EPA seeks to clarify Clean Water Act after adverse court rulings

By Brain Skoloff

Associated Press

WEST PALM BEACH, Fla. - If not for the pumps, canals and dikes that dissect South Florida, much of it would be under several feet of water part of the year.

Towns along the south rim of Lake Okeechobee would be inundated during downpours. To prevent such catastrophes on the northern edge of the Everglades, state water managers move water back and forth through channels in and out of the lake and have done so for decades.

But a federal judge's recent ruling in Florida that the U.S. Clean Water Act requires the state obtain permits before pumping contaminated water from farmland and urban run-off into Lake Okeechobee has put the state's flood control operations - and similar programs around the country - in limbo. It also could affect a multibillion federal and state effort to restore the Everglades, critics of the ruling say.

The U.S. Environmental Protection Agency now says it may seek an amendment to the act, arguing that the Florida ruling and others have created confusion over when and where permits are required. Some judges are interpreting the law in a manner Congress never intended, the EPA contends.

"In the last several years, courts have offered very different and conflicting interpretations of the Clean Water Act, and we think it's important to add certainty and clarity," Benjamin Grumbles, EPA's assistant administrator for water, said in a recent interview with The Associated Press.

"We stand ready to work with Congress if Congress chooses to amend the Clean Water Act to clarify when a permit is needed and when it isn't."

The EPA's latest push for Clean Water Act clarification came after the December court ruling over Lake Okeechobee, which at 730 square miles is the second-largest freshwater lake in the contiguous United States.

Several groups, including the Miccosukee Tribe of Indians, which considers the lake and the Everglades part of its ancestral home, sued the South Florida Water Management District, claiming that back-pumping of polluted water into the lake was putting the entire Everglades restoration project in jeopardy.

U.S. District Judge Cecilia M. Altonaga's decision concluded a yearlong trial and threatens a rule proposed by the EPA in June that would allow state water managers nationwide to skip having to obtain permits when transferring water from one place to another, no matter how polluted it is. Permits would still be required if the water transfer process itself might introduce additional pollutants.

If Altonaga's ruling stands, and the EPA still pushes through its rule, thousands of flood control projects across the country could be put on hold, taken off-line or face lawsuits from environmentalists.

"If the EPA decides to plow ahead with this rule, you can certainly expect it to be challenged in court by environmental groups," said Jim Murphy, an attorney for the National Wildlife Federation.

"The national implications of this case are very significant and important for water quality nationwide," added Joan Mulhern, legislative counsel for the nonprofit Earthjustice law firm, which represented parties suing Florida water managers. "The EPA is ignoring the plain language of the law."

The act requires a permit be obtained for "the construction or operation of facilities, which may result in any discharge into ... navigable waters." But it also gives some leeway to states to approve projects without permits, leaving much of the language in the law open to interpretation.

Since the 1970s, Florida water managers have pumped water from canals carrying pollutants from adjacent sugar-growing lands and cities into the lake for flood control and to bolster water reserves that could be used during drought.

Water managers say the method is crucial to keep cities from being inundated and that a lengthy permitting process would only serve to slow Everglades restoration efforts and could halt development in places.

At issue is whether permits are needed to simply move the water from place to place. Carol Wehle, executive director of the South Florida Water Management District, contends that Congress never intended for the Clean Water Act to cover such movements, but rather govern pollutants coming from industrial sources.

"Our contention is we shouldn't have to get a water quality permit because the source of the pollution is not the district," Wehle said. "If the quality of the water going into our canal system was clean, then we would not be having this issue."

If permits were required, Wehle predicted "our entire flood control system would shut down."

"The solution is very complex, and it's going to take the cities and the counties all doing their part," she said. "We are not in any way, shape or form saying that water quality isn't an important issue. But we're trying to look at it from a logical point of view."

Even Judge Altonaga acknowledged in her ruling there was no quick fix to the decades-old practice.

"There is no dispute that, at present (the water district) may not cease its back-pumping operations because massive flooding would result," Altonaga wrote in her ruling.

Robert Coker, vice president of U.S. Sugar Corp., which farms several hundred thousands acres near Lake Okeechobee and was a party in the lawsuit, predicted "utter chaos across the country" if the judge's ruling stands.

"This will become a cottage industry for lawyers and environmental consultants who will be bringing lawsuits nationwide," costing millions of dollars, Coker said.

In June, a federal appeals court upheld New York City's penalty for violating the Clean Water Act by adding silt to an upstate trout stream that carries water supply to millions of people. The city settled the case for just over $5 million in the lawsuit brought by sportsmen and environmentalists.

Just as the judge in Florida ruled, the New York appeals court found the city needed permits to move water through tunnels and channels from a reservoir 120 miles north.

"We're studying our options but remain fully committed to reducing confusion based on the various court cases across the country," said the EPA's Grumbles. "We at the EPA have always taken the view that water transfers do not require Clean Water Act permits. Congress never intended for water transfers to be regulated in the same way as discharges from an industrial plant."

David Guest, Earthjustice's lead attorney in the Florida case, believes the language in the law is clear and that the judges' rulings have "put a dagger" into the EPA proposed national rule.

"The Florida case makes an explicit finding that the proposed rule contradicts the plain language of the Clean Water Act," Guest said, adding that the EPA would be violating federal law if the rule was pushed through. "It would be illegal."