

Lewis, Longman & Walker, P.A.
Attorneys at Law

**The Winds of Change...
Storming into the Future**

Water Quality and Quantity Considerations

**Annual Conference of the
Florida Association of Special Districts**

June 15, 2006

Michelle Diffenderfer, Esquire

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U.S. Army Corps of Engineers
Central & Southern Florida Flood Control Project

Compartmentalized
1800 miles of levees
& canals
300 Structures
30+ Pump Facilities





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Is an NPDES permit needed?

- Whether the transfer of water that contains pollutants from a navigable water across a levee into navigable waters that contain less pollutants requires a federal NPDES permit under Section 402 of the Clean Water Act (33 U.S.C. § 1342(a)), where the transferred water contains a pollutant but the pumping station itself adds no pollutants to the water being pumped?

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**The S-9 pumps and
L-31/33 Levees**

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FASD and LWDD entered as Amicus

- The FASD is comprised of 89 special districts, 39 of which are water control districts that may be affected by the suits.
- LWDD is a creature of statute:
 - 298 District
 - 218 square miles; 11 cities
 - 511 miles of canals
 - 20 major water control structures
- LWDD does not have the authority to permit or control water quality within its boundaries; it can only levy assessments in furtherance of its operations which include the movement of water for flood control purposes.

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Potential Impacts of NPDES Permitting on LWDD: A Practical Example

- LWDD's current budget is \$12.5 million.
- It would cost LWDD between \$400-\$800 million to install a treatment system that would ensure attainment of NPDES permitting requirements.
- Currently, landowners are specially assessed 33.05 cents per acre or portion thereof in furtherance of LWDD operations.
- Current assessments would increase to between \$1,200-\$1,400 per parcel to install this treatment system.



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US Supreme Court's direction

- Remanded to District Court for further fact finding as to whether the two waters in question were “meaningfully distinct”
- If they were “meaningfully distinct”, a permit would be required
- The Court noted that EPA had not spoken to this issue in an administrative document



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Status of Remand

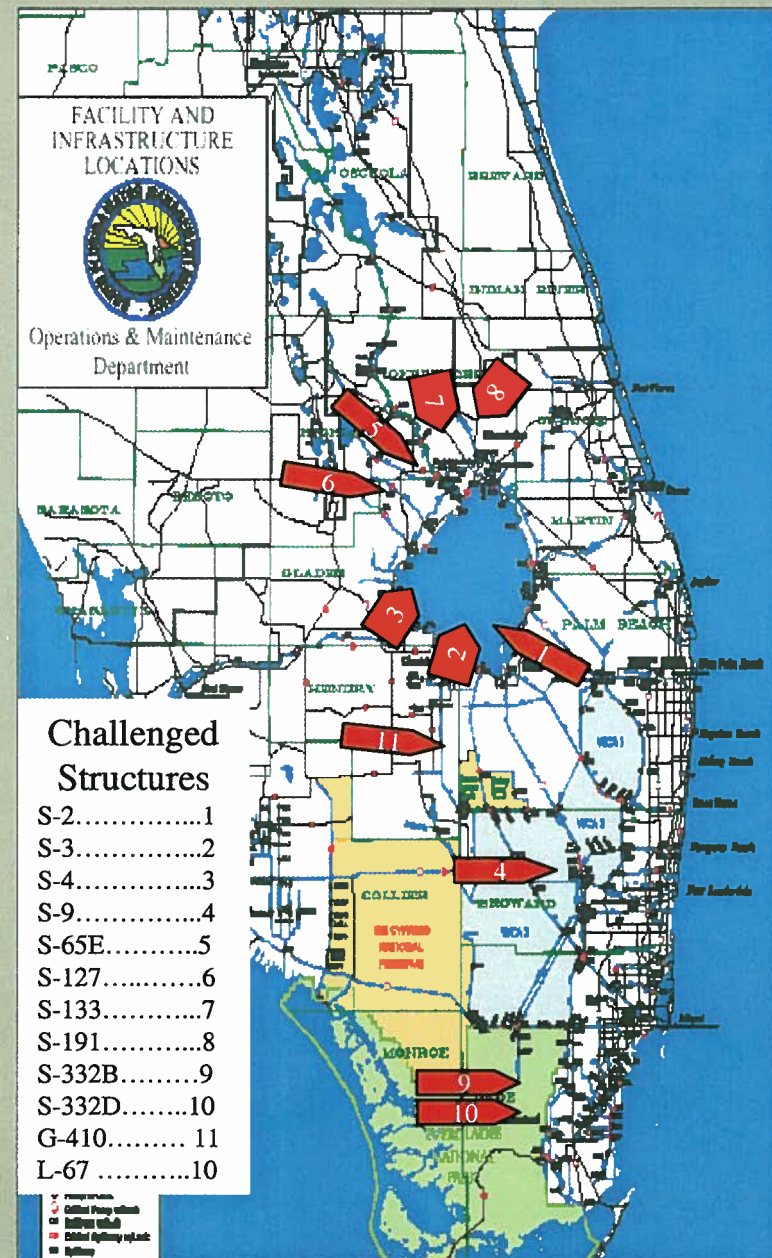
- Dispositive Motions are due June 16, 2006
- Trial is set for September, 2006
- Issue will be whether SFWMD will ask for a Stay pending EPA rulemaking on the issue



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Implications: NPDES Citizen Suits

- 4 Structures in Litigation
- Notices of intent to sue served Against 16
- Agency officials predict more structures could be challenged





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Lake Okeechobee S-2/3/4 Stations



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S-2, 3 & 4



S-2



S-4



S-3

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Status of S-2 case

- Closing arguments finished April 6, 2006
- The parties are awaiting a ruling from the Court
- The issue will be whether the SFWMD decides to request a Stay pending EPA rulemaking on the issue



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The Clean Water Act

A Study in Cooperative Federalism

Distinct Federal and State Roles

Primary rights and responsibility for water and land use management reserved to the States – CWA § 101(b)

State rights to allocate water within its jurisdiction shall not be impaired – CWA § 101(g)

Non-NPDES pollution left to level of government closest to the problem – S. Rep.No. 370, 95th Cong.

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Water Quality Controls

State Watershed Planning & Regulatory Programs

CWA Sec. 101(b) & (g)

CWA Sec. 303-WQS's

CWA Sec. 319 – Carrot Approach

CWA Sec. 304(f)(2)(F) – Flow Diversion

Comprehensive Everglades Restoration Plan CERP

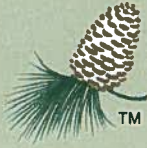
WRDA, NEPA, ESA, Etc...

CWA Sec. 401, 101(g)

Phased Federal Involvement

CWA Sec. 303 – Impaired Waters & TMDLs

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The Clean Water Act Regulation of Water Management Systems

Change to normal flow of surface and ground waters
is non-NPDES pollution

- H.R. Rep. No. 92-911, 92nd Cong.

EPA directed to issue guidance to States on non-
NPDES methods for control of pollution caused
by Dams, levees, canals and other flow diversion
facilities.

- CWA § 304(f)(2)(F)

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The NPDES Program

Section 402 of the Clean Water Act

Discharge of Pollutants illegal without NPDES Permit.

- Clean Water Act §§ 301 & 402

“Discharge of Pollutants” means “any addition of any pollutant to navigable waters from any point source.”

- Clean Water Act § 502(12)



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The Traditional “Addition” Test

Pollutant must be added or introduced to the navigable waters from the “outside world.”

Mere transfer or movement of pre-existing pollutants from one water body to another not an “addition” of pollutants.

National Wildlife Federation v. Gorsuch

National Wildlife Federation v. Consumers Power

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“But For” & “Meaningfully Distinct” Tests?

Rejection of “unified waters” theory

Dubois v. U.S.D.A.

“Outside World” includes other water bodies

Catskill Mountains v. City of NY

“But for” the point source, pollutants would not enter the receiving water body, therefore there is an “addition”

So. FL Water Management District v. Miccosukee 11th Cir.

“Premature” to conclude waters were “meaningfully distinct”

Miccosukee S. Ct.

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Problems with Applying NPDES to Water Transfers

- Eviscerates Federal & State Balance
- Federalizes Land and Water Use Planning
- Imposes responsibility for all pollutants upon the States
- Imposes effluent limitations upon the movement of water
- Interferes with watershed management

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EPA Actions

- EPA issued an August 5, 2005 Memorandum entitled Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers
- Memo confirmed EPA's interpretation that Congress intended for water transfers to be subject to oversight by water resource management agencies and State Non-NPDES authorities, rather than the NPDES permitting program

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EPA Rulemaking

- On June 7, 2006 EPA proposed a new rule to expressly exclude water transfers from the NPDES permitting program
- Rule amends the CWA regulations
- Rule will take effect unless changes are made during the 45 day public comment period which ends July 24, 2006



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The Rule

- Part 122, Section 122.3 Exclusions:
 - (i) Discharges from a water transfer. Water transfer means an activity that conveys waters of the US to another water of the US without subjecting the water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants added by the water transfer activity itself to the water being transferred.



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Left on the table

- EPA is seeking comment on the potential for an additional provision allowing States to designate particular water transfers as being subject to the NPDES program on a case by case basis. EPA did not select this option but would like public comment on it.



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Any Questions?

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