

## MEMORANDUM

**TO:** Governing Board Members

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

**DATE:** October 27, 2008

**SUBJECT: Action Required**

Authorization to intervene or participate as amicus curiae in the matter of *Florida Wildlife Federation, Inc., et al v. Stephen L. Johnson, Administrator of the United States Environmental Protection Agency; and the United States Environmental Protection Agency*, United States District Court for the Northern District of Florida, Case No. 4:08-CV-00324-RH-WCS,

### **Background**

On July 17, 2008, the Florida Wildlife Federation, Inc., in conjunction with several other environmental plaintiffs, filed suit in the Northern District of Florida against Stephen L. Johnson in his Official Capacity as Administrator of the United States Environmental Agency ("EPA") and the EPA. The suit seeks a declaratory judgment and injunctive relief against the EPA for allegedly failing to comply with their non-discretionary duty to promptly set numeric nutrient criteria for the State of Florida as directed by Section 303 (c)(4)(b) of the Clean Water Act ("CWA").

The plaintiffs advance the claim that the EPA is required to promptly set new or revised water quality standards for a state once it has made a determination that the standard is necessary to meet the requirements of the CWA. It is alleged that the EPA, in its 1998 National Strategy for the Development of Regional Nutrient Criteria, determined that development of numeric standards for phosphorus and nitrogen was necessary to meet the requirements of the CWA and required the state to enact them by 2004. The plaintiff's maintain that Florida continues to follow a narrative water quality standard for nutrients and has failed to develop the required numeric criteria, thereby obligating the EPA to undertake the process of establishing them.

The federal government is expected to aggressively defend the subject action. Nonetheless, the District's interests in the project are unique and of critical enough significance to its mission that participation is recommended to ensure our interests are protected. This will likely require joining the suit as an intervenor party at the remedy stage and could involve filing briefs as amicus curiae on the merits. The District would be a regulated entity were the Plaintiffs to prevail and has a significant interest in the ultimate outcome of the case as to remedies given that the possible remedies could have a drastic effect on District restoration projects and flood control operations. District staff have specialized knowledge of state efforts to meet the current narrative criteria and establish numeric criteria, as well as the ramifications of particular results in this case that can contribute to the resolution of this case in a manner consistent with District plans.

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

Ensuring lawsuits filed by special interests do not burden or delay completion of the District's restoration projects or unduly burden the District in the operation of its structures is essential to achieve the District's mission, particularly its restoration goals.

**Funding Source**

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

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

The subject restoration project impacts broadly across the entirety of the District due to its potential to alter District operations as a regulated entity under the CWA.

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

Failure to intervene would result in the failure to ensure that the District's interests in the subject litigation are fully protected.

**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, operations and Everglades Restoration.

SGW/CP/pm