No. 02-626

In The
Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND BRIEF FOR THE LAKE WORTH DRAINAGE DISTRICT AND THE FLORIDA ASSOCIATION OF SPECIAL DISTRICTS AS AMICI CURIAE IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

KENNETH G. SPILLIAS
Counsel of Record
TERRY E. LEWIS
STEPHEN A. WALKER
MICHELLE DIFFENDERFER
LEWIS, LONGMAN & WALKER, P.A.
1700 Palm Beach Lakes Blvd.
Suite 1000
West Palm Beach, Florida 33401
(561) 640-0820

Counsel for Amici Curiae, Lake Worth Drainage District and Florida Association of Special Districts

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION OF LAKE WORTH DRAINAGE DISTRICT AND THE FLORIDA ASSOCIATION OF SPECIAL DISTRICTS FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF

The Lake Worth Drainage District ("LWDD") and the Florida Association of Special Districts ("FASD"), by and through undersigned counsel and pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, respectfully move this Honorable Court for leave to file a Brief as *Amici Curiae* in support of the Petition for Writ of Certiorari filed with this Court by the South Florida Water Management District ("SFWMD").

Pursuant to Rule 37.2(a), Movants sought the consent of the opposing parties, Miccosukee Tribe of Indians and Friends of the Everglades, to the filing of an *Amici Curiae* Brief in support of the SFWMD's Petition for a Writ of Certiorari. Consent was withheld by the Miccosukee Tribe of Indians. No response has been received from Friends of the Everglades.

Movant FASD, a Florida Corporation, is an association consisting of 89 special districts in the State of Florida, including 39 of the State's water control districts. Movant LWDD, a member of FASD, is an independent taxing district of the State of Florida created pursuant to Special Act and Chapter 298, Florida Statutes. LWDD encompasses approximately 218 square miles in southeastern Palm Beach County, Florida. It includes within its boundaries, 11 municipalities, 20,000 acres of agricultural land and is bordered on the west by the Arthur R. Marshall Loxahatchee National Wildlife Refuge, otherwise known as Water Conservation Area #1 ("WCA-1").

LWDD's water management system provides comprehensive flood control and water supply protection to over 700,000 residents, 20,000 acres of prime agricultural land and 120,000 acres of urban development. It does this by maintaining approximately 511 miles of canals, 20 major water control structures and numerous other minor structures. A large portion of the activities of water control districts such as LWDD and those that are members of FASD is the movement of water for drainage and flood control purposes. That movement of water often occurs from one navigable body to another through structures which would meet the definition of "point source" under the Clean Water Act. These water control districts obtain surface water management permits from State of Florida permitting agencies, including the five water management districts, one of which is the Petitioner, SFWMD.

The decision of the Eleventh Circuit Court of Appeals from which SFWMD has sought a Petition for Writ of Certiorari will, if permitted to stand, have significant financial and operational impacts on water control districts such as Movants subjecting them to a new and intensive permitting process which has never before been deemed to be required by the Clean Water Act.

Given the fact that there are now conflicting opinions among the Circuit Courts of Appeals on the issues presented by SFWMD's Petition for Writ of Certiorari, as well as the fact that Movants are regulated by the non-point source permitting process provided for in the Clean Water Act, Movants have a significant interest in the outcome of the Petition presently before the Court.

For these reasons, the Movants, Lake Worth Drainage District and Florida Association of Special Districts,

respectfully request that this Honorable Court grant leave to file an *Amici Curiae* Brief on behalf of the Petitioner, South Florida Water Management District.

Respectfully submitted,

KENNETH G. SPILLIAS
Counsel of Record
TERRY E. LEWIS
STEPHEN A. WALKER
MICHELLE DIFFENDERFER
LEWIS, LONGMAN & WALKER, P.A.
1700 Palm Beach Lakes Blvd.
Suite 1000
West Palm Beach, Florida 33401
(561) 640-0820
Counsel for Amici Curiae, Lake Worth Drainage District and Florida Association of Special Districts

TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF 1

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 4

ARGUMENTS FOR GRANTING THE PETITION.... 6

THE ELEVENTH CIRCUIT ERRED, AND CREATED CONFLICT AMONG THE CIRCUITS, IN FINDING THE MOVEMENT OF WATER TO BE AN ADDITION OF POLLUTANTS FROM A POINT SOURCE SUBJECT TO NPDES PERMITTING 6

CONCLUSION..... 13

APPENDIX.....App. 1

TABLE OF AUTHORITIES

Page

CASES

Appalachian Power Company v. Train, 545 F. 2d 1345 (4th Cir. 1975) 11

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F. 3d 481 (2nd Cir. 2001) 12

Committee to Save Mokelumne River v. East Bay Municipal Utility District, 13 F. 3d 305 (9th Cir. 1993) 9

DuBois v. U.S. Department of Agriculture, 102 F. 3d 1273 (1st Cir. 1996) 12

Miccosukee Tribe of Indians, Sam Poole v. South Florida Water Management District; Friends of the Everglades v. South Florida Water Management District, 280 F. 3d 1364 (11th Cir. 2002) 1

National Wildlife Federation v. Consumers Power Company, 862 F. 2d 580 (6th Cir. 1988) 7, 11

National Wildlife Federation v. Gorsuch, 693 F. 2d 156 (D.C. Cir. 1982) 11

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) 6

STATUTES

33 U.S.C. §1251 *et seq*. 2

33 U.S.C. §1251(b) 6

33 U.S.C. §1313(b) 6

33 U.S.C. §1313(d) 9

TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. §1313(e) 6

33 U.S.C. §1314(f)(2)(F) 7

33 U.S.C. §1329 6

33 U.S.C. §1362(6) 8

33 U.S.C. §1362(12) 6

33 U.S.C. §1362(14) 2, 8

Chapter 298, Florida Statutes 1

Section 403.067, Florida Statutes 8

OTHER AUTHORITIES

EPA, The Control of Pollution Caused by Hydrographic Modifications (1973) 7

INTEREST OF *AMICI CURIAE*

Amici Curiae[1], Lake Worth Drainage District ("LWDD") and the Florida Association of Special Districts ("FASD"), submit this brief in support of the Petition for Writ of Certiorari presented by the South Florida Water Management District ("SFWMD") seeking review of the decision of the Eleventh Circuit Court of Appeals in *Miccosukee Tribe of Indians, Sam Poole v. South Florida Water Management District; Friends of the Everglades v. South Florida Water Management District*, 280 F. 3d 1364 (11th Cir. 2002).

In Florida today there are more than one thousand independent and dependent special districts, governed by more than 30 statutes and involving over 500 local governments. Special districts have a long history in the State of Florida and all were created in order to provide specific government services to a target population. Included among Florida's special districts are 96 water control districts and five water management districts.

FASD, a Florida Corporation, is an association consisting of 89 special districts in the State of Florida, including 39 of the State's water control districts. LWDD, a member of FASD, is an independent taxing district of the State of Florida created pursuant to Special Act and Chapter 298, Florida Statutes. LWDD encompasses approximately 218 square miles in southeastern Palm

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the a*mici curiae*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief.

Beach County, Florida. It includes within its boundaries, 11 municipalities, 20,000 acres of agricultural land and is bordered on the west by the Arthur R. Marshall Loxahatchee National Wildlife Refuge, otherwise known as Water Conservation Area #1 ("WCA-1").

LWDD's water management system provides comprehensive flood control and water supply protection to over 700,000 residents, 20,000 acres of prime agricultural land and 120,000 acres of urban development. It does this by maintaining approximately 511 miles of canals, 20 major water control structures and numerous other minor structures. The district's flood control discharges are through control structures to discrete water bodies such as Lake Worth Lagoon and the Hillsboro Canal, which are outside the boundaries of the LWDD system, as well as a number of lakes which are within its boundaries. The system is also operated to provide groundwater recharge for 24 municipal wellfields and for the prevention of salt water intrusion. LWDD relies for its water supply on deliveries from the U. S. Army Corps of Engineers' Central and Southern Florida Flood Control Project (C&SFCP), primarily WCA-1, which is separated from the LWDD system by a dike and three control structure*s*, to maintain canal levels that recharge public water supply well-fields, to prevent salt water intrusion and to provide irrigation to a vital agricultural area in Palm Beach County. LWDD is the largest water control district in the State of Florida.

LWDD is one of 19 water control districts located within Palm Beach County alone. All of these districts utilize various major and minor water control structures such as pumps, spillways and canals which meet the definition of "point source" found in the Clean Water Act. 33 U.S.C. §1251 *et seq.*; see 33 U.S.C. §1362(14). These

districts serve both agricultural and urban needs. For example, there is the South Florida Conservancy District ("SFCD"). This water control district is located in the Everglades Agricultural Area south of Lake Okeechobee. The district's structures (pumps) provide the SFCD with the opportunity to withdraw water from Lake Okeechobee for agricultural water supply needs. Likewise, these pumps provide the district with the opportunity to discharge excess water from its geographic boundaries to Lake Okeechobee for flood control purposes. The district is equipped with pumps on its southernmost boundary which allows it to pump and discharge water from the Hillsboro and North New River Canals to the south. In addition, the SFCD is served by the S-236 pump station on the southern border of Lake Okeechobee.

There is also the Northern Palm Beach County Improvement District ("NPBCID") which services an urban area. This water control district is located in the eastern portion of Palm Beach County and extends to the county's boundary with Martin County to the north. The NPBCID is comprised of separate parcels separated by levees, each parcel equipped with pumps that allows it to withdraw or discharge water over district levees into either the C-17 or C-18 canals operated by SFWMD, which are navigable waters of the United States.

Another example of a water control district, this time beyond the boundaries of Palm Beach County, is the Joshua Water Control District ("JWCD") which serves agricultural areas. The JWCD is located in DeSoto County, west of Lake Okeechobee. This water control district operates under a gravity driven system using spillways, culverts and weirs to withdraw and discharge water throughout its boundaries. The water moves through this

district over a berm that delineates the district boundary and via a weir which allows the water to pass offsite under U.S. Highway 70. The water then moves by gravity through Prairie Creek and ultimately to the Peace River, both navigable waters of the United States.

LWDD and NPBCID have surface water management permits from the South Florida Water Management District ("SFWMD") which cover non-point source surface water discharges. JWCD has its permit from the Southwest Florida Water Management District. None of these water control districts, however, have ever been required to obtain a Section 402 National Pollution Discharge Elimination System ("NPDES") permit to operate. Under the holding of the Eleventh Circuit's decision below, and the broad language utilized in that holding, the question, and concern, is raised whether the LWDD and the FASD's water control district members will be required to obtain point source permits for each of their water control structures which merely transfer water from one navigable body of water to another. The Eleventh Circuit's decision below thus has a significant impact on these entities which it is important for this Court to consider in its determination whether to issue its writ of certiorari.

SUMMARY OF THE ARGUMENT

The decision below, requiring as it does a NPDES point source permit when water containing pollutants is transferred through a point source from one navigable body to another, is contrary to the expressed intent of Congress in passing the Clean Water Act. That intent, which is to recognize, preserve and protect the primary

responsibilities and rights of states with regard to the use of land and water resources, has been recognized by Courts of Appeals including the Fourth, Sixth and the District of Columbia Circuits and by the Environmental Protection Agency ("EPA"), the agency charged with enforcing the Act. Recent cases from the First and Second Circuit Courts of Appeals, as well as the decision below of the Eleventh Circuit, are in conflict with these prior decisions, the language of the Act and the Congressional intent.

If permitted to stand, the Eleventh Circuit's opinion below will have a significant impact on *Amici Curiae* and other similarly situated governmental water control districts in the State of Florida, requiring applications for multiple NPDES permits contrary to long-standing policies and procedures and in conflict with the federal/state system of preventing and reducing pollution set out in the Clean Water Act. Given the conflicting decisions of the various Circuit Courts of Appeals and the significant adverse operational and economic impacts on governmental water management and water control entities in Florida and throughout the country, review by this Court is necessary to resolve the conflicts and clarify the reach of the NPDES permit requirements in the circumstances presented.

ARGUMENTS FOR GRANTING THE PETITION

THE ELEVENTH CIRCUIT ERRED, AND CREATED CONFLICT AMONG THE CIRCUITS, IN FINDING THE MOVEMENT OF WATER TO BE AN ADDITION OF POLLUTANTS FROM A POINT SOURCE SUBJECT TO NPDES PERMITTING.

The impact of the Eleventh Circuit's expansive "but for" interpretation of the "addition . . . from" element set forth in 33 U.S.C. §1362(12) requiring a NPDES point source permit to transfer water from one navigable body to another, is vividly demonstrated by a review of the requirements it would place on LWDD, the dozens of other water control districts in the State of Florida and the five water management districts, including SFWMD. It is a review of these impacts on literally hundreds of governmental entities which also vividly demonstrates that the Eleventh Circuit's interpretation is not what Congress intended in the distinctions it made between point source and non-point sources of pollutants and pollution.

As noted by the SFWMD in its petition, the states are directed to address non-point source pollution but are left to determine for themselves the nature of the steps to take. 33 U.S.C. §§1313(b) and (e), 1329. The expressed policy of the Congress is to recognize, preserve and protect the primary responsibilities and rights of states not only to prevent and reduce pollution but to plan the development and use of land and water resources and to allocate quantities of water within their jurisdictions. 33 U.S.C. §1251(b). This Congressional intent was expressly recognized by the Court in the recent decision of *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,* 531 U.S. 159, 174, 121 S.Ct. 675, 684 (2001). In the State of Florida, the primary vehicles for

exercising these rights and responsibilities are the water management districts. Water control districts, such as LWDD, which are permitted by water management districts, play a similar crucial role at the local government level in the implementation of these plans and responsibilities.

To impose upon these water management entities the requirement of a NPDES point source permit every time water is transferred through a point source from one navigable body to another would place an unbearable burden on these districts, would interfere with the State's management of these resources and would, in essence, preempt, by judicial fiat, the expressed intent of Congress. Under the holding of the decision below, any transfer of water from one body to another that introduces an already existing pollutant would require a NPDES permit. This is so even in those situations, as with the S-9 pump station, where the two bodies of water would be one but for a man-made structure which separates them. The changes to the movement, flow or circulation of these navigable waters caused by the construction of man-made structures or flow diversion facilities, are intended to be and have been controlled by the states under non-point source procedures and methods developed with guidance from the EPA. 33 U.S.C. §1314(f)(2)(F); *National Wildlife Federation v. Consumers Power Company*, 862 F. 2d 580, 588 (6th Cir. 1988); see also, *EPA, The Control of Pollution Caused by Hydrographic Modifications* (1973).

Just as the SFWMD does, LWDD and the other water control districts in the State receive water which can, and

most often will, contain pre-existing pollutants[2], which were naturally occurring or added from other sources upstream. These waters are then transferred through structures, which meet the definition of "point-sources", into other navigable bodies of water without the addition of any new pollutants or, in the case of, for example, agricultural operations, the addition of pollutants from exempt activities. See 33 U.S.C. §1362(14). Under the expansive language of the decision below, a NPDES permit would be required at each point-source where such a transfer occurs. This would, for all intents and purposes, usurp the State's role in the overall management of its water resources.

For a water control district such as LWDD, a requirement to obtain a NPDES point source permit for its movement of water from one navigable surface water body to another would impose significant financial and operational burdens. As noted, LWDD, which has a large number of water control structures and moves water to and from a number of navigable bodies, is required to obtain a surface water management permit from SFWMD. Landowners within the district who discharge into the district's canals may also be subject to the extensive total maximum daily load ("TMDL") program regulatory requirements of Section 403.067, Florida Statutes, which addresses surface waters that do not meet the State's water quality

[2] "Pollutant" is defined in 33 U.S.C. §1362(6) as meaning "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."

standards. This provision of Florida law, addressing both point source and non-point source pollution, is a state program in accordance with the planning requirements of Section 303(d) of the Clean Water Act. 33 U.S.C. §1313(d).

To now impose the additional regulatory requirement of obtaining a NPDES point source permit for the transfer of water from one body to another would place LWDD and other water control districts in the position of not only having to engage in a separate and costly permitting process, but of potentially having to treat water at each point source to remove already existing pollutants. And, at least based on the Ninth Circuit's view, this would be the case even where there is no net increase in the level of pollutants in the receiving body of water. See*, Committee to Save Mokelumne River v. East Bay Municipal Utility District*, 13 F. 3d 305 (9th Cir. 1993). The point source/non-point source regulatory system created by the Clean Water Act and its implementation by the state and federal governments militate against the Eleventh Circuit's expansive view of the NPDES permitting process and the inordinate and unwarranted regulatory burden it would place on state and local water management and water control entities.

To say that a NPDES point source permit is not required for the movement of water between waters of the United States is not to say that the introduction of pollutants into such waters is beyond regulatory authority. As noted above, the states are authorized and even required to address waters that do not meet state water quality standards.

But the Clean Water Act has also been applied to address a major source of pollutants that enter United

States waters – upland storm water runoff. On November 16, 1990, EPA published in the Federal Register its new storm water NPDES regulations which established a permitting system for storm water discharges from municipal separate storm sewer systems (known as MS4s). The application of this program is described in a series of letters between LWDD, the Florida Department of Environmental Regulation (the predecessor agency to the present Department of Environmental Protection) and the EPA. (App. 1-19). The EPA explained that LWDD and other districts would be required to submit NPDES applications for storm water discharges if they owned or operated a system that met the definition of a municipal separate storm sewer and was within one of ten listed Florida counties (including Palm Beach County). Since transfers of water from waters of the State and of the United States to other waters of the State and the United States are not considered within the MS4 permit application requirement, LWDD was not required to apply for such permits.

Nonetheless, the MS4 program does provide a regulatory vehicle for addressing the initial introduction of pollutants from upland sources into waters of the United States from storm water runoff, just as the NPDES point source permit process addresses the *initial* discharge of pollutants from upland sources into water from point sources. Once these pollutants have entered the waters of the United States, or are otherwise naturally occurring (e.g., "biological materials"), no additional benefit is derived from requiring point source permits every time water is moved from one navigable water body to another, as the Eleventh Circuit would require.

Historically, EPA has never required LWDD or other water control districts to obtain a NPDES point source

permit to transfer water from one navigable body to another. In its exposition to LWDD of its then new storm water discharge permit, EPA made it clear that transfer of water from waters of the State and the United States to other waters of the State and the United States did not fall within those permitting requirements. While EPA had established a new NPDES permitting system to deal with municipal separate storm sewer systems, it did not alter the NPDES point source permit system as it had historically been interpreted and applied – i.e., that a point source permit is not required for the movement of the waters of the United States between each other. To impose such a requirement now would have a drastic impact on extensive and far-reaching programs and systems which have been developed and implemented within the present, already complex, regulatory system.

The thorough and extensive discussion of the legislative history of the Clean Water Act set forth by the District of Columbia Circuit in *National Wildlife Federation v. Gorsuch*, 693 F. 2d 156 (D.C. Cir. 1982), as adopted and followed by the Fourth and Sixth Circuits in *Appalachian Power Company v. Train*, 545 F. 2d 1345 (4th Cir. 1975) and *National Wildlife Federation v. Consumers Power Company*, *supra*, demonstrates that the intent of Congress in passing the Clean Water Act was not to require a NPDES point source permit for the transfer of water containing pre-existing pollutants from one navigable body to another. There is nothing in *Gorsuch*, *Consumers Power*, *Appalachian Power* or the language of the Clean Water Act itself which would indicate that that situation is strictly limited to dams. Nor, given the often similar purposes of dams to the levees, pumps, spillways, gates and other water management structures utilized by LWDD, Florida's

water management districts and other water control districts, is there a logical basis for any such distinction.

In its 30 years, the Clean Water Act has never been interpreted by EPA to require a NPDES permit for the mere transfer of water from one navigable body to another. Surface water management systems have been established and flood control projects constructed under state water management programs utilizing the non-point source permitting process to address water quality issues in such circumstances. Nothing has changed by way of Congressional enactment to modify that process. In essence, the Eleventh Circuit's extension of the NPDES point source permit process, expanding on cases such as *DuBois v. U.S. Department of Agriculture*, 102 F. 3d 1273 (1st Cir. 1996) and *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F. 3d 481 (2nd Cir. 2001), is tantamount to amending the Clean Water Act, a process not properly within the ambit of judicial authority. In these circumstances, this Court should accept jurisdiction of the case to determine the propriety under the Clean Water Act of the Eleventh Circuit's far reaching change to what have been long-standing policies and procedures which have been implemented by the EPA, the Army Corps of Engineers and, in the case of Florida, the Florida Department of Environmental Protection, its water management districts and its various water control districts pursuant to the permits they receive from the State permitting agencies.

CONCLUSION

In addition to being in conflict with decisions of the Fourth, Sixth, and District of Columbia Circuits, the Eleventh Circuit's opinion below is creating confusion and disruption in the operation of many, if not all, of the over 100 governmental water management and water control entities in the State of Florida. Since the issuance of the Eleventh Circuit's opinion, two additional SFWMD pump stations (S-2 and S-3) have become the subject of citizen lawsuits and at least nine notices of intent to bring additional lawsuits have been filed. The prospect of litigation over hundreds of water control structures, the uncertainty of what circumstances require a NPDES permit and which do not in light of the conflicting pronouncements emanating from the various Courts of Appeals, and the drastic revisions to the permitting process which will necessarily result from the Eleventh Circuit's decision, will have a profound impact on how water is managed in the State of Florida – an impact that has not been demonstrated would be beneficial or was intended by Congress in enacting the Clean Water Act.

For the reasons set forth herein, as well as those set forth in the Petition for a Writ of Certiorari, *Amici Curiae*

respectfully submit that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

KENNETH G. SPILLIAS
Counsel of Record
TERRY E. LEWIS
STEPHEN A. WALKER
MICHELLE DIFFENDERFER
LEWIS, LONGMAN & WALKER, P.A.
1700 Palm Beach Lakes Blvd.
Suite 1000
West Palm Beach, Florida 33401
(561) 640-0820
Counsel for Amici Curiae, Lake Worth Drainage District and Florida Association of Special Districts

November 2002

LWDD
LAKE WORTH
DRAINAGE DISTRICT

Board of Supervisors
C. Stanley Weaver
Kermit Dell
John I. Whitworth III
Secretary/Manager
William G. Winters
Assistant Manager
Richard S. Wheelihan
Attorney
Perry & Schone, P.A.

13081 MILITARY TRAIL
DELRAY BEACH, FLORIDA 33484

May 7, 1991

Scott Benyon
Florida Department of Environmental Regulation
Re: NPDES/LWDD

Dear Scott:

This letter is being sent to request from your Department a written confirmation that it is the determination of FDER that the waters of the Lake Worth Drainage District are waters of the State of Florida and further that your Department is in agreement with E.P.A. that the Lake Worth Drainage District is not required to make application for a permit as required by the NPDES regulations.

This District was created in 1915 under a special act of the Florida Statues (61.1747). Since that time the Lake Worth Drainage District has operated and maintained a system of canals which acts as a conveyance system carrying only stormwater. This operation of Lake Worth Drainage District is permitted by the South Florida Water Management District in accordance with Florida Statues Chapters 373 and 401. At no time does this District treat

or accept direct stormwater that falls within it's 218 square miles. All stormwater from public and/or private systems are required to be treated prior to discharging into our systems.

Further, the District has been required at all times to secure permits from your agency and the Corp. of Engineers to perform any works within District rights-of-way for any type of construction. Therefore your agency and the Corp. have always categorized the Lake Worth Drainage District as consisting of State and U.S. waters.

After several meetings with Roosevelt Childress, Chief South Area Permits Unit Facilities Performance Branch Water Management Division of E.P.A., Bart Bibler of FDER and the Lake Worth Drainage District, it was the consensus of these agencies' representatives that the Lake Worth Drainage District should not be required to make application for either phase of the NPDES permit program since the waters of the Lake Worth Drainage District are waters of the State of Florida and therefore are waters of the United States.

It would be appreciated if I could receive a written confirmation of FDER's determination that the waters of Lake Worth Drainage District are waters of the State of Florida and further that it is the position of FDER that Lake Worth Drainage District should not be required to obtain a NPDES permit as soon as possible so I may present your letter and the Lake Worth Drainage District's position letter to E.P.A. within the immediate future.

If I can be of any assistance, please do not hesitate in calling me.

Sincerely,

LAKE WORTH
DRAINAGE DISTRICT

/s/ Mark A. Perry
Mark A. Perry
Attorney for LWDD

MAP:jma

[LOGO] ***Florida Department of Environmental Regulation***

Southeast District • 1900 S. Congress Ave., Suite A • West Palm Beach, Florida 33406

Lawton Chiles, Governor Telephone No. 407/433-2650
Carol M. Browner, Secretary

May 23, 1991

Mr. William G. Winters
Lake Worth Drainage District
13081 Military Trail
Delray Beach, FL 33484

Dear Mr. Winters:

RE: NPDES PERMIT REQUIREMENTS

We have reviewed the drainage network of the Lake Worth Drainage District, and it is our opinion that all waters and wetlands connected to those waters within your system are waters of the state; and therefore are waters of the United States. Historically, the Department has always required permits for dredge and fill activities within these waters. These permits have always required that the proposed activities must meet state water Quality Standards for Class III Waters as stated in 17-312, Florida Administrative Rule.

I hope this letter will be of some assistance to you as your organization deals with the Environmental Protection Agency in Atlanta. If I can be of further assistance, please contact *Marion Hedgepeth* or myself at (407) 433-2650.

Sincerely,

/s/ J. Scott Benyon
J. Scott Benyon
Deputy Assistant Secretary

cc: Steve Hall, DER Tallahassee
Palm Beach County Department of Environmental Resources Management

---

May 29, 1991

Mr. Roosevelt Childress, Chief
South Area Permits Unit
Facilities Performance Branch
Water Management Division
United States Environmental Protection Agency
Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365

Re: Lake Worth Drainage District, A Special Taxing District of the State of Florida/NPDES Permit

Dear Roosevelt:

As you are aware, this office is general counsel for the Lake Worth Drainage District, a special taxing district of the State of Florida, located in Palm Beach County.

Enclosed you will find a copy of a letter received by the Lake Worth Drainage District from J. Scott Benyon, Deputy Assistant Secretary from the Florida Department of Environmental Regulation confirming the fact that it is the position of the State of Florida that all waters contained within the Lake Worth Drainage District system are waters of the State of Florida, and therefore are waters of the United States. Also, please be advised that the Lake Worth Drainage District does not own or operate any municipal stormwater collection system feeding into State waters or Federal waters and therefore the Lake Worth Drainage District does not fall within the requirements of being required to submit an application for a permit under the NPDES permit program.

On behalf of the Lake Worth Drainage District, I respectively request written confirmation from your agency stating that the Lake Worth Drainage District

shall not be required to submit an application for permit, as set forth under the EPA regulations in the National Pollutant Discharge Elimination System permit program. Since the waters within the Lake Worth Drainage District system are State waters and therefore Federal waters and the Lake Worth Drainage District does not own or operate any municipal stormwater collection system feeding into State waters the Lake Worth Drainage District should not be required to submit for a permit.

It would be appreciated if the Lake Worth Drainage District could receive written confirmation from your agency within the immediate future, setting forth the fact that the Lake Worth Drainage District will not be required to submit an application for a NPDES permit.

If you should have any questions regarding the contents of this letter or if I can be of any further assistance please do not hesitate in contacting this office.

Sincerely,

LAKE WORTH
DRAINAGE DISTRICT

Mark A. Perry
Attorney for L.W.D.D.

MAP:jma
Enclosure
cc: William G. Winters, Manager

[LOGO] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

JUN 10 1991

REF: 4WM-FP

Mr. William Winters
Lake Worth DD
13081 Military Trail
Delray Beach, FL 33484

Dear Addressee:

Region IV of the Environmental Protection Agency (EPA) has received several letters and calls requesting clarification of the responsibilities and requirements of the 298 Districts (and other special districts operating in a similar capacity), based on EPA's new storm water National Pollutant Discharge Elimination System (NPDES) regulations which were published in the *Federal Register* on November 16, 1990. Also, there appears to be some remaining confusion among the 298 Districts about the options available for municipalities and 298 Districts to group themselves to submit applications for storm water discharges from municipal separate storm sewer systems (MS4's).

A 298 District (or special district) is required to submit a MS4 application *only* if it owns or operates a system that meets the definition of a municipal separate storm sewer and is within one of the ten (10) counties listed in Attachment A. (See Attachment B for the definition of a

municipal separate storm sewer.) Waters of the State and waters of the United States, including canals that are considered waters of the State, are not MS4's. Therefore, each 298 District (or special district) should evaluate their system based on the definition of a municipal separate storm sewer, and make the determination of whether or not they own or operate a MS4. If it is determined that no MS4 is owned or operated, then no application is required. However, if it is determined that a MS4 is owned or operated, the 298 District is required to submit an application for the discharges from its MS4.

In order to clarify our intent in *recommending* that the county be "lead applicant", please understand that it was only a recommendation. We assumed the county would be the one municipal entity that may have the resources, expertise and contacts with all the municipalities within the county to be able to coordinate completion of a single MS4 application. (By definition, 298 Districts and other special districts are considered municipalities for the purpose of obtaining NPDES permit coverage for MS4 discharges.) All municipalities are certainly entitled to submit an individual application; however, you must discuss responsibilities for any shared outfalls with any adjacent municipality. Identification as the "lead applicant" carries with it no designated or implied authorities over any other municipality in the county, whether an application is submitted in conjunction with the "lead applicant" or separately. All participants in the submittal of a single application are considered co-applicants.

As a result of comments received at our individual meetings with the potential municipal applicants in the counties, any group of municipalities in a county can participate as co-applicants; this will include Chapter 298

Special Districts that own and operate MS4's that are not waters of the U.S. For Part 1 of the application, each set of co-applicants is required to identify and sample 250 field screening points (500 field screening points if one of the co-applicants is listed in the aforementioned *Federal Register* as a large MS4). These field screening points are to be distributed among the co-applicants as agreed upon by them. The five (5) to ten (10) representative sampling locations for Part 2 of the application should be handled in a similar manner. This is a change from our previous requirement which offered municipalities only the following two options for submitting MS4 applications: (1) participate with the county and share the total number of field screening points required for the county; or (2) submit an individual application. The Part 1 application deadline for all municipalities not specifically listed in the storm water regulations is May 18, 1992, and Part 2 is due by May 17, 1993.

If you determine that your district does not own or operate any system or portion of a system that is described by the definition of a municipal separate storm sewer, please notify our office by letter. Also enclosed is a list of the active NPDES facilities in your county for your use in completing the MS4 application. The industrial and municipal storm water application guidance manuals and the lists of waterbodies with known water quality impacts in your county, if any, will be mailed to you soon. If you or your staff have any questions or comments please contact the appropriate member of my staff as shown on Attachment A.

Sincerely,

/s/ Roosevelt Childress
Roosevelt Childress, Acting Chief
Permits Section
Facilities Performance Branch
Water Management Division

Enclosures

ATTACHMENT A

Listed below are the ten (10) Florida counties which are required to submit an NPDES application for discharges from their MS4's (all municipalities within these counties are required to submit MS4 discharge applications as well). Also shown are the permit writers assigned to each county.

County	Permit Writer	Telephone #
Broward	Chris Thomas	404/347-3633
Dade	Tammy Bradley-Moore	404/347-3866
Duval	Karrie-Joe Shell	404/347-3633
Escambia	Angie Fugo	404/347-3379
Hillsborough	Jeannie McNeill	404/347-2913
Orange	Brenita Richardson	404/347-3379
Palm Beach	Chris Thomas	404/347-3633
Pinellas	Jeannie McNeill	404/347-2913
Polk	Angie Fugo	404/347-3379
Sarasota	Tammy Bradley-Moore	404/347-3866

ATTACHMENT B

DEFINITION OF "MUNICIPAL SEPARATE STORM SEWER"

Reference 40 CFR 122.26(b)(8)

MUNICIPAL SEPARATE STORM SEWER means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribe organization, or a designated and approved management agency under section 208 of the Clean Water Act (CWA) that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2

(LOGO)

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

JUN 24 1991

REF: 4WM-FP

Mr. Mark A. Perry
Attorney for Lake Worth Drainage District
1308 Military Trail
Delray Beach, Florida 33484

Dear Mr. Perry:

Thank you for your letter of May 29, 1991, on behalf of Lake Worth Drainage District. I have enclosed a copy of a letter that was sent to all Chapter 298 and similar districts. Lake Worth Drainage District's letter was dated June 10, 1991. The referenced June 10, 1991, letter states that if a district determines it does not own or operate any portion of a system which is considered to be a municipal separate storm sewer (see Attachment B of the enclosed letter), then it should provide written notice to our office of such determination. The June 10, 1991, letter also states that if a district makes the determination that no municipal separate storm sewer system (MS4) is owned or operated, then no MS4 application is required.

Your letter of May 29, 1991, may serve as the written notification we are requesting. Based on your determination that Lake Worth Drainage District does not own or operate a MS4, no MS4 application is required. If you have

any questions please call Mr. Chris Thomas of my staff at 404/347-3633.

Sincerely,

/s/ Roosevelt Childress
Roosevelt Childress, Acting Chief
Permits Section
Facilities Performance Branch
Water Management Division

Enclosure (1)

(LOGO)

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

JUN 10 1991

REF: 4WM-FP

Mr. William Winters
Lake Worth DD
13081 Military Trail
Delray Beach, FL 33484

Dear Addressee:

Region IV of the Environmental Protection Agency (EPA) has received several letters and calls requesting clarification of the responsibilities and requirements of the 298 Districts (and other special districts operating in a similar capacity), based on EPA's new storm water National Pollutant Discharge Elimination System (NPDES) regulations which were published in the *Federal Register* on November 16, 1990. Also, there appears to be some remaining confusion among the 298 Districts about the options available for municipalities and 298 Districts to group themselves to submit applications for storm water discharges from municipal separate storm sewer systems (MS4's).

A 298 District (or special district) is required to submit a MS4 application *only* if it owns or operates a system that meets the definition of a municipal separate storm sewer and is within one of the ten (10) counties listed in Attachment A. (See Attachment B for the definition of a

municipal separate storm sewer.) Waters of the State and waters of the United States, including canals that are considered waters of the State, are not MS4's. Therefore, each 298 District (or special district) should evaluate their system based on the definition of a municipal separate storm sewer, and make the determination of whether or not they own or operate a MS4. If it is determined that no MS4 is owned or operated, then no application is required. However if it is determined that a MS4 is owned or operated, the 298 District is required to submit an application for the discharges from its MS4.

In order to clarify our intent in *recommending* that the county be "lead applicant", please understand that it was only a recommendation. We assumed the county would be the one municipal entity that may have the resources, expertise and contacts with all the municipalities within the county to be able to coordinate completion of a single MS4 application. (By definition, 298 Districts and other special districts are considered municipalities for the purpose of obtaining NPDES permit coverage for MS4 discharges.) All municipalities are certainly entitled to submit an individual application; however, you must discuss responsibilities for any shared outfalls with any adjacent municipality. Identification as the "lead applicant" carries with it no designated or implied authorities over any other municipality in the county, whether an application is submitted in conjunction with the "lead applicant" or separately. All participants in the submittal of a single application are considered co-applicants.

As a result of comments received at our individual meetings with the potential municipal applicants in the counties, any group of municipalities in a county can participate as co-applicants; this will include Chapter 298

Special Districts that own and operate MS4's that are not waters of the U.S. For Part 1 of the application, each set of co-applicants is required to identify and sample 250 field screening points (500 field screening points if one of the co-applicants is listed in the aforementioned *Federal Register* as a large MS4). These field screening points are to be distributed among the co-applicants as agreed upon by them. The five (5) to ten (10) representative sampling locations for Part 2 of the application should be handled in a similar manner. This is a change from our previous requirement which offered municipalities only the following two options for submitting MS4 applications: (1) participate with the county and share the total number of field screening points required for the county; or (2) submit an individual application. The Part 1 application deadline for all municipalities not specifically listed in the storm water regulations is May 18, 1992, and Part 2 is due by May 17, 1993.

If you determine that your district does not own or operate any system or portion of a system that is described by the definition of a municipal separate storm sewer, please notify our office by letter. Also enclosed is a list of the active NPDES facilities in your county for your use in completing the MS4 application. The industrial and municipal storm water application guidance manuals and the lists of waterbodies with known water quality impacts in your county, if any, will be mailed to you soon. If you or your staff have any questions or comments please contact the appropriate member of my staff as shown on Attachment A.

Sincerely,

/s/ Roosevelt Childress, Acting Chief
Permits Section
Facilities Performance Branch
Water Management Division

Enclosures

ATTACHMENT A

Listed below are the ten (10) Florida counties which are required to submit an NPDES application for discharges from their MS4's (all municipalities within these counties are required to submit MS4 discharge applications as well). Also shown are the permit writers assigned to each county.

County	Permit Writer	Telephone #
Broward	Chris Thomas	404/347-3633
Dade	Tammy Bradley-Moore	404/347-3866
Duval	Karrie-Jo Shell	404/347-3633
Escambia	Angie Fugo	404/347-3379
Hillsborough	Jeannie McNeill	404/347-2913
Orange	Brenita Richardson	404/347-3379
Palm Beach	Chris Thomas	404/347-3633
Pinellas	Jeannie McNeill	404/347-2913
Polk	Angie Fugo	404/347-3379
Sarasota	Tammy Bradley-Moore	404/347-3866

ATTACHMENT B

DEFINITION OF "*MUNICIPAL SEPARATE STORM SEWER*"

Reference 40 CFR 122.26(b)(8)

MUNICIPAL SEPARATE STORM SEWER means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribe organization, or a designated and approved management agency under section 208 of the Clean Water act (CWA) that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.