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Miccosukee and its Implications for National Discharge Elimination System Permits

Miccosukee Tribe of Indians of Florida v. South Florida Water Management District,1 established that, under the Clean Water Act (CWA),2 a National Pollution Discharge Elimination System (NPDES) permit is required to transfer polluted water from one source to another, otherwise disconnected, body of water, regardless of whether the transferring facility itself adds any pollutants to the water.3 The court refused, however, to enjoin the transfer.4

In 1999, Miccosukee Tribe and Friends of the Everglades brought suit in federal court against the South Florida Water Management Agency over its operation of a pump transferring polluted water from a drainage canal to another waterway in Broward County, Florida.5 The plaintiffs claimed that the water transfer constituted a discharge of pollutants without a permit and was, thus, a violation of the CWA.6 Section 402 of the Clean Water Act forbids the discharge of pollutants from a point source into navigable waters without a NPDES permit.7 The District Court granted summary judgment for the plaintiffs and issued an order enjoining operation of the pump.8 The Eleventh Circuit affirmed the summary judgment order, holding that a pumping station that discharged runoff water constituted a “point source” within the meaning of the CWA and that the appellant water agency thus needed an NPDES permit to operate it.9 However, the court reversed the lower court’s granting of an injunction, stating that an injunction was inappropriate because it would impose greater costs on local residents than benefits to the receiving waterway.10

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1. 280 F.3d 1364 (11th Cir. 2002).
4. Id. at 1371.
5. Id. at 1366.
6. Id.
8. Miccosukee, 280 F.3d at 1366.
9. Id. at 1368-69.
10. Id. at 1369.
Section 1311 of the CWA prohibits pollutant discharges that are not sanctioned by a permit. Specifically the Act prohibits the addition of pollutants to navigable waters from a point source. The Act further defines a point source as "any discernible, confined and discrete conveyance." Section 1342 allows the EPA to issue NPDES permits for the operation of a given point source subject to certain regulatory provisions, including effluent limits and monitoring and reporting requirements. There are several ecological advantages to the NPDES, such as regulation of technological standards applied to water treatment and transportation as well as limitations on total pollution levels in affected waters. Permits also facilitate compliance; an NPDES permit holder may not only be ordered to comply or face a civil action in court but may also be subjected to criminal penalties for violating the permit terms.

In Miccosukee, the water district maintained that its S-9 pumping station, which merely moved polluted water from one waterway (the C-11 canal) to another (the A-3A), did not constitute a "point source" under the CWA because it did not add any pollutants to the water. High levels of phosphorous were already present in the water before it passed through the pump (S-9). The Eleventh Circuit disagreed, instituting a "but for" test to determine whether a point source is the "cause-in-fact of the discharge of pollutants." In essence, because the water in the C-11 canal never would have flowed into the A-3A, but for the S-9 pump, the

12. A cornerstone of the Clean Water Act is that the "discharge of any pollutant" from a "point source" into navigable waters of the United States is unlawful unless the discharge is made according to the terms of an NPDES permit obtained from either the United States Environmental Protection Agency ("EPA") or from an authorized state agency. Ass'n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc., 299 F.3d 1007 (9th Cir. 2002); 33 U.S.C. §§ 1311(a), 1342; see also Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist., 13 F.3d 305, 308 (9th Cir.1993).
16. If a permit writer finds "that technology-based effluent limits are not sufficient to ensure that water quality standards, designed to protect the water quality, will be attained in the receiving water...the CWA (section 303(b)(1)(c)) and NPDES regulations (40 CFR 122.44(d)) require that the permit writer develop more stringent, water quality-based effluent limits designed to ensure that water quality standards are attained." EPA, NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM, WATER QUALITY AND TECHNOLOGY-BASED PERMITTING, available at http://cfpub2.epa.gov/npdes/generalissues/watertechnology.cfm?program_id=45 (last visited Sept. 29, 2003).
17. 33 U.S.C. § 1319(c).
18. Miccosukee, 280 F.3d at 1367-68.
19. Id. at 1368.
pump was a "point source," and the water agency needed an NPDES permit in order to comply with the CWA.20

Some have criticized the Eleventh Circuit decision in Miccosukee as opening the flood gates for EPA interference with "local government autonomy over water management decisions."21 For instance, in a letter to Department of the Interior Secretary Gale Norton, the attorneys general of Arizona, Colorado, Montana, New Mexico, Utah, and North and South Dakota urged Secretary Norton to side with the South Florida Water Management Agency, claiming that the ruling in Miccosukee "raises an issue of vital importance to the economic and social well-being of the West,"22 a region where redistributing water to other states is common practice. Indeed, the Ninth Circuit recently cited Miccosukee in holding that the CWA "does not require that the discharged water be altered by man...because the goal of the CWA is to protect receiving waters, not to police the alteration of the discharged water."23 It is now up to the Supreme Court24 to determine whether the Eleventh Circuit should have adopted the approach of the D.C. and Sixth Circuits, which have interpreted the CWA to apply "only if the point source itself physically introduces a pollutant into water from the outside world."25

Although the Eleventh Circuit ruled that an NPDES permit was required, it vacated the lower court's injunction ordering the water agency to cease operations until in compliance with the CWA because "the cessation of the S-9 pump would cause substantial flooding in western Broward County which, in turn, would cause damage to and displacement of a significant number of people."26 The court also noted not only that the injunction could not be "rightly enforced," but also that the plaintiffs had conceded that they wanted the defending agency to apply for a permit within a reasonable time rather than have the district

20. Id. at 1369. The court added that it did not matter that both the A-3A and the WCA-3A historically constituted one body of water in the Florida Everglades, before man made them into "separate and distinct bodies of water" but rather that the two were separate at the time of the S-9 pumping. Id. at 1369 n.8.
21. On November 25, the Association of Metropolitan Sewerage Agencies, along with the City of New York, the National League of Cities, the Association of Metropolitan Water Agencies, and the National Association of Flood and Stormwater Management Agencies, filed an amicus curie brief with the United States Supreme Court that urged the court to overturn the Eleventh Circuit decision. AMSA Clean Water News, Legal Briefs (Jan. 2003), at http://www.amsa-cleanwater.org/pubs/cleanwater/jan03/7.cfm.
26. Miccosukee, 280 F.3d at 1369-70.
court's injunction enforced at once. Nonetheless, subsequent opinions addressing sanctions and injunctions as appropriate remedies have eschewed discussion of whether the plaintiffs' concession in Miccosukee had any bearing on the Eleventh Circuit's decision. Instead, more recent cases have merely interpreted the Eleventh Circuit as ruling that "what cannot be done must not be ordered to be done."  

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27. Id. at 1371.