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INTERAGENCY AGREEMENT

Between

THE DEPARTMENT OF ENVIRONMENTAL REGULATION

And

SOUTH FLORIDA WATER MANAGEMENT DISTRICT

Concerning

AUTHORITY TO CERTIFY WATER QUALITY STANDARDS

UNDER THE FEDERAL CLEAN WATER ACT

THIS INTERAGENCY AGREEMENT, made and entered into this 28th day of September, 1984, by and between the Florida Department of Environmental Regulation, hereinafter referred to as "DER", and the South Florida Water Management District, hereinafter referred to as "SFWMD."

WITNESSETH:

WHEREAS, the 1984 Legislature of the State of Florida enacted the "Warren S. Henderson Wetlands Protection Act", effective October 1, 1984, which expresses a legislative intention that the water management districts have the primary responsibility for regulating the water quality impacts of agricultural activities and surface water management systems; and

WHEREAS, Section 401 of the Federal Clean Water Act, 33 USC Section 1341, provides that each state shall grant or deny certification to the Federal Environmental Protection Agency for a proposed activity to be licensed or permitted under Federal law with the potential to cause any discharge or pollution in waters, as to whether such activity will or will not meet state water quality standards; and

WHEREAS, permits granted by the United States Army Corps of Engineers pursuant to Section 404 of the Federal Clean Water Act, 33 USC Section 1344, for dredge and fill activities require certification from the state that such activities will not violate water quality standards; and

WHEREAS, certifications under the Federal Clean Water Act for dredge and fill activities related to agricultural operations have previously been issued or denied by DER; and

WHEREAS, DER desires that said responsibility be transferred to the water management districts, in accordance with the aforesaid legislative intent; and

WHEREAS, the Governor's directive to the water management districts for implementation of the Wetlands Act, dated June 4, 1984, expresses the desire that the districts perform all regulatory functions for agricultural activities and agricultural water management systems; and

WHEREAS, the Governor of the State of Florida intends to designate the water management districts to be the appropriate state agencies to perform the water quality certifications required by Section 401 of the Clean Water Act for the agricultural operations relative to Section 404 permits.

NOW, THEREFORE, the DER and the SFWMD agree as follows:

1. The DER agrees to execute a delegation of authority to SFWMD pursuant to Chapters 403 and 373, Florida Statutes, granting SFWMD the authority to make water quality determinations and enforce water quality standards within its jurisdiction. The delegation of authority will take effect upon execution of this agreement. A copy of said delegation order is attached hereto as Exhibit A and by reference made a part hereof.

2. The DER shall retain the right to enforce state water quality standards pursuant to its statutory authority, concurrent with the SFWMD.

3. The SFWMD shall notify the DER South Florida District Office of all requests for certification under section 401 within three days of receipt of such requests. The DER may offer comments on the certification request within 30 days of receipt. In the event comments are not received within that time period, SFWMD shall presume that DER has no objection to issuance of the water quality certification. The DER will provide technical and legal assistance to SFWMD for certification determinations upon request.

4. In the event of material changes in a permit application subsequent to initial notification to DER pursuant to Paragraph 3, SFWMD shall notify the South Florida District DER Office within three days of receipt, and DER shall provide comments thereon within 20 days.

5. In the event SFWMD is required to defend a water quality certification decision made pursuant to Section 401 of the Federal Clean Water Act in a legal proceeding, the DER will, upon request, provide technical or legal support needed to assist in the defense of any such action.

6. All certification applications which are pending upon transfer of certification authority to the SFWMD, for which final or intended agency action has not been taken, shall become the responsibility of SFWMD. The DER shall transmit all relevant case material, including comments, within ten days of transfer of certification responsibility.

7. All certification applications which are the subject of final or intended agency action, including those presently in administrative or judicial proceedings, shall remain the responsibility of the DER. The SFWMD assumes no liability or responsibility with regard to those certification determinations.

8. The delegation of authority to SFWMD from the DER mentioned in paragraph one shall be revocable if the DER determines that SFWMD is not properly

carrying out its duties in the certification process. The DER may also recommend to the Governor that the designation of SFWMD as the certifying agency for section 401 water quality certifications be withdrawn.

9. SFWMD shall provide DER with notice of intended agency action on all section 401 certifications. In the event DER objects to intended SFWMD action, it shall petition for formal administrative hearing in all cases involving a disputed issue of material fact, or an informal hearing in cases not involving a disputed issue of material fact. In the event the DER subsequently disagrees with final agency action taken pursuant to section 120.57(1)(b)9., Florida Statutes, it may then appeal said action pursuant to section 373.114, Florida Statutes. The record in that proceeding shall be limited to that which was developed in the prior proceeding.

10. The DER shall only appeal SFWMD certification decisions pursuant to paragraph 9 in the event it has recommended against granting the certification in accordance with the time limitations of paragraphs 3 and 4 hereof, and said recommendation was not accepted by SFWMD.

11. In the event the DER appeals an individual SFWMD certification decision pursuant to section 373.114, Florida Statutes, and as a result of said appeal certification is denied, the DER agrees to be joined as a party defendant in any legal proceedings resulting from such denial and to fully defend against such claims.

12. It is the intent of the parties that each agency bear full legal responsibility for its own actions.

13. The DER concurs with the legal determinations made in the September 19, 1984 memorandum from Thomas J. Schwartz to John R. Wodraska, which is attached hereto as Exhibit B and by reference made a part hereof.

14. It is understood that supplemental agreements may be necessary to implement the processing of section 401 certifications.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in their respective names the day and year first written above.

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL
REGULATION

By Terri Cole
Asst. Secretary

Attest [Signature]

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT

By JR Wodraska
Executive Director

Attest [Signature]

BEFORE THE STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL REGULATION

IN RE:)
)
WATER MANAGEMENT DISTRICT) OGC File No.
WATER QUALITY DELEGATION)
_____)

ORDER OF DELEGATION

WHEREAS, the state's water management districts are presently engaged in various aspects of regulating the water resource pursuant to Chapter 373, F.S., which include the regulation of consumptive water use, well construction and construction of surface water management systems; and,

WHEREAS, it is the policy of the state, pursuant to section 373.016, F.S., to provide for the management of water and related land resources; promote the conservation, development and proper utilization of surface and ground water; preserve natural resources, fish and wildlife; promote the public policy set forth in section 403.021, F.S., and to the greatest extent practicable, delegate to the water management districts the power and responsibility for accomplishing the conservation, protection, management and control of the waters of the state; and,

WHEREAS, the Department has primary power and responsibility for the protection of water quality pursuant to Chapter 403, F.S.; and,

WHEREAS, the protection of water quality is inextricably linked with the accomplishment of the general water management objectives set forth in section 373.016, F.S.; and,

WHEREAS, pursuant to section 403.813(2), F.S., the Department is authorized to delegate its water quality and other functions when the secretary determines that a water management district has the financial and technical capability to carry out the delegated activity; and,

WHEREAS, as Secretary of the Department, I find that the South Florida Water Management District has the financial and technical capability to carry out the water quality functions set forth in this Order, and therefore find that the public interest will be served by granting said District the authority to apply and enforce water quality standards.

NOW, THEREFORE, be it ORDERED that:

1. The Department hereby delegates to the South Florida Water Management District the authority pursuant to sections 403.061, .121,

.131, .141, .151, and .161, F.S., to apply and enforce the Department's water quality standards, as contained in Chapters 17-3 and 17-4, Florida Administrative Code, and to make determinations of compliance with these water quality standards.

2. This delegation is to be concurrent with the Department's authority and is not intended in any way to abrogate or restrict the Department's authority to apply and enforce state water quality standards.
3. This delegation is subject to being rescinded after 30 days notice by either agency.

DONE AND ORDERED this _____ day of September, 1984, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL REGULATION

VICTORIA J. TSCHINKEL
Secretary
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32301
(904) 488-4805

MEMORANDUM

TO: John R. Wodraska, Executive Director

FROM: Thomas J. Schwartz, District Counsel

SUBJECT: District Acceptance of Section 401 Certification for Agricultural Operations

DATE: September 19, 1984

After reviewing the legal materials provided to us by the Department and discussing the certification question with my staff, I believe the District can act as the certifying agency pursuant to section 401 of the Federal Water Pollution Control Act, Public Law 92-500, for those permits issued to agricultural operations by the U.S. Army Corps of Engineers pursuant to section 404 of that Act, in accordance with the following parameters:

1. For those agricultural operations which require a surface water management permit from the District pursuant to section 373.416, Florida Statutes, the certification would be issued in conjunction with the issuance of a surface water management permit. For those agricultural activities which are not subject to District jurisdiction pursuant to section 373.416, Florida Statutes, the certification procedure would involve the issuance of a letter to the Corps of Engineers. The issue as to the type of administrative review process the District will engage in (i.e. whether Chapter 120 procedures will be followed) presents a complex legal problem, which has not been resolved at this time. I wish to receive input from regulated and other interests on this question.
2. Authority for issuance of certification letters would be grounded in both Chapters 373 and 403, Florida Statutes. Presently, the District is under a delegation of authority from the Department to issue stormwater discharge permits in conjunction with its surface water management permits. See section 17-25.09, Florida Administrative Code. The Department would not delegate to the District the authority it presently retains pursuant to section 403.913, Florida Statutes, to "require a ... discharge permit at the ultimate point of discharge from one or a group of connected agricultural water management systems." The "discharge permits" mentioned in this provision are those which are issued by the EPA pursuant to section 402 of Public Law 92-500. The Department's present role with regard to these permits is to issue the section 401 water quality certification. It is possible, however, that EPA may delegate the authority to issue these "NPDES" permits to the Department sometime in the future. NPDES permits are only required by EPA for specific classes of point source pollutants established by regulation. At present, the only agricultural activity, excluding processing plants, apparently in need of NPDES permits is feedlots. 40 CFR section 412.
3. For agricultural "activities" which do not involve the construction of an "agricultural water management system," the District will certify whether diffuse surface water runoff from the site is anticipated to meet state water quality standards, pursuant to the provisions of Chapters 17-3 and 17-4, Florida Administrative Code.

EXHIBIT B

4. Certification shall only relate to the off-site impact of point or non-point source discharges. Pursuant to section 403.913(2), Florida Statutes, water quality standards are not to be enforced within an agricultural water management system.

The authority to be delegated to the District to permit water quality certification for agricultural activities otherwise outside the District's jurisdiction is the Department's general authority to enforce water quality standards pursuant to sections 403.061 and 403.161, Florida Statutes. The District presently has authority to enforce water quality standards under the aforesaid statutory provisions for those stormwater discharge activities which require a surface water management permit from the District. See section 17-25.09, Florida Administrative Code, and DER Delegation Order dated January 6, 1982. The District, however, is presently without authority to enforce water quality standards for those activities not requiring surface water management permits. We have discussed whether this delegation should be limited to agricultural activities or apply across the board to all types of activities not presently subject to District jurisdiction. Because this authority may be of some assistance to the District in protecting water quality for non-agricultural activities which are causing problems, I recommend in favor of a general delegation. Such a delegation would leave the Department with concurrent authority as to non-agricultural activities.

Authority for delegation of DER powers to the District is contained in section 403.812(2), Florida Statutes. Section 403.812(3), Florida Statutes, provides that:

A delegation pursuant to this section may be rescinded only if the Secretary determines that such delegation is not being carried out in accordance with the rules of the department.


Consistent with the above provision, and in order to avoid the difficulties which might ensue if the Department reviews District certification decisions on a case-by-case basis, it is my strong recommendation that the District only accept the 401 certification responsibility if the Department agrees that it will not challenge individual District certification decisions pursuant to section 373.114, Florida Statutes, and that the Department's exclusive remedy in the event it determines that the certification process is not being properly administered is to withdraw its delegation of authority and take over administration of that process. This is not intended to exclude the Department from a review and comment role on all certifications issued by the District, should the Department so desire. This is consistent with the manner in which the District and the Department have administered the stormwater delegation.

I would also suggest that District acceptance of certification responsibility not involve an assumption by the District of the responsibility to defend certification decisions which have already been made by the Department and are presently subject to administrative review under Chapter 120, Florida Statutes. Nor should the District assume any liability in inverse condemnation or otherwise as a result of those certification decisions. We originally discussed a "hold and save" provision with regard to the entire certification

Memorandum
401 Certification
September 19, 1984
Page 3

process. I am willing to withdraw my recommendation for such a provision, subject, however, to the inclusion of express language in a certification agreement exculpating the District from all liability or responsibility for certification decisions which were made by the Department prior to the delegation of certification authority to the District. The basic idea is that each agency defend and be responsible for its own decisions.

With regard to how the delegation of certification authority is to be accomplished, it is my suggestion that the DER issue a delegation order in conjunction with an agreement signed by the agency heads, setting forth the procedural mechanisms by which certification is to be accomplished, as well as the various provisions which I've mentioned above. It will also be necessary to coordinate with the Corps of Engineers and EPA as to the implementation of the certification process, and it is possible that one or both of these agencies may also need to be a party to the delegation agreement. I believe it will be difficult to accomplish the preparation of an agreement and review by affected interest's prior to the October 1, 1984 goal set by the Governor, but will afford the matter top priority and proceed as expeditiously as possible.


cc: See attached list/ep