this version, the District had unfettered discretion to refuse to close it if found that, *for any reason*, it could not afford the deal and still maintain its other responsibilities.

This opt-out right was substantially curtailed in the May 2009 Purchase and Sale Agreement (the "Agreement), and was changed as follows:

> *BUYER~~, in its sole and absolute discretion~~, is satisfied that no events have occurred since the Effective Date, and no conditions existed as of the Effective Date which were unknown to BUYER, that would cause the amount of debt and debt service necessary to finance this transaction ~~shall not~~ to adversely affect the financial capacity of BUYER to continue to fulfill its statutory, contractual, and other legal obligations and mandates based on its historical and projected operations.*

Agreement § 7(a)(xviii) (the "Opt-Out Provision"). Under this language the cancellation has to be because of a fact not known, and not anticipated, by the District. The "sole and absolute discretion" language was removed, so the District also has to objectively and affirmatively show that it cannot satisfy its mandates, as opposed to having that determination be beyond challenge.

This is critical as it allows a claim that the District could afford the transaction by raising taxes. US Sugar would argue that the District is not at a point where it cannot "continue to fulfill its statutory, contractual, and other legal obligations and mandates" because it can simply raise taxes to fill in the gap caused by the USSC debt service.

The current Agreement has another avenue for termination, however. It allows the District to terminate, *unconditionally*, if "Validation has not been issued by March 31, 2010." Agreement § 4. That contractual right would be compromised if the District extends the March 31st validation, as proponents of the deal suggest.

## II. **Available Courses of Action**

The District has three options before it that far better protect it than simply giving away its unfettered right to terminate:

1. <u>Direct staff to termination the agreement if validation has not occurred by March 31st</u>: At this point the District's financial constraints and the devastating financial impact that completing the USSC Acquisition would bring are well known to both the Board and the general public. There is no way to complete the transaction without increasing taxes and cutting critical programs. While there may be a desire by some to continue the pretense that the deal might be salvaged, current financial projections show that there is no chance that it can be accommodated without some combination of devastating program cuts and increased taxes. Thus, the best option is simply to let the March 31, 2010, deadline run and, as soon as that date passes, terminate the Agreement pursuant to section 4.

2. <u>Negotiate an amendment that restores the Governing Board's original opt-out provision</u>: Should the Governing Board not be ready to make a decision and want to keep the deal on life support, a better alternative than unilaterally changing the validation date – and therefore giving away important rights – is to negotiate better terms in exchange for the District not immediately terminating the Agreement. One item that could be part of this is restoring the Governing Board's original, and far superior, financial opt-out language.

3. <u>Do nothing and let the validation deadline run</u>: A final option is simply to do nothing and let the validation date expire. If the March 31 date is not extended, the District would retain the right to terminate at any time thereafter, but would not be obligated to do so. This would put the District in a far stronger position, and let it walk away cleanly at any time.

Any of these options is a better alternative than simply giving away the contractual rights afforded by the expiration of the deadline. It is important to note, however, that the District has asked the Supreme Court of Florida to resolve important constitutional issues. A final decision on whether the Governing Board believes it can afford the transaction and intends to follow through should therefore be made at the earliest possible date. Without such a determination, it is our view that there is no live case and controversy before the Court.

We would therefore urge that the Governing Board acknowledge the inevitable and cancel the transaction now as outlined in Option No. 1. The District simply cannot afford the deal, as its latest strategic planning workshops and correspondence from its outside financial advisors have made clear. There is no point to continuing the pretense of the acquisition and continuing to expend public dollars on a land purchase that there is no viable way to complete absent raising taxes.

## III. Conclusion

The District is facing a financial shortfall that will make closing on the transaction impossible without raising taxes. The expiration of the validation deadline, thankfully, gives the District a clear, highly defensible way out of the transaction. Absent this contractual right, the only basis to terminate the Agreement would be the Opt-Out Provision in the conditions to closing of the Agreement.

That provision, however, only applies if the District can prove that (i) the termination is due to unforeseeable circumstances and (ii) the District has no way to afford the transaction. This last point is critical, because U.S. Sugar could assert that the transaction is affordable if the District can pay for it by raising *ad valorem* taxes. It could seek to prevent termination on this basis and could seek specific performance; *i.e.*, could sue to force the District to follow through with the transaction. Alternatively, if U.S. Sugar could show that the termination was improper and a breach of the Agreement it could seek substantial damages.

Agenda Item 41 asks the Governing Board to *give away* an absolute right to terminate the Agreement, apparently for no consideration. This would place the District in a far inferior bargaining position and expose the District to substantial liability should the Governing Board adhere to its promise not to raise taxes. The vote on Thursday is not a simple one to extend the deadline, as some have suggested. The legal risks need to be seriously and thoughtfully considered.

It is now abundantly clear that the District cannot afford the transaction at its current tax rates. The Governing Board should therefore reevaluate the transaction now, in light of its and the Governor's repeated pledges not to raise taxes. If that promise is to be kept, the best course of action is to take advantage of the expiration of the bond validation deadline and terminate the agreement immediately after that deadline runs.

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