ORIGINAL

IN THE
SUPREME COURT OF FLORIDA

Case No 90,042

In re Advisory Opinion to the Governor,)
Request of March 6, 1997.)
)

Initial Brief of
Flo-Sun, Incorporated,
Osceola Farms Co., Atlantic Sugar Association, Inc.,
& Okeelanta Corporation

On a Request from Governor
Lawton Chiles for Advisory Opinion

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INTRODUCTION AND SUMMARY OF ARGUMENT

Governor Lawton Chiles has requested this Court's guidance in interpreting the recent amendment to article II, section 7 of the Florida Constitution ("Amendment 5"), as it relates specifically to his responsibility as Governor to ensure that the constitutional and statutory laws of Florida are faithfully executed. In explaining his need for this Court's advisory opinion, Governor Chiles said:

> [d]ue to the uncertainty created by the unclear language of Amendment 5, the South Florida Water Management District and the Department of Environmental Protection, the governmental entities charged with enforcing the Everglades pollution abatement initiatives, are unable to move forward to enforce this amendment without a clear interpretation as to its meaning and effect. As Governor, I am responsible for providing these executive agencies with direction as to their enforcement responsibilities, to see that the law is faithfully executed, and to report on the state's progress in restoring the Everglades System.

Letter from Governor Lawton Chiles to Florida Supreme Court, March 6, 1997.

In an effort to define his responsibilities as head of the executive branch of government, Governor Chiles asked this Court two questions: (1) Whether Amendment 5 is self-executing, not requiring any legislative action considering the existing Everglades Forever Act, or whether it requires some further action by the Legislature; and (2) what is meant by the phrase "primarily responsible," as used in Amendment 5.

Flo-Sun, Incorporated, through its related companies, Osceola Farms Co., Atlantic Sugar Association, Inc., and Okeelanta Corporation ("Interested Parties") file this brief to assist the

Court in answering these two questions.[1] The Governor should be advised that Amendment 5 is not self-executing, and that no specific action is required of him or anyone else at this time. Instead, Amendment 5 imbeds in the Florida Constitution an existing principle of law (polluters are responsible for their own pollution) and renders this principle specifically applicable to Article II, Section 7(a), which grants the Florida Legislature the power to make laws for abatement of pollution.

The Florida Legislature has enacted a number of laws pursuant to the mandate of article II, section 7(a), including the Everglades Forever Act. The responsibility of the Governor is to faithfully execute all such laws unless and until such time as the Florida Legislature chooses to amend one or more laws, or a court of competent jurisdiction declares a particular law to be inconsistent with the constitutional principle embodied in Amendment 5. Furthermore, the Court should advise Governor Chiles that the phrase "primarily responsible" is not susceptible to definition in the abstract. It was intended not to declare a precise standard, but instead was chosen to allow for its interpretation within a specific factual context.

THE GENESIS OF AMENDMENT 5

To answer the Governor's questions concerning how his constitutional duties are affected by Amendment 5, it is helpful to understand the origins of the Amendment.

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1. The Interested Parties previously suggested to this Court that the questions posed by Governor Chiles are not appropriate for resolution in the advisory opinion process. The Interested Parties renew that suggestion at this time. While the Court maintains advisory opinions are not binding in subsequent litigation, the Court's "suggestion" frequently directs determinations in the lower courts, and if rights are adjudicated without a factual record and the opportunity to be heard afforded by the adversary process, due process can be unintentionally compromised.

The Original Political And Environmental Issues

When Florida became a state in 1845, the Everglades comprised approximately four million acres. Massive sheets of fresh water moved from Orlando to the tip of the Keys. Over the past 150 years, most of the Everglades has disappeared, because the fresh water upon which it depended has been diverted and removed. Massive quantities are being diverted directly to the sea to protect urban dwellers from floods, while the remainder has been diked and channelized to create water reservoirs and dry lands to accommodate South Florida's expanding urban population, as well as agriculture. These factors have contributed to the changing water quantity and the timing of water (called the hydroperiod) draining into the Everglades, so that today only two million acres of the original Everglades remain.

Stormwater runoff and natural drainage from the Everglades Agricultural Area ("EAA"), approximately 700,000 acres just south of Lake Okeechobee, flow through three water conservation areas owned by the South Florida Water Management District ("the District") before the water enters Everglades National Park. Approximately 400,000 acres of sugar cane and as many as 50,000 acres of vegetables and other crops are cultivated in the EAA. Water from the EAA is enriched with nutrients resulting primarily from the oxidation of natural concentrations of phosphorus, nitrogen, and other elements existing naturally in the soil. Because plants and animals native to the Everglades have evolved from extremely low nutrient levels, excessive nutrients can change the long-term balance of Everglades flora and fauna.

There is universal agreement that the most important component of Everglades Restoration is hydrologic restoration. By some estimates only fifteen percent or less of the water conservation areas and none of the Everglades National Park itself is impacted at all by water

quality of EAA runoff.[2] The area of water quality impact is still debated, but the greater need for hydrologic restoration is not.[3]

The Litigation and Settlement Agreement

The United States of America ("U.S.") sued the District and the Florida Department of Environmental Regulation ("DER") in the United States District Court Southern District of Florida for alleged contamination of the Loxahatchee National Wildlife Refuge and the Everglades National Park, Case No. 88-1886-CIV-HOEVELER. On July 26, 1991, the U.S. entered into a Settlement Agreement with the state agencies, and on February 24, 1992, the Southern District approved and entered as a consent decree the settlement agreement.

In the Settlement Agreement, the parties committed to programs and actions designed to

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2. Data from the existing monitoring program shows that phosphorus levels from EAA flows have been reduced to normal background levels within six miles of the point of discharge from the EAA into one water conservation area and over 35 miles from the Park.

3. The U.S. Army Corps of Engineers "Reconnaissance Report" of the Comprehensive Review Study, Central and Southern Florida Project, dated November 1994, reads:

> The fundamental tenet of south Florida ecosystem restoration is that hydrologic restoration is a necessary starting point for ecological restoration. Water built the south Florida ecosystem. Water management changes have adversely affected this ecosystem. And restoration begins with the reinstatement of the natural distribution of water in time and space. The spatial extent of the hydrologically restored area is critical to ecological restoration, as will be explained below. Water quality improvement must be an integral part of all hydrologic restoration. [Report p. 17]

This emphasis on the distribution of water is found in all discussions of Everglades Restoration. Almost all of the major problems of the Everglades, including loss of wading bird populations, are attributed in the "Reconnaissance Report" to "substantial, regional changes in the hydrology in the Everglades basin as the source of the problem." [Report p. 53]

restore and protect the park and the refuge. Specifically, the agreement delineated certain remedial programs to improve the water quality of discharges from the EAA. The remedial programs consisted of the construction and operation of stormwater treatment areas ("STAs") by the District and the initiation by the state agencies of a regulatory permitting program requiring growers within the EAA to institute various best management practices ("BMPs").

The Statement of Principles

Approximately two years after the Settlement Agreement between the U.S. and the State of Florida, on July 13, 1993, the U.S., the District, and the DER entered into a Statement of Principles ("Statement") with Flo-Sun Incorporated, the United States Sugar Corporation, and South Bay Growers, Inc. (collectively described as "Agricultural Interests"). The Statement embraced an agreement that would begin the renewal of the Everglades ecosystem by restoring natural flows of clean water. The parties to the Statement had developed a Technical Plan that addressed the improvement of water quality reaching the Everglades and the water quantity, sheet flow, and other hydroperiod restoration needs of the Everglades ecosystem and of agricultural and other elements of south Florida's economy. The Technical Plan called for the acquisition of the necessary lands and the construction of the STAs and the establishment of the BMPs provided for in the prior settlement agreement between the U.S. and the State. The technical plan expanded the area from which water would be treated to include a large urban area to the east of the EAA and a large agricultural area to the West. Runoff from those areas under the technical plan will be routed into the EAA for treatment by STAs. The parties agreed that the Technical Plan was "the best way to move forward." The Statement also embraced a shared financial commitment as between the parties.

The Agricultural Interests agreed to pay up to $322 million over 20 years to fund the construction and operations outlined in the Technical Plan. A schedule of annual payments from 1994 through 2013 was attached. The DER committed to its good faith, best efforts to pursue enumerated State funds during the construction period of the STAs, and the District agreed to vote on an increase in the millage rate for ad valorem taxes of .10 mill. The federal government agreed to its good faith, best efforts to pursue the C-51 Flood Control Project and certain measures identified in the Technical Plan designed to provide substantial amounts of water to the Everglades. The first cost of the C-51 project and these measures was set forth as $107 million.

The Statement also contained a section entitled "Certainty and Enforceability." It provided that "All persons must have a clear understanding and recognition of their rights and obligations." As to farmers, it declared, "In return for substantial financial commitments and regulatory requirements (i.e., the BMPs) farm interests in the EAA seek to move forward with an assurance that their Everglades environmental responsibilities will be defined under the provisions of the final mediated agreement and under provisions of applicable law and administrative processes."

The Agreement Between Flo-Sun and the United States

The discussions following the Statement of Principles did not result in a final settlement agreement among all of the signatories to the Statement. Nevertheless, the United States and Flo-Sun continued their negotiations, and from Flo-Sun's standpoint, the object of the negotiations was to reach an agreement that Flo-Sun's environmental and financial responsibilities vis-a-vis the Everglades ecosystem. On January 13, 1994, the United States and Flo-Sun signed an historic agreement.

Flo-Sun agreed to pay into a special account under the control of the United States Secretary of Interior or to the District, as the case might be, its proportionate share, based on acreage, of the Agricultural Interests' financial commitment undertaken in the Statement of Principles, on or before December 31 of each year, beginning in 1994. Thus, Flo-Sun agreed to pay to the U.S. annual amounts of money equivalent to the payments for the construction of the STAs described in the Statement of Principles.

Flo-Sun also agreed to implement the on-farm measures, the BMPs, described in the Statement of Principles.

Flo-Sun further agreed to withdraw from the suit brought by the U. S. against the State of Florida in the Southern District and from all related litigation in all jurisdictions, and agreed to refrain from any further funding of such litigation.

In return for the fulfillment of these obligations by Flo-Sun, the U.S. agreed not to sue Flo-Sun over phosphorous concentrations in water or to seek funding to construct a regional water treatment system to assist in the reduction of phosphorous concentrations, until June 30, 2003. Thereafter, until June 30, 2008, the U.S. tied its ability to sue Flo-Sun for phosphorous reductions to stated measurements of phosphorous concentration then found in the discharges from the STAs.

The U.S. and Flo-Sun contemplated that state agencies might accept the terms of this Agreement as finally expressed in legislation. Accordingly, the parties stipulated that if authorized by new legislation, Flo-Sun's entry into the agreement and its performance of all its obligations under the agreement should establish Flo-Sun's compliance with state water quality requirements in the EAA and the Everglades Protection Area ("EPA") until December 2006.

Also, the parties stipulated that if state agencies accepted the terms of this Agreement, Flo-Sun's annual payments were to be made to the District for the construction of the STAs, and if the Florida Legislature substituted another method of payment applicable to growers and to be used for the implementation of the STAs, then the taxes or assessments levied by the Legislature would offset dollar for dollar the payments required to be made under this Agreement.

The U.S. and Flo-Sun agreed that they would, in good faith, join with the State in supporting legislation to institute a system in which all agricultural parties would be required to make the annual payments and to implement the BMPs that Flo-Sun undertook in this Agreement.

The Agreement remains in effect between the U.S. and Flo-Sun as long as Flo-Sun receives the benefit of water quality compliance (i.e., its implementation of the BMPs) and the certainty of the payment obligations established by the Agreement.

The Settlement is Implemented Through the Everglades Forever Act

On April 19, 1994, the Florida Legislature passed the Everglades Forever Act, section 373.4592, Florida Statutes (1995). The Act became law on May 3, 1994, when it was signed by Governor Lawton Chiles.

The relationship between the Act, the Statement of Principles, and the Agreement between the U.S. and Flo-Sun is clear. The Act refers to the Statement of Principles, and states: "That agreement should be used to begin the cleanup and renewal of the Everglades ecosystem." § 373.4592(1)(c), Fla. Stat. (1995).

The "Everglades Program" is defined to mean the program of projects, regulations, and research provided by the law, including the Everglades Construction Project. Id.

§ 373.4592(2)(g). The "Everglades Construction Project," as defined by section 373.4592(2)(f), is essentially the same as the Technical Plan contemplated by the Statement of Principles and the Agreement (i.e., the STAs and the BMPs).

The Legislature found that the Statement of Principles, the Everglades Construction Project, and the regulatory requirements of the law "provide a sound basis for the state's long-term cleanup and restoration objectives for the Everglades." Id. § 373.4592(1)(g).

The Act continues: "It is the intent of the Legislature to provide a sufficient period of time for construction, testing, and research, so that the benefits of the Everglades Construction Project will be determined and maximized prior to requiring additional measures. The Legislature finds that STAs and BMPs are currently the best available technology for achieving interim water quality goals of The Everglades Program." Id. § 373.4592(1)(g).

The Act provides that agricultural growers who are in compliance with the BMP requirements of the District and who have made all payments required under the Everglades Program shall not be required to implement additional water quality improvement measures prior to December 31, 2006, with enumerated exceptions. Id. § 373.4592(4)(f)(3).

The Act imposes an Everglades Agricultural Privilege Tax on the agricultural growers. Id. §373.4592(6). The tax is an annual tax, in stated amounts per acre for stated years, beginning in November 1994. The amount of the tax is substantially equivalent to the growers' payments contemplated by the Statement of Principles and the payments agreed to by the U.S. and Flo-Sun in their Agreement.

The Statement of Principles contemplated that the District would provide for an increase in the millage rate for ad valorem tax of 0.1 mill to generate funds for Everglades restoration.

The Everglades Forever Act provides: "The ad valorem tax proceeds not exceeding 0.1 mill levied within the Okeechobee Basin for such purposes shall be the sole direct contribution from district ad valorem taxes appropriated or expended for the design, construction, and acquisition of the Everglades Construction Project unless the Legislature by specific amendment to this section increases the 0.1 mill ad valorem tax contribution." Id. § 373.4592(4)(a).

The Statement of Principles and the Agreement contemplated the acquisition of necessary lands by the District for the construction of the STAs and the implementation of the BMPs. The Act provides: "The Legislature further declares that certain lands may be needed for the treatment or storage of water prior to its release into the Everglades Protection Area. The acquisition of real property for this objective constitutes a public purpose for which public funds may be expended . . . the governing board of the district is empowered and authorized to acquire fee title or easements by eminent domain for the limited purpose of implementing stormwater management systems, identified and described in the Everglades Construction Project or determined necessary to meet water quality requirements established by rule or permit." Id. § 373.4592(5)(a)6.(b).

The Agreement between the U.S. and Flo-Sun remains in effect. Following the execution of the Agreement, Flo-Sun has met and continues to meet its contractual obligations. It withdrew from the United States' suit in the Southern District of Florida and from all related litigation, and it has ceased to fund in any manner any such litigation. It implemented established BMPs. It has made the required payments through the payment of the state's privilege tax for the years 1994 and 1995. In sum, Flo-Sun fully supported and is complying with the Everglades Forever Act, as passed.

From being a party to the Statement of Principles, from entering into the Agreement with the U. S., and from supporting the Everglades Forever Act, Flo-Sun's purpose was to obtain from the U.S. and the State a definition of its environmental responsibilities and its financial responsibilities to the Everglades for a period of ten years. Approximately 2,069 acres of Flo-Sun's lands have been taken for the purpose of implementing the STAs or the BMPs established by the permitting process of the District. As on-farm measures, Flo-Sun must comply with established BMPs. As its financial contribution, Flo-Sun must pay and is paying the amount of moneys as now fixed by the privilege tax under the Everglades Forever Act.

Performance of the Best
Management Practices Exceeds Goals

EAA farmers have greatly exceeded the requirement that twenty-five percent of the phosphorus be reduced by farm level BMP's. In the last year the performance was sixty-eight percent. What is significant about this is that BMPs were implemented over about a three-year period. In each year the reductions improved and in the final year of implementation sixty-eight percent was attained. The three-year average was forty-seven percent.

If the STAs had been constructed and operated during the last year, only thirty-five percent of the phosphorus treated would have originated from the EAA farms. During the last year there was more phosphorus in Lake Okeechobee water released to the Water Conservation Areas than there was from the EAA farms. The EAA farmers were actually improving the

quality of water they discharged compared to the water quality of their irrigation supplies from the lake.[4]

The Everglades Forever Act Addresses
Both Water Quality and Quantity

The "Findings and Intent" of the Everglades Forever Act [section 373.4592(1)(e) and (f)] includes:

> (e) It is the intent of the Legislature to pursue comprehensive and innovative solutions to issues of water quality, water quantity, hydroperiod and invasion of exotic species which face the Everglades ecosystem. The Legislature recognizes that the Everglades ecosystem must be restored both in terms of water quality and water quantity and must be preserved and protected in a manner that is long term and comprehensive . . .
>
> (f) The Legislature finds that improved water supply and hydroperiod management are crucial elements to overall revitalization of the Everglades ecosystem, including Florida Bay. It is the intent of the Legislature to expedite plans and programs for improving water quantity reaching the Everglades, correcting long-standing hydroperiod problems, increasing the total quantity of water flowing through the system.

The Everglades Construction Project is to be operated to achieve a twenty-eight percent average annual increase in flows to the EPA.

The design, construction, and operation of the Everglades Construction Project is to proceed as described in a separate document incorporated into the Act by reference. This is the "Conceptual Design Document" of February 15, 1994, referred to in several parts of the Act.

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4. Phosphorus flows into the lake are largely from sources north of the lake including urban wastewater, dairy farms, and cattle operations. Phosphorus from the EAA into the lake represents a minor portion, currently less than six percent.

This document demonstrates the multipurpose nature of the Everglades Construction project and shows that the STAs are providing much more than treatment of EAA agricultural runoff. The project was designed to provide hydroperiod restoration for the Rotenberger Tract[5] in the EAA as well as overdrained portions of the Water Conservation Areas south of the EAA. There are also flood control benefits to Wellington and the other residential areas east of the EAA by inclusion of the "C-51 West project" as STA 1 East. There is a project component to divert water from an area northeast of the EAA, the "L-8 basin," into Lake Okeechobee for water supply benefits to the region.

Studies by the District consultants of other technology that could provide water quality treatment alone, much more reliably and with no more cost, are summarized in the Conceptual Design Document. These treatment systems, however, did not use large areas of land. The larger STAs finally chosen will provide storage and timing benefits to improve water distribution and hydrologic restoration in the Water Conservation Areas and Rotenberger Tract.

In addition to the multiple functions of the STAs, there are new distribution or spreader systems built at the south end of the EAA to change the delivery of water from the canal system to a sheet flow system. These have no water quality treatment function but are designed to improve the hydroperiod deficiencies of the existing distribution system.

The treatment provided in the STAs for EAA agricultural runoff may only be temporary. The District has released a draft "Lower East Coast Water Supply Plan." One of the proposals of

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5. The Rotenberger tract is a state-owned wildlife management area not devoted to agricultural use.

this plan is to build reservoirs in the EAA to hold EAA agricultural runoff and recycle this back to the farms.

Whether or not the recycling reservoirs are built, it is clear that a declining percentage of phosphorus will originate in the EAA. More and more phosphorus treated in the STAs will come from other areas. Based on an average of the last three years, if current BMP performance continues, only fifty percent or less of the treatment capacity will be needed for EAA runoff. The rest will come from other basins and other landowners. The Everglades Forever Act construction project deals not only with phosphorus but also water flow and quantity, and benefits areas outside the EAA and not connected to agriculture.

SOE Proposes
Amendments 4, 5, and 6

In 1994, a group calling itself, Save Our Everglades, Inc. ("SOE"), an organization with the avowed purpose of stopping the production of sugar in the EAA, sponsored and funded the 1994 "Save Our Everglades" initiative petition. In re: Advisory Opinion to the Attorney General -- Save Our Everglades, 636 So. 2d 1336, 1337 (Fla. 1994). This Court held that the petition violated both the state constitutional single-subject requirement and the ballot title and summary requirements of section 101.161, Florida Statutes. Id. at 1341.

SOE then broke the Amendment into three parts -- Amendment 4 proposed a one-cent per pound fee on the first processors of raw sugar grown in the EAA, Amendment 5 proposed requiring those causing pollution in the EAA and the EPA to be held "primarily responsible" for paying for the abatement of that pollution, and Amendment 6 proposed creating a trust fund to pay for the cost of Everglades restoration. Amendment 5 itself was internally confused. In one

section it imposed liability for polluting the EPA and EAA on anyone who causes pollution in those areas, while another section appeared to impose liability only on those in the EAA and EPA for the pollution they caused in those areas. The ballot summary advised voters only of the latter of these two impacts. The full text of the petition is included in Appendix A.

The Electorate's Perception[6]
of Amendments 4, 5, and 6

During the election period, Amendments 5 and 6 "were virtually ignored." (Appendix C-1). Most news reports were directed to Amendment 4 or simply treated Amendments 4, 5, and 6 together. (Composite Appendix B). Media told voters that "Amendment 4 . . . [was] the guts of the program, " (C-2), while Amendments 5 and 6 only would "add language to the constitution and create a trust to carry out the tax plan" (C-3) and were "contingent on the passage of the sugar tax." (C-4).

Those papers that did address Amendment 5 treated it as only setting forth goals to be followed. They reported that Amendment 5 would impose liability "in theory" only (C-5), that it would establish a "principle" (C-6) to be "enshrine[d] in the state constitution." (C-7). SOE also told numerous newspapers that Amendment 5 only established a "simple principle" regarding Everglades pollution. (C-8). Perhaps for this reason, papers editorialized that it was too vague to be approved. One recommended voting against Amendment 5 because, while "[n]o reasonable person could oppose" the substance of it, "it doesn't belong in the state Constitution." (C-9).

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6. As noted in Point II of the Argument, it is appropriate for this Court to review campaign materials, newspaper articles, and other published statements interpreting the meaning of this Amendment, as they constitute meaningful and pertinent history in construing constitutional provisions adopted through the initiative process.

Papers observed that there was "considerable disagreement about the consequences of its passage" (C-10), and that "it doesn't say how the responsible parties will be identified." (C-11).

Indeed, everyone was confused by the meaning of Amendment 5. As noted above, one section of the petition appeared to impose liability on all those who caused pollution in the EPA and EAA, whether or not those entities were in the EPA and the EAA. Thus, numerous editorials told the voters that Amendment 5 would make all "those polluting the Everglades . . . responsible for the cost of cleaning up pollution they created." (C-12). Another told voters that "Amendment Six [sic] would provide that *any party* that causes pollution in or near a specific part of the Everglades shall be 'primarily responsible' for cleaning up that pollution." (C-13) (emphasis added). Another said that Amendment 5 was fair to the sugar industry, which was not "mention[ed] . . . specifically." (C-14). Similar reports and editorials appeared at various times in almost every daily and weekly newspaper in the State. (C-15). SOE reported the same in editorials (C-16) and promotional material. (C-17).

Newspapers also editorialized that Amendment 5 was not self-executing. "Amendment No. 5 is a bit redundant," one observed, "but it enhances the authority of the Legislature, governor, and water district to hold the sugar industry responsible for paying to clean up its pollution." (C-18). Another cited a source suggesting that Amendment 5 gave entities in the State a substantive right not to be subject to unfair burdens for Everglades cleanup. (C-19).

Few reports deal with the phrase "primarily responsible." However, the papers did treat the Amendment as spelling out "that water polluters in the Everglades farming area are responsible for most of the cost of the cleanup." (C-20) (emphasis added). Other papers reported the same. (C-21). Those papers stating that Amendment 5 would make farmers who

"pollute farm lands" responsible for paying to clean up that contamination (C-22) did not explain how that interpretation of the amendment could be supported by the language of the amendment.

The Voters Defeat Amendment 4
but Accept Amendments 5 and 6

On Election Day, November 5, 1996, the voters rejected Amendment 4, but approved Amendments 5 and 6.[7]

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7. Section 11.242, Florida Statutes, requires the Joint Legislative Management Committee to publish the Florida Constitution with the Florida Statutes. The statute provides the Committee with no authority to revise the text of a constitutional amendment. Nevertheless, instead of incorporating into the 1997 Florida Statutes that segment of the Amendment 5 petition entitled "FULL TEXT OF PROPOSED AMENDMENT," the Committee added to article II, section 7 only the language following the language of paragraph (b). The Committee omitted the entire language of paragraphs (a) and (b) of Amendment 5 from the 1997 Florida Statutes.

The confusion of the Committee regarding the language of the Florida Constitution is understandable because paragraphs (a) and (b) of Amendment 5 do read, at least in part, as though they are directions to a compiler, rather than as though they are amendments to the state's founding document. But confusion cannot alter the consequences of the petition process -- the language that appeared on the petition as the language to be made a part of the Constitution is now a part of the Constitution and it must be treated as such. At this time, it does not appear to the Interested Parties that the Governor's question relates to this issue. The Interested Parties raise this point only because of its likelihood of affecting the rights and responsibilities of various entities.

ARGUMENT

I.

Amendment 5 is Not Self-Executing

As its sponsors argued to this Court before approval by the electorate, Amendment 5 is not self-executing.[8] Article II, section 7(b) must be read in conjunction with section 7(a), which has already been interpreted by the Court and implemented by the Legislature. In elevating a well-accepted principle of environmental law to constitutional dignity, existing legislation remains in place. Indeed, this Court has previously held that existing legislation can implement a later-enacted constitutional provision. See Section II C, infra. The Governor should be advised to enforce the laws as they currently exist.

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8. The supporters of Amendment 5 argued that Amendment 5 would not alter existing law and would not be self-executing. According to their analysis of the amendment it:

> would perform a single, legislative function, i.e., the allocation of financial responsibility for cleanup costs upon those whose liability is determined . . . . The Responsibility for Paying Costs initiative leaves the substantive policies regarding water cleanup and pollution abatement unchanged . . . The amendment is not self-executing, but requires findings that someone has in fact polluted . . . . Where, however, pollution is found and existing or future programs provide for its abatement, this initiative works to allow the imposition of limited financial responsibility in making those who caused the pollution "primarily responsible" for paying the costs of the abatement of that pollution, leaving the exact determination of such costs to a forum better able to weigh the facts and circumstances of an individual case.

Initial Brief of Save Our Everglades, Inc. at 11, 14-15; Advisory Opinion to the Attorney General--Fee on the Everglades Sugar Production, 681 So. 2d 1124 (Fla. 1996).

A. Article II, Section 7(b) Supplements and Should be Read in Conjunction with Article II, Section 7(a)

Article II, Section 7(a) of the Florida Constitution provides, "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty." Section 7(a) further provides that "[a]dequate provision shall be made by law for the abatement of air and water pollution." Pursuant to this mandate, the Legislature has enacted a number of laws including Chapter 373, Florida Statutes (the Florida Water Resources Act of 1972); Chapter 403, Florida Statutes (the Florida Air and Water Pollution Control Act); and Chapter 380, Florida Statutes (the Florida Environmental Land and Water Management Act).[9]

Constitutional provisions should be interpreted in connection with other constitutional provisions affecting the same subject matter. State v. City of Avon Park, 149 So. 409, 416 (Fla. 1933), rehearing denied, 151 So. 701 (Fla. 1933), modified by 158 So. 159 (Fla. 1934). In creating a new subsection (b) to article II, section 7, Amendment 5 modifies and supplements a constitutional mandate that is non-self-executing on its face. Amendment 5 likewise requires implementation by the Legislature.[10]

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9. See Florida Wildlife Fed. v. State Dep't of Environmental Regulation, 390 So. 2d 64, 66 (Fla. 1980); Friends of Everglades v. Bd. of Co. Comm'rs, 456 So. 2d 904, 912-13 (Fla. lst DCA 1984), review denied, 462 So. 2d 1108 (Fla. 1985); Turner v. Trust for Public Land, 445 So. 2d 1124, 1126 (Fla. 5th DCA 1984); Cross Key Waterways v. Askew, 351 So. 2d 1062, 1063-64 (Fla. lst DCA 1977), aff'd, 372 So. 2d 913 (Fla. 1978).

10. Provisions of the Florida Constitution are regarded as "self-executing" only if they can be implemented without the aid of legislative enactment. See Gray v. Bryant, 125 So. 2d 846 (Fla. 1960). "Whether a constitutional provision should be construed to be self-executing, or not self-executing, is whether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without aid of legislative enactment." Id. at 851.

Amendment 5 is a constitutional statement of principle. But, it does not answer the questions of what constitutes "water pollution," how is one to be adjudged a "polluter," and what mechanism should exist for assessing the cost of abating that pollution.[11] Pollution is not a term that defines itself. With respect to the Everglades, it is necessary to determine the level of phosphorus that can properly be considered "pollution" before anyone can be known to be a polluter.

Likewise, Amendment 5 is silent as to how such decisions should be made. Unlike Amendment 4 (the defeated one-cent tax) and 6 (the approved trust fund), which expressly reference a state agency and define what it is to do, there is nothing in the language of Amendment 5 to suggest any role for the District, the DER, or the Governor.[12]

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11. As the proponents of Amendment 5 suggested to this Court, the amendment requires findings that someone has in fact polluted. See Note 8, supra. A finding that someone has in fact polluted turns upon the definition of pollution, and defining "pollution" is in the first instance a legislative function, as evidenced by the preexisting portion of article II, section 7 of the Florida Constitution, which provides that "[a]dequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise." (Emphasis added).

Amendment 5 neither defines "pollution" nor grants to any entity -- the District, the DER, the Governor -- the ability to define it. Thus, the power to make such policy pronouncements necessarily remains with the Florida Legislature.

12. As a creature of the Legislature, the District clearly cannot implement this amendment. § 363.069, Fla. Stat. (1995). Unlike a city or county, it possesses no home rule powers. A special district has no inherent powers; it possesses only those powers properly delegated to it by express statement or by necessary implication. "An agency has only such power as expressly or by necessary implication is granted by legislative enactment. An agency may not increase its own jurisdiction and, as a creature of statute, has no common law jurisdiction or inherent power such as might reside in, for example, a court of general jurisdiction." Department of Environmental Regulation v. Falls Chase Special Taxing Dist., 424 So. 2d 787, 793 (lst DCA 1982), review denied, 436 So. 2d 98 (Fla. 1983). Accord East Central Regional Wastewater Facilities Operation Bd. v. City of West Palm Beach, 659 So. 2d 402 (Fla. 4th DCA 1995). This Court has warned that "[i]f there is a reasonable doubt as to the lawful

This case is similar to Florida Department of Education v. Glasser, 622 So. 2d 944 (Fla. 1993), in which this Court reviewed article VII, section 9 of the Florida Constitution. That section states: "Counties, school districts, and municipalities shall, and special districts may be authorized by law to levy ad valorem taxes." This Court held that this language was not self-executing. Id. at 947. In so doing, this Court noted that "[h]ad the framers of the 1968 Constitution intended a self-executing grant of power, they could have chosen self-executing language. Our present constitution contains numerous examples of such phrases." (citing numerous examples); see also Art. I, § 24(c), Fla. Const. ("this section shall be self-executing").

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existence of a particular power that is being exercised, the further exercise of the power should be arrested." Edgerton v. International Co., 89 So. 2d 488, 490 (Fla. 1956). Therefore, the District remains an administrative agency entitled to exercise quasi-legislative powers only pursuant to a proper delegation of legislative authority that does not violate this separation of powers doctrine. See Askew v. Cross Key Waterways, 372 So. 2d 913 (Fla. 1978); Booker Creek Preservation, Inc. v. Southwest Fla. Water Mgt. Dist., 534 So. 2d 419, 423 (Fla. 5th DCA 1988), ("[R]ulemaking powers of administrative agencies are necessarily limited to the parameters of the statute which confers on the agency its rule-making authority") review denied, 542 So. 2d 1334 (Fla. 1989); see also St. Johns River Water Mgt. Dist. v. Zellwood Drainage & Water Control Dist., 677 So. 2d 342 (Fla. lst DCA 1996).

The District is an executive branch "agency" subject to the separation of powers clause, the constitutional limitation on exercise of judicial powers set forth in article V, section 1 of the Florida Constitution, and Florida's Administrative Procedure Act (chapter 120, Florida Statutes). The voters' approval of Amendment 5 in no way altered this reality. Section 120.52(8)(g), Florida Statutes (1996 Supp.) expressly defines agency action that constitutes an "invalid exercise of delegated legislative authority." This provision explains that "[a]n agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute." Thus, the District is limited to rulemaking necessary to implement statutory direction provided to it by the Florida Legislature. Any action in excess of that would equate to an attempt by the District to usurp legislative powers in violation of the separation of powers clause of the Florida Constitution.

B. Existing Environmental Law, Including The Everglades Forever Act, Constitutes "Adequate Provision by Law" to Satisfy the Constitutional Directive of Article II, Sections 7 (a) and (b)

The Constitutional directive of article II, section 7, as amended, including subsections (a) and (b), has been satisfied by the Everglades Forever Act and other existing environmental legislation. The Act is a technically sound plan for restoring the Everglades. It is comprehensive, addressing the paramount issues of water quantity and flow, in addition to water quality concerns. Finally, it encompasses the settlement of a federal lawsuit and the settled expectations of parties that have relied upon its provisions.[13]

Some have suggested that Amendment 5 renders the funding mechanisms of the EFA unconstitutional, and that they should be revisited by the Legislature. However, Amendment 5 is not a formula for taxation. It does not purport to address or limit the Legislature's use of the power to tax authorized by article VII of the Florida Constitution. There is no linkage between Amendment 5 and the authority of the Legislature to enact taxes to pay for comprehensive Everglades restoration. Moreover, Amendment 5 does not serve as an industry-wide indictment and assessment of damages against the sugar industry. The Interested Parties are in compliance with pollution laws and regulations. Their farms are utilizing BMPs to reduce phosphorus levels below those required by law. Because, as a matter of law, these companies are not polluting,

13. Flo-Sun has relied upon commitments made in its agreement with the United States, which have been incorporated in the Everglades Forever Act. It withdrew from litigation where its rights could have been protected, made substantial payments of funds, and agreed to a stipulated taking of its land in eminent domain.

their obligations are unaffected by Amendment 5.[14]

Implementation of Amendment 5 would require an individualized inquiry of whether a specific person or entity is a polluter. An existing statutory provision that already implements Amendment 5 is found in Chapter 403, Florida Statutes. The Florida Air and Water Pollution Control Act, provides:

> Whoever commits a violation specified in s. 401.161(1) is liable to the state for any damage caused to the air, waters, or property, including animal, plant, or aquatic life of the state and for reasonable costs and expenses of the state in tracing the source of the discharge in controlling and abating the source and the pollutants, and in restoring the air, waters, and property, including animal, plant, and aquatic life of the state to their former condition, and furthermore is subject to the judicial imposition of a civil penalty of not more than $10,000 per offense.[15]

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14. As articulated by SOE's counsel, Amendment 5 requires findings that someone has in fact polluted. It cannot be construed as containing such a determination without conflicting with article I, section 10 of the Florida constitution and violating the United States Constitution's prohibition against bills of attainder. Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a trial, are prohibited bills of attainder. United States v. Lovett, 328 U.S. 303 (1946); Owens v. Ivey, 525 N.Y.S. 2d 508, 515 (N.Y. City Ct. 1988) (Parental Responsibility Act imposing liability on parents for malicious and destructive acts of their children based solely on the parent/child relationship was an unconstitutional bill of attainder.) This point raises the issue that there are a number of constitutional issues raised by the passage of Amendment 5 and what it means to those affected by it. The Interested Parties do not believe that the Governor's questions are pertinent to those issues and, of course, this proceeding clearly is not the appropriate forum to litigate those issues. See supra note 1. The Interested Parties certainly reserve all their arguments regarding the federal constitutionality of the Amendment.

15. Section 403.161, Florida Statutes, referenced in the Act makes it a violation to "cause pollution . . . so as to harm or injure human health or welfare, animal, plant or aquatic life or property" or "[t]o fail to obtain any permit required by this chapter . . . or fail to comply with any rule, regulation, order, permit or certification adopted or issued by the department pursuant to its lawful authority." Section 403.031(7), Florida Statutes, defines pollution but excludes from the general definition activities or discharges "authorized by applicable law."

This provision applies to any person found to be a polluter. As an implementation of Amendment 5, a constitutionally desirable aspect of section 403.141 is its general applicability. There is no rationale for treating those within the EAA who cause pollution any differently from (1) those outside the EAA who cause pollution inside the EAA, (2) those who cause pollution in the Kissimmee River or Lake Okechobee, (3) those who cause pollution in Florida Bay, or (4) those who cause pollution in the St. Johns River. The approach taken by the Legislature avoids equal protection and due process concerns.

The Everglades Forever Act provides in Section 373.4592(11), Florida Statutes, entitled "Applicability of laws and Water Quality Standards; Authority of District and Department":

> (a) Except as otherwise provided in this section, nothing in this section shall be construed:
>
> 1. As altering any applicable state water quality standards, laws, or district or department rules in areas impacted by this section.
>
> 2. To restrict the authority otherwise granted the department and the district pursuant to this chapter or chapter 403, and provisions of this section shall be deemed supplemental to this chapter and chapter 403.

Subsection (c) of section 11 then provides a discharge limit for phosphorus of 50 parts per billion for landowners who are not in compliance with the EFA Best Management Practices provisions of ection 373.4592(4)(f).

In Section 4(f), the Legislature:

> finds that through implementation of the Everglades BMPs Program and the implementation of the Everglades Construction Project, reasonable further progress will be made towards addressing water quality requirements of the EAA canals and the

> Everglades Protection Area. Permittees within the EAA and the C-139 Basin who are in full compliance with the conditions of permits under chapters 40E-61 and 40E-63, Florida Administrative Code, have made all payments under the Everglades Program and are in compliance with subparagraph a(8) if applicable, shall not be required to implement additional water quality improvement measures prior to December 31, 2006 . . .

Moreover, the State of Florida has never found that phosphorus from sugar cane growers within the EAA constitutes pollution. Phosphorus is governed by the nutrient standard of Rule 62-302.530, Florida Administrative Code. Under this standard, there must be a site-specific determination that for a water body in question an imbalance exists that results from nutrient concentrations. This determination has never been made for the Everglades by any agency rule or order.[16] Permits have been issued repeatedly to EAA landowners which require for issuance a determination that all water quality standards, including phosphorus, have been met. A permit has also been issued, renewed, and reissued to the South Florida Water Management District authorizing the District to direct the flow of water from the northern one-third of the EAA from Lake Okeechobee into the Everglades Protection Area as part of its plan to increase the flow of water into the Everglades.

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16. There is concern, noted in the Everglades Forever Act, that "waters flowing into the Everglades Protection Area contain excess levels of phosphorus." However, this is not a determination of pollution that defines a numerical limit above which there will be an "imbalance in natural populations of flora and fauna" as required by the nutrient standard. In order to determine a numerical standard, the Legislature has established in the Everglades Forever Act, section 373.4592(4)(d) and (e), a process to: (1) evaluate data to "adequately describe water quality in the Everglades Protection Area;" (2) evaluate "ecological and hydrological needs of the Everglades Protection Area;" (3) complete research needed to support a phosphorus criterion in the Everglades Protection Area by 2001; and (4) complete all research necessary to "numerically interpret for phosphorus the Class III narrative nutrient criterion necessary to meet water quality standards in the Everglades Protection Area."

Chapter 403, the Florida Air and Water Pollution Control Act, and section 373.4592, the Everglades Forever Act, constitute "adequate provision by law" for the abatement of water pollution as required by article II, section 7, Florida Constitution, including the mandate of Amendment 5. The Interested Parties are in full compliance with those laws and are not polluters as contemplated by Amendment 5.

C. Existing Legislation Implements Amendment 5

This Court should advise the Governor that, as was the case in In Re Advisory Opinion to the Governor, 132 So. 2d 163 (Fla. 1961), existing legislation, including the Everglades Forever Act, sufficiently implements Amendment 5.

There, Governor Bryant sought the opinion of the Justices concerning the authority to appoint an additional county court judge for Duval County in light of adoption of article V, section 7, Florida Constitution. The Governor viewed the provision as non-self-executing. This Court agreed that the provision was not self-executing and required legislative action. Id. The Court then examined whether existing legislation sufficiently authorized such an appointment:

> In considering the effect of constitutional amendments upon existing statutes, the rule is that the statute will continue in effect unless it is completely inconsistent with the plain terms of the Constitution. However, when a constitutional provision is not self-executing, as is the case here, all existing statutes which are consistent with the amended Constitution will remain in effect until repealed by the Legislature. Implied repeals of statutes by later constitutional provisions is not favored and the courts require that in order to produce a repeal by implication the repugnancy between the statute and the Constitution must be obvious or necessary. Pursuant to this rule, if by any fair course of reasoning the statute can be harmonized or reconciled with the new constitutional provision then it is the duty of the courts to do so.

Id. at 169.

Here, there is no conflict between the Everglades Forever Act, other environmental legislation, and Amendment 5. Amendment 5 simply restates, in general terms appropriate to a constitution, the requirements of existing law.

D. The Governor Should Enforce Existing Laws

The Governor's responsibility under article IV, section 1 of the Florida Constitution is to "take care that the laws be faithfully executed." Laws interpreting article II, section 7(a) and (b) have been enacted, and Governor Chiles and his executive branch agencies have the authority to enforce them. E.g., Advisory Opinion to the Governor, 200 So. 2d 534, 536 (Fla. 1967) (to fully consider the Governor's authority under the Constitution, it is necessary to refer to statutes).

In responding to Governor Chiles' questions concerning Amendment 5, this Court should advise the Governor that he should continue to enforce all laws implementing article II, section 7(a) and (b), including the Everglades Forever Act. Should the Legislature choose to enact additional laws interpreting article II, section 7, the Governor will, of course, have the duty to enforce those laws as well. If questions arise concerning the enforcement of existing laws as applied to particular individuals, these questions can be examined in our court system, and individuals' rights and responsibilities can be adjudicated as required by our Constitution. The Governor and his agencies continue to have full and complete authority to enforce existing laws, until directed by court of competent jurisdiction to do otherwise.[17] This Court should advise the

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17. See, e.g., Marbury v. Madison, 5 U.S. 137, 166 (1803) ("[W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possess a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to

Governor to continue with his responsibilities under the laws enacted pursuant to article II, section 7 until directed by the Legislature or a court to do otherwise.

II.

The Phrase "Primarily Responsible" Establishes a General Principle that Those Responsible for Pollution Should Pay for the Cleanup; Precise Percentages of Responsibility Can Only Be Determined in a Factual Context

In determining the meaning of the phrase "primarily responsible" in Amendment 5, this Court should look beyond the plain language of the constitutional provision only if it finds the phrase to be ambiguous. Florida League of Cities v. Smith, 607 So. 2d 397, 400 (Fla. 1992) ("[W]hen constitutional language is precise, its exact letter must be enforced and extrinsic guides to construction are not allowed to defeat the plain language."). The Governor's request for an interpretation of the phrase in his request for an advisory opinion suggests that the phrase is ambiguous, which permits this Court to examine "considerations of sound public policy" in attempting to ascertain the meaning of the words. Austin v. State ex rel. Christian, 310 So. 2d 289, 292 (Fla. 1975).

This Court has held that when provisions of a constitutional amendment proposed by the initiative process are unclear, the first source for understanding the provisions are the materials that were available to voters at the time they cast their ballots. In Williams v. Smith, 360 So. 2d 417, 420 n.5 (Fla. 1978), the Court stated:

> In analyzing a constitutional amendment adopted by initiative rather than by legislative or constitution revision commission vote, the intent of the framers should be accorded less significance than the intent of the voters as evidenced by materials they had

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resort to the laws of his country for a remedy.").

> available as a predicate for their collective decision. An absence of debate and recorded discussion marks the development of an initiative proposal. To accord the same weight to evidences of the intent of an amendment's framer as is given to debates and dialogue surrounding a proposal adopted from diverse sources would allow one person's private documents to shape constitutional policy as persuasively as the public's perception of the proposal. This we cannot permit.

See also Plante v. Smathers, 372 So. 2d 933 (Fla. 1979). Thus, it is appropriate to review campaign materials, newspaper articles, and other published public statements concerning the meaning of the phrase "primarily responsible."

One public statement concerning the meaning of "primarily responsible" was made to this Court on August 29, 1996, during the review of Amendment 5 for ballot title and summary sufficiency and single-subject rule compliance. An attorney for SOE offered the following explanation:

> It says primarily responsible. The word primarily was used advisedly as the best choice. There were other options the drafters had. They could have said absolutely liable; they could have said a percentage of liability; any of those would have been arbitrary and not have recognized judicial discretion and agency discretion to fashion the rational remedy.

Argument of Jon Mills, Transcript of Oral Argument to the Florida Supreme Court, August 29, 1996, at 11 (Appendix D).[18] Mr. Mills' and SOE's position apparently was that determining primary responsibility involves the exercise of discretion in a specific factual context, either by a court in a case or controversy, or by the Legislature in implementing legislation.

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18. In the Reply Brief of Save Our Everglades Committee at p. 13, the supporters of Amendment 5 state, "the initiative . . . does not assert that a polluter will be fully or solely responsible for pollution."

Mills' and SOE's explanation that "primarily responsible" is a general principle that must be given meaning in the context of a specific factual situation is consistent with much of the media coverage of Amendment 5 before the 1996 general election. As previously noted, although few articles focused directly on the meaning of "primarily responsible," numerous articles stated that Amendment 5 established general goals to be followed concerning Everglades cleanup, a "theory", or established only a "principle" to be followed and "enshrine[d]" in the state constitution. And, as noted above, the media that did address the "primarily responsible" concept, if only indirectly, summarized it by saying that Amendment 5 would make the polluters responsible only for "most of the cost of the cleanup." See supra.

Voters in the 1996 general election were told that Amendment 5 established a principle that those who cause pollution in the Everglades should be primarily responsible for cleaning up that pollution. Voters were not told that "primarily responsible" meant any specified percentage, nor were they told how the costs of cleanup would ultimately be determined or allocated. Rather, they were presented with a commonly understood phrase that can only be more fully interpreted in the context of a specific factual situation.

The phrase "primarily responsible" has been addressed by courts in numerous contexts, most of which offer little guidance in the interpretation of article II, section 7(b).[19] Nonetheless,

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19. A number of cases using this phrase arise in the insurance context. Many of these concern rental car accidents and interpretation of section 627.7263, Florida Statutes, which provides that the lessor's insurance is primary unless specifically delineated language in the rental agreement provides otherwise. The statute does not define "primary," but the cases generally hold that the insurer providing primary coverage is required to pay the full amount of any debt or judgment up to the limits of that insurer's policy. E.g., Allstate Ins. Co. v. Fowler, 480 So. 2d 1287 (Fla. 1985). These "first in line" insurance cases should not be considered applicable to the definition of "primarily responsible" in Amendment 5 because voters were not

a review of many cases in Florida and other jurisdictions rejects the suggestion that "primarily responsible" means solely or completely responsible in all contexts. See e.g., Mize v. Mize, 621 So. 2d 417 (Fla. 1993) ("[A]lthough one parent may have primary residential responsibility for a child, the law seeks to assure that the child have 'frequent and continuing contact' with both parents and that parental responsibility for the child be shared."); The Florida Bar re Amendment to Rules Regulating The Florida Bar, 605 So. 2d 252 (Fla. 1992) (bench and bar are "primarily responsible" for providing competent legal services for all persons; lawyer assuming primary responsibility for the legal services on behalf of the client receives a minimum of 75 percent of the total fee); Cortes v. State Board of Regents, 655 So. 2d 132 (Fla. lst DCA 1995) ("While the Board of Regents has primary responsibility for the system, the Board's responsibilities for universities' programs and fiscal performance are limited to reviewing, evaluating, and monitoring."); Schmeck v. Sea Oats Condominium Ass'n, Inc., 441 So. 2d 1092 (Fla. 5th DCA 1983) (condominium association not primarily responsible for structural problems because it acted as reasonably and expeditiously as possible to correct the problem); see also Deltide Fishing & Rental Tools, Inc v. U.S., 279 F. Supp. 661 (D. La. 1968) ("In terms of numbers,

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told during the 1996 general election that certain "polluters" would pay for the cleanup of the Everglades until their financial resources were exhausted. Rather, the general principle conveyed was that those responsible for causing pollution would pay for the cleanup of that pollution. The percentage of responsibility and how it might be determined or allocated in a specific factual context was not part of the debate during the election. Indeed, this definition of "primarily responsible" does not even make logical sense in the context of Amendment 5. If the term in fact meant that those responsible would be fully responsible until their resources were depleted, then it would have been more logical to say that either these entities would be "fully responsible" or simply "responsible." Instead, the voters approved an amendment that would make those responsible only "primarily responsible," something less than fully responsible. Therefore, the alternative definitions of this term found in other case law are of more assistance in this case.

primarily means a majority, a numerical plurality."); Industrial Refrigeration and Equip. Co. v. State Tax Comm'n, 408 P.2d 937, 940 (Ore. 1965) ("We hold that 'primarily' as used in [the Oregon statute at issue] means the largest category of several categories, but not necessarily more than 50 per cent of the total volume of business."); Hausman v. Rudkin, 268 So. 2d 407 (Fla. 4th DCA 1972) ("The term primarily simply signifies that the agricultural use must be the most significant activity on the land where the land supports diverse activities"); S.E.C. Corp. v. U.S., 140 F. Supp. 717 (D.C.N.Y. 1956), aff'd, 241 F. 2d 416 (2d Cir. 1957), cert. denied, 354 U.S. 909 (1957) (word "primarily" is to be interpreted as meaning essential or substantial rather than principal or chief, in the context of the capital gains income tax statute excluding taxpayer property held primarily for sale to customers in ordinary course of trade); Marshall v. Burger King Corp., 504 F. Supp. 404, 409 (1980), amended on other grounds, 509 F. Supp. 353 (E.D.N.Y. 1981), aff'd, 675 F.2d 516 (2d Cir. 1982) (word primary "is much more plausibly interpreted in its usual sense as meaning chief, principal, or first of several functions").

These cases illustrate that the phrase "primarily responsible" can be interpreted in many ways, depending on the factual context. Similarly, voters in the 1996 general election were informed that Amendment 5 created a general principle that those who cause pollution are primarily responsible for cleaning up that pollution, with the determinations of responsibility and precise percentages of liability to be determined in a specific case or regulatory context. This Court should instruct the Governor that "primarily responsible" cannot be defined in the abstract; rather, such interpretation must await a specific set of circumstances.

CONCLUSION

In sum, the Interested Parties respectfully recommend the following:

The Governor should be advised that the recent amendment to article II, section 7 of the Florida Constitution (Amendment 5) elevates an existing principle of environmental law to constitutional dignity. Because it lacks specifics of implementation and operates to supplement the mandate to the Legislature contained in article II, section 7(a), it is not self-executing. However, the Florida Legislature has already enacted specific legislation consistent with Amendment 5. It is the responsibility of the Governor and the executive branch to enforce existing law. Finally, the phrase "primarily responsible" cannot be defined in the abstract. Such interpretation must await a specific set of circumstances.

Respectfully submitted,

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