

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

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MICCOSUKEE TRIBE OF INDIANS)
OF FLORIDA, a federally-recognized)
Indian Tribe,)

Plaintiff,)

v. UNITED STATES OF AMERICA,)
THE ENVIRONMENTAL)
PROTECTION AGENCY, MICHAEL)
O. LEAVITT, Administrator of the EPA,)
JIMMY PALMER, Regional)
Administrator of the EPA, Region IV)

Defendants,)

Case No.

04-21448

CIV - GOLD

MAGISTRATE JUDGE
SIMONTON

The Plaintiff, the Miccosukee Tribe of Indians of Florida, files this complaint seeking relief in the nature of declaratory and injunctive relief under the Federal Water Pollution Control Act ("Clean Water Act") and the Administrative Procedure Act.

FEDERAL ISSUES IN DISPUTE

1. This is a civil action under section 505 of the Clean Water Act, 33 U.S.C. § 1365, which provides for citizens suits, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et. seq.*, which governs judicial review of agency action.

2. Plaintiff seeks to compel Defendants, pursuant to 33 U.S.C. section 1365(a)(2), to perform its non-discretionary duty to review and disapprove the amended Everglades Forever Act ("Amended EFA") as a change to the State's water quality standards, as required by the mandatory review procedures of section 303(c) of the Clean Water Act, 33 U.S.C. §1313(c), and to comply with the standards and procedures prescribed in 33 U.S.C. § 1313(c) and 40 C.F.R. § 131.20.

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3. Plaintiff disputes Defendants' agency action deciding that the State of Florida's 2003 amendments to the "Everglades Forever Act" ("EFA") embodied in section 373.4592, Florida Statutes, do not constitute a change to Florida's water quality standards for the Everglades. The agency action, reflected in its November 5, 2003, decision document is arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law. APA, 5 U.S.C. § 706.

4. Plaintiff further claims that Defendants' decision that the Amended EFA is not a change to the State's water quality standards is directly and unlawfully contrary to the prior federal administrative and judicial decisions involving the same State water quality standards for the Everglades in violation of the doctrine of administrative res judicata.

PLAINTIFF

5. The Miccosukee Tribe of Indians of Florida (the "Tribe") is a federally recognized Indian Tribe whose members reside within the Florida Everglades and are directly and adversely affected by the Amended EFA, and its implementation by the State of Florida, and by the failure of defendants to enforce the provisions of the Clean Water Act.

6. The Tribe and its members reside in the Florida Everglades and have a substantial interest in this litigation. Plaintiff has a special interest in the protection of the Everglades by ensuring compliance with the Clean Water Act, including but not limited to compliance with established water quality standards for waters being discharged into the Tribe's traditional Everglades homeland and the meeting of compliance deadlines, because discharges of polluted phosphorous laden water flow into the land where members of the Tribe reside, work and recreate.

7. The Tribe's landed interests in the Everglades include a federal Indian Reservation, a perpetual lease for use and access to substantial portions of Water Conservation Area 3A, the Miccosukee Reserved Area on the border of Everglades National Park, and aboriginal and statutory rights to reside in the Park and the Big Cypress National Preserve. The Tribe and its members, who depend upon the environmental preservation of these regions, have a fundamental, substantial interest in preserving these areas as viable natural ecological systems.

8. The alteration of the natural state of the Everglades as a result of water discharges containing excessive nutrients and pollutants, and the permanent destruction of the Everglades as a unique natural ecosystem, including imbalances in natural flora and fauna, seriously threatens the entire way of life of the Tribe and its members, their traditional bases of subsistence, their commercial activities, recreational activities, their religious practices, and their natural resources (including their lands, the flora and fauna living on their lands, and the ground and surface waters flowing through and across their lands).

9. Among the subsistence and recreational activities of the Tribe and its members are hunting, fishing, frogging, commercial air-boating, subsistence agriculture, as well as gathering of native plant material in the Everglades.

10. The members of the Miccosukee Tribe are the only residents of the Everglades. The Miccosukee Tribal members live upstream of Everglades National Park and downstream of the adjacent Everglades Agricultural Area ("EAA") that is a source of harmful nutrients that flow into the Everglades. As a result, the nutrients and pollutants that cause degradation of water quality are received and absorbed first by the lands and

waters used and owned by Plaintiff, which act as a biological filter for these nutrients before they reach Everglades National Park located further downstream.

11. The absorption of the nutrients in these lands and waters, which is causing the degradation in water quality, is occurring not only in plant materials, but also in the soils, causing permanent and irreparable damage to Tribal Everglades lands.

12. Degradation of Everglades water quality directly threatens the very existence of the Tribe and its members, their economy, their religion, their recreation, and their entire culture and way of life.

13. Plaintiff's Tribal members, as the sole residents of the Everglades and users of the Everglades, are directly affected and have sustained, and will continue to sustain, damage from the excessive levels of nutrients permitted to flow into the Everglades by the Amended EFA.

DEFENDANTS

14. The United States of America ("United States") is the government of the United States, which may be named as a defendant and against which equitable relief may be entered under 33 U.S.C. § 1365(a)(1) and against which declaratory judgment and injunctive relief may be entered pursuant to 28 U.S.C. §§ 2201, 2202, and Fed. Civ. P. 57, and 65(a).

15. The Environmental Protection Agency ("EPA") is an agency of the United States that may be named as a defendant and against whom equitable relief may be entered under 33 U.S.C. § 1365 (a)(1) and against which declaratory judgment and injunctive relief may be entered pursuant to 28 U.S.C. §§ 2201, 2202, and Fed. Civ. P. 57, and 65(a).

16. Michael Leavitt is the Administrator of the Environmental Protection Agency and may be named as a defendant under 33 U.S.C. § 1365(a)(1) and (2) and against whom declaratory judgment and injunctive relief may be entered pursuant to 28 U.S.C. §§ 2201, 2202, and Fed. Civ. P. 57, and 65(a).

17. Jimmy Palmer is the EPA Regional Administrator for Region IV and may be named as a defendant under 33 U.S.C. § 1365(a)(1) and (2) and against whom declaratory judgment and injunctive relief may be entered pursuant to 28 U.S.C. §§ 2201, 2202, and Fed. Civ. P. 57, and 65(a).

JURISDICTION AND VENUE

18. This Court has jurisdiction over this civil action under 28 U.S.C. § 1331 (federal question); 33 U.S.C. § 1365 (citizen suits under the Clean Water Act); 28 U.S.C. § 1362 (civil actions brought by federally recognized Indian Tribes wherein matter in controversy arises under the Constitution, laws, or treaties of the United States); 28 U.S.C. § 1361 (action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the Plaintiff); and under the Administrative Procedure Act (“APA”), 5 U.S.C. § 701, et. seq.

19. Venue is proper in this district under 28 U.S.C. § 1391(b) because this claim arose in the Southern District of Florida; and under 28 U.S.C. § 1391(e) because it is a civil action against the United States, its agencies and/or officers or employees of those agencies acting in their official capacities.

GENERAL ALLEGATIONS

20. The Federal Water Pollution Control Act, commonly known as the Clean Water Act, as amended, 33 U.S.C. §§ 1251 to 1387, is a comprehensive water quality

statute enacted by Congress to restore and maintain the chemical, physical, and biological integrity of the nation's waters. The Clean Water Act seeks to attain water quality that provides for the protection and propagation of fish, shellfish, and wildlife.

21. The Clean Water Act requires the adoption of water quality criteria as part of water quality standards that will fully protect the designated use of the entire water body.

22. The Clean Water Act allows revisions of water quality standards only if such revisions are subject to, and consistent with, the anti-degradation policy of the Act.

23. The Clean Water Act requires that when a state revises or adopts a new water quality standard that such revised or new standard shall be submitted to the Administrator of EPA for review and approval.

24. The Clean Water Act requires water quality standards to protect the public health or welfare, enhance the quality of water, and serve the purposes of the Clean Water Act.

25. Water quality standards must be established based on water quality based treatment controls and strategies, not technology based levels of treatment.

26. The Clean Water Act requires the state to notice and hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards.

27. The State of Florida, its agency, the Department of Environmental Protection ("DEP") and its statutory component, the Environmental Regulation Commission ("ERC"), have set narrative water quality criteria for all classes of waters in Florida, providing that man-induced nutrient enrichment shall be considered degradation and prohibiting nutrient-induced imbalances in natural populations of aquatic flora and fauna.

28. Among the State of Florida's existing narrative water quality criteria are FAC 62-302.530(48)(b) which requires that in no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in the natural populations of aquatic flora or fauna; and FAC 62-302.530(48)(a) which defines man-induced nutrient enrichment as degradation and requires that the discharge of nutrients continue to be limited to prevent violations of other standards contained in the chapter. Other provisions require that substances in concentrations that result in the dominance of nuisance species shall not be allowed and that to ensure biological integrity, the Shannon Weaver diversity index of benthic macroinvertebrates shall not be reduced to less than 75% of established background levels.

29. The Everglades Protection Area is defined under Florida law as Water Conservation Area 1 or the Arthur R. Marshall Loxahatchee National Wildlife Refuge, Water Conservation Area 2A, Water Conservation Area 2B, Water Conservation Area 3A, Water Conservation Area 3B, and Everglades National Park. Fla. Stat. 373.4592(2)(i).

30. Everglades National Park and the Arthur R. Marshall Loxahatchee National Wildlife Refuge ("Loxahatchee") are designated as Outstanding Florida Waters under section 62-302.700 of the Florida Administrative Code, which gives these areas additional special protection.

31. The Everglades Protection Area is categorized as a Class III water body. The designated use of Class III waters includes recreation, propagation and maintenance of a healthy, well-balanced population of fish and wildlife. The relevant supporting water quality criteria for Class III designated uses are contained in Florida Administrative Code

section 62-302.500 (Surface Waters: Minimum Criteria, General Criteria) and section 62-302.530 (Table: Surface Water Quality Criteria). The criterion of particular concern in the Everglades is the Class III nutrient criteria for nutrients with the primary nutrient of concern being phosphorous.

32. The Everglades Forever Act, section 272.4592, Florida Statutes, was signed into law and became effective in 1994 ("1994 EFA"). The Everglades Forever Act applies to the Everglades Protection Area, which is designated as a Class III water body.

33. On June 21, 1994, shortly after the 1994 EFA became law, the Tribe sent the EPA a 60 day letter notifying the EPA that the 1994 EFA changed Florida's water quality standards because it allowed discharges of phosphorous above the level that caused an imbalance of flora and fauna to continue until December 31, 2006; that it violated the Clean Water Act's anti-degradation standards; and that Florida had failed to submit the EFA to the EPA for review as required by the Clean Water Act.

34. On September 15, 1994, the EPA sent the Florida Department of Environmental Protection (DEP) a copy of the Tribe's allegations and by letter dated October 31, 1994, DEP responded to the EPA informing them that the State did not consider the EFA to constitute a change in water quality standards under the Clean Water Act.

35. Without having conducted a proper section 303(c) review required under the Clean Water Act and requested by the Tribe, the EPA agreed with the State that the EFA did not constitute a change in standards in a letter dated April 12, 1995.

36. Four weeks prior to the EPA's April 12, 1995 letter, the Miccosukee Tribe of Indians filed a federal lawsuit substantially similar to the present action against the same

federal Defendants claiming that the 1994 EFA had changed Florida's water quality standards and that the Defendants had failed to comply with its non-discretionary duty under the Clean Water Act to review these new State water quality standards. Case No. 95-9533-CIV-Davis (S.D. Fla.) The federal lawsuit was brought under the citizen suit provision of the Clean Water Act seeking to compel the EPA to perform its nondiscretionary duty pursuant to section 303(c) of the Clean Water Act to review and disapprove of the 1994 EFA as a change in State water quality standards; to require EPA to force Florida to initiate notice and public hearings on the change; and to find the 1994 EFA in violation of the anti-degradation requirements of the Act.

37. On July 26, 1995, the Federal District Court granted the Defendants' motion to dismiss the case and found that the EFA had not changed water quality standards and that EPA had no mandatory duty to review the Act.

38. The Eleventh Circuit Court of Appeals reversed the District Court's dismissal on February 10, 1997 and held that the lower Court should not have relied on the State's representations that the Act did not change the standards. *Miccosukee Tribe of Indians of Florida v. United States*, 105 F.3d 599 (11th Cir. 1997). The Court of Appeals remanded with instructions that the District Court conduct its own factual findings to determine whether the EFA changed water quality standards.

39. On September 30, 1997, following the remand, the EPA announced its intention to review the 1994 EFA pursuant to section 303(c) of the Clean Water Act. The EPA held a public meeting on November 19, 1997, and the public comment period was held open until November 28, 1997. The Tribe presented public comments on the issue, stating that the 1994 EFA was a change in water quality standards.

40. On January 30, 1998, the EPA issued its determination on its review conducted pursuant to section 303(c) of the Clean Water Act, finding that the 1994 EFA did not change the State's water quality standards.

41. On September 11, 1998, the District Court issued an Order on the Tribe's Complaint, finding the Defendant EPA's determination that the 1994 EFA was not a change in water quality standards under the Clean Water Act to be arbitrary and capricious, and remanded it back to the EPA with the directive to review the 1994 EFA as a change to Florida's water quality standards and to approve or disapprove the change, as required by the Clean Water Act.

42. Upon remand from the Eleventh Circuit, the EPA conducted another review of the EFA as a change in water quality standards pursuant to section 303(c) of the Clean Water Act and issued a determination, dated September 15, 1999, approving the changes. The EPA found that the unprecedented twelve year schedule in the 1994 EFA was a compliance schedule and stated that the acceptability and reasonableness of the twelve year schedule was based on the condition that the December 31, 2006 deadline for the phosphorus criterion would be met. The EPA concluded that Florida's narrative criterion for nutrients, as amended by the 1994 EFA compliance schedule, met the requirements of the Clean Water Act.

43. In a subsequent related case, Friends of the Everglades sued the EPA claiming that the 1999 EPA determination was arbitrary and capricious. Case No. 00-935-CIV-Seitz/Garber. Based upon the EPA's repeated emphasis that Florida must meet the December 31, 2006 compliance deadline, the District Court upheld the EPA's administrative determination that the 1994 EFA was in compliance with the legislative

requirements of the Clean Water Act and was, accordingly, a lawful administrative implementation of that Act.

44. In 2003, the Florida legislature amended the Everglades Forever Act with Senate Bill 626, enacted on May 20, 2003, and Senate Bill 54A, enacted on July 1, 2003 (collectively, the “Amended EFA”).

45. The Amended EFA was passed, notwithstanding the EPA’s administrative imposition of the 2006 compliance deadline in the 1994 EFA, and despite the District Court’s Order sustaining the 1994 EFA based upon that deadline. The Amended EFA, among other things, eliminated the 2006 compliance deadline and established a substantial change in the State’s water quality standards for the Everglades Protection Area.

46. The EPA had a non-discretionary duty to review the Amended EFA and approve or disapprove the changes to the water quality standards.

47. This non-discretionary duty included a review under the Clean Water Act of the changes established by the Amended EFA as a new administrative implementation; to determine under the doctrine of administrative res judicata whether the changes were lawfully based upon either (1) a material change in factual circumstances in the physical environment warranting a change, or (2) a material strengthening of the existing standards to improve water quality, and, if so, to approve or disapprove those changes to the State’s water quality standards.

48. Pursuant to section 303(c)(2)(A) of the Clean Water Act, states electing to establish their own water quality standards, must submit all new or revised standards to EPA for approval or disapproval. Under section (303)(c)(3), EPA must either approve or

disapprove these standards within 60 or 90 days, respectively, of their submittal.

49. In enacting the amendments to the 1994 EFA, the State of Florida once again changed its water quality standards by authorizing moderating provisions that allow harmful discharges of nutrients into the Everglades Protection Area to continue for an extended period of time, and violate the narrative and numeric criteria for phosphorous until at least 2016, and will continue to cause an imbalance in the natural populations of flora and fauna.

50. The Amended EFA, among other things, replaced the deadline in the 1994 EFA, which required that waters being discharged to the Everglades Protection Area must meet water quality standards and the numeric phosphorous criterion, by December 31, 2006, with a requirement only to implement the pre-2006 projects and strategies of the Long Term Plan, defined in the Amended EFA, by December 31, 2006. The Amended EFA has thus substituted the requirement that the phosphorous criterion must be met in waters being discharged to the Everglades Protection Area by 2006 with a mere requirement that a plan for meeting the criterion in the future be in place by 2006.

51. The Amended EFA states that the Long Term Plan will be implemented for an initial thirteen year phase (2003-2016), and contemplates another ten year second phase (until 2026), and does not require the achievement of the numeric or narrative phosphorous criteria.

52. The Amended EFA authorizes permits that violate the Clean Water Act.

53. The Amended EFA allows landowners and permittees, who are not in compliance with water quality standards by December 31, 2006, to discharge in excess of both the numeric criterion and narrative criterion for phosphorous for at least an

additional ten years in violation of the Clean Water Act and in direct contradiction to both the Defendant EPA's prior administrative determination and the District Court's prior order that the 2006 compliance deadline would be met under the 1994 EFA.

54. The Long Term Plan authorized by the Amended EFA reduces enforcement of water quality based standards to technologically based limitations that will allow continued degradation in violation of established water quality standards.

55. By authorizing moderating provisions that replace or supplant the narrative criterion by allowing discharges of water that will violate the narrative and numeric criteria for phosphorous until at least 2016, the Amended EFA represents a de facto suspension of water quality standards and a moratorium on water quality enforcement until 2016; changes Florida's water quality standards; and violates the Clean Water Act, including its anti-degradation requirements.

56. By creating impacted and unimpacted areas of Class III waters in the Everglades Protection Area, the Amended EFA improperly established two subcategories of designated use for the Everglades in violation of the Clean Water Act.

57. By authorizing moderating provisions that allow discharges into unimpacted areas that will cause an imbalance of flora and fauna, the Amended EFA violates the Clean Water Act and its anti-degradation requirements and fails to provide water of sufficient quality to fully protect the existing designated uses of the entire water body.

58. As a result of this change in water quality standards, excessive nutrients and pollutants will continue to be discharged into the waters of the Everglades for extended periods of time, thereby violating the existing narrative nutrient water quality criterion.

59. The Clean Water Act states that a water quality standard may be revised only

if such revision is subject to, and consistent with, the anti-degradation policy established by the Act. By not making a determination that the Amended EFA is inconsistent with the Clean Water Act, the EPA has authorized continued degradation of water quality in violation of the Clean Water Act.

60. The Amended EFA requires the wholesale approval of technology based limitations which replace and/or nullify water quality standards and allow continued pollution in violation of the narrative water quality criterion and the requirements of the Clean Water Act.

61. Under 40 CFR § 131.20(c), the State of Florida was required to notify the EPA of any revision to water quality standards within 30 days of the final state action to adopt and certify the revised standard. That requirement applies to the passage of the Amended EFA.

62. The State failed to notify the administrator of the EPA, as required by 33 U.S.C. § 1313(c), that by amending the 1994 EFA, the State has in effect changed water quality standards.

63. Defendants are required to review these changes in Florida's water quality standards and can only allow the change to the water quality standards if such changes are consistent with the anti-degradation policy established under the Clean Water Act.

64. Defendants have failed to require the State of Florida to comply with the requirements of the Clean Water Act and applicable federal regulations.

65. Defendants have failed to find that the Amended EFA is a change in Florida's water quality standards, and to disapprove such changes, as required by the Clean Water Act.

66. Plaintiff notified EPA by letter dated June 3, 2003, of the revision in water quality standards caused by the amendment of the 1994 EFA and of the State of Florida's failure to comply with the procedures for review and revision of water quality standards. Plaintiff also notified the State of Florida and its officials. The letter notified the Administrator of the EPA that the amendment of the 1994 EFA effectively changed Florida's water quality standards, and that these changes violated the anti-degradation requirements of the Clean Water Act. The letter was notice to Defendants that they had 60 days to compel the State of Florida to comply with the procedures for revision and review of water quality standards prescribed in section 303(c) of the Clean Water Act, the regulations in 40 C.F.R. § 131.20, and with the anti-degradation requirements of the Clean Water Act. In the alternative, the notice was intended to allow the State of Florida to cure its violations within 60 days as required by 33 U.S.C. § 1365(b).

67. On July 1, 2003, the EPA, through James D. Giattana, Director of the Water Management Division, Region 4, responded to the Plaintiff's notification.

68. In further response to the Tribe's 60 day letter, on November 5, 2003, the EPA considered the amendments to the 1994 EFA enacted May 20, 2003, and July 1, 2003, through a perfunctory analysis and decided that the Amended EFA does not constitute at this time, new or revised water quality standards and, therefore, is not subject to approval or disapproval under section 303(c) of the Clean Water Act.

69. Defendants did not undertake the review required by section 303(c) of the Clean Water Act with respect to the Amended EFA.

70. Plaintiff has a special interest, as contemplated by 33 U.S.C. § 1365(g), in the protection of the Everglades and in limiting the levels of pollutant discharge permitted by

the Amended EFA because such discharges flow into the land where members of the Tribe reside, work, recreate, and practice their traditional culture and way of life.

71. Any negative change in water quality brought about by the Amended EFA results in injury to the Tribe, which for economic, aesthetic, conservation, recreational, religious and cultural reasons has an interest in the Everglades.

COUNT I

(Citizen Suit under the Clean Water Act: Declaratory & Injunctive Relief)

72. Plaintiff realleges and incorporates by reference paragraphs 1 through 71 above.

73. Plaintiff has a clear right to relief because the requirements of the Clean Water Act on reporting new and/or revised water quality standards, and the review by the EPA, are non-discretionary.

74. The Clean Water Act states that a water quality standard may be revised only if such revision is subject to, and consistent with, the anti-degradation policy established by the Clean Water Act.

75. The Clean Water Act requires that whenever a State revises or adopts a new standard on water quality, such revised or new standard shall be submitted to the Administrator of the EPA and the EPA Administrator has a non-discretionary duty to review such new or revised water quality standards.

76. The amendments to the 1994 EFA changed the water quality standards in the State of Florida and the State was required under 33 U.S.C. § 1313(c) to submit the revised and/or new water quality standards to the EPA for approval and to follow the procedures set forth in 40 C.F.R. § 131, et. seq.

77. The State failed to notify the EPA of the changes in water quality standards for waters in the Everglades Protection Area after it adopted the amendments to the 1994 EFA, and the EPA failed, after proper notice by Plaintiff, to require the State to comply with the requirements and procedures of the Code of Federal Regulations and the Clean Water Act and to submit the changes to EPA for review for it to determine their consistency with the requirements of the Clean Water Act.

78. The Clean Water Act requires that the revised or new water quality standards protect the public health or welfare, enhance the quality of water, and serve purposes of the Clean Water Act. The Amended EFA does not comply with these requirements.

79. Despite the fact that the Amended EFA does not comply with the requirements of the Clean Water Act, Defendants failed to review it as a change in the State's water quality standards pursuant to section 303(c) of the Clean Water Act and to disapprove the change.

80. Defendants have not commenced, and are not diligently prosecuting, civil or criminal actions in federal or state court to require compliance with the narrative water quality criterion that applies to the Everglades. Plaintiff has exhausted all other avenues of relief. Plaintiff sent a 60 day notice letter to the EPA notifying the EPA of the State's violation of the anti-degradation requirements of the Clean Water Act, and its failure to follow the proper procedures. The Plaintiff requested the EPA to enforce the provisions of the Clean Water Act and to review the Amended EFA as a change in water quality standards and to disapprove the change, as required by the Clean Water Act. Plaintiff also notified the State of its failure to comply with the requirements of the Clean Water Act and of its failure to provide proper notice under 40 C.F.R. § 131.20.

81. Therefore, Plaintiff requests the Court to:

a) Require that the Defendants comply with the non-discretionary requirements of the Clean Water Act and the applicable regulations to conduct a review of the Amended EFA as a change in the State's water quality standards pursuant to section 303(c) of the Clean Water Act;

b) Determine that the Amended EFA is a change in water quality standards and violates the Clean Water Act;

c) Award Plaintiff litigation costs as provided under 33 U.S.C. § 1365(d), including reasonable attorney and expert witness fees; and

d) Order such other and further relief, as the Court deems just.

COUNT II

(Administrative Procedure Act)

82. Plaintiff realleges and incorporates by reference paragraphs 1 through 71 above.

83. Defendants' decision reflected in its November 5, 2003 document that the Amended EFA does not constitute a change in water quality standards is arbitrary, capricious, an abuse of discretion, not in accordance with law, in excess of statutory jurisdiction, and without observance of procedure required by law within the meaning of the APA, 5 U.S.C. § 706.

84. The Amended Everglades Forever Act effectively changed the State's water quality standards for the Everglades Protection Area.

85. The Amended EFA imposes a de facto moratorium on enforcement of the narrative water quality standards until the year 2016, and thereby legislatively authorizes

continuing violations of the State's narrative and numeric criteria for phosphorous and other nutrients and fails to protect the designated uses of the entire water body.

86. By setting new or revised standards, the Amended EFA allows excessive levels of nutrients and pollutants to be discharged into the Everglades and fails to take into consideration the public water supplies, propagation of fish and wildlife, or the damage to the recreational, agricultural and other uses of the Everglades as required by the Clean Water Act.

87. By authorizing technology based levels of treatment for extended periods of time which do not have to comply with the water quality based standard, the Amended EFA allows continued degradation of the water body in violation of the Clean Water Act.

88. The EPA had a duty to conduct a section 303(c) review of these newly enacted standards to determine whether they comply with the purposes of the Clean Water Act and to require the State to follow the procedure requirements under the Clean Water Act and its regulations, including holding a public hearings for the purpose of reviewing, modifying or adopting these changes in water quality standards for the Everglades after it adopted the amendments to the 1994 EFA.

89. The November 5, 2003, document issued by the EPA does not constitute a review under section 303(c) of the Clean Water Act.

90. The Clean Water Act requires the revised or new water quality standards to protect the public health or welfare, enhance the quality of water, and serve the purposes of the Clean Water Act. The Defendants' conclusion that the Amended EFA does not constitute a change in water quality standards is contrary to this requirement.

91. Due to Defendants' knowing and conscious failure to comply with, and enforce, the requirements of the Clean Water Act and the APA, Plaintiff has suffered legal wrongs because of agency action and is adversely affected and aggrieved by agency action within the meaning of the Administrative Procedure Act, 5.U.S.C. 702.

92. WHEREFORE, Plaintiff requests that the Court declare and order that:

a) The Amended EFA is a change in the State of Florida's water quality standards;

b) Defendants' agency action defined in the document that determined that the Amended EFA is not a change in the State of Florida's water quality standards is arbitrary and capricious, an abuse of discretion, and not in accordance with law and the Clean Water Act;

c) The issue be remanded back to the agency with directions to review the Amended EFA as a change to the State's water quality standards, as the Clean Water Act and its implementing regulations require;

d) Defendants' failure to conduct the review required under section 303(c) of the Clean Water Act of the Amended EFA as a change in water quality standards, including requiring the State to hold public hearings and follow the procedures of the Clean Water Act and its regulations, is arbitrary, capricious, an abuse of discretion, not in accordance with law, in excess of statutory jurisdiction, and without observance of procedure required by law within the meaning of the APA, 5 USC 706;

e) Defendants be required to enforce the Clean Water Act and compel the State to comply with the requirements of the Clean Water Act, including submittal of the required documents to the EPA, public notice, public hearings and a public comment period to

review the modification and/or change to the State's water quality standards by the Amended EFA;

f) Award Plaintiff litigation costs as provided under 33 U.S.C. § 1365(d), including reasonable attorney and expert witness fees.

g) Order such other and further relief as the Court deems just and proper.

COUNT III

(Declaratory and Injunctive Relief Under the Doctrine of Administrative Res Judicata)

93. Plaintiff realleges and incorporates by reference paragraphs 1 through 71 above.

94. By participating in the implementation of the Clean Water Act, the State of Florida has submitted its enacted water quality standards to be part of federal administrative implementation of the Clean Water Act and subject to federal administrative law. Under the Clean Water Act and federal administrative law, the function of EPA in reviewing Florida's Amended EFA is not a rule-making function but, rather, an adjudicatory one of reviewing another governmental authority's decision to determine whether that decision conforms to law.

95. Under established principles of administrative law, the EPA's determination that the 2006 compliance deadline of the 1994 EFA was reasonable and necessary for Florida's water quality standards to comply with the Clean Water Act constituted an administrative adjudication by that agency, which was based upon proper review procedures and a fully litigated evidentiary record; accordingly that EPA ruling is a final agency action governed by the doctrine of administrative res judicata.

96. Pursuant to the doctrine of administrative res judicata, the EPA is not authorized to approve the adopted water quality standards of the Amended EFA without first determining that those changed standards are warranted either (A) by a change in environmental circumstances in the Everglades Protection Area; or, (B) by the implementation of more stringent water quality standards under the Amended EFA.

97. There are no changes in the physical environment of the Everglades Protection Area that would warrant a change in Florida's water quality standards as implemented by the EPA's prior administrative approval of the changes to the water quality standards rendered by the 1994 EFA and as sanctioned by the District Court Order confirming that administrative action; and accordingly, the doctrine of administrative res judicata precludes EPA approval of the Amended EFA as a matter of law.

98. The Amended EFA results in a lowering of the water quality standards administratively and judicially established under the changes to the water quality standards rendered by the 1994 EFA, by eliminating the December 31, 2006 compliance deadline for the narrative and numeric criteria for phosphorus being discharged into the Everglades Protection Area, and allowing continued degradation in violation of the Clean Water Act; and accordingly, the doctrine of administrative res judicata precludes EPA approval of the Amended EFA as a matter of law.

99. WHEREFORE, the Tribe requests the Court to declare that:

- a) EPA's mandatory review of the changes to the water quality standards by the Amended EFA is governed by the doctrine of administrative res judicata;
- b) The EPA may not declare that the Amended EFA constitutes no change to the water quality standards, or approve the changes in water quality standards embodied in

the Amended EFA, without first determining that the changes are warranted under the doctrine of administrative res judicata by either a change in the physical environment of the Everglades Protection Area or an imposition of more stringent water quality standards than the changes to the water quality standards previously implemented under the 1994 EFA;

c) The Court reserves jurisdiction to enforce the requirements of the doctrine of administrative res judicata with respect to EPA's mandatory review of the Amended EFA.

d) Order such other relief as the Court deems just.

Respectfully submitted,

LEHTINEN, VARGAS, & RIEDI, P.A.

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By: 

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Florida Bar No. 265551

JS 44 (Rev. 3/99)

CIVIL COVER SHEET

04-21448

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THIS FORM.)

I. (a) PLAINTIFFS

Miccosukkee Tribe of Indians of Florida, a federally-recognized Indian Tribe,

(b) County of Residence of First Listed Plaintiff
(EXCEPT IN U.S. PLAINTIFF CASES)

Miami-Dade County

(c) Attorney's (Firm Name, Address, and Telephone Number)

Kelly S. Brooks, Esq., Dexter Lehtinen, Esq.
Lehtinen, Vargas & Riedi, P.A., 7700 N. Kendall Drive, Suite 303
Miami, Florida 33156 305-279-1166

DEFENDANTS

United States of America, The Environmental Protection Agency, Micheal O. Leavitt, Administrator of the EPA, Jimmy Palmer, Regional Administrator of the EPA, Region I

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item 111)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- Citizen of This State ☐ 1 ☐ 1 Incorporated or Principal Place of Business In This State ☐ 4 ☐ 4
- Citizen of Another State ☐ 2 ☐ 2 Incorporated and Principal Place of Business In Another State ☐ 5 ☐ 5
- Citizen or Subject of a Foreign Country ☐ 3 ☐ 3 Foreign Nation ☐ 6 ☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 362 Personal Injury Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input checked="" type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General Habeas Corpus: <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	SOCIAL SECURITY <input type="checkbox"/> 861 HIA (139511) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609

V. ORIGIN

(PLACE AN "X" IN ONE BOX ONLY)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

(Cite the U. S. Civil Statute under which you are filing and write brief statement of cause. Do not cite jurisdictional statutes unless diversity.)

Clean Water Act, 33 USC 1365; APA, 5 USC 702.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 ☐

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) (See instructions):

IF ANY

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

\$150.00 903138

6/18/04