IN THE SUPREME COURT OF FLORIDA

Case No. 90,042

ADVISORY OPINION TO THE GOVERNOR --

1996 AMENDMENT 5 (EVERGLADES)

BRIEF OF INTERESTED PARTIES SUGAR CANE GROWERS COOPERATIVE OF FLORIDA AND ST. JOE CORPORATION

On Request for a Written Opinion of the Justices as to the Interpretation of a Portion of the Constitution Upon a Question Affecting the Executive Powers and Duties of the Governor

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GLOSSARY

In this brief, the following acronyms have the meanings set forth below:

BMP	"Best Management Practice" or "BMP" means a practice or combination of practices determined by the South Florida Water Management District, in cooperation with the Department of Environmental Protection, based on research, field testing, and expert review, to be the most effective and practicable, including economic and technological considerations, on-farm means of improving water quality in agricultural discharges to a level that balances water quality improvements and agricultural productivity. § 373.4592(2)(a), Fla. Stat. (1995).
DEP	Florida Department of Environmental Protection. See § 20.255, Fla. Stat. (1996 Supp.)
EAA	"Everglades Agricultural Area" means those lands south of Lake Okeechobee described in section 373.4592(15), Florida Statute. See § 373.4592(2)(e), Fla. Stat. (1995).
EPA	"Everglades Protection Area" means Water Conservation Areas 1, 2A, 2B, 3A, and 3B, the Arthur R. Marshall Loxahatchee National Wildlife Refuge, and the Everglades National Park. § 373.4592(2)(h), Fla. Stat. (1995).
SFWMD	South Florida Water Management District. See, e.g., § 373.0659(1)(e), Fla. Stat. (1995).
SOE	Save Our Everglades, Inc., proponent of 1996 Amendment 5.
STA	"Stormwater Treatment Area" or "STA" means a treatment area described and depicted in the South Florida Water Management District's Conceptual Design Document of February 15, 1994, and any modifications as provided in the Everglades Forever Act, to filter phosphorus and other constituents of stormwater runoff prior to discharge into the EPA. See § 373.4592(2)(l), Fla. Stat. (1995).
SWIM	Surface Water Improvement and Management Act. See §§ 373.451 - 373.4595, Fla. Stat. (1995).

STATEMENT OF INTEREST

Sugar Cane Growers Cooperative of Florida ("Cooperative") is an agricultural marketing cooperative association formed and operated pursuant to Chapter 618, Florida Statutes. Headquartered in Belle Glade in western Palm Beach County, the Cooperative processes sugar cane from approximately 67,000 acres of land in the Everglades Agricultural Area ("EAA"), cultivated by the Cooperative and its 56 member growers. In 1996, the Cooperative appeared before this Court to participate in the validation proceeding on the constitutional initiative which is the subject matter of Governor Chiles' request. Advisory Opinion to the Attorney General--Fee on Everglades Sugar Production, 681 So.2d 1124 (Fla. 1996).

St. Joe Corporation ("St. Joe"), headquartered in Jacksonville in Duval County, is the sole owner of Talisman Sugar Corporation ("Talisman"), a Florida corporation which cultivates sugar cane on approximately 43,000 acres, and leases another 6,000 acres for sugar cane cultivation, in the EAA.

Agricultural operations conducted by the Cooperative and Talisman in the EAA involve the management and storage of surface waters for irrigation and flood control purposes. To regulate waters in the vicinity, the South Florida Water Management District ("SFWMD") pumps surface waters from the EAA into the Everglades Protection Area ("EPA").

In response to the Court's order dated March 17, 1997, in Case No. 90,042, for the reasons set forth above the Cooperative and St. Joe declare their substantial interests in the subject matter of this proceeding. See Fla. R. App. P. 9.500(b)(2).

PRELIMINARY STATEMENT

In an advisory opinion proceeding pursuant to Article IV, section 1(c) and Rule 9.500, Florida Rules of Appellate Procedure, the Justices may consider a question of constitutional interpretation from the Governor in the light of facts commonly known by the general public. E.g., In re Advisory Opinion to the Governor, 243 So.2d 573, 576 (Fla. 1971); In re Advisory Opinion to the Governor, 81 So.2d 778, 780 (Fla. 1955). See also §§ 90.201(1), 90.202(5),(11), Fla. Stat. (1995). It is particularly appropriate for the Justices to exercise their discretion in this manner where, as here, the constitutional provision to be interpreted was proposed by the initiative process.

The specific questions posed by Governor Chiles, and others that may be raised regarding Article II, section 7(b), must be answered against the backdrop of a century of public and private decisions to alter the natural system known as the Everglades and manage it for human purposes. These decisions have involved federal, state, and local governmental entities and a multitude of private interests in the agricultural, land development, and other industries.

Even the Court has played a role in implementing this policy of change. When the Court unanimously upheld the tax assessments of the state's Everglades Drainage District in 1921, Justice Whitfield expounded that Everglades reclamation would "render fit for cultivation and occupancy immense areas of lands in the state that because of their original character are detrimental to the general welfare if not reclaimed, but extremely valuable when rendered useful for occupancy and cultivation." Everglades Sugar and Land Co. v. Bryan, 81 Fla. 75, 106-07, 87 So. 68, 77 (1921).

State and private efforts to reclaim the Everglades began in the late 1800s and were joined by federal efforts near the turn of the century. The narrow strip along the eastern edge of the Everglades -- now the developed Lower East Coast -- was to be reclaimed by building an embankment and converting the small streams that flowed out of the Everglades to the Atlantic Ocean into major drainage canals. Fertile lands south of Lake Okeechobee would be drained to create an agricultural area. See generally Everglades of Florida, S. Doc. No. 89, 62d Cong., 1st Sess. (1911) [App., Tab A].[1]

By 1928, six drainage canals had been constructed, but they did not prevent severe property damage due to flooding of lands and towns in the Everglades region. Further, overdraining resulted in parched prairies, burning mucklands, and saltwater intrusion near the Lower East Coast. So in 1948 the Congress approved further public works to drain and alter the Everglades region. These included interconnected reservoirs, called Water Conservation Areas, in Dade, Broward, and Palm Beach counties to store rainfall, stormwater runoff, and discharges from Lake Okeechobee, and to prevent flooding of the urbanizing areas on the Lower East Coast. The 1948 plan also included works around Lake Okeechobee to regulate water supplies and stormwater runoff from rich mucklands already partially in production, now known as the EAA. See generally Comprehensive Report on Central and Southern Florida for Flood Control and Other Purposes, H. Doc. No. 643, 80th Cong., 2d Sess. (1949) [App., Tab B]. The Legislature concurred in 1949, ch. 25270, Laws of Fla., and the project was largely completed by 1962.

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[1] This brief is accompanied by an Appendix which includes pertinent documents from official sources. References to the Appendix are denoted by brackets containing "App." followed by the tab behind which the document is found, and the page number, if one.

The 1948 plan, designated the Central and Southern Florida Flood Control Project, permanently altered the hydrology and landscape of southeastern Florida. This outcome was not unexpected; it had been taken into account by the Congress and the Legislature prior to approval. A 1948 report filed by the U.S. Army Corps of Engineers stated:

> The extensive changes wrought in the Everglades areas will result in the loss of certain unique wildlife habitats. The Fish and Wildlife Service decries this loss even though it may be overshadowed by benefit to the fishery. ...
>
> It is apparent that the characteristics of the waters with respect to their occurrence, movement, and quality, will be appreciably changed by the proposed flood control and other works ...

Id. at IX (comments of the Secretary of the Interior). After weighing the various public and private interests, the Congress and the Legislature decided to make the far-reaching changes to the Everglades.

In recent years, the results of the 1948 plan have been examined through the prism of changing societal values. In 1988, the United States brought suit against the State of Florida and the SFWMD, alleging they had failed to carry out their state law duties to enforce water quality standards in stormwater runoff pumped from the EAA by the SFWMD, damaging certain federal lands. In 1991, after the personal intercession of Governor Chiles, the United States, the State, and the SFWMD settled. United States v. South Fla. Water Management Dist., 847 F. Supp. 1567 (S.D. Fla. 1992), aff'd, 28 F.3d 1563 (11th Cir. 1994), cert. denied sub nom., Western Palm Beach Farm Bureau, Inc. v. United States, ___ U.S. ___, 115 S.Ct. 1956, 131 L.Ed.2d 848 (1995). The settling parties agreed to adopt a comprehensive Surface Water Improvement and Management ("SWIM") Plan pursuant to section 373.451 -.4595, Florida Statutes, to implement the settlement. Before this plan was approved, Governor Chiles led lawmakers to

enact the Everglades Forever Act, ch. 94-115, Laws of Fla. (codified at § 373.4592, Fla. Stat. (1995)), to end the litigation and get on with Everglades restoration.

The Everglades Forever Act replaced the process set up by the 1991 settlement with the comprehensive "Everglades Program" to restore and protect the region. This program of projects, regulations, research, and financing mechanisms is "by far the largest environmental cleanup and restoration program of this type ever undertaken." § 373.4592(1)(h), Fla. Stat. (1995). The "Everglades Construction Project" includes stormwater treatment areas ("STAs") to filter phosphorous from EAA runoff, id. § 373.4592(4)(a), and other works to improve Everglades water quantity, water delivery, and hydroperiod. Id. § 373.4592(4)(b).

Also required is a research and monitoring program to lay the scientific foundation for a numeric criterion for phosphorus in waters of the EPA. Id. § 373.4592(4)(d). That effort will lead to rulemaking to set a numeric criterion on phosphorus, to replace the current narrative criterion. The Department of Environmental Protection ("DEP") must complete this rulemaking by December 31, 2003. Id. § 373.4592(4)(e). Phosphorous discharge limits must then be established for EAA and SFWMD discharge permits, to assure that the phosphorous criterion is met in EPA waters no later than December 31, 2006. Id. § 373.4592(4)(e)3., (10)(a).

Because public and private interests and equities are inextricably intertwined due to historical decisions, the Everglades Forever Act codified the cost shares envisioned by a 1993 Statement of Principles prepared by litigants to promote settlement of a challenge to the Everglades SWIM Plan. Id. § 373.4592(1) [App., Tab C]. Under this public policy decision, the Everglades Construction Project is financed in large part by an Everglades Agricultural Privilege Tax on farmers. The annual privilege tax is limited to agricultural lands and excludes

residential and other nonagricultural properties, and is levied on a per-acre basis with graduated increases over its first 20 years. The rate may be reduced, based on the effectiveness of mandatory on-farm Best Management Practices ("BMPs"), but in no event may it be less than $24.89/acre prior to November 2014.[2] Id. § 373.4592(6)(c)4. The tax is projected to yield between $232 million and $322 million to finance the Everglades Construction Project. See "Statement of Principles of July 1993," at 3 (referenced in § 373.4592(1), Fla. Stat. (1995)) [App., Tab C, at 3]. Thus, by paying the privilege tax, EAA growers are primarily responsible to finance the water quality component of the Everglades Construction Project.[3]

After enactment of the Everglades Forever Act, Save Our Everglades, Inc. ("SOE"), proposed a constitutional initiative to impose a tax on raw sugar production to finance additional restoration. This Court invalidated the initiative. Advisory Opinion to the Attorney General--Save Our Everglades, 636 So.2d 1336 (Fla. 1994).

In 1996, SOE proposed three new initiatives. [App., Tab E]. Amendment 4 would have imposed a tax on EAA raw sugar production; Amendment 5 established a financial responsibility principle for EPA pollution abatement; and Amendment 6 created an Everglades Trust Fund. All were validated by this Court. Advisory Opinion to the Attorney General--Fee on Everglades

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[2] The privilege tax will fall to a rate of $10.00/acre for tax notices mailed in November 2014 "and thereafter[.]" § 373.4592(6)(c)6., Fla. Stat. (1995). The charges will thus be imposed indefinitely, providing a revenue stream to operate and maintain the STAs.

[3] The total projected capital cost of EAA-related components of the Everglades Construction Project is approximately $288 million. See Conceptual Design Document, at V-3 (Feb. 15, 1994) (referenced in § 373.4592(2)(f), Fla. Stat. (1995)) [App., Tab D, at V-3]. When hydroperiod improvements are deducted, the projected cost for EAA-related water quality improvements is approximately $277 million. Id.

Sugar Production, 681 So.2d 1124 (Fla. 1996) [hereinafter Save Our Everglades II]. The tax was rejected; the trust fund and financial responsibility measures were adopted. [App., Tab F].

The full text of 1996 Amendment 5 reads as follows:

> (a) The Constitution currently provides, in Article II, Section 7, the authority for the abatement of water pollution. It is the intent of this amendment that those who cause water pollution within the Everglades Agricultural Area or the Everglades Protection Area shall be primarily responsible for paying the costs of abatement of that pollution.
>
> (b) Article II, Section 7 is amended by inserting (a) immediately before the current text, and adding a new subsection (b) at the end thereof, to read:
>
> > (b) Those in the Everglades Agricultural Area who cause water pollution within the Everglades Protection Area or the Everglades Agricultural Area shall be primarily responsible for paying the costs of the abatement of that pollution. For the purposes of this subsection, the terms "Everglades Protection Area" and "Everglades Agricultural Area" shall have the meanings as defined in statutes in effect on January 1, 1996.

[App., Tab E, at 2].

On March 6, 1997, the Governor requested an advisory opinion as to the interpretation of Article II, section 7(b). The Governor asked the following questions:

> 1. Is the 1996 Amendment 5 to the Florida Constitution self-executing, not requiring any legislative action considering the existing Everglades Forever Act? Or is the Legislature required to enact implementing legislation in order to determine how to carry out its intended purposes and defining any rights intended to be determined, enjoyed, or protected?
>
> 2. What does the term "primarily responsible" as used in 1996 Amendment 5 to the Florida Constitution, mean? Does it mean responsible for more than half of the costs of abatement, or responsible for a substantial part of the costs of abatement, or responsible for the entire costs of the abatement, or does it mean something different not suggested here?

On March 17, 1997, the Justices issued an Order accepting jurisdiction pursuant to Article IV, section 1(c). See Fla. R. App. P. 9.500(b)(1).

SUMMARY OF ARGUMENT

Article II, section 7(b) is intended to establish a constitutional principle to be observed by the Legislative, Executive, and Judicial branches in the exercise of their respective powers in the field of environmental protection and pollution abatement. This new limitation must be read in conjunction with pre-existing Article II, section 7(a), which on its face is not self-executing. When these two provisions are read in pari materia, section 7(b) establishes a limiting principle which requires statutory rules to have full meaning and effect. The Legislature has enacted such rules in pre-existing statutes, including the Everglades Forever Act.

An answer to the narrowest interpretation of the Governor's questions will not genuinely speak to his underlying concern -- the prospect of further litigation over Everglades restoration, fueled by SOE's 1996 initiatives. Therefore, the ultimate issue presented to the Justices is whether the Everglades Forever Act is in harmony with the new financial responsibility principle for the abatement of Everglades water pollution. In addressing this issue, it is essential for the Justices to consider the constitutional principle in light of its practical effect.

The Court has previously held that, when considering the effect of a constitutional amendment upon a pre-existing statute, the statute will continue in effect unless it is completely inconsistent with the plain terms of the Constitution. Whether or not Article II, section 7(b) is self-executing, the Everglades Forever Act implements and furthers, or is otherwise consistent with, this new principle, and the Justices should so declare.

The Everglades Forever Act is an intricate statutory framework to restore the Everglades, based on the best available technology and a public policy allocation of a shared financial

burden, without any adjudication of liability for pollution. It does not relieve anyone properly adjudicated liable for pollution from primary responsibility for abatement of that pollution.

Until December 31, 2006, a discharge after implementation of on-farm BMPs by an EAA grower current in paying agricultural privilege taxes is authorized by applicable law, and therefore is not pollution. Beginning January 1, 2007, the Everglades Forever Act requires EAA farmers and the SFWMD to be in full compliance with a to-be-adopted numeric criterion for phosphorous in EPA waters. That criterion will constitute one basis upon which pollution can be determined and result in liability to which the principle in Article II, section 7(b) would apply. Absent a judicial or quasi-judicial determination of pollution by one in the EAA, Article II, section 7(b) is not intended to disturb existing financial obligations of EAA farmers or ad valorem taxpayers, as determined by the Legislature under its plenary authority.

The term "primarily responsible" means an adjudged polluter in the EAA is financially responsible "for the most part" and is "first in line" to pay for abatement of any pollution which he or she has caused. The measure does not impose a fixed or minimal percentage of financial responsibility but contemplates a case-by-case assessment based on equitable considerations. This interpretation is based upon the plain meaning of the initiative, not technical definitions. It is buttressed by the framers' intention as declared in this Court during the validation proceeding, and the circumstances of the measure's adoption in 1996.

For these reasons, the Everglades Forever Act implements and furthers, or is otherwise in harmony and consistent with, Article II, section 7(b). No legislative action is required, and existing state policy on Everglades restoration, as charted by Governor Chiles and the Legislature, should hold to its statutory course.

ARGUMENT

I

Whether or not Article II, section 7(b) is self-executing, the Everglades Forever Act initiates immediate Everglades restoration with equitable financing, without relieving anyone from the "primary responsibility" for abatement of his or her water pollution, and is therefore consistent with the principle embodied in Article II, section 7(b).

We turn initially to the Governor's first question, regarding whether Article II, section 7(b) is "self-executing, not requiring any legislative action considering the existing Everglades Forever Act[.]" Letter from Honorable Lawton Chiles, Governor, to Honorable Gerald Kogan, Chief Justice, and the Justices of the Supreme Court of Florida, at 3 (Mar. 6, 1997).

An answer to the narrowest interpretation of this question will not genuinely speak to the Governor's underlying concern -- the prospect of "further litigation" over Everglades restoration, fueled by SOE's 1996 initiatives. Id. The ultimate issue presented to the Justices by Governor Chiles is whether the public policy decisions embodied in the Everglades Forever Act are in harmony with the new financial responsibility principle for the abatement of Everglades water pollution. Thus, this proceeding is added to that sparse category in which an after-adopted constitutional amendment implicates a pre-existing statute. That is the issue which the Justices necessarily face.

Article II, section 7(b) does not exist in isolation from the Legislature's plenary authority regarding pollution abatement; it was incorporated into an existing section and employs key terms of that provision, now Article II, section 7(a). Where the Constitution contains multiple provisions on the same subject, they must be read in pari materia to ensure a consistent and logical meaning that gives effect to each provision. In re Advisory Opinion to the Governor, Appointment of County Commissioners, Dade County, 313 So.2d 697, 701 (Fla. 1975).

Article II, section 7(a) establishes the state's policy "to conserve and protect its natural resources" and directs the Legislature to provide by statute for the "abatement of air and water pollution[.]" Askew v. Game and Fresh Water Fish Commission, 336 So.2d 556, 560 (Fla. 1976) (quoting Art. II, § 7, Fla. Const.). Under this provision, the Legislature has "enormous discretion[.]" Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, 680 So.2d 400, 408 (Fla. 1996) (construing similar Art. IX, § 1, Fla. Const.).

By contrast, Article II, section 7(b) has a "limited and focused objective[.]" Save Our Everglades II, 681 So.2d at 1130. It does not alter the Legislature's mission to preserve the state's natural resources and determine by law which discharges constitute "pollution." It does not alter the Legislature's mission to determine by law the appropriate standard for the "abatement" of that pollution. It does not alter the authority of the Judicial or Executive branches to determine who has caused such pollution, in accordance with due process and statutory law, in a judicial or quasi-judicial proceeding. Rather, Article II, section 7(b) establishes a constitutional principle to be observed by the Legislative, Executive, and Judicial branches imposing financial responsibility for abatement costs in a particular geographic area when implementing or enforcing statutes pursuant to Article II, section 7(a).

> As the Court opined in the validation proceeding, this measure does not perform
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> the legislative function of "freezing" the boundaries within which the amendment would operate as of January 1, 1996; the executive functions of determining that remediable types and levels of pollution exist and will continue to exist in perpetuity, eliminating agency discretion to grant variances and other relief mechanisms, and designating abatement as the environmental goal; and the judicial function of selecting polluters as the parties liable for payment of abatement costs.

Save Our Everglades II, 681 So.2d at 1131 n.5.

The Court has held that the test to determine whether a constitutional provision is self-executing is whether it "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 the aid of legislative enactment." Gray v. Bryant, 125 So.2d 846, 851 (Fla. 1960) (citation omitted). As further explained by the Georgia Supreme Court, a constitutional provision is not self-executing "'when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.'" Goldrush II v. City of Marietta, No. S96A194, 1997 WL 115693, at 2 (Ga. Mar. 17, 1997) (e.a.) (citations omitted).

Applying these canons, when the two portions of Article II, section 7 are read in pari materia, section 7(b) establishes a principle to be incorporated into statutes enacted by the Legislature to carry out its duties under section 7(a), which on its face is not self-executing but which has been executed by the Legislature. See, e.g., chs. 373, 380, 403, Fla. Stat. (1995 & 1996 Supp.). Section 7(b) is intended to establish this principle so it will be carried out by the Legislative, Executive, and Judicial branches in the exercise of their respective powers in the field of environmental protection and pollution abatement, but this principle requires statutory rules to have full meaning and effect.

No matter how the Justices answer the Governor's first question in its narrowest context, it is essential for them to consider this new constitutional principle in light of "its practical effect[,]" In re Advisory Opinion to the Governor, Request of June 29, 1979, 374 So.2d 959, 966 (Fla. 1979), which here means its relationship to the Everglades Forever Act. The Cooperative and St. Joe respectfully submit the Everglades Forever Act is in harmony with, gives effect to, and is consistent with Article II, section 7(b). The Justices should so declare.

If Article II, section 7(b) is self-executing, then the Everglades Forever Act is in harmony and consistent with it. See Gray, 125 So.2d at 851 (self-executing constitutional provision may be supplemented by legislation). The statute establishes an interim program to improve water quality in the Everglades without an adjudication of "pollution" for which anyone bears legal liability. It also establishes a long-term program designed to set a numeric criterion for phosphorous in the EPA and phosphorous limits in permits for discharges to EAA canals and the EPA. Thus, the Everglades Forever Act will result in setting limits from which future "pollution" can be determined and liability can be imposed, based on all the facts and circumstances. It does not relieve anyone properly adjudicated liable for "pollution" from the primary responsibility for paying to abate that pollution. § 373.4592(11)(a), Fla. Stat. (1995). Article II, section 7(b) will apply to liability resulting from all such adjudications.

If Article II, section 7(b) is not self-executing, then the Everglades Forever Act and other pre-existing statutes have already implemented this new constitutional principle by "'laying down rules by means of which those principles may be given the force of law.'" Goldrush II, 1997 WL 115693, at 2 (citations omitted). The interim phase of the Everglades Forever Act is not based upon any judicial, quasi-judicial, or legislative determination of "pollution" caused by any public or private entity. It is grounded on the state's policy "to conserve and protect its natural beauty[.]" Art. II, § 7(a), Fla. Const. Nevertheless, of all the public and private interests involved, EAA growers are statutorily the first in line to pay the projected cost of improvements designed to improve Everglades water quality. If additional steps are necessary for compliance with the numeric criterion for phosphorus after January 1, 2007, the mandate of Article II, section 7(b) will apply.

For these reasons, "it is immaterial ... whether [Article II, section 7(b)] be construed to be self-executing or not." Gray, 125 So.2d at 850. The Legislature has already enacted legislation which will give full effect to, or is otherwise consistent with, the electors' command.

To appreciate the harmonious relationship between Article II, section 7(b) and the Everglades Forever Act, the statute must be examined in detail. With this statute, the Legislature carried out its duty to conserve and protect the natural resources in the Everglades. Art. II, § 7, Fla. Const. Led by Governor Chiles, it also decided to serve the salutary purpose of resolving protracted litigation in order to get on with the business of Everglades restoration. § 373.4592(1)(c), Fla. Stat. (1995). To that end, the Legislature declared that the comprehensive program established by the Everglades Forever Act was "a sound basis for the state's long-term cleanup and restoration objectives of the Everglades." Id. § 373.4592(1)(g).

The Legislature recognized that the threat to the Everglades involves multiple causes, including water quality, water supply, and hydroperiod changes. It recognized the "special nature of the conveyance canals of the EAA" and "the integrated water management purposes for which the Central and Southern Florida Flood Control Project was constructed[.]" Id. § 373.4592(4)(e)4. It recognized that Everglades restoration is a scientific and technical challenge requiring immediate corrective action as well as additional study in the light of other on-going activities. Id. § 373.4592(1)(g), (h). And it recognized that restoration will have profound implications for varying public and private interests. Id. § 373.4592(1)(d)-(f). Mindful of these competing concerns and interests, the Legislature sought to strike a balance that would propel the state toward the overriding public policy goal -- "restoration of the Everglades system[.]" § 187.201(10)(b)8., Fla. Stat. (1996 Supp.).

In the interim phase of the Everglades Forever Act, the legislative scheme requires immediate initiation of public works and private measures, and triggers a time-limited process for determining other activities necessary to restore the Everglades. The statute requires EAA farmers to improve water quality through implementation of on-farm BMPs, or meet a statutorily set discharge limit unless and until DEP sets some other limit by rule. § 373.4592(11)(c), Fla. Stat. (1995). It also requires EAA growers to primarily finance the Everglades Construction Program to address water quality on a regional basis. The BMPs and Everglades Construction Project "are currently the best available technology for achieving the interim water quality goals of the Everglades Program." Id. § 373.4592(1)(g).

An EAA farmer who implements the BMPs and is current in paying the privilege tax to support the Everglades Construction Project "shall not be required to implement additional water quality improvement measures, prior to December 31, 2006[.]" Id. § 373.4592(4)(f)3. Stated differently, until January 1, 2007, any discharge after implementation of on-farm BMPs by an EAA grower current in paying agricultural privilege taxes is "authorized by applicable law," § 403.031(7), Fla. Stat. (1996 Supp.), based on the Legislature's plenary authority to determine which discharges constitute "pollution." Therefore, such a discharge is not "pollution" requiring abatement for which Article II, section 7(b) prescribes financial responsibility.

The on-farm BMPs have been successfully implemented.[4] And under the Everglades Forever Act, the farmers will contribute between $232 million and $322 million to the cost of

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[4] Under the Everglades Forever Act, EAA farmers are required to achieve an annual phosphorus load reduction of at least 25 percent. See Fla. Admin. Code Rule 40E-63. During the most recent water year, EAA farmers achieved a 68 percent reduction. South Florida Water Management District, "Rule 40E-63 Information Update: EAA Basin--Total Phosphorus Levels" (June 24, 1996) [App., Tab G]

the Everglades Construction Project. By this contribution, EAA farmers will be primarily responsible for financing the portion of these works attributable to water quality improvements in EAA stormwater. Other sources may be tapped to finance components addressing water quantity and hydroperiod restoration needs of the Everglades, although landowners within the SFWMD are protected against having to shoulder an undue share of the overall cost of the Everglades Construction Project. § 373.4592(4)(a), Fla. Stat. (1995).

In the interim phase, the Everglades Forever Act also establishes a research-based process to establish by December 31, 2003, a numeric criterion for phosphorous to protect natural areas of the EPA,[5] and "to define the relationship between waters discharged to, and the resulting water quality in," the EPA. Id. § 373.4592(4)(e)2.-3. These relationships are to be reflected in discharge permit limits with which all EAA farmers and the SFWMD must comply by December 31, 2006. Id. §§ 373.4592(4)(f)4., (10).

The phosphorus criterion and discharge limits will become one basis for determining whether any EAA farmer or the SFWMD has engaged in "pollution" of the EAA or EPA, effective January 1, 2007, which is the beginning of the long-term compliance phase ("Phase II") under the Everglades Forever Act. Any permittee whose discharge exceeds the applicable permit limits will be "primarily responsible" for any abatement costs necessary to meet those limits, pursuant to Article II, section 7(b), after an adjudication of liability.

Even if -- by some stretch of the imagination and the Constitution -- the Everglades Forever Act were construed as a binding determination that all EAA growers were guilty of

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[5] The Everglades Forever Act establishes a phosphorus criterion of 10 parts per billion in the EPA as a default standard if the DEP rulemaking process does not result in a numeric phosphorus criterion by December 31, 2003. § 373.4592(4)(e)2., Fla. Stat. (1995).

"pollution," the Legislature has obligated EAA growers to primarily finance the Everglades Construction Program. As demonstrated by the Conceptual Design Document incorporated by reference in the Everglades Forever Act, § 373.4592(2)(f), Fla. Stat. (1995), the projected cost of these public works -- to the extent they are directed at improving water quality in the Everglades -- is primarily borne by EAA growers. Further, the Everglades Forever Act does not limit any permittee's financial responsibility for pollution abatement during Phase II, beginning January 1, 2007. § 373.4592(10)(b), Fla. Stat. (1995).

A harmonious reading of Article II, section 7(b) and the Everglades Forever Act comports with the Court's longstanding rules of constitutional construction. In 1961, the Justices advised Governor Bryant that a 1951 statute enacted to implement a 1950 constitutional amendment on judicial manpower was "adequate to implement" a similar 1956 constitutional amendment which was not self-executing. In re Advisory Opinion to the Governor, 132 So.2d 163, 168 (Fla. 1961). In rendering that advice, the Justices articulated the rules that apply here:

> 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., 132 So.2d at 169 (citations omitted) (e.a.). See also Gray, 125 So.2d at 850 (harmonizing existing statute with new constitutional provision).

As demonstrated above, the Everglades Forever Act easily satisfies these tests, as applied in the context of Article II, section 7(b). Indeed, the clearest indication that Article II, section 7(b) was intended to be read in harmony with the Everglades Forever Act is that the new constitutional provision expressly incorporates precise statutory definitions of the EPA and EAA from the Everglades Forever Act. Art. II, § 7(b), Fla. Const.

Finally, reconciliation of the Everglades Forever Act with Article II, section 7(b) is consistent with the history of the initiative's adoption. See In re Advisory Opinion to the Governor, 243 So.2d at 577. Stated differently, the Justices must ask whether the electors in 1996 wanted to further the well-publicized 1994 decisions of Governor Chiles and the Legislature to initiate coordinated public and private Everglades restoration efforts on an expeditious basis without further delays due to litigation, or whether the electors wanted to reverse course and play the "blame game."

The electors' actions answer that question: Amendment 4, implicitly purporting to fix blame and assess financial responsibility, was inconsistent with the Everglades Forever Act and would not have furthered the restoration program, so it was rejected. Amendments 5 and Amendment 6 are consistent with and will further the restoration program established by the Everglades Forever Act. They were adopted to ensure that it would be carried out prudently and with an equitable allocation of shared financial responsibility among public and private interests. For the Justices to decide otherwise would require them to conclude that the electors intended for 1996 Amendment 5 to overrule the substantive provisions of the Everglades Forever Act, even though no such intention appears on the measure's face.

In summary then, the Everglades Forever Act is an intricate statutory framework to restore the Everglades, based on "the best available technology" and a public policy legislative allocation, on an interim basis, of a shared financial burden. It was intended to initiate immediate steps to enhance the Everglades, refine water quality standards based on scientific study, and provide financing for needed public works, without relieving anyone who has been adjudicated liable for "pollution" of the financial burden for any abatement. In Phase II, after December 31, 2006, the Everglades Forever Act requires implementation of additional measures so that "no EAA permittee's discharge shall cause or contribute to any violation of water quality standards in the" EPA, and does not limit financial responsibility. Id. §§ 373.4592(4)(f)4., (11)(a). The SFWMD is similarly required to develop a plan and proposed funding for changes to the public works discharges needed to achieve the same goal. Id. § 373.4592(10)(a).

No one adjudicated liable for "pollution" is relieved of financial responsibility. Instead, the Everglades Forever Act allocates shared public and private financial burdens based on overriding public policy. "The judiciary must defer to the wisdom of those who have carefully evaluated and studied the social, economic, and political ramifications of this complex issue -- the legislature." Coalition for Adequacy and Fairness in School Funding, Inc., 680 So.2d at 407. Because the comprehensive legislative scheme is in harmony with the command of the electors, the Everglades Forever Act implements and is otherwise consistent with Article II, section 7(b), and the Justices should so declare.

II

The term "primarily responsible" means "for the most part" and "in the first place" and constitutes a financial responsibility principle for pollution abatement to be applied on a case-by-case basis, based on a factual record, consistent with equitable concepts.

We turn next to the Governor's second question, regarding the nature and extent of the limitation on the discretion of the Legislative, Executive, and Judicial branches in implementing and enforcing environmental protection laws enacted pursuant to Article II, section 7(a).

The touchstone for determining the meaning of a constitutional provision is the intent of the electors who adopted it. In re Advisory Opinion of the Governor Request of November 19, 1976 (Constitution Revision Commission), 343 So.2d 17, 22 (Fla. 1977). The Court will discover this intent based on the plain, obvious, and ordinary meaning of the words enshrined in the Constitution, as revealed by commonly used dictionaries. Myers v. Hawkins, 362 So.2d 926, 930 (Fla. 1978). Only if those words are ambiguous will the Court rely upon judicial construction, utilizing extrinsic aids, and even then extrinsic aids may not be used to defeat the plain meaning of constitutional language. Florida League of Cities v. Smith, 607 So.2d 397, 400 (Fla. 1992).

Here, the word "responsible" is defined in commonly used dictionaries to mean "liable" or "answerable." Webster's Third New International Dictionary, at 1935 (1986); Webster's Ninth Collegiate Dictionary, at 1005 (1990); The American Heritage Dictionary, at 1053 (2d College ed. 1985). Thus, the nature of the limitation in Article II, section 7(b) is on the authority of the three branches to impose financial liability for water pollution abatement in the EAA and EPA. Otherwise, the authority of the Legislative, Executive, and Judicial branches

in the field of environmental protection and pollution abatement is unrestricted by this newly adopted provision.

In determining the extent of the limitation, we begin by acknowledging that the word "primarily" is intended to qualify or limit the word "responsible." This must be so, because "effect should be given to every part and every word of the Constitution[.]" City of Tampa v. Birdsong Motors, Inc., 261 So.2d 1, 5 (Fla. 1972) (e.a.). Had the electors wanted to impose unqualified or unlimited liability for water pollution abatement in the Everglades, they would not have placed the modifier "primarily" prior to the word "responsible."

The question then becomes in what way the word "primarily" qualifies or limits the word "responsible." The word "primarily" is defined to mean "first of all" or "for the most part" (i.e., fundamentally, principally, chiefly) and "in the first place" or "at first" (i.e., originally). Webster's Third International Dictionary, at 1800 (1986); Webster's Ninth Collegiate Dictionary, at 934 (1990); The American Heritage Dictionary, at 983 (2d College Ed. 1985).

Thus, under the plain language of Article II, section 7(b), if the cost of abating water pollution in the EAA and EPA is allocated, a polluter in the EAA must be financially responsible "in the first place" and "for the most part" for the cost of abating any pollution which he or she has caused. "This language is clear and unambiguous, and the intent thereof is obvious and understandable." Plante v. Smathers, 372 So.2d 933, 938 (Fla. 1979).

Because the intent of Article II, section 7(b) is clear based on the plain and ordinary meaning of the chosen words, technical meanings should be eschewed. It may be argued that this term connotes a principal-surety relationship, whereby the principal is liable for the entire debt and the surety is only secondarily liable if the principal defaults. See, e.g., United States

v. Unum, Inc., 685 F.2d 300, 304 (5th Cir. 1981). Nothing in the text of the initiative or the ballot summary suggests such a technical definition was intended. Moreover, this argument runs counter to the time-honored judicial practice of ascribing an ordinary meaning to the words in an initiative amendment. Myers, 362 So.2d at 930. For these reasons, the Justices should not assume the electors understood or sought to adopt the nuances of suretyship law, or any other arcane technical definition, when they adopted Article II, section 7(b).

Although resort to extrinsic aids is not necessary here, the plain and ordinary meaning of the term "primarily responsible" as used in Article II, section 7(b) is consistent with the meaning and operation of the measure as described by its sponsor, SOE, during the initiative validation proceeding before this Court in 1996.[6]

Under SOE's conception of Article II, Section 7(b) at that time, the measure does not impose an inflexible standard for "full" or "sole" financial responsibility. Save Our Everglades II, Reply Brief of Save Our Everglades, Inc., at 13. It makes no "specific percentage designation of liability." Id., Initial Brief of Save Our Everglades, Inc., at 3. It does not even seek to impose a "minimal percentage" of financial responsibility. Id., at 11-12.

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[6] The Court has reasoned that the intent of an initiative's framers should not be accorded as much weight as that of the electors, illuminated by explanatory campaign materials. Plante, 372 So.2d at 936. That canon was articulated prior to creation of the validation procedure for initiatives in 1986. Art. IV, § 10, Fla. Const.; § 16.061, Fla. Stat. (1995). The validation procedure is the closest Florida has come to establishing an official "filtering legislative process" for constitutional initiatives. Fine v. Firestone, 448 So.2d 984, 988 (Fla. 1984).

Initiative sponsors must now appear before this Court to secure a ballot position. While perhaps not dispositive, where an issue was addressed by an initiative's framers in a contested validation proceeding, in subsequent reviews the Court should place great weight on these prior representations about an initiative's meaning. Otherwise, the Court will foster bait-and-switch tactics by initiative sponsors who would argue to this Court that their proposal has one meaning, but sell it to the voters as meaning something else. This the Court must not allow.

Instead, Article II, section 7(b) contemplates the application, in case-by-case adjudications, of those "equitable" principles customarily associated with the Judicial Branch and grounded in historic concepts of fairness. Id., Reply Brief of Save Our Everglades, Inc., at 5. It "works to allow the imposition of limited financial responsibility in making those who caused the pollution 'primarily responsible for paying the costs of 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." Id., Initial Brief of Save Our Everglades, Inc., at 14-15 (e.a.).

At oral argument in the validation proceeding, SOE's counsel, Jon Mills, further explained the purpose for and meaning of the phrase "primarily responsible":

> ... It says primarily responsible. The word primarily was used advisably 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.
>
> Therefore, this is the best response to the issue of trying to place some responsibility on those who have actually polluted. Those who have actually polluted vis-a-vis the taxpayer of the State of Florida. While this was called polluter pay, some suggest it might be better called taxpayer pays a fair share. The issue involved here is priority and responsibility. Primarily pay means chiefly responsible, it means first in line, and is easily understandable to decisionmakers.

Transcript of Oral Argument, at 11-12, Williams v. Save Our Everglades, Inc., Case No. 88,343 (Fla. argued Aug. 29, 1996) (e.a.) [App., Tab H, at 11-12].

As a temporal limitation, Article II, section 7(b) is forward-looking. Absent an express intention for Article II, section 7(b) to be applied retrospectively, it must be regarded as prospective-only in its operation. State v. Lavazzoli, 434 So.2d 321, 323 (Fla. 1983). See also 16 Am. Jur. 2d § 65 Constitutional Law, at 383-85 (1979). Thus, it is to be applied in future

adjudications of "pollution" resulting in liability for abatement costs. "Had the framers intended that [the initiative would apply to prior adjudications of pollution liability, or disturb prior policy decisions of the Legislature pursuant to Article II, section 7(a)], it would not have been difficult for them to express that intent." Williams v. Smith, 360 So.2d 417, 420 (Fla. 1978).

This overall understanding of Article II, section 7(b) is consistent with the plain meaning of the chosen phraseology, and it makes sense in the context of the well-publicized general election of 1996. The electors adopted this financial responsibility standard, and a provision establishing the Everglades Trust Fund, see Art. X, § 17, at the same time they rejected a proposed tax on Everglades sugar production to finance Everglades restoration.

The electors did not evidence an intention to disturb existing arrangements for Everglades restoration as made by the Legislature in the Everglades Forever Act. Their intent was to allow the statutory restoration program to continue with initiatives that were consistent with the Everglades Forever Act. The Everglades Trust Fund marked an evolution of a statutory cost-accounting provision in the Everglades Forever Act, § 373.4592(14), Fla. Stat. (1995), and the financial responsibility provision assured that when additional steps were taken, primary responsibility for abating any water pollution in the EPA or EAA would fall on each polluter who caused it. Article II, section 7(b) is intended to ensure fairness in the allocation of the financial burdens of Everglades restoration.

Read in pari materia with Article II, section 7(a) then, Article II, section 7(b) means anyone in the EAA who causes water "pollution" in the EAA or EPA -- as determined under applicable law enacted by the Legislature by virtue of its plenary authority pursuant to Article II, section 7(a) -- is financially responsible "for the most part" and "in the first place" for any

necessary abatement of the pollution he or she causes. Only after a judicial or quasi-judicial determination of liability based on statutory law does the constitutional principle for financial responsibility come into play on any liability. And then the constitutional command is to make the polluter liable for abatement "for the most part" and "in the first place."

So long as the Legislative, Executive, and Judicial branches comply with this constitutional principle, they will meet the command of the electors when assigning responsibility for water pollution abatement costs in the EAA and EPA.

CONCLUSION

For the foregoing reasons of law and policy, the Cooperative and St. Joe respectfully request that the Justices render a written opinion which opines that:

(a) Article II, section 7(b) is not self-executing and establishes a constitutional principle to be observed by the Legislative, Executive, and Judicial branches in the imposition and enforcement of financial responsibility for pollution abatement pursuant to statute;

(b) The term "primarily responsible" means "first in line" and "for the most part" and is intended to be applied prospectively in case-by-case adjudications, based upon a factual record, consistent with traditional equitable principles; and

(c) Whether or not Article II, section 7(b) is self-executing, the Everglades Forever Act either implements and furthers, or is otherwise in harmony and consistent with, this new constitutional principle. It is fully applicable to anyone in the EAA who is adjudged liable for abatement of water pollution of the EAA or EPA on a prospective basis, but it is not intended to disturb existing statutory law that establishes the financial obligations of EAA farmers pursuant to the Everglades Forever Act through December 31, 2006.

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Certificate of Service

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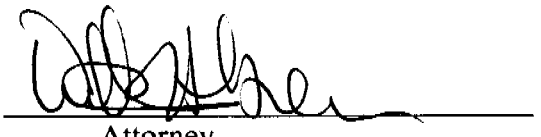

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