

# Watering Down the Clean Water Act: A Critique of the NPDES Water Transfers Rule

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## INTRODUCTION

On June 4, 2009, the Eleventh Circuit in *Friends of the Everglades v. South Florida Water Management District*<sup>1</sup> held that the transfer of water by pumping contaminated water from drainage canals<sup>2</sup> into an upstream lake used for drinking water was not subject to the National Pollutant Discharge Elimination System (“NPDES”) permit program under section 402 of the Clean Water Act (“CWA” or the “Act”).<sup>3</sup> The lake, known as Lake Okeechobee (“Lake”), “is the second largest freshwater lake within the continental United

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1. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009).

2. *Id.* at 1214. These drainage canals contain rainwater and runoff from agricultural, industrial and residential areas. *Id.* Designated as Class III waters, the waters in these canals contained a “loathsome concoction” of pollutants including nitrogen, phosphorous, total suspended solids, dissolved solids, low quantities of dissolved oxygen, and un-ionized ammonia. *Id.*; *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, No. 02-80309 Civ., 2006 WL 3635465, at \*14, \*19 (S.D. Fla. Dec. 11, 2006) (citing FLA. ADMIN. CODE ANN. r. 62-302.400 (2006)). In contrast, Florida has designated Lake Okeechobee as a Class I water body, or potable water supply. *Id.* The biological differences between Lake Okeechobee and the canals are considered “severe.” *Id.* at \*20–21.

3. See *Friends of the Everglades*, 570 F.3d at 1214, 1228. The Clean Water Act, 33 U.S.C. §§ 1251–1387 (2006), makes the “discharge of any pollutant” by any person unlawful, except in compliance with specified provisions of the Act. *Id.* § 1311(a). The Act defines “discharge of any pollutant” as “any addition of any pollutant to navigable waters from any point source.” *Id.* § 1362(12) (emphasis added). Section 402 of the Act specifically authorizes the NPDES permit program, and the program is codified into two sections of the United States Code: section 1311, which describes effluent limitations, and section 1342(a)(1), which sets out the overall structure of the permit program.

States,”<sup>4</sup> and it is separated from drainage canals by the Herbert Hoover Dike (“Dike”).<sup>5</sup> At issue in *Friends* were the pump stations built into the Dike that were used to “backpump” the polluted waters from the canal into the Lake for flood control or water supply purposes.<sup>6</sup> To enjoin the South Florida Water Management District (“Water District”) from pumping the canal waters into the Lake, the *Friends* plaintiffs-appellees sued the Water District, contending that the water transfers constituted an “addition” of regulated pollutants that triggered the NPDES permit requirement.<sup>7</sup> The *Friends* plaintiffs-appellees therefore argued that the Water District would have to obtain an NPDES permit before conducting the water transfers.<sup>8</sup>

In finding that water transfers did not constitute an “addition” under the CWA, the *Friends* court reasoned that the statutory language was ambiguous and, therefore, gave *Chevron* deference to a recent interpretation of the NPDES provision by the U.S. Environmental Protection Agency (“EPA”).<sup>9</sup> Specifically, on June

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4. *Friends of the Everglades*, 2006 WL 3635465, at \*7; see also CAROL GREGWARE, GUIDE TO THE LAKE OKEECHOBEE AREA, at vii (1997); *Water Management Projects*, S. FLA. WATER MGMT. DISTRICT, <https://my.sfwmd.gov/portal/page/portal/sfwmdmain/regions> (last visited Aug. 20, 2011).

5. The Hoover Dike is a “27 to 42-foot high, and up to 300-foot wide barrier that physically separates the Lake from the lands surrounding the lake.” *Friends of the Everglades*, 2006 WL 3635465, at \*8; see also *Herbert Hoover Dike: Facts & Information*, U.S. ARMY CORPS OF ENG’RS, JACKSONVILLE DIST., [http://www.saj.usace.army.mil/Divisions/Everglades/Branches/HHDProject/DOCS/HHD\\_facts.PDF](http://www.saj.usace.army.mil/Divisions/Everglades/Branches/HHDProject/DOCS/HHD_facts.PDF) (last visited Oct. 10, 2010).

6. *Friends of the Everglades*, 2006 WL 3635465, at \*13–15.

7. See *Friends of the Everglades*, 570 F.3d at 1221. The *Friends* court, at the outset, determined that: (1) the pump stations were “point sources”; (2) the Lake and the drainage canals are “navigable waters”; and (3) that the waters transferred from the polluted canal to the Lake contains “pollutants” within the meaning of the CWA. *Id.* at 1216 (citing *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102, 105 (2004)). See 33 U.S.C. § 1362 (2006) for the definitions of these terms within the CWA.

8. *Friends of the Everglades*, 570 F.3d at 1221.

9. *Id.* at 1217–28. Courts have used the term “*Chevron* deference” to articulate the administrative deference doctrine set by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In *Chevron*, the Court set forth the legal test for determining whether to grant deference to a government agency’s interpretation of its own statutory mandate. *Id.* at 843–44. The *Chevron* decision created a two-part analysis (called the “*Chevron* two-step test”), where a reviewing court determines: (1) Whether the statute is ambiguous or there is a gap that Congress intended the agency to fill, and (2) if so, whether the agency’s interpretation of a statute is reasonable or permissible. See *id.* If an agency’s interpretation is reasonable, then the court will defer to the agency’s reading of the statute. *Id.*

13, 2008, the EPA promulgated the final NPDES Water Transfers Rule (“Final Rule”) for public review.<sup>10</sup> The Final Rule exempts “water transfers” from the requirements of the NPDES permit program.<sup>11</sup> Under the Final Rule, transferring water between waters of the United States does not require a permit,<sup>12</sup> unless the transferred water will be used for industrial, municipal, or commercial uses, or unless the water transfer involved a conveyance or point source that, by itself,<sup>13</sup> introduces new pollutants into the receiving water body.<sup>14</sup> Because the water transfers in *Friends* fell within the Final Rule’s exemptions, the *Friends* court reversed the district court’s holding, and ruled that the Water District did not have to obtain an NPDES permit.<sup>15</sup>

The Eleventh Circuit’s holding and its deference to the Rule leave a gaping hole in the “comprehensive regulatory regime” established by Congress under the Clean Water Act.<sup>16</sup> Without the benefit of a NPDES permit process in most water transfers, water bodies with fragile and unique vegetative and wildlife habitats like those in Lake

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10. National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i)).

11. *Id.* at 33,704. Historically, in administering the CWA, EPA generally did not require NPDES permits for water transfers. National Pollutant Discharge Elimination System (NPDES) Water Transfers Proposed Rule, 71 Fed. Reg. 32,887, 32,891 (proposed June 7, 2006); *Miccossukee*, 541 U.S. at 102, 107. However, prior to 2005, EPA had not formally articulated its policy regarding water transfers in any administrative document. Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y., 273 F.3d 481, 490 (2d Cir. 2001); *see also Miccosukee*, 541 U.S. at 107–08 (noting that EPA had espoused conflicting views regarding water transfers on occasions).

12. “Waters of the United States” are defined for purposes of the NPDES permitting program in 40 C.F.R. § 122.2 (2000). *See also* 33 U.S.C. § 1362(7) (2006) (defining “navigable waters” to mean the waters of the United States).

13. Under the CWA, a point source is “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14) (2006).

14. *See* NPDES Water Transfers Rule, 73 Fed. Reg. at 33,699–700 (providing examples of various water transfer scenarios that would be exempted from the NPDES permitting program). This definition of water transfers reflects what is sometimes referred to as the “unitary water theory” of navigable waters. *See Miccosukee*, 541 U.S. at 105–07. Under the unitary waters theory, all navigable waters should be considered a singular entity, rather than separate entities or individual bodies of water. Therefore, transferring pollution from one navigable water to another does not “add” to the pollution. However, an addition will occur when pollutants “first enter navigable waters from a point source.” *See Friends of the Everglades*, 570 F.3d at 1217.

15. *Friends of the Everglades*, 570 F.3d at 1228.

16. *Arkansas v. Oklahoma*, 503 U.S. 91, 99, 101 (1992).

Okeechobee may be destroyed by unregulated water transfers. This Note analyzes the Final Rule's consonance with the goal of the CWA, and more specifically, with the purpose of the NPDES program.

Part I of this Note describes the significant role water transfers play in the United States. Part II uncovers the political, economic, cultural, and environmental landscape that gave rise to the enactment of the CWA and, particularly, the NPDES permit program under section 402 of the CWA. Because the interpretation of "addition" as it relates to water transfers has been highly contested in courts well before the promulgation of the Final Rule, Part III discusses this case law, as well as EPA's preliminary interpretation prior to the Final Rule. Part IV describes EPA's rationale for the Final Rule. Part V contends that EPA's interpretation of "addition" is unreasonable, because it ignores the delicate balance between environmental concerns and state sovereignty concerns Congress sought to resolve when enacting the CWA and its amendments. Part VI posits that an interpretation that would best achieve the legislative purpose of section 402 of the CWA would be one that defines "addition" as any discharge from a point source from one "meaningfully distinct" navigable water to another "meaningfully distinct" navigable water.<sup>17</sup>

#### I. SIGNIFICANCE OF WATER TRANSFERS

Thousands of water transfers exist across the United States in many different contexts.<sup>18</sup> Generally, water transfers divert water containing pollutants from one navigable water to another through natural or man-made conveyances, such as tunnels, channels, and streams.<sup>19</sup> Some are as simple as moving a small quantity of water a short distance. Others can be as complex as reallocating water from

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17. This interpretation of section 402 of the CWA was also raised by the United States Supreme Court in *Miccosukee*, 541 U.S. 95. *Miccosukee* was decided prior to the promulgation of the Final Rule, and hence, *Chevron* deference was not an issue in that case. *Id.* at 95–105.

18. Lawrence R. Liebesman & Steve Kelton, Comment, *Clean Water Act NPDES Water Transfer Issue: The Implications for the Water Supply and Water User Communities*, 39 ENVTL. L. REP. 10181, 10189 (2009).

19. NPDES Water Transfers Rule, 73 Fed. Reg. at 33,698. Water transfers either pump or passively direct water for uses such as providing drinking water, irrigation, power generation, flood control, and environmental restoration. *Id.*

multiple reservoirs and transporting substantial quantities of water over long distances, across both state and basin boundaries.<sup>20</sup>

An NPDES permit requirement for water transfers provokes much controversy “because many of the United States’ major metropolitan areas—including Los Angeles, San Francisco, New York City, and Denver—rely on interbasin transfer water for a large percentage of their municipal water supply.”<sup>21</sup> Requiring an NPDES permit for every instance of water transfer that currently takes place across the United States burdens many water suppliers because the NPDES permit process can be time consuming, and “compliance tremendously costly.”<sup>22</sup> Yet thirteen states have requested EPA’s permanent withdrawal of the Final Rule and supported the requirement for an NPDES permit for water transfers.<sup>23</sup>

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20. *Id.*; see also Peter D. Nichols, *Miccosukee: The Potential for Clean Water Act Discharge Permits for Water Transfers*, 33 COLO. LAW. 119, 121 (2004).

21. Jeremy N. Jungreis & Robert C. Horton, *Awash in Controversy: The Developing Saga of the EPA Water Transfers Rule*, 40 A.B.A. TRENDS 6 (2008). In the arid west, water transfers are becoming more common because water that has been traditionally allocated for irrigation is being transferred to “growing cities [that] can no longer secure additional supplies through surface supply augmentation or ground water pumping.” COMM. ON WESTERN WATER MGMT ET AL., NAT’L RESEARCH COUNCIL, *WATER TRANSFERS IN THE WEST: EFFICIENCY, EQUITY, AND THE ENVIRONMENT* 16 (1992); see also Sara Colangelo, Comment, *Transforming Water Transfers: The Evolution Of Water Transfer Case Law And The NPDES Water Transfers Proposed Rule*, 35 ECOLOGY L.Q. 107, 109 (2008) (describing how the nation’s demanding need for limited water resources prompts the use of water transfers as a device to reallocate waters); Kevin Haskins, Note, *A “Delicate Balance”: How Agency Nonacquiescence and the EPA’s Water Transfer Rule Dilute the Clean Water Act After Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 60 ME. L. REV. 173 (2008).

22. Jungreis & Horton, *supra* note 21, at 6.

23. See N.Y. ATT’Y GEN. ET AL., COMMENTS ON EPA PROPOSED RULE CONCERNING THE APPLICABILITY OF NPDES PERMITS TO INTER-BASIN TRANSFERS OF WATER CONTAINING POLLUTANTS 9–10 (2006), available at <http://www.doj.state.wi.us/news/files/EPARule.pdf> (noting that “[s]tates have a strong interest in ensuring a strong ‘national floor’ of water quality controls through the Act’s permitting requirement,” and moreover, because “watersheds do not respect political boundaries, downstream [s]tates have a substantial interest in protecting their water bodies through the uniform processes and remedies provided by the Act against the transfer of pollutants originating in upstream [s]tates”).

## II. HISTORY OF THE CLEAN WATER ACT AND THE NPDES PROVISION

The U.S. Congress enacted the Federal Water Pollution Control Act Amendments of 1972,<sup>24</sup> now commonly referred to as the Clean Water Act, after finding that previous water pollution control laws were grossly ineffective. Therefore, the CWA established an ambitious objective of “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters.”<sup>25</sup> Towards that end, Congress prohibited discharges of pollutants into the nation's waters unless a discharger complies with permit requirements.<sup>26</sup> The NPDES permit program became one of the primary vehicles to accomplish that national goal.<sup>27</sup>

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24. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 896 (1972), amended by Clean Water Act of 1977, Pub. L. No. 95-217, § 5(a), 91 Stat. 1566 (codified as amended at 33 U.S.C. §§ 1251–1387 (2006)). The final version of the Clean Water Act was vetoed by President Richard M. Nixon, but the House and Senate overrode the veto. PETER CLEARY YEAGER, *THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION* 173 (1991).

25. 33 U.S.C. § 1251(a) (2006). The CWA had its origins in the Federal Water Pollution Control Act (“FWPCA”), Pub. L. No. 80-845, 62 Stat. 1155 (1948). *See generally* 2 WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW* 252 (2d ed. 1994) (discussing the passage of the 1948 Federal Water Pollution Control Act). The FWPCA empowered federal agencies to support states in providing for water pollution control activities, and thus the federal role was merely advisory. S. REP. NO. 92-414, at 1–2 (1971), reprinted in 1972 U.S.C.C.A.N. 3668-70; PAUL CHARLES MILAZZO, *UNLIKELY ENVIRONMENTALISTS: CONGRESS AND CLEAN WATER, 1945–1972*, at 142–45 (2006). Subsequent amendments to the FWPCA broadened the federal government's authority in water pollution control. *See, e.g.*, Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246 (1966) (imposing fine on polluters); Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965) (setting water quality standards which are state and federally enforceable and mandating a water quality assessment program); Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87-88, 75 Stat. 204 (1961) (providing for an abatement suit at the request of a state environmental pollution agency).

Despite the original FWPCA and amendments following the Act's passage, water quality remained well below applicable standards, and enforcement of the standards was nearly nonexistent. BEATRICE HORT HOLMES, *HISTORY OF FEDERAL WATER RESOURCES PROGRAMS AND POLICIES* 190–93 (1979); MILAZZO, *supra*, at 142–45; DAVID ZWICK & MARCY BENSTOCK, *WATER WASTELAND* 271–280 (1971).

26. *See* 33 U.S.C. §§ 1311, 1342, 1344 (2006); S. REP. NO. 92-414, at 70 (1971), reprinted in 1972 U.S.C.C.A.N. 3738 (noting that the permit program is the “most effective control mechanism”).

27. Colangelo, *supra* note 21, at 114 (citing Richard Konkoly-Thege, *Addition of a Pollutant and Division of a Natural Body of Water: Should There be a New Math for NPDES Permits Under the Clean Water Act?*, 33 CAP. U. L. REV. 787, 802 (2005)). Congress also created a comprehensive permitting program for dredge or fill activities—as distinct from point

Importantly, the NPDES permit program stemmed from the permit program first established under the 1899 Refuse Act.<sup>28</sup> In enacting the NPDES provision, Congress acknowledged that the previous permit program was weak in that it only applied to industrial polluters, and that the authority was divided between two federal agencies.<sup>29</sup> Therefore, the CWA not only restructured the authority for water pollution control and consolidated authority in the Administrator of the EPA, but revamped the focus of previous enforcement from regulating the amount of pollutants in a given body of water to regulating effluent limitations.<sup>30</sup> This change prevented dischargers from releasing pollutants into waters in the hope that mere dilution without affecting ambient water quality would prevent the triggering of federal regulation.<sup>31</sup>

Despite the new focus on effluent limitations, the NPDES permit program still took into account the receiving water quality in determining the appropriate restrictions on discharges at their source.<sup>32</sup> If “the application of effluent limitations under [the NPDES

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source discharges under the NPDES permit program—under section 404 of the CWA. 33 U.S.C. § 1344.

28. Sarah Slack, Note, *When Is a Pesticide Not a Pollutant? Never: An Analysis of the EPA's Misguided Guidance*, 90 IOWA L. REV. 1241, 1247 (2005). See generally Jason R. Jones, Comment, *The Clean Water Act: Groundwater Regulation and the National Pollutant Discharge Elimination System*, 8 DICK. J. ENVTL. L. & POL'Y 93, 96 (1999) (noting that the Refuse Act, which amended the Rivers and Harbors Act of 1890, gave the Secretary of the Army the power to issue permits regulating discharges).

29. Slack, *supra* note 28, at 1247.

30. *Id.* (citing S. REP. NO. 92-414, at 5); see D. Brennen Keene, Comment, *The Inconsistency of Virginia's Execution of the NPDES Permit Program: The Foreclosure of Citizen Attorneys General from State and Federal Courts*, 29 U. RICH. L. REV. 715, 718–19 (1995). An “effluent limitation” is “any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters.” Clean Water Act § 502(11), 33 U.S.C. § 1362(11) (2006). Section 301(e) of the Act requires that “[e]ffluent limitations established pursuant to this section or [Section 302 of the Act] shall be applied to all point sources of discharges of pollutants in accordance with the provisions of this Act.” 33 U.S.C. § 1311(e) (2006). Regulations implementing § 301(e) of the Act are known as effluent limitation guidelines, which EPA has published at 40 C.F.R. §§ 401–71 (2008).

31. See RODGERS, *supra* note 25, at 259. For a general discussion of the operation of the NPDES program, see David Drelich, *Restoring the Cornerstone of the Clean Water Act*, 34 COLUM. J. ENVTL. L. 267, 296–300 (2009).

32. Amy E. Fortenberry, Comment, *Moving Violations: Violations of the Clean Water Act and Implications for CERCLA's Federally Permitted Release Exception*, 24 B.C. ENVTL. AFF. L. REV. 821, 826 (1997).

program] . . . would interfere with the attainment or maintenance of that water quality,” the NPDES program provided that alternative effluent control strategies be employed.<sup>33</sup>

In 1977, the U.S. Congress amended the CWA, adding, among other provisions, section 101(g) to underscore the state’s primary authority in the water allocation business.<sup>34</sup> The amendments were followed by a 1978 EPA memorandum stating that the amendments did not prohibit EPA from taking actions required to protect water quality of the nation’s waters even if such actions incidentally affected state water rights and state usages of water.<sup>35</sup>

Under the current NPDES program, EPA’s regulations provide for two types of permits that it can grant after a hearing: individual and general permits.<sup>36</sup> As the designations imply, the EPA grants individual permits to specific facilities for specific discharges.<sup>37</sup> Similarly, general permits are granted to categories of similar point sources that have common components, such as location and type of discharge.<sup>38</sup>

### III. INTERPRETATIONS OF “ADDITION” PRIOR TO FINAL RULE

Pennsylvania has required NPDES permits for water transfers since 1986. This was the result of a holding by the Commonwealth Court of Pennsylvania in *Del-AWARE Unlimited v. Department of Environmental Resources*,<sup>39</sup> in which the court upheld a ruling by the

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33. 33 U.S.C. § 1312 (2006). Effluent limitations under the NPDES program were a means to an end. In *Natural Resources Defense Council v. Costle*, the D.C. Circuit noted that “the primary purpose of effluent limitations” is to ensure “uniformity among federal and state jurisdictions enforcing NPDES.” 568 F.2d 1369, 1378 (D.C. Cir. 1977). Thus, it makes sense that the NPDES provision in CWA § 302, 33 U.S.C. § 1312, provides an alternative to effluent limitations in circumstances where enforcing effluent limitations may be counterintuitive, such as with water transfers.

34. Pub. L. No. 95-217, 91 Stat. 1567 (1977).

35. Memorandum from Thomas Dorling, Assistant Adm’r for Water & Waste Mgmt., to Reg’l Adm’rs, on State Authority to Allocate Water Quantities—Section 101(g) of the Clean Water Act (Nov. 7, 1978), available at [http://water.epa.gov/scitech/swguidance/standards/upload/1999\\_11\\_03\\_standards\\_waterquantities.pdf](http://water.epa.gov/scitech/swguidance/standards/upload/1999_11_03_standards_waterquantities.pdf).

36. See EPA Administered Permit Programs: The National Pollutant Discharge Elimination System, 40 C.F.R. § 122.28 (2004).

37. *Id.* § 122.21.

38. *Id.* § 122.28.

39. *Del-AWARE Unlimited, Inc. v. Dep’t of Env’tl. Res.*, 508 A.2d 348 (Pa. Commw.



state's Environmental Hearing Board finding that a diversion of water from a river to two nearby streams through a pump station required an NPDES permit.<sup>40</sup> As a result of the ruling, the Pennsylvania Department of Environmental Protection issued a *Policy for Permitting Surface Water Diversions*, which specified factors considered in issuing NPDES permits.<sup>41</sup> It took into account two basic factors: "(1) the designated uses of the receiving stream and the water quality criteria necessary to protect those uses, and (2) the effluent quality necessary to meet established water quality criteria or minimum treatment requirement in order to protect designated stream uses."<sup>42</sup>

Prior to the Final Rule, federal courts have also broached the issue of whether water transfers fell within the NPDES permitting provision.<sup>43</sup> In 1982, the D.C. Circuit in *National Wildlife Federation v. Gorsuch*<sup>44</sup> considered whether adverse water quality changes caused by the release of polluted water through a dam into a downstream river required an NPDES permit.<sup>45</sup> Although cognizant

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1986).

40. *Id.* at 351, 354–56. In *Del-AWARE Unlimited*, the Commonwealth Court of Pennsylvania did not face the issue of whether the water diversion constituted an "addition" under section 402 of the CWA. *See id.* at 348–60. Neither party raised the issue, and the dispute focused on the meaning of "point source" under section 402 of the CWA and how the term related to the diversion of water from one water body to another water body. *See id.* The *Del-AWARE Unlimited* court seemingly assumed that there was an "addition" based on the fact there were two separate water bodies in question. *See id.* at 359. The court found that an NPDES permit was required for the diversion because the pipes used to divert the water constituted a point source. *Id.*

41. PA. DEP'T OF ENVTL. PROT., BUREAU OF WATER QUALITY PROT., POLICY FOR PERMITTING SURFACE WATER DIVERSIONS 8–10 (1998), available at <http://www.eibrary.dep.state.pa.us/dsweb/Get/Version-48796/362-2000-003.pdf> [hereinafter POLICY GUIDE].

42. *Id.* at 8. In addition to the two factors, the *Policy Guide* also specified that in assessing the water quality impact of a proposed water transfer, the parameters to be evaluated should include temperature and levels of ammonia, dissolved oxygen, bioassay-based metals and phosphate. *Id.* at 10. Moreover, the *Policy Guide* specified consideration for impacts to aquatic life in conjunction with toxicity testing and other biological assessment techniques. *Id.* at 11.

43. *See, e.g.,* Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y., 273 F.3d 481 (2d Cir. 2001); Dubois v. USDA, 102 F.3d 1273 (1st Cir. 1996); Nat'l Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988); Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982).

44. *Gorsuch*, 693 F.2d 156.

45. *Id.* at 165. The adverse water quality changes related to low dissolved oxygen, temperature changes, nutrients, sediments, and super saturation. *Id.* at 161. The parties disputed

of the water quality issues caused by dams, defendant EPA argued that for there to be an “addition of a pollutant from a point source to occur, the point source must introduce a pollutant into navigable water from the outside world,” and that “merely pass[ing]” water from one body of navigable water to another did not trigger the NPDES permit requirement.<sup>46</sup> After an extensive exegesis of the CWA's statutory text, structure, and legislative history, the D.C. Circuit held that EPA's interpretation of the NPDES permit program as excluding dam-caused pollution was “reasonable, not inconsistent with congressional intent and entitled to great deference.”<sup>47</sup>

Six years later, the Sixth Circuit reached the same conclusion. In *National Wildlife Federation v. Consumers Power Co.*,<sup>48</sup> the Sixth Circuit considered whether water transfers from a hydropower facility that pumped water from a lake to a reservoir and then released the water back to generate electricity triggered the NPDES permit provision.<sup>49</sup> The Sixth Circuit agreed with *Gorsuch* and deferred to EPA's position that an NPDES permit was not required.<sup>50</sup> The court noted that “Congress apparently intended that pollution problems caused by dams and other flow diversion facilities are generally to be regulated by means other than the NPDES permit program.”<sup>51</sup>

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whether these constituted “pollutants,” and if so, whether these pollutants were “additions” that required a NPDES permit. *Id.* at 165.

46. *Id.* at 165.

47. *Id.* at 183. The *Gorsuch* court found that the language of the statute was ambiguous as it relates to water transfers. *Id.* at 175. Turning to the legislative history, it found that Congress was focused on regulating “traditional industrial and municipal wastes” when it enacted the NPDES permitting provision, so thus never considered the regulation of facilities such as dams under section 402. *Id.* Additionally, the *Gorsuch* court concluded that Congress probably did not consider the regulation of dams because such water transfers were not amenable to the technological controls, such as effluent limitations, required for point sources under the NPDES permit program. *Id.* Lastly, the court reasoned that had Congress wanted to apply the NPDES program wherever feasible, “it could easily have chosen suitable language, *e.g.*, all pollution released through a point source,” instead of limiting the application of the NPDES program to the “‘addition’ of ‘pollutants’ ‘from’ a point source.” *Id.* at 176.

48. *Consumers Power*, 862 F.2d 580.

49. *Id.* at 581. During the diversion of water, the hydropower facility caused some fish and other aquatic organisms to be entrained into the pumps, chopped up, and then subsequently discharged back to the lake. *Id.* at 582–83.

50. *Id.* at 590.

51. *Id.* at 587.

In 1996, the First Circuit in *Dubois v. United States Department of Agriculture*<sup>52</sup> held that the transfer of pollutants from a river to a pond required an NPDES permit.<sup>53</sup> In *Dubois*, a ski resort operator drew water for snowmaking from a relatively pristine pond used for drinking water and from a nearby river.<sup>54</sup> After the combined waters were pumped through the snowmaking system, they were disposed back into the pond.<sup>55</sup> Evidence showed that the combined water introduced into the pond contained bacteria, oil, grease, phosphorus, turbidity, heat, and other aquatic organisms, such as *Giardia lamblia*,<sup>56</sup> not previously present in the pond waters.<sup>57</sup> The *Dubois* court held that the transfer of polluted water from one water body to a distinct water body constituted an “addition” of pollutants to the receiving water body.<sup>58</sup>

In 2001, the Second Circuit in *Catskill Mountains Chapter of Trout Unlimited v. City of New York*<sup>59</sup> held that the transfer of drinking water from a reservoir to a premier trout fishing creek through a water tunnel qualifies as an “addition.”<sup>60</sup> The court found that although the water bodies were hydrologically connected,<sup>61</sup> the tunnel changed the directional flow and gravity as waters from the reservoir under natural conditions would never reach the creek.<sup>62</sup> As a

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52. *Dubois v. USDA*, 102 F.3d 1273 (1st Cir. 1996).

53. *Id.* at 1299.

54. *Id.* at 1277–78.

55. *Id.* at 1278.

56. This parasite causes “giardiasis,” a diarrheal illness. *Giardia*, CDC, <http://www.cdc.gov/parasites/giardia> (last visited Mar. 4, 2011).

57. *Dubois*, 102 F.3d at 1277–78.

58. *Id.* at 1296–97. The court emphasized that river water and pond water, for all relevant purposes, were distinct. Although water naturally flowed from the pond into the river, water would never naturally flow from the river to the pond. *Id.* at 1297. That difference, along with the vast difference in water quality between the two water bodies, made the pumping an “addition.” *Id.* at 1297–99. Furthermore, the court distinguished *Gorsuch* and *Consumers Power* as involving the accumulation of the same water or the movement of water within the same water body. *Id.* at 1299.

59. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481 (2d Cir. 2001).

60. *Id.* at 489. The plaintiff alleged that the tunnel discharges pollutants in the form of “suspended solids,” “turbidity,” and heat into the creek and that the discharges caused the creek to “violate state water quality standards for turbidity and temperature.” *Id.* at 485.

61. *Id.* at 484. The waters were hydrologically connected because they both flowed into the Hudson River. *Id.*

62. *Id.* The *Catskill* court found that the reservoir waters were diverted south through the

result, the Second Circuit concluded that “[n]o one can reasonably argue that the water in the [reservoir] and the [creek] are in any sense the ‘same.’”<sup>63</sup> Persuaded by the ordinary meaning of the word “addition” to encompass circumstances where water is moved from one “discrete” water body to another, the Second Circuit held that the water transfer was an “addition” that required an NPDES permit.<sup>64</sup>

In 2004, the Supreme Court in *South Florida Water Management District v. Miccosukee Tribe of Indians* examined facts and issues similar to the ones in *Friends*.<sup>65</sup> The *Miccosukee* plaintiffs alleged that an NPDES permit was required for the pumping of stormwater runoffs with elevated levels of phosphorous into an water conservation area in the Florida Everglades that is naturally low in phosphorous.<sup>66</sup> The *Miccosukee* Court considered whether water transfers were an “addition” that required a NPDES permit,<sup>67</sup> and noting that the EPA had not fully articulated its position regarding

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tunnel for several miles and released into the creek. *Id.* Absent the tunnel, the reservoir water would flow north and eventually make its way into the Hudson River. *Id.* On the other hand, water from the creek would naturally make its way southeast to the Hudson River by way of another reservoir. *Id.*

63. *Id.* at 492.

64. *Id.* at 489, 493–94. The Second Circuit brushed aside EPA’s informal policy papers which declared that NPDES permits should not be required for dam releases because they are not considered “discharges” under the CWA. *Id.* at 490. The court found that EPA’s policy was never formalized in a notice-and-comment rulemaking or formal adjudication, and thus the policy was entitled to less deference. *Id.* at 490–91 (citing *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)).

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

66. *Id.* at 100–02. The plaintiffs argued that the phosphorous from the runoffs alters the balance of the water conservation area’s ecosystem by “stimulat[ing] the growth of algae and plants foreign to the [] ecosystem.” *Id.* at 101. Beginning in the early 1900s up until today, the U.S. Army Corps of Engineers and the predecessors to the Water District have constructed an immense system of water control and diversion facilities, canals, and levees in the Florida Everglades. Colangelo, *supra* note 21, at 122–23. Currently the canals and dikes created by this project redirect 1.7 billion gallons of water each day out of the Everglades through 1,400 miles of canals, levees, and dikes, 125 water control structures, and 18 pumping stations. *Id.* (citing CHRISTINE A. KLEIN ET AL., NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES 104 (2005); Richard J. Anson, Jr., *Protecting and Preserving Our National Parks: The Everglades National Park Restoration Project*, 19 VA. ENVTL. L.J. 121, 136 (2000)). Pollutants from agricultural and urban runoff have degraded the waters of the Florida Everglades, and thereby has “drastically reduc[ed] the abundance of birds and wildlife.” Christine A. Klein, *On Integrity: Some Considerations for Water Law*, 56 ALA. L. REV. 1009, 1013. For a history of the Everglades and a description of its ecology, see Konkoly-Thege, *supra* note 27, at 789–93.

67. *Miccosukee*, 541 U.S. at 105–06.

this issue at that time and that some factual issues remain unresolved, remanded the case for further fact-finding.<sup>68</sup> Specifically, the Court wanted to know whether the two waters in question were “meaningfully distinct,” although the Court did not define the term.<sup>69</sup> Ultimately, the Court agreed that if the two waters were not in fact meaningfully distinct, then no NPDES permit would be required.<sup>70</sup>

In 2005, EPA first responded to the *Miccousukee* remand by issuing a preliminary agency interpretation of “addition” within section 402 of the CWA.<sup>71</sup> EPA concluded that a water transfer is not an “addition” that would potentially subject it to the NPDES permitting requirements.<sup>72</sup> EPA then expressed its intent to codify their interpretation through the rulemaking process.<sup>73</sup> However, in light of the *Miccousukee* Court’s holding, EPA also noted that if it were required to make a factual determination as to whether a waterbody is “meaningfully distinct,” it would undertake a two-part test.<sup>74</sup> Specifically, this test must determine whether the waters are distinct,<sup>75</sup> and whether the distinction between them is meaningful.<sup>76</sup>

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68. *Id.* at 111–12.

69. *Id.*

70. *Id.* However, the Court declined to resolve the question of whether water transfers require NPDES permits when the water bodies at issue *are* in fact meaningfully distinct. *Id.*

71. Memorandum from Ann R. Klee, Gen. Counsel, U.S. Env’tl. Prot. Agency, and Benjamin H. Grumbles, Assistant Adm’r for Water, U.S. Env’tl. Prot. Agency, to Regional Administrators, Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers 2 (Aug. 5, 2005), available at [http://www.epa.gov/ogc/documents/water\\_transfers.pdf](http://www.epa.gov/ogc/documents/water_transfers.pdf) [hereinafter *2005 EPA Memorandum*].

72. The *2005 EPA Memorandum* contains the same argument for exempting water transfers under the NPDES permitting program as in the Final Rule. *Id.*

73. *Id.* at 19.

74. *Id.* at 15.

75. *Id.* To determine whether waters are “distinct,” EPA argued that the analysis must determine whether there is a natural or man-made hydrological connection between the two water bodies. *Id.* at 15–16. The *2005 EPA Memorandum* noted that a water transfer rule adopting the “meaningfully distinct” test may include water bodies that are man-made changes in the normal flow or surface and ground waters because Congress has acknowledged that the nation’s waters have been extensively altered by human activity for centuries. *Id.* Further, the provisions of the CWA has been applied to “all waters that meet the statutory and regulatory definitions of navigable waters, regardless of whether human activity may have contributed to making the water what it is today.” *Id.* at 15.

76. *Id.* To determine whether waters are “meaningfully” distinct, EPA posits that the analysis must determine whether the water transfers would have a “meaningful, or significant, adverse effect on water quality that is not being adequately addressed by States and water resource management agencies.” *Id.* at 17. This meant that the requirement for a NPDES permit

#### IV. EPA'S RATIONALE FOR THE FINAL WATER TRANSFERS RULE

On June 13, 2008, EPA promulgated the Final Rule, which set aside the two-part test in favor of categorically exempting all water transfers that fall under the Final Rule's definition.<sup>77</sup> EPA justified its interpretation by examining the Act's statutory language and structure, and pointed out multiple provisions of the CWA which leave primary oversight of water transfers to state water resource management agencies and state non-NPDES authorities.<sup>78</sup>

According to EPA, both sections 101(g) and 510(2) of the CWA stood for the proposition that Congress made clear "the [Act] is to be construed in a manner that does not unduly interfere with the ability of States to allocate water within their boundaries."<sup>79</sup> EPA then cited section 101(b) for the proposition that states have primary responsibilities with respect to the development of land and water resources.<sup>80</sup> Finally, EPA cited section 304(f) for the proposition that Congress foresaw that water transfers could result in pollution but it chose to regulate certain water transfers or flow diversions through dams, levees, and channels outside of the NPDES program, insofar as

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for water transfers may consider "whether there are existing laws, regulations, or programs that are being implemented that adequately address the types of water quality concerns associated with the water transfer at issue." *Id.* Conversely, where authorities are not being implemented to address the water quality concerns, EPA believed that other factors should be considered in determining whether a water transfer concerns "meaningfully" distinct water bodies. *Id.* One possible factor may include "the degree of similarity or differences between the waters," such as the "differences between the chemical, physical and biological characteristics" of the water bodies at issue. *Id.* at 17-18.

77. NPDES Water Transfers Rule, 73 Fed. Reg. 33, 697 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i)). Noting that the term "addition" is a general term, undefined by the statute, EPA turned to statutory construction principles to construe the meaning of the term. *Id.* at 33,700-01. First, the EPA took a "holistic" approach to the statute by viewing the provision in the context of the whole law, its objectives, and policy. *Id.* (citing *United States v. Boisdore's Heirs*, 49 U.S. 113, 122 (1850)). Above all, EPA reasoned that "the heart of this matter is the balance Congress created between federal and State oversight of activities affecting the nation's waters." *Id.*

78. *Id.* at 33,701-03.

79. *Id.* at 33,704. Specifically, section 101(g) states that "[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 [the Act]." Section 510(2) provides that "[e]xcept as expressly provided in this Act, nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." *Id.*

80. *Id.* at 33,702.

these transfers or diversions do not involve discharges from point sources.<sup>81</sup>

Taking these four statutory provisions in conjunction, EPA, in effect, framed water transfers as an issue solely related to water management or allocation rather than water quality.<sup>82</sup> EPA then concluded that Congress could neither have intended to create federal interference with state authority over water allocation and management, nor intended to create federal oversight of water transfers under the NPDES program.<sup>83</sup> Finally, EPA distinguished water transfers from NPDES discharges because all NPDES discharges are subject to effluent limitations<sup>84</sup> and, since operators of water diversion facilities are not generally responsible for the presence of the pollutants in the waters they transfer, the effluent limitations applied to all NPDES discharges will be inapplicable.

EPA also discussed the legislative history of the CWA sections it cited to support its interpretation. It noted that the legislative history of section 101(g) reveals that “[i]t is the purpose of this [provision] to insure that State [water] allocation systems are not subverted.”<sup>85</sup> Additionally, EPA argued that “the legislative history of the Act

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81. *See id.* Section 304(f)(2)(F) of the CWA directs EPA to “issue guidelines for identifying and evaluating the nature and extent of *nonpoint sources* of pollution, as well as processes, procedures and methods to control pollution [resulting] from, among other things, ‘changes in the movement, flow or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.’” *Id.* EPA reasoned that, because section 304(f)(2)(F) “concerns nonpoint sources” of pollutants, including flow diversion and water movements, Congress must not have intended water transfers to fall under “point source” discharges regulated by the NPDES program. *See* NPDES Water Transfers Rule, 73 Fed. Reg. at 33,702 (citing *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106 (2004)). Ironically though, water can only be artificially transferred or diverted through point source conveyances, such as dams and flow diversion facilities, and courts have found that section 304(f)(2)(F) does not explicitly exempt nonpoint sources if they also fall within the definition of point source. *See infra* note 105 and accompanying text. As a result, EPA’s final interpretation seems to, in effect, equate non-point source “concerns” of section 304(f)(2)(F) as exemptions for point source discharges falling within the “concerns,” contrary to what courts have concluded.

82. For a discussion of the balance Congress sought to achieve between the state’s right to allocate water and the federal government’s authority to regulate water quality under the CWA, see Klein, *supra* note 66, at 1017–20.

83. NPDES Water Transfers Rule, 73 Fed. Reg. at 33,702–05.

84. *Id.* For a discussion of effluent limitations, see *supra* note 30.

85. NPDES Water Transfers Rule, 73 Fed. Reg. at 33,703 (citing CONG. RESEARCH SERV., Serial No. 95-14, A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, at 532 (1978)).

discusses water flow management activities in the context of the nonpoint source program only,” pointing to section 304(f), where a House Committee Report “specifically mentioned water flow management as an area where EPA would provide technical guidance to States for their nonpoint source programs, rather than an area to be regulated [by the NPDES program] under section 402” of the Act.<sup>86</sup>

As a result of its interpretation of the language, structure, and legislative history of these limited sections of the CWA, EPA concluded that “Congress generally did not intend to subject water transfers to the NPDES program.”<sup>87</sup>

#### V. A CRITIQUE OF EPA’S RATIONALE

Case law, legislative history, and statutory structure of the CWA and NPDES permitting provisions suggest that EPA’s interpretation of “addition” is unreasonable, and should not be given deference by courts.

##### A. Case Law

As mentioned in Part III, the First Circuit in *Dubois* and the Second Circuit in *Catskills* held that water transfers required an NPDES permit.<sup>88</sup> The *Dubois* court examined the legislative history of the Act, and concluded that Congress could not have intended to allow water transfers through a point source without considering the water quality effects of such transfers.<sup>89</sup> The *Catskills* court similarly examined the Act’s legislative history and concluded that the “ordinary meaning” of the term “addition” would provide enough basis to reject a unitary waters theory approach like the one espoused by the Final Rule.<sup>90</sup> The *Catskills* court found the unitary waters theory approach inconsistent with the goals of the CWA because it “would mean that movement of water from one discrete water body

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86. *Id.* (citing H.R. REP. NO. 92-911, at 109 (1972)).

87. *Id.*

88. *See supra* notes 52–64 and accompanying text.

89. *Dubois v. USDA*, 102 F.3d 1273, 1297–98 (1st Cir. 1996).

90. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481, 493 (2d Cir. 2001).



to another would not be an addition even if it involved a transfer of water from a water body contaminated with myriad pollutants to a pristine water body containing few or no pollutants.”<sup>91</sup> Finally, both cases accurately distinguished *Gorsuch* and *Consumers Power* as cases that involved the accumulation of the same water or the movement of water within the same water body.<sup>92</sup> In *Gorsuch* and *Consumers Power*, there was no concern that the normal directional flow was being subverted or that the waters were materially distinct from one another.<sup>93</sup>

Additionally, courts have contradicted EPA’s interpretations of sections 101(g) and 510(2) of the Act. In *PUD No. 1 of Jefferson County v. Washington State Department of Ecology*,<sup>94</sup> the Court stated that “Sections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation.”<sup>95</sup> In *United States v. Akers*,<sup>96</sup> the Ninth Circuit looked at the same statutory provisions and concluded that “[a] fair reading of the statute as a whole makes clear that, where both the state’s interest in allocating water and the federal government’s interest in protecting the environment are implicated, Congress intended an accommodation.”<sup>97</sup> Further, “[s]uch accommodations are best reached in the individual permit process.”<sup>98</sup> Based on these court opinions, it appears that EPA overstated the dichotomy between federal water quality protection and preservation of states’ water rights over issues of allocation.

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91. *Id.* at 493.

92. *See supra* notes 44–51 and accompanying text.

93. *See supra* notes 43–51 and accompanying text.

94. 511 U.S. 700, 720 (1994).

95. *Id.* at 720.

96. 785 F.2d 814, 821 (9th Cir. 1986) (quoting *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 513 (10th Cir. 1985)).

97. *Id.*

98. *Id.*

### *B. Legislative History and Statutory Structure*

Additionally, legislative history does not support EPA's interpretation. Although section 101(g) does concern water allocation, it was not intended to take precedence over legitimate and necessary water quality considerations. At the time of the CWA and its subsequent amendments, many western states were concerned about the federal government's intrusion into water transfers insofar as it related to the quantity of water already allocated to states.<sup>99</sup> Water was—and continues to be—a valuable natural resource in the western states and most had developed a water allocation system based on the prior appropriation doctrine.<sup>100</sup> Because of the growing demand and resulting scarcity of water, many western states declared themselves the owners of their waters in trust for their citizens. In this role, the states adopted formal administrative permit procedures designed to consolidate historic water rights, provide for the transfer and creation of future rights, and enforce such rights.<sup>101</sup> However, even though states developed their own regulatory schemes governing issues of water quantity and allocation, Congress proceeded apace to regulate all other aspects of water, like water

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99. See S. Env't & Pub. Works Subcomm. Hearings on Federal Water Pollution Control Act Amendments of 1977, Part 4, June 13, 1977, at 243–64 (testimony of Federal agency and FWPCA failure to equitably allocate water resources among competing users in Wyoming); COMM. ON WESTERN WATER MGMT., NAT'L RESEARCH COUNCIL, WATER TRANSFERS IN THE WEST: EFFICIENCY, EQUITY, AND THE ENVIRONMENT 23–25 (1992) (noting the significance of water transfers in the West); GERALD D. NASH, THE AMERICAN WEST IN THE TWENTIETH CENTURY: A SHORT HISTORY OF AN URBAN OASIS 292 (1973).

100. See Ray Huffaker, Ari Michelsen & Joel Hamilton, *The Uneasy Hierarchy of Federal and State Water Laws and Policies*, WATER RESOURCES UPDATE, Jan. 2001, at 1, 3–10, available at [http://www.ucowr.org/updates/pdf/V118\\_A2.pdf](http://www.ucowr.org/updates/pdf/V118_A2.pdf). The prior appropriation doctrine allocated surface water resources on a “first in time, first in right” basis without restriction to a specified geographic area. *Id.* In contrast, eastern states adopted a riparian rights system that allocated water based on the waters' location in relation to the owned land. See *Riparian Water Rights—Understanding Eastern U.S. Water Law*, WATER COLO. BLOG (June 21, 2009, 11:58 AM), <http://www.watercolorado.com/riparian-water-rights-understanding-eastern-us-water-law/>. For a comparative historical description of prior appropriation and riparian water rights schema, see JOSHUA GETZLER, A HISTORY OF WATER RIGHTS AT COMMON LAW 117–52, 268–327 (2004).

101. Charles T. DuMars & A. Dan Tarlock, *New Challenges to State Water Allocation Sovereignty*, 29 NAT. RESOURCES J. 331, 332 (1989), available at [http://www.nationalaglawcenter.org/assets/bibarticles/dumarstarlock\\_challenges.pdf](http://www.nationalaglawcenter.org/assets/bibarticles/dumarstarlock_challenges.pdf).

quality, as water pollution became increasingly serious all over the country, including the West.<sup>102</sup>

Unsurprisingly, due to the historical problem relating to western water scarcity, the drafters of § 101(g) in the 1977 Amendments to the CWA were careful to balance the need to reduce and eliminate water pollution with the need to preserve the states' longstanding water allocation priorities.<sup>103</sup> One of the drafters, Senator Malcolm Wallop of Wyoming, stated that § 101(g) was not intended to take precedence over legitimate and necessary water quality considerations, but rather it was designed to protect the state's historic rights to establish priority of usage and "from mischievous abrogation by those who would use an act, designed solely to protect water quality and wetlands, for other purposes."<sup>104</sup> Accordingly, even though EPA correctly concluded that section 101(g) was intended by Congress to preserve the states' right over their historic allocation of water within their boundaries, EPA incorrectly concluded that water allocation should take precedence over all water quality considerations.

EPA also incorrectly concluded the Congressional intent of § 510(2). The Senate Committee Report stated that, "[t]his section of the Act retains the right of any State or locality to adopt or enforce effluent standards or limitations, or any other requirement, respecting control or abatement of a water pollution more stringent than those required or established under this Act."<sup>105</sup> Therefore, section 510(2) does not support the EPA's contention that Congress intended to leave *complete* oversight of water transfers to water resource management agencies and state non-NPDES authorities, but rather supports the contention that states may set more stringent, but not lower, pollution standards than the federal floor.

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102. KLEIN ET AL., *supra* note 66, at 828–29; NASH, *supra* note 99, at 288–95.

103. Colangelo, *supra* note 21, at 115 n.45 (citing Nichols, *supra* note 20, at 119, 120).

104. 123 CONG. REC. 39,211–12 (1977) (statement of Sen. Wallop), *reprinted in* CWA77 Leg. Hist. 14 (LEXIS). Senator Wallop explained that the requirements of section 402 and 404 permits, for instance, may incidentally affect individual water rights, but that it was not the purpose of the amendment to prohibit those incidental effects so long as those effects were prompted by legitimate and necessary water quality considerations. *Id.* at 39,112.

105. S. REP. NO. 92-414, at 85 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3751; *see also* S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 106 (2004).

Furthermore, although EPA correctly interprets section 304(f) to reflect an understanding by Congress that water movement could result in pollution, it does not follow that such pollution must be managed by states under their nonpoint source program authorities rather than by the NPDES program. The water movement activities listed in 304(f) may still be subject to the NPDES program if such water movement activities are emitted from a discernible conveyance or point source.<sup>106</sup>

Additionally, even if most water transfers are not like effluent discharges in municipal, industrial, or commercial operation, the NPDES permit program, under § 302 of the CWA, shows an intent by Congress to regulate water pollution that may not be susceptible to effluent limitations and are better regulated by “alternative effluent control strategies.”<sup>107</sup> Moreover, Congress sought to overcome the weaknesses of the 1899 Refuse Act, which only applied a permit requirement to industrial polluters, by creating the NPDES permit program and defining “pollutants” broadly, such that the permit program would apply not only to industrial dischargers, but to *all* dischargers.

Finally, the unitary waters theory espoused by the Final Rule ignores the CWA’s treatment of “dredged material” and “dredged spoil” in section 404 of the CWA, which applies the same statutory definition of “addition” as in the NPDES program under section 402 of the CWA.<sup>108</sup> The very nature of dredged spoil and dredged material is their obligation within the waters of the United States.<sup>109</sup> Thus, any discharge of dredged material inherently involves moving

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106. *See, e.g.*, *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984) (holding that section 304(f) lists activities that “may involve discharges from both point and nonpoint sources, and those from point sources are subject to regulation”); *Sierra Club v. Abston Constr. Co., Inc.*, 620 F.2d 41 (5th Cir. 1980); *United States v. Earth Sciences*, 599 F.2d 368, 373 (1979).

107. *See supra* note 33 and accompanying text.

108. CWA section 301(a) prohibits the “discharge of any pollutant” without a permit, with section 502(6) defining “pollutant” to include “dredged spoil,” and section 502(12) defining “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.” CWA § 301(a), 33 U.S.C. § 1311 (2006); CWA § 502(12), 33 U.S.C. § 1362(12) (2006).

109. 40 C.F.R. § 232.2 (2010) (EPA regulation defines “dredged material” as “material that is excavated or dredged from waters of the United States”); *accord* 33 C.F.R. § 323.2(c) (Corps of Engineers regulation).

material that originated in United States waters, even if it does not introduce material to those waters from an external source.<sup>110</sup> Federal appellate courts have found that simply relocating dredged or fill material within a single water body constitutes an “addition.”<sup>111</sup> As a result, if the mere relocation of dredged materials mandates a Clean Water Act permit, so does a mere relocation or transfer of pollutants from one water body to another under section 402 of the CWA.<sup>112</sup>

## VI. RECOMMENDATION

In light of previous case law, legislative history, and the Supreme Court’s dictum in *Miccosukee*, EPA’s interpretation of “addition” in the Final Rule is unreasonable and inconsistent with the delicate balance between environmental concerns and state sovereignty concerns Congress sought to resolve when it enacted the CWA and its subsequent amendments. EPA should have applied the “meaningfully distinct” test in determining what water transfers constitute an “addition” under the NPDES program, rather than categorically exempting all water transfers from the program. This “meaningfully distinct” test should distinguish water transfers that do not significantly alter the biological, chemical, and physical structure of the receiving water body from water transfers that do.

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110. According to the sponsor of the floor amendment that first proposed assigning the Corps permitting authority over dredged material discharge, such discharge involves “moving spoil material from one place in the waterway to another, without the interjection of new pollutants.” 117 CONG. REC. 38,854 (1971) (statement of Sen. Ellender); *accord id.* at 38,853 (“The disposal of dredged material does *not* involve the introduction of *new* pollutants; it merely *moves* the material from one location to another.”) (emphasis added).

111. *See, e.g.*, *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000) (relocation of dredged material from a ditch to the edge of the ditch constituted an “addition”); *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1403–05 (D.C. Cir. 1998) (holding that “incidental fallback,” which occurs when dredged material is returned “virtually to the spot from which it came,” does not constitute an “addition”); *United States v. Huebner*, 752 F.2d 1235, 1241–43 (7th Cir. 1985) (§ 404 permit required for use of earthmoving equipment to spread soil around wetlands); *Avoyelles Sportsmen’s League v. Marsh*, 715 F.2d 897 (5th Cir. 1983). However, the court in *Nat’l Mining Ass’n* confirmed that relocation of dredged material to a different spot—even within the same water body—can constitute an “addition” and, thus, a discharge. *Nat’l Mining Ass’n*, 145 F.2d at 1403–05.

112. Based on the similarity of the language used to define “addition” in sections 404 and 402, Congress may have likely intended that the term “addition” as it applies to dredged materials has an application similar to the term “addition” as it applies to water transfers, where pollutants are relocated or transferred from one water body to another water body.

While EPA's preliminary analysis of the "meaningfully distinct" test is useful, it is overly complicated. EPA's two-part test misapplies grammatical construction because the adjective "meaningfully" modifies "distinct," and so whether a water source is "meaningfully distinct" should not have to meet a two prong analysis, such that the first prong requires a determination of whether a water is "distinct." The question really is whether the water meets the threshold level of being "meaningfully distinct," not that it must be "distinct" in the first place.

A more useful way in applying *Miccosukee*'s "meaningfully distinct" test should take into account a multitude of factors such as the ones considered in Pennsylvania's Policy Guide.<sup>113</sup> Rather than rely on a simple formulation such as hydrological connectivity,<sup>114</sup> the test should consider: the flow direction (upstream vs. downstream); the water quality standards between the receiving and transferring waters; the likely impacts to vegetative and aquatic life in the receiving water body; and any potential mitigation measures that may limit the impact in a cost-effective manner. Despite the fear that permits will be required for every instance of a water transfer, the Supreme Court has previously noted that while "permitting authority is necessary to protect water quality," regulatory costs may be alleviated by the use of general permits, rather than individual NPDES permits.<sup>115</sup>

#### CONCLUSION

The interpretation of "addition" by EPA under the NPDES Water Transfers Rule is unreasonable. Although the term "addition" is ambiguous under a plain reading of the statute, EPA incorrectly characterized the legislative intent in the CWA sections they cited.

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113. See POLICY GUIDE, *supra* note 41.

114. In *Dubois*, the court rejected the Forest Service's "hydrological connectedness" proposal because it ignored the directional flow of the water. *Dubois v. USDA*, 102 F.3d 1273, 1298 (1st Cir. 1996).

115. Bettina Boxall, *Water Pumping Case May Stem Flows in West*, L.A. TIMES, Dec. 22, 2003, at B5 (referring to the amicus brief filed with the Supreme Court by Colorado's attorney general); see also Brief for Former Adm'r Carol M. Browner et al. as Amici Curiae Supporting Respondents at \*3, *S. Fla. Water Mgmt. Dist. v. Miccosukee*, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22793539.

An interpretation that would best achieve the legislative intent of the CWA and the NPDES permit program should define “addition” as any discharge from a point source from one “meaningfully distinct” waters of the United States to another “meaningfully distinct” waters of the United States. Concededly, determining what waters are meaningfully distinct may not be as streamlined as EPA’s categorical exemption of water transfers from the NPDES permitting requirements, but this approach better effectuates the delicate balance between environmental concerns and state sovereignty concerns Congress sought to resolve when it enacted the CWA and its amendments.