

BEFORE THE STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In re: Everglades National Park
40001 State Road 9336
Homestead, FL 33034

OGC Case No. 19-1517

Petition for Variance from
Provisions of Rule 62-342.700(15)(b) F.A.C.

DEP File No.: 257597-005

ORDER GRANTING PETITION FOR VARIANCE

On August 28, 2019, Everglades National Park, Petitioner, filed a petition with the Florida Department of Environmental Protection (Department) requesting a section 120.542, Florida Statutes (F.S.), variance from the requirements of Rule 62-342.700(15)(b), Florida Administrative Code (F.A.C.). Rule 62-342.700(15)(b) F.A.C., requires governmental entities other than the Department or Districts to establish a trust fund for the perpetual management of a mitigation bank which meet the requirements of subsection 62-342.700(11), F.A.C. Subsection 62-342.700(11)(b), F.A.C., requires the trust fund agreement be worded in substantial conformance with the form incorporated therein. The Petitioner seeks a variance in order to continue the use of the Memorandum of Agreement (MOA) between the United States Department of the Interior, National Park Service, Everglades National Park, and the National Park Foundation. This MOA established the Everglades National Park Freshwater Wetlands Mitigation Fund for the construction and perpetual management of the Hole in the Donut Mitigation Bank, but is not worded in substantial conformance with the form incorporated into subsection 62-342.700(11)(b), F.A.C.

Notice of receipt of the petition was published in the Florida Administrative Register on September 13, 2019. No public comment was received.

BACKGROUND AND APPLICABLE REGULATORY CRITERIA

The Hole in the Donut Mitigation Bank (HID) is an approximately 6,600-acre mitigation bank within Everglades National Park (ENP), originally permitted February 15, 1995, Permit No. 132416479. The HID applied for a major modification on September 9, 2019, Permit No. 257597-005.

Federal appropriation laws detail fiscal management methods which include how funds can be received and managed on behalf of the Federal Government. The National Park Foundation (NPF) is an entity that is congressionally authorized to receive and manage funds on behalf of the federal government. This authorization allowed ENP, under the United States Department of Interior and the NPF, to establish the Everglades National Park Freshwater Wetlands Mitigation Fund (Fund) in 1994. The purpose and management of the Fund are memorialized in the MOA between ENP and the NPF (last renewed March 25, 2015). The MOA is currently undergoing further revisions to incorporate provisions required by the Department. Additional language requested by the Department has been added to the MOA to further ensure the requirements and intent of 62-342 F.A.C. are met.

The applicable rules state in pertinent part: Governmental entities other than the Department or Districts shall establish a trust fund for the perpetual management of the Mitigation Bank which meets the requirements of subsection 62-342.700(11), F.A.C. Subsection 62-342.700(11)(b), requires the trust fund agreement be worded in substantial conformance with the form incorporated therein. The variance is requested because the MOA between ENP and the NPF is not worded in substantial conformance with the form incorporated in 62-342.700(11)(b), F.A.C.

THE VARIANCE WILL MEET THE UNDERLYING PURPOSE OF THE STATUTE

Section 120.542(2), Fla. Stat., states "variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness." The variance procedure is intended to provide relief from unreasonable, unfair, and unintended results in unique cases.

Section 373.4136, F.S., states a person the department and the water management districts may require permits to authorize the establishment and use of mitigation banks. A mitigation bank permit shall also constitute authorization to construct, alter, operate, maintain, abandon, or remove any surface water management system necessary to establish and operate the mitigation bank. To obtain a mitigation bank permit, the applicant must provide reasonable assurance that it can meet the financial responsibility requirements prescribed for mitigation banks. Further, section 373.4135(1)(a) F.S. states "The Legislature intends that the provisions for establishing mitigation banks apply equally to both public and private entities, except that the rules of the department and water management districts may set forth different measures governing financial responsibility, and different measures governing legal interest, needed to ensure the construction and perpetual protection of a mitigation bank."

A mitigation bank must provide financial responsibility for the long-term management of the improved ecological conditions to be effectively managed in perpetuity.

The Petitioner demonstrated that the purpose of the underlying statute will continue to be achieved through the MOA.

The Everglades National Park Freshwater Wetlands Mitigation Fund is fully funded. The HID annual reviews the projects full cost accounting is not requesting a variance from the cost adjustment provision in subsection 62-342.700(14), F.A.C.

SUBSTANTIAL HARDSHIP TO THE PETITIONER

"Substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver," Section 120.54(2), Florida Statutes.

Petitioner requests a variance of the strict application of Rule 62-342.700(15)(b), F.A.C., because applying the rules would be a substantial hardship.

The Petitioner demonstrated that strict application of the rule would result in substantial legal hardship to the Petitioner.

Strict application of 62-342.700(15)(b), F.A.C., would cause a hardship because the HID lacks the independent authority to create a trust fund. To complete this process with other than a congressionally authorized agent such as the NPF would require extensive justification, review and approval at the highest levels of the National Park Service. The MOA is an existing and established fund that has been functioning as designed since 1994. The Fund is adequately funded to carry out the perpetual management of the HID. The MOA meets the intent of the trust fund as a financial responsibility mechanism for perpetual management.

THEREFORE, IT IS ORDERED:

Based on the foregoing reasons, the Petitioner has demonstrated that it has met the requirements for a variance of 62-342.700(15)(b), F.A.C. PETITIONER'S REQUEST FOR A VARIANCE IS GRANTED.

This variance shall remain in effect for the duration of Permit No. 257597-005, as modified.

As required in Permit No. 257597-005 Specific Condition 11, prior to release of credits the permittee shall ensure the Department possesses the most current signed copy the Memorandum of Agreement (MOA) between the United States Department of the Interior, National Park Service, Everglades National Park, and the National Park Foundation. The MOA is in the process of being signed by the NPF and ENP, no credits will be awarded to Hole in the Donut Mitigation Bank until the Department receives the executed MOA.

Prior to any modifications made to the MOA the Department shall be provided the opportunity to review and comment on the changes. The Department shall be provided a signed copy of any modified MOA reflecting changes to the terms, provisions or requirements between the United States Department of the Interior, National Park Service, Everglades National Park, and the National Park Foundation within 30 days of signing.

NOTICE OF RIGHTS

This action is final and effective on the date filed with the Clerk of the Department unless a petition for an administrative hearing is timely filed under Sections 120.569 and 120.57, F.S., before the deadline for filing a petition. On the filing of a timely and sufficient petition, this action will not be final and effective until further order of the Department. Because the administrative hearing process is designed to formulate final agency action, the hearing process may result in a modification of the agency action or even denial of the request for a variance or waiver.

Petition for Administrative Hearing

A person whose substantial interests are affected by the Department's action may petition for an administrative proceeding (hearing) under Sections 120.569 and 120.57, F.S. Pursuant to Rule 28-106.201, F.A.C., a petition for an administrative hearing must contain the following information:

(a) The name and address of each agency affected and each agency's file or identification number, if known;

(b) The name, address, telephone number, and any e-mail address of the petitioner; the name, address, telephone number, and any e-mail address of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests are or will be affected by the agency determination;

(c) A statement of when and how the petitioner received notice of the agency decision;

(d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;

(e) A concise statement of the ultimate facts alleged, including the specific facts that the petitioner contends warrant reversal or modification of the agency's proposed action;

(f) A statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and

(g) A statement of the relief sought by the petitioner, stating precisely the action that the petitioner wishes the agency to take with respect to the agency's proposed action.

The petition must be filed (received by the Clerk) in the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000. Also, a copy of the petition shall be mailed to the applicant at the address indicated above at the time of filing.

Time Period for Filing a Petition

In accordance with Rule 62-110.106(3), F.A.C., petitions for an administrative hearing must be filed within 21 days of receipt of this written notice. The failure to file a petition within the appropriate time period shall constitute a waiver of that person's right to request an administrative determination (hearing) under Sections 120.569 and 120.57, F.S., or to intervene in this proceeding and participate as a party to it. Any subsequent intervention (in a proceeding initiated by another party) will be only at the discretion of the presiding officer upon the filing of a motion in compliance with Rule 28-106.205, F.A.C.

Extension of Time

Under Rule 62-110.106(4), F.A.C., a person whose substantial interests are affected by the Department's action may also request an extension of time to file a petition for an administrative hearing. The Department may, for good cause shown, grant the request for an extension of time. Requests for extension of time must be filed with the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, before the applicable deadline for filing a petition for an administrative hearing. A timely request for extension of time shall toll the running of the time period for filing a petition until the request is acted upon.

Mediation

Mediation is not available in this proceeding.

Judicial Review

Once this decision becomes final, any party to this action has the right to seek judicial review pursuant to Section 120.68, F.S., by filing a Notice of Appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the Clerk of the

Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this action is filed with the Clerk of the Department.

DONE AND ORDERED this 4th day of November, 2019, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



Timothy Rach
Program Administrator
Submerged Lands and Environmental Resources
Coordination Program

Attachments:

Memorandum of Agreement (MOA) between the United States Department of the Interior, National Park Service, Everglades National Park, and the National Park Foundation

Copies furnished to:

Jonathan Taylor, NPS, jonathan_e_taylor@nps.gov
Michelle Tongue, NPS, michelle_tongue@nps.gov
Joint Administrative Procedures Committee
Mitigation Banking File

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Order, including all copies, were mailed before the close of business on 11/04/2019, to the above listed persons.

FILING AND ACKNOWLEDGMENT

FILED, on this date, under 120.52(7), Florida Statutes, with the designated Department Clerk, receipt of which is hereby acknowledged.



11/04/2019

Clerk

Date

MEMORANDUM OF AGREEMENT

THE UNITED STATES DEPARTMENT OF THE
INTERIOR NATIONAL PARK SERVICE
EVERGLADES NATIONAL PARK
40001 STATE ROAD 9336
HOMESTEAD, FLORIDA 33034-6733

AND

NATIONAL PARK FOUNDATION

This Memorandum of Agreement is between the National Park Service, Everglades National Park (hereinafter the "PARK"), an agency of the United States Department of the Interior, acting through the Superintendent of the PARK, or his designee, and the National Park Foundation (hereinafter the "FOUNDATION").

WITNESSETH

Whereas, the purpose of the National Park Service is to preserve, interpret, and manage the National Park System for the benefit, education and enjoyment of the people of the United States, as provided for in the Act of August 25, 1916 (codified at 16 U.S.C. §1 et seq.); and

Whereas, 48 STAT. 816, enacted May 30, 1934, provided for the establishment of the PARK in the State of Florida; and

Whereas, the PARK recognizes its responsibilities to control exotic pest plant species to prevent or reverse disruption to native communities; and

Whereas, in the PARK there is a site known as the Hole-in-the-Donut (hereinafter "HID") that is heavily infested with exotic pest plants; and

Whereas, the PARK has developed a mitigation program with the goal of restoring wetlands such as but not limited to the HID, that are adversely impacted by exotic pest plant species, agriculture or other anthropogenic disruptions to native plant communities; and

Whereas, pursuant to the mitigation program the PARK established the HID mitigation project through a Clean Water Act, section 404 permit, issued by the U.S. Army Corps of Engineers (ACOE) and the Environmental Resource Permit issued by the Florida Department of Environmental Protection (FDEP), that authorizes the use of mitigation funds from various development actions in the southern Florida area for the removal of exotic plants from and the restoration of the HID, as detailed in the project's Mitigation Instrument, the Department of Army Permit #1993-01691, and the FDEP Permit #132416479; and

Whereas, pursuant to the federal and state permits for the HID there are certain established regulations requiring that funds are available for restoration, perpetual management or needed corrective actions related to the management of the mitigation project; and

Whereas, the FOUNDATION is authorized by Act of Congress to receive and administer donations and funds received for the benefit of units of the National Park System; and

Whereas, the HID mitigation funds were originally managed on behalf of the PARK by the FOUNDATION pursuant to a Memorandum of Agreement dated January 28, 1994 (hereinafter the 1994 MOA); and

Whereas, the FOUNDATION understands that mitigation funds transferred to the FOUNDATION from mitigation applicants under an approved mitigation instrument/agreement/permit will cease when the PARK determines that mitigation project credits and or acres such as those belonging to the HID are no longer available to the public; and

Whereas, the FOUNDATION understands that the mitigation funds it administers on behalf of the mitigation projects, such as the HID are intended solely for use toward meeting each project's annual financial obligations related to environmental restoration activities and long term management in perpetuity; and

Whereas, the 1994 MOA expires after twenty (20) years and must be renewed; and

Whereas, the purpose of this Memorandum of Agreement is to establish terms for the FOUNDATION's administration of such mitigation funds such as the HID.

Now, therefore, pursuant to the authorities set forth above, the PARK and the FOUNDATION do hereby agree as follows:

1. FOUNDATION FUND.

The FOUNDATION shall administer the "Everglades National Park Freshwater Wetlands Mitigation Fund" (hereinafter the FUND), which was established pursuant to the 1994 MOA. The FUND shall allow for an account or multiple subsidiary accounts to be established through which the FOUNDATION will manage monies transferred from requests by mitigation applicants, or their intermediaries. Monies in the account(s) from the FUND shall be used solely for activities associated with the Park's HID in-lieu-fee or mitigation bank, including restoration, monitoring, long term and adaptive management.

2. INVESTMENT OF THE FUND.

Monies in the account(s) from the FUND will be invested according to the FOUNDATION's Restricted Short Medium Term Investment Policy ("POLICY") such POLICY having been duly adopted by the FOUNDATION's Board of Directors on the recommendation of the Investment Committee. The POLICY will conform to applicable legal requirements and ethical standards for non-profit organizations, and will be reviewed and adjusted as deemed necessary and appropriate by the Investment Committee of the FOUNDATION's Board. The FOUNDATION will invest and manage monies of the FUND only in accordance with the POLICY. The FOUNDATION will not be liable for the performance of the FUND to the extent it is invested in accordance with the POLICY, in which case, all gains and losses will be borne by the restricted FUND.

3. REIMBURSEMENT PROCEDURES.

The FOUNDATION will transfer monies from the FUND to the PARK at the written request of the PARK. The FOUNDATION disbursements to the PARK will be no more frequent than monthly and no less frequent than quarterly, unless otherwise agreed in writing by the parties. Monies from the FUND will be placed into a reimbursable account established by the PARK, and will be used solely for activities associated with the mitigation projects including restoration, monitoring, maintenance, long-term management and other related purposes, as determined solely by the PARK. The PARK will retain complete control and discretion over the expenditure of mitigation project funds; the FOUNDATION will have no right,

role or responsibility related to the expenditure of those mitigation project funds by the PARK.

4. FINANCIAL OPERATING PROCEDURES.

The FOUNDATION, in cooperation with the PARK, will prepare written Standard Operating Procedures for the day-to-day receipt of monies from third parties, disbursements, and management of the FUND, to be approved by the PARK. These Standard Operating Procedures may require periodic review and adjustments by the FOUNDATION and the PARK. Pursuant to the Standard Operating Procedures, the FOUNDATION will:

- record all monies received and issue receipts to payees and to the PARK.
- maintain its financial records related to each mitigation project, such as the HID, in accordance with Generally Applicable Accounting Procedures.
- prepare quarterly balance sheets and statement of receipts and disbursement.

5. OTHER FOUNDATION DUTIES.

The FOUNDATION will provide additional advisory or other services to the PARK related to the mitigation projects such as the HID, upon request from the PARK by agreement of the parties.

6. FUND AUDIT.

The FOUNDATION will engage an independent Certified Public Accountant to conduct an audit of the account and subsidiary accounts held in the FUND in accordance with Generally Accepted Auditing Principles and Government Auditing Standards. The audit will be conducted annually for each Federal fiscal year (October 1-September 30). The FOUNDATION shall submit the auditor's report and any discussion pertaining to it when completed.

7. NEW FINANCIAL MANAGEMENT SYSTEMS.

In the event the FOUNDATION adopts a new financial management system all data shall be transferred from the old financial management system into the new financial management system.

In the event another entity becomes the fiscal agent for the mitigation funds such as those for the HID project, the FOUNDATION shall provide to that entity all records in the FOUNDATION's possession related to the project(s), both digital and hard copy. This includes but is not limited to the cash receipt journal; general

ledger and any subsidiary ledgers; financial reports; and the transaction history of the account(s) held by the FOUNDATION including transfers, deposits, interest and dividends earned, realized losses, unrealized gains and losses and expenditures.

8. ACCESS TO RECORDS.

The FOUNDATION shall allow the PARK access to all written and electronic records in their possession that relates to the project(s) and both past and current agreement.

The FOUNDATION shall retain all written records for a period of seven (7) years. The FOUNDATION shall keep electronic records relating to all years of each project and both the past and current agreement. The FOUNDATION shall keep the electronic records for no less than 5 years beyond the term of this agreement. The FOUNDATION agrees to provide such assistance as may be necessary to facilitate the review of the records regardless of format, by the PARK when deemed necessary by the PARK either to insure compliance with accounting and financial standards.

All records regardless of format shall be considered permanent and will be stored in areas that have the lowest possible risk of damage. Records are most vulnerable to damage from water, high temperatures, humidity and pests, the records shall not be stored in areas where these are known problems.

The FOUNDATION shall provide to and the PARK shall accept all of the FOUNDATION's written records related to this agreement that are older than 7 years old, if requested. The FOUNDATION will transfer electronic records according to standards applicable at the time of transfer. Before the FOUNDATION allows records to leave their offices, a chain of custody form must be completed to document and track the disposition of the records. The chain of custody form can be downloaded from the Records Management Program website.

The FOUNDATION shall make all records or documents which relate to this Memorandum of AGREEMENT available to the PARK at the FOUNDATION's offices during regular business hours.

9. PREPARATION AND SUBMISSION OF ANNUAL REPORTS.

The FOUNDATION shall prepare a draft financial report of restricted fund activities for the federal fiscal year (October 1 - September 30) just ended, and provide it to the PARK for consideration, review and comment by December 1 of each year. The FOUNDATION's reports shall include, at a minimum:

- the general ledger for the current fiscal year and any subsidiary ledgers
- a summary of annual activity including deposits, interest and dividends earned, realized losses, unrealized gains and losses, expenditures and the year's investment performance of accounts under management
- a summary of the project(s) activity since inception (all years inception-present) including the general ledger, deposits, interest and dividends earned, realized losses, unrealized gains and losses expenditures and investment performance of accounts under management.

The PARK will provide comments and recommendations, if any, on the draft report to the FOUNDATION by December 15. The FOUNDATION will prepare a final financial report, reflecting PARK comments and recommendations, if any, and provide it to the PARK by January 15th. The final financial report shall include the auditor's report and any discussion pertaining to it (see FUND AUDIT above). The PARK may distribute the final report to any parties of its choosing.

10. MEETINGS.

The FOUNDATION shall be available, upon reasonable notice, to attend or facilitate meetings with the PARK, as well as regulatory and enforcement officials if necessary, to discuss, explain, plan or otherwise coordinate any of the FOUNDATION's investment management activities or information related to the Project.

11. FEES.

The FOUNDATION shall receive an annual management fee for its role as fiscal agent for the FUND. This fee will cover all costs and expenses incurred by the FOUNDATION as part of its responsibilities under this Memorandum of Agreement, including any fee charged by a financial consultant or fund administrator. Any operating fees collected by exchange traded funds (ETFs), mutual funds, or other financial products in the normal course of transactional activities in which the restricted Project funds are invested will be borne by the FUND.

The annual rate of the management fee, based on the investment balance of all funds under management, is currently 0.4%.

Project expenditures, including the management fee, are evaluated annually per federal and state requirements. Adjustment to project expenditures may be required in order to ensure long term success. Therefore, the management fee may be reviewed during the lifetime of this MOU.

12. CONFLICTS OF INTEREST.

The FOUNDATION must annually review and disclose potential conflicts of interest related to the financial management of the project(s), on its behalf and on the behalf of its subcontractors, if applicable. Disclosure will include relationships between the FOUNDATION Board of Directors and parties seeking mitigation in HID under regulatory authority of Federal, State, and Local entities; between FOUNDATION Board members and investment funds selected by the PARK or recommended by the FOUNDATION; and any other relationships that may entail an appearance of conflict of interest.

13. GENERAL.

(a) Term of Agreement. The term of this Memorandum of Agreement shall be twenty (20) years, beginning on the latest day and year noted on the WITNESS blocks. The Memorandum of Agreement will be renewed and extended for additional 20 year terms by mutual written agreement of both parties. New provisions, terms or conditions may require revisions to the Memorandum of Agreement sooner.

The Memorandum of Agreement may be terminated upon sixty days notice by either party. Termination must be in accordance with applicable provisions of Everglades National Park Mitigation Bank Permit requirements and any other agreements the PARK may have regarding completion of mitigation work for monies already distributed for that purpose related to mitigation projects such as the HID. Any monies contained in the FUND upon such termination shall remain solely for the purposes of the Park's in-lieu-fee or mitigation bank projects. The FOUNDATION will work closely with the PARK to administer any disposal or transfer needed to facilitate closure of the FUND. These activities will be approved by the ACOE and FDEP.

(b) No member of, or delegate to, Congress, or Resident Commissioner, shall be admitted to any share or part of this Memorandum of Agreement or to any benefit that may arise there from, but this restriction shall not be construed to extend to this Memorandum of Agreement if made with a corporation or company for its general benefits.

(c) The FOUNDATION agrees that all its activities under this Memorandum of Agreement shall be conducted in accordance with all applicable laws and regulations, both State and Federal. Specifically, the FOUNDATION shall comply with the requirements of (a) Executive Order No. 11246 of September 24,

1967, (b) Title V, Section 503 for Government Contractors and Sub-contractors to take affirmative action to employ and to advance in employment qualified handicapped individuals, and (c) with regulations heretofore or hereafter promulgated relating to non-discrimination in employment and in providing facilities and service to the public.

(d) Anti-Deficiency Act: Notwithstanding any provision to the contrary herein, nothing in this Memorandum of Agreement shall be construed as binding the United States of America to expend in any one fiscal year any sum in excess of appropriations made by Congress or administratively allocated for the purpose of compliance with the conditions for the agreement for the fiscal year, or bind the United States under any contract or other obligation for the further expenditure of money in excess of such appropriations or allocations; further, nothing in this Memorandum of Agreement may be considered as implying that Congress will at a later date appropriate funds sufficient to meet deficiencies.

e) Fund Contingency. The FOUNDATION will not transfer funds from the restricted FUND to third parties without written consent of the PARK, except as herein provided. If the Park has failed to meet its regulatory obligations, and is voluntarily or involuntarily required to grant custodial responsibilities to another agent (aka receivership) of the HID, the FOUNDATION will work closely with the PARK to transfer such funds to ACOE, FDEP, or their designee.

f) Key Officials for the PARK. The current PARK Superintendent will provide review and approve of terms of all agreements and will exercise the authority to approve conduct of agreements regarding the PARK. The Project manager will act as the Superintendent's authorized and designated representative with regard to implementation and coordination of this Memorandum of Agreement. The PARK shall provide written notice to the FOUNDATION of any changes in key officials within thirty (30) days of such change.

g) Key Officials for the FOUNDATION. The President or the Chief Operating Officer of the FOUNDATION will provide review and approval of terms of all agreements and will exercise the authority to approve conduct of cooperative projects regarding the FOUNDATION. The Chief Financial Officer of the FOUNDATION will provide contracting authority and fiscal control for the FOUNDATION. The FOUNDATION shall provide written notice to the PARK of any change in key officials within thirty (30) days of such change.

IN WITNESS WHEREOF, the Park and the FOUNDATION have caused this Memorandum of Agreement to be executed this _____ day of _____, 2019.

National Park Foundation

By: _____

National Park Service

By: _____

Park Superintendent



**United States Department of the Interior
NATIONAL PARK SERVICE**



**Everglades and Dry Tortugas National Parks
40001 State Road 9336
Homestead, Florida 33034**

August 28, 2019

RECEIVED

Justin G. Wolfe, General Counsel
Florida Department of Environmental Protection
Office of General Counsel
3900 Commonwealth Blvd.
M.S. 35
Tallahassee, FL 32399

SEP 9 2019

DEPT. OF ENVIRONMENTAL PROTECTION
OFFICE OF GENERAL COUNSEL

Re: Request Petition for Variance from Rule 62-342.700(15)(b) F.A.C.

Dear Mr. Wolfe,

In support of the application for a major modification of the Hole in the Donut Wetland Mitigation Bank's (HID) Florida Department of Environmental Protection (Department) Permit # 132416479, and per Section 120.542, Florida Statutes, this letter serves to request a variance from rule 62-342.700(15)(b), Florida Administrative Code (F.A.C.), pertaining to establishment of a trust fund for perpetual management of the bank as required by 373.4136 Florida Statute.

Federal appropriation laws detail fiscal management methods which include how funds can be received and managed on behalf of the Government. The National Park Foundation (NPF) is an entity that is congressionally authorized to receive and manage funds on behalf of the federal government. This authorization allowed Everglades National Park (Park), under the United States Department of Interior, and the NPF to establish a "Fund" on behalf of the HID (1994). The purpose and management of the Fund are memorialized in a Memorandum of Agreement (MOA) between the Park and NPF (last renewed in March 25, 2015). The MOA is currently undergoing further revision to incorporate provisions required by the Department.

Strict application of the uniformly applicable rule requirements of 62-342.700(15)(b), F.A.C. as a result of the major modification of the HID Permit, i.e. requiring the Park to establish a trust fund for the perpetual management of the bank would cause a hardship. The HID lacks independent authority to create a fund. To complete this process with other than a congressionally authorized agent such as the NPF would require extensive justification, review and approval at the highest levels of the National Park Service. Further, the Army Corps of Engineers (ACOE) vetted and accepted the use of this Fund and the associated MOA, when the HID came into compliance with the 2008 Federal Mitigation Rule in 2015. Therefore, to create an additional trust fund would also require approval from ACOE. And, it is unclear whether the HID could obtain approval from NPS and ACOE.

Furthermore, the Fund balance (financed as mitigation credits have been withdrawn) and the annual long term financial planning, evaluated by the Department and ACOE since 2015 has demonstrated that the Fund's balance is sufficient to provide the financial assurances for all of the obligations of the HID including restoration, monitoring, and perpetual long term management.

The perpetual Fund with the NPF and the MOA detailing its purpose and management, demonstrates that the HID has achieved the intention of the financial responsibility requirements of rule 62-342.700(15)(b), F.A.C. by other means. In addition, updates to the MOA have been proposed, incorporating Department comments which serve to ensure the requirements and intent of Department rules are met. It is requested that this MOA, as amended, be used to satisfy the perpetual financial assurance requirements of rule 62-342.700(15)(b), F.A.C., through the duration, but not to exceed the expiration date, of the Department permit, as amended.

In addition, though it is referenced within subsection 62-342.700(15)(b), F.A.C., the HID is not requesting a variance pertaining to the cost adjustment provision in rule 62-342.700(14), F.A.C. In conformance with the requirements set forth in HID's Department of the Army In-Lieu Fee Program Instrument, the HID documents and annually reviews the project's full cost accounting.

Sincerely,



Pedro Ramos
Superintendent
South Florida National Parks
40001 State Road 9336
Homestead, FL 33034
305-242-7712
pedro_ramos@nps.gov

Enclosures: Memorandum of Agreement (as amended)

cc:
Joint Administrative Procedures Committee
Room 680
The Pepper Building
111 W. Madison Street, Tallahassee, Florida 32399-1400

Notice of Variances and Waivers

DEPARTMENT OF ENVIRONMENTAL PROTECTION

RULE NO.: RULE TITLE:

62-342.700 Financial Responsibility

NOTICE IS HEREBY GIVEN that on August 28, 2019, the Department of Environmental Protection, received a petition for variance pursuant to Section 120.542, F.S. from Petitioner, the U.S. Department of the Interior, National Park Service. The petition requested a variance from paragraph 62-342.700(15)(b), F.A.C., which requires that a trust fund for perpetual management of a mitigation bank be established using a form that is in substantial conformance with the form incorporated into the Rule. The facility is located at 40001 State Road 9336, Homestead, Florida 33034-6733. The petition has been assigned OGC # 19-1517 and Permit # 132416479.

A copy of the Petition for Variance or Waiver may be obtained by contacting: Laura Chandler, telephone (850)245-8479, e-mail FDEPMitigationBankTeam@dep.state.fl.us; Department of Environmental Protection, 2600 Blair Stone Road, Tallahassee, Florida 32399; during normal business hours, 8:00 a.m. – 5:00 p.m., Monday through Friday, except legal holidays. The file is available online and can be accessed through the Department's Information Portal at: <http://prodenv.dep.state.fl.us/DepNexus/public/searchPortal>. Written comments must be received by the Department of Environmental Protection no later than 14 days from the date of publication of this notice.