IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-80309-CIV-ALTONAGA/BANDSTRA

FRIENDS OF THE EVERGLADES, INC.,
FLORIDA WILDLIFE FEDERATION,
et al.,

Plaintiffs,

v.

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,
HENRY DEAN, EXECUTIVE
DIRECTOR

Defendant.
_____/

FLORIDA WILDLIFE FEDERATION'S THIRD AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

INTRODUCTION

Plaintiff Florida Wildlife Federation ("FWF") sues South Florida Water Management District, Henry Dean, Executive Director, for violating the Clean Water Act by failing to obtain required permits for SFWMD's discharge of pollutants into Lake Okeechobee from three pumping stations: S-2, S-3, and S-4. The discharges are in violation of the permit requirement

outlined in §§ 301 and 402 of the Clean Water Act. This complaint seeks a declaratory judgment and injunctive relief.

NATURE OF THE CASE

1. This citizen suit is brought pursuant to § 505(a)(1) of the Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C. § 1365(a)(1), to compel SFWMD, through an injunctive and declaratory judgment action against its executive director, Henry Dean, to obtain a National Pollution Discharge Elimination System ("NPDES") permit required by the Clean Water Act §§ 301 and 402 for the discharge of pollutants through the S-2, S-3, and S-4 pumping stations into Lake Okeechobee.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this case pursuant to the "Citizen suits" provision of the Clean Water Act, 33 U.S.C. § 1365(a). This Court also has federal question jurisdiction by virtue of 28 U.S.C. § 1331.

3. Venue is proper in this judicial district and in this Court.

4. Plaintiff has provided the South Florida Water Management District, Henry Dean, Executive Director, with over sixty days written notice of the violations of law alleged herein in the form and manner required by § 505(b)(2) of the Clean Water Act. 33 U.S.C. § 1365(b)(2).

THE PARTIES

5. Plaintiff FWF is a Florida statewide non-profit conservation and education organization with its main office in Tallahassee, Florida. It is a membership-based organization with approximately 12,500 members throughout Florida. The organization's mission includes the preservation, management, and improvement of Florida's water resources and its fish and wildlife habitat. Many of FWF's members reside within the watershed of the S-2, S-3, and S-4 pumps and Lake Okeechobee.

6. Many FWF members use the waters in or around the area where the pumps of the S-2, S-3, and S-4 pumping stations empty into Lake Okeechobee for canoeing, sport boating, wildlife observation, photography, personal and commercial research, sport fishing, waterfowl hunting, and collecting aquatic life for personal consumption.

7. Presently, the waters of Lake Okeechobee are degraded as a result of pollutants discharged through the pumps in the S-2, S-3, and S-4 pumping stations. Because of this discharge, the ecological balance of the

lake has been disrupted, there are frequent algal blooms, a dominance of algal and animal species that are tolerant of eutrophic conditions, and changes in vegetation due to nutrient enrichment.

8. Numerous members of FWF are being adversely affected by Defendant's failure to obtain NPDES permits for the pumps at the S-2, S-3, and S-4 pumping stations. Specifically, these FWF members are suffering an injury in fact because the pollution interferes with their fishing and recreational activities in nearby areas.

9. A declaratory judgment and an injunction requiring SFWMD to immediately obtain NPDES permits will redress the injury being suffered by these members of the Plaintiff FWF.

10. Plaintiff FWF files this action on its own behalf and on behalf of its members in an effort to protect their economic, recreational, conservation, scientific, and aesthetic interests in the waters of Lake Okeechobee.

11. The interests described above of Plaintiff FWF and its members have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely affected and irreparably injured by Defendant's violation of the Clean Water Act's NPDES permit requirement.

12. Defendant, South Florida Water Management District through Henry Dean, Executive Director, acting in his official capacity, maintains and operates water supply and flood control structures, including those structures and facilities at issue in this case, the operation of which results in the discharges of pollutants into Lake Okeechobee.

13. Defendant is located at SFWMD's headquarters at 3301 Gun Club Road, West Palm Beach, Florida, 33046.

BACKGROUND AND FACTS

14. The Clean Water Act was enacted by Congress in 1972 to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). The Act further declared that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. § 1251(a)(1).

15. Under the CWA, "the discharge of any pollutant by any person shall be unlawful" unless it meets the NPDES permitting requirements set forth in § 402. 33 U.S.C. § 1311. The terms of NPDES permits are calculated to reduce pollution to levels that are not harmful to the waters into which they flow.

16. The "discharge of a pollutant" refers to any addition of any pollutant to navigable waters of the United States from any point source. 33 U.S.C. § 1362(12).

17. The term "pollutant" includes, among other things, chemical wastes and municipal and agricultural waste discharged into water. 33 U.S.C. § 1362(6).

18. Waters of the United States are waters that are federally navigable in the sense that they are navigable in fact and law, and include waters that flow into federally navigable waters. 33 U.S.C. § 1362(7).

19. For more than the past five years, the Defendant, has authorized the periodic discharge of water that contains pollutants from the pumps in the S-2, S-3, and S-4 pumping stations into Lake Okeechobee and continues to do so.

20. The S-2 pumping station discharges water collected in the Hillsboro Canal and North New River Canal into Lake Okeechobee.

21. The S-3 pumping station discharges water collected in the Miami Canal into Lake Okeechobee.

22. The S-4 pumping station discharges water collected in the C-20 canal and other canals into Lake Okeechobee.

23. The natural condition of Lake Okeechobee and the Everglades is that condition which existed prior to the construction of any levees or canals in the Lake Okeechobee/Everglades region.

24. In its natural condition, Lake Okeechobee was a lake.

25. In its natural condition, the Everglades was a wetland that occupied lands south of the southern shore of Lake Okeechobee.

26. Maps of the Everglades and Lake Okeechobee as they existed in their natural condition show Lake Okeechobee and the Everglades as separate and distinct bodies of water.

27. The boundary between Lake Okeechobee and the Everglades was surveyed by official state surveyors who had been instructed to survey the ordinary high water boundary of the lake as it existed prior to drainage operations.

28. In their natural condition, a broad pond apple forest (also known as a custard apple forest) existed along the south shore of the lake.

29. Water flowed out of the lake through stream channels in the natural muck berm formed by the pond apple forest.

30. During periods of high water when the water reached an elevation of 20 to 21 feet above mean sea level, sheet flow occurred over the entire southern rim of Lake Okeechobee.

31. Near the end of the 19th century and the beginning of the 20th century, efforts were begun to lower the water level in Lake Okeechobee and to drain the Everglades. These efforts attracted settlers to the area south of the lake to farm the organic soils. A muck levee was constructed on the southern side of Lake Okeechobee to provide flood protection to residents. Although the Everglades Drainage District constructed levees, locks, dams and 440 miles of canals, flooding from the hurricane of 1928 killed over 2000 people.

32. In 1930, the Federal Government became involved and construction of the Herbert Hoover Dike around Lake Okeechobee began. In the following years, over drainage during droughts caused coastal salt water intrusion and muck fires in the Everglades while hurricanes continued to result in property damage.

33. Over drainage and the lowering of lake levels during this time period also caused the muck lands south of the lake to subside so much that the water on these lands began to drain back into the Lake and not south across the Everglades as was formerly the case.

34. As a result of these conditions, the U. S. Army Corps of Engineers (COE) was authorized to create the present Central and South Florida Project for Flood Control and Other Purposes.

35. Part of the Central and Southern Florida Project was the creation of the Agricultural and Conservation areas south of the lake.

36. As part of this plan, an area of thick peat soil south of Lake Okeechobee was designated the "Everglades Agricultural Area" ("EAA")."

37. Farther south, other areas of peat soils less suitable for agriculture were designated as "Water-Conservation Areas ("WCAs").

38. As a result of the project, lands in the Everglades Agricultural Area have been "reclaimed" from their natural state and are now agricultural lands used primarily for the growing of sugar cane with the aid of an extensive network of private levees, drainage canals, and drainage pumps and with the aid of the levees, canals, and pumps of the District.

39. The stormwater canals headed by pumping stations S-2, S-3, and S-4 are artificially constructed waterways sited in locations where rivers used to flow through the natural muck berm on Lake Okeechobee's southern shore.

40. When the Herbert Hoover dike was constructed, the dike in some areas was constructed approximately a half-mile to a mile and a half lakeward of the existing south and east shoreline of the lake.

41. The Miami Canal, between the S-2 pumping station in the dike and the S-8 pumping station at the southern end of the EAA, crosses approximately a half mile of former lakebed and 20 miles of former Everglades.

42. The North New River Canal, between the S-2 pumping station in the dike and the S-7 pumping station at the southern end of the EAA, crosses approximately one and a half miles of former lakebed and 25 to 30 miles of former Everglades.

43. The Hillsboro Canal, between the S-2 pumping station in the dike and the S-6 pumping station at the southern end of the EAA, crosses approximately one and a half miles of former lakebed and 20 miles of former Everglades.

44. The C-20 canal was constructed along the shore of the former lakebed and connects with other drainage canals that cross and drain lands that were former Everglades located in what is now the S-4 basin.

45. Pursuant to the provisions of the Clean Water Act, the State of Florida has classified all water bodies in the State according to one of five designated uses – Class I (drinking water supplies) which has the most stringent water quality criteria through Class V (industrial) which has the least stringent water quality criteria.

46. By administrative rule, the State has classified Lake Okeechobee as a Class I water body (Potable Water Supplies), has classified the main District stormwater canals described above as Class III water bodies (Recreation, Propagation and Maintenance of a Healthy, Well-Balanced Population of Fish and Wildlife), and the private agricultural canals as Class IV water bodies. (Agricultural Water Supplies).

47. When Lake Okeechobee and the Everglades were in their natural condition (prior to construction of levees and canals or the use of pumps) there was little intermingling between the surface water and ground water in the northern part of the Everglades (the present day EAA area).

48. The lack of intermingling of surface water and groundwater in the Northern Everglades was due to the existence of Lake Flirt Marl, a hard, impermeable rock layer (also known as the caprock layer) that lies directly below the muck soils.

49. When the canals leading to the S-2, S-3, and S-4 pumping stations were constructed they penetrated this impermeable rock layer with the result that groundwater was able to seep into and mingle with the surface water of the canals.

50. Agricultural drainage canals dug by sugar cane growers in the EAA also penetrated this impermeable rock layer with the result that

groundwater was able to seep into and mingle with the surface water of the agricultural drainage canals.

51. The practice of sugar cane growers of dynamiting the impermeable rock layer has resulted in cracks in the limestone layer which allow ground water to seep into and mingle with the surface waters of the agricultural drainage canals.

52. The operation of the S-2, S-3, and S-4 pumping stations results in the rapid drawdown of water in the canals and exacerbates the flow of groundwater into the canals.

53. Farm water management in the EAA consists of water table management achieved through a combination of open field ditches and high volume pumps.

54. Because rainfall is highly seasonal and frequently intense, flows in the drainage/irrigation networks can undergo extreme variations, going from stagnation to maximum flow in short periods.

55. The high volume drainage pumps discharge a mixture of groundwater and polluted surface water from the agricultural canals into the main District stormwater canals, and the water from the stormwater canals is then pumped into Lake Okeechobee through pumping stations S-2, S-3, and S-4.

56. Despite the intermingling of groundwater and surface water in the EAA caused by the canal construction and pumping activities of the District and the sugar cane growers, lake water, canal water, and groundwater continue to be chemically distinct.

57. The chemical characteristics of Lake Okeechobee, the canals, and the groundwater underlying Lake Okeechobee and the canals can be determined by examining the historic water quality monitoring records of the District, the State, and the Federal Government.

58. Those records show that the waters of Lake Okeechobee are chemically distinct from the waters of the canals.

59. Those records also show that lake water and canal water are each chemically distinct from the groundwater in the aquifers underlying the lake and the canals.

60. Those records also show that the water discharged from the canals into Lake Okeechobee through pumping stations S-2, S-3, and S-4 contains pollutants including, but not limited to, nutrients, total dissolved solids, and un-ionized ammonia.

61. In its natural condition, Lake Okeechobee exhibited the ecological characteristics and the biota of a lacustrine ecosystem.

62. In its natural condition, the Everglades exhibited the ecological characteristics and the biota of a wetland ecosystem.

63. In their natural condition, Lake Okeechobee and the Everglades were ecologically distinct water bodies.

64. In their natural condition, Lake Okeechobee and the Everglades were biologically distinct water bodies.

65. In their natural condition, Lake Okeechobee and the Everglades were hydrologically distinct water bodies.

66. In its current diked condition, the lake continues to exhibit the ecological and biological characteristics of a lacustrine ecosystem.

67. In their current condition, the District stormwater canals exhibit the ecological and biological characteristics of an artificially created drainage ditch, i.e., highly variable flow regimes (stagnant when the pumps are off to high flow when the pumps are turned on), lack of habitat diversity, lack of substrate availability and diversity, lack of riparian zones and riparian zone vegetation, low dissolved oxygen levels, high nutrient levels, and biota adapted to a nutrient enriched environment.

68. The District has divided the EAA into hydrological subbasins with recognized boundaries.

69. The S-2 pumping station discharges water collected in the North New River and Hillsboro River Canals from the S-2 subbasin, the S-3 pumping station discharges water collected in the Miami Canal from the S-3 subbasin, and the S-4 pumping station discharges water collected in C-20 Canal and associated canals from the S-4 subbasin.

70. In their current condition, the District stormwater canals and Lake Okeechobee are ecologically distinct water bodies.

71. In their current condition, the District stormwater canals and Lake Okeechobee are biologically distinct water bodies.

72. In their current condition, the District stormwater canals and Lake Okeechobee are hydrologically distinct water bodies.

73. Lake Okeechobee, the Northern Everglades, the EAA, and the District's stormwater canals were and are all meaningfully distinct water bodies.

74. Point sources are sources of water pollution from a discernable, confined and discrete conveyance such as a pipe, channel, tunnel, or conduit. 33 U.S.C. § 1362(14).

75. The pumps in the S-2, S-3, and S-4 pumping stations are discernable, confined, and discrete conveyances of water.

76. The pumps in the S-2, S-3, and S-4 pumping stations are all point sources under the Clean Water Act.

77. When a point source artificially transfers water and pollutants from one body of water to another meaningfully distinct body of water into which the pollutants did not naturally flow, an addition of pollutants from the point source occurs and an NPDES permit is required.

78. The Everglades in its natural state did not flow into Lake Okeechobee and there are no records that indicate that it did.

79. The pumps in the S-2, S-3, and S-4 pumping stations are point sources that discharge pollutants into Lake Okeechobee.

80. The Defendant has not been issued, nor has it applied for, NPDES permits for the discharge of these pollutants into Lake Okeechobee.

81. The effects of the discharge are water quality degradation in Lake Okeechobee.

COUNT I
CLAIM FOR DECLARATORY JUDGMENT

82. Paragraphs 1-81 are incorporated by reference.

83. The pumps in the S-2, S-3, and S-4 pumping stations convey water from the District stormwater canals, each of which is a separate and

meaningfully distinct water body, into Lake Okeechobee, a separate and meaningfully distinct water body.

84. The water transferred through the pumps carries pollutants.

85. The pumps in the S-2, S-3, and S-4 pumping stations are all point sources under the Clean Water Act.

86. The discharge of pollutants from any point source into navigable waters requires a NPDES permit.

87. Defendant has not obtained NPDES permits.

88. Defendant has violated and is violating the provisions set forth in §§ 301 and 402 of the Clean Water Act.

89. Based on the foregoing facts, Plaintiff FWF requests a declaration of Defendant's violation of the NPDES permit requirement under the Clean Water Act.

COUNT II
CLAIM FOR INJUNCTIVE RELIEF

90. Paragraphs 1-81 are incorporated by reference.

91. Plaintiff FWF has no adequate remedy at law for these violations.

92. Irreparable environmental degradation occurs each day Defendant continues to authorize the unlawful pollution of the waters of Lake Okeechobee.

93. Therefore, Plaintiff FWF seeks an injunction requiring Defendant to obtain NPDES permits immediately.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff FWF respectfully requests this Court to enter the following relief:

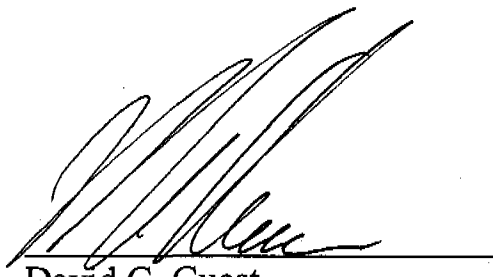
a) a declaratory judgment that Defendant's failure to obtain NPDES permits stands in violation of §§ 301 and 402 of the Clean Water Act;

b) an injunction against Defendant, requiring compliance with the NPDES provisions outlined in §§ 301 and 402 of the Clean Water Act;

c) an award of litigation costs, including reasonable attorney and expert witness fees, as authorized in § 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d); and,

d) such other and further relief as the court deems just and appropriate to effectuate a complete resolution of the legal disputes between Plaintiff and Defendant.

RESPECTFULLY SUBMITTED this 22nd day of February, 2005.



David G. Guest
Fla. Bar No. 0267228
Monica K. Reimer
Fla. Bar No. 0090069
P.O. Box 1329
Tallahassee, FL 32302-1329
Phone: (850) 681-0031
Facsimile: (850) 681-0031
COUNSEL FOR FLORIDA
WILDLIFE FEDERATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on this 22d day of February, 2005, by U.S. Mail and facsimile on:

Daniel H. Thompson
Berger Singerman
315 South Calhoun Street, Suite 712
Tallahassee, Florida 32301

John Childe
606 Pine Road
Palmyre, Pennsylvania 17078

James Nutt
South Florida Water Management District
3301 Gun Club Road, MSC 1410
West Palm Beach, Florida 33406

Kelly S. Brooks
Dexter W. Lehtinen
Lehitnen Vargas Reiner & Reidi, P.A.
7700 North Kendall, Ste. 303
Miami, Florida 33156

Dione Carroll
P.O. Box 440021
Miami, Florida 33144

Rick J. Burgess
Gunster Yoakley & Stewart, P.A.
Broward Financial Centre, Ste. 1400
500 East Broward Boulevard
Fort Lauderdale, Florida 33394

Attorney