June 2005

Meaningfully Distinct Waters, the Unitary Water Theory, and the Clean Water Act: Miccosukee v. South Florida Water Management District

Priscillia de Muizon

Follow this and additional works at: http://scholarship.law.berkeley.edu/elq

Recommended Citation
Available at: http://scholarship.law.berkeley.edu/elq/vol32/iss3/3

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z3FTG11

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcer@law.berkeley.edu.
“Meaningfully Distinct” Waters, the Unitary Waters Theory, and the Clean Water Act:

Miccosukee v. South Florida Water Management District

Priscillia de Muizon*

The Miccosukee Tribe of Indians and Friends of the Everglades brought suit against a water management district in southern Florida, alleging that it was in violation of the Clean Water Act for failing to obtain a National Pollution Discharge Elimination System (NPDES) permit for a pump which propels polluted water from a drainage canal into the Everglades. On appeal, the United States Supreme Court remanded the case for further development of the record on whether the canal and water conservation area are “meaningfully distinct” bodies of water for permitting purposes. On remand the defendants will be able to pursue the “unitary waters theory” advanced by the United States as amicus curiae late in the stages of litigation, which posits that all navigable waters of the United States are one, and that movement of water (and pollutants) from one navigable water body to the other does not require an NPDES permit. This note explores the potential implications of the unitary waters theory and concludes that the lower court will reject it on remand. It also discusses the related but discrete issue of whether the two water bodies in question are “meaningfully distinct.” Finally, it argues that an NPDES permit for the pump will not actually solve what is at the heart of this dispute - pollution of the Everglades, and that efforts should instead be focused the
state and federal projects already working to decrease the nonpoint source pollution that is poisoning this national treasure.

Introduction .......................................................................................................................... 419

I. Regulating Discharges of Pollution under the Clean Water Act .......................................................................................................................... 420
   A. Point Sources, Nonpoint Sources, and the Permitting Requirement .................................................................................................................. 420
   B. What Gives Rise to a Cause of Action Under the Clean Water Act? .................................................................................................................. 421
      3. Borden Ranch Partnership v. United States Army Corps of Engineers ........................................................................................................ 424

II. Miccosukee v. South Florida Water Management District .......................................................................................................................... 425
   A. Factual Background .......................................................................................................................... 425
   B. Early Everglades Litigation and the Everglades Forever Act .......................................................................................................................... 429
   C. Miccosukee—Proceedings in the District Court .......................................................................................................................... 433
   D. Miccosukee—Proceedings in the Eleventh Circuit .......................................................................................................................... 435
   E. Miccosukee—Proceedings in the Supreme Court .......................................................................................................................... 436
      1. Petition for Certiorari and the Critical Amicus Brief .......................................................................................................................... 436
      2. The Supreme Court Decision .......................................................................................................................... 438

III. Prediction for Remand .......................................................................................................................... 439
   A. The Unitary Waters Theory Will Likely Be Rejected .......................................................................................................................... 440
      1. The Eleventh Circuit Already Rejected the Unitary Waters Theory .......................................................................................................................... 440
      2. The Supreme Court Has Shown Suspicion Towards the Unitary Waters Theory .......................................................................................................................... 440
      3. Other Circuits Have Already Rejected the Unitary Waters Theory .......................................................................................................................... 442
      4. EPA Already Addressed and Rejected the Unitary Waters Theory .......................................................................................................................... 444
      5. Purposes and Goals of the Clean Water Act .......................................................................................................................... 445
   B. Issue of “Meaningfully Distinct” Water Bodies Remains for the Complex Hydrology of Southern Florida .......................................................................................................................... 446
   C. Addressing Nonpoint Source Pollution and the Relevance of Programs Already in Place .......................................................................................................................... 448

Conclusion .......................................................................................................................... 451
INTRODUCTION

After the infamous 2004 hurricane season came to a close in Florida, bringing much death and destruction in the wake of Hurricanes Charley, Frances, Ivan and Jeanne, state and local officials thanked the complex system of levees, pumps and canals in South Florida for mitigating the damage the hurricanes could have unleashed.¹ This extensive and expensive water management system, run by the Central and South Florida Flood Control Project ("C&SF Project" or "Project"), protects the expanding south Florida metropolitan centers, including Miami, Fort Lauderdale, and West Palm Beach, from the regular flooding that accompanies storms during the hurricane season.

Originally designed to reclaim swampland for agriculture and housing, the system also protects the unique ecological region known as the Everglades from the encroaching pollution that inevitably accompanies growth. But the Supreme Court’s 2004 decision in South Florida Water Management District v. Miccosukee Tribe of Indians threatens the C&SF Project’s ability to effectively protect the Everglades from severe pollution—and, more generally, the federal government’s power to regulate pollution threatening waterways across the nation—by remanding the case for further consideration of what constitutes a body of water under the Clean Water Act (CWA or "Act").²

This note begins by discussing the regulation of pollution under the CWA. It then considers the physical setting and procedural history of the Miccosukee case and the Supreme Court’s reaction to the “unitary waters theory” that the United States advanced as amicus curiae in the late stages of the Miccosukee lawsuit. The potential implications of the “unitary waters theory” and related but discrete issue of whether the segments of the C&SF Project in question are “meaningfully distinct” bodies of water under the CWA are also discussed. This note predicts that the lower courts will—and should—reject the unitary waters theory. Finally, this note argues that any future resolution to this dispute should incorporate and continue to foster the state and federal projects already working towards reductions of nonpoint source pollution poisoning the Everglades.

I. REGULATING DISCHARGES OF POLLUTION UNDER THE CLEAN WATER ACT

A. Point Sources, Nonpoint Sources, and the Permitting Requirement

The CWA\(^3\) was enacted to restore and maintain the chemical, physical, and biological integrity of the nation’s waters, to make the nation’s increasingly-polluted waters “fishable and swimmable” by 1983, and to cease the discharge of pollutants into waterways by 1985.\(^4\) To achieve these grand goals, the Act focused on the more obvious sources of water pollution: point source discharges. The term “point source” is defined by the Act as “any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container... from which pollutants are or may be discharged.”\(^5\)

Congress specifically focused on pollution from point sources for several reasons. First, identifying point sources is a more manageable task than trying to identify all of the nonpoint sources that may be polluting a waterway.\(^6\) Relatedly, because point sources often trace back to a particular industry or activity, assigning responsibility for point-source pollution is easier than for diffuse nonpoint source pollution.\(^7\) Finally, point sources are more amenable to end-of-pipe treatment, regulation, and permitting. In placing the bulk of its emphasis on point sources, the CWA does not adequately address nonpoint source pollution, which is usually the result of rainfall moving over and through the ground, picking up and carrying away natural and human-made pollutants such as fertilizers, pesticides, oil, grease, toxic chemicals, sediments and atmospheric deposition, ultimately depositing them into rivers, lakes, wetlands and coastal waters.\(^8\)

The CWA prohibits discharge of pollutants into waterways from any point source unless the discharger obtains a National Pollution Discharge Elimination System (NPDES) permit.\(^9\) The United States Environmental Protection Agency (EPA) is primarily responsible for administering the NPDES permit system. Though it may delegate this power to the states, the EPA retains power to veto state-issued permits or withdraw state

---

An NPDES permit provides two levels of pollution control: "technology-based limits (based on the ability of dischargers in the same industrial category to treat wastewater) and water quality-based limits (if technology-based limits are not sufficient to provide protection of the water body)."\textsuperscript{11} "[W]hile the effluent limitations focus on the composition of the waste stream as it flows out of the discharge pipe, water quality standards focus on the overall quality of the receiving water."\textsuperscript{12} NPDES permits thus transform the Act's general regulatory requirements into enforceable obligations on individual dischargers.\textsuperscript{13} An NPDES permit from federal or state government must undergo a public hearing before issuance and is issued for a fixed term; state-issued permits have a five-year maximum.\textsuperscript{14} Permit violations can result in injunctions, revocation of the permit, and criminal and civil penalties.\textsuperscript{15}

Under the CWA, nonpoint sources are governed by a far more lenient standard than point sources\textsuperscript{16} and do not require permits.\textsuperscript{17} Thus, a nonpoint source discharger does not have to undergo the lengthy and often expensive application process, public comment period, periodic reviews, monitoring, and renewals of the NPDES permit. Accordingly, many disputes arise regarding whether a certain source of pollution qualifies as a point source or nonpoint source.\textsuperscript{18}

\section*{B. What Gives Rise to a Cause of Action Under the Clean Water Act?}

Any discharge of a pollutant from a point source into navigable waters of the United States without an NPDES permit violates the CWA.\textsuperscript{19} The statute defines all of these crucial terms. Under the Act, the term "pollutant" means "dredged soil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological

\footnotesize{\textsuperscript{10} 33 U.S.C. § 1342(c).  
\textsuperscript{12} Andreen, \textit{supra} note, 6 at 548.  
\textsuperscript{13} Id. at 562.  
\textsuperscript{14} 33 U.S.C. § 1342.  
\textsuperscript{15} Id.  
\textsuperscript{16} Although it does not provide regulations on nonpoint sources, the Act does make a reference to them. "[I]t is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution." 33 U.S.C. § 1251.  
\textsuperscript{17} 33 U.S.C. § 1342.  
\textsuperscript{18} See, e.g., United States \textit{v.} Plaza Health Labs., Inc., 3 F.3d 643 (2d Cir. 1993) (holding that a human being was not a point source subject to criminal liability under Clean Water Act); Concerned Area Residents for the Env't \textit{v.} Southview Farm, 34 F.3d 114 (2d Cir. 1994) (holding that animal feeding lot operation was a point source under Clean Water Act, which is not subject to any agricultural exemption).  
\textsuperscript{19} 33 U.S.C. § 1342.}
materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” 20 Navigable waters are defined as waters of the United States. 21 Point sources, as noted above, are “any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, discrete fissure, [or] container ... from which pollutants are or may be discharged.” 22 Finally, “discharge” means “any addition of any pollutant to navigable waters from any point source.” 23

However, the Act fails to define the word “addition.” 24 And therein lies the controversy in Miccosukee: how to determine whether two neighboring water bodies are distinct such that diverting polluted water from one into the other is “adding” pollutants to the latter. Three major cases in the last two decades have centered around the issue whether the discharge of a pollutant from a point source qualifies as an “addition” under the CWA: two concern dams and one involves “deep ripping” of wetlands.


Defendants in the Miccosukee case relied on two critical cases regarding dam-induced water quality changes which illustrate important aspects of interpreting the terms “discharge” or “addition” of pollutants under the CWA. In the first case, National Wildlife Federation v. Gorsuch, the District of Columbia Court of Appeals deferred to the EPA’s position that an NPDES permit was not required for a dam to release water into a downstream river. 25 The National Wildlife Federation argued that dam-induced water quality changes (such as low dissolved oxygen, dissolved minerals and nutrients, water temperature changes, sediment release and supersaturation) constituted a “discharge of a pollutant” under the CWA. 26 In contrast, the EPA took the position that because dams did not actually add pollutants from the “outside world,” the discharge of dammed water did not qualify for regulation under the Act and instead should be regulated through state programs addressing nonpoint source pollution. 27

In analyzing the claims, the court identified five elements which must be present for dams to require NPDES permits: “(1) a pollutant must be

---

20. 33 U.S.C. § 1362(6); exceptions omitted.
25. 693 F.2d 156 (D.C. Cir. 1982).
26. Id. at 161; 33 U.S.C. § 1362(12).
27. Gorsuch, 693 F.2d at 161, 165.
added to navigable waters from a point source." The dispute centered on whether water released through the dam qualified as "pollutants" and whether they constituted an "addition" of a pollutant "from" a point source. Plaintiffs argued that any adverse change in the quality of reservoir water from its natural state involved a pollutant. Furthermore, the release of polluted river water through the dam constituted an addition from a point source to the waters below the dam. The EPA argued that a pollutant must be added from the outside world to be considered an added pollutant. For example, because dam-caused pollution passes through the dam from one body of navigable water into another—i.e., from the reservoir into the downstream river—it does not contribute anything not already in the river and thus is not "adding" a "pollutant" under the Act. The EPA further argued that water quality effects, such as low dissolved oxygen and temperature changes, are not included in the statutory term "pollutant." The D.C. Circuit reversed the district court's judgment in favor of plaintiffs, finding the EPA's interpretation of the CWA reasonable and entitled to "great deference."


The parties in Miccosukee also looked to another dam case, National Wildlife Federation v. Consumers Power Co., to decipher whether a pollutant has been added to a body of water. Here, the Sixth Circuit found that the facility's movement of pollutants—live and dead fish and fish remains—was not an "addition" of pollutants to navigable waters under the CWA. The court used the same framework laid out in Gorsuch. Because the fish were clearly biological materials which fell under the definition of "pollutant[s]," the crucial issue again was the term "added." The court found that since the fish always remained within the waters of the United States, albeit on either side of the facility, there was

28. Id. at 165 (emphasis in original).
29. Id.
30. Id.
31. Id.
32. Id.
33. Id.
35. Gorsuch, 693 F.2d at 183. The court noted that the National Wildlife Federation was free to seek a legislative solution to solve the issue of whether dams should be regulated by the NPDES program. Id.
36. 862 F.2d 580 (6th Cir. 1988).
37. Id. at 581.
38. Id. at 583 (citing Gorsuch, 693 F.2d at 165).
39. Id. at 583-84.
in fact no "addition" of fish parts to the river. From the court's point of view, the facility merely "changes the movement, flow, or circulation of navigable waters when it temporarily impounds waters... in a storage reservoir, but does not alter their character as waters of the United States." Therefore, it could not be considered a point source "adding" pollution to a navigable water and was not in violation of the CWA for operating without an NPDES permit.

3. Borden Ranch Partnership v. United States Army Corps of Engineers

In a more recent case, Borden Ranch Partnership v. United States Army Corps of Engineers, the Supreme Court upheld a Ninth Circuit ruling that “deep ripping” of soil could result in the “addition” of a pollutant. Angelo Tsakopoulos, a real estate developer in the Central Valley of California, wished to convert a cattle ranch into vineyards and orchards. Because the unique hydrological features of the land would not naturally permit the deep root systems of vines to thrive, the soil had to undergo “deep ripping” for vineyards to be planted. This procedure involved using a tractor to drag four- to seven-foot long metal prongs through the soil, piercing a buried layer of clay that prevented surface water from penetrating more deeply into the soil.

After Tsakopoulos deep ripped portions of his property over a three year period—including protected wetland areas subject to cease and desist orders from the United States Army Corps of Engineers (“Corps”)—the Corps and EPA issued a regulatory guidance letter distinguishing deep ripping from normal plowing activities. The letter concluded that deep ripping in wetlands “destroys their hydrological integrity” and “therefore requires a permit under the CWA.” Shortly thereafter, the Corps concluded that Tsakopoulos had continued to deep rip without permission.

40. Id. at 585. The court also held that the water never lost its status as a water of the United States by passing through the dam. Also, the general congressional policy that NPDES permits are not required for pollution induced by dams, and the fact that Congress specifically refers to pollution resulting from dams in the “nonpoint source” portion of the Clean Water Act, worked to support the defendants’ position. Id. at 588; 33 U.S.C. § 1314(f)(2)(F) (2000).
41. Consumers Power, 862 F.2d at 589.
42. Id.
43. 537 U.S. 99 (2002), aff’g by an equally divided Court 261 F.3d 810 (9th Cir. 2001).
44. Borden Ranch P’ship v. U.S. Army Corps of Eng’rs, 261 F.3d 810, 812 (9th Cir. 2001).
45. Id.
46. Id.
47. Id. at 813.
48. Id.
49. Id.
Tsakopoulos filed suit against the EPA and the Corps, arguing that deep ripping could not constitute an “addition” of a “pollutant” into wetlands because it only churned up the soil, that a plow was not a point source, and that deep ripping was exempt from the Act because of the farming exemption. The Ninth Circuit, however, disagreed. It ruled that bulldozers and tractors fit clearly within the broad statutory definition of “point source.” The court also ruled that deep ripping constituted an “addition” because Tsakopoulos had churned up material in the wetlands and then redeposited it. Such “redeposits” of material can constitute an “addition” of a pollutant under the CWA. Further, the Court held that although no new material was added, a pollutant had been added when the protective layer of soil holding the wetland in place was wrenched up by the deep ripping, moved around, and redeposited elsewhere. A year later the Supreme Court granted certiorari and affirmed the Ninth Circuit’s judgment.

These cases illustrate that the CWA term “addition” has been interpreted case-by-case in unanticipated ways. Thus its meaning as applied to the Miccosukee dispute is by no means clear.

II. MICCOSUKEE V. SOUTH FLORIDA WATER MANAGEMENT DISTRICT

A. Factual Background

The history of the system of levees, canals and pumps at issue today in the Miccosukee case is a complicated saga. Historically, water flowed freely in the Everglades from Lake Okeechobee to the Gulf of Mexico, a slow-moving “river of grass” 120 miles long and fifty miles wide, less than one foot deep. Early settlers considered the Everglades a “worthless swamp” despite its unique ecosystem, and in the 1900s began digging canals to drain the wetlands and “reclaim” the Everglades. Reclamation was promoted by the United States, which granted swamp lands to Florida under the 1850 Swamp Lands Act with the implied duty to drain

---

50. Id. at 814-15.
52. Borden Ranch, 261 F.3d at 814.
53. Id.; see also Rybachek v. U.S. Envt'l Prot. Agency, 904 F.2d 1276 (9th Cir. 1990) (holding that moving material from a stream bed, sifting out gold, and returning the material to the stream bed is an “addition” of a pollutant).
54. Borden Ranch, 261 F.3d at 814.
55. Borden Ranch, 537 U.S. at 100.
These reclamation activities solved some problems and created others, such as lowering the water table and causing salt water to intrude into wells and drinking water supplies. Nonetheless, the abundance of "new" land stimulated population growth in South Florida in cities such as Fort Lauderdale, Miami and Fort Myers. As more people arrived, more canals and roads were built to accommodate, profit from, and protect these growing metropolitan areas. Meanwhile, farming in the region began to flourish.

In 1948 Congress established the C&SF Project to address the continuing drainage and flood control problems in reclaimed portions of the Everglades, protect the growing urban and agricultural lands from flood, provide a water supply for the Everglades National Park, and preserve wildlife habitat. The first component of the Project, administered by the United States Army Corps of Engineers, was to establish a perimeter levee around the eastern edge of the Everglades to block the flow of water and protect lands to the east, severing the eastern 16% of the Everglades from its interior. Another component of the Project was to use the remaining portion of the Everglades as a water conservation area. Finally, the Project designated 27% of the northern portion of the Everglades to agriculture, establishing the Everglades Agriculture Area ("Agriculture Area").

This Agriculture Area was a critical factor in justifying the Project economically because it was too risky to invest in farming the lands without assurances to prevent seasonal flooding. Today the Agriculture Area encompasses more than 500,000 acres, or close to 1,000 square miles, of irrigated land. This land, composed of rich organic peat and...

60. U.S. Dep't of Interior, Nat'l Park Serv., supra note 56.
61. Id.
62. Id.
63. Id.
65. Id.
66. Id.
muck soils, is highly productive and is considered one of Florida's most important agricultural regions. These lands are farmed year-round to produce sugar cane, vegetables, sod, and smaller amounts of other crops, such as rice and citrus. In 1987, sugar cane production alone accounted for 633 square miles of land use within the Agricultural Area. The estimated annual economic impact of the agricultural produce from the Agricultural Area is over $1 billion.

The Florida legislature also enacted legislation to manage and protect the Everglades, including the Water Resources Act, which led to the establishment of the South Florida Water Management District (SFWMD) in 1976. The SFWMD implements the State's water policies along hydraulic boundaries from Orlando to Key West and is supervised by the Florida Department of Environmental Protection (DEP). The SFWMD became the local entity responsible for running the federal Project with specific authority to engage in flood protection, water quality protection, and environmental protection and enhancement.

Although the Project is composed of over 1,800 miles of canals and levees, primary water control structures, pumping stations, navigational locks and impounded water storage areas, the key components of the Project—the crux of the Miccosukee dispute—are the C-11 basin and canal, Water Conservation Area 3, levees L-33 and L-37, and pump station S-9. The C-11 canal runs through the C-11 basin, an area within the Project that includes agricultural, residential and urban development. The C-11 canal drains excess waters from the basin, collecting groundwater and rainwater and moving it out of the region to maintain the delicate balance of water levels that protect the area from flooding and saltwater intrusion. Because of the development and agricultural activities in the C-11 basin, rainwater falling onto the lands in the C-11 basin collects and absorbs contaminants such as phosphorous, fertilizers, and other urban pollutants.

The C-11 canal collects and carries collected drainage waters towards Water Conservation Area 3, one of three interconnected water conservation areas being maintained and restored as remnants of the

---

69. S. Florida Water Mgmt. Dist., Everglades Interim Report, supra note 68 at 5.
70. Id.
71. Id.
72. Id.
73. FLA. STAT. ch. 373.069 (2005).
75. Id.
76. Id.
78. Id. at 99-100.
79. Id. at 100-01.
original Everglades.\textsuperscript{80} Water Conservation Area 3 encompasses 915 square miles of land across Broward and Miami-Dade Counties.\textsuperscript{81} Water in Water Conservation Area 3 is maintained at higher levels than the rest of the Project area, thereby raising the groundwater table, protecting against saltwater intrusion, and acting as a water reservoir for urban and agricultural needs by preventing fresh water from flowing to the ocean.\textsuperscript{82} Just as importantly, Water Conservation Area 3 protects native fish, wildlife and plant species by providing a wetlands habitat close to the historic conditions of the Everglades.\textsuperscript{83} Located south of Water Conservation Area 3, the Everglades National Park separates Water Conservation Area 3 from the Florida Bay and Gulf of Mexico to the south. The Loxahatchee National Wildlife Refuge, comprising most of the land in Water Conservation Area 1, is located north-east of Water Conservation Area 3 between the Everglades Agriculture Area and urban cities on the eastern coast of Florida.\textsuperscript{84}

The areas surrounding Water Conservation Area 3 are subject to intensive year-round use of pesticides relating to agricultural production, mosquito control, aquatic plant growth in local waterways, golf course maintenance, and lawn and vegetation maintenance.\textsuperscript{85} These activities, coupled with powerful storm events, result in high levels of phosphorous-rich runoff polluted with pesticides.\textsuperscript{86} Water Conservation Area 3 is a phosphorous-sensitive oligotrophic ecosystem in which wetland native plants thrive on very low amounts of phosphorous and other nutrients.\textsuperscript{87} The phosphorous in the water that drains from the C-11 Canal into the Water Conservation Area 3 ecosystem causes extensive eutrophication, increases in phosphorous concentrations due to nutrient-rich runoff from surrounding farmland and urban areas.\textsuperscript{88} Eutrophication effects include “loss of water column dissolved oxygen, algal blooms, changes in vegetation and biodiversity, and the accumulation of phosphorus in sediments,” which can result in the “reduction or loss of a waterbody’s habitat.”\textsuperscript{89} These effects threaten the survival of the sixty-eight species

\textsuperscript{80} Id. at 100.
\textsuperscript{82} Miccosukee, 541 U.S. at 100-01.
\textsuperscript{83} Miccosukee, 541 U.S. at 95.
\textsuperscript{86} Id. at 21.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
listed as endangered or threatened in the South Florida ecosystem, and
many more species considered rare or of special concern. Neither party
in Miccosukee disputed that the waters carried by the C-11 canal and
dumped into the Water Conservation Area 3 are highly polluted or that
they threaten the delicate balance of the Water Conservation Area 3
ecosystem.

Two levees prevent water carried by the C-11 canal into Water
Conservation Area 3 from flowing back into the cities and agricultural
areas to the east. These levees, L-33 and L-37, separate Water
Conservation Area 3 from the C-11 basin so that rain falling on the west
side of the levees falls into the natural wetlands portion of the region, and
rains falling to the east fall on cities, roads, and agricultural land,
collecting contaminants such as phosphorous before being funneled
through the other parts of the system and eventually dumped into Water
Conservation Area 3. This separation not only allows Water
Conservation Area 3 to maintain higher water and water quality levels,
but provides flora, fauna and wildlife a sanctuary in an environment that
is otherwise threatened by development and agriculture.

The final critical component of the Project on which the Miccosukee
dispute is focused is pump station S-9, located where the C-11 canal
meets the levees which enclose Water Conservation Area 3. The S-9
pump moves water from the canal through three pipes sixty feet across
the levees into Water Conservation Area 3. The pump transfers the
water whenever the canal water reaches four feet above sea level and
stops when it falls to one foot above sea level.

B. Early Everglades Litigation and the Everglades Forever Act

In 1988, the United States Attorney’s Office sued Florida’s DEP and
the SFWMD on behalf of the Everglades National Park and the
Loxahatchee National Wildlife refuge for failing to protect the quality of
water entering federal areas from nutrient-rich farm run-off. The United

---

90. S. Florida Water Mgmt. Dist., The Living Everglades: Everglades Information: FAQs, at
http://glades.sfwmd.gov/empact/home/02_everglades/08_faq.shtml#2; www.evergladesplan.org/
91. FLA. STAT. ch. 373.4592(1)(b), (d) (2005).
93. Id. at 100-01.
94. Id.
96. Id.
98. Id. at 1569. Like Water Conservation Area 3, the Loxahatchee National Wildlife
Refuge also suffers from an overload of phosphorous due to contaminated run-off from the
States alleged that SFWMD violated the Florida Surface Water Improvement Act of 1987, which forbade SFWMD's activities and operations from adversely affecting the area's indigenous vegetation and wildlife; that it violated Florida law by operating pumps, canals and various other water control structures without the necessary permits; and that it breached contracts with the United States Army Corps of Engineers and the United States. The lawsuit settled in 1991 through a federal consent decree, which laid out an “ambitious strategy to restore and preserve the Everglades ecosystem.”

Agricultural interests objected to the consent decree, however, and instigated legal challenges which prevented Florida from implementing the contemplated control measures. This resulted in further negotiations between interested parties.

In 1993, the South Florida Everglades Restoration Task Force was founded through an agreement between five federal departments and the EPA, under the leadership of the Secretary of the Interior, to “coordinate the development of consistent policies, strategies, plans, programs, and priorities for addressing the environmental concerns of South Florida.” Soon after, the original Task Force was expanded to include representatives from the Miccosukee and Seminole Tribes and from the Office of the Governor of Florida. Finally, in 1996, the task force was established in federal law, becoming the Federal Task Force on South Florida Ecosystem Restoration (“Task Force”), with the goal of examining various ways to restore the Everglades system. The Task Force was further expanded to include two representatives from the Florida state government, a representative from the SFWMD, and two local-government representatives.

In 1994 the Florida Everglades Forever Act was signed, providing a means for accomplishing the restoration goals envisioned in the earlier

99. United States v. S. Florida Water Mgmt. Dist., 922 F.2d 704, 707-708 (11th Cir. 1991); see also FLA. ADMIN. CODE ANN. r. 62-302.530 (barring acts that create “an imbalance in natural populations of aquatic flora or fauna”).
100. United States v. S. Florida Water Mgmt. Dist., 922 F.2d at 710.
103. Id.
105. Id.
"MEANINGFULLY DISTINCT" WATERS

consent decree by expanding the clean-up program but extending the deadlines. The Everglades Forever Act, to be implemented by the state of Florida through SFWMD, requires the state to develop and propose a phosphorous criterion to incorporate in its water quality standards. It states that "[i]n no case shall such phosphorus criterion allow waters in the Everglades Protection Area to be altered so as to cause an imbalance in the natural populations of aquatic flora or fauna." The Everglades Construction Project, one of the fifty-four projects intended to implement the requirements of the Everglades Forever Act, calls for the construction of six stormwater treatment areas (STAs) in the Everglades Agricultural Area by 2003, and the implementation of best management practice technologies (BMPs):

The Legislature finds that STAs and BMPs are currently the best available technology for achieving the interim water quality goals of the Everglades Program. A combined program of agricultural BMPs, STAs, and requirements of this section is a reasonable method of achieving interim total phosphorus discharge reductions. The Everglades Program is an appropriate foundation on which to build a long-term program to ultimately achieve restoration and protection of the Everglades Protection Area.

The STAs comprise 40,000 acres of marshes, designed to act as buffers filtering nutrients from water before it flows into the Everglades. Algae and microscopic organisms absorb phosphorous and other nutrients from the water, using them in life processes or storing them in their tissues. With an interim goal for phosphorous levels of 50 parts per billion (ppb), the parties involved in the lawsuit elected to construct STAs to address the problem of contaminated runoff polluting the Everglades because they naturally filter water and remove phosphorous while mimicking the natural environment. Former farmland and state wildlife management lands situated downstream from

108. Id. at 3.
111. FLA. STAT. ch. 373.4592(1)(g) (2005).
112. West & Allen, supra note 102.
the major canals carrying agricultural discharge water were chosen as sites for the STAs. Farm runoff would thus flow through the STAs before reaching the Everglades.

The first STA, the Everglades Nutrient Removal Project or STA-1, was completed by the SFWMD in 1997 and spanned 5.97 square miles. It effectively reduced phosphorous levels to 25 ppb, well below the 50 ppb goal, and was used as a prototype for the design, construction and operation of subsequent STAs, for which construction began once the first STA was successfully completed.

The Everglades Forever Act states that the DEP "shall issue a permit for a term of 5 years for the construction, operation, and maintenance of the Everglades Construction Project." These are NPDES permits required by EPA for the STAs that discharge into the Water Conservation Areas. The SFWMD argued that NPDES permits were not necessary for operation of the STAs. But the EPA concluded that, even though the STAs removed pollutants, they were treatment systems actively collecting pollutants, and therefore required NPDES permits under the CWA. EPA issued the first permit to SFWMD for discharges from STA-1 into Water Conservation Area 1, the Loxahatchee Refuge. Florida DEP issued permits to SFWMD for the remaining STAs after receiving authority from the EPA to issue NPDES permits.

In 1993, the Friends of the Everglades, a non-profit organization dedicated to protecting and restoring the Everglades, appealed the NPDES permit issued by EPA to SFWMD for the discharges from

---

116. Id.
120. FLA. STAT. ch. 373.4592(4)(a) (2005); see Rizzardi, supra note 114, at 83 (citing National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Florida and the United States Environmental Protection Agency, Region 4 (May 1, 1995) (“The Florida DEP administers a federally-approved NPDES program pursuant to an interagency agreement and in accordance with state administrative codes.”)).
121. Rizzardi, supra note 114, at 57-58.
Although it supported the EPA’s determination that a permit was required for the discharges, the Friends of the Everglades objected to the facts that the permit provided only for an interim standard for phosphorous and lacked any other parameters. The group let the appeal lapse, however, when it challenged the Everglades Forever Act for its suspension of water quality standards for twelve to thirteen years in anticipation of the construction of the STAs. Their goal in pursuing this litigation—which is still in progress—is to restore previously existing standards throughout the Everglades.

Along with the STAs, the Everglades Forever Act also requires SFWMD and Florida’s DEP to develop and implement a water quality monitoring program to evaluate the effectiveness of BMPs for reducing phosphorous loads from the Agriculture Area. SFWMD developed the Agriculture Area BMP Regulatory Program to implement BMPs such as fertilizer practices and water management and sediment control practices. The program has seen success. Over a three year period, BMPs have cumulatively reduced phosphorous loads from the Agriculture Area by 55%.

C. Miccosukee—Proceedings in the District Court

The Miccosukee Tribe of Indians of Florida is a federally-recognized tribe that has lived in the Everglades for centuries. Their way of life in part relies upon preservation of the Everglades ecosystem, including water quality and quantity. In 1947 the United States Department of the Interior declared that most of the Tribe’s ancestral land was to become part of the Everglades National Park. The Tribe continues to have land interests lying within the Everglades, including a perpetual lease to most of the land comprising Water Conservation Area 3.

The Friends of the Everglades and Miccosukee Tribe of Indians each brought suit against the SFWMD in 1997 alleging that it was violating the

126. Id.
127. Id.
130. Id.
133. Miccosukee, 1999 WL 33494862 at *1.
CWA by discharging pollutants from the C-11 Canal through the S-9 pump station into the Water Conservation Area 3 area of the Everglades.\textsuperscript{134}

All parties in \textit{Miccosukee} agreed from the beginning that S-9 was discharging pollutants into Water Conservation Area 3.\textsuperscript{135} They also agreed that, though the waters of the C-11 canal and Water Conservation Area 3 are not navigable in fact, they qualify as navigable waters of the United States for purposes of the CWA because they are connected to waters of the United States such as the Atlantic Ocean.\textsuperscript{136} Thus both the C-11 canal and Water Conservation Area 3 fall into the scope of the CWA prohibitions on discharging pollutants from point sources into navigable waters. However, the parties disagreed over whether the S-9 discharges required an NPDES permit.

The tribal plaintiffs claimed that S-9 was a point source conveying pollutants into a jurisdictional water of the United States without an NPDES in violation of the CWA.\textsuperscript{137} SFWMD argued that S-9 was not a point source because it did not actually create the pollutants that were being discharged into the Everglades.\textsuperscript{138} It argued that the C-11 canal, which contained polluted runoff from the east, was the source of pollution.\textsuperscript{139} SFWMD also argued that because water from the C-11 canal seeped into the Everglades as groundwater, and because both areas were once part of the historic Everglades, the C-11 canal and Water Conservation Area 3 were the same body of water and thus an NPDES permit was not necessary.\textsuperscript{140}

The district court rejected SFWMD’s argument that the canal and the Everglades were the same body of water, finding that the two were separate bodies of water with different levels of water quality.\textsuperscript{141} The court’s rationale was that water would not naturally flow or seep from the canal into the Everglades and “that at one time these two bodies of water were hydrologically connected is now irrelevant and ignores the fundamental direction of water flow.”\textsuperscript{142}

\begin{footnotesize}
\begin{enumerate}
\item 137. \textit{Miccosukee}, 1999 WL 33494862 at *1.
\item 138. \textit{Id.} at *7.
\item 139. \textit{Id.}
\item 140. \textit{Id.} at *2.
\item 141. \textit{Id.} at *7.
\item 142. \textit{Id.} at *6.
\end{enumerate}
\end{footnotesize}
The district court also rejected SFWMD’s argument that S-9 does not need an NPDES permit because it does not create the pollution that it conveys into Water Conservation Area 3. It held that under the CWA, a pipe such as those through which S-9 pumps water is clearly a point source; in fact, it is the first example listed in the statutory definition of a point source. Furthermore, that the pollutants were not created by S-9 was “immaterial in a plain reading of the Act.” The district court thus denied SFWMD’s motion for summary judgment and granted plaintiffs’ motion for summary judgment, holding that S-9 required an NPDES permit and enjoining SFWMD from operating S-9 until one was obtained.

D. Miccosukee—Proceedings in the Eleventh Circuit

SFWMD appealed the district court’s decision. At this stage, it was clear that the parties agreed on several points: the S-9 pump station and its pipes constituted a point source, the waters released by S-9 contained pollutants, and the C-11 canal and Water Conservation Area 3 were navigable waters. The main dispute on appeal centered on one legal issue: whether the pumping of the already polluted water constituted an addition of pollutants to navigable waters from a point source.

Before affirming the district court’s ruling that an NPDES permit was required for the operation of S-9, the Eleventh Circuit clarified the proper analysis for such issues. First, in determining whether pollutants are added to a navigable water under the Act, the receiving body of water was the relevant body to analyze. Second, the key question for the court was whether, “but for” the discharges from the point source, “the pollutants would have been added to that body of water.” In other words, the court must ask whether the “point source is the cause-in-fact of the release of pollutants into navigable waters.”

145. Miccosukee Tribe of Indians v. S. Florida Mgmt. Dist., 280 F.3d 1364, 1369 (11th Cir. 2002).
146. Id. at 1366.
150. Miccosukee, 280 F.3d at 1367 (emphasis in original).
151. Id. at 1368.
152. Id.
Neither party disputed that the receiving body of water, Water Conservation Area 3, was being polluted. Neither party disputed that, without the operation of S-9, the polluted waters from the C-11 Canal would not flow into the Water Conservation Area 3. Thus, the court found that S-9 was indeed the cause-in-fact of the pollution into Water Conservation Area 3. Accordingly, the court held S-9 was a point source adding pollutants to navigable waters.

Despite this finding, the Eleventh Circuit vacated the district court’s injunction, agreeing with SFWMD’s contention that the district court had abused its discretion by not applying traditional equitable standards. The court determined that if the S-9 pump was turned off pursuant to the district court’s injunction, excess water in the C-11 canal would flow back over the lands to the east and “substantial flooding” would occur in Broward County, which has a population of over 1.5 million people. (Indeed, because of these potentially disastrous consequences, the plaintiffs did not oppose SFWMD’s emergency motion for relief from the district court judgment.) The Eleventh Circuit held that instead of issuing an injunction which cannot be “rightly enforced,” the district court should have ordered SFWMD to obtain an NPDES permit within a reasonable time period, with the option of using the various available enforcement mechanisms in case SFWMD failed to comply with the order. The Eleventh Circuit thus affirmed the district court’s judgment that SFWMD was in violation of the CWA and needed to obtain an NPDES permit, vacated the judgment awarding the injunction, and remanded for further proceedings. Unhappy with this result, SFWMD filed a petition for certiorari to the United States Supreme Court, which was granted.

E. Miccosukee—Proceedings in the Supreme Court

1. Petition for Certiorari and the Critical Amicus Brief

In its petition for certiorari, SFWMD made two arguments—one old and one new—in urging the Court to reverse the Eleventh Circuit. First,
SFWMD repeated its original claim that the NPDES system did not extend to state flow diversion facilities that do not contribute pollutants to the nation’s waters.\textsuperscript{162} It next argued a new point: that the water on either side of the S-9 pump is part of a single body of navigable water such that moving water from one side to the other involves no “addition” and thus falls outside the NPDES scheme.\textsuperscript{163} “Nothing about moving water around within the same water body ‘increases’ or ‘augments’ the pollution pre-existing within the water system.”\textsuperscript{164} SFWMD thus claimed that the Eleventh Circuit erred in concluding that S-9 moves water between “distinct” bodies of water.\textsuperscript{165}

The Supreme Court invited the Solicitor General to submit an amicus brief in response to the petition for certiorari to understand the United States’ position on this matter.\textsuperscript{166} The United States initially argued that the writ of certiorari should be denied because the Eleventh Circuit’s decision did not conflict with any decision of the Supreme Court or any other courts of appeal.\textsuperscript{167}

After the Court granted certiorari, the United States submitted an amicus brief on the merits, arguing that the judgment of the Eleventh Circuit should be reversed.\textsuperscript{168} In this subsequent brief, the United States argued that the Eleventh Circuit erred in requiring the SFWMD to obtain an NPDES permit because “the SFWMD’s pumping activity does not result in ‘the discharge of any pollutant’ within the meaning of the Clean Water Act.”\textsuperscript{169} The United States claimed that Congress did not intend to impose NPDES permitting requirements on water control facilities across the nation that do no more than convey or connect navigable waters, and that S-9, which merely conveys navigable waters from the C-11 canal to Water Conservation Area 3, falls into this category.\textsuperscript{170}

This argument, the “unitary waters” theory\textsuperscript{171}, has potentially far-reaching consequences for the analysis of whether movements between nominally distinct bodies of water are “additions” for purposes of the CWA and NPDES permitting. The theory is that all bodies of water that fall under the definition of “navigable waters” or “waters of the United

\begin{itemize}
  \item 162. Brief for Petitioner at *23 (2003 WL 22766715).
  \item 163. Id. at 46.
  \item 164. Id.
  \item 165. Id.
  \item 169. Id. at 2.
  \item 170. Id. at 12.
  \item 171. Miccosukee, 541 U.S. at 106.
\end{itemize}
States” should be viewed as one body for purposes of determining whether there has been an “addition of any pollutant to navigable waters from any point source.” The practical effect of the theory is that an addition of a pollutant from a point source occurs only when the pollutant is introduced to any navigable waters for the first time. Thus, NPDES permits would not be required for transfers of water from one navigable water body to another navigable water body, regardless of whether the first water body was highly polluted and the second pristine. Because the C-11 canal and Water Conservation Area 3 are both considered waters of the United States, under the unitary waters theory it would not matter whether they are hydrologically connected or meaningfully distinct bodies of water. By virtue of their both being “navigable waters,” no NPDES permit would be needed to pump C-11 water in the Water Conservation Area 3. Nor would an NPDES permit be required for any other pumping or engineered transfer of one “navigable water” into another across the nation. Thus, theoretically, CWA’s permit requirements could not prevent someone from piping the polluted waters of the C-11 canal all the way across the continent and dumping them into the more pristine waters of Lake Tahoe.

2. The Supreme Court Decision

For the third time, SFWMD’s argument that S-9 was not a point source because it did not actually create the pollutants that were being discharged into the Everglades was rejected. The Supreme Court disagreed with SFWMD’s interpretation of the term “discharge of a pollutant,” stating that the statutory definition of the term under the CWA clearly “includes within its reach point sources that do not themselves generate pollutants.” Surprisingly, the Court did not stop there. It went on to acknowledge the new theory argued by the United States in its amicus brief: “Having answered the precise question on which we granted certiorari, we turn to a second argument, advanced primarily by the [United States] as amicus curiae ... that all the water bodies that fall within the Act’s definition of ‘navigable waters’ ... should be viewed unitarily for purposes of NPDES permitting requirements.” But the Court declined to resolve the unitary waters argument because it was not brought up by SFWMD in the proceedings in the lower courts or in its petition for certiorari.

172. Id.
173. Id.
174. Id. at 109.
175. Id. at 105.
176. Id. at 105-06.
177. Id. at 109.
Instead, the Court held that the unitary waters argument was open to the parties on remand\(^\text{178}\), effectively giving SFWMD a new opportunity to defend the suit using a theory not previously advanced. Thus, despite its decision to affirm the lower court’s legal conclusion to the question presented for certiorari, the Court vacated the Eleventh Circuit’s judgment and remanded the case because triable issues still existed with regard to the facts of the case.\(^\text{179}\)

Justice Scalia wrote a compelling dissenting opinion, claiming that the unitary waters argument had already been raised below and rejected by the Court of Appeals.\(^\text{180}\) In its opinion, the Eleventh Circuit court referred to SFWMD’s argument that no addition of pollutants from a point source can occur unless a point source adds pollutants to navigable waters from the outside world.\(^\text{181}\) To Justice Scalia, that sounded just like the unitary waters argument: “That the argument was not phrased in the same terms or argued with the same clarity does not mean it was not made.”\(^\text{182}\) Justice Scalia also claimed that SFWMD’s new argument that Water Conservation Area 3 and C-11 were historically and remain hydrologically related was different from the argument that absent pump station S-9 pollutants would flow uphill from C-11 into Water Conservation Area 3, and that the courts were not responsible for speculating “sua sponte about possibilities that even the parties have not contemplated.”\(^\text{183}\) In sum, Justice Scalia would have affirmed the judgment below as to the question presented—that a point source does not have to actually create the pollutants it is transferring to fall under NPDES permit requirements—and leave the United States’ unitary waters theory “to be considered in another case.”\(^\text{184}\)

### III. PREDICTION FOR REMAND

Considering that the Eleventh Circuit, other appellate courts, the EPA, and even the Supreme Court have not embraced the unitary waters theory, it is unlikely that upon remand the district court will accept this argument. Nonetheless, the district court will need to determine how to make the factual decision of whether the C-11 canal and Water Conservation Area 3 are “meaningfully distinct” bodies of water. Because the factual record thus far is inconclusive, and because the Supreme Court failed to provide guidance for how to balance the

\(^{178}\) Id. \\
\(^{179}\) Id. at 112. \\
\(^{180}\) Id. \\
\(^{181}\) Miccosukee Tribe of Indians v. S. Florida Mgmt. Dist., 280 F.3d 1364, 1367 (11th Cir. 2002). \\
\(^{182}\) Miccosukee, 541 U.S. at 112. \\
\(^{183}\) Id. \\
\(^{184}\) Id.
complex issues regarding the two water bodies' current and historical hydrological connection, this issue will present complications on remand. However, as discussed below, at the heart of this issue is the very real fact that SFWMD does not create the pollution it conveys through the Project pipes, and the farmers and municipalities responsible for the nonpoint source pollution that ends up in the Everglades are exempted from the CWA's requirements. Addressing this crucial fact and molding protective programs to target pollution at the source, through NPDES permitting or as supplements to the projects already in place, is the only effective way to end the pollution problem in the Everglades that gave rise to this litigation.

A. The Unitary Waters Theory Will Likely Be Rejected

1. The Eleventh Circuit Already Rejected the Unitary Waters Theory

It is unlikely the Eleventh Circuit will accept the unitary waters theory on remand because, as Justice Scalia pointed out in his dissent, it already rejected the theory.\(^{185}\) In reviewing the SFWMD's unitary waters argument the first time through, the Eleventh Circuit rejected the idea that moving polluted water from one navigable body of water to another was not an addition—as the district court did.\(^{186}\) And if on remand the court looks to persuasive authority regarding the unitary waters theory, it will find that at least two circuits have rejected the theory, while no circuits have endorsed it.\(^{187}\)

2. The Supreme Court Has Shown Suspicion Towards the Unitary Waters Theory

Furthermore, some of the Supreme Court Justices seemed skeptical of the unitary waters theory and aware of the dire implications such a theory would have on the nation's waterways. As Justice Breyer said to counsel for SFWMD: "If I accept your side of it, it seems to me I ... leave the EPA without any power to deal with what I [call] the filthy river problem,"\(^{188}\) i.e., that pumping polluted waters from a filthy river into a pristine pond would not be considered an addition of pollutants to waters of the United States. Breyer continued:

---

185. Id.
186. Miccosukee, 280 F.3d at 1368.
187. See Dubois v. U.S. Dep't of Agric., 102 F.3d 1273 (1st Cir. 1996); Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001).
If I take their side... suddenly everybody in the California water project... has to run off and get permits, and that too is a big problem. So it sounds to me that that second problem could be dealt with by EPA through rules [under which] they'd automatically get permits in certain circumstances. But if I take your side of it, the opposite filthy river problem, there's nothing to be done.\textsuperscript{189}

In addressing SFWMD's and the United States' contentions about the havoc that failure to adopt the unitary waters theory would wreak upon water districts across the nation, the Justices discussed California in particular. California is a prime candidate for such a discussion because the water supplies for the southern half of the state—including cities such as Los Angeles and San Diego—and agricultural interests in the Central Valley rely on transfers of water from the northern half of the state. The Justices referred to \textit{Natural Resources Defense Council v. Costle}\textsuperscript{190}, in which Judge Leventhal listed a set of tactics EPA could use, including general or area permits, to alleviate the administrative burden of addressing the potentially large number of permits that would be required for water transfers in California alone.\textsuperscript{191}

One of the Justices also referred to information provided by Pennsylvania in an amicus brief, describing the benefits and protections that would be afforded by rejecting the unitary waters theory.\textsuperscript{192} The Pennsylvania courts in 1986 held that the state's NPDES permitting program applied to inter-basin diversions of water containing pollutants from one water body to another.\textsuperscript{193} From that point on the Pennsylvania Department of Environmental Protection has routinely applied its NPDES permit programs to water diversions between water bodies and has developed a formal guidance document.\textsuperscript{194} It seeks to maintain authority to regulate situations that might adversely affect the water quality of a receiving body under the CWA, which it fears adoption of the unitary waters theory would frustrate.\textsuperscript{195} The state is concerned that allowing the mixing of waters with significantly different chemical, biological and physical attributes to escape the CWA's permitting requirements would undermine the Act's comprehensive approach to protecting the nation's waters.\textsuperscript{196} The state has argued that the NPDES

\textsuperscript{189} \textit{Id.} at *8.
\textsuperscript{190} 568 F.2d 1369 (D.C. Cir. 1977).
\textsuperscript{191} \textit{Id.} at *25 (2004 WL 111643).
\textsuperscript{194} Brief of the Commonwealth of Pennsylvania as Amicus Curiae at *2 (2003 WL 22793537).
\textsuperscript{195} \textit{Id.} at *3.
\textsuperscript{196} \textit{Id.} at *2-*3.
permitting program provides a “flexible, efficient, enforceable and necessary means to protect the water quality and designated uses of surface waters,” and that since it began implementing the NPDES permitting program in 1986 it has not experienced any of the apocalyptic scenarios SFWMD and the United States predicted in their briefs.\textsuperscript{197}

The NPDES permit program authorizes the use of general permits that can be issued quickly without significant administrative burden, and many of the NPDES permits also authorize the use of Best Management Practices (BMP’s) in place of more traditional numeric effluent limitations in appropriate situations. The NPDES permit program also expressly authorizes compliance schedules where a permittee needs additional time to achieve compliance. An NPDES permit provides an effective and enforceable means to protect water quality that is lacking under Florida state law that is subject to change.\textsuperscript{198}

The Supreme Court Justices’ questions and Commonwealth of Pennsylvania’s argument persuasively explain that the unitary waters theory should be rejected because it would not effectively promote the protection of the nation’s waters as the CWA envisioned. They also discredit the permitting nightmare SFWMD and the United States claim will arise if the theory is not accepted.

3. \textit{Other Circuits Have Already Rejected the Unitary Waters Theory}

That other courts facing the unitary waters theory have rejected it is another reason why the Eleventh Circuit will probably reject it on remand. In \textit{Dubois v. United States Department of Agriculture}, the First Circuit decided whether a river and pond in New Hampshire were two distinct waters of the United States for purposes of the CWA and NPDES permitting.\textsuperscript{199} Loon Corporation, the owner of Loon Mountain Ski Area, wanted to transfer water from the East Branch of the Pemigewasset River, a relatively unprotected Class B waterway, through snowmaking pipes and ultimately into Loon Pond, a pristine Class A water body.\textsuperscript{200} The two water bodies were hydrologically connected, but only in one direction since water flowed naturally down from the pond to the river. Thus the pollution in the East Branch could not flow into Loon Pond absent human intervention. The question before the court was similar to the cases discussed above: whether there was an “addition” of pollutants when the polluted water was discharged through the pipe, which was clearly a point source, into Loon Pond.\textsuperscript{201}

\begin{itemize}
\item \textsuperscript{197} Id. at *5.
\item \textsuperscript{198} Id.
\item \textsuperscript{199} 102 F.3d 1273 (1st Cir. 1996).
\item \textsuperscript{200} Id. at 1277, 1279.
\item \textsuperscript{201} Id. at 1296.
\end{itemize}
The district court ruled that there was no addition of pollutants in this case and accepted the Forest Service's unitary waters argument: that the waters of the East Branch and Loon Pond are part of "a singular entity, the waters of the United States," and thus there can be no "addition" of water or pollutants.\(^{202}\) The First Circuit, however, rejected this argument, finding that there was no basis in law or fact for this "single entity" theory.\(^{203}\) Accordingly, it ruled that the Forest Service's determination that an NPDES permit was unnecessary as well as "arbitrary and capricious and not in accordance with the law."\(^{204}\) The transfer of water from the East Branch to the pond would not occur naturally. Although the water bodies are hydrologically connected in the downstream direction, the reverse was not the case. The waters from the East Branch and the pollution they carried did not naturally flow upstream into the pristine Loon Pond.\(^{205}\) Thus the hydrological-connection argument was inaccurate. Finally, the court found there was nothing in the CWA evincing a congressional intent to distinguish between "unrelated" and "related" or "hydrologically connected" water bodies.\(^{206}\) The Act simply addresses "any addition of any pollutant to navigable waters from any point source."\(^{207}\) Thus the First Circuit rejected the "unitary waters theory" in this case, concluding that the East Branch and Loon Pond are two distinct waters of the United States, and that Loon Corporation's proposal to transfer polluted water from the former to the latter constituted an "addition" under the Clean Water Act for which an NPDES permit was required.\(^{208}\)

Another case where the unitary waters theory was argued and rejected by a court of appeals was in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York.*\(^{209}\) That case involved the transfer of drinking water from one reservoir through a tunnel and into a creek that ultimately emptied into another reservoir.\(^{210}\) Here again the issue was whether, for an "addition" to occur, a point source must introduce the pollutant from the "outside world."\(^{211}\) The Second Circuit reasoned that the "outside world" could be any place outside of the particular water
body in question, including another water body. When water and suspended sediments passed from the tunnel and into the creek, an addition of a pollutant from a point source had been made to a navigable water and so all terms of the statute were met, thus triggering the NPDES permit requirement. The Second Circuit specifically addressed and rejected the unitary waters theory from Dubois. It reasoned that "such a theory would mean that movement of water from one discrete water body to another would not be an addition even if it involved a transfer of water from a water body contaminated with myriad pollutants to a pristine water body containing few or no pollutants." The court held that such an interpretation was inconsistent with the ordinary meaning of the word "addition."

4. EPA Already Addressed and Rejected the Unitary Waters Theory

Former EPA Administrator Carol M. Browner submitted, along with former assistant administrators and former general counsels, an amicus brief in the Miccosukee lawsuit. In that brief, Browner argued that, even if the Court were to find the CWA was ambiguous on this point, in a past rulemaking the EPA General Counsel "specifically and unambiguously" rejected the unitary waters theory. Moreover, Browner argued this interpretation of the CWA, not the Solicitor General's, was entitled to Chevron deference. Browner was referring specifically to a 1975 EPA General Counsel formal rulemaking on whether irrigation return flows amounted to a point source regarding a case where the unitary waters argument was also raised. Of that rulemaking Browner wrote that

what is most striking ... is that he specifically rejects the very same construction of the Clean Water Act that the Solicitor General sets forth in his amicus brief in this case. One of the arguments raised in the 1975 proceeding by those claiming that the Section 402 permit requirement did not apply to irrigation return flows amounted to a point source regarding a case where the unitary waters argument was also raised. Of that rulemaking Browner wrote that

212. Id. This is similar to the Eleventh Circuit's focus on the receiving body of water in the Miccosukee lawsuit. Miccosukee Tribe of Indians v. S. Florida Mgmt. Dist., 280 F.3d 1364, 1368 (11th Cir. 2002).
213. Catskill, 273 F.3d at 492-93.
214. Id. at 493.
215. Id.
216. Id.
218. Id. at *16.
219. Id. at *18.
220. Id. at *17-*18 (citing in re Riverside Irrigation District, Decision of the General Counsel No. 21 (June 27, 1975) (finding that irrigation ditches that discharge to navigable waters require NPDES permits even if they themselves qualify as navigable waters)).
waters was that the irrigation ditch could itself be considered a navigable water and therefore it could not be deemed to be adding pollutants even when discharging to another navigable water. That is of course precisely what the Solicitor General is arguing before this Court ... [T]he EPA General Counsel, however, squarely rejected that contention.221

Browner argued that only the views of the EPA General Counsel in a formal decision, and not those expressed by the Solicitor General in an amicus brief, are entitled to Chevron deference.222

5. Purposes and Goals of the Clean Water Act

The CWA's purpose is to restore and maintain the physical, chemical and biological integrity of the nation's waters.223 As SFWMD's counsel was questioned by one of the Justices during oral argument, "shouldn't the purposes of the act be taken into consideration in defining what is a body or a unified body of water?"224 And later, Justice Scalia questioned Dexter Lehtinen, the Miami attorney representing the Miccosukee Tribe, about how the Act simply states that one shall not add pollutants to the navigable waters of the United States, which could be construed as supporting the unitary waters theory.225 Mr. Lehtinen responded that if this were construed to be the meaning of the text, pollutants could be spread between navigable waters with completely different designated uses and water qualities, an interpretation at odds with the fact that this provision has been recognized as the main method by which the CWA protects clean water.226 He further pointed out that construing the Act as forbidding only the initial addition of a pollution into navigable waters, and not movements of polluted water between separate bodies of navigable water, would make administering the NPDES permitting system impossible:

221. Id. The EPA General Counsel found that "to define the waters here at issue as navigable waters and use that as a basis for exempting them from the permit requirement appears to fly directly in the face of clear legislative intent to the contrary." Id. at *18.

222. Browner writes:

In contrast to a brief filed in the course of litigation, such as that submitted by the Solicitor General in this case, the General Counsel's ruling is precisely the kind of exercise of legislatively delegated lawmaking authority that has the 'force of law' for which Chevron deference applies in the event of statutory ambiguity.


224. United States Supreme Court Oral Argument at *17 (2004 WL 111643).

225. Id. at *32.

226. Id. at *33.
A permit writer is told to evaluate the propriety of the proposed addition of a pollutant based on the designated use and water quality standards of the receiving navigable water. It wouldn't be effective if thereafter that permit were deemed, as a matter of law, to have authorized the addition of that pollutant throughout the entire United States to any navigable water no matter what its designated use and no matter what its water quality standard.\(^{227}\)

As counsel for the Tribe has argued, Congress's intent in passing the CWA should play a large role in interpreting its language in favor of not viewing all of the navigable waters of the United States unitarily and permitting the transfer of highly polluted waters into a separate and more pristine body of navigable water.

**B. Issue of “Meaningfully Distinct” Water Bodies Remains for the Complex Hydrology of Southern Florida**

Even if the unitary waters theory is rejected on remand, the lower court will still need to resolve the issue of whether C-11 and Water Conservation Area 3 are “meaningfully distinct” bodies of water. Both parties appear to agree that if two water bodies are actually part of the same larger water body, pumping polluted water from one to the other would not constitute an “addition” of water or pollutants for purposes of the CWA.\(^{228}\) But they disagree on whether the C-11 canal and Water Conservation Area 3 themselves were actually distinct bodies of water. SFWMD and the United States in its amicus brief contended that because the C-11 canal and Water Conservation Area 3 “share a unique, intimately related, hydrological association, they can appropriately be viewed, for purposes of Section 402 of the Clean Water Act, as parts of a single body of water.”\(^{229}\) The Tribe, on the contrary, sees the C-11 canal and Water Conservation Area 3 as distinct water bodies because of their differing biological and ecosystem characteristics.\(^{230}\) Thus, on remand much will turn on whether the courts consider the canal and the Everglades meaningfully distinct bodies of water. If so, then SFWMD must obtain an NPDES permit to pump water through S-9 into the Everglades; if not, then the courts will likely find S-9 does not contribute an “addition” of pollutants to Water Conservation Area 3 and, as a result, SFWMD will not need an NPDES permit to continue pumping.

In remanding the case, the Supreme Court failed to give any guidance to the lower court regarding how to identify distinct “pots” of

\(^{227}\) United States Supreme Court Oral Argument at *33-*34 (2004 WL 111643).
\(^{228}\) Miccosukee, 541 U.S. at 96.
\(^{229}\) Id. at 109.
\(^{230}\) Id. at 110.
water. The unique facts in this case will present complications for the lower court in making this determination.

In determining whether the canal and Water Conservation Area 3 are distinct bodies of water, the district court will need to study the region's hydrology. But this is easier said than done. The entire area, including some of Florida's largest metropolitan centers and over 440,000 acres of sugarcane fields, was historically a shallow sheet of water, slowly moving towards the ocean. The entire region was hydrologically connected and water moved roughly north to south. However, the area is now part of a complex plumbing system, and what once was natural is now anything but. Today, if S-9 ceased operation the waters in Water Conservation Area 3—maintained at a higher point above sea level than the surrounding areas—would overflow the levees and flood the C-11 basin. As explained by counsel for the Tribe, Water Conservation Area 3 is higher than the canal, and water flows away from it towards the Atlantic Ocean to the east. Without the pump, water would not flow from the C-11 Basin towards Water Conservation Area 3. Adding to the puzzle, the waters in the area are all linked through the underground aquifer and inevitable leaks through the levees and canals. Again counsel for the tribe explained that, even if water permeated the levees separating the Water Conservation Area from the C-11 Basin, the seepage only moves in the direction of the natural flow, east to west, since the pumps are not artificially pushing this seepage westward. This seepage, however, may end up in the C-11 canal and be circulated back into the Water Conservation Area via the S-9 pump.

The Eleventh Circuit already looked to the issue of the hydrological connection between C-11 and Water Conservation Area 3, rejecting SFWMD's argument that the historical hydrological connection between the two precludes finding them distinct or that S-9 changes the "natural"

---

231. Miccosukee, 541 U.S. at 109-110 (citing Catskill, 273 F.3d at 492 ("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 . . . ").)


234. Dugger, supra note 233.

235. Miccosukee, 541 U.S. at 95.

236. Susan Bruninga, Florida Agency May Need Permit to Transfer Runoff Into Reservoir, Supreme Court Rules, BNA INC. ENVIRONMENTAL REPORTER, March 26, 2004, at A28.

237. Id. And none of the parties seem certain whether once waters from Water Conservation Area 3 overflow into the C-11 basin, they might eventually even themselves out, resulting in water flowing again as a sheet in the general north-south direction.

238. Miccosukee, 541 U.S. at 110.

239. Bruninga, supra note 236.
flow of water. The court emphasized that neither party disputed that without S-9 the polluted waters from C-11 would not normally flow into the Water Conservation Area 3, and concluded that “[m]an has made the two bodies of water two separate and distinct bodies of water.” As one of the Justices commented in oral argument, C-11 and Water Conservation Area 3 have been “altered by manmade structures so that they perhaps are no longer a single body. Is that what the Eleventh Circuit concluded in effect?... The manmade structures have separated them and they’re no longer unitary.” Counsel for the Tribe emphasized that it is particularly important to remember that the C-11 Canal was not a residual part of the historic Everglades and that the C-11 Basin is not naturally connected to the Water Conservation Area but divided by the levee: C-11 is “no more part of the Everglades protection area than Fenway Park in Boston is part of the Charles River because it’s built on the landfill where the Charles River once was. They’re quite distinct.”

On remand, the district court might make the same determination or it might come to a different conclusion after the parties obey the Supreme Court’s instructions to further develop the record. If the unitary waters theory is rejected, the resolution of this factual issue regarding whether C-11 and Water Conservation Area 3 are “meaningfully distinct” water bodies will determine whether SFWMD must obtain an NPDES permit for its operation of pump station S-9.

C. Addressing Nonpoint Source Pollution and the Relevance of Programs Already in Place

A key factor in the Miccosukee dispute, clouded by the years of litigation and contention, is the fact that the farmers and municipalities in southern Florida responsible for the nonpoint source pollution that is poisoning the Everglades are exempt from CWA permitting requirements. Addressing this crucial fact and molding protective programs to target pollution at the source, through NPDES permitting or as supplements to the projects already in place, is the only way to get at the source of this litigation and rectify the pollution problem in the Everglades. In fact, the existing programs are quite possibly the same phosphorous-reducing programs that an NPDES permit would require.

240. Miccosukee Tribe of Indians v. S. Florida Mgmt. Dist., 280 F.3d 1364, 1369, n.8 (11th Cir. 2002).
241. Id. at 1369.
243. Id. at *53.
244. Miccosukee, 541 U.S. at 112.
245. Such diffuse runoff is considered nonpoint source pollution and is not subject to the Clean Water Act’s NPDES permitting requirements. See Miccosukee, 541 U.S. at 101.
In its amicus brief the United States argued that S-9 should be regulated under state authority as nonpoint source pollution, because the CWA does not require an NPDES permit for water control facilities that "merely convey or connect navigable waters" and Congress "made clear" that nonpoint source pollution must be addressed through mechanisms other than the NPDES permit program.246 The United States further argued that the imposition of NPDES permitting requirements on S-9 would not provide any substantial environmental benefits and would instead waste government resources and even hinder the Everglades restoration process.247 Indeed, the water transported from the C-11 canal and into the Water Conservation Area 3 through pumping station S-9 contains pollutants from agricultural and urban runoff, classic nonpoint source pollution. But SFWMD, the entity which would be required to comply with an NPDES permit, is not responsible for the polluted waters and is only moving it around for flood protection. Thus, BMPs play an important role in reducing the farming interests' contribution to the problem through their use of pesticides and other farming practices.

Perhaps this issue affected the Supreme Court's decision to remand the case, despite the Eleventh Circuit's holding that an NPDES permit is required, because the Court does not find it fair to allocate responsibility to SFWMD for pollution carried by C-11 that originates from farmlands. It would be costly and technically difficult for SFWMD to comply with an NPDES permit while farmers, despite producing much of the pollution that is at issue, are exempted from the CWA's requirements.

Several months after the CWA was enacted, EPA conducted a formal rulemaking in which it concluded that when runoff from agricultural activities ultimately reaches pipes, ditches and channels, any effluent containing contaminants and conveyed by those discrete conveyances into navigable waters constitutes point source discharges of a pollutant within the meaning of the Act.248 "It is not legally tenable to treat farm discharges as nonpoint sources."249 The decision regarding nonpoint source water pollution seems practical in light of the infeasibility of determining individual sources of pollution. But when another party clearly not responsible for polluting the water ends up bearing responsibility for reducing that pollution merely because it channels the water elsewhere, the interplay between point source and nonpoint source rules is inequitable.

247. Id.
248. See Form and Guidelines Regarding Agricultural and Silvicultural Activities, 38 Fed. Reg. 18000 (1973) (cited in Browner Amicus Brief at *8 (2003 WL 22793539)).
249. Browner Amicus Brief at *9 (citing EPA General Counsel Opinion (August 3, 1973), Authority to Exclude Point Sources from the Permit Program).
Because the effort, time, and money SFWMD would have to exert to comply with a potential NPDES permit would detract from the phosphorous-reducing programs already in place, perhaps incorporating the aspects of the current joint state and federal projects developed in the past decades under the Everglades Forever Act—without necessarily resolving the issue of whether this particular water body must have an NPDES permit—would be a more efficient and practical solution than continuing to fight over whether an NPDES permit is needed. Alternatively, the parties might agree on an NPDES permit with terms that compliment the current efforts. Either way, tighter controls on nonpoint source pollution—the real culprit in this dispute—would have to be undertaken to clean up the phosphorous problem.

The factual issue of how SFWMD would comply with an NPDES permit supports this idea. Because EPA has not set a categorical standard for what is Best Available Technology for phosphate discharge reduction applicable to pumping stations, the Florida DEQ, as the state permitting agency, would have to apply its Best Professional Judgment to determine what treatment technology would be available. Thus far, it looks as if the Everglades Forever Act’s choice of constructing STAs to filter phosphorous from the waters before they enter the Water Conservation Areas is the best option.250 In any case, because the Florida legislature has found that STAs, along with BMPs, are the equivalent of Best Available Technologies251, current efforts to clean up the phosphorous loads probably already mirror what an NPDES permit would require.252

In fact, during oral argument, the Tribe’s counsel emphasized that the permit they envision would require “simply that the plan that SFWMD already has... on the books, and which they mention in their brief, be implemented within a reasonable time period and under a reasonable compliance schedule.”253 Thus, the Tribe, in an effort to get the SFWMD to meet the water quality standards for S-9 which it is already committed to achieving, is using the CWA to prevent “backsliding.”254

---

250. FLA. STAT. ch. 373.4592.
251. Id.
252. SFWMD is also currently engaged in a project sponsored by the United States Army Corps of Engineers which addresses the phosphorous problem in Water Conservation Area 3 by using smaller pumps alongside pump station S-9 to intercept cleaner seepage water and pump it back into the Water Conservation Area and nearby storage basins before it mixes with polluted waters from C-11 basin. See Joe R. Miller, Central and Southern Florida Ecosystem Restoration: Critical Letter Project Report, at www.saj.usace.army.mil/projects/newrpt.htm (last visited July 19, 2005).
254. Id. at *46.
CONCLUSION

The Miccosukee case illustrates the dire importance of amping-up nonpoint source pollution controls in order for the CWA to be truly effective. Although the Eleventh Circuit rightly held that the S-9 pump station should be regulated under the CWA, the physical reality of the pollution problem in southern Florida is greater than what an NPDES permit can remedy. Although an NPDES permit for S-9 may lead to lowered phosphorous levels, this only treats a symptom of the underlying problem. Rather than point fingers at the SFWMD, which is charged with managing and enhancing the Everglades and protecting citizens and water supplies from flood problems, more attention should be turned towards the true culprits responsible for the nonpoint source pollution funneled through the SFWMD’s system: the agricultural interests and urban developments creating the polluted runoff that poisons the Everglades ecosystem.

255. Miccosukee Tribe of Indians v. S. Florida Mgmt. Dist., 280 F.3d 1364, 1371 (11th Cir. 2002).
256. FLA. STAT. ch. 373.069 (2005).