

## MEMORANDUM

**TO:** Governing Board Members

**FROM:** Sheryl G. Wood, General Counsel

**DATE:** May 25, 2010

**SUBJECT: Action Required**

Authorization to intervene or participate as amicus curiae in two related lawsuits pending before the United States District Court for the District of Columbia: *New Hope Power Company v. U.S. Army Corps of Engineers*, Case No. 09-cv-02413 and *American Farm Bureau Federation v. U.S. Army Corps of Engineers*, Case No. 10-cv-00489.

### **Background**

In December 2009, New Hope Power Company and the Okeelanta Corporation sued the United States Corps of Engineers to challenge the extension of the Corps' permitting jurisdiction over certain historic wetlands. The American Farm Bureau Federation and U.S. Sugar Corporation filed their own challenge. Both cases are currently pending in the U.S. District Court for the District of Columbia.

The Corps has generally recognized wetlands that had been reclaimed for agricultural use before 1985 as falling outside their dredge and fill permitting jurisdiction under Section 404 of the Clean Water Act. Those lands are commonly known as Prior Converted Croplands. Clean Water Act Section 404 permits are not required for their use and development.

Culminating in 2009, the Corps now claims jurisdiction over Prior Converted Croplands if they cease being used for agricultural purposes. Under that "Change of Use" Policy, the District has been asked to provide significant mitigation as a condition to implementing restoration projects upon historic farmlands. That practice will add substantial costs to the overall restoration effort, particularly the District's River of Grass program.

The District has objected to the Corps' permitting its restoration programs projects that take prior converted croplands out of production and commits them to improving the environment. The imposition of permits to the District's projects is counterproductive, a significant disincentive to state and local restoration planning. Tellingly, the Corps does not provide mitigation for its own restoration projects, including Comprehensive Everglades Restoration Plan (CERP), when it converts farmlands to a civil works project.

The District does not share the plaintiffs' concern and does not intend to question the Corps' policy with respect to permitting prior converted croplands changed to other, non-environmental uses. Staff is seeking only limited participation in these cases, solely to advance the position that otherwise exempt prior converted croplands should not be brought into the Section 404 program whenever they are taken out of production and put to use for environmental restoration.

Protecting the District's interests may require the filing of amicus curiae briefs and, potentially, intervention as a party to the litigation. If the District does not participate, the distinction between taking farmlands out of production for restoration purposes and changing their use for another, non-environmental purpose may be lost upon the Court and our ability to make that important distinction in the future may be impacted.

**How this helps meet the District's 10-year Strategic Plan**

Preventing the Corps from requiring permits from extending to the District's restoration programs will promote its ability to achieve the District's mission, particularly its restoration goals.

**Funding Source**

This matter will be handled by the District's Office of Counsel. Litigation costs will be funded through ad valorem funds.

**This Governing Board item impacts what areas of the District, both resource areas and geography?**

The Corps' permitting program broadly impacts any restoration project contemplated within the Everglades Agricultural Area or other farmlands being used for restoration.

**What concerns could this Governing Board item raise?**

Failure to ensure the District's interests in the subject litigation are fully protected could result in project delays and costly additional requirements.

**Why should the Governing Board approve this item?**

The item should be approved to ensure the subject litigation does not interfere with the District's mission and Everglades Restoration.

If you have any questions, please do not hesitate to call me at extension 6976.

SGW/JN/pm