By Carolyn Raffensperger

Arguing Pollution Is Legal Under CWA

The destruction of the Everglades by the sugar industry has made Floridians so angry, they have amended their state constitution and brought suit to try to stop the carnage. Much of the controversy centers on Lake Okeechobee, which is at the heart of the Everglades. The second-largest (730 square miles) freshwater lake wholly within the boundary of the lower 48 states, Okeechobee serves as a reservoir for what is known as the 700,000-acre Everglades Agricultural Area.

The EAA was created in 1948, when much of the Everglades was drained for agriculture and flood control purposes. Now, about 560,000 acres of the EAA is used to grow sugar. Water is stored in the lake for irrigation during a drought but in times of high water, this water drains into rivers and marine estuaries, essentially destroying the native ecosystems. The water pouring out of the lake through the engineered canals carries a lethal mix of pesticides and fertilizer and overwhelms the delicate saline balance of the marine coves.

It only took 30 years after the EAA was created to destroy the hydrology and biology of the Everglades. Eutrophication — the influx of nutrients causing massive growth of plants like algae — of Lake Okeechobee became a chronic problem by the 1980s. Algae, cattails, and nonnative plants are still destroying the lake and areas as far away as the Ding Darling Wildlife Refuge on Sanibel Island.

Friends of the Everglades, et al. v. South Florida Water Management District, et al., is a suit in federal court on behalf of the Friends of the Everglades, Florida Wildlife Federation, Fishermen Against the Destruction of the Environment, and the Miccosukee Tribe to compel the South Florida Water Management District to comply with the Clean Water Act's requirement to get a permit for pumping water into Lake Okeechobee. The district has never applied to the Florida Department of Environmental Protection, which has federally delegated permitting authority under the CWA. The city of South Bay and the United States Sugar Corporation intervened on the side of the district.

The *Friends of the Everglades* case is almost identical to another case, *South Florida Water Management District v. Miccosukee Tribe,* on remand from the U.S. Supreme Court. In both cases, the district has defended its action by claiming that it was not actually adding pollutants to the water, but merely transporting already polluted water from one body of water to another.

In *Miccosukee Tribe*, the district court held that the water management district had violated the CWA. The 11th Circuit Court of Appeals affirmed and said that the pumping is a point source of pollution. The Supreme Court remanded the case so the district court could consider whether the water conservation area and the canal used to transport the water are distinct or unitary water bodies. If they are unitary, then the water district will not need a permit under the Clean Water Act. The judge has not acted on the remand.

The 1972 Clean Water Act was passed to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." At least for point sources, the act essentially reverses the burden of proof by specifying that all discharges into the waters of the United States are unlawful unless specifically authorized by a permit. Under the act, "The discharge of any pollutant by any person shall be unlawful" unless it meets the requirements in its permit.

At issue in the *Friends of the Everglades* suit is whether pumping water into Lake Okeechobee by the district is the discharge of a pollutant. The Bush administration, in an unprecedented move, is siding with the defendants rather than with those trying to uphold the law. U.S. EPA has joined with the defendants arguing that the Clean Water Act does not apply because pumping water into the lake is simply moving water from one location to another. Since the district already has state approval and no pollutants or contaminants are added to the pumped water, it claims it is not obligated to get a permit.

The will of Floridians to clean up the Everglades and to have the polluter pay for it has been expressed clearly in a provision they voted into their Constitution in 1996. Article II, Section 7b, of the Florida Constitution states: "Those in the Everglades Agricultural Area who cause water pollution within the Everglades Protection Area or the Everglades Agricultural Area shall be primarily responsible for paying the costs of the abatement of that pollution."

Taken together, the polluter pays constitutional provision and reversing the burden of proof in the Clean Water Act should be enough legal muscle to force governmental entities from U.S. EPA to the South Florida Water Management District to fulfill their public trust responsibilities to protect the Everglades from further damage and begin aggressive restoration measures.

Some of those measures are in progress but appear to be a means of delay. In October, Governor Jeb Bush announced a $200 million plan to clean up the lake and two downstream estuaries, part of the $8 billion Everglades restoration package. But environmentalists argue that the cleanup plan actually pushes back the deadline for clean water and maintains the polluting status quo. "Money and promises from the sugar industry to politicians bought them 10 more years of polluting and millions of dollars in new taxes on Florida citizens to help clean it up," is the way Friends of the Everglades expressed it.

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