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Via Email

Re: 2020 LORS HAB Planned Deviation Environmental Assessment

Dear Colonel Kelly:

I am writing to provide comments of Florida Crystals Corporation and its affiliates (including New Hope Sugar Company and Okeelanta Corporation) on the Supplemental Draft Environmental Assessment ("Supplemental EA" or "SEA") for the 2020 Planned Deviation to the Water Control Plan for Lake Okeechobee and Everglades Agricultural Area ("LORS 2008"). This letter supplements our September 19, 2019 letter to the U.S. Army Corps of Engineers ("Corps") on this topic ("Initial FCC Letter").

The Corps is proposing to drain more water from Lake Okeechobee in the spring dry season and hold back more water in the summer wet season. This proposal runs counter to the basic logic of all water control plans for Lake Okeechobee since the 1950s, which have sought to maximize retention of water in the spring so that it can be available for water supply in case of drought. Lowering the lake in the spring puts longtime water users like Florida Crystals at great risk if drought conditions develop.

In 2018-2019, the Corps implemented a conceptually similar program to the proposed Planned Deviation (known as the "additional operational flexibility" program), that drained water from the lake up to the limits set forth in LORS 2008. The result was that lake stages dropped a foot below normal and there was almost a water shortage this spring.

The Planned Deviation would appear to allow for even greater releases from Lake Okeechobee under certain circumstances by relaxing restrictions in LORS 2008 that limited releases during the "additional operational flexibility" program. Appendix A to the Supplemental EA, which sets forth the rules for the Planned Deviation, contains very few limitations on the "greater flexibility" it would give to the Corps when lake levels are low in the dry season. This means that the Corps is proposing to have the ability to take even bigger gambles with local communities' water supply than it took in the "additional operational flexibility" operation.

The Supplemental EA claims that this is necessary to reduce the risk that summer lake releases will exacerbate harmful algae blooms (“HABs”) in the St. Lucie and Caloosahatchee Estuaries. However, the Supplemental EA cannot say how much the Planned Deviation will reduce HABs in the estuaries, other than to assert that it will have no significant effect. If the Supplemental EA cannot say that the Planned Deviation will significantly improve the HAB situation in the estuaries, then it calls into question why the Corps is making this proposal.

The Supplemental EA also claims that there will be no significant effect on lake stages, water supply, and other environmental concerns related to lowering water levels, based on hydrological modeling summarized in Appendix B. Florida Crystals appreciates the Corps’ decision to conduct modeling. However, the Supplemental EA does not model all ways that the Corps could implement the Planned Deviation, only some nonexclusive scenarios. Those scenarios do not include operations similar to the “additional operational flexibility” program that had dramatic effects on lake stages. The model also incorporates limitations on lake releases which are not set forth in the Planned Deviation and which are inconsistent with recent Corps management of Lake Okeechobee. These limitations on the modeling have the effect of understating the likely impacts of the Planned Deviation, and undercut the basis for most of the Supplemental EA’s assertion that there will be no significant impacts.

Last year, Florida Crystals submitted extensive comments on the Planned Deviation that asked the Corps to take a much harder look at this proposal. The Supplemental EA does not address most of our substantive concerns. Appendix C.1 contains purported responses to our comments by us and other stakeholders, but in many cases those responses are non-sequitur statements that appear to be cut-and-pasted in many places and which do not actually respond to the points that were made. So that we do not repeat ourselves, we incorporate those previous comments here, and highlight only a subset of issues below. We also incorporate by reference comments from U.S. Sugar Corporation and other water users on the proposal.

Our bottom line is that the Supplemental EA does not justify proceeding with the Planned Deviation in its current form. The Corps needs to revise its analysis to accurately show the likely effects of the proposal; prepare an environmental impact statement (“EIS”); follow the other procedures for modifying a regulation schedule; and correctly identify and comply with the statutes that authorize this action.

I. More Clarity Is Needed Regarding the Nature of the Planned Deviation

The Supplemental EA needs to clarify the nature and scope of the Planned Deviation. The description of the Planned Deviation in the Supplemental EA is substantially the same as the description in the initial draft EA. The proposal still calls for releasing more water in the spring dry season and trying to hold back more water in the summer wet season. In apparent recognition that releasing water in the spring could result in substantial effects on lake levels, the Supplemental EA includes a few additional features, such as the concept of a “credit limit” (although it is not quantified or required) and limitations on releases in certain colored zones of the regulation schedule.

The description of the Planned Deviation in the Supplemental EA is more vague about how long it will be in effect. The initial draft EA stated that the Planned Deviation “will be in effect for a minimum duration of one year.” Initial Draft EA (“DEA”), at 1-11. The Supplemental EA removes that sentence, and is silent as to a minimum duration. See SEA, at 1-13. Both the

initial draft EA and Supplemental EA indicate that the Planned Deviation may be in effect until LORS 2008 is replaced by the new regulation schedule LOSOM. DEA, at 1-11; SEA, at 1-13. Both talk about “possible extension” of the deviation, but neither indicates from when the deviation would be extended. *Id.*

The vagueness regarding the length of time the Planned Deviation will be in effect obscures the proposal’s relationship to the underlying regulation schedule. Our initial comment letter pointed out that a recurring, regular departure from a regulation schedule is not a “deviation” but is a fundamental change to the regulation schedule. Appendix C.1 tries to deny this reality by stating, “[t]he Corps is not seeking a change to the water control plan at this time, but a planned temporary deviation,” yet acknowledges that the proposed new criteria could be in place “until LOSOM is implemented.” App. C.1 at 986. This is important, because changes to regulation schedules cannot be approved as deviations, require additional procedures, and require preparation of an EIS. See Initial FCC Letter, at 10-11.

We are concerned that the Supplemental EA characterizes this proposal as a deviation in order to minimize the opportunity for stakeholders to provide meaningful comments. When the proposed action was unveiled last summer, Florida Crystals and other stakeholders submitted extensive comments. The Corps considered them for nearly ten months, then released the Supplemental EA with a one-month comment period. We have asked for additional time to provide comments, because we would like to review the new hydrological modeling in detail, but the Corps has refused to give an extension. Stakeholders like Florida Crystals are justifiably concerned with the way that the Corps is pushing through this proposed action, and we believe it is inconsistent with Corps regulations.

II. The Hydrological Modeling Does Not Accurately Depict Conditions Resulting from the Proposed Deviation

The hydrological modeling in Appendix B does not accurately depict water conditions if the Corps implements the Planned Deviation as it is described in the Supplemental EA. The hydrological modeling assumes greater limitations on the release of water from Lake Okeechobee than are provided in the Planned Deviation. As a result, the modeling underestimates the effects of the proposed operations on lake levels, water supply, and other environmental concerns. To remedy these errors, the Corps either needs to explicitly commit to manage Lake Okeechobee consistent with the limitations in the modeling, or acknowledge that the Supplemental EA does not satisfy the National Environmental Policy Act (“NEPA”) for operations not modeled in the document.

A. The Planned Deviation Contains Few Limitations on the Corps’ Flexibility

The express goal of the Planned Deviation is to provide even “greater flexibility” to release water from the lake in the spring dry season, by relaxing constraints in LORS 2008 designed to protect water supply. SEA, at A-1. Appendix A states that water could be released to the south “up to the maximum extent practicable to the WCA’s when LORS Part C does not recommend releases within the Low, Baseflow, and Beneficial Use Sub Bands.” *Id.* Releases to the west and east could be quadrupled, increasing to 2000 cfs at S-79 and 730 cfs at S-80, “when LORS Part D recommends up to 450 cfs measured at S-79 and up to 200 cfs as measured at S-80, or when Part D does not specifically recommend releases (Beneficial Use Sub Band).” *Id.* These constraints could be relaxed any time the HAB triggers are met, which

as discussed in our initial comment letter, are so broad that they likely would be met every year. There are no limits on the duration of the higher releases. *Id.* at A-4. Water could be steadily released, or released in pulses, with no restrictions on the Corps' discretion. *Id.* at A-6. The Planned Deviation therefore would relax the restrictions in LORS 2008 which limited the amount of water released in the 2018-2019 "additional operational flexibility" operations.

There are few limitations in Appendix A on how the Planned Deviation would be applied. Releases in the Beneficial Use Sub Band "would be cut back if lake levels fall within 0.25 feet of the Water Supply Management Band." *Id.* Releases would be made at lake levels below 12 feet only if water levels are rising faster than 0.15 feet per week. *Id.* Appendix A also identifies some new zones in the Operational Band, "which could be raised or lowered ... by up to 0.5 feet," that "illustrate" where releases "could" be made in the spring. *Id.* at A-4. (We assume that these are intended to be required elements of the Planned Deviation, but the permissive language could suggest that these zones are just examples of how the Corps might apply the Planned Deviation.) Other than that, there are no hard limits on how much water will be released.

The primary way that the Corps will attempt to limit loss of water supply is through its "water bank" concept, in which the Corps would try to hold back releases in the summer months (when the risk of drought conditions is lower) to offset earlier releases in the spring months (when lake water is most likely to be needed for water supply). The "goal" is to meet a "net zero" amount of total releases by December 1, but obviously there is no guarantee that the summer hold-backs will make up for the spring releases. *Id.* at A-6. There also is a "credit limit" concept, by which the Corps would limit the amount of spring releases, but Appendix A does not require the Corps to adopt any specific credit limit and therefore would impose few constraints on the Corps' discretion. *Id.* at A-7.

B. The Hydrological Modeling in Appendix B Does Not Show the Effects of Managing Lake Okeechobee Consistent with the Planned Deviation

The hydrological modeling of the Planned Deviation in Appendix B does not accurately depict the effects of the proposed operations on lake levels, water supply, and other environmental concerns.

First, the modeling only shows certain "scenarios" for how the Planned Deviation might be implemented. Appendix A makes clear that those scenarios "are not meant to be all inclusive or limiting in any way." *Id.* at A-9. This means that the scenarios modeled in Appendix B do not represent all of the ways that the Corps could implement the Planned Deviation, and do not restrict the scope of the agency's discretion. Those scenarios do not include obvious ways that the Planned Deviation might be implemented, such as if it were implemented in conditions similar to 2018 and 2019 along with the Corps' "additional operational flexibility" program.

Second, the modeling incorporates limitations that do not exist in the Planned Deviation and which the Corps is not required to follow. One of those limitations is explicit: the modeling assumes implementation of small "credit limits," even though there is no required credit limit in Appendix A. *Id.* at A-7, B-4. Other limitations are contained in the computer code of the model, but are not stated in the Supplemental EA. It is our understanding that the Corps' model assumes that only ~60,000 acre feet of water would be sent to the Stormwater Treatment Areas

("STA's"), despite there being no such limitation in Appendix A or LORS 2008. The model assumes that there would be no releases in the Beneficial Use Sub Band when the lake is below 12 feet, even though Appendix A expressly allows for such releases. The model assumes that the Corps will be following standard LORS 2008 operations (i.e., those specifically provided in the Water Control Plan), and not non-standard operations under the "additional operational flexibility" provision of LORS 2008. We believe that there likely are more limitations hidden in the computer code, but we have not had sufficient time to review the model given the Corps' refusal to extend the comment period. All of these limitations reduce the appearance of impacts to lake levels, water supply, and other environmental concerns.

At least some of these model limitations are inconsistent with the Corps' actual history managing Lake Okeechobee. The best example is the limitation on releases to the STAs, through which all releases to the Water Conservation Areas must pass. The Corps already sends far more water to the STAs than the ~60,000 acre feet assumed in the model. Over the past five water years, an average of 212,000 acre feet has been sent to the STAs each year, and 454,000 acre feet was sent to the STAs in 2018-19 alone. This is a massive amount of water unaccounted for in the model, and it is not valid to assume that such releases do not occur when the Corps does them every year.

The Corps also releases water when the lake is below 12 feet within the Beneficial Use Sub Band (e.g., releases to the Caloosahatchee River), despite the model's assumption that none of this occurs. Water releases at this time are especially important, because this is when lake levels are flirting with water shortage. Not modeling these operations means that the Supplemental EA does not show their effect.

The assumption that the Corps will operate the lake pursuant to standard LORS guidance also has the effect of underestimating the potential impact of the Planned Deviation. The modeling in Appendix B assumes that the Planned Deviation would be used only in 20 out of the 45 years in the period of record. SEA, at B-5. This apparently is because the model assumes that water levels would not be in the range affected by the Planned Deviation under standard LORS operations. However, in recent years the Corps has operated the lake outside of standard LORS guidance to dramatically lower lake levels, e.g., in the 2018-19 "additional operational flexibility" program. Such operations would have lowered lake levels so that the Planned Deviation would be used, but that is not shown in the model. The result is that Appendix B underestimates how often the Planned Deviation would be implemented.

Third, the Supplemental EA's discussion of the modeling masks the effects of the Planned Deviation in individual years by focusing on a 45-year average. For instance, the Supplemental EA states that "[t]he overall volume of water released from Lake Okeechobee will not change for this implementation outcome, resulting in no net effect on lake stage at the end of the deviation period." SEA, at 4-8. That assertion is based on the unstated fact that the modeling assumes that the deviation will not even be implemented in 25 of the 45 years in the period of record, which has the effect of skewing the average. For the 20 years that the deviation is implemented, Appendix B shows that the "water bank" concept would be unsuccessful in at least 15 of those years and the deviation would increase the total amount of water released from the lake. Since the concerns with the Planned Deviation are focused on the drought years, not the wet years, it is misleading to discuss effects in the context of the overall period of record that incorporates those wet years.

C. Recommendations for Correcting the Modeling Deficiencies

We believe that there are three ways to correct the modeling deficiencies in the Supplemental EA. First, the Corps could conduct new modeling that accurately forecasts the effects of the deviation, correcting for the errors identified above. Second, the Corps could incorporate all of the limitations in the modeling into the Planned Deviation itself, i.e., limit the Corps' discretion to match the limitations in the modeling and limit the use of the deviations to the scenarios set forth in Appendix B. Third, the Corps could acknowledge that it has only complied with NEPA for the specific scenarios modeled in Appendix B (after correcting for the hidden assumptions), and conduct new modeling if and when it seeks to deviate in ways different than those modeled in Appendix B. So that the public is fully informed of the Corps' plans, we recommend that the Corps take the first or second approach (conduct new modeling or limit the Planned Deviation consistent with the limitations in the modeling).

To be clear, the Corps cannot rely on mitigations built into the modeling to issue a Finding of No Significant Impact unless it unequivocally commits to implementing those mitigations. Several courts have overturned Corps' decisions which were based on mitigation promises which were not certain to occur. See, e.g., *Hill v. Boy*, 144 F.3d 1446 (11th Cir. 1998) (remanding Corps decision where FONSI relied on actions that were uncertain to occur); *Friends of Back Bay v. U.S. Army Corps of Engineers*, 681 F.3d 581 (4th Cir. 2012) (remanding Corps decision where FONSI relied upon unfounded assumption that a rule would be enforced). If the Corps is unwilling to commit to the limitations on releases contained in the model, then it cannot rely on the model results to make a Finding of No Significant Impact.

III. The Supplemental EA Does Not Analyze a Reasonable Range of Alternatives

The discussion of alternatives in the Supplemental EA remains insufficient. In comments on the initial draft EA, Florida Crystals and other stakeholders asked the Corps to seriously consider alternatives that would achieve project objectives without draining water supply from Lake Okeechobee. The Supplemental EA fails to consider such alternatives, and ignores the most of the points we made in our previous letter.

A. The Corps' Goals

In our previous letter, we asked the Corps to better define its goals, so that it could consider a wider array of alternatives. We also stated our concern that "the latest focus on HAB may obscure an unstated Corps goal ... simply to lower average water levels in Lake Okeechobee." Initial FCC Letter, at 10.

The Supplemental EA contains no substantive changes based on our comments. Appendix C.1 contains a nonsequitur response that simply repeats the agency's predetermined conclusion that Alternative B causes no harm, and that the Corps needs "greater flexibility." App. C.1 at 988. Nowhere are there any assurances that the Corps' true goal is not merely to lower lake levels to achieve the goals of the Comprehensive Everglades Restoration Plan ("CERP"). To the contrary, the Supplemental EA literally has pages of discussion of how lowering average lake stages will achieve the goals of CERP, see SEA, at 2-6 to 2-9, which suggests that it is the agency's true goal.

B. Failure to Analyze Alternative D

We pointed out in our last letter that Alternative D should not have been dismissed from detailed consideration. We also pointed out unsubstantiated assertions in the original draft EA regarding Alternative D, and asked the Corps to provide a factual basis to support those assertions.

Despite our comments, the Supplemental EA dismisses Alternative D in four sentences. The document admits that “Alternative D satisfies the goal to reduce the risk of transporting a HAB from Lake Okeechobee to the Caloosahatchee and St. Lucie estuaries and/or exacerbating an HAB in those areas.” SEA, at 2-9. But it repeats the statement that Alternative D would “increase the risk” to the Herbert Hoover Dike and suggests that the Corps can take no action that ever increases water levels in the lake. *Id.* at 2-9 to 2-10.

The Supplemental EA provides no facts or information that demonstrates that this conclusion is correct. We specifically asked the Corps to provide the factual basis for similar statements in the initial draft EA, and the revised document provides none. In particular, there is no hydrological modeling of Alternative B to substantiate the assertion that Alternative D will increase risk to the dike. In September 2019, MacVicar Consulting provided modeling of Alternative D that indicated it would have no effect on risk to the dike. In Appendix C.1’s response to comments, the document states that MacVicar Consulting’s modeling “does not accurately represent the operational strategy of the proposed planned deviation” (not explaining why), but says nothing to question MacVicar Consulting’s modeling of Alternative D. It is arbitrary and capricious for the Corps to ignore this alternative without providing any factual basis.

C. Failure to Consider Other Alternatives

The Supplemental EA also fails to consider a number of other alternatives that could address the HAB issue without endangering water supply. Florida Crystals suggested in its previous comment letter that the Corps consider alternatives that would hold back water before it enters Lake Okeechobee, as a way of creating capacity to hold back releases to the Caloosahatchee and St. Lucie Estuaries. In its response to comments, the Corps states that the benefits would be “negligible” and the negative impacts would be “significant,” but provides no hydrological modeling or facts to substantiate these assertions. Florida Crystals suggested several potential alternatives that would target nutrient levels or HAB’s themselves, instead of draining away water supply, but the Supplemental EA refuses to address them because the Corps claims that it lacks authority to address water quality. App. C.1 at 994. This response ignores the NEPA regulation that says that agencies must consider alternatives that “not within the jurisdiction of the lead agency,” 40 CFR § 1502.14(c), because a NEPA document may serve to persuade other agencies with such authority to act. The one constant in the Corps’ response is a refusal to look at any alternative other than the one it proposes. That is inconsistent with NEPA.

IV. The Supplemental EA Fails to Adequately Analyze the Impacts of the Planned Deviation

The Supplemental EA largely repeats many of the statements and conclusions about the environmental effects of the Planned Deviation that were contained in the initial draft EA. Since

our initial comments remain applicable, and to avoid repetition, we incorporate all of previous comments and highlight a few issues below.

A. Effect of the Planned Deviation on HABs

The entire justification for the Planned Deviation is that draining water from Lake Okeechobee in the spring dry season will reduce HABs and their effects in the downstream Caloosahatchee and St. Lucie Estuaries in the summer. The Supplemental EA asserts that the Planned Deviation will reduce HABs in the estuaries, but does not explain how much it will reduce those HABs or how it might change their impacts. For most other issues, the Supplemental EA provides detailed analysis of how the Planned Deviation will affect environmental concerns, but for HABs, which is the central justification for the Planned Deviation, there is almost nothing. The only statement about the effect of the Planned Deviation on HABs is that it will have “negligible to minor beneficial effects.” SEA at 4-16. The Corps needs to clearly demonstrate with evidence that reducing summer discharges will reduce HAB’s in the estuaries, because there is science indicating that the opposite may occur. See, e.g., EPA, “Recommended Human Health Recreational Ambient Water Quality Criteria or Swimming Advisories for Microcystins and Cylindrospermopsin,” at 33 (May 2019) (“The increase in water column stability associated with higher temperatures, less flow, and shallower water can also favor total cyanobacteria growth.”) (citing scientific studies), available at <https://floridadep.gov/oeat/oeat/content/27269-blue-green-algae-task-force>.

In its comment letter on the initial draft EA, Florida Crystals asked the Corps to explain exactly how the Planned Deviation would affect HABs in the lake and downstream, how much the deviation would help with the HAB problem, and also asked the Corps to substantiate a number of assertions about the effects on HABs that had been made without any citations to evidence. The Supplemental EA itself provides none of that detail. Appendix C.1 contains some purported responses to Florida Crystals’ questions, but most are mere assertions of fact with little citation to evidence.

Some of the statements in Appendix C.1 appear to contradict statements in the main body of the Supplemental EA. For instance, the main text states that, “cyanobacteria tends to exhibit optimal growth rates at higher temperatures,” SEA, at 3-3, while Appendix C.1 states, “[i]t is not clear to the Corps or most scientists familiar with Lake O algal bloom dynamics that temperature is the primary controlling factor in algal bloom growth for Lake Okeechobee,” App. C.1 at 997.

Other statements are based on false premises about hydrology. Appendix C.1 states that, “[n]o net increase in nutrient loading to the estuaries is expected from implementation of this deviation as there is no net increase in water volumes to the estuaries from Lake Okeechobee as part of this deviation.” Appendix C.1 at 997. Yet, the modeling in Appendix B shows that in 15 of the 20 years the Planned Deviation would be implemented, the “water bank” would not balance and more water would be released from the lake than otherwise would occur. App. B, at B-7 to B-9. With more water comes more nutrients.

The lack of coherent, evidence-based conclusions regarding the benefits of the Planned Deviation for HAB’s is concerning. The entire justification for the Planned Deviation is reducing HABs in the estuaries. If the Corps cannot explain exactly how much this Planned Deviation will benefit that situation, then it lacks basis to move forward.

B. Water Levels in Lake Okeechobee, Water Supply, Vegetation, In-Lake Fish and Wildlife, and Navigation

The Supplemental EA asserts that the Planned Deviation will have no meaningful effects on water levels in Lake Okeechobee, water supply during droughts, vegetation, in-lake wildlife, and navigation. These assertions are based entirely on the modeling contained in Appendix B. As discussed above, the modeling in Appendix B does not accurately depict what will happen if the Planned Deviation is implemented as described in Appendix A. That modeling assumes certain limitations on how LORS 2008 and the deviation would be implemented which are not set forth in Appendix A and which are inconsistent with how the Corps has actually managed Lake Okeechobee. This has the effect of masking the effects of the Planned Deviation, and minimizing its adverse effects on lake levels. The Corps should remodel the Planned Deviation, using assumptions which match the language of the proposed action and the Corps' actual activities, and then reevaluate the proposal's effects. Until there is accurate modeling, the Supplemental EA cannot conclude there are insignificant effects.

C. Releases of Water and Nutrients to the Downstream Estuaries and STAs

The Supplemental EA asserts that the Planned Deviation will have no effect on downstream water quality in the estuaries or WCAs. This is based on modeling in Appendix B that purports to show no net increase in releases from the lake if the Planned Deviation is implemented. Since lake releases contain nutrients, the volume of water released drives water quality effects downstream.

The modeling in Appendix B does not depict hydrological conditions likely to result from the Planned Deviation. The modeling assumes limits on the amount of water released which do not match either the language of the Planned Deviation in Appendix A, or the Corps' actual practices in managing Lake Okeechobee. For example, the modeling assumes that only ~60,000 acre feet are sent to the STAs (through which water passes before entering the WCAs), even though an average of approximately 212,000 acre feet have been delivered from the lake to the STA's over the past five water years. This means that the hydrological modeling cannot be relied upon to demonstrate that the Planned Deviation will not send additional water and nutrient loads to downstream waters.

Even if the modeling were accurate, it actually indicates that in most years the Planned Deviation will deliver more water to the estuaries and WCAs. Appendix B indicates that in 15 of the 20 years the Planned Deviation would be implemented over the period of record, there would be a net increase in the releases to the estuaries and WCAs because the "water bank" concept would be ineffective. See SEA, at B-7 to B-9. This means that the Planned Deviation would send more nutrients to downstream waters, because lake water has high levels of nitrogen and phosphorus.

Nowhere does the Supplemental EA acknowledge or analyze the ecological effect of sending those additional nutrients to the estuaries and WCAs. The document contains no discussion or analysis of how this would affect compliance with downstream water quality standards. Instead, the Supplemental EA disclaims any Corps legal responsibility for compliance with water quality standards and related legal requirements, and attempts to wash the Corps' hands of any potential harm to the STAs that could result from sending too much water. App. C.1 at 1011. This blame shifting and legal finger pointing is disappointing and

irrelevant. The Corps decides when and how much water to release from Lake Okeechobee, which drives the volume of water sent to downstream waters including the STAs. Even if the Corps follows “SFWMD guidance” on where to route that water, *id.*, it is still a Corps decision. Sending more nutrient laden water to the STAs and estuaries has factual and legal consequences. NEPA requires federal agencies to analyze the reasonably foreseeable effects of their actions, and sending more water and nutrients to the STA’s and estuaries is one of those effects. We made this point in our prior comment letter, and the Supplemental EA simply ignores it.

The Supplemental EA also fails to address the effects of sending more Lake Okeechobee water to the estuaries in the spring dry season and less in the summer wet season. As pointed out in our initial comment letter, fish and wildlife in the downstream estuaries are evolved to expect lower salinities in the summer and higher salinities in the spring. The Planned Deviation would release and withhold lake releases at times opposite to seasonal conditions. It is obvious that changing the timing of releases could have seasonal effects on downstream species. The Supplemental EA contains no analysis of these types of effects, and does not even address this point in Appendix C.1.

D. Environmental Justice

We repeat our concern that the Planned Deviation raises significant questions about environmental justice. The Planned Deviation is designed to help the communities along the coast (which are wealthier) at the expense of communities around the lake (which are poorer). The Planned Deviation seeks to avoid “releasing water from Lake Okeechobee when HABs are occurring in the lake, [there]by transferring blooms to the estuaries.” SEA, at 1-2. Most of the risks associated with the Planned Deviation are borne by people living around the lake, such as the risk that there will not be enough water if there is a drought, and the risk that lake levels will interfere with boating and recreation-based businesses.

The Supplemental EA suggests that there will be significant benefits for the coastal communities: “Economic losses to the Caloosahatchee and St. Lucie estuaries associated with HABs in recent years is assumed to be significant ... [and the Proposed Action] is expected to reduce economic losses that could result from HABs.” *Id.* at 4-16. The Supplemental EA asserts that there will be no disparate effects by claiming that there will be no negative effects on the lake, which primarily is based on the hydrological analysis. App. C.1 at 1013. However, as discussed above, not only does the hydrological modeling underestimate the adverse effects on lake levels, but the modeling indicates that lake levels will be lowered 15 out of 20 years over the period of record that the Planned Deviation is implemented. The disparate effects of this proposal cannot be denied, and we believe the Corps needs to confront this issue much more directly.

E. Need for Preparation of an Environmental Impact Statement

We continue to believe that NEPA requires preparation of an EIS for the proposed action. The only way that the Supplemental EA avoids the documentation of significant impacts is through the hydrological modeling in Appendix B, which uses false assumptions that limit the apparent adverse effect of the Planned Deviation. Until the Corps prepares hydrological modeling that accurately depicts the Planned Deviation and the Corps’ actual operational practices, it cannot conclude that there are no significant impacts. We also note that the draft

Finding of No Significant Impact would conclude that there are simply no significant impacts, and does not acknowledge that the Corps' modeling indicates that there are no significant impacts only if mitigating actions are implemented (i.e., the limitations on releases contained in the model). This is important, because if the Corps is not committing to those mitigations, then it cannot conclude that no significant impacts will occur.

In our previous comments, we pointed out that an EIS is required not just if there are significant adverse environmental effects, but also if there are significant beneficial effects. The Corps obviously must think that the Planned Deviation will have significant beneficial effects on HABS in the downstream estuaries, otherwise the agency would not have proposed it. We note that in response to this comment, Appendix C.1 simply says (in several places), “[s]ignificant adverse effects to the human environment are not expected relative to the No Action Alternative (LORS 2008).” App. C.1 at 1016. This statement ignores the point that NEPA regulations require an EIS whenever there are significant effects, regardless of their characterization as good or bad.

We also pointed out that Corps regulations require preparation of an EIS when the Corps proposes a “major change in operations” and if the Corps would “add additional [project] purposes.” Releasing water from Lake Okeechobee in the spring dry season, which is when the Corps has conserved water since the 1950s to protect against droughts, is a major change in operations. Protecting water quality in the estuaries is not a project purpose identified in the Water Control Manual, and the Corps previously told a Member of Congress that “addressing water quality is not a federally-authorized project purpose.” Corps Letter to Rep. Mast, Attachment 1 (July 5, 2018). Appendix C.1 has no response to either these points other than to try to implicitly walk back the statement regarding water quality (addressed further below). It is arbitrary and capricious for the agency to ignore its own regulations.

V. Questions Remain Regarding the Corps' Authority to Implement the Planned Deviation

The Corps can only act pursuant to Congressional authorization. In our initial comment letter, we cited provisions of Environmental Regulation 1110-2-140 (May 2016) that “any deviations must be consistent with the project authorizations and within existing authorizations.” Initial FCC Letter, at 46. That regulation also provides that the Corps must go back to Congress for more statutory authority if there are “[c]hanges to a water control plan that could impact the fulfillment of authorized purposes or that could result in operations which do not fall within existing authorities.” *Id.*

The Corps has authority to implement LORS 2008 and the Planned Deviation pursuant to the Water Resources Development Act of 2000 (“WRDA 2000”). WRDA 2000 authorizes the Corps to implement the Comprehensive Everglades Restoration Plan (“CERP”). CERP calls for modifying regulation schedules in Lake Okeechobee to lower average water levels in the lake and reduce damaging discharges to the St. Lucie and Caloosahatchee estuaries. Much of the Supplemental EA is devoted to explaining how the Planned Deviation will meet CERP's ecological performance measures developed by the RECOVER committee. See, e.g., SEA, at 2-6 to 2-9. However, the Supplemental EA asserts that the Planned Deviation is not being implemented pursuant to WRDA 2000, apparently so that the Corps can avoid requirements in WRDA 2000 designed to protect water supply. App. C.1 at 1036. For this reason, the

Supplemental EA states that the Corps is relying on other statutory authority to implement the Planned Deviation.

The Supplemental EA ignores most of our previous comments that the Corps lacks authority to implement the Planned Deviation based on any other statutory authority. The statutes identified as the source of authority in the Supplemental EA do not authorize operations that prioritize environmental conditions in the St. Lucie and Caloosahatchee Estuaries over water supply. The Flood Control Acts of 1948 and 1954 authorized the original Central and Southern Florida Project, which prioritized water supply and flood protection, and did not authorize efforts to maintain water quality in the estuaries. Initial FCC Letter, at 47-51. WRDA 1992 authorized the Corps to study modifications to the project that could be the basis of legislative proposals to Congress, but did not authorize the Corps to change actual operations before new Congressional authorization. *Id.* at 51. (The Congressional authorization that resulted from that study was WRDA 2000.) Consistent with our understanding of the Corps' authority under these old statutes, the current Water Control Manual does not identify maintaining water quality in the estuaries as a project purpose. *Id.* at 37.

In response to these comments, the Supplemental EA makes no effort to explain how the Flood Control Acts of 1948 and 1954, or WRDA 1992, authorize the Planned Deviation. Appendix C.1 is silent regarding the limited authority offered by those statutes. Instead, the Supplemental EA asserts that the Corps has broad discretion to deviate from regulation schedules without reference to any authorization from Congress. App. C.1 at 1027. This assertion is based on dicta in two court cases that dealt with completely different facts. *Miccosukee Tribe v. United States*, 980 F.Supp.2d 448 (S.D. Fla. 1997) (rejecting claims based on the Corps' refusal to deviate from water regulation schedule); *Miccosukee Tribe v. United States*, 716 F.3d 535 (11th Cir. 2013) (deviation from regulation schedule to comply with the mandatory duties of the Endangered Species Act). Nothing in those cases holds that the Corps can implement deviations that are not supported by Congressional authorizations.

The Supplemental EA also cites another sentence from Engineering Regulation 1110-2-240 that deviations are allowed if they do not "significantly affect[] the fulfillment of the project's authorized purposes." App. C.1 at 1027. Nothing in this sentence nullifies the other requirements of this Engineering Regulation cited in our previous letter. Rather than allowing more deviations, this sentence adds an additional requirement for deviations, i.e., that they cannot significantly affect the fulfillment of authorized purposes.

The main way that the Supplemental EA attempts to show that the Corps has authority to implement the Planned Deviation is by asserting that maintaining water quality in the St. Lucie and Caloosahatchee Estuaries is an authorized project purpose. SEA, at 1-1; App. C.1 at 1028. The Corps took the opposite position as recently as 2018 in a letter to Congress, a fact which the Supplemental EA ignores. Instead, the Supplemental EA cites the Flood Control Act of 1968 as authority to protect water quality in the estuaries, and quotes a sentence from the Chief of Engineer's Report approved in that statute. The language cited in the Chief's Report does not support the Supplemental EA's position, because it says that the report did "not make recommendations specifically for water quality," see *id.*, and only discusses water quality in Lake Okeechobee, the WCAs, and downstream Everglades (not the St. Lucie and Caloosahatchee Estuaries). More importantly, the Flood Control Act of 1968 authorized much higher water levels in Lake Okeechobee than are maintained today, which means that this

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statute cannot provide authority for even LORS 2008 which substantially lowered average lake stages.

We also note that the Supplemental EA waffles on the Corps' authority to address water quality, stating that "the Corps does not have general authority to implement pollution control measures for the C&SF Project." SEA, at 1-1. The Planned Deviation is a "pollution control measure": the Corps proposes to reduce discharges to the estuaries in the summer months when those discharges might contain pollutants – HABs and/or nutrients – in order to improve water quality in the downstream waters. If the Corps lacks authority to "implement pollution control measures," then it raises fundamental issues regarding its authority to proceed with this proposal.

WRDA 2000 was passed because the Corps' previous authorities did not give it flexibility to revise the Central and Southern Florida Project to achieve environmental purposes. The Planned Deviation is clearly being planned as if it is a CERP project – it relies on CERP performance measures in its formulation. We ask that the Corps stop the shell game of trying to justify its actions based on older Congressional authorizations, acknowledge that WRDA 2000 is the only statute that authorizes this latest proposal, and comply with the requirements of WRDA 2000.

Thank you for considering these comments. We look forward to staying engaged with this proposal.

Sincerely,

A handwritten signature in cursive script that reads "Neal McAilley".

Neal McAilley

cc: Matthew Coglianese, Florida Crystals