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Is the EPA's Unitary Waters Theory All Wet

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COMMENT

Is the EPA's Unitary Waters Theory All Wet?

I. INTRODUCTION.....	401
II. BACKGROUND.....	405
A. NPDES Programs, Permits, and CWA Citizen Suit Challenges.....	405
B. Judicial Review of a Regulating Agency's Statutory Interpretation.....	410
C. The Dam Cases.....	411
1. <i>National Wildlife Federation v. Gorsuch</i>	411
2. <i>National Wildlife Federation v. Consumers Power</i>	414
3. <i>S.D. Warren Co. v. Maine Board of Environmental Protection</i>	416
D. The Federal Circuit Pumping Station Cases.....	417
1. <i>Dubois v. United States Department of Agriculture</i>	417
2. <i>Catskill Mountains Chapter of Trout Unlimited Inc. v. City of New York</i>	419
3. <i>Northern Plains Resource Council v. Fidelity Exploration & Development Co.</i>	421
E. The United States Supreme Court Pumping Station Case: South Florida Water Management District v. Miccosukee Tribe of Indians.....	422
1. The District Court.....	423
2. The United States Court of Appeals for the Eleventh Circuit.....	424
3. The United States Supreme Court.....	424
III. ANALYSIS.....	428
A. <i>Contrary to the CWA</i>	431
1. The Omission of "Any".....	431
2. Protection for Individual Bodies of Water.....	433
3. Conflict with Current NPDES Regulations.....	434
4. NPDES Discharges vs. Dredge and Fill Discharges.....	435
B. <i>NPDES Permitting is Flexible and Effective</i>	436
1. Potential for Increased NPDES Regulation.....	436
2. Potential for Innovative NPDES Regulation.....	437
C. <i>Unregulated Discharges can be Environmental Injustice</i>	441
D. <i>Due Little Deference</i>	443
IV. CONCLUSION.....	446

I. INTRODUCTION

The history of American water is a sordid tale. American sage Mark Twain purportedly said "whiskey is for drinking, water is for fighting over."¹

1. Thomas L. Sansonetti & Sylvia Quast, *Not Just A Western Issue Anymore: Water Disputes in the Eastern United States*, 34 CUMB. L. REV. 185, 185 (2003-2004).

Today the American West looks much different than it did in Mark Twain's time, primarily because the cities of Los Angeles, San Francisco, Las Vegas, Phoenix, Salt Lake City, Albuquerque, and Denver have relied on water transfers, such as transbasin diversions or interbasin transfers, to sustain their populations.² Leading western food producing areas including California's Central and Imperial Valleys, Idaho's Snake River Valley, Washington's Yakima Valley, and Colorado's Larimer and Weld Counties have also relied on water transfers for production.³ For example, California's Imperial Valley flourishes in a once dry valley in part because of a complicated water transfer system.⁴ The success of many western cities and agricultural areas depends on the quality of the water supply.⁵ For example, if these transfers relay salty, industrial wastewater then this water may react with the soil and kill all the plants.⁶ Such transfers of dirty water may consequently deprive farmers and ranchers of their very livelihood.⁷ The reliance on water transfers is not unique to the American West.

The rising demand for water in the eastern United States has been marked by a rise in water transfers and water quality issues.⁸ Since before World War II, New York City has relied on a transfer of water that mixed pristine water with muddy water for its water supply.⁹ More recently, a New Hampshire ski area planned to transfer water from a river that was known to peel the paint off of nearby buildings in order to make snow.¹⁰ A historic remnant of the Florida Everglades is today overgrown with slimy algae blooms as a result of an unregulated water transfer.¹¹ As Thomas L. Sansonetti and Sylvia Quast deftly observed, "Rudyard Kipling's line about 'East is East, and West is West, and never the twain shall meet' no longer applies, at

2. Brief Amici Curiae of the States of Colorado and New Mexico in Support of Petitioner at 2, *S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (No. 02-626) [hereinafter *Colorado Brief*]; *Catskill Mountain Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 489 (2d Cir. 2001), *appeal docketed*, No. 03-7203 (2d Cir. Feb. 21, 2003).

3. *Colorado Brief*, *supra* note 2, at 2.

4. *Id.*

5. *See id.*

6. *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1162 (9th Cir. 2003), *cert. denied*, 540 U.S. 967 (2003).

7. *See id.*

8. Sansonetti, *supra* note 1, at 185-86.

9. *Catskill*, 273 F.3d at 484.

10. *Dubois v. USDA*, 102 F.3d 1273, 1297 (1st Cir. 1996), *cert. denied*, 521 U.S. 1119 (1997).

11. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 101 (2004), *reh'g denied*, 541 U.S. 1057 (2004).

least when it comes to disputes over water.”¹² The twain do meet in the national challenge regarding water quality.¹³ Dirty water is an American issue.

Perhaps as a response to the Cuyahoga River bursting into flames as a result of water pollution,¹⁴ the Clean Water Act (CWA) was enacted “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹⁵ To achieve the CWA’s purpose of clean American waters, and to balance each state’s water allocation rights, the CWA employs a system of “cooperative federalism.”¹⁶ The federal Environmental Protection Agency (EPA) oversees National Pollution Discharge Elimination System (NPDES) permitting programs that have been implemented by nearly all states¹⁷ and twenty-seven American Indian tribes.¹⁸ The NPDES program regulates the discharge of pollutants into the Nation’s waters in order to ensure water quality.¹⁹ The NPDES permitting system is the cornerstone of the CWA.²⁰

The unitary waters theory is the EPA’s position that when Congress enacted the CWA it intended that all waters within the borders of the United States be regulated as one big body of water.²¹ According to the EPA, the waters in the United States are not thousands of distinct and different rivers, streams, lakes, and ponds.²² Rather, they are all one body of water and for that reason can be mixed together without an NPDES permit.²³ Under this theory, the fact that American waters have different physical integrities, such as some are warm and others are cold, is irrelevant.²⁴ Also irrelevant is the

12. Sansonetti, *supra* note 1, at 186.

13. *See id.*

14. Kenneth M. Murchinson, *Learning From More Than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future*, 32 B.C. ENVTL. AFF. L. REV. 527, 585 (2005).

15. Clean Water Act § 101(a), 33 U.S.C. § 1251(a) (2000).

16. Reed D. Benson, *Pollution Without Solution: Flow Impairment Problems Under Clean Water Act Section 303*, 24 STAN. ENVTL. L.J. 199, 204 n.16 (2005).

17. *Id.*

18. Brief Amici Curiae of the National Tribal Environmental Council and the National Congress of American Indians in Support of Respondents at 3, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (No. 02-626) [hereinafter NTEC & NCAI Brief]. For a critique of treating sovereign tribes as states, see Dean B. Suagee, *The Indian Country Environmental Justice Clinic: From Vision to Reality*, 23 VT. L. REV. 567, 567-68 (1999).

19. Benson, *supra* note 16, at 200.

20. *N.R.D.C. v. EPA*, 822 F.2d 104, 108 (D.C. Cir. 1987).

21. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105-06 (2004), *reh’g denied*, 541 U.S. 1057 (2004).

22. *See, e.g., id.*

23. *Id.*

24. *Cf. Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 494 (2d Cir. 2001), *appeal docketed*, No. 03-7203 (2d Cir. Feb.

fact that American waters have different chemical integrities, such as some are naturally salty and others naturally arsenic.²⁵ Even the visual example that American waters have different biological integrities, such as some are home to alligators and some to beavers, is irrelevant.²⁶ By the unitary waters logic, if one transfers dirty water from a city lagoon into a pristine mountain stream full of fish, then there is no addition of a toxic or pollutant to the stream.²⁷ Therefore, there is no need for a state, a tribe, or the EPA, to regulate the transfer with an NPDES permit.²⁸ One may be better off drinking whiskey than the dirty water the EPA is fighting to save from NPDES regulation through its unitary waters theory.

The unitary waters theory ought to be summarily rejected by the courts. Part III (A) of this comment discusses the inconsistency of the unitary waters theory with both the plain language of the CWA and current EPA regulation regarding discharges. Part III (B) maintains that innovative NPDES permitting is capable of regulating water transfers free of extreme cost or delay without the unitary waters theory to lighten the regulatory load. Part III (C) makes the case that the unitary waters theory can lead to environmental injustice by allowing unregulated pollution to be discharged into important cultural areas. Finally, Part III (D) reasons that there are no formal government documents, or strong policy arguments, to support the EPA's position and thus the theory should be given little to no judicial deference.

This comment will first explore the regulatory backdrop and case law development of the unitary waters theory. The regulatory backdrop in Part II (A) explains NPDES programs, permits, and citizen suit challenges. Part II (B) then provides an overview of the judicial deference due to a regulating agency's statutory interpretation. Part II (C) collects the earliest cases to delve into the principles that later became the unitary waters theory beginning with the dam cases. These cases included: *National Wildlife Federation v. Gorsuch*²⁹ and *National Wildlife Federation v. Consumers Power*.³⁰ Additionally, the United States Supreme Court granted certiorari over a dam case, *S.D. Warren Co. v. Maine Board of Environmental Protec-*

21, 2003). For a thorough discussion of chemical, biological, ecosystem, social, and legal integrity in the CWA, see also Christine A. Klein, *On Integrity: Some Considerations for Water Law*, 56 ALA. L. REV. 1009 (2005).

25. *Catskill*, 273 F.3d at 494.

26. *Cf. id.*

27. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106 (2004), *reh'g denied*, 541 U.S. 1057 (2004).

28. *Id.*

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

30. *Nat'l Wildlife Fed'n v. Consumers Power*, 862 F.2d 580 (6th Cir. 1988).

tion, which will be decided in the October Term 2005.³¹ Part II (D) lays out the more recent federal circuit pumping station cases to have analyzed the unitary waters theory. These cases included: *Dubois v. United States Department of Agriculture*,³² *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*,³³ and *Northern Plains Resource Council v. Fidelity Exploration & Development Co.*³⁴ Finally, Part II (E) analyzes the much-studied United States Supreme Court case of *South Florida Water Management District v. Miccosukee Tribe of Indians*.³⁵ *Miccosukee* is presently on remand to the United States Court of Appeals for the Eleventh Circuit for the factual determination of whether the two bodies of water in the litigation are meaningfully distinct or a unitary body of water.³⁶ *Miccosukee*'s progeny may change the way all states regulate their waters and issue NPDES permits for water transfers.³⁷

This comment will next analyze four key issues presented by the case law. The first issue is whether the CWA was enacted for the protection of all bodies of water in the United States as one unitary body of water. The second issue is whether NPDES permitting becomes practically impossible to administer without the help of unitary waters theory because so many transfers would need to be regulated. The third issue is whether the unitary waters theory leads to environmental injustice because it allows certain populations of people to disproportionately shoulder the burden of unregulated discharges. The final issue is what level of deference the EPA's unitary waters theory ought to be afforded upon judicial review.

II. BACKGROUND

A. NPDES Programs, Permits, and CWA Citizen Suit Challenges

The CWA established the NPDES permitting program.³⁸ The NPDES program does not stop all harmful activities.³⁹ Rather, the NPDES

31. *S.D. Warren Co. v. Me. Bd. of Env'tl. Prot.*, 868 A.2d 210 (Me. 2005), *cert. granted*, 126 S. Ct. 415 (2005) (No. 04-1527), *argued*, (Feb. 21, 2006).

32. *Dubois v. USDA*, 102 F.3d 1273 (1st Cir. 1996), *cert. denied*, 521 U.S. 1119 (1997).

33. *Catskill Mountain Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001), *appeal docketed*, No. 03-7203 (2d Cir. Feb. 21, 2003).

34. *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003), *cert. denied*, 540 U.S. 967 (2003).

35. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), *reh'g denied*, 541 U.S. 1057 (2004).

36. *Id.* at 112.

37. Peter D. Nichols, *Miccosukee: The Potential for Clean Water Act Discharge Permits For Water Transfers*, 33 COLO. LAW. 119, 119 (2004).

38. Clean Water Act § 402, 33 U.S.C. § 1342 (2000).

39. Benson, *supra* note 16, at 200-01.

program “prohibits the discharge of any pollutant from a point source into navigable waters, unless the discharger possesses a valid permit authorizing the release of the particular pollutant discharged in the specific amount, or concentration, contained in the discharge.”⁴⁰ After an opportunity for a public hearing, the EPA Administrator may issue a permit for the discharge of a pollutant (or pollutants) upon one of two conditions: the discharge will meet all applicable requirements under the CWA, or the discharge will meet additional requirements the Administrator determines to be necessary.⁴¹ Such additional requirements may include data collecting, information collecting, and reporting.⁴²

The EPA set minimum procedural guidelines and other elements for state NPDES programs and tribal NPDES programs (collectively referred to as State programs)⁴³ in order to establish nationally “uniform application forms and other minimum requirements”⁴⁴ A State may submit a description of its proposed NPDES program for approval by the EPA Administrator.⁴⁵ Even after program approval, the EPA Administrator may suspend

40. Robert W. Vinal, *Proof of Wrongful Discharge of Pollutant Into Waterway under Federal Clean Water Act*, 36 AM. JUR. 3D *Proof of Facts* § 2 (2005) (citing 33 U.S.C. §§ 1311(a), 1342).

41. Clean Water Act § 402(a)(1), 33 U.S.C. § 1342(a)(1) (2000). Section 402(a)(1) states:

Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

Id.

42. Clean Water Act § 402(a)(2). Section 402(a)(2) states: “[t]he Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.” *Id.*

43. § 518(e). Section 518(e) states: “[t]he Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II of this chapter and [section 1342]” *Id.*

44. § 304(h)(i)(1). Section 304 (h)(i)(1) states: “[t]he Administrator shall (1) within sixty days after October 18, 1972, promulgate guidelines for the purpose of establishing uniform application forms and other minimum requirements for the acquisition of information from owners and operators of point-sources of discharge subject to any State program under section 1342 of this title” *Id.*

45. § 402(b). Section 402(b) states:

the State's issuance of NPDES permits⁴⁶ or withdraw a State's approved program if the program fails to conform to the established EPA guidelines.⁴⁷

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist . . .

Id.

46. § 402(c)(1). Section 402(c)(1) states:

Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

Id.

47. §402(c)(3). Section 402(c)(3) states:

Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

Id.

Any citizen is authorized to sue any person on the citizen's own behalf through a CWA citizen suit.⁴⁸ The United States District Courts have exclusive jurisdiction to hear CWA citizen suits regardless of the amount in controversy between the parties or State citizenship of the parties when all the elements are met.⁴⁹ The citizen may sue "the United States, and . . . any other governmental instrumentality or agency . . ." for: an alleged violation of an effluent standard; an alleged violation of any limitation under the CWA; or an alleged violation of an Administrator's order or State's order.⁵⁰ A citizen may seek to enforce the standard or limitation that is being violated, to force the Administrator to act, and civil penalties.⁵¹ The citizen may not commence an action until first giving the potential defendant and Administrator, or State, sixty-days notice.⁵² Any citizen may intervene as a matter of right when the Administrator or State is pursuing a violation in

48. § 505(a)(1). See Annotation, *Citizen's action under 33 U.S.C.A. § 1365(A)(1) for violation of effluent standards or limitations under Federal Water Pollution Control Act (33 U.S.C.A. § 1251 et seq.) or orders with respect thereto*, 68 A.L.R. FED. 701 (1984) (illustrating examples of successful and unsuccessful citizen's actions for CWA violations).

49. Clean Water Act § 505(a)(2). Section 505(a)(2) states any citizen may commence a suit "[t]he district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties . . ." *Id.*

50. § 505(a)(1)-(2). Sections 505(a)(1)-(2) state any citizen may also commence a suit:

against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator . . .

Id. See Elaine K. Zipp, Annotation, *Citizen's action against administrator of environmental protection agency to compel performance of nondiscretionary duty under § 505(A)(2) of Federal Water Pollution Control Act amendments of 1972 (33 U.S.C.A. § 1365(A)(2))*, 57 A.L.R. FED. 851 (1982) (illustrating examples of successful and unsuccessful challenges for a failure to perform nondiscretionary duties).

51. Clean Water Act § 505(a)(2). See Andrew Oliveira, Christopher Schenck, Christopher D. Cole & Nicole L. James, *Environmental Crimes*, 42 AM. CRIM. L. REV. 347 (2005) (illustrating examples of CWA civil and criminal penalties).

52. Clean Water Act § 505(b)(1)(A). Section 505(b)(1)(A) states that no citizen suit may commence "prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order . . ." *Id.*

court.⁵³ The Administrator may also intervene as a matter of right when any citizen is pursuing a violation in court.⁵⁴

An NPDES permit violation has five elements: the “discharge,” of a “pollutant,” from a “point source,” into “navigable waters,” “without a permit.”⁵⁵ Under the CWA, a “discharge” is defined as the addition of any pollutant.⁵⁶ The CWA does not define the term “addition.”⁵⁷ A “pollutant” is broadly defined to include biological materials, heat, rock, sand, and agricultural waste, among other examples.⁵⁸ A “point source” is defined as any

53. § 505(b)(1)(B). Section 505(b)(1)(B) states that no citizen suit may commence “if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.” *Id.*

54. § 505(c)(2). Section 505(c)(2) states that: “[i]n such action under this section, the Administrator, if not a party, may intervene as a matter of right.” *Id.*

55. §§ 502(12), 301(a), 402. *See, e.g.,* Ann K. Wooster, Annotation, *Actions brought under Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act)* (33 U.S.C.A. §§ 1251 et seq.) – *Supreme Court cases*, 163 A.L.R. FED. 531 (2000) (compiling CWA citizen suits before the Supreme Court).

56. § 502(12). Section 502(12) states:

The term ‘discharge of a pollutant’ and the term ‘discharge of pollutants’ each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

Id.

57. *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 174 (D.C. Cir. 1982).

58. *Clean Water Act* § 502(6). Section 502(6) states:

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. This term does not mean (A) “sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces” within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

discernible, confined, discrete conveyance.⁵⁹ “Navigable waters” include traditionally navigable waters and also non-navigable waters that drain into navigable waters as all courts have held that navigability in fact is not required.⁶⁰ In summary, any person may sue any entity because without an NPDES permit, “almost any structure which conveys almost any type of material into almost any body of surface water constitutes an illegal discharge under the CWA”⁶¹

B. *Judicial Review of a Regulating Agency’s Statutory Interpretation*

When an agency’s statutory interpretation is challenged, the court first gives the agency an appropriate level of judicial deference and then tests the reasonableness of the agency’s interpretation against that deference.⁶² In the seminal case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, the United States Supreme Court held that Congress’s explicit and implicit legislative delegation to an agency to interpret a statute bars a court from substituting its own statutory construction.⁶³ For example, “[t]he agency’s construction must be upheld if, in light of the appropriate degree of deference, it is ‘sufficiently reasonable’, even if it is not ‘the only reasonable one or even the reading the court would have reached’ on its own.”⁶⁴ The courts will not automatically grant a regulating agency’s interpretation *Chevron* deference.⁶⁵ Since *Chevron*, “a very good indicator of delegation meriting *Chevron* treatment [is] express congressional authorizations to en-

Id.

59. § 502(14). Section 502(14) states:

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 stormwater discharges and return flows from irrigated agriculture.

Id. See also Ronald I. Mirvis, Annotation, *What constitutes “point source” of pollution subject to control by provisions of Water Pollution Control Act, as amended (33 U.S.C.A. § 1362(14))*, 52 A.L.R. FED. 885 (1981) (giving examples of CWA point sources).

60. *Gorsuch*, 693 F.2d at 165.

61. *Vinal*, *supra* note 40, § 2.

62. *Gorsuch*, 693 F.2d at 156.

63. *Chevron U.S.A. Inc. v. N.R.D.C.*, 467 U.S. 837, 843 (1984). See Kristine Cordier Karnezis, *Construction and Application of “Chevron Deference” to Administrative Action by United States Supreme Court*, 3 A.L.R. FED. 2D 25 (2005).

64. *Gorsuch*, 693 F.2d at 171.

65. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (citations omitted).

gage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”⁶⁶

Even if the agency’s interpretation is not afforded *Chevron* deference, it may receive a spectrum of judicial respect upon review. When the agency has engaged in neither notice-and-comment rulemaking nor formal adjudication, the court will defer to the agency’s interpretation after weighing the *Skidmore* factors of: “the degree of [the] agency’s care, its consistency, formality, and relative expertness”⁶⁷ The court may then give a “spectrum of responses” ranging from “great respect” to “indifference.”⁶⁸

C. *The Dam Cases*

Though the unitary waters theory claims that all waters within the borders of the United States are one body of water,⁶⁹ the issues involved in the dam cases are closely related. Two key federal cases examined whether an NPDES permit is required for a dam that discharges removed water back into the original water body.⁷⁰ These two dam cases questioned whether the “pollutant” was introduced from the outside world⁷¹ and this analysis is still used in unitary waters litigation today.

1. *National Wildlife Federation v. Gorsuch*

The first key case to question whether an NPDES permit would be required for the discharge of water back into the same water body was *National Wildlife Federation v. Gorsuch*.⁷² The National Wildlife Federation (the plaintiffs), along with the State of Missouri as intervenor, petitioned the district court to declare that the EPA and Administrator Anne Gorsuch had violated a nondiscretionary duty when the EPA generally failed to require NPDES permits for the discharge of dam water.⁷³ The plaintiffs complained dams caused water quality changes resulting in low dissolved oxygen, dissolved minerals, dissolved nutrients, water temperature changes, sediment release and/or supersaturation of oxygen in both a dam’s reservoir and the river downstream.⁷⁴ Commentators have since described the effects of these

66. See *Mead*, 533 U.S. at 229-30 (reviving the *Skidmore* analysis).

67. *Id.* at 228 (footnotes omitted).

68. *Id.*

69. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105-06 (2004), *reh’g denied*, 541 U.S. 1057 (2004).

70. *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); *Nat’l Wildlife Fed’n v. Consumers Power*, 862 F.2d 580 (6th Cir. 1988).

71. *Gorsuch*, 693 F.2d at 174-75; *Consumers Power*, 862 F.2d at 584.

72. *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982).

73. *Id.* at 161. The challenge was regarding a general failure to require NPDES permits and was not a failure to require a permit for one particular dam. *Id.*

74. *Id.* at 161-64.

water quality changes on the fish downstream from the dam as creating “asphyxiated fish.”⁷⁵ All parties agreed that dams can be a “point source,” among other things, but disputed whether dams’ above described effects were “pollutants” and an “addition” of a pollutant, among other things.⁷⁶

The district court issued a declaration and an order that the EPA had a nondiscretionary duty to require dam operators to obtain discharge permits.⁷⁷ The district court afforded the EPA’s “more tortured” interpretation of “addition”, that the pollutants were not introduced from the outside world, little deference because it offered no scientific expertise, advanced no policy reasons, was “counter to expressed congressional intent, and [was] inconsistent with [the EPA’s] own implementation of the [CWA] in other contexts.”⁷⁸ The district court ruled in favor of the plaintiffs.⁷⁹ The EPA appealed the decision.⁸⁰

On appeal, the D.C. Circuit considered “whether certain dam-induced water quality changes constitute the ‘discharge of a pollutant’ as that term is defined in CWA section 502(12).”⁸¹ The D.C. Circuit characterized the issue as one of CWA construction; namely if the CWA mandated that dam-induced water quality changes must be regulated under the NPDES regulatory regime.⁸² The plaintiffs asserted that the purpose of the CWA was broad enough to include the dam-induced water quality changes.⁸³ In opposition, the EPA argued that the purpose of the CWA was narrow and dam-induced water quality changes would instead be rightly regulated under state-developed non-point source pollution programs.⁸⁴

Both parties analyzed principles similar to what later became the unitary waters theory to support their CWA interpretations.⁸⁵ The plaintiffs laid out their NPDES permit violation argument.⁸⁶ The plaintiffs argued that “any adverse change in the quality of reservoir water from its natural state involves a ‘pollutant’ and that release of polluted water through the dam into the downstream river constitutes the ‘addition’ of a pollutant to navigable waters ‘from’ a point source.”⁸⁷ In denial, the EPA stated there was no

75. Klein, *supra* note 24, at 1020.

76. *Gorsuch*, 693 F.2d at 165.

77. *Id.* at 161.

78. *Id.* at 166 (citations omitted).

79. *Id.*

80. *Id.* at 156, 161.

81. *Id.*

82. *Id.* at 165-66.

83. *Id.* at 165.

84. *Id.* at 165-66.

85. *Id.* at 165.

86. *Id.*

87. *Id.* at 165.

NPDES violation because the pollutant was already in the water and was not generated by the dam as a CWA "point source."⁸⁸ In support of this proposition, the EPA floated its outside world test:

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).⁸⁹

The EPA then argued that in this case the pollutant was not added from the outside world but was already in the body of water.⁹⁰ Therefore, no NPDES permit was necessary.⁹¹

The D.C. Circuit gave great deference to the EPA's interpretations.⁹² The court concluded the EPA was due deference based on the "usual factors" because: it was the CWA's regulatory agency, it was consistent, its construction was contemporaneous, it had scientific expertise, Congress acquiesced in its interpretation, and it was sufficiently thorough.⁹³ The D.C. Circuit used two internal EPA documents to find strong policy support for the EPA's position and to meet these factors in order to grant *Chevron* deference to the EPA.⁹⁴ Therefore, the court held the EPA's interpretations were supported.⁹⁵ The D.C. Circuit reversed the district court's judgment and found that the EPA's outside world construction did not frustrate the purpose of the CWA.⁹⁶ The D.C. Circuit cautioned, however, that this was a narrow decision that did not decide what constitutes a discharge of a pollutant under the CWA, but rather that the court found the EPA's CWA interpretation to be reasonable.⁹⁷

88. *Id.*

89. *Id.*

90. *Id.*

91. *See id.*

92. *Id.* at 169.

93. *Id.*

94. *Id.* at 169-70 (citing Letter from Alan Kirk, Assistant Administrator for Enforcement and General Counsel, EPA, to Regional Counsels (Aug. 1, 1974); EPA Office of General Counsel, *Action Memorandum on Issuing NPDES Permits to Dams* (1978)).

95. *Id.* at 171-77 (interpreting "addition," "pollutant," and "from").

96. *Id.* at 183.

97. *Id.*

2. *National Wildlife Federation v. Consumers Power*

The second dam case to consider whether an NPDES permit would be required for a dam was *National Wildlife Federation v. Consumers Power*.⁹⁸ The National Wildlife Federation (the plaintiffs), an environmental organization, filed a CWA citizen suit against the Consumers Power Company, a hydroelectric power business, to force Consumers Power to apply for an NPDES permit for its Ludington facility.⁹⁹ The Ludington facility, one of the largest hydroelectric power facilities in the U.S., uses reversible turbines to divert water four hundred feet uphill from Lake Michigan into a storage reservoir, then it reverses the turbines to allow the water to gush back to Lake Michigan, thus generating power.¹⁰⁰ In the process, fish and other aquatic organisms are carried with the water creating greater force to generate power, but few survive the turbines.¹⁰¹ The fish and other aquatic organisms are discharged back into Lake Michigan as a sort of "fish smoothie."¹⁰² The plaintiffs prevailed when the district court ordered Consumers Power to apply for an NPDES permit from the Michigan Water Resources Commission (MWRC) within sixty days.¹⁰³ Consumers Power appealed, and the order to apply for an NPDES permit was stayed.¹⁰⁴

The Sixth Circuit applied the five elements for an NPDES violation and framed the issue on appeal as whether the Ludington facility "adds" a pollutant to Lake Michigan.¹⁰⁵ The Sixth Circuit acknowledged that the term "addition" was not defined by the CWA and therefore was an issue for EPA interpretation.¹⁰⁶ In its amicus brief, the EPA proposed the outside world test, which was based on unitary waters theory principles to support its interpretation of "any."¹⁰⁷ The Sixth Circuit looked to the previous *Gorsuch* decision and acknowledged that the "EPA also argued, as it does here, that there can be no addition unless a source 'physically introduces a pollutant into water from the outside world.'"¹⁰⁸ Therefore, the EPA asserted both in

98. *Nat'l Wildlife Fed'n v. Consumers Power*, 862 F.2d 580 (6th Cir. 1988).

99. *Id.* at 581.

100. *Id.* at 581-82.

101. *Id.* at 582.

102. *Id.*

103. *Id.* at 581.

104. *Id.*

105. *Id.* at 583-84. The five elements of a violation are: 1) the "discharge," 2) of a "pollutant" 3) from a "point source" 4) to a "navigable water" 5) without an NPDES permit. *Id.* at 583.

106. *Id.* at 584.

107. *Id.*

108. *Id.* (quoting *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d. 156, 175 (D.C. Cir. 1982)).

Gorsuch and this case that no NPDES permit was necessary because the fish were already in the water and not introduced from the outside world.¹⁰⁹

The EPA then refined its outside world argument before the Sixth Circuit by demonstrating when pollutants are added from the outside world.¹¹⁰ The EPA began by conceding that American seafood processors add fish smoothie from their processing plants into the waters of the United States, just as Consumers Power did in the instant case.¹¹¹ The EPA had issued effluent guidelines in order to regulate the seafood processors' discharge.¹¹² The EPA argued that the seafood processors' fish smoothie was distinguishable from the instant case because the seafood processors' fish smoothie *left* the waters of the United States.¹¹³ The processors took the live seafood out of the water, turned it into a fish smoothie in the plant, then discharged it back into the waters of the United States.¹¹⁴ Thus, the seafood processors' discharge of the fish smoothie was from the outside world.¹¹⁵ As in direct contrast with the seafood processors, the EPA argued that because the live fish from Lake Michigan were pulled uphill in the water, then the dead fish were returned downhill in the same water and discharged back into Lake Michigan, they never left the waters of the United States.¹¹⁶ The EPA then concluded that the Consumers Power unregulated discharge of a fish smoothie was distinguishable from the seafood processors' regulated discharge as Consumers Power fish smoothie never left the water and as such was not introduced from the outside world.¹¹⁷

The Sixth Circuit sided with the EPA.¹¹⁸ The Sixth Circuit concluded that *Chevron* substantial deference applied and that the EPA's interpretation was a permissible construction of the word "addition" in the CWA.¹¹⁹ Relying heavily on the D.C. Circuit's reasoning, the court stated the EPA's reasonable interpretation was not contrary to any CWA policies or its legislative history.¹²⁰ The Sixth Circuit then drew an analogy to the *Chevron* case: "*Chevron* rejected a court's attempt at redefining an undefined statutory term in terms of the 'general purpose' of the statute, when the agency has already defined the term."¹²¹ The court concluded against this

109. *Id.*

110. *Id.* at 585-86.

111. *Id.* at 585.

112. *Id.* (citations omitted).

113. *Id.*

114. *Id.*

115. *Id.* at 584, 585.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 584.

120. *Id.*

121. *Id.* at 584 (citation omitted).

backdrop of *Chevron* deference “[a]ny water quality change resulting from the release of entrained fish at the Ludington facility is simply not, giving proper deference to the EPA definition, from the physical introduction of a pollutant from the outside world.”¹²² Therefore, the court held that Consumers Power did not need to obtain an NPDES permit for the discharge of the fish smoothie into Lake Michigan.¹²³ The district court’s decision was reversed and remanded.¹²⁴

3. *S.D. Warren Co. v. Maine Board of Environmental Protection*

Recently, the United States Supreme Court granted certiorari over a dam case, *S.D. Warren Company v. Maine Board of Environmental Protection*.¹²⁵ *South Florida Water Management District v. Miccosukee Tribe of Indians*, the United States Supreme Court pumping station case discussed *infra* in part II (E) below, may have impliedly overturned *National Wildlife Federation v. Gorsuch* and *National Wildlife Federation v. Consumers Power* because *Miccosukee* held that the point source itself need not generate the pollutant.¹²⁶ Moreover, *Gorsuch* and *Consumers Power* were litigated in the 1980s, before considerable development in the law of judicial deference to agency interpretation.¹²⁷ Therefore, the petitioner S.D. Warren Company queried the Supreme Court: “Does the mere flow of water through an existing dam constitute a ‘discharge’ under [s]ection 401, 33 U.S.C. [section] 1341, of the Clean Water Act, despite this Court’s holding last year in *Miccosukee* that a discharge requires an addition of water from a distinct body of water?”¹²⁸ The outcome of this hydroelectric dam decision and the analysis of the outside world test are closely related to the unitary waters theory.

122. *Id.* at 586.

123. *Id.* at 590.

124. *Id.*

125. *S.D. Warren Co. v. Me. Bd. of Env'tl. Prot.*, 868 A.2d 210 (Me. 2005), *cert. granted*, 126 S. Ct. 415 (2005) (No. 04-1527), *argued*, (Feb. 21, 2006).

126. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), *reh'g denied*, 541 U.S. 1057 (2004).

127. *See, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218 (2001) (holding that an agency ruling is entitled to deference only to the degree of the ruling’s persuasiveness.).

128. For the question presented, *see* Supreme Court of the United States Docket for 04-1527 Question Presented, <http://www.supremecourtus.gov/qp/04-01527qp.pdf> (last visited Mar. 20, 2006).

D. *The Federal Circuit Pumping Station Cases*

Three key federal cases have examined the unitary waters theory in the context of pumping stations.¹²⁹ These cases directly considered the unitary waters theory.¹³⁰ The framework for analyzing whether an NPDES permit is required is that the court first place itself in the shoes of the receiving water and then determine whether the pollutant would reach the receiving water had it not been for the water transfer.¹³¹

1. *Dubois v. United States Department of Agriculture*

The first key case to discuss the unitary waters theory was *Dubois v. United States Department of Agriculture*.¹³² Dubois filed a citizen suit against the Forest Service, an agency of the United States Department of Agriculture, for failing to require the Loon Mountain Ski Area (Ski Area) to obtain an NPDES permit.¹³³ The Ski Area had requested to expand its snowmaking facilities by augmenting its diversion from Loon Pond through a water transfer from the East Branch of the Pemigewasset River (East Branch).¹³⁴ The Forest Service oversaw the portion of the Ski Area located in the White Mountain National Forest (Forest) and thus required an Environmental Impact Statement (EIS) to determine the expansion's impact on the Forest and to determine if an NPDES permit was necessary for the water transfer.¹³⁵ After the EIS, the Forest Service determined that no NPDES permit was necessary and Dubois challenged the decision.¹³⁶

The district court found the NPDES permit elements of the of a "discharge" of a "pollutant" "from a point source" to "a navigable water" but did not find an "addition" requirement of a "discharge," reasoning that the two bodies of water were legally one body of water.¹³⁷ The district court first found, and the parties agreed, that Loon

129. *Catskill Mountain Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001), *appeal docketed*, No. 03-7203 (2d Cir. Feb. 21, 2003); *Dubois v. USDA*, 102 F.3d 1273 (1st Cir. 1996), *cert. denied*, 521 U.S. 1119 (1997); *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003), *cert. denied*, 540 U.S. 967 (2003).

130. *Catskill*, 273 F.3d 481; *Dubois*, 102 F.3d 1273; *Fidelity*, 325 F.3d 1155.

131. *Fidelity*, 325 F.3d at 1162.

132. *Dubois v. USDA*, 102 F.3d 1273 (1st Cir. 1996), *cert. denied*, 521 U.S. 1119 (1997).

133. *Id.* at 1273.

134. *Id.* at 1277-78.

135. *Id.* at 1278.

136. *Id.* at 1280.

137. *Id.* at 1296.

Pond was a “water of the United States.”¹³⁸ The district court then found that the Ski Area “discharged” the East Branch water, which was a “pollutant,” “through its snowmaking pipes into Loon Pond.”¹³⁹ For these reasons, both parties agreed there was a “discharge” of a “pollutant” from a “point source” within the meaning of the CWA.¹⁴⁰ Turning to the unitary waters theory, the district court reasoned that the East Branch and Loon Pond were all part of “a singular entity, ‘the waters of the United States.’”¹⁴¹ The district court upheld the singular water concept by clarifying that “the bodies of water are not to be considered individually in this context.”¹⁴² The district court concluded that the transfer of water from the East Branch into Loon Pond would not constitute an “addition” of the East Branch into Loon Pond.¹⁴³ The district court granted summary judgment in favor of the Forest Service.¹⁴⁴

The First Circuit reviewed the district court’s decision and framed the issue as whether there was an “addition.”¹⁴⁵ Though not using the terms “unitary waters theory,” the First Circuit rejected the “singular waters” principle and the “singular waters” interpretation of an “addition.”¹⁴⁶ The First Circuit held that the transfer of water from the East Branch to Loon Pond would not occur naturally and held when “water leaves the domain of nature and is subject to private control rather than purely natural processes . . . it has lost its status as waters of the United States.”¹⁴⁷ Therefore, the court found that the East Branch and Loon Pond were two separate “waters of the United States” and by extension the proposed transfer of water from one to the other constituted an “addition.”¹⁴⁸ The First Circuit spelled out “where, as [was] undisputed . . . the discharge is through a point source and the intake water contains pollutants, an NPDES permit is required.”¹⁴⁹

138. *Id.*

139. *Id.*

140. *Id.* at 1296.

141. *Id.*

142. *Id.*

143. *Id.* at 1296.

144. *Id.* at 1277.

145. *Id.* at 1296.

146. *Id.*

147. *Id.* at 1296-97.

148. *Id.* at 1299.

149. *Id.*

The First Circuit acknowledged the significance of its rejection of the unitary waters theory for water quality.¹⁵⁰ The First Circuit shed light on the deeper issue before the court: “We can take judicial notice that the Pemigewasset River was for years one of the most polluted rivers in New England, the repository for raw sewage from factories and towns. It emitted an overwhelming odor and was known to peel the paint off buildings located on its banks.”¹⁵¹ The First Circuit feared that under the unitary waters theory, Loon Pond may suffer the fate of Pemigewasset River.¹⁵² Hence, the First Circuit cogently reversed the district court.¹⁵³

2. *Catskill Mountains Chapter of Trout Unlimited Inc. v. City of New York*

The second key case to discuss the unitary waters theory was *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*.¹⁵⁴ Environmental and recreational organizations (the plaintiffs) brought a CWA citizen suit against the City of New York (City).¹⁵⁵ Since World War II, the City has obtained its drinking water by diverting water from the Schoharie Reservoir through the Shandaken Tunnel to the Esopus Creek, which pours into the Ashokan Reservoir.¹⁵⁶ The plaintiffs argued that instead of applying the outside-world test from the dam cases the court should apply a but-for test, meaning without the Shandaken Tunnel, Schoharie Reservoir would not “hydrologically connect” to Esopus Creek.¹⁵⁷ Thus, plaintiffs argued the Shandaken Tunnel was a “discharge” of a “pollutant” to Esopus Creek.¹⁵⁸ The plaintiffs concluded that the two bodies of water were distinct and connecting them required an NPDES permit.¹⁵⁹ Nevertheless, the district court granted the City’s motion to dismiss because there was no “discharge” of a pollutant because there was no addition of a pollutant.¹⁶⁰

The Second Circuit reversed the district court’s holding that there was no “discharge.”¹⁶¹ The court held that the EPA’s policy of not requiring

150. *Id.* at 1297.

151. *Id.*

152. *Id.*

153. *Id.* at 1301.

154. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001), *appeal docketed*, No. 03-7203 (2d Cir. Feb. 21, 2003).

155. *Id.* at 484.

156. *Id.*

157. *Id.* at 491.

158. *Id.* at 485.

159. *Id.*

160. *Id.*

161. *Id.* at 494.

an NPDES permit for water transfers and the EPA's interpretation of "addition" were not due *Chevron* deference.¹⁶² The Second Circuit explained:

[i]n several policy statements made in opinion letters and reports to Congress in the 1970s and 1980s, the EPA took the position that dam releases should not be considered "discharges" under the CWA and thus NPDES permits would not be required for those releases. [See *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d. 156, 167-69 (D.C. Cir. 1982)]. This position was never formalized in a notice-and-comment rulemaking or formal adjudication under the [Administrative Procedure Act, 5 U.S.C. §§ 553, 554 (2000)], although the EPA subsequently reiterated its position in the *Gorsuch* and *Consumers Power* cases, as a defendant and *amicus curiae*, respectively.¹⁶³

Based on CWA section 502(14), the court found that the point source need not generate the pollutant in order to be a CWA point source subject to an NPDES permit.¹⁶⁴ Turning to the "singular entity" theory supporting the EPA's "addition" interpretation, the Second Circuit pointed out:

[s]uch a theory would mean that movement of water from one discrete water body to another would not be an addition even if it involved a transfer of water from a water body contaminated with myriad pollutants to a pristine water body containing few or no pollutants. Such an interpretation is inconsistent with the ordinary meaning of the word "addition."¹⁶⁵

Accordingly, the Second Circuit reversed the district court's analysis and held the City must obtain an NPDES permit.¹⁶⁶

162. *Id.* at 491.

163. *Id.* at 489-90.

164. *Id.* at 493.

165. *Id.*

166. *Id.* at 494. After *Miccosukee*, the City has appealed its roughly 5.75 million dollar penalty, *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp. 2d 41, 54 (N.D.N.Y. 2003), based on a unitary waters theory argument that the two bodies of water are not meaningfully distinct. *Catskill Mountain Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001), *appeal docketed*, No. 03-7203 (2d Cir. Feb. 21, 2003); Timothy S. Bishop, *The Clean Water Act in the Supreme Court: Recent Developments*, SK037 A.L.I.-A.B.A. 121, 129 (2004).

3. *Northern Plains Resource Council v. Fidelity Exploration & Development Co.*

The third key federal circuit case to discuss the unitary waters theory was *Northern Plains Resource Council v. Fidelity Exploration & Development Co.*¹⁶⁷ The Northern Plains Resource Council (the plaintiffs), a conservation group, brought a CWA citizen suit against Fidelity Exploration & Development Company (Fidelity).¹⁶⁸ Plaintiffs complained of un-permitted groundwater that Fidelity pumped into the Tongue River from its coal-bed methane (CBM) development in the Powder River Basin.¹⁶⁹ The Montana Department of Environmental Quality (MDEQ) advised Fidelity that it did not need a Montana NPDES permit for this process because CBM water (which in this case was salty, yet unaltered, groundwater) was exempt from Montana's permitting scheme.¹⁷⁰ Nevertheless, the MDEQ warned Fidelity that the EPA did not provide such an exception for its NPDES permit.¹⁷¹ The plaintiffs also argued for a but-for test, stating that the unaltered groundwater would not ordinarily reach the Tongue River without Fidelity pumping the ground water into the Tongue River.¹⁷² Therefore, the plaintiffs maintained that the addition of the CBM groundwater to the Tongue River required an NPDES permit because it was a "discharge" of a "pollutant."¹⁷³ The district court granted summary judgment for Fidelity and held that the CBM groundwater was not a CWA "pollutant."¹⁷⁴ The plaintiffs appealed to the Ninth Circuit.¹⁷⁵

The Ninth Circuit analyzed the principles behind the unitary waters theory when examining whether unaltered water can be a "pollutant."¹⁷⁶ The court stated that the relevant body of water for the analysis was the Tongue River, thus the court put itself in the shoes of the receiving water.¹⁷⁷ In this case, the Ninth Circuit examined the effect on the Tongue River and illuminated that "[b]y discharging CBM water into the Tongue River, Fidelity alters the water quality of the Tongue River."¹⁷⁸ Though not stating it as

167. *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003), *cert. denied*, 540 U.S. 967 (2003).

168. *Id.* at 1157.

169. *Id.*

170. *Id.* at 1157-59.

171. *Id.*

172. *Id.* at 1158.

173. *Id.*

174. *Id.* at 1160.

175. *Id.*

176. *Id.* at 1162.

177. *Id.*

178. *Id.* CBM water is groundwater that is released from the coal seam during the methane gas extraction process, and not surface water, which the CWA was written to protect. *See Wash. Wilderness Co. v. Heckla Mining Co.*, 870 F. Supp. 983, 989-

such, the Ninth Circuit seemed to put the unitary waters theory out to pasture in response to Fidelity's argument:

[w]ere we to conclude otherwise, and hold that the massive pumping of salty, industrial waste water into protected waters does not involve [the] discharge of a "pollutant," even though it would degrade the receiving waters to the detriment of farmers and ranchers, we would improperly undermine the integrity of [the CWA's] prohibitions.¹⁷⁹

Finally, the court addressed Fidelity's line of reasoning that only water which had been "transformed by human activity" was a "pollutant" subject to an NPDES permit.¹⁸⁰ In dismissing this quarrel, the Ninth Circuit illustrated how this line of reasoning would lead to an illogical conclusion because "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."¹⁸¹ The Ninth Circuit reversed the district court's decision and required an NPDES permit.¹⁸²

E. The United States Supreme Court Pumping Station Case: South Florida Water Management District v. Miccosukee Tribe of Indians

The only decided United States Supreme Court case to discuss the unitary waters theory was *South Florida Water Management District v. Miccosukee Tribe of Indians*.¹⁸³ The Supreme Court did not decide that the Eleventh Circuit's application of the pumping station "but-for" test was inadequate, namely that without the canal there would be no "addition" to the Everglades.¹⁸⁴ The Court held it was instead "premature," and remanded the case to the Eleventh Circuit to determine the factual issue of whether the two waters were meaningfully distinct.¹⁸⁵

991 (E.D. Wash 1994) (explaining the CWA does not protect groundwater alone but that courts are split regarding whether the CWA governs groundwater that is hydrologically connected to surface water). Therefore, CBM water may be distinguishable from "the waters of the United States" in the unitary waters theory discussion. *See id.*

179. *Fidelity*, 325 F.3d at 1162 (citation omitted) (last alteration in original).

180. *Id.*

181. *Id.* at 1163.

182. *Id.*

183. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), *reh'g denied*, 541 U.S. 1057 (2004).

184. *Id.* at 111.

185. *Id.* at 111-12.

1. The District Court

The Miccosukee Tribe of Indians and Friends of the Everglades, an environmental organization, together as plaintiffs filed a CWA citizen suit.¹⁸⁶ Plaintiffs complained that the regional South Florida Water Management District (SFWMD) was “discharging a pollutant” and had failed to obtain the proper NPDES permit for the Central and Eastern Water Project (Project).¹⁸⁷ Since 1948, the Project has converted the Everglades, which would otherwise be a sea of grass covered by a free flowing sheet of blended groundwater and rainwater, into cultivated land, among other things.¹⁸⁸ The genesis of the lawsuit was the point where the Project collects rainwater and groundwater in a canal, C-11, and then diverts it through a pump station, S-9, to a wetland remnant of the Everglades, WCA-3.¹⁸⁹

The Project created a seemingly harmonious balance of productivity and protection, but there was trouble in paradise.¹⁹⁰ A newspaper reported that “[t]he torrent of water spewing from the backside of the pump churned up a foot-thick blanket of yellow-brown froth. Blobs of foam drift over murky, greenish-brown water and out into what once were the pristine environs of the Florida Everglades.”¹⁹¹ The water collected in the C-11 canal was higher in phosphorous than the rest of the water in the area because of run-off from agricultural fertilizers.¹⁹² A growth of algae blooms and non-native plants was the ultimate effect to the Everglades wetland, WCA-3.¹⁹³

The district court granted summary judgment for the plaintiffs.¹⁹⁴ The district court reasoned the canal, C-11, and Everglades wetland, WCA-3, were not a unitary body of water:

[i]n this case an addition of pollutants exists because undisputedly water containing pollutants is being discharged through S-9 from C-11 waters into the Everglades, both of which are separate bodies of United States water with . . . different quality levels. They are two separate bodies of wa-

186. *Id.* at 99.

187. *Id.* at 99-103.

188. *Id.* at 100.

189. *Id.* at 100-01.

190. *Id.* at 101.

191. Warren Richey, *Everglades Cleanup at Stake in Court Case*, CHRISTIAN SCI. MONITOR, Jan. 14, 2004, available at <http://www.csmonitor.com/2004/0114/p02s01-usju.html> (last visited Mar. 20, 2006). See John H. Minan, *Recent Developments in Environmental Law*, 36 URB. LAW. 793, 794-95 (2004).

192. *Miccosukee*, 541 U.S. at 101-02.

193. *Id.* at 101.

194. *Id.*

ter because the transfer of water or its contents from C-11 into the Everglades would not occur naturally.¹⁹⁵

The district court therefore reasoned that without the pumping station, S-9, the two waters would not otherwise mix and held the SFWMD must obtain an NPDES permit.¹⁹⁶ The SFWMD appealed to the Eleventh Circuit.¹⁹⁷

2. The United States Court of Appeals for the Eleventh Circuit

The Eleventh Circuit affirmed the district court.¹⁹⁸ First, the Eleventh Circuit put itself in the shoes of the receiving water by maintaining that “the receiving body of water is the relevant body of navigable water” for the court’s analysis.¹⁹⁹ Second, the court found that there was an “addition of a pollutant:”

[F]or an addition of pollutants to be from a point source, the relevant inquiry is whether – but for the point source – the pollutants would have been added to the receiving body of water When a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed, that point source is the cause-in-fact of the discharge of pollutants.²⁰⁰

The Eleventh Circuit concluded that had it not been for the S-9 pump there would be no discharge of greenish-brown pollutants from the canal, C-11, into the Everglades wetland, WCA-3.²⁰¹ The Eleventh Circuit held an NPDES permit was required for the pump.²⁰²

3. The United States Supreme Court

The SFWMD, with the EPA weighing in as *amicus curiae*, appealed three issues to the Supreme Court.²⁰³ The first issue, and the question over which the Supreme Court granted certiorari, was “[w]hether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an ‘addition’ of a pollutant ‘from’ a point source

195. *Id.* at 103 (citation omitted).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* (citation omitted).

200. *Id.* at 103-04 (citation omitted).

201. *Id.*

202. *Id.* at 104.

203. *Id.*

triggering the need for a [NPDES] permit under the [CWA]?”²⁰⁴ The petitioner SFWMD seemed to craft the issue in order to implicate the outside world test for an “addition” from the dam cases and to implicate that the “point source” must generate the pollutant to be a CWA “point source.”²⁰⁵

Impliedly in contrast to the dam cases, the Supreme Court looked to the CWA section 502(7) definition of a “point source” and held the point source does not need to generate the pollutant.²⁰⁶ The Supreme Court explained, “[t]ellingly, the examples of ‘point sources’ listed by the [CWA] include pipes, ditches, tunnels, and conduits, objects that do not themselves generate pollutants but merely transport them.”²⁰⁷ Therefore, applying the CWA definition to the instant case, the S-9 pump was a “point source” despite the fact it did not generate the phosphorus-laden water.²⁰⁸

The EPA advanced its unitary waters theory in response to whether the water transfer “adds” a pollutant.²⁰⁹ The EPA explained that “all” the waters of the United States, including the territorial seas, “should be viewed unitarily [as one single body of water] for purposes of NPDES permitting requirements.”²¹⁰ By the EPA’s reasoning, no NPDES permit would be required, as in this case, when “water from one navigable water body is discharged, unaltered, into another navigable water body.”²¹¹ The EPA advanced that water transfers should not be regulated by NPDES permitting under any conditions, for example an NPDES permit is not necessary “even if one water body were polluted and the other pristine, and the two would not otherwise mix.”²¹² Thus, the S-9 pump did not need an NPDES permit.²¹³

The EPA argued that the plain language of the CWA supported its unitary waters theory.²¹⁴ The EPA asserted that Congress did not intend for the SFWMD to obtain an NPDES permit because the CWA left out the word “any” from the phrase “navigable waters.”²¹⁵ The EPA asserted that the

204. *Id.* at 104.

205. *See id.*

206. *Id.* at 105.

207. *Id.*

208. *Id.*

209. *Id.* at 105-06.

210. *Id.*

211. *Id.* at 106.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* The CWA states in pertinent part that “any addition of any pollutant to navigable waters from any point source . . .” must be permitted. Clean Water Act § 502(12), 33 U.S.C. § 1362(12) (2000).

proper regulatory regime for this water transfer was a local, non-point source pollution program and not the NPDES regime.²¹⁶

The EPA then plead to the Supreme Court for *Chevron* deference.²¹⁷ As the CWA does not define the term “addition” in the context of what is a CWA “discharge,” the EPA argued it had supplied a reasonable interpretation of “addition” with the unitary waters theory.²¹⁸ The EPA then asserted the practical considerations that requiring an NPDES permit for “every engineered diversion of one navigable water into another . . .” would be an expensive NPDES regulatory jumble.²¹⁹ Many states and cities filed amici curiae briefs in support of the SFWMD on this issue, including an adamant brief by the states of Colorado and New Mexico who were joined by eleven other western states.²²⁰

The Supreme Court first countered the EPA’s assertions that Congress did not intend for the CWA to protect individual bodies of water.²²¹ First, the Supreme Court acknowledged in dicta that CWA section 304(f)(2)(F) does not explicitly exempt non-point pollution sources from the NPDES program if they *also* fall within the “point source” definition.²²² The Supreme Court also acknowledged in dicta that CWA sections 303(c)(2)(A) and 303(d) may be contrary to the unitary waters approach.²²³ Particularly, section 303(d) mandates that each state determine the total maximum daily load (TMDL) of each pollutant that a single water body can sustain and then allocate the amount each entity can pollute the water, like a pollution budget, in order to protect that individual body of water.²²⁴ The Supreme Court summed up that “this approach suggests that the Act [CWA] protects individual water bodies as well as the ‘waters of the United States’ as a whole.”²²⁵

The Supreme Court next noted skepticism for affording the EPA such strong *Chevron* deference for its unitary waters theory. After reviewing the record and briefs, the Court questioned whether the unitary waters theory was a long-standing official policy because, “the Government does not identify any administrative documents in which EPA has espoused that position. Indeed, an amicus brief filed by several former EPA officials argues that the

216. *Miccosukee*. 541 U.S. at 106. The EPA asserted that CWA section 304(f)(2)(F) should govern this transfer. *Id.*

217. *See id.*

218. *Id.* at 107.

219. *Id.* at 108.

220. *See Colorado Brief, supra* note 2.

221. *Miccosukee*, 541 U.S. at 107.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

agency once reached the opposite conclusion.”²²⁶ The Court cited the EPA’s NPDES general conditions regulation as an example of when the EPA in fact regulates water transfers.²²⁷ Therefore, as the United States Supreme Court reviewed the EPA’s official documents it found that the unitary waters approach could instead conflict with current EPA policy.²²⁸

The Supreme Court then turned to the arguments advanced regarding the effects of requiring NPDES permits for every transfer of water.²²⁹ First, the Court examined the arguments by the EPA and amici in favor of SFWMD. The Supreme Court summarized their concerns:

[m]any of those diversions might also require expensive treatment to meet water quality criteria. It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress’ specific instruction that “the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired” by the Act.²³⁰

All the same, many states, tribes, and cities filed amicus curiae briefs in support of the respondents citing important policy considerations.²³¹ The Supreme Court summarized the arguments in favor of the Miccosukee Tribe of Indians and the Friends of the Everglades while also suggesting a solution:

On the other hand, 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.²³²

Nevertheless, the Supreme Court did not affirm the Eleventh Circuit’s rejection of the unitary waters theory.²³³

The Supreme Court majority, with Justice O’Connor authoring the opinion, did not rule on the unitary waters theory definition of “addition.”²³⁴

226. *Id.* at 107-08 (citation omitted).

227. *Id.* at 108 (citing 40 C.F.R. § 122.45(g)(4) (2003)).

228. *Id.*

229. *Id.* at 107-08.

230. *Id.*

231. *Id.*

232. *Id.* at 108 (citing 40 C.F.R. §§ 122.28, 123.25 (2003)).

233. *Id.* at 111-12.

234. *Id.* at 109. Commentators have surmised that the Court did not rule on the unitary waters issue because Justice O’Connor was writing to get a majority among

The majority explained, “we find it necessary to vacate the judgment of the [Eleventh Circuit] with respect to a third argument presented by the [SFWMD], the unitary waters argument will be open to the parties on remand.”²³⁵ The Supreme Court stated that this issue was whether the two bodies of water were meaningfully distinct which would be a factual issue that needed further development below before the determination could be made.²³⁶

Justice Scalia in part concurred with the majority and, in part, dissented from the majority.²³⁷ Justice Scalia concurred in the majority’s holding that an NPDES permit was required for the S-9 pump despite the fact the pump does not itself generate the pollutant.²³⁸ However, Justice Scalia found the majority’s unitary waters decision faulty on two grounds.²³⁹ First, Scalia asserted that the majority invited the consideration of another legal theory that was not in response to the question presented to the Court.²⁴⁰ Therefore, as a procedural matter, Justice Scalia would have affirmed the Eleventh Circuit without reaching the unitary waters theory question.²⁴¹ Furthermore, Scalia emphasized that the unitary waters theory was argued below and rejected.²⁴² As such, there was no point in asking the Eleventh Circuit to reconsider an argument it had already rejected.²⁴³

III. ANALYSIS

The EPA employed the unitary waters theory to interpret five different terms of the CWA accordingly implicating four important issues. The EPA interpreted the terms “addition,”²⁴⁴ “discharge,”²⁴⁵ “pollutant,”²⁴⁶ “from

very different opinions at the post-argument conference. Bishop, *supra* note 166, at 129.

235. *Miccosukee*, 541 U.S. at 109.

236. *Id.* at 111-12.

237. *Id.* at 112 (Scalia, J., concurring in part, dissenting in part).

238. *Id.*

239. *Id.*

240. *Id.* at 112-13 (Scalia, J., concurring in part, dissenting in part).

241. *Id.*

242. *Id.* (quoting as an example *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 280 F.3d 1364, 1368 n.5 (11th Cir. 2002) (“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 contents the outside world cannot include another body of navigable waters.”); Brief for Appellant at 10, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 280 F.3d 1364 (11th Cir. 2002) (“The S-9 pump station merely moves navigable waters from one side of the levee to another.”)).

243. *Id.*

244. *Nat’l Wildlife Fed’n v. Consumers Power*, 862 F.2d 580, 584 (6th Cir. 1988); *Dubois v. USDA*, 102 F.3d 1273, 1295 (1st Cir. 1996), *cert. denied*, 521 U.S. 1119

a point source,”²⁴⁷ and the omission of “any” before the term “navigable waters”²⁴⁸ with its unitary waters theory argument. Still, the plain language of the CWA does not support these interpretations.²⁴⁹ Moreover, in *Miccosukee* the EPA sided with the SFWMD and amici to assert that it would be too costly and complicated for the NPDES permitting program to regulate every water transfer.²⁵⁰ By contrast, other amici weighed in to illustrate

(1997); *Catskill Mountain Trout Unlimited v. City of New York*, 273 F.3d 487, 483 (2d Cir. 2001), *appeal docketed*, No. 03-7203 (2d Cir. Feb. 21, 2003).

245. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982).

246. *N. Plains. Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1163 (9th Cir. 2003), *cert. denied*, 540 U.S. 967 (2003).

247. *Catskill*, 273 F.3d at 483.

248. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106 (2004), *reh'g denied*, 541 U.S. 1057 (2004).

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

250. *Infra* part (III) (B) (1). Myriad amici sided with the SFWMD. Brief of Amici Curiae 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 in Support of Petitioner, S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626) [hereinafter Water District Brief]; Brief of Amici Curiae of the City of New York, the Association of Metropolitan Water Agencies, the National Association of Flood and Stormwater Management Agencies, the American Water Works Association, and the Association of Metropolitan Sewerage Agencies in Support of Petitioner, S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626); Brief for the Utility Water Act Group as Amicus Curiae in Support of Petitioners, S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626); Brief of Amicus Curiae National Association of Home Builders in Support of Petitioner, S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626); Brief for the United States as Amicus Curiae Supporting Petitioner, S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626) [hereinafter EPA Brief]; Colorado Brief, *supra* note 2; Brief of the National League of Cities, Council of State Governments, International City/County Management Association, National Conference of State Legislatures, National Association of Counties, International Municipal Lawyers Association, and U.S. Conference of Mayors as Amici Curiae Supporting Petitioner, S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626); Brief Amici Curiae of the National Water Resources Association, the Metropolitan Water District of Southern California, the Central Arizona Water Conservation District, the Arizona Department of Water Resources, the Association of California Water Agencies, the Western Urban Water Coalition, the Western Coalition of Arid States, and the State Water Contractors, in Support of Petitioner, S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626); Brief for the Lake Worth Drainage District and the Florida Association of Special Districts as Amici Curiae in Support of Petitioner South Florida Water Management District, S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626); Brief of Amicus Curiae The City of Weston, Flor-

competing policies and assert that, as a practical matter, the NPDES permitting program should regulate much deserving water quality issues in an efficient manner.²⁵¹ Furthermore, as amici and commentators point out, if the EPA continues to allow unregulated discharges of dirty water to dispropor-

ida, in Support of Petitioner, S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626); Brief of Amicus Curiae of Pacific Legal Foundation in Support of Petitioner, S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626); Brief of Idaho Governor Dick Kempthorne as Amicus Curiae in Support of Petitioner, S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626); Brief for Amici Curiae Florida Fruit and Vegetable Association, Florida Farm Bureau Federation, American Farm Bureau Federation, and Charles H. Bronson, as the Florida Commissioner of Agriculture in Support of Petitioner, S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626).

251. *Infra* part (III) (B) (2). A multitude of amici curiae sided with the Miccosukee Tribe of Indians and the Friends of the Everglades. Brief of Amici Curiae Trout Unlimited Inc., Catskill Mountains Chapter of Trout Unlimited, Inc., Theodore Gordon Flyfishers, Inc., Catskill-Delaware Natural Water Alliance, Inc., Federated Sportsmen's Clubs of Ulster County, Inc., Riverkeeper, Inc., in Support of Respondents, S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626); Amicus Brief of the Association of State Wetland Managers and the Tropical Audubon Society in Support of Respondents, S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626); NTEC & NCAE Brief, *supra* note 18, Motion for Leave to File Brief and Brief Amici Curiae of the Coalition of Greater Minnesota Cities and the City of Saint Cloud, Minnesota in Support of Respondents, S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626); Brief of Amici Curiae Former Administrator Carol M. Browner, Former Assistant Administrators Charles Fox and Robert W. Perciaepe and Former General Counsels Jonathan Z. Cannon and Jean I. Nelson of the United States Environmental Protection Agency in Support of Respondents, S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626) [hereinafter Browner Brief]; Brief of Amici Curiae Florida Wildlife Federation, Environmental Confederation of Southwest Florida, and Audubon Society of the Everglades in Support of Respondents, S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626); Brief of Amici Commonwealth of Pennsylvania, Department of Environmental Protection in Support of Respondents, S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626); Amicus Curiae Brief of Tongue & Yellowstone River Irrigation District, Tongue River Water Users' Association, and Northern Plains Resource Council, Inc. in Support of Respondents, S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626); Brief of the States of New York, Connecticut, Illinois, Kentucky, Maine, Massachusetts, Michigan, Missouri, New Jersey, North Carolina, Oklahoma, Vermont, and Washington as Amici Curiae in Support of Respondents, S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626); Brief of Amici Curiae National Wildlife Federation, Natural Resources Defense Council, Sierra Club, American Rivers, National Audubon Society, National Parks Conservation Association and World Wildlife Fund in Support of Respondents, S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626).

tionately affect certain populations in the United States, then environmental injustice occurs.²⁵² Finally, as the Supreme Court noted, the unitary waters theory was not a long-standing EPA policy memorialized in notice-and-comment rulemaking or formal adjudication, as would accord *Chevron* deference.²⁵³ The courts should instead weigh the *Skidmore* factors and give the unitary waters theory little deference.²⁵⁴

A. *Contrary to the CWA*

Mark Twain penned, “[t]he difference between the *almost-right* word & the *right* word is really a large matter – it’s the difference between lightning-bug & lightning.”²⁵⁵ The EPA advanced its interpretations of the CWA terms “discharge,” “pollutant,” “addition,” “from” and “point source,” and the omission of “any” before the term “navigable waters” to support its unitary waters theory.²⁵⁶ The federal courts have rightly rejected the EPA’s unitary waters interpretation of the terms “discharge,” of a “pollutant,” “addition,” “from,” and “point source.”²⁵⁷ Only the term “any” in relation to “navigable waters” remains for the EPA to keep its unitary waters theory afloat.²⁵⁸

1. The Omission of “Any”

In *Miccosukee*, the EPA argued that the almost right word was “any” and that was the difference between Congress’s intent for the unitary waters theory and Congress’s intent against it.²⁵⁹ The EPA advanced that the term “any” indicates Congress’s intent that various types of additions, pollutants, and point sources are within the “regulatory reach” of the CWA.²⁶⁰ The EPA explained CWA section 502(14) defines “discharge of a pollutant” to include *any* addition of *any* pollutant to the navigable waters from *any* point source.²⁶¹ The EPA reasoned the conspicuous absence of the term *any* be-

252. *Infra* part (III) (C).

253. *Infra* part (III) (D). Nevertheless, the deference analysis may change as the EPA is presently writing regulations for water transfers. *Water Pollution: EPA to Finalize Rules on Water Transfers, Livestock Operations, Pesticides in Water*, CHEM. REG. DAILY (BNA) D25 (Mar. 15, 2006).

254. *Id.*

255. THE QUOTABLE MARK TWAIN: HIS ESSENTIAL APHORISMS, WITTICISMS & CONCISE OPINIONS 300 (R. Kent Rasmussen ed., Contemporary Books 1998) (citing Letter to George Bainton (Oct. 15, 1888), on file with the Mark Twain Project) [hereinafter Quotable Mark Twain].

256. See *supra* notes 244-48 and accompanying text.

257. *Id.*

258. EPA Brief, *supra* note 250, at 19.

259. *Id.*

260. *Id.*

261. *Id.*

fore the phrase “the navigable waters” was the Congressional expression that there was no need for an NPDES permit to regulate the simple conveyance of a pollutant from one body of navigable water to another.²⁶²

More specifically, and confusingly, the EPA asserted that Congress intended to only regulate the discharge of pollutants from sources *other than* a navigable water.²⁶³ The EPA argued that had Congress intended NPDES permitting for the addition of a navigable water to another navigable water, then “it would have made that extraordinary intention manifest.”²⁶⁴ The EPA made the convoluted argument that Congress would have used the language “a specific portion of the navigable waters” in the NPDES permitting sections of the CWA rather than simply navigable waters if it had intended NPDES permitting to regulate water transfers.²⁶⁵ The EPA seemed to argue that permitting at the “point source” of the water transfer was too late because “[w]hatever pollutants the waters contain are already in the ‘waters of the United States’ when those waters pass through a point source.”²⁶⁶ Furthermore, the EPA maintained that while “[s]uch an activity can conceivably lead to changes in water quality, but that does not, within the normal meaning of the relevant terms, constitute an ‘addition’ of any pollutant to ‘the waters of the United States.’”²⁶⁷ The EPA concluded that non-point source pollution programs and other programs “which attack the problem at its source” should instead govern these water quality issues.²⁶⁸

The EPA’s unitary waters interpretation of the plain language of the CWA does not hold water. The purpose of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”²⁶⁹ Congress wrote the CWA for a singular “Nation” with many, plural, “waters.”²⁷⁰ Congress did not write the CWA for the “Nation’s water,” in the singular, as if to indicate one unitary body of water.²⁷¹ Congress also recognized that the Nation’s many waters may be in different conditions and therefore the purpose was to *restore* some bodies of water and to *maintain* others.²⁷² If the purpose of the CWA was to clean up the Nation’s one body of water, then it would have been enacted only to restore the Nation’s wa-

262. Daniel M. Krainin & Ami M. Grace, *Agricultural Management Case Law Update*, 9 A.B.A. AGRIC. MGMT. COMMITTEE NEWSL. 3, 4 (Jan. 2005).

263. Travis Trimble, *Eleventh Circuit Survey*, 56 MERCER L. REV. 1255, 1264 (2005) (citation omitted) (emphasis added).

264. EPA Brief, *supra* note 250, at 19.

265. *Id.* at 19-20 (citation omitted).

266. *Id.* at 16.

267. *Id.*

268. *Id.* at 27.

269. Clean Water Act § 101(a), 33 U.S.C. § 1251(a) (2000).

270. *See id.*

271. *See id.*

272. *See id.*

ter.²⁷³ Furthermore, Congress wrote the CWA for the purpose of restoring and maintaining the integrity of the Nation's many waters.²⁷⁴ The Second Circuit rightly noted that the chemical, physical, and/or biological integrity of an individual stream may be changed by artificially mixing it with a different stream or transferring it to a completely different water basin.²⁷⁵ For example, the integrity of cold water will be damaged by the addition of warm water because it will destroy the natural habitat for cold water trout, which is part of the stream's biological integrity.²⁷⁶ Therefore, as the Second Circuit explained, the unitary waters theory is contrary to the aim of the CWA because the natural chemical, physical, or biological integrity can be destroyed by mixing one of the Nation's waters with another of the Nation's waters.²⁷⁷

2. Protection for Individual Bodies of Water

As the Supreme Court illustrated, the EPA's unitary waters theory is incorrect because at least three specific sections of the CWA do protect individual bodies of water.²⁷⁸ Notably, CWA section 301(a) states "the discharge of any pollutant by any person shall be unlawful."²⁷⁹ Even if the water was already polluted, the act of discharging more pollutant in already polluted water is still unlawful.²⁸⁰ Section 301(a) instead regulates all discharges in order to protect individual bodies of water from act of discharging.²⁸¹ Moreover, section 402(b) allows a State to propose an NPDES regulatory regime for "navigable waters within its jurisdiction."²⁸² Navigable waters under that State's jurisdiction are then protected separately from the waters of another State's jurisdiction, treating them as a body of water within the border of each individual State and not as one unitary body of water within the borders of the United States as a whole.²⁸³ As a further example indicating individual water protection, CWA section 502(12)(B) protects "the waters of the contiguous zone" or "the ocean" from a discharge of a pollutant.²⁸⁴ Under the CWA regime, the navigable waters in one jurisdic-

273. *See id.*

274. *Id.*

275. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 494 (2d Cir. 2001), *appeal docketed*, No. 03-7203 (2d Cir. Feb. 21, 2003).

276. *See id.*

277. *Id.*

278. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 107-09 (2004), *reh'g denied*, 541 U.S. 1057 (2004).

279. Clean Water Act § 301(a), 33 U.S.C. § 1311(a) (2000).

280. *See id.*

281. *See id.*

282. Clean Water Act § 402(b).

283. *See id.*

284. § 502(12)(B).

tion, or contiguous zone, or the ocean, are then protected individually at the very least from waters of another jurisdiction, non-contiguous zone, or non-ocean.²⁸⁵ None of these provisions, then, implicate the unitary waters theory.

As the Supreme Court explained, CWA section 303(d) is the most telling because it mandates that each State determine the TMDL of each pollutant that an individual water body can sustain.²⁸⁶ To provide this protection for individual waters, a State must first identify distinct bodies of water within its borders.²⁸⁷ A State must then classify each distinct and individual body of water.²⁸⁸ Based on each individual body of water's classification, a State assigns the TMDL that individual water body can bear in order to protect it, separately.²⁸⁹ As the Supreme Court summarized, "[t]his approach suggests that the Act protects individual water bodies as well as the 'waters of the United States' as a whole."²⁹⁰ Hence, a commentator has reasoned the CWA was "aimed at protecting individual bodies of water, as shown by its provisions for water quality standards" along with the other individual water protection measures discussed above.²⁹¹

3. Conflict with Current NPDES Regulations

The Supreme Court announced, and commentators agree, that the unitary waters theory "could also conflict with current NPDES regulations."²⁹² For example, a published EPA regulation governing NPDES permit conditions discusses intake water as distinct from the discharging water as opposed to discussing the two as a unitary body of water.²⁹³ This regulation outlines how dischargers may get credit for pollutants already in the intake water.²⁹⁴ As such, the discharger's effluent limitations or standards for the discharge water can be adjusted for those pollutants that were already in the intake water.²⁹⁵ To receive a pollution credit, the discharger must demonstrate that "the control system it proposes or uses to meet applicable

285. *See id.*

286. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 107 (2004), *reh'g denied*, 541 U.S. 1057 (2004); Clean Water Act § 303(d), 33 U.S.C. 1313(d) (2000). TMDL stands for total maximum daily load. *Id.*

287. § 303(d)(1)(A)-(B), 303(d)(3).

288. § 303(d)(1)(C).

289. *Id.* However, the EPA has been slow to implement CWA section 303(d). Benson, *supra* note 16, at 221.

290. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 107 (2004), *reh'g denied*, 541 U.S. 1057 (2004).

291. Philip Weinberg, *2003-2004 Survey of New York Law*, 55 SYRACUSE L. REV. 965, 976-77 (2005) (citations omitted).

292. Trimble, *supra* note 263, at 1264 (quoting *Miccosukee*, 541 U.S. at 107).

293. 40 C.F.R. § 122.45 (2005).

294. *Id.*

295. *Id.*

technology-based limitations and standards would, if properly installed and operated, meet the limitations and standards in the absence of pollutants in the intake waters.²⁹⁶ Dischargers can *only* get this credit if the discharger proves that the intake water is drawn from the *same body of water* as the body of water receiving the discharge.²⁹⁷ This credit is not available when the *intake water* is from a body of water *distinct from the receiving body of water*.²⁹⁸ Therefore, the EPA's NPDES regulatory regime will treat the discharge differently when the intake water and the receiving water in the transfer are *two distinct bodies of water*, thus protecting the *receiving water*.²⁹⁹

4. NPDES Discharges vs. Dredge and Fill Discharges

Commentators have observed the EPA's unitary waters construction of the CWA regarding NPDES discharge permits (CWA section 402) conflicts with the EPA's CWA construction regarding dredge and fill permits (CWA section 404).³⁰⁰ The rules of statutory construction, and common sense, dictate that phrases in two statutory sections must be interpreted consistently with one another.³⁰¹ All discharges of pollutants are strictly barred under CWA section 301 unless the discharges are covered by a CWA permit.³⁰² Therefore, the first element of both NPDES permits and dredge and fill permits is the "discharge".³⁰³ Discharging dredge and fill material includes activities such as sidcasting,³⁰⁴ placer mining,³⁰⁵ and deep ripping.³⁰⁶

296. *Id.*

297. *Id.*

298. *See id.*

299. *See id.*

300. Allison M. Dornsife, Comment, *From a Nonpollutant into a Pollutant: Revising EPA's Interpretation of the Phrase "Discharge of any Pollutant" in the Context of NPDES Permits*, 35 ENVTL. L. 175 (2005).

301. *Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993) (citations omitted); *First City Bank v. Nat'l Credit Union Admin. Bd.*, 111 F.3d 433, 438-39 (6th Cir. 1997).

302. Clean Water Act § 301, 33 U.S.C. § 1314 (2000).

303. *Id.* § 402, § 404. Section 301 incorporates the definition of discharge from CWA section 502(12). *Id.*

304. *United States v. Deaton*, 209 F.3d 331, 337 (4th Cir 2000). Sidcasting is the piling of dirt taken from ditch-digging or channeling activities and piling it on the sides of the ditch. *Id.* at 332.

305. *Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990). Placer mining runs water through sediment from stream beds, for example, to force the metal ores to settle to the bottom while the sediment remains suspended in the water that is then released back into the stream. *Id.* at 1282. This "sluicing process" is much like a contemporary "panning for gold" process. *See, e.g., id.*

306. *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 815 (9th Cir. 2001), *aff'd*, 537 U.S. 99 (2002). Deep ripping results when four-to-seven foot long metal prongs poke holes deep in the earth and the displaced soil is drug behind the bulldozer or tractor. *Id.* at 812.

None of these activities increase the amount of pollutant in the navigable waters, or add pollutants from the outside world, because they disturb what is already there.³⁰⁷ Broader still, a dredge and fill “discharge” includes material such as grass from a riverbed that never leaves the river but rather is simply “churned up” and re-deposited.³⁰⁸ In summary, the EPA has interpreted discharge from CWA section 301 broadly in the dredge and fill context and narrowly in the NPDES context thus violating canons of statutory construction.

B. NPDES Permitting is Flexible and Effective

In his personal writings, Mark Twain composed that “[t]here are two times in a man’s life when he should not speculate: when he can afford it, and when he can’t.”³⁰⁹ In *Miccosukee*, the Supreme Court stated that if NPDES permits are required for simple water transfers then “thousands of new permits might have to be issued, especially to western states, whose water supply networks often rely on engineered transfers among various natural water bodies. Many of those diversions might also require expensive treatment to meet water quality criteria.”³¹⁰ Commentators have summarized “such requirements could impose serious burdens on water supply projects, but could also be necessary to protect water quality.”³¹¹

1. Potential for Increased NPDES Regulation

The states of Colorado and New Mexico, writing for eleven western states, led the amici charge to resist NPDES permitting for water transfers.³¹² Colorado alone has more than several hundred water transfers that *may* each require NPDES permits if the unitary waters theory is rejected.³¹³ Commentators have noted that western states do “rely heavily on transfers from various natural water bodies to supply their citizens with water of sufficient quality.”³¹⁴ Commentators and Water District amici argued that NPDES permitting for these transfers would result in inevitable delays, thus producing “significant practical consequences.”³¹⁵ The first inevitable delay is a

307. *Id.*; Rybachek, 904 F.2d at 1285; *Deaton*, 209 F.3d at 337.

308. *U.S. v. M.C.C. of Fla. Inc.*, 772 F.2d 1501, 1503-04 (11th Cir. 1985).

309. Quotable Mark Twain, *supra* note 255, at 261 (citations omitted).

310. *S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 108 (2004), *reh’g denied*, 541 U.S. 1057 (2004) (citation omitted).

311. Benson, *supra* note 16, at 213.

312. Colorado Brief, *supra* note 2.

313. *Id.* at 3 n.2.

314. Lawrence R. Liebesman & John H. Turner, Jr., *The 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.”* SKO37 A.L.I.-A.B.A. 131, 139 (2004).

315. *Miccosukee*, 541 U.S. at 108; Liebesman, *supra* note 314, at 139.

result of water districts and others needing to apply for and receive thousands of new NPDES permits for both existing and proposed water transfers.³¹⁶ Commentators have explained that there is also potential for more expensive water due to the permitting and treatment to achieve NPDES water quality conditions.³¹⁷ In order to achieve the water quality conditions in the permits, water may need to be stored and treated at the transfer point.³¹⁸ Commentators have illustrated two possible consequences of such storage and treatment: expensive treatment facilities would need to be built in pristine Western areas;³¹⁹ and water would be delayed in these treatment facilities.³²⁰ This delay of the water may equal less water to allocate.³²¹ State water allocation rights cannot be “superseded, abrogated or otherwise impaired” by the EPA as per the Wallop Amendment to the goals section of the CWA.³²² Commentators and amici argue the ultimate issue is then that NPDES permitting for water transfers would interfere with state water allocation rights, violating the CWA.³²³ Nevertheless, not all states agree.

2. Potential for Innovative NPDES Regulation

In *Micosukee*, the eastern states of New York, Connecticut, Illinois, Kentucky, Maine, Massachusetts, Michigan, Missouri, New Jersey, North Carolina, Vermont, and Pennsylvania joined Oklahoma and Washington, from west of the Mississippi River, to support NPDES permitting for water transfers.³²⁴ As an example of a state in support of NPDES regulation of water transfers, the State of Pennsylvania uniformly administers its NPDES program to regulate transfers of water.³²⁵ In 1986, the Pennsylvania courts held that water transfers required NPDES permits.³²⁶ After nearly twenty years of experience, Pennsylvania made the case to the Supreme Court:

Since 1986, Pennsylvania has not experienced any of the litany of problems that [SFWMD] and its [amici curiae] predict. The NPDES permit program authorizes the use of general permits that can be issued quickly without significant administrative burden, and many of the NPDES permits also authorize the use of Best Management Practices (BMP's) in place of more traditional numeric effluent limi-

316. Liebesman, *supra* note 314, at 139.

317. *Id.*

318. Nichols, *supra* note 37, at 122.

319. *Id.*

320. Water District Brief, *supra* note 250, at 12.

321. Nichols, *supra* note 37, at 122.

322. Clean Water Act § 101(g), 33 U.S.C. § 1251(g) (2000).

323. *Id.*; Nichols, *supra* note 37, at 122.

324. *See supra* note 251 and accompanying text.

325. Pennsylvania Brief, *supra* note 251, at 5.

326. *DEL-AWARE Unlimited v. DER*, 508 A.2d 348 (Penn. 1986).

tations in appropriate situations. The NPDES permit program also expressly authorizes compliance schedules where the permittee needs additional time to achieve compliance.³²⁷

The EPA authorized the use of these general NPDES permits through its regulations.³²⁸ The EPA authorized NPDES general permit categories to include: stormwater point sources, point sources from the same or substantially similar types of operations, point sources with similar wastes or disposal practices, and point sources with the same operating conditions.³²⁹ These general permits can be as large as a whole State or as small as a sewer district.³³⁰ As illustrated by the State of Pennsylvania, the EPA general permitting regulation thus allows a State to craft a manageable NPDES permit program.

Even if the Eleventh Circuit confirms on remand that an NPDES permit is needed for the *Miccosukee* water transfer,³³¹ the western states' hands are not tied. As Pennsylvania illustrated, states may create such authorized general categories as: concentrated animal feeding operations (CAFO's), stormwater associated with construction activities, and municipal storm sewer permits.³³² Other States could create such general permits for categories of use in the style of Pennsylvania and consistent with long-standing EPA policy.³³³ A State could develop a general permit for each of its water basins.³³⁴ Or, a State could develop a general permit for each size of water transfer.³³⁵ The EPA has already promulgated a general NPDES permit regulation,³³⁶ it is now up to the states to implement the regulation and craft their program in a way that best protects water quality in an efficient and effective manner.

Commentators, along with the states of Colorado and New Mexico, advocated that the Wallop Amendment is a barrier to NPDES permitting,³³⁷ but perhaps it invites an innovative management opportunity. The Wallop amendment, CWA section 101(g), states:

327. Pennsylvania Brief, *supra* note 251, at 5.

328. 40 C.F.R. § 122.28 (2005).

329. *Id.*

330. *Id.*

331. S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 109 (2004), *reh'g denied*, 541 U.S. 1057 (2004).

332. Pennsylvania Brief, *supra* note 251, at 16-17.

333. *Id.*; 40 C.F.R. § 122.28.

334. 40 C.F.R. § 122.28.

335. *See, e.g. id.*

336. *Id.*

337. Nichols, *supra* note 37, at 121.

[i]t is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.³³⁸

Developing general NPDES basin-by-basin permit requirements through a coordinated local, state, tribal, and federal approach may provide the comprehensive solutions the Wallop Amendment contemplates.³³⁹ For example, the state of Georgia is undertaking a state-wide plan that accounts for water transfers on a water basin by water basin approach in order to meet the water quantity needs of its citizens.³⁴⁰ As a result, the EPA's general permitting regulations set up a vehicle through which federal agencies can cooperate with State agencies to develop water quality solutions.

In addition to general permitting, State and local governments could better manage their NPDES programs through cost-sharing with national financial assistance.³⁴¹ Commentators have noted that the NPDES regulatory regime currently provides little incentive for compliance.³⁴² Under the NPDES program, State and local governments respond to great regulatory demands with few regulatory resources.³⁴³ The cost combined with the fact that "[e]nvironmental impacts usually are the cumulative product of many sources, and polluters frequently can impose the bulk of pollution problems on those downstream."³⁴⁴ Therefore, commentators note it is not surprising that for local governments "the benefits of environmental expenditures are likely to receive a lower priority than other expenditures whose benefits are concentrated more locally."³⁴⁵ The NPDES program may then become more

338. Clean Water Act § 101(g), 33 U.S.C. §1251(g) (2000). The Wallop Amendment was named after one of its authors, former United States Senator Malcolm Wallop from Wyoming. Benson, *supra* note 16, at 209.

339. See *supra* notes 331-38 and accompanying text.

340. Stephen E. Draper, *Sharing Water Through Interbasin Transfer and Basin of Origin Protection in Georgia: Issues for Evaluation in Comprehensive State Water Planning for Georgia's Surface Water Rivers and Groundwater Aquifers*, 21 GA. ST. U. L. REV. 339 (2004).

341. Murchinson, *supra* note 14, at 589.

342. *Id.* at 597.

343. *Id.* at 589.

344. *Id.*

345. *Id.*

efficient if water transfers are regulated because the regulation's effects will reach upstream to where the pollution actually began.³⁴⁶

Additionally, States could get more bang for their buck through the opportunity to regulate agricultural runoff and other such non-point sources of pollution through the NPDES program.³⁴⁷ The CWA expressly excluded regulation of non-point source pollution from its NPDES program, thereby tying the EPA's hands when it comes to CWA enforcement.³⁴⁸ Nevertheless, as the Supreme Court noted in *Miccosukee*, the NPDES program does not expressly exclude non-point sources of pollution *if* such sources could also be point sources.³⁴⁹ Commentators have noted that regulation of non-point source pollution that reaches States' water systems through a pump system or dam would address a long-standing thorn in the side of CWA enforcement because so many sources of pollution were excluded.³⁵⁰ Therefore, once the non-point source pollution merges with the point source, its effect on water quality can be regulated through the NPDES permitting program.³⁵¹

As a practical matter, NPDES permitting for water transfers and dams should be manageable even without general permitting and cost-sharing.³⁵² The D.C. Circuit did the math in the context of NPDES dam permitting and concluded a small number of permits would actually be required.³⁵³ Before the D.C. Circuit, the EPA had advanced it would be required to complete the impossible task of issuing two million new NPDES permits.³⁵⁴ The D.C. Circuit rebuked:

Yet, so far as the record shows, most, if not all the dams that cause water quality problems are large hydroelectric dams. Thus, the number of dams that would require permits is probably no more than the 50,000 "large" dams in the country, and quite possibly only the 3,000 or so dams that are large enough to generate significant amounts of hydroelec-

346. *See id.*

347. John H. Davidson, *Factory Fields: Agricultural Practices, Polluted Water and Hypoxic Oceans*, 9 GREAT PLAINS NAT. RESOURCES J. 1, 33, 35 (2005).

348. *Id.* at 33, 34.

349. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106 (2004), *reh'g denied*, 541 U.S. 1057 (2004).

350. Davidson, *supra* note 347, at 3.

351. *Id.* at 35; *Miccosukee*, 541 U.S. at 106.

352. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 181, 182 (D.C. Cir 1982).

353. *Id.*

354. *Id.*

tric power. That is manageable even if it turns out to be impracticable to issue categorical permits³⁵⁵

Moving to the math from the pumping station cases, the Supreme Court projected that the total number of permits required for water transfers in the United States would also only be in the thousands, though the true number remains to be seen.³⁵⁶ In any case, there are other important policy considerations beyond the cost of regulation that weigh heavily in the equation.

C. *Unregulated Discharges can be Environmental Injustice*

In *Following the Equator: A Journey Around the World*, Mark Twain wrote that “[b]y trying we can easily learn to endure adversity. Another man’s, I mean.”³⁵⁷ The EPA’s unitary waters theory begs not only water quality questions but environmental justice questions as well.³⁵⁸ The SFWMD and other similarly situated amici complain of the added time and cost that an NPDES permitting regime for simple water transfers would bring.³⁵⁹ In the interim, the Miccosukee Tribe of Indians and other similarly situated amici are already bearing the cost of unregulated discharges.³⁶⁰

The EPA defines environmental justice as:

the fair treatment of all races, cultures, incomes, and educational levels with respect to the development and enforcement of environmental laws, regulations and policies, with fair treatment “implying” that no subgroup of people should be forced to shoulder a disproportionate share of the negative environmental impacts of pollution or environmental hazards due to a lack of political or economic strength.³⁶¹

In the unitary waters theory context, the EPA is forcing the Miccosukee Tribe of Indians to shoulder the burden of greenish-brown pollutant

355. *Id.*

356. *Miccosukee*, 541 U.S. at 108.

357. Quotable Mark Twain, *supra* note 255, at 3 (citation omitted).

358. Drew Melville, “*Whiskey is for Drinking*”: *Recent Water Law Developments in Florida*, 20 J. LAND USE & ENVTL. L. 489, 500 (2005).

359. *See supra* notes 312-23 and accompanying text.

360. NTEC & NCAI Brief, *supra* note 18, at 7.

361. Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 U. Ill. L. Rev. 103, 106 (quoting EPA, OFFICE OF SOLID WASTE & EMERGENCY RESPONSE ENVTL. JUSTICE TASK FORCE, U.S. ENVTL. PROTECTION AGENCY, *Draft Final Report 17* (1994)).

spewing blobs of foam into the once pristine Everglades.³⁶² The Miccosukee Tribe explained:

[SFWMD] is collecting, conveying and disposing of mixed waters to the benefits of the C-11 Basin, not for the benefit of the Everglades, and in doing so it is intentionally discarding the pollutants into lands where the Tribe lives and works, impairing Tribal uses in order to protect the developments in the west.³⁶³

However, as commentators have noted, the Supreme Court chose to ignore the issue of environmental injustice completely despite these arguments by the Miccosukee Tribe of Indians and similarly situated amici curiae.³⁶⁴ The decision is void of one mere mention of the issue.³⁶⁵

The value of clean water means “different things to different people.”³⁶⁶ Commentators illustrate, “[t]o many individuals and societies, water symbolizes security, opportunity, and self-determination. People in areas where water scarcity is the norm associate water with life, power, and status.”³⁶⁷ The water pollution effects in Indian country go beyond even these.³⁶⁸ Commentators have understood, “for Native American tribes, land is not fungible The loss of place may impact the identity and destiny of the tribe itself.”³⁶⁹ Such effects include the loss of the right and the place to conduct religious and cultural practices.³⁷⁰ Tribal amici pointed out that economic effects are another issue.³⁷¹ Amici illustrate that due to the greenish-brown water spewing from the pumping station, the Miccosukee Tribe of Indians has suffered economic loss from off-reservation hunting, fishing, and gathering.³⁷² Nevertheless, these amici asserted that states are not likely to make decisions that raise their own costs, such as increasing the cost of

362. NTEC & NCAI Brief, *supra* note 18, at 1-2; See Brief for Respondent Miccosukee Tribe of Indians of Florida at 7-8, *S. Fla. Mgmt. Dist., v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (No. 02-626) [hereinafter Miccosukee Brief].

363. Miccosukee Brief, *supra* note 362, at 36 n.6.

364. Kristin Carden, Case Comment, *South Florida Water Management District v. Miccosukee Tribe of Indians*, 28 HARV. ENVTL. L. REV. 549, 556, 560 (2004); accord Melville *supra* note 358, at 500.

365. Melville, *supra* note 358, at 556.

366. Draper, *supra* note 340, at 351.

367. *Id.* at 351-52 (citations omitted).

368. Suagee, *supra* note 18.

369. NTEC & NCAI Brief, *supra* note 18, at 13 (quoting JUDITH ROYSTER, THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS, 157-58 (Michael B. Gerrard ed., 1999)).

370. *Id.* at 12-13.

371. *Id.* at 8.

372. *Id.* at 1-2.

water quality regulation.³⁷³ By contrast, the federal government owes a trust responsibility to protect Tribal assets.³⁷⁴ Amici concluded federal NPDES permitting is best suited to balance the competing interests of two sovereigns (a state and a tribe) concerning interstate water pollution.³⁷⁵ As such, NPDES permitting should regulate the transfer of polluted water in order to create a forum for those disproportionately impacted to exercise some control over their surroundings.

D. *Due Little Deference*

In his further travels around the world, Mark Twain observed, “[t]o succeed in the other trades, capacity must be shown; in the law, concealment of it will do.”³⁷⁶ The EPA’s unitary waters theory was given *Chevron* deference in the analysis of the dam cases.³⁷⁷ The dam cases were litigated with a now-antiquated interpretation of the *Chevron* judicial deference doctrine, and commentators suggest this faulty “[EPA] position . . . should no longer be entitled to the deference it has enjoyed for well over two decades.”³⁷⁸ Today, “a very good indicator of delegation meriting *Chevron* treatment is express congressional authorization to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”³⁷⁹ The pumping station cases were skeptical of affording the EPA’s unitary waters theory *Chevron* deference.³⁸⁰ Most recently, the United States Supreme Court dismissed the EPA’s argument because the EPA could not point the Court to a single rule enacted through notice-and-comment rulemaking, a single adjudication, or a single public administrative document.³⁸¹ Therefore, in the upcoming Eleventh Circuit remand litigation, the EPA’s unitary waters theory should not be given *Chevron* deference.³⁸²

373. *Id.* at 7.

374. *Id.*

375. *Id.* at 9.

376. Quotable Mark Twain, *supra* note 255, at 157 (citation omitted).

377. Nat’l Wildlife Fed’n v. Gorsuch, 693 F.2d 156, 170 (D.C. Cir. 1982); Nat’l Wildlife Fed’n v. Consumers Power, 862 F.2d 580, 584 (6th Cir. 1988).

378. Dornsife, *supra* note 300, at 179.

379. United States v. Mead Corp., 533 U.S. 218, 229 (2001).

380. Catskill Mountain Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 490-91 (2d Cir. 2001), *appeal docketed*, No. 03-7203 (2d Cir. Feb. 21, 2003); N. Plains Res. Council v. Fid. Exploration & Dev. Co., 325 F.3d 1155, 1164 n.4 (9th Cir. 2003), *cert. denied*, 540 U.S. 967 (2003).

381. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 107 (2004), *reh’g denied*, 541 U.S. 1057 (2004).

382. *See id.* at 107, 109; Chevron U.S.A. Inc. v. N.R.D.C., 467 U.S. 837 (1984). Nevertheless, the deference analysis may change as the EPA is presently writing regulations for water transfers. *Water Pollution: EPA to Finalize Rules on Water Transfers, Livestock Operations, Pesticides in Water*, CHEM. REG. DAILY (BNA) D25 (Mar. 15, 2006).

In the absence of *Chevron* deference, the Eleventh Circuit ought to instead apply the *Skidmore* factors to evaluate what weight to award the EPA in its unitary waters interpretation of “addition.”³⁸³ When the agency has engaged in neither notice-and-comment rulemaking nor formal adjudication, the court will defer to the agency’s interpretation based on its persuasiveness after weighing: “the degree of the agency’s care, its consistency, formality, and relative expertness”³⁸⁴ The court may then give a “spectrum of responses” ranging from “great respect” to “near indifference.”³⁸⁵ The four *Skidmore* factors reveal that the EPA’s unitary waters theory is due little judicial respect.

In analyzing the first *Skidmore* factor, commentators have avowed that the degree of the EPA’s “care” in advancing the unitary waters theory should be discounted.³⁸⁶ A commentator cites that the EPA’s “endless” and “wasteful” unitary waters litigation is diverting resources from the \$8 billion Everglades restoration project.³⁸⁷ Thus the EPA chose to litigate the issue, taking time, resources, and focus away from the goal of the Everglades Restoration Project.³⁸⁸ Moreover, in the dam context, instead of litigating the unitary waters theory in *Consumers Power*,³⁸⁹ the EPA only needed to instruct the defendants to place a net before the turbines to catch the fish and prevent the fish smoothie.

The treatment of the second *Skidmore* factor of the agency’s “consistency” in upholding the unitary waters theory is unclear. Throughout the litigation in the case law, the EPA held the unitary waters line before the courts of appeals in both the dam cases and the pumping station cases.³⁹⁰ However, as the Supreme Court elucidated in *Miccossukee*, former EPA Administrator Carol Browner, among others, weighed in as amicus curiae to state that the long-standing EPA policy was to require NPDES permits for

383. See *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (holding that an agency’s informal interpretation will given deference to the degree to which it persuades the court thus reviving the *Skidmore* factors.).

384. *Id.* at 288 (footnotes omitted).

385. *Id.*

386. *Cf. Bishop*, *supra* note 166, at 126.

387. *Id.*

388. *Id.*

389. See *Nat’l Wildlife Fed’n v. Consumers Power*, 862 F.2d 580, 582 (6th Cir. 1988).

390. *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 165, 174-75 (D.C. Cir. 1982) (advancing the outside world framework); *Consumers Power*, 862 F.2d at 584 (arguing application of the outside world analysis); *Dubois v. USDA*, 102 F.3d 1273, 1296 (1st Cir. 1996), *cert. denied*, 521 U.S. 1119 (1997) (making the case for the singular entity theory); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 107 (2004), *reh’g denied*, 541 U.S. 95, 109 (2004) (advancing the unitary waters theory).

dams and this policy logically extended to water transfers.³⁹¹ More recently, after the *Miccosukee* litigation before the Supreme Court, EPA's General Counsel, Ann R. Klee, and Assistant Administrator for Water, Benjamin H. Grumbles, issued a memo to EPA regional administrators.³⁹² The subject of the memo was: "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers."³⁹³ The memo seemed to admit the EPA's error in claiming the unitary waters theory was a long-standing agency position on NPDES permits as it "has not been fully articulated in an administrative document."³⁹⁴ The memo attempted to distinguish the former Administrator Browner's opinion because her opinion did not address the issue of a CWA "addition."³⁹⁵ However, as commentators, the state of Pennsylvania, and the Supreme Court pointed out, EPA regulations do regulate water transfers and the "addition" of one water to another distinct body of water.³⁹⁶ Thus, the consistency of the EPA's unitary waters position is questionable.

The third and fourth *Skidmore* factors do not appear to strengthen the case for deference to the unitary waters theory. The Supreme Court provided insight into the third *Skidmore* factor.³⁹⁷ It explained that there has been no degree of "formality" as evidenced by a lack of notice-and-comment rulemaking, formal adjudication, or public documents published in the Federal Register.³⁹⁸ Regarding the final factor, the EPA's "relative expertness" regarding "the chemical, physical and biological integrity of the Nation's

391. Browner Brief, *supra* note 251, at 17.

392. Ann R. Klee & Benjamin H. Grumbles, *Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers*, memorandum, http://www.epa.gov/ogc/documents/water_transfers.pdf (last visited on Mar. 23, 2006) [hereinafter Klee Memo].

393. *Id.* at 1.

394. *Id.* at 2.

395. *Id.* at 2 n.5. In examining *In Re Riverside Irrigation Dist. LTD. & 17 others*, Op. No 21, (E.P.A.G.C. Jun. 27, 1975) 1975 WL 23864, which former Administrator Browner references, the Klee memo stated:

That opinion did not specifically address the question of whether an "addition" has occurred when a navigable water is merely conveyed to another navigable water. Instead, the specific issue that opinion addressed was whether "irrigation return flow [is] a properly permitable [point] source within the meaning of sections 301 and 402 of the [Clean Water] Act."

Id.

396. 40 C.F.R. §§ 122.45, 122.28 (2005).

397. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 107 (2004), *reh'g denied*, 541 U.S. 95, 109 (2004).

398. Administrative Procedure Act, 5 U.S.C. §§ 553, 554 (2000); *Miccosukee*, 541 U.S. at 107.

waters," is undisputed as it is the agency charged with administering the CWA.³⁹⁹ Nevertheless, as the D.C. District Court pointed out, the EPA brings no scientific expertness to the table when it comes to construing the plain language of the CWA.⁴⁰⁰ The EPA's unitary waters theory is due little deference when weighing the *Skidmore* factors of formality, expertness, care, and the complex issue of consistency.

IV. CONCLUSION

The EPA's unitary waters theory is all wet. The NPDES regulatory regime should properly police water transfers in order to clean up the Nation's dirty waters for the benefit of all citizens. The unitary waters theory is contrary to the CWA, to current NPDES permits, and to the EPA's interpretation of "discharge" in the context of dredge and fill permits.⁴⁰¹ NPDES water quality regulation of water transfers and dams presents an opportunity for innovative, cooperative, and practical permitting solutions with cost-sharing prospects.⁴⁰² NPDES regulation also provides an opportunity for the much-needed protection of important cultural areas.⁴⁰³ The courts can help this process along by giving minimal deference to the EPA's latest attempt to keep its unitary waters theory afloat.⁴⁰⁴

HEIDI HANDE

399. Clean Water Act § 101(a), 33 U.S.C. § 1251(a) (2000).

400. Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 169 (D.C. Cir. 1982).

401. *Supra* part (III) (A).

402. *Supra* part (III) (B).

403. *Supra* part (III) (C).

404. *Supra* part (III) (D).