BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Environmental Cost Recovery Clause	DOCKET NO. 20170007-EI
	DATED: November 1, 2017

SOUTHERN ALLIANCE FOR CLEAN ENERGY'S MOTION FOR REOPENING OF THE RECORD AND SUPPLEMENTARY HEARING

Southern Alliance for Clean Energy ("SACE"), pursuant to R. 28-106.204, F.A.C. hereby moves to reopen the record of this proceeding and for a supplemental hearing for the limited purpose of cross examining Florida Power & Light ("FPL") witness Michael Sole in relation to a newly discovered Florida Department of Environmental Protection ("DEP") memorandum ("Memo"). The Memo speaks directly to the prudence of FPL's actions and inactions which is a paramount question before the Commission in this docket, and a full examination of the Memo is essential. Given the significant amount of cost recovery sought by FPL, granting this motion will serve a great public interest and ensure that the Florida Public Service Commission ("Commission") has the most accurate, material and competent evidence before it in rendering a decision in this docket. In support, SACE states:

1. An evidentiary hearing was held in this docket on October 25th, 26th, and into the early morning of October 27th, with testimony ending at approximately12:30 AM Friday morning. The hearing focused on contested issues 10A through 10E regarding FPL's requested cost recovery of compliance costs stemming from the June 20, 2016 Consent Order between FPL and the DEP, and the October 2015 Consent Agreement between FPL and the Miami-Dade County Department of Environmental Resources Management.

Issue 10B focuses on whether those costs were prudently incurred. (Prehearing Order, p. 9). Central to the prudence determination is establishing when FPL's operation of the cooling canal system ("CCS") created a hypersline plume that migrated outside of the CCS boundary. Simply put, what did FPL know and when did it know it?

2. Over the course of discovery, in particular the deposition of Michael Sole ("Deposition") on October 9, 2017. SACE learned that FPL's federal NPDES permit had been "administratively continued." (Sole Deposition Transcript p. 115 (deposition transcript excerpts are provided as EXHIBIT A)). Over the course of its research regarding the NPDES permit, SACE identified the potentially material and relevant Memo (EXHIBIT B) and filed a public records request for the document with the DEP clerk on Monday, October 23, 2017 at 3:26 PM. SACE called the DEP clerk regarding the status of the records request on Tuesday, October 24th and left a message; that call was not returned. SACE requested the document again on Wednesday October 25th. The Memo finally arrived from the DEP clerk's office on Friday, October 27th at 12:23 AM – just minutes before the end of the hearing at 12:39 AM and at least an hour after Mr. Sole concluded his testimony and was excused from the remainder of the hearing.[1] (EXHIBIT C) The email was understandably not seen until after the hearing had adjourned. The curious timing of the DEP clerk's response (12:23 AM Friday morning) to SACE's request suggests that it may have been timed so as to not make the Memo available as evidence at the evidentiary hearing. Clearly, due the timing of the DEP's response to SACE's request, SACE was not able to enter the document as an exhibit and cross-examine the witnesses on the matters contained in the Memo.

[1] Hearing Transcript, Volume 6, pp. 819, 967.

3. The Memo indicates that the DEP was unequivocal in its understanding that the CCS was the source of the hyper-saline plume that was moving westward from the CCS property in 2009 and that the GII-III water boundary lay just west of the interceptor ditch since the early 80's. (Memo, p. 1-2) Over the course of discovery, FPL did not disclose that DEP had no doubts that the hyper-saline plume was caused by the CCS and migrating west from the CCS property. (See, for example, the references below from the Deposition transcript). It is implausible that Michael Sole, the DEP secretary at the time (Testimony of Michael Sole, July 19, 2017, p. 1), could have not known, and hence FPL could have not known that DEP had no doubts that a hypersaline plume was moving westward from the CCS property in 2009. FPL did not only fail to disclose the DEP's 2009 position, despite multiple timely requests during the discovery process, but instead misled the parties by stating time and time again that there was uncertainty within the regulatory agencies until 2013. These are matters that, based on their great significance, will ultimately determine the outcome of the proceeding.

4. Mr. Sole in his Deposition, when asked about indications of salinity and hyper salinity related to the CCS, indicates that there were some concerns about it but says that "I think at that time the question was, was it caused by the CCS or were there other factors contributing to the issue." (Deposition, p. 106-107)

5. Mr. Sole in the Deposition says that in 2008 and 2009 the SFWMD identified concerns about the CCS as contributing to the hyper salinity. He says "but there wasn't evidence to support it." He does not mention the DEP as the source of the concern. (Deposition, pp. 125-6) Likewise earlier in his Deposition Mr. Sole states in referring to

earlier data on the hypersaline plume that "[t]he question is, whether or not that data was affirmatively establishing that source was the cooling canals." (Deposition pp. 89-90)

6. However, paragraph 3 of the Memo in the first sentence does not support the notion that DEP had any doubts about the source of the hypersaline plume; it states unequivocally, " we now know there is a plume of hypersaline water moving west from the CCS." (emphasis added) Morevoer, the last sentence of paragraph 3 suggests using SFWMD data from February and March of 2009, which presumably indicates full awareness that evidence of the contamination exists.

7. The inconsistencies of Mr. Sole's statements versus what DEP knew at the time impact the credibility of FPL's position throughout discovery and at the hearing that there was doubt in the regulators' minds about the source of the hypersalinity and about whether the District possessed data from early 2009 that indicated water quality problems.[2] Therefore, the Memo at issue could have been used to impeach aspects of the company's evidence and provide a more accurate record to the Commission on a matter of critical importance regarding the prudency of FPL's actions and inactions. Mr. Sole testified on multiple occasions at the evidentiary hearing on what FPL knew and when it knew it regarding the hypersaline plume source. For instance, see the response from Mr. Sole at Hearing Transcript Volume 3, p. 376 stating that there were indications in 2009 that the CCS "may have a problem" with impacts to adjacent waters. Certainly, as DEP Secretary in the 2009 timeframe, based on the Memo, he would have known that there was a problem with hypersalinity outside the CCS boundary and that the CCS was the

[2] Additionally, the record evidence shows that SFWMD relied on FPL to provide it with the water quality data via FPL's water quality monitoring program; therefore, FPL was the party who gathered the raw data, analyzed it and disseminated the information to the regulators, and as such, would have first-hand knowledge of the data referenced in the Memo at issue.

source. The question of the certainty of the regulatory agencies on the source of the hypersaline plume is a material fact in establishing whether FPL's past actions or inactions, which led to the cost recovery expenses, were prudent.

8. In relation to the GII-III water boundary, the Memo states that documents from the early 80's indicate the "boundary at the time was just west of the CCS interceptor ditch." (Memo, p. 1). Yet, Mr. Sole testified at the evidentiary hearing that during that timeframe the boundary was several miles further west and beyond Tallahassee Road (Transcript Volume 3, p 351). These inconsistencies call into question the credibility of the company's suggestions during testimony that the level of contamination in the aquifer that called for lessened oversight and concern by regulators as well as FPL. The Memo could have been used to challenge testimony by FPL witnesses on this material key point.

9. Precedent dictates that there are conditions under which it is appropriate to reopen the record of the proceeding, despite the Commission's general hesitance to do so. One such condition is when reopening the record serves a great public interest. (See Order No. PSC-07-0483-PCO-EU) In this docket, FPL has requested cost recovery amounts of over $200 million from 2016 through 2026 (Testimony of Michael Sole, July 19, 2017, Exhibit MWS-14 and Testimony of Renae Deaton, April 3, 2017, Exhibit RBD-1 p. 4 of 44). The Commission's decision in this docket will determine whether FPL's actions related to its remediation program are reasonable and prudent - thereby impacting the bills of approximately 4.9 million customers.[3] The $200 million price tag the Company is seeking is a magnitude of times more than what this Commission approved for the original Turkey Point Cooling Canal Monitoring Plan. (See hearing exhibit 77)

[3] Nextera Energy Fact Sheet, at http://www.nexteraenergy.com/company/factsheet.shtml

Therefore, the matter before the Commission is absolutely a matter of great public concern; and as such, the Commission should rely on the most accurate record of the evidentiary hearing.

10. The Commission has also found that when revised information provides new evidence that may be material to its decision in a matter, it is appropriate to reopen the record. (Order No. PSC-97-0408-FOF-TL, p. 3) Florida Courts have defined material evidence to mean evidence which is relevant and goes to the substantial matters in dispute, or has a legitimate and effective influence or bearing on the decision of the case. Winter Haven v. Tuttle/White Constructors, 370 So. 2d 829, 832 (2d DCA 1979). Additionally, when such information is competent and relevant and assists the Commission in making a more informed decision, it is appropriate to open the record. (Order No. PSC-07-0483-PCO-EU, p. 3-4). The prudence of FPL's actions or inactions related to the operation of the CCS is not only material, but it is in-fact, the touchstone question in this docket before the Commission. The Memo is competent and relevant evidence as it is a document obtained directly from the DEP and relates squarely to what the agency knew about the source of the hypersaline plume in 2009. Therefore, the Commission should have the opportunity to consider this newly discovered material and competent evidence.

11. The Rules of Florida Civil Procedure, 1.540(b), Relief from Judgment, Decrees, Orders regarding newly discovered evidence, while not directly applicable in this case as SACE is requesting a limited supplemental hearing, provides several appropriate reasons for a new hearing including: newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; or fraud (whether

heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party. (Fla. R. Civ. P. 1.540(b), 2017) SACE presents this Commission with newly discovered evidence, which due to Michael Sole's prefiled testimony, FPL's discovery responses, and Mr. Sole's Deposition statement, was not reasonably discoverable. SACE performed its due diligence prior to the hearing by reviewing the FPL responses to OPC and Staff's discovery requests and actively participating in the deposition of Michael Sole. SACE did not become aware, nor could it have become aware that DEP had no doubt in 2009 that the source of the hypersaline plume was the CCS. But for incidental research into the status of the NPDES permit, SACE would have never identified the Memo. SACE asked the DEP to provide the memo on an expedited basis. SACE drafted this motion alerting the Commission as to the existence of the newly discovered evidence as soon as possible. While SACE performed its due diligence in discovery, it is important to note that even where such evidence could have been discovered prior to the hearing, Florida courts have held that the requirement of due diligence is not a legal absolute. Cluett v. Department of Professional Regulation, Florida Real Estate Com., 530 So. 2d 351, 355, (1st DCA 1988)(citing Roberto v. Allstate Insurance Co. 457 So. 2d 1148, (3rd DCA 1984)("The requirement of due diligence, however, is not a legal absolute. A party is not required to anticipate false testimony from the opposing party and is therefore not required to discover evidence, which would refute the false testimony"). As such, SACE has no obligation to identify evidence that purportedly could not exist according to Mr. Sole's testimony.

12. The re-opening of the record and holding of a supplemental hearing will allow all the parties, including FPL, to address the inconsistencies between Mr. Sole's testimony

and the contents of the Memo. Granting SACE's motion serves a great public purpose, and allows the Commission to make a more fully informed decision as to the ultimate prudence of FPL's actions or inactions relative to the operation of the CCS. In order to facilitate a process by which the Commission can consider this newly discovered evidence, SACE, without waiving any due process rights embedded within this motion, is willing to meet the current briefing schedule with the evidence on the record today; and should this motion be granted, file a later supplemental brief based on the record from the supplemental hearing.

13. Consistent with Rule 28-106.204(3), SACE has conferred with the other parties of record in the docket and can represent that at the time of this filing that the Office of Public Counsel states that after reviewing SACE's Motion, OPC determined it agrees with the facts outlined and the basis for relief. Accordingly, OPC fully supports and joins in the Motion; FIPUG takes no position, Tampa Electric takes no position, FPL opposes the motion, Gulf Power takes no position, and Duke Energy Florida takes no position.

14. WHEREFORE, SACE, for the reasons stated above, respectfully request the Commission reopen the record of this proceeding and conduct a supplemental hearing for the limited purpose for examination of the Memo. Additionally, SACE requests oral argument to allow the parties to more fully address the Commission on this motion.

RESPECTFULLY SUBMITTED this 1st day of November, 2017

/s/ George Cavros
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(866) 924-2824 (fax)

Counsel for Petitioner
Southern Alliance for Clean Energy

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Southern Alliance for Clean Energy's Motion for Reopening of the Record and Supplemental Hearing was furnished to the following by electronic mail on this 1st day of November, 2017:

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/s/ George Cavros
George Cavros

EXHIBIT A

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO.: 20170007-EI
FILED: October 3, 2017

In Re: Environmental Cost Recovery Clause.

ORIGINAL

Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408
October 9th, 2017
1:03 p.m.

DEPOSITION OF
MICHAEL SOLE

Taken before ONEIDA DEL TORO, Court Reporter and Notary Public in and for Palm Beach County, State of Florida at Large.

I N D E X

EXHIBITS

APPEARANCES:

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A No, I think when you go through many of the reports there is a lot of discussion about the complexity of understanding, influence of CCS in light of the fact that we're already in a saltwater intruded environment. We're already in a Class 3 water that is non-potable, that has salt, was salty before the CCS was there and the discernment of whether the migration increases of salt or as a result of the CCS or as a result of drought or as result of other activities was unclear, unproven. It is believed or I believe that at the time of the final 2012 report that the answer was clear that the CCS was contributing to a hypersaline plume beyond the boundaries of the CCS.

Q Are you saying that before April 4th, 2013 that there were no indication or you had no idea that the hypersaline water had moved beyond the boundaries of the CCS, you meaning, FPL?

A No, I'm not saying that.

Q So you're saying there were indications that a hypersaline plume or waters were outside of the boundaries to the west of CCS before this time?

A Yes, data showed that there was ground water with higher than 34 PSU salinity in it beyond the cooling canals prior to 2013 or 2012 data set.

The question is, whether or not that data was affirmatively establishing that the source of that was the cooling canals. Hypersalinity occurs in this region naturally as well. Hypersalinity is not limited to ground water underneath or adjacent to the cooling canal system.

Q Is it your testimony that there was no indications of hypersaline water to the west of the CCS that had tritium markers in it?

A No, that's not my testimony.

Q If hypersaline water was indicated that had tritium markers that were higher than ambient occurrence of tritium, that would be an indicator that the CCS was directly causing the presence of the hypersaline water with the elevated tritium levels; is that fair?

A An indicator, yes.

Q Is it true that there were both the presence of elevated tritium and water above 34 PSU status before 2012 that FPL was aware of?

A I'd have to review the documents again to affirmatively establish that.

Q But to the extent that was true --

A It's been a while since I looked at the 2011 report is the problem.

Q There's no mention of a Recovery Well System here, right?

A There is not.

Q Mr. Labauve's testimony in 2009 doesn't mention a Recovery Well System, right?

A Not specifically, but again, the testimony does reference the need to abate or take actions.

Q In 2009 FPL is not acknowledging that they even have indication that there was hypersaline plume that needed to be pulled back into or retracted into the boundaries of the CCS, are they?

A My hesitancy is the way you asked the question because in 2009 there was some indication of salinity and hyper solidity near the CCS. I think at that time the questions was, was it caused by the CCS or were there other factors contributing to the issue.

Q Did you tell the commission that, that that was that indication in 2009? Not you, but FPL.

A I understand the question. I think the conditions of certification and then subsequently the Supplemental Agreement identifies the potential. If you go to Exhibit NWS4 on page 2 of 11, it notes whereas the District's evaluation of recent monitoring data indicates that the intercepter ditch

may not be effective in restricting the movement of saline water westward from the cooling canal system.

Q This was dated October 16th of 2009?

A I believe so. It was being negotiated at the time that FPL was in front of the commission.

Q The Commission's Order at page 12 in 2009 in the ECRC document references Mr. Labauve's testimony filed August 3rd, 2009.

Would you accept that subject to check?

A Subject to check, yes.

Q This document NWS4, did not exist at the time of his testimony, right?

A The signed document did not exist at the time of his testimony.

Q The commission didn't rely on that document, right?

A I know there was testimony that related to the negotiations, whether or not there was specific testimony not written, but verbal that talked about the progress being made with the District I don't know.

Q You didn't tell the commission in 2009 that FPL anticipated being found in violation of Rule 62-520.400, did you?

in compliance with his NPDEF permits, but as identified in my testimony an unanticipated -- excuse me, unexpected condition occurred and we had a ground water plume that although we had monitored for did not identify until later now confirmed in 2013. That is the circumstances that we're operating under.

Q To the extend to use the word unexpected instead of unintended --

A I meant unintended, sorry.

Q That's okay. If I could get you to look at NWS3 page 10 and 11. This is your NPDEF IWW permit?

A Yes.

Q This is the permit that you operate the PCS under; is that correct?

A That's correct. In addition to the supplemental agreements.

Q Correct, okay. This permit is has expired, but because of your application was within the timeframe and it is pending it is still your permit; is that fair?

A It is considered an administratively continued permit and yes, it is effective.

Q If I look on page 10 at the bottom I see

A I know that it's been publically available. Whether it's on the website, I don't recall, but that report is publically available.

Q Instead of evidence let me lower the threshold a bit to that question and just say a data point. So when did FPL have its first data point the cooling canal system was contributing to the ground water salt concentration, concentrations that were increasing through time in the Biscayne Aquifer West of this cooling canal system?

A I think throughout monitoring that has occurred that Dames & Moore did, there were always indications of oh, saltwater is increasing in some areas and sometimes decreasing in some areas throughout the operation of the CCS. The question that's critical is at what point did FPL and maybe it's the one I just answered, FPL and agencies recognized that no, it affirmatively was from the CCS. Again, my testimony is, you know, there wasn't that affirmative acknowledgment until 2013 after the reports were done and the data was had. Throughout that operation of the CCS there were reports that showed there was salinity increases. Whether they were from drought, whether they were from operation of the CCS or whether they were increases that were

acknowledged, but no corrective action was needed by the Water Management District. That occurred throughout the operation until roughly 2008 and 2009 when the Water Management District identified as we went through the uprate that there were concerns that the CCS was contributing. And so to answer your question, I would argue that, you know, in 2008 and 2009 timeframe there were indications that the CCS could be contributing, but there wasn't evidence to support it.

Q The next question is, when did FPL first consider taking action to mitigate the impacts of the CCS on the ground water salt concentration that were increasing through time in the Biscayne Aquifer west of the CCS?

A There were, and I don't remember the year exactly, but I want to say in 2011 there was some analysis done to discern what actions could be taken if the CCS was contributing to a problem. There was a study done that gave alternative potentials that we would do if the outcome of the 2009 study plan indicated that corrective actions were needed.

Q Are you referring to the Geo Trans Feasibility Analysis in 2010?

A I am. Yes, sir.

EXHIBIT B

Florida De, .rtment of

Memorandum **Environmental Protection**

TO: Marc Harris
NPDES Power Plant Permitting Supervisor/Tallahassee

THROUGH: Linda Brien
Water Facilities Administrator/DEP Southeast District

FROM: Tim Powell
Wastewater Permitting Supervisor/DEP Southeast District

DATE: November 16, 2009

SUBJECT: FPL Turkey Point NPDES Permit Renewal (FL0001562)

Marc,

We have reviewed the subject permit renewal package, received October 22, 2009, and offer the following comments.

1. The applicant should submit a proposal for a ground water monitoring plan. The plan could include wells that are part of the updated SFWMD Monitoring Plan in the agreement that was approved last month by the SFWMD Board. The plan should include monitoring of ground waters both east and west of the Cooling Canal System (CCS). Any wells that are used to monitor ground water movement to Biscayne Bay should be monitored for appropriate surface water standards (Class III Marine). The proposal should identify the G-II/G-III ground water boundary, and include compliance wells at the boundary.

2. Per FAC Rule 62-520.520(8), existing cooling ponds are exempt from secondary standards for G-II ground water so long as the cooling pond waters are monitored pursuant to Department permit to ensure that the pond does not impair the designated use of contiguous ground waters and surface waters. Review of water quality data collected by the SFWMD in Feb-Mar 2009 indicates not only exceedences of the secondary standards, but also for at least one primary standard - sodium. The following wells listed below indicate sodium levels above the standard (160 mg/L). Please see the attached map for well locations. It's important to note that the L-3 and L-5 wells exhibit higher salinities than sea water, in line with the CCS salinities.

Well ID	Sodium (mg/L)
BBCW-4	2,730
BBCW-5	3,560
FKS-4	2,850
G-21	1,640
G-28	6,750
L-3	17,200
L-5	15,600

Compliance with our Ground Water rules depends on where the boundary between G-II and G-III waters lies. Review of documents from the early 1980's indicate the boundary at the time lay just west of the CCS interceptor ditch. The applicant should discuss this data and how they can demonstrate compliance with appropriate ground water criteria.

3. It is inaccurate to describe the CCS as a "closed-loop" system, since we now know there is a plume of hypersaline water moving west from the CCS. It is also likely that the CCS is impacting surface waters to the west, or possibly Biscayne Bay to the east. Therefore, a complete analysis of CCS waters should be completed as provided in Section V of the ground water discharge application (Form 2CG), and Section VII of the surface water discharge application (Form 2CS). We recommend at least three sampling events from various representative locations within the CCs. We suggest at least three locations: one of effluent (cooling water) exiting the plant condensers; one at cooling water intake; and one point approximately midway between the intake and effluent points. Some of the data collected in the SFWMD study In Feb-Mar 2009 could be used.

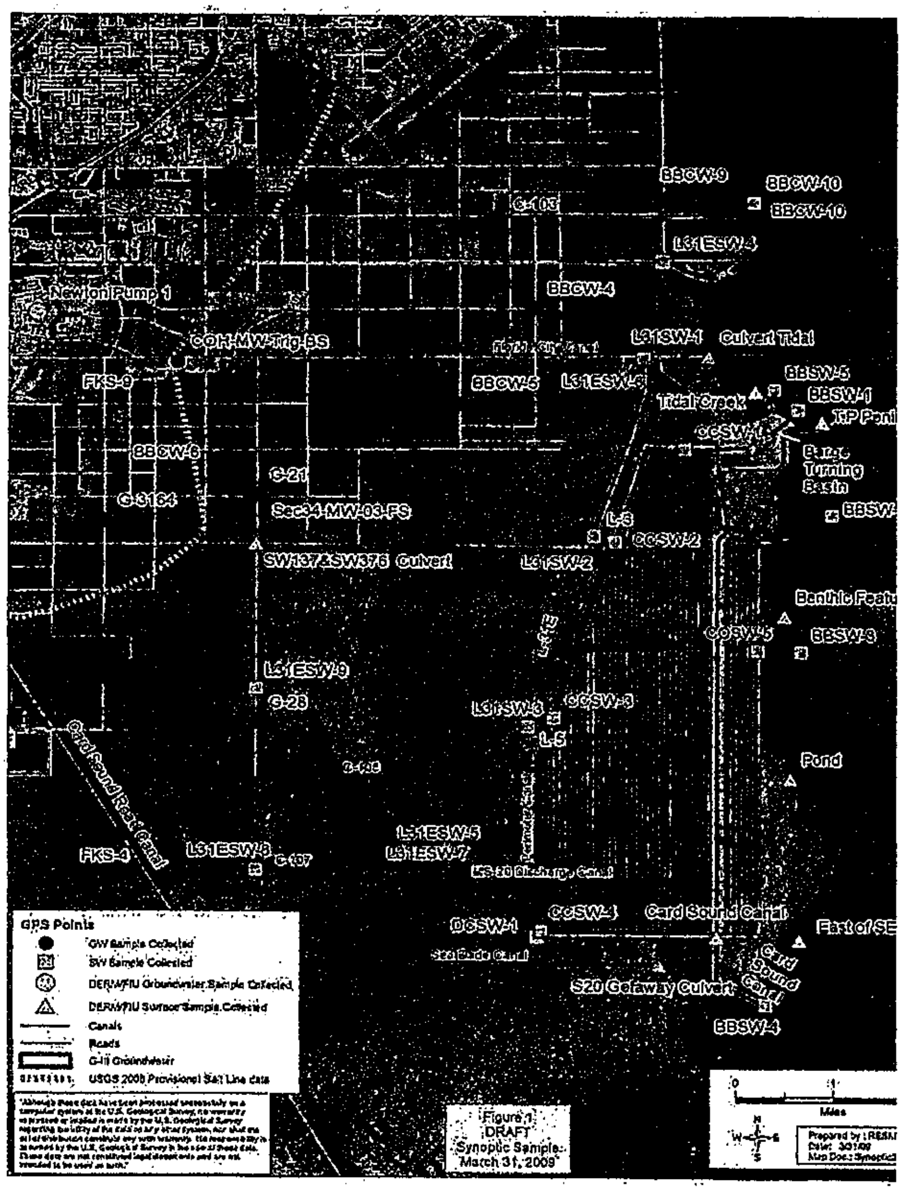

Figure 1
DRAFT
Synoptic Sample
March 31, 2009

EXHIBIT C

From: "Chapman, Heather" <Heather.Chapman@dep.state.fl.us>
To: George Cavros <george@cavros-law.com>
Sent: Friday, October 27, 2017 12:23 AM
Subject: RELEASE - PRR - G. Cavros / Public Records Request - DEP 2009 Memo (FL0001562) November 16, 2009 Memorandum from Tim Powell to Marc Harris re: FPL Turkey Point NPDES Permit Renewal (FL0001562)

Dear Mr. Cavros,

Requested memorandum attached.

Thank you,

Heather Chapman
Program Administrator
Office of General Counsel
Florida Department of Environmental Protection
3900 Commonwealth Blvd., MS 35
Tallahassee, FL 32399-3000
Office (850) 245-2209
Heather.Chapman@dep.state.fl.us

From: Chapman, Heather
Sent: Wednesday, October 25, 2017 10:49 AM
To: 'George Cavros' <george@cavros-law.com>
Subject: PRR - G. Cavros / Public Records Request - DEP 2009 Memo (FL0001562) November 16, 2009 Memorandum from Tim Powell to Marc Harris re: FPL Turkey Point NPDES Permit Renewal (FL0001562)

Good morning,

Thank you for your public records request. The Department is researching and compiling the responsive record.

Thank you,

Heather Chapman
Program Administrator
Office of General Counsel
Florida Department of Environmental Protection
3900 Commonwealth Blvd., MS 35
Tallahassee, FL 32399-3000
Office (850) 245-2209
Heather.Chapman@dep.state.fl.us

From: George Cavros [mailto:george@cavros-law.com]
Sent: Monday, October 23, 2017 3:26 PM
To: Chapman, Heather <Heather.Chapman@dep.state.fl.us>
Subject: Public Records Request - DEP 2009 Memo (FL0001562)

Dear Ms. Chapman,

Pursuant to Chapter 119, F.S., I am requesting the following document below in bold lettering. Please let me know as soon as the document has been located so I can view the document electronically, or as an email attachment. Please call me at the number below with any questions. To the extent that you can expedite the request, I would really appreciate it.

Thanks so much for your assistance,

Sincerely, George Cavros

November 16, 2009 Memorandum from Tim Powell to Marc Harris re: FPL Turkey Point NPDES Permit Renewal (FL0001562)

120 E. Oakland Park Blvd., Suite 105
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