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September 28, 2021

THIS IS AN URGENT LEGAL MATTER REQUIRING YOUR IMMEDIATE ATTENTION

Via Registered Mail, Return Receipt Requested:

Manatee County Board of County Commissioners
c/o County Administrator Scott L. Hopes
Manatee County Administrative Building
1112 Manatee Avenue West
Bradenton, FL 34205

Office of the County Attorney
c/o Manatee County Attorney William Clague
Manatee County Administrative Building
1112 Manatee Avenue West
Bradenton, FL 34205

Other recipients identified on signature page

NOTICE OF INTENT TO SUE PURSUANT TO THE RESOURCE CONSERVATION AND RECOVERY ACT, 42 U.S.C. § 6972(a)(1)(B)

Dear Manatee County Board of County Commissioners:

Pursuant to the citizen suit provisions of the 1976 Amendments to the Solid Waste Disposal Act (hereinafter referred to as the "Resource Conservation and Recovery Act" or "RCRA"), 42 U.S.C. § 6972(a)(1)(A) & (B) the Center for Biological Diversity, Tampa Bay Waterkeeper, Suncoast Waterkeeper, ManaSota-88, and Our Children's Earth Foundation (collectively referred to hereinafter as the "Notifying Parties") hereby notify you that on or after the 90th day from the date of your approval and implementation of DEP UIC Permit No. 0322708-002-UC/1I, Notifying Parties intend to amend an existing lawsuit, or initiate a citizen suit against you, in the United States District Court for the Middle District of Florida or another court of competent jurisdiction concerning the imminent and substantial endangerment to human health and the environment threatened by your injection of solid and hazardous waste from the former Piney Point Phosphate facility, located at 13300 Highway 41 North, Palmetto, FL 34221 (hereinafter "Piney Point"), in violation of RCRA. Notifying Parties will also allege that Manatee County has engaged in unlawful "open dumping" under RCRA.

For reference, Figure 1 below is aerial imagery of the Piney Point Site:

RCRA LEGAL BACKGROUND

Enacted in 1976, RCRA is intended to "eliminate[] the last remaining loophole in environmental law, that of unregulated land disposal of discharged materials and hazardous wastes." *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 874 F.3d 1083, 1089 (9th Cir. 2017) (quoting H.R. Rep. No. 94-1491, at 4 (1976)) (alterations in original). Like other environmental statutes, RCRA contains a citizen suit provision authorizing private citizens to enforce the law, including:

> against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment[.]

42 U.S.C. § 6972(a)(1)(B). In light of "RCRA's broad language and remedial purpose," courts have given this "endangerment provision" an expansive construction. *Fresh Air for the Eastside, Inc. v. Waste Mgmt. of N.Y., LLC*, 405 F. Supp. 3d 408, 439 (W.D.N.Y. 2019); *see also Simsbury-Avon Pres. Club, Inc. v. Metacon Gun Club, Inc.*, 575 F.3d 199, 210 (2d Cir. 2009); *Davis v. Sun Oil Co.*, 148 F.3d 606, 609 (6th Cir. 1998). Therefore, "if an error is to be made in

applying the endangerment standard, the error must be made *in favor of protecting public health, welfare and the environment*." *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 259 (3d Cir. 2005) (emphasis added) (citation omitted).

Under RCRA's citizen suit provision, a notifying party must typically wait 90 days after providing pre-suit notice before filing a complaint alleging an imminent and substantial endangerment to health and the environment. 42 U.S.C. § 6972(b)(2)(A).

Additionally, RCRA prohibits "open dumping." 42 U.S.C. § 6945(a) prohibits the operation of "any solid waste management practice or disposal of solid waste which constitutes the open dumping of solid waste." "Disposal" means "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste . . . into or on any land or water[.]" 42 U.S.C. § 6903(3). Enforcement of this prohibition is available through RCRA's citizen suit provision. 42 U.S.C. § 6972(a)(1)(A). As required by statute, EPA has promulgated criteria under RCRA § 6907(a)(3) defining solid waste management practices that constitute open dumping. *See* 42 U.S.C. § 6944(a); 40 C.F.R. Parts 257 and 258. These regulations prohibit the contamination of any underground drinking water source beyond the solid waste boundary of a disposal site. 40 C.F.R. § 257.3-4(a).

The definition of "underground drinking water source" includes an aquifer supplying drinking water for human consumption or any aquifer in which the groundwater contains less than 10,000 mg/l total dissolved solids. 40 C.F.R. § 257.3-4(c)(4). "Contaminate" means to introduce a substance that would cause: (i) the concentration of that substance in the groundwater to exceed the maximum contaminant level specified in Appendix I, or (ii) an increase in the concentration of that substance in the groundwater where the existing concentration of that substance exceeds the MCLs specified in Appendix I. 40 C.F.R. § 257.3-4(c)(2).

Finally, through the "Bevill" amendment, phosphogypsum stacks and associated process wastewater are exempt from regulation under RCRA as hazardous wastes, but *not* from regulation as solid wastes. *See, e.g.*, 40 C.F.R. § 261.4(b)(7) (preceding title: "Solid wastes which are not hazardous wastes.") & § 261.4(b)(7)(ii)(D) (exempting from the definition of hazardous waste *only* "[p]hosphogypsum from phosphoric acid production"). Importantly, "phosphoric acid production," as that term is used in the governing federal regulations, does <u>not</u> include wastes generated from a monoammonium and/or diammonium phosphate production processes. Monoammonium and/or diammonium phosphate production waste is therefore subject to regulation as hazardous waste under RCRA Subchapter C.

Accordingly, the United States of America recently settled two lawsuits brought under RCRA through federal consent decrees brought against fertilizer manufacturers J.R. Simplot Company and Mosaic Fertilizer LLC. In those lawsuits, the United States of America alleged that defendants unlawfully disposed of hazardous wastes from monoammonium and/or diammonium phosphate production processes into phosphogypsum stacks, and that wastes generated from monoammonium and/or diammonium phosphate production processes are not within the scope of the Bevill amendment under 40 C.F.R. § 261.4(b)(7) & (b)(7)(ii)(D). *See U.S. v. J.R. Simplot Company & Simplot Phosphates, LLC*, Case No. 2:20-cv-00125-NDF, Dkt.

No. 10 (D. Wyo. 2020) (Consent Decree); *U.S. v. Mosaic Fertilizer, LLC*, Case No. 2:15-cv-04889, Dkt. No. 2-1 (E.D. La. 2015) (Consent Decree).

FACTUAL BACKGROUND

Piney Point was a phosphate fertilizer plant owned and operated by multiple different corporations from 1966 until operations ceased in 1999. Historically, Piney Point consisted of an acid plant, a phosphoric acid plant, an ammoniated phosphate fertilizer plant with storage for ammonia, phosphoric acid, and other products necessary for the manufacture of fertilizer, and related facilities. All were located within an approximately 670-acre parcel of land.

Phosphoric acid production involves the use of acidic solutions to separate phosphorus from phosphate-containing rock. The resulting waste is phosphogypsum. Phosphogypsum is watery when it is first stored, but over time it dries, and a crust forms over the top, forming "stacks." At Piney Point, this toxic waste was formed into large stacks which rose as high as 70-80 feet and encompassed 457 acres.

Phosphogypsum is radioactive and can contain uranium, thorium, and radium. Over time, uranium and thorium decay into radium, and radium subsequently decays further into radioactive radon, the second-leading cause of lung cancer in the United States. Radium-226, found in phosphogypsum, has a 1,600-year radioactive decay half-life. In addition to high concentrations of radioactive materials, phosphogypsum and associated process wastewater can contain carcinogens and heavy toxic metals like antimony, arsenic, barium, cadmium, chromium, copper, fluoride, lead, mercury, nickel, silver, sulfur, thallium and zinc.

Upon information and belief, the operations at Piney Point utilized a monoammonium and/or diammonium phosphate production process in the creation of phosphate fertilizer. In 1990, Royster Phosphates, Inc., then-operator of the Piney Point facility, provided the United States Environmental Protection Agency with its response to EPA's regulatory questionnaire entitled "National Survey of Solid Wastes from Mineral Processing Facilities." The questionnaire was "designed to obtain information on the generation and management of selected solid wastes from mineral processing facilities." The questionnaire was EPA's method of fulfilling the Congressional requirement that EPA determine whether "Special Wastes" such as phosphogypsum should be subject to the requirements of Subtitle C of RCRA, the chapter of RCRA that focuses on hazardous wastes.

Royster Phosphates, Inc.'s response to EPA's questionnaire included maps of the Piney Point facility that demonstrate the facility utilizes a monoammonium ("MAP") and/or diammonium phosphate ("DAP") production process. The maps below identify both a "DAP" plant as well a "diammonium phosphate pond" at the site, and show that the waste stream from the "DAP" production process was disposed of in the phosphogypsum stack system:

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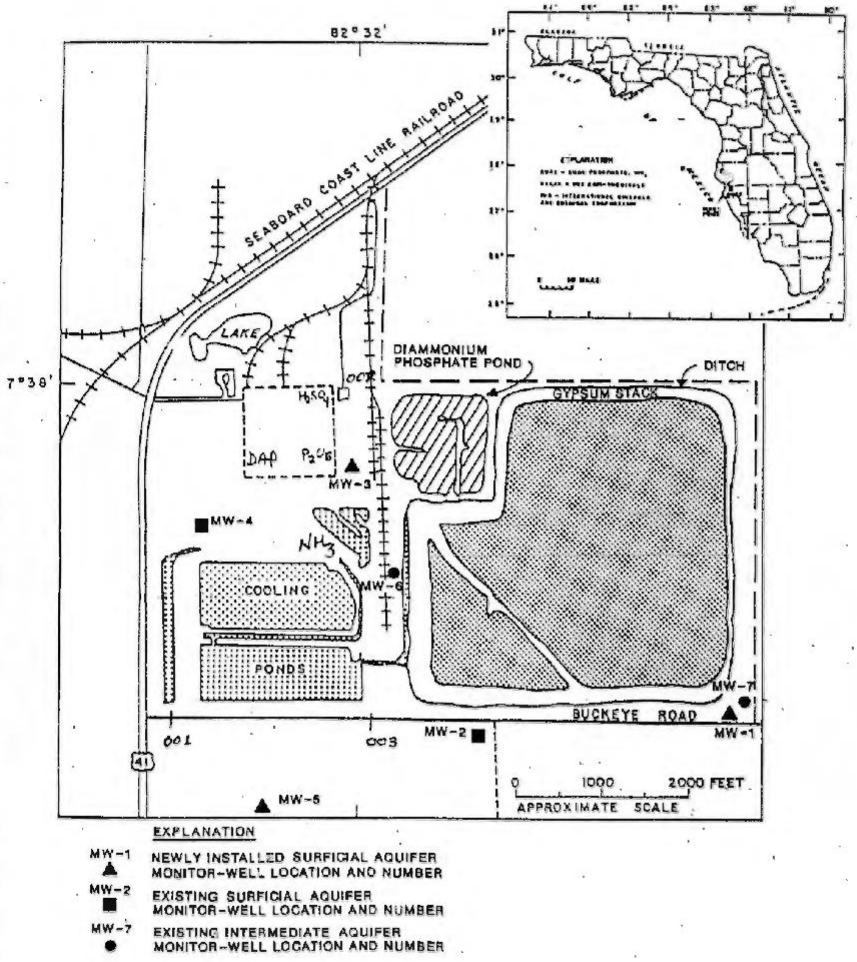

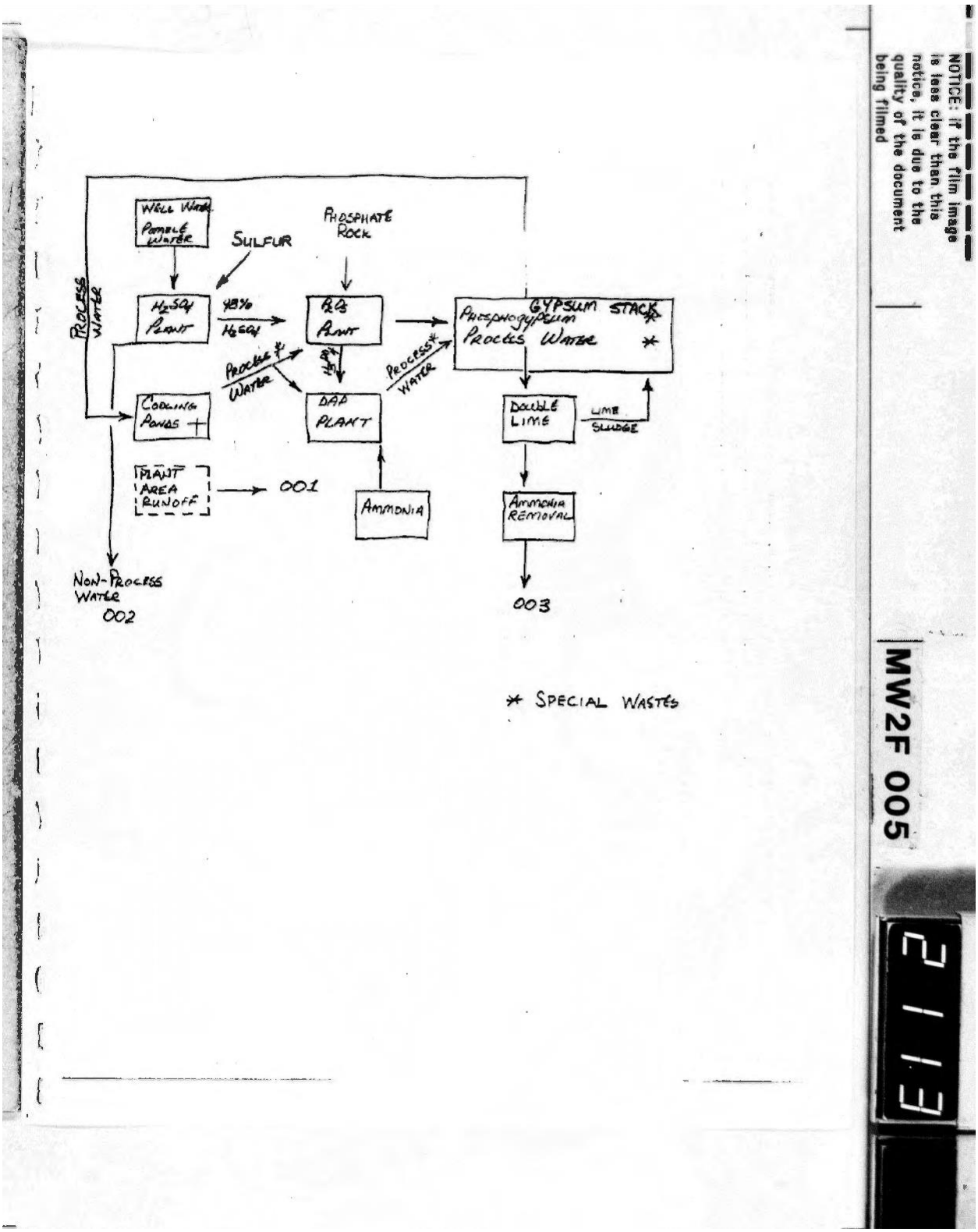

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As the maps and the questionnaire demonstrate, the waste disposed of in the phosphogypsum stacks at Piney Point is <u>not</u> Bevill-exempt material, but rather hazardous waste

from the monoammonium and/or diammonium phosphate production process. Furthermore, upon information and belief, the waste presently stored at Piney Point satisfies all regulatory requirements for characterization of hazardous waste. *See* 40 C.F.R. Part 261.

Phosphate fertilizer production continued until 1999, when production ceased. In 2001, Piney Point Phosphates, Inc., a wholly-owned subsidiary of Mulberry Corporation, operated the Piney Point site. In February 2001, Mulberry Corporation filed for bankruptcy and provided Florida State officials with 48 hours' notice that it was abandoning the property. The property's ownership and operation then passed to the Florida Department of Environmental Protection ("FDEP") through a court-ordered receivership, also in February 2001. FDEP was the real property owner of the site until August 2006 when HRK Holdings LLC ("HRK") purchased Piney Point in connection with the Mulberry Corporation's bankruptcy proceeding. HRK operated the site until 2021, when yet another receiver was appointed over the site.

Between 2001 and 2021, hundreds of millions of gallons of wastewater was discharged to surface waters by FDEP, HRK, and others due to the inability of these owners and operators to properly manage the existing wastewater at the site. In 2021, HRK and FDEP discharged approximately 215 million gallons of wastewater directly into Tampa Bay, precipitating one of the worst "red tide" events that Tampa Bay has ever experienced.

In April 2021, Manatee County applied for a permit from FDEP for the construction and operation of a Class I industrial injection well for the disposal of wastewater presently impounded at the Piney Point site. According to the permit application, "The owner of the well is Manatee County and the well will be located near an existing exploratory well (EW-1) that will be converted to a monitor well for this proposed Class I injection well system." The Class I industrial injection well will be installed into the Lower Floridan aquifer "with casing to approximately 1,950 feet below land surface (bls) and an open hole to approximately 3,300 feet bls." The permit application admits that Manatee County does not know the precise geologic strata in the location where the well is planned to be installed. Instead, Manatee County asserts that the "anticipated geologic strata" were identified based on a well installed five miles away from the planned well site. The permit application further admits that Manatee County does not know the precise location where the Underground Source of Drinking Water begins or ends.

Most concerning, the permit application does not include any water treatment provisions to address the hazardous constituents within the Piney Point phosphogypsum stack and related process wastewater. Instead, a "pre-treatment facility" is proposed (but not yet constructed or designed). "The pre-treatment strategy is not to reduce constituents to any regulatory standard as the water has been characterized as non-hazardous and is acceptable for Class I injection. Rather, the treatment will be to assure chemical compatibility with the injection zone to avoid or limit the potential for plugging of the formation to the degree possible. The type and level of treatment is yet to be determined and will be the scope of Jacobs Engineering."

Water quality sampling information included with the permit application from April 9, 2019 and August 22, 2019 shows that the wastewater proposed to be disposed of in the underground injection well contains hazardous levels of pollutants, including heavy metals and radioactive waste.

I. Manatee County Will Be Liable for Contributing to an Imminent and Substantial Endangerment to Health and the Environment if it Completes the Underground Injection Well and Disposes Solid and Hazardous Waste into the Floridian Aquifer

Manatee County will violate RCRA by contributing to an imminent and substantial endangerment to health or the environment by disposing of solid and hazardous waste through the proposed underground injection well. Specifically, Notifying Parties will allege that Manatee County is a "person" that is a "past or present transporter" and a "past or present owner or operator of a treatment, storage, or disposal facility," namely the underground injection well where solid and hazardous waste from the Piney Point site will be disposed. 42 U.S.C. § 6972(a)(1)(B). RCRA defines "person" as including a "State" and a "political subdivision of a State[.]" 42 U.S.C. § 6903(15). Manatee County qualifies as a "political subdivision of a State," and is therefore subject to a RCRA citizen suit brought pursuant to 42 U.S.C. § 6972(a)(1)(B). Furthermore, federal law authorizes suit against state officials that violate federal law, notwithstanding the eleventh amendment. *See, e.g., Ex Parte Young*, 209 U.S. 123 (1908).

Notifying Parties will allege that Manatee County is an owner and operator of a solid and hazardous waste treatment and disposal facility, in particular the proposed underground injection well. RCRA defines "disposal" as used within 42 U.S.C. § 6972(a)(1)(B) as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C. § 6903(3). The permit application clearly indicates that the owner and operator of the proposed underground injection well is Manatee County.

Notifying Parties will further allege in the lawsuit that Manatee County "has contributed and…is contributing to the past or present handling, storage, treatment, transportation, or disposal" of solid and hazardous waste. 42 U.S.C. § 6972(a)(1)(B). The term "contribution" is a term of art encompassing a measure of control, and has been construed to mean "lend assistance or aid to a common purpose," "have a share in any act or effect," "be an important factor in," or "help to cause." Here, Notifying Parties will allege that Manatee County contributed and continues to contribute to the past and present handling, treatment, and disposal of solid and hazardous waste consequent to its operation of the proposed underground injection well, the sole purpose of which is to dispose of the remaining solid and hazardous waste at the Piney Point site.

Notifying Parties will further allege that the wastes being disposed of through the underground injection well are hazardous waste, as that term is used in RCRA. As stated above, phosphogypsum stacks and associated process wastewater are exempt from regulation under RCRA as hazardous wastes by operation of the "Bevill Amendment," but *not* from regulation as solid wastes. *See, e.g.*, 40 C.F.R. § 261.4(b)(7) (preceding title: "Solid wastes which are not hazardous wastes.") & § 261.4(b)(7)(ii)(D). However, information provided by a former operator of Piney Point while the site was still creating phosphoric fertilizer demonstrates that Piney Point utilized a monoammonium ("MAP") and/or diammonium phosphate ("DAP") production process, meaning the waste stream at Piney Point was never within the scope of the Bevill amendment, and therefore subject to regulation as hazardous waste under RCRA Subchapter C.

Florida law also prohibits the use of a Class I underground injection well for the disposal of hazardous waste. F.A.C. 62-528.400(1) (prohibiting the injection of hazardous waste through any well or septic system "except for those Class 1 wells permitted to inject hazardous waste as of January 1, 1992"). Florida expressly adopted federal definitions and exclusions for solid and hazardous waste. F.A.C. 62-730-30(1) (adopting by reference the provisions of 40 C.F.R. Part 261). Because monoammonium and/or diammonium phosphate production processes are not within the scope of the hazardous waste exclusion under 40 C.F.R. § 261.4(b)(7), the wastes proposed to be disposed of by Manatee County through the underground injection well are properly classified as hazardous waste – waste that is *prohibited* from being disposed of through underground injection.

Finally, Notifying Parties will allege in the lawsuit that Manatee County's disposal of hazardous waste through the proposed underground injection well "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). Courts have "emphasized the preeminence of the word 'may' in defining the degree of risk needed" to maintain an endangerment claim. *Me. People's All. v. Mallinckrodt, Inc.*, 471 F.3d 277, 288 (1st Cir. 2006). The word "may," combined with the word "endangerment," contemplates only "a threatened or potential harm, and does not require proof of actual harm." *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1015 (11th Cir. 2004); *see also Mallinckrodt*, 471 F.3d at 296. The words "imminent" and "substantial" have similarly broad meanings. "Imminence generally has been read to require only that the harm is of a kind that poses a near-term threat; there is no corollary requirement that the harm necessarily will occur or that the actual damage will manifest itself immediately." *Mallinckrodt*, 471 F.3d at 288 (citing *Cox v. City of Dallas*, 256 F.3d 281, 299-300 (5th Cir. 2001)). Finally, an endangerment is "substantial" when "there is reasonable cause for concern that someone or something may be exposed to risk of harm" absent remedial action. *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1021 (10th Cir. 2007). Where all elements are present, courts have "broad authority. . . to grant all relief necessary to ensure complete protection of the public health and the environment." *Little Hocking Water Ass'n, Inc. v. E.I. du Pont Nemours & Co.*, 91 F. Supp. 3d 940, 952 (S.D. Ohio 2015) (internal quotations and citation omitted); *see also Meghrig v. KFC W., Inc.*, 516 U.S. 479, 479 (1996).

In particular, Notifying Parties will allege that disposing of hazardous waste through underground injection presents an imminent and substantial endangerment by releasing, leaking, leaching, or otherwise causing solid and hazardous waste to enter groundwaters, where it is then transported off-site into nearby groundwaters and the underlying aquifer. Such disposal activities will cause violations of applicable groundwater quality standards and drinking water quality standards and threaten the purity of an underground drinking water resource relied upon by millions of Floridians, for both potable water and for irrigation use.

42 U.S.C. § 6972(a) states that the District Courts of the United States shall have jurisdiction to order any person who "has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste" that presents an imminent and substantial endangerment to health or the environment to take such action as may be necessary to cease and correct the pollution. Notifying Parties intend to seek legal and equitable relief in their lawsuit, including but not limited to temporary and/or

permanent injunctive relief, as well as attorneys' and expert witnesses' fees, and costs, associated with the suit.

Notifying Parties will also seek to impose remedial injunctive relief that fully abates the imminent and substantial endangerment posed by the underground injection and disposal of hazardous waste from Piney Point to human health and the environment.

II. Manatee County Will Be Liable for Violating RCRA's "Open Dumping" Prohibition if it Completes the Underground Injection Well and Disposes Solid and Hazardous Waste into the Floridian Aquifer

As described above, 42 U.S.C. § 6945(a) prohibits the operation of "any solid waste management practice or disposal of solid waste which constitutes the open dumping of solid waste." "Disposal" means "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste . . . into or on any land or water[.]" 42 U.S.C. § 6903(3). Enforcement of this prohibition is available through RCRA's citizen suit provision. 42 U.S.C. § 6972(a)(1)(A) As required by statute, EPA has promulgated criteria under RCRA § 6907(a)(3) defining solid waste management practices that constitute open dumping. *See* 42 U.S.C. § 6944(a); 40 C.F.R. Parts 257 and 258. These regulations prohibit the contamination of any underground drinking water source beyond the solid waste boundary of a disposal site. 40 C.F.R. § 257.3-4(a).

The definition of "underground drinking water source" includes an aquifer supplying drinking water for human consumption or any aquifer in which the groundwater contains less than 10,000 mg/l total dissolved solids. 40 C.F.R. § 257.3-4(c)(4). "Contaminate" means to introduce a substance that would cause: (i) the concentration of that substance in the groundwater to exceed the maximum contaminant level specified in Appendix I, or (ii) an increase in the concentration of that substance in the groundwater where the existing concentration of that substance exceeds the MCLs specified in Appendix I. 40 C.F.R. § 257.3-4(c)(2).

Notifying Parties will allege that Manatee County knows or should know through the exercise of reasonable care and due diligence that disposing of hazardous waste through underground injection will "contaminate" an underground drinking water source. The permit application for the underground injection well states that injected hazardous waste will migrate laterally away from the bore hole, where it migrates away and off the injection well disposal site.

42 U.S.C. § 6972(a) states that the District Courts of the United States shall have jurisdiction to order any person who "has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste" that presents an imminent and substantial endangerment to health or the environment to take such action as may be necessary to cease and correct the pollution. Notifying Parties intend to seek legal and equitable relief in their lawsuit, including but not limited to temporary and/or permanent injunctive relief, as well as attorneys' and expert witnesses' fees, and costs, associated with the suit.

PARTIES PROVIDING THIS NOTICE OF INTENT TO SUE

The names, addresses, and phone numbers of the people giving this Notice of Intent to Sue are:

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CONCLUSION

We will be available to discuss effective remedies and actions that will assure Manatee County's future compliance with RCRA and all other applicable state and federal environmental

laws. If you wish to avail yourself to this opportunity and avoid the need for adversarial litigation, or if you have any questions regarding this letter, please contact the undersigned. If you are or will be represented by an attorney, please also have that attorney contact the undersigned.

/s/ Charles M. Tebbutt
Charles M. Tebbutt
Attorney for Notifying Parties

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