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MEMORANDUM

DATE: January 4, 2018

TO: Florida Department of Environmental Protection ("FDEP")

FROM: Michael D. Minton
Brad Gould
Dana M. Apfelbaum

RE: Code Section 118 / Master Development Plan

FDEP currently makes payments of grant funds in furtherance of its objectives and plans, such as the Basin Management Action Plan ("BMAP") developed in 2013 to implement Total Phosphorus, Total Nitrogen, and related BOD load reductions to achieve the TMDLs for the St. Lucie River and Estuary Basin.

Prior to the Tax Cuts and Jobs Act of 2017 (the "Act"), payments received under the grants described above, would have been exempt from gross income of a corporate recipient under § 118(a) of the Internal Revenue Code of 1986 ("Code"), which exempts any "contribution to capital of the taxpayer" by a nonshareholder from inclusion in gross income of the taxpayer. Case law provides guidance as to what qualifies as a nonshareholder contribution to capital as follows: (1) the contribution must become a permanent part of working capital; (2) the contribution must not be compensation for specific quantifiable services; (3) the contribution must be bargained for; (4) the contribution must foreseeably benefit the corporation in an amount commensurate with its value; and (5) the contribution must ordinarily be employed to generate additional income.

Many of the grants awarded by FDEP to further its objectives would qualify for this exemption, which the corporate recipients of the grants would have relied upon when applying for grant funds, which are to be paid out over a period of time.

Section 13312 of the Act, however, amends § 118 by specifically excluding from the meaning of "contribution to capital of the taxpayer" both contributions in aid of construction or

any other contribution as a customer or potential customer **and contributions by any governmental entity or civic group**. This amendment is to be effective for contributions made after the Act's date of enactment which was December 22, 2017. The Act does, however, provide an exception for contributions made after the effective date by a governmental entity which are made pursuant to a **"master development plan"** approved by the governmental entity prior to the effective date. The term "master development plan" is not defined in the Act.

FDEP undoubtedly has many ongoing agreements to provide grant funds, including those for project development and enviroment studies and dispersed water projects, furthering its overall plan and clean water objectives of the BMAP. While such payments were excluded from income under § 118 prior to the Act, only payments made pursuant to an existing master development plan for projects approved prior to the date of enactment of the Act will now receive that treatment. This is a critical change in treatment and could have a significant impact on current recipients for projects approved prior to the date of enactment of the Act.

There is a notable lack of guidance on what might qualify as a "master development plan." Certainly the FDEP has a general plan and objectives, in furtherance of which it develops programs such as the BMAP, among others. While a more permanent solution needs to be examined at the federal legislative level, it seems appropriate to preserve the integrity of FDEP's existing agreements with grant recipients and avoid unintended tax consequences which also could discourage further landowner cooperation in such projects. There is an opportunity here to document and memorialize FDEP's programs like the BMAP as a "master development plan" approved prior to the enactment of the Act. Please let us know if we can be of assistance in crafting language for FDEP that will meet both the needs of grant recipients and FDEP until a more permanent solution can be reached.

MDM:dma