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# Does It Hold Water? Repudiating the “Singular Entity” or “Unitary Waters” Approach to the Clean Water Act

Gregory L. Sattizahn<sup>1</sup>

## I.

### INTRODUCTION

In *South Florida Water Management District v. Miccosukee Tribe of Indians*, the United States Supreme Court was presented with a novel and untested argument by the United States, appearing as *amicus curiae*, which asserted the bold proposition that for the purpose of the Clean Water Act’s (hereinafter “CWA”) National Pollution Discharge Elimination System (hereinafter “NPDES”), all navigable waters of the United States should be considered unitarily when determining whether there is an addition of a pollutant to a navigable water.<sup>2</sup> Under this approach, the United States asserted that a NPDES permit would not be required when unaltered water from one navigable body of water containing pollutants was intermingled with another navigable water body. Furthermore, the United States maintained that in such a situation a NPDES permit was unnecessary irrespective of whether the pollutant discharge was naturally occurring or accomplished through an unnatural conveyance such as a point source, the traditional point of regulation under the CWA. The United States maintained that the NPDES permit requirement was avoided because there was no “addition” to the navigable waters of the United States.

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2. *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 134 U.S. 1537, (2004) [hereinafter *Miccosukee*] *petition for rehearing denied* *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S.Ct. 2198 (2004) (mem).

Despite overtures that this “unitary waters” or “singular entity” approach was not consistent with the purpose of the Act or the regulations then in place, the United States Supreme Court left this argument unanswered, and reversed and remanded for further factual development of the record, specifically allowing the United States an opportunity to advance this argument below. We have certainly not heard the end of the “unitary waters” theory. Consequently, this article examines the United States’ proposed “unitary waters” or “singular entity” approach to navigable waters under the CWA as it relates to the NPDES permit requirement.

To aid in the discussion, Section II of this article provides an overview of the CWA by examining the relevant statutory provisions and developed jurisprudence concerning the “addition” of a pollutant to navigable waters of the United States. Section III of this article proceeds with a discussion of *Miccosukee* and the United States’ position in that case advocating the “singular entity” or “unitary waters” approach to the CWA. Section IV of this article offers an analysis of the United States’ unitary waters approach to the NPDES permitting system. Section V of this article concludes that the unitary waters doctrine is unsupported by the statutory framework, case law, and overall purpose and intent of the CWA, specifically the NPDES permit requirement.

## II.

### OVERVIEW OF THE CWA

#### A. *Relevant Provisions*

Congress enacted the CWA in 1972 with the stated objective to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.”<sup>3</sup> To meet this goal, the CWA prohibits “the discharge of any pollutant by any person” unless the provisions of the Act allow otherwise.<sup>4</sup> The relevant provision concerning the legality of a discharge is 33 U.S.C. § 1342, which establishes the National Pollutant Discharge Elimination System.<sup>5</sup> The NPDES permit has been characterized as “the most important component of the Act” and is the key to obtaining the

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3. Federal Water Pollution Control Act and Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972); [hereinafter Clean Water Act or CWA as codified and amended]; 33 U.S.C. § 1251 (2004).

4. 33 U.S.C. § 1311(a) (2004).

5. 33 U.S.C. § 1342 (2004).

CWA's ambitious goals.<sup>6</sup> In its most basic form, the NPDES permit limits the types and quantities of pollutants that can be discharged into the navigable waters of the United States.<sup>7</sup>

A "discharge of a pollutant" is defined in the CWA as "any addition of any pollutant to navigable waters from any point source."<sup>8</sup> A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any . . . pipe, ditch, channel, or tunnel . . . from which pollutants are or may be discharged."<sup>9</sup> As a result, the prerequisites for the NPDES permit requirement are (1) discharge, or any addition; (2) of any pollutant; (3) from a point source; (4) to navigable waters. These requirements have all become terms of art under the CWA. Therefore, it is helpful to briefly explore some of the relevant case law interpreting these terms.

## B. *Developed Jurisprudence*

### 1. Discharge or Addition

A NPDES permit is required for "any addition of any pollutant to navigable waters from any point source."<sup>10</sup> However, the term "addition" is not defined in the CWA. Therefore, case law has become the mode for definition and interpretation of that term and its import under the CWA.

In *Dubois v. United States Department of Agriculture*, the First Circuit Court of Appeals addressed the application of the NPDES permit requirement to a ski resort that drew water for

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6. *Dubois v. United States Dep't of Agric.*, 102 F.3d 1273, 1294 (1st Cir. 1996) *cert. denied sub nom. Loon Mountain Recreation Corp. v. Dubois*, 521 U.S. 1119 (1997). "Congress viewed the NPDES program as its most effective weapon against pollution. Prior to 1972, federal water pollution law had required the states, under EPA oversight, to develop water quality standards and then limit industrial and municipal discharges so to meet those standards. This system proved inadequate." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 176 (D.C. Cir. 1982) [hereinafter *Gorsuch*]. "[T]he regulatory regime it creates requires principally that discharges be regulated by permit, not prohibited outright." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 486 (2nd Cir. 2001) [hereinafter *Trout Unlimited*]. "A cornerstone of the Clean Water Act is that the 'discharge of any pollutant' from a 'point source' into navigable waters of the United States is unlawful unless the discharge is made according to the terms of an NPDES permit obtained from either the United States Environmental Protection Agency or from an authorized state agency." *Ass'n to Protect Hammersley, ELD, and Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1009 (9th Cir. 2002).

7. 33 U.S.C. § 1342.

8. 33 U.S.C. § 1362(12) (2004).

9. 33 U.S.C. § 1362(14).

10. 33 U.S.C. § 1362(12).

snowmaking from Loon Pond, a pristine water body in the White Mountain National Forest.<sup>11</sup> After the water was pumped through an artificial snowmaking system, the remaining water was deposited into Loon Pond.<sup>12</sup> This return flow not only included water that was originally drawn from Loon Pond but also included return flows from other water bodies which were distinct from, and of lesser quality than, Loon Pond.<sup>13</sup> The court of appeals was asked to determine whether the return flow from the snowmaking equipment constituted an "addition of a pollutant" to Loon Pond within the meaning of the CWA.

The Forest Service argued, and the district court held, that there was no addition of a pollutant to Loon Pond under these facts because the waters were from a single entity.<sup>14</sup> However, in rejecting the "singular entity" theory, the court of appeals reversed the district court's determination that the East Branch and Loon Pond, the two contributing water bodies to the snowmaking operation, were part of a "singular entity" as "waters of the United States" and determined that they "were not to be considered individually in this context."<sup>15</sup> The court held that "there is no basis in law or fact for the district court's 'singular entity' theory."<sup>16</sup> The court stated:

The error in the [district] court's reasoning is highlighted by an analogy the court drew: it hypothesized a pond in which we place a pipe . . . and we pump the pond water from the bottom to the surface. No one would reasonably contend that internal pumping causes an 'addition' of pollutants to the pond. Instead, we would consider the pumping to be a redistribution of pollutants from one part of the pond to another. Such a situation is not at all analogous to the instant case. There is no barrier separating the water at the top of the pond from the water at the bottom of the same pond; chemicals, organisms, and even heat are able to pass from the top

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11. *Dubois*, 102 F.3d at 1277-78. Loon Pond was classified as a Class A waterbody and an Outstanding Resource Water. *Id.* It ranked in the upper 95th percentile of all lakes and ponds in Northern New England for its low level of phosphorus. *Id.* at 1277. As a result of the limited phosphorus present, the pond had higher clarity, biological production and supported a rich variety of life. *Id.* It was also a major source of drinking water for a town located below it. *Id.*

12. *Dubois*, 102 F.3d at 1278.

13. *Id.* Water for the snowmaking operation was also obtained from the East Branch of the Pemigewasset River and Boyle Brook. *Id.* The water from East Branch contained "bacteria and other aquatic organisms such as *Giardia lamblia*, phosphorus, turbidity and heat." *Id.*

14. *Dubois*, 102 F.3d at 1296.

15. *Id.*

16. *Id.*

to the bottom or *vice versa*, at rates determined only by the laws of science.

In contrast, the transfer of water or its contents from the East Branch to Loon Pond would not occur naturally. This is more analogous to the example the district court gave from the opposite end of the spectrum: where water is added 'from an external source' to the pond and an NPDES permit is required.<sup>17</sup>

Therefore, the court concluded that the transfer of pollutants from one body of water to another constituted an "addition of pollutants" within the meaning of the CWA.<sup>18</sup>

But in another line of cases addressing the "addition of a pollutant," the United States successfully argued that a dam does not constitute a point source creating the addition of pollutants when it merely passes water from a dam reservoir downstream.<sup>19</sup> Rather, the point or nonpoint character of the discharge was created when such pollution initially entered navigable water.<sup>20</sup> In excusing the NPDES permit requirement in this situation, the District of Columbia Court of Appeals deferred to the EPA's view that the NPDES permit program was inapplicable because of the unique nature of the dam-facilitated pollution and the deference to state water management practices, of which dams represented "a major component."<sup>21</sup> As a result, water passing through a dam unaltered did not create the "discharge of a pollutant" under the CWA.<sup>22</sup>

Likewise, *National Wildlife Federation v. Consumers Power Company* reaffirmed the reasoning in *Gorsuch* discussed above and determined that a hydroelectric facility that did not add anything to the navigable water from the "outside world" did not require a NPDES permit for the movement of pollutants already in the water.<sup>23</sup> The court held that the release of turbine generating water which contained fish entrails did not constitute a "dis-

17. *Dubois*, 102 F.3d at 1296-97.

18. *Id.*

19. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175-77 (D.C. Cir. 1982); *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 587 (6th Cir. 1988).

20. *Gorsuch*, 693 F.2d at 175.

21. *Id.* at 179, 182.

22. *Id.* at 182. However, the Court in *Gorsuch* rejected the argument that "any addition must occur 'from' a point source and not merely through a point source." *Id.* at 175.

23. *Consumers Power*, 862 F.2d at 586.

charge” under the CWA.<sup>24</sup> “However, if the dam itself added pollutants to the water, rather than merely transmitting the water coming into it, in whatever altered form, then it would be subject to the NPDES permit system.”<sup>25</sup>

For comparison, in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, the Second Circuit Court of Appeals addressed the applicability of the permit system to an interbasin transfer.<sup>26</sup> The city of New York transferred water from a reservoir through a tunnel and eventually into Esopus creek.<sup>27</sup> The water from the creek flowed to another reservoir that facilitated its delivery to the city for use as drinking water.<sup>28</sup> Trout Unlimited alleged that the water discharged into Esopus Creek required a NPDES permit because the tunnel that facilitated the discharge allowed the transfer of suspended solids, turbidity, and heat.<sup>29</sup> In reversing and remanding, the Second Circuit Court of Appeals determined that “for there to be an ‘addition’ a ‘point source’ must introduce the pollutant into navigable water from the outside world.”<sup>30</sup> However, the Court only embraced this view “provided that ‘outside world’ is construed as any place outside the particular water body to which pollutants are introduced.”<sup>31</sup> Consequently,

Given that understanding of ‘addition,’ the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a ‘discharge’ that demands an NPDES permit.<sup>32</sup>

The Court distinguished both *Gorsuch* and *Consumers Power* as “essentially involv[ing] the recirculation of water, without anything added ‘from the outside world.’”<sup>33</sup> The court stated that

24. *Consumers Power*, 862 F.2d at 583, 585. The court found that the “facility [did] not create the fish which became entrained in the process of generating electricity.” *Id.* at 585.

25. *Id.* at 586. The EPA “had consistently maintained that dam-induced water quality changes are not generally the result of the discharge of any pollutant” and not subject to an NPDES permit. *Id.* at 587.

26. *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 490-93 (2d. Cir. 2001)

27. *Trout Unlimited*, 273 F.3d at 484.

28. *Id.*

29. *Id.* at 485.

30. *Id.* at 491 (citing *Gorsuch*, 693 F.2d at 165).

31. *Trout Unlimited*, 273 F.3d at 491.

32. *Id.*

33. *Id.* The Court analogized that “The *Gorsuch* and *Consumers Power* decisions comport with the plain meaning of ‘addition,’ assuming that the water from which the discharges came is the same as that to which they go. If one takes a ladle of soup

the United States' singular entity or "sameness" argument "strains past the breaking point" in this situation.<sup>34</sup> To hold otherwise, the court opined, "would mean that movement of water from one discrete water body to another would not be an addition even if it involved a transfer of water from a water body contaminated with myriad pollutants to a pristine water body containing few or no pollutants."<sup>35</sup> The court reasoned that "[s]uch an interpretation would be inconsistent with the ordinary meaning of the word 'addition.'"<sup>36</sup>

## 2. Pollutant

"The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water."<sup>37</sup> "[T]he breadth of many of the items in the list of 'pollutants' tends to eviscerate any restrictive effect."<sup>38</sup> In fact, the list has been characterized as "haphazard," and it "invite[s] the inclusion of discharged substances that are not specifically listed into these broad categories."<sup>39</sup> As a result, a court can make an independent determination that a substance is a pollutant within the meaning of the CWA.<sup>40</sup> It is also relevant to note that under the act, "pollution" is a "*man-made or man-induced* alteration of the chemical, physical, biological, and radiological integrity of water."<sup>41</sup>

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from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot (beyond, perhaps, a *de minimis* quantity of airborne dust that fell into the ladle). In requiring a permit for such a 'discharge' the EPA might as easily require a permit for Niagara Falls." *Id.* at 492.

34. *Id.* at 492. As the court observed, in this situation, water was artificially diverted and moved several miles to an unrelated body of water. *Id.*

35. *Id.* at 493.

36. *Trout Unlimited*, 273 F.3d at 493. This distinction was carried forward in *Greenfield Mills Inc. v. Macklin*, 361 F.3d 934, 948-49 (7th Cir. 2004) (holding that discharge of dredged material into a contiguous body of water constituted an addition).

37. 33 U.S.C. § 1362(6).

38. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 565 (5th Cir. 1996) *cert. denied Cedar Point Oil Co., Inc., v. Sierra Club, Lone Star Chapter*, No. 95-1831, 519 U.S. 811, 117 S. Ct. 57, 136 L. Ed. 2d 20 (U.S. Oct. 7, 1996).

39. *Sierra Club, Lone Star Chapter*, 73 F.3d at 565 (citing *Gorsuch*, 693 F.2d at 173 n.52).

40. *Sierra Club, Lone Star Chapter*, 73 F.3d at 566.

41. 33 U.S.C. § 1362(19)(emphasis added).



For example, in *Northern Plains Resource Council v. Fidelity Exploration and Development Company*, the Ninth Circuit Court of Appeals determined that “produced water” which was a by-product of coal bed methane extraction was a pollutant under the CWA.<sup>42</sup> The definition of pollutant was also found to include “unaltered groundwater” in which no chemicals were added to the water in the extraction process.<sup>43</sup> The groundwater at issue was discharged directly into the Tongue River instead of re-injected below ground into an approved well.<sup>44</sup> The court rejected arguments that the fact that the water was “unaltered,” “naturally occurring,” or “only water” was relevant in determining if the water was a “pollutant” under the CWA.<sup>45</sup> Consequently, because of the pollutants present in that unaltered groundwater it, the water was determined to be a “pollutant within the plain meaning of the CWA and [was] subject to NPDES permitting requirements.”<sup>46</sup> Moreover, the court in *Fidelity* determined that the addition of a pollutant “refers to the effect of the discharge on the receiving water; it does not require that the discharged water be altered by man.”<sup>47</sup> Consequently, the receiving water body is the relevant water body under the CWA.<sup>48</sup>

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42. *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*, 325 F.3d 1155, 1161-62 (9th Cir. 2003) [hereinafter *Fidelity*] *cert denied* *Fidelity Exploration and Production Co. v. Northern Plains Resource Council, Inc.*, 124 S. Ct. 434 (2003) (mem.).

43. *Fidelity*, 325 F.3d at 1161.

44. *Id.*

45. *Id.* at 1162. “It is the introduction of these contaminants, not their transformation by humans, that renders them pollutants. Also, by allowing the degradation of the quality of receiving waters, the consequences of Fidelity’s interpretation [ ] would upset the integrity of the CWA.” *Id.* at 1163. The groundwater contained “calcium, at 1162. “It is the introduction of these contaminants, not their transformation by humans, that renders them pollutants. Also, by allowing the degradation of the quality of receiving waters, the consequences of Fidelity’s interpretation [ ] would upset the integrity of the CWA.” *Id.* at 1163. The groundwater contained “calcium, magnesium, sodium, potassium, bicarbonate, sulfate, chloride, and fluoride.” *Id.* at 1158. magnesium, sodium, potassium, bicarbonate, sulfate, chloride, and fluoride.” *Id.* at 1158.

46. *Fidelity*, 325 F.3d at 1161. By discharging the water into the Tongue River Fidelity altered the water quality of the River and caused “pollution” under the CWA. *Id.* at 1162. This water would not have reached the Tongue River absent Fidelity’s extraction process. *Id.* at 1158.

47. *Id.* at 1162.

48. *Id.* at 1162 (stating “[a] contrary reading of the definition is illogical because the goal of the CWA is to protect receiving waters, not to police the alteration of the discharged water.”).

### 3. Point Source

The term 'point source' means any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigated agriculture.<sup>49</sup>

This definition "makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'"<sup>50</sup> The point source "does not necessarily refer to the place where the pollutant was created but rather refers only to the proximate source from which the pollutant is directly introduced to the destination water body."<sup>51</sup> "Point and nonpoint sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by whether the pollution reaches the water through a confined, discrete conveyance."<sup>52</sup> Moreover, the Pennsylvania Supreme Court has held that a diversion of water containing pollutants from one body of water to another constitutes a point source under the CWA and is distinct from a diversion within a single body of water because "the point source itself physically introduces a pollutant into the water from the outside world."<sup>53</sup>

### 4. Navigable Waters

"The term 'navigable waters' means the waters of the United States, including the territorial seas."<sup>54</sup> It is under this definition that the United States creates the "unitary waters" theory whereby all navigable waters of the United States are viewed unitarily for determining the NPDES permitting requirement.<sup>55</sup> "Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for 'water

49. 33 U.S.C. § 1362(14).

50. *Miccosukee*, 124 S. Ct. at 1543.

51. *Trout Unlimited*, 273 F.3d at 493. In *Trout Unlimited*, the court found that a tunnel that conveyed the pollutant from the original source to navigable water was a point source under the CWA. *Id.*

52. *Trustees for Alaska v. Envtl. Protection Agency*, 749 F.2d 549, 558 (9th Cir. 1984). See also *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1978).

53. *Del-Aware Unlimited, Inc. v. Commonwealth*, 508 A.2d 348, 359 (Pa. Commw. Ct. 1986) (distinguishing *Gorsuch*, 693 F.2d at 175).

54. 33 U.S.C. § 1362 (7).

55. *Miccosukee*, 124 S. Ct at 1543-44.

moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.”<sup>56</sup> “In keeping with these views, Congress chose to define the waters covered by the Act broadly.”<sup>57</sup> “Although simple in theory, the application of ‘waters of the United States’ has been anything but straightforward.”<sup>58</sup> There have been ongoing disputes in interpreting the reach of the phrase “navigable waters” within the meaning of the CWA, particularly concerning the jurisdictional reach of the Act over wetlands.<sup>59</sup> However, for the purpose of this article, we can assume the water transfer, conveyance, or discharge involves only traditional and undisputed navigable waters of the United States.<sup>60</sup>

### III.

#### SOUTH FLORIDA WATER MANAGEMENT DISTRICT V. MICCOSUKEE TRIBE OF INDIANS

##### A. *Facts and Procedural History*

South Florida Water Management District (District) operated a pumping facility as part of the Central and South Florida Flood Control Project.<sup>61</sup> That project consisted of an array of levees, canals, pumps, and water impoundment areas in the region between the south Florida coastal hills and the Everglades.<sup>62</sup> Historically, this area was part of the vast Everglades region.<sup>63</sup> However, with the draining of the Everglades in the early 1900’s,

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56. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985) (quoting S. Rep. No. 92-414, p. 77 (1972), 1972 U.S.C.C.A.N at 3668, 3742).

57. *Riverside Bayview Homes*, 474 U.S. at 132-33.

58. *United States v. Rapanos*, 339 F.3d 447, 451 (6th Cir. 2003).

59. See Gregory L. Sattizahn, *The Ebb and Flow of the Clean Water Act: Redefining Clean Water Act Jurisdiction after SWANCC*, 8 Great Plains Nat. Resources J. 1 (2004).

60. In fact, the United States’ unitary waters theory requires such an assumption.

61. *Miccosukee*, 124 S. Ct. at 1540.

62. *Id.*

The Everglades is an extensive and unique wetlands system consisting of millions of acres of shallow sawgrass marshes, wet prairies, aquatic sloughs, and tree islands. The area provides a home for unique wildlife such as wading birds, and threatened and endangered species such as wood storks, snail kites, bald eagles, Florida panthers and American crocodiles. Congress has identified the Everglades as an important environmental ‘treasure’ that includes uniquely-important and diverse wildlife resources and recreational opportunities.

Brief for Respondent Miccosukee Tribe of Indians of Fla., S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians of Fla., 124 S. Ct. 1537 (2004) [hereinafter Brief for Respondent] (internal citations omitted).

63. *Miccosukee*, 124 S. Ct. at 1540.

and through the construction of a series of canals, the water table in the region was lowered.<sup>64</sup> As a result, flooding occurred and salt water intruded upon coastal wells.<sup>65</sup> The Project's creation was a response to these problems.<sup>66</sup> The local sponsor and ground level operator of the Project was the District, with oversight authority by the United States Army Corps of Engineers.<sup>67</sup>

One of these canals, C-11, collected groundwater and rainwater from south-central Broward County.<sup>68</sup> This drainage area included urban, agricultural, and residential development areas.<sup>69</sup> At the western terminus of the C-11 canal was the S-9 pumping station.<sup>70</sup> When water gathered above a pre-determined level in the C-11 canal, it would be pumped through the S-9 pump station and into a large wetland area.<sup>71</sup> This water, formerly held in the C-11 canal, traveled approximately sixty feet during the pumping process before it eventually reached the wetland area, which was referred to as WCA-3.<sup>72</sup>

WCA-3 was a designated "water conservation area" and the largest of its kind.<sup>73</sup> The WCA-3 was a remnant of the original South Florida Everglades and was an undeveloped wetlands area.<sup>74</sup> Fresh water was impounded in this area as a means to maintain the delicate balance of the Everglade water table and to preserve the natural wetlands.<sup>75</sup> The WCA-3 was maintained at a "significantly higher" physical level than the developed area that was drained by the C-11 basin.<sup>76</sup> Therefore, without artificial levees in place, the water from WCA-3 would flow east and

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64. *Id.*

65. *Id.* The area was drained to make it suitable for cultivation which led to the numerous problems necessitating the Project. *Id.*

66. *Id.* The purpose of the project was flood control, water conservation, and drainage. *Id.*

67. *Id.*

68. *Id.* "C-11 collects groundwater and rainwater from a 104 square-mile area in south central Broward County." *Id.*

69. *Micosukee*, 124 S. Ct. at 1540.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 1540-41.

rejoin the waters of the canal.<sup>77</sup> The consequence would be a flood of the C-11 basin.<sup>78</sup>

Because of this artificial separation, rainwater that eventually flowed into the C-11 basin was exposed to the urban, agricultural, and residential environment in the developed areas.<sup>79</sup> This water was collected by the C-11 canal as surface water runoff or as indirect groundwater return flow.<sup>80</sup> As a result, the water contained various contaminants associated with such development. One of the most significant of these chemicals was phosphorus.<sup>81</sup> Consequently, when this water was eventually pumped into the WCA-3 basin by means of the C-11 canal and the S-9 pumping station, the result was an alteration in the chemical balance of the water in the WCA-3.<sup>82</sup> WCA-3 was naturally low in phosphorus, and the introduction of this chemical stimulated the growth of plant life and algae, which were not a natural component of the Everglades ecosystem.<sup>83</sup>

The Miccosukee Tribe and the Friends of the Everglades (hereinafter "Tribe") filed suit in federal district court to enjoin the pumping from the S-9 station without an NPDES permit.<sup>84</sup>

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77. *Miccosukee*, 124 S. Ct. at 1541.

78. *Miccosukee*, 124 S. Ct. at 1541. The population of the C-11 basin was 136,000 people. *Id.* at 1540.

79. *Id.* "[T]he Project has wrought large-scale hydrologic and environmental change in South Florida, some deliberate and some accidental. Its most obvious environmental impact has been the conversion of what were once wetlands into areas suitable for human use. But the Project also has affected those areas that remain wetland ecosystems." *Id.*

80. *Miccosukee*, 124 S. Ct. at 1541.

81. *Miccosukee*, 124 S. Ct. at 1541. The phosphorus was the result of fertilizers used by agriculture in the C-11 drainage basin. *Id.* "The Everglades is an oligotrophic wetlands system that is phosphorus-limited and phosphorus-sensitive. The level of phosphorus is the defining chemical characteristic of the Everglades system and the addition of phosphorus above natural levels causes an imbalance in flora and fauna." Brief for Respondent at 7, *Miccosukee*, 2003 WL 22766719 (No. 02-626) (internal citations omitted). See also *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, No. 98-6056-CIV, 98-6057-CIV, 1999 WL 33494862 (S.D. Fla. Sept. 30, 1999).

82. *Miccosukee*, 124 S. Ct. at 1541. It was undisputed that S-9 does not itself add any pollutants to the water but only transfers the water in its pre-existing condition. *Id.* at 1543.

83. *Miccosukee*, 124 S. Ct. at 1541. The Court recognized that "[t]he phosphorus-related impacts of the Project are well known and have received a great deal of attention from state and federal authorities for more than 20 years. A number of initiatives are currently under way to reduce these impacts and thereby restore the ecological integrity of the Everglades." *Id.* Deterred by the slow paced progress the Tribe initiated this lawsuit. *Id.*

84. *Id.*

On cross-motions for summary judgment, the district court granted the Tribe's motion for summary judgment on the issue of whether S-9 required an NPDES permit.<sup>85</sup> The district court held that S-9 allowed the transfer of a pollutant, phosphorus, to occur between two separate bodies of water, a transfer that would not otherwise occur naturally.<sup>86</sup> As a result of this finding, the district court held that the discharge of a pollutant occurred within the reach of the CWA's NPDES permit program.<sup>87</sup>

The Eleventh Circuit Court of Appeals affirmed that decision on the basis that the receiving body of water was the relevant target of inquiry for CWA analysis: an addition of pollutants occurred from a point source in that area under a but-for test, and the point source (the S-9 pumping station), while not generating pollutants itself, was a cause-in-fact of the polluting discharge. Therefore, the discharge required an NPDES permit.<sup>88</sup> The United States Supreme Court granted the District's writ of certiorari, and the United States appeared in the matter as *amicus curiae*.<sup>89</sup>

#### B. *The United States' Argument in Support of a Unitary Waters or Singular Entity Theory Under the CWA*

As *amicus curiae*, the United States contended in *Miccosukee* that the waters of the United States were viewed "unitarily" for purposes of NPDES permitting under the CWA.<sup>90</sup> As previously mentioned, a discharge of pollutants under the CWA is "any addition of any pollutant to navigable waters from any point source."<sup>91</sup> The United States maintained "that the absence of the word 'any' prior to the phrase 'navigable waters' in § 1362(12) signal[ed] Congress' understanding that NPDES permits would not be required for pollution caused by the engi-

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85. *Miccosukee*, 124 S. Ct. at 1542.

86. *Miccosukee*, 124 S. Ct. at 1542.

87. *Miccosukee*, 124 S. Ct. at 1542. Moreover, the district court issued an order enjoining the operation of the S-9 pumping station. *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1369 (11th Cir. 2002).

88. *Miccosukee*, 124 S. Ct. at 1542; *Miccosukee*, 280 F.3d at 1368-69. The Court of Appeals reversed the district court's order enjoining pumping from S-9. *Miccosukee*, 280 F.3d at 1369-70 ("[t]he cessation of the S-9 pump would cause substantial flooding in western Broward County which, in turn, would cause damage to and displacement of a significant number of people. . .").

89. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 123 S. Ct. 2638 (2003)

90. *Miccosukee*, 124 S. Ct. at 1544.

91. 33 U.S.C. § 1362(12). See *supra* note 10.

neered transfer of one 'navigable water' into another."<sup>92</sup> Rather, the United States asserted that the regulation of pollution in such a situation would occur through state nonpoint source restrictions.<sup>93</sup> Furthermore, the United States urged the Supreme Court to adopt the unitary waters approach "out of deference to a longstanding EPA view that the process of transporting, impounding, and releasing navigable waters cannot constitute an addition of pollutants to waters of the United States."<sup>94</sup>

Under this theory, any pollutants in the C-11 canal that were conveyed through the S-9 pumping station were already present in waters of the United States within the meaning of the CWA.<sup>95</sup> As a result of this self-contained viewpoint, the United States maintained that nothing was introduced from the "outside world" to trigger the NPDES permit requirement.<sup>96</sup> Therefore, a point source that merely conveyed water without adding pollutants would escape regulation under the NPDES permitting program.<sup>97</sup> Moreover, the United States warned that if a NPDES permit were required in this situation, it could significantly im-

92. *Miccosukee*, 124 S. Ct. at 1544. The United States' argument appears to ignore the fact that "waters" is plural in this definition. See 33 U.S.C. § 1362(12).

93. *Miccosukee*, 124 S. Ct. at 1544. 33 U.S.C. § 1314(f)(2)(F) (2003) provides that: The Administrator, after consultation with appropriate Federal and State agencies and other interested persons shall issue . . . information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from . . . (F) 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.

94. *Miccosukee*, 124 S. Ct. at 1544.

95. Brief for United States as Amicus Curiae Supporting Petitioner at 7, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537 (2004) (No.02-626) [hereinafter Brief for United States as Amicus Curiae Supporting Petitioner], also available at <http://www.usdoj.gov/osg/briefs/2003/2pet/6invt/2002-626.pet.ami.inv.html> (last visited July 13, 2004).

96. Brief for United States as Amicus Curiae Supporting Petitioner at 8-10.

97. Brief for United States as Amicus Curiae Supporting Petitioner at 8. The United States conceded that "[s]uch an activity can conceivably lead to changes in water quality." *Id.* However, it maintained that "but it does not, within the normal meaning of the relevant terms, constitute an 'addition' of any pollutant to 'the waters of the United States.'" *Id.* "So long as the water control facility at issue does not add pollutants to 'the waters of the United States,' an NPDES permit is not required." *Id.* at 9. The United States also recognized that "if water is diverted from navigable waters for an intervening use, the water may lose its status as 'waters of the United States' and consequently become subject, upon its reintroduction into navigable waters, to the NPDES permitting process." *Id.* at 11.

pede the distribution of water by the several states and raise the associated costs.<sup>98</sup>

### C. *The Supreme Court's Decision in Miccosukee*

In an opinion authored by Justice O'Connor, the Supreme Court determined unequivocally that the CWA regulates point sources "that do not themselves generate pollutants."<sup>99</sup> In fact, this conclusion was reached without much disagreement amongst the parties themselves.<sup>100</sup> The Supreme Court thereafter answered the precise question presented in the petition for certiorari: "Whether 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 an [NPDES] permit under the Clean Water Act."<sup>101</sup> Answering that question, the Court turned its attention to the argument advanced by the United States "that all the water bodies that fall within the Act's definition of 'navigable waters' (that is, all 'the waters of the United States, including the territorial seas,' 33 USC § 1362(7)) should be viewed unitarily for purposes of NPDES permitting requirements."<sup>102</sup> Under this approach, there would be no addition of a pollutant to navigable waters in a situation where "water from one navigable water body is discharged, unaltered, into another navigable

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98. *Miccosukee*, 124 S. Ct. at 1544-45. Interestingly, the United States initially requested the Supreme Court to deny certiorari in this case because "the fact specific decision does not give rise to a conflict among the courts of appeals or otherwise present a question warranting this court's review." Brief for United States as Amicus Curiae at 2, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S.Ct. 1537 (2004) (No. 02-626); also available at <http://www.usdoj.gov/osg/briefs/2002/2pet/6invt/2002-0626.pet.ami.inv.html> (last visited July 13, 2004). It is also opined that "although the court of appeals' ruling could potentially subject petitioner to additional administrative burdens, the extent of those burdens at this juncture is uncertain and could be relatively modest." Brief for United States as Amicus Curiae at 9, *Miccosukee* (02-626). Furthermore, "[t]he court of appeals' decision does not present an issue of exceptional or nationwide importance. Petitioner exaggerates in suggesting that the court of appeals 'has fundamentally extended the scope of the NPDES program.'" *Id.* at 7.

99. *Miccosukee*, 124 S. Ct. at 1543. The opinion was joined by Chief Justice Rehnquist, Justice Stevens, Justice Kennedy, Justice Souter, Justice Thomas, Justice Ginsburg and Justice Breyer. Justice Scalia concurred in part and dissented in part.

100. *Miccosukee*, 124 S. Ct. at 1543.

101. *Miccosukee*, 124 S. Ct. at 1543. The Court determined that a point source is a "conveyance" and that "this 'definition makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters. . .'" *Id.*

102. *Miccosukee*, 124 S. Ct. at 1543.



water body.”<sup>103</sup> The position of the United States was that nonpoint source regulation would then fill the regulatory gap to protect the nation’s waters.<sup>104</sup>

The Supreme Court indicated that the United States’ deference to nonpoint source regulation as the primary enforcement mechanism for these types of water transfers failed to recognize that the nonpoint source provisions “do[ ] not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the ‘point source’ definition.”<sup>105</sup> Furthermore,

[S]everal NPDES provisions might be read to suggest a view contrary to the unitary waters approach. For example, under the Act, a State may set individualized ambient water quality standards by taking into consideration ‘the designated uses of the navigable waters involved.’ 33 U.S.C. § 1313(c)(2)(A). Those water quality standards, in turn, directly affect local NPDES permits; if standard permit conditions fail to achieve the water quality goals for a given water body, the State must determine the total pollutant load that the water body can sustain and then allocate that load among the permit-holders who discharge to the water body. § 1313(d). This approach suggests that the Act protects individual water bodies as well as the ‘waters of the United States’ as a whole.”<sup>106</sup>

The Supreme Court also recognized that the unitary waters approach could conflict with current NPDES regulations. For example, 40 C.F.R. § 122.45(g)(4) allows an industrial user “intake credits” for water withdrawn from navigable waters, but “only if the discharger demonstrates that the intake water is drawn from the same body of water into which the discharge is made.”<sup>107</sup> Moreover, the Court indicated that despite the United States’ assertion that requiring NPDES permits in such situations could raise the costs of water transportation and distribution, “it may be that such permitting authority is necessary to protect water quality, and that the States or EPA could control regulatory costs

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103. *Miccousukee*, 124 S. Ct. at 1543.

104. *Miccousukee*, 124 S. Ct. at 1544.

105. *Miccousukee*, 124 S. Ct. at 1544.

106. *Miccousukee*, 124 S.Ct. at 1544.

107. 40 C.F.R. § 122.45(g)(4)(2003): That regulation provides:

Credit shall be granted only if the discharger demonstrates that the intake water is drawn from the same body of water into which the discharge is made. The Director may waive this requirement if he finds that no environmental degradation will result.

*Id.*

by issuing general permits to point sources associated with water distribution programs."<sup>108</sup>

However, the Court declined to fully address the unitary waters argument in light of disputed facts about whether or not there were, in fact, two distinct bodies of water at issue.<sup>109</sup> As a result, the grant of summary judgment by the district court was deemed inappropriate, thus requiring a remand for further factual development.<sup>110</sup> In remanding, the Court indicated:

[D]espite its relevance here, neither the District nor the Government raised the unitary waters approach before the Court of Appeals or in their briefs respecting the petition for certiorari. Indeed, we are not aware of any reported case that examines the unitary waters argument in precisely the form that the Government now presents it. As a result, we decline to resolve it here. Because we find it necessary to vacate the judgment of the Court of Appeals . . . the unitary waters argument will be open to the parties on remand.<sup>111</sup>

As such, the United States was given a second chance at advancing the unitary waters theory upon further factual development of the record.

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108. *Miccosukee*, 124 S. Ct. at 1545. The Court recognized that this is indeed how Pennsylvania has already interpreted the CWA. *Id.*

109. *Miccosukee*, 124 S. Ct. at 1545-47. The Court observed:

In the courts below, as here, the District contended that the C-11 canal and WCA-3 impoundment area are not distinct water bodies at all, but instead are two hydrologically indistinguishable parts of a single water body. The Government agrees with the District on this point, claiming that because the C-11 canal and WCA-3 'share a unique, intimately related, hydrological association,' they 'can appropriately be viewed, for purposes of Section 402 of the Clean Water Act, as parts of a single body of water.' Brief for United States in Opposition 13. The Tribe does not dispute that if C-11 and WCA-3 are simply two parts of the same water body, pumping water from one into the other cannot constitute an 'addition' of pollutants. As the Second Circuit put it in *Trout Unlimited*, '[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot.' 273 F.3d at 492. What the Tribe disputes is the accuracy of the District's factual premise; according to the Tribe, C-11 and WCA-3 are two pots of soup, not one.

*Id.* at 1545.

110. *Miccosukee*, 124 S. Ct. at 1547. "After reviewing the full record, it is possible that the District Court will conclude that C-11 and WCA-3 are not meaningfully distinct water bodies. If it does so, then the S-9 pumping station will not need an NPDES permit." *Id.*

111. *Miccosukee*, 124 S. Ct. at 1545.

#### D. Justice Scalia's Concurrence in Part and Dissent in Part

Though Justice Scalia agreed with the Court's holding that a point source is not exempt from a NPDES permit simply because it does not itself add pollutants to water, he disagreed with the Court's reversal and remand and would have affirmed the Court of Appeals.<sup>112</sup> Based on his review of the record, Justice Scalia indicated that the unitary waters argument had, in fact, been advanced below, and the matter should not have been remanded for further consideration in light of the court of appeals' previous rejection of the argument.<sup>113</sup> Furthermore, Justice Scalia dismissed the Court's position that there were disputed facts as to whether, "absent S-9, pollutants would flow from C-11 to WCA-3," by remarking that this is "a journey that, at the moment, is uphill."<sup>114</sup> Disagreeing with the majority, he contended that even the parties had not advanced such a theory of the case, and the Court should not support the reversal *sua sponte* with this assertion.<sup>115</sup> However, Justice Scalia's opinion was not joined by any other members of the Court.

#### IV.

#### ANALYSIS

The United States' unitary waters argument is fundamentally flawed and unsupported by the CWA in more than one respect. Specifically, the United States' argument fails to appreciate that a point source is the starting point for any regulatory analysis under the CWA; any introduction of a pollutant through such a source triggers the NPDES requirement, whether the pollutant is generated from the point source itself or not. The United States'

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112. *Miccosukee*, 124 S. Ct. at 1547 (Scalia, J., concurring in part and dissenting in part).

113. *Miccosukee*, 124 S. Ct. at 1547 (Scalia, J., concurring in part and dissenting in part) (citing *Miccosukee*, 280 F.3d at 1368 n. 5). See *Miccosukee*, 280 F.3d at 1368 n. 5 ("We reject the Water District's argument that no addition of pollutants can occur unless pollutants are added from the outside world insofar as the Water District contends the outside world cannot include another body of navigable waters."). "That the argument was not phrased in the same terms or argued with the same clarity does not mean it was not made." *Id.* at 1547 (Scalia, J., concurring in part and dissenting in part).

114. *Miccosukee*, 124 S. Ct. at 1547 (Scalia, J., concurring in part and dissenting in part). The majority opinion conceded that "[t]he District Court certainly was correct to characterize the flow through the S-9 pump station as a non-natural one, propelled as it is by diesel-fired motors against the pull of gravity." *Id.* at 1546.

115. *Miccosukee*, 124 S. Ct. at 1547 (Scalia, J., concurring in part and dissenting in part).

attempted, narrow view of a pollutant under the CWA, is overly restrictive and inconsistent with CWA jurisprudence. Moreover, the United States misapprehends the "addition" of pollutant cases and the statutory framework in which those cases apply. It attempts to stretch a simple theory into an abstract and unworkable one that is unsupported by the CWA and would significantly impinge upon the intent of the Act. Despite the Supreme Court's remand in *Miccosukee*, it seems clear that the underpinnings of the unitary waters argument have simply eroded.

A. *A Point Source Triggers the Regulation of Any Pollutant, Even Pollutants Originating Elsewhere, Irrespective of Whether the Point Source Itself Adds Any Pollutants*

In the aftermath of *Miccosukee*, it is clear that "a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'"<sup>116</sup> Rather, a point source is the conveyance or transport device for the pollutants irrespective of whether the point source itself generates the pollutants.<sup>117</sup> Therefore, it is clear that a discrete conveyance device, such as the S-9 pump station at issue in *Miccosukee*, is a triggering point for CWA regulation under the NPDES framework. Indeed, it is difficult to envision a human-induced water transfer that does not make use of a point source.

Related to this holding is the Court's treatment of the United States' attempt to defer to nonpoint source pollution controls as a means to regulate the impact of such water transfers in lieu of requiring an NPDES permit. Rather than creating a separate mechanism for regulating pollution, as the United States contended, the Court recognized that the state nonpoint source pollution programs create yet another layer ensuring the ambitious goals of the CWA are met.<sup>118</sup> In this regard, the CWA "does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the 'point source' definition."<sup>119</sup> As such, both regulatory vehicles work toward the goal of reducing pollutants and pollution in the nation's waters. They are not separate and distinct, as the United States suggested.

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116. *Miccosukee*, 124 S. Ct. at 1543. In fact, the United States agreed with this conclusion. Brief for United States as Amicus Curiae Supporting Petitioner at 10.

117. *Miccosukee*, 124 S. Ct. at 1543.

118. *Miccosukee*, 124 S. Ct. at 1544.

119. *Miccosukee*, 124 S. Ct. at 1544.

For example, "point and nonpoint sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by whether the pollution reaches the water through a confined, discrete conveyance."<sup>120</sup> Thus, even when traditional nonpoint sources of pollution release pollutants from a discernible conveyance, they are subject to NPDES regulation, as are all point sources."<sup>121</sup> Consequently, the starting point for the NPDES analysis is satisfied when a transfer occurs through a point source, irrespective of whether the point source is totally benign from the standpoint of pollution or whether the foreign substances that are eventually transferred can be the subject of nonpoint state water quality regulation.

### B. *Transferred Water Can Constitute a Pollutant under the CWA*

A lynchpin of the United States' argument in support of the unitary waters theory was the idea that the water being transferred was unaltered, meaning that the pollutants (which undisputedly existed in the transferred water) were present prior to the transfer. As a result, the theory goes, the pollutants were not created by, or the result of, the water transfer. This argument is a misapprehension of CWA jurisprudence.

The breadth of the term "pollutants" in the CWA "tends to eviscerate any restrictive effect."<sup>122</sup> "[T]he statutory definition of pollutant at least appears to invite the inclusion of discharged substances that are not specifically listed in these broad categories."<sup>123</sup> Moreover, "the legislative history of the CWA provides little guidance on how inclusive Congress intended the definition of pollutant to be."<sup>124</sup> As one leading commentator has observed:

This laundry list of 'bads' endorses an understanding of a pollutant as a 'resource out of place.' The congressional purpose was to

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120. *Trustees for Alaska*, 749 F.2d at 558.

121. *Trustees for Alaska*, 749 F.2d at 558 (rejecting contention that mining is only subject to nonpoint source regulation). See also *Earth Sciences, Inc.*, 599 F.2d at 373; *Sierra Club v. Abston Construction Co.*, 620 F.2d 41, 44 (5th Cir. 1980).

122. *Sierra Club, Lone Star Chapter*, 73 F.3d at 565.

123. *Id.*

124. *Id.*

identify expansively and anticipate all the physical 'stuff' that could end up in the wrong place to the detriment of water quality.<sup>125</sup>

This all-inclusive theory is also supported by the definition of "pollution" under the CWA "which means nothing less than 'man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water.'"<sup>126</sup>

Natural materials that are altered by human processing or manipulation can just as readily affect the composition of water and constitute a pollutant under the CWA.<sup>127</sup> Furthermore, even naturally occurring contaminants can be considered pollutants, as was demonstrated in *Northern Plains Resource Council v. Fidelity Exploration and Development Company*, which held that unaltered groundwater could be considered a pollutant under the CWA.<sup>128</sup> *Fidelity* recognized that a discharge of water, even in its natural and unaltered state, can create an alteration of the water quality of the receiving body of water and thereby constitute a pollutant within the meaning of the CWA.<sup>129</sup> "It is the introduction of these contaminants, not their transformation by humans, that renders them pollutants."<sup>130</sup> To hold otherwise, "would upset the integrity of the CWA."<sup>131</sup> As a telling example, the court recognized that a contrary conclusion

125. *Sierra Club, Lone Star Chapter*, 73 F.3d at 565 (quoting 2 William H. Rodgers, Jr. *Environmental Law: Air and Water* 144 (1986)). The commentator continues:

Despite the absence of an indisputable catch-all (e.g. 'any other waste whatever'), there is little doubt that the recitation of categories in the definition of 'pollutant' is designed to be suggestive not inclusive. In the 1972 amendments, Congress meant to carry on the tradition of the Refuse Act, and that tradition was to construe the word 'refuse' as condemning each and every variation of damage-inducing wastes that changing technologies could invent.

*Id.* at 565-66.

126. *Sierra Club, Lone Star Chapter*, 73 F.3d at 566 (quoting 2 William H. Rodgers, Jr. *Environmental Law: Air and Water* 144 (1986); 33 U.S.C. § 1362 (19)).

127. See e.g., *Ass'n of Pac. Fisheries v. Environmental Protection Agency*, 615 F.2d 794, 802 (9th Cir. 1980) (holding processed fish parts were a pollutant within the meaning of the act); *Association to Protect Hammersley, ELD, and Totten Inlets*, 299 F.3d at 1017.

128. *Fidelity*, 325 F.3d at 1163. "This broadened scope of safeguarding the integrity of each navigable body of water is focused on maintaining the natural structure and function of ecosystems." Debra A. Owen, Casenote, *When Naturally Occurring Water is a Pollutant: Northern Plains Resource Council v. Fidelity Exploration and Development Co.*, 8 Great Plains Nat. Resources J., 65 (2003).

129. *Fidelity*, 325 F.3d at 1162-63.

130. *Fidelity*, 325 F.3d at 1163 (distinguishing *Association to Protect Hammersley, ELD, and Totten Inlets*, 299 F.3d at 1017).

131. *Id.*

[W]ould allow someone to pipe the Atlantic Ocean into the Great Lakes and then argue that there is no liability under the CWA because the salt water from the Atlantic Ocean was not altered before being discharged into the fresh water of the Great Lakes. Or, water naturally laced with sulfur could be freely discharged into receiving water used for drinking water simply because the sulfur was not added to the discharged water. Such an argument cannot sensibly be credited.<sup>132</sup>

This example highlights the inherent flaw in the United States' argument: water itself, even if unaltered by the transferring entity or point source, can constitute a pollutant within the meaning of the CWA and degrade the nation's waters.

By way of comparison, in *Miccosukee*, the pollutant was the phosphorus channeled by the C-11 canal. Under the unitary waters approach, there is no conceivable limit to the harm that could be caused by the introduction of myriad other pollutants, both naturally and unnaturally occurring, into the water sought to be transferred. Requiring a NPDES permit in such a situation creates an added layer to safeguard the nation's waters and is consistent with the ambitious goals and intent of the CWA.

### C. *The Unitary Waters Theory Runs Contrary to the Purpose and Intent of the CWA*

The CWA has properly been characterized as "a bold and sweeping legislative initiative, enacted to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>133</sup> "This objective incorporated a broad, systemic view of the goal of maintaining and improving water quality."<sup>134</sup> In pursuit of this objective, "[t]he most important component of the Act is the requirement that an NPDES permit be obtained."<sup>135</sup>

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132. *Id.*

133. *Dubois*, 102 F.3d at 1294 (citing 33 U.S.C. § 1251(a)).

134. *Dubois*, 102 F.3d at 1294 (citing *Riverside Bayview Homes*, 474 U.S. at 132). "[A]s the House Report on the legislation put it, 'the word integrity . . . refers to a condition in which the natural structure and function of ecosystems [are] maintained.'" *Id.* (quoting H.R. Rep. No. 92-911, at 76 (1972); 1972 U.S.C.C.A.N. at 3744).

135. *Dubois*, 102 F.3d at 1294. As recognized by the court in *Gorsuch*: There is indeed some basis in the legislative history for the position that Congress viewed the NPDES program as its most effective weapon against pollution. Prior to 1972, federal water pollution law had required the states, under EPA oversight, to develop water quality standards and then limit industrial and municipal discharges so as to meet those standards. This system proved inadequate. It was costly, slow, and complicated to determine the effluent limits needed to maintain water quality. Many states did not set effluent limits and enforcement was all but nonexistent. The

"Although the Act contains the lofty goal of eliminating water pollutant discharges altogether, the regulatory regime it creates requires principally that discharges be regulated by permit, not prohibited outright."<sup>136</sup> The NPDES is the "cornerstone" of the CWA.<sup>137</sup>

A point source that conveys a pollutant into navigable waters must obtain a NPDES permit.<sup>138</sup> The NPDES permit limits and controls the amount and type of pollution that can be discharged.<sup>139</sup> As a practical matter:

There are several ecological advantages to the NPDES, such as regulation of technological standards applied to water treatment and transportation as well as limitations on total pollution levels in affected waters. Permits also facilitate compliance; an NPDES permit holder may not only be ordered to comply or face a civil action in court but may also be subjected to criminal penalties for violating the permit terms.<sup>140</sup>

Moreover, "[a]n applicant for an individual NPDES permit must provide information about, among other things, the point source itself, the nature of the pollutants to be discharged, and any water treatment system that will be used."<sup>141</sup> In addition to individual permits, there are also general permits aimed at meeting the oversight goals while eliminating duplication and cost.

General permits greatly reduce that administrative burden by authorizing discharges from a category of point sources within a specified geographic area. Once EPA or a state agency issues such a permit, covered entities, in some cases, need take no further action

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1972 Act made technology-based effluent limits, rather than water quality standards, 'the basis of pollution prevention and elimination' because they were 'the best available mechanism to control water pollution.'

*Gorsuch*, 693 F.2d at 175 (citing S. Rep. at 8, 1972 *LegHist* 1426, 1972 U.S.C.C.A.N. at 3675).

136. *Trout Unlimited*, 273 F.3d at 486.

137. *Association to Protect Hammersley, ELD, and Totten Inlets*, 299 F.3d at 1009.

138. See 33 U.S.C. § 1311(a). "The general prohibition of CWA § 301(a) regarding point source pollution is self-executing. In order to avoid liability under § 301(a), a polluter must apply for and obtain an NPDES permit from the EPA, or from an authorized state water pollution control agency. EPA, or an authorized state agency, may in its discretion exempt a specific pollutant discharge from § 301(a)'s general prohibition by issuing an NPDES permit. Alternatively, the agency may choose not to issue such a permit, leaving the discharge unlawful under § 301(a)." *Consumers Power*, 862 F.2d at 582 (internal citations omitted).

139. See *Consumers Power*, 863 F.2d at 582.

140. Miranda Gong, *Miccossukee and Its Implications for National Discharge Elimination System Permits*, 30 *Ecology L.Q.* 783, 784 (2003).

141. *Miccossukee*, 124 S. Ct. at 1545 n. 1.



to achieve compliance with the NPDES besides adhering to the permit conditions.<sup>142</sup>

These general permits are a tool for the regulatory authority to reduce regulatory costs associated with the NPDES permitting system while still protecting water quality.

Though the United States contended that requiring a NPDES permit for a transfer of water containing pollutants would wreak havoc on the state water distribution systems, raise the costs associated with such systems, and violate the intent of the CWA to preserve such systems, the argument is gravely overstated. The CWA provides 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," and the act shall not be construed "as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States."<sup>143</sup> However, as the Supreme Court has previously recognized, these sections "preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of the water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation."<sup>144</sup>

In *Miccosukee*, the Supreme Court noted the United States' warning that requiring a NPDES permit would upset the state water supply networks, raise costs, and violate Congress' intent to preserve water allocation for the states. However, without addressing the merits of the assertion, the Court simply indicated that "it may be that such permitting authority is necessary to protect water quality, and that the States or EPA could control regulatory costs by issuing general permits to point sources associated with water distribution programs."<sup>145</sup> As the Court hinted, the United States' position would be inconsistent with both the developed jurisprudence in the area of state allocation and the overall purpose of the CWA.

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142. *Miccosukee*, 124 S. Ct. at 1545 n.1 (citing 40 C.F.R. § 122.28(b)(2)(v) (2003)).

143. 33 U.S.C § 1251(g); 33 U.S.C § 1370 (2004).

144. PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700, 720 (1994).

145. *Miccosukee*, 124 S. Ct. at 1545. The Court also recognized that this was the position of Pennsylvania, which required permits for interbasin water transfers. *Id.*

D. *A Transfer of Unaltered Water That Contains Pollutants, Occurring Between Two Separate Bodies of Water, Constitutes an Addition of a Pollutant Under the CWA*

1. The Dam Cases

In support of its unitary waters approach, the United States relied primarily upon *Gorsuch* and *Consumers Power* to demonstrate that the addition of unaltered water did not constitute a pollutant within the reach of the CWA. However, this assertion failed to appreciate the context of those cases. The simple and basic distinguishing fact is that *Gorsuch* and *Consumers Power* both involved dams, which necessarily separated a *single* body of water.<sup>146</sup> Significantly, the EPA seemed to have recognized and relied upon this important fact in its arguments in *Gorsuch*:

EPA argues, on the other hand, that for addition of a pollutant from a point source to occur, the point source must *introduce* the pollutant into navigable water from the outside world; dam caused pollution, in contrast, merely passes through the dam from one body of navigable water (the reservoir) into another (the downstream river).<sup>147</sup>

As later recognized in *Consumers Power*, EPA has taken the position that "there can be no addition unless a source 'physically introduces a pollutant into water from the outside world.'"<sup>148</sup>

Comparatively, *Gorsuch* and *Consumers Power* both recognized that a dam could add pollutants from the "outside world:"

To the extent that no more has been shown than that unclean water flows out of the dam, Congress clearly displayed an intention to exempt dams from the Clean Water Act. However, if the dam itself added pollutants to the water, rather than merely transmitting the water coming into it, in whatever altered form, then it would be subject to the NPDES permit system.<sup>149</sup>

The United States' unitary waters approach failed to appreciate that the "outside world" for purposes of the NPDES permitting

146. *Gorsuch*, 693 F.2d at 175; *Consumers Power*, 862 F.2d at 588-89.

147. *Gorsuch*, 693 F.2d at 165. It is noteworthy that *Gorsuch* also rejected the EPA's position that a point source had to add pollutants, rather than simply passing pollutants through it, to invoke regulation under the CWA. *Id.* at 175 n. 58.

148. *Consumers Power*, 862 F.2d at 584.

149. *Consumers Power*, 862 F.2d at 586. It is also important to the analysis that the waters passing through the dams never lose their status as waters of the United States. *Id.* at 589. *Compare* Committee to Save Mokelumne River v. East Bay Municipal Utility Dist., 13 F.3d 305, 308 (9th Cir. 1993) (holding Mine Run Dam is subject to NPDES permit requirement because the dam collected acid mine drainage and then passed such pollutants into the Mokelumne River).

system could include water from other water bodies, even if unaltered, if those transferred waters contained pollutants. In this respect, those introduced waters would not simply be “pass through” waters within the same water body, as analyzed in the dam cases.<sup>150</sup> The analytical framework utilized in the dam cases focused on whether the water being “transferred” was, in actuality, the same water already contained in the pre-existing water body. The framework thus negated the idea that a transfer, which denotes movement from the natural water body, was in fact actually occurring.

As a result of this analysis, the courts determined that a NPDES permit was not required for the movement of water solely within the same water body and not from “the outside world.” These cases stand for the unremarkable proposition that movement of unaltered water within a single entity does not constitute an addition of a pollutant requiring an NPDES permit. In fact, this rationale and its analytical framework are not inconsistent with those cases that hold a transfer of water containing pollutants from the “outside world” requires a NPDES permit.

## 2. Addition of Unaltered Water from the Outside World Requires a NPDES Permit

The United States’ attempt to take issue with those cases that hold that a transfer of unaltered water containing pollutants constitutes an addition of a pollutant requiring a NPDES permit is based on a misinterpretation of the developed jurisprudence in the area. In an attempt to create a direct conflict between the dam cases referenced above and the holdings in other circuits addressing the transfer of unaltered water requiring an NPDES permit, the United States’ position in *Miccosukee* failed to appreciate the interrelationship of the two lines of authority. This is demonstrated in *Trout Unlimited*, wherein the court actually embraced *Gorsuch* and *Consumers Power*, “provided that ‘outside world’ is construed as any place outside the particular water body

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150. The reasoning of *Gorsuch* and *Consumers Power* would nevertheless apply after the transferring point source, subject to the NPDES requirement, has transferred the waters and those waters then pass through a dam or other point source within the same body of water; just the same as any other upstream point source introducing pollutants to the waters at issue in *Gorsuch* and *Consumers Power*. Clearly, the concern is not the transfer of water itself but, instead, the myriad of pollutants that can be contained therein.

to which pollutants are introduced.”<sup>151</sup> In so holding, the court recognized that *Gorsuch* and *Consumers Power* “essentially involved the recirculation of water, without anything added ‘from the outside world.’”<sup>152</sup> For example,

If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not added soup or anything else to the pot (beyond, perhaps, a *de minimis* quantity of airborne dust that fell into the ladle). In requiring a permit for such a ‘discharge,’ the EPA might as easily require a permit for Niagara Falls.<sup>153</sup>

This “ladle of soup” analogy demonstrates an understanding that all the waters of the United States do not constitute a single “pot of soup.”

Rather, each water is separate and distinct based upon its own “ingredients.” For example, in *Dubois*, the court recognized that “[n]o one would reasonably contend that internal pumping causes an addition of pollutants to the pond. Instead, we would consider the pumping to be a redistribution of pollutants from one part of the pond to another.”<sup>154</sup> However, the addition of lesser quality water, and the pollutants contained therein, from a separate water body could have a dramatic effect on the receiving body of water.<sup>155</sup> As such, an unnatural joining of waters, and the resulting deterioration of the receiving waters as a result of the introduction of polluted foreign waters, required a NPDES permit.<sup>156</sup> Each water body develops its own “ingredients” that make up the “soup” or water contained therein. Such distinctions are based on a number of variables, such as the pollutants introduced into the waters and the naturally occurring conditions

151. *Trout Unlimited*, 273 F.3d at 491. As previously mentioned, this characterization is consistent with the analysis employed in each of the dam cases. See *supra* n.19-25, 148.

152. *Trout Unlimited*, 273 F.3d at 491.

153. *Trout Unlimited*, 273 F.3d at 492.

154. *Dubois*, 102 F.3d at 1296-97. Furthermore, this reasoning is consistent with the CWA’s aim to reduce man-made or man-induced alterations to the integrity of the nation’s waters. See 33 U.S.C. § 1362(19).

155. *Dubois*, 102 F.3d at 1297. It appears well-settled that the receiving body of water is the relevant body of water for the CWA analysis. See *Fidelity*, 325 F.3d at 1162; *Trout Unlimited*, 273 F.3d at 492.

156. *Dubois*, 102 F.3d at 1297-98. Related to this point is the recognition that “the water leaves the domain of nature and is subject to private control rather than purely natural processes.” *Id.* at 1297. See also *Del-AWARE*, 508 A.2d at 381-82 (distinguishing *Gorsuch* “because it dealt with water diversion within a single body of water.”). Moreover, the introduction of water from a separate basin is not a “flow diversion” as in the case of a dam, levee channel or causeway. *Id.* at 382.

of the water body.<sup>157</sup> Significantly, the Supreme Court quoted this "pot of soup" analogy in remanding *Miccosukee* for further factual development concerning the sameness of the two water bodies at issue.<sup>158</sup>

Therefore, the developed jurisprudence in this area has recognized a natural and common sense understanding that waters within an existing water body are the same for NPDES permit analysis.<sup>159</sup> Pollutants introduced from the "outside world," however, including an outside water body, can trigger the NPDES permit provisions. The unitary waters approach advocated by the United States would disintegrate this distinction and would ultimately work to the detriment of the nation's water quality.

## V.

### CONCLUSION

A unitary waters approach to the CWA and the NPDES permitting system is unsupported by the statutory framework, the developed jurisprudence in the area, and is inconsistent with the intent and ambitious goals of the act. The NPDES permit system is the centerpiece of the CWA and represents its most effective weapon against degradation of our nation's waters. Rather than deferring solely to nonpoint source regulation as a means of dealing with the introduction of pollutants to a navigable waterway through the addition of outside waters, it is necessary to work toward the nation's water quality goals through a two-pronged approach utilizing the benefits of each. This is especially important when the introduction of pollutants occurs through the unnatural conveyance of the point source, the traditional regulatory focus of the CWA.

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157. As a practical matter it would also seem beneficial to view the individual water bodies as distinct for CWA regulation. This is also consistent with the goal of the CWA to protect individual ecosystems. See *Riverside Bayview Homes*, 474 U.S. at 132-33.

158. *Miccosukee*, 124 S. Ct. at 1545. In this author's opinion, the interesting question on remand in *Miccosukee*, is now whether or not the unnatural separation created distinct bodies of water over time.

159. In remanding, the Supreme Court indicated that "it is possible the District Court will conclude that C-11 and WCA-3 are not meaningfully distinct water bodies. If it does so, then the S-9 pumping station will not need an NPDES permit." *Miccosukee*, 124 S. Ct. at 1547. As a result, the Court held, at least tacitly, that a transfer of water within the same water body does not require an NPDES permit.

This point source need not add or generate pollutants; rather, it need only effectuate the delivery of pollutants to the navigable waters of the United States to qualify. Certainly, the introduction of any substance, other than water, that contains pollutants and is channeled into the nation's waters through a point source would invoke the protections of the NPDES permit requirement. Merely because it is water that promotes the introduction of such pollutants does not mean the source is any less harmful or should escape the permit requirements of NPDES.

The CWA operates to protect and promote water quality in both individual water bodies and the waters of the United States as a whole. The attempt to limit this framework through a unitary waters approach ignores the fact that the introduction of pollutants from the "outside world" works to the detriment of the individual water bodies and the nation's waters as a whole.