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April \_\_\_, 2015

**NOTICE OF INTENT TO SUE**  
VIA CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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**Re: 60-DAY NOTICE OF INTENT TO SUE VIOLATIONS OF THE NATIONAL ENVIRONMENTAL POLICY ACT; THE ENDANGERED SPECIES ACT; THE MARINE MAMMAL PROTECTION ACT; THE NATIONAL MARINE SANCTUARIES ACT; COASTAL ZONE MANAGEMENT ACT; THE CLEAN WATER ACT AND THE CLEAN AIR ACT; REGARDING MONROE COUNTY AND THE FLORIDA KEYS AQUEDUCT AUTHORITY'S DESIGN, CONTRACTING, CONSTRUCTION AND OPERATION OF THE CUDJOE REGIONAL WASTEWATER SYSTEM IN THE LOWER FLORIDA KEYS.**

Dear Madams and Sirs:

This is to advise that our law firm has been retained as lead counsel to represent Dump the Pumps, Inc. (“DTP” and “client”) for violations of the above referenced federal laws concerning the development, construction and operation of the Cudjoe Regional Wastewater System (“CRWS” and “the project”) in the Lower Florida Keys. Our client is a domestic, not for profit, corporation organized by citizens and property owners in Monroe County with concerns about the lack of (1) compliance with federal laws, (2) agency-oversight, (3) scientific support and (4) safeguards used to advance the development of the CRWS project.

Notice is provided pursuant to relevant provisions of the National Environmental Policy Act (“NEPA” 42 U.S.C. 4321 *et seq.*), the Clean Water Act (“CWA” 33 U.S.C. § 1251 *et seq.*), the Endangered Species Act (“ESA” 16 U.S.C. § 1531 *et seq.*), the Marine Mammal Protection Act (“MMPA” 16 U.S.C. § 1361 *et seq.*), the National Marine Sanctuaries Act (“NMSA” 16 U.S.C. § 1431 *et seq.*), the Coastal Zone Management Act (“CZMA” 16 U.S.C. § 1451 *et seq.*), and the Clean Air Act (“CAA” 42 U.S.C. §7401, *et seq.*) for violations of various provisions of these Acts and their implementing regulations by failing to: (1) undertake the required analysis, (2) conduct the required consultation, and (3) mitigate the environmental impacts of the development, construction and operation of the CRWS project by Monroe County and the Florida Keys Aqueduct Authority (“FKAA”).

## INTRODUCTION

In 2010, the Florida Legislature enacted section 403.086(10). In that statute, the Legislature found that the discharge of inadequately treated and managed domestic wastewater from small wastewater facilities and septic tanks and other onsite systems in the Florida Keys compromises the coastal environment, including the nearshore and offshore waters, and threatens the quality of life and local economies that depend on these resources. The statute further finds that the only practical and cost-effective way to improve wastewater management in the Florida Keys is for the local governments in Monroe County—which includes FKAA—to timely complete the wastewater and sewage treatment and disposal facilities pursuant to a Master Plan. To that end, the statute mandates that certain wastewater facilities identified in the Master Plan, including those at issue here, be completed by December 31, 2015.

To implement the Master Plan and this legislative mandate, Monroe County and FKAA entered into an interlocal agreement, which establishes and specifies FKAA's responsibilities to design, construct, operate, and maintain the central wastewater collection and treatment system. The CRWS is a component of this central wastewater collection and treatment system. It is intended to serve the Cudjoe Regional Wastewater Service Area, which covers portions of Lower Sugarloaf Key, Upper Sugarloaf Key, Cudjoe Key, Summerland Key, Ramrod Key, Little Torch Key, and Big Pine Key. The FKAA has used federal funding, in whole or part, for the design and construction of components of the CRWS.

During the brief public-comment period at the March 11, 2015, Steering Committee Meeting of the Florida Keys National Marine Sanctuary (“FKNMS” and “the Sanctuary”) Water Quality Protection Program, DTP members advised the Steering Committee that the CRWS project did not comply with federal laws. Banks Prevatt, President of DTP, advised the Steering Committee that DTP had not been able to locate even a Final Environmental Assessment (“EA”) or

confirmation as to who authored an alleged *Draft EA* for the CRWS project. During his comments, he submitted to the Steering Committee a hard copy and electronic copies on a compact disc (“CD”) of five documents supporting his comments (“Exhibit 1a-e”). Federal agency representatives and members of the Steering Committee were present during that meeting. Included in those documents is evidence that, to the extent necessary, DTP has exhausted administrative remedies.

In an email dated February 11, 2015, to U.S. Senator Nelson’s office, an unidentified US Army Corps of Engineers (“Corps”) respondent disavowed the Corps’ authorship of the alleged *Draft EA* for the CRWS project and stated that they did not know who created and distributed the *Draft EA*. This *Draft EA* (“Exhibit 2”) is dated November 2010 and bears the name and logo of the Corps. The title of the *Draft EA* is “Florida Keys Water Quality Improvements Program (FKWQIP) - Florida Keys Aqueduct Authority Cudjoe Regional Wastewater System, Monroe County, Florida” (“Cudjoe Regional Wastewater System,” “the CRWS project” and “the project”).

The US Fish and Wildlife Service (“USFWS”) has notified the FCAA at least three times (October 2013, May 22, 2014 and March 12, 2015) that the CRWS project does not comply with federal laws implemented to ensure the recovery of federally endangered and threatened species (“Exhibit 3a and b”). The FCAA is the operator of the CRWS project and Monroe County is the owner of the CRWS project. Despite this notice, FCAA requested and obtained a permit modification from the South Florida Water Management District (“SFWMD”) to install a French drain in the CRWS project. Although DTP sent a letter dated January 29, 2015, objecting to the requested permit modification because of the environmental harm that would result, the potential environmental harm was ignored, the requested modification was granted and the French drain was installed without a consultation from the USFWS. A copy of DTP’s letter of objection is included as (“Exhibit 3c”).

Despite notice from the USFWS, there has been no ESA consultation, no environmental harm analysis / NEPA compliance, no Final Areawide Environmental Impact Statement (“EIS”), no Final EIS, no Final EA and only a forged Corps *Draft EA*, the FCAA and Monroe County continue to development and construction the CRWS project. The FCAA press release dated March 25, 2015 (“Exhibit 4”) and the quote from Monroe County Mayor Danny Kolhage confirm that the FCAA and Monroe County intend to proceed with the CRWS project without the delay which might result from complying with federal laws - injecting sewage effluent into shallow and deep injection wells in the Florida Keys.

Further, the CRWS project appears to be a *de facto* implementation of the Corps’ 2014 Final Groundwater Model released in the Corps 2014 Final Report prior to the completion of the review of that Final TDR Project by the National Research Council (“NRC”). The title of that report is Central and Southern Florida Project, Comprehensive Everglades Restoration Plan, Final Technical Data Report, Aquifer Storage and Recovery Regional Study (“the Final Technical Groundwater Model Project” and “the Final TDR Project”). That Final Technical Groundwater Model Project includes six appendices (“Exhibit 5a-g”) and also does not comply with NEPA. The Corps’ Final Technical Groundwater Model Project includes all of Monroe County and the Greater Everglades basin, which is based on surfacewater sub-basins and does not address preferential flow of ground water through fractures, including *sewage effluent injected into the aquifer*.

Examples of the myriad inadequacies of the Corps’ Final Technical Groundwater Model Project were provided, among other places, in three comment letters to the Corps and the NRC by the Ecology Party of Florida (“Exhibit 6a-c”). Those comment letters included extensive exhibits supporting those

comments that the Corps' Final Technical Groundwater Model Project was invalid. Those exhibits are incorporated into the exhibits for this notice of intent to sue. Copies of those three comment letters also were sent to the US Environmental Protection Agency ("USEPA"), US Department of the Interior ("USDIO"), USFWS, National Oceanic and Atmospheric Administration ("NOAA") and Florida Department of Environmental Protection ("FDEP") recipients of this notice of intent to sue letter.

The initial comment letter regarding the inadequacies of the Corps' Final Technical Groundwater Model Project was dated January 9, 2015. Exhibit D of that initial comment letter was a copy of a 2014 publication summarizing evidence and adverse impacts of submarine groundwater discharge ("SGD") of sewage effluent in the Florida Keys. The evidence provided in that peer-reviewed publication supported the conclusion that the source of sewage effluent causing the environmental harm in that study area was from sewage effluent injections into deep wells similar to the deep injection well(s) proposed in the FKAA press release dated March 25, 2015 ("Exhibit 4"). The SGD study area included the area of the CRWS project. That peer-reviewed publication also summarized the published literature confirming the discharge of sewage effluent from shallow injection wells, which are widespread throughout the Florida Keys.

Contaminants in injected sewage effluent are not restricted to forms of nitrogen and phosphorus that result in eutrophication and harmful algal blooms ("HABs"). In the Florida Keys and many other locations in Florida the injected sewage effluent includes hazardous waste from the phosphate mining industry that is added to the municipal water supply for fluoridation and excreted pharmaceutical compounds. That industrial waste used for fluoridation commonly is contaminated with arsenic. A copy of the Material Safety Data Sheet ("MSDS") for the type of fluoride commonly used for fluoridation is provided in "Exhibit H1" of the notice of intent to sue letter dated May 29, 2014 regarding the inadequacies of the Final Areawide EIS for the proposed expansion of phosphate mining in central Florida and in "Exhibit 7." That Final Areawide EIS also included an inadequate groundwater model that failed to incorporate preferential flow, such as flow through fractures. That notice of intent to sue letter also was sent to the Corps, USEPA, USDIO, USFWS and FDEP. A copy of that notice of intent to sue letter and MSDS is included with this notice of intent to sue as "Exhibit 7a and b."

In addition to the failure of the CRWS project to comply with NEPA requirements, that project also violates state laws and is regulated by state laws that have no adequate scientific support. In 2010, the Florida Legislature enacted 403.086(10), Florida Statutes ("FS"), specifically addressing the Florida Keys, based on the conclusion that the discharge of inadequately treated and managed domestic wastewater from small wastewater facilities and septic tanks and other onsite systems in the Florida Keys compromises the coastal environment, including the nearshore and offshore waters, and threatens the quality of life and local economies that depend on these resources. Those conclusions and adopted laws were not based on results from comprehensive scientific studies to distinguish the magnitude of water quality degradation that was occurring from shallow and deep injection wells because such studies had not been conducted. The statute further concluded that the only practical and cost-effective way to improve wastewater management in the Florida Keys is for the local governments in Monroe County - which includes FKAA - to timely complete the wastewater and sewage treatment and disposal facilities pursuant to the Master Plan.<sup>1</sup> To that end, the statute mandates that certain wastewater facilities identified in the Master Plan, including those at issue in these proceedings, be completed by December 31, 2015. Florida Statutes 403.086(3) - (5) and 10(a) state, in relevant part [Emphasis added]:

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<sup>1</sup> The design for the CRWS project is not in compliance with the 2000 waste water Master Plan.

**(3) This section shall not be construed to prohibit or regulate septic tanks or other means of individual waste disposal which are otherwise subject to state regulation.<sup>2</sup>**

(4) For purposes of this section, the term “advanced waste treatment” means that treatment which will provide a reclaimed water product:

(a) Contains not more, on a permitted annual average basis, than the following concentrations:

1. Biochemical Oxygen Demand (CBOD5). . . . . 5mg/l
2. Suspended Solids. . . . . 5mg/l
3. Total Nitrogen, expressed as N. . . . . 3mg/l
4. Total Phosphorus, expressed as P. . . . . 1mg/l

(b) Has received high level disinfection, as defined by rule of the department.

(5) (a) Notwithstanding any other provisions of this chapter or chapter 373, when a reclaimed water product has been established to be in compliance with the standards set forth in subsection (4), that water shall be presumed to be allowable, and its discharge shall be permitted in the waters described in paragraph (1)(c) at a reasonably accessible point where such discharge results in minimal negative impact. This presumption may be overcome only by a demonstration that one or more of the following would occur:

1. That the discharge of reclaimed water that meets the standards set forth in subsection (4) will be, by itself, a cause of considerable degradation to an Outstanding Florida Water or to other waters and is not clearly in the public interest....

(b) If one or more of the conditions described in subparagraphs (a)1.-3. have been demonstrated, remedies may include, but are not limited to, the following:

1. Require more stringent effluent limitations;
2. Order the point or method of discharge changed;
3. Limit the duration or volume of the discharge; or
4. Prohibit the discharge only if no other alternative is in the public interest.

(5) (a) Notwithstanding any other provisions of this chapter or chapter 373, when a reclaimed water product has been established to be in compliance with the standards set forth in subsection (4), that water shall be presumed to be allowable, and its discharge shall be permitted in the waters described in paragraph (1)(c) at a reasonably accessible point where such discharge results in minimal negative impact. This presumption may be overcome only by a demonstration that one or more of the following would occur:

1. That the discharge of reclaimed water that meets the standards set forth in subsection (4) will be, by itself, a cause of considerable degradation to an Outstanding Florida Water or to other waters and is not clearly in the public interest.

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<sup>2</sup> The Master Plan has resulted in a *de facto* prohibition of septic tanks, while completely ignoring likely contamination of surface waters from pollutants injected into shallow and deep wells.

(10)... To give effect to those findings, the requirements of this subsection apply to all domestic wastewater facilities in Monroe County, including privately owned facilities, unless otherwise provided under this subsection.

**(a) The discharge of domestic wastewater into surface waters is prohibited.**<sup>3</sup>

(c) After December 31, 2015, all new or expanded domestic wastewater discharges must comply with the treatment and disposal requirements of this subsection and department rules.

(e) **Class V injection wells**, as defined by department or Department of Health rule, must meet the following requirements and otherwise comply with department or Department of Health rules, as applicable:

1. If the design capacity of the facility is less than 1 million gallons per day, the injection well must be at least 90 feet deep and cased to a minimum depth of 60 feet or to such greater cased depth and total well depth as may be required by department rule.

2. Except as provided in subparagraph 3. for backup wells, if the design capacity of the facility is equal to or greater than 1 million gallons per day, each primary injection well must be cased to a minimum depth of 2,000 feet or to such greater depth as may be required by department rule.

3. If an injection well is used as a backup to a primary injection well, the following conditions apply:

a. The backup well may be used only when the primary injection well is out of service because of equipment failure, power failure, or the need for mechanical integrity testing or repair;

b. The backup well may not be used for more than a total of 500 hours during any 5-year period unless specifically authorized in writing by the department;

c. The backup well must be at least 90 feet deep and cased to a minimum depth of 60 feet, or to such greater cased depth and total well depth as may be required by department rule; and

d. Fluid injected into the backup well must meet the requirements of paragraph (d).

(f) The requirements of paragraphs (d) and (e) do not apply to:

1. **Class I injection wells** as defined by department rule, including any authorized mechanical integrity tests;

(h) If it is demonstrated that a discharge, even if the discharge is otherwise in compliance with this subsection, will cause or contribute to a violation of state water quality standards, the department shall:

1. Require more stringent effluent limitations;

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<sup>3</sup> The wastewater facilities designed and operated by FKAA and Monroe County and permitted by FDEP are discharging wastewater into surface waters via shallow and deep injection wells.

2. Order the point or method of discharge changed;
3. Limit the duration or volume of the discharge; or
4. Prohibit the discharge.

## LEGAL BACKGROUND

### A. The National Environmental Policy Act

The purpose of the National Environmental Policy Act is set forth in 42 U.S.C. § 4331:

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high density, urbanizations, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining the environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practical means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, *it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may:*

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) *The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.* (Emphasis added).

### B. Endangered Species Act

The ESA, 16 U.S.C. 460, *et seq.* provides broad protection for species of fish, wildlife and plants that are listed as threatened or endangered in the U.S. or elsewhere. Enacting the ESA, Congress declared that "the United States has pledged itself as a sovereign state in the international community to conserve to

the extent practicable the various species of . . . wildlife . . . facing extinction.” 16 U.S.C. § 1531(a)(4). One of the stated purposes of the Act is “to provide a program for the conservation of . . . endangered species and threatened species.” Id. § 1531(b). The ESA defines an “endangered species” as “any species which is in danger of extinction.” Id. § 1532(6). A “threatened species” is one that is likely to become endangered within the foreseeable future. Id. § 1532(20). Section 9 of the ESA prohibits the “taking” of any endangered species. Id. § 1538(a). *The Act defines the term “take” very broadly to include “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”* Id. § 1532(19). *The term “harass” is defined as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.”* 50 C.F.R. § 17.3. *The term “harm” is defined as “an act which actually kills or injures wildlife, [which] . . . may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”* Id.<sup>4</sup> (Emphasis added).

### C. Marine Mammal Protection Act

Congress enacted the Marine Mammal Protection Act because “certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man’s activities.” 16 U.S.C. § 1361(1). Among other things, Congress was concerned that “there is inadequate knowledge of the ecology and population dynamics of such marine mammals and of the factors which bear upon their ability to reproduce themselves successfully.” Id. § 1361(3). Legislative history confirms that Congress intended to build a “conservative bias” into the Act “[a]s far as could be done,” so that *“no steps should be taken regarding these animals that might prove to be adverse or even irreversible in their effects until more is known.”* H.R. Rep. No. 92-707, at 5 (1971), reprinted in 1972 U.S.C.C.A.N. 4144, 4148. The MMPA establishes a *“moratorium on the taking . . . of marine mammals”* to protect against further depletion and extinction of marine mammals. 16 U.S.C. § 1371(a). The term “take” means “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” Id. § 1362(13). All takings of marine mammals in these circumstances are prohibited by the Act unless first authorized by the Secretary of Commerce. Id. § 1371(a).<sup>5</sup> (Emphasis added).

### D. National Marine Sanctuaries Act

The National Marine Sanctuaries Act of 1972 (“NMSA”) was enacted *“to protect, and, where appropriate, restore and enhance natural habitats, populations, and ecological processes” in “areas of the marine environment which are of special national significance. . . .”* 16 U.S.C. § 1431(b)(1), (3). NMSA, among other things, encourages federal, state, and international cooperation, §§ 1435, 1442, prohibits activities that “destroy, cause the loss of, or injure” sanctuary resources, § 1436(1), and enforces its provisions through criminal and civil penalties, § 1437. *NMSA requires all federal agencies to consult with the Secretary of Commerce (“Secretary”) at least 45 days prior to approving a federal action, if their actions are “likely to*

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<sup>4</sup> Discharges of pollutants through shallow and deep injection wells are harming endangered and threatened species and resulting in unpermitted take of those species.

<sup>5</sup> Discharges of pollutants through shallow and deep injection wells might prove to be adverse or even irreversible in their effects on marine mammals and may be resulting in the taking of marine mammals.

*destroy, cause the loss of, or injure any sanctuary resource. . . .*” 16 U.S.C. § 1434(d)(1). If the Secretary determines that the proposed action is “likely to destroy, cause the loss of, or injure any sanctuary resource,” then the Secretary must “recommend reasonable and prudent alternatives, which may include conduct of the action elsewhere[.]” § 1434(d)(2). (Emphasis added).

#### **E. Coastal Zone Management Act**

Through the Coastal Zone Management Act of 1972 (“CZMA”), Congress found, among other things, that “[t]he habitat areas of the coastal zone, and the fish, shellfish, other living marine resources, and wildlife therein, are ecologically fragile and consequently extremely vulnerable to destruction by man’s alterations.” 15 U.S.C. § 1451(d). ***Congress declared a national policy to, among other things, “preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone for this and succeeding generations.”*** 15 U.S.C. § 1452(1). The CZMA also recognizes that the individual states play a key role in the “protection and use of the land and water resources of the coastal zone. . . .” 15 U.S.C. § 1451(i). To meet its goals, the CZMA requires that “[e]ach federal activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.” 16 U.S.C. § 1456(c)(1)(A). A state coastal zone management program requirement is practicable unless prohibited by federal law. 15 C.F.R. § 930.32(a)(1).

Federal agencies are responsible for determining consistency with the state coastal zone management program policies. The federal agency must, however, “provide State agencies with consistency determinations for all Federal agency activities affecting any coastal use or resource.” 15 C.F.R. § 930.34(a)(1). If there will be no coastal effects, then the federal agency must provide the state with a “negative determination.” 15 C.F.R. § 930.35(a). The CZMA mandate requiring consistency with state coastal zone management programs is not limited to activities that actually occur within the coastal zone. Instead, ***the standard is whether the federal action “affects any land or water use or natural resource of the coastal zone.”*** 16 U.S.C. § 1456(c)(1)(A). ***“Effects include both direct effects which result from the activity and occur at the same time and place as the activity, and indirect (cumulative and secondary) effects*** which result from the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.” 15 C.F.R. § 930.11(g). Agencies are required to “broadly construe the effects test to provide State agencies with a consistency determination under § 930.34 and not a negative determination under § 930.35 . . . .” 15 C.F.R. § 930.33(d). (Emphasis added).

#### **F. Clean Water Act**

Section 301(a) of the CWA, 33 U.S.C. § 1311(a), ***prohibits the discharge of any pollutants except as authorized by, and in compliance with, certain enumerated sections of the CWA***, including Section 402 of the CWA, 33 U.S.C. § 1342. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines the term “discharge of pollutants” as “any addition of any pollutant to navigable waters from any point source . . . .” Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines the term “pollutant” to include sewage, sewage sludge, biological materials, and industrial and municipal waste discharged into water. Section. 502(14) of the CWA, 33 U.S.C. §

1362(14), defines the term "*point source*" as "*any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . . from which pollutants are or may be discharged.*" Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines the term "navigable waters" as the waters of the United States, including territorial seas.<sup>6</sup> (Emphasis added).

## **G. Clean Air Act**

The Clean Air Act (CAA) 42 U.S.C. §7401, *et seq.* (1970), is the comprehensive federal law that regulates air emissions from stationary and mobile sources. Among other things, this law authorizes EPA to establish National Ambient Air Quality Standards (NAAQS) to protect public health and public welfare and to regulate emissions of hazardous air pollutants. Section 112 of the Clean Air Act addresses emissions of hazardous air pollutants. The 1990 Clean Air Act Amendments revised Section 112 to first require issuance of technology-based standards for major sources and certain area sources.

### **THE PROJECT ACTION**

#### **Cudjoe Regional Wastewater Treatment Plant Florida Keys Water Quality Improvements Program**

The Florida Keys Water Quality Improvements Program, with the Corps as the lead agency, intends to implement wastewater and stormwater projects that allegedly will alleviate the water quality degradation that allegedly has resulted from the discharge of inadequate and untreated wastewater and stormwater into nearshore waters of the Sanctuary. The Sanctuary is part of a complex ecosystem encompassing approximately 2,800 square nautical miles of nearshore and marine waters, including the Everglades, Florida Bay, and adjacent areas. The Florida Keys is a chain of more than 800 islands extending approximately 220 miles southwest from the southern tip of the Florida peninsula and through the Sanctuary. The CRWS project is the final regional wastewater system to be constructed as the culmination of a several decades of projects allegedly intended to improve the water quality of the Florida Keys pursuant to Congressional mandate.

The Florida Keys Water Quality Improvement Plan is based on the presumption that removing shallow package plant wells and septic tanks and installing centralized sewers will improve water quality. Thus, the other two large wastewater treatment plants in The Florida Keys – in Key West and Key Largo – utilize gravity and vacuum collection systems and shallow or deep wells for injection of the partially treated sewage effluent.

The intention in the CRWS project, however, is to collect the sewage from more than 7,000 households, businesses, and commercial establishments via a pressure sewer system that incorporates some gravity wastewater collection to reduce the number of pumps in densely populated areas. The intent is for wastewater is to be transported under pressure through the lower Keys to a treatment plant on Cudjoe Key where it would be treated and the effluent then injected into four shallow wells drilled into porous limestone

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<sup>6</sup> Shallow and deep injection wells are vertical point-source pipes, channels and conduits through which biological materials, industrial and municipal waste and other pollutants are discharged into marine sanctuaries, other coastal waters and inland surface waters.

along the coast of Cudjoe Key. In a pressure sewer system, rather than having infiltration from leaks, any imperfection in the envelope of the piping results in pressure injection of unscreened, totally untreated raw sewage into the tidal groundwater and into the fresh water lenses that are critical to the survival of numerous endangered and threatened species in the CRWS project. In some areas, these fresh water lenses still supply fresh water wells that have existed for many decades and are used for consumption or irrigation.

The pressure sewer collection system poses a potentially greater risk of contamination of ground water than the existing septic tanks, which at the very least skim and settle influent. A properly installed septic tank drainfield has been shown in studies detailed in USEPA reports to be highly effective at removing pathogens and nutrients within a few feet of the drainfield pipe. The effluent of a septic tank is distributed in the root zone where significant uptake of nutrients and water may be expected. Unlike a septic tank, a pressure sewer system fails to operate without electrical power and with its very limited storage capacity may be expected to spill raw sewage on the ground or back into homes through low drains. The CRWS project proposes to utilize positive displacement pumps with no pressure relief devices. These pumps are capable of generating pressures sufficient to burst pipes and fittings- pressures in excess of test pressures. Excessive, damaging pressure may be expected to occur if there is a power outage of even modest duration and too many pumps attempt to operate at once.

Excessive pressure also may be expected if a line valve is closed or if there is a pipe blockage by damage, accumulated deposits, or air lock. The substandard velocities of the CRWS design and inadequate or improperly placed air release valves in the system virtually assure such problems. A leak or even a burst pipe can be very difficult to detect or locate in a pressure sewer system, unlike with a vacuum or gravity system where the problem is easily identified and localized. It is likely that there will be initial and increasing injection of raw sewage into the groundwater as a result of the type of design and characteristics of it. The master pump stations, as designed, have extremely limited storage capacity and a pump or standby generator failure leaves only minutes for a crew to respond and resolve the problem before the wetwell overflows massive quantities of raw sewage. Due to the positive displacement pumps utilized in the collection system, closing a valve to stop the overflow may be reasonably expected to result in excessive pressure and burst pipes or fittings.

The treatment plant on Cudjoe Key would use extremely hazardous (deadly) chlorine gas stored in cylinders for disinfection of effluent. The FDEP advised against the use of chlorine gas, but FKAA engineers claimed liquid chlorine was unavailable in the Keys. This written denial of availability of a safer alternate was in spite of the fact that liquid chlorine is used in most other treatment plants in the Keys and is stocked on Big Pine Key. The CRWS plant lies within a wildlife refuge inhabited by many Key deer and other endangered species. There have been two reports of a Florida panther sighting on this refuge land by the road into the CRWS plant site.

Currently and for several decades past, approximately 0.5 million gallons per day of potable water has been piped from the mainland in south Florida and distributed daily on Big Pine Key alone. Most of that water is delivered to the root zone of plants after on-site treatment via septic tank or aerobic tank drain fields. Even if this additional water serves only to replace evaporation of fresh water, the effect of this water on the habitat of many threatened and endangered species that depend on adequate fresh water and the proposed elimination of that water from the root zone has not been evaluated.

The CRWS project is located in what is known as the Lower Keys, located in unincorporated

Monroe County. The CRWS project is bordered on the north by the shallow waters of the back county of Florida Bay and on the south by the Atlantic Ocean. The project extends from Big Pine Key to Lower Suagrloaf Key. The islands lie within the fragmented boundaries of the Florida Keys Wildlife Refuges Complex, which includes the National Key Deer Refuge and the Great White Heron National Wild Refuge among others. Mangrove stands within the CRWS project are valuable communities that serve a variety of natural functions including acting as storm buffers, decreasing erosion and stabilizing land, enhancing water quality, recycling nutrients, providing habitat for a large variety of animals, and acting as nursery grounds for many species, including many commercially valuable fish species. Marine and benthic habitats in the nearshore waters of the CRWS project include seagrass beds, tidal/sand flats, sand/mud bottom, and hardbottom communities. These communities are sensitive, complex ecosystems influenced by many different sources. Changes in water temperature, pH, and clarity levels all affect the health and survival of marine and benthic communities.

Degradation of groundwater and nearshore water quality have occurred within the CRWS project area and other developed areas of the Keys since implementation of the Master Plan. In addition to becoming less saline because of the freshwater influence of wastewater inputs, groundwater quality has become degraded because wastewater typically is oxygen-depleted, enriched in the nutrients like nitrogen and phosphorus, and contains fecal coliform bacteria. Because of its open nature, the effects of degraded ground water can be seen in nearshore and offshore marine waters and their ecosystems. Degraded ground water can flow into nearshore waters of the Sanctuary within hours or days. Rainfall is an important factor affecting the movement of substances through groundwater, especially in the Keys. During a rainfall event, nutrients and pathogens are transported from ground water to local canals and adjacent nearshore waters through the porous characteristic of the underlying aquifer.

The nearshore waters adjacent to the CRWS project area already are degraded, with large algal mats covering turtle grass beds and other marine life and there is no evidence to support a conclusion that extensive aquifer injections of sewage effluent in shallow and deep injection wells are not a primary cause of this degradation and HABs. When dead algae decompose, oxygen is depleted and can create hazardous or toxic conditions for organisms, resulting in adverse impacts such as fish kills and species shifts. Large algal blooms would also cause hypoxic (low oxygen) or anoxic (oxygen depleted) conditions in shallow, poorly flushed locations such as the canals of the CRWS project area. In addition, elevated nutrient loads can induce changes in species composition of a community and can stress seagrasses by promoting epiphyte growth. Nearshore habitats, particularly seagrasses, are adversely affected by water quality degradation. Nutrient enrichment and contaminant introduction lead to algal blooms, decreased water clarity and light penetration and subsequent loss of seagrasses.

Increasing dysfunction of the impacted areas and the impacts themselves can extend farther from shore affecting offshore water quality and the health of coral reef ecosystems and are likely the result of deep-well injections. Excessive nutrient loading in nearshore waters of the Sanctuary exacerbate historic problems related to coral reef health. Water quality degradation due to the release of contaminants and pathogens from wastewater, landfill contaminated groundwater, and stormwater can result in bioaccumulation and biomagnification of the pollutants as the pollutants “build-up” as individual organisms and are consumed by larger and larger organisms and transferred up the food chain.

Homeowners on Big Pine Key are being charged for a residential lot-specific environmental evaluation to place a few feet of pipe, yet the FKAA contractors are taking heavy equipment down the road shoulders and into and across those same private residential property to install county-owned pump station

machinery without any type of environmental assessment being completed.

Although coral dust is not listed as a hazardous air pollutant, DTP has continuing concerns about adverse impacts to humans and other animals from coral dust during the construction phase of the CRWS project. Coral dust is a known respiratory irritant. Prolonged exposure to respirable crystalline silica (quartz) can cause Silicosis, a fibrosis (scarring) of the lungs. Silicosis may be progressive; it may lead to disability and death. Silicosis increases risk of Tuberculosis. Inhaled from occupational sources is classified as carcinogenic to humans. There is evidence that exposure to respirable crystalline silica or that the disease Silicosis is associated with increased incidence of Scroderma, an autoimmune disorder manifested by fibrosis of the skin and internal organs. There are several studies suggesting that exposure to respirable silica or that the disease Silicosis is associated with the increased incidence of kidney disorders. Finally, eye exposure to silica dust may cause abrasions of the cornea.

### **ENDANGERED AND THREATENED SPECIES AT ISSUE**

Coral reefs and other benthic habitats are identified as Essential Fish Habitat and must be considered as part of any federal action. Three endangered terrestrial species and one endangered marine species have been observed by Service staff on Cudjoe Key near the CRWS plant site. The endangered Elkhorn and Staghorn corals also are found on Looe Key, just a few miles to the south, and are known to grow in nearshore waters. Elkhorn Coral (*Acropora palmate*) is a threatened species with designated critical habitat located just south of Cudjoe Key. Elkhorn coral is extremely susceptible to the sedimentation and eutrophication that would result from the CRWS plant and any shallow and deep sewage injection wells.

The Small Tooth Sawfish (*Pristis pectinate*) is an endangered species that makes its home in shallow coastal and estuarine waters such as those in the vicinity of the CRWS project. In fact, the Coupon Bight Aquatic Preserve adjacent to Big Pine Key is a known sawtooth nursery. A permit was issued by FDEP for a totally exposed and unprotected soft HDPE plastic pressure sewer forcemain pipe across the shallow waters of Coupon Bight to carry 15-20,000 gallons per day of raw sewage from an island resort to the mainland. That state permit was issued with no oversight or review from the Corps, USFWS, the Sanctuary or NOAA. This pipe previously existed as a water service pipe that was cut by boat propellers frequently. A state administrative Petition against the permit by DTP resulted in the applicant withdrawing the application shortly before the hearing, but FDEP is expected to re-issue that state permit. A copy of that FDEP action, violating federal laws, is provided in "Exhibit 1c."

The Lower Keys Marsh Rabbit (*Sylvilagus palustris hefneri*) is a critically impaired and endangered species that maintains its primary habitat in the tidal marshes and adjacent upland habitat within the CRWS project.

The Silver 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, as well as freshwater occurrences located throughout the CRWS project. Those habitats are designated critical habitat for that species.

The Key Deer (*Odocoileus virginianus clavium*) is an endangered species. Key Deer utilize Cudjoe Key's fresh water, pinelands, hardwood hammocks and mangroves for its habitat and grassy areas for feeding and may move to adjacent islands during wet weather, returning in dry periods to islands having fresh water.

The USFWS has concluded, “*The limited amount of undeveloped natural habitat in the Keys makes these areas and associated species vulnerable to development. Because there are so few remaining developable lands, any project that results in the loss of natural areas is likely to impact protected species.*” (Emphasis added) The lack of compliance with federal laws to ensure a complete and honest assessment of the potential consequences of implementing the CRWS and to assure that comprehensive protective measures are in place, constitutes an imminent threat of harm to listed species and the environment in the vicinity of the CRWS project area.

## CONCLUSIONS

No federal agency has completed a Final or Draft Areawide EIS, a Final or Draft EIS, or even a Final or Draft EA or Record of Decision from the Corps for the CRWS project. In fact, the *Draft EA*<sup>7</sup> for the CRWS project that bears the name and logo of the Corps (and based on statements from the Corps)<sup>7</sup> is an apparent forgery. There is no record of a formal consultation with the Commerce Department under the MMPA or the USFWS under Section 7 or Section 9 of the ESA.

The design, contract administration, construction and operation for the CRWS project separately and collectively violate, and will continue to violate, the National Environmental Policy Act; the Endangered Species Act; the Marine Mammal Protection Act; the National Marine Sanctuaries Act; the Coastal Zone Management Act; the Clean Water Act and the Clean Air Act. Despite these clear violations of federal law, the FCAA and Monroe County continue development and construction of the CRWS project. Specific examples of these violations include, but are not limited to, the following:

- a. The design for the CRWS project is not in compliance with the 2000 wastewater Master Plan;
- b. The Master Plan has resulted in a *de facto* prohibition of septic tanks, which provide freshwater and nutrients to the root zone of critical habitat, while ignoring contamination of surface waters from pollutants injected into shallow and deep wells;
- c. The wastewater facilities designed and operated by FCAA and Monroe County and permitted by FDEP are discharging wastewater into surface waters via shallow and deep injection wells;
- d. Shallow and deep injection wells are vertical point-source pipes, channels and conduits through which biological materials, industrial and municipal waste and other pollutants are discharged into marine sanctuaries, other coastal waters and inland surface waters;
- e. Discharges of pollutants through shallow and deep injection wells are harming endangered and threatened species and resulting in unpermitted take of those species;
- f. Discharges of pollutants through shallow and deep injection wells might prove to be adverse or even irreversible in their effects on marine mammals and may be resulting in the taking of marine mammals;
- g. Discharges of pollutants through shallow and deep injection wells are destroying, causing the loss of and injuring sanctuary resources;
- h. The CRWS project constitutes *de facto* implementation of the Corps’ 2014 Final Groundwater Model released in the Corps 2014 Final Report, prior to the completion of the review of that Final TDR Project by the National Academy’s NRC; and
- i. The CRWS project constitutes additional adverse impacts of phosphate mining not considered in the Corps’ Final Areawide EIS for proposed expansion of phosphate mining in central Florida, due

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<sup>7</sup> The Corps staff has stated that they do not know who prepared and distributed this forged *Draft EA*.

to fluoride from industrial mining waste added to municipal water prior to injection of that industrial waste into shallow and deep wells.

### REQUESTED ACTION

Our clients respectfully request the immediate issuance of a cease and desist order for all aspects of design, contract administration, construction and operation related to the CRWS project until the completion of all of the following:

1. full-scale investigation to determine the entities or person(s) responsible for drafting the forged *Draft EA* bearing the agency name and logo of the Corps;
2. enforcement of criminal and civil penalties related to the forged *Draft EA* for the CRWS project;
3. removal of the French drain installed by FKAA in the CRWS project area under the SFWMD permit modification, without a formal USFWS consultation;
4. a comprehensive, multi-agency Areawide EIS, including the USEPA, NOAA/National Marine Fisheries Service, US Geological Survey (“USGS”) and USFWS to evaluate the direct, indirect, secondary and cumulative adverse impacts of all of the aquifer injections throughout the extent of Floridan aquifer system and of the Corps’ 2014 Final Groundwater Model, which does not incorporate preferential flow through fractures and other conduits in the karst aquifer system; and
5. all secondarily required Federal consultations after the Final Areawide EIS is completed.

Please do not hesitate to contact us if you wish to discuss this matter or have any questions concerning this letter. If we do not hear from you, we will assume that no action will be taken and will consider all available avenues, including litigation, to conserve the highly imperiled listed species in the region of the Florida Keys encompassing the CRWS, the environment of the Florida Keys, and the Florida Keys National Marine Sanctuary in accordance with the requirements of NEPA, the ESA, the MMPA, the NMSA, the CZMA, the CWA and the CAA.

To the extent necessary, this correspondence shall constitute notice of our client’s intent to sue under the referenced federal Acts for violations of those Acts with respect to all impacts and aspects of this project. If you have any questions, please contact me.

Very truly yours,

DAVID P. REINER, II, ESQ.

## EXHIBITS:

1. Documents provided for the record by DTP at the 3/11/15 FKNMS Water Quality Protection Program Steering Committee Meeting
  - a. 11/10 Corps Draft EA for FKAA Cudjoe Regional Wastewater System
  - b. Undated background of CRWS project and Federal requirements
  - c. 4/16/14 FDEP permit issued to Little Palm violating federal laws
  - d. 2/3/15 DOAH Administrative Law Judge's ruling on DTP case
  - e. 2/20/15 Exceptions to DOAH Administrative Law Judge's Recommended Order on DTP case
2. 2/11/15 Corps email response to Senator Nelson confirming that Corps Draft EA is fraudulent
3. Letters from USFWS to FKAA re: non-compliance with federal laws and DTP letter opposing KFKAA permit modification to install French drain for dewatering
  - a. 5/22/14 USFWS FKAA letter to FKAA re: CRWS Section 9 prohibitions
  - b. 3/12/15 USFWS letter to FKAA re: CRWS Project
  - c. 1/29/15 DTP letter opposing FKAA permit modification to install French drain for dewatering
4. 3/25/15 Zuelch, FKAA press release for CRWS injection wells
5. *De facto* implementation of Corps' 2014 Final Technical Data Report and Groundwater Model
  - a. 10/14 Corps Central and Southern Florida Project, Comprehensive Everglades Restoration Plan, Final Technical Data Report, Aquifer Storage and Recovery Regional Study
  - b. Appendix A – USEPA Letter Dated 24 September 2013 to FDEP
  - c. Appendix B – Supporting document for geotechnical studies
  - d. Appendix C – Supporting documents for geochemical studies
  - e. Appendix D – Supporting documents for microbiological studies
  - f. Appendix E – Reports documenting development and calibration of the Regional ASR Study Groundwater Flow Model and Simulations
  - g. Appendix F – Ecological Risk Assessment Report and supporting documents
6. Comment letters to the Corps and the NRC by the Ecology Party of Florida
  - a. 1/9/15 First comment letter to the Corps and the NRC by the Ecology Party of Florida
  - b. 1/23/15 Second comment letter to the Corps and the NRC by the Ecology Party of Florida
  - c. 2/1/15 Third comment letter to the Corps and the NRC by the Ecology Party of Florida
7. 5/29/14 Notice of intent to sue letter re: inadequacies of the Final Area-wide EIS for the proposed expansion of phosphate mining in central Florida

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