

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 88-1886-CIV-MORENO

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SOUTH FLORIDA WATER MANAGEMENT
DISTRICT, et al.,
Defendants.

**UNITED STATES' MEMORANDUM IN REPLY TO THE STATE PARTIES'
RESPONSE TO THE UNITED STATES' MOTION TO ADOPT THE SPECIAL
MASTER'S REPORT IN PART**

The plaintiff United States of America hereby submits its reply to the Response filed by the State Parties on October 12, 2006 to the United States' September 26, 2006 Motion to Adopt the Special Master's July 5, 2006 Report in part. Unlike their objections to the Special Master's Report, which devoted only a few pages to challenging the Master's rulings on "violation," the State Parties' response to the United States' Motion to Adopt presents exhaustive challenges to the Master's rulings that the State Parties' efforts to demonstrate that the past exceedances were due to Type I error, and to other so-called errors in the statistical derivation of the Consent Decree's Appendix B Interim Levels equation, amounted to impermissible "collateral attacks" on the Consent Decree. As we explain below, none of the State Parties' challenges to the Master's "collateral attack" rulings are meritorious, and therefore, the "violation" part of the Master's Report should be sustained -- with supplementation by this Court further finding that the "evidence" proffered by the State Parties purporting to show error allegedly inherent in the Appendix B equation is separately and independently barred under judicial estoppel principles and the parol evidence rule.

Before addressing the State Parties' collateral attack challenges, it is important to highlight the absence of ambiguity in the Appendix B equation itself. The Refuge Interim Level equation in Appendix B is set forth as follows:

$$C = 11.9187 - .603261S + 1.372[7.5311 - .9247S + .02882758S^2],$$

where "C" equals the "natural log of the geometric mean total phosphorus concentration across 14 marsh stations (CA1-3 to CA1-16), and "S" is the "[a]verage stage measured at gauges CA1-9, CA1-7, and CA1-8C on sampling date (feet)." CD, Appendix B, Attachment 1, at B-7. "The interim levels

represent the 10% rejection level of the observed 14 station interior marsh mean concentration at a given mean daily stage, adjusted to a baseline time period of June 1978 to June 1979.” Id. at B-2.

As shown above, there is no ambiguity in the above equation; its provisions are both straightforward and clear. Appendix B specifies a precise formula that the Settling parties agreed upon for determining how the Interim Levels shall be computed. The equation allows the State Parties to know in advance the specific numeric phosphorus concentration level (in parts per billion (“ppb”)) they must achieve in relation to the stage at which samples are collected. And, as a mathematical formula, the equation always produces uniform results, i.e., once stage “S” is known, the formula always generates the same numeric phosphorus number the state parties must achieve to remain in compliance with the Decree. Finally, Appendix B of the Decree goes on to state:

A panel of scientists designated by the TOC will track and evaluate compliance with all aspects of state water quality standards including the phosphorus limits, concentration levels and criteria. The represented agencies may request technical assistance from others. An exceedance occurs if the 14 station mean concentration is greater than the computed concentration level two or more times in any 12 consecutive sample collections. Based upon review of monthly trends for the 14 station mean and other relevant information, the TOC members will forward their opinions and recommendations to their respective agencies for relevant action. An exceedance will constitute a violation of this Agreement and relevant water quality criteria unless the TOC determines there is substantial evidence that it is due to error or extraordinary natural phenomena.

CD, Appendix B, at B-5 (emphasis added).

It is highly relevant that the State Parties have not asserted that there was any instance of mathematical error, or stage recordation error, in computing the Interim Levels that were used to arrive at the conclusion that there have been exceedances in every year from 1999 through 2004. It is also salient that the State Parties have not argued that there was error in the manner the samples taken between February 1999 through August 2004 were collected, labeled, stored, analyzed or reported. Instead, the State Parties are asserting that the equation itself produces what they regard as an unacceptable potential for statistical error.

When the State Parties’ “error” defenses to the exceedances are examined carefully, it becomes clear that the State Parties are mounting a series of prohibited collateral attacks on the validity of the Appendix B equation, i.e., arguing that it is prone to statistical error and should not be trusted to represent 1978-1979 “Outstanding Florida Waters” (“OFW”) level of water quality. To that end, the State Parties sponsored a statistician, Dr. Ronald Marks, to testify about the alleged shortcomings of the Appendix B Interim Levels equation. Though Dr. Marks conceded that he had no personal

involvement in the negotiations of the Settlement Agreement, 3-13-2006 Tr. 866-67, and though he admitted that he had no personal knowledge of the Settling Parties' objectives when they committed to the obligations of the Consent Decree, id. at 866, Dr. Marks nonetheless purported to testify that

- Appendix B equation is a “model that will way too often simply by chance identify false exceedances. In order to achieve an annual rejection level of 10%, a monthly rejection level of 4.5% is needed. The use of this more statistically accepted – and fairer - rejection rule would have resulted in the number of identified exceedances dropping dramatically for both the interim and long-term models.” (SFWMD Exh. 136 at 2);
- “The application of a 4.5% rejection rule would more likely accomplish the likely intended purpose of the "10% rejection rule" applied to "any 12 consecutive sample collections" than the current use.” (SFWMD Exh. 136 at 15, emphasis added);
- “[T]he current interim model is not a valid model for evaluating phosphorus levels in the Refuge”; because:
 - “Too few observations were used to model the complex Refuge phosphorus distribution;”
 - “The available observations were not temporally balanced across months and seasons;”
 - “There was high risk of contamination in the baseline measurements.”

(SFWMD Exh. 136 at 23, emphasis added.)

Dr. Marks went on to testify that the Appendix B Interim Levels equation must be changed to avoid inherent error in design. Thus, he explained, “the current interim model is not a valid model for evaluating phosphorus levels in the Refuge. The current interim model needs to be updated in one of a number of possible ways,” including adding additional temporal predictors, using higher quality data, changing the way the data is analyzed (using individual stations instead of geometric means of all 14 stations). SFWMD Exh. No. 134 at 24. Dr. Marks concluded that

the current interim model is too simplistic, based on too few imprecise measurements to model a complex and changing ecological system like the Refuge. I believe the predicted values from this model have virtually no validity in monitoring current phosphorus levels in the Refuge. A new, more comprehensive model taking into account multiple aspects of the Refuge system needs to be developed to monitor phosphorus levels with an acceptable level of statistical and ecological validity.

Id.

The above testimony by Dr. Marks' makes its unmistakably clear that the State Parties are seizing upon the “error” term in Appendix B, which was intended to convey errors in stage recordation during current sampling, and/or in collecting, handling, storing, analyzing and reporting 1999-2006

samples, to mount a broadside, collateral attack on the overall validity of the Appendix B equation. On cross examination, Dr. Marks admitted that the statistical principles upon which he relied to render his opinions about the alleged structural weaknesses in the Appendix B Interim Levels compliance model are not new, and existed during the 1991-1992 period when the Settlement Agreement was negotiated, consummated, and entered as a Consent Decree. See 3/13/2006 Tr. 858. Dr. Marks also conceded that all of the statistical principles and methods applied in his reports to show alleged weaknesses in the Appendix B compliance model would have been understood by competent statisticians back in 1992. Id. Thus, as Dr. Marks acknowledged, the statistical consultants to the State Parties would have been aware of the so-called Type I error/false positive potential, and the other alleged structural infirmities of the Appendix B equation, at the time the Settlement Agreement was signed in 1991. See id. In these circumstances, the “error” cited by Dr. Marks is simply his own personal assessment that the negotiators for the State Parties may have made errors in judgment or policy in accepting the model. Such errors are clearly not of the kind that could excuse exceedances from becoming violations.

Dr. Redfield’s testimony is likewise part of the State Parties’ collateral attack on the Appendix B equation. His testimony stands for the proposition that the Appendix B Interim levels should be disregarded, and exceedances dismissed as “Type I error,” anytime the state parties can show they achieved average phosphorus concentrations during the 1999-2006 era that were lower than the 1978-79 data (even though they can make that alleged comparison only by ignoring the “stage” at which the measurements were taken, in direct contravention of the Settling Parties’ agreement that permissible concentration levels would be adjusted according to stage at which measurements were taken). See SFWMD Exh. No. 134 at 1. Dr. Redfield’s testimony completely changes the compliance test, and substitutes average concentrations, annualized inflow concentration comparisons, and phosphorus retention rate data comparisons, for Interim Levels established by the Appendix B equation. The State Parties agreed that “stage” would be a variable component of the Interim Levels model; yet Dr. Redfield’s data comparisons do not adjust for stage. Instead, they ignore stage and implicitly attack the validity of the stage variable that they agreed would be a necessary element of the Interim Levels equation.

Dr. Goforth’s so-called correlation analysis is yet a third element in the State Parties’ collateral attack on the validity of the Appendix B equation, because it purports to find error in the equation, as evidenced by a purportedly low correlation between external loading and changes in interior

concentration. The relevance of this so-called correlation has been completely undermined by Dr. Goforth's own admission, in testimony before this Court in December 2004, see 12-13-2004 Tr. 157, that there is no quantifiable relationship between those variables. And it is unclear why the State Parties proffered such testimony, given that there is no evidence that the negotiators believed there was any simple linear relationship between external loads and interior concentrations.^{1/}

In the final analysis, the Special Master's conclusions about these impermissible collateral attacks on the Appendix B equation were right on target. Reduced to essentials, the State Parties' case for "error" amounts to an effort to undermine, attack, and ultimately to change the Interim Levels equation as a compliance standard, without seeking a Consent Decree modification. Their approach to "error" runs afoul on the well-established principle that the validity of provisions of a Consent Decree is not open to collateral attack in a proceeding, such as this, to enforce those provisions. See Harris v. City of Philadelphia, 47 F.3d 1333 (3rd Cir. 1995).

Aside from collateral attack vulnerabilities, the state parties' interpretation of error -- as encompassing Type I error in the Interim Levels equation -- is a patently unreasonable construction of "error" because it renders the Interim Levels compliance test meaningless and unenforceable. As the State Parties' approach to this case demonstrates (i.e., by their attempt to deduce putative causal effects of Type I error through nuanced and indirect inferences from inapposite statistical data), there is no way to demonstrate that the Appendix B equation has ever actually produced any Interim Level that, at a given stage, was lower than it should be due to a 10% risk of Type I error. As Dr. William Walker explained:

^{1/} To the contrary, it appears that the development of the Interim Levels equation was NOT predicated on any assumption by the Settling Parties that there was any quantifiable relationship between external loading and interior concentrations, even though a causal connection was presumed in requiring compliance with limits on interior Refuge concentration levels and the 85% load reduction obligation. That appears to be why the Settling Parties included Paragraph 11B of the Decree which requires the State Parties to take the lead on "key" research that would focus on

the development (including appropriate data collection) of models of phosphorus dynamics in the EPA. For example, one priority would be an understanding of the relationships between phosphorus input and water quality at the 14 interior marsh stations in the Refuge, including definition of the future role of recycling of previous excess phosphorus inputs.

CD at ¶ 11B. Indeed, it was the failure to conduct and complete such research before the 1999-2004 exceedances occurred that prompted the Master to conclude, correctly, that the State Parties "have too large a hurdle . . . to overcome in their efforts to produce 'substantial evidence' that the exceedance in question was due to 'error.'" Master's Report at 27.

If you're using the model that is basically used for compliance purposes where an agreement is made on the dataset and the model structure and the Type One error, then I would not include Type One error in the future as a factor. There's no way. The Type One error is really related to the random variability in the data that's captured in the residuals from the regression model. And in the future if you try to look at a data point, it's above the line, you say well, that's Type One error, that would have to be a random variation above the line, and there's no way of telling looking at one data point well, this is one of those 1 in 10 . . . events.

3/16/2006 Tr. 1876-77 (emphasis added).

The State Parties' Type I error defense also represents an attempt to retreat from their solemn commitment to achieve water quality consistent with the Interim Levels, despite the 10% rejection level in the equation.^{2/} As Dr. Walker testified:

[M]y understanding of the error in Appendix B is bad data, unrepresentative samples, because at the time of the Settlement Agreement we agreed on starting with a certain dataset, we looked at different structures of the model, we came up with a regression model, we fit the model and then we decided, well, what kind of maximum Type One error risk do we want to run at. And it was at 90 percent. And so that's it. And once you do that, you calculate a line. And that's the line, you agree to the line, you don't change the line. And in the future when you collect data you compare the data with the line. And if the data are above the line, then you apply the extraordinary -- or the error criterion. But, again, once the line is drawn Type One error no longer exists because you accepted the model.

^{2/} Contrary to suggestions made during the October 16, 2006 hearing by counsel for the State Parties and/or the Farm Interests, there is no agreement by the technical expert representing the federal parties that the Appendix B Interim Levels equation produces any risk of Type I error (much less the asserted 10% or 34% risk of false positives). U.S. expert, Dr. Walker, testified that other factors offset those considered by Dr. Marks in evaluating magnitude of Type I error risk associated with the interim levels." U.S. Exh. 89 at 14.

Indeed, Dr. Walker testified, see U.S. Exh. 57 at 5, 19-25, and the SFWMD's statistician, Dr. Marks, agreed, see 3-13-2006 Tr. 917-18, that the Appendix B equation has a very large risk of Type II error, i.e., a statistical error that produces Interim Levels that are too high such that the equation causes true exceedances to go undetected and unreported. Because of the very large potential for Type II error in the Appendix B model, due to changes in sampling methodology and differences in expected variances around the mean phosphorus values (1999-2004 geometric means values had lower variability than projected by the Appendix B formula), the Interim Levels numbers generated by the Appendix B equation would have been lower had the model been adjusted for these phenomena. The higher-than-necessary Interim Levels numbers caused by the Type II error in the Appendix B equation reduces the chance that the past exceedances were influenced by Type I error. This was explained in the U.S. October 12 Response to the State Parties' Objections, at 12.

Finally, alternative statistical comparisons of median values performed independently by both Dr. Marks (SFWMD's expert) and Dr. Walker (the U.S. expert) confirmed that the phosphorus concentration values in recent data are significantly higher than in the historical OFW data, and that the likelihood that the exceedances were statistical flukes (Type I errors) is negligible. See U.S. Exh. 89 at 15.

3/16/06 Tr. 1875-76.^{3/}

The State Parties' attempt to attribute "error" to the Appendix B equation itself violates the parol evidence rule. As shown above, the equation is clear and unambiguous: " $C = 11.9187 - .603261S + 1.372[7.5311 - .9247S + .02882758S^2]$ ", CD, Appx. B, at B-6, where the "interim levels represent the 10% rejection level of the observed 14 station interior marsh mean concentration at a given mean daily stage, adjusted to a baseline time period of June 1978 to June 1979." Id. at B-2. The State Parties' agreement to the equation's use of a 10% rejection level, which creates a potential for a maximum 10% risk of Type I false positives, is likewise clear and unambiguous. Parol evidence, i.e., extrinsic evidence in the form of testimony from statisticians to contradict clear and unambiguous language, cannot be used to create an ambiguity or to contradict otherwise plain and unambiguous language in Appendix B. Thus, in addition to upholding the Master's rulings concerning the State Parties' impermissible collateral attacks on the Consent Decree, the Court should find that the State Parties' Type I error testimony and exhibits separately violate the parol evidence rule. See Vencor Hospitals v. Blue Cross Blue Shield of Rhode Island, 284 F.3d 1174, 1179-80 (11th Cir.2002).^{4/}

^{3/} At page 5 of their response, the State Parties suggest that Dr. Walker made a prior inconsistent statement in a 2000 EPA publication, by there acknowledging that the Appendix B compliance test had a maximum 10% Type I error, and that "results of the test would be interpreted by a "scientific panel" in light of the inherent risk of Type I error." The document that the State Parties are quoting from is not in evidence, and the State Parties elected not to cross examine Dr. Walker about this year 2000 article. Whatever it may mean, it does not state that the TOC may excuse exceedances if it finds they are due to Type I error. The statement is consistent with a separate provision of Appendix B that a "panel of scientists," designated by the TOC, will "track and evaluate compliance with all aspects of state water quality standards including the phosphorus limits, concentration levels and criteria." See CD, Appendix B at B-5. It is also consistent with still another provision of Appendix B, which states that the scientific panel will be convened to evaluate potential causes if fewer than three sampling date geometric means collected within the past 12 consecutive sampling periods are below the mean interior marsh total phosphorus concentration level during the baseline period. See CD, Appendix B, at B-5 to B-6.

^{4/} If, perchance, the Court should find that the term "error" is ambiguous and that parol evidence is necessary to resolve whether Type I false positive rate was intended to be included among the species of error that could excuse exceedances, it should refer the matter back to the Special Master for a limited evidentiary hearing on the Settling Parties' intent with respect to this issue in their settlement negotiations. For example, the Tribe proffered evidence from Mark Maffei, a former Refuge official who participated in the settlement negotiations on behalf of the United States, and who submitted a declaration and expert report that was excluded by the Special Master solely on account of the Master's collateral attack rulings (rendering it moot for the purposes of the March 2006 hearings). Mr. Maffei's report directly and explicitly rebuts Dr. Mark's report about the purpose and function of the Appendix B model. See Tribe Exh. No. 337 at 4 (averring that the Appendix B "model was not developed to predict future marsh phosphorus concentrations, the model was developed in order to judge whether the marsh total phosphorus concentrations which
(continued...)

At pp. 11-12 of their Response, the State Parties take issue with the United States' judicial estoppel arguments, asserting that the doctrine does not bar the State Parties from asserting Type I error as a defense to exceedances. They suggest that because the DEP made statements in "administrative proceedings" that the Appendix B equation is a "reasonable surrogate" for satisfying the antidegradation requirement applicable to "Outstanding Florida Waters" (which applies to the Refuge), the State Parties cannot be estopped in judicial proceedings from denying it. Resp. at 12 n.2 (emphasis added). This argument is contradicted by the record. The State Parties are judicially estopped from denying that the Appendix B equation is a valid surrogate for OFW water quality, and that this is a valid defense to the Type I error claim, because the DEP made both of these representations to Judge Hoeveler in an opposition to the Farm Interests' effort to jettison the Interim levels when the Consent Decree was undergoing consensual modification during the 1995-1996 era.^{5/} See Docket Entry ["DE"] DE 1424, at 17-19. The DEP in January 1996 unequivocally represented to this Court that the Appendix B Interim Levels were a reasonable surrogate for OFW era water quality and that this DEP finding trumps the Farm Interests' argument that the Appendix B Interim Levels equation due to alleged 34% risk of falsely reporting exceedances. And if the Appendix B equation's status as a reasonable surrogate for OFW level water quality was a valid defense to the Farm Interests' Type I error attack on the Interim Levels formula, as the State Parties argued in 1996, then its status as "surrogate" for OFW era water quality water is still a valid defense to any attack on the Type I error component in Appendix B today, including the State Parties' own attack, and the State Parties are judicially estopped from denying it.^{6/}

^{4/}(...continued)

would be measured in the future were statistically different from those that existed during the Outstanding Florida Waters of base period 1978-1979 as described by the model.")

^{5/} In 1996, the Farm Interests raised challenges to Appendix B that were virtually identical to the Type I error rate and other bias challenges that the State Parties are now asserting. To overcome that challenge, the Florida DEP filed a post hearing brief in January 1996 in this case, see DE 1424, at 17-19, specifically opposing the Farm Interests' Type I error and bias challenges. The state parties argued in defense of of the Appendix B Interim Levels that they were a reasonable surrogate for the water quality needed to satisfy the antidegradation requirement that applies under state law to Outstanding Florida Waters such as the Refuge.

^{6/} At p. 12 of their response, the State Parties suggest that the United States has already effectively acknowledged that the State Parties are entitled to make statistical model-related challenges to exceedances of the Appendix B Interim Levels, and thereby presumably has waived judicial estoppel objections to such challenges, when in 1996 (before the Interim Levels became effective) the United States asked the Court to defer ruling on the Farm Interests' Type I error-
(continued...)

At pp. 7-8, the State Parties seek to find fault with Dr. Walker's testimony and exhibit (U.S. Exh. 119) demonstrating that there is, in his expert judgment, a causal association between positive hydraulic gradients from the rim canal and excursions above the Interim Levels. Dr. Walker demonstrated that in every instance of an excursion between 1999 and 2004, there was a positive hydraulic gradient from the rim canal to the interior marsh, causing waters from the rim canal to flow into the interior. U.S. Exh. 119. Correspondingly, there was no instance of an excursion during times of a negative hydraulic gradient, *i.e.*, when water is flowing from the interior toward the rim canal. *Id.* Dr. Walker also looked at operational changes the District had implemented during 2005, such as keeping stage in the Refuge lower through a change in the Refuge regulation schedule, and regulating increases in stage so that they were more gradual -- causing minimal hydraulic gradients. He regarded it as no coincidence that these changes in SFMWD operating procedures resulted in no excursions since May and June 2005. *See* 2006 Tr. 1710-1720; U.S. Exhs. 104, 119.^{7/}

The District faults Dr. Walker's testimony because it did not explain instances when there was a positive hydraulic gradient between the rim canal, yet no excursion occurred.^{8/} The State Parties

^{6/}(...continued)

related attack on the Decree. In the excerpt of the U.S. brief quoted by State Parties, the United States nowhere suggests that Type I error is a specie of error that could excuse exceedances. Instead, the United States was urging the Court to find that the matter was unripe, and that the Court should defer addressing the Farm Interests' argument that, in the event of any future exceedances, additional remedies should not be ordered in light of the Type I error risk. In these circumstances, the United States' argument went to the improper timing of that issue (lack of ripeness); it was not a concession that Type I error would be relevant to the propriety of ordering additional remedies. As explained at p.8 n.5, *supra*, the State Parties countered the Type I error argument raised by the Farm Interests more substantively by arguing to this Court on the merits that the Interim levels, 10% rejection level and all, constituted DEP's surrogate for OFW era water quality. DE 1424 at 17-19.

^{7/} The State Parties' attack on Dr. Walker's failure to quantify the degree of causal association between hydraulic gradients and excursions is undercut by admissions by SFWMD's own personnel. In January 2005, the SFWMD effectively conceded that there is a causal relationship between rim canal penetration events (positive hydraulic gradients) and adverse water quality impacts to the interior Refuge, when its Deputy Executive Director sent a letter to the Corps requesting a temporary deviation from the 1995 regulation schedule because deliveries of Lake Okeechobee water to replace Lake Worth water supply releases "may have unintended adverse consequences by contributing to the penetration of this water, containing phosphorus, into the interior marsh at stages above 14-14.5 feet." U.S. Exh. 120 at 1 (emphasis added).

^{8/} At pp. 10-11 of their Response, the State Parties cite the absence of any immediate excursion following the fall 2004 hurricanes as evidence undermining Dr. Walker's hydraulic gradient opinions. However, as Dr. Walker explained, during the 2004 hurricanes, there was a lot of rainfall in the center of the Refuge which would allow water in the interior to push back on water entering from the rim canal, diminishing the force of hydraulic gradients from the rim canal. *See* 3-15-2006 Tr. 1717.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **UNITED STATES' MEMORANDUM IN REPLY TO THE STATE PARTIES' RESPONSE TO THE UNITED STATES' MOTION TO ADOPT THE SPECIAL MASTER'S REPORT IN PART** was served by first-class mail on this 19th day of October, 2006 upon the following:

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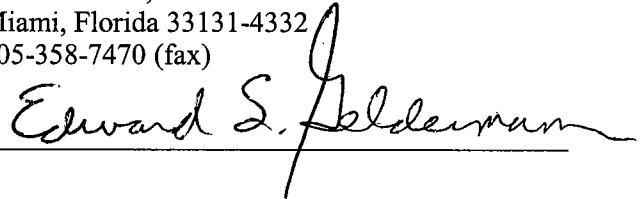
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