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March 13, 2015

By Email Only

Hon. Danny Kohlage, Mayor
Hon. Heather Carruthers, Mayor Pro Tempore
Hon. George Neugent, Hon. Sylvia Murphy and Hon. David Rice, County Commissioners,
Monroe County
1100 Simonton Street
Key West, FL 33040

Re: Violations of Section 9 of the U.S. Endangered Species Act and Chapter 120 F.A.C. by the Florida Keys Aqueduct Authority and Monroe County Based on their Announced Imminent Use of Shallow Well Injection of Partially Treated Municipal Sewage Effluent at Cudjoe Regional Wastewater Treatment Plant

Mayor and Commissioners:

The undersigned represent Mike Laudicina, a resident of Monroe County. We have previously provided you with a copy of our March 11, 2015, 60 day Notice of Intent to Sue pursuant to Section 11(g) of the Endangered Species Act, 16 U.S.C. § 1540(g), (“ESA”) and the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370h, (“NEPA”) (collectively referred to as the “Acts”), based on evidence that the U.S. Fish and Wildlife Service (“Service”), the U.S. Environmental Protection Agency (“EPA”), the National Oceanic and Atmospheric Administration (“NOAA”) and the Army Corps of Engineers (“Corps”) have violated and continue to contravene various provisions of the Acts and their implementing regulations by failing to conduct, initiate or otherwise complete the required consultation and analyses for the shallow well injection of regional municipal sewage effluent by the Cudjoe Regional Wastewater Treatment Plant (“Plant” or “Cudjoe”) by Monroe County and the Florida Keys Aqueduct Authority.

During our review and preparation for suit, it became apparent that Monroe County may not be aware that it is officially distributing and relying on a document purporting to be a “Draft Environmental Assessment” dated November 2010, titled as a Florida Keys Water Quality Improvements Program Draft Environmental Assessment and bearing the name and logo of the Army Corps of Engineers.

We are writing to inform you that the Corps expressly denies authoring this document. ¹

This “purported environmental assessment” has apparently been relied on extensively in applications for state and federal funding, and otherwise. Monroe County posted and maintains this document on its official website and has ostensibly based many official Monroe County actions on this document which include, but are not limited to, the following:

1. Monroe County Resolution 147-2012, which adopted the Cudjoe Regional Wastewater Treatment System Facilities Plan, contained this “purported environmental assessment” as its Environmental Review Section in Appendix E of the Facilities Plan, and which presents it as a Florida Keys Water Quality Improvements Program official document, authored by the Corps.
2. The Facilities Plan was then included as an official document supporting Monroe County’s application to the State Revolving Loan Fund, containing this “purported environmental assessment.”
3. Monroe County submitted the Facilities Plan and the “purported environmental assessment” as part of its application for Restore Act federal council funding.
4. FCAA submitted the “purported environmental assessment” to US Fish and Wildlife Service in response to a request to the Service by citizens trying to locate environmental compliance documents, including any evidence of compliance with Section 7 of the ESA.

We are sure that further discoveries of additional erroneous reliance on this “purported environmental assessment” will be made as legal actions progress. At this point, however, we wanted to alert you to the problem so that steps can be taken to correct the misperceptions, mis-statements, and erroneous reliances by Monroe County based upon this “purported environmental assessment.”

In fact, there has been no compliance with the Endangered Species Act or the National Environmental Policy Act for the Cudjoe Plant. Importantly, the Service has confirmed that the “purported environmental assessment” has been determined by the Service “... to not contain sufficient information to evaluate the project’s potential to affect federally listed species.” (Service email to Caron Balkany, 3-3-15). Not only is the document not what it purports to be, but it is also unacceptable as it does not meet the requirements for an environmental assessment.

The Service has been in communication with FCAA concerning this lack of a Section 7 consultation, and has requested FCAA to provide information concerning the source of its federal funding. FCAA has not done so, and the Service is awaiting this information so that it can alert the appropriate federal agency of the need for a Section 7 consultation.

¹ In recent conversations and emails with Corps staff and counsel, it was confirmed to us that the “purported environmental assessment” was not authored by the Corps, as is represented.

Assuredly, FCAA will promptly comply with the Service's repeated requests for this information, so that the required Section 7 consultation can belatedly proceed.

Due to mistaken reliance on this "purported environmental assessment," the County – including the Commissioners, the County Administrator, and County staff and counsel – is probably unaware of the environmental damage and damage to federally protected endangered species and designated critical habitat that can and will result from the use of the shallow sewage injection wells. Likewise, it seems apparent that the County is not aware that the announced April start-date for the use of the shallow sewage wells --while legal challenges to the permit are still pending -- will violate the Florida Administrative Procedures Act, Chapter 120, Florida Statutes and result in further litigation, and that the use of the shallow sewage wells without mandatory compliance with federal environmental laws will subject both the County and FCAA to civil and criminal penalties.²

Because of mistaken reliance on the "purported environmental assessment," you are probably unaware that Cudjoe contains designated critical habitat for the endangered Silver Rice Rat. Rice Rat (*Oryzomys argentatus*; *Oryzomys palustris natator*) is an endangered species that maintains its habitat in the areas containing contiguous mangrove swamps, salt marsh flats, and buttonwood transition vegetation (See, Goodyear 1987) as well as freshwater occurrences such as those located on Cudjoe Key. Service personnel have observed the Silver Rice Rat on Cudjoe Key.

A proper Section 7 consultation with the Service, as is required by law, would have revealed this presence of the Endangered Silver Rice Rat and its designated critical habitat on Cudjoe, along with the observed presence of the Endangered Marsh Rabbit, the Endangered Key Deer, and the Endangered Small Tooth Sawfish in the near shore waters. A proper environmental review would have revealed the impact on the Endangered Corals, as well.

The purpose of the Section 7 consultation with the Service is precisely to determine the existence of endangered species and their habitat so they can be protected.

Likewise, had the County complied with NEPA, it would have become aware of the presence of these endangered species and the designated critical habitat. NEPA is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1. Its purposes are to "help public officials make decisions that are based on understanding of environmental consequences, and to take actions that protect, restore, and enhance the environment," and to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." *Id.* §§ 1500.1 (b)-(c).

² The ESA provides for civil penalties of up to \$25,000 per violation, and criminal penalties of up to \$50,000 and one year imprisonment per violation. 16 U.S.C. § 1540(a), (b).

None of the planning documents prepared by or for the County, or anyone else, has ever analyzed the potential impact of the shallow sewage injection wells on endangered species or the designated critical habitat. There is not one environmental document which compares the use of shallow wells to deep wells in terms of cost benefit, prevention of damage to the environment, impact on endangered species, or degradation of water quality.

Since neither the County nor FCAA completed the required analysis of the potential harm to these endangered species from shallow sewage injection wells, the community has raised funds to do it themselves. Dr. Todd Kincaid, a well-respected hydrogeologist often hired by the Department of Energy, FDEP and others to perform hydrogeological studies, has reviewed the literature and documents prepared by or for the County and/or FCAA. He has performed calculations, mapping and modeling based on the data observed by FCAA contractors concerning the functioning of the subject wells.

In Dr. Kincaid's expert opinion, the aquifer cannot contain the sewage effluent because the limestone is too porous. The gradient created by the injection of the less saline effluent will force the partially treated sewage effluent and the existing groundwater, contaminated by the County's former landfill, into the designated critical habitat within the adjoining wetlands, into the surface waters off Cudjoe Key, and onto the Plant site itself. This damage to critical habitat will violate the Endangered Species Act and create liability for Monroe County and FCAA for civil and criminal penalties. It may also prove to be the end of the Endangered Silver Rice Rat.

In the opinion of Dr. Brian Lapointe, a globally respected marine biologist and Research Professor at Florida Atlantic University – Harbor Branch, when the nutrient-laden sewage effluent reaches the surface waters, as described by Dr. Kincaid, it will degrade the water quality of the National Marine Sanctuary thereby endangering the protected corals and violating Florida law.

We are assuming that Monroe County and FCAA will not proceed with operation of the Plant and shallow wells until the complete and thorough compliance with all environmental laws is confirmed. It is unfortunate that reliance on this "purported environmental assessment" has apparently led Monroe County and others to believe that such environmental review and compliance had already taken place, as it should have, long ago.

If necessary, we are prepared to file suit to utilize all legal avenues, including a petition for injunctive relief, should operation of the shallow wells commence before compliance with all environmental laws and with Chapter 120, Florida Statutes.

We have brought these issues to your attention now because we believe that you've been operating under the false assumption that an environmental review of the impacts from the operation of the Plant had been properly conducted, and that no environmental damage would occur. Both of these assumptions are incorrect. We urge the County to take action to correct the mistaken reliance on the "purported environmental assessment" and immediately authorize funds for the construction of the deep injection well necessary to protect the

federally designated critical habitat, the Endangered Species and the Plant site itself.

We remain willing to discuss this matter further, should the County desire, and are hopeful that our shared goals of protecting the environment, the endangered species and their habitat and improving water quality in the Keys will demonstrate that a deep injection well at the Cudjoe Plant is needed now.

Sincerely,

/s/

Caron Balkany
Christopher T. Byrd

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