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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

REGION IV

In the Matter of:	)	
	)	
South Florida Water Management District	)	NPDES Permit No. FL0043885
	)	(Motion to Begin Discharges)
	)	

Order Authorizing Interim Discharge and Setting Matter for Oral Argument

On April 1, 1994, EPA Region IV issued NPDES Permit No. FL0043885 to the South Florida Water Management District ("SFWMD") to discharge from the Everglades Nutrient Removal Project ("ENR Project") to the L-7 Borrow Canal (or L-7 Levee) in Water Conservation Area-1, of which the Arthur R. Marshall Loxahatchee National Wildlife Refuge ("Refuge"), is a part.

The ENR Project is a man-made wetland that is intended to biologically remove phosphorous from agricultural runoff water which had been discharged directly into the Everglades but now will be diverted through the ENR Project before being discharged into the Everglades. As stated in the notice of public hearing for the NPDES permit, nutrients in the water, primarily phosphorous, are expected to be reduced primarily by uptake by planted and naturally recruited vegetation and periphyton (organisms attaching to underwater surfaces according to Webster's Third International Dictionary).

Pursuant to 40 C.F.R. §124.74, requests for an evidentiary hearing on the permit have been filed by the permittee, SFWMD, and by the Friends of the Everglades ("Friends"), the Miccosukee Indian

Tribe ("Tribe") and collectively by the Sugar Growers Cooperative, Roth Farms and Wedgewood Farms (Farmers"). These requests are currently pending before the Regional Administrator.

SFWMD has filed pursuant to 40 C.F.R. §124.60, a request to begin discharges under the permit pending final agency action on the permit.[1] The motion is opposed by Friends, Tribe and Farmers. EPA, although professing to be a non-party, supports SFWMD's motion. The Florida Department of Environmental Protection ("DEP") has moved to intervene in support of the motion.

Under 40 C.F.R. §124.60, SFWMD's motion to begin discharge should be granted if it demonstrates the following:

1. It is likely to receive the permit.

2. The environment will not be irreparably harmed if the facility is allowed to begin discharging.

3. The discharge is in the public interest.

For the reasons stated below, I find on the papers filed before me that the significant issue is whether the environment is likely to be irreparably harmed by the discharge. It is on this issue that I am ordering oral argument. Pending oral argument, I am authorizing the discharge on the conditions specified below.

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[1] Final agency action includes not only the Regional Administrator's decision on the evidentiary hearing requests, but also the initial decision of the Presiding Officer, if an evidentiary hearing is granted, and the final order of the Environmental Appeals Board on appeal as provided in 40 C.F.R. §124.91.

It is clear that the public interest strongly weighs in favor of allowing the discharge. The ENR Project is a pilot project, designed to obtain data that will be utilized in setting up storm treatment areas to remedy the degradation of the Everglades. In addition to the reduction of phosphorous, which it is hoped the ENR Project will demonstrate can be achieved through natural processes, the permit also sets up monitoring requirements for various parameters. Friends, Tribe and Farmers dispute the adequacy of those monitoring requirements to protect the Everglades. Friends and Tribe also contend that Region IV should have conducted an Evnvironmental Impact Study for the ENR Project. A review of the papers indicates that there are arguments pro and con for these contentions. This proceeding is not intended to supplant the permit proceedings, and I do not construe my duty in passing upon this motion as one in which I should resolve all issues raised in the permit proceeding. These contentions were carefully considered by Region IV in it decision to issue the permit. While its decision could be changed if an evidentiary hearing is granted, I do not find on the papers before me any grounds for assuming that on the present record, Region IV's resolution of the issues was incorrect.

Farmers, for its part, contends that the EPA has no jurisdiction over the discharges, asserting that the waters diverted to the ENR project are agricultural stormwater discharges and return flows from irrigated agriculture, both of which are

excluded from regulation under the NPDES program.[2]

Contrary to what the EPA argues, the EPA's jurisdiction to issue the permit is material to whether SFWMD will receive the permit. If the EPA has no jurisdiction to issue the permit, the question of authorization to discharge becomes moot. My consideration of the merits of Farmer's argument, however, should be governed by the nature of the proceeding before me. What is being sought is an authorization to commence discharge under the terms of the permit with such additional conditions as are found to be appropriate. Farmers jurisdictional argument is really directed to negating the permit in its entirety. The net result is to allow the discharge without any permit conditions attached. In effect, this would be tantamount to granting the relief requested by SFWMD, if not more relief than they actually seek. The need, accordingly, for me to rule upon the jurisdictional question in determining whether to allow the discharge authorized by the permit has not been shown.[3]

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[2] The Clean Water Act ("CWA") §301, 33 U.S.C. §1311, prohibits discharges of any pollutant except in compliance with specified sections of the Act, including §402, 33 U.S.C. §1342, providing for the issuance of NPDES permits. The "discharge of a pollutant" is defined as any addition of a pollutant from any "point source". CWA §502(12), 33 U.S.C. §1362(12). Agricultural stormwater discharges and return flows from irrigated agriculture are excluded from the definition of a "point source."

[3] Farmers has submitted an appendix with its papers containing extensive excerpts from transcribed testimony on technical aspects of the discharges. Their significance, however, to the issue of whether the discharges as regulated by the permit would create some irreparable injury not present if the discharges were not regulated at all is not apparent.

Farmers also questions the jurisdiction of the EPA on the

Friends and Tribe concede the EPA's jurisdiction over the discharge under the NPDES program but argue that there has not been shown to be any immediate need to authorize the discharge. As I understand their argument, they are not contending to stop the water flow into the ENR Project, but would oppose any discharge unless the water reaches a level where it threatens to overflow the levees surrounding the ENR Project. The public interest, however, favors allowing the Project to begin and the study to get underway as soon as possible. Also, to try to identify the point at which the discharge should be allowed because the water level in the ENR Project has become unduly high or the ENR Project is threatened to be deluged by impending storms does not seem practical.[4]

There is, however, one point which deserves further consideration, and on which I am ordering oral argument. SFWMD has pointed to my authority under §124.60(a)(2) to impose "appropriate conditions" on any authorization to discharge I grant. In response to SFWMD's request for an evidentiary hearing, Region IV has

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grounds raised by SFWMD in its objections to the permit but not pressed here, namely, that the biological treatment resulting from letting the water flow through the constructed wetlands does not add any pollutants to the water. See National Wildlife Federation v. Consumers Power Co., 862 F. 2d (6th Cir. 1988), National Wildlife Federation v. Gorsuch, 693 F. 2d 156 (D.C. Cir. 1982). Again, since the result sought does not appear to be inconsistent with allowing the discharge, the issue is best left to resolution in the proceeding itself.

[4] I note that the parties have not been able to stipulate on this issue.

recommended that SFWMD apply for certain modifications.[5] SFWMD recommends that I insert these modifications as conditions on my order.

There does appear to be some question as to the truth of SFWMD's claim that the only contribution the ENR Project can make to the water quality of the Everglades is a reduction in the phosphorous discharged into it from the Project.[6] Nor is it really known at this time how effective the ENR Project will actually be in removing phosphorous.

The authorization sought here would among other things delete the limitations on phosphorous in the discharge and the requirement for monitoring for fecal coliform. Whether the permit will be modified to include these changes is still be determined. There is no information in the papers before me that these changes in the short run are likely to result in any irreparable harm. As already noted, however, the authorization stays in effect until final resolution of the permit proceedings which conceivably could take several years. The questions raised seem technical and the parties have not been given the opportunity to comment on the appropriateness of the changes. I am reluctant to dispose of them,

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[5] See Friends Response (Exhibit B) (SFWMD's request for evidentiary hearing) and EPA letter of June 3, 1994, (SFWMD's Motion to discharge (Exhibit K).

[6] See Permit, Item A-9. See also, SFWMD's Comments 29 and 30 and Region IV's responses thereto. Response to Comments at Time of Final Permit Issuance, pp. 9-10.

accordingly, simply on the papers.[7] Consequently I am scheduling oral argument on the issue of the appropriateness of inserting the changes requested by SFWMD, or some variant thereof, in the authorization. The issue is whether they are likely to result in irreparable harm if they are put into effect pending a final decision on the permit.

Oral argument, accordingly, is scheduled for August 22, 1994, at 2:00 pm EDT in Washington, D.C., as agreed to at the telephone conference. The argument will be heard at EPA Headquarters, 401 M Street, S.W., Room 2409. The argument will be transcribed.

The DEP's motion to intervene on this motion is granted. They obviously have an interest in this issue.

The time allotted for oral argument is as follows:

Each party is granted 20 minutes for its main argument except Region IV and DEP. These two parties are each granted ten minutes, since their arguments appear to be largely repetitive of SFWMD's arguments. The time allotted for rebuttal will be determined at the argument.

In the meantime I authorize the discharge from the ENR Project, pending my final order after hearing oral argument. This authorization includes the changes to the permit described in Region IV's letter of June 3, 1994. As already stated, there is no showing that in the short term these changes are likely to result

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[7] I note, for example, that Burkett S. Neely, Jr., Manager of the Refuge, in his affidavit, Exhibit J to SFWMD's motion, recommends that the pumping activities should be reviewed if discharges to the Refuge exceed 100 ppb of phosphorous on a monthly average.

in irreparable harm. Whether they should still be allowed unchanged or some additional changes inserted will be determined after hearing oral argument.

Gerald Harwood

Gerald Harwood
Senior Administrative Law Judge

Dated: August 8 1994

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on August 8, 1994.

Shirley Smith
Legal Staff Assistant
for Judge J. F. Greene

NAME OF RESPONDENT: South Florida Water Management District
DOCKET NUMBER: NPDES Permit No. FL0043885

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