

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FLORIDA WILDLIFE FEDERATION, INC.;
CONSERVANCY OF SOUTHWEST
FLORIDA, INC.; and ENVIRONMENTAL
CONFEDERATION OF SOUTHWEST
FLORIDA, INC.,

Plaintiffs,

CASE NO. _____

v.

UNITED STATES ARMY CORPS OF
ENGINEERS,

and

FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION
AND SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,

Defendants.

_____ /

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs—Florida Wildlife Federation, Inc., the Conservancy of Southwest Florida, Inc., and the Environmental Confederation of Southwest Florida, Inc.—bring this action against the United States Army Corps of Engineers (“the Corps”) to abate the Corps’ operation of water control structures on the Caloosahatchee River, which results in violations of the Florida Department of Environmental Regulation’s water quality standards and the South Florida Water Management District’s minimum flows and levels for the Caloosahatchee River.

NATURE OF THE CASE

1. This action arises under and alleges violations of the Clean Water Act, 33 U.S.C. § 1323; Florida Water Resources Act, Florida Statutes § 373.433; and Florida water pollution control and abatement regulations.

2. Under the Clean Water Act, 33 U.S.C. § 1323, each federal agency “having jurisdiction over any property or facility, . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity”

3. Additionally, “[a]ny stormwater management system, dam, impoundment, reservoir, appurtenant work, or works which violates the laws of this state or which violates the standards of the governing board or [DEP] shall be declared a public nuisance. The operation of such stormwater management system, dam, impoundment, reservoir, appurtenant work, or works may be enjoined by suit by the state or any of its agencies or by a private citizen.” § 373.433, Fla. Stat.

4. Plaintiffs contend that the Corps own three water control structures on the Caloosahatchee River, and that the agency’s operation of those structures results in violations of Florida water quality standards for total dissolved solids and dissolved oxygen. Additionally, the Corps’ operation of these structures fails to meet the designated uses of the Caloosahatchee River for public drinking water, propagation of fish and wildlife, and recreation. Finally, the Corps’ operation of the water control structures violates Florida’s salinity and minimum flows and levels regulations for the Caloosahatchee River.

5. Accordingly, Plaintiffs seek a declaration that the Corps' operation of the Caloosahatchee River water control structures violates the Clean Water Act and the Florida Water Resources Act, and an injunction prohibiting the Corps from operating those structures in a manner that violates state water protection laws.

JURISDICTION

6. This Court has subject matter jurisdiction over this action by virtue of 28 U.S.C. § 1331 (federal question jurisdiction), and 28 U.S.C. § 1346 (United States as a defendant).

7. Under the Clean Water Act, 33 U.S.C. § 1323, each agency of the federal government "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity" This provision applies to any requirement whether substantive or procedural to the exercise of any Federal, State, or local administrative authority, and to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. *Id.*

THE PARTIES

8. Plaintiff Florida Wildlife Federation ("Federation") is a Florida statewide non-profit conservation and education organization with its principal place of business in Tallahassee, Florida. It is a membership-based organization with approximately 13,000 members throughout Florida. The organization's mission includes the preservation, management, and improvement of Florida's water resources and its fish and wildlife habitat.

The Federation represents its members in state and federal litigation brought to preserve and protect Florida's river, lakes, estuaries, and coastal waters.

9. Plaintiff Conservancy of Southwest Florida, Inc. ("the Conservancy") is a Florida non-profit corporation with its primary place of business in Naples, Florida. There are approximately 6,000 CSF members residing throughout Florida. CSF is a grassroots organization devoted to protecting the land, water, and wildlife of Southwest Florida. CSF works to protect both the quality and quantity of southwest Florida's water resources through education, monitoring, litigation, and preservation.

10. Plaintiff Environmental Confederation of Southwest Florida ("ECOSWF") is a Florida non-profit corporation with its primary place of business in Sarasota, Florida. ECOSWF has approximately 50 members consisting of business entities, governmental agencies and other organizations and individuals living in Southwest Florida. ECOSWF is a regional coalition which focuses its efforts on protecting the conservation interests of Southwest Florida, including Charlotte, Collier, DeSoto, Lee, Manatee, and Sarasota Counties. ECOSWF accomplishes its goals through active stewardship of Southwest Florida's wildlife, water, soil and air, through citizen participation and education, through legal challenges aimed at preserving Florida's waters, and by its support of preservation and conservation.

11. Each of the Plaintiffs files this action on its own behalf and on behalf of its members in an effort to protect their health, economic, recreational, aesthetic, scientific and conservation interests in the waters of Florida.

12. Defendant United States Army Corps of Engineers is an agency of the United States. The Corps owns, maintains, and operates the S-77, S-78, and S-79 water control

structures on the Caloosahatchee River pursuant to the Central and Southern Florida Flood Control Act.

13. The Corps' Jacksonville District Office, which is responsible for operation of the water control structures at issue, is located at 701 San Marco Boulevard, Room 372, Jacksonville, Florida 32232.

14. Defendant Florida Department of Environmental Protection ("DEP") is located at 3900 Commonwealth Boulevard, M.S. 49, Tallahassee, Florida 32399. Section 373.433, Florida Statutes, makes this defendant a necessary party to this action. Plaintiffs do not assert any claim or seek any relief against DEP.

15. Defendant South Florida Water Management District ("SFWMD") is located at 3301 Gun Club Road, West Palm Beach, Florida 33046. Section 373.433, Florida Statutes, makes this defendant a necessary party to this action. Plaintiffs do not assert any claim or seek any relief against SFWMD.

STANDING

16. Members of the Federation, the Conservancy, and ECOSWF use and enjoy the Caloosahatchee River for a variety of recreational, aesthetic, educational, and scientific purposes, including, but not limited to, wading, walking, swimming, canoeing, sailing, sport boating, sport and commercial fishing, wildlife observation, photography, personal and commercial research, and collecting aquatic life for personal and commercial consumption. Plaintiffs and their members intend to continue to do all of the foregoing activities on an ongoing basis in the future, and they derive recreational, aesthetic, scientific, educational, and economic benefits from the natural resources of this aquatic ecosystem.

17. The Corps' operation of the federal water control structures on the Caloosahatchee River violates Florida water quality standards and therefore, harms and Plaintiffs' and their members' recreational, aesthetic, scientific, educational, conservational, and economic interests in the natural resources of these waters.

18. The Corps' operation of the federal water control structures on the Caloosahatchee River results in critically low levels of dissolved oxygen, high dissolved solids, high salinity levels, and the growth of toxic algae blooms all of which have diminished Plaintiffs' and their respective members' use and enjoyment of these waters for boating, canoeing, swimming, and fishing, and have adversely affected their ability to observe and enjoy the native wildlife that rely upon these waters as habitat.

19. Additionally, some of Plaintiffs' members obtain drinking water from the Olga Water Treatment facility on the Caloosahatchee River, upstream of S-79 (Franklin Lock). The Corps' operation of the federal water control structures on the Caloosahatchee River regularly causes the Facility, which supplies drinking water to approximately 40,000 households, to shut down due to violation of drinking water standards, ambient water quality standards, and toxic algae outbreaks.

20. As non-profit organizations incorporated under the laws of Florida, plaintiffs are entitled to sue as private citizens of the State of Florida.

BACKGROUND AND FACTS

21. The Corps owns, operates, and has sole authority over S-77, S-78, and S-79, the water control structures (each comprised of a spillway and a navigation lock) that are used to regulate the flow of water from Lake Okeechobee down the Caloosahatchee River and into the downstream Caloosahatchee estuary.

22. S-77 (the Moore Haven Lock) is at the headwaters of the Caloosahatchee and controls flows between the Lake and the River.

23. S-78 (the Ortona Lock) lies 15.5 miles to west of the Moore Haven Lock.

24. S-79 (the Franklin Lock) lies 27.9 miles to the west of the Ortona Lock. This Lock was built pursuant to the 1948 Comprehensive Plan.

25. Downstream of the Franklin Lock is the tidally influenced estuarine portion of the Caloosahatchee River which flows for another 25 miles until it empties into San Carlos Bay.

26. The Corps controls water levels in Lake Okeechobee, which is a major water source for the River.

27. The Lake and the segment of the Caloosahatchee River between the Lee/Hendry County Lines and the Franklin Lock (approximately seven river miles) are designated for use as potable water supplies and are classified as Class I waters by Florida water quality standards regulations. Fla. Admin. Code R. 62-302.400(16)(b)(22),(26),(43),(47), and (50) (Lake Okeechobee); Fla. Admin. Code R. 62-302.400(16)(b)(36) (Caloosahatchee River).

28. The Olga Water Treatment Facility is a drinking water plant that draws its source water from a point just upstream of the Franklin Lock within the area designated for use as potable water supplies. The Plant provides drinking water to 40,000 households in Eastern Lee County.

29. The remaining portions of the River are designated for Recreation, Propagation and Maintenance of a Healthy, Well-Balanced Population of Fish and Wildlife

and therefore are classified as Class III waters by Florida water quality standard regulations. Fla. Admin. Code R. 62-302.400(14).

30. During times of low water, the Corps routinely operates the Caloosahatchee structures in a manner that results in no freshwater being released into the tidal portion of the Caloosahatchee River below Franklin Lock for months at a time.

31. Similarly, in times of low water, the Corps also allows the upper portion of the Caloosahatchee River to flow backwards into Lake Okeechobee. As a result, the Caloosahatchee River estuary is deprived of freshwater flowing downstream from its upper watershed.

32. Without freshwater flows inflows during the dry season, high salinities extend all the way up the River to the Franklin Lock, eliminating the Estuary's low salinity zone. Tape grass, the prevailing submerged aquatic vegetation in the Upper Estuary, provides important nursery areas and habitat for larval and juvenile fish and invertebrates including many economically important species. It also helps to maintain water clarity and quality by stabilizing and trapping sediments and taking up nutrients that would otherwise promote rapid ecological changes in the estuary. Therefore, scientists use tape grass beds, which grow in shallow water, as an indicator of estuarine health.

33. A combination of laboratory experiments, field observations, and review of the literature indicate that tape grass populations cannot sustain themselves over the long-term at salinities above 10 parts per thousand.

34. By regulation, the SFWMD has set a minimum mean monthly flow ("MFL") of 300 cubic feet per second of water to maintain sufficient salinities at S-79 to prevent a minimum flow exceedance. An MFL exceedance occurs when (during a 365 day period): a)

a 30-day average salinity concentration exceeds 10 parts per thousand at the Fort Myer's salinity station, or b) a single daily average salinity exceeds a concentration of 20 parts per thousand at the Fort Myers salinity station. Exceedance of either (a) or (b) for two consecutive years violates the MFL.

35. MFLs are set to identify where significant harm to the resource is expected to occur.

36. The MFL for the Caloosahatchee River has now been violated for five consecutive years.

37. Shutting off flows through S-79 also impacts water quality upstream of the Franklin Lock.

38. When flows are shut off, chloride levels and dissolved solid levels in the water upstream of the Lock will rise to the point that they violate state water quality standards, result in violations of Safe Drinking Water standards, and force closure of the Olga Treatment Facility. This year the Facility has already been closed for over two months.

39. When flows are cut off, dissolved oxygen levels in the water upstream of the lock decrease to a point below the level needed to sustain aquatic life. Low dissolved oxygen levels can be caused by lack of flow and also by algae which consume oxygen as they die and decompose, both of which conditions are caused by the operation of the S-79 structure.

40. Algal blooms occur when high concentrations of nutrients enter the water and stimulate the growth of cyanobacteria cells that naturally occur there. Their growth becomes much more rapid than normal and under proper conditions (slow moving or stagnant water, warm temperatures, high sunlight) the algae cells can reach such high levels that the water turns bright green.

41. Algal blooms can cause taste and odor problems with drinking water, can contribute to the formation of carcinogenic substances in drinking water when it undergoes chlorination, and can produce toxins that are not removed by the drinking water treatment process and. Algal bloom toxins can cause liver and neurological disease in animals and humans that drink or come into contact with the River water. They can also cause skin irritations, kill fish and other animals, and their appearance and odor can seriously impair the recreational value of the waterbody.

42. Shutting off flows through S-79 has caused algal blooms in the Caloosahatchee River that can extend upstream and downstream of the Franklin Lock and which have generated warnings by Glades, Hendry, and the Lee County public health departments that neither people nor animals should come into contact with the water, should drink the water, or eat fish taken from the water. Exhibit A (Lee County Health Department Algae Warning Sign Posted on Caloosahatchee River at U.S. Army Corps of Engineers' Franklin Lock Recreation Area, June 6, 2011).

43. Algal blooms have occurred in the Caloosahatchee River eight of the past eleven years. In 2011 alone, there were eight weeks of blooms.

44. The effect of this operational regime causes the following violations of state laws and regulations regarding the control and abatement of water pollution:

(a) saltwater intrudes upstream of the Franklin Lock raises chloride levels and routinely forces the closing of the Olga Water Treatment Facility located just upstream of the Franklin Lock. That Facility provides drinking water to 40,000 households in Eastern Lee County. When the water in the River cannot be used for

potable water supplies, the result is violation of the designated use of the river as a potable water supply;

(b) water upstream of the Franklin Lock violates the Department's dissolved oxygen criteria for Class I and Class III waters;

(c) water upstream of the Franklin Lock violates the Department's dissolved solids standards for Class I waters;

(d) the stagnating nutrient enriched waters upstream and downstream of the Franklin Lock routinely develop harmful algal blooms of toxigenic cyanobacteria that can and have produced cyanotoxins in such concentrations that they poison and can even kill animals and humans and thus violates the Department's water quality standard that prohibits substances in concentrations that produce adverse physiological or behavioral response in humans, plants, or animals;

(e) the harmful algal blooms that develop upstream and downstream of the Franklin Lock also result in violations of the designated Class III uses of those waters for recreation and wildlife propagation as evidenced by Lee, Hendry, and Glades County public health advisories that warn the public to stay out of the water, warn against drinking by humans or animals, and warn against eating fish caught in those waters during bloom events; and,

(f) the waters downstream of the Franklin Lock violate the District's salinity and minimum flows and levels regulations for the Caloosahatchee River which are set to protect against significant harm to the water resources and the ecology of the area.

THE CLEAN WATER ACT AND
FLORIDA WATER QUALITY STANDARDS

45. The Clean Water Act, 33 U.S.C. § 1251 *et seq.*, is a comprehensive water quality statute designed to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The Act was also intended to “provide[] for the protection and propagation of fish, shellfish, and wildlife.” 33 U.S.C. § 1251(a)(2).

46. As one means of achieving these ambitious goals, the Clean Water Act provides that each federal agency “having jurisdiction over any property or facility, . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity . . .” 33 U.S.C. § 1323. This obligation applies “(A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner.” *Id.*

47. Consistent with the purposes of the Clean Water Act, Florida enacted the Air and Water Pollution Control Act “to conserve the waters of the state and to protect, maintain, and improve the quality” of those waters. § 403.021(2), Fla. Stat. Pursuant to that Act, Florida has adopted a comprehensive program for the prevention, abatement, and control of pollution in all of the state’s navigable waters. DEP has classified these waters according to their designated uses (*i.e.*, the “present and future most beneficial use of a body of water”). Fla. Admin. Code R. 62-302.200(8). Florida has divided its waters into six classes: Class I (Potable Water Supplies); Class II (Shellfish Propagation or Harvesting); Class III

(Recreation, Propagation and Maintenance of a Healthy, Well-Balanced Population of Fish and Wildlife); Class III Limited (Fish Consumption, Recreation or Limited Recreation, and/or Propagation and Maintenance of a Limited Population of Fish and Wildlife);¹ Class IV (Agricultural Water Supplies); and Class V (Navigation, Utility and Industrial Use). Fla. Admin. Code R. 62-302.400(1).

48. The Caloosahatchee River is designated Class I from the Lee/Hendry County Line downstream to the S-79 water control structure. Fla. Admin. Code R. 62-302.400(16)(b)(36). Class I waters are designated for use as potable water supplies and generally have the most stringent water quality criteria. The remainder of the Caloosahatchee River is designated Class III (Recreation, Propagation and Maintenance of a Healthy, Well-Balanced Population of Fish and Wildlife). Fla. Admin. Code R. 62-302.400(14). All Class I and III waters, however, share water quality criteria established to protect fish consumption, recreation, and the propagation and maintenance of a healthy, well-balanced population of fish and wildlife. Fla. Admin. Code R. 62-302.400(4).

49. For each of the designated use classifications, the state has established water quality standards for certain pollutants that are the minimum necessary to protect, maintain, and improve the quality of the water for its specific designated use. §§ 403.021(2), (11), Fla. Stat.; Fla. Admin Code R. 62-302.300(3).

50. For both Class I and III waters in Florida, levels of dissolved oxygen “shall not be less than 5.0.” Fla. Admin Code R. 62.302.530(30).

¹ No Florida water body has been designated as a Class III-Limited water.

51. For Class I waters, DEP has adopted regulations establishing a 500 milligram per liter monthly average, and a 1,000 milligram per liter maximum for dissolved solids. Fla. Admin. Code R. 62-302.530(31).

52. For all classes of waters, DEP regulations prohibit “[s]ubstances in concentrations which injure, are chronically toxic to, or produce adverse physiological or behavioral response in humans, plants, or animals.” Fla. Admin. Code R. 62-302.530(61).

53. To further promote the public policy set forth in the Florida Air and Water Pollution Act, Florida also enacted the Florida Water Resources Act to conserve and control water use, minimize degradation of water, preserve natural resources, fish, and wildlife, and promote recreation, and the health, safety, and general welfare of the people of the state. *See* §§ 373.016(3)(a)-(j), Fla. Stat.

54. The Florida Water Resources Act divides the waters of Florida into five water management districts, and requires either DEP or the governing board of each water management district to establish minimum water flows and levels for all surface waters in each district. §§ 373.042(1) & .069(1), Fla. Stat. The minimum water flow for a given watercourse is the level below which there would be significant harm to the water resources or ecology of the area. §§ 373.042(1)(a) & (b), Fla. Stat.

55. The South Florida Water Management District has primary authority for promulgating and implementing minimum flows and levels for the Caloosahatchee River. For the Caloosahatchee River, “a minimum mean monthly flow of 300 CFS is necessary to maintain sufficient salinities at S-79 in order to prevent a [minimum flows and levels] exceedance.” A minimum flows and levels exceedance occurs when “(a) a 30-day average salinity concentration exceeds 10 parts per thousand at the Ft. Myers salinity station . . . ; or

(b) a single, daily average salinity exceeds a concentration of 20 parts per thousand at the Ft. Myers salinity station. Exceedance of either paragraph (a) or (b), for two consecutive years is a violation of the MFL.” Fla. Admin Code R. 40E-8.221.

56. Finally, Florida’s abatement statute provides that “[a]ny stormwater management system, dam, impoundment, reservoir, appurtenant work, or works which violates the laws of this state or which violates the standards of the governing board or the department shall be declared a public nuisance. The operation of such stormwater management system, dam, impoundment, reservoir, appurtenant work, or works may be enjoined by suit by the state or any of its agencies or by a private citizen. The governing board or the department shall be a necessary party to any such suit.” § 373.433, Fla. Stat.

CLAIM FOR RELIEF

Abatement

57. Plaintiffs hereby re-allege and incorporate by reference the allegations set forth in paragraphs 1 through 56 as if set forth in full.

58. Under the Clean Water Act, 33 U.S.C. § 1323(a)(1), each federal agency “having jurisdiction over any property or facility . . . shall be subject to, and comply with all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity”

59. Under the Florida Water Resources Act, “[a]ny stormwater management system, dam, impoundment, reservoir, appurtenant work, or works which violates the laws of this state or which violates the standards of the governing board or the department shall be declared a public nuisance. The operation of such stormwater management system, dam,

impoundment, reservoir, appurtenant work, or works may be enjoined by suit by the state or any of its agencies or by a private citizen.” § 373.433, Fla. Stat.

60. The Corps owns, operates, and has sole authority over water control structures S-77, S-78, and S-79, which are dams, impoundments, reservoirs, or appurtenant works within the meaning of Section 373.433, Florida Statutes.

61. The Corps’ operation of those water control structures causes violations of Florida water quality standards for total dissolved solids and dissolved oxygen in the Caloosahatchee River. Fla. Admin Code R. 62-302.530.

62. The Corps’ operation of the S-77, S-78, and S-79 water control structures causes violations of DEP regulations prohibiting “[s]ubstances in concentrations which injure, are chronically toxic to, or produce adverse physiological or behavioral response in humans, plants, or animals.” Fla. Admin. Code R. 62-302.530(61).

63. The Corps’ operation of the S-77, S-78, and S-79 water control structures causes the River to fail to meet its designated uses for public drinking water supply, for recreation, and for propagation of fish and wildlife. Fla. Admin Code R. 62-302.300.

64. The Corps’ operations of the S-77, S-78, and S79 water control structures causes violations of Florida’s salinity and minimum flows and levels regulations for the Caloosahatchee River. Fla. Admin. Code R. 40E-8.221.

65. Plaintiffs are private citizens of the State of Florida, and therefore are entitled to sue to enforce the provisions of Section 373.433, Florida Statutes.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Florida Wildlife Federation, Inc., Conservancy of Southwest Florida, Inc., and Environmental Confederation of Southwest Florida, Inc.

respectfully request this Court issue a judgment declaring that the Corps' operation of the federal Caloosahatchee River water control structures fails to comply with Florida laws and regulations relating to the control and abatement of water pollution, an injunction pursuant to the Florida Water Resources Act, Section 373.433, Florida Statutes, prohibiting the Corps from operating the federal water control structures in a manner that violates Florida water protection laws and regulations, and any such further relief as the Court deems just and appropriate to effectuate a complete resolution of the legal dispute between Plaintiffs and the Corps.

Dated: July 30, 2012

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WARNING: ALGAE ALERT

STAY OUT OF WATER



**NO DRINKING
BY HUMANS OR ANIMALS**



NO EATING FISH



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CALL (239) 274-2204**

LEE COUNTY HEALTH DEPARTMENT