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The U.S. Supreme Court's Decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*: Leaving the Scope of Regulation Under the Clean Water Act in "Murky Waters"

by Lawrence R. Liebesman

In an 8-to-1 decision authored by Justice Sandra Day O'Connor, the U.S. Supreme Court reversed the U.S. Court of Appeals for the Eleventh Circuit's decision that the South Florida Water Management District's (District's) operation of a pumping station required a national pollutant discharge elimination system (NPDES) permit because pollutants transferred from a canal to a water conservation area would not have occurred but for the operation of the pump.[1] However, as discussed below, the Court left unresolved several key issues regarding the Clean Water Act (CWA)[2] permit program that must await future resolution by the courts.

Background

The District operates a pumping facility (S-9) that is used to pump water from a canal (C-11) into a water conservation area in the Everglades (WCA-3). This system is part of a broader collection of levees, canals, pumps, and water basins that together make up the Central and South Florida Flood Control Project (Project). The Project changed the flow of water in South Florida by stopping the natural "sheet flow" that once carried water from north to south, and by controlling the flow of water within South Florida to prevent flooding, conserve water, and serve similar purposes. The District is the day-to-day operator and the local sponsor of the Project.

The District uses S-9 to pump water out of C-11 when water rises higher than a certain level. The water is pumped into WCA-3, some 60 feet away; the Project utilizes levees to keep this water from flowing back to the east. By not letting the water run into the ocean as it would if allowed to flow naturally, the District conserves freshwater and preserves the Everglades environment. Without the Project, the heavily populated area drained by C-11 would be flooded in a matter of days.

The Miccosukee Tribe of Indians (Tribe) and the Friends of the Everglades brought a citizen suit under the CWA challenging the District's pumping of water from C-11 into WCA-3 without a proper NPDES permit. The federal district court granted summary judgment to the Tribe, finding that the C-11 and Everglades waters were distinct bodies of water because the transfer of water at issue would not have occurred naturally.[3]

The Eleventh Circuit upheld the district court's judgment, holding that an addition of pollutants from a point source is found whenever, "but for the point source," the pollutants would not have been added to the receiving body of water.[4] Thus, the Eleventh Circuit held that any point source causing water to "flow into another distinct body of navigable water into which it would not have otherwise flowed" is causing an "addition" for purposes of the CWA.[5]

In so holding, the court followed decisions of the U.S. Court of Appeals for the First Circuit and the U.S. Court of Appeals for the Second Circuit. In *Dubois v. U.S. Department of Agriculture*,[6] the First Circuit held that a transfer of polluted water from a river to a pristine pond would require an NPDES permit, as it would be an "addition" of pollutants to the pond. Five years later, in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*,[7] the Second Circuit held that transferring polluted water from one distinct body of water to another may amount to an "addition" of a pollutant for purposes of the CWA.[8]

In following the First and Second Circuits, the Eleventh Circuit specifically distinguished *South Florida Water Management District v. Miccosukee Tribe of Indians*[9] from two other cases involving dams (the *Dam Cases*). Both the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. Court of Appeals for the Sixth Circuit had deferred to the U.S. Environmental Protection Agency's (EPA's) interpretation that dam-induced water quality

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1. South Fla. Water Management Dist. v. Miccosukee Tribe of Indians, 124 S. Ct. 1537, 34 ELR 20021 (2004) [hereinafter Miccosukee II].
2. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.
3. Miccosukee Tribe of Indians of Fla. v. South Fla. Water Management Dist., 1999 WL 33494862 (S.D. Fla. 1999).
4. Miccosukee Tribe of Indians of Fla. v. South Fla. Water Management Dist., 280 F.3d 1364, 1368, 32 ELR 20475 (11th Cir. 2002) [hereinafter Miccosukee I].
5. *Id.*
6. 102 F.3d 1273, 1299, 27 ELR 20622 (1st Cir. 1996).
7. 273 F.3d 481, 32 ELR 20229 (2d Cir. 2001).
8. *Id.* at 489.
9. 124 S. Ct. 1537, 34 ELR 20021 (2004).

changes did not add pollutants from the outside world and therefore did not involve an "addition" of pollutants.[10] In contrast, the Eleventh Circuit concluded that it knew of "no instance in which the EPA has extended its policy on dams and dam-induced water-quality changes to facilities like the S-9 pump station."[11]

The Court granted certiorari in *Miccosukee*, to resolve, inter alia, the above split among the circuits in deciding how the term "addition of pollutants" should be interpreted under the NPDES permitting regime. The Court vacated the Eleventh Circuit's decision, and remanded to the district court because it found that further development of the record was needed to resolve the issue of whether C-11 and WCA-3 are indeed distinct bodies of water. However, the Court did not rule on the merits of a key issue raised by the federal government as amicus—the "unitary waters" theory—instead opting to leave that argument open to the parties on remand.

Analysis of the Court's Decision

The Court's decision essentially avoided the fundamental issue of the scope of the CWA's authority over water transfers. The Court noted that the District and the federal government advanced "three separate arguments, any of which would, if accepted, lead to the conclusion that the S-9 pump station does not require a point source discharge permit under the NPDES program."[12] The Court instead declined "at this time to resolve all of the parties' legal disagreements, and instead remand[ed] for further proceedings regarding their factual dispute."[13] The following discussion analyzes the only issue resolved and those issues avoided by the Court that must await future cases.

Main Issue Resolved

The only issue clearly resolved by the Court in *Miccosukee* was the precise question that served as the basis of granting certiorari—whether the NPDES program applies when a pollutant *originates* from a point source, not when pollutants originating elsewhere simply pass through the point source. The Court listed examples of point sources to include "pipes, ditches, tunnels, and conduits, objects that do not themselves generate pollutants but merely transport them."[14] The Court stressed that "one of the [CWA's] primary goals was to impose NPDES permitting requirements on municipal wastewater treatment plants."[15] Therefore, the Court clearly held that the definition of discharge of a pollutant includes "point sources that do not themselves generate pollutants."[16]

Issues Raised But Not Resolved

The Court addressed, but did not resolve, a key point raised by the U.S. Department of Justice as amicus—whether the "unitary waters" argument is controlling. The proposition is that *all* of the waters that fall within the CWA's definition of "navigable waters" should be considered unitary for purposes of the NPDES permitting requirements.[17] Rather, the Court, with Justice Antonin Scalia dissenting, noted that the "unitary waters" argument had not been raised below, but was available to the parties on remand.[18]

However, the Court did touch on the distinction between point and nonpoint pollution sources, noting that the latter are not specifically excluded from the NPDES program if they also fall within the point source definition.[19] The Court specifically referenced CWA §1313(c)(2)(A), which allows states to "set individualized ambient water quality standards by taking into consideration the designated uses of the navigable waters involved."[20] Those standards directly affect local NPDES permits. The Court also recognized that the total maximum daily load (TMDL) program that covers pollutants originating from both point and nonpoint sources, noting that "if standard permit conditions fail to achieve the water quality goals for a given water body, the [s]tate 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."[21]

The Court suggested that the CWA may be intended to protect individual bodies of water as well as "navigable waters" and that the "unitary waters" approach may conflict with existing NPDES regulations. Noting how the CWA already credits the intake of polluted water, the Court concluded that the NPDES program "appears to address the movement of pollutants among water bodies, at least at times."[22] In dicta, the Court noted the tension between water quality, increased treatment costs, and federalism principles inherent in the CWA. If water transfers become prohibitively expensive, then perhaps NPDES requirements will illegally impinge on a state's authority to allocate its own water.[23] Conversely, a broad NPDES interpretation might be required to protect water quality, with general permits used to control the increased regulatory costs.[24]

However, while the Court essentially described the inherent conflicts in the overarching "unitary waters" issue, it fundamentally avoided the hard factual questions by finding that the record did not have enough facts to determine whether C-11 and WCA-3 are distinct bodies of water, or are instead "indistinguishable parts of a single water body."[25] The Court held that there was not sufficient information in the record to determine whether C-11 and WCA-3 are distinct bodies of water, and therefore elected to not decide this issue.[26] The Court held that if, on remand, the lower court

10. *See* National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 13 ELR 20015 (D.C. Cir. 1982); National Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580, 19 ELR 20235 (6th Cir. 1988).
11. *Miccosukee I*, 280 F.3d at 1368.
12. *Miccosukee II*, 124 S. Ct. at 1542.
13. *Id*.
14. *Id.* at 1543.
15. *Id.*
16. *Id.*
17. *Id*. at 1543-44.
18. *Id*. at 1545. Justice Scalia, in a short partial dissent, argued that the "unitary waters" argument was raised and decided below, citing the Eleventh Circuit's opinion and stating: "I see no point in directing the Court of Appeals to consider an argument it has already rejected." *Id.* at 1547.
19. *Id*. at 1544.
20. *Id.* (citing 33 U.S.C. §1313(c)(2)(A) (internal quotations omitted)).
21. *Id.* at 1544. *See also* Pronsolino v. Nastri, 291 F.3d 1123, 32 ELR 20689 (9th Cir. 2002).
22. *Miccosukee II*, 124 S. Ct. at 1544.
23. *Id.* at 1545.
24. *Id*.
25. *Id*.
26. *Id*.

found that C-11 and WCA-3 are not "meaningfully distinct water bodies," then S-9 will not need an NPDES permit.[27] Using the Second Circuit's language in *Trout Unlimited*, the Court compared water transfers to the stirring of a pot of soup, reasoning that "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."[28]

Interestingly, the Court characterized the factual record in a way that may provide some guidance on remand by stating that it "does contain information supporting the District's view of the facts."[29] The Court noted that the boundary between C-11 and WCA-3 was "indistinct," that there appeared to be some significant mingling of the two waters, and that, "because Everglades soil is extremely porous, water flows easily between ground and surface waters, so much so that ground and surface waters are essentially the same thing."[30] Yet, after suggesting that the exiting factual record may support the District, the Court refused to go further, declaring that it was not necessary to decide whether the district court's test (that bodies of water are distinct where the transfer of water or pollutants would not occur naturally) was appropriate as it was applied prematurely regardless of whether the actual test was appropriate or not.[31]

The Unitary Waters Theory

As described above, the theory advanced by the federal government, as amicus—that all "navigable waters" in the United States are part of one large "unitary waters"[32]—will be a central legal question in future litigation. Because the CWA requires an NPDES permit only when a pollutant has been added to navigable waters, the Court noted that "the [g]overnment's approach would lead to the conclusion that such permits are *not* required when water from one navigable water body is discharged, unaltered, into another navigable water body."[33] Recognizing the profound impact of this issue, the Court stated that "we are not aware of any reported case that examines the unitary waters argument in precisely the form that the [g]overnment now presents it. As a result we decline to resolve it here."[34]

However, the Court did lay out the arguments raised by both sides of this issue. Acceptance of the "unitary waters" theory would mean that systems such as C-11/WCA-3 would not require an NPDES permit. Consequently, the states would continue to be responsible for regulating these facilities through nonpoint source pollution programs. Indeed, water district amici argued that water distribution by the various state programs would remain affordable and would not result in prohibitive cost increases that would ultimately be passed on to consumers.[35] Also, if the district court accepts the "unitary waters" theory on remand, the issue of whether C-11 and WCA-3 are distinct (the "single waters" theory) would become moot. If all "navigable waters" are considered as one unitary water body, C-11 and WCA-3 would clearly be part of a unitary water system and courts would not need to reach the issues of "separateness" of water systems. Therefore, any diversions of water between them would be permissible without triggering the NPDES permit requirement.

Further, the Court acknowledged the practical consequences of requiring NPDES permits for water transfers. As western water districts and the state of Colorado (also as amici) argued, acceptance of the Eleventh Circuit's "but for" test and rejection of the unitary waters principle would mean that NPDES permits were required for every water diversion. Thus, virtually every water management system in the country will have to go through the time-consuming and costly process of seeking an NPDES permit.[36] These effects would be particularly onerous on western states, who rely heavily on transfers from various natural water bodies to supply their citizens with water of sufficient quality. The inevitable delays from the permitting process, amici argue, would have "significant practical consequences,"[37] and may cause shortages in the water supply for certain areas of the country.[38] Any shortages could in turn cause water quality problems for the public served by a particular water system.

Indeed, as the water district amici asserted, the prohibitive rise in costs of water distribution would contravene the U.S. Congress' mandate that "the authority of each [s]tate to allocate quantities of water within its jurisdiction shall not be superseded, abrogated[,] or otherwise impaired" by the CWA.[39] Absent a clear statement from Congress, a reviewing court should not sanction federal usurpation of state and local control of land and water resources.[40] The states already have in place complex water management systems and regulations that would have to be overhauled if the Eleventh Circuit reasoning is adopted. The states' involvement in regulation of this area implicates the requirement of a "clear statement" by Congress of its intent to infringe on powers generally left to the state.[41] Federal usurpation of the state power to regulate water flow will likely result in more burdensome regulation. Therefore, Congress must clearly state its intention to alter the current regime, else the courts are overstepping their bounds and not respecting fundamental federalist principles.

27. *Id*. at 1547.
28. *Id*. at 1545.
29. *Id*. at 1546.
30. *Id*. (internal quotations omitted).
31. *Id*.
32. *Id.* at 1543.
33. *Id*. at 1543 (emphasis in original).
34. *Id.* at 1545.
35. Amici Brief of the Nationwide Public Projects Coalition, West Valley Water District of California, the Metropolitan Denver Water Authority of Colorado, the Cobb County-Marietta Water Authority of Georgia, and the Wheeler Ridge-Maricopa Water Storage District of California at 15, South Fla. Water Management Dist. v. Miccosukee Tribe of Indians, 124 S. Ct. 1537, 34 ELR 20021 (2004) (No. 02-626). EPA estimates that the total permitting cost to applicants is approximately $62.8 million per year. *See* U.S. EPA, Information Collection Request for Applications for National Pollutant Discharge Elimination System Discharge Permits and the Sewer Sludge Management Permits (Final Draft), OMB No. 2040-0086, at 6(b)(i) (1999) (EPA ICR No. 0226.15), *available at* http://www.epa.gov/icr/icrs/icrpages/0226ss15.htm (last visited Sept. 17, 2004).
36. *Id.*
37. *Miccosukee II*, 124 S. Ct. at 1544.
38. Amici Brief of Nationwide Public Projects Coalition et al. at 17, South Fla. Water Management Dist. v. Miccosukee Tribe of Indians, 124 S. Ct. 1537, 34 ELR 20021 (2004) (No. 02-626).
39. 33 U.S.C. §1251(g).
40. Amici Brief of Nationwide Public Projects Coalition et al. at 21, *Miccosukee II* (No. 02-626).
41. Solid Waste Agency of N. Cook County v. Corps of Eng'rs, 531 U.S. 159, 174, 31 ELR 20382 (2001).

On the other hand, the Court also noted that NPDES permitting for water diversion facilities may be necessary to protect water quality. The Court further stated that costs could be kept down "by issuing general permits to point sources associated with water distribution programs" rather than time-consuming individual permits under the NPDES program.[42] Pennsylvania has adopted this approach in interpreting the CWA to cover intrabasin transfers of the type at issue here.[43]

Significantly, the Court also recognized that EPA has not been consistent in how it views intrabasin water transfers in the context of the asserted "unitary waters" theory. The Court seemed to reject the government's assertion that deference should be given to EPA's "long-standing" view that the "process of 'transporting, impounding[,] and releasing navigable waters' cannot constitute an 'addition' of pollutants . . . ."[44] The Court noted that the government could not point to "any administrative documents that espoused that position."[45] On the contrary, the Court cited an amicus brief by former EPA Administrator Carol Browner and other former EPA officials that "argues that the government once reached the opposite conclusion." That brief referred to a 1975 EPA Office of General Counsel Opinion which indicated that "irrigation ditches that discharge to navigable waters require NPDES permits even if they themselves qualify as navigable waters."[46]

Indeed, from a scientific standpoint, it is hard to argue that water transfers do not involve some form of change to the water quality of the receiving waters. The hydrologic nature and composition of the water movement in the transfer process is hardly static. Since the CWA broadly defines the term "pollutant"[47] and every individual body of water contains distinct constituents,[48] the transfer of water from one source to another will inevitably result in the "movement of pollutants."

Because an immeasurable variety of sources contribute to a body of water's constitution, no two waters are identical. Each separate body naturally contains a hodgepodge of material in varying occurrence and proportion based on the particular sources that contribute to the water and the physical characteristics of the water body itself.[49] This unique mix occurs even within a unitary water storage basin where, for example, topography or human intervention have created two physically separate bodies of water.[50]

Thus, under the reasoning of the Eleventh Circuit, the simple act of recombining water bodies separated by man-made devices such as levees, canals, or pumps would be enough to require an NPDES permit because the movement of pollutants between allegedly distinct water bodies would be the same as any other "addition" from the outside world such as discharges from a wastewater treatment plant. Under the Eleventh Circuit's "but for" test an "addition of pollutants" occurs whenever any intrasystem diversion structure moves water from one distinct body of water to another (a routine practice for water supply systems) even though no pollutants from the outside world have been added. Under such an analysis, it would be hard to escape the NPDES permit process for even the most minor water transfer. Yet, as indicated above, numerous amici representing water districts and other state and local interests presented very strong arguments to the contrary. Resolving whether Congress intended the NPDES program to cover all such movements as "additions of pollutants," even within a formerly unified but now separated water system, is the great unresolved issue for the future.

Recent Developments

Three courts have cited *Miccosukee* since the decision was issued on March 23, 2004.[51] In a fourth case not yet decided, the city of New York (New York) is seeking to test the issues raised, but not resolved, before the Second Circuit in an appeal of civil penalty action arising from *Trout Unlimited*.[52] New York asserts that the Court's finding in *Miccosukee*—that transfers between indistinct water bodies do not require NPDES permits—also applies to interbasin transfers.[53] New York argues that *Miccosukee* leaves "no further doubt about the . . . principle that the NPDES program does not apply to intrabasin transfers of untreated water."[54]

Finding no reason to differentiate between the *Dam Cases* and the water system at issue in *Trout Unlimited*, New York requests that the Second Circuit overturn the trial

42. *Miccosukee II*, 124 S. Ct. at 1545.

43. *Id*.

44. *Id.* at 1544.

45. *Id.*

46. *Id.*

47. Under the CWA, a "pollutant" includes "dredged spoil, solid waste, . . . biological materials, . . . heat, . . . rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. §1362(6). In certain circumstances, various federal courts have determined that the distinct, naturally occurring and artificial constituents comprising a water body fall within the CWA's definition of "pollutant." *See, e.g.*, National Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580, 583, 19 ELR 20235 (6th Cir. 1988) (citations omitted) (holding that dam-created fish remains constitute biological material pollutants). *See also* Rybachek v. EPA, 904 F.2d 1276, 1285, 20 ELR 20973 (9th Cir. 1990) (accepting EPA's judgment that pebbles, sand, and other natural material may constitute regulable pollutants when discharged by mining operation).

48. *See* Brian J. Skinner & Stephen C. Porter, Physical Geology 283-85 (1987).

49. *Id.*

50. *See id.* at 291-98. For a technical look at how runoff, erosion, nonpoint source pollution, adjacent land use and exempted or previously permitted discharges affect water composition, see Raymond A. Young & Ronald L. Giese, Introduction to Forest Science 397-401 (2d ed. 1990).

51. *See* Environmental Protection Info. Ctr. v. Pacific Lumber Co., slip op., 2004 WL 838160, at *7 (N.D. Cal. 2004) (*Miccosukee* confirms "the correctness of this court's 'point source' understanding"); WaterKeepers N. Cal. v. AG Indus. Mfg., Inc., 375 F.3d 913, 915, 34 ELR 20056 (9th Cir. 2004) ("Congress enacted the [CWA] in 1972 in order to 'restore and maintain the chemical, physical, and biological integrity of the [n]ation's waters'"); State Auto. Property & Cas. Ins. Co. v. Gorsuch, 323 F. Supp. 2d 746, 753 (W.D. Va. 2004) (phosphorous absorbed by rain is a contaminant).

52. Following the Second Circuit's 2001 decision, the district court issued a ruling holding the city liable for civil penalties in the amount of $5.749 million and directed that the city pursue—and third-party defendant, the New York State Department of Environmental Conservation, make—a determination concerning a state pollution discharge elimination system permit for the city's Shandaken tunnel. Brief of Defendants-Third-Party Plaintiffs-Appellants-Cross--Appellees, at 6, Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 32 ELR 20229 (2d Cir. 2001) (No. 00-9447).

53. *Id*. at 22-23.

54. *Id*. at 23.

court's decision.[55] New York argues that the impoundment of water in dams does not scientifically differ from interbasin or intrabasin transfers of water because the constitution of the water is changed in each of these systems.[56]

According to New York's brief, the Court identified two sections of the CWA that appear to militate against the "unitary waters" theory: (1) "states establish water quality standards for *individual* bodies of water"; and (2) industrial NPDES permit holders have provisions available to them allowing them to "withdraw water for industrial purposes and release it back to the same water body."[57] Indeed, New York quotes the government's *Miccosukee* brief as follows:

> [T]he U.S. Government specifically distinguished between the mere transfer of untreated water which does not require a permit and the situation in which water is diverted from navigable waters for an intervening use, in which case 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.[58]

However, New York argues that the Court's concerns in *Miccosukee* regarding the "unitary waters" theory addressed "*where* pollutants may be added," not "*whether* a[n] NPDES permit is required in the first place."[59] Thus, New York argues that the "commercial exploitation of water should be treated differently from simple municipal water management,"[60] and the Court's doubts about interbasin transfers are misplaced.

The Second Circuit has yet to rule on the appeal of *Trout Unlimited*. Thus, it is difficult to predict how the "unitary waters" theory will ultimately be resolved. In addition, the *Miccosukee* case is still pending on remand in the U.S. District Court for the Southern District of Florida. As New York is arguing in the *Trout Unlimited* case, factual development could lead to adoption of the "unitary waters" theory, at least with respect to municipal water treatment facilities.

Conclusion

Miccosukee raises many more issues than it resolves. In essence, the Court "punted" on the fundamental questions of what constitutes a single water body and whether waters that were once unified but have now been separated by man-made structures are, in fact, legally distinct. In doing so, it described but did not resolve the overarching "unitary waters" theory advanced by the government. Resolution of these issues will have profound consequences on the administration of the CWA's NPDES permit program and the relationship between the federal government and the states in achieving the important goals of that legislation.

55. *Id*. at 26.

56. *Id*. at 25.

57. *Id*. at 29-30 (citations omitted) (emphasis added).

58. Amicus Brief of the United States at 30-31, South Fla. Water Management Dist. v. Miccosukee Tribe of Indians, 124 S. Ct. 1537, 34 ELR 20021 (2004) (No. 02-626) (internal quotation marks omitted).

59. Brief of Defendants-Third-Party-Plaintiffs-Appellants-Cross-Appellees at 31, *Trout Unlimited* (No. 03-7203) (emphasis in original).

60. *Id.*