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United States v. S. Fla Water Mgmt. Dist., No. 88-1886, 2005 U.S. Dist. LEXIS 11600 (S.D. Fla. June 14, 2005)

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United States v. S. Fla. Water Mgmt. Dist., No. 88-1886, 2005 U.S. Dist. LEXIS 11600 (S.D. Fla. June 14, 2005) (holding the United States, South Florida Water Management District, and the State of Florida Department of Environmental Protection violated a consent decree to reduce phosphorus levels in the Florida Everglades and Loxahatchee National Wildlife Refuge by allowing multiple exceedances to occur).

This suit stems from a 1991 settlement to an action filed by the United States alleging pollution in the Florida Everglades and Loxahatchee National Wildlife Refuge ("Refuge") due to agricultural production resulting in phosphorus accumulations. The United States, the South Florida Water Management District, and the State of Florida Department of Environmental Protection incorporated the settlement agreement into a consent decree with self-imposed deadlines. In 1992, the United States District Court for the Southern District of Florida granted intervention rights to the Miccosukee Tribe ("Tribe"), enabling the court to enforce the settlement agreement to protect the Tribe's rights and interests. The Tribe asked the United States to seek mediation on the issues. After the United States declined, the Tribe filed this suit. The Tribe sought relief alleging that there were: 1) violations of the decree due to elevated phosphorus levels at the Refuge that were not the result of error or extraordinary phenomena, and 2) for failing to timely construct storm-water treatment areas ("STAs").

The consent decree required water sampling on an ongoing basis at 14 different sampling points throughout the Refuge, and provided both interim and long-term phosphorus concentration level goals. The consent decree described that an exceedance occurred when the monthly geometric mean was greater than the interim level two or more times in any twelve consecutive samplings. It also stated that exceedances could occur only when there were no errors or extraordinary natural phenomena. Based on sampling performed by the parties, testimony from the Technical Oversight Committee (created by the parties to monitor compliance), and testimony from the parties that the exceedances did occur, the court found that the phosphorus levels exceeded the interim level multiple times. It also found that neither error nor extraordinary phenomena caused the exceedances. Therefore, the court held that each elevated sample constituted an additional violation of the consent decree.

The consent decree also called for the construction of STAs designed to decrease the amount of phosphorus from farm water run-off discharged into the Refuge. The Tribe alleged that STA 3/4 was not operational by the deadline prescribed in the decree. The United States alleged it met the terms of the decree regarding the STA because it built the STA on time, but it was not yet operating as intended. The court found that the consent decree intended the STA be constructed and operating in order to perform its function of decreasing

the amount of phosphorus in the water. The court held that the United States had violated the consent decree by not having STA 3/4 operational.

The court held that the United States violated the consent decree due to exceedances and the failure to meet the deadline for making STA 3/4 operational. The court ordered the Special Master to hold a hearing to determine remedies for the violations, and to file a recommendation with the court. It also ordered that while the parties await the court's imposed remedies, the United States and the state agencies should implement their own remedies and provide the court more details about the alleged exceedances as well as create a new schedule for making 3/4 operational.

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United States v. Metro Dist. Comm'n, No. 85-0489-RGS, 83-1614-RGS, 2005 U.S. Dist. LEXIS 5649 (Mass. Dist. Ct. Apr. 6, 2005) (holding the Massachusetts Water Resources Authority should submit an amended project schedule after receiving assurances from the United States that an agreement to provide stormwater control on a portion of the project would not be construed as setting precedent).

The Massachusetts Water Resources Authority ("MWRA") filed its Quarterly Compliance and Progress Report ("Quarterly Report") and Combined Sewer Overflow ("CSO") Control Plan Annual Progress Report for 2004 ("Annual Report") on March 15, 2005. The United States and the Conservation Law Foundation ("CLF") brought this action in response. The Annual Report provided a status summary of ongoing CSO control plan projects. The MWRA listed 14 of 25 CSO project components as complete. The MWRA also included a proposed schedule for other project components. Two proposed projects involved stormwater control plans: a storage tunnel in North Dorchester Bay and a Reserved Channel sewer separation project.

Despite the MWRA's inclusion of the proposed schedules in the Annual Report, the MWRA declined to file a motion to amend the main CSO project schedule, Schedule Six, to incorporate the new construction milestones until it reached an agreement with the Environmental Protection Agency ("EPA") and the Department of Environmental Protection ("DEP") on "all outstanding issues" regarding the long term CSO control plan. The MWRA's Board of Directors ("Board") was concerned about the MWRA's agreement to accept responsibility for stormwater control for the North Dorchester Bay and Reserved Channel projects. The MWRA insisted that its acceptance of stormwater control for the North Dorchester Bay and Reserved Channel projects must not be viewed as establishing precedent for its other CSO control projects. The Board requested assurances from the EPA