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NPDES PERMITS & WATER TRANSFERS

POST-MICCOSUKEE COURT IN FLORIDA FINDS NPDES PERMIT NECESSARY

by Richard M. Glick, Davis Wright Tremaine LLP (Portland, OR)

In the first reconsideration of the cases giving rise to the US Supreme Court's decision in *South Florida Water Management Dist. v. Miccosukee Tribe of Indians* (541 US 95 (2004) (*Miccosukee*), a federal judge in Florida held that "backpumping" of flood waters from drainage canals into Lake Okeechobee requires a National Pollutant Discharge Elimination System permit ("NPDES" permit, 33 USC § 1342) under the federal Clean Water Act (CWA). *Friends of the Everglades v. South Florida Water Management District* (Case No. 02-80309-CIV-ALTONAGA/Turnoff, Dec. 11, 2006. (*Friends*) Because the practical benefit to the Everglades of requiring a permit was not immediately apparent, the court ordered further proceedings to better define the scope of injunctive relief. All parties agree that backpumping is necessary to avoid flooding populated and agricultural areas.

Interestingly, the court devotes 15 pages of this 107-page order to the question of whether SFWMD enjoys sovereign immunity under the 11th Amendment to the US Constitution. The court concludes in the affirmative, that SFWMD as an instrumentality of the State of Florida is immune from suit in the federal courts, and that SFWMD has not waived immunity, yet proceeds to issue a ruling on the merits.

In 2002, environmental organizations led by Friends of the Everglades (FOE) filed a citizen suit under the CWA to compel the South Florida Water Management District (SFWMD) to obtain a NPDES permit under section 402 of the CWA. The drainage canals in question carry polluted municipal and agricultural runoff, which are pumped upgradient into Lake Okeechobee to avoid flooding. The case was consolidated with another brought against the SFWMD by the Florida Wildlife Federation. The Miccosukee Tribe, which intervened in the FOE case, filed yet another case against SFWMD that involves different pump stations that transfer canal water to a designated conservation area. The cases were all stayed when the US Supreme Court accepted certiorari in the *Miccosukee* case. After *Miccosukee* was decided, the stays were lifted and the instant case (i.e. *Friends*) reopened.

The case presents a unique test of the scope of CWA § 402. Most of southern Florida was developed on reclaimed lands that were formerly part of the vast Everglades. The lands were drained to accommodate both high value agriculture and municipal development. The land areas in question are immediately south of Lake Okeechobee, one of the largest fresh water lakes in the United States. The boundary between the lake the and adjacent wetlands varied historically, depending on weather conditions. These lands are almost flat, but in a natural state drained slowly to the sea. They were drained through a labyrinth of canals and levees leading from the lake to the Gulf of Mexico. Working in conjunction with the US Army Corps of Engineers, SFWMD operates several large pump stations to prevent canal or levee overtopping. In most cases the most practical solution is to pump flood waters back "uphill" to Lake Okeechobee.

It is undisputed that backpumping results in the transfer of polluted water from the canals into Lake Okeechobee. The legal issue is whether this transfer constitutes an "addition of pollutants" that requires a NPDES permit. The CWA prohibits "the discharge

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of any pollutant," except in compliance with the CWA. 33 USC § 1311. "Discharge" is defined as "any addition of any pollutant to navigable waters from any point source." 33 USC § 1362(12). Following the Supreme Court's ruling in *Miccosukee*, EPA proposed rules that would exclude water transfers from regulation under the NPDES program. *NPDES Water Transfers Proposed Rule*, 71 Fed. Reg. 32887 (June 7, 2006). However, the *Friends* court declined to defer to the US Environmental Protection Agency's (EPA's) interpretation of the CWA because "No agency interpretation, or court order for that matter, can alter the unambiguous congressional intent expressed in a statute and the Court thus rejects the interpretation proposed by the EPA." *Slip Op.* at 84.

SFWMD argued that an "addition to navigable waters" does not occur from backpumping, but rather simply moves water between and among navigable waters. This argument derives from the *Miccosukee* case, which involved transfers from a SFWMD drainage canal into a designated conservation area. There the federal government advanced its "unitary waters" theory, i.e. that all navigable waters should be viewed as one for CWA purposes, and thus water transfers should be seen as non-point source activities that do not require NPDES permits. The Court did not resolve this issue, noting that it had not been adequately argued below, but could be raised on remand. Instead, the Court held that further proceedings are necessary to determine whether the two affected water bodies are "meaningfully distinct" from each other. If they are not, then no NPDES permit is required. 541 US at 112.

After a lengthy description of the physical features of the Everglades, both naturally and as transformed, the District Court determined that in the instant case the subject drainage canals and Lake Okeechobee are in fact meaningfully distinct. Although the court declined to "articulate a precise test," it nevertheless concluded:

> But, at a minimum, the evidence must demonstrate that pollutants would not have reached the Lake were it not for backpumping, and that the Lake and canals are distinct from one another and would remain distinct if backpumping ceased. Suffice it to say that, based upon the evidence presented, the Lake is "meaningfully distinct" from the canals.
> *Slip Op.* at 86.

In reaching that conclusion, the court cites ten factors, among these are physical barriers between the water bodies, chemical and biological differences, and that the water would not normally flow from the canal areas into the lake but for backpumping. The fact that there is some natural intermingling of water between the canals and lake is not relevant: "However, the Supreme Court has instructed that the proper question is whether the bodies of water are '*meaningfully* distinct,' not 'completely distinct.'" *Id*. at 87.

Conclusion

The *Miccosukee* case, and those like *Friends* arising from the same or similar facts, raise important policy questions about water resource management in the West. Water transfers, often between basins, occur routinely and are not now subject to the CWA regulatory program. The Supreme Court in *Miccosukee* was unmoved by the argument that regulation would make such transfers prohibitively expensive, which would obviate the CWA's proscription against interference with state authority to allocate water. The Court noted that expenses could be controlled through issuance of general permits. Thus, courts will apply the limited guidance supplied by the Supreme Court to the specific facts at hand to discern whether meaningful distinctions can be made. The broader implications of *Friends* and other cases on Western water law transfers will be explored in detail in the February, 2007, issue of *The Water Report*.

For Additional Information, Contact: Davis Wright Tremaine LLP (Portland, OR), 503/ 778-5210 or email: rickglick@dwt.com

Richard M. Glick is a partner in the Portland, Oregon, Office of Davis Wright Tremaine LLP, where he is head of the firm's Natural Resources Practice Group. His practice emphasizes water, environmental and energy law. Prior to entering private practice, Rick was staff counsel at the California State Water Resources Control Board, and then deputy City Attorney for the City of Portland, where he advised the City's Bureaus of Water Works, Hydroelectric Power and Environmental Services. He is a former chair of the Oregon State Bar Section on Environmental and Natural Resources Law, and a member of the Water Resources Committee of the ABA Section on Environment, Energy, and Resources.

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Editors: David Light
David Moon

Phone: 541/ 343-8504
Cellular: 541/ 517-5608
Fax: 541/ 683-8279
email:
thewaterreport@hotmail.com
website:
www.TheWaterReport.com

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