



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

DEC 13 1993

OFFICE OF  
WATER

MEMORANDUM

SUBJECT: "Waters of the United States" Determination for A  
Proposed Cooling Pond Site in Polk County, Florida

FROM: Robert Perciasepe  
Assistant Administrator *Bob Perciasepe*

TO: W. Ray Cunningham, Director  
Water Management Division

This memorandum responds to your March 5, 1993, request for assistance in making the decision whether a cooling pond proposed for construction in Polk County, Florida, by the Florida Power Corporation (FPC), will be a "water of the United States" and thus subject to the Clean Water Act (CWA), including National Pollutant Discharge Elimination System (NPDES) requirements.<sup>1</sup> After reviewing this question, I have concluded that due to ambiguities in the existing regulation and apparent lack of national consistency, EPA should begin rulemaking development to air the policy issues and clarify the jurisdictional status of steam electric cooling ponds. In the interim, EPA Region IV may continue to conform its permitting decisions to its past practice.

In the last six months, EPA Headquarters and Region IV have held a series of meetings on this topic. We have gathered information concerning the proposed FPC cooling pond as well as EPA's jurisdictional treatment of cooling ponds across the Regions. We also received additional information and expressions of interest in this matter from the State of Florida, the utility industry, selected environmental groups, and members of the public. This information, however limited, has suggested a need to clarify the jurisdictional status of steam electric cooling ponds through rulemaking development and input from all interested persons.

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<sup>1</sup>A second smaller cooling pond is also proposed for construction in Polk County, Florida, by the Tampa Electric Company (TECO). EPA Headquarters' information on this cooling pond is limited; however, the directions provided in this memorandum would also apply to the TECO cooling pond.

### Proposed FPC Cooling Pond

Based upon the information currently available, it appears that the Florida Power Corporation proposes to construct a 3000-megawatt steam electric generation plant in Polk County, Florida, on 8000 acres currently used for phosphate mining operations. The plant site will include a proposed four-square mile (2600-acre) steam electric cooling pond which will likely be established partially on existing wetlands that are located within clay treatment ponds currently used for mining operations. The proposed site was selected over other possible sites through a consensus approach including local environmental groups.

The mining companies presently operating the proposed site have requested State approval of a reclamation plan under which approximately 80% of mining operation areas would be reclaimed to uplands; the remainder would include wetlands. Our latest information is that the utility company has requested modification of the reclamation plan under which 100% of the site could be converted to uplands. Once mining use ceases, EPA and the Corps must decide whether to assert jurisdiction over existing wetlands and whether a CWA section 404 permit may be needed for discharges associated with construction of the cooling pond, among other activities.

Florida Power plans to design the cooling pond to allow no point source discharges from the pond to other surface waters of the U.S. The power company represents that the cooling pond will be an isolated artificial water body that will not be open for any recreational purposes. The company also indicates that construction of a steam electric cooling pond rather than a cooling tower will consume less water and may be significantly less costly for the utility.

Make-up water for the proposed steam electric cooling pond is expected to include cooling water blowdown of approximately four MGD and commercial wastewater (including probable effluent from citrus growers) of approximately two MGD. The proposed steam electric cooling pond is also expected to receive approximately 20,000 gallons of secondary sewage effluent and three million gallons of tertiary-treated municipal effluent daily from local publicly owned treatment works.

Polk County contains many wetlands. This part of the State is inhabited by endangered species and is regarded as a pathway for migratory bird overflights. An EPA wetlands biologist and a Corps field inspector have observed the presence of endangered species, vegetated wetlands, and migratory waterfowl on the proposed plant site. Areas adjacent to the proposed cooling pond site may also attract birds/species and contain wetlands. The Endangered Species Act and the Migratory Bird Treaty Act may also

provide some environmental protection for the birds and other species in the area.

### Relevant NPDES Regulations

40 C.F.R §122.2 establishes criteria for determining whether a given waterbody is a "water of the United States." For example, paragraph (c) of §122.2 provides that "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, 'wetlands,' sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce . . ." are "waters of the United States." Since 1980, §122.2 has excluded from the definition of "waters of the United States" "[w]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) . . . (emphasis supplied)."

Thus, under the definition of "waters of the United States" as revised in 1980, steam electric cooling ponds as defined under §423.11(m) that met the requirements of §122.2 were "waters of the United States" and could not be considered to be excluded waste treatment systems. In making the decision as to whether a given steam electric cooling pond is a "water of the United States," the permitting authority, however, determined on a case-by-case basis whether the §423.11(m) steam electric cooling pond otherwise met the definition of "waters of the United States." Under paragraph (c) of §122.2, for example, a permitting authority could determine that the use of the cooling pond would or could affect interstate commerce. There were, and are, various ways to establish a nexus to interstate commerce. Such findings can be highly fact-specific.<sup>2</sup>

In 1982, when the national effluent limitations guidelines for steam electric generating facilities were revised, the

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<sup>2</sup>For example, based on Commerce Clause authority, EPA may extend CWA jurisdiction to waters used by migratory birds and endangered species, including the habitat which is essential to maintaining them. Last summer, in Hoffman Homes, Inc. v. Administrator, No. 90-3810, slip op. at 8-10 (July 19, 1993), for example, the Seventh Circuit upheld the validity of the migratory bird nexus for asserting CWA jurisdiction over isolated waters. Though disagreeing with EPA on the application of the particular facts under this standard, the court agreed that EPA could reasonably interpret the definition of "water of the United States" to include waters based on potential connection to interstate commerce. The court also agreed that bird use could provide the connection between a water and interstate commerce.

definition of "cooling pond" at 40 C.F.R. §423.11(m) was deleted. EPA did not, however, revise the regulatory definition at 40 C.F.R. §122.2, with the cross reference to §423.11(m) steam electric cooling ponds.

#### Jurisdictional Treatment of Existing Cooling Ponds

EPA's Regional Offices recently provided us with readily available information concerning the jurisdictional treatment of steam electric cooling ponds. This limited information suggests that many steam electric cooling ponds are not currently considered to be "waters of the United States." We believe this result could be due to several factors. On a case-by-case basis, the Regions may have made the determination that specific steam electric cooling ponds do not meet the criteria for a "water of the United States" as required under §122.2. It also appears, however, that this result could reflect the age of the cooling ponds relative to the evolving definition of "waters of the United States" (some cooling ponds were first permitted in the early 1970's before EPA revised the definition of "waters of the United States" to provide the steam electric cooling pond exception to the waste treatment system exclusion); or confusion over the continuing validity of the cooling pond exception to the waste treatment exclusion due to the deletion of the definition of "cooling pond" at 40 C.F.R. §423.11(m).

#### Additional Considerations for the Rulemaking Proceeding

Through a rulemaking proceeding designed to clarify the definition of "waters of the United States," EPA may also obtain the public's views as to whether policy or technical factors should affect the jurisdictional status of steam electric cooling ponds. A rulemaking proceeding may also facilitate consideration of whether any changes to the CWA are necessary to address such concerns. EPA may also consider whether it is appropriate to "grandfather" the status of existing cooling ponds. In addition, EPA may wish to consider whether other clarifications to the regulatory definition of "waters of the United States" are necessary.

#### Interim NPDES Permitting Determinations

Developing a rule which clarifies the jurisdictional status of cooling ponds will take time. In the meanwhile, given the deletion of the definition of steam electric cooling ponds from EPA's regulations, the past practice in Region IV, and the ambiguity in the regulation as reflected in the apparently inconsistent national practice, you have some discretion in instances where you have to make NPDES decisions concerning particular facilities. Specifically, while it would be appropriate to regulate as "waters of the United States" a steam electric cooling pond based on an actual or potential connection

to interstate commerce, you also have the option, given the deletion of the steam electric cooling pond definition, of interpreting the waste treatment system exclusion as encompassing all steam electric cooling ponds or of taking into account the fact that a particular pond has a dual purpose of cooling and of treatment of other wastes.<sup>3</sup> When additional rulemaking is completed, permitting authorities such as Region IV will need to consider what effect the new regulation has upon existing steam electric cooling ponds. Finally, you should also continue to conform all interim permitting decisions to the requirements of section 404 of the CWA, where applicable.

I would be happy to discuss this matter further with you. In the meantime, my staff is available to work with your office, on any aspect of this issue that would be helpful.

cc: Water Management Division Directors, Regions I-III, V-X  
Water Permits Branch Chiefs, Regions I-X  
Michael Cook  
Robert Wayland  
Tudor Davies  
Susan Lepow

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<sup>3</sup>Based on the available facts regarding the proposed FPC steam electric cooling pond, it would appear that this particular cooling pond, once created, may meet one or more of the current criteria for demonstrating an actual or potential connection to interstate commerce, e.g., since it would or could be used as habitat by migratory birds and/or endangered species. However, given the current ambiguity regarding the applicability of the waste treatment system exclusion to steam electric cooling ponds, the Region would have the discretion ultimately to determine that NPDES permitting requirements do not apply to the FPC pond based on the application of such exclusion.