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The Water Transfers Saga

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I. Developments To Date.

1. The *Miccosukee* and *Catskill* Cases.

Ten years ago Judge Wilkie Ferguson, Jr. entered summary judgment for the plaintiff Miccosukee Tribe of Indians and Friends of the Everglades on a novel claim: that a public water manager is required to obtain a discharge permit under Clean Water Act Section 402 in order to transfer or divert water—that is, to convey or connect water of the United States to other water of the United States without subjecting it to any intervening use. 1999 WL 33494862 (S.D. Fla. Sept. 30, 1999). Judge Ferguson made this ruling in a case involving the South Florida Water Management District's (SFWMD) operation of pumps that transferred water from a canal across a levee into a water conservation reservoir located within the original boundaries of the Everglades, when the canal water allegedly contained more pollutants than the reservoir water.

According to Judge Ferguson, this water transfer amounted to an "addition" of pollutants to the "navigable" "waters of the United States" and therefore required an NPDES permit under Section 402. This interpretation of CWA Section 402 threatened to have broad reach, because many if not most water transfers are likely to involve waters of somewhat different chemical compositions and might therefore be asserted to involve the "addition" of "pollutants." And there are tens of thousands of public and private water diversions around the country using tunnels, channels, sluice gates, pumps, or the like, many of them critical to water supply for urban areas and agriculture. In fact, the entire Nation's system of water allocation, management, and supply depends on countless water diversions. Under the district court's reasoning, virtually any of them could be argued to require a permit. Yet never had EPA subjected any of these transfers to the NPDES permitting scheme under the CWA.

The Eleventh Circuit affirmed. 280 F.3d 1364 (11th Cir. 2002). It held that whenever pollutants would not reach the "receiving water" but for the water transfer, an addition triggering the need for a discharge permit has occurred. Litigation on a parallel track, involving a transfer of water as part of New York City's water supply system, reached the same result. In *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 273 F.3d 481 (2d Cir. 2001), on remand, 244 F. Supp. 2d 41 (N.D.N.Y. 2003), New York City was penalized $6 million for a non-permitted transfer—for operating a system through which it had transferred water for some 70 years.

The Supreme Court took up the issue of water transfers in the *Miccosukee* case, *SFWMD* v. *Miccosukee Tribe*, 541 U.S. 95 (2004), but failed to resolve it. The Supreme Court vacated the Eleventh Circuit's decision, but left open two issues for remand. First, the United States in its brief to the Court argued that as a matter of the plain meaning of the statute no permit is required because the "navigable waters" of the United States is a unitary concept, so that an "addition" of pollutants to those navigable waters occurs at the first entry of the pollutants into the waters and not when pollutants are simply moved around entirely within the navigable waters, as occurs in a water transfer. The Supreme Court held that this "unitary waters" argument had not been preserved in earlier stages of the litigation and refused to address it, leaving it in the first instance to be considered on remand.

Second, and independent of the unitary waters reading, no permit would be required if the canal and reservoir between which water was transferred were not "meaningfully distinct" bodies of water. The Court remanded for additional fact-finding on that question.

2. The Friends of the Everglades Case.

Following the Supreme Court's non-resolution of the question, the Second Circuit revisited its *Catskill* decision and reaffirmed its prior view that the CWA requires a permit for a water transfer between distinct water bodies. 451 F.3d 77 (2d Cir. 2006).

Remand proceedings in the *Miccosukee* case itself were stayed, however, while the issues left open by the Supreme Court were litigated in a similar case in the same court, *Friends of the Everglades* v. *SFWMD*. An effort by the environmental plaintiffs to lift the stay was recently rejected by the Eleventh Circuit. *Miccosukee Tribe* v. *SFWMD*, No.07-12012 (11th Cir. Feb. 24 2009).

The *Friends* case involves SFWMD's pumping of water from canals in the Everglades Agricultural Area south of Lake Okeechobee across the Herbert Hoover Dike into the Lake. Following a two-month trial in *Friends*, Judge Altonaga ruled that an NPDES permit was required for the pumps by the plain language of the CWA. An appeal by the SFWMD and intervenors EPA and U.S. Sugar Corporation followed. That appeal was argued to the Eleventh Circuit in January 2009, before Judges Dubina and Carnes and visiting Judge Goldberg, and is now awaiting a decision. Regardless of the outcome of the appeal, another effort by the losing parties to interest the en banc Eleventh Circuit and the Supreme Court in the case is a distinct possibility.

3. EPA's Water Transfer Rule.

Intertwined with the NPDES litigation have been important developments on the regulatory front—and more litigation related to the regulatory action. The Eleventh Circuit and Supreme Court in the *Miccosukee* case pointed out that EPA had issued no rule setting forth its long-held position that water transfers do not trigger Section 402's permit requirement. After the Supreme Court ruled, EPA set about filling the regulatory void first with guidance, then a proposed rule, and finally, on June 13, 2008, a final rule stating that "discharges from a water transfer" are not subject to NPDES permitting. The rule defines a water transfer as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use."

4. The Rule Challenge Litigation.

Various environmental groups promptly filed suit to challenge the new rule. Some filed in district courts, others in circuit courts—there being some uncertainty in the case law over where a challenge to a rule exempting an activity from NPDES permitting belongs pursuant to CWA Section 509(b). Compare *National Cotton Council* v. *E.P.A.*, 2009 WL 30292 (6th Cir.

2009) (court of appeals) with *Northwest Environmental Advocate* v. *E.P.A.*, 537 F.3d 1006 (9th Cir. 2008) (district court). The court of appeals petitions for review were consolidated in the Eleventh Circuit, which then stayed the rule challenge pending its resolution of the already-briefed *Friends* case. The rule challenges filed in district courts in New York and Florida likewise have been stayed. While SFWMD and U.S. Sugar have been permitted to intervene in the Eleventh Circuit case, the efforts of western water managers to do so were rebuffed.

It is easy to see why courts stayed these rule challenges. SFWMD and U.S. Sugar have argued in the *Friends* appeal that no "addition" of pollutants is involved in a water transfer under the plain language of the statute, so the permitting requirement is not triggered. EPA argued that the court should give *Chevron* deference to its rule, and should uphold the rule under *Chevron* because its interpretation that no "addition" to waters of the United States is involved in a transfer is a reasonable one. If the court of appeals accepted either the plain language or *Chevron* deference argument, there would be nothing left to the environmental groups' rule challenge.

II. The Argument for Not Requiring Permits for Water Transfers.

Under *Chevron*, EPA's Water Transfers Rule is entitled to deference if it is a reasonable interpretation of the statute. In fact, the Rule is not only reasonable, it is the only plausible reading to the statutory language and structure. Those who have challenged the Rule make a fundamental mistake about how the Statute is supposed to work, with States regulating discharges that do not properly fit within the NPDES formula.

1. The "Cooperative Federalism" Structure of the CWA.

The Clean Water Act envisions "a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992). To achieve that goal while preserving the States' primacy in water quality protection and land and water resources management, the Act divides regulatory authority between the State and federal governments based on the source of pollution. 33 U.S.C. §§ 1251(b), (g).

Section 402 gives EPA regulatory authority to eliminate the release of industrial and municipal wastes. 33 U.S.C. § 1342; see *Nat'l Wildlife Fed'n* v. *Consumers Power*, 862 F.2d 580, 582 (6th Cir. 1988). Absent an NPDES permit establishing "effluent limitations" for the point source, discharge of "any pollutant" from that source into the navigable waters is unlawful. *Id.* §§ 1311(a), 1311(b)(1)(A), 1342(a). "Effluent limitations" restrict the "quantities, rates, and concentrations of chemical, physical, biological, and other constituents" at the point at which they are discharged. *Id.* § 1362(11). Once an NPDES permit is issued, those "generally applicable" standards become "the obligatio[n] * * * of the individual discharger." *EPA* v. *California*, 426 U.S. 200, 205 (1976).

"[D]efined by exclusion [to] includ[e] all water quality problems not subject to [the] § 402" program, regulation of nonpoint sources of pollution (such as runoff) is the primary responsibility of the States. *Nat'l Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 166 (D.C. Cir. 1982). "[W]ater quality standards are the basis of the 'nonpoint source' program," *Consumers Power*, 862 F.2d at 588, and are promulgated by the States to "establish the desired condition of a waterway." *Arkansas*, 503 U.S. at 101. While the CWA "provides no direct mechanism to control nonpoint source pollution," *Pronsolino* v. *Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002), States are responsible for adopting nonpoint source management programs to address "watershed-by-watershed" concerns and to institute a "continuing planning process" to meet their water quality goals. 33 U.S.C. §§ 1313(a), (e); 1329(a)-(b).

Under this framework, water distribution and control operations that merely redirect the flow of water are beyond the intended scope of NPDES. The Clean Water Act employs two

distinct strategies to control pollution, and in endeavoring to eliminate entry of waste into the Nation's waters prior to discharge, Congress did not intend that a State would be required to obtain a federal permit simply to pump water from one part of its management system to another.

2. The Plain Language Of The CWA Does Not Require NPDES Permits For Water Transfers.

Section 402 requires an NPDES permit for "the discharge of any pollutant," 33 U.S.C. § 1342(a)(1), defined as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). Before a permit is required each of "five elements must be present": "(1) a *pollutant* must be (2) *added* (3) *to navigable waters* (4) *from* (5) a *point source*." *Gorsuch*, 693 F.2d at 165. Careful attention to these precise terms of "a complicated statute like the [CWA]" is important because "technical definitions [were] worked out with great effort in the legislative process." *S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 126 S. Ct. 1843, 1849-1850 (2006).

Undefined in the CWA, the term "addition" is to be construed "'in accordance with its ordinary or natural meaning.'" *S.D. Warren*, 126 S. Ct. at 1847. In its primary sense, "addition" means the "result of adding; anything added," and to "add" is to "join, annex, or unite * * * so as to bring about an increase (as in number [or] size)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 24 (1993). Under this ordinary usage the diversion of already polluted "navigable waters" from one location to another does not "join" "any pollutant" "to navigable waters" or bring about any "increase" in pollutants in "the waters of the United States." The pollutants can only be "joined" or "united" with "the waters of the United States" upon first entry into those waters. *Gorsuch*, 693 F.2d at 165 (for NPDES to apply, the point source must be site of pollutant's initial entry to navigable waters); *Consumers Power*, 862 F.2d at 584 (same).

As the United States explained to the Supreme Court in its brief in the *Miccosukee* case, "[w]hatever pollutants the waters contain are already *in* 'the waters of the United States,' when those waters pass through" the pump or other diversion; the pumps "merely conve[y]" but do not add those waters. U.S. Amicus Br., No. 02-626, at 16 (Sept. 10, 2003), *available at* http://tinyurl.com/253yuc. Before there is an addition of pollutants from a point source, the point source "must convey a [pollutant] *from the outside world* into 'the waters of the United States.'" *Id.* at 14 (emphasis added); *United States* v. *Riverside Bayview Homes*, 474 U.S. 121, 132-133 (1985) (Congress's goal in the CWA was to control pollutants "at the source").

Plain language of the CWA supports this reading. In defining the reach of the discharge prohibition, Congress spoke of an addition "to navigable waters," not "to navigable water." The collective term "waters" signifies an intent to designate the entire system of U.S. waters, rather than any particular body of water, as the site at which an "addition" is judged. The CWA's specific definition of "navigable waters" as "*the* waters of the United States" confirms that "navigable waters" are a conceptual whole for purposes of determining if an "addition" has occurred. 33 U.S.C. § 1362(7). "Placing the article 'the' in front of a word connotes the singularity of the word modified." *Renz* v. *Grey Advertising, Inc.*, 135 F.3d 217, 222 (2d Cir. 1997). See *Rapanos*, 126 S. Ct. at 2220.

And while the modifier "any" precedes every other element in the definition of "discharge of pollutants"—"any addition," "any pollutant," "any point source"—the statute conspicuously does not refer to "any" navigable waters but talks simply of "any addition of any pollutant to navigable waters." 33 U.S.C. § 1362(12). This shows that while "additions," "pollutants," and "point sources" are conceived of in their various forms, "navigable waters" are viewed in the aggregate. As the United States told the Supreme Court in *Miccosukee*, "[t]he *absence* of the modifier 'any' in conjunction with 'navigable waters' * * * signifies Congress's * * * understanding that 'the waters of the United States' should be viewed as a whole for purposes of NPDES permitting requirements," so that "[o]nce a pollutant is present in one part of

'the waters of the United States,' its simple conveyance to a different part" is not a "discharge of a pollutant" triggering section 402. U.S. Amicus Br., No. 02-626, at 19 (emphasis original).

If the CWA stated that a permit must be obtained for an "addition" to "any" navigable water or "body" of navigable water, that might more nearly capture the concept that each time pollutants pass from one watercourse to another, NPDES is triggered. Congress did use such language elsewhere in the statute. *E.g.*, 33 U.S.C. § 1312(a) (providing for water quality based effluent limitations on point source discharges when necessary to attain "water quality in *a specific portion of the navigable waters*"); *id.* § 1313(c)(2)(A) (requiring State to establish water quality standards taking into account "the designated uses of *the navigable waters involved*"); *id.* § 1313(d)(1)(B) (referring to "waters *or parts thereof*") (all emphases added). These provisions show that Congress understood that "the navigable waters" is a unitary concept and that further specification was necessary when it sought in the Act to refer to parts or portions of the navigable waters. Congress undoubtedly would have used this terminology of parts or portions in the definition of a discharge of a pollutant if that is what it had intended. See U.S. Amicus Br., No. 02-626, at 19 (Congress "would have defined the 'discharge of a pollutant' to include 'any addition of any pollutant to [a specific portion of the] navigable waters from any point source'" had it "intended that the movement of one body of navigable waters into another body of navigable waters" trigger the NPDES requirement); *Gorsuch*, 693 F.2d at 176 ("it does not appear that Congress wanted to apply the NPDES system wherever feasible. Had it wanted to do so, it could easily have chosen suitable language"); *Conservation Law Found.* v. *Hannaford Bros.*, 327 F. Supp. 2d 325, 331 (D. Vt. 2004) ("Had Congress intended to mandate NPDES permits" for water transfers between individual water bodies, "it knew how to say so and would have done so"), aff'd, 139 F. App'x 338 (2d Cir. 2005).

The Second Circuit in *Catskill* criticized the "singular entity" approach to "navigable waters" as being "inconsistent" with the "ordinary meaning of the word 'addition,'" because then "movement of water from one discrete water body to another would not be an addition even if it involved a transfer of water * * * contaminated with myriad pollutants to [water that was more] pristine." *Catskill I*, 273 F.3d at 493; accord *Catskill II*, 451 F.3d at 81. That is not an argument grounded in statutory language. Instead, it reflects the court's naked policy choice to elevate its own conception of how to achieve the goal of clean water over the plain language that Congress used to delineate the mechanisms to achieve that goal. It ignores the critical role that Congress gave the States. It presumes that NPDES is the *only* mechanism by which CWA effectuates the protection of water quality, whereas in fact there exist numerous other initiatives to address the professed pollution concern, such as State implementation of water quality standards and regulation of sources of pollution not covered by the NPDES program. *E.g.*, 33 U.S.C. §§ 1313(d)(1), 1288, 1329.

3. The CWA Read As A Whole Confirms The Unitary Waters Interpretation Of Section 402.

This interpretation of Section 402 is also confirmed by a holistic reading of the statute that takes into account its other provisions.

(a) Section 304(f), 33 U.S.C. § 1314(f), which the Supreme Court recognized "concerns nonpoint sources" (*Miccosukee*, 541 U.S. at 106, 124 S. Ct. at 1544), is entitled "[i]dentification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution." It provides that EPA in consultation with federal and State agencies is to promulgate guidelines concerning nonpoint source pollution and methods "to control pollution resulting from * * * changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." Section 304(f) thus indicates that Congress intended that the "movement" of

water through "flow diversion" facilities like the S-2, S-3, and S-4 pumps should be addressed by the States through their nonpoint source programs, not by application of the Section 402 permitting program—even though flow diversion facilities would typically satisfy the statutory definition of a point source. See H.R. Rep. No. 92-911, at 109 ("Section 304[f] addresses the problem of nonpoint sources of pollutants [such as] manmade changes in the normal flow of surface and ground waters"); *Consumers Power*, 862 F.2d at 583-584, 588 ("water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under the 'nonpoint source' category").

(b) Congress expressed its intention "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and in doing so "to plan the development and use * * * of land and water resources." CWA § 101(b), 33 U.S.C. § 1251(b). It further intended that "the authority of each State to allocate quantities of water within its jurisdiction shall not be * * * impaired." CWA § 101(g), 33 U.S.C. § 1251(g).

Other provisions of the statute make clear that Congress implemented these commands by, among other things, leaving with the States the authority to control nonpoint sources of pollution (which typically requires land and water use planning)—including, specifically, water diversions (which are typically essential to the allocation of quantities of water). *E.g.*, CWA §§ 304(f), 319, 33 U.S.C. §§ 1314(f), 1329. To expand the scope of the federal NPDES permitting system at the expense of State authority over nonpoint sources of pollution would fly in the face of this express congressional intent and violates the cardinal principal that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States* v. *Bass*, 404 U.S. 336, 349 (1971); see *Solid Waste Agency*, 531 U.S. at 173-174 (applying this rule to the interpretation of the Clean Water Act). As the United States informed the Supreme Court in *Miccosukee*, interpreting Section 402 to reach water transfers would "impose substantial obstacles to the operation of state water allocation systems," and "[n]othing in the Clean Water Act's text or history suggests that Congress intended that result." U.S. Amicus Br., No. 02-626, at 25 n.11.

(c) The CWA lists categories of facilities that need permits, including the treatment required for each category. 33 U.S.C. § 1311(b)-(m) (effluent limitations for categories of point sources); *id.* § 1314(b), (d) (levels of treatment for industrial and municipal point sources); *id.* § 1316(b) (categories of point sources required to meet new source performance standards). That not one of those provisions addresses a State's diversion of water for flood control, water supply, or other public purposes is telling.

(d) Legislative history confirms that Congress intended Section 402 to apply to the first entrance of pollutants into "the navigable waters" and for subsequent transfers to be addressed through nonpoint source and water quality programs. See S. Rep. No. 92-414, at 77 (1971) (Act's aim is that "discharge of pollutants be controlled *at the source*"); *id.* at 73 (Congress "concentrate[d] on the control of pollutants *placed in* surface waters"); *id.* at 70 (goal is "to control" the discharge of pollutants "on a *source by source basis*"); H.R. Rep. No. 92-911, at 109 (Congress adopted Section 304(f) because it understood the need "to vigorously address the problems of nonpoint sources," including "from such nonpoint sources as * * * natural and manmade changes in the normal flow of surface and ground waters").

4. The Supreme Court's *Miccosukee* Decision Does Not Contradict This Straightforward Reading of the CWA.

The Supreme Court "decline[d] to resolve" the "unitary waters argument" in *Miccosukee* on the ground that "neither the District nor the Government raised the unitary waters approach" at earlier stages of the litigation, and made it clear that the argument would be open to the parties in the future. 541 U.S. at 109.

The Supreme Court did raise a number of questions about the unitary waters approach that were not addressed in the briefing in that case, but that are easily answered:

(a) Although Section 304(f) "does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the 'point source' definition" (541 U.S. at 106), few diversions could be achieved without the use of some device that qualifies as a point source under the Act's broad definition—"any discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14). The very purpose of a diversion is to convey water in a different direction, usually involving some feature that confines the water in the process such as a "pipe, ditch, channel, tunnel [or] conduit." *Ibid.* Congress would hardly have bothered to promulgate Section 304(f) to cover only diversions that do not use a point source—a virtually empty set. Section 304(f) and its legislative history show that Congress envisioned that water transfers would be dealt with by the nonsource point program.

(b) That certain provisions of the CWA do refer to specific portions of the navigable waters shows that Congress was concerned to "protec[t] individual water bodies." 541 U.S. at 107. But when Congress meant to impose an obligation with respect to specific portions of the navigable waters—typically in connection with State water quality obligations—it plainly so stated. Section 402 and its definitions do not do so. This stark contrast in the terms Congress chose to use underlines the validity of the unitary waters approach to NPDES permitting. In determining *whether an NPDES permit is required* the question is does the point source at issue add pollutants to the navigable waters as a whole. But in determining *appropriate water quality standards and effluent limitations* the specific characteristics of a particular water body are of course to be taken into account. Those are harmonious, not inconsistent approaches.

(c) That 40 C.F.R. § 122.45(g)(4) allows an "intake credit" for pollutants to an industrial user who uses polluted water and then returns it to the same waterbody, but not otherwise, is of no moment. See 541 U.S. at 107-108. The industrial use and then discharge of water is subject to Section 402, absent a specific exemption like the agricultural exemption. See *Dubois* v. *United States Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996); U.S. Amicus Br., No. 02-626, at 23 n.8. The "intake credit" rule merely takes pollutants that were always in the water out of the effluent limit equation. It in no way suggests that water that is conveyed, without an intervening use, falls within the NPDES program.

(d) A 1975 EPA General Counsel opinion that "irrigation ditches that discharge to navigable waters require NPDES permits even if they themselves qualify as navigable waters" is not relevant. 541 U.S. at 107, citing *In re Riverside Irrigation Dist.*, 1975 WL 23864 (EPA OGC June 27, 1975). It was Congress's view that this and similar positions taken by EPA were incorrect that led it to enact the broad exemption for agricultural discharges in 1977, making clear that irrigation return flows involve no discharge requiring federal permits. CWA § 502(14), 33 U.S.C. § 1362(14). Furthermore, EPA has stated that the 1975 opinion was narrow in scope and "did not specifically address" transfers that merely convey navigable waters, and that "[t]o the extent" the opinion could be interpreted to apply more broadly to water transfers "it is superseded" by EPA's subsequent interpretations expressly addressing those transfers. EPA, *Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers* at 2-3 n.5 (Aug. 5, 2005), *available at* http://www. epa.gov/ogc/documents/water_transfers.pdf.

Because the plain language and structure of the CWA mandate that NPDES requirements do not apply to water transfers, and because the Water Transfer Rule is therefore a reasonable exercise of EPA's authority under *Chevron*, the Rule should be upheld by the Eleventh Circuit and Supreme Court.