

## SETTLEMENT AGREEMENT

**WHEREAS**, Alfred J. Davis and Cindy Davis (“the Davises”) and the United States Environmental Protection Agency, Lisa L. Jackson, Administrator of the United States Environmental Protection Agency; and Gwendolyn Keyes Fleming, Regional Administrator of the United States Environmental Protection Agency Region IV (collectively, “EPA”) hereby enter into this Settlement Agreement with respect to an action filed by Plaintiffs on June 9, 2009 (M.D. Fla. Case No. 8:09-cv-1070-EAK);

**WHEREAS**, on June 9, 2009, Plaintiffs filed the above-referenced law suit against EPA, the City of St. Petersburg, and the Southwest Florida Water Management District. (Doc. #1). Plaintiffs amended their complaint on February 25, 2010. (Doc. #31).

**WHEREAS**, Plaintiffs’ Amended Complaint asserts eight counts against EPA under the APA, and three counts against the city of St. Petersburg, Florida and the Southwest Florida Water Management District (one count under the Clean Water Act and two counts under State common law) in connection with alleged degradation of the 309 waterbodies known as “Outstanding Florida Waters.” In Counts I-V, Plaintiffs seek review of EPA’s 2008 “approval” of the State of Florida’s Triennial Review under Clean Water Act (“CWA”) Section 303(c) and assert a failure to make a determination under CWA Section 303(c)(4)(B) that revised water quality standards are necessary; Count VI seeks review of EPA’s 2008 decision on review of the State’s Impaired Waters Rule; Count VII seeks review of EPA’s 2009 approval in part of the State’s CWA Section 303(d) list of impaired waters; and Count VIII seeks review of EPA’s alleged failure to object to the renewal of the City of St. Petersburg’s CWA Municipal Separate Storm Sewer System (MS4) permit for stormwater discharges and failure to reopen all MS4 permits for discharges to waters on the State’s Section 303(d) list of impaired waters.

**WHEREAS**, the Davises filed their law suit out of concern for implementing and enforcing the Clean Water Act’s antidegradation policy and implementation criteria, especially including the protection of Tier I “existing uses,” protection of Tier II assimilative capacity, and the need to prevent the degradation of the existing ambient water quality in Outstanding Florida Waters, especially Clam Bayou;

**WHEREAS**, on March 29, 2010, EPA moved to dismiss Counts I-V, VI, and VIII of the Amended Complaint. On June 16, 2010, the Court granted that motion with respect to Counts I-V and Count VIII.

**WHEREAS**, Section 303(d)(1)(A), 33 U.S.C. 1313(d)(1)(A), of the CWA requires each State to identify and prioritize those waters where technology-based controls are inadequate to attain water quality standards;

**WHEREAS**, water quality standards amount to a description of the desired condition of a waterway and consist principally of: (a) designated beneficial uses for waters, such as public

water supply, recreation, protection and propagation of fish, shellfish and wildlife, and navigation; (b) water quality criteria, which define the amounts of pollutants, in either numeric or narrative form, that the waters can contain without impairment of their designated beneficial uses; and (c) antidegradation requirements, which are designed to protect and maintain existing uses and waters whose quality exceeds that necessary to support designated beneficial uses;

**WHEREAS**, the State's identification of substandard waters, known as "water quality limited segments," forms the basis of the Section 303(d) list;

**WHEREAS**, EPA has a non-discretionary duty under Section 303(d) of the Clean Water Act to approve or disapprove Section 303(d) lists submitted by a state to EPA and, upon disapproval, to identify such waters as EPA determines necessary to attain the applicable water quality standards;

**WHEREAS**, in assessing whether a water body should be placed on the State's Section 303(d) list, the State and EPA shall evaluate all existing and readily available water quality-related data and information.<sup>1</sup> This includes existing and readily available data and information relating to, inter alia, dissolved oxygen, total nitrogen, total phosphorus, biochemical oxygen demand, total kjeldahl nitrogen, turbidity, chlorophyll, color, salinity, specific conductance, sediment toxicity, bacteria, mercury, and polycyclic aromatic hydrocarbons. Existing and readily available water quality-related data and information includes shellfish maps developed by the Florida Department of Agriculture and Consumer Services;

**WHEREAS**, the State of Florida has divided its Section 303(d) list into five parts, with each part representing a different geographic group of waters.

**WHEREAS**, Clam Bayou is currently listed on Florida's Section 303(d) list for Group 5 for low dissolved oxygen, mercury, fecal coliform, and nutrients;

**WHEREAS**, Clam Bayou is scheduled for the development of a Total Maximum Daily Load ("TMDL") for low dissolved oxygen, fecal coliform, and nutrients, pursuant to a 1999 Consent Decree (by December 2011 by the Florida Department of Environmental Protection ("FDEP") or September 2012 by EPA);

**WHEREAS**, following completion of the terms of the agreement as set forth below under "EPA Actions," EPA intends to consider all applicable State water quality standards, including antidegradation requirements, in its review of future Section 303(d) list submittals from the State of Florida;

**WHEREAS**, EPA intends to address, nationally, how antidegradation requirements should be considered when assessing waters pursuant to Section 303(d) of the Clean Water Act;

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<sup>1</sup> The outcome of such an evaluation (i.e., whether a water body should be listed) depends on the quality and quantity of such data and information.

**WHEREAS** the Davises and EPA have agreed to a settlement of the remaining two counts against EPA (Count VI and Count VII) in the Amended Complaint filed on April 12, 2010 (Docket No. 31) in the above-referenced case without any admission of fact or law, which they consider to be just, fair, adequate and equitable resolution of the claims raised in the Amended Complaint;

**WHEREAS** it is in the interest of the public, the parties and judicial economy to resolve the above-referenced action without protracted litigation;

NOW, THEREFORE, IT IS HEREBY AGREED that:

### **I. Parties**

1. The parties to this Settlement Agreement (“Agreement”) are the Davises and EPA. The parties understand that (a) Lisa Jackson and Gwendolyn Keyes Fleming<sup>2</sup> were sued in their official capacities as Administrator of the United States Environmental Protection Agency and Regional Administrator of United States EPA, Region IV, respectively and (b) the obligations arising under this Agreement are to be performed by EPA and not by Lisa Jackson or Gwendolyn Keyes Fleming in their individual capacities.

2. This Agreement applies to, is binding upon, and inures to the benefit of the Davises and EPA.

### **II. EPA Actions**

3. The Parties understand and agree that the State of Florida has primary responsibility to identify those waters for which technology-based controls are inadequate to attain water quality standards, as set forth in Section 303(d)(1)(A) of the Clean Water Act, 33 U.S.C. § 1313(d)(1)(A). EPA expects Florida to submit its next Section 303(d) list update for Group 5 waters in 2012. EPA agrees that when reviewing Florida’s next Section 303(d) list for Group 5, it will consider all State water quality standards, including antidegradation requirements, and it will consider all existing and readily available water quality related data and information in assessing the State’s Group 5 water bodies, which includes waters within the Clam Bayou Watershed in Pinellas County. As part of this review, EPA will consider Florida’s water quality standards regulations. At this time, those regulations are: Florida Administrative Code Sections 62-4.242, 62-302.500, 62-302.200, 62-302.300, and 62-302.700.

4. In the event EPA disapproves the State’s next Group 5 Section 303(d) list submission for failure to appropriately assess whether the State’s Group 5 waters are attaining water quality standards, including antidegradation requirements, EPA will identify those waters not identified

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<sup>2</sup> Gwendolyn Keyes Fleming has been substituted for A. Stanley Meiburg pursuant to Fed. R. Civ. P. 25(d).

by Florida that EPA determines not to be attaining any applicable water quality standard and take action to add such waters to Florida's Group 5 Section 303(d) list pursuant to Section 303(d)(2) of the Clean Water Act, 33 U.S.C. § 1313(d)(2), and 40 C.F.R. § 130.7(d)(2).

### **III. Dismissal of Claims and Covenant Not to Sue**

5. Within 10 days of the effective date of this Settlement Agreement, the Davises agree to dismiss without prejudice all existing claims against EPA (Counts VI and VII of the Amended Complaint) in the above-referenced action (M.D. Fla. Case No. 8:09-cv-1070-EAK). The parties jointly shall file the appropriate notices with the Court regarding dismissal of claims. The Davises further agree that they will not appeal the Court's order of June 16, 2008 granting EPA's motion to dismiss Counts I-V and VIII.

6. This Settlement does not impair any right the Davises may have to bring an action challenging EPA's decision in connection with EPA's approval or disapproval of any State-submitted Section 303(d) list. The Parties agree that any challenge to EPA's future decisions in approving or disapproving any State-submitted Section 303(d) list must be brought in an action for review under the Administrative Procedure Act, and be based on the certified administrative records for such decisions.

7. The Davises expressly reserve (a) the right to petition the EPA to initiate rulemaking for development of a schedule for the adoption of a estuarine health standard for the State of Florida (including a salinity shock health standard); (b) the right to petition EPA to initiate rulemaking on the issue of MS4 permits to implement the CWA's antidegradation policy and restoration of Section 303(d) listed impaired waters; and (c) the opportunity to challenge in any appropriate forum the lawfulness of any antidegradation policy implementation methodology EPA ultimately promulgates pursuant to CWA 303(c). EPA preserves all its defenses to any such challenges.

### **IV. Fees and Costs**

8. The Parties agree that the Davises are entitled to reasonable attorney's fees and costs for work completed in connection with Counts VI and VII of the Amended Complaint (Docket No. 31), accrued as of the effective date of this Settlement Agreement. The Parties have agreed that Plaintiffs are entitled to a total of \$49,929.00 for full payment of reasonable fees and costs that were asserted or could have been asserted by the Davises related to Counts VI and VII of the Amended Complaint. Payment for these fees and costs will be made within 120 days of the effective date of this Settlement Agreement. The Davises agree that they will not seek reimbursement in any subsequent action against EPA for any fees or costs incurred by the Davises as a result of work or expenses for which EPA is paying fees and costs pursuant to this paragraph.

## **V. Effect of Settlement**

9. This Agreement was negotiated between the Davises and EPA in good faith and jointly drafted by the parties. Accordingly, the parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Agreement. This Agreement shall not constitute or be construed as an admission or adjudication by the United States or EPA of any question of fact or law with respect to any of the claims raised in the this matter. Nor is it an admission of violation of any law, rule, regulation, or policy by the United States or EPA. This Settlement Agreement shall not be admitted for any purpose in any proceeding without prior notice to and the express consent of EPA.

## **VI. Dispute Resolution**

10. In the event of a disagreement between the parties concerning the interpretation or completion of any aspect of this Settlement Agreement, the dissatisfied party shall provide the other party with written notice of the dispute and a request for negotiations. The parties shall meet and confer in order to attempt to resolve the dispute within 15 business days of the written notice, or such time thereafter as is mutually agreed. If the parties are unable to resolve the dispute within 45 days of such meeting, the Davises' sole remedy is to bring an action to re-assert the existing claims (Counts VI and VII of the Amended Complaint). The Parties agree that contempt of court is not an available remedy under this Settlement Agreement.

## **VII. Modification**

11. This Settlement Agreement may be modified by written agreement of the parties without notice to the court. If a subsequent change in law alters or relieves EPA of its obligations concerning matters addressed in this Settlement Agreement, then the Settlement Agreement shall be amended to conform to such changes. Any dispute regarding invocation of this provision shall be resolved in accordance with the dispute resolution provisions of Section VI.

## **VIII. Notice**

12. Any notice required or made with respect to this Settlement Agreement shall be in writing and shall be effective upon receipt. For any matter relating to this Settlement Agreement, the contact persons are:

For the Davises:

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Mail Code 2355A  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

Upon written notice to the other parties, any party may designate a successor contact person for any matter relating to this Settlement Agreement.

#### **IX. Compliance With Other Laws**

13. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or take actions in contravention of the Administrative

Procedure Act, 5 U.S.C. §§ 551-559, 701-706, the Clean Water Act, or any other law or regulation, either substantive or procedural.

#### **X. Agency Discretion**

14. Except as expressly provided herein, or in any supplement to this Settlement Agreement, nothing in this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the CWA, 33 U.S.C. §§1251 et seq., or by general principles of administrative law.

#### **XI. Force Majeure**

15. The possibility exists that circumstances outside the reasonable control of EPA could delay compliance with this Settlement Agreement. Such situations include, but are not limited to, a government shutdown as occurred in 1995 and 1996, a natural disaster or catastrophic environmental events requiring an immediate and/or time consuming response by EPA. EPA will provide Plaintiffs with reasonable notice in the event that EPA invokes this term of the Settlement Agreement.

#### **XII. Representative Authority**

16. The individuals signing this Agreement on behalf of the parties hereby certify that they are authorized to bind their respective parties to this Agreement.

#### **XIII. Choice of Law**

17. This Agreement shall be governed and construed under the laws of the United States.

#### **XIV. Termination**

18. Upon the fulfillment of EPA's obligations under this Agreement, EPA's obligations under this Agreement shall be terminated.

#### **XV. Final Agreement**

19. This Agreement constitutes the final, complete and exclusive agreement and understanding between Davises and EPA with respect to the matters addressed in this Agreement. There are no representations, agreements or understandings relating to this settlement other than those expressly contained in this Agreement.

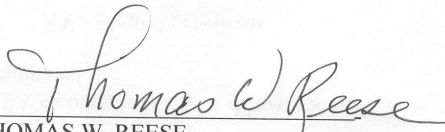
**XVI. Effective Date of Settlement Agreement**

20. The Effective Date of this Agreement shall be the date of the last signatory to the Agreement.

WHEREFORE, after reviewing the terms and conditions of this Agreement, the United States on behalf of EPA, and the Davises hereby consent and agree to the terms and conditions of this Agreement.

FOR THE DAVISES:

Dated: 12/20, 2010



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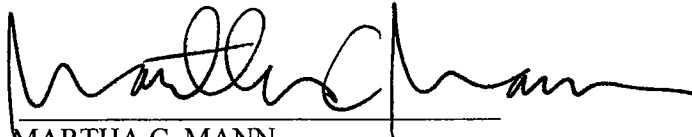
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Dated: 12/20, 2010



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