

# The Unitary Waters Approach: The Government’s Misguided Attempt to Limit the Reach of the Clean Water Act\*

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## I. INTRODUCTION

Historically, water from Lake Okeechobee has flowed slowly over central and southern Florida creating a large wetland.<sup>1</sup> In 1850, Congress transferred more than twenty million acres of this wetland<sup>2</sup> to Florida for the express purpose of constructing “levees and drains to reclaim the swamp and overflowed lands therein . . . .”<sup>3</sup> After several failed attempts at reclamation, Florida, with the help of the U.S. Army Corps of Engineers, altered the natural flow of ground and surface water in the area, transforming some of the wetland into fertile farmland.<sup>4</sup> The reclamation project, officially known as the Central and South Florida Project for Flood Control and Other Purposes (C&SF Project),<sup>5</sup> involved four principal water control technologies: (1) levees; (2) water storage

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1. “Before drainage and canalization, water moved through the Everglades as a slow but pervasive surface flow from Lake Okeechobee through a mosaic of sawgrass marshes, wet sloughs, and forested islands along a topographic gradient of about 1 m per 56 km.” Daniel L. Childers et al., *Decadal Change in Vegetation and Soil Phosphorus Pattern Across the Everglades Landscape*, 32 J. ENVTL. QUALITY 344, 346 (2003).

2. Andrew P. Morriss & Roger E. Meiners, *The Destructive Role of Land Use Planning*, 14 TUL. ENVTL. L.J. 95, 129 (2000). Approximately 1.5 million acres of the 20 million acres transferred has been converted into the Everglades National Park, Everglade National Park, Park Establishment, <http://www.nps.gov/ever/eco/nordeen.htm> (last visited Nov 8, 2005).

3. 43 U.S.C. § 982 (2000). In full, the statute reads:

To enable the several States (but not including the States of Kansas, Nebraska, and Nevada) to construct the necessary levees and drains, to reclaim the swamp and overflowed lands therein—the whole of the swamp and overflowed lands, made unfit thereby for cultivation, and remaining unsold on or after the 28th day of September, A.D. 1850, are granted and belong to the several States respectively, in which said lands are situated: *Provided, however*, That said grant of swamp and overflowed lands, as to the States of California, Minnesota, and Oregon, is subject to the limitations, restrictions and conditions hereinafter named and specified in this chapter, as applicable to said three last-named States respectively.

*Id.*

4. Everglade Plan, *Development of Central & South Florida (C&SF) Project*, [http://www.evergladesplan.org/about/restudy\\_csf\\_devel.cfm](http://www.evergladesplan.org/about/restudy_csf_devel.cfm) (last visited Nov. 08, 2005). In 2002, Florida ranked ninth in the value of farm products and second in production of fresh vegetables with sales of \$6.85 billion and \$1.6 billion, respectively. Florida Department of Agriculture and Consumer Services, *Overview of Florida Agriculture*, <http://www.florida-agriculture.com/agfacts.htm> (last visited Jan 30, 2005).

5. The C&SF Project is a multipurpose project that was first authorized by the Flood Control Act of 1948, Pub. L. No. 858, 62 Stat. 1171, 1175 (1948).

areas; (3) canals; and (4) pump stations.<sup>6</sup> The combined effect of these technologies was to stop the natural westward flow of the water and to artificially redirect the flow eastward, separating habitable regions from the surrounding wetland.<sup>7</sup> Today, these regions are home to more than 136,000 people and contain both urban and agricultural developments.<sup>8</sup>

In 2003, the C&SF Project was the subject of a Supreme Court case that could dramatically limit the reach of the Clean Water Act (CWA).<sup>9</sup> In *South Florida Water Management District v. Miccosukee Tribe of Indians*, the Court heard arguments regarding whether a water transfer occurring within the C&SF Project could be regulated by the CWA's primary pollution control program, the National Pollutant Discharge Elimination System (NPDES).<sup>10</sup> The Court held that water transfers may be so regulated if they occur between two "meaningfully distinct" water bodies.<sup>11</sup> In a somewhat surprising development, the government, in its amicus brief, advocated a radically new interpretation of the CWA, which would remove all water transfer activities from the reach of the NPDES permit program.<sup>12</sup> The government's interpretation is commonly known as the "unitary waters" approach because, under this

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6. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 100 (2004). The C&SF Project works as follows: (1) canals collect ground water and rainwater from an area that includes urban, agricultural, and residential developments; (2) the pump stations transfer water from the canals to water storage areas; (3) the levees prevent the water from returning from water storage areas back to the urbanized areas. *Id.*

7. EVERGLADES: THE ECOSYSTEM AND ITS RESTORATION 60 (Steven M. Davis & John C. Ogden eds., 1994).

8. *Miccosukee*, 541 U.S. at 100.

9. *Id.* at 98-112.

10. *Id.* at 104. See discussion *infra* Section III for more information on the National Pollutant Discharge Elimination System.

11. *Miccosukee*, 541 U.S. at 112. The Court held that "a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters,' which are, in turn, defined as 'the waters of the United States.'" *Id.* at 105. However, the Court went on to state that "it is possible that the District Court will conclude that [they] are not meaningfully distinct water bodies. If it does so, then the [transfer] will not need a NPDES permit." *Id.* at 112.

12. Brief for United States as Amicus Curiae Supporting Petitioner at 19, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22137034.

"[T]he waters of the United States" should be viewed as a whole for purposes of NPDES permitting requirements. Once a pollutant is present in one part of "the waters of the United States," its simple conveyance to a different part is not a "discharge of a pollutant" within the meaning of the Act.

*Id.*

approach, all waters of the United States are viewed as a singular water body.<sup>13</sup>

This Comment will, first, determine whether the government's unitary waters approach is a viable interpretation of the CWA. Second, it will explore what characteristics should be considered to determine whether two water bodies are "meaningfully distinct." Finally, this Comment will explore the possible consequences of applying the NPDES program to water transfers between two water bodies.

In order to clarify this Comment, this section will summarize the important aspects of the *Miccosukee* case. Section II will briefly introduce the CWA. Section III will introduce the NPDES permitting program and will discuss the requirements of the NPDES program and how *Miccosukee* could alter those requirements. Section IV will discuss the government's unitary waters approach and consists of three parts: (1) an introduction to the government's approach; (2) an analysis of the arguments in favor of the unitary waters approach; and (3) a discussion of whether other parts of the CWA are in conflict with the government's interpretation. Section V will discuss the characteristics that should be used to determine whether two water bodies are "meaningfully distinct." Finally, section VI will explore the potential consequences of applying the NPDES program to water transfer activities.

#### A. Summary of *Miccosukee*

The Miccosukee Indian Tribe (Tribe) brought suit against the South Florida Water Management District (Water District) for the environmental harm caused by the C&SF Project.<sup>14</sup> At the time of the case, the Water District was in charge of the C&SF Project.<sup>15</sup> The litigation arose after the Tribe discovered that run-off from the surrounding developments had been channeled into the South New River Canal (Canal) and pumped into the Wetland Conservation Area Number Three (Wetland).<sup>16</sup> This was all done pursuant to the C&SF Project.<sup>17</sup> The run-off that

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13. *Miccosukee*, 541 U.S. at 105-06; see also Kristin Carden, Case Comment, South Florida Water Management District v. Miccosukee Tribe of Indians, 28 HARV. ENVTL. L. REV. 549, 554 ("[T]he Court discussed the 'unitary waters' argument advanced primarily by the federal government.").

14. Brief for the Respondent Friends of the Everglades at 1-2, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22733911. The CS&F project channels agriculture run-off and pumps it back into the Everglades. *Id.* at 5. This run-off causes the growth of foreign vegetation, including cattails. *Id.* at 6. Once these cattails take over, oxygen levels are no longer sufficient to support the native aquatic plant life or animals. *Id.*

15. *Miccosukee*, 541 U.S. at 100.

16. *Id.*

17. *Id.* at 100-01.

flowed into the Canal had higher phosphorus levels than those naturally found in the Wetland.<sup>18</sup> As a consequence, once pumped into the Wetland, the phosphorus-enriched water caused the growth of foreign vegetation, which began to threaten the existence of the naturally occurring flora.<sup>19</sup>

However, despite its negative environmental effects, the transfer of water could not be stopped without flooding a populous area and displacing thousands of residents.<sup>20</sup> The Canal serves as a collection area for two main water sources. First, it collects excess run-off from the surrounding agricultural and urban developments.<sup>21</sup> Secondly, it collects water that naturally seeps into it from the Wetland.<sup>22</sup> Due to the porous nature of the surrounding soil, and the natural westward drainage flow, water is shared between the Wetland and the Canal.<sup>23</sup>

The Tribe alleged that the Water District violated the CWA by pumping the phosphorus-enriched water into the Wetland without obtaining an NPDES permit.<sup>24</sup> An NPDES permit authorizes the dumping of polluted substances into waters of the United States.<sup>25</sup> Generally, five elements must be present in order to trigger the need for an NPDES permit: “(1) a *pollutant* must be (2) *added* (3) to *navigable waters* (4) *from* (5) a *point source*.”<sup>26</sup> Both parties agreed that the pump station that transfers water from the Canal to the Wetland is a point source, that the Wetland and the Canal are navigable waters, and that the water pumped into the Wetland contains pollutants.<sup>27</sup> Therefore, the primary dispute centered on whether the pumping of water between the Canal and the Wetland constituted an *addition* of pollutants to navigable

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18. Brief for Respondent Friends of the Everglades, *supra* note 14, at 6.

19. *Id.*

20. *Miccosukee*, 541 U.S. at 100-01.

21. *Id.* at 100.

22. *Id.* at 110.

23. *Id.* “Because Everglades soil is extremely porous, water flows easily between ground and surface waters, so much so that ‘[g]round and surface waters are essentially the same thing.’” *Id.*

24. See Brief for Respondent Miccosukee Tribe of Indians of Florida at 12-14, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22766719.

25. Nat’l Wildlife Fed’n v. Gorsuch, 693 F.2d 156, 165 (D.C. Cir. 1982) (referring to when NPDES permits are required for dams).

26. *Id.* at 165.

27. *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1367 (11th Cir. 2002).

waters.<sup>28</sup> If so, then an NPDES permit would be required to exchange water from the Canal to the Wetland.<sup>29</sup>

The Water District and the government, which became involved in the case because of the potential impact on the NPDES permitting program,<sup>30</sup> contended that the pumping of water from the Canal to the Wetland did not fall under the NPDES program.<sup>31</sup> The Water District argued that since water naturally seeps between the Wetland and the Canal, they share a hydrological connection and as such, are part of a single water body.<sup>32</sup> In addition, the government argued that all waters of the United States should be viewed unitarily for purposes of NPDES permitting.<sup>33</sup> Carried to its logical conclusion, such an assertion means that all waters within the United States are collectively one giant body of water and any conveyance within this singular body of water could never constitute an addition of pollutants.<sup>34</sup> Therefore, according to the government's argument, an NPDES permit would only be required when pollutants are first introduced into the waters of the United States.<sup>35</sup> Understood this way, the pumping of water from the Canal to the Wetland is merely a conveyance within the national water body and does not constitute an addition of pollutants as defined by the CWA.<sup>36</sup>

In response, the Tribe advocated that the Canal and the Wetland are two distinct water bodies because they do not share similar biological or ecosystem characteristics.<sup>37</sup> In support of its argument, the Tribe pointed to the fact that the Wetland is home to unique vegetation and wildlife, while the Canal is not.<sup>38</sup> In addition, the Tribe noted that the

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28. *Id.*

29. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 102-03 (2004).

30. Brief for United States as Amicus Curiae Supporting Petitioner, *supra* note 12 at 1-2.

31. *Id.* at 14; Brief for Petitioner at 20-24, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22137015.

32. Brief for Petitioner, *supra* note 31 at 46-49.

33. *Miccosukee*, 541 U.S. at 105-06.

34. *Id.* at 106. "Because the Act requires NPDES permits only when there is an addition of a pollutant 'to navigable waters,' the Government's approach would lead to the conclusion that such permits are *not* required when water from one navigable water body is discharged, unaltered, into another navigable water body." *Id.*

35. For example, a company dumping pollution from their factory into a river would still require a NPDES permit. However, if that pollution is later discharged into an adjacent lake via a pump station, then a NPDES permit is not required for that transfer.

36. *Miccosukee*, 541 U.S. at 109.

37. *Id.* at 110; *see also* Brief for Respondent Miccosukee Tribe of Indians of Florida, *supra* note 24, at 6-7.

38. "The Everglades is an extensive and unique wetlands system consisting of millions of acres of shallow sawgrass marshes, wet prairies, aquatic sloughs, and tree islands." The area provides a home for unique wildlife such as wading birds, and

Wetland and the Canal have drastically different water qualities and therefore should be considered two distinct water bodies.<sup>39</sup>

The federal district court granted the Tribe's motion for summary judgment and issued an order requiring the Water District to obtain an NPDES permit for the pumping of water between the Canal and the Wetland.<sup>40</sup> In addition, it enjoined the Water District from operating the pump station until an NPDES permit was obtained.<sup>41</sup> The Eleventh Circuit affirmed the district court's ruling but vacated the injunction due to the practical necessity of the pumping and the danger suspension would present to thousands of residents.<sup>42</sup>

In 2003, the Supreme Court granted certiorari.<sup>43</sup> There was great interest in this case as shown by the twenty-three separate amicus briefs filed with the Court by a broad range of interested parties.<sup>44</sup> To some,

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threatened and endangered species such as wood storks, snail kites, bald eagles, Florida panthers and American crocodiles." Brief for Respondent Miccosukee Tribe of Indians of Florida, *supra* note 24, at 6.

39. *Id.* at 7, 31 n.14.

40. *Miccosukee*, 541 U.S. at 99; *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, Nos. 98-6056-CIV, 98-6057-CIV, 1999 WL 33494862, at \*1 (S.D. Fla. Sept. 30, 1999).

41. *Id.* at \*6.

42. *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1369-71 (11th Cir. 2002). The appellate court held that "an addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants into navigable waters." *Id.* at 1368. The court went on to state that the Canal was the cause-in-fact of the addition of pollutants to the Wetland. *Id.* at 1369. However, the court did not affirm the injunction because "severe flooding" would occur to a residential area. *Id.* at 1371.

43. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe Of Indians*, 539 U.S. 957 (2003).

44. The thirteen amicus briefs filed in support of the Water District consisted of the following: Brief for Amici Curiae Florida Fruit and Vegetable Ass'n et al. in Support of Petitioner, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22118364; Brief of Idaho Governor Dirk Kempthorne as Amicus Curiae in Support of Petitioner, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22118368; Brief Amicus Curiae of Pacific Legal Foundation in Support of the Petitioner, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22118373; Brief of Amicus Curiae the City of Weston, Florida, in Support of Petitioner, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22137027; Brief for the Lake Worth Drainage District and the Florida Ass'n of Special Districts as Amici Curiae in Support of Petitioner South Florida Water Management District, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22137027; Brief Amici Curiae of the National Water Resources Ass'n et al. in Support of Petitioner, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22137029; Brief of the National League of Cities et al. as Amici Curiae Supporting Petitioner, *S.*

this case appeared to be about a simple issue of statutory interpretation.<sup>45</sup> For others, this case was an opportunity to clarify the reach of the NPDES program.<sup>46</sup>

After reviewing the record and hearing oral arguments, the Supreme Court decided to remand the case back to the district court because there was not enough information to determine whether the Canal and the

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Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22137030; Brief Amici Curiae of the States of Colorado and New Mexico in Support of Petitioner, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22137032; Brief for United States as Amicus Curiae Supporting Petitioner, *supra* note 12; Brief of Amicus Curiae National Ass'n of Home Builders in Support of Petitioner, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22196454; Brief for the Utility Water Act Group as Amicus Curiae in Support of the Petitioner, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22196594; Brief of Amici Curiae the City of New York et al. in Support of Petitioner, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22220093; Brief of Amici Curiae the Nationwide Public Projects Coalition et al. in Support of Petitioner, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22137031. The remaining ten amicus briefs filed in support of the Miccosukee Tribe consisted of the following: Brief of Amici Curiae National Wildlife Federation et al. in Support of Respondents, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22766717; Brief of the States of New York et al. as Amici Curiae in Support of Respondents, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22766718; Amicus Curiae Brief of Tongue & Yellowstone River Irrigation District et al. in Support of Respondents, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22793536; Brief of Amici Commonwealth of Pennsylvania, Department of Environmental Protection in Support of Respondents, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22793537; Brief of Amici Curiae Florida Wildlife Federation et al. in Support of Respondents, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22793538; Brief of Amici Curiae Former Administrator Carol M. Browner et al. of the United States Environmental Protection Agency in Support of Respondents, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22793539; Brief of Amici Curiae of the Coalition of Greater Minnesota Cities and the City of Saint Cloud, Minnesota in Support of Respondents, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22811822; Brief Amici Curiae of the National Tribal Environmental Council and the National Congress of American Indians in Support of Respondents, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 23189937; Amicus Brief of the Association of State Wetland Managers and the Tropical Audubon Society in Support of Respondents, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22733912; Brief of Amici Curiae Trout Unlimited Inc. et al. in Support of Respondents, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22733910.

45. See, e.g., Brief for Respondent Miccosukee Tribe of Indians of Florida, *supra* note 24, at 12-19.

46. See, e.g., Brief for United States as Amicus Curiae Supporting Petitioner, *supra* note 12, at 15.



Wetland were two “meaningfully distinct” water bodies.<sup>47</sup> However, the Court gave no guidance on how to define “meaningfully distinct.”<sup>48</sup> Additionally, the Court declined to resolve whether the federal government’s “unitary waters” approach was a valid interpretation of the CWA because neither the government nor the Water District raised the issue before the Court of Appeals in its brief requesting certiorari.<sup>49</sup> Nevertheless, the Court did invite the parties to take up the issue on remand.<sup>50</sup>

## II. OVERVIEW OF THE CLEAN WATER ACT

The Federal Water Pollution Control Act Amendments of 1972, commonly known as the Clean Water Act, marked a dramatic change to the overall strategy of federal water pollution legislation.<sup>51</sup> Prior to 1972, the main goal of federal water pollution laws was to assist the states in achieving their own water quality standards.<sup>52</sup> In contrast, under the CWA, the federal government set a national standard of water quality that replaced all existing state standards.<sup>53</sup> Incorporated into the national standard was the goal “to restore and maintain the chemical, physical and biological integrity of the Nation’s waters.”<sup>54</sup> In order to accomplish this goal, section 301(a) of the CWA prohibits the “discharge of any pollutant by any person” into navigable waters.<sup>55</sup> This

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47. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 112 (2004).

48. *Id.* at 111-12.

49. *Id.* at 109.

50. *Id.*

51. William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972*, 22 STAN. ENVTL. L.J. 215 (2003).

The Clean Water Act of 1972 was revolutionary in many ways. It made the federal government the dominant authority in an area where the states had long held sway. It instituted a new system of technology-based effluent limitations that would demand the same basic level of treatment for a particular industry, regardless of whether it was located in Georgia or New York, Louisiana or Wisconsin. No longer could an industry so effectively block state pollution control efforts by threatening to relocate to a more lenient jurisdiction. And no longer could discharge limitations be based solely upon the assimilative capacity of the receiving waterway and its ability to meet a designated use—which might well be only industrial or agricultural usage.

*Id.* at 286.

52. *Id.* at 292.

53. *Id.* at 286.

54. 33 U.S.C. § 1251(a) (2000).

55. 33 U.S.C. § 1311(a) (2000).

represented a change to the basic approach of setting water quality standards. Before the passing of the CWA, water quality standards were set by determining how much pollution one water body could digest without exceeding the ambient water quality standard.<sup>56</sup> In contrast, under the CWA, the national standard is exclusively concerned with eliminating all discharges of pollutants into U.S. waters.<sup>57</sup>

However, an exception to this zero pollution approach is contained in section 402 of the CWA, otherwise known as the NPDES permit program.<sup>58</sup> Under the NPDES permit program, “the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants,”<sup>59</sup> upon condition that the discharger meets all applicable effluent standards under the law.<sup>60</sup> The NPDES permit thus serves as a temporary patch until it is technologically and economically feasible for the polluter to reduce its discharge to zero.<sup>61</sup>

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56. S. REP. NO. 92-414, at 7-8 (1971), *as reprinted in* 1972 U.S.C.A.N. 3668, 3678.

This section establishes a policy that the discharge of pollutants should be eliminated by 1985, that the natural chemical, physical, and biological integrity of the Nation’s waters be restored, and that an interim goal of a water quality allowing fish propagation and suitable for swimming should be reached by 1981. The States are declared to have the primary responsibility and right to implement such a goal. The policy declaration of the Federal Water Pollution Act has been revised substantially in order to represent the departure in Federal water pollution control policy from a water quality standards control mechanism to a discharge control mechanism.

*Id.* Ambient water quality standards are defined as “provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses.” 40 C.F.R. § 131.3(i) (2003).

57. S. REP. NO. 92-414, at 7-8 (1971), *as reprinted in* 1972 U.S.C.A.N. 3668, 3678; *see* ROGER W. FINDLEY ET AL., *CASES AND MATERIALS ON ENVIRONMENTAL LAW* 386-89 (6th ed. 2003).

58. Clean Water Act § 402, 33 U.S.C. § 1342 (2000); *see also* 33 U.S.C. § 1311(a) (2000).

59. 33 U.S.C. § 1342(a)(1) (2000).

Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

*Id.*

60. *Id.*; *see also* Karen M. McGaffey, *Water Pollution Control Under the National Pollutant Discharge Elimination System*, in *THE CLEAN WATER HANDBOOK* 18 (Mark A. Ryan ed., 2d ed. 2003) (“The CWA requires all dischargers to comply with effluent limitations based on available pollution control technology. These ‘technology-based limits’ are established after consideration of technological feasibility and cost.”).

61. 33 U.S.C. § 1311(b)(2)(A) (2000). This section states that the Administrator

## III. THE NPDES PERMIT PROGRAM

## A. Background

The origin of the NPDES permit program can be traced back to section 13 of the Rivers and Harbors Appropriations Act of 1899 (Refuse Act).<sup>62</sup> This act gave authority to the Secretary of the Army, upon the advice of the Chief Engineer, to permit the deposit of any materials when “anchorage and navigation will not be injured thereby.”<sup>63</sup> The primary purpose of the Refuse Act was to prevent foreign objects from obstructing America’s waterways and, therefore, permits were only required for “*industrial* discharges of ‘refuse’ into navigable waters.”<sup>64</sup>

In 1972, the CWA transferred the Secretary of the Army’s authority to issue permits to the Administrator of the Environmental Protection Agency (EPA).<sup>65</sup> In addition, Congress expanded the scope of the permit to include the “discharge of any pollutant”<sup>66</sup> in order for it to serve as the

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must require the elimination of all discharges if the “elimination is technologically and economically achievable for a category or class of point sources.” *Id.*

62. 33 U.S.C. §§ 407, 1342(a)(4), (2000).

63. 33 U.S.C. § 407 (2000).

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed.

*Id.*

64. Nat’l Wildlife Fed’n v. Gorsuch, 693 F.2d 156, 172 (D.C. Cir. 1982).

65. 33 U.S.C. § 1342(a)(2),(4) (2000).

All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

33 U.S.C. § 1342(a)(4) (2000).

66. 33 U.S.C. § 1342(a)(1) (2000).

major regulatory mechanism of the CWA.<sup>67</sup> However, Congress limited the applicability of the permit by narrowing the phrase “discharge of any pollutant” to only include pollutants from a point source.<sup>68</sup>

Fundamentally, Congress limited the scope of the NPDES permit program because it wanted some of the control to remain with the states.<sup>69</sup> The passing of the CWA marked a shift in the federal-state framework. For the first time, the federal government was encroaching in state water use laws by setting a national water quality standard.<sup>70</sup> However, Congress still wanted some state involvement in water use legislation and permitting.<sup>71</sup> As such, Congress gave states the authority to develop their own NPDES permit programs as long as they met the guidelines set forth by the EPA.<sup>72</sup> Furthermore, pollutants that do not originate from a point source are predominately regulated by the states.<sup>73</sup>

In addition to issuing NPDES permits, Congress permitted the states along with the EPA to impose civil penalties on polluters.<sup>74</sup> The civil penalties range from injunctive relief to monetary fines up to \$25,000 per day per violation.<sup>75</sup> In addition, the CWA authorizes criminal

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67. Keith Keplinger, *The Economics of Total Maximum Daily Loads*, 43 NAT. RESOURCES J. 1057, 1058 (2003) (“The major regulatory mechanism of the CWA, the National Pollutant Discharge Elimination System (NPDES) focused on the technical feasibility of achieving effluent standards as the primary factor in establishing pollution controls in contrast to former clean water legislation, with its emphasis on state-administered ambient standards.”).

68. 33 U.S.C. § 1362(12) (2000).

69. 33 U.S.C. § 1251(b) (2000).

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

*Id.*; see also *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001) (declining to extend the reach of the Clean Water Act to “an abandoned sand and gravel pit” even though it provided a habitat for migratory birds because it would intrude too far into state domain).

70. Andreen, *supra* note 51, at 286.

71. 33 U.S.C. § 1251(b) (2000).

72. 33 U.S.C. § 1342(b) (2000).

73. 33 U.S.C. § 1288 (2000); see also FINDLEY ET AL., *supra* note 57, at 470 (“Either the states will undertake to regulate nonpoint sources on their own initiative or they won’t, and there appears to be nothing the EPA can do but to cheer on the ambitious and chide the apathetic.”).

74. 33 U.S.C. § 1319(b) (2000) (“The Administrator is authorized to commence a civil action for appropriate relief.”).

75. 33 U.S.C. § 1319(g) (2000) (“The amount of a class I civil penalty under paragraph (1) may not exceed \$ 10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed \$25,000.”). The largest fine ever was \$12.6 million for almost 7,000 violations. *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 354 (E.D. Va. 1997). However, in 2002, the average penalty was \$11,411 and the median penalty was \$15,000. U.S. Environmental

penalties of imprisonment and large monetary fines up to one million dollars.<sup>76</sup>

While the EPA and the states have the ability to enforce the effluent limitations of NPDES permits, the CWA authorizes citizens to bring civil actions against any person violating these limitations.<sup>77</sup> Furthermore, citizens may bring a civil action against the EPA Administrator for failure to perform a nondiscretionary duty under the CWA.<sup>78</sup>

### *B. Requirements of the NPDES Program*

An NPDES permit is required whenever a point source discharges pollutants into navigable waters.<sup>79</sup> The key terms located within this section are: (1) discharge of pollutant; (2) point source; and (3) navigable waters.<sup>80</sup> A review of these terms is helpful in evaluating when an NPDES permit is required by the CWA.

#### *1. Discharge of Pollutant*

Under the CWA, a “discharge of a pollutant” is defined as “any addition of any pollutant to navigable waters from any point source.”<sup>81</sup> The meaning of “discharge of a pollutant” is constantly being reshaped by the courts and is not always straightforward.<sup>82</sup> As a consequence,

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Protection Agency, *Comparative Report and Civil and Criminal Penalties Assessed by U.S. EPA Region 5*, <http://www.epa.gov/region5/orc/annualreports/2002/pentrends92-02.pdf> (last visited Feb. 5, 2005).

76. 33 U.S.C. § 1319(c) (2000). For some examples of criminal convictions under the CWA, see Christine L. Wettach, *Mens Rea and the “Heightened Criminal Liability” Imposed on Violators of the Clean Water Act*, 15 STAN. ENVTL. L.J. 377, 384-93 (1996).

77. 33 U.S.C. § 1365(a)(1) (2000) (“[A]ny citizen may commence a civil action on his own behalf—against any person . . . [or] any other governmental instrumentality or agency . . . who is alleged to be in violation of [the CWA]”). In environmental legislation, Congress authorized citizen suits to “motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings.” *Friends of the Earth v. Carev*, 535 F.2d 165, 172 (2d Cir. 1976) (quoting Senate Committee on Public Works, S. REP. NO. 91-1196, at 35-36 (1970)).

78. 33 U.S.C. § 1365 (a)(2) (2000) (“[A]ny citizen may commence a civil action on his own behalf—against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this [Act].”).

79. 33 U.S.C. § 1311(a) (2000).

80. McGaffey, *supra* note 60, at 9.

81. 33 U.S.C. § 1362(12) (2000).

82. See, e.g., *S. Fl. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*,

courts have come to different conclusions in cases involving similar activities.<sup>83</sup> For example, the Ninth Circuit ruled that the stirring up of streambed sediment by re-circling water can be interpreted as a discharge of a pollutant.<sup>84</sup> In contrast, the D.C. Circuit held that a dam that stirs up sediment, discharges supersaturated gases, and changes the water temperature is not adding pollutants.<sup>85</sup>

As a general rule, water allocation activities do not fall under the NPDES permitting program to the extent that the waters involved can be fairly treated as one single water body.<sup>86</sup> The principle behind this rule is cleverly laid out with the following analogy: “If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not ‘added’ soup or anything else to the pot.”<sup>87</sup> In the same sense, if a dam removes pollutants from a lake and then re-deposits them into the same lake, a discharge of a pollutant has not occurred.

Ultimately, the method adopted by the courts to ascertain whether two water bodies are “meaningfully distinct” will determine whether water transfer activities will fall under the reach of the NPDES permitting program. For example, if all waters of the United States are viewed as one giant body of water, as the government’s unitary waters approach implies, then discharges from water transfer stations would simply be re-circulating pollutants already present in the water and would thus be exempted from NPDES permits. On the other hand, if the courts reject the unitary waters approach, then water transfers between two “meaningfully distinct” water bodies could require an NPDES permit.

## 2. Point Source

Under the CWA, a “point source” is defined as “any discernable, confined and discrete conveyance . . . from which pollutants are or may

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273 F.3d 481 (2d Cir. 2001); *Nat’l Wildlife Fed’n v. Consumer Power Co.*, 862 F.2d 580 (6th Cir. 1988); *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982).

83. *Compare Gorsuch*, 693 F.2d at 156, with *Rybachek v. Env’tl. Prot. Agency*, 904 F.2d 1276 (9th Cir. 1990).

84. *Rybachek*, 904 F.2d at 1285 (holding that placer mining that caused rock, sand, and minerals from the streambed to be re-suspended in the water column constituted a discharge of a pollutant as defined by the CWA).

85. *Gorsuch*, 693 F.2d at 175 (holding that water flowing over a dam causing supersaturation of entrained gas in addition to stirring up the downstream sediment did not constitute a discharge of a pollutant as defined by the CWA).

86. *See Consumer Power*, 693 F.2d at 584; *Gorsuch*, 693 F.2d at 175; *see also* Brief for United States as Amicus Curiae, *supra* note 12, at 16-17.

87. *Miccousukee*, 541 U.S. at 110 (quoting *Catskill*, 273 F.3d at 492). In *Catskill*, this analogy was used to illustrate for the reader the differences between its facts and those in *Gorsuch* and *Consumer Power*. *Catskill*, 273 F.3d at 492.

be discharged.”<sup>88</sup> According to EPA regulations, “this definition includes surface runoff collected and channeled by human effort, and discharges through pipes, sewers, or other conveyances leading to privately owned treatment works.”<sup>89</sup> However, the CWA excludes several potential sources of pollution from being a point source. For example, agriculture stormwater discharges and return flows from irrigated agriculture are not point sources.<sup>90</sup>

If the source is determined to not be a point source, then by default it becomes a nonpoint source.<sup>91</sup> In turn, if the pollution comes from a nonpoint source, then it is characterized as nonpoint source pollution. Under the CWA, an NPDES permit is not required for nonpoint source pollution; instead, such pollution is predominately regulated by the states.<sup>92</sup>

Since the CWA treats point and nonpoint sources so differently, “the determination of what constitutes a point source is very consequential.”<sup>93</sup> Generally, the courts have held that the point versus nonpoint source character of a pollutant is determined at the time it first enters the waters of the United States.<sup>94</sup> This interpretation coincides with the EPA’s policy that pollution should be addressed at its source, not at subsequent transfers between two bodies of water.<sup>95</sup>

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88. 33 U.S.C. § 1362(14) (2000).

89. McGaffey, *supra* note 60, at 11 (quoting 40 C.F.R. § 122.2 (1999)).

90. 33 U.S.C. § 1362(14) (2000) (point source “does not include agricultural stormwater discharges and return flows from irrigated agriculture”).

91. *Gorsuch*, 693 F.2d at 165-66.

[T]he Act divides the causes and control of water pollution into two categories, *point sources of pollutants* (regulated through the § 402 permit program) and *nonpoint sources of pollution* (regulated by the states through ‘areawide waste treatment management plans’ under § 208, 33 U.S.C. § 1288). The latter category is defined by exclusion and includes all water quality problems not subject to § 402.

*Id.*

92. *Oregon Natural Desert Ass’n v. Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998) (“[T]he Act provides no direct mechanism to control nonpoint source pollution but rather uses the ‘threat and promise’ of federal grants to the states to accomplish this task.”); *see also* Michael C. Blumm & William Warnock, *Roads Not Taken: EPA vs. Clean Water*, 33 ENVTL. L. 79, 82 (2003) (stating that nonpoint source pollution “remains largely free of federal regulation”).

93. FINDLEY ET AL., *supra* note 57, at 417.

94. *Gorsuch*, 693 F.2d at 175 (stating that the “point or nonpoint character of pollution is established when the pollution first enters navigable water”).

95. *Id.* at 175-76.

The approach adopted by the courts to determine whether two bodies of water are “meaningfully distinct” has the potential to undermine the EPA’s policy. Consider what would happen if the courts adopt the hydrological connection test, proposed by the Water District,<sup>96</sup> to determine whether two bodies of water are meaningfully distinct. Under this approach, transfers between water bodies that do not naturally flow into one another would fall under the reach of the NPDES permit program. If the water is polluted, then once the pollution is transferred it would become point source pollution because water transfer stations are considered point sources.<sup>97</sup> This is true regardless of how the pollution first entered the waters of the United States. For example, if the pollution first enters U.S. waters in compliance with the CWA (from a nonpoint source or an NPDES authorized polluter), and then is subsequently transferred by a regulated water transfer station, the pollution would change from “authorized” pollution to point source pollution, requiring an NPDES permit. This would unjustly hold water transfer facilities accountable for polluted water that they simply move from point A to point B. Furthermore, characterizing bodies of water in this fashion would require multiple parties to obtain NPDES permits for the same pollution.

### 3. Navigable Waters

Under the CWA, “navigable waters” are defined as “the waters of the United States, including the territorial seas.”<sup>98</sup> In adopting this definition, Congress wanted to give “navigable waters” the broadest meaning permissible under the Commerce Clause.<sup>99</sup>

Furthermore, two Supreme Court cases expanded the definition of navigable waters to include non-navigable water bodies that share a significant connection with navigable water bodies.<sup>100</sup> In both of these decisions, the Court discussed factors that should be analyzed when

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96. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 110 (2004).

97. *Id.* at 105.

98. 33 U.S.C. § 1362(7) (2000).

99. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985) (“In adopting this definition of ‘navigable waters,’ Congress evidently intended . . . to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.”).

100. *See id.* (holding that the CWA extends to wetlands that are adjacent to other water bodies over which the government has jurisdiction); Solid Waste Agency of N. Cook County v. U.S. Army of Corps of Eng’rs, 531 U.S. 159, 174 (2001) (holding that “an abandoned sand and gravel pit” falls outside the reach of the CWA because it does not have a significant nexus with a water body over which the government has jurisdiction).



deciding whether two water bodies are sufficiently interconnected to be considered one larger water body.<sup>101</sup> Even though these cases deal with non-navigable water bodies, the same factors can be used by the lower courts to interpret what the Supreme Court meant by “meaningfully distinct” water bodies in its *Miccosukee* decision.

The first of these two Supreme Court cases is *United States v. Riverside Bayview Homes, Inc.*<sup>102</sup> In this case, the Court extended the CWA’s definition of navigable waters to include non-navigable wetlands that are adjacent to navigable water bodies.<sup>103</sup> The Court held that non-navigable wetlands should be considered “waters of the United States” because they affect the water quality of adjacent lakes, rivers and streams in several ways.<sup>104</sup> For instance, even though some wetlands do not receive water from adjacent sources, they can still drain into the adjacent waters.<sup>105</sup> In these circumstances, the wetlands serve as a filter or a purifier for the water draining into the adjacent waters.<sup>106</sup> In addition, the wetlands can prevent flooding and erosion of the adjacent water body by slowing down the flow of surface run-off.<sup>107</sup> Finally, adjacent wetlands function as an integral part of the overall aquatic environment by providing general habitat, spawning, rearing and resting sites for aquatic species.<sup>108</sup> The decision to include non-navigable wetlands within the definition of “waters of the United States” reflects the Court’s recognition of the ecological and biological connection between adjacent waters.

The second of the Supreme Court cases that deal with the expansion of the CWA’s definition of navigable waters to include non-navigable water bodies is *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*.<sup>109</sup> In this case, the Court narrowed its earlier decision in *Riverside* by mandating that there be a minimum level of connection between the non-navigable water body and the adjacent navigable water body.<sup>110</sup> The Court concluded that only non-navigable

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101. *Riverside*, 474 U.S. at 134-35; *Solid Waste Agency of N. Cook County*, 531 U.S. at 170-74.

102. *Riverside*, 474 U.S. at 139.

103. *Id.*

104. *Id.* at 134.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 134-35.

109. *Solid Waste Agency of N. Cook County v. U.S. Army of Corps of Eng’rs*, 531 U.S. 159 (2001).

110. *Id.* at 167.

waters that actually abut, are inseparably bound up with, or have a significant nexus with a navigable waterway would be considered “waters of the United States.”<sup>111</sup> Applying this new standard, the Court concluded that a significant nexus is not present if the only connection between the two water bodies is their concurrent use by a few migratory birds.<sup>112</sup>

#### IV. THE UNITARY WATERS APPROACH

##### A. *An Introduction to the Unitary Waters Approach*

In *Miccosukee*, the government argued for a unitary waters or national approach in defining the nation’s water system.<sup>113</sup> Under this approach, “all the water bodies that fall within the [CWA]’s definition of ‘navigable waters’ . . . should be viewed unitarily for purposes of NPDES permitting requirements.”<sup>114</sup> In other words, all waters of the United States should be viewed as one giant water body. This approach has the ability to significantly diminish the scope of the NPDES permitting program by permanently exempting all water transfers from requiring a permit.

##### B. *An Analysis of the Unitary Waters Approach*

The government presents three arguments to support its unitary waters approach. First, the unitary waters approach preserves the EPA’s longstanding viewpoint that “the process of merely transporting, impounding, and releasing navigable waters that may already contain pollutants does not constitute an ‘addition’ of pollutants to the ‘waters of the United States.’”<sup>115</sup> Second, it preserves the states’ traditional power

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111. *Id.*

112. *Id.* at 174. This holding invalidated the longstanding interpretation commonly known as the “Migratory Bird Rule.” Robert R.M. Verchick, *Toward Normative Rules for Agency Interpretation: Defining Jurisdiction Under the Clean Water Act*, 55 ALA. L. REV. 845, 871-72 (2004). The “Migratory Bird Rule” includes, within the reach of the CWA, any waters “[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties” or “[w]hich are or would be used as habitat by other migratory birds which cross state lines.” Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

113. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105-06 (2004).

114. *Id.*

115. Brief for United States as Amicus Curiae Supporting Petitioner, *supra* note 12, at 16.

to use their water resources as they see fit.<sup>116</sup> Lastly, the text and structure of the CWA signifies Congress's intent to view the nation's water system as a whole for the purposes of NPDES permitting requirements.<sup>117</sup>

### *1. Preserving the EPA's Longstanding View*

The first policy argument used to support the government's unitary waters approach is that it preserves the EPA's longstanding position that water transfer activities are exempted from the NPDES permit program.<sup>118</sup> However, the EPA has never formally adopted this viewpoint.<sup>119</sup> The government gleaned this longstanding position from a pair of cases, commonly known as the "dam" cases.<sup>120</sup> In these cases, the EPA promulgated that, with respect to pollution, an "addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world."<sup>121</sup>

The "dam" cases consist of two circuit court decisions: *National Wildlife Federation v. Gorsuch*<sup>122</sup> and *National Wildlife Federation v. Consumer Power Company*.<sup>123</sup> In *Gorsuch*, a dam had caused a variety of interrelated water quality problems to a river downstream from it.<sup>124</sup> These problems consisted of low dissolved oxygen levels, dissolved minerals and nutrients, water temperature changes, sediment release, and supersaturation.<sup>125</sup> The end result of these water quality changes was the

116. *Id.* at 25 & n.11 ("It 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]]." (quoting 33 U.S.C. § 1251(g) (2000))).

117. *Id.* at 16-21.

118. *Id.* at 15-20.

119. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 490 (2d Cir. 2001) ("Instead, the EPA's position is based on a series of informal policy statements made and consistent litigation positions taken by the EPA over the years, primarily in the 1970s and 1980s.").

120. Brief for United States as Amicus Curiae Supporting Petitioner, *supra* note 12, at 16-17.

121. See *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982); *Nat'l Wildlife Fed'n v. Consumer Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988).

122. *Gorsuch*, 693 F.2d at 156.

123. *Consumer Power*, 862 F.2d at 580.

124. *Gorsuch*, 693 F.2d at 161.

125. *Id.* Supersaturation occurs when water plunges at high velocity into a water body. *Id.* at 164. Depending on the velocity and turbulence, the receiving water body could become aerated in excess of normal concentration. *Id.* This excess aeration is harmless to humans but can be fatal to fish. *Id.*

destruction of nearly a half-million fish.<sup>126</sup> In *Consumer Power*, a dam located on Lake Michigan generated power by forcing water through its turbines.<sup>127</sup> During the normal operation of the dam, fish would be sucked into the generator and would be destroyed as a consequence.<sup>128</sup> Afterwards, the water, along with the dead fish, would be pumped back into Lake Michigan, thereby diminishing water quality.<sup>129</sup>

The EPA has consistently maintained that dam-induced water changes are not covered under the CWA and as such do not require an NPDES permit.<sup>130</sup> In both “dam” cases, the courts gave great deference to the EPA’s interpretation and adopted its viewpoint in their rulings.<sup>131</sup> In arguing for a unitary waters approach, the government has interpreted the “dam” holdings as proof of the EPA’s longstanding position that water transfer activities are exempted from the NPDES permit program.<sup>132</sup>

Recently, three U.S. courts of appeals (including the appellate court in *Miccosukee*) have undermined this position by holding that an NPDES permit can be required for water transfer activities between two separate bodies of water.<sup>133</sup> These three courts recognized that the “dam” courts adopted the EPA’s position that an NPDES permit is only required for point sources that introduce pollutants into waters of the United States from the outside world.<sup>134</sup> However, neither the EPA nor the “dam” courts had established whether the “outside world” included other bodies

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126. Nat’l Wildlife Fed’n v. Gorsuch, 530 F. Supp. 1291, 1302 (D.D.C. 1982), *rev’d*, Nat’l Wildlife Fed’n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982).

127. *Consumer Power*, 862 F.2d at 581-82.

128. *Id.* at 582.

129. *Id.*

130. *Id.* at 587; *see also Gorsuch*, 693 F.2d at 168 (“[The] EPA has never changed its basic position that dams generally do not require NPDES permits.”).

131. *See Consumer Power*, 862 F.2d at 590; *see also Gorsuch*, 693 F.2d at 183 (“[The] EPA’s interpretation is reasonable, not inconsistent with congressional intent, and entitled to great deference; therefore, it must be upheld.”).

132. Brief for United States as Amicus Curiae Supporting Petitioner, *supra* note 12, at 16-17. In its Brief the government stated that the “EPA and the lower courts have long recognized that the process of merely transporting, impounding, and releasing navigable waters that may already contain pollutants does not constitute an ‘addition’ of pollutants to ‘the waters of the United States’ in the sense that the Clean Water Act uses those terms.” *Id.* at 16.

133. *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1368-69 (11th Cir. 2002); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001) (“[T]he transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a ‘discharge’ that demands an NPDES permit.”); *Dubois v. Loon Mountain Recreation Corp.*, 102 F.3d 1273, 1299 (1st Cir. 1996) (stating that the transfer of water from one water body to another constitutes an “addition”).

134. *Miccosukee*, 280 F.3d at 1367; *Catskill*, 273 F.3d at 491; *Dubois*, 102 F.3d at 1299.

of water.<sup>135</sup> All three appeals courts determined that in the “dam” cases, the EPA was not arguing for a complete exemption of all water transfer activities, but only an exemption for those transfers that occur within the same water body.<sup>136</sup>

However, the “dam” cases need to be put in the proper context.<sup>137</sup> First, in both “dam” cases the body of water that was receiving the “polluted water” and the body of water which was the source of the “polluted water” were one and the same.<sup>138</sup> Second, the issue in the “dam” cases was whether certain dam-induced water quality changes constituted discharges of pollutants, not whether the pollutants traveled from one water body to another.<sup>139</sup>

The three appeals courts distinguished the “dam” cases and expressly stated that the EPA had never adopted the position that all water transfer activities were exempted from the NPDES permitting program.<sup>140</sup> All three courts dismissed the exception argument stating that the “outside world” includes other water bodies.<sup>141</sup>

Of the three appellate-level cases, the most pertinent is *Catskill Mountain Chapter of Trout Unlimited v. City of New York*.<sup>142</sup> In *Catskill*, the conflict involved the Shandaken Tunnel, which transferred water from the more polluted Schoharie Reservoir to Esopus Creek, a world class trout stream.<sup>143</sup> In this case, the court refused to adopt the EPA’s position on dam exemptions because unlike the “dam” cases, the water was diverted from one water body through a tunnel to a completely different water body.<sup>144</sup>

135. See *Miccosukee*, 280 F.3d at 1368; *Catskill*, 273 F.3d at 491; see also Brief for the Respondent Friends of the Everglades, *supra* note 14, at 27-28.

136. *Miccosukee*, 280 F.3d at 1367-68; *Catskill*, 273 F.3d at 491; *Dubois*, 102 F.3d at 1299.

137. *Catskill*, 273 F.3d at 492 (“The *Gorsuch* and *Consumer Power* decisions comport with the plain meaning of ‘addition,’ assuming that the water from which the discharges came is the same as that to which they go.”).

138. *Id.* at 491-92.

139. *Id.*

140. See, e.g., *id.* at 490.

If the EPA’s position had been adopted in a rulemaking or other formal proceeding, deference of the sort applied by the *Gorsuch* and *Consumers Power* courts might be appropriate. Instead, the EPA’s position is based on a series of informal policy statements made and consistent litigation positions taken by the EPA over the years, primarily in the 1970s and 1980s.

*Id.*

141. See *supra* text accompanying note 133.

142. *Catskill*, 273 F.3d at 481.

143. *Id.* at 484-85.

144. *Id.* at 492.

The *Catskill* ruling is bolstered by the fact that the EPA has never issued a formal position contradicting the result.<sup>145</sup> Therefore, in light of the decision in *Catskill* and the EPA's response to it, it appears that the government's first argument—preserving the EPA's longstanding unitary waters view—is not entirely accurate. The government's argument will have persuasive value only if the EPA takes the formal position that all water transfer activities merely connecting or conveying navigable waters are exempted from NPDES permitting.

## 2. *Maintaining States' Rights*

The second policy argument in support of the government's unitary waters approach is that such approach preserves the states' traditional power to regulate and use their water resources.<sup>146</sup> This power is codified in section 1251 of the CWA which declares, “[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 this [Act].”<sup>147</sup> It is the government's opinion that requiring NPDES permits for water transfer activities within a state's borders would violate section 1251.<sup>148</sup>

First, requiring NPDES permits for water transfer activities could interfere with the maximum utilization of the states' water resources.<sup>149</sup> In the western United States, water is scarce.<sup>150</sup> Consequently, it is important for these states to be able to transfer water freely within their

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145. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 107 (2004) (“[T]he Government does not identify any administrative documents in which EPA has espoused that position.”). Furthermore, there is some evidence that the EPA took the opposite position in the past. Brief of Amici Curiae Former Administrator Carol M. Browner et al. of the United States Environmental Protection Agency in Support of Respondents, *supra* note 44, at 17-18. In a formal decision, the EPA General Counsel stated “[i]t is therefore my opinion that, even should the finder of fact determine that . . . [t]he ditch is a navigable water, it would still be permissible as a point source where it discharges into another navigable water body, provided that the other point source criteria are also present.” *Id.* (quoting EPA General Counsel Opinions, No. 21 (June 27, 1975)).

146. Brief for United States as Amicus Curiae Supporting Petitioners, *supra* note 12, at 25-28.

147. 33 U.S.C. § 1251(g) (2000).

148. Brief for United States as Amicus Curiae Supporting Petitioners, *supra* note 12, at 25.

149. Brief Amici Curiae of the States of Colorado and New Mexico in Support of Petitioner, *supra* note 44, at 11-22; *see also* Brief Amicus Curiae of the National Water Resources Ass'n et al. in Support of Petitioner, *supra* note 44, at 14-19.

150. Brief Amici Curiae of the States of Colorado and New Mexico in Support of Petitioner, *supra* note 44, at 2 (“West of the 100th Meridian, the nation is generally arid; that is, it receives less than thirty inches of annual precipitation necessary to sustain non-irrigated agriculture.”).

borders in order to meet the needs of their populations.<sup>151</sup> This is especially true in cases of emergency. For instance, over the past few years, some western states have experienced devastating droughts and accompanying wild fires.<sup>152</sup> In order to fight these droughts and fires, it is necessary to quickly transfer vast quantities of water.<sup>153</sup> If NPDES permits were required for these transfers, then it is possible that these transfers would be delayed.<sup>154</sup>

Second, NPDES permits would impair existing state water activities.<sup>155</sup> Many states, especially in the West, move vast quantities of water among and within various bodies of water within their borders in order to meet a wide range of needs.<sup>156</sup> Some of these transfers involve moving water from more polluted water bodies to less polluted ones.<sup>157</sup>

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151. For example, in Colorado sixty percent of its citizens depend on water that is transferred from other areas. *Id.* at 2-3.

152. "In 2002, Colorado experienced its most severe single-year drought on record." Melinda Kassen, *Statutory Expansion of State Agencies' Authority to Administer and Develop Water Resources in Response to Colorado's Drought*, 7 U. DENV. WATER L. REV. 47, 48 (2003). In 2003, California experienced severe wild fires in which 959,955 acres were burned. Joel Rubin et al., *Weather Cools Wildfires' Fury*, L.A. TIMES, Oct 31, 2003, at A1.

153. Brief Amici Curiae of the States of Colorado and New Mexico in Support of Petitioner, *supra* note 44, at 18-20.

154. An application for a NPDES permit is required to be submitted at least 180 days before the date of the initial discharge. 40 C.F.R. § 122.21(c) (2003). Furthermore, a permit is effective 30 days after the agency decisions. 40 C.F.R. § 124.15(b). Therefore, under the normal terms of the NPDES permit program, a state would be required to wait at least 210 days before a NPDES permit could be issued and made effective.

155. Brief Amici Curiae of the States of Colorado and New Mexico in Support of Petitioner. *supra* note 44, at 17-30; Brief of Amici Curiae the Nationwide Public Projects Coalition et al. in Support of Petitioner, *supra* note 44, at 5-14.

156. The California State Water Project is the nation's largest water conveyance system. California Department of Water Resources, *The SWP Today*, <http://www.publicaffairs.water.ca.gov/swp/swptoday.cfm> (last visited Feb. 2, 2005). It consists of 33 storage facilities, 21 lakes and reservoirs, and 662 miles of canals and pipelines. *Id.* This unique system supplies the water for more than twenty million Californians. California Department of Water Resources, *Central Valley Project*, <http://www.publicaffairs.water.ca.gov/swp/cvp.cfm> (last visited Oct. 27, 2005). An example of a smaller water conveyance system is the Colorado-Big Thompson Project. Brief Amici Curiae of the States of Colorado and New Mexico in Support of Petitioner, *supra* note 44, at 16 n.14. In this project, enough water is transferred to irrigate over 600,000 acres. *Id.* at 2.

157. Run-off from snow melt and thunderstorms can contain naturally occurring pollutants that would trigger the need for a NPDES permit if the water containing the run-off is later transferred. Brief Amici Curiae of the National Water Resources Ass'n et al. in Support of Petitioner, *supra* note 44, at 16. Furthermore, the majority of water conveyance systems in the West use open ditches and canals which are directly impacted

If the NPDES permitting program reaches these water transfer activities, then these transfers would require a permit. States could be forced to spend millions of dollars constructing treatment facilities in order to comply with the NPDES permitting process.<sup>158</sup> If the states could not afford to make the changes necessary to comply with the NPDES permit system, then some water transfer activities might be stopped.

Third, permitting water transfer activities could interfere with interstate water allocations.<sup>159</sup> A significant number of water transfer activities occur within interstate stream systems.<sup>160</sup> The water from these systems is allocated by multi-state compacts or Supreme Court decrees.<sup>161</sup> Subjecting these water transfer activities to the NPDES permitting program would have “significant practical consequences” for interstate allocations.<sup>162</sup> For instance, a state that is on the giving end of water allocations could, if its water transfer station were required to obtain a permit, be forced to build expensive treatment facilities or reduce the amount of water that it transfers in order to comply with the permit.<sup>163</sup> As a consequence, the states on the receiving end of these water allocations would experience higher water costs or a decrease in the amount of water available for beneficial use.<sup>164</sup>

However, while requiring an NPDES permit would demand more from individual states in terms of compliance, it is not clear whether subjecting water transfer activities to the NPDES permitting program would unduly infringe on the states’ rights. First, a vast majority of the water transfers would not fall under the reach of the NPDES program because they either involve transfers from more pristine waters to those

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by run-off. Brief Amici Curiae of the States of Colorado and New Mexico in Support of Petitioner, *supra* note 44, at 16 n.13.

158. Brief Amici Curiae of the States of Colorado and New Mexico in Support of Petitioner, *supra* note 44, at 15-16.

To avoid the potential to cause an excursion above the water quality standards of the receiving water body during spring runoff, a transbasin diverter might have to expend millions of dollars to construct a treatment facility or implement so-called best management practices in an attempt to reduce the presence of even natural pollutants.

*Id.*

159. *See supra* note 156.

160. *See, e.g.*, Brief Amici Curiae of the States of Colorado and New Mexico in Support of Petitioner, *supra* note 44, at 1-4.

161. *See, e.g.*, 43 U.S.C. § 6171 (2000) (authorizing the Colorado River Compact signed by Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming); *Arizona v. California*, 373 U.S. 546, 592 (1963) (allocating the lower Colorado River among Arizona, California, and Nevada).

162. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 108 (2004); *see also supra* text accompanying notes 155-157.

163. *See supra* text accompanying note 158.

164. *Id.*



that are less pristine or consist simply of diverting water away from a body of water.<sup>165</sup> Second, even if an NPDES permit is required, there are several ways to expedite the process. The EPA and the states<sup>166</sup> have the authority to issue “general permits” which can cover an entire category of activities.<sup>167</sup> These general permits could substantially streamline the permitting process and provide considerable flexibility in scheduled compliance.<sup>168</sup> In addition, if the states had to issue individual NPDES permits, their familiarity with the affected bodies of water would allow them to act quickly on permit applications.<sup>169</sup>

### 3. *Statutory Interpretation of the Clean Water Act.*

The government argues that the language of the CWA supports its unitary waters approach.<sup>170</sup> As mentioned before, the CWA defines the term “discharge of a pollutant” as “any addition of any pollutant to

165. Brief of Amici Curiae Former Administrator Carol M. Browner et al. of the United States Environmental Protection Agency in Support of Respondents, *supra* note 44, at 24-25.

166. Forty-two out of the fifty states have the authority from the EPA to issue general permits. 65 Fed. Reg. 50,528, 50,529 (Aug. 18, 2000); *see also* Randy Hill, *NPDES Permit Application and Issuance Procedures*, in *THE CLEAN WATER HANDBOOK* 43 (Mark A. Ryan ed., 2d ed. 2003).

167. 40 C.F.R. § 122.28(b)(2)(v) (2003).

Discharges . . . may, at the discretion of the Director, be authorized to discharge under a general permit without submitting a notice of intent where the Director finds that a notice of intent requirement would be inappropriate. In making such a finding, the Director shall consider: the type of discharge; the expected nature of the discharge; the potential for toxic and conventional pollutants in the discharges; the expected volume of the discharges; other means of identifying discharges covered by the permit; and the estimated number of discharges to be covered by the permit. The Director shall provide in the public notice of the general permit the reasons for not requiring a notice of intent.

*Id.*

168. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 108 n.\* (2004).

General permits greatly reduce that administrative burden by authorizing discharges from a category of point sources within a specified geographic area. Once 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.

*Id.*

169. Brief of the States of New York et al. as Amici Curiae in Support of Respondents, *supra* note 44, at 25-26.

170. Brief for United States as Amicus Curiae Supporting Petitioner, *supra* note 12, at 18-20.

navigable waters from any point source.”<sup>171</sup> In this definition, “any” is used to modify “addition,” “pollutant,” and “point source,” but not to modify “navigable waters.” The government thus argues that the absence of the modifier “any” before “navigable waters” indicates Congress’s intent to view the nation’s water system as one large water body.<sup>172</sup> As such, it insists that if Congress wanted to include the movement of water from one water body to another within the reach of the NPDES permitting program, then “it would have made that extraordinary intention manifest.”<sup>173</sup> The government urges that this intention could have been manifested by either adding the word “any” or another appropriate modifier before “navigable waters.”<sup>174</sup> Furthermore, when it intended to refer only to individual water bodies in other parts of the CWA, Congress used appropriate modifiers to so indicate.<sup>175</sup>

Another argument raised by the government to support its interpretation is that it has been expressly recognized that water transfer activities should be regulated through means other than the NPDES permitting program.<sup>176</sup> For example, in section 101(g) the CWA stipulates that the states, not the EPA, have primary responsibility with respect to the development and use of their water resources.<sup>177</sup> Furthermore, Congress has recognized that the water quality issues arising from water transfer activities are closely associated with nonpoint sources of pollution,

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171. 33 U.S.C. § 1362(12) (2000).

172. Brief for United States as Amicus Curiae Supporting Petitioner, *supra* note 12, at 19.

173. *Id.*

174. “At the least, [Congress] would have defined the ‘discharge of a pollutant’ to include ‘any addition of any pollutant to [a specific portion of the] navigable waters from any point source.’” *Id.*

175. 33 U.S.C. § 1312(a) (2000).

Whenever, in the judgment of the Administrator or as identified under section 304, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 301(b)(2) of this Act, would interfere with the attainment or maintenance of that water quality in a *specific portion of the* navigable waters which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

*Id.* (emphasis added).

176. Brief for United States as Amicus Curiae Supporting Petitioner, *supra* note 12, at 25-28.

177. 33 U.S.C. § 1251(g) (2000). The legislative history reveals that “[i]t is the purpose of this amendment to insure that State allocation systems are not subverted.” PUD No. 1 of Jefferson County v. Wash. Dep’t of Ecology, 511 U.S. 700, 721 (1994) (quoting SENATE AND PUBLIC WORKS COMM., 95D CONG., LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977 578 (Comm. Print 1978)).

which do not require an NPDES permit and should be regulated as such.<sup>178</sup>

However, the government's interpretation of the CWA loses momentum when viewed in light of its overall objective. In general, courts should favor interpreting statutory terms in ways that further the overall objective of the statute.<sup>179</sup> As mentioned earlier, the overall objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>180</sup> The government's unitary waters approach would undermine this objective by allowing water from polluted water bodies to be transferred to more pristine water sources. For instance, under the government's unitary waters approach, the NPDES permitting program would not regulate the transferring of water from a waterway, which serves as a repository for raw sewage from factories and towns, to a water body that serves as a drinking water reservoir.<sup>181</sup>

Moreover, discharges of pollutants that occur in water transfer activities will not be adequately regulated by the nonpoint source pollution programs.<sup>182</sup> In general, nonpoint source programs have proven unsuccessful in protecting our waters.<sup>183</sup> A 1998 survey conducted by

178. A discussion in the House Report illustrates this point:

Section 304[e] addresses the problem of nonpoint sources of pollutants. This Section and the information on such nonpoint sources is among the most important in the 1972 Amendments. If our water pollution problems are to be truly solved, we are going to have to vigorously address the problems of nonpoint sources. The Committee, therefore, expects the Administrator to be most diligent in gathering and distribution of the guidelines for the identification of nonpoint sources and the information on processes, procedures, and methods for control of pollution from such nonpoint sources as . . . natural and man made changes in the normal flow of surface and ground waters.

Brief for United States as Amicus Curiae Supporting Petitioner, *supra* note 12, at 26-27 (quoting H.R. Rep. No. 92-911, at 109 (1972)).

179. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 503-05 (1989). See generally Robert R.M. Verchick, *Toward Normative Rules for Agency Interpretation: Defining Jurisdiction Under the Clean Water Act*, 55 ALA. L. REV. 845 (2004).

180. 33 U.S.C. 1251(a) (2000).

181. This example is roughly based on the facts of *Dubois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996).

182. See The National Water Quality Inventory Report to Congress for 1988, 65 Fed. Reg. 43,586, 43,587 (July 13, 2000).

183. "The success in cleaning up pollution from point sources has not been matched by controls over polluted runoff from sources such as farms, urban areas, forestry, ranching, and mining operations." FINDLEY ET AL., *supra* note 57, at 391-92. A recent report to Congress has indicated that "rainwater runoff from urban and agricultural land

the EPA found that nearly forty percent of the nation's waters are so polluted that they cannot support basic activities like swimming and fishing.<sup>184</sup> The same report acknowledges that the majority of the pollution comes from nonpoint sources, which fall outside the reach of the NPDES permitting program.<sup>185</sup> Therefore, if we follow the government's suggestion to treat water transfer activities the same as nonpoint source pollution, we are effectively ignoring the problem. This flies in the face of the objective of the CWA.

*C. Is the Unitary Waters Approach a Viable Interpretation of the Clean Water Act?*

Before discussing whether the unitary waters approach is a viable interpretation of the CWA, it is necessary to review the court's role in reviewing an agency's interpretation. In general, courts give great deference to the construction of a statute by an administering agency.<sup>186</sup> This is especially true in the case of the EPA's interpretations of the CWA because of the complex subject matter involved.<sup>187</sup> However, if an agency's interpretation nullifies another section of the same statute, then it will be ruled unreasonable and rejected.<sup>188</sup>

In *Miccosukee*, the Supreme Court raised concerns over a potential conflict between the government's unitary waters approach and other NPDES provisions.<sup>189</sup> One of these conflicts lies within the "intake credits" provision of the NPDES program.<sup>190</sup> Under this provision, "intake credits" are issued to industrial water users for the pollution that

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are a leading source of impairment." The National Water Quality Inventory Report to Congress for 1988, 65 Fed. Reg. at 43,587.

184. Office of Wastewater Management of the EPA, *Water Pollution Control: 25 Years of Progress and Challenges for the New Millennium 2* (1998), <http://www.epa.gov/npdespub/pubs/25PROG.PDF> (last visited Feb 4, 2005).

185. *Id.*

186. *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 843-44 (1984) (stating that the Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer").

187. "Congress generally intended that EPA would exercise *substantial* discretion in interpreting the [Clean Water] Act." *Nat'l Wildlife Fed'n v. Consumer Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988) (quoting *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 173 (D.C. Cir. 1982)). However, there is some debate on whether the government's unitary waters approach should be given deference because the EPA has never formally adopted it. *See supra* note 145 and accompanying text.

188. *Whitman v. American Trucking Ass'n Inc.*, 531 U.S. 457, 485 (2001) (stating that a reasonable interpretation can never nullify another section of the same statute).

189. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 107-08 (2004) ("The 'unitary waters' approach could also conflict with current NPDES regulations.").

190. 40 C.F.R. § 122.45 (2003).

is already present in the water that they use.<sup>191</sup> When these users return the water after use, these credits ensure that they will not be forced to remove the pollutants that were in the water before it was withdrawn.<sup>192</sup> However, the NPDES program explains that these credits are issued “only if the discharger demonstrates that the intake water is drawn from the same body of water into which the discharge is made.”<sup>193</sup> Therefore, it appears that the NPDES permit *does* regulate water flows within individual water bodies. The government’s approach also conflicts with the water quality standards program of the CWA.<sup>194</sup> This program requires the states to set water quality standards based on the “designated uses of the navigable waters involved.”<sup>195</sup> Generally, the states assign different designated uses not only to separate water bodies, but to different portions of the same water bodies.<sup>196</sup> If the water body fails to achieve its designated use, then the state must allocate a reduction among all NPDES permit holders that are discharging pollutants into the water body.<sup>197</sup> Therefore, this program appears to protect the individual uses of the different water bodies. This dynamic is inconsistent with the government’s unitary waters approach which treats all waters of the United States as one giant water body.<sup>198</sup>

#### V. OTHER POSSIBLE METHODS FOR DEFINING “MEANINGFULLY DISTINCT” WATER BODIES

In *Miccosukee*, the Water District and the Tribe had different opinions on how the Court should define a “meaningfully distinct” water body.<sup>199</sup> The Tribe wanted to group water bodies based on biological and ecosystem characteristics.<sup>200</sup> In contrast, the Water

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191. *Id.*

192. *Miccosukee*, 541 U.S. at 107-08.

193. *Id.* at 107 (quoting 40 C.F.R. § 122.45(g)(4)).

194. The CWA requires states to establish water quality standards for all intrastate waters and to review them every three years. 33 U.S.C. § 1313 (2000).

195. 33 U.S.C. § 1313(c)(2)(A). Some examples of the more common designated uses are: “drinking water, water-based recreation, fishing/eating, aquatic life, agriculture water supply, and industrial water supply.” FINDLEY ET AL., *supra* note 57, at 456.

196. FINDLEY ET AL., *supra* note 57, at 456.

197. 33 U.S.C. § 1313(d).

198. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105-06 (2004).

199. *Id.* at 110.

200. Brief for Respondent Miccosukee Tribe of Indians of Florida, *supra* note 24, at 6-7.

District wanted the Court to focus on whether the water bodies shared a hydrological connection.<sup>201</sup>

#### A. *Biological and Ecosystem Characteristics*

The Tribe argued that “meaningfully distinct” water bodies are those that do not share similar biological and ecosystem characteristics.<sup>202</sup> This approach makes sense when viewed in light of the overall goal of the CWA: “to restore . . . the chemical, physical, and biological integrity of the Nation’s waters.”<sup>203</sup> In short, biological integrity, and the life forms that a water body naturally supports, cannot be restored without addressing the chemical composition and the physical make-up of the water. For example, fish that are naturally occurring in a stream will no longer thrive there if the water becomes too acidic or too warm (to name a few of many changes that a water body can undergo with the addition of pollutants).<sup>204</sup> By focusing on the natural biological and ecosystem characteristics of water as a means of grouping water bodies together, as the Tribe encouraged, the overarching goal of the CWA would be furthered.

Furthermore, a biological and ecosystem approach to classifying water systems is not a new one. The Supreme Court has adopted this approach when determining whether a non-navigable water body should fall within the CWA’s definition of “navigable waters.”<sup>205</sup> In *United States v. Riverside Bayview Homes, Inc.*, the Supreme Court held that non-navigable wetlands which significantly affect the water quality and aquatic ecosystem of an adjacent navigable water body should be included within the reach of the CWA.<sup>206</sup> With this decision, the Court acknowledged the importance of ecological and biological distinctions between water bodies.<sup>207</sup>

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201. Brief for Petitioner, *supra* note 31, at 6-7.

202. Brief for Respondent Miccosukee Tribe of Indians of Florida, *supra* note 24, at 6-7.

203. 33 U.S.C. § 1251(a) (2000).

204. *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 183 (D.C. Cir. 1982).

205. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 167 (2001) (stating that the Court “found that Congress’ concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands ‘inseparably bound up with the ‘waters’ of the United States’”); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985); *see supra* text accompanying notes 102-108.

206. *Riverside*, 474 U.S. at 139.

207. *Id.*

*B. Hydrological Connections*

If the Court decided to define “meaningfully distinct” based on hydrological connections, then the focus would be on whether bodies of water naturally intermingle with each other.<sup>208</sup> The rationale behind this division is that if the waters already intermingle, then taking water from one source and transferring it to another will have no effect.<sup>209</sup>

This approach appears to be in line with the overall objective of the CWA. If the waters naturally share a significant hydrological connection, then pumping water between sources will have no additional effect on the physical, chemical, or biological integrity of the waters.<sup>210</sup> This is also consistent with the EPA’s position involving the “dam” cases because mere conveyances or transfers within the same body of water would be excluded.<sup>211</sup>

However, if the pumping activity is significantly mixing the two sources beyond the naturally occurring transfer, then this approach begins to undermine the overall objective of the CWA. For example, in *Miccosukee*, natural seepage between the Canal and the Wetland was found, and the Water District used the existence of such water flow to draw a hydrological connection between the two water bodies.<sup>212</sup> While this was a hydrological connection, the water was being pumped from the Canal into the Wetland at a significantly higher rate than the natural gradual seepage from the Wetland to the Canal.<sup>213</sup> Furthermore, the natural mixing of water was found to flow from the Wetland to the Canal, the opposite direction of the water transfer from the pumping activity.<sup>214</sup> This indicates that there was no naturally occurring transfer of the water in the direction of the pumping mechanism. Consequently, the pumping activity was mixing the two sources beyond any naturally occurring transfer, which in this case was threatening the biological

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208. Brief for Petitioner, *supra* note 31, at 6-7.

209. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 109-10 (2004).

210. *Id.* at 109-10.

211. See *supra* text accompanying notes 120-132.

212. *Miccosukee*, 541 U.S. at 109-11.

213. Water is pumped from the Canal to the Wetlands at 2880 cubic feet per second. Brief for Respondent Miccosukee Tribe of Indians of Florida, *supra* note 24, at 8.

214. The Canal is east of the Wetland and the natural flow of the water is eastward. *Id.* Therefore, absent the water transfer station, the water would naturally flow from the Wetland into the Canal. *Id.*

integrity of the Wetland.<sup>215</sup> Thus, this transfer undermined the overall purpose of the CWA, and the water transfer facility should have been required to obtain an NPDES permit.

### C. A Possible Compromise

It is possible for the Court to adopt both approaches in a two step process. First, the Court must determine whether the two water bodies have similar biological characteristics and/or ecosystems. If they do possess such similar qualities, then the water bodies can be viewed as one larger water body and the NPDES permitting program would not reach any water transfers between them. However, if they do not possess similar biological characteristics or ecosystems, then the Court must determine whether the two water bodies are so hydrologically connected that the commingling of the two water sources would still occur to the same degree absent human intervention. If the Court determines that a sufficient amount of water naturally flows between them, then these water bodies are viewed as one and any water transfers between them are exempted from the NPDES permit program. On the other hand, if the Court determines that they are not significantly hydrologically connected, then these two water bodies should be considered “meaningfully distinct” and any water transferred between them can be regulated by the NPDES permit program.

## VI. POTENTIAL CONSEQUENCES

The potential consequences of subjecting water transfer activities to NPDES permit requirements can be significant, especially for the western states. Typically, the western states receive less than thirty inches of rain a year.<sup>216</sup> This rainfall does not satisfy the water needs of the citizens within these states.<sup>217</sup> Therefore, it is necessary to transfer water through a complex system of man-made reservoirs and natural water systems.<sup>218</sup> These transfer systems could be held responsible for the clean-up costs for a disproportionate amount of pollution. As indicated above, if water transfer activities are considered point sources regulated by the CWA, then any pollutant that passes through them becomes the responsibility of the water transfer manager.<sup>219</sup> Water

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215. *Miccousukee*, 541 U.S. at 101-02.

216. Brief Amici Curiae of the States of Colorado and New Mexico in Support of Petitioner, *supra* note 44, at 2.

217. *Id.*

218. *Id.*; see *supra* note 156 and accompanying text.

219. Brief of Amici Curiae the Nationwide Public Projects Coalition et al. in Support of Petitioner, *supra* note 44, at 6-12.



managers would be responsible for cleaning any pollutant that passes through their system, regardless of origin. To put this in perspective, a water manager located in Southern California could be responsible for a nonpoint source pollutant that enters the Colorado River in Arizona but is later conveyed by a water transfer station in San Diego. Additionally, these water managers would be civilly and criminally liable for the pollution.<sup>220</sup>

The facts in *Miccosukee* highlight the potential unfairness of holding water transfer managers responsible for the pollution that passes through their stations.<sup>221</sup> In *Miccosukee*, the Water District was brought into court for pollution that was generated from agricultural run-off.<sup>222</sup> However, a quick look at the parties of the case shows that no person or organization producing the pollutant will be held liable for this pollution.<sup>223</sup> Why? Because agricultural run-off is specifically defined as a nonpoint source and as such, is outside the reach of the NPDES permit program.<sup>224</sup> Therefore, the Water District was sued over a pollutant that, absent a subsequent transfer point, would not be subject to NPDES regulation. Furthermore, the Water District had no choice but to pump the polluted water.<sup>225</sup> If the pumps were turned off, a populated area would have been flooded.<sup>226</sup>

On the other hand, even though regulating water transfers has the potential to unfairly prejudice water managers, this decision does have its justifications. Primarily, as mentioned earlier, to exempt all water transfers would undermine the overriding policy of the CWA.<sup>227</sup> In addition, regulating water transfers presents an alternative for the unsuccessful nonpoint source pollution plan that is currently in place.

The CWA has not been successful in eliminating nonpoint source pollution from U.S. waters.<sup>228</sup> In a 1998 report to Congress, the EPA reported that thirty-five percent of rivers and streams and forty-five percent of lakes are still impaired and further acknowledged that

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220. 33 U.S.C. § 1319(c) (2000).

221. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004).

222. *Id.* at 100-02.

223. The only defendant is the South Florida Water District. *Id.* at 95.

224. 33 U.S.C. § 1362(14) (2000); *see supra* text accompanying note 90.

225. *See supra* notes 20-23 and accompanying text.

226. *See supra* text accompanying note 20.

227. *See supra* Section IV(B)(3).

228. *See* Nancy Stoner, Clean Water at Risk: A 30th Anniversary Assessment of the Bush Administration's Rollback of Clean Water Protections 9-24 (2002), [http://www.amrivers.org/doc\\_respository/cwa30.pdf](http://www.amrivers.org/doc_respository/cwa30.pdf) (last visited Feb 4, 2005).

nonpoint source pollution is the main reason why these waters are still polluted.<sup>229</sup> Moreover, the report went on to state that the leading cause of noncompliance of rivers and streams is nonpoint source run-off from agriculture.<sup>230</sup>

Currently, there are federally subsidized facilities that are used to improve water quality.<sup>231</sup> These publicly owned treatment works (POTWs) collect wastewater from surrounding areas and remove harmful pollutants from the waste so that it may be safely discharged into the receiving water body.<sup>232</sup> Water transfer stations could follow this model and act as treatment centers for nonpoint source pollution that enters U.S. waters. This approach might be a fair balance between the inequity of holding water transfer managers liable for another's pollution and the need to develop a program addressing nonpoint source pollution. However, this approach would be extremely costly.<sup>233</sup> In the end, a proposal of this magnitude would ultimately have to be approved by Congress.

## VII. CONCLUSION

In sum, how the Court ultimately defines “meaningfully distinct” water bodies will determine whether water transfer activities fall within the reach of the NPDES program. Under the government’s unitary waters approach, all water transfers would not require NPDES permits.

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229. Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation, 65 Fed. Reg. 43,586, 43,587 (July 13, 2000).

230. *Id.*; see also David Zaring, *Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future*, 20 HARV. ENVTL. L. REV. 515, 517-18 (1996) (stating that nonpoint sources account for sixty-five to seventy-five percent of the pollution in the nation’s most polluted waters and that agriculture run-off is “the single largest nonpoint source of surface water pollution”).

231. See FINDLEY ET AL., *supra* note 57, at 454-55 for a general discussion of POTWs.

232. *Id.*

Public owned treatment works (POTWs) collect wastewater from homes, commercial buildings, and industrial facilities and transport it via a series of pipes, known as a collection system, to the treatment plant. The POTW removes harmful organisms and other contaminants from the sewage so it can be discharged safely in the receiving water body.

*Id.* In order to encourage the construction of POTWs, the government created a \$60 billion federal grant program. *Id.* at 455. As a condition of receiving grant money, the states were required “to establish area-wide management agencies with both planning and regulatory functions for waste treatment.” *Id.*

233. In a 1998 report, the EPA suggested that it would cost an estimated \$139.5 billion to correct the current water quality problems. Office of Wastewater Management, *Water Pollution Control: 25 Years of Progress and Challenges for the New Millennium 2* (1998), <http://www.epa.gov/npdespub/pubs/25PROG.PDF> (last visited Feb 4, 2005).

In contrast, under the Tribe's biological and ecosystem approach and the Water District's hydrological approach, at least some water transfer activities would be regulated by the NPDES program. Although the government presents several arguments to support its approach, none of them are clearly convincing. Furthermore, its approach appears to conflict with other aspects of the CWA, possibly causing the Court to reject it on those grounds alone. However, the government is correct that exposing water transfer activities to the NPDES program could unfairly shift the clean-up of water pollution to the people in charge of these transfer stations. This reason alone is insufficient to totally exempt all water transfer activities from the NPDES program regardless of their environmental impacts. Instead, the government should treat these water transfer points as an opportunity to solve the nonpoint source pollution problems facing the nation.

Both the Water District's and the Tribe's approach appear consistent with the overall objective of the CWA. Instead of choosing one approach over the other, it would make the most sense to adopt them both in a two-step test.<sup>234</sup> This test would ensure that water transfers causing environmental harm to the receiving water body would fall within the reach of the NPDES permit program, but would not impose NPDES permitting requirements on water transfers within the same water body.

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234. *See supra* Part V.C.

