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Pumping Pollution: An In-Depth Analysis of *Miccosukee* and Notes on *S.D. Warren Co. v. Maine Bd. of Dept. Env'tl. Protection*, with Comments on Improving the State and Federal Regulation of Activities that Cause Water Quality Degradation

Jessica A. Barkas*

In March of 2004, the Supreme Court issued its opinion in *South Florida Management District v. Miccosukee Tribe of Indians*.¹ The Court had granted certiorari on the question of whether the South Florida Water Management District (“Water District”) was violating the Clean Water Act (“CWA”) by discharging phosphorus-laden water (phosphorus is a pollutant under the CWA) from a flood control canal into the Everglades. The specific structures at issue were the S-9 pump, responsible for pumping excess water from rain, surface runoff, and subterranean seepage from the C-11 Canal to Water Conservation Area 3 (“WCA-3”) of the Everglades.² The Miccosukee, a relatively small tribe based in the Everglades, along with a citizen group, Friends of the Everglades, brought suit against the Water District for discharging pollutants without a National Pollution Discharge Elimination System (“NPDES”) permit.³ The Water District claimed that since it was just moving water from the canal to WCA-3 and did not itself add any pollutants, the S-9 pump’s discharges could not meet the Act’s definitional requirement that a discharge of a pollutant be an “addition”

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

2. *Id.* at 99-101.

3. *Id.* at 99.

of a pollutant.⁴

In the first portion of this article, I will discuss the arguments and concerns of the parties to *Miccossukee* and the numerous amici, some of which bring up issues in contemporary water law, such as federalism concerns under the CWA § 101(g), water diversion and use rights, the practical and regulatory consequences of hydrological connectivity, the water quality impacts of water extraction and/or water diversion, and the bounds of federal and state authority to mandate water quality standards that impact use, movement, and disposal of water. As a background to *Miccossukee*, I discuss several other water transfer cases involving the CWA that have been brought to the Supreme Court and the courts of appeal in the last decade.

After a brief recounting of the facts and legal issues in the *Miccossukee* case, I will describe the briefs of the parties, the briefs of Colorado and other water-limited states who supported the Water District, the briefs of parties in water-limited states who nonetheless supported the tribe, and some of the arguments made by amici that were not covered by the parties. I will briefly recount what the Supreme Court decided and what questions it left open on remand. Finally, I will discuss the Environmental Protection Agency's ("EPA") views, as set out in an August 2005 interpretation letter, on whether a *Miccossukee*-type diversion requires a NPDES permit. I will also describe and discuss *S.D. Warren Co. v. Maine Bd. Dept. of Env'tl. Protection*, a § 401 certification case being heard by the United States Supreme Court in the October 2005 term.⁵ In *S.D. Warren*, the Petitioner dam operator argued that the *Miccossukee* ruling means that its dams, which impound, divert, and discharge most of the flow of a river, causing water quality degradation, do not require a § 401 certification because they do not discharge a pollutant.⁶

In the second half, to supplement the discussion in the briefs of the sorts of projects and entities that may be affected by the *Miccossukee* decision, I review some of the news stories and law review articles commenting on the case and related CWA issues. I then discuss some of the suggested solutions and mitigating measures against financial and administrative overburden on water projects, such as the possibility of utilizing state- or project-wide general permits.⁷ I conclude that

4. *Id.* at 104.

5. *S.D. Warren Co. v. Maine Bd. Dept. Env'tl. Protection*, 868 A.2d 210 (2005), *cert. granted*, 74 U.S.L.W. 3220 (Oct. 11, 2005) (No. 04-1527).

6. See discussion of Brief of Petitioner, *S.D. Warren Co.*, *infra*.

7. An EPA webpage explains general permits at <http://www.epa.gov/npdes/pubs/101pape.pdf>:

A general permit covers multiple facilities within a specific category. General

administrative and monetary costs to water projects can be readily mitigated by the use of general permits, sensitive timelines, and federal assistance with constructing waste treatment facilities where necessary. Furthermore, for at least some diversions, permitting requirements are necessary to maintain water quality and are well within the spirit, if not the explicit letter, of the CWA. Finally, I argue for rethinking how we view congressional intent in CWA technical interpretation to better reflect the improvements that have been made since the 1970s in our understanding of the causes of water quality degradation and technical expertise in water treatment, in light of Congress's explicit intention to completely stop pollution discharges to the nation's waters.⁸

CWA Water Transfer Cases in the Higher Courts

The CWA, by putting mandatory controls on the discharge of pollutants into the nation's waters, necessarily affects individual and institutional use of water rights. A line of Supreme Court and federal Court of Appeals cases in the last decade have explored the boundaries and purposes of the CWA, with inquiries into what the bounds of "the waters of the United States" might be, whether and to what extent water quantity is a component of water quality, and most recently, how the nation's many thousands of water diversions may be regulated when they degrade water quality.

In *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*,⁹ the Supreme Court dealt with a conflict between the Washington State

permits may offer a cost-effective option for permitting agencies because of the large number of facilities that can be covered under a single permit. According to the NPDES regulations at 40 C.F.R. § 122.28, general permits may be written to cover categories of point sources having common elements, such as: Storm water point sources; Facilities that involve the same or substantially similar types of operations; Facilities that discharge the same types of wastes or engage in the same types of sludge use or disposal practices; Facilities that require the same effluent limits, operating conditions, or standards for sewage sludge use or disposal; and Facilities that require the same or similar monitoring.

General permits, however, may only be issued to dischargers within a specific geographical area such as city, county, or state political boundaries; designated planning areas; sewer districts or sewer authorities; state highway systems; standard metropolitan statistical areas; or urbanized areas. By issuing general permits, the permitting authority allocates resources in a more efficient manner to provide more timely permit coverage. For example, a large number of facilities that have certain elements in common may be covered under a general permit without expending the time and money necessary to issue an individual permit to each of these facilities. In addition, using a general permit ensures consistency of permit conditions for similar facilities.

8. See generally 33 U.S.C. § 1251.

9. *PUD No. 1 of Jefferson County v Wash. Dept. of Ecology*, 511 U.S. 700 (1994).

Department of Ecology and a public utility district that wanted to build a dam on the Dosewallips River, a very high quality river that originates in Olympic National Park.¹⁰ Building hydroelectric dams, as the utility district planned to do, requires a license from the Federal Energy Regulatory Commission ("FERC").¹¹ In order to get a FERC license for a facility that might cause a discharge during at least some stage in its construction or operation, the utility must get a certification from the relevant state authority (Washington State Department of Ecology in this instance) that the project will meet state water quality standards promulgated pursuant to the CWA.¹² In order to protect the Dosewallips River as a salmon-bearing stream, Ecology's certification required the utility to maintain certain minimum instream flows in the river below the dam.¹³

The utility district objected to the minimum flow requirements, asserting, among arguments, that the FERC licensing authority superceded the state's water quality authority and that section 101(g) limited the scope of the CWA to measures that did not affect water allocation.¹⁴ Noting that the utility district's use of this argument was "peculiar," given that the section in question actually was meant to preserve states' rights to allocate water, the Court interpreted 101(g) as simply providing a reassurance that state water allocation decisions were in general not to be subverted, though legitimate and necessary water quality controls that affected individual water rights were still permissible under the CWA.¹⁵

The Court also dealt with in-stream flow as a valid water quality perimeter. Washington's water quality standards included a narrative condition that required water quality in the Dosewallips River sufficient to protect fish habitat and migration.¹⁶ The Court reasoned that water quantity is part of water quality because a decline in water quantity can destroy fish habitat and migration in a stream, uses that are specifically protected by Washington's water quality standards.¹⁷ Individual water rights to a stream can therefore be restricted by the state under federal CWA authority (and under more stringent state standards) in order to maintain minimum instream flows for fish.¹⁸ The Court held that the State of Washington could permissibly condition the CWA certification

10. *Id.* at 705-06, 708-09.

11. *Id.* at 709.

12. *Id.*

13. *Id.*

14. *Id.* at 720-22.

15. *Id.* at 733-34.

16. *Id.* at 714-15.

17. *Id.* at 719.

18. *Id.* at 720.

to require minimum instream flows.¹⁹

In *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, citizen groups sued the City of New York for discharging silty water from a reservoir into a trout stream, Esopus Creek, without a NPDES permit, in violation of CWA § 1311(a).²⁰ New York City argued that the silt entered the first river as nonpoint source runoff and was not added at the point source discharge in to the second river.²¹ The Second Circuit Court noted that the silt would not be in the receiving body but for the tunnel maintained by the City to facilitate transfers of water.²²

The Second Circuit distinguished two dam-related cases that held that water quality changes caused by water from hydroelectric facilities could not be considered a “discharge,” so they did not require a NPDES permit.²³ In both cases, water was drawn from and later discharged back to the very same water body as it had come from, without anything being added to it. In *National Wildlife Federation v. Gorsuch*, water was released over a dam from a reservoir, waters of which would naturally flow downstream anyway.²⁴ In *National Wildlife Federation v. Consumers Power Co.*, water (and live fish) was withdrawn from a lake, then discharged back into the same lake (along with fish ground up in the turbines).²⁵

Gorsuch and *Consumers Power* may no longer be good law in some respects. Both courts gave substantial deference to the position asserted by the EPA in opinion letters to Congress that the dam releases were not discharges. The EPA had not arrived at its conclusion by any sort of rulemaking or other formal administrative process.²⁶ The *Catskill* court noted that more recent Supreme Court precedent made clear that opinion letters “do not deserve broad deference of the sort accorded by the *Gorsuch* and *Consumers Power* courts.”²⁷

The *Catskill* court drew support from two earlier cases in the First and Second Circuits. In *Dague v. City of Burlington*, hazardous waste from a city’s landfill drained to a pond that neighboring plaintiff landowners used for a water supply.²⁸ Where leachate from a landfill

19. *Id.* at 735.

20. *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001).

21. *Id.* at 485, 493.

22. *Id.* at 492.

23. *Id.* at 491-92 (citing *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); *Nat’l Wildlife Fed’n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988)).

24. *Id.* at 491 (citing *Gorsuch*, 693 F.2d at 174-75).

25. *Id.* at 491-492, (citing *Consumers Power*, 862 F.2d at 586).

26. *Id.*

27. *Id.* at 490 (citing *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Christensen v. Harris County*, 529 U.S. 576 (2000)).

28. *Dague v. City of Burlington*, 935 F.2d 1343, 1354-55 (2d Cir. 1991).

entered a pond, which emptied through a culvert into a wetland, the court held that the pond and marsh were different navigable waters, the culvert was found to be a point source; and the release of pond water through the culvert was a “discharge.”²⁹

In *Dubois v. U.S. Dep’t of Agriculture*, a ski resort operator pumped polluted river water into a pond to fuel its snow-making equipment without a NPDES permit.³⁰ The First Circuit found that the two bodies of water were distinct and that the river water would never enter the pond water, absent the ski area pumping, so the natural separation of the river from the pond made the discharge of the river water into the pond an “addition.”³¹ The *Dubois* court distinguished *Gorsuch* and *Consumers Power* because they were diversions from and back into the same body.³²

Polluted water transport cases are not limited to surface waters. In *Northern Plains Resources Council v. Fidelity Exploration & Development Co.*, the Ninth Circuit Court of Appeals interpreted “pollutant” to include groundwater discharged into a stream as part of a methane gas extraction operation.³³ The defendant extracted groundwater as part of its mining operation. It sought to discharge the water into the nearby Tongue River, though the water contained minerals and salt.³⁴ Though the groundwater was unaltered by the defendant, the court held that the water was industrial wastewater, thereby falling within the express definition of a pollutant in § 502(6) of the CWA (which lists, among several other substances, “industrial, municipal, and agricultural waste discharged into water” as “pollutants”).³⁵

All of these cases are discussed in the briefs and oral arguments to the Supreme Court in the *Miccosukee* case. The Courts of Appeal have taken a track against allowing unregulated discharge of polluted water, at least when the waters are not hydrologically connected. Unfortunately, the Supreme Court didn’t grant certiorari in *Catskill* or any of the other cases that involved more clearly unconnected waters (in the hydrological sense)—they granted certiorari on a case from one of the most well-known, porous wetlands in the world.

Miccosukee in the Lower Courts

The bulk of the Southern District of Florida Court’s unpublished

29. *Id.*

30. *Dubois v. U.S. Dep’t of Agriculture*, 102 F.3d 1273 (1st Cir. 1996).

31. *Id.* at 1296-97.

32. *Id.* at 1299.

33. *N. Plains Res. Council v. Fidelity Exploration & Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003).

34. *Id.* at 1157.

35. *Id.* at 1160.

1999 opinion was dedicated to whether the Water District was a state agency and thus immune from suit under the 11th Amendment.³⁶ After deciding the immunity issue against the Water District, the court turned to the Tribe's motion for summary judgment on the issue of the District's unpermitted discharge from S-9.³⁷ The court acknowledged that the C-11 canal and the Everglades were once a single body, but manmade structures had divided them into two bodies, some groundwater seepage notwithstanding.³⁸ The court reasoned that the plain language of the CWA indicated that discharge of polluted waters from the C-11 canal through the pipes of the S-9 pump easily met the statutory definition of discharge of a pollutant; "any discharge of any pollutant to navigable waters from any point source" (navigability was not disputed at any stage in this litigation).³⁹ Because the water qualities were so different, they were now permanently divided into separate bodies, and the water was pumped in the opposite direction of natural flow, the court granted the Tribe's motion for summary judgment.⁴⁰

The Water District only appealed the district court's decision that the S-9 pump was subject to NPDES permitting requirements. The Eleventh circuit reviewed the decision *de novo*.⁴¹ They made two conclusions early in their opinion: 1) when determining whether pollutants have been added to navigable waters, "the receiving body of water is the relevant body of navigable water," and 2) the question of whether pollutants are from a point source turns on "whether—but for the point source—the pollutants would have been added to the receiving body of water."⁴² If a point source causes pollutants to be added to a receiving body of water, it is the "cause-in-fact of the release of pollutants into navigable waters."⁴³ The Court flatly rejected the Water District's argument that pollutants from another navigable water body are not really pollutants discharged from "the outside world," and are not subject to NPDES permitting requirements.⁴⁴ The Court also rejected the Water District's argument that because the District did not add the pollutants, the pollutants were not "from" the point source—the S-9

36. *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, No. 98-6056-CIV, 1999 WL 33494862 (S.D.Fla. Sep. 30, 1999).

37. *Id.*

38. *Id.* at 7.

39. *Id.* at 6-7.

40. *Id.* at 7.

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

42. *Id.* at 1368.

43. *Id.*

44. *Id.* at 1368 n.5.

pump.⁴⁵ The Court cited *Dubois* and *Catskill* in support of its “but-for” analysis of whether the S-9 pump was discharging a pollutant from a point source.⁴⁶ Finally, the Court rejected the Water District’s argument that because the C-11 canal and the WCA were historically connected, they cannot now be two separate bodies.⁴⁷

The Court of Appeals noted that the District Court had granted a motion to enjoin operation of the S-9 pump without fully considering that immediate shut down of the pump would cause widespread flooding in populous Broward County.⁴⁸ Because the lower court failed to balance the interests when deciding to grant the injunction, the Eleventh Circuit vacated the injunction and remanded with instructions to the lower court to order the Water District to obtain a NPDES permit to operate the S-9 pump within a reasonable period.⁴⁹ The Water District appealed this decision to the Supreme Court and the Court granted certiorari.

Principle Arguments of Petitioner, the Water District

The Petitioner presented the issue as “[w]hether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an ‘addition’ of a pollutant ‘from’ a point source triggering the need for a National Pollutant Discharge Elimination System permit under the Clean Water Act.”⁵⁰ The Water District had two principle assertions: that state flow diversion facilities that do not themselves add pollutants to water are not subject to NPDES requirements and that, in the alternative, the Everglades ecosystem is a single navigable water, so no addition is made by pumping water from one part to another. For the former, the Water District employed arguments focused on plain language, legislative history, and principles of statutory interpretation.

The Water District argued that the NPDES permit requirement would displace state authority over water management and that Congress had made no plain statement that it intended to usurp the states in this respect.⁵¹ It argued that application of NPDES to water diversion facilities would lead to “absurd” and “disastrous” results, and that the

45. *Id.* at 1368.

46. *Id.* at 1369, n.7.

47. *Id.* at 1369 n.8.

48. *Id.* at 1366.

49. *Id.* at 1371.

50. Brief of Respondent Miccosukee Tribe at i, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (No. 02-626).

51. Water District Brief at 34.

severe criminal penalties in the CWA required narrow interpretation.⁵²

The Water District's first specific argument was that because the EPA, in over 30 years of CWA regulation, had not required that flow diversion facilities get NPDES permits, the discharges of the S-9 pump were exempt. The Water District, from the outset, carefully distinguished its activities as a state flow diversion facility from those of "industrial, municipal and other dischargers of waste."⁵³ The Water District predicted "disastrous consequences" if the court upheld the Eleventh Circuit's reading that NPDES permits are required in these circumstances, including penalties like that leveled against New York City the prior year.⁵⁴ In *Catskill*, the Second Circuit upheld a \$5.7 million CWA penalty based on New York's failure to obtain a NPDES permit for a water diversion of its water supply that caused silt and other pollutants to be discharged into a clear trout stream.⁵⁵

The Water District also lamented that complying with the NPDES permit requirements for S-9 and its other discharge points would "divert scarce government resources to permitting and interfere with the States' nonpoint source pollution programs."⁵⁶ Underfunded permitting authorities would be "overwhelmed" with this new category and the permitting requirement would spawn "a whole new area of wasteful litigation," as interested parties might sue over the terms or issuance of permits.⁵⁷

The Water District argued that since several dictionary definitions of "from" indicated that it means "origin" or "source," Congress must have meant to preclude application of the NPDES permit to any source discharging pollutants that was not the originator of those pollutants.⁵⁸ The Water District cited language in the *Consumers Power* case that an "addition" "occurs only if the point source itself physically introduces a pollutant into water from the outside world," apparently espousing the view that the canal was not "the outside world" relative to WCA-3.⁵⁹

The Water District argued that the phosphorus-contaminated water in the canal was not, by definition, a pollutant. "Pollutant" is defined in the Act as, among other things "industrial, municipal, and agricultural waste discharged into water."⁶⁰ They also cited a 9th Circuit case defining pollutants as "waste material of a human or industrial

52. *Id.* at 37.

53. *Id.* at 23.

54. *Id.*

55. *Id.*

56. *Id.* at 24.

57. *Id.*

58. *Id.* at 26.

59. *Id.* at 27.

60. 33 U.S.C. § 1362(6) (2006).

process.”⁶¹ It was the Water District’s apparent position that nonpoint source runoff of agricultural and domestic fertilizers, collected in the canal were neither “industrial, municipal, and agricultural waste discharged into water,” nor “waste material of a human or industrial process.”

To support their position, the Water District quoted the legislative history of the CWA:

[I]n describing its direction to EPA to issue information on processes, procedures, and methods to control pollution caused by flow diversion facilities under § 304(f)(2)(F), Congress expressly identified “natural and man-made changes in the normal flow of surface and ground waters” as “nonpoint source” activities that are subject to state nonpoint source programs rather than the NPDES program.⁶²

The Water District’s next argument emphasized that the lower court’s reading of the CWA was both contrary to “ordinary principles of statutory interpretation” and would lead to an unduly burdensome bureaucratic process, as well as “absurd” and “disastrous” results.⁶³ They argued that defining the pumping system at issue as a point source of pollution subject to NPDES permitting would strip states of their power to control nonpoint source pollution, and that Congress would not take such an action without a clear statement of intent.⁶⁴ They reiterated their earlier argument that the language of 304(f)(2)(F) excluded the Florida pumping system from regulation as a point source, and asserted that obtaining NPDES permits for Florida’s pumping stations would be “unnecessarily burdensome” and that Congress only meant to regulate industrial and municipal point source polluters.⁶⁵

The Water District predicted dire consequences if, as the Eleventh Circuit decided, the “receiving body of water is the relevant body of navigable water.” The Water District argued that every water transfer could potentially require a NPDES permit because all waters, no matter how clean, contain some pollutants.⁶⁶ “Movement” becomes synonymous with “addition” and “navigable waters” with “pollutant.”⁶⁷ The Water District argued that this reading would subvert and undermine state water management programs and nonpoint source pollution

61. Brief of Respondent Miccosukee Tribe, *supra* note 50, at 29.

62. *Id.* at 33, citing H.R. Rep. No. 92-911, at 109 (1971).

63. *Id.* at 23.

64. *Id.* at 34.

65. One wonders how this case might have been different if it were a city operating the pump.

66. *Id.* at 38.

67. *Id.*

controls:

If the decision below stands, the planned solution to those problems—traditionally state regulatory strategies, best management practices, land use planning, urban waste management, public education, and ground water controls—will be replaced with technology-based effluent limitations that give no consideration to quantity requirements not only of urban and agricultural areas, but of the environment itself.⁶⁸

The District argued that water management authorities should not have to be responsible for controlling pollutants they did not generate.⁶⁹ They expressed fear that they would be judged in violation of the CWA, subjected to substantial financial penalties, as well as continuing financial responsibility for hurricane and drought-induced water quality changes in the Everglades.⁷⁰

The Water District's final argument urged the Court to overrule the lower court based on its misunderstanding of the hydrology of the system in question.⁷¹ Here, the District argued that the waters in the instant circumstances are not really separate. The Everglades have been consistently treated as a single water body for management and scientific purposes—pumps, canals, and levees notwithstanding. In this area of the world, the surface and groundwaters flow together and the basins are not distinct.⁷² In the Water District's view, management of the water and water pollution in the Everglades has always been done on an Everglades system-wide level and it is arbitrary to demand permits for pumps that move water around an integrated, single system. The Solicitor General, in its amicus brief, takes this single entity argument a big step further and argues that the whole of "waters of the United States" are a single entity and that no addition of polluted water from one body can ever be a NPDES-invoking discharge to another body.⁷³

Principle Arguments of the United States as Amicus Curiae in Support of the Water District

The Solicitor General supported the Petitioner with three principle arguments: 1) the CWA definition of "discharge of a pollutant" does not include conveyance and discharge of water between navigable waters;

68. *Id.* at 39.

69. *Id.*

70. *Id.* at 43-44.

71. *Id.* at 47.

72. *Id.*

73. Brief of Solicitor General as Amici Curiae supporting Petitioner at 19, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541, U.S. 95 (2004) (No. 02-626).

2) the CWA does not require a NPDES permit for every point source discharge that is the “cause-in-fact” of the release of pollutants to navigable waters; and 3) the CWA expresses Congress’ intent that facilities that connect navigable waters would be regulated through means other than the NPDES permitting system.⁷⁴

The first argument rests on the Solicitor General’s assertion that the C-11 canal and the WCA-3 should be viewed as part of one connected “waters of the United States.” This is the introduction of the “unitary waters theory.”⁷⁵ The Solicitor General argued that by its omission of “any” before “navigable waters” in the definition of discharge of a pollutant, “any addition of any pollutant to navigable waters from any point source,” Congress understood all navigable waters to be one single entity.⁷⁶ Therefore, no one could ever be adding a pollutant by pumping dirty water from one water body to another, cleaner body, because, in effect, the dirty water body and the clean water body are one. This theory was novel to Supreme Court jurisprudence, but had been twice tried before in the First and then the Second Circuit Courts of Appeal under the “singular entity” moniker.⁷⁷ The Solicitor General was dismissive of these earlier courts’ findings, which read the CWA as contemplating separate water bodies, arguing instead that the earlier dam cases, which both found that water moving from a reservoir through a dam and into the stream below did not constitute an addition, were better decisions. Both cases use the language that an “addition from a point source occurs only if the source itself physically introduces a pollutant into the water from the outside world.”⁷⁸ The Solicitor General’s reliance on *Gorsuch* and *Consumers Power* as analogous to the Florida situation rests on the assumption that the two water bodies are really one, and thus neither can be the outside world to the other.

The Solicitor General further bolstered its argument in favor of treating all navigable waters as a single body by citing the language of 33 U.S.C. 1312(a) (“a specific portion of the navigable waters”) as evidence that Congress viewed the waters as one entity and by asserting that it would be “unmanageable” to determine whether waters that shared or were thought to share a hydrological connection were “separate and distinct.”⁷⁹

In its next argument, the Solicitor General attacked the lower

74. *Id.* at 19, 21, 85.

75. *Id.* at 19.

76. *Id.*

77. See *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d. Cir. 2001); *Dubois v. U.S. Dept. of Agric.*, 102 F.3d 1273 (1st Cir. 1996).

78. Brief of Solicitor General, *supra* note 73, at 16.

79. *Id.* at 19.

court's finding that "an addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants into navigable waters."⁸⁰ The Solicitor General declined to support the Water District's argument below that pollutant must be added by the point source itself for the pollutant to be "from" that point source, but challenged the lower court's "but-for" analysis. Resting on its earlier argument that all waters are one and a dictionary definition of "from," as "a point or place where an actual physical movement . . . has its beginning," the Solicitor General argued that the pumping station was not itself a source of pollutants, it was only a conveyer of water from one part of a unified water to another (not from the "outside world")—and that the lower court's but-for causation interpretation of discharge of a pollutant was beyond the scope of the CWA.⁸¹

Finally, the Solicitor General argued that Congress meant for states and federal regulators to deal with these types of pollution problems by utilizing means other than the NPDES permitting system.⁸² In support, they cited provisions in the CWA protecting state water use management responsibilities, providing for state nonpoint source pollution management programs, and the passage of specific Everglades restoration laws for Florida.⁸³

Principle Arguments of Respondents, the Tribe and Friends of the Everglades

The Tribe first pointed out that there was no dispute that the S-9 pump was a "point source," that the water discharged from the pump contained "pollutants," and that the EPA regulatory definition of "discharge of a pollutant:"

includes additions of pollutants into waters of the United States from:
Surface runoff which is collected or channeled by man: [and]
discharges through pipes . . . or other conveyances owned by a
State . . . which do not lead to a treatment works. . . .⁸⁴

The Tribe explained that the C-11 Canal collects runoff from the C-11 Basin and then discharges it to WCA-3, against the natural direction of flow.⁸⁵ As the Tribe emphasized several times throughout its brief, the S-9 pump causes polluted water to move in a direction that it would

80. *Id.* at 21.

81. *Id.* at 22.

82. *Id.* at 25.

83. *Id.* at 28.

84. 40 C.F.R. § 122.2 (2005).

85. Brief of Respondent Miccosukee Tribe, *supra* note 50, at 7.

never go in the absence of the pump.⁸⁶ The Tribe attacked the Water District's contention that because the pollutants could not be "from" the S-9 pump itself, the pumping of polluted water did not fall under the definition of discharge of a pollutant. The Tribe pointed out that:

The Petitioner's construction would require the Court to add language to the statutory definition as follows: "any addition of any pollutant to navigable waters from any point source unless the pollutant is not produced by the point source itself." The Solicitor General would rewrite the statutory definition as follows: "any addition of any pollutant to navigable waters from any point source unless the pollutant originates in some already polluted navigable waters."⁸⁷

The co-respondent, Friends of the Everglades, echoed the Tribe's arguments in many respects. The Friends cited the language of the CWA and the Solicitor General's decision, to decline supporting the Petitioner in its argument that pollutants must be generated by the point source itself to be "from" it and subject to NPDES permitting requirements, to support its argument that such a reading would mean that "few if any point sources would be governed by the CWA."⁸⁸

The Tribe pointed to the EPA's position in *Northern Plains*, that a state could not exempt the discharge of unaltered, but naturally pollutant-containing, groundwater discharges to surface water from the requirement to obtain a NPDES permit.⁸⁹ The Tribe contended that the Solicitor General's position in the present case was contradictory to the position it had just taken in the groundwater case.⁹⁰

Another point of emphasis that appeared many times in the Tribe's brief was that without the pump system, the phosphorus would never end up in WCA-3, and that the CWA divided the regulation of point source and nonpoint source pollutants based on practical feasibility of regulation.⁹¹ The Tribe also employed dictionary definitions to bolster its interpretation of "discharge" and "addition" as covering the action of the S-9 pump, again emphasizing that the pump added pollutants to waters that would not otherwise receive them.⁹² The Tribe used the language of the CWA definition of "point source," which includes "any

86. *Id.*

87. *Id.* at 16.

88. Brief of Respondent Friends of the Everglades at 16, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626).

89. N. Plains Res. Council v. Fidelity Exploration & Dev. Co., 325 F. 3d 1155 (9th Cir. 2003).

90. Brief of Respondent, Miccosukee Tribe, *supra* note 50, at 16 n.10.

91. See Brief of Respondent Friends of the Everglades, *supra* note 88, at 24.

92. *Id.* at 28-29.

discernible, confined and discrete conveyance, including but not limited to any pipe . . . from which pollutants are discharged.”⁹³ Because words like “conveyance” and “pipe” are included in the definition, the CWA explicitly contemplates that point sources don’t have to be themselves the generator of pollutants.⁹⁴

The Tribe also pointed to an earlier Supreme Court opinion regarding the City of Milwaukee sewage and stormwater overflows. In that case, the Court noted in a footnote that “overflows from a city sewer system of sewage and stormwater runoff constituted point source discharges even though neither the sewage nor the stormwater originated at or were produced by the overflow point sources.”⁹⁵ They also argued that the Water District’s concession below that the S-9 pump is a “point source” makes its pollutant discharges unlikely targets of nonpoint source regulation—essentially, if the S-9 pump isn’t subject to NPDES permitting requirements, there is no other way to regulate its pollutant discharges.⁹⁶

The Friends noted the language of *Gorsuch* in support of the Tribe and the Friends’ distinction between point and nonpoint sources of pollution: “[i]t is a ‘discharge’ of a pollutant that distinguishes a point source from a nonpoint source. CWA § 502(14) defines a point source as ‘any . . . discrete conveyance . . . from which pollutants are or may be discharged.’ 33 U.S.C. § 1362(14). . . . A nonpoint source is understood as any source of pollution that cannot be traced to a point source.”⁹⁷ The diffuseness or discreteness of a pollutant discharge as the practical distinction between point source and nonpoint source pollution is also noted by sources cited in the Tribe’s brief: “The S-9 pump station is an identifiable and discrete conveyance and thus presents none of the difficulties that remove nonpoint sources from permit requirements.”⁹⁸

In its argument that Congress put in explicit exemptions from NPDES regulation when it meant to limit the application of the Act to water transfers, the Tribe pointed to the sections of 33 U.S.C. 1362, subsections 6 and 14, which exclude “water . . . injected into a well to facilitate production of oil or gas, or water derived in association with oil

93. 33 U.S.C. § 1362(14) (2000).

94. Brief of Respondent Friends of the Everglades, *supra* note 88, at 18.

95. Brief of Respondent Miccosukee Tribe, *supra* note 50, at 19, citing *City of Milwaukee v. Ill. & Michigan*, 451 U.S. 304, 318 n.11 (1981).

96. Brief of Respondent Miccosukee Tribe, *supra* note 50, at 20.

97. Brief of Respondent Friends of the Everglades, *supra* note 88, at 46, citing *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 164 (D.C. Cir. 1982).

98. Brief of Respondent Miccosukee Tribe, *supra* note 50, at 21, citing *Pronsolino v. Natri*, 291 F.3d 1123, 1126 (9th Cir. 2002) (“Nonpoint sources of pollution are non-discrete sources; sediment run-off from timber harvesting, for example, derives from a nonpoint source”).

or gas production and disposed of in a well . . . and . . . agricultural stormwater discharges and return flows from irrigated agriculture.”⁹⁹ Storm water discharges are regulated as point sources in other areas of the Act: “point sources include publicly owned treatment works (“POTW’s”) which often simply filter and pass through to navigable waters pollutants originating from nonpoint sources.”¹⁰⁰ The Tribe argued that the Water District’s canal and pump station functioned much like a municipal separate storm sewer:

In fact, the C-11 Canal compares very closely, if not exactly, to a municipal separate storm sewer, because it is a “man-made channel” owned by the State “flood control or drainage district” “designed or used for collecting or conveying storm water.” 40 C.F.R. § 122.26(b)(8). Under the controlling EPA regulations, the discharged water from the pipes of the S-9 pump station can be defined as “stormwater” because it consists of “stormwater runoff, . . . surface runoff and drainage.” See 40 C.F.R. § 122.26(b)(13) (2002). Indeed, the C-11 Canal and the S-9 pump station are regulated under Florida’s “Everglades Storm Water Program.”¹⁰¹

Next, the Tribe argued that the Eleventh Circuit’s conclusion that “moving pollutants from one body of water of the United States to another constitutes an ‘addition’ within the meaning of the CWA,” is consistent with holdings in a number of other Circuits that have dealt with the problem, noting decisions in the 1st, 2nd, 9th, and DC Circuits.¹⁰²

The Tribe distinguished *Gorsuch* and *Consumers Power* based on the facts of each case. Both involved water withdrawals above a dam and then discharges either back into the same body of water or discharges to the stream below the dam, to which the water behind the dam would naturally be connected, but for the dam.¹⁰³ Again, the Tribe used the fact that the S-9 pump back pumps water to connect two bodies

99. Brief of Respondent Miccosukee Tribe, *supra* note 50, at 21.

100. See 33 U.S.C. § 1311 (a-b).

101. Brief of Respondent Miccosukee Tribe, *supra* note 50, at 23.

102. *Id.* at 24-25 (citing *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991); *Dubois v. U.S. Dept. of Agric.*, 102 F.3d 1273 (1st Cir. 1996); *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001); *Ne. Plains Res. Council v. Fidelity Exploration & Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003); *Ala. Rivers Alliance v. F.E.R.C.*, 325 F.3d 290, 296 (D.C. Cir. 2003) (holding that the installation and operation of replacement turbines which released low DO water into the river at an increased rate of 900 cfs was an activity that “may result in any discharge” under Section 401(a)(1)); and *Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 308-09 (9th Cir. 1993) (holding that dam was subject to permit requirement where it discharged collected surface runoff into river below), *cert. denied*, 513 U.S. 873 (1994)).

103. Brief of Respondent Miccosukee Tribe, *supra* note 50, at 26.

of water that would otherwise not intermix.¹⁰⁴ The Friends addressed the potential conflict of the Eleventh Circuit's decision with *Gorsuch* and *Consumers Power* in a manner similar to the Tribe.¹⁰⁵

The Tribe also addressed the Water District's argument that § 304's mention of flow diversion facilities as sources of nonpoint source pollution means that such facilities are nonpoint sources of pollution in all instances:

Section 304(f)(2) lists numerous activities, which may result in nonpoint sources of pollution, including runoff from agricultural, silvicultural, mining, construction activities and "changes in the movement, flow, or circulation of navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." 33 U.S.C. § 1314(f)(2). Section 304(f) calls for regulation of nonpoint sources of pollution caused by these activities but it does not suggest that point sources such as pipes and other conveyances are not treated as point sources when they discharge pollutants in connection with these activities. To the contrary, the CWA subjects these activities to the NPDES program when the pollutants from those activities are emitted from a discernable conveyance.¹⁰⁶

The Friends addressed the Water District's § 304 arguments in a similar manner.¹⁰⁷

The Friends also noted some of the specific changes in the Everglades ecosystem, taking place because of the high level of phosphorus pollution discharged by S-9:

In the Everglades, the areas immediately surrounding the S-9, and actually quite a distance surrounding the S-9, is very highly polluted. J.A. 125. From the S-9 pump station looking west into WCA-3A there is a monoculture of cattails. J.A. 38-39. Once the cattail stand dominates the area, it doesn't add oxygen to the water the way the rooted aquatic plants and periphyton and the sawgrass do. The native fish do not survive there, nor can the aquatic bugs that fish feed on be found there. . . .¹⁰⁸

The Friends discussed Florida and the Water District's failure to control nonpoint source pollution as the genesis of lawsuits. Under the state's Everglades restoration legislation, Florida did not include a provision to control pollutant discharges from S-9 and also suspended water quality

104. *Id.*

105. Brief of Respondent Friends of the Everglades, *supra* note 88, at 27-28.

106. *Id.* (citing 40 C.F.R., §§ 122.2, 122.23, 122.24, 122.26, 122.27).

107. Brief of Respondent Friends of the Everglades, *supra* note 88, at 32-33.

108. *Id.* at 32.

standards in the Everglades Protection Area until 2016 to allow the Water District to develop a numeric standard for phosphorus.¹⁰⁹ At this point, the Friends and the Tribe determined that the Water District was violating the CWA by failing to control the pollutant discharges from S-9 and filed suit.¹¹⁰

The Friends attacked the Water District's characterization of the waters of WCA-3 as the same as those in the C-11 canal. They emphasized that the whole Everglades system was divided into several units, each of which is not necessarily interrelated to the others and each of which has a separate water quality designation assigned by the state—they are managed as separate waters.¹¹¹ The C-11 Canal, under Florida law, is a stormwater drainage basin, accepting the permitted discharges from urban, suburban, industrial, and agricultural runoff from 298 subbasins.¹¹² Prior to channelization, the C-11 Canal was a river that flowed south and then east. The S-9 pump enables this river to reverse course and discharges storm water overflow to WCA-3A. In sum, the essence of the Friends' and Tribe's argument on this point is that because the units are separated, albeit often not completely, by physical barriers, managed for different uses, and display different chemical and biological characteristics, the different areas are distinct water bodies.

In response to the Solicitor General's "singular" or "unitary waters" theory, the Tribe cited an EPA General Counsel Decision rejecting the notion of treating all navigable waters as one as contrary to the intent of Congress.¹¹³ The Tribe made reference to the First Circuit Court of Appeals decision in the *Dubois* case, which rejected a navigable waters as a "singular entity" argument and declined to exempt pumping highly polluted river water to a much cleaner upland pond from NPDES permitting.¹¹⁴ The Tribe concluded that allowing indiscriminant pumping of polluted water from one body to another, regardless of how clean the receiving body was, "would sanction any number of rearrangements and redeposits of pollutants that could claim earlier introduction in navigable waters and presents the court with a radically amended definition of 'discharge of a pollutant' that is certain to harm the water quality of all downstream States and Tribes."¹¹⁵ Like the Tribe, the Friends cited *Catskill*, *Dubois*, and *Northern Plains* in support of their position that "addition" includes conveying pollutants that would

109. *Id.* at 43-44.

110. *Id.* at 44.

111. *Id.* at 19.

112. *Id.* at 20.

113. Brief of Respondent Miccosukee Tribe, *supra* note 50, at 31.

114. *Id.*

115. *Id.* at 33.

not make it into the receiving body of water but for the conveyance.¹¹⁶

The Friends also addressed the Solicitor General's preferred treatment of each of the waters in question as unitary "waters of the United States." Using arguments and statutory language citations similar to the Tribe, the Friends surmised that Congress meant to treat each discharge individually. Citing language from *EPA v. California*,¹¹⁷ the Friends noted that the NPDES permitting requirements were enacted to deal with the failure of the prior system, which relied on setting ambient water quality standards rather than pollutant discharge limitations at the source: "Such direct restrictions on discharges facilitate enforcement by making it unnecessary to work backward from an over-polluted body of water to determine which point sources are responsible and which must be abated."¹¹⁸ The Friends also noted that treating all waters as part of a unitary whole and allowing unregulated discharge from a polluted body to a cleaner body would render superfluous the CWA's requirements that states classify each of their water bodies with a designated use and its requirement that states assure that those uses are not degraded.¹¹⁹

The final part of the Tribe's brief discussed § 101(g) and the CWA's division of responsibilities between the state and federal governments. The Tribe argued that the Water District and the Solicitor General proposed to exempt the S-9 pump discharges because 101(g) preserves the authority of states to allocate quantities of water:

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.¹²⁰

The Tribe noted that this very section was interpreted by the Supreme Court in 1994 in *PUD No. 1 of Jefferson County*.¹²¹ As the *PUD No. 1* court noted, 101(g) does not outright forbid restrictions on water quality which affect water quantity—quite to the contrary, the legislative history

116. Brief of Respondent Friends of the Everglades, *supra* note 88, at 29-30.

117. *Env't Prot. Agency v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200 (1976).

118. Brief of Respondent Friends of the Everglades, *supra* note 88, at 25-26 (citing *Env'tl. Prot. Agency v. California ex rel. State Water Res. Control Bd.*, 426 U.S. at 204).

119. Brief of Respondent Friends of the Everglades, *supra* note 88, at 26-27.

120. 33 U.S.C. § 1251(g) (2006).

121. 511 U.S. 700, 733-34 (1994).

indicates that 101(g) was added to assure that water quality restrictions that affected individual water rights were “prompted by legitimate and necessary water quality considerations.”¹²² Thus, Congress made a distinction between impermissible federal meddling in state land use law and decisions allocating water between users, and permissible, necessary, federally-required water quality regulations that happen to affect individual water rights. The Tribe also argued that the 101(g) water allocation decision argument isn’t even applicable to the S-9 pump because it is not allocating water among users—its essentially just disposing of it.¹²³

Section 101(g) directs state and federal regulators to work together to develop water quality programs. The CWA was enacted in response to states’ collective failure to self-regulate water quality.¹²⁴ In the Tribe’s view, the Water District was arguing for an exemption from this federal-state partnership by releasing itself from federal NPDES permit oversight. Other components of the Everglades restoration plan had obtained NPDES permits, for discharges from a nutrient removal project and for discharge of treated stormwaters, so exempting discharge of untreated phosphorus-laden waters without a NPDES permit is inconsistent with the other permit requirements.¹²⁵ The ability to obtain NPDES permits for Everglades restoration projects also undercuts the Water District’s argument that obtaining such would upset federalism arrangements.¹²⁶ The Friends repeat the substance of the Tribe’s brief on the federalism issue.¹²⁷

The Tribe argued that the “doomsday scenarios” of near-universal application of NPDES requirements to water diversions would likely be far less dramatic than asserted.¹²⁸ They suggested that the EPA might use its guidance and rulemaking authority to clarify when NPDES permits would be required, that “pollutants” which do not cause “pollution” as it is statutorily defined might be excluded from

122. The specific section of the legislative history references by both the *PUD No. 1* court (at 734) and the Tribe is 3 Legislative History of the Clean Water Act of 1977 (Committee Print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14, at 532 (1978):

The requirements [of the Act] may incidentally affect individual water rights. . . . It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations.

123. Brief of Respondent Miccosukee Tribe, *supra* note 50, at 35.

124. *Id.* at 39 (citing 118 CONG. REC. 10,203, 10,251 (1972)).

125. Brief of Respondent Miccosukee Tribe, *supra* note 50, at 39.

126. *Id.*

127. Brief of Respondent Friends of the Everglades, *supra* note 88, at 36-37.

128. *Id.* at 40-41.

regulation—leading to the inference that permits would only be required on a case by case basis when a given diversion causes a water quality problem, and that a number of less burdensome permitting mechanisms are available for large-scale projects like the Everglades restoration in the form of general permits or system-wide permits.¹²⁹ Everglades restoration itself would be helped because NPDES permits require that water quality goals be achieved—as the Tribe noted, the Everglades restoration has suffered a number of delays and missed deadlines—the requirement for a NPDES permit would make delaying water quality improvements much more difficult.¹³⁰ The Friends concluded that the effect of the Eleventh Circuit’s decision would be something less than catastrophic for water diverters around the country:

The Eleventh Circuit Decision does not impact on many of the Amicus concerns. The Decision does not conflict with the EPA exemption for dam-caused pollution within a single water body. If there are inter-basin transfers . . . an NPDES permit will not “wreak havoc,” either on dischargers or the state. Instead, it will protect our Nation’s waters when discharges from one navigable body of water to another adds pollutants that could cause harm.¹³¹

Oral Argument Highlights

The Water District began by arguing that its pumps do not add pollutants to navigable waters because there is no addition when waters are moved around without adding anything.¹³² Justice Breyer raised the “obvious question . . . is you have one of these rivers that’s so filthy that you can set fire to it, and next to it is the most pristine, beautiful trout lake ever [and waters could be moved from the former to the latter].”¹³³ The Water District responded that there were state water quality regulations and other parts of the CWA that would prevent such an occurrence. However, as the Tribe pointed out in its argument, no such provision was used to prevent polluted Pemigewasett River water from being pumped into Loon Pond, one of the cleanest waters in the First

129. *Id.*

130. Brief of Respondent Miccosukee Tribe, *supra* note 50, at 41.

131. Brief of Respondent Friends of the Everglades, *supra* note 88, at 47.

132. Transcript of Oral Argument at 2, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, No. 02-626 (U.S. Jan. 14, 2004); Audio Tape: Oral Argument for The Oyez Project: *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, available at Audio Tape: Oral Argument for The Oyez Project: *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, available at: <http://www.oyez.org/oyez/resource/case/1651/audioresources> (last visited Apr. 15).

133. Transcript of Oral Argument at 2, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, No. 02-626 (U.S. Jan. 14, 2004).

Circuit state New Hampshire—only the First Circuit's decision in the *Dubois* case, that a NPDES permit was required, prevented the prolonged dumping of water sometimes known to peel paint off of buildings into an important drinking water pond.¹³⁴ Furthermore, as the Tribe pointed out, the State of Florida's comprehensive regulatory scheme was still allowing very polluted water to discharge through the S-9 pump into the Everglades.¹³⁵ On questions about whether a general permit might solve the problem of many jurisdictions having to get thousands of permits, the Water District could only respond that the states already comprehensively address the filthy to pristine trout pond problem with water quality standards and TMDLs.¹³⁶

Partway into the Water District's argument, the factual question of the hydrology in this particular case was brought up. The Water District explained that much of the water in the canal was there through underground seepage and that there is, in fact, an unconfined aquifer¹³⁷ that runs under the C-11 basin and connects to WCA-3.¹³⁸ The Tribe emphasized that whatever seepage there was would only flow toward C-11 and not toward WCA-3, the implication being that keeping S-9 from releasing pollutants would be effective in reducing pollution in WCA-3, maintaining their practical separateness, subterranean hydrological connection notwithstanding.¹³⁹ Even so, it is evident from the Court's decision to remand for factual findings on the separateness of the two waters that the Court was not satisfied with the facts extracted from the oralists or the parties' briefs.

The Water District's final issue in oral argument was regarding the unitary waters theory. The Court asked the Water District how it could support its pro-unitary theory position in light of the CWA's many areas that contemplate, or even require, the treatment of the United States' waters as separate and discrete bodies, such as the designation of use provisions.¹⁴⁰ The Water District could not give a particularly detailed response—only some reference to the complexities of the Act and § 304.¹⁴¹

Much of the Solicitor General's argument focused on the unitary theory and how the EPA, in 30 years, had never tried to regulate situations like the S-9 pump.¹⁴² The Solicitor General also emphasized

134. *Id.* at 31.

135. *Id.* at 44-45.

136. *Id.* at 6-7.

137. *Id.* at 9.

138. *Id.*

139. *Id.* at 41.

140. *Id.* at 18.

141. *Id.* at 15-17.

142. *Id.* at 21.

the arguments for leaving these types of problems to the states, who may choose, like Pennsylvania (discussed below), to permit such discharges under their own state laws.¹⁴³

The Tribe talked about the practical effect on the process of permit writing that reading a unitary theory into the CWA would have, given that permit writers are instructed to consider the permit in light of the effects of the proposed discharge on the receiving system.¹⁴⁴ If the receiving water body is all of the United States' surface waters, the permit writer's job is made practically impossible because he would have to evaluate the effect on *all* of the waters.¹⁴⁵ In response to the concern about huge administrative burdens and interference with water supply brought up by water management interests and the western states, the Tribe pointed out that withdrawals for consumptive use would not be covered diversions, nor would agricultural return flows (because the pertinent part of the CWA exempts them), and that where a state or district ends up needing permits for several facilities, it can get a general permit.¹⁴⁶ The Tribe found it immaterial that the two water bodies are connected by underground flows because the surface waters, their biological characteristics, are distinct, and the underground water is substantially different from the surface waters on either side.¹⁴⁷ In any case, the Water District's pumping is essentially upstream, like the *Dubois* case, and, like *Dubois*, it is immaterial that some of the upstream water sometimes leaks down stream.¹⁴⁸

The Amici Supporting the Water District

Over twenty amicus briefs were filed in the *Miccosukee* case. In this section, I discuss a representative few from both sides. Colorado and New Mexico, joined by Hawaii, Idaho, Nebraska, Nevada, North Dakota, South Dakota, Texas, Utah, and Wyoming submitted a brief.¹⁴⁹ They wrote in support of the Water District. The Colorado brief contained an overview of the vast water diversion projects in the West and argued that the application of the NPDES permitting system to these diversions could potentially require thousands of permits and untold sums of money

143. *Id.* at 25-26.

144. *Id.* at 32, 46-47.

145. *Id.*

146. *Id.* at 38-39.

147. *Id.* at 41.

148. *Id.*

149. Brief of Petitioner State of Colorado et al. as Amicus Curiae Supporting Petitioner, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2003) (No. 02-626).

for administrative and treatment facility expenses.¹⁵⁰ Such expenses and administrative roadblocks would, Colorado argued, force state water allocation permit holders to relinquish part of their water rights.¹⁵¹ Since the Colorado brief did not really contain any legal arguments not brought up by the parties (aside from putting more emphasis on federal interference with state water allocation decisions and the rights of individual water right holders), I use this and other amicus briefs for the factual information they contain.

Colorado began by noting that most of the arid western states use a prior appropriation system of water allocation and that agriculture in many states depended on irrigation.¹⁵² Most of the precipitation in the arid states falls as snow in the winter, in the mountains.¹⁵³ Major water projects are required to capture, store, and transport mountain snow melt to what would otherwise be more or less desert. Many of the nation's important agricultural areas such as the "Weld and Larimer Counties in Colorado, the Central and Imperial Valleys in California, the Snake River Valley in Idaho, and the Yakima Valley in Washington," would not be productive if not for large-scale irrigation projects (note, however, that Washington joined several other states in support of the Tribe, while California declined to support either side).¹⁵⁴ Many of the large western cities, like Albuquerque, Denver, Los Angeles, Las Vegas, Phoenix, San Francisco, and Salt Lake City also depend heavily upon water from mountain rivers and lakes, sometimes piped hundreds of miles.¹⁵⁵

Water diversions are of paramount importance in Colorado:

[F]orty-nine major transbasin diversions/deliveries move an average of 550,000 acre feet per year of water ("af/year") to supplement supplies in other basins. Transbasin diversions include the Colorado-Big Thompson/Windy Gap Projects, which deliver nearly 280,000 af/year¹⁵⁶ to supplement the water supplies of thirty cities and towns and over 600,000 acres of farmland. Colorado Springs employs six transbasin diversions/deliveries to move 75,000 af/year, eighty percent of its total supply, to city residents. Denver similarly moves over 200,000 af/year through two transmountain tunnels to meet nearly half of the city's needs. Sixty percent of Coloradoans depend

150. *Id.* at 17.

151. *Id.*

152. *Id.* at 2.

153. *Id.* at 15.

154. *See infra* note 197.

155. Brief of Petitioner State of Colorado et al., *supra* note 149.

156. Brief of Nat'l Water Res. Ass'n as Amicus Curiae Supporting Petitioner, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2003) (No. 02-626). The amicus brief of the National Water Resources Association and several other water agencies and organizations put the figure at an average of 228,000 af/year.

on transbasin diversions/deliveries for at least part of their domestic supplies. In addition, over fifty percent of Colorado's irrigated farmland relies on transbasin diversions/deliveries.¹⁵⁷

Colorado points out that to date, none of those diversion facilities had been required to get a NPDES permit, though it also notes that of Colorado's 107,403 miles of streams, only 4,964 (4.6%) are impaired under CWA standards and there is no evidence that the impairments are caused by water diversions.¹⁵⁸

Colorado feared that under the Eleventh Circuit's "but-for" test, each and every water diversion discharge point would require a permit.¹⁵⁹

For example, the Fort Lyon Canal in the Arkansas River Basin, Colorado's driest watershed, carries water from the Arkansas River and two reservoirs for 113 miles almost to the Kansas State Line. It serves 93,000 acres of irrigated farmland, in the process crossing or flowing through seven creeks and arroyos and two reservoirs. The Eleventh Circuit's opinion would require the Canal's operator to obtain as many as nine permits. The water of the Arkansas River is high in total dissolved solids, so the Canal's operator might have to build one or more water treatment plants in order to meet NPDES permit requirements. This is neither financially nor technically feasible for canal shareholders, many of whom are economically-depressed farmers and ranchers.¹⁶⁰

New Mexico's San Juan-Chama Project diverts 90,500 af/year from the Colorado River Basin to the Rio Grande Basin through transmountain tunnels, slaking the thirst of Albuquerque, Santa Fe, farmers of the Middle Rio Grande Conservancy District, and Indian Tribes and Pueblos.¹⁶¹ The diversion offsets the depletion of the Rio Grande Basin, allowing New Mexico to use its full allotment under the Rio Grande Compact.¹⁶² Without these waters, the cities would have to pump from non-rechargeable aquifers and many farmers, Tribes, and Pueblos would have to make do with a much reduced supply.¹⁶³ The Central Arizona Project supplements flagging groundwater supplies for Phoenix and Tucson with 1.5 million af/year of Colorado River water. Further up the Colorado River Basin, thirty-six water diversions move 700,000 af/year to consumers in Colorado, New Mexico, Utah, and Wyoming.¹⁶⁴

157. Brief of Petitioner State of Colorado et al., *supra* note 149.

158. *Id.* at 3, n.2.

159. *Id.* at 3.

160. *Id.* at 3-4.

161. *Id.* at 4.

162. *Id.*

163. *Id.*

164. *Id.*

The California State Water Project delivers quantities up to 4.7 million af/year to supplement the water supply of twenty million citizens and to irrigate 660,000 acres of farmland. The federal Central Valley Project irrigates 2.6 million acres and supplies water for urban and wildlife uses with a diversion of 7.3 million af/year. California also diverts 4.5 to 5.2 million af/year from the Colorado River to water Southern Californian crops and municipal uses.¹⁶⁵ Many of the western states use storage, water right transfer, and banking systems to put water by for drought years, trade water when it is needed more elsewhere, and other extra water needs, such as fire-suppression and aquifer recharge. Colorado argued that the Eleventh Circuit's reading would seriously curtail the use of these banking systems and emergency diversion of water through natural water courses because of the time it would take to apply for a NPDES permit.¹⁶⁶

Support for the Respondent

The Commonwealth of Pennsylvania wrote an amicus brief in support of the Tribe regarding its own practice and positive experience with regulating diversions that cause water quality changes.¹⁶⁷ The states of New York, Connecticut, Illinois, Kentucky, Maine, Massachusetts, Michigan, Missouri, New Jersey, North Carolina, Oklahoma, Vermont, and Washington joined as amici on another brief in support of the Tribe.¹⁶⁸ The New York amici generally echoed the Tribe and Friends of

165. Brief of Petitioner State of Colorado et al., *supra* note 149, at 5.

166. *Id.* at 19-20.

167. The Commonwealth of Pennsylvania outlines its experience with NPDES regulation of water diversions and interest in the *Miccosukee* case:

Since 1986, the Department has routinely applied its NPDES permit program to diversions of such water from one distinct body of water to another and has developed a formal guidance document for use in applying these NPDES permitting requirements that provide needed environmental protection. The regulated community in Pennsylvania has routinely complied with the applicable NPDES requirements relating to such diversions. The Department seeks to maintain its full scope of authority to regulate, through the Act, numerous situations which could potentially have an adverse impact on the quality of a receiving body of water such as: the transfer of salt water into fresh water basins; the conveyance of water infested with invasive species (e.g., zebra mussels) into a body of water that is not; the pumping of warm, sediment-laden lake water into a higher-altitude, high quality trout stream with cold and clear water; and the man-induced drainage of collected waters containing high levels of polluted runoff, including phosphorus, into separate and sensitive watersheds.

Brief of the Commonwealth of Pennsylvania, Dep't of Env't'l Prot. as Amici Curiae Supporting Respondent at 2-3, *S. Fla. Water Mgmt. Dist v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2003) (No. 02-626).

168. Note the presence of New York, Oklahoma, and Washington. The State of New York supported the Tribe, in contrast to New York City, which joined with several

the Everglades by arguing that there was strong textual support in the CWA for the proposition that water transfers through point sources are covered (citing the 40 C.F.R. § 122.2 definition of discharge of a pollutant, which includes “surface runoff which is collected or channeled by man”), that *Gorsuch* and *Consumers Power* are factually inapplicable and perhaps wrongly decided (as both relied on EPA opinion letters and reports, giving undue deference to documents that are not of the type subject to *Chevron*-style deference),¹⁶⁹ and that the CWA’s repeated structural focus on the quality of each distinct water body strongly militates against an intent to treat all water of the United States as a single body.¹⁷⁰ The New York amici placed the focus of the balance of their brief on the ill-fit of nonpoint source programs to address pollution caused by water transfers and on how permit requirements for diversions are both helpful to states and are not unduly burdensome.¹⁷¹

The New York amici noted the contradiction between the Water District’s acknowledgement that the S-9 pump is a point source, but insisted that the pollution it discharges can only be dealt with through nonpoint source regulation.¹⁷² They pointed out that foreclosing the states’ and EPA’s ability to regulate water diversions under the CWA would leave the states with little protection against the diverted pollution of upstream neighbors and allow for scenarios in which salt waters could be dumped into fresh water, sediment-laden water into clear, warm water into cold, and invasive species-infested waters into uninfected waters.¹⁷³ To refute the Petitioner’s assertion that § 304(f), by providing guidance on how to address pollution from nonpoint sources, exempted such sources from point source regulation, the New York amici noted that the EPA regulations require NPDES permits for CAFOs, mining operations, and construction activities, which also generate nonpoint source pollution.¹⁷⁴ They emphasized that the point source is an essential area

municipal water works organizations to write in support of the Water District. No doubt the City was still stinging from the \$5.7 million dollar penalty the Second Circuit had recently assessed against it for violating the CWA by discharging silty water to a clear stream as part of a water supply diversion project. Oklahoma and the eastern half of Washington are both arid and benefit from water diversion programs, but chose to support the Tribe.

169. Brief of the State of New York et al. as Amici Curiae Supporting Respondent at 8, *S. Fla. Water Mgmt. Dist v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2003) (No. 02-626) (referring to *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 166-67 (D.C. Cir. 1982); *Nat’l Wildlife Fed’n v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988)).

170. Brief of Respondent State of New York, *supra* note 169, at 7-8.

171. *Id.* at 18-26.

172. *Id.* at 14.

173. *Id.* at 4.

174. *Id.* at 15.

for control and it is immaterial that the controllers of the point source were not the ones originally responsible for the pollution—they are responsible for whether or not the pollution is discharged through the point sources into the other body.¹⁷⁵ New York noted the opinions in the *Catskill*, *Dubois*, *Dague*, and *Northern Plains* cases all gave the states the ability to better protect the quality of their waters.¹⁷⁶

New York dismissed the concerns and even doomsaying of other amici and the Petitioner in regard to the burden and feasibility of obtaining NPDES permits for water diversions.¹⁷⁷ They began by noting that the EPA and the delegated states issue countless permits to address a variety of situations, and general permits cover hundreds of thousands of pollutant discharges.¹⁷⁸ The State of New York and amici contradicted the claim of New York City that the Eleventh Circuit's decision would require permits for "two million dams, and countless other diversion structures, across the nation," (an average of about 40,000 new permits per state) and pointed to the fact that even thirsty Colorado asserted that it would potentially have to get permits for only "several hundred transbasin diversions/deliveries."¹⁷⁹

Acknowledging the streamlining capacity of the general permitting option and noting that if the permitting process proved unworkable for water diversion facilities, Congress could act to correct the problem, the New York amici were wholly unperturbed by the specter of having to obtain more permits.¹⁸⁰ Finally, the New York amici argued that many areas in the text and application of the law, such as "schedules of compliance," judicial stays on enforcement, and judicial exercises of equitable discretion would allow leeway for water diverters to get into NPDES compliance without shutting off the diversion.¹⁸¹

The Supreme Court's Answer—And Non-Answer

In response to briefs and oral argument, the Court issued a near-unanimous (Scalia dissenting in part) opinion that was not wholly satisfactory to either side. Citing several provisions in the CWA that would be superfluous otherwise, the Court rejected the District's argument that pollutants must be from the point source itself to be the discharge of a pollutant from a point source.¹⁸² This is the only ruling on

175. *Id.* at 16.

176. *Id.* at 19-21.

177. *Id.* at 23.

178. *Id.*

179. *Id.*

180. *Id.* at 23-26

181. *Id.* at 26.

182. *S. Fla. Water Mgmt. Dist v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105

law that the Court made in this case.

The Court next explored the Solicitor General's "unitary waters" argument. The Court noted several places in the CWA that would not be consistent with such a reading. One such section is 303, which directs states that want to administer their own CWA program to assign designated uses to each water body. Section 303 directs that when water quality conditions decline, permits notwithstanding, states must determine the TMDL for a water body and then allocate the allowable discharge among permit holders.¹⁸³

The Court rejected the Solicitor General's argument that the Court should adopt the "longstanding EPA view that the process of 'transporting, impounding, and releasing navigable waters' cannot constitute an 'addition' of pollutants to 'the waters of the United States.'"¹⁸⁴ The Court declined the Solicitor General's invitation to take that view because the government had not identified any administrative documents in which the EPA espoused such a position.¹⁸⁵

The Court also pointed out that some of the EPA's regulations were inconsistent with the Solicitor General's arguments. For example, 40 C.F.R. 122.45(g)(4) (2003) "allows an industrial water user to obtain "intake credit" for pollutants present in water that it withdraws from navigable waters. When the permit holder discharges the water after use, it does not have to remove pollutants that were in the water before it was withdrawn. However, the EPA extends such credit "only if the discharger demonstrates that the intake water is drawn from the same body of water into which the discharge is made."¹⁸⁶

The Court also addressed the Petitioner's argument that § 304's instruction to states to develop management systems to deal with nonpoint source pollution caused by water flow diversion structures indicates that pollution caused by these diversions can *only* be dealt with by nonpoint source controls: "[we] note, however, that § 1314(f)(2)(F) does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the 'point source' definition."¹⁸⁷

With a nod to the other amici, such as Colorado and several other western states, the Court noted that applying NPDES permit requirements to engineered diversions of water from one navigable water to another may create a situation in which thousands of projects would

(2003).

183. *Id.* at 106 (citing 33 U.S.C. §§ 1313(c), (d) (2006)).

184. *Miccousukee Tribe*, 541 U.S. at 107 (citing Brief of Solicitor General, *supra* note 73).

185. *Id.*

186. *Id.* at 107, 108.

187. *Id.* at 107.

need to obtain permits and potentially very costly water treatment equipment may need to be purchased.¹⁸⁸ On the other hand, the Court acknowledged that such permitting authority may be necessary to maintain water quality, and that the EPA could ease regulatory burdens by issuing general permits for the point sources in any given water project.¹⁸⁹

After all of this discussion, the Court concluded that the unitary theory was not raised below and was not specifically argued in the petition for certiorari.¹⁹⁰ The Court also concluded that there was a significant question of fact regarding whether C-11 and WCA-3 were truly separate water bodies for the purposes of the CWA, given that the Everglades soil is porous and the fact, acknowledged on all sides, that water moves between the water bodies in question via seepage. The Tribe argued a biologically-based separateness, that the bodies are separate because they have different water qualities and support different biota.¹⁹¹ The Water District argued that they were the same because they are hydrologically connected.¹⁹² Since the factual questions of whether these two particular bodies are really one was insufficiently resolved in the lower court, the Court remanded to the Court of Appeals for the factual determination of whether the waters are “meaningfully distinct” and left open the unitary waters argument raised by the Solicitor General.¹⁹³

Justice Scalia concurred in part and dissented in part, opining that the Court should not raise factual issues and potential arguments regarding the oneness or separateness of the WCA-3 and C-11 *sua sponte*.¹⁹⁴ Scalia also disagreed with the majority on its direction on remand to the Court of Appeals to consider the unitary argument—Justice Scalia read the lower opinion and briefing to have argued, considered, and rejected the substance of the unitary theory, even if not so precisely named in the litigation.¹⁹⁵

Reaction to *Miccosukee*: Academic Commentary, EPA’s Interpretation Letter, and *S.D. Warren Co.*

In the weeks running up to the time that *Miccosukee* was argued before the Supreme Court and in the time since the opinion was released,

188. *Id.* at 108.

189. *Id.*

190. *Id.* at 109.

191. *Id.* at 110.

192. *Id.*

193. *Id.* at 112.

194. *Id.* at 113.

195. *Id.* at 112.

several news sources picked up the story and a handful of articles appeared in the legal academic press. The *Denver Post* editorialized about what the consequences of the Court's decision might be for some of metropolitan Denver water supplies, such as that piped from the Blue River through the Roberts Tunnel.¹⁹⁶ The editorial board recognized the strengths of the policy consequences on both sides of the issue and supported a decision in favor of the Tribe, though narrowly drawn to give water suppliers enough leeway to cope with the prospect of applying for permits and perhaps building treatment facilities otherwise unplanned for.

The *Los Angeles Times*, *New York Times*, and *Washington Post* all reported on the upcoming oral arguments in late 2003 and early 2004. The *L.A. Times* quoted a California water regulation lawyer, who noted that waters from different watersheds have different temperatures and constituents. "It's very unusual that you would not have something that could be called a pollutant."¹⁹⁷ When asked whether California was joining one side or the other (both sides asked), a spokesman for the California attorney general's office said that the "office just realizes that there are good arguments on both sides and... we don't feel comfortable signing on to either."¹⁹⁸ Sean Hecht, the executive director of UCLA's Environmental Law Center said "I do think that it's likely that many water diversions will require permits if the court rules in the [Tribe and Friends'] favor... [b]ut wide ranging permitting systems have been developed before, and I don't see development of another one as apocalyptic."¹⁹⁹

The *Washington Post* reported on the oral arguments specifically, noting Justice Breyer's concern that the Water District's reading of the statute would allow the most filthy water to be pumped into a pristine trout lake and Justice Scalia's concern that the Tribe's reading would require permits for transfers between equally polluted waters.²⁰⁰ The *New York Times* reported on the biological consequences of the Water District's discharge, noting the problem with cattail infestation and accompanying decline in native flora and fauna communities in the area of the discharge, in which the average phosphorus concentration is

196. Editorial, *Our Stake in the Everglades: Agenda 2004 Water*, DENVER POST, Jan. 12, 2004, at B-07.

197. Bettina Boxall, *Water Pumping Case May Stem Flows in the West: Managers Fear that a Supreme Court Ruling in a Florida Suit Could Require Federal Pollution Permits for Transfers in Other States*, L.A. TIMES, Dec. 22, 2003, at B-5.

198. *Id.*

199. *Id.*

200. Charles Lane, *Court Urged to Require EPA Role in Everglades Shift of Polluted Water*, WASH. POST, Jan. 15, 2004, at A3.

double the level at which native plants, like sawgrass, can thrive.²⁰¹

A law review casenote on the *Northern Plains* groundwater discharge case discusses the Eleventh Circuit's opinion in *Miccosukee* in its discussion of recent cases that have concluded that the relevant inquiry when humans move polluted water is the effect on the receiving body.²⁰² A case comment for the Supreme Court's *Miccosukee* ruling appeared in the *Harvard Environmental Law Review*²⁰³ and a similar casenote appeared in the *Utah Bar Journal*.²⁰⁴ In the latter, the author noted that while several Water District amici warned that permitting requirements would raise the cost of necessary water transfers to the point that such transfers would be "virtually prohibited in the west," and that being required to obtain these permits would usurp states' rights to allocate water, the Court took the view that such precautionary measures may be necessary to preserve water quality and that the use of general rather than individual permits would likely mitigate the administrative burden of permit application.²⁰⁵ One author lamented the defense sides' collective failure in *Miccosukee* and *Catskill* to look to Section 10 of the Rivers and Harbors Act for a possible jurisdictional solution.²⁰⁶

A short but fairly comprehensive analysis of the Supreme Court's opinion also appears in BNA's *Environment Reporter*.²⁰⁷ That article focused on the predicted costs should either side ultimately prevail, environmental if the S-9 pump is allowed to continue to operate in its current state, versus regulatory costs if it is not. The authors, while highlighting (the surely exaggerated) claims of some amici that permitting their water transfers would cost hundred of millions of dollars, also noted that water treatment costs would be lowered for

201. Felicity Barringer, *Water Pump Case Tests Federal Law*, N.Y. TIMES, Jan. 14, 2004, at A11.

202. Debra A. Owen, Casenote, *When Naturally-occurring Water is a Pollutant: Northern Plains Resource Council v. Fidelity Exploration & Development Co.*, 8 GREAT PLAINS NAT. RESOURCES J. 65 (2003).

203. Kristen Carden, Case Comment, *U.S. Supreme Court Environmental Case, October 2003 Term: South Florida Water Management District v. Miccosukee Tribe of Indians*, 28 HARV. ENVTL. L. REV. 549 (2004).

204. Rosemary J. Beless, *Miccosukee: Can the Mere Transport of Unaltered Water Violate the Clean Water Act?*, 17 UTAH BAR J. 12 (2004).

205. *Id.* at 15.

206. Paul F. Foley, *Missing the Point with Point-source "Addition" Semantics: Section 511 of the Clean Water Act Exempts Interconnected Waterways from Section 402 Jurisdiction, Period?* 9 OCEAN & COASTAL L.J. 65 (2003) (arguing that section 511 of the CWA leaves the Army Corp of Engineers exclusive jurisdiction over discharges associated with Corp-permitted water diversion structures, so section 402 cannot be applied to pollutant discharges associated with such diversions).

207. Richard Davis & Brian Doster, *South Florida Water Management District v. Miccosukee Tribe of Indians: Supreme Court Considers Extending Clean Water Act Regulation*, 35 ENV'T REP. 91 (2004).

downstream users who require cleaner water for their uses (such as municipal drinking water purification facilities). They concluded that the choice is essentially between allocating cost of the pollution along the water course to those who are practically able to abate pollution, though not the original polluters, or to allocate the burden of pollutant discharge to the end of the pipe to be borne by the natural world and by those who use and depend upon a normally functioning ecosystem.

The EPA Interpretation Letter and Some Criticisms

Six months after the *Miccosukee* ruling, the EPA released an interpretation letter, publishing its position on whether a diversion that does not itself add pollutants to a navigable water requires a NPDES permit.²⁰⁸ The EPA also indicted the intent to undertake a formal rulemaking to follow up its interpretation letter. Using much of the same reasoning and materials as the Water District in *Miccosukee*, the EPA argued that “Congress intended to leave oversight of water transfers to water resources management agencies and state non-NPDES authorities instead of the NPDES program.”²⁰⁹

The EPA began by highlighting the importance of water diversions, noting, for instance, the dependencies of New York City and Los Angeles on water transfers.²¹⁰ The letter then discussed the principles of statutory construction, concluding that a “holistic” approach should be taken to interpreting the CWA and asserting that the CWA should be interpreted by “analyzing the statute as a whole and by ‘[looking] at the provisions of the whole law, and its object and policy.’”²¹¹ The EPA then undertook an analysis of the statutory language, noting that the Act recognizes that states have the “primary responsibilities with respect to the ‘development and use (including restoration, preservation, and enhancement) of land and water resources.’”²¹² The EPA quoted §§ 101(b) and (g) as support for its assertion that the CWA expresses an understanding that water control facilities are not subject to the NPDES regime²¹³ and describes NPDES regulations of water transfers as potentially “unnecessary” interference with state water right allocation

208. Memorandum from Ann R. Klee, EPA General Counsel and Benjamin H. Grumbles, EPA Asst. Adm’r for Water to Regional Adm’rs, regarding Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers at 1 (Aug. 5, 2005), available at http://www.epa.gov/ogc/documents/water_transfers.pdf [hereinafter EPA Memo].

209. *Id.* at 4.

210. *Id.* at 3-4.

211. *Id.* at 5.

212. *Id.* at 5.

213. *Id.*

decisions,²¹⁴ though it does acknowledge that the CWA “does not prohibit the EPA and States from taking actions under the CWA that they determine are needed to protect water quality.”²¹⁵

The EPA also cites § 304(f), which directs the EPA to “issue guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants” and “processes . . . to control pollution from . . . ‘changes in movement, flow or circulation of any navigable waters . . . including changes caused by construction of . . . flow diversion facilities,’” implying that mention of a pollutant type in a regulatory regime other than NPDES precludes regulation under NPDES.²¹⁶ It should be noted here that the EPA appears to adopt an assertion from *Consumers Power* that “‘nonpoint source’ is shorthand for and includes all water quality problems not subject to § 402,” setting up a circular argument against regulation under NPDES.²¹⁷ Essentially, these discharges should not be regulated under NPDES because they are classified as nonpoint source pollution (notwithstanding the fact that they are discharged from a point source) and they are classified as nonpoint source pollution because they are not regulated under NPDES. The EPA also argues that by directing the EPA to develop guidelines and work with states to develop solutions to nonpoint source pollution and activities that cause pollution without discharging a pollutant, Congress meant to preclude application of NPDES to discharges that could, practically speaking, be regulated as point sources discharges.²¹⁸ The EPA also cited the absence of language about water management activities in the § 301 general prohibition against the discharge of a pollutant as support for its position that because pollution from water diversions was not Congress’s chief concern in enacting the CWA in 1972—an era of combustible rivers—pollution from such diversions should not be regulated by the NPDES program now.

The EPA also discussed the legislative history of the CWA, citing many of the same authorities discussed in the briefs of the parties to *Miccosukee*²¹⁹ and asserted that because Congress recognized that some states had water quantity allocation programs that considered water quality, Congress intended that the federal law not apply to “water quality issues associated with water resource management.”²²⁰ The EPA

214. *Id.* at 6.

215. EPA Memo, *supra* note 208, at 5-6 (citing 33 U.S.C. §1251(b), (g) (2000); PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, 511 U.S. 700 (1994)).

216. *Id.* at 6.

217. *Id.* at 6, n.9.

218. *Id.* at 7.

219. *Id.* at 8-9.

220. *Id.* at 9.

concluded that Congress did not intend to subject water transfers to the NPDES regime.²²¹

The EPA then took up an analysis of the *Gorsuch* and *Consumers Power* cases in contrast to *Catskill* and *Dubois*.²²² The EPA criticized the 1st and 2nd Circuits for interpreting the statute by looking to congressional intent with regard only to the section they were interpreting, the § 502(12) definition of “addition,” and praised the older cases because, in EPA’s view, the courts in those cases took a more “holistic” view of statutory interpretation, examining the whole of the statute to support its interpretation that discharges from dams to not require a NPDES permit.²²³ The EPA did not discuss the fact that the precedential value of the *Gorsuch* and *Consumers Power* cases has seemingly been undercut by subsequent Supreme Court decisions that suggest that the courts in those cases gave undue deference to an EPA interpretation document.²²⁴ The EPA also asserted that the “but-for” test in *Catskill* and *Dubois* was “significantly” undercut by the Court’s opinion in *Miccossukee* because the Court did not view the fact that the pumps in *Miccossukee* moved water against the natural direction of flow as dispositive of the issue of whether the waters were distinct (and thus whether there could be an “addition”).²²⁵

The EPA concluded the letter by offering its views on how a court should determine whether two waters were “meaningfully distinct,” should a subsequent ruling nonetheless uphold the application of the NPDES regime to a water diversion, and given that the Supreme Court, in coining the phrase, did not define it.²²⁶ The agency’s suggestions appear to militate toward a narrow view of what is “meaningfully distinct,” suggesting that both natural and man-made, present and historical hydrological connections should be considered in the “distinct” portion of the analysis. Curiously, the EPA does not suggest in any of its discussion of distinctness that the analysis should include any inquiry into biological or chemical distinctness. It mentions physical distinctions only in the context of separateness from other bodies—not in the context of differing temperature, flow patterns, depth, etc. The EPA reads “meaningful” to require a “significant adverse effect on water quality,” but relies for support only on its previous argument and conclusion that Congress meant to leave much water quality management to states,

221. *Id.*

222. *Id.* at 10-12.

223. *Id.* at 13.

224. *See, e.g.,* United States v. Mead Corp., 533 U.S. 218 (2001); Christensen v. Harris County, 529 U.S. 576 (2000).

225. EPA Memo, *supra* note 208, at 15.

226. *Id.*

without providing federal minimum standards.²²⁷ Adverse effect would also be measured by chemical, biological, and physical characteristics.²²⁸

The EPA's preference seems to be to read the statute as narrowly as possible, despite the purpose language in § 101, despite the fact that the plain language of section 402 can readily be interpreted to require a NPDES permit in the Florida situation (there being, by agreement or by court ruling, a discharge, a pollutant, a navigable water, and a point source), and despite the stated congressional intent to apply the CWA as broadly as constitutionally possible. Rather than interpreting the statute to protect water quality in all constitutionally possible situations, the EPA requires an explicit instruction from Congress to apply the CWA to water transfers.²²⁹

The EPA assumes in its opinion that interfering with state water transfers by requiring a permit may be "unnecessary," however, the letter suggests no solution to situations like that in Florida, where the state has failed to require any kind of pollution control for the S-9 pump. In the foreseeable future, the Management District must either have a change of heart, or some kind of federal "interference" will be necessary to stop that pollution. The EPA opinion makes several assumptions about congressional intent. It assumes that in making provisions for the control of nonpoint source pollutants, Congress did not mean for nonpoint source pollutants that had become confined to a discrete area and then discharged from a point source to be treated as point sources. The same documents that the EPA cites in support of its inference that Congress did not mean for the CWA to interfere with state water allocation in any way explicitly say that Congress meant for the CWA to apply to as broad a range of waters and discharges as constitutionally permissible.²³⁰

The EPA position, though unfortunate for the health of the nation's waters, is not surprising, given its history of reluctance to promulgate, implement and make effective the program of water quality improvement that Congress created in the TMDL program. Usually, as in the case of water diversions and its post-*Miccosukee* interpretation letter, the EPA points to § 101(g) as the insurmountable obstacle to federal involvement in anything involving water quantity or movement of water. However, in the *PUD No. 1* case, the Supreme Court reaffirmed that the § 101(g) reservation of state authority over water allocation still allows regulation of water quality that affects water quantity.²³¹ Despite what may be

227. *Id.* at 16-17.

228. *Id.* at 16-18.

229. *Id.* at 6 ("[A]bsent clear Congressional intent to the contrary, it is reasonable to read the statute as not requiring NPDES permits for water transfers").

230. *Id.*

231. *Id.* at 6 n.8; 33 U.S.C. §1251 (2000).

argued by Colorado and other states well-known for fighting federal involvement in water allocation decisions, the CWA's express purpose is to prevent pollution and stop pollutant discharges—regulation of activities that cause pollution, including state and local-controlled water diversions, is not an impermissible interference with a state water allocation decision. The state can still allocate the available water to persons and purposes as it sees fit—it just has to comply with overlaying federal water quality requirements.

On October 11, 2005, the Supreme Court granted certiorari on the appeal of a dam operator, the S.D. Warren Company, from a decision of Maine's highest court regarding the application of § 401 of the CWA, the certification requirement litigated in *PUD No. 1*, to their FERC license renewal.²³² Although the EPA expressly limited the scope of its interpretation letter to “activities that convey or connect navigable waters without subjecting the water to intervening industrial, municipal, or commercial use,” and specifically notes that the movement of water through a dam is not a water transfer, so the interpretation does not apply to dams that do not add any pollutants of their own to their discharges, the dam operator is attempting to avoid the § 401 certification requirement and is using *Miccosukee* and the EPA interpretation letter for support.²³³

Section 401 requires that “Any applicant for a Federal license . . . to conduct any activity including . . . the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing . . . agency a certification from the State in which the discharge originates . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.”²³⁴ The S.D. Warren Company is the owner of five hydroelectric dams that power their paper mill in Maine.²³⁵ As the operator of a hydroelectric facility, S.D. Warren is required by federal law to obtain a FERC license.²³⁶ S.D. Warren sought to renew this license in 1999.²³⁷ FERC regulations require that an applicant for a license file with them a certification, a request for a certification, or a waiver from the certification requirement.²³⁸

S.D. Warren took the position that the dams do not cause a

232. S.D. Warren. Co. v. Me. Bd. Dep't Envtl. Prot., 126 S.Ct. 415 (2005).

233. Brief of Petitioner, S.D. Warren. Co. v. Me. Bd. Dep't Envtl. Protection, No. 04-1527 (U.S. Oct. 11, 2005).

234. 33 U.S.C. § 1341(a)(1) (2000).

235. Brief of Petitioner, *supra* note 233, at 3.

236. *Id.* at 4-5.

237. *Id.* at 5.

238. *Id.* at 9.

discharge into the river, but the Maine Department of Environmental Protection issued a certification that placed a number of conditions on the operation of the dams, which S.D. Warren claims will result in a projected loss of one-seventh of the power generated.²³⁹ Although no party alleged that releases from S.D. Warren's dam contained any pollutants, the releases cause water quality problems, such as low dissolved oxygen, low instream flows, and impaired recreational use of some areas of the river.²⁴⁰ The conditions pertained to water levels and flows, eel and fish passage, reaeration measures, and recreational facilities.²⁴¹ S.D. Warren challenged several aspects of the Maine DEP's conditions on certification, but the Supreme Court granted certiorari on only one question: Does the mere flow of the Presumpscot River through S.D. Warren's existing dams constitute a "discharge into" the Presumpscot River under section 401 of the Clean Water Act?²⁴²

Essentially, S.D. Warren argues that because the *Miccosukee* opinion required that a discharge include some kind of pollutant in order for that discharge to be regulated under NPDES program (§ 402), § 401 water quality certification also requires that the "discharge" contain a pollutant. Section 401 does not prohibit the "discharge of a pollutant" like § 402, it requires that applicants for a federal license, like a hydroelectric permit, obtain a water quality certification if their construction or operation of the facility could result in a "discharge." The CWA defines "discharge of a pollutant" and "discharge" separately.²⁴³ However, the Maine Supreme Judicial Court ("SJC") assumed that the "discharge" as used in § 401 requires some "addition." S.D. Warren, as noted above, operated its dams apparently without adding any pollutants to the water that was discharged. The SJC opinion asserted that S.D. Warren did in fact "add" water to the river in its discharge in that in the act of withdrawing the water from the river and running it through its turbines, S.D. Warren had subjected the water to "private control" and thus removed it from classification as the "waters of the United States"; when the water was discharged back to the river, an "addition" occurred.²⁴⁴ On appeal to the Supreme Court, S.D. Warren

239. *Id.*

240. Brief of Respondent at 10, *S.D. Warren Co. v. Me. Bd. Dep't Env'tl. Protection*, No. 04-1527 (U.S. Oct. 11, 2005).

241. Brief of Petitioner, *supra* note 233, at 9.

242. *S.D. Warren Co. v. Me. Bd. Dep't Env'tl. Protection*, 126 S.Ct. 415 (2005). The precise question that the Court granted certiorari was "Does the mere flow of water through an existing dam constitute 'discharge' under Section 401, 33 U.S.C. § 1341, of the Clean Water Act, despite this Court's holding last year in *Miccosukee* that a discharge requires the addition of water from a distinct body of water?"

243. 33 U.S.C. §1362(12), (16) (2000).

244. *S.D. Warren Co. v. Maine Bd. Dept. Env'tl. Protection*, 2005 ME 27, ¶ 12-13

attacked this reasoning as being without legal support.

The “private control” reasoning was also “not proffered by [the Maine Board of the Department of Environmental Protection (“Maine”)].”²⁴⁵ The brief of the respondent, Maine, focused its arguments on what is meant by “discharge” and “discharge of a pollutant” in § 401 versus § 402. The definitions are, in relevant part, as follows:

(12) The term “discharge of a pollutant” and the term “discharge of pollutants” each means

(A) any addition of any pollutant to navigable waters from any point source. . . .

(16) The term “discharge” when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.²⁴⁶

Brief of S.D. Warren Company

S.D. Warren’s entire argument is premised on an addition of a pollutant being required in order for § 401 to apply. The argument summary began with the assertion that §§ 502(12) and (16) mean that “discharge” equals “an addition . . . from a point source,” so built its argument around whether there is an addition in this case, and assailing the SJC’s rather novel reasoning regarding “private control” of water by S.D. Warren creating an addition and for that reason, putting Warren’s dam within the purview of § 401.

S.D. Warren’s first argument was that the phrase “discharge into” requires an “addition”: there is no “discharge” under § 401 when there’s no addition.²⁴⁷ They asserted that § 502(12) definition of “discharge of pollutants” “makes clear” that Congress equated the notion of discharge with the notion of “any addition . . . from a point source.”²⁴⁸ They cited *North Carolina v. FERC*, which stated that “the nearest evidence we have of definitional intent by Congress reflects, as might be expected, that the word ‘discharge’ contemplates the addition . . . of a substance of substances.” S.D. Warren also argued that Congressional intent to make “discharge” the same as “addition . . . from a point source” is evidenced by the fact that § 401 apportions certification responsibility is based on

(Feb. 15, 2005), *cert. granted* S.D. Warren Co. v. Me. Bd. Dept. Env'tl. Protection, 126 S. Ct. 415 (Oct. 11, 2005).

245. Brief of Respondent, *supra* note 240, at 12.

246. 33 U.S.C. § 1362(12), (16) (2000).

247. Brief of Petitioner, *supra* note 233, at 14.

248. *Id.* at 15.

who has jurisdiction over the place where the discharge originates, so Congress envisioned discharges from point sources.²⁴⁹ The reasoning then goes that because point source language carries over from 502(12) to 401, “addition” must also.²⁵⁰

S.D. Warren’s second argument was that though the SJC did not disagree with reading an “addition” requirement into § 401, the flow of water through dams is not, in and of itself, an addition of anything to the river. They reiterated its argument that Congress associated “discharge” with “addition” by the definition of “discharge of a pollutant,” and that the use of the word “includes” in 505(12) is merely used to express “an illustrative application of a statute’s scope,” and should not be read to mean “addition of anything at all, much less water itself.”²⁵¹ Section 401 uses “discharge into,” and Congress could not have “envisioned a river flowing through a dam as a river ‘discharging into’ itself.”²⁵² S.D. Warren asserted that the SJC’s argument that water flowing through a dam stopped being navigable waters is wrong.²⁵³ The only support that the SJC cited was in the unsupported dicta of *Dubois*.²⁵⁴ S.D. Warren cited *Consumers Power* for the statement that dams discharging unclean water are exempt from the CWA²⁵⁵ and argued that the SJC’s opinion calls into question the reach of federal authority over navigable waters.²⁵⁶

Petitioner’s third argument was that the Court’s recent *Miccossukee* opinion supports the conclusion that flow through a dam is not a discharge of anything into the river²⁵⁷—because *Miccossukee* requires a meaningful distinction between water bodies in order for there to be a discharge of a pollutant under § 402, S.D. Warren should not have to get a § 401 certification as the waters up and downstream from the dam are not meaningfully distinct.²⁵⁸ They cited the August 2005 EPA *Miccossukee* letter interpreting § 402 as support for its position because the EPA said NPDES permits are generally inapplicable to water transfers and to dams that don’t add pollutants—that “movement of water through a dam doesn’t require a NPDES permit because it doesn’t transfer water between two water bodies and because “no addition has occurred.”²⁵⁹ “[G]enerally water quality changes caused by the existence

249. *Id.* at 15-16.

250. *Id.* at 16.

251. *Id.* at 17.

252. *Id.*

253. *Id.*

254. *Id.* at 17-18.

255. *Id.* at 18.

256. *Id.* at 18-20.

257. *Id.* at 20.

258. *Id.* at 21.

259. *Id.* at 22.

of dams and other similar structures were intended by Congress to be regulated under the ‘nonpoint source’ category of pollution.”²⁶⁰

The Petitioner’s next argument was that “§ 304(f)(2)(F) evidences that Congress used terms and concepts other than ‘discharge’ to describe the mechanism whereby dams can affect water quality.”²⁶¹ S.D. Warren acknowledged that a dam “affects a river.”²⁶² Petitioner then argued that because § 304(f)(2)(F) instructs the EPA to provide information about identifying the sources of nonpoint sources of pollution and methods to control that pollution, including pollution caused by the construction of dams,²⁶³ Congress intended that dam-induced changes to water quality to be regulated using “nonpoint source controls.”²⁶⁴

Next, S.D. Warren argued that § 511(c)(2), which prohibits duplicative NEPA review of the EPA and/or a state’s effluent limitations or § 401 certification conditions,²⁶⁵ requires that § 401 only apply to activities that cause the discharge of a pollutant to achieve its purpose.²⁶⁶ Petitioner argued that § 511(c)(2) would “preclude duplicative . . . NEPA review of certifications involving discharge of pollutants, but allow . . . review when something other than a pollutant, and presumably less harmful, is added to the water.”²⁶⁷ S.D. Warren did not cite to any authority in support of this interpretation.

S.D. Warren’s final argument concerned why Congress used the word “includes” in defining “discharge.”²⁶⁸ They noted that the language of § 401 is the same as the previously enacted Federal Water Quality Improvement Act as amended in 1970.²⁶⁹ Section 402’s language was also enacted as it is stated today. However, S.D. Warren noted that the Senate bill for the 1972 amendments defined “discharge” as “discharge of a pollutant” as defined in the enacted statute—that the Senate version “‘discharge’ means . . . any addition of any pollutant to navigable waters from any point source.”²⁷⁰ The House version had a different definition, apparently due to its alternative way of dealing with permitting thermal discharges, which would have lumped “discharge” and “discharge of a pollutant” into the same definition.²⁷¹ Because the statutory language

260. *Id.* at 23, quoting EPA Memo quoting *Gorsuch*.

261. *Id.* at 23.

262. *Id.*

263. *Id.* at 24.

264. *Id.* at 25.

265. *Id.* at 26-27.

266. *Id.* at 28.

267. *Id.*

268. *Id.* at 29.

269. *Id.*

270. *Id.* at 30.

271. *Id.* at 30-31.

changed (due mostly, according to S.D. Warren's citations, to Congress's evolving decision process regarding application of NPDES permitting to thermal discharges), they argued that the language of the statute as drafted during one point of the legislative process evidences a Congressional intent to equate "discharge" and "discharge of a pollutant," the latter not being a subset of the former.²⁷² S.D. Warren did not cite any statement by Congress or to any case to support its argument. They concluded that the CWA "unambiguously requires . . . that something be added into navigable waters from a point source [for there to be] any discharge into waters under § 401."²⁷³

Brief of the Maine Board of the Department of Environmental Protection

Maine began with the argument that the language of § 401 and § 502(16) is plain that "any discharge" includes flow out of FERC-licensed dams.²⁷⁴ The operative clause of § 401 is written in the most expansive terms: "and activity . . . which may result in any discharge to navigable waters."²⁷⁵ The definition in § 502 all use "means" (including "discharge of a pollutant"), except "discharge," which is not expressly defined—§ 502 only has a statement that it "includes" the "discharge of pollutants," so a discharge that does not discharge pollutants is clearly contemplated.²⁷⁶ Finally, the Supreme Court noted, in the *PUD No. 1* case, the concession of the appealing public utility district that "discharge of water at the end of the tailrace," is a discharge within the meaning of § 401.²⁷⁷

Maine responded that there was no support for Petitioner's argument that "'discharge' 'equates to' 'discharge of a pollutant.'"²⁷⁸ Courts do not read all independent meaning out of terms that are separately used and described or defined.²⁷⁹ The requirement for an "addition" can't be implied into the meaning of discharge because Congress would have put it there and the independent definition of "discharge of a pollutant" does include a requirement for an "addition"—Congress could easily have included the word addition in describing "discharge," if it had intended that meaning.

Maine argued that the *Alabama Rivers* and *North Carolina* cases

272. *Id.* at 31-33.

273. *Id.* at 34.

274. Brief for Respondent, *supra* note 240, at 15.

275. *Id.* at 16.

276. *Id.* at 17-18.

277. *Id.* at 19 (citing *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994)).

278. *Id.* at 20.

279. *Id.*

cited by Petitioner dealt with whether a 401 certification was needed to amend an existing FERC license when the discharge changed, and the parties apparently agreed certification would be needed on expiration.²⁸⁰ “Courts decline invitations to read a restrictive or limiting term found in one provision into a section where Congress did not use that term.”²⁸¹ The debate is not whether there is an addition, it is about whether there is a discharge—the fact that the river flows through the dam’s turbines and is discharged through its tailrace is all that is required. SJC’s placement of importance on an addition was erroneous, so the “private control reasoning was unnecessary.”²⁸²

The purpose and structure of the CWA reinforces the plain meaning that “any discharge” does not require an addition of something outside the river.²⁸³ The CWA is meant to prevent pollution, which is broadly defined, and the states are the principle actors in abating pollution.²⁸⁴ “Discharge of pollutants” is not the only cause of pollution, so the purpose of the CWA is broader than to simply stop pollutant discharges.²⁸⁵ If “discharge” meant the same thing as “discharge of a pollutant,” § 401 wouldn’t make sense—the CWA requires states to establish designated uses for waters and gives them broad conditioning authority to maintain that use. It would be inconsistent for Congress to only allow this conditioning authority to the small subset of dams that discharge pollutants.²⁸⁶ A reminder that dams that do discharge pollutants would be required to get a NPDES permit, so to apply § 401 certification requirements only to dams that already have to get a NPDES permit would be redundant. Maine then made the policy argument that excluding hydropower facilities like Petitioner’s from § 401 certification requirements would place unfair burden on other river users to reduce pollution.²⁸⁷

Maine then pointed out the separate functions for § 401 and § 402 and noted that *Miccosukee* dealt with the addition in the context of § 402 (as noted above, that there was a “discharge” was not disputed in *Miccosukee*).²⁸⁸ Maine responded to S.D. Warren’s § 304(f)(2)(F) argument by pointing out that the Supreme Court (in *PUD No 1*.) already concluded that the pollution caused by dams, as described in § 304(f)(2)(F) is properly the subject of states’ 401 conditioning

280. *Id.* at 21 n.16.

281. *Id.* at 21.

282. *Id.* at 23.

283. *Id.*

284. *Id.* at 24.

285. *Id.*

286. *Id.* at 25.

287. *Id.* at 26.

288. *Id.* at 27.

authority and it is simply an information-sharing provision.²⁸⁹ Maine then noted that S.D. Warren's discussion of the mechanisms in the CWA for dealing with point versus nonpoint sources of pollution is inapplicable to this case because the dams are point sources in that the hydroelectric facility is a "discrete conveyance of water."²⁹⁰

Section 511(c)(2) doesn't help Petitioner either because it is essentially a restraint on the federal government from using NEPA to interfere with the establishment of effluent limitations or § 401 certification conditions set by states or EPA.²⁹¹ The language "discharge of a pollutant" is used because Congress meant to assign sole authority over controls of pollutant discharges to the EPA and states.²⁹² "511(c)(2) doesn't speak to other statutes that might address water quality impacts, such as [Federal Power Act]."²⁹³

The plain meaning of the statute is confirmed by its history and evolution: the 1970 Water Quality Improvement Act used "any discharge" in § 21(b), the predecessor of § 401, which required a certification for any federally licensed activity that "may result in a discharge"—the "discharge of a pollutant" language did not appear until the 1972 Act, which added the NPDES regime.²⁹⁴ Maine cited several references in the Congressional Record that indicate that Congress meant for all hydropower facilities to obtain § 401 certifications with their FERC licenses.²⁹⁵ Further, Maine argued that Congressional acquiescence to prior interpretations of a statute can "inform the court's decision," in subsequent challenges, noting that a proposed amendment to the CWA after the *PUD No. 1* decision never made it out of committee.²⁹⁶

Maine's final argument was that *Chevron* deference, or at least "persuasive respect," should be given to the EPA and FERC's interpretation of § 401 that certification is required for hydropower facilities, citing EPA's interpretive handbook and EPA's position in its amicus brief in *PUD No. 1* that the operation of dams causes a discharge triggering § 401.²⁹⁷ The August 2005 EPA *Miccosukee* memorandum does not help Petitioner because, on its face, it dealt exclusively with § 402 and that § 401 and other provisions addressed problems that were

289. *Id.* at 29 (citing *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994)).

290. *Id.* at 29 (*Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982)).

291. *Id.* at 30.

292. *Id.* at 31.

293. *Id.*

294. *Id.* at 33.

295. *Id.* at 34, *see generally* 33-37.

296. *Id.* at 38.

297. *Id.* at 38-39, 41.

beyond the scope of § 402.²⁹⁸ FERC interprets the application of § 401 essentially the same as the EPA and has asserted that position in guidance documents, in briefs to the Supreme Court, and has consistently included the Maine DEP's certification conditions in other hydropower licenses, rejecting the same arguments made by Petitioner.²⁹⁹

Maine has the better argument in *S.D. Warren*. Though the Maine SJC used a poorly supported and rather novel theory in its opinion, it reached the right result. Given the central intent of the CWA, to stop pollution and improve water quality, using the states as the principal actors in regulation and enforcement of water quality, it would make little sense to prevent them from imposing conditions to maintain water quality in the context of § 401. If § 401 only applied to licensing dams that discharge some pollutant (one example of an activity that causes pollution), there would be little reason for § 401 to exist—presumably, those pollutant-discharging facilities would be covered under § 402, rendering § 401 mostly redundant. FERC and the EPA have both interpreted § 401 to apply to all dams that must be federally licensed, so a decision to the contrary would have the potential to affect every federal dam license (and states' ability to maintain water quality in dammed rivers) across the United States. States would suddenly have no regulatory authority to prevent or mitigate pollution caused by hydroelectric facilities. *S.D. Warren's* reliance on § 511 and § 304 to support its argument requires a rather tortured interpretation of the meaning, scope and purpose of those provisions, with little or no support from prior case law or legislative history. Finally, it is hard to see how finding that § 401 only applies to dams that discharge pollutants could be consistent with the reasoning, dicta, policy, and decision of the Supreme Court in *PUD No. 1*, which, in several ways, reinforced the notion that states have broad authority to condition § 401 certification on restrictions that assure compliance with state water quality standards, even if the facility does not discharge pollutants.

In contrast, although Maine does not adopt the reasoning of the SJC in reaching the desired result, its arguments are better supported by the case law, legislative history, and the stated central goals and policies stated in the CWA. Maine adopts many of the winning arguments in the *PUD No. 1* case, is consistent with longstanding EPA and FERC interpretation, and its interpretation of "discharge" is not inconsistent with the conclusions of the Supreme Court in *Miccosukee*, which dealt principally with the meaning of "addition" in the context of NPDES permitting. Interpreting § 401 to apply to nearly all hydroelectric

298. *Id.* at 40.

299. *Id.* at 41.

facilities, rather than the presumably very small proportion that actually discharge pollutants from the hydroelectric facility, gives greater effect to § 401, which is more consistent with the separate purpose of § 402 and the purpose of the CWA as a whole. Oral arguments were heard on February 21, 2006, the same day as the *Rapanos* and *Carabell* cases were heard, which concern the application of § 404 dredge and fill permits to wetlands that are somewhat distant from navigable waters.³⁰⁰

S.D. Warren v. Maine at Oral Argument

At oral argument, S.D. Warren focused its argument on the undisputed point that the water above and below S.D. Warren's dams is a single body of water, and the disputed point that in order for § 401 to apply, the waters must be two separate waters or there must be a discharge of a pollutant.³⁰¹ S.D. Warren argued that the word "into" in the phrase "discharge into the navigable waters," requires two different waters,³⁰² because the language would require that the river "metaphysically" discharge into itself.³⁰³ The parties did not dispute that the movement of water through the turbines and to the downriver side of the dam was a "discharge" in the ordinary, dictionary definition sense.³⁰⁴

S.D. Warren's second main argument was that Congress did not intend that states have a "veto" over the FERC licensing process.³⁰⁵ Allowing the state to impose its certification requirements would render FERC permit proceedings "a mail office," with FERC having no real choice but to capitulate to state requirements.³⁰⁶ To support this argument, S.D. Warren pointed out that Congress directed FERC to consider state environmental concerns in the 1986 Electric Consumers Protection Act, but did not state that FERC should capitulate to all state water quality requirements.³⁰⁷ Chief Justice Roberts asked Petitioner whether water taken out of the river, stored for several years, then discharged to the same river might be a discharge, and whether the answer would be different if the dams released water at intervals, rather

300. Supreme Court Oral Argument Calendar, *available at* http://www.supremecourtus.gov/oral_arguments/oral_arguments.html (last visited Apr. 15, 2006).

301. Transcript of Oral Argument at 3, *S.D. Warren Co. v. Me. Bd. of Env'tl. Prot.*, 2005 ME 27 (Feb. 15, 2005), *cert. granted*, 126 S.Ct. 415 (Oct. 11, 2005) (No. 04-1527). Copies of the oral argument transcript are *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1527.pdf.

302. *Id.* at 10-11.

303. *Id.* at 16.

304. *Id.* at 10, 36.

305. *Id.* at 3-4.

306. *Id.* at 19.

307. *Id.* at 19-21.

than continuously.³⁰⁸ Petitioner responded that the barrel would be a discharge, because the water was removed from the river, not merely slowed down, as with Petitioner's dam, and that in order for there to be a discharge, the control and/or separation of the water from the river must be to the point where the waters are no longer "unitary."³⁰⁹

S.D. Warren argued that the fact that the water changes in character and chemical characteristics due to the dam is immaterial because rivers change at various points, such as at rapids, and the changes caused by the dams are not different from those changes, in terms of whether the river is still the same river.³¹⁰ Further, the changes in water flow, oxygen content, and temperature caused by the dams are all non-point sources of pollution, § 401 doesn't cover non-point sources of pollution, so the mere discharge of the river back into the river below the dam is not a § 401-triggering discharge because there is no discharge of a pollutant.³¹¹

Justice Breyer was concerned with whether the EPA has authority under the CWA to check a state that promulgates a "nutty" water quality standard and whether a state could completely outlaw dams through water quality standards.³¹² It was undisputed that states could effectively outlaw hydroelectric facilities on at least some rivers via water quality standards.³¹³ Justices Alito and Roberts queried both sides regarding what FERC's view was.³¹⁴ S.D. Warren responded that FERC's view had been inconsistent.³¹⁵ The United States responded that FERC shared the position of the United States and that state water quality standards had been part of administrative practice and agency interpretation for the past 30 years.³¹⁶

Justice Alito noted that § 401 does not require two water bodies.³¹⁷ S.D. Warren responded that the word "discharge" is used numerous times in the statute in association with something being emitted, so the Court should take that, along with the phrase "discharge into" to mean that there must be either distinct water bodies or the discharge of a pollutant,³¹⁸ but Justice Souter indicated skepticism with this argument by noting that there is "good reason to think that unqualified discharge

308. *Id.* at 24-25.

309. *Id.* at 25-26.

310. *Id.* at 12.

311. *Id.* at 6-7.

312. *Id.* at 21.

313. *Id.* at 21-23.

314. *Id.* at 18, 20, 23, 41, 44.

315. *Id.* at 23.

316. *Id.* at 57-58.

317. *Id.* at 26.

318. *Id.* at 26-28.

means something different than discharge of pollutant.”³¹⁹ In response to a question from Justice Souter, S.D. Warren argued that even standing a stick in the river may create a discharge under the state’s view, in that anything that changes flow or direction would be a discharge.³²⁰

The State of Maine emphasized two points in its argument: that § 401 is the only way that states can have any control over water quality problems caused by dams,³²¹ and that “discharge” has a broader meaning under § 401 than “discharge of a pollutant” has under § 402.³²² Chief Justice Roberts and Justice Scalia were both interested in the extent to which a change in flow or restraint might be a “discharge” under § 401.³²³ Maine conceded that even a water wheel or a very wide post might cause a discharge, but emphasized that the discharge had to be federally licensed, and that a *de minimus* doctrine would apply to assure that changes in flow be substantial to trigger § 401.³²⁴ In response to Justice Scalia’s question about the seeming oddity of having a river “discharge into itself,” Maine pointed out that the discharge was from the federally licensed activity, which is the impoundment.³²⁵

Justice Scalia had several questions for Maine and the *Amicus Curiae*, the United States, about what “discharge” and “addition of pollutants” meant in legal and factual situation in the *Miccosukee* case.³²⁶ Justice Scalia read the Court’s opinion as holding that the pumping activity in *Miccosukee* was not a discharge, and the Court held as it did not because there was no addition of a pollutant, but because there was no discharge.³²⁷ Maine pointed out that *Miccosukee* was a § 402 case, and that the terms “discharge from a point source” and “discharge” mean different things and are used differently in § 401 and § 402.³²⁸ Justice Souter pointed out that *Miccosukee* involved the discharge of a pollutant that was present in the water before it was discharge to the other side of the dike.³²⁹ The United States noted that the unresolved question in *Miccosukee* was whether the waters were separate and thus, whether an addition was occurring when the pump transferred the water from one side of the dike to the other.³³⁰ Maine noted that § 402 requires that a

319. *Id.* at 28-29.

320. *Id.* at 30-31.

321. *Id.* at 34.

322. *Id.* at 38.

323. *Id.* at 32-34.

324. *Id.* at 33.

325. *Id.* at 34.

326. *Id.* at 37-38, 52-56.

327. *Id.* at 37.

328. *Id.* at 38-39.

329. *Id.* at 39.

330. *Id.* at 54-56.

discharge come from a source separate from the receiving water, but § 401 does not.³³¹ Maine also noted that this was a longstanding requirement; as early as 1971, § 21(b) of the Water Quality Improvement Act, § 401's precursor, required federally licensed activities that create a discharge to comply with state water quality standards.³³²

Maine also focused on the fact that § 303 of the CWA requires states to adopt and maintain water quality standards,³³³ and that although the Electric Consumers Protection Act does require FERC to give consideration to environmental protection and power production, Congress gave states primacy to maintain and enforce their water quality standards.³³⁴ Justice Alito asked Maine whether Congress intended that a state be allowed to ban hydropower.³³⁵ Maine responded that a state's power with respect to § 401 certifications is not unbounded,³³⁶ states can only make certification conditions that are necessary to maintain water quality standards³³⁷ and though a state could change its water quality standards to preclude hydropower,³³⁸ Maine includes hydropower as a designated use in all but a few of its rivers, similar to other states.³³⁹ Section 401 is the only way for states to enforce these standards with respect to federally licensed facilities, so if the Court takes that § 401 authority away from states, it would "create a gaping hole in the Clean Water Act."³⁴⁰

As *Amicus Curiae*, the United States supported the State of Maine in each of Maine's arguments.³⁴¹ In response to additional questioning by Justice Scalia, the United States confirmed that "discharge of a pollutant" is a statutory term of art in § 402 and means addition of a pollutant from a point source, and that "discharge" includes discharge of a pollutant.³⁴² In the course of distinguishing *Miccosukee* from the present case, the U.S. pointed out that the Court remanded *Miccosukee* for a factual finding on whether the waters were two or one, but stuck to its position in *Miccosukee* that the waters are one body.³⁴³

Chief Justice Roberts questioned the United States on whether states could completely preclude hydropower and whether that would create a

331. *Id.* at 35, 38.

332. *Id.* at 40-41.

333. *Id.* at 41.

334. *Id.* at 42.

335. *Id.* at 44.

336. *Id.*

337. *Id.*

338. *Id.* at 45.

339. *Id.* at 42.

340. *Id.* at 42.

341. *Id.* at 50-51.

342. *Id.* at 52.

343. *Id.* at 53-56.

federal preemption issue with regard to FERC jurisdiction.³⁴⁴ The U.S. conceded that it was possible for a state to preclude hydropower entirely, but that was not the situation here, so the Court need not address that possibility.³⁴⁵ The United States also pointed out that word “into” in the phrase “into navigable waters” was a simple linguistic convention, the implication being that it does not have independent meaning that would require that there be two separate waters for § 401 to apply.³⁴⁶

The United States reinforced Maine’s argument that Congress gave states primary authority under the CWA to deal with pollution and recognized that discharges from confinements likely create pollution,³⁴⁷ so it makes sense for states to be able to review an activity resulting in discharge to check for water quality problems.³⁴⁸ In response to a question from Justice Breyer, the U.S. noted that those water quality standards include provisions to protect fish, and without the certification conditions imposed by the State of Maine on S.D. Warren, there would be no water for fish or eels in parts of the river.³⁴⁹ In response to Justice Alito’s concern that a state hosting a hydroelectric facility providing power to consumers in other states could restrict the operation of the hydropower facility (and the interstate power output), the U.S. cited the EPA’s interstate reconciliatory authority, as set out in *Arkansas v. Oklahoma*.³⁵⁰ At press time, the Supreme Court had not yet ruled on the *S.D. Warren* case. However, the briefs and arguments of the parties provide a useful illustration of how some of the arguments used in the largely unresolved *Miccosukee* case may be used in other CWA contexts.

From Spontaneous Combustion to Anoxia: The Practical Effect of *Miccosukee* and an Argument to Change Course in CWA Interpretation

The Supreme Court left two main questions unanswered in *Miccosukee*: 1) can it be consistent with the text, stated purposes, and congressional intent behind the CWA to treat all of the waters of the United States as one, and 2) how connected or unconnected must two bodies of water be before they are considered two separate bodies? If the answer to the first question is yes, the second is irrelevant.

The CWA should not be read to treat all bodies of water as the same water body. As the Supreme Court noted, many areas of the CWA make it very clear that the Congress meant for the EPA and the states to treat

344. *Id.* at 58-59.

345. *Id.* at 59.

346. *Id.* at 60-61.

347. *Id.* at 59-60.

348. *Id.* at 61.

349. *Id.* at 61-62.

350. *Arkansas v. Oklahoma*, 503 U.S. 91 (1992).

each discrete water body as a separate unit for the purposes of pollution control. A recent Comment to the Virginia Environmental Law Journal takes on the unitary water theory, concluding that neither the statutory language, statutory objective, legislative history, nor case law support the use of the unitary waters theory and that the effect of treating all waters of the United States as one body “would be both substantial and adverse.”³⁵¹ Allowing a state to treat all of its waters as one unitary body would allow situations such as what is occurring in Florida—dirty water is being discharged into a cleaner body of water with relatively little consequence for water management authorities. The Water District and the Solicitor General argued in *Miccosukee* that the nonpoint source pollution programs in each state would be the best way to deal with the problem.

Unfortunately, as Florida has made abundantly clear, such programs are not always entirely effective—in fact, many of the pollution control measures meant to protect WCA-3 were recently delayed by over ten years by Florida’s legislature.³⁵² Without the authority to require NPDES permits for discrete, *controllable* points of discharge, neither citizens nor the federal government can do anything to stop a water authority or any other entity from moving dirty water around to cleaner water bodies—the federal government’s and citizens’ hands are effectively tied against intervention.

The central policy statement found in the CWA is a mandate to eliminate discharges. Congress enacted the provisions that attempt to deal with nonpoint source pollution in recognition of the fact that not all discharges are from such easily identified and controlled sources as pipes. In the Florida case, manmade structures impound dirty water, then discharge it to a cleaner body. The fundamental difference between this situation and the typical agricultural, suburban, or urban runoff scenario is that the dirty water is contained—it is technically possible and practically achievable for the water in the canal to be treated before it is discharged to WCA-3—it is not diffuse runoff over a river bank directly into a natural river. The Florida situation resembles municipal accumulation of sewer and storm water for treatment before discharging it. Without storm drains and sewers that empty to a central treatment facility, those liquid wastes would runoff over the land and be discharged as nonpoint source pollutants. The Water District, by constructing the C-11 canal, has arrested most of the overland runoff in its path to the

351. Matthew Duchesne, Comment, *Discharging the Clean Water Act's NPDES Requirements: Why the "Unitary Waters" Theory Does Not Hold Water*, 23 VA. ENVTL. L.J. 461, 476 (2005).

352. Brief of Respondent Friends of the Everglades, *supra* note 88, at 43-44.

Everglades. Instead of treating the runoff accumulated in the C-11 canal, they have been discharging it, in concentrated pulses, to the relatively clean waters of the Everglades. Treatment facilities aren't cheap, but the CWA's pollutant discharge limitations are not optional and clean water is not free.

Given that Florida has had difficulty and continues to delay resolving the problem of phosphorus nonpoint source pollution, it is not hard to imagine that other water districts around the country might be similarly situated. Water treatment is just as necessary in these situations as they are for municipal sewer and storm water treatment. Funds must be allocated for treatment of water in the C-11 canal just as they must be allocated for sewage treatment plants.³⁵³

However, there is no reason why there should be cause for panic among water diverters. The Water District in Florida is probably more of an exception than the rule in terms of water diverters that are actually degrading the quality of the receiving body of water. For example, Colorado noted in its brief that less than five percent of its waters were impaired and none of the impaired waters were believed to be so due to a water diversion. However, it is time for water diverters and the agencies that regulate them to seriously consider the water quality impacts of diversions, both the transfer of pollutants discharged into the water upstream, and the consequences of flow modifications to the maintenance of water quality standards.

In a recent article in the *Stanford Environmental Law Journal*, University of Wyoming law professor Reed Benson argues that flow impairment in rivers is "not just a water quantity problem" noting that "hydrological modification" is "the second-leading source of water quality impairment for U.S. rivers, streams and lakes."³⁵⁴ "Most uncontrolled water quality degradation today relates to water uses authorized by state water allocation systems."³⁵⁵ Professor Benson notes that § 303 of the CWA focuses on water quality (rather than point-source discharge limitations) and requires states to adopt, with EPA approval,

353. I don't pretend to believe that funds for such treatment facilities are readily available and I recognize that treatment plants for traditional stormwater discharges are only now in development or contemplated development in many areas. This reality does not take away from the fact that similarly dangerous nutrient loading and other types of pollution can and should be prevented, in the spirit if not explicitly in the words of the CWA, when collected in canals and basins of the sort present in Florida. In essence, if it causes water quality degradation and there is something that we can do to stop it, we should (and must, if we are truly "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters").

354. Reed D. Benson, *Pollution Without Solution: Flow Impairment Problems Under Clean Water Act Section 303*, 24 STAN. ENVTL. L.J. 199, 200-01 (2005).

355. *Id.* at 205 (quoting Prof. David H. Getches, University of Colorado School of Law).

water quality standards for all of its waters and take steps to identify and clean up “impaired waters.”³⁵⁶ He also summarizes the EPA’s long-failure and general reluctance to adopt regulations to implement § 303(d), particularly with regard to the TMDL program, which would enable the EPA and the states to address regulation of nonpoint source pollution.³⁵⁷ Prof. Benson argues that the TMDL program could be useful in dealing with flow-related water quality problems.³⁵⁸ He also notes the spotty manner in which states include flow impairment in their 303(d) lists of impaired waters to the EPA and the inconsistent, and generally counterproductive way in which the EPA has dealt with states that did include plans to remedy flow impairment in their regular reports to the agency.³⁵⁹ He reports that many states simply ignore the problem of flow-impaired waters, excluding such waters from their 303(d) lists,³⁶⁰ and uses the example of Montana, which did include flow-impaired rivers in its list of waters in which water quality was impaired.³⁶¹ When Montana submitted a plan to remedy the water quality problems caused by flow impairment for one river in 1996, the EPA approved the plan, including the solutions to the flow-impairment problems.³⁶² In 2000, when Montana submitted a plan for another river that impaired principally by low-flow, the EPA applauded Montana’s effort, but refused to approve or disprove the program because the EPA believes “flow impairment was not a pollutant and that TMDLs were appropriate only for pollutants.”³⁶³ Due to the EPA’s position, Montana now places “low priority” on improving water quality problems due to low flow, and develops TMDLs only for waters that are “impaired by a pollutant.”³⁶⁴ The EPA’s position has, in fact, removed much of a state’s motivation to remedy water quality impacts caused by low flow, evidence of—along with its reluctance to implement TMDL regulations, its failure to object to the Solicitor General’s “unitary waters theory,” its position against regulation of water diversions that discharge pollutants in the *Miccosukee* interpretation letter, its apparent intent (evidenced in the *Miccosukee* interpretation letter) to read “meaningfully distinct”

356. *Id.* at 215.

357. *Id.* at 221-28. “TMDL,” or total maximum daily load, is a sort of pollution budget by which the regulatory agency sets the limits on different types of pollution necessary to maintain the water quality standard that the state or the EPA has set for that body of water. *Id.* at 219-20.

358. *Id.* at 228.

359. *Id.* at 238-240.

360. *Id.* at 240.

361. *Id.* at 244-248.

362. *Id.* at 244.

363. *Id.* at 246.

364. *Id.* at 248.

narrowly to exclude many water diversions from potential NPDES regulation—a disturbing tendency of the EPA to avoid requiring states to take action to prevent water quality degradation.

The EPA could use the regulatory power given to it by Congress to draft a set of regulations for water diversions that would achieve the goal of protection of cleaner waters from dirty water discharges while allowing necessary water diversions to continue. Perhaps the most elegant way to deal with the problem of maintaining water quality changes in large-scale water projects would be for the EPA or the delegated states to issue project- or state-wide general NPDES permits.

In any case, there is little reason for water diversion authorities to panic at the prospect of overnight NPDES permit requirements. Courts aren't typically inclined to grant impossible injunctions, and most would be loath to cut off anyone's water supply by demanding a halt to diversions until a NPDES permit can be acquired. Moreover, if the water quality degradation is temporary (such as elevated turbidity after a heavy rain or spring snow melt), no citizen could bring suit to enjoin the pollution because under the CWA, citizen suits for wholly past violations are barred.³⁶⁵ It is unlikely that the EPA and state regulatory agencies would use their generally small enforcement budgets to punish water districts for pollution that is largely the doing of Mother Nature.

Note, however, that ongoing siltation or other "naturally occurring pollution" that degrades the quality of the receiving body of water (particularly if it was a fish-bearing stream not naturally prone to high levels of silt, as was the stream at the heart of the *Catskill* case against New York City), pollution prevention measures must be taken. In the case of suspended and settleable solids, simple filtration or settling ponds might be all that is necessary to eliminate the problem.

It is highly possible that states and their water management subdivisions could apply for general permits for their water diversion projects with all reasonable speed, while continuing to divert as necessary. In the seemingly uncommon situation that it is necessary to build a treatment facility to avoid degradation of water quality, legal or regulatory measures could be employed to mitigate the effects of either short-term ongoing pollution or temporarily reduced water supply.

Conclusion

Due to the circumstances of the day (e.g. the infamous spontaneous

365. See *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987). On the other hand, citizens would be able to argue that this is an ongoing problem that could be addressed by citizen suits. The resolution of that precise question is to be resolved another day.

combustion of the Cuyahoga River), when Congress enacted the CWA, its principal concern was with dealing with point source, traditional industrial water pollution. Regulation of point sources was technically feasible and the regulation was rather more straightforward than for non-point source pollution. But today, much of the nation's water quality problems derive from discharges, surface runoff, and water flow changes that are not readily regulated by a simple end-of-pipe permitting scheme. Additionally, there are some situations, as in *Miccosukee* and in many stormwater systems, where nonpoint source pollution from runoff is collected in a discrete space, then discharged to another body across an impermeable or semi-impermeable barrier. Here, we have the opportunity to treat that polluted water before the discharge. The components of a traditional industrial discharge situation that make treatment technically feasible are present: a discrete containment of pollutants and a discrete conveyance to an outside body of water. Thus, it is technically feasible to treat the water in *Miccosukee* and in other water diversion scenarios in a way that it is not as feasible to treat pollution runoff in a situation in which the water is not directed into some kind of storm drain, canal or holding pond.

Such regulation does not involve an unnecessary or impermissible intrusion into local and state land use decisions or state water allocation decisions. As the Supreme Court noted in *PUD No. 1*, CWA water quality controls can permissibly be placed on waters that are subject to state water quantity allocation decisions; this regulation is not contrary to § 101(g) because it is a water quality control.³⁶⁶ If water quality controls that affected water quantity allocation decisions were impermissible, the CWA would lose much of its meaning because any permit or certification requirement could arguably be an interference with a state water allocation decision. Subjecting water diversions to NPDES permitting is also a way that states can begin to protect water quality in terms of in-stream flow, turbidity, and other activities and pollutants that cause water pollution.

States should read *Miccosukee* as a warning to look at their own water diversions and how they affect water quality. As clean water becomes harder to come by, states should prepare themselves to deal with as many water quality problems as technologically and fiscally possible. The EPA appears reluctant, at this time, to get at all involved in regulation of water quality that may involve some interference with states having an absolute prerogative to distribute and transport water as they see fit. Rather than initiate a rulemaking on under what

366. *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 733-34 (1994).

circumstances a water diversion might require a NPDES permit, the EPA has indicated an intent to undertake a rulemaking to state that pollutant-containing water diversions will not be regulated under the NPDES regime.³⁶⁷

It is then left to states (whether Congress fully intended it so or not), as the regulation of point source pollutants initially (and unsuccessfully) was, to seek solutions to water quality degradation caused by water diversions, by low-flow, and by nonpoint source pollution, and to implement those solutions in these times of declining water quality and quantity. If states fail at this difficult and conflict-ridden task, perhaps, once again, Congress will have to step in and create a more concrete legislative regime to deal with lingering water quality problems. But courts should not wait for the states' possible failure to do their part in water quality maintenances and improvement—the judicial branch can act as an important protector of water quality. The Nation's waters would benefit from a reframing of legal debates regarding water quality from one of technical interpretation of often ambiguous statutory language, to one focusing on how the EPA and states may permissibly (within the confines of the federal and state constitutions) regulate the causes of water quality degradation to achieve the unambiguous purpose of the CWA—to stop pollution and to restore the biological, chemical and physical integrity of the Nation's waters.

367. EPA Memo, *supra* note 208, at 3.