IN THE SUPREME COURT
STATE OF FLORIDA

Case No. 90,042

IN RE: REQUEST FOR ADVISORY OPINION PURSUANT TO ARTICLE IV, SECTION 1(C) OF THE FLORIDA CONSTITUTION

INITIAL BRIEF OF INTERESTED PARTY, UNITED STATES SUGAR CORPORATION

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STATEMENT OF THE CASE, FACTS AND INTERESTS OF UNITED STATES SUGAR CORPORATION IN THIS PROCEEDING

This matter was initiated on March 6, 1997 when Lawton Chiles, the Governor of the State of Florida, submitted a written request for advisory opinion, pursuant to Article IV, § 1(c), of the Florida Constitution to this Court. Through that request, the Governor seeks advice concerning a November 5, 1996 amendment to Article II, § 7(b) of the Florida Constitution by citizens' initiative. Article II, § 7(b), as amended, provides:

> 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 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.

With regard to this amendment, the Governor has requested resolution of the following questions allegedly affecting his executive duties and responsibilities:

> 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?[1]
>
> 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 cost of the abatement, or does it mean something different not suggested here?

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[1] As discussed later in this Initial Brief, shortly after Amendment 5 was passed by the electorate the Attorney General issued a brief, somewhat conclusory opinion to the South Florida Water Management District finding the amendment to be self-executing. Fla. Op. Att'y Gen. 96-92 (November 12, 1996). [Appendix, Tab 1] As noted by Governor Chiles in his request for advisory opinion to this Court, the state agencies charged with implementing the Everglades Forever Act, § 373.4592, Fla. Stat., differ with the conclusion reached by the Attorney General and, in fact, the Attorney General's own staff reached a different conclusion. [See Appendix, Tab 2]

Pursuant to Article IV, § 1(c) of the Florida Constitution and Internal Operating Procedure § II, G.2, Supreme Court Manual, interested parties are permitted to be heard on questions presented by the Governor to the Court in requests for advisory opinions. United States Sugar Corporation ("U.S. Sugar"), as a landowner and grower in the Everglades Agricultural Area ("EAA"), as that area is defined at §373.4592(15), Florida Statutes, has a substantial and direct interest in the resolution of the foregoing questions, for not only does U.S. Sugar, an employee-owned company, conduct its operations in the areas within the scope of Amendment 5, and thus could be found to be a "primarily responsible" person as utilized therein, but also because U.S. Sugar has expended considerable financial and other resources in complying with the comprehensive program to clean up the Everglades as specified by the Legislature in the Everglades Forever Act ("EFA" or the "Act"), § 373.4592, Florida Statutes.

The interest of EAA landowners such as U.S. Sugar in this Court's resolution of the questions propounded by the Governor is in part expressed in the Governor's letter where he stated:

> As background, it should be noted that the "Everglades Forever Act" was enacted after many years of litigation involving the United States of America, the State of Florida, the South Florida Water Management District, the Department of Environmental Protection, and certain large agricultural interests to determine how and at whose expense pollution of the Everglades should be abated. s. 373.4592, Fla. Stat.
>
> The Everglades Forever Act established two funding sources for pollution abatement in the Everglades Agricultural Area (EAA), that is, the Everglades agricultural privilege tax, and the levy of a 0.1 mill ad valorem tax on property within the Okeechobee Basin. ss. 373.4592(6) and (4)(a). Therefore, the law in effect at the time of the adoption of Amendment 5 was designed to divide the burden of the costs of pollution abatement on the public by the 0.1 mill tax and the agricultural users by the privilege tax of $24.89 per acre.

March 6, 1997 Request for Advisory Opinion, pp. 1-2.[2]

U.S. Sugar is one of the agricultural interests referred to above that was and is involved in the litigation that served as a backdrop for the EFA and, more importantly, is subject to paying approximately $11 million per year tax for the privilege of conducting agricultural activities within the Everglades Agricultural Area. See § 373.4592(6), Fla. Stat. This tax was determined by the 1994 Florida Legislature and Governor Chiles to be a fair and proportionate allocation of the responsibility for water quality improvement measures in the Everglades, in effect rendering EAA agricultural landowners "primarily responsible" for resolving alleged problems associated with levels of phosphorous in runoff from their lands. In fact, under the EFA, EAA farmers are committed to paying at least $232 million and possibly as much as $322 million to fund the "comprehensive and innovative solutions to issues of water quality, water quantity, hydroperiod, and invasion of exotic species which face the Everglades ecosystem." § 373.4592(1)(e), Fla. Stat.[3]

As will be discussed in more detail herein, the EFA is a comprehensive mechanism by which the mandate of Amendment 5 is currently being implemented. Amendment 5 reaffirms the plans and programs established by the Legislature through the EFA. In fact, Amendment 5, by giving the EAA and the Everglades Protection Area ("EPA") the "meanings as defined in statutes in effect on January 1, 1996," expressly incorporates definitions from the EFA as that is the only Florida statute

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[2] While not mentioned in the Governor's request, the EFA also designates federal funding to address pollution caused by urban stormwater runoff from western Palm Beach County. § 373.4592(4)(a)1., Fla. Stat.

[3] Urban landowners in South Florida are only required to pay 0.1 mill as their contribution to Everglades restoration. EAA landowners also pay the 0.1 mill assessment in addition to their agricultural privilege taxes noted above.

which defines those terms. See §§ 373.4592(2)(h) (definition of EPA) and (15) (definition of EAA), Fla. Stat.

SUMMARY OF ARGUMENT

U.S. Sugar maintains that Amendment 5 to the Florida Constitution is already being implemented in the State of Florida through the continuation of the comprehensive provisions of the EFA and, as such, no further action is necessary to implement it. By complying with the dictates and requirements of the EFA, the Governor and the various state administrative bodies charged with implementing the Act, including the Department of Environmental Protection ("DEP") and the South Florida Water Management District ("SFWMD"), will be furthering the goals and provisions of Amendment 5 on a daily basis when action is taken pursuant to the EFA.

The term "primarily" as utilized in Amendment 5 should be given its ordinary and common meaning in order to effectuate the intent of the voters of the State of Florida. Some common dictionary meanings of the word "primarily" are "mostly," "chiefly" and "principally." When read in the context of these common definitions of the word "primarily," Amendment 5 must be construed as providing that those in the EAA who cause water pollution in the EAA or the EPA are mostly or principally or chiefly, but definitely not completely or solely responsible for the cost of abatement of pollution. A review of the comprehensive plans and programs of the EFA, including the imposition on EAA landowners of an agricultural privilege tax, the requirement that they implement Best Management Practices ("BMPs"), totally at their own expense, to clean up their runoff, and the requirement that they meet new water quality standards to be established by way of a research program, shows the "primarily responsible" mandate of Amendment 5 is currently being implemented in the EAA.

Amendment 5 is also not self-executing because it utterly fails to lay down a sufficient rule by which it can be implemented without aid of legislative enactment. That it is not self-executing, however, is best reflected in the fact that it is an amendment to and thus takes color from Article II, § 7 (now § 7(a)), which expressly requires that adequate provision for pollution abatement generally "shall be made by law." Amendment 5, now Article II, § 7(b), must therefore be read as requiring legislative implementation.

ARGUMENT

I. AMENDMENT 5, BY ADDING ARTICLE II, § 7(B) TO THE FLORIDA CONSTITUTION, REAFFIRMS EXISTING FLORIDA LAW AS EXPRESSED IN THE EVERGLADES FOREVER ACT

> 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.

Article II, § 7(b), Florida Constitution (emphasis supplied). In his letter of March 6, 1997, Governor Chiles has formally asked this Court the meaning of the term "primarily responsible" as utilized above. More specifically, the Governor has asked whether the term "primarily" means "responsible for more than half of the costs of abatement [the position taken by DEP], 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?"

Certain groups committed to driving agriculture, in particular sugarcane farming, out of the EAA have asserted after the election in various fora that "primarily responsible" as used in Amendment 5 should be defined in such a way so as to require so called "polluters" in the EAA to pay the entire costs of abating such pollution even if it would mean bankruptcy; these groups propose that such costs should only be shared after EAA agriculture is no longer financially solvent

and able to pay.[4] U.S. Sugar submits that this position is contrary to the plain meaning of the phrase "primarily responsible" and that any such construction would be contrary to the intent of the voters who passed Amendment 5 on November 5, 1996. Instead, and as acknowledged by its drafters, Amendment 5 places "primary," not "ultimate" or "sole" or "absolute" or "total" responsibility upon those in the EAA who cause water pollution in the EAA or EPA for paying the costs of abatement of that pollution and does not depart from current Florida law, as embodied in the EFA.[5]

A. The Everglades Forever Act Already Places Primary Responsibility On EAA Agriculture For Paying the Costs of Addressing Water Quality Concerns Resulting From EAA Runoff

The Everglades Forever Act ("EFA") was enacted in 1994, ch. 94-115, Laws of Florida, codified at § 373.4592, Fla. Stat. (Supp. 1994), and establishes a comprehensive plan for dealing with problems in the Everglades ecosystem through a program of construction projects, research and monitoring programs, regulation, funding and a number of other program elements. The program elements aim to address problems associated with hydropattern, exotic species control, water quality

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[4] Even the Department of Environmental Protection, one of the agencies charged with implementing the EFA, rejects this principle/surety law interpretation of Amendment 5 as "inappropriate." See December 16, 1996 Memorandum from DEP Assistant General Counsel. Appendix, Tab 3. Moreover, it is important to bear in mind that on November 5, 1996 the voters also overwhelmingly defeated a proposed constitutional amendment to impose an industry crippling penny a pound tax on raw sugar from the EAA; this evidences an intent on the part of the electorate not to impose onerous financial burdens on Florida's sugar farmers.

[5] It should be noted that Mr. Perry Odom, General Counsel of the Florida Department of Environmental Protection, has publicly stated at various meetings, including at the February 13, 1997 regular meeting of the Governing Board of the SFWMD that his agency has determined that "primarily responsible" as used in Amendment 5 "means the majority, it means chiefly, it means over 50%." [Appendix, Tab 4 (transcript remarks of Perry Odom to SFWMD Governing Board dated February 13, 1997)].

and other stresses on the system such as the water demands and runoffs of urban areas, including the developed lower east coast of Florida.

The EFA also creates the "Everglades Construction Project" ("ECP") which calls for the creation of six stormwater treatment areas located, for the most part, at the south end of the EAA and encompassing more then 40,000 acres, to act as filters for water entering the EPA from the EAA and other areas adjacent thereto such as the C-139 Basin. See § 373.4592(2)(f)(4)(a), Fla. Stat. The EFA authorizes the District to take, through eminent domain or purchase, lands in the EAA for construction of these massive treatment areas. § 373.4592(5)(b), Fla. Stat.

The EFA also sets forth requirements for use of BMPs[6] on farms within the EAA. The stated goal of implementation of BMPs, was to reduce phosphorus loads leaving the EAA by 25%. § 373.4592(6)(c)3, Fla. Stat. In fact, through farmer funded on-site phosphorus-reduction BMPs EAA farmers, such as U.S. Sugar, have reduced phosphorus discharge by an average of 47 percent over the last three years and removed in excess of 68 percent of the phosphorus discharge into the Everglades in the 1996 water year. [Appendix, Tab 5 (District Rule 40E-63 Information Update, dated June 24, 1996)].

One aim of the EFA is to establish a numerical phosphorus criterion to replace Florida's current narrative nutrient standard with a specific numeric standard.[7] DEP and the District must,

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[6] "'BMP' means a practice or combination of practices determined by the [SFWMD], 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 consideration, 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.

[7] Florida's narrative nutrient standard provides "In no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora or

however, first undertake an ambitious research and monitoring program to determine this numeric standard , taking into account the true harm caused by nutrients, and at what numeric levels, to the Everglades ecosystem, a situation which is currently unknown. § 373.4592(4), Fla. Stat. This research and monitoring will eventually culminate in a rulemaking process to establish that phosphorus criterion.

The Everglades Research and Monitoring Program established in the EFA, in section 373.4592(4)(d), Florida Statutes , mandates that the District and DEP are responsible for research and monitoring to establish a phosphorous criterion:

> (d) *Everglades research and monitoring program.--*
>
> 1. By January 1996, the department and the district shall review and evaluate available water quality data for the Everglades Protection Area and tributary waters and identify any additional information necessary to adequately describe water quality in the Everglades Protection Area and tributary waters. By such date, the department and the district shall also initiate a research and monitoring program to generate such additional information identified and to evaluate the effectiveness of the BMPs and STAs, as they are implemented, in improving water quality and maintaining designated and existing beneficial uses of the Everglades Protection Area and tributary waters. As part of the program, the district shall monitor all discharges into the Everglades Protection Area for purposes of determining compliance with state water quality standards.
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> (e) *Evaluation of water quality standards.*
> 1. The department and the district shall employ all means practicable to complete by December 31, 1998, any additional research necessary to:
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> a. Numerically interpret for phosphorus the Class III narrative nutrient criterion necessary to meet water quality standards in the Everglades Protection Area; and

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fauna." Fla. Admin. Code r. 62-302.530(48)(b).

b. Evaluate existing water quality standards applicable to the Everglades Protection Area and EAA canals.

This research shall be completed no later than December 31, 2001.

Section 373.4592(4)(e)3, Florida Statutes, expressly requires DEP to "use the best available information to define relationships between waters discharged to, and resulting water quality in, the Everglades Protection Area." Once this information is gathered the District and DEP are to establish discharge limits in permits for discharges into the EAA canals and the Everglades Protection Area. Id. These water quality standards are to be incorporated as of December 31, 2006 into all new and existing permits. § 373.4592(4)(f)4, Fla. Stat. Therefore, as of December 31, 2006 EAA landowners will be required to meet these new water quality standards or face the consequences of non-compliance.

Through the EFA the legislature of the State of Florida decided a fair and equitable allotment of the costs of paying for the comprehensive restoration plan envisioned through the ECP. More specifically, the EFA imposes an agricultural privilege tax for the privilege of engaging in any agricultural trade or business in the EAA (which for U.S. Sugar is $11 million per year). This tax is to be paid annually by EAA farmers and periodically increases until the year 2013. § 373.4592(6)(c)1., Fla. Stat. If farmers are able, through the implementation of BMPs, to decrease phosphorous loads at points of discharge from the EAA then they are eligible for what are referred to as "incentive credits" against the privilege tax. Id. These incentive credits reduce the tax "only to the extent the phosphorous load reduction exceeds 25 percent." Id. The EFA also sets a minimum tax below which incentive credits may not be utilized. Id. As noted previously, EAA landowners must also pay the generally applicable 0.1 mill ad valorem tax assessment. Under the EFA, EAA

landowners are thus held responsible for contributing at least $232 million and possibly up to $322 million towards the costs of remedying water quality concerns associated with runoff from the EAA. U.S. Sugar submits that a review of the EFA shows that Florida currently has an existing comprehensive statutory scheme for the abatement of water quality concerns in the Everglades whereby those who cause water pollution in the EAA and the EPA are held primarily responsible.

B. Like Florida's Sunshine Law Constitutional Amendment, Amendment 5 Expresses a Public Mandate Reaffirming a Comprehensive Statutory Mandate, In this Case the EFA

In 1994 the Florida Legislature found that the Everglades Construction Project as mandated by the EFA:

> represents by far the largest environmental cleanup and restoration program of this type ever undertaken, and the returns from substantial public and private investment must be maximized so that available resources are managed responsibly.

§ 373.4592(1)(h), Fla. Stat. As detailed above the comprehensive restoration plan of the EFA allocates responsibility for the costs of implementing its first phase in a manner found to be in the best interest of the people of Florida as a whole. Given this impressive and much publicized statutory framework for remedying perceived problems in the Everglades *it is just as likely that the voters of the State, in passing Amendment 5, intended not to disrupt or imperil the plans and programs of the EFA but instead to reaffirm them.*

In Monroe County v. Pigeon Key Historical Park, Inc., 647 So. 2d 857 (Fla. 3d DCA 1995) the court discussed the impact of the 1992 Amendment to Article I, § 24(b) of the Florida Constitution to give constitutional status to Florida's Government in the Sunshine Law, § 286.011(1), Fla. Stat. as follows:

> Our new constitutional amendment, now article 1, section 24(b) of the Florida Constitution, *expresses a recent public mandate reaffirming the Sunshine Law* and extending its reach into every meeting at which public business is to be transacted or discussed. Yet, the amendment neither provides for its own enforcement nor counters Tolar's standard of remediation.

Monroe County, 646 So.2d at 861 (emphasis supplied). Like the Sunshine Law Amendment, Amendment 5 also reflects a mandate of the electorate reaffirming a comprehensive statutory scheme, in this case the EFA.[8] Such an interpretation was apparently acknowledged by the sponsor of Amendment 5 who explained to this Court:

> The principle that one should take responsibility for one's own pollution arises from notions of fundamental fairness. The language of this initiative will augment the existing state policy with regard to water pollution abatement to reflect this fundamental principle.

Initial Brief of Save Our Everglades Committee, p. 5, In re: Advisory Opinion to the Attorney General - Responsibility for Paying Costs of Water Pollution Abatement in the Everglades, Case No. 88,345. This language clarifies the intent of the framers of the Amendment 5 that it is in line with established Florida law.

This conclusion is likewise consistent with a longstanding principle of statutory construction. "In considering the effect of constitutional amendments upon an existing statute (such as the EFA), the rule is that the statute will continue in effect unless it is completely inconsistent with the terms of the Constitution." In re Advisory Opinion to the Governor, 132 So. 2d 163, 169 (Fla. 1961). Furthermore, if the statute can reasonably be reconciled with the new constitutional provision, the

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[8] As has been noted, Amendment 5 defines the terms EAA and EPA by reference to the EFA.

Court must do so. Id. Viewed in this light, the EFA easily satisfies Amendment 5's letter and intent, thus giving meaning to the phrase "primarily responsible."

It is also well-established that the intent and purpose of a constitutional amendment may be discerned

> from historical precedent, from the present facts, from common sense, and from an examination of the purpose the provision was intended to accomplish and the evil sought to be prevented. Furthermore, [courts] may look to the explanatory materials available to the people as a predicate for their decision as persuasive of their intent.

Plante v. Smathers, 372 So. 2d 933, 936 (Fla. 1979), cited in Department of Environmental Protection v. Millender, 666 So. 2d 882, 886 (Fla. 1996). See also State, Commission on Ethics v. Sullivan, 449 So.2d 315, 316 (Fla. 1st DCA 1984), rev. denied, 458 So.2d 271 (Fla. 1984). In interpreting a constitutional amendment, all logically relevant factors should be considered. This includes any evidence that demonstrates that the voters intended to maintain the commercial viability of an industry being affected by the amendment. See Department of Environmental Protection, 666 So. 2d at 886. Moreover, a court will not adopt an interpretation of a constitutional provision which will lead to an absurd result that is contrary to the intent and purpose to be accomplished by the amendment. Id.

In this case if "primarily responsible" is interpreted in a manner whereby EAA agriculture is financially crippled the intent and purpose of Amendment 5 would be subverted. Not only would a source of funding for the restoration of the Everglades be eliminated but a strong and vibrant section of Florida's economy would be wiped out. Once again, U.S. Sugar submits that a more logical interpretation of Amendment 5 is that the voters of the State intended to reaffirm the comprehensive and scientifically based Everglades cleanup and restoration program established by

the well publicized and commonly known EFA. Cf. Vinales v. State of Florida, 394 So. 2d 993, 994 (Fla. 1981) (where constitutional provision is "susceptible to more than one meaning, the meaning adopted by the legislature is conclusive.")

C. In Interpreting Amendment 5 the Intent of the Voters Must be Given Paramount Consideration

In interpreting a constitutional amendment, Florida courts will "first seek to ascertain the intent of the framers and voters, and to interpret the provision before [the court] in the way that will best fulfill that intent." Gray v. Bryant, 125 So. 2d 846, 852 (Fla. 1960). See also Bailey v. Ponce de Leon Port Authority, 398 So. 2d 812, 814 (Fla. 1981) (in construing constitutional provisions the court "must ascertain and effectuate the intent of the framers and the electors."). While the intent of the framers of a constitutional provision adopted by petition is considered in interpreting a constitutional amendment, even greater weight is given to the intent of the voters. See Myers v. Hawkins, 362 So. 2d 926, 930 (Fla. 1978). Moreover, "[w]here possible, [the courts] are guided by circumstances leading to the adoption of a provision." Gallant v. Stephens, 358 So. 2d 536, 539 (Fla. 1978). As has been held by this Court:

> We have already held that the intent of the framer of a constitutional provision adopted by initiative petition will be given less weight in discerning the meaning of an ambiguous constitutional term that the probable intent of the people who reviewed the literature and the proposal submitted for their consideration.

Myers, 362 So. 2d at 930 (citing Williams v. Smith, 360 So. 2d 417, 420 (Fla. 1978)).

It is important to bear in mind that nowhere in the pamphlets, advertisements or other materials disseminated by the framers of Amendment 5 were the voters of the State ever given the impression that the term "primarily responsible" was to be interpreted as requiring "those in the

Everglades Agricultural Area who cause water pollution" to bear the sole responsibility for paying the costs of abating pollution until they could pay no more, and only then would such costs be shared.[9] In fact, voters in the same election voted down proposed Amendment 4 to the Constitution which would have imposed an industry crippling penny per pound tax on raw sugar from sugarcane grown in the EAA.

D. The Term "Primarily" Should be Given its Ordinary and Common Meaning

Florida courts traditionally engage in a two step process when interpreting the intent of the electorate regarding a constitutional amendment adopted by initiative. First, courts will "consult widely circulated dictionaries to see if there exists some plain, obvious and ordinary meaning for the words or phrases approved for placement in the Constitution." Myers, 362 So. 2d at 930. Second, courts are also always "obliged to interpret a constitutional term in light of the primary purpose for which it has been adopted." Id.

In construing a constitutional provision, "words should be given reasonable meaning according to the subject matter, but in the framework of contemporary societal needs and structure." Commission on Ethics, 449 So.2d at 316. This Court should first consider the "plain, obvious and ordinary meaning" of the term "primarily." See Myers, 362 So. 2d at 930. The Random House Dictionary defines "primarily" as "essentially; mostly; chiefly; principally." RANDOM HOUSE DICTIONARY (2d Ed. Unabridged 1987). Webster's sets out the following entry under "primarily:"

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[9] U.S. Sugar has assembled a representative compilation of the pamphlets, advertisements and other materials used by the proponents of Amendment 5. As the Court will quickly see, Amendment 5 was usually little more than an afterthought to the proponents' promotional materials. At no point, however, did they ever clearly state that "primarily" should have a meaning other than its ordinary and common one. [See Appendix, Tab 6].

"1: for the most part: CHIEFLY ... 2: in the first place: ORIGINALLY." WEBSTER'S NEW COLLEGIATE DICTIONARY (1995). "Primarily" has also been defined as "Chiefly: principally." THE AMERICAN HERITAGE DICTIONARY (2d College Ed. 1985).

The central issue before this Court is how to define "primarily" in a manner which will best reflect the intent of the voters. As previously noted, the electors in the same election voted down a penny per pound tax on raw sugar that would have had a crippling impact on sugarcane farming in the EAA and would have shifted the then unfunded burden of paying for Everglades restoration to the general public. This is evidence of an intent on the part of the voters not to damage an important sector of Florida's economy in the drive to restore the Everglades. To best effectuate this intent the word "primarily" as utilized in Amendment 5 should be defined in an ordinary manner rather than as a term of art. See Hausman v. Rudkin, 268 So. 2d 407, 409 (Fla. 4th DCA 1972) (where the court, in defining "primarily" in an agricultural zoning matter, ascribed a fairly common sense definition by holding that the "term 'primarily' simply signifies that the agricultural use must be the most significant activity on the land where the land supports diverse activities").

U.S. Sugar submits that the voters' definition of "primarily" would generally follow those above and would not encompass the proponents' rather extraordinary notions. Amendment 5 is in essence a general statement of public policy and not a definitive allocation of the costs of environmental remediation of the Everglades ecosystem. As discussed in detail later in this Brief, a comprehensive allocation of the costs of the Everglades Construction Project, which resulted from a searching and through assessment of the financial and other impacts of the Project and its costs, with an equitable apportionment based on responsibility and fairness principles, has already been undertaken by way of the EFA. The viability of an industry, in this case EAA agriculture, and its

impact on the economy of the State of Florida is not a matter which can be ignored in this type of assessment.

Some of the proponents of Amendment 5 have contended in various fora that its reference to "primarily responsible" somehow has an analogy in insurance or principal/surety law. "Primarily responsible" as utilized in the context of Amendment 5 must be distinguished from that phrase, or derivations thereof, utilized in the context of the insurance or principal/surety law as a term of art. See generally Allstate Ins. Co. v. Executive Car and Truck Leasing, Inc., 494 So. 2d 487 (Fla. 1986); Insurance Co. of North America v. Avis Rent-a Car System, Inc., 348 So. 2d 1149 (Fla. 1977); McCue v. Diversified Services, Inc., 622 So. 2d 1372 (Fla. 4th DCA 1993); Allstate Ins. Co. of Canada v. Value Rent-a-Car of Florida, Inc., 463 So. 2d 320 (Fla. 5th DCA 1985), review denied, 476 So. 2d 672 (Fla. 1985). In these financial responsibility law cases the question may arise as to which carrier is the "primary" insurer.

U.S. Sugar submits that these cases have limited applicability outside of the contractual realm of insurance law where parties have bargained for some shared responsibility of future loss, which is typically specified in a general manner in advance (i.e., loss from collision, etc.). In those cases an insurance company is actually receiving compensation to guarantee against the happening of some event in the future and is able to plan its business investments and strategies in a way which accounts for such exposure. Actuarial tables and statistics provide insurance companies with the ability to predict with some certainty the amounts they will be required to pay out in the future and then charge for their services accordingly. Insurance law takes these factors into account and utilizes the terms "primary" or "responsible" as terms of art rather then ascribing their ordinary and common meanings. Amendment 5, on the other hand, should not be construed to contain any terms of art

unfamiliar to the ordinary voter; instead, the plain and ordinary meaning of the words should be used. In the case of the term "primarily," the meaning that would most likely be ascribed to it by the ordinary voter would be "mostly" or "chiefly" as set forth in the dictionaries cited above.

In fact, the Save Our Everglades Committee conceded as much at the August 29, 1996 oral argument on whether Amendment 5 and its accompanying proposals offended the single subject or ballot summary requirements for such citizen initiatives. Counsel for the Committee, Jon Mills, advised the Court:

> 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 lawmakers. [emphasis supplied]

[Appendix, Tab 7, pp. 11-12 (transcript excerpt of oral argument in In re: Advisory Opinion to the Attorney General - Save Our Everglades, ___So. 2d ____, Case No. 88,343 (Fla. 1996)]. Having so advised the Court on this previous occasion, neither the Committee nor its counsel should now be permitted to argue differently.

E. Principles of Fairness Require that Amendment 5 Be Construed as a Reaffirmation of Existing Florida Law

Examples of shared responsibility in remedying environmental problems are the well known in Florida law, e.g., the state sponsored programs related to the remediation of underground petroleum storage tanks as well as of dry cleaning establishments.[10] Similar to these programs, a determination has been made by the Legislature that the costs of implementing the ambitious construction and restoration project envisioned by the EFA should be shared among all taxpayers and similarly situated persons. In the case of the EFA, primary responsibility is still placed upon EAA landowners to abate pollution from their property through a number of measures including the Agricultural Privilege Tax, BMPs and permit conditions, including a to be determined numeric criterion for phosphorous in farm runoff.

In evaluating the equities of the funding methods of the EFA it is also important to remember that anthropogenic sources of phosphorus (e.g., fertilizer), which is the pollutant of concern in the Everglades, are not the only sources of phosphorus pollution there. Phosphorous not only occurs naturally in the soils of the EAA and EFA but is also introduced into the system by agricultural discharges outside of the EAA that discharge into the EAA or the EPA, such as cattle and dairy farms, municipalities and other non-EAA dischargers in the Kissimmee River drainage basin and around Lake Okeechobee. Moreover, naturally occurring events, such as rainfall and fire, are also responsible for a large quantity of phosphorous in the Everglades, with rainfall estimated to be responsible for 40 percent of the total phosphorous load to the EPA. [Appendix, Tab 8 (excerpt from Everglades 1996 Annual Report, p. 25)].[11]

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10 See generally ch. 376, Fla. Stat.

11 Amendment 5's advocates are already seeking a 10 parts per billion numeric phosphorus criterion for discharges to the EPA. The average phosphorus concentration in South

As this Court is likely aware, the EAA receives most of its irrigation water from Lake Okeechobee, as well as from rainfall. What is not as apparent is that irrigation water supplies from the Lake are higher in phosphorous when entering the EAA than when leaving. This is especially significant given that only a small percentage of the phosphorous in Lake Okeechobee is attributable to the EAA; the remainder comes from naturally occurring phosphorous in the Lake and from rainfall, municipalities and other non-EAA farmers who discharge runoff into the Lake. Despite that additional phosphorus load from other sources, the SFWMD has found that EAA farmers have reduced phosphorous leaving the EAA by an average of 47% over the last three years and removed 68% for the 1996 "water year." [Appendix, Tab 5]. Thus, pursuant to the EFA, EAA landowners are not only cleaning up their irrigation water, which has been enriched with phosphorous from other sources, but are also funding up to $322 million of the Everglades Construction Project. They are, in fact and in law, already "primarily responsible" for the costs of abating their pollution.

II. Article 2, § 7(b) of the Florida Constitution Is Not Self-executing as it Does Not Lay Down a Sufficient Rule by Means of Which its Purpose May Be Accomplished.

As noted above, the Governor has requested an advisory opinion from this Court as to whether Article II, section 7(b) of the Florida Constitution is

> 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?

The question of whether Amendment 5 is self-executing cannot be resolved in a vacuum by simply looking at the terms of the amendment itself. In Gray v. Bryant, 125 So. 2d 846 (Fla. 1960), this

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Florida's rainfall, however, is more than three times as much!

Court established the test to determine whether a constitutional provision should be construed to be self-executing, or not self-executing, as

> 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 the aid of legislative enactment.

Gray, 125 So. 2d at 851 (citations omitted). Amendment 5, by leaving open a vast array of unanswered questions, does not establish a sufficient rule of law to be deemed self-executing.

A. Amendment 5 is Ambiguous and Utilizes Contested Terms

As was detailed by U.S. Sugar in its Motion to Remand to Circuit Court or in the Alternative Motion to Strike or Dismiss Request for An Advisory Opinion the following questions require answers, assuming they are not provided by the EFA, before Amendment 5 can be executed:

- How is "cause" in Amendment 5 to be defined?
- Is Amendment 5 retroactive in effect or prospective only? For example, does Amendment 5 give due credit to the 68% phosphorus load reductions previously noted?
- How is the term "pollution" in Amendment 5 defined? Does it take meaning from the statutory definition of "pollution" in section 403.031(7), Florida Statutes?
- Is the scope of Amendment 5 narrow or broad? Does it apply only to EAA landowners who cause pollution in the EAA or the EPA, but not to non-EAA landowners who cause pollution in the EAA or EPA?[12]

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[12] This is an important issue. The intent section of Amendment 5 states that it is to apply to "those who cause water pollution in the Everglades Protection Area or the Everglades Agricultural Area," thus clearly suggesting that non-EAA polluters are also subject to its provisions.

- What is the extent of liability of the SFWMD and the United States Army Corps of Engineers, who are jointly responsible for the design, construction, maintenance of the Central and South Florida Project, a vast system of canals and pumping stations which delivers phosphorus-enriched waters from all parts of the Kissimmee River - Lake Okeechobee - EAA drainage system to the Everglades?
- What is the liability of upstream, non-EAA landowners who deliver phosphorus-enriched waters to the EAA before it enters the EPA?
- Who makes the determination that a person is the "cause" of pollution or "primarily responsible" for that pollution?
- What happens when several factors are the "cause" of any pollution? What if other non-causative factors contribute to or worsen the pollution? And how is "primary responsibility" for multiple causes apportioned?
- How is the value of non-monetary contributions to water quality improvements (e.g., agricultural BMPs) calculated and weighed when assessing primary responsibility?
- If additional taxes, fees or other exactions are to be imposed, how are they to be assessed, and by whom?

Amendment 5, by leaving open a vast array of unanswered questions, does not establish a sufficient rule of law to be deemed self-executing.

The actual amendatory language, however, is limited to "[t]hose in the Everglades Agricultural Area who cause water pollution." This is not only a construction issue; it also has constitutional equal protection implications.

Amendment 5 is too vague on its face to be workable and, without being linked to the EFA, may lead to absurd applications. An EAA landowner whose car drips oil onto a pavement could be held "primarily responsible" for paying the cost of abating pollution from highway runoff. Without considering issues surrounding substantive due process and equal protection, EAA residents and local businesses and even local governments, who may be found to 'pollute' just as much as someone in any other area of the State, may become subject to frivolous lawsuits brought by those adverse to any use of the EAA for purposes other than environmental conservation and protection. The Court should not cavalierly open the floodgates to such litigation (which has already been threatened by the Save Our Everglades Committee).

B. Amendment 5 Fails the Test for Determining Whether a Constitutional Provision is Self-Executing

In Alsdorf v. Broward County, 333 So. 2d 457 (Fla. 1976), this Court considered three criteria for determining if a constitutional provision is self-executing: (1) whether the language of reasonably straightforward and unambiguous; (2) whether the format of the particular provision is unique to our Constitution; and (3) whether the provision can operate without legislative clarification. The application of these three factors to Amendment 5 demonstrates that it is clearly not self-executing.

First, the language of Amendment 5 is not reasonably straightforward and is ambiguous. Despite their common textbook definitions, the terms "cause," "pollution," and "primarily responsible" are anything but clear when applied to the Everglades as evidenced by the intense litigation which has been ongoing since 1988 in U.S. v. South Florida Water Management District, 88-1886-Civ-Hoeveler (S.D. Fla). It would be naive to think that Amendment 5 unambiguously

resolves the meanings of these and other terms central to Amendment 5 without reference to the EFA or other enabling legislation.

The format of Amendment 5, moreover, is unique to our Constitution. While mandatory negatives are found throughout the Constitution, see Alsdorf, 333 So.2d at 460 n.11, Amendment 5 is unique as it purports to impose liability on private citizens and businesses, as opposed to governmental entities. Finally, as noted above, Amendment 5 cannot operate in a sensible and meaningful manner without implementing legislation. Everglades restoration issues are highly scientific and technical in nature and resolving them will require a comprehensive plan, as evidenced by the EFA.

C. Amendment 5 Must be Read in Pari Materia with Article 2, § 7(a) of the Florida Constitution

Amendment 5, which added § 7(b) to Article II of the Florida Constitution, must be read *in pari materia* with § 7(a) of Article II which provides:

> It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. *Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise.* [e.s.]

The phrase "shall be made by law" as utilized in § 7(a) indicates that the provision is not self-executing but instead requires implementing legislation. See Florida Department of Education v. Glasser, 622 So. 2d 944, 946-47 (Fla. 1993) ("We attribute to the words 'shall ... be authorized by law' their plain meaning: legislative authorization is required to trigger this provision; it is not self-executing.") Finding Article II, § 7(b) to be self-executing would be inconsistent with the plain language of § 7(a) of the same Article. This Court has found it imperative to avoid such conflicts:

> It is a fundamental rule of construction of our constitution that a construction of the constitution which renders superfluous, meaningless, or inoperative any of its

> provisions should not be adopted by the courts. Where a constitutional provision will bear two constructions, one of which is consistent and the other which is inconsistent with another section of the constitution, the former must be adopted so that both provisions may stand and have effect. Construction of the constitution is favored which gives full effect to every clause and every part thereof. Unless a different interest is clearly manifested, constitutional provisions are to be interpreted in reference to their relation to each other, that is in pari materia, since every provision was inserted with a definite purpose.

Burnsed v. Seaboard Coastline R. R. Co., 290 So. 2d 13, 16 (Fla. 1974) (citations omitted). "[E]ach subsection, sentence, and clause must be read in light of the others to form a congruous whole so as not to render any language superfluous." Department of Environmental Protection, 666 So. 2d at 886.

Article II, § 7(b) must be deemed to have been inserted where it was for a definite purpose and should be construed *in pari materia* with the legislative implementation mandate of § 7(a). See Advisory Opinion of Governor, Appointment of County Comm'r, Dade County, 313 So. 2d 697, 701 (Fla. 1975). Section 7(a) specifically provides that the Legislature is to enact legislation to assure the abatement of water pollution. Amendment 5 modifies and supplements an existing constitutional mandate that is non-self-executing on its face. It likewise requires legislative implementation.

D. Attorney General Advisory Opinion Should Be Disregarded.

It should be noted that the Attorney General, at an early stage of debates over the scope and effect of Amendment 5, issued an advisory opinion to the Executive Director of the South Florida Water Management District where he determined, in a conclusory fashion, that Amendment 5 is self-executing. See Fla. Att'y Gen. Op. 96-92 (Nov. 12, 1996) [Appendix, Tab 1]. As noted by the Governor, however, the agencies responsible for implementing the EFA, the DEP and the District, disagree with the Attorney General and

> have suggested an opinion that the amendment is not self-executing, that too many policy determinations remain unanswered. These entities question any agencies (sic) ability to determine rights and responsibilities, the purposes intended to be accomplished, and the means by which the purposes may be accomplished.

March 6, 1997 Letter from Governor Lawton Chiles at p. 2. In fact, a memorandum from the Office of Counsel of the SFWMD discusses whether Amendment 5 is self-executing as follows:

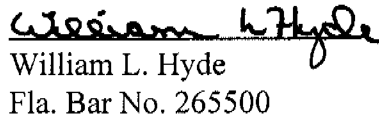
> In the case of Amendment #5, on paying the costs of pollution abatement, new legislation is probably needed, and the amendment is probably not self-executing. [] Furthermore, given the uncertain meaning of words such as "water pollution" and "primarily responsible for paying," as discussed above in (2)(b), the provision should not be considered self-executing, because the amendment's language does not appear to create a "sufficient rule," making its purpose and intent clear, without the aid of legislative enactment, as required in Gray v. Bryant, 125 So.2d 846 (Fla. 1960).

[Appendix, Tab 9 (October 10, 1996 SFWMD Office of General Counsel Memorandum)]. Moreover, it should also be noted that the Attorney General's staff, in preliminary drafts of his opinion to the SFWMD Executive Director, consistently were of the opinion that Amendment 5 consisted of a statement of policy which "would not appear to be self-executing but would require implementing legislation."[Appendix, Tab 2 (staff drafts of Attorney General Opinion)]. As this Court is aware, opinions of the Attorney General, while entitled to some deference, are not legally binding on Florida courts. Lowry v. Parole and Probation Comm'n, 473 So. 2d 1248 (Fla. 1985)(holding Attorney General opinion did not represent legislative intent). For the reasons set forth above, this Court should not give any weight to the Attorney General's rather conclusory opinion, particularly since it is contrary to the advice of his own staff and conflicts with the advice of the agencies charged with implementing Everglades restoration.

REQUEST FOR RELIEF

United States Sugar Corporation requests that the Court provide the following advice to Governor Chiles: (1) that the term "primarily" in amendment 5 must be given its ordinary and common meaning, i.e., essentially, mostly, chiefly, principally; and (2) that Amendment 5 is not self-executing.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Initial Brief and accompanying Appendix of United States Sugar Corporation has been provided via U.S. Mail this ___ day of April, 1997, to Dexter Douglass, Esquire, General Counsel, Office of the Governor, The Capitol, Tallahassee, Florida 32399-0001, Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida 32399-00001, Perry Odom, Esquire, General Counsel, Department of Environmental Protection, 2600 Blair Stone Road, Tallahassee, FL 32399-2400, Barbara Markham, Esquire, Office of General Counsel, South Florida Water Management District, 3301 Gun Club Road, West Palm Beach, FL 33146, William Green, Esquire, Hopping, Green, Sams & Smith, 123 South Calhoun Street, P.O. Box 6526, Tallahassee, FL 32314, Susan Turner, Esquire, Holland & Knight, P.O. Drawer 810, Tallahassee, FL 32302, Donna E. Blanton, Esquire and Joseph P. Klock, Jr., Esquire, Steel, Hector & Davis, 215 S. Monroe Street, Tallahassee, Florida 32301, Mike Rosen, Esquire, P.O. Box 10228, Tallahassee, FL 32302 and Thom Rumberger, Esquire, P.O. Box 1873, Orlando, Florida 32802-1873 this 7th day of April, 1997.

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