

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION**

**CASE NO. 02-80309-CIV-ALTONAGA/Turnoff**

**FRIENDS OF THE EVERGLADES,  
INC., et al.,**

Plaintiffs,

vs.

**HENRY DEAN**, Executive Director, South  
Florida Water Management District, in his  
official capacity; *et al.*,

Defendants.

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**ORDER ON REMEDIES**

**THIS CAUSE** came before the Court upon the parties' memoranda on injunctive relief and remedies;<sup>1</sup> Plaintiffs' and Plaintiff-Intervenor's Joint Motion for Joinder of Mike Sole, in his Official Capacity as Secretary of the Florida Department of Environmental Protection, as an Involuntary Plaintiff [D.E. 653], filed on March 6, 2007; Intervenor-Defendant, U.S. Sugar's Motion to Strike Plaintiffs' Exhibits to Plaintiffs' Memorandum on Injunctive Relief and Remedies [D.E. 665], filed on April 13, 2007; and Defendant, the SFWMD's Motion for Certification Under § 1292(b) [D.E. 689], filed on June 4, 2007. The Court has carefully considered the parties' written submissions, the record, and applicable law.

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<sup>1</sup> Plaintiffs, Friends of the Everglades ("FOE"), Fishermen Against Destruction of the Environment, Inc. ("FADE"), and Florida Wildlife Federation's ("FWF['s]") Memorandum on Injunctive Relief and Remedies [D.E. 649]; Intervenor-Plaintiff, the Miccosukee Tribe of Indians of Florida's (the "Tribe['s]") Brief in Support of Appropriate Final Judgment Remedies and Procedures [D.E. 654]; Defendants, South Florida Water Management District (the "SFWMD") and Carol Wehle's ("Wehle['s]") Response in Opposition to Plaintiffs' Memoranda Regarding Remedies [D.E. 673]; Intervenor-Defendant, United States' Remedy Brief [D.E. 662]; Intervenor-Defendant, United States Sugar Corporation's ("U.S. Sugar['s]") Memorandum on Remedies and Post-Trial Proceedings [D.E. 664]; and the reply briefs filed by the parties.

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## **I. BACKGROUND**

On December 11, 2006, after a bench trial, the undersigned issued an Order Setting Forth Findings of Fact and Conclusions of Law (the “December 11 Order”), which concluded, in pertinent part, that “in the absence of a [National Pollution Discharge Elimination System (“NPDES”)] permit, the operation of the S-2, S-3, and S-4 pump stations to backpump pollutant-containing waters from the canals in a northerly direction into Lake Okeechobee is in violation of the [Clean Water Act].” (*Dec. 11 Order* [D.E. 636] at 106). Finding that the issue had not been fully briefed, the Court did not rule, at that time, on Plaintiffs’ request that the Court issue an injunction requiring the SFWMD and/or its Executive Director to obtain a NPDES permit for the SFWMD’s backpumping activities. (*See id.*).

The parties have submitted lengthy briefs regarding what particular injunctive relief, if any, the Court should order. Plaintiffs and Intervenor-Plaintiff, in their briefs regarding remedies, have taken the position that the Court should enter an injunction requiring the SFWMD’s Executive Director<sup>2</sup> to apply for a NPDES permit and should hold additional hearings to determine what interim injunctive relief should be granted while that NPDES permit application is pending.

Defendants, the SFWMD and Wehle, agree that, given the December 11 Order, the SFWMD must submit to the state’s NPDES permitting scheme (although they argue an injunction is not necessary because they will voluntarily comply with that requirement). Defendants further argue that the Court should issue a final interpretive judgment and retain jurisdiction to ensure compliance with

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<sup>2</sup> In the December 11 Order, the Court found that the SFWMD enjoyed sovereign immunity from Plaintiffs’ suit. The SFWMD, however, has conceded that the case may proceed against its Executive Director under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

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that judgment.<sup>3</sup> (*See SFWMD Remedies Br.* [D.E. 673] at 23). They also maintain that the Court does not have the authority to, nor should it, order any type of interim injunctive relief. (*See id.* at 3-23).

## II. ANALYSIS

### A. Issuance of Injunction Requiring the SFWMD to Apply for NPDES Permit

#### 1. Legal Standard

A party is entitled to the issuance of a permanent injunction where the party has established: (1) the violation of a right asserted in the complaint (success on the merits in the party's case); (2) that there is no adequate remedy at law for the violation of the right; and (3) that irreparable harm will result if the court does not order injunctive relief. *See Alabama v. United States Army Corps of Eng'rs*, 424 F.3d 1117, 1128 (11th Cir. 2005). Because issuance of an injunction is an equitable remedy, the Court must also balance the hardships between the parties and give due regard to the public interest in fashioning an appropriate remedy. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987).

#### 2. Issuance of Injunction is Warranted Here

As more fully set forth in the Court's December 11 Order,<sup>4</sup> Plaintiffs have established a violation of the CWA, prevailing on the merits of their claim. Such a violation of the CWA may only

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<sup>3</sup> Intervenor-Defendant, United States, agrees that an order requiring the SFWMD/Wehle to apply for a NPDES permit would be appropriate in this case. (*See U.S. Remedies Br.* [D.E. 662] at 3). Intervenor-Defendant, U.S. Sugar, also appears to agree that an injunction requiring compliance with the NPDES permitting scheme would be appropriate should the Court find that, at trial, Plaintiffs met their burden of proving irreparable harm and that such an injunction would be in the public interest. (*See U.S. Sugar Remedies Br.* [D.E. 664] at 46-47). U.S. Sugar has also taken the position that the issuance of interim injunctive relief would be inappropriate in this case. (*See id.* at 3).

<sup>4</sup> The Court adopts in this Order the Findings of Fact and Conclusions of Law set forth in the December 11 Order.

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be remedied by the issuance of equitable relief, and the Court finds that there is no adequate remedy at law. The outstanding questions, then, are whether: (1) Plaintiffs established at trial the existence of irreparable harm, and (2) the balance of hardships and the public interest favor the issuance of an injunction requiring that the SFWMD's Executive Director apply for a NPDES permit.

a. *Irreparable Harm*

Plaintiffs contend that they established at trial that irreparable harm will result if their requested relief is not granted. In support of this argument, they cite to the testimony of Dr. Tom Crisman, who testified that the backpumping at issue creates a significant risk of triggering a toxic algal bloom that could cause serious injury to humans and death to wildlife. (*See Pls. Remedies Brief* [D.E. 649] at 4-5). In addition, Plaintiffs contend that the trial testimony established that backpumping and disinfection create toxic disinfection byproducts that can sicken humans. (*See id.* at 5). Finally, Plaintiffs contend that the trial testimony established that backpumping causes irreparable ecological harm to Lake Okeechobee. (*See id.* at 6). Defendants do not seriously challenge these assertions, and the undersigned finds that Plaintiffs have met their burden of showing the potential for irreparable harm in the absence of a permanent injunction.

b. *Balance of Equities and Public Interest*

Plaintiffs contend that the irreparable harm they illustrated at trial outweighs any inconvenience to Defendants that will result from the issuance of an injunction requiring a NPDES permit. (*See id.* at 6). They also assert that the public interest in safe water supplies and the ecological integrity of Lake Okeechobee favor the issuance of such an injunction. (*See id.*). The undersigned agrees and finds that equitable considerations favor the issuance of an injunction

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requiring that the SFWMD's Executive Director apply for a NPDES permit.<sup>5</sup>

3. Inclusion of Deadlines in Injunction

Plaintiffs contend that the Court should place a specific time limit for compliance and for the issuance of the permit. Given anticipated complications in the permitting process, including, among other things, that there are no "off-the-shelf" templates that can be followed in fashioning an appropriate permit, the Court finds that the imposition of hard deadlines for issuance of the NPDES permit would be inappropriate in this case, and that an order requiring application for such a permit "forthwith" will adequately address Plaintiffs' claims.

**B. Issuance of Interim Injunctive Relief**

In their Remedies Brief, Plaintiffs assert that the Court should hold hearings regarding whether to order interim relief, which could include, *inter alia*, requiring: (1) the SFWMD and/or its Executive Director to report to the Court on backpumping episodes; (2) development of a new pumping protocol; (3) preparation of an analysis of the effect of the Bolles Canal expansion; (4) construction of additional in-city and on-farm on-site floodwater storage facilities; (5) application of the SFWMD's best management practices ("BMP") rule in the S-4 Basin; and (6) stormwater treatment area ("STA") construction or enlargement. (*See Pls. Remedies Br.* at 9-10). Intervenor-Plaintiff, the Tribe, additionally requests that the Court issue an order invalidating the Environmental Protection Agency's Proposed Rule regarding NPDES water transfers, *see* 71 Fed. Reg. 32887, a

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<sup>5</sup> The SFWMD and Wehle assert that the issuance of an injunction is unnecessary because the December 11 Order made clear that the SFWMD must have a NPDES permit for its backpumping operations, an issue that was previously unclear, and the SFWMD has every intention of complying with the law as interpreted by the Court. (*See SFWMD Remedies Br.* at 24-25). Having found that Plaintiffs are legally entitled to the issuance of an injunction, the remedy they sought in their complaints, the undersigned is not persuaded now by the argument that the Court should not enter an injunction because the SFWMD's Executive Director will voluntarily comply with the implications of the Court's interpretation of the CWA.

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request the United States adamantly opposes on a number of bases. (*See Tribe Remedies Br.* [D.E. 654] at 16-19; *U.S. Remedies Br.* at 7-11).

Plaintiffs propose an extensive and lengthy process for the Court's consideration of these proposed interim remedies. That process would include the designation of experts, exchange of expert reports and rebuttal expert reports, mediation wherein the parties' experts would attempt to agree on appropriate interim relief, expert depositions, and an evidentiary hearing.

Defendants raise a number of challenges to Plaintiffs' requests for interim relief, including that Plaintiffs failed to put Defendants on notice of these requests in their complaints and failed to establish their entitlement to such interim relief at trial. Defendants also raise a number of legal arguments regarding the Court's authority to issue such interim relief. In addition, based on Plaintiffs' proposal for a lengthy remedies procedure, the SFWMD has renewed its Motion for Certification Under § 1292, urging that the Court enter a final declaratory judgment and allow the parties to take an interlocutory appeal of the December 11 Order.

The undersigned finds that the issuance of interim relief is premature, and perhaps academic at this time. By entering a Final Judgment that includes the permanent injunction that Plaintiffs sought from the inception of this case, the Court has resolved the case in a manner that allows the parties to immediately pursue their appeals of the Court's conclusion that the CWA requires the SFWMD to acquire a NPDES permit for its backpumping activities. That appeal would likely result in a stay of any interim relief the Court could order at the conclusion of the somewhat lengthy process Plaintiffs envision. Conducting further evidentiary hearings, which would require the parties to engage in additional discovery and would require the Court to resolve highly technical arguments regarding the environmental impact of the SFWMD's activities, could potentially result in the

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unnecessary expenditure of resources for both the judiciary and the parties. Should the Court's interpretation of the CWA be overturned on appeal, that expenditure of time and resources would have been in vain.

In entering a Final Judgment, the Court will retain jurisdiction to ensure compliance with the judgment, meaning that the Court will have jurisdiction to order interim remedies should this matter return to this Court following appeal. Plaintiffs' present requests for interim relief are therefore denied.

**C. Joinder of DEP Secretary Mike Sole**

In their Joint Motion for Joinder of Mike Sole, in his Official Capacity as Secretary of the Florida Department of Environmental Protection, as an Involuntary Plaintiff[D.E. 653], Plaintiffs and Intervenor-Plaintiff contend that the Court should join Mike Sole (the "DEP Secretary") as an involuntary plaintiff for purposes of the remedies phase of the proceedings to "ensur[e] that the defendant's NPDES permit applications . . . are promptly processed and issued and to facilitate consideration of the permitting agency's position on questions relating to interim remedies." (*Mot.* [D.E. 653] at 1-2).

Setting aside the issues of whether such a joinder would be feasible under the Federal Rules of Civil Procedure, the undersigned agrees with Defendants and Intervenor-Defendant, United States, that such joinder would be premature at this time because there is no evidence that the DEP Secretary or the Florida Department of Environmental Protection will attempt to delay issuance of a permit to the SFWMD. Should such a delay occur or should another reason for joinder arise, Plaintiffs may renew their motion.

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**D. Dismissal of the SFWMD**

In their brief regarding remedies, the SFWMD and Wehle request that the SFWMD be dismissed from this action on the basis of the sovereign immunity that the undersigned found it enjoys from this suit. The request is appropriate and is granted.

**III. CONCLUSION**

Based on the foregoing, it is

**ORDERED AND ADJUDGED** as follows:

(1) Plaintiffs' request that the Court issue an injunction requiring the SFWMD's Executive Director to apply for a NPDES permit forthwith is **GRANTED**. The injunction shall be issued in a separate Final Judgment, which shall be immediately appealable. The Court will retain jurisdiction over the parties, including to the extent allowable while any appeal is pending, to ensure compliance with the judgment.

(2) Plaintiffs' request for interim injunctive relief is **DENIED** for the reasons set forth above.

(3) Plaintiffs and Plaintiff-Intervenor's Joint Motion for Joinder of Mike Sole, in his Official Capacity as Secretary of the Florida Department of Environmental Protection, as an Involuntary Plaintiff [D.E. 653] is **DENIED**.

(4) U.S. Sugar's Motion to Strike Plaintiffs' Exhibits to Plaintiffs' Memorandum on Injunctive Relief and Remedies [D.E. 665] is **DENIED AS MOOT**.

(5) The SFWMD's Motion for Certification Under § 1292(b) [D.E. 689] is **DENIED AS MOOT**.



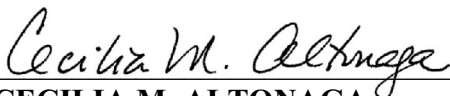
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(6) Defendants' Motion to Strike and, in the Alternative, Response to Requests to Clarify and Reconsider Eleventh Amendment Issues [**D.E. 691**], filed on June 14, 2007, is **DENIED**.

(7) Plaintiffs' claims against Defendant, the SFWMD, are **DISMISSED**. The Executive Director of the SFWMD shall remain as a party to this action.

(8) The Clerk of the Court is instructed to **CLOSE** the case. Any pending motions not otherwise ruled upon are **DENIED AS MOOT**.

**DONE AND ORDERED** in Chambers at Miami, Florida, this 14th day of June, 2007.

  
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**CECILIA M. ALTONAGA**  
**UNITED STATES DISTRICT JUDGE**

Copies provided to:

- (1) Magistrate Judge William C. Turnoff
- (2) All counsel of record