

***SOUTH FLORIDA WATER MANAGEMENT DISTRICT V.  
MICCOSUKEE TRIBE OF INDIANS: HAS THE U.S. SUPREME  
COURT “OPENED UP THE FLOODGATES” ON FEDERAL  
REGULATION OF WATER DIVERSION FACILITIES?***

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I. INTRODUCTION

In a time when the nation’s water agencies and developers have gone to great lengths to “tap and reroute water to quench the thirst of expanding suburban communities,” an interesting question has surfaced.<sup>1</sup> Is the discharge of a pollutant from a canal through a

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<sup>1</sup> Felicity Barringer, *Water Pump Case Tests Federal Law*, N.Y. TIMES, Jan. 14, 2004, at A1.

pumping station into a “navigable water,”<sup>2</sup> such as a wetland,<sup>3</sup> like taking a spoonful of soup from one bowl and passing it into another; or is such a discharge as “[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, [without having] ‘added’ soup or anything else to the pot?”<sup>4</sup> In March of 2004, the United States Supreme Court decided *South Florida Water Management District v. Miccosukee Tribe of Indians*,<sup>5</sup> holding that the federal Clean Water Act (“CWA”) and its permitting requirements<sup>6</sup> apply to point sources that do not themselves generate pollutants.<sup>7</sup> The Court, however, declined to answer whether the engineered movement of water from one “navigable water” to another requires compliance with the CWA.<sup>8</sup> The Court stated that a permit under the CWA is not necessary when a pollutant from one body of water is added to another body of water that is not “meaningfully distinct” from the first.<sup>9</sup> The question of what constitutes “meaningfully distinct” was left open for remand,<sup>10</sup> and the various circuits will inevitably have to develop their own definitions in order to determine whether or not certain water diversion facilities are subject to the permitting regulations of the CWA.

*Miccosukee* involved a canal which pumped polluted water into a natural wetland.<sup>11</sup> The Supreme Court remanded the case for further development of the Government’s “unitary waters” theory.<sup>12</sup> According to this theory, all “navigable waters” of the United States

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<sup>2</sup> 33 U.S.C. § 1362(7) (2000) (defining “navigable waters” as “the waters of the United States”).

<sup>3</sup> A “wetland” may fall within the jurisdiction of the Clean Water Act. *See* *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 124 (1985) (concluding that a definition of “waters of the United States” includes wetlands adjacent to other bodies of water).

The term “wetlands” means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

*Id.* (citing 33 C.F.R. § 323.2(c) (1978)).

<sup>4</sup> *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 492 (2d Cir. 2001).

<sup>5</sup> 541 U.S. 95 (2004).

<sup>6</sup> *See infra* notes 38–47 and accompanying text.

<sup>7</sup> *Miccosukee*, 541 U.S. at 105.

<sup>8</sup> *Id.* at 112.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 99–100.

<sup>12</sup> *Id.* at 104–12.

should be viewed unitarily and, therefore, a CWA permit would not be required when “one navigable water body is discharged, unaltered, into another navigable water body.”<sup>13</sup> If courts accept this theory, “meaningfully distinct” waters will not exist and water diversion facilities will not likely be subject to the CWA permitting mandates. There is considerable precedent, however, which may establish that the “unitary waters” theory is incorrect.<sup>14</sup>

If courts find that water diversion facilities do, in fact, connect “meaningfully distinct” bodies of water, activities never before regulated by the CWA could be subject to permitting requirements.<sup>15</sup> Suppliers of drinking water,<sup>16</sup> agricultural irrigation districts,<sup>17</sup> and mineral extraction operations<sup>18</sup> may be among the many required to obtain permits under the CWA. This may result in disruptions to their operations, as well as permitting and treatment costs in the

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<sup>13</sup> *Miccossukee*, 541 U.S. at 104.

<sup>14</sup> See, e.g., *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1299 (1st Cir. 1996) (holding that the transfer of water from a river through snow-making pipes to a pond, which resulted in the transfer of pollutants, required a National Pollution Discharge Elimination System permit because the river and pond were two distinct “waters of the United States”); *Catskill Mountains*, 273 F.3d at 481 (holding that New York City’s use of a tunnel to transfer drinking water from a reservoir into a creek triggered the Clean Water Act’s permit requirements); *N. Plains Res. Council v. Fid. Exploration and Dev. Co.*, 325 F.3d 1155, 1162 (9th Cir. 2003) (“The requirement that the physical, biological, or chemical integrity of the water be a ‘man-induced’ alteration refers to the effect of the discharge on the receiving water; it does not require that the discharged water be altered by man.”); *Borden Ranch P’ship v. U.S. Army Corps of Eng’rs*, 261 F.3d 810, 815 (9th Cir. 2001), *aff’d*, 527 U.S. 99 (2002) (holding that a pollutant is “added” into wetlands through the process of deep ripping where the “soil [is] wrenched up, moved around, and redeposited”).

<sup>15</sup> Richard Davis & Brian Doster, *South Florida Water Management District v. Miccosukee Tribe of Indians: Supreme Court Considers Extending Clean Water Act Regulation*, 35 ENV’T REP. (BNA) 91, 92 (Jan. 9, 2004) [hereinafter Davis & Doster].

The court’s decision of the *Miccossukee* case has the potential to extend the reach of the Clean Water Act to activities and industries historically exempt from regulation under that statute. Moreover, by its decision of the case, the court could restructure legal responsibilities and economic relationships in ways that could scarcely have been contemplated by the framers of the act.

*Id.*

<sup>16</sup> “Suppliers of drinking water . . . often move water from basins in which it is plentiful to basins in which need exceeds supply.” *Id.* at 91–92.

<sup>17</sup> “[A]gricultural irrigation districts frequently move water from basin to basin to allow productive use of fertile but arid lands.” *Id.* Furthermore, Congress has exempted “agricultural stormwater discharges and return flows from irrigated agriculture” from the definition of “point source.” 33 U.S.C. § 1362(14) (2000).

<sup>18</sup> See Davis & Doster, *supra* note 15, at 91.

hundreds of millions of dollars.<sup>19</sup> Costs could be passed on to farmers and ranchers who will either have to increase their own costs and lose competitiveness, or move away from certain practices and products altogether.<sup>20</sup> A more regulated permitting requirement for water diversion facilities would also raise issues of federalism and the powers of the states to regulate their own environmental laws.<sup>21</sup> It may be argued that such permitting requirements interfere with the states' sovereign prerogatives to manage their own water resources and meet the interests and needs of their own citizens.<sup>22</sup>

These controversies all revolve around the fundamental issue of whether or not a water diversion facility connects two bodies of water that are "meaningfully distinct." It appears that the only argument which may save these facilities from permitting requirements under the CWA is the "unitary waters" theory raised in *Miccosukee*.<sup>23</sup> Unless courts favor strong public policy arguments, however, or unless Congress decides to expressly exempt water diversion facilities from the permitting requirements,<sup>24</sup> it is likely that these facilities will have

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<sup>19</sup> *Id.* at 92.

The additional costs of compliance with the Clean Water Act will have to be absorbed somewhere—whether they are borne by those who move water from one watershed to another, passed back upstream to the sources of the pollutants, or passed forward to end-users of the water. Regardless, the movement of these costs through the nation's economy can be expected to result in changes, both foreseen and unforeseeable, that restructure economic relationships at the most fundamental level.

*Id.*

<sup>20</sup> *See id.* at 97.

<sup>21</sup> *See* 33 U.S.C. § 1251(g) (2000).

<sup>22</sup> *See id.* § 1370.

<sup>23</sup> The "unitary waters" theory may also potentially impact decisions that have held hydroelectric or dam facilities not subject to CWA permitting requirements because they do not add pollutants to a waterway. *See Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 590 (6th Cir. 1988); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 183 (D.C. Cir. 1982).

<sup>24</sup> Even when the Environmental Protection Agency ("EPA") was faced with issuing "millions of applications" and argued that Congress "could not have intended to impose such burdens," it was held that the EPA Administrator does not have the authority to exempt any categories of "point sources" from permit requirements. *NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977). Therefore, the court could not acquiesce to the Agency's sympathetic pleas, concluding that only Congress could create such exemptions. *Id.* ("This is a proper task for the Legislature where the public interest may be considered from the multifaceted points of view of the representational process.").

to spend millions of dollars to comply with the CWA, leaving both urban and rural communities to suffer the consequences.<sup>25</sup>

This Comment will explore how a court may define “meaningfully distinct” in light of the “unitary waters” theory posited by the Government in *Miccosukee*. It will also discuss the consequences of subjecting water diversion facilities to the strict permitting requirements of the CWA. Part II will provide an overview of the central issues of *Miccosukee*,<sup>26</sup> while Part III will comprehensively analyze the “unitary waters” theory, as well as the arguments against it.<sup>27</sup> Part IV will consider the many consequences of imposing permitting requirements on water diversion facilities, should the “unitary waters” theory be rejected.<sup>28</sup> Part V will look to whether such permitting requirements will undermine essential aspects of the CWA, including the agricultural exemption and sovereign powers of the states.<sup>29</sup> Finally, Part VI will attempt to explore the next logical steps and possible resolution to the queries raised in *Miccosukee*.<sup>30</sup>

## II. DIVERTING THE ISSUES IN *MICCOSUKEE*

### A. *The Clean Water Act*

A brief overview of the CWA is essential to fully understand the significant issues and arguments raised in *Miccosukee*. In 1972, Congress enacted the Federal Water Pollution Control Act, now known, along with its amendments, as the CWA. The CWA’s purpose

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<sup>25</sup> Drew Douglas, *Environment: Requiring Permit for Everglades Pumping May Slow Restoration, Solicitor General Says*, DAILY RPT. FOR EXECUTIVES: REG. & LAW (BNA), No. 178, at A-26 (Sept. 15, 2003). As stated by Nicolas Gutierrez, the District’s chairman:

We’re already well on the way to cleaning up the Everglades. Yet today’s progress could be diverted—or even reversed—if the law is wrongly applied, and if new procedures are added to existing regulations. Unless the lower court’s misreading of the law is overturned, there will be serious national consequences for the environment and the economy. . . . If we win this case, the real winner will be our nation’s environment, which will enjoy a faster and more effective cleanup. But if we lose this case, the real losers will be the nation’s taxpayers, who will see their scarce resources frittered away on needless bureaucratic paperwork instead of practical measures that protect our environment.

*Id.*

<sup>26</sup> See *infra* Part II.

<sup>27</sup> See *infra* Part III.

<sup>28</sup> See *infra* Part IV.

<sup>29</sup> See *infra* Part V.

<sup>30</sup> See *infra* Part VI.

is to respond, comprehensively, as a matter of national policy, to the complex problem of restoring and maintaining the “chemical, physical, and biological integrity of the Nation’s waters.”<sup>31</sup> The CWA generally prohibits the discharge of any pollutant by any person into certain waters and “effectively creates a five-part jurisdictional test: Is there (1) an addition (2) of a pollutant (3) to the navigable waters (4) from a point source (5) by a person?”<sup>32</sup> One of the most challenging aspects of the CWA is understanding its many definitional complexities, yet this must be overcome in order to apply the CWA to particular circumstances.

The CWA defines “pollutant” as “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.”<sup>33</sup> The phrase “discharge of a pollutant” is defined as “any addition of any pollutant to navigable waters from any point source.”<sup>34</sup> Furthermore, the CWA defines “navigable waters” as “the waters of the United States.”<sup>35</sup>

The CWA distinguishes between point sources and non-point sources. A “point source” is “any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.”<sup>36</sup> Congress determined that federally mandated permitting programs are appropriate responses for addressing the addition of pollutants to the waters of the United States from “point sources” but that tailored state regulations are more appropriate for non-point sources.<sup>37</sup>

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<sup>31</sup> 33 U.S.C. § 1251 (2000). Though the CWA establishes an important role for the federal government, it also recognizes the primary responsibilities of the individual states to protect water quality and to manage water resources, including “the authority of each State to allocate quantities of water within its jurisdiction.” *Id.* § 1251(b), (g).

<sup>32</sup> Robin Kundis Craig, *Beyond SWANCC: The New Federalism and Clean Water Act Jurisdiction*, 33 ENVTL. L. 113, 115 (2003).

<sup>33</sup> 33 U.S.C. § 1362(6) (2000).

<sup>34</sup> *Id.* § 1362(12).

<sup>35</sup> *Id.* § 1362(7).

<sup>36</sup> *Id.* § 1362(14).

<sup>37</sup> See Brief for the United States as Amicus Curiae Supporting Petitioner at 5, *Micosuquee*, 541 U.S. 95 (No. 02-626), 2003 WL 22137034. “Congress recognized that a wide variety of human and nonhuman activities affect water quality and that the

Therefore, the CWA merely encourages states to develop local programs to control the non-point sources of pollution.<sup>38</sup>

Section 402 of the CWA creates the National Pollution Discharge Elimination System (“NPDES”) Program.<sup>39</sup> According to Section 402, the U.S. Environmental Protection Agency (“EPA”) or a qualifying state agency can issue a permit for the discharge of any pollutant, or combination of pollutants, upon condition that such discharge will meet specified requirements.<sup>40</sup> The NPDES program imposes limitations on a point source discharge by establishing a variety of requirements, including: technology-based effluent limitations,<sup>41</sup> water-quality-based effluent limitations,<sup>42</sup> water quality standards,<sup>43</sup> national standards of performance for new point sources,<sup>44</sup> effluent standards for toxic pollutants,<sup>45</sup> pretreatment effluent limitations for point sources that discharge into publicly owned treatment works (“POTWs”),<sup>46</sup> record-keeping and reporting requirements,<sup>47</sup> and ocean discharge criteria.<sup>48</sup>

The CWA has been criticized by many since its enactment. Some argue that its “command-and-control approaches . . . are simply old-fashioned—expensive, inefficient, and rigid relics of the big-

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government’s response to water pollution must be tailored to the nature of the activity and the severity of threat.” *Id.*

<sup>38</sup> See, e.g., 33 U.S.C. § 1288(b)(2)(F) (2000) (encouraging a process “to (i) identify, if appropriate, agriculturally and silviculturally related nonpoint sources of pollution, including return flows from irrigated agriculture, and their cumulative effects, runoff from manure disposal areas, and from land used for livestock and crop production, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources); *id.* § 1314(f) (describing the “[i]dentification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution”); *id.* § 1329 (illustrating non-point source management programs).

<sup>39</sup> *Id.* § 1342. *Cf. id.* § 1344 (granting the Army Corps of Engineers the authority to issue “Section 404” permits “for the discharge of dredged or fill material into the navigable waters at specified disposal sites”).

<sup>40</sup> *Id.* § 1342(a)(1).

<sup>41</sup> 33 U.S.C. § 1311(b) (2000). Technology-based effluent limitations are restrictions on “quantities, rates, and concentrations of chemical, physical, biological, and other constituents.” *Id.* § 1362(11).

<sup>42</sup> *Id.* § 1312(a). Water-quality-based effluent limitations are set when technology-based effluent limitations are inadequate to meet the water quality standards set by the state. *Id.* § 1313(a).

<sup>43</sup> *Id.* § 1313(c)(2).

<sup>44</sup> *Id.* § 1316.

<sup>45</sup> 33 U.S.C. § 1317(a) (2000).

<sup>46</sup> *Id.* § 1317(b).

<sup>47</sup> *Id.* § 1318.

<sup>48</sup> *Id.* § 1343.

government past.”<sup>49</sup> Others disapprove of “the expansive role given to the federal government.”<sup>50</sup> The debates are ongoing, and have pitted the hopeful aspirations of the environmental community against the independent liberties of the regulated community.

*B. The Central and South Florida Flood Control Project*

In between South Florida’s coastal hills and the Everglades lies a “vast array of levees, canals, pumps, and water impoundment areas” known as the Central and South Florida Flood Control Project (“Project”).<sup>51</sup> By altering the hydrology of the Everglades and changing the natural flow of ground and surface water, the Project sought to ensure flood protection, water conservation, and drainage.<sup>52</sup> The South Florida Water Management District (“District”) operates the Project, in particular, a canal called “C-11,” a pump station known as “S-9,” an undeveloped wetland area called “WCA-3,” and two levees referred to as “L-33” and “L-37.”<sup>53</sup> These are the five essential elements of the Project at issue in *Miccosukee*.<sup>54</sup>

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<sup>49</sup> William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 ALA. L. REV. 537, 539 (2004).

<sup>50</sup> *Id.*

<sup>51</sup> *Miccosukee*, 541 U.S. at 99. Florida had built several canals in the early 1900s to drain the wetlands and make them suitable for cultivation; instead, the canals lowered the water table, allowed salt water to intrude upon coastal wells, and could not control flooding. *Id.* at 99–100. In 1948, Congress responded to these problems by establishing the Project. *Id.*

<sup>52</sup> *Id.*

Freshwater systems have been altered since historical times; however, the pace of change accelerated markedly in the early 20th century. Rivers and lakes have been modified by altering waterways, draining wetlands, constructing dams and irrigation channels, and establishing connections between water basins, such as canals and pipelines, to transfer water. Although these changes have brought increased farm output, flood control, and hydropower, they have also radically changed the natural hydrological cycle in most of the world’s water basins.

World Resources Institute, *A Guide to World Resources 2000-2001: People and Ecosystems: The Fraying Web of Life*, at 103 (2001), available at [http://pdf.wri.org/wr2000\\_chapter2\\_full.pdf](http://pdf.wri.org/wr2000_chapter2_full.pdf).

The devastating, if not fully intended, consequences of the . . . Project’s operation over the intervening fifty years have included widespread destruction of the natural Everglades system. The Everglades now occupy less than half the area of its historic pre-drainage wetland, and the remaining half of the natural system shows symptoms of serious ecological decline.

Mary Doyle & Donald Jodrey, *Everglades Restoration: Forging New Law in Allocating Water Environment*, 8 ENVTL. LAW. 255, 260 (2002).

<sup>53</sup> *Miccosukee*, 541 U.S. at 100–01.

<sup>54</sup> *Id.*

C-11 collects groundwater and rainwater from urban, agricultural, and residential areas, and as the water level rises above a certain level, the S-9 pumps water out of the canal and into WCA-3.<sup>55</sup> L-33 and L-37 slow down return flow by holding back the surface waters of WCA-3.<sup>56</sup> The effect is “to artificially separate the C-11 basin from WCA-3; left to nature, the two areas would be a single wetland covered in an undifferentiated body of surface and ground water flowing slowly southward.”<sup>57</sup>

Problems arise when rainwater, falling on the agricultural, urban, and residential land, absorbs contaminants produced by human activities before entering into the C-11 canal.<sup>58</sup> The C-11 water, consequently, contains high levels of phosphorous, which is found in fertilizers used by farmers.<sup>59</sup> This water is then pumped across the levees into WCA-3, altering the balance of its ecosystem and stimulating the growth of algae and plants foreign to the Everglades ecosystem.<sup>60</sup> Since the plants and animals native to the Everglades have adapted to the very low phosphorous conditions, any phosphorous enrichment in the area can cause impacts such as “loss of water column dissolved oxygen, loss of native plant life (periphyton (micro-algae) and macrophytes), and loss of preferred foraging habitat for wading birds.”<sup>61</sup>

### C. *The Clean Water Act Claims*

The Miccosukee Tribe of Indians and the Friends of the Everglades brought a citizens’ suit against the District, claiming that

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<sup>55</sup> *Id.* WCA-3 used to be part of the original South Florida Everglades and is now considered a water conservation area. *Id.* “The District impounds water in these areas to conserve fresh water that might otherwise flow directly to the ocean, and to preserve wetlands habitat.” *Id.*

<sup>56</sup> *Id.* at 101.

<sup>57</sup> *Miccosukee*, 541 U.S. at 101.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Memorandum from Dan Scheidt, Senior Scientist of the South Florida Initiative, to the Director of the Water Management Division 4 (May 20, 1999), available at <http://www.epa.gov/region4/southflorida/miccosukee/memo1.pdf>. The Florida Legislature attempted to remedy these problems by passing the Everglades Forever Act (“EFA”) in 1994, after the federal government sued the Florida Department of Environmental Regulation and the South Florida Water Management District. See FLA. STAT. § 373.4592 (1994); *United States v. S. Fla. Water Mgmt. Dist.*, 847 F. Supp. 1567, 1569 (S.D. Fla. 1992). The EFA required the building of Storm Water Treatment Areas on the southern border of the Everglades Agricultural Area (“EAA”) to absorb phosphorous-containing waters from flowing directly from the EAA into the Everglades. See FLA. STAT. § 373.4592 (2002).

the District could not operate the S-9 pump without an NPDES permit under Section 402 of the Clean Water Act because the pump station moved phosphorous-laden water from C-11 into WCA-3.<sup>62</sup> Arguing that this conveyance was the “discharge of a pollutant” from “any point source,” the plaintiffs sought to enjoin the operation of S-9 and, therefore, the conveyance of water from C-11 into WCA-3.<sup>63</sup> The district court granted the plaintiffs’ motion for summary judgment, concluding that C-11 waters and the Everglades were “two separate bodies of water because the transfer of water or its contents from C-11 into the Everglades would not occur naturally.”<sup>64</sup>

The Eleventh Circuit affirmed the district court’s conclusion that pollutants were indeed being added to WCA-3.<sup>65</sup> The District argued that a point source must add pollutants from the outside world in order for there to be an addition of a pollutant.<sup>66</sup> Nevertheless, the court considered whether, “but for the point source,” the pollutants would have been added to the Everglades.<sup>67</sup> Believing that C-11 water would not flow into WCA-3 without the S-9 pump station, the Eleventh Circuit held that as the cause-in-fact of the addition of pollutants, the S-9 pump station required an NPDES permit.<sup>68</sup> Although determining that a permit was required, the Eleventh Circuit vacated the district court’s judgment awarding an injunction.<sup>69</sup> The court recognized that an injunction would result in the cessation of the S-9 pump, causing substantial flooding and the

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<sup>62</sup> *Miccosukee*, 541 U.S. at 102. See 33 U.S.C. § 1365 (2000) (citizen suit provision). The Miccosukee Tribe of Indians has been quite active in the battle to decrease the amount of phosphorous in the Everglades. See *Miccosukee Tribe of Indians*, Final Admin. Order (DOAH, 2004) (No. 03-2872RP), available at <http://www.doah.state.fl.us/ros/2003/03%2D2872%2Epdf>. In July 2003, Florida’s Environmental Regulation Committee (“ERC”) issued a ruling, adopting a default standard of ten parts per billion for phosphorous and incorporating certain testing criteria and moderating provisions. *Id.* The Miccosukee Indians immediately brought an administrative challenge, claiming that the Florida Department of Environmental Protection exceeded its authority and calling into question most of the testing criteria. *Id.*

<sup>63</sup> *Miccosukee*, 541 U.S. at 103.

<sup>64</sup> *Id.* (quoting Appendix to Petition for Writ of Certiorari at 28a–29a, *Miccosukee*, 541 U.S. 95 (No. 02-626)).

<sup>65</sup> *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1368 (11th Cir. 2002).

<sup>66</sup> *Id.* at 1367. (citing *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982) (giving deference to EPA’s interpretation that “[an] addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world”)).

<sup>67</sup> *Id.* at 1368.

<sup>68</sup> *Id.* at 1369.

<sup>69</sup> *Id.* at 1371.

displacement of many people.<sup>70</sup> In light of these “disastrous consequences,” the Eleventh Circuit held that the district court should order the District to obtain an NPDES permit within a reasonable period of time.<sup>71</sup> If the District failed to comply with this order, the plaintiffs could then rely on the “various enforcement mechanisms available under the CWA, such as fines and criminal penalties.”<sup>72</sup>

The United States Supreme Court granted certiorari and first considered whether the pumping of water by the District, which added nothing to the water being pumped, constituted an “addition” of a pollutant from a point source, thereby triggering the need for an NPDES permit.<sup>73</sup> The District argued that a point source only requires an NPDES permit “when a pollutant originates from the point source,” not when it merely passes through the point source.<sup>74</sup> Writing for a nearly unanimous Court, Justice O’Connor rejected the District’s argument as “untenable” and held that “a point source need not be the original source of the pollutant; it need only convey the pollutant to ‘navigable waters.’”<sup>75</sup>

While holding that the definition of “discharge of a pollutant” included within its reach “point sources that do not themselves generate pollutants,” the Court, nevertheless, remanded the case and allowed for the development of an argument which was not previously raised before the Eleventh Circuit.<sup>76</sup> The Government’s “unitary waters” argument views all “navigable waters” unitarily for purposes of NPDES requirements, and focuses on the definition of a pollutant discharge as “any addition of any pollutant to navigable waters from any point source.”<sup>77</sup> According to the Government, the absence of the word “any” prior to the phrase “navigable waters” indicates “Congress’ understanding that NPDES permits would not be required for pollution caused by the engineered transfer of one

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<sup>70</sup> *Id.* at 1369.

<sup>71</sup> *Miccosukee*, 280 F.3d at 1370–71.

<sup>72</sup> *Id.* at 1371. *See also* 33 U.S.C. § 1319 (2000). Violations carry fines of up to \$100,000 per day and six years imprisonment. *Id.* § 1319(c)(2).

<sup>73</sup> *Miccosukee*, 541 U.S. at 104.

<sup>74</sup> Brief for Petitioner at 20, *Miccosukee*, 541 U.S. 95 (No. 02-626), 2003 WL 22137015.

<sup>75</sup> *Miccosukee*, 541 U.S. at 105.

<sup>76</sup> *Id.* at 112.

<sup>77</sup> *Id.* at 105; 33 U.S.C. § 1362(12) (2000).

‘navigable water’ to another.”<sup>78</sup> The Supreme Court agreed that an adoption of the “unitary waters” approach would lead to the conclusion that the District may operate the S-9 pump station without an NPDES permit, but declined to review or resolve the argument.<sup>79</sup>

Although the Court acknowledged that the Eleventh Circuit endorsed a test which considered whether the transfer of water contents would naturally occur, it directly refused to determine whether this test was adequate.<sup>80</sup> Justice Scalia, concurring in the judgment, thought that a remand was not necessary because the Eleventh Circuit had already considered and rejected the “unitary waters” argument.<sup>81</sup> Justice Scalia would have rather left the Government’s “unitary waters” theory “to be considered in another case.”<sup>82</sup> Despite Justice Scalia’s hesitation to further explore the “unitary waters” theory, courts all over the country will now find themselves face-to-face with the theory as they decide whether water diversion facilities connect two “meaningfully distinct” bodies of water or whether they involve “two hydrologically indistinguishable parts of a single water body.”<sup>83</sup>

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<sup>78</sup> *Miccosukee*, 541 U.S. at 106.

Congress intended that such pollution instead would be addressed through local nonpoint source pollution programs. Section 1314(f)(2)(F), which concerns nonpoint sources, directs the Environmental Protection Agency (EPA) to give States information on the evaluation and control of “pollution resulting from . . . changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

*Id.* (quoting 33 U.S.C. § 1314(f)(2)(F) (2000)) (ellipses in original).

<sup>79</sup> *Id.* at 109.

<sup>80</sup> *Id.* at 111.

<sup>81</sup> *Id.* at 112 (Scalia, J., concurring in part and dissenting in part). “That the argument was not phrased in the same terms or argued with the same clarity does not mean it was not made.” *Id.* at 113.

<sup>82</sup> *Miccosukee*, 541 U.S. at 112.

<sup>83</sup> *Id.* at 109. “[T]he ‘unitary waters’ argument will now be presented in various water diversion cases working their way through the courts and citizens suits seeking injunctive relief against water diversion structures will continue to be filed.” David Ashton, *More Soup: Local Implications of the Supreme Court’s Ruling in South Florida Water Management District v. Miccosukee Tribe of Indians*, E-Outlook Environmental Hot Topics and Legal Updates, Oregon State Bar Environmental & Natural Resources Section, Issue 1 (2004), at 2, available at <http://www.osbenviro.homestead.com/files/2004issue1.pdf>.

## III. WHAT IS “MEANINGFULLY DISTINCT?”

A. *The “Unitary Waters” Theory*

In *Miccossukee*, the Government argued that for purposes of determining whether there had been “any addition of any pollutant to navigable waters from any point source,” all the water bodies that fall within the CWA’s definition of “navigable waters” should be viewed “unitarily” for purposes of NPDES requirements.<sup>84</sup> According to this “unitary waters” theory, since the CWA requires NPDES permits only where there is an addition of a pollutant “to navigable waters,” such permits are not required when “water from one navigable water body is discharged, unaltered, into another navigable water body.”<sup>85</sup> An amicus brief filed by the Government argued that the pollutants are already in waters of the United States and therefore cannot be added by a point source that simply transports them to a different location in this network.<sup>86</sup> As stated by the Government,

Section 502(12) cannot reasonably be understood to include an activity that merely transports navigable waters from one location, through a “point source,” to another location. Such an activity can conceivably lead to changes in water quality, but it does not, within the normal meaning of the relevant terms, constitute an “addition” of any pollutant to “the waters of the United States.”<sup>87</sup>

The Government used statutory interpretation and the CWA’s definitions to support its “unitary waters” argument.<sup>88</sup> By leaving out the modifier “any” in conjunction with the phrase “navigable waters,” the Government suggested that Congress consciously chose for “the waters of the United States” to be viewed as a whole for NPDES requirements.<sup>89</sup> Once a pollutant was present in a segment of “the waters of the United States,” a “discharge” would not result if it was merely conveyed to a different water segment.<sup>90</sup> According to the Government, Congress used the modifier “any” with reference to “addition,” “pollutant,” and “point source,” and if Congress had actually intended the phrase “addition of a pollutant” to include the movement of one navigable water body into another navigable water body, it would have clearly defined the “discharge of a pollutant” to

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<sup>84</sup> *Miccossukee*, 541 U.S. at 106.

<sup>85</sup> *Id.*

<sup>86</sup> Brief for the United States as Amicus Curiae, *supra* note 37, at 16.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 19.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

incorporate any addition of any pollutant to “a specific portion” of the navigable waters from any point source.<sup>91</sup>

Existing case law also supports the Government’s “unitary waters” theory. For instance, the District of Columbia and Sixth Circuits have held that hydroelectric dams and similar structures do not require NPDES permits.<sup>92</sup> In *National Wildlife Federation v. Gorsuch*,<sup>93</sup> the National Wildlife Federation (“NWF”) sought to control changes in water quality resulting from dam operations.<sup>94</sup> The NWF petitioned the EPA to establish effluent guidelines for water quality problems caused by dams to waters downstream such as oxygen depletion,<sup>95</sup> temperature changes,<sup>96</sup> sediment disruption impairing water quality,<sup>97</sup> and gas supersaturation.<sup>98</sup> When the EPA refused, the NWF filed suit seeking a judicial declaration that the dam-induced water quality changes should be subject to NPDES permitting requirements.<sup>99</sup>

The NWF argued that an “addition” occurs “when (1) a dam causes pollutants to enter the reservoir and (2) the polluted water subsequently passes through the dam—the point source—into the formerly unpolluted river below.”<sup>100</sup> The EPA took the position that

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<sup>91</sup> *Id.* “Congress would not have extended NPDES permitting requirements to potentially thousands of water diversion facilities without any textual acknowledgement of that intention.” Brief for the United States as Amicus Curiae, *supra* note 37, at 19.

<sup>92</sup> *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 174–75 (D.C. Cir. 1982); *Nat’l Wildlife Fed’n v. Consumers Power Co.*, 862 F.2d 580, 589 (6th Cir. 1988).

<sup>93</sup> *Gorsuch*, 693 F.2d at 161.

<sup>94</sup> *Id.*

<sup>95</sup> Waters low in oxygen may kill fish and limit a river’s ability to break down pollutants and other organic matter. *See id.* If oxygen is completely depleted, compounds such as iron, manganese, and phosphate “tend to be leached from bottom muds into the reservoir” which can “harm fish, make the water unpalatable for drinking, and foster undesirable plant growth.” *Id.* at 163.

<sup>96</sup> Certain species of fish can only survive in warm water, while other species can only survive in cold water; thus, any changes in water temperature caused by dams can kill certain species of fish. *Id.*

<sup>97</sup> The plaintiffs argued that the dams will cause the reservoir to fill with sediment, which “in some cases can require periodic dredging or sluicing.” *Id.* at 164.

<sup>98</sup> Water mixes with the air when it plunges from the reservoir into the downstream river, causing the downstream river to become “supersaturated,” that is, “aerated in excess of normal concentration.” *Gorsuch*, 693 F.2d at 164. Supersaturated water can be fatal to fish and the plaintiffs became concerned of this after more than 400,000 fish died of gas bubble disease because of supersaturated gas caused by spills over the unfinished Harry S. Truman Dam in Missouri. *See Nat’l Wildlife Fed’n v. Gorsuch*, 530 F. Supp. 1291, 1302 (D.D.C. 1982).

<sup>99</sup> *Gorsuch*, 693 F.2d at 161.

<sup>100</sup> *Id.* at 174.

dam releases into downstream receiving waters do not constitute the “addition” of pollutants, and that dams are non-point sources rather than point sources.<sup>101</sup> Under the EPA’s view, for there to be an addition of a pollutant from a point source, “the point source must *introduce* the pollutant into navigable water from the outside world; dam-caused pollution, in contrast, merely passes through the dam from one body of navigable water (the reservoir) into another (the downstream river).”<sup>102</sup> The D.C. Circuit extended great deference to the EPA’s interpretations, noting that “[t]he agency’s construction must be upheld if . . . it is ‘sufficiently reasonable,’ even if it is not ‘the only reasonable one or even the reading the court would have reached.’”<sup>103</sup> Although the court stated that the language of the statute permits either the NWF’s or the EPA’s construction, the D.C. Circuit reasoned that because Congress indicated that the EPA should have discretion in defining what constitutes point sources and pollutants, it also would have intended the EPA to have similar discretion in defining the term “addition.”<sup>104</sup> Therefore, the D.C. Circuit upheld the EPA’s interpretation that a point source must “itself physically introduce[] a pollutant into the water from the outside world.”<sup>105</sup>

The NWF again brought a citizen suit in *National Wildlife Federation v. Consumers Power Company*<sup>106</sup> against a company that owned

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<sup>101</sup> *Id.* at 165.

<sup>102</sup> *Id.* (emphasis in original).

<sup>103</sup> *Id.* at 171 (quoting *Fed. Election Comm’n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981)).

<sup>104</sup> *Id.* at 175. It is significant to note that the D.C. Circuit decided *Gorsuch* just two years before the U.S. Supreme Court decided *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, a landmark case in the law of judicial deference. 467 U.S. 837 (1984). The *Chevron* Court held that where a “statute is silent or ambiguous with respect to the specific issue [under review], the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843. In order to establish permissibility, courts should determine whether the statute’s silence or ambiguity represents an explicit or implicit delegation of authority to the agency to analyze the issue. *Id.* at 843–44. An explicit statutory gap suggests an express delegation of authority to the agency to analyze the specific provision of the statute, and courts should give the legislative regulations controlling weight “unless they are arbitrary, capricious, or manifestly contrary to the statute.” *Id.* An implicit statutory gap also delegates interpretive authority to the agency and “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Id.* at 844. Therefore, a court may reject an agency interpretation not only because it conflicts with the express intentions of the statute, but also because it is an unreasonable interpretation of an ambiguous statute. *Id.*

<sup>105</sup> *Gorsuch*, 693 F.2d at 174–75.

<sup>106</sup> 862 F.2d 580 (6th Cir. 1988).

and operated a hydroelectric facility along the eastern shore of Lake Michigan.<sup>107</sup> The facility pumped water to a man-made reservoir during hours of low-cost electricity, allowing the water to drive turbine generators on its return to the Lake during peak hours.<sup>108</sup> When the pumps withdrew water, and again when the returning water drove the turbines, fish were drawn through the pumps, killing them and releasing remains into Lake Michigan.<sup>109</sup> The NWF argued that the release of the fish parts was an addition of a pollutant to Lake Michigan which required an NPDES permit under the CWA.<sup>110</sup>

The EPA argued that an “addition” of a pollutant requires the physical introduction of the pollutant “from the outside world.”<sup>111</sup> Following *Gorsuch*’s deferential reasoning, the court accepted the EPA’s interpretation of “addition” as permissible, stating that the facility “merely change[d] the movement, flow, or circulation of navigable waters when it temporarily impound[ed] waters from Lake Michigan in a storage reservoir, but [did] not alter their character as waters of the United States.”<sup>112</sup> According to the Sixth Circuit, “Congress apparently intended that pollution problems caused by dams and other flow diversion facilities are generally to be regulated by means other than the NPDES permit program.”<sup>113</sup>

The EPA’s interpretations in *Gorsuch* and *Consumers Power* both support the “unitary waters” theory by creating a distinction between water diversion facilities that merely *convey* unaltered water and facilities that have long been subject to permitting requirements

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<sup>107</sup> *Id.* at 581.

<sup>108</sup> *Id.* at 581–82.

<sup>109</sup> *Id.* at 582.

<sup>110</sup> *Id.* at 584. “Millions of pounds of live fish, dead fish and fish remains annually discharged into Lake Michigan by the Ludington facility are pollutants within the meaning of the CWA, since they are ‘biological materials.’” *Id.* at 583; *see also* Ass’n of Pac. Fisheries v. EPA, 615 F.2d 794 (9th Cir. 1980).

<sup>111</sup> *Consumers Power*, 862 F.2d at 584.

<sup>112</sup> *Id.* at 589. The court attempted to distinguish such dam facilities from steam/electric industrial operations which remove water, allowing the water to enter the industrial complex and absorb heat and other minerals produced by the plant or electric generator before being added to the waters of the United States. *Id.* at 589.

<sup>113</sup> *Id.* at 587.

Section 304(f)(2)(F) provides that the EPA shall issue information on (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from . . . (F) changes in the movements, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

*Id.* (citing 33 U.S.C. § 1314(f)(2)(F) (2000)) (ellipses in original).

because they actually alter the water by adding a pollutant before conveying it.<sup>114</sup> For instance, both courts noted that if a pumping station leaks oil, grease, or other pollutants into waters (as opposed to merely conveying or connecting those waters), that addition is subject to an NPDES permit.<sup>115</sup> Also, Section 402 of the CWA subjects placer mining<sup>116</sup> of ore deposits in streams and rivers to the NPDES permitting program because the process results in the excavation and point source discharge of dirt and gravel into navigable waters.<sup>117</sup> Section 404 of the CWA, which specifically addresses dredged and fill material, subjects the deposit or redeposit of such material to a specialized permitting program because that activity results in the point source discharge of dredged or fill materials into navigable waters.<sup>118</sup>

Also, if water is diverted for an intervening use, the water may lose its status as “waters of the United States” and consequently become subject, upon reintroduction into navigable waters, to the NPDES permitting process. One example of this is if an industrial user withdraws water from a navigable water body for process or cooling purposes and returns the water into the same water body through a point source.<sup>119</sup> Another example is if a facility withdraws water from a navigable water body, removes preexisting pollutants to purify the water, and then discharges the removed pollutants (possibly in a concentrated form) back into the navigable water body while retaining the purified water for use in the facility.<sup>120</sup>

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<sup>114</sup> See, e.g., *Consumers Power*, 862 F.2d at 586.

To the extent that no more has been shown than that unclean water flows out of the dam, Congress clearly displayed an intention to exempt dams from the Clean Water Act. However, if the dam itself added pollutants to the water, rather than merely transmitting the water coming into it, in whatever altered form, then it would be subject to the NPDES permit system.

*Id.*

<sup>115</sup> *Id.*; *Gorsuch*, 693 F.2d at 165.

<sup>116</sup> Placer mining has been described as “one of four basic methods of mining metal ores; it involves the mining of alluvial or glacial deposits of loose gravel, sand, soil, clay, or mud called ‘placers.’ These placers often contain particles of gold and other heavy minerals.” *Rybachek v. EPA*, 904 F.2d 1276, 1282 (9th Cir. 1990).

<sup>117</sup> See *id.* at 1285.

<sup>118</sup> See 33 U.S.C. § 1344 (2000); *United States v. Deaton*, 209 F.3d 331, 335–36 (4th Cir. 2000); *United States v. M.C.C. of Fla., Inc.*, 772 F.2d 1501, 1503–06 (11th Cir. 1985); *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 923–25 (5th Cir. 1983).

<sup>119</sup> 40 C.F.R. §§ 122–125 (2005).

<sup>120</sup> See *In re City of Phoenix, Ariz. Squaw Peak & Deer Valley Water Treatment Plants*, 9 E.A.D. 515, 2000 WL 1664964 (EPA Envtl. App. Bd. Nov. 1, 2000).

*Gorsuch* and *Consumers Power* give the impression that any pollutant created by or passing through a man-made facility is not an “addition” to the receiving waters so long as the upstream or downstream waters were in some way contiguous. Nevertheless, it is important to recognize that the true holdings of both cases were that the EPA’s interpretations were reasonable and warranted deference.<sup>121</sup> Once courts were given the power to interpret the CWA, in the absence of a reasonable interpretation by the EPA, the definition of the term “addition” began to change and these interpretations can now be used to challenge the “unitary waters” theory.

B. *The “Unitary Waters” Theory’s Shortcomings*

Although the Supreme Court refused to rule on the “unitary waters” theory, it did suggest that several NPDES provisions might contradict the theory.<sup>122</sup> For instance, the CWA appears to protect not only the “waters of the United States” as a whole, but also individual water bodies by allowing states to set individualized ambient water quality standards.<sup>123</sup> By setting such water quality standards, states take into consideration the designated uses of the navigable waters involved, as well as the water quality criteria for such waters based upon the uses designated.<sup>124</sup> The water quality standards directly affect local NPDES permits because if the standard permit conditions fail to achieve the water quality goals for a given water body, the state must determine the total pollutant load that the water body can sustain and then allocate that load among the permit-holders who discharge into the water body.<sup>125</sup> For each non-compliant body, states must develop water pollution budgets and

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<sup>121</sup> *But see* Brief of Amici Curiae the City of New York et al. in Support of Petitioner at 27, *Miccossukee*, 541 U.S. 95 (No. 02-626), 2003 WL 22220093.

Although in *Gorsuch*, the District of Columbia Circuit Court of Appeals stated that the EPA interpretation was entitled to “great deference,” the decision itself demonstrates that the court did not simply defer to [the] EPA. Rather, it contains a detailed analysis of the specific language of the [CWA] and its legislative history, as well as an evaluation of policy, weighing the interests of preserving the integrity of the waters of the United States against the interests of states in water management. Instead of giving undue deference to the EPA interpretation, the *Gorsuch* court labored to ensure that it evaluated the competing interests of the [CWA] against local water management issues.

*Id.* (citation omitted).

<sup>122</sup> *Miccossukee*, 541 U.S. at 107.

<sup>123</sup> 33 U.S.C. § 1313(c)(2)(A) (2000).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* § 1313(d).

remedial pollutant loading allocations, known as “total maximum daily loads” (“TMDLs”), to address both point and non-point sources of pollutants in an effort to achieve compliance with applicable water quality standards.<sup>126</sup>

An amicus brief filed by the State of New York in *Miccossukee* cautioned against using the “unitary waters” theory, stating that to adopt such a “dubious theory would be manifestly inconsistent with the [CWA], and deprive States of effective tools to monitor, maintain, and achieve water quality consistent with the designated use and water quality criteria applicable to each individual water body within their borders.”<sup>127</sup> It was further noted by the respondents that Congress had exempted only two categories in its definition of the terms “pollutant”:

(A) ‘sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces’ . . . ; [and] (B) water, gas, or other material which is injected into a well to facilitate [the] production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well . . . is approved by authority of the State in which the well is located.<sup>128</sup>

Given that Congress had expressly defined these two categories, “[i]t could have [also] extended the exceptions to include pollutants from one navigable water to another. It did not.”<sup>129</sup>

After *Gorsuch* and *Consumers Power*, the issue of water transfer and the exemption of dam pollution from NPDES permitting requirements remained unchallenged until courts began to deny deference to the EPA’s policies and distinguish the facts in *Gorsuch* and *Consumers Power*. In *Dubois v. United States Department of Agriculture*,<sup>130</sup> the First Circuit held that an NPDES permit was necessary for an interbasin water transfer.<sup>131</sup> In order to make snow, a ski resort operator moved water from the East Branch of the polluted Pemigewasset River into a relatively undefiled pond, called Loon

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<sup>126</sup> *Id.* § 1313(d)(1)(C)–(D). See *Pronsolino v. Natri*, 291 F.3d 1123, 1139 (9th Cir. 2002) (holding that the CWA clearly requires TMDLs to be set for waters not meeting water quality standards due to both point and nonpoint sources, and that nothing in the statute indicates that TMDLs were not required for waters impaired only by nonpoint sources).

<sup>127</sup> Brief of the States of New York et al. as Amici Curiae in Support of Respondents at 12, *Miccossukee*, 541 U.S. 95 (No. 02-626), 2003 WL 22766718.

<sup>128</sup> 33 U.S.C. § 1362(6) (2000).

<sup>129</sup> Brief for the Respondent Friends of the Everglades at 26, *Miccossukee*, 541 U.S. 95 (No. 02-626), 2003 WL 22733911.

<sup>130</sup> 102 F.3d 1273 (1st Cir. 1996).

<sup>131</sup> *Id.* at 1299.

Pond, that was at an elevation upstream from the East Branch.<sup>132</sup> Water from Loon Pond naturally flowed into the East Branch, but water from the East Branch did not naturally flow into Loon Pond.<sup>133</sup> Loon Pond ranked in the upper ninety-fifth percentile of all lakes and ponds in northern New England for low levels of phosphorous and therefore had limited plant growth, high water clarity, and high total biological production.<sup>134</sup> The pond not only supported a variety of life in its ecosystem, but it also was a major source of drinking water for the town just below it.<sup>135</sup> In contrast, “intake water taken from the East Branch contain[ed] bacteria, other aquatic organisms such as *Giardia lamblia*, phosphorous, turbidity and heat.”<sup>136</sup> Oil and grease were also allegedly present in the discharge water.<sup>137</sup>

A citizen suit, brought against the Forest Service, claimed that the Forest Service violated the CWA “by failing to obtain an NPDES permit before approving [the] plan to remove water from the East Branch, use it to pressurize and prevent freezing in its snowmaking equipment, and then discharge the used water into Loon Pond.”<sup>138</sup> The district court ruled there was no “addition” of pollutants to Loon Pond because the intake water from the East Branch and the water from Loon Pond were all part of a “singular entity,” the “waters of the United States,” and must not therefore be considered individually.<sup>139</sup> As long as the pipes added no new pollutants, the district court concluded that the transfer of water from the East Branch into Loon Pond did not necessitate an NPDES permit.<sup>140</sup>

The First Circuit reversed, holding that that the East Branch of the Pemigewasset River and Loon Pond were two wholly distinct bodies of water and that the transfer of polluted water from the Pemigewasset River into Loon Pond was an “addition” under the CWA, which required an NPDES permit.<sup>141</sup> The First Circuit held that the “singular entity” argument had no basis in law and that under such an interpretation of “addition,” the pollution of one navigable water would necessitate all other navigable waters to passively suffer the same fate:

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<sup>132</sup> *Id.* at 1277–78.

<sup>133</sup> *Id.* at 1297.

<sup>134</sup> *Id.* at 1277.

<sup>135</sup> *Id.*

<sup>136</sup> *Dubois*, 102 F.3d at 1278.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 1296.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1299.

We can take judicial notice that the Pemigewasset River was for years one of the most polluted rivers in New England, the repository for raw sewage from factories and towns. It emitted an overwhelming odor and was known to peel the paint off buildings located on its banks. Yet, under the district court's theory, even if such conditions still prevailed, a proposal to withdraw water from the Pemigewasset to discharge it into Loon Pond would be analogous to moving water from the top to the bottom of a single pond; it would not constitute an "addition" of pollutants "from an external source" because both the East Branch and Loon Pond are part of the "singular" waters of the United States. The district court apparently would reach the same conclusion regardless of how polluted the Pemigewasset was or how pristine Loon Pond was. We do not believe Congress intended such an irrational result.<sup>142</sup>

Additionally, the court found that the transferred water ceased to be a water of the United States when it became subject to private control rather than natural processes.<sup>143</sup> The *Dubois* court stated it was "simply wrong" to analogize the situation to a "dam that merely accumulates the *same* water" as in *Gorsuch*, or a "pump storage facility that stores water from one source in a different place" as in *Consumers Power*.<sup>144</sup> Distinguishing the dam cases as involving "one flowing water body into another stationary, colder body," the court concluded it simply could not allow "such a watering down of Congress' clear statutory protections."<sup>145</sup>

Five years later the issue surfaced again when the Second Circuit decided *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*.<sup>146</sup> The court held that New York City needed an NPDES permit for diverting water from one drainage basin into another in order to facilitate its supply of drinking water to the city's population.<sup>147</sup> The

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<sup>142</sup> *Dubois*, 102 F.3d at 1297.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 1299 (italics in original). The First Circuit conceded that internal pumping would not cause an "addition" of pollutants to the pond because that would be considered a redistribution of pollutants from one part of the pond to the other. *Id.* at 1296–97. Internal pumping involves "no barrier separating the water at the top of a pond from the water at the bottom of the same pond; chemicals, organisms, and even heat are able to pass from the top to the bottom or vice versa, at rates determined only by laws of science." *Id.* at 1297. The court concluded that the transfer of water from the East Branch to Loon Pond, however, would not occur naturally, stating that "the East Branch and Loon Pond are not the same body of water; the East Branch is indeed a source 'external' to Loon Pond." *Id.*

<sup>145</sup> *Dubois*, 102 F.3d at 1299.

<sup>146</sup> 273 F.3d 481 (2d Cir. 2001).

<sup>147</sup> *Id.* at 493.

transfer involved moving water from the Schoharie Reservoir through the Shandaken Tunnel and into the Esopus Creek, a Hudson River tributary.<sup>148</sup> The City of New York had operated this transfer system since before World War II.<sup>149</sup> Absent the tunnel and under natural conditions, water from the Schoharie Reservoir would never reach the Esopus Creek; instead, the water leaving the Reservoir would “flow north in Schoharie Creek, join the Mohawk River, and flow into the Hudson River.”<sup>150</sup>

A group of environmental organizations alleged that the Shandaken Tunnel discharged “pollutants in the form of ‘suspended solids,’ ‘turbidity,’ and heat into the Esopus Creek,” thereby violating the state water quality standards and requiring an NPDES permit.<sup>151</sup> While the EPA maintained that dam-produced pollution is exempt from permit requirements, the Second Circuit refused to grant broad deference to the EPA’s position, explaining that “‘interpretations contained in formats such as opinion letters are ‘entitled to respect’ . . . but only to the extent that those interpretations have the ‘power to persuade.’”<sup>152</sup> The court did not find the EPA’s position persuasive at all and was able to distinguish the facts from those in *Gorsuch* and *Consumers Power*. While *Gorsuch* and *Consumers Power* involved the “recirculation of water, without anything added ‘from the outside world,’” the Second Circuit was faced with a situation where water was artificially diverted from its natural course in order to travel many miles through a tunnel and into the Esopus Creek.<sup>153</sup> Because these two water bodies were “utterly unrelated,” the court held that “[n]o one [could] reasonably argue that the water in the Reservoir and the Esopus [were] in any sense the ‘same,’ such that ‘addition’ of one to the other [was] a logical impossibility.”<sup>154</sup>

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<sup>148</sup> *Id.* at 484.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 485. “Esopus Creek, Catskill contended, is naturally clearer and cooler than the water entering it from the Tunnel and supports ‘one of the premier trout fishing streams in the Catskill Region.’” *Catskill Mountains*, 273 F.3d at 485.

<sup>152</sup> *Id.* at 491 (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)) (ellipses in original).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 492. The *Catskill Mountains* court also rejected the “singular entity” theory raised in *Dubois*:

Such a theory would mean that movement of water from one discrete water body to another would not be an addition even if it involved a transfer of water from a water body contaminated with myriad pollutants to a pristine water body containing few or no pollutants. Such an interpretation is inconsistent with the ordinary meaning of the word “addition.”

The Ninth Circuit encountered similar issues and held in *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*<sup>155</sup> that Montana could not exempt Fidelity Exploration & Development Company (“Fidelity”) from its obligation to obtain an NPDES permit for its coal bed methane (“CBM”) extraction process.<sup>156</sup> During the extraction process, groundwater was pumped to the surface and into various holding ponds, including the Tongue River which was used for irrigation by farmers downstream.<sup>157</sup> Though the extraction process did not actually add pollutants to the groundwater, the water naturally contained calcium, magnesium, sodium, chloride, fluoride, and many other substances that could affect the downstream farms, “caus[ing] soil particles to unbind and disperse, destroying soil structure and reducing or eliminating the ability of the soil to drain water.”<sup>158</sup> Since the CBM waters came from deep underground aquifers, it would never reach the Tongue River, but for Fidelity’s extraction process.<sup>159</sup> The Ninth Circuit rejected the argument that such discharge water could not be a pollutant simply because it was “unaltered and transported from one body of water to another.”<sup>160</sup> Instead, the court concluded that its situation was “practically indistinguishable” from *Catskill Mountains* and *Dubois*, even if the pollutants were not added by man, but were naturally present.<sup>161</sup>

A comparable holding was made by the Ninth Circuit in *Borden Ranch Partnership v. United States Army Corps of Engineers*,<sup>162</sup> although the permit required was a Section 404 permit from the Army Corps of Engineers for “dredged or fill material” instead of a Section 402 NPDES permit.<sup>163</sup> At issue was a form of agricultural activity called “deep ripping” in which long metal prongs were dragged through soil behind a tractor or a bulldozer and a “ripper” gouged through a restrictive layer of soil, disgoring the soil and then dragging it

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*Id.* at 493.

<sup>155</sup> 325 F.3d 1155 (9th Cir. 2003).

<sup>156</sup> *Id.* at 1165.

<sup>157</sup> *Id.* at 1158.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 1163.

<sup>161</sup> *Fidelity*, 325 F.3d at 1163.

<sup>162</sup> 261 F.3d 810 (9th Cir. 2001).

<sup>163</sup> *Id.* at 818. While a Section 402 permit concerns the discharge of a “pollutant” from a “point source” into the Nation’s waters, a Section 404 permit grants the Army Corps of Engineers the authority to issue permits for discharges of dredged or fill material.

See 33 U.S.C. § 1344(f)(1)(A) (2000).

behind the ripper.<sup>164</sup> The defendant argued that deep ripping was not an “addition” of a “pollutant” into wetlands “because it simply churns up soil that is already there, placing it back basically where it came from.”<sup>165</sup> Nevertheless, the court held that a “pollutant” had certainly been “added” even if it did not involve the introduction of material brought in from somewhere else.<sup>166</sup> The court reasoned, “[p]rior to deep ripping, the protective layer of soil was intact, holding the wetland in place. Afterwards, that soil was wrenched up, moved around, and redeposited somewhere else.”<sup>167</sup> Therefore, a Section 404 permit was required in order for the defendant to continue his practice of deep ripping.<sup>168</sup>

An inference can be made from the previous cases that, under certain circumstances, the mere transport of unaltered water from the diverting water body to the receiving water body may require an NPDES permit.<sup>169</sup> Such a circumstance would occur if the unaltered water is diverted into a receiving water body where it would not naturally flow and the diverted water degrades the receiving water body. Therefore, a “unitary waters” theory would not survive should courts choose to myopically focus on the natural flow of waters rather than the fact that they are all somehow connected to one another in order to determine whether they are “meaningfully distinct.”<sup>170</sup>

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<sup>164</sup> *Borden Ranch*, 261 F.3d at 812.

<sup>165</sup> *Id.* at 814.

<sup>166</sup> *Id.* at 815.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 818. The Ninth Circuit based its holding on cases it thought “recognize[d] that activities that destroy the ecology of a wetland are not immune from the [CWA] merely because they do not involve the introduction of material brought in from somewhere else.” *Id.* at 814–15. For instance, the Ninth Circuit “considered a claim that placer mining activities were exempt” from the CWA, and held that “removing material from a stream bed, sifting out the gold, and returning the material to the stream bed was an ‘addition’ of a pollutant.” *Borden Ranch*, 261 F.3d at 814 (citing *Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990)). Also, the *Borden Ranch* court aligned its reasoning with that of the Fourth Circuit in *United States v. Deaton*, where the court held:

It is of no consequence that what is now dredged spoil was previously present on the same property in the less threatening form of dirt and vegetation in an undisturbed state. What is important is that once that material was excavated from the wetland, its redeposit in that same wetland added a pollutant where none had been before.

*Id.* (quoting *United States v. Deaton*, 209 F.3d 331, 335–336 (4th Cir. 2000)).

<sup>169</sup> See *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001); *N. Plains Res. Council v. Fidelity Exploration and Dev. Co.*, 325 F.3d 1155, 1163 (9th Cir. 2003).

<sup>170</sup> See *Miccosukee*, 541 U.S. at 96. Still open for debate, however, is whether an NPDES permit is required despite section 511(a)(2) of the CWA “which states that the CWA ‘shall not be construed’ as ‘affecting or impairing the authority of the

#### IV. THE INEVITABLE CONSEQUENCES OF REGULATING THE MOVEMENT OF UNALTERED WATER UNDER THE CWA

If courts decline to accept the “unitary waters” theory, an NPDES permit may be required for every engineered diversion of one navigable water into another, and thousands of new permits might have to be issued, particularly in the western states where engineered transfers are relied upon by water supply networks.<sup>171</sup> As the South Florida Water Management District argued:

A host of state and local water management agencies and their national organizations, numerous States, and state and municipal government organizations . . . have explained that imposition on NPDES permitting on hundreds of thousands of such [water] transfers would be impractical, wasteful, hugely disruptive of the Nation’s intricate system of water allocation and control, and entirely otiose in light of nonpoint source programs and powers that address pollution in diverted waters.<sup>172</sup>

Among those affected by the new permitting requirements will be agricultural irrigation districts, suppliers of drinking water, mineral extraction operations, electric power producers, and residential developers.<sup>173</sup> Water management agencies will be exposed to huge

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Secretary of the Army (A) to maintain navigation or (B) under the Act of March 3, 1899” which, according to section 511, is the Rivers and Harbors Act of 1899. Paul F. Foley, *Missing the Point with Point-Source “Addition” Semantics: Section 511 of the Clean Water Act Exempts Interconnected Waterways from Section 402 Jurisdiction, Period?*, 9 OCEAN & COASTAL L.J. 65, 78–79 (2003). Though not mentioned in *Miccossukee*, this argument notes that the CWA cannot “affect or impair” the Secretary of the Army’s navigation authority or authority under the Rivers and Harbors Act:

Pursuant to the Secretary of the Army’s authority, the Army Corps issues permits for activities affecting navigable waters. Section 10 of the Rivers and Harbors Act prohibits altering or modifying, “in any manner,” the “course, location, condition, or capacity of” any navigable water, including canals or “the channel of any navigable water,” without the Secretary of the Army’s authorization. This language is extremely broad: requiring a Section 402 permit for a canal pump station . . . and the prospect of the canal’s continued operation being cast in doubt—is, on its face, a change in the “condition, or capacity of” that canal in some “manner.” Any such change in the condition or capacity of a waterbody must be approved by the Army Corps under Section 10—not by EPA under Section 402 of the CWA.

*Id.* at 78–79 (citing 33 U.S.C. § 403 (2000)).

<sup>171</sup> Brief Amici Curiae of the States of Colorado and New Mexico in Support of Petitioner at 2–4, *Miccossukee*, 541 U.S. 95 (No. 02-626), 2003 WL 22137032.

<sup>172</sup> Reply Brief at 13, *Miccossukee*, 541 U.S. 95 (No. 02-626), 2003 WL 23051957.

<sup>173</sup> See Davis & Doster, *supra* note 15, at 91–92. Suppliers of drinking water move water from basins in which water is plentiful to basins in which need exceeds supply; mineral extraction operations often redirect waters over large land area; electric power producers fear they will need permits to discharge cooling water in separate

penalties for violations, and even criminal prosecution.<sup>174</sup> Also, the EPA will suffer many administrative burdens as it seeks to develop technology-based effluent limitations for the new class of dischargers and confronts an already backlogged NPDES program.<sup>175</sup>

One of the most troublesome effects of new NPDES permitting requirements will be the disruption to the agricultural economy if the newly-permitted irrigation districts seek to pass the high costs of treatment back upstream to their agricultural clients.<sup>176</sup> These increased costs could thwart the competitiveness of United States agricultural commodities in global markets and force alterations in numerous aspects of farming operations such as crop selection, tillage practices, and pesticide use.<sup>177</sup> If farmers are given an incentive to move away from certain practices and products, pesticide manufacturers will also suffer by encountering changes in demand for particular crop protection products that would otherwise have to be removed from downstream waters.<sup>178</sup> The increased agricultural costs could also mean relocating agricultural production to areas that have relatively lower costs.<sup>179</sup> Though this may strike a balance for the benefit of consumers, it may also continue to harm the environment if these lower costs are achieved by ignoring harmful environmental externalities. This availability to simply relocate production, however, may be somewhat unrealistic:

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waters from which the water was withdrawn; and residential developers may be limited by the amount of water available to expand communities, particularly those in warm and dry climates. *Id.* at 97.

<sup>174</sup> See *supra* note 72 and accompanying text. Even a negligent violation can bring significant fines and two years in prison. 33 U.S.C. § 1319(c)(2) (2000). In *Catskill Mountains*, the district court issued a hefty \$5.7 million penalty against the City of New York. See *Catskill Mountains*, 244 F. Supp. 2d at 57.

<sup>175</sup> See Reply Brief, *supra* note 172, at 15 (citing EPA OFFICE OF INSPECTOR GENERAL, EPA SHOULD TAKE FURTHER STEPS TO ADDRESS FUNDING SHORTFALLS AND TIME SLIPPAGES IN PERMIT COMPLIANCE SYSTEM MODERNIZATION EFFORT, No. 2003-M-00014 (May 20, 2003)). It has been suggested that the NPDES program is an overly burdensome requirement simply because it lacks the flexibility to deal appropriately with transfers of untreated water. Brief of Amici Curiae the City of New York et al., *supra* note 121, at 13–14. “Where the transferred water contains pollutants that are not introduced by the entity operating the transfer, as in *Miccossukee* (where the water contains phosphorous from urban runoff) and *Catskill Mountains* (where the water contains naturally occurring turbidity), this requirement can place an impossible burden on the transferor.” *Id.*

<sup>176</sup> See Brief for Amici Curiae Florida Fruit and Vegetable Ass’n et al. in Support of Petitioner at 4, *Miccossukee*, 541 U.S. 95 (No. 02-626), 2003 WL 22118364.

<sup>177</sup> See Davis & Doster, *supra* note 15, at 97.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

Manufacturers and traders may relocate when times are tough, but the farmer's reliance on land (an asset that cannot be moved from place to place) creates a somewhat permanent interest in the stability and security of the state. A given plot of land is irrevocably tied to the territorial state in which it happens to be located. This gives farmers an interest in the politics and defense of the state, as it limits their ability to relocate their assets when political winds change.<sup>180</sup>

The unexpected burden of permitting requirements may also increase costs and time delays that could force operations to cease.<sup>181</sup> After the Eleventh Circuit's decision in *Miccosukee*, several agricultural groups feared the costs and expenses associated with the ruling:

If the Eleventh Circuit's decision stands, the South Florida Water Management District ("SFWMD") will have to increase its budget to pay for the expensive NPDES permitting process for S-9, the pump station that moves water from one side of a levee to the other in the same watershed. SFWMD will more than likely obtain the funding to obtain and implement this NPDES permit by increasing agriculture privilege taxes, ad valorem taxes on property owners in the district, fees, and assessments. The costs may be further magnified by the SFWMD having to take steps to permit many other structures or facilities similarly situated to the S-9 facility.<sup>182</sup>

Despite these agricultural groups' outcries, it may be time for the community to accept responsibility and share the costs of their harms, as agricultural nutrient, pesticide, and sediment pollution remain as the leading source of impairment to the nation's lakes, rivers, and estuaries.<sup>183</sup> While added regulatory burdens will

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<sup>180</sup> Paul B. Thompson, *Globalization, Losers and Property Rights*, 9 MINN. J. GLOBAL TRADE 602, 608 (2000).

<sup>181</sup> Davis & Doster, *supra* note 15, at 96.

In perhaps the majority of cases, local water management agencies will be unable to obtain or comply with NPDES permits for facilities that are essential to many public uses, including flood control, ensuring a reliable supply of water for domestic, commercial, and industrial uses, and fire suppression. Where it is possible to comply with permit terms and conditions, the cost of doing so is incalculable. The harm to the public will be enormous and direct if the Eleventh Circuit decision is upheld, while in most cases the decision will not lead to any measurable environmental benefit.

Brief of Amici Curiae the City of New York et al., *supra* note 121, at 5.

<sup>182</sup> Brief for Florida Fruit and Vegetable Ass'n et al. as Amici Curiae, *supra* note 176, at 4 (citations omitted).

<sup>183</sup> J.B. Ruhl, *Three Questions for Agriculture About the Environment*, 17 J. LAND USE & ENVTL. L. 395, 400 (2002).

effectively force farms out of business, this was true of many other industries that were forced to operate under the “polluter pays” ethic of environmental regulation.<sup>184</sup> The challenge is “whether we have the political will to cause the farming industry some pain, but the ingenuity to do so with some sense of efficiency.”<sup>185</sup>

Courts still recognize the catastrophic consequences of forcing certain facilities to cease operations, and have often issued flexible rulings so as to accommodate the water management districts.<sup>186</sup> For instance, in *Miccosukee* the Eleventh Circuit chose not to issue an injunction to stop operation of the S-9 pump station because it would have resulted in massive flooding in the urban, agricultural, and residential area.<sup>187</sup> Similarly, the district court in *Catskill Mountains* declined to enjoin the City of New York from operating the Shandaken Tunnel without a permit because it would have led to

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<sup>184</sup> *Id.* at 406. While other industries had to take costly measures to comply with environmental regulations and have adopted successful arrangements of environmental efficiency and production efficiency, the agricultural industry “has been stunted by widespread industry advocacy and government endorsement of the ‘first stewards of the land’ rhetoric” which claims that because farmers “depend” on their land, they are “environmentally benign or, even better, a positive environmental force.” *Id.* at 401–03. Yet, the fishing industry is just as dependent on fisheries, but has nonetheless depleted the fisheries to unsustainable levels. *Id.* With regards to the “stewardship” argument of agricultural policy:

[H]ow are we to count depositing fertilizers, pesticides, and animal wastes on the land, exposing soils to wind and water erosion, sucking water out of rivers and aquifers, and all the other traits of modern farming? And regardless of how well they care for their land, the bottom line is that farming has significant adverse offsite impacts, as runoff and wind carry pollution, wastes, and sediments to distant lands and waters. This is stewardship of the land?

*Id.* at 401–02.

<sup>185</sup> *Id.* at 406.

Regulation at an appropriate level will be difficult to achieve in light of the political power of the agricultural lobby, the daunting technical and administrative difficulties of regulating such a decentralized industry, and the costs of implementing such regulations. Yet, progress may be possible through free-market pricing, environmental subsidies, and taxes on agricultural inputs designed to reflect their environmental cost. The issue is not different from many problems in environmental economics in that either appropriate pricing or equivalent regulation can lead to significantly improved, if not optimal, behavior.

David E. Adelman & John H. Barton, *Environmental Regulation for Agriculture: Towards a Framework to Promote Sustainable Intensive Agriculture*, 21 STAN. ENVTL. L.J. 3, 22 (2002).

<sup>186</sup> See *Miccosukee*, 280 F.3d at 1369–71; *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp. 2d 41, 54–55 (N.D.N.Y. 2003).

<sup>187</sup> See *Miccosukee*, 280 F.3d at 1369–71.

water supply shortages for millions of people.<sup>188</sup> This raises a question regarding the realistic ability to enforce the NPDES program where high permit costs could disturb the livelihood of so many people.

The imposition of permitting requirements on the diversion and delivery of water in an unaltered condition from one basin to another basin will most considerably impact the economic and social well-being of the western states.<sup>189</sup> According to a brief filed by the states of Colorado and New Mexico, “[w]est of the 100<sup>th</sup> Meridian, the nation is generally arid; that is, it receives less than the thirty inches of annual precipitation necessary to sustain non-irrigated agriculture. . . . Hence, it is necessary to divert and deliver water through a complex system of manmade and natural conveyances and reservoirs.”<sup>190</sup> In the absence of such a system, agricultural regions would not be able to support crops and many popular cities would never have flourished, including Denver, Las Vegas, Los Angeles, and Phoenix.<sup>191</sup>

In *Miccosukee*, the U.S. Supreme Court attempted to allay the fear of high regulatory costs by suggesting that states or the EPA issue general permits to point sources associated with water distribution programs.<sup>192</sup> Also, the Pennsylvania Department of Environmental Protection claimed that assertions stating that the NPDES permitting program was a “costly, time-consuming, burdensome and bureaucratic program that [would] ‘wreak havoc’” were simply

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<sup>188</sup> See *Catskill Mountains*, 244 F. Supp. 2d at 54–55.

<sup>189</sup> Brief Amici Curiae of the States of Colorado and New Mexico, *supra* note 171, at 5; see also Brief Amici Curiae of the Nat’l Water Res. Ass’n et al. in Support of Petitioner at 10, *Miccosukee*, 541 U.S. 95 (No. 02-626), 2003 WL 22137029.

<sup>190</sup> Brief Amici Curiae of the States of Colorado and New Mexico, *supra* note 171, at 2. “If water is the ‘lifeblood’ of the West, then transbasin diversions/deliveries are surely the ‘arteries’ that sustain the region’s cities, towns, agriculture and industry.” *Id.* at 29.

<sup>191</sup> *Id.* at 2.

<sup>192</sup> See *Miccosukee*, 541 U.S. at 108. But see Peter D. Nichols, *Miccosukee: The Potential for Clean Water Act Discharge Permits for Water Transfers*, 33 COLO. LAW. 119, 121 (2004).

If it ultimately is determined that engineered transfers are required to obtain NPDES permits, they will be subject to all attendant CWA requirements, including water quality standards, anti-degradation, and wasteload allocations for impaired waters. These far-reaching requirements would accrue under any kind of permit, whether individual, general, or nationwide. Many water rights owners would have no alternative to curtailing their water transfers to meet NPDES permitting conditions, wasteload allocations for impaired waters, and anti-degradation requirements of the CWA.

*Id.*

“unsupported,” “not accurate,” and “highly speculative.”<sup>193</sup> The Pennsylvania Commonwealth Court interpreted the CWA to cover interbasin water transfers in 1986 and since then has not encountered any catastrophic consequences.<sup>194</sup> Therefore, the Pennsylvania Department of Environmental Protection professed that “Pennsylvania’s actual experience with its NPDES program . . . establishes that the NPDES program provides a flexible, efficient and effective means to protect water quality and stream uses.”<sup>195</sup>

## V. “WATERING DOWN” THE CWA’S AGRICULTURAL EXEMPTION AND SOVEREIGN POWERS OF THE STATES

### A. *The Agricultural Exemption*

Even if it is agreed that the agricultural industry should share in the costs of its environmental harms, the fact of the matter is that the CWA expressly provides agricultural exemptions for the discharge of waters used for the production of crops.<sup>196</sup> The NPDES program expressly prohibits any permit requirements for agricultural discharges, stating that “[t]he Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly require any State to require such a permit.”<sup>197</sup> The possibility of federally regulating the movement of unaltered water under the NPDES program could effectively undermine these agricultural exemptions through “increased taxes, fees and/or assessments imposed by [water management districts] to pay for NPDES permits and technologies for . . . [certain] facilities.”<sup>198</sup>

Originally, the NPDES program did not cover non-point sources, which were primarily agricultural; instead, these sources were

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<sup>193</sup> Brief of Amici Commonwealth of Pennsylvania, Dep’t of Env’tl. Prot. in Support of Respondents at 16, *Micosukee*, 541 U.S. 95 (No. 02-626), 2003 WL 22793537.

<sup>194</sup> *Id.* at 11–18 (citing *Del-AWARE Unlimited v. Dep’t of Env’tl. Res.*, 508 A.2d 348 (Pa. Commw. Ct. 1986)).

<sup>195</sup> *Id.* at 16. The CWA provides for “schedules of compliance” to allow long-term implementation of corrective measures necessary to achieve compliance with applicable water quality standards, while allowing important, though problematic water diversions to continue in the short-term. See 33 U.S.C. § 1362(17) (2000).

<sup>196</sup> 33 U.S.C. §§ 1342(1), 1362(14) (2000).

<sup>197</sup> *Id.* § 1341(a)(1).

<sup>198</sup> Brief for Amici Curiae Florida Fruit and Vegetable Ass’n et al., *supra* note 176, at 5.

addressed by the states.<sup>199</sup> As Senator Bob Dole reasoned, this would “place responsibility on the states for instituting and expanding the control of water pollution related to agriculture.”<sup>200</sup> In the CWA’s 1977 amendments, the exemption for “return flows from irrigated agriculture” was expressly added as an exclusion from the definition of “point source.”<sup>201</sup> A provision prohibiting NPDES permits for agricultural discharges was also added.<sup>202</sup> The Water Quality Act of 1987 exempted “agricultural stormwater discharges” from the definition of “point source,” confirming Congress’ intent that agriculture is not covered as industrial or municipal pollution.<sup>203</sup>

If the diversion of unaltered water requires an NPDES permit because agricultural discharges have contributed to the “addition” of “pollutants” to the navigable waters, the regulatory costs of complying with the permit may be passed on to farmers and ranchers.<sup>204</sup> Consequently, the deliberate economic benefits realized from the agricultural exemptions may be substantially eroded, frustrating Congress’ primary intentions for the exemptions. The Eleventh Circuit acknowledged this in *Fishermen Against the Destruction of the Environment, Inc. v. Closter Farms, Inc.*,<sup>205</sup> where the court interpreted and applied the agricultural exemptions from the NPDES program.<sup>206</sup> Closter Farms irrigated sugar cane by a process called flood irrigation.<sup>207</sup> Water from Lake Okeechobee was forced from irrigation canals “into the sugarcane fields by raising the water levels in the canals” and was then discharged back into the lake.<sup>208</sup> Stormwater was also pumped into the lake, rather than allowing it to follow its natural flow.<sup>209</sup> The Eleventh Circuit held the discharges to

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<sup>199</sup> Pub. L. No. 92-500, § 208; 86 Stat. 816, 839–41 (1972) (codified as amended at 33 U.S.C. § 1288 (2000)); S. REP. NO. 92-414, at 1 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3669.

<sup>200</sup> 1972 U.S.C.C.A.N. 3668, 3759 (supplemental views of Sen. Dole).

<sup>201</sup> Pub. L. No. 95-217, § 33(b); 91 Stat. 1577 (1977) (codified as amended at 33 U.S.C. § 1362(14) (2000)). This exclusion overrode a 1975 federal district court opinion holding the 1972 amendments to the Federal Water Pollution Control Act did not exclude point sources from agriculture from NPDES permitting. *Natural Res. Def. Council, Inc. v. Train*, 396 F. Supp. 1393, 1402 (D.D.C. 1975).

<sup>202</sup> Pub. L. No. 95-217, § 33(c); 91 Stat. 1577 (1977) (codified as amended at 33 U.S.C. § 1342(1) (2000)).

<sup>203</sup> Pub. L. No. 100-4, § 503; 101 Stat. 7, 75 (1987) (codified as amended at 33 U.S.C. § 1462(14) (2000)).

<sup>204</sup> *See* Davis & Doster, *supra* note 15, at 97.

<sup>205</sup> 300 F.3d 1294 (11th Cir. 2002).

<sup>206</sup> *Id.* at 1297.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

the lake were covered by the agricultural exemptions and, with regards to the stormwater runoff, that “[n]othing in the language of the statute indicates that stormwater can only be discharged where it naturally would flow.”<sup>210</sup> The court further held that the canals used to irrigate the sugarcane fields through flood irrigation were a “return flow from irrigation agriculture” and expressly exempt from the definition of “point sources” regulated by the NPDES program.<sup>211</sup>

Most of the cases involving the movement of unaltered water to another navigable water body, such as in *Miccosukee*, also involve pollution caused by agricultural runoff.<sup>212</sup> If water diversion facilities are now forced to obtain NPDES permits because of this type of pollution, it is likely that costs associated with such regulation will be passed on or at least shared with agricultural communities; an effect which possibly undermines the very purpose of having an agricultural exemption under the CWA.<sup>213</sup>

### B. Federalism

“Federalism” concerns the balance of power between “a centralized but limited federal government and dispersed but relatively unfettered state governments.”<sup>214</sup> It advances the protection of individual liberty by “preventing governmental power from concentrating in one governmental body or in a single person.”<sup>215</sup> In enacting the CWA, Congress showed concern in maintaining states’ traditional rights and responsibilities “to plan the development and use of land and water resources” so as not to impair allocations by states of their waters.<sup>216</sup> Therefore, extending the NPDES program to

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<sup>210</sup> *Id.* (citing 33 U.S.C. § 1362(14) (2000)).

<sup>211</sup> *Closter Farms*, 300 F.3d at 1297.

<sup>212</sup> Ruhl, *supra* note 183, at 400. As of 1992, farm runoff released 1.16 million tons of phosphorous and 4.65 million tons of nitrogen into the nation’s waters each year. *Id.*

<sup>213</sup> 33 U.S.C. § 1341(a)(1) (2000).

<sup>214</sup> Craig, *supra* note 32, at 119–20.

<sup>215</sup> *Id.* at 120.

<sup>216</sup> 33 U.S.C. § 1251(b) (2000). The CWA also states:

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of

the traditionally local water management activity of moving water across levees may fundamentally shift the federal-state balance achieved in the CWA.<sup>217</sup>

The CWA states that “[i]t is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by the [CWA].”<sup>218</sup> As a result, Congress chose to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.”<sup>219</sup> Consequently, the Supreme Court has acknowledged that the CWA must be interpreted with Congress’ intent to maintain the federal-state balance of powers in mind.<sup>220</sup> In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (“SWANCC”),<sup>221</sup> the United States Supreme Court noted that land and water use decisions are traditionally and primarily state prerogatives and where a statutory interpretation “alters the federal-state framework by permitting federal encroachment upon a traditional state power,” Congress must clearly convey its intent.<sup>222</sup>

Congress has never expressly established its intent to impose NPDES permit requirements on transbasin diversions, though it has clearly expressed its intent to honor long-standing federal deference to state water law.<sup>223</sup> In 1977, the Senate adopted the Wallop-Hart Amendment in reaction to proposals that “reducing water diversions/deliveries under state law might be necessary to solve water quality problems” and in order to ensure the protection of the

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performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

*Id.* § 1370.

<sup>217</sup> See Brief for Petitioner, *supra* note 74, at 4.

<sup>218</sup> 33 U.S.C. § 1251(g) (2000).

<sup>219</sup> *Id.* § 1251(b).

<sup>220</sup> See *Solid Waste Agency of N. Cook County v. U.S. Corps of Eng’rs*, 531 U.S. 159, 163 (2001) [hereinafter, “SWANCC”]. See also *PUD No. 1 v. Wash. Dep’t of Ecology*, 511 U.S. 700, 704 (1994).

<sup>221</sup> 531 U.S. 159 (2001).

<sup>222</sup> *Id.* at 173.

<sup>223</sup> See Brief Amici Curiae of the States of Colorado and New Mexico, *supra* note 171, at 5–9.

states' sovereign powers.<sup>224</sup> As part of the 1977 CWA amendments and building upon the 1972 amendments, Congress declared that the authority of each state to allocate quantities of water will not be impaired by the CWA and that nothing in the CWA will be construed to abrogate water rights established by any state.<sup>225</sup> Therefore, it may be that NPDES permit requirements for the movement of unaltered water "under individual water rights allocated under state law would directly abrogate state water allocations" and that "[s]uch federal interference has important implications, not only for individual water rights, but also for comity among the states under interstate compacts and equitable apportionments and for the maximum utilization of scarce water resources."<sup>226</sup>

## VI. MAKING WAY THROUGH MURKY WATERS

Based on the Supreme Court's guidance in *Miccossukee* and supportive case law, it seems that the mere transport of unaltered water from one body of water to a water body that would not naturally receive this diverted water could require an NPDES permit if the diverted water degrades the receiving water body.<sup>227</sup> Permitting the diversion of such unaltered water could affect thousands of dams, levees, aqueducts, canals, and other structures used for ordinary water management, public water supply, flood control, and navigation.<sup>228</sup> While it could be argued that the NPDES program is the wrong tool for regulating water transfers and diversions, there remains a concern that allowing the unpermitted diversion of polluted water would open the door to major degradation of less polluted water bodies by more polluted ones, thereby creating a significant gap in the states' authority under the CWA to protect and maintain the quality of their waters.<sup>229</sup>

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<sup>224</sup> *Id.* at 10.

<sup>225</sup> See 33 U.S.C. § 1251(g) (2000).

<sup>226</sup> Brief Amici Curiae of the States of Colorado and New Mexico, *supra* note 171, at 12. Western states are particularly concerned with how the CWA's federal-state relationships affect the allocation of water: "[t]he history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *California v. United States*, 438 U.S. 645, 653 (1978).

<sup>227</sup> *Miccossukee*, 541 U.S. at 112; *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001); *N. Plains Res. Council v. Fidelity Exploration and Dev. Co.*, 325 F.3d 1155, 1163 (9th Cir. 2003).

<sup>228</sup> See *Davis & Doster*, *supra* note 15, at 92.

<sup>229</sup> See Brief Amici Curiae of the States of Colorado and New Mexico, *supra* note 171, at 12.

The ultimate holding in *Miccossukee* on remand has the potential to overturn dam cases such as *Gorsuch* and *Consumers Power*.<sup>230</sup> Both the C-11 basin and WCA-3 were part of the historical Everglades and have been described as waters that would essentially be a single water body, but for man's intervention.<sup>231</sup> To say that two bodies of water would be one, but for man's intervention, would describe a dam and, under the established law, dams do not "add" pollutants to downstream waters. Therefore, if the South Florida Water Management District is required to obtain an NPDES permit, despite the possibility that the C-11 basin and WCA-3 would together naturally be a single wetland, this would presumably contradict the holdings of the dam cases. If the C-11 basin and WCA-3 are in fact found not to naturally constitute a single water body, the only alternative argument is the "unitary waters" theory. Unfortunately, given the plain language, structure, history, and interpretations of the CWA, it is likely that the "unitary waters" argument will, in fact, not hold water.

As more and more water diversion facilities are becoming exposed to stricter water regulations, each of their cases will come down to detailed and complex issues such as where the water would flow, but for the intervening facility, and the particular processes used to divert the water. These potentially confusing and fact-intensive inquiries have led facility operators and water districts to argue possible inconsistencies with the CWA's agricultural exemption, the undermining of federalism, and administrative burdens.<sup>232</sup> What these groups may ideally be seeking, however, is a separate exemption for their facilities under the CWA. As Justice Scalia suggested: "The horrors that can be imagined—if they are really so horrible and ever come to pass—can readily be corrected by Congress" should the NPDES permit process as enacted truly prove unworkable in practice.<sup>233</sup> Unfortunately, this is unrealistic, as the difficulty and reluctance to propose an amendment for the CWA will always serve as an obstacle.

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<sup>230</sup> Brief of the States of New York et al. as Amici Curiae, *supra* note 127, at 8 n.2. "If the dam context is determined to be factually indistinguishable from the facts of this case, however, it would become apparent that the dam cases were wrongly decided." *Id.*

<sup>231</sup> *Miccossukee*, 541 U.S. at 101.

<sup>232</sup> Brief Amici Curiae of the States of Colorado and New Mexico, *supra* note 171, at 2.

<sup>233</sup> *E. Assoc. Coal Corp. v. United Mine Workers*, 531 U.S. 57, 69 (2000) (Scalia, J., concurring).

It is also questionable whether the EPA could itself exempt its own categories of point sources from the CWA's permit requirements. The D.C. Circuit held in *Natural Resources Defense Council, Inc. v. Costle*<sup>234</sup> that:

The wording of the statute, legislative history, and precedents are clear: the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of [Section] 402. Courts may not manufacture for an agency a revisory power inconsistent with the clear intent of the relevant statute.<sup>235</sup>

The court noted that such a task was appropriate only for the legislature, rather than the judiciary, "where the public interest may be considered from the multifaceted points of view of the representational process."<sup>236</sup> More recently, the Ninth Circuit distinguished the EPA's authority to define point and non-point sources from attempts to wholly exempt categories of point sources from NPDES permitting requirements.<sup>237</sup> In *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*,<sup>238</sup> the court stated that although the EPA has the power to define point and non-point source pollution "where there is room for reasonable interpretation of the statutory definition," the EPA may not merely "exempt from NPDES permit requirements that which clearly meets the statutory definition of a point source by 'defining' it as a non-point source. Allowing the EPA to contravene the intent of Congress, by simply substituting the word 'define' for the word 'exempt,' would turn *Costle* on its head."<sup>239</sup>

What the *Costle* court did concede was the necessary flexibility in the conditioning of permits, so long as the conditions were not inconsistent with the express terms of the CWA.<sup>240</sup> Since the EPA could not exempt categories of point sources, the court suggested the use of general permits as devices to mitigate the overwhelming burden of issuing thousands of new permits, while accommodating

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<sup>234</sup> NRDC v. Costle, 568 F.2d 1369, 1377 (D.C. Cir. 1977).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* (citing Fed. Power Comm'n v. Texaco, Inc. 417 U.S. 380, 400 (1974)).

<sup>237</sup> League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren, 309 F.3d 1181, 1190 (9th Cir. 2002).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Costle*, 568 F.2d at 1382.

“Congress’ clear mandate that all point sources have permits.”<sup>241</sup> This suggestion may now serve as one answer to the troubles associated with imposing NPDES permitting requirements upon water diversion facilities.

While an applicant for an individual NPDES permit must provide information about, among other things, the point source itself, the nature of the pollutants to be discharged, and any water treatment system that will be used, general permits greatly reduce these administrative burdens by authorizing discharges from a category of point sources within a specified geographic area.<sup>242</sup> Once the EPA or a state agency issues such a permit, covered entities, in some cases, need take no further action to achieve compliance with the NPDES besides adhering to the permit conditions.<sup>243</sup>

The EPA often uses such general permits for the oil and gas industry.<sup>244</sup> Also, the United States Army Corps of Engineers’ dredge and fill permitting program includes a “nationwide permit” which authorizes the discharge of dredged or fill material for small-scale projects that will have minimal harmful effects on the environment.<sup>245</sup> The State of Pennsylvania has advocated its use of general permits as a way to significantly save on both time and money for applicants, while still meeting the applicable provisions of the CWA and state laws.<sup>246</sup> Pennsylvania uses general permits for categories such as concentrated animal feeding operations, stormwater associated construction activities, and municipal separate storm sewer systems.<sup>247</sup> These general permits are said to have eliminated a “litany of

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<sup>241</sup> *Id.* at 1381. The court noted the practical differences between general permits and exemptions:

An exemption tends to become indefinite: the problem drops out of sight, into a pool of inertia, unlikely to be recalled in the absence of crisis or a strong political protagonist. In contrast, the general or area permit approach forces the Agency to focus on the problems of specific regions and requires that the problems of the region be reconsidered at least every five years, the maximum duration of a permit.

*Id.* at 1382.

<sup>242</sup> See 40 C.F.R. § 122.28(b)(2)(v) (2003).

<sup>243</sup> *Id.*

<sup>244</sup> See *Texas Oil & Gas Ass’n. v. EPA*, 161 F.3d 923, 929 (5th Cir. 1998).

<sup>245</sup> Keith Rizzardi, *Regulating Watershed Restoration: Why the Perfect Permit is the Enemy of the Good Project*, 27 *NOVA. L. REV.* 51, 71 (2002).

<sup>246</sup> Kathleen A. McGinty, *Pennsylvania’s Approach to Sustainable Development*, 19 *NAT. RES. & ENV’T* 46, 49 (2004); see also Brief of Amici Commonwealth of Pennsylvania, Dep’t of Env’t. Prot., *supra* note 193, at 16.

<sup>247</sup> Brief of Amici Commonwealth of Pennsylvania, Dep’t of Env’t. Prot., *supra* note 193, at 16.

problems” by minimizing paperwork and administrative burdens.<sup>248</sup> Even Florida’s Water Management District administers Environmental Resource Permitting programs that include general permits for minor projects such as road resurfacing, dock maintenance, mosquito control, underground cables, and utility infrastructure.<sup>249</sup> Nevertheless, critics of general permits argue that they provide insufficient public review and unfair special treatment.<sup>250</sup> Although general permit programs may not necessarily solve all of the complex problems associated with regulating water diversion facilities, they may be a step towards finding an equitable solution to a testing dilemma.

## VII. CONCLUSION

It is easily understood that actively discharging a pollutant from a point source into a water of the United States without a permit almost always violates the CWA. It is a more difficult question, however, “when water is not altered chemically, physically, biologically, or radiologically, by man, but is merely transported, by man, from one water body to another.”<sup>251</sup> While this question may seem very philosophical and abstract to some, it is quite real and problematic for the multitude of facilities managing public water supply systems, flood control, and navigation. Those in fear of ripple effects will continue to debate the issue, but such arguments will only be successful by falling on the ears of the legislature rather than the courts. As Justice Stevens once stated, “[it] is not what a court thinks is generally appropriate to the regulatory process, it is what Congress intended.”<sup>252</sup> Therefore, the ultimate resolution will inevitably reflect Congress’ clear intention under the CWA of restoring and maintaining the “chemical, physical, and biological integrity of the Nation’s waters.”<sup>253</sup>

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<sup>248</sup> *Id.*

<sup>249</sup> Rizzardi, *supra* note 245, at 72.

<sup>250</sup> *Id.*

<sup>251</sup> Rosemary J. Beless, *Miccosukee: Can The Mere Transport of Unaltered Water Violate the Clean Water Act?*, 17 UTAH B.J. 12, 12 (2004).

<sup>252</sup> *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1977).

<sup>253</sup> 33 U.S.C. § 1251 (2000).