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Dear Mr. Armstrong:

Subject: DEP File Number FL0002526-001-003 IWIS, International Paper Company, Escambia County

We offer the following comments on the draft NPDES permit, draft consent order, draft waiver of wetlands rules, draft NSAI monitoring plans and draft contingency plans and associated materials for International Paper Company's Cantonment facility in Escambia County, FL. The applicant is Ms. Nikki Slusser, Mill Manager, P.O. Box 87, Cantonment, FL 32533-0087. Names and addresses of commenters appear at the end of this document.

1. *Absence of "Reasonable assurance" and failure to meet antidegradation, TMDL and antibacksliding requirements:* An NPDES permit can be granted only if it will provide reasonable assurance of compliance with applicable water quality standards in the receiving water body. IP's draft permit and accompanying documents fail to provide such assurance.

The Notice of Draft Permit states, "The Department has determined that the applicant has provided reasonable assurance that the... system [for waste disposal] complies with" 403.088(2)(e) and (f) F.S., and Chapters 62-620, 62-660 and 62-522 F.A.C.

But reasonable assurance that a facility "complies with 403.088(2)(e) and (f)" is in effect reasonable assurance that a facility *cannot and will not meet water quality standards – and that it must continue to pollute the waters of the state*. This is not the statutory CWA standard for reasonable assurance of compliance with water quality standards.

Nor do the permit, accompanying draft C.O. and other documents satisfy the requirements of other aspects of either Florida clean water law or the Clean Water Act, such as anti-backsliding and wetlands protection provisions. Unless key components of it are revised, the permit must be denied by FDEP. And EPA has an independent duty to veto the permit if it is submitted for federal review and approval in its current form.

The proposed discharge of paper mill and (theoretically) sewage treatment plant wastes into Tee and Wicker Lakes and thence Perdido Bay would result in further deterioration of water quality in Perdido Bay, which is already 303(d) listed as impaired both by Florida and by EPA. It would also result in a reduction in water quality in Tee and Wicker Lakes. Both of these water quality reductions would violate the Clean Water Act's antidegradation requirements.

2. *Irrelevance of “net environmental benefit:”* The fact that another water body, i.e., Eleven Mile Creek, might experience *some* improvement in its current degraded condition does not make lawful the relocation of the facility’s pollution problem to a new water body. We reject DEP’s practice of invoking an illegal and non statutory ‘net environmental benefit’ standard to justify issuance of an NPDES permit simply by relocating an ongoing pollution problem from one water body to another. Even if granting this draft permit would result in some improvement in one receiving water body, and less-than-would-otherwise-be-the-case deterioration in another water body, it will not satisfy CWA or F.S. requirements unless it affords reasonable assurance of *compliance with WQS*. “Net environmental benefit” is a nice-sounding phrase but it lacks legal significance; it is not equivalent to reasonable assurance of water quality standards compliance.

3. *Flaws in Sec. 404 Permit must be addressed:* The construction and installation of the proposed effluent pipeline system requires a CWA sec. 404 wetlands destruction permit, which means that the proposed activity must satisfy not only the NPDES permitting requirements but also the requirements of the 404(b)(1) guidelines of the CWA. In effect, there must be no feasible alternative to the pipeline for section 404(b)(1) to be satisfied. The IP proposal package fails to make that case because it does not fully explore alternatives.

In addition, the proposed discharge of an average 8000 lbs/day and a daily maximum of 16,000 lbs a day of total suspended solids (TSS) into the jurisdictional wetlands will result in artificial filling of the wetland over time. (The permit does *not* provide for periodic solids removal from the wetlands, even though treatment ponds currently used for effluent generally require periodic cleaning.) The current plan for the discharge of fill material throughout the affected acres may therefore be covered by Chapter 62-312 F.S., dredging and filling of wetlands.

The 402 and 404 permitting procedures should be undertaken hand in hand, and if the facility cannot satisfy requirements of either one or the other, then work should be halted on both -- and both permits should be denied.

4. *Improper Disregard for Past Violations:* Apart from the significant potential water quality impacts to Perdido Bay and Tee and Wicker Lakes, and the potential for negative consequences to Elevenmile Creek of being de-watered for many months of the year, the draft permit plus draft Consent Order would paper over -- and even reward -- long-standing violations of earlier permits and orders, and earlier demands for mitigation of water quality impacts caused by the facility.

In 1989, FDEP issued Champion (previous owner and operator of the facility) a five year state wastewater Temporary Operating Permit (“TOP”) accompanied by a Final Order that expressly stated: “After the studies referred to in the Consent Order [entered “in conjunction with temporary operating permit IT17-156163,”], the Department will not allow Champion additional time to study problems further. Significant improvements will be required within the five year period and at the end of that period the plant *will be*

in compliance with all water quality standards or will be denied an operating permit, with related enforcement action.”

Yet, today the facility continues to be in violation of its permit limits and is not being denied an operating permit, *and* DEP’s draft Consent Order not only fails to impose any sanctions for past and continued violations, it absolves the facility from *all* past harms and violations, in effect rewarding the mill for not obeying the previous permit, Consent Order or Hearing Officer’s Final Order.

5. *There are continuous violations of the administratively continued NPDES permit, which should trigger permit denial or, at the very least, meaningful sanctions and strict timelines for compliance under Florida’s own policies:* Assuming for the moment that the expired 1983 NPDES permit has been validly administratively continued (so that its limits still apply), International Paper’s current discharge routinely violates the limits in that permit. IP cannot currently attain compliance with these limits. The draft C.O. and draft permit admit as much.

The problem with the draft permit and draft C.O. is that they fail to address this long term, nearly continuous, non compliance. The draft permit does not comply with CWA requirements for limits on future schedules of compliance, and the draft C.O. does not comply with Florida’s own policies respecting treatment of facilities that are in violation of NPDES permit limitations at the time when they seek new or renewed permits.

Florida DEP acknowledges that “Since the Department received delegation of the NPDES Program on May 1, 1995, Temporary Operation Permits (TOPs) are no longer an option for facilities that cannot qualify for a wastewater permit.”

DEP thinks that it can issue a permit for a discharger who is unable to meet the requirements of the Clean Water Act by invoking Chapter 403.088(2)(e) F.S., as its substitute for the now-outlawed Temporary Operating Permit.

But 403.088.(2)(e) F.S. cannot be read to authorize issuance of a permit that violates the clear language of the Clean Water Act, which requires that no permit be issued unless “such discharge will meet . . . all applicable requirements under sections 301, 302, 306, 307, 308 and 403” of the CWA. CWA Sec. 402(a)(1). States like Florida that administer NPDES programs must “issue permits which both “apply, and ensure compliance with, any applicable requirements of sections 301, 302, 306, 307 and 403” of the CWA, and “are for fixed terms not exceeding five years.” CWA Sec. 402(b)(1)(A) and (B).

It is clear Florida cannot issue permits that do not assure compliance with water quality standards, and/or that exceed five years’ duration. Nor can Florida issue an NPES permit that insures water quality standards only sometime *after* five years have elapsed, as it purports to do with this draft permit – plus – C.O. based upon a timeline for attaining compliance with permit limits more than five years after issuance of the permit. A permit containing limits that would have no effect for the entire duration of its five year term is like a contract with no consideration, and therefore null.

If 403.088(2)(e) and (f) F.S. is invoked in this fashion, it effectively re-establishes Temporary Operation Permits with a new label. That clearly violates the NPDES permitting program's requirements, and EPA must veto it.

Moreover, even if Florida somehow could issue a TOP to IP under the guise of Sec. 403.088(2)(e) and (f) F.S., the draft permit-plus-C.O. presented here *does not conform to the state's own guidance on the appropriate use of administrative and consent orders.*

Under Florida's policy for the use of Administrative Orders and Consent Orders, which was adopted in order to bring the state into conformity with EPA's requirements for a delegated NPDES program, a facility that is not in compliance with a current permit cannot simply be issued a new permit with an Administrative Order as a means for resolving compliance concerns. "Some type of enforcement action will be necessary to bring the facility back into compliance."

This policy specifies that, when a "facility is not in compliance with its current permit or has no current permit, and will be unable to meet one or more conditions or effluent limits of the new permit", "any action taken to resolve this situation is an enforcement action and must be tracked as such, even when there are no penalties." Florida's policy recommends that "First, staff should negotiate a CO that contains a compliance schedule (include all necessary permitting milestones in addition to corrective actions) with the interim conditions and effluent limits (if needed). Then issue the permit with the final conditions and effluent limits. The permit must reference the CO."

The draft permit does not actually reference the Consent Order (although its "fact sheet" does, so it's not as if DEP doesn't know how.) The draft permit refers to the C.O. only as follows: "This permit is accompanied by an Order pursuant to paragraphs 403.088(2)(e) and (f), which establishes interim limits and a compliance schedule." The likely reason for the permit's failure *properly* to reference and incorporate the Consent Order is Florida's awareness that by doing so it would be issuing an NPDES permit with an effective duration of greater than five years.

The draft permit's 'reference' to the C.O. is as deceptive as it is ineffectual. First, 403.088 (2) (e)(and (f) authorizes the use of mere Administrative Orders (AO's), which are *not* deemed enforcement actions. The draft permit's vague mention of 403.088(2)(e) and (f) does not reveal that this facility is *in violation of its previous permit and subject to an ongoing enforcement action.* Second, the permit attaches and lists a number of accompanying documents, yet it *omits to list and attach the Consent Order.* Thus, the C.O.'s 'reference' in the permit is without predicate. DEP's permit files will contain no record of an enforcement action and, like the previous C.O., this one stands little or no chance of being enforced. Nor does the permit plus Consent Order show any sign of *being tracked as an enforcement action*, despite the requirement in Florida's enforcement policy that such tracking occur.

Still more troubling, the draft C.O. on its face does not provide reasonable assurance that the discharge will attain compliance with water quality standards *even after nine years have passed.* It contains several 'escape clauses' that would authorize I.P. to continue to

violate WQS.

For example, the draft C.O. opens the door to submittal by the IP of a “petition requesting the department approve a moderating provision for transparency” nine months after permit and C.O. issuance. The nature of this ‘moderating provision’ is unstated. This has the earmarks of a back-door variance for transparency that would be agreed to between DEP and the permittee without public notice and hearing.

[Note: If a variance is needed and anticipated, then the variance (or SSAC) must be in place before a permit can be granted – or, at the very least, concurrent with the permit. The procedure hinted at in the draft C.O. violates both public participation requirements *and* water quality requirements!]

More broadly, the draft C.O. authorizes I.P. to take *nine years* to complete its wastewater improvement project and attain compliance with permit limits. (Paragraph 11(j) says, “Within 108 months of the effective date of this Consent Order, the Respondent shall comply with all applicable water quality standards which may include any alternative water quality standards established pursuant to paragraph 11(h)”.) (The draft C.O. also gives IP another six months of wiggle room if ECUA backs out of its agreement (as it has already done); see paragraph 11(d)).

NPDES permits cannot exceed five years. *How can a C.O. purport to assure compliance with a permit that will have ceased to exist nearly five years before its limits become enforceable?*

The farcical nature of this “enforcement action” goes even deeper than the schedule cited above. Florida policy states that “This type of CO issued as part of a permitting action is technically an enforcement action and must be developed and tracked jointly by the compliance/enforcement staff and the permitting staff.... Civil and/or stipulated penalties and Department costs should be included if appropriate.” But Florida’s actions in this case also flout the penalty policy. The C.O. actually *absolves I.P. of all previous violations and obligations under earlier consent orders, and imposes no penalties of any kind, substituting all-encompassing absolution for actual punishment.*

Paragraph 26 of the C.O provides that “The Department, for and in consideration of the complete and timely performance by the respondent of the obligations agreed to in this Consent Order, hereby waives its right to seek judicial imposition of damages or civil penalties for alleged violations through the date of the filing of this Consent Order as addressed in this Consent Order.”

In other words, DEP is *prospectively* assuming complete compliance with the Consent Order – and, in exchange, is forgiving any and all past penalties. This despite the fact that, following the previous C.O., no compliance was achieved over a period of nearly fifteen years!

The icing on this cake: the draft C.O. provides for stipulated penalties for IP, the world’s largest pulp and paper industry giant, of \$500.00 per violation. (Draft C.O. at paragraph

20.) That stipulated penalty equals one fiftieth of the legal limit in daily civil penalties under the Clean Water Act. Why on earth should DEP bind itself to a \$500/day penalty, which is little more than a parking ticket? This penalty would be far cheaper to pay than it would be for IP to attain compliance. It is, in effect, an incentive to violate permit limits rather than a deterrent to non-compliance. It is for this reason, as well as fundamental fairness, that EPA's civil penalty policy requires that CWA civil penalties re-coup the economic benefits of non-compliance.

Back in 1989 when this permittee's earlier Consent Order was written, it specified that "a violation of the terms of th[e] Consent Order may subject [the permittee] to judicial imposition of damages, civil penalties of up to \$10,000 per offense and criminal penalties." After an additional fifteen years of non-compliance, the threatened penalties have shrunk to one twentieth their previous size! (Of course, no enforcement action was taken in the interim except by the Natural Resources Defense Council.)

6. *Improper use of Federal Funds should be scrutinized before this permit becomes final:* The draft permit and C.O are framed as if there were a realistic prospect that ECUA would have a functional POTW operating as a partner in utilizing the proposed pipeline, even though ECUA has no intention of building such a facility. In December 2003 the ECUA Board voted to scrap construction of a POTW on this site, which ECUA deems the "Central County Facility", and seek a site "within the industrial zoned land area – centrally located in the northeast section of the county." (See attachment two, minutes of ECUA December 18, 2003 Board Meeting, at p. 13.)

The continued inclusion of ECUA in this overall proposal has achieved its most important purpose from IP's and DEP's standpoint: it gave International Paper access to tens of millions of dollars in no-interest SRF loan funds to construct the 'shared' effluent pipeline (which only IP is likely ever to use).

This inappropriate expenditure of federally-backed revolving loan funds, when the public 'partner' is clearly not a part of the deal, merits careful scrutiny by EPA. The fact that former DEP Secretary David Struhs moved from DEP to a high-ranking position at International Paper Company in the middle of negotiations to finalize the discharge permit and the SRF loan raises, at a minimum, the strong appearance of impropriety.

Even if ECUA still *desired* to construct and operate a POTW on the proposed site and to discharge to Perdido Bay, ECUA could not obtain a valid NPDES permit. ECUA's effluent would constitute a new discharge of nutrients to a 303(d)-listed, nutrient-impaired waterway. Such a discharge is not legal under the Clean Water Act or Florida law.

7. *The wetlands public access waiver constitutes and improper conveyance of State Submerged Lands into Private Ownership and/or Control:* The permitting documents ignore, and perhaps facilitate through legal sleight of hand, the transfer from public ownership into private control of two beloved Florida public lakes that would be on the receiving end of 17 MGD of paper mill wastes (and theoretically another 5 MGD of treated sewage effluent). This is a 'deal' that Floridians would never accept if they

understood it, and that federal and state regulators should also reject.

The permit applicant seeks a waiver, under 120.542 F.S., from the requirements of 660.300(1)(a)(3) and (4), which would otherwise require that any wetlands used for a wastewater treatment experiment be restricted from the public, and that they not be used for recreation. See OGC File No. 04-0730.

Waivers from these restrictions would be *ultra vires* and cannot be granted to the applicant. In order for an applicant to seek a waiver so that it can open an otherwise restricted area to public use, *first the applicant would have to possess the right to restrict such access*. Tee and Wicker Lakes are public, and belong to the state of Florida and its citizens. They are not under the ownership or control of IP. IP currently has no ownership rights. Since IP has no basis for asserting control over access to the lakes, it cannot either authorize or prevent access and it cannot authorize or restrict recreation. Nor can the State, through granting of the waiver, create such ownership rights (or waive such ownership obligations) for IP.

8. *Inadequate assurance of health protection for those who use the lakes*: Beyond the invalidity of the state's waiver, the 'evidence' cited regarding the safety of recreation in and on the water is very shaky. Although IP makes assertions with respect to the anticipated impacts of the effluent on aquatic life protection and the in situ biological community, the permit-writers are aware that this is an experiment, and have established a detailed ongoing monitoring program to evaluate whether the biological community is affected by exposure to the effluent.

IP has not offered any affirmative evidence that public health will be protected should the water's other uses – namely, fishing and contact or non-contact recreation -- occur in the lakes. Nor has it evaluated the impact on human health from consumption of fish caught in these waters, once the treated industrial effluent is present in high concentrations. Follow up research on human health impacts is not even planned. This deficiency needs to be addressed.

9. *Ineffectual and Inadequate Contingency Plan in Event of Failed Wetlands Experiment renders the permit package unacceptable*: All are aware that the experimental wetland may not work to attain the anticipated treatment and pollution attenuation, and that significant harm may result to the wetlands and to Tee and Wicker Lakes if this experiment fails. The draft permit and accompanying documents contain a contingency plan, indicating what IP will do in the event that the "No Significant Adverse Impact" analysis determines that there is, in fact, a significant adverse impact.

The problem is that this contingency plan, intended to remove or reduce the discharge of contaminants harming the wetlands and Tee and Wicker Lakes, is to move the discharge back into Elevenmile Creek. This is a plan that *IP's own research has already concluded would be environmentally unacceptable to Eleven Mile Creek*. The contingency plan in its own words admits that re-locating more of the discharge back to Elevenmile creek "may not meet some water quality standards" and "increases dredge and fill impacts." In other words, the contingency plan is not permit-able under section 402 or 404 of the CWA, and

therefore is not realistically available to IP. The contingency plans are fig leaves, not a real plans. If the experiment fails, we are back at square one.

A *meaningful* contingency plan would include the technologically more advanced in-mill changes assessed and deemed feasible and economically achievable by Dr. Norman Liebergott, the pulp and paper expert that NRDC and the Clean Water Network retained to assess IP's alternatives. A copy of analysis is attached to these comments and incorporated by reference.

The alternatives identified by Dr. Lieberman include increased pollutant removals, such as wastewater recycling and conductivity removal, which would, among other things, (a) reduce water consumption (improving the flow in Eleven Mile Creek by reducing the extent of the cone of depression caused by IP's groundwater withdrawals), and (b) reduce the volume of wastewater requiring AWT, thereby making longer wastewater residence times and lower nutrient additions feasible.

Other consultants whose advice IP rejected as too costly advised the acquisition and use of increased acres of land for wetlands treatment; still others have advocated upland land application of effluent on protected forested acres.

These sorts of alternatives would provide true contingency plans for the mill's effluent if this large-scale wetlands treatment experiment fails. DEP and EPA should not countenance a "duck and cover" contingency plan which really offers the mill and the community no alternative.

10. *Ineligibility of IP for an NPDES permit with schedule of compliance for a new discharge to the impaired waters of the Bay:* The federal rules define a "new discharger" as "any building, structure, facility or installation from which there is or may be a 'discharge of pollutants': (b) that did not commence the 'discharge of pollutants' ... prior to August 13, 1979; (c) which is not a 'new source,' and (d) which has never received a finally effective NPDES permit for discharges at that 'site.'" 40 C.F.R. 122.2; see 62-620.200(28) F.A.C.

Assuming IP's expired permit was administratively continued, this draft permit clearly is for a new rather than a continuing discharge, given the re-location to a new water body and the fact that IP has never received a finally effective permit to discharge at the proposed new site. Thus, IP proposes to become a *new discharger* to Perdido Bay.

A new discharge is subject to several limitations, including an absolute limit on the use of schedules of compliance greater than three years: "The first NPDES permit issued to a new source or new discharger shall contain a schedule of compliance *only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised after commencement of construction but less than three years before commencement of the relevant discharge.*" 40 CFR 122.47(a)(2). For a discharge like IP's, no schedule of compliance would be authorized, since neither the applicable water quality standards nor the technology based effluent limits of the Cluster Rule were issued or revised after commencement of construction but before discharge. Thus, IP's new

discharge *does not qualify for any schedule of compliance* under federal constraints. (And even if IP were eligible for the three year exception cited above, the draft C.O. schedule is three times as long.)

11. *No new discharge of pollutants of concern to an impaired water is permissible:* Even if the IP discharge could survive the prohibition on schedules of compliance for existing and most new dischargers, it cannot survive the prohibition on new or expanded discharges of the pollutants of concern to impaired waters.

The listing of Perdido Bay as impaired for nutrients makes it evident that there is no assimilative capacity for nutrients in these waters. Therefore, particularly in the absence of a TMDL, no new discharge of nutrients can be allowed. As DEP is aware:

The Department finds that excessive nutrients (total nitrogen and total phosphorus) constitute one of the most severe water quality problems facing the State. It shall be the Department's policy to limit the introduction of man-induced nutrients into waters of the State. *Particular consideration shall be given to the protection from further nutrient enrichment of waters which are presently high in nutrient concentrations or sensitive to further nutrient concentrations and sensitive to further nutrient loadings. ...*

62-302.300(13), F.A.C. (emphasis supplied).

The discharge of nutrients is governed by 62-302.530(48)(a) and (b), F.A.C., which state that:

(a) The discharge of nutrients shall continue to be limited as needed to prevent violations of other standards contained in this chapter. Man-induced nutrient enrichment (total nitrogen or total phosphorus) shall be considered degradation in relation to the provision of Sections 62-302.300, 62-302.700, and 62-4.242, F.A.C.

(b) In no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora or fauna.

IP wants to relocate an existing, nutrient-laden discharge from one site (Elevenmile Creek) into another (Tee and Wicker Lakes and Perdido Bay) Both water bodies are at risk from nutrient over enrichment. While the reductions in nutrient loadings that IP's plant improvements will achieve are steps in the right direction, the discharge will remain a significant source of man-induced nutrients reaching the Lakes and Bay, causing "degradation" as defined above.

12. *IP is Ineligible for a permit renewal that contains a schedule of compliance:* If IP wishes to regard this application as one for renewal of a permit for an ongoing discharge, then the permit fails for a different reason. DEP is obligated to ensure that NPDES permits comply with minimum requirements of both Federal and Florida law. 403.0885

(2) Fla. Stat. The program is to be administered “in accordance with 40 C.F.R. Part 123.”
403.0885(2) Fla. Stat.

While the Clean Water Act and the M.O.U. pursuant to which Florida has agreed to administer the NPDES program authorize the State to make use of schedules of compliance in certain limited circumstances, those circumstances are constrained by 40 C.F.R., Part 123, with which DEP has agreed to comply.

The federal rules *do not allow for any schedules of compliance for permits issued to continuing discharges*. (Under the CWA, even new dischargers are limited to a three years’ maximum schedule of compliance, and no *continuing* discharger could qualify for a schedule of compliance since the CWA presumes that, by the end of any full permit term, a continuing discharger seeking permit renewal will have attained compliance). Thus, the continued discharge into Elevenmile Creek in violation of applicable water quality standards is illegal and cannot be saved through use of a CO with a schedule of compliance – particularly one that (a) is nine and a half years long; (b) does not assure compliance with water quality standards; (c) absolves all past violations without any penalties, and (d) does not mandate compliance with water quality standards for numerous parameters during the entire permit term.

13. *Significant Flaws in ‘Experimental Wetlands Distribution System proposal:*
There are several illegal components to the ‘experimental wetlands permit’ that is at the heart of this permitting package:

‘Exemptions’ from WQC: 62-660.300 F.A.C., the provision establishing the experimental wetlands program, purports to authorize a discharger to obtain an exemption from otherwise applicable water quality criteria for a period of five years. This provision of state rules on its face violates the CWA, by ‘authorizing’ exemptions from applicable water quality standards. It cannot form the basis of a lawful NPDES permit.

Perhaps in an effort to paper over this impermissible provision, the draft ‘authorization of exemption’ that accompanies the draft permit is framed somewhat differently from the Florida rules, and refers instead to ‘alternative’ WQC rather than to exemptions from WQC. It makes mention of submittal of proposed ‘alternative criteria’ to EPA for review and approval.

But the Florida *law* says no such thing. It claims to do that which cannot be done: (1) to exempt a discharge from WQC, and (2) to extend an ‘alternate’ WQC for longer than the period of triennial review required for all WQC.

If a rationale exists for establishing site specific alternative criteria, then the state and the discharger need to go through the procedure for review and approval of SSAC, which is authorized by the CWA and state rules. Unlike the procedure outlined in 62-660.300, *the SSAC are subject to public comment and to EPA review and approval*. The experimental wetlands criteria approach spelled out here attempts to circumvent both timely EPA review and approval and public review, comment and an opportunity to challenge the

criteria.

Also, in valid site specific WQC situations, such criteria are adopted and EPA-approved *before* a discharge may commence. First you show an alternate standard is warranted, and only then do you qualify for a permit. (This is precisely the approach to SSAC-issuance that BKI attempted, and the federal government rebuffed, in 1998.)

It would appear that DEP and IP are seeking to disguise the incompatibility of 62-660.300 with the Clean Water Act by claiming that “this [experimental wetlands] authorization does not include an exemption from water quality standards since the facility’s discharge must comply with the interim limits in Table 3 of Paragraph 16 of the Consent Order.” (Fact Sheet at Page 13.) But the attempt must fail. The “interim limits” in the C.O. *are themselves illegal substitutes for applicable water quality standards*, intended to use a C.O. issued pursuant to another section of Florida law inconsistent with the CWA (403.088(2)(e) and (f)) which purports to allow permits that violate water quality standards to be issued. This ‘double bootstrap’ maneuver must fail.

For example, with respect to dissolved oxygen (D.O.) the applicable Florida WQC requires D.O. levels of 5.0 mg/l at all times. The “interim limit” in the C.O. says “Levels of dissolved oxygen including daily and seasonal fluctuations shall be maintained to sustain a healthy biological community within the wetland. In addition, Tee and Wicker Lakes are to maintain their existing and designated uses, as demonstrated by baseline monitoring, such that dissolved oxygen levels are not significantly decreased below background.”

This formulation is a definition of D.O. *that has no relationship to the bright line WQC of 5.0 mg/l D.O. in the F.A.C.* It contains so much wiggle room that it is impossible to say what D.O. levels in the wetland or in the Lakes would be considered compliant with WQC. What is a ‘significant decrease below background’? Dead fish floating on the surface? This is an attempt to create a new WQC without following the requirements of Florida law for an SSAC, a variance or a revised WQC based on new information. It is illegal.

Inapplicability of experimental wetlands exemption to freshwater wetlands: Even if the experimental wetlands provision were legal under sec. 303(c)-(e) of the Clean Water Act, 62-660.300(1), F.A.C., applies to freshwater wetlands (potentially potable water) only. Since no experimental wetlands usage provision exists in Florida law for estuarine or marine wetlands, the project is not eligible for experimental wetlands usage – and hence not eligible for the waiver from requirements of 62-660.300(a)(1)(4) and (5).

Double- Bootstrapping of wetlands exemptions and 403.088(2)(e): The Draft Final Order granting IP’s petition for a waiver under section 120.542 F.S. asserts disingenuously, “Sections 403.087 and 403.088, F.S., contain comprehensive requirements to ensure that the discharge of treated industrial wastewater *will not impair the designated uses of receiving water bodies*. International Paper has demonstrated...that the proposed discharge into the wetlands will not impair the designated and existing uses of contiguous waters.” *In fact*, the permit is crafted to comply with 403.088(2)(e) and (f),

provisions of the statute which cast aside the CWA requirement that a permit ensure that water quality standards be attained. On this shaky house of cards, the DEP would authorize continued public recreation on public lakes that have been converted into private wastewater treatment ponds.

14. *The Draft Permit would improperly authorize increases in production:* The draft permit states that the facility produces 1650 ADMT. In contrast, the expired was based on a production level of 1500 adm. Authorizing an increase in production when the facility remains in violation of its previous permit's limits and Consent Order, is illegal under the terms of the Final Order that accompanied the earlier permit. Moreover, the increased production signals an expanded discharge, which is not permissible to an impaired water in the absence of a wasteload allocation that attains commensurate decreases in pollution from other sources.

15. *Absence of Flow Limits in Draft Permit:* The permit calls only for reporting on flow and contains no flow limits. Why? The wetlands system has a design capacity which can be expected to remain functional as a treatment system only if flow limits are observed. The wetland will not do its job if water depths are exceeded. "Report only" is not acceptable. Permit limits for flow need to be specified because a part of the problem with this facility is the overloading of Tee and Wicker Lakes with more effluent than they can assimilate.

16. *Proposed increases in BOD Limits constitute an antibacksliding violation:* The draft permit's daily max for BOD5 rises -- from 7,650 lbs/day (year round) under the old permit, to 9,000 lbs/day May-Oct and 10,200 lbs/day November to April, in the new draft. This is a clear violation of the antibacksliding requirements of the Clean Water Act.

Under Section 402(o) of the CWA and 40 CFR 122.44(i), establishment of less stringent (i.e., backsliding) effluent limits may be allowed where:

- (1) There have been material and substantial alternations or additions to the permitted facility which justify this relaxation.
- (2) New information (other than revised regulations, guidance, or test methods) is available that was not available at the time of permit issuance which would have justified a less stringent effluent limitation.
- (3) Technical mistakes or mistaken interpretations of the law were made in issuing the permit under Section 402(a)(1)(b). [not applicable to WQBELs]
- (4) Good cause exists due to events beyond the permittee's control (e.g., acts of God) and for which there is no reasonably available remedy.
- (5) The permit has been modified under 40 CFR §122.62, or a variance has been granted. [Not applicable to WQBELs]
- (6) The permittee has installed and properly operated and maintained required treatment facilities but still has been unable to meet the permit limitations (relaxation may only be allowed to the treatment levels actually achieved).

None of these exceptions justifies backsliding in this case. The permit fact sheet says that backsliding for IP is “justified by the installation and normal operation of a modified return activated sludge WWTP that is designed to nitrify ammonia and limit nutrients.” Draft Permit Fact Sheet at page 14. However, there is no logical rationale to authorize *less stringent* permit limits based upon the installation of technology which should be *improving – not lessening* - the quality of the effluent to be discharged.

Moreover, section 402(o)(3) prohibits the relaxation of effluent limitations in all cases if a revised effluent limitation would result in a violation of applicable water quality standards, including antidegradation requirements. Thus, even if any of the backsliding exceptions outlined in either the statute or regulations were applicable, Section 402(o)(3) acts as a floor and restricts the extent to which effluent limitations may be relaxed. This requirement affirms existing provisions of the CWA that require permit limits, standards, and conditions to ensure compliance with applicable technology-based limits and water quality standards.

Since the discharge of increased loadings of BOD to a water body that is listed as nutrient impaired and low-DO will result in further impairment, under no circumstances could backsliding be authorized under 402(o)(3).

17. *Phosphorus limits should be more stringent:* IP’s currently reported total phosphorus discharges are 80 lbs/day long term average, 115 lbs/day maximum 30 day average, and 201 lbs/day daily maximum. The draft permit proposes a 184 lbs/day “monthly daily average,” subtracting 41 lbs/day if ECUA is discharging. (Draft Permit at p. 5, paragraph. 1.A.7.

Despite IP’s claims that the new experimental wetland treatment system will improve nutrient controls, the proposed permit limit would actually represent a significant increase over current discharge levels for total phosphorus. Thus, it would violate antibracksliding provisions. Where current performance exceeds the calculus of the WQBEL, then current performance should determine the maximum permit limit – particularly where the water body is impaired!

Nor should the hypothetical ECUA contribution of phosphorus or other pollutants be allocated to IP. The objective is to avoid all avoidable increases in nutrient loadings to impaired waters, not to maximize IP’s wiggle room under its permit. Particularly since it is clear that ECUA will not ‘claim’ its allocation, the fiction that their loadings will one day be re-allocated should be dispensed with before any permit is written.

If IP is given the ECUA ‘allocation’ of pollutants, it would also violate antidegradation requirements, which state that any lowering of water quality is illegal in Tier 1 waters or, if there remains any assimilative capacity, then 40 CFR 131.12 says “ In allowing ... lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved *the highest statutory and regulatory requirements* for all new and existing point sources” (in tier 2 waters). If higher levels of nutrient control can be attained, IP must attain them.

18. *Nitrate/Nitrite, TKN, Total Nitrogen and Total Ammonia:* The draft permit sets the limit based upon what they characterize as Dr. Livingston's finding that the loadings in 1989-91 were "not harmful to the biology of the Bay." The relocation of the discharge, directly into the Bay and into Tee and Wicker Lakes, differs from the loadings at that time originating in Elevenmile Creek. It is appropriate to build into this proposed discharge a maximum feasible buffer in limiting nutrient discharges directly to the Bay. The draft permit inappropriately authorizes IP to discharge an unnecessary 130 lbs/day that would otherwise be allocated to the ECUA facility (if it were to be built); this buffer should be eliminated from the IP permit limit. As with the phosphorus limit, it violates antidegradation requirements.

It is particularly important to limit IP's N and P discharges to the greatest extent attainable in order to keep open the feasibility of implementing contingency plans if the "NSAP" analyses demonstrate that the lakes and wetlands are adversely impacted by the effluent. Elevenmile Creek is highly sensitive to nutrients and, according to Dr. Livingston, any nutrient discharges to the creek (even its lower reaches) would be reduced by one to two orders of magnitude in order to avoid re-stimulating HAB blooms. Therefore, allowing IP to discharge an additional 130 lbs/day should not be permitted.

19. *Continued Color controls should be enforceable in the permit:* IP's continued use of its highly effective color removal technique should be mandated as an enforceable BMP in the permit, as should a numeric set of limits based upon current BPJ performance.

20. *Dissolved Oxygen compliance should be assessed in the receiving waters:* DO should be monitored in the true receiving waters from the effluent discharges and not at the end of the pipe before it enters the experimental wetlands. The 5.0 minimum DO level will be temporarily elevated using passive aeration at the end of the pipe. But the effluent passing through the wetland is going to exert its effect on DO levels in the ultimate receiving waters in Tee and Wicker and beyond. Particularly since COD is high in pulp mill wastes, and exerts its effects over a longer time period than BOD, measuring only at the aeration pipe renders falsely positive results. Attainment of DO levels required by WQS in the lakes and bay should be the measure of compliance, and conversely a failure to attain WQC should trigger contingency plans.

21. *Monitoring for compliance with metals limits should be more frequent:* IP claims its metals dischargers are at or below WQC, but the permit requires only one annual monitoring event, based allegedly on consistent compliance. Our research found less than perfect compliance. Metals monitoring is inexpensive and routine. It should be performed a minimum of quarterly, so that meaningful compliance assessment can be made and appropriate sanctions can be imposed as appropriate .

Conclusion

Thank you for the opportunity to comment.

Sincerely,

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Attachments:

1. "A Short Evaluation of the Operation of the International Paper Co. Mill in Cantonment, Florida," Norman Liebergott, PhD., Scientific Bleaching Consultant (April 28, 2002).
2. "Minutes of the Escambia County Utilities Authority board Meeting held Thursday, December 18, 2003 at 3:00 PM in the ECUA Board Room at 9250 Hamman Street, Ellyson Industrial Park, Pensacola, FL." (In which ECUA Board votes to proceed with identifying a suitable alternative site for the ECUA Main Street POTW and include in the budget the loan funds previously targeted for the "Central County facility" (i.e., the one located on IP land).)
3. Memorandum to District Water Facilities Administrators and District Wastewater Program Managers, From Mimi Drew, Director, Division of Water Facilities: "Guidance on the Appropriate Use of Administrative Orders and Consent Orders in Permitting Actions" (May 13, 1996)