

# CRS Report for Congress

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## Everglades Restoration: Modified Water Deliveries Project

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### Summary

The Modified Water Deliveries Project (Mod Waters) is a controversial ecological restoration project in south Florida designed to improve water delivery to Everglades National Park. The implementation schedule of Mod Waters is of interest to Congress partly because its completion is required before the implementation of portions of the Comprehensive Everglades Restoration Plan. Concerns have been raised in hearings on the Administration's FY2006 budget request regarding the cost of implementing the project and the U.S. Army Corps of Engineers' authority to fund the project. Further, due to concerns regarding phosphorus pollution in the Everglades, Congress enacted a provision in the FY2004, FY2005, and FY2006 Interior Appropriations Acts that conditions funding for Mod Waters on meeting state water quality standards. In addition, the use of eminent domain to acquire land for a flood mitigation plan adjacent to the park has been contentious. Several landowners who were unwilling to sell their land obtained a ruling in federal court that prevented further land acquisitions in the area. The Corps appealed this decision, and Congress authorized a plan, which included land acquisition, in the Consolidated Appropriations Resolution for FY2003 (P.L. 108-7). This report provides background on Mod Waters and discusses issues relating to its current status, funding, and land acquisition needs. This report will be updated as warranted.

### Most Recent Developments

The Modified Waters Deliveries Project (Mod Waters) is being implemented by the Department of the Interior and the U.S. Army Corps of Engineers in southern Florida. (See **Figure 1**.) For FY2006, the Administration has requested a total of \$60 million for the project: \$35 million through the Corps and \$25 million through the Department of the Interior.

The President's request for the Everglades has drawn attention because of a proposed change in the funding of Mod Waters. The request called for the Corps to broaden its role by jointly funding the project with the Department of Interior, which previously had solely funded the project. This raises the question of whether the Corps is authorized to receive

appropriations to work on the project. The Administration's position appears to be for the Corps to pay for roughly two-thirds of the remaining \$191 million required to complete the project from FY2006-FY2009.<sup>1</sup> The Interior Appropriations Act for FY2006 provides \$25 million for Mod Waters and conditions this funding to the appropriation of matching funding for the Corps (P.L. 109-54). Corps funding for Mod Waters for FY2006 is not yet determined. The House version of the Energy and Water Appropriations (H.R. 2419) provides \$35 million and the in H.Rept. 109-86 the Committee states that the Corps has sufficient authority to receive and expend funds to proceed with project construction. The Senate version of H.R. 2419 does not fund Mod Waters, and according to S.Rept. 109-84, the Senate Appropriations Committee "does not believe sufficient current authorization exists for the Corps to fund the work."

A provision in the Interior Appropriations Act for FY2006 (P.L. 109-54) conditions funding for Mod Waters on meeting state water quality standards. This provision cites provisions in the FY2004 Interior Appropriations Act, which states that funds appropriated for Mod Waters will be provided *unless* the Secretary of the Interior, Secretary of the Army, Administrator of the EPA, and Attorney General indicate in a joint report (to be filed annually until December 31, 2006) that water entering the A.R.M. Loxahatchee National Wildlife Refuge and Everglades National Park does not meet state water quality standards, and the House and Senate Committees on Appropriations respond in writing disapproving the further expenditure of funds.<sup>2</sup>

## Background

The Modified Water Deliveries Project was authorized by the Everglades National Park Protection and Expansion Act of 1989 (P.L. 101-229) to improve water deliveries to Everglades National Park and, to the extent possible, restore the natural hydrological conditions within the park. The completion of Mod Waters is expected to be significant step towards the implementation of the Comprehensive Everglades Restoration Plan (CERP; Title VI, P.L. 106-541, the Water Resources Development Act of 2000 [WRDA

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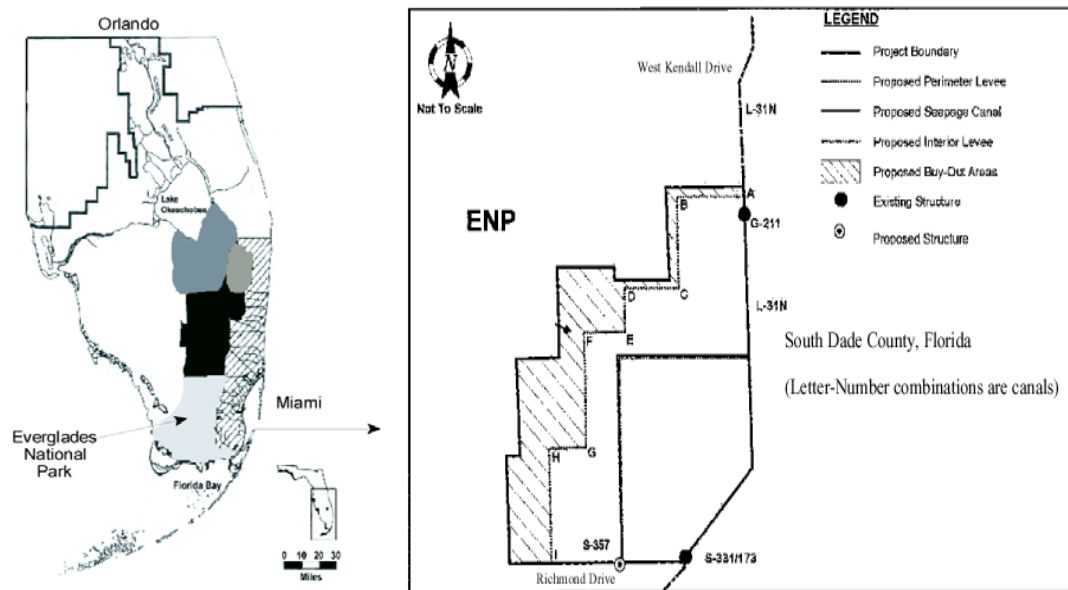
<sup>1</sup> U.S. Dept. of the Interior, News Release, "FY2006 Interior Budget Emphasizes Commitments, Cooperative Efforts, Performance and Fiscal Restraint," Feb. 7, 2005. Accessed March 14, 2005 at [[http://www.doi.gov/news/05\\_News\\_Releases/050207a](http://www.doi.gov/news/05_News_Releases/050207a)].

<sup>2</sup> For more information, see CRS Report RL32131, *Phosphorus Mitigation in the Everglades*, by Pervaze Sheikh and Barbara Johnson.

2000)).<sup>3</sup> Mod Waters must be completed before appropriations can be made to construct other restoration projects in the east Everglades (§601(b)(2)(D)(iv) of WRDA 2000).

Mod Waters is expected to consist of structural modifications and additions to the Central and Southern Florida Project (C&SF Project) to improve the timing, distribution, and quantity of water flow to the Northeast Shark River Slough.<sup>4</sup> Increased water flow to the Northeast Shark River Slough will increase water supplies in the park and is expected to improve the natural habitat and hydrology of a portion of the Everglades ecosystem.<sup>5</sup>

**Figure 1. The 8.5 Square Mile Area in Southern Florida**



**Source:** Adapted from the U.S. Army Corps of Engineers.

Mod Waters is expected to flood some residential and agricultural areas adjacent to the park. Legislation authorizing this project instructs the Secretary of the Army to determine if residential and agricultural areas within or adjacent to the 8.5 SMA will be flooded from the hydrological changes of Mod Waters (§104(a)). If these areas are under threat of flooding, the law mandates that a flood protection system must be developed for

<sup>3</sup> For more information Florida Everglades restoration, see CRS Report RS20702, *South Florida Ecosystem Restoration and the Comprehensive Ecosystem Restoration Plan*, by Nicole Carter.

<sup>4</sup> Originally, the Corps was asked to alter water flow in the Everglades to control flooding, open land for agriculture, and provide water supplies to urban areas. The cornerstone of this effort was the Central and Southern Florida Project, which was authorized by the Flood Control Project Act of 1948 (ch. 771, 62 Stat. 1171). This project resulted in nearly 1,000 miles of canals, 720 miles of levees, and more than 200 water control structures (e.g., dikes, dams and pumping stations).

<sup>5</sup> For more details, see U.S. Army Corps of Engineers, *Modified Water Deliveries to Everglades National Park and South Dade Canals (C-111) Projects* accessed on March 14, 2005, at [http://www.saj.usace.army.mil/dp/MWDC111.htm].

the area (§104(b)). To prevent flooding, several mitigation features have been developed. One of these features is called Alternative 6D, which is a plan for protecting residents in the 8.5 SMA from flood waters resulting from the project (discussed further below).

The importance of Mod Waters goes beyond its expected direct results. Legislation authorizing CERP provides that the Mod Waters must be completed before several CERP projects involving water flows on the east side of the park can receive appropriations (§601(b)(2)(D)(iv) of WRDA 2000).

## Issues Surrounding the Modified Water Deliveries Project

Three issues are being debated about the implementation of Mod Waters, including its estimated funding level, the relevance of its completion to overall restoration efforts in the Everglades, and the controversy surrounding land acquisition in the 8.5 SMA.

**Funding.** The question of whether the Corps is authorized to fund Mod Waters has been an issue during the deliberation over the FY2006 Energy and Water Appropriations. Arguments used to support the proposition that the Corps could be authorized to directly fund Mod Waters cite §102(f) of the Everglades National Park Protection and Expansion Act of 1989 (P.L. 101-229), which is the only section that authorizes funding and authorizes such sums as may be necessary to carry out the provisions of the act. This provision would include §104, which authorizes Mod Waters, though it primarily authorizes activities carried out by the Corps. Arguments used to argue against Corps authorization to fund Mod Waters could cite the long history of transfers from the NPS to the Corps, which could be argued to establish a strong precedent for the lack of Corps authority. Due to these conflicting arguments and the lack of clear legislative intent, the authority for the Corps to directly fund Mod Waters might still remain debatable.

Rising project costs for Mod Waters led some critics to question its viability. The original cost of completing Mod Waters was estimated at \$81.3 million in 1990.<sup>6</sup> The current estimated cost for completing the project is \$398 million.<sup>7</sup> To date, approximately \$192 million has been appropriated for constructing and implementing Mod Waters, and \$206 million more is estimated to be needed to finish the project (i.e., FY2005-FY2009).<sup>8</sup> Some supporters of Mod Waters argue that changes in the implementation plan, the rising cost of land acquisition, and flood mitigation requirements have led to higher costs. This was reflected, according to some, in the changes in the 1992 General Design Memorandum, which were derived from improved modeling data and the project's need to be compatible with CERP.

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<sup>6</sup> U.S. Army Corps of Engineers, *Modified Water Deliveries to Everglades National Park*, General Design Memorandum, Jacksonville District, June 1992.

<sup>7</sup> U.S. Dept. of the Interior, *FY2006 Budget Justification, National Park Service* (Washington, DC, 2005).

<sup>8</sup> Of the total amount of funds already spent and estimated to complete Mod Waters, approximately \$200 million is for land acquisitions and approximately \$198 million is for construction, design, and monitoring, among other things.

**Project Delays.** Mod Waters was originally estimated to be completed by 1997, yet now some argue it is unclear as to when or even whether the project will be completed. The FY2006 Administration request indicates that funding will be requested through FY2009. Some argue that the delay in implementing Mod Waters jeopardizes implementation of CERP projects, causes further degradation within Everglades National Park, and will set a precedent for delays and deliberation regarding land acquisition activities when CERP projects are being implemented.<sup>9</sup> Others contend that the SFWMD has already acquired 50% of the necessary land for implementing CERP and that delays should not be an issue.

**Land Acquisition in the 8.5 Square Mile Area.** Implementation of Mod Waters was dependent on acquiring land in the 8.5 SMA. Land acquisition in this area was controversial because there were several unwilling sellers and the Corps had to exercise eminent domain in some cases to acquire the necessary lands.

The 8.5 SMA is a region adjacent to Everglades National Park of approximately 5,600 acres with a residential community of approximately 1,500 people. Due to its low topography (ranging from 5.0 to 8.5 feet NGVD<sup>10</sup>) and lack of drainage, parts of the 8.5 SMA frequently flood for several months during the rainy season (typically from May to October). With the implementation of Mod Waters, the Corps expected that most of the 8.5 SMA would flood. The Corps developed a flood mitigation plan in 1992 (the 1992 *General Design Report and EIS for Modified Water Deliveries to Everglades National Park* [1992 Plan]). The 1992 Plan was expected to provide flood mitigation for residents in the 8.5 SMA and allow for the implementation of Mod Waters. However, the 1992 Plan was later deemed “unworkable” by the superintendent of Everglades National Park, who claimed that it would not provide full flood protection for current and future residents in the 8.5 SMA.<sup>11</sup>

The Corps began to devise a new plan for Mod Waters and the 8.5 SMA in 1999, which considered several alternative plans, including the complete buyout of the 8.5 SMA. A new plan, referred to as Alternative 6D, was proposed by the Corps in 2000. This plan includes a perimeter levee, seepage canal, pump station, and storm water drainage for flood protection in the 8.5 SMA. Instead of a complete buyout of the 8.5 SMA, this plan proposed the acquisition of approximately 2,500 acres in the 8.5 SMA (39% of the total area) and the acquisition of 77 residential tracts (24 tenant-occupied tracts and 53 owner-occupied tracts) in the 8.5 SMA (13% of the total number of “residential areas” in the 8.5 SMA).<sup>12</sup>

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<sup>9</sup> §601(b)(2)(D)(iv) of WRDA 2000 provides that Mod Waters must be completed before appropriations can be made to construct other restoration projects in the east Everglades.

<sup>10</sup> NGVD is the National Geodetic Vertical Datum, which is used to assess elevation relative to sea level.

<sup>11</sup> U.S. House Resources Subcommittee on National Parks and Lands, *Issues Regarding Everglades National Park and Surrounding Areas Impacted by Management of the Everglades*, oversight hearing, April 27, 1999, 106<sup>th</sup> Cong., 1<sup>st</sup> sess. (Washington, DC: GPO), Serial No. 106-24.

<sup>12</sup> A residential area contains either a fixed home, mobile home, or travel trailer.

On February 23, 2001, some residents who are unwilling to sell their land in the 8.5 SMA filed a case against the Corps with two complaints. They asserted that the Corps does not have the authority to implement a plan that does not protect the entire 8.5 SMA from flooding, and that the Corps does not have the authority to exercise eminent domain or spend money to acquire their land through condemnation.<sup>13</sup> On July 5, 2002, a district judge adopted an earlier ruling by a federal magistrate that restricted the Corps from veering from its original mandate to protect the entire community from flooding, and prevented the Corps from acquiring land in the 8.5 SMA. The Corps appealed this decision to the U.S. Court of Appeals for the Eleventh Circuit on September 4, 2002.

To help implement Mod Waters, Congress included a provision in the Consolidated Appropriations Resolution for FY2003 (Division F, Title I, §157 of P.L. 108-7) that authorizes the Corps to implement a flood protection plan (Alternative 6D) for the “8.5 Square Mile Area” (8.5 SMA) as *part* of Mod Waters. Three conditions are specified in the section authorizing implementation of Alternative 6D: (1) the Corps may acquire residential property needed to carry out Alternative 6D if the owners are first offered comparable property in the 8.5 SMA that will be provided with flood protection; (2) the Corps is authorized to acquire land from willing sellers in the flood-protected portion of the 8.5 SMA to carry out the first condition; and (3) the Corps and the nonfederal sponsor may carry out these provisions with funds provided under the Everglades National Park Protection and Expansion Act of 1989 (P.L. 101-229; 16 U.S.C. §410r-8) and funds provided by the DOI for land acquisition for restoring the Everglades.

Some critics of land acquisition in the 8.5 SMA base their arguments on the same principles used to criticize the acquisition of the entire 8.5 SMA — that the federal government should not exercise eminent domain to remove unwilling sellers and that the federal government is obligated to protect all residential areas from floods under P.L. 101-229. Some critics also argue that there are several unwilling sellers in the area and that if condemnations proceed, delays due to litigation will be inevitable and will eventually harm the ecosystem.<sup>14</sup> The Corps asserts that there are several willing sellers in the 8.5 SMA.<sup>15</sup> Approximately 90% of the landowners in the 8.5 SMA have signed contracts to sell their land to the federal government and by June 2004, 13 tracts of land have been acquired by eminent domain (5 were residential tracts and 8 were unoccupied tracts). Some supporters of acquiring land in the 8.5 SMA and implementing Alternative 6D argue that if this plan is not implemented, delays may be even longer in implementing Mod Waters and restoring the regional ecosystem, to the detriment of Everglades National Park.

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<sup>13</sup> *Garcia vs. United States*, No. 01-801-CIV-Moore, slip op. (D.S.D. FL. July 5, 2002).

<sup>14</sup> Michael Grunwald, “Dispute Stalls Everglades Project,” *Washington Post*, July 17, 2002: A21.

<sup>15</sup> The Corps asserts its power for condemnation is authorized under 40 U.S.C. §257 and 33 U.S.C. §591. This authority is extended to practices of flood control under 33 U.S.C. §701 according to the Corps. Personal communication with Barry Vorse, U.S. Army Corps of Engineers, on Sept. 7, 2002.