

**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?**

*The Everglades are an American treasure on par with the Grand Canyon, Yellowstone, and California's ancient redwoods. There is no other place else like them in the world. But the Everglades are dying. And if we do not act now, we may very well lose the opportunity to save them for future generations.*<sup>1</sup>

I. INTRODUCTION

The Everglades National Park (the Everglades) is a vibrant and dazzling ecosystem that supports an extensive plant life and a “wealth of fish, lobsters, shrimp, bass, catfish, alligators, and numerous other animals.”<sup>2</sup> This environmental marvel, located in southern Florida, is currently subject to increased pollution caused by elevated phosphorous levels, disrupted water flow, and extensive water controls that were developed within the past fifty years.<sup>3</sup> Only recently has the federal government and the State of Florida recognized the degradation.<sup>4</sup> In response, “comprehensive and expensive environmental protection plan[s]” have been developed to “rebalance the Everglades’ ecosystem.”<sup>5</sup>

The water control systems were developed, in part, to control flooding in residential areas.<sup>6</sup> These systems collect stormwater and agricultural runoff to prevent areas of Broward County, Florida, from flooding.<sup>7</sup> A portion of the collected water is then pumped into a water conservation area of the Everglades.<sup>8</sup> Unfortunately, the collected waters contain pollutants, and the South Florida Water Management District (SFWMD) pumps these already polluted waters into a water conservation area that has lower concentration of those pollutants.<sup>9</sup> While the entire area was

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<sup>1</sup> Letter from Joseph W. Westphal, Assistant Secretary of the Army (Civil works), to the Honorable Albert Gore, former President of the Senate, July 1, 1999.

<sup>2</sup> Richard J. Ansson, Jr., *Protecting and Preserving Our National Parks: The Everglades National Park Restoration Project*, 19 VA. ENVTL. L.J. 121, 122 (2000).

<sup>3</sup> See discussion *infra* Part II.A.

<sup>4</sup> See discussion *infra* Part II.A.

<sup>5</sup> Ansson, *supra* note 2, at 123.

<sup>6</sup> See discussion *infra* Part II.A.

<sup>7</sup> See discussion *infra* Part II.A.

<sup>8</sup> See discussion *infra* Part II.C.

<sup>9</sup> See discussion *infra* Part II.C.

historically and hydrologically one body of water, many parts of the Everglades are now separated by extensive systems of canals, basins, levees, and pumping stations.<sup>10</sup> In an effort to combat the increased pollutant levels in the Everglades, the Miccosukee Tribe of Indians (the Tribe) and the Friends of the Everglades together filed suit against the SFWMD to force the water management district to acquire a National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act.<sup>11</sup>

Part II discusses the Everglades' overall geomorphic history and development as a natural water body that was historically, or hydrologically, one "sheet" of water. Additionally, it will discuss the development and destruction of the Everglades over the past century, focusing on the current water controls that introduce already polluted water into a water conservation area of the Everglades. Part III will review the procedural history of the case and the Supreme Court's holdings.

Part IV is divided into various subsections in order to analyze the legal arguments in *Miccosukee I*. It will discuss the initial development of the Clean Water Act (CWA),<sup>12</sup> the legislative intent behind the CWA, and specifically, the NPDES permitting system under the CWA and its progression. Part IV will also review what constitutes an "addition of any pollutant"<sup>13</sup> and consider whether it matters if the already polluted water is merely conveyed. It will discuss historically connected water bodies and whether they are forever one body of water or whether they can, at some point, become separate and distinct bodies of water. Ultimately, Part IV will indicate whether water management districts and the like are exempt from the requirement to obtain a NPDES permit.

Part V discusses the potential impact of the Supreme Court's decision and possible subsequent holdings on remand. It will cover the burdens imposed upon SFWMD, other water management districts, and other municipalities if they are required to get a NPDES permit to "discharge" water that they are merely conveying from one area to another hydrologically connected area. Part V will discuss cost increases in managing water or providing clean water, and the possible increase in taxpayer costs. Part V will also discuss the impact on the Everglades, pristine areas, and the national environment if no NPDES permit is

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<sup>10</sup> See discussion *infra* Part II.A.

<sup>11</sup> *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, No. 98-6056-CIV, 98-6057-CIV, 1999 WL 33494862, at \*1 (S.D. Fla. Sept. 30, 1999), *aff'd in part and vac'd in part*, 280 F.3d 1364 (11th Cir. 2002), *vac'd and remanded*, 541 U.S. 95 (2004) [hereinafter *Miccosukee I*].

<sup>12</sup> 33 U.S.C. §§ 1251-1274, 1281-1330, 1341-1346, 1361-1377, 1381-1387 (2000).

<sup>13</sup> 33 U.S.C. § 1362(12)(A) (2000) (defining a discharge as "addition of any pollutant to navigable waters from any point source").

required. It will speak to the potential pollution of clean water, increased costs of cleaning and protecting waters, the increased environmental damage caused by polluting, and ultimately, the damage to flora, fauna, animals, and habitats.

The SFWMD ultimately believes that because it is merely transporting already polluted water, and historically the water bodies were connected, it is not “adding” a pollutant “from a point source,” and thus it is not required by the CWA to obtain a NPDES permit.<sup>14</sup> However—in light of the Court’s decision in *Miccosukee I*, current Supreme Court precedent with regard to the strict statutory interpretation of environmental statutes, Circuit Court precedent, and the legislative history and intent behind the CWA and the NPDES permitting program—it is likely that upon remand, the district court will decide that it is necessary for the SFWMD to obtain a NPDES permit due to its continued pollution of the Everglades.

## II. THE EVERGLADES: CONSTRUCTION, DESTRUCTION AND CONTROL

### A. *History and Development of the Everglades*

The Everglades is a water-based ecosystem, known as the “River of Grass,” with a total surface area of 4,500 square miles, flowing from Lake Okeechobee to the Gulf of Mexico.<sup>15</sup> Congress has recognized the Everglades as a valuable environmental treasure that “includes uniquely-important and diverse wildlife resources and recreational opportunities.”<sup>16</sup> In the Water Resources Development Act of 2000, Congress found that preserving the Everglades as part of “the pristine and natural character of the South Florida ecosystem is critical to the regional economy.”<sup>17</sup>

Historically, the hydrologically connected water flowed slowly from Lake Okeechobee down through the Everglades into the sea in a large, slow moving, quiet, and unrestricted sheet.<sup>18</sup> However, the natural flow

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<sup>14</sup> See discussion *infra* Part IV.

<sup>15</sup> MARJORY STONEMAN DOUGLAS, *THE EVERGLADES: RIVER OF GRASS* 10 (1947).

<sup>16</sup> Water Resources Development Act of 2000, Pub. L. No. 106-541, § 602(a)(1), 114 Stat. 2572, 2693 (2000); see also FLA. STAT. ANN. § 373.4592(1)(a) (West 2005) (stating that “the Everglades ecological system not only contributes to South Florida’s water supply, flood control, and recreation, but serves as the habitat for diverse species of wildlife and plant life”).

<sup>17</sup> Water Resources Development Act of 2000, § 602(a)(2).

<sup>18</sup> See Mark Derr, *Splendor in the Swamp*, SIERRA, July/Aug. 1999, at 51; SFWMD, 2003 Everglades Consolidated Report App. 1-1, available at [http://www.sfwmd.gov/org/ema/everglades/consolidated\\_03/ecr2003/index.html](http://www.sfwmd.gov/org/ema/everglades/consolidated_03/ecr2003/index.html) (last visited Apr. 15, 2005); see also *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1366 n.2 (11th Cir. 2002) (stating that “[b]ut for the construction of the L-33 and L-37 levees and

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was altered by the construction of “1400 hundred miles of canals, levees and dikes, 125 water control structures, and 18 pumping stations” by the United States Army Corps of Engineers (Corps).<sup>19</sup> In 1948, Congress authorized the Corps, through the Central and South Florida Project (C&SF), to construct the canals, levees, water control structures, and water impoundment areas in order to advance the preservation of fish and wildlife, to control regional groundwater and salinity in South Florida, and to create proper drainage to control flooding.<sup>20</sup> In an effort to further protect and benefit the Everglades, Congress, via the Water Resources Development Act of 1996 (WDRA 1996), instructed the Secretary of the Army to develop a “comprehensive plan for the purpose of restoring, preserving, and protecting the South Florida ecosystem.”<sup>21</sup> As a result, the Secretary developed the Comprehensive Everglades Restoration Plan (CERP).<sup>22</sup>

Adopted by Congress in 2000, CERP allows for modifications of the C&SF Project in order to “restore, preserve, and protect” the South Florida ecosystem which includes the Everglades, “while providing for other water-related needs of the region, including water supply and flood protection.”<sup>23</sup> CERP’s objective, in part, is “to ensure the protection of water quality [and reduce] the loss of fresh water [in order to improve] the environment” of the Everglades ecosystem.<sup>24</sup> In order to reach those admirable goals, Congress approved more than one billion dollars for initial projects.<sup>25</sup> However, in carrying out those projects, Congress specifically required the Secretary to “ensure that all ground water and surface water discharges from any project feature authorized by this subsection [to] meet all applicable water quality standards and applicable water quality permitting requirements.”<sup>26</sup>

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the C-11 canal, water would flow as a sheet across WCA-3A and the C-11 Basin in a southerly direction”).

<sup>19</sup> See Ansson, *supra* note 2, at 136 (internal quotations omitted); see also EVERGLADES: THE ECOSYSTEM AND ITS RESTORATION 55 (Steven M. Davis & John C. Ogden eds. 1994) (discussing the State of Florida’s initial involvement in developing canals and related structures prior to the Army Corps of Engineers’ involvement).

<sup>20</sup> Flood Control Act of 1948, ch. 771, § 203, 62 Stat. 1175, 1175-1181 (1948).

<sup>21</sup> Water Resources Development Act of 1996, Pub. L. No. 104-303, § 528(b)(1)(A)(i), 110 Stat. 3767, 3767 (1996).

<sup>22</sup> Pub. L. No. 106-541, 114 Stat. 2680 (2000).

<sup>23</sup> *Id.* § 601(b)(1)(A).

<sup>24</sup> *Id.* § 601(b)(1)(A).

<sup>25</sup> *Id.* § 601(B).

<sup>26</sup> *Id.* § 601(b)(2)(A)(ii)(II).

*B. Protecting the Everglades*

Phosphorous levels are “the defining chemical characteristic” of the Everglades.<sup>27</sup> The Everglades is a wetland system that, in its natural state, contains minimal “plant nutrient minerals and organisms [, but is normally] rich in oxygen in all depths.”<sup>28</sup> Normally, the system contains only limited amounts of phosphorus, which dictates “the type and distribution of aquatic flora, and fauna.”<sup>29</sup> The increased phosphorous levels have led to an imbalance in native flora and fauna, resulting in new, abnormal, and harmful growth.<sup>30</sup> Increased phosphorous levels promote cattail expansion, which crowds out “native sawgrass and other vegetation, thus affecting the habitat of other wildlife, such as birds and fish.”<sup>31</sup> The phosphorous pollution is also killing coral in the Gulf of Mexico because, like the Everglades, “the living reef” is a nutrient-poor environment that is adversely affected by the increased influx of the pollutant.<sup>32</sup>

In an effort to combat the damaging phosphorous increases, the federal government brought an action in 1988 against the SFWMD, alleging violations of state law and federal contracts due to the water district allowing phosphorous-polluted water to be diverted into the Everglades.<sup>33</sup> As a result of the suit, a consent decree required the state of Florida to carry out a regulatory permit program designed to improve the quality of runoff entering the Everglades.<sup>34</sup> Furthermore, the decree required the SFWMD to construct stormwater-treatment areas.<sup>35</sup> To facilitate the implementation of the consent decree, Florida passed the Everglades Forever Act of 1994.<sup>36</sup>

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<sup>27</sup> Miccosukee I, No. 98-6056-CIV, 1999 WL 33494862, at \*1 (S.D. Fla. Sep. 30, 1999).

<sup>28</sup> *Id.* at \*1 n.3.

<sup>29</sup> *Id.* at \*1.

<sup>30</sup> *Id.*; see also Ansson, *supra* note 2, at 139; FLA. STAT. ANN. § 373.4592(1)(d) (West 2005) (“The [Florida] Legislature finds that waters flowing into the Everglades Protection Area contain excessive levels of phosphorus. A reduction in levels of phosphorus will benefit the ecology of the Everglades Protection Area.”).

<sup>31</sup> Ansson, *supra* note 2, at 139.

<sup>32</sup> *Id.*

<sup>33</sup> See *United States v. S. Fla. Water Mgmt. Dist.*, 847 F. Supp. 1567, 1569 (S.D. Fla. 1992), *aff’d in part and rev’d in part*, 28 F.3d 1563 (11th Cir. 1994).

<sup>34</sup> *Id.* at 1569-70.

<sup>35</sup> *Id.* at 1570. Marshes designed to filter nutrients from farm-water runoff destined for the Everglades were designated by the decree as the appropriate water-treatment mechanism. *Id.*

<sup>36</sup> FLA. STAT. ANN. § 373.4592 (West 2005).

C. *The Current Problem*

Another effort to force Florida to recognize continued pollution was brought forth in the *Miccosukee* case,<sup>37</sup> the focus of this Article. The case revolves around specific existing water control facilities that are part of the C&SF Project, which is now managed by the SFWMD.<sup>38</sup>

In the early 1900s, the Army Corps of Engineers dug out what is now known as the C-11 Canal in order “to facilitate the draining of western portion of Broward County which is part of the C-11 Basin.”<sup>39</sup> In the 1950’s, the Corps built L-33 and L-37—two north-south levees—and a pumping station—S-9—located where the two levees intersect, at the south end of L-37 and the north end of L-33.<sup>40</sup> SFWMD now operates the S-9 pumping station.<sup>41</sup> The C-11 Basin’s western boundary is the L-33 and L-37 levees, which demarcated and created Water Conservation Area-3A (WCA-3A) to the west of the levees.<sup>42</sup> Historically, the Everglades encompassed both the C-11 Basin and the WCA-3A, and before the canal and levees were built, water flowed across both areas in a southerly direction.<sup>43</sup> As a result of the extensive construction by the Corps, the resulting natural direction of the flow of the water became west to east

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<sup>37</sup> *Miccosukee I*, No. 98-6056-CIV, 9806057-CIV, 1999 WL 33494862 (S.D. Fla. Sept. 30, 1999).

<sup>38</sup> *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1366 (11th Cir. 2002) [hereinafter *Miccosukee II*].

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* The S-9 pumping station effectively bisects what could visually appear to be a large levee. See South Florida Water Management District, *Map of S-9 Structure*, available at [http://www.sfwmd.gov/gover/s\\_9final/s\\_9\\_photos/s9\\_enp.jpg](http://www.sfwmd.gov/gover/s_9final/s_9_photos/s9_enp.jpg) (last visited Apr. 18, 2005) [hereinafter *Map of S-9 Structure*]. The S-9 pumping station is situated in such a way that *seems* to bisect one long levee, separating it into two separate levees known as the L-33 and the L-37. See *id.*

<sup>41</sup> *Miccosukee II*, 280 F.3d at 1366. See *Map of S-9 Structure*, *supra* note 40, for a detailed map of southern Florida, which includes the location of the S-9 pumping station, the C-11 canal, the L-33 and L-37 levees, and the Water Conservation Area (WCA-3A) to the west of the S-9 pumping station.

<sup>42</sup> *Miccosukee II*, 280 F.3d at 1366. The WCA-3A is on the western side of the levees, while the C-11 Basin is on the eastern side of the levees. *Map of S-9 Structure*, *supra* note 40.

<sup>43</sup> *Miccosukee II*, 280 F.3d at 1366 n.2 (11th Cir. 2002) (“But for the construction of the L-33 and L-37 levees and the C-11 canal, water would flow as a sheet across WCA-3A and the C-11 Basin in a southerly direction. Now, because of the construction of these structures, water from the C-11 Basin generally does not flow west into the WCA-3A without the operation of S-9.”).

(towards the Atlantic Ocean).<sup>44</sup> Furthermore, water from C-11 Basin flows west into the WCA-3A *only* when the S-9 pump is operating.<sup>45</sup>

Running east-west through the C-11 Basin is the C-11 Canal, which collects water run-off from the Basin and terminates at the S-9 pumping station.<sup>46</sup> The S-9 station uses three pipes to pump the water from the C-11 Canal, through the levees, into WCA-3A.<sup>47</sup> Each pump “can displace 960 cubic feet of water per second[, but when] the S-9 pumps are not in operation, water does not discharge from the pipes.”<sup>48</sup> This process is known as “backpumping” because the natural easterly flow of the water is reversed, forcing the direction of the flow of the water to flow towards the west.<sup>49</sup> Unfortunately, the water that is collected by the C-11 Canal and then pumped by the S-9 pumping station contains phosphorus at greater levels than what is found in WCA-3A.<sup>50</sup> However, the pump station itself adds no pollutants to the waters being pumped.<sup>51</sup>

In the end, SFWMD could shut down the S-9 pumping station to keep the phosphorous-laden water from entering WCA-3A; unfortunately, such an action would flood “the populated western portion of Broward County . . . within days.”<sup>52</sup> As a result of these pollutant discharges by the S-9 pumping station, the Miccosukee Tribe of Indians of Florida and the Friends of the Everglades, Inc. filed suit in the southern district court of Florida to force the SFWMD to obtain an NPDES permit.<sup>53</sup>

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

The Miccosukee Tribe of Indians of Florida is a federally recognized Indian tribe whose members have lived and worked in the Everglades for

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<sup>44</sup> *Id.*; see also Map of S-9 Structure, *supra* note 40.

<sup>45</sup> Miccosukee II, 280 F.3d at 1366. However, the majority in the Supreme Court case of *South Florida Water Management District v. Miccosukee Tribe of Indians* noted that the two separate waters could be deemed one water body due to intermingling of surface and ground waters. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 110 (2004) [hereinafter Miccosukee III].

<sup>46</sup> Miccosukee II, 280 F.3d at 1366. The water collected by the C-11 Canal also contains seepage from WCA-3A. *Id.* This indicates that water actually moves from the water conservation area into the C-11 Basin.

<sup>47</sup> *Id.*

<sup>48</sup> Miccosukee I, No. 98-6056-CIV, 98-6057-CIV, 1999 WL 33494862, \*1 n.5 (S.D. Fla. Sept. 30, 1999); see also Miccosukee II, 280 F.3d at 1366.

<sup>49</sup> See Miccosukee I, 1999 WL 33494862, at \*6; Miccosukee II, 280 F.3d at 1366.

<sup>50</sup> Miccosukee II, 280 F.3d at 1366.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

generations.<sup>54</sup> The Miccosukee possess “land interests . . . within the Everglades, including a perpetual lease to most of [WCA-3A],” and their continued existence is intricately tied to a healthy Everglades ecosystem.<sup>55</sup> The Friends of the Everglades is a Florida, “nonprofit grassroots organization dedicated to protecting and restoring the Everglades.”<sup>56</sup> Originally founded by Marjory Stoneman Douglas in 1969 in order to stop the building of a jetport in the Everglades, the Friends of the Everglades has expanded to a membership of over 6,000 members, all of whom are dedicated to the protection and preservation of the Florida Everglades.<sup>57</sup> The SFWMD is one of five water management districts that were created in 1976,<sup>58</sup> and one of its main duties is to manage the C & SF Project and “the operation of many levees, canals and water impoundment areas,” including the C-11 Basin, the C-11 Canal, the L33 & L-37 levees, the WCA-3A, and the S-9 pumping station.<sup>59</sup>

The Miccosukee Tribe of Indians and Friends of the Everglades sued the SFWMD under the “citizen suit” provision of the CWA<sup>60</sup> in order to enjoin the pumping of polluted water into WCA-3A and to enforce the provision of the CWA that requires the SFWMD to obtain a NPDES permit to continue pumping.<sup>61</sup> Neither party disputed that, but for the pumping by the S-9 pump station, the polluted waters from the C-11 canal would not flow into the WCA-3A.<sup>62</sup> In an effort to hold the SFWMD accountable, suit was filed to determine whether already polluted water, merely carried by the C-11 canal, requires a NPDES permit.<sup>63</sup>

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<sup>54</sup> Miccosukee I, 1999 WL 33494862, at \*1.

<sup>55</sup> *Id.*

<sup>56</sup> Friends of the Everglades, *available at* <http://www.everglades.org> (last visited Apr. 13, 2005).

<sup>57</sup> *Id.* In 1993, President Clinton awarded Marjory Stoneman Douglas the Medal of Freedom, the nation’s highest civilian award, for her pure and unflinching dedication to the Everglades. *Id.* Mrs. Stoneman Douglas wrote *The Everglades: River of Grass* in 1947, a book that placed the unique ecosystem and its destruction into the forefront of public scrutiny. *Id.* In response to the recognition of the book, President Harry Truman created the Everglades National Park, preserving over two million acres of the ecosystem. *Id.* Mrs. Stoneman Douglas “died in 1998 at the age of 108, having done more than any other one person to protect this magnificent portion of wild America.” *Id.*

<sup>58</sup> FLA. STAT. ANN. § 373.069 (West Supp. 2005 ). While it was created by Florida statute, the SFWMD is not an “arm or agency of the state.” Miccosukee I, 1999 WL 33494862, at \*4.

<sup>59</sup> Miccosukee II, 280 F.3d at 1366.

<sup>60</sup> The Clean Water Act, 33 U.S.C. § 1251(e) (2003).

<sup>61</sup> 33 U.S.C. § 1342(h)-(j) (2000).

<sup>62</sup> Miccosukee I, 1999 WL 33494862, at \*7; Miccosukee II, 280 F.3d at 1367.

<sup>63</sup> Miccosukee I, 1999 WL 33494862, at \*3.

Additionally, the plaintiffs requested an injunction to stop the continued pollution of the Everglades (WCA-3A) until a NPDES permit was obtained.<sup>64</sup>

A. *The District Court*

The plaintiffs first brought suit in the Southern District Court of Florida.<sup>65</sup> The plaintiffs argued that the SFWMD was using the S-9 pumping station to pump already polluted water from the C-11 Basin and Canal into the WCA-3A, an area of the Everglades that has a “significantly different water quality,” without obtaining a NPDES permit.<sup>66</sup> The defendant, SFWMD, argued that, while the S-9 pump did release polluted water into WCA-3A, the polluted water was not a result of the addition of pollutants by the defendant.<sup>67</sup> Furthermore, the defendant argued that both the WCA-3A and the C-11 Basin and Canal were historically part of the Everglades and that the S-9 pumping station “merely passes water between two parts of the same body of United States water and therefore does not create pollutants; . . . they are created by the C-11 and its adjacent lands uses.”<sup>68</sup> Both parties moved for summary judgment,<sup>69</sup> with the plaintiffs requesting an order to enjoin the continued operation of the S-9 pumping station.<sup>70</sup> The court granted summary judgment in favor of the Tribe, stating that the S-9 pump is a point source of polluted water being issued into the “relatively pristine Everglades water,” thus requiring a NPDES permit under the Clean Water Act.<sup>71</sup> The court also issued an injunction to prohibit the operation of the S-9 pumping station.<sup>72</sup> Furthermore, the court found “that SFWMD is not an arm or agency of the state for Eleventh Amendment purposes,” thus they are not afforded its protection against suits in law or equity.<sup>73</sup>

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<sup>64</sup> Miccosukee II, 280 F.3d at 1366.

<sup>65</sup> Miccosukee I, 1999 WL 33494862, at \*1.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at \*2.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at \*3.

<sup>70</sup> Miccosukee II, 280 F.3d 1364, 1366 (11th Cir. 2002).

<sup>71</sup> Miccosukee I, 1999 WL 33494862, at \*7.

<sup>72</sup> Miccosukee II, 280 F.3d at 1366. The district court agreed to stay the injunction pending appeal because shutting the S-9 pumps down would cause major flooding in a matter of days. *Id.* at 1371.

<sup>73</sup> Miccosukee I, 1999 WL 33494862, at \*6.

### B. *The Appellate Court*

In the defendant's appeal to the Eleventh Circuit Court of Appeals, the same arguments were advanced.<sup>74</sup> The Eleventh Circuit affirmed the district court's ruling and provided a clearer view of stipulated and uncontested factual issues.<sup>75</sup> The court stated that "[w]hen 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."<sup>76</sup> While affirming the district court's ruling that the SFWMD must obtain a permit to operate the S-9 pumping station, it vacated the injunction because it was too drastic of a remedy and remanded the case back to the district court.<sup>77</sup> The appellate court ordered SFWMD to obtain the proper NPDES permit within a reasonable period of time, but if it fails to comply, the "[p]laintiffs may then seek to enforce the order through the various enforcement mechanisms available under the CWA, such as fines and criminal penalties."<sup>78</sup>

### C. *The Supreme Court*

After the appellate court rejected SFWMD's petition for rehearing,<sup>79</sup> it petitioned the Supreme Court.<sup>80</sup> On June 27, 2003, the Supreme Court granted a writ of certiorari, but limited certiorari to Question 1 presented by the petition.<sup>81</sup> "[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 triggering the need for a National Pollutant Discharge Elimination System permit under the Clean Water Act."<sup>82</sup>

#### 1. *The Arguments*

In its brief SFWMD argued that the S-9 pump does not add any pollutant because the pump itself is not a source of the pollutant.<sup>83</sup> They

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<sup>74</sup> However, SFWMD did not appeal the Eleventh Amendment immunity ruling.

<sup>75</sup> *Id.* at 1371.

<sup>76</sup> *Id.* at 1368.

<sup>77</sup> *Id.* at 1371.

<sup>78</sup> *Id.* (citing 33 U.S.C. § 1319 (2000)).

<sup>79</sup> *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 45 Fed. Appx. 880 (11th Cir. 2002) (table decision, denying rehearing en banc).

<sup>80</sup> Brief of Petitioner at \*1, 541 U.S. 95 (2004) (No. 02-626), at 2003 WL 22137015.

<sup>81</sup> *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 539 U.S. 957 (2003).

<sup>82</sup> *Id.* at \*1.

<sup>83</sup> *Id.* at \*26-27.

argued that because the pollutants are added prior to the S-9 pump's discharge, the point source is actually where the pollutants enter the water, not where the pump delivers the already polluted water into the WCA-3A.<sup>84</sup> Essentially, the SFWMD argued that since the S-9 pump is merely conveying already polluted water and does not actually add pollutants, the S-9 pump does not qualify as a point source.<sup>85</sup>

The SFWMD also argued that since the C-11 Basin, C-11 Canal, and the WCA-3A were historically hydrologically connected bodies of water, they are actually one single entity.<sup>86</sup> This "singular entity" theory deems the historically connected areas to be one system, which would mean that bodies of water on both sides of the pump are the same water body.<sup>87</sup> Analogously, the pump is like a soup ladle that transfers soup from one end of a pot (C-11 canal and basin) to the other (WCA-3A).<sup>88</sup> The SFWMD believed that by holding the District responsible, the court would impose tremendous burdens upon it for merely moving water within the same system.<sup>89</sup>

Replying to the SFWMD's arguments, the Tribe argued that an "addition" of a pollutant "from" a point source refers to what is conveying

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<sup>84</sup> See *id.* at \*26-27.

<sup>85</sup> See *id.* at \*27.

<sup>86</sup> *Id.* at \*22.

<sup>87</sup> See *id.*

<sup>88</sup> *Id.* at \*46 (citing *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001)). The U.S. federal government, in its amicus brief, put forth a similar argument of "unitary waters" in which it stated that all waters of the United States should be viewed as unitary under NPDES permitting. See Brief for the United States as Amicus Curiae Supporting Petitioner at \*18-20, *Miccosukee III*, 541 U.S. 95 (2004) (No. 02-626), at 2003 WL 22137034; see also *Miccosukee III*, 541 U.S. 95, 105-06 (2004). Under the federal government's theory, "unitary waters" would allow one U.S. water body to flow into a second U.S. water body without an NPDES permit, regardless of the level of pollution or difference in water quality. *Miccosukee III*, 541 U.S. at 105-06. The federal government put forth that such discharges should be handled under state nonpoint source programs, which, under the CWA, allows states to evaluate and control "pollution resulting from . . . changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." *Id.* at 106 (quoting 33 U.S.C. § 1314(f)(2)(F) (2000)). The Court noted that even if such discharges fall in nonpoint source programs, such programs do "not explicitly exempt nonpoint pollution sources from the NPDES program [so long as] they *also* fall within the 'point source' definition." *Id.*

<sup>89</sup> Brief for Petitioner at \*22-23, *Miccosukee III*, 541 U.S. 95 (2004) (No. 02-626), at 2003 WL 22137015.

the polluted water, not what added the actual pollutant.<sup>90</sup> Furthermore, the Tribe reasoned that “point source” refers “to the proximate source from which the pollutant is introduced to the destination water body” and not “to the place where the pollutant was created.”<sup>91</sup> The Tribe contended that the purpose of the CWA and the NPDES permitting system was to eliminate the discharge of pollutants into navigable waters, and as a result, the SFWMD must obtain a permit before pumping polluted waters in the WCA-3A.<sup>92</sup>

Additionally, the Tribe argued that the historic hydrological connectedness of the water and the singular entity theory was inappropriate.<sup>93</sup> The Tribe insisted that many navigable waters have differing pollutant levels and by allowing the singular entity theory and historic hydrological connectedness to become the accepted norm in water management, the SFWMD and other such entities would have a license to convey pollutants from one water body to another, without any permitting requirements.<sup>94</sup>

## 2. *The Decision*

The Supreme Court began its decision by discussing the C&SF Project’s vast systems.<sup>95</sup> While the Court recognized that the C&SF Project’s improvements allowed for proper drainage, flood protection, and water conservation, “[t]hese improvements *fundamentally altered the hydrology of the Everglades*, changing the natural sheet flow of ground and surface water.”<sup>96</sup> The Court noted that “[a]bsent human intervention, [WCA-3A] water would simply flow back east, where it would rejoin the waters of the canal and flood the populated areas of the C-11 basin.”<sup>97</sup> Ultimately, the Court described the area under dispute as “artificial[1]” barriers that “separate the C-11 basin from WCA-3,” and noted that if “left to nature, the two areas would be a single wetland covered in an undifferentiated body of surface and ground water flowing slowly southward.”<sup>98</sup> Ultimately, the Court acknowledged that the C&SF Project created extensive environmental and hydrological changes that led to the

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<sup>90</sup> Brief for Respondent Miccosukee Tribe of Indians of Florida at 18, *Miccosukee III*, 541 U.S. 95 (2004) (No. 02-626), at 2003 WL 22766719 [hereinafter *Brief for Respondent*].

<sup>91</sup> *Id.* at 20.

<sup>92</sup> *Id.* at 16.

<sup>93</sup> *Id.* at 30-32.

<sup>94</sup> *Id.* at 31-32.

<sup>95</sup> *Miccosukee III*, 541 U.S. 95, 99 (2004).

<sup>96</sup> *Id.* at 100 (emphasis added).

<sup>97</sup> *Id.* at 100-01.

<sup>98</sup> *Id.* at 101.

“conversion of what were once wetlands into areas suitable for human use.”<sup>99</sup>

In discussing the *Miccosukee* case, the Supreme Court organized its decision utilizing the three arguments put forth by the SFWMD and adopted by the federal government as amicus.<sup>100</sup> The Court began by answering the question upon which it granted certiorari: whether the SFWMD’s S-9 pump constitutes an “addition” of a “pollutant” from a point source under the NPDES permitting program when it merely carries already polluted water and does not, itself, add pollutants to the water.<sup>101</sup> The Court rejected the SFWMD’s initial argument that to qualify as a point source under the CWA, the point source must be the origin of the pollutant.<sup>102</sup> The Court held that the S-9 pump qualified as a point source under the CWA’s definition of a point source, which could subject it to NPDES permitting requirements.<sup>103</sup> Regardless of the decision that the S-9 pump qualified as a point source under the CWA, the Court refused to determine whether the WCA-3A was a separate water body than the C-11 Basin and C-11 Canal.<sup>104</sup>

Moving on in its discussion, the Court turned to the “unitary waters” argument, which states that the transfer of one body of navigable water into another should not be subject to NPDES permitting.<sup>105</sup> Essentially, the argument holds that regardless of the amount of pollution, no permit is required if the transfer of water is between two U.S. water bodies.<sup>106</sup> The Court recognized the complexity of the issue when it noted that such transfers are not “explicitly exempt . . . from the NPDES program if they . . . fall within the ‘point source’ definition.”<sup>107</sup> However, the Court declined to resolve the “unitary waters” issue because neither party actually raised the issue before the Court of Appeals or in their supporting briefs for certiorari.<sup>108</sup> While vacating the Court of Appeals decision on this issue, the Supreme Court left the argument open on remand.<sup>109</sup>

Although the Court answered the question that a facility like the S-9 pumping station qualifies as a point source that can add a pollutant, it chose to vacate and remand the *Miccosukee* case regarding the Eleventh

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 104.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 105.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 112.

<sup>105</sup> *Id.* at 106.

<sup>106</sup> *Id.* at 107.

<sup>107</sup> *Id.* at 106.

<sup>108</sup> *Id.* at 109.

<sup>109</sup> *Id.*

Circuit's decision on the hydrological connectedness of the C-11 Basin, C-11 Canal, and the WCA-3.<sup>110</sup> In its decision, the Eleventh Circuit held that these hydrological areas were separate and distinct water bodies,<sup>111</sup> completely inapposite of the SFWMD's view that all the areas are part of a single hydrologically connected water body.<sup>112</sup> The Eleventh Circuit's holding affirming the district court's determination of distinct water bodies and the SFWMD's differing assertion of hydrological connectedness was viewed by the Court as factual disputes that were never fully vetted in the lower courts.<sup>113</sup> Citing the district court's inappropriate use of a summary judgment to decide the issue,<sup>114</sup> the Court failed to resolve the dispute and remanded the case back to the district court for further proceedings on the issue.<sup>115</sup>

#### IV. ANALYSIS: THE CLEAN WATER ACT, POLLUTANT ADDITION, AND WATER BODY DIVISION

##### A. *The Clean Water Act and the NPDES Permitting System*

Over 100 years ago, Congress began its quest for clean waters when it created the first federal statute prohibiting water pollution. The Rivers and Harbors Act of 1890 prohibited the dumping of waste in New York Harbor,<sup>116</sup> and in 1899, Congress developed the first permitting system, which allowed the Secretary of the Army to regulate waste discharges through permits.<sup>117</sup> For the next half-century, Congress enacted few laws governing water pollution, despite the growing concern of water pollution and a federal investigation by the Public Health Service indicating the health effects of dangerous pollutant discharges in navigable lakes and

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<sup>110</sup> *Id.* at 112.

<sup>111</sup> *Id.* at 111; *Miccosukee II*, 280 F.3d 1364, 1368 (11th Cir. 2002).

<sup>112</sup> *Miccosukee III*, 541 U.S. at 110.

<sup>113</sup> *Id.* at 111-12.

<sup>114</sup> *Id.* at 111. The Court noted that “[s]ummary judgment is appropriate only where there is no genuine issue of material fact.” *Id.* In light of this view, the Court believed “that some factual issues remain unresolved.” *Id.*

<sup>115</sup> *Id.* at 112.

<sup>116</sup> See 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). The Rivers and Harbors Act of 1890 “was intended only to safeguard navigability” of the New York Harbor. *Id.*

<sup>117</sup> *Id.* The amendment by Congress gave the Secretary of the Army the power to issue permits regulating discharges, regardless of whether the discharge affected navigation. *Id.*

streams.<sup>118</sup> In an effort to strengthen the protection of the nation's waters, Congress eventually enacted the Federal Water Pollution Control Act of 1948 (FWPCA).<sup>119</sup> This federal law allowed for a cooperative effort between federal, state, and local governments in maintaining water control standards and dispersing federal monies to effectuate the Act's goals.<sup>120</sup> Unfortunately, the FWPCA lacked the proper regulatory power and ability to determine violations of the then current standards.<sup>121</sup> To strengthen the FWPCA, Congress amended it in 1972 and again in 1977 when it was renamed the Clean Water Act (CWA).<sup>122</sup>

Congress stated that the CWA's goal is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>123</sup> To effectuate this goal, the CWA states that any discharge of a pollutant is prohibited, unless it is done in compliance with the terms of the Act.<sup>124</sup> The CWA established a provision to address such discharges: the National Pollutant Discharge Elimination System.<sup>125</sup> As a result of the provision, a discharge of a pollutant is allowed only if it complies with the CWA and its NPDES permitting system.<sup>126</sup>

### 1. *The NPDES Permitting System*

The NPDES permitting system, a provision within the CWA, prohibits any discharge of pollutants from a point source into navigable waters without an NPDES permit.<sup>127</sup> However, pollutant discharges are not prohibited; they merely require a NPDES permit.<sup>128</sup> Each component of these prohibitions and the addition of a pollutant are defined in the

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<sup>118</sup> *Id.* (noting that the Public Health Service had no authority to regulate dangerous discharges; however, the Public Health Service, along with many state and local health agencies, adopted voluntary standards for treating drinking water).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 97 (discussing the inability of the FWPCA to enforce the standards created by the Water Quality Act of 1965).

<sup>122</sup> *Id.*

<sup>123</sup> 33 U.S.C. § 1251(a) (2000); *see also* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 579 (4th ed. 2001) (indicating that the CWA's goals were also the goals of the Federal Water Pollution Control Act of 1948).

<sup>124</sup> Clean Water Act of 2000, § 1311(a).

<sup>125</sup> *Id.* § 1342.

<sup>126</sup> EPA v. California *ex rel* State Water Res. Control Bd., 426 U.S. 200, 205 (1976); *see also* Clean Water Act, Pub. L. No. 92-500, 86 Stat. 301 (1972).

<sup>127</sup> *See* Clean Water Act of 2000, §§ 1311(a), 1342.

<sup>128</sup> *Id.* § 1311(a).

CWA.<sup>129</sup> A “discharge of a pollutant” is any addition of any pollutant to navigable waters from any point source.<sup>130</sup> “Navigable waters” are defined as the waters of the United States.<sup>131</sup> The SFWMD stipulated that both the C-11 Basin and the WCA-3A are navigable waters.<sup>132</sup> An “addition of a pollutant” is defined later in this Article. As to what is a point source, the CWA defines it as “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.”<sup>133</sup> In interpreting this section, it is important to note that the term “from” is a focus of this Article discussed below.

The NPDES program was created to accomplish “the national goal that the discharge of pollutants into the navigable waters be eliminated.”<sup>134</sup> The CWA is “aimed at achieving maximum ‘effluent limitations’ on ‘point sources.’”<sup>135</sup> In order to achieve that, the CWA states that “it is unlawful for any person to discharge a pollutant without obtaining [an NPDES] permit and complying with its terms.”<sup>136</sup> “An NPDES permit serves to transform generally applicable effluent limitations . . . into the obligations . . . of the individual discharger.”<sup>137</sup> Effluent limitations are determined under the Water Quality Standards portion of the CWA, which dictates that states are responsible for establishing and reviewing, triennially, water standards and criteria.<sup>138</sup> States are required to identify water areas where the standards will not be met with effluent limitations.<sup>139</sup> For areas that do not meet the established water quality standards, states must establish total maximum daily loads for those waters.<sup>140</sup> Effluent limitations are created and imposed by employing the “best available technology economically achievable.”<sup>141</sup> Thus, states develop the effluent limitations through the best available technology that is also economically feasible. These “generally applicable” effluent limitations are what the individual discharger must meet in order to comply with its NPDES permit.

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<sup>129</sup> *Id.* § 1342.

<sup>130</sup> *Id.* § 1362(12).

<sup>131</sup> *Id.* § 1362(7).

<sup>132</sup> *Miccosukee I*, No. 98-6056-CIV, 98-6057-CIV, 1999 WL 33494862, at \*3 (S.D. Fla. Sept. 30, 1999).

<sup>133</sup> Clean Water Act of 2000, § 1362(14).

<sup>134</sup> *Id.* § 1251(a)(1).

<sup>135</sup> *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 204 (1976).

<sup>136</sup> *Id.* at 205.

<sup>137</sup> *Id.*

<sup>138</sup> Clean Water Act of 2000, § 1313(a).

<sup>139</sup> *Id.*

<sup>140</sup> Clean Water Act, Pub. L. No. 92-500, § 303(c)(4)(C), 85 Stat. 848 (1972).

<sup>141</sup> Clean Water Act of 2000, § 1311(b)(2)(A).

B. *Natural Water Body Division and Pollutant Addition*

An NPDES permit is required whenever there is a discharge of a pollutant, from a point source, into navigable waters. SFWMD contends that it is only transporting already polluted water within the same water body,<sup>142</sup> like moving water from one end of a bathtub to the other. Therefore, SFWMD asserts that by merely altering the location of the water within the same body, there cannot truly be an addition of a pollutant from a point source.<sup>143</sup> Furthermore, SFWMD believes that an NPDES permit is not necessary due to the historic connectedness of the waters.<sup>144</sup> To understand SFWMD's contentions, it is important to discuss hydrologically connected water bodies, singular entity theory and the addition of a pollutant, and whether the pollutant is within the same body or comes from an outside source.

1. *Hydrologically Connected Bodies of Water*

SFWMD argues that due to the historic hydrologically connected water areas, including the C-11 Basin, C-11 Canal, WCA-3A, and the S-9 pumping station, there cannot be an addition of a pollutant because SFWMD is merely moving the water from one area of the *same* water body to the other.<sup>145</sup> While there is no case law that defines historically hydrologically connected waters, cases from various circuits shed light on this novel issue.

In *Dubois v. United States Department of Agriculture*,<sup>146</sup> the First Circuit Court of Appeals found that the mere flow of water from a "pristine" pond into a polluted river does not create the "hydrological connection" required to state that the two distinct water bodies are one hydrologically connected body when polluted river water is diverted to the pond.<sup>147</sup> *Dubois* involved a ski resort corporation that intended to use waters from one body of water the East Branch of the Pemigewasset River to make artificial snow and to thereafter discharge the remaining water into

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<sup>142</sup> Brief for Petitioner at 46-49, *Miccosukee III*, 541 U.S. 95 (2004) (No. 02-626), at 2003 WL 22137015; *see also* *Miccosukee I*, at \*2 1999 WL 33494862, No. 98-6056-civ, 98-6057-civ, (S.D. Fla. Sept. 30, 1999); *Miccosukee II*, 280 F.3d 1364, 1369 n.8 (11th Cir. 2002).

<sup>143</sup> Brief for Petitioner at 48-49, *Miccosukee III* (No. 02-626); *see also* *Miccosukee I*, 1999 WL 33494862, at \*2; *Miccosukee II*, 280 F.3d at 1369 n.8.

<sup>144</sup> Brief for Petitioner at 48-49, *Miccosukee III* (No. 02-626); *see also* *Miccosukee I*, 1999 WL 33494862; *Miccosukee II*, 280 F.3d at 1369 n.8.

<sup>145</sup> Brief for Petitioner at 46-49, *Miccosukee III* (No. 02-626); *see also* *Miccosukee I*, 1999 WL 33494862, at \*2; *Miccosukee II*, 280 F.3d at 1369 n.8.

<sup>146</sup> 102 F.3d 1273 (1st Cir. 1996).

<sup>147</sup> *Id.* at 1298.

another body of water Loon Pond.<sup>148</sup> The Pemigewasset River water contained pollutants, which were then delivered through a system of pumps and pipelines into pristine Loon Pond.<sup>149</sup> The court stated that the CWA does not indicate that Congress intended to differentiate between “hydrologically connected” water bodies and “unrelated” water bodies.<sup>150</sup> Additionally, the court noted that:

More compellingly, the . . . ‘hydrological connectedness’ proposal ignores a fundamental fact about water: the direction of flow. It is true that Loon Pond and the East Branch of the Pemigewasset River are ‘hydrologically connected’ in the sense that water from the Pond flows *down* and eventually empties into the River. But water from the East Branch certainly does not flow *uphill* into Loon Pond, carrying with it the pollutants that have undisputedly accumulated in the East Branch water from some of the other sources of water entering the East Branch from upstream. Under such circumstances, defendants cannot credibly argue that these water bodies are so related that the transfer of water *from* the East Branch *to* Loon Pond is not an ‘addition’ of water from one of the ‘waters of the United States’ to another.<sup>151</sup>

In a second case that touches upon hydrological connectedness, the Second Circuit Court of Appeals in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*<sup>152</sup> found that even when two bodies of water are hydrologically connected, that does not mean that they are one distinct body of water.<sup>153</sup> The water bodies involved in *Catskill Mountains Chapter of Trout Unlimited, Inc.* were a reservoir in New York’s Catskill Mountains, which stored drinking water for New York City, and a pristine creek many miles away from the reservoir.<sup>154</sup> Water from the reservoir, which contained minor pollutants, was diverted from the reservoir through a tunnel for several miles and then was released into a pristine creek in order to facilitate delivery of drinking water to New York City.<sup>155</sup> The court recognized that “[a]bsent the tunnel, water leaving the Reservoir would flow north [and eventually] flow into the Hudson River,” whereas

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<sup>148</sup> *Id.* at 1280.

<sup>149</sup> *Id.* at 1278.

<sup>150</sup> *Id.* at 1298.

<sup>151</sup> *Id.*

<sup>152</sup> 273 F.3d 481 (2d Cir. 2001).

<sup>153</sup> *Id.* at 484.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

water from the pristine creek flows in a southeast direction into the Hudson River.<sup>156</sup> The court noted that while the reservoir and the creek “are hydrologically connected only insofar as both are tributaries of the Hudson[, u]nder natural conditions, water from the . . . Reservoir would never reach [the] Creek.”<sup>157</sup>

2. “*Singular Entity*” Theory, *Distinct Bodies of Water, and the Addition of a Pollutant*

Upon resolution of whether historic hydrologically connected waters are separate, the applicability of the CWA can be settled, and in turn, determine whether a NPDES permit will be required. In determining whether a NPDES permit is required, the First and Second Circuits recognize that, when two bodies of water are separate and distinct and when pollutants do not enter the second body of water except for the point source, a permit is required.<sup>158</sup>

In the aforementioned *Dubois*, the First Circuit ultimately held that the piping of water from a polluted river (Pemigewasset River) for commercial use and the planned release into an upstream “pristine” lake (Loon Pond) would constitute an “addition” of a pollutant from a point source.<sup>159</sup> Initially, the trial court found that the CWA did not apply because the Pemigewasset River and Loon Pond were all part of a “‘singular entity,’ the waters of the United States.”<sup>160</sup> However, the First Circuit Court of Appeals reversed, finding that there was “no basis in law or fact for the district court’s ‘singular entity’ theory.”<sup>161</sup> The court found:

the transfer of water or its contents from the East Branch [of the Pemigewasset River] to Loon Pond would not occur naturally. This is more analogous to the example the district court gave from the opposite end of the spectrum: where water is added “from an external source” to the pond and an NPDES permit is required. . . . [T]he East Branch is indeed a source “external” to Loon Pond. . . . The district court apparently would reach the same conclusion regardless of how polluted the Pemigewasset

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Miccosukee II*, 280 F.3d 1364, 1369 n.7 (11th Cir. 2002); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2nd Cir. 2001); *Dubois v. United States Dept. of Agric.*, 102 F.3d 1273, 1296-99 (1st Cir. 1996).

<sup>159</sup> *Id.* at 1296-99.

<sup>160</sup> *Id.* at 1296.

<sup>161</sup> *Id.*

was or how pristine Loon Pond was. We do not believe Congress intended such an irrational result.<sup>162</sup>

In addition, the *Catskill Mountains* case, similar to *Dubois* and the current case, found that diverting water from a reservoir, containing pollutants, by a tunnel into a creek, for which the reservoir was not naturally a source, constituted “an ‘addition’ of a ‘pollutant’ from a ‘point source.’”<sup>163</sup> While the trial court noted that under normal conditions the water from the reservoir would never reach the creek, it nonetheless found that water from the reservoir and the tunnel was not an “addition” under the CWA.<sup>164</sup> The Second Circuit reversed and found that the water from the reservoir and tunnel was, in fact, an “addition” to the creek.<sup>165</sup>

### 3. The “Dam” Cases

In determining whether water movement within one singular body of water is deemed an “addition,” it is important to look at cases involving a structure that impedes or separates specific areas of connected water bodies. The Fourth, Sixth, and D.C. Circuits have broached this topic in three cases dealing with dams. Interestingly, all three Circuits held that dams and dam-induced water quality changes are exempt from NPDES permits.

In 1982, the National Wildlife Federation (NWF) sued the EPA over the EPA’s failure to compel hydroelectric dam operators to obtain an NPDES permit.<sup>166</sup> The NWF claimed that a hydroelectric dam that captured polluted river water and, subsequently, discharged it downstream was an “addition” of pollutants “from” a point source, thus requiring a NPDES permit.<sup>167</sup> In contrast, the EPA argued that a point source must introduce a pollutant from the outside world in order to be deemed an “addition” of a pollutant from a point source.<sup>168</sup> In the case of a dam that holds water in a reservoir, the EPA argued that the water merely passes through the dam from the reservoir to the river and is not causing an addition because the source of the pollutant is not from the outside

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<sup>162</sup> *Id.* at 1297.

<sup>163</sup> *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001).

<sup>164</sup> *Id.* at 485.

<sup>165</sup> *Id.* at 489.

<sup>166</sup> *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 161 (D.C. Cir. 1982).

<sup>167</sup> *Id.* at 161-65. The alleged “pollutants” included cold water mixing downstream, low dissolved oxygen and other minerals in the water moving through the dam, sediment settling at the bottom of the reservoir, and supersaturation, where water mixes with air due to the high velocity release and can harm fish due to the high aeration. *Id.*

<sup>168</sup> *Id.* at 175.

world.<sup>169</sup> The D.C. Circuit agreed with the EPA's view and held that a discharge from a dam to the river below is not a point source discharge requiring an NPDES permit.<sup>170</sup> As the Second Circuit noted in *Catskill Mountains*, this case "essentially involved the recirculation of water, without anything [being] added 'from the outside world.'"<sup>171</sup> The water moving through the dam was arguably the same water and, thus, "nothing was introduced to the water that was not, in some sense, already there."<sup>172</sup>

In *National Wildlife Federation v. Consumers Power Co.*,<sup>173</sup> the Sixth Circuit ruled that a dam on Lake Michigan which merely moved water from one point of the lake to another did not create an "addition" of a pollutant from a point source.<sup>174</sup> In *Consumers Power Co.*, the power company operating the dam had "withdrawn water from Lake Michigan along with some surprised fish, for hydro-electric power generation."<sup>175</sup> After passing through the hydroelectric generators, where the fish were pulverized, the water and fish parts were returned to the Lake.<sup>176</sup> The Court determined that there was not an "addition" of a pollutant because while the fish were in a different form, they were returned to the Lake.<sup>177</sup> The Sixth Circuit held that the Lake Michigan dam, like the dam in *Gorsuch*, did not introduce a pollutant from the outside world (the fish exist on both sides of the dam), and thus there was not an "addition" from a point source.<sup>178</sup> As a result, no NPDES permit was required.<sup>179</sup>

While not a "dam" case, *Appalachian Power Company v. Train*<sup>180</sup> offers further guidance in determining an "addition" of a pollutant. In *Train*, the EPA promulgated regulations that established limitations on the discharges of heat from steam electric generating plants into navigable waters (factually similar to the dam cases).<sup>181</sup> To gain a frame of reference, the Fourth Circuit looked at various cooling methods for power

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<sup>169</sup> *Id.* at 165.

<sup>170</sup> *Id.* at 175.

<sup>171</sup> *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001).

<sup>172</sup> *Id.* (citing *Gorsuch*, 698 F.2d at 174-75).

<sup>173</sup> 862 F.2d 580 (6th Cir. 1988).

<sup>174</sup> *Id.* at 581.

<sup>175</sup> *Catskill Mountains Chapter of Trout Unlimited, Inc.*, 273 F.3d at 491 (citing *Consumers Power Co.*, 862 F.2d at 581-82).

<sup>176</sup> *Consumers Power Co.*, 862 F.2d at 585.

<sup>177</sup> *Id.*; see also *Catskill Mountains Chapter of Trout Unlimited, Inc.*, 273 F.3d at 491.

<sup>178</sup> *Consumers Power Co.*, 862 F.2d at 585-86.

<sup>179</sup> *Id.*

<sup>180</sup> 545 F.2d 1351 (4th Cir. 1976).

<sup>181</sup> *Id.* at 1355.

plants that take water from a lake or pond to cool the generators and then return the water to the same water body.<sup>182</sup> While noting that the lake water pulled in to cool the generators contained pollutants, the court held that the CWA did not require the removal of pre-existing pollutants prior to returning the water from the original navigable water.<sup>183</sup>

C. *Application to Miccosukee*

1. *Historically connected water bodies*

SFWMD believes that because the water bodies in this case were historically connected, they are exempt from an NPDES permit because the S-9 pumping station is merely moving already polluted water from one part of the water body to another.<sup>184</sup> Essentially, SFWMD is stating that a historically connected water body will forever remain one water body. The question is: can a historically connected water body, at some point, become separate and distinct bodies of water?

Looking at the “dam” cases, it seems that SFWMD’s contention has merit. Under this interpretation, the Everglades should be viewed as one ecosystem, with the C-11 Basin, C-11 Canal, the L-33 and L-37 levees, and WCA-3A constituting one body of water. Thus, in light of the “dam” cases, water moving within the same body would not result in an addition.<sup>185</sup> However, those “dam” cases are distinguishable because they dealt only with dams that merely interrupted the natural flow of water. In this case, the development of canals, basins, and levees created *distinct* bodies of water that no longer flow together.<sup>186</sup> In fact, the water that flows in a western direction in the C-11 Basin and Canal is *reverse* from the natural flow of the water.<sup>187</sup> Water from the WCA-3A gets into the C-11 Basin naturally, but not the other way around.<sup>188</sup> In this case, cleaner water gets into the basin.

However, the Supreme Court did note in its decision that “[b]ecause Everglades soil is extremely porous, water flows easily between ground

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<sup>182</sup> *Id.* at 1357-58.

<sup>183</sup> *Id.* at 1377.

<sup>184</sup> Brief for Petitioner at 48-49, *S. Fla. Water Mgmt. Dist.* (No. 02-626), available at 2003 WL 22137015; *Miccosukee I*, 1999 WL 33494862, \*2 (S.D. Fla. 1999); *Miccosukee II*, 280 F.3d 1364, 1367-1368 (11th Cir. 2002).

<sup>185</sup> See *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); see also *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988).

<sup>186</sup> *Miccosukee II*, 280 F.3d at 1366 n.2; see also discussion *supra* at Part I.C.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* Essentially, the cleaner water from the WCA-3A moves into the more polluted C-11 Basin.

and surface waters,”<sup>189</sup> causing “some significant mingling of the two waters,” which led the Court to state that it seems the “boundary between C-11 and WCA-3A is indistinct.”<sup>190</sup> This assertion contradicts the district court’s determination that the “the transfer of water or its contents from C-11 into the Everglades would not occur naturally.”<sup>191</sup>

If a narrow view were taken of the Court’s characterization of the situation, it seems that these two hydrologically connected water bodies should, in fact, be viewed as one, seemingly like a dam. However, the Court noted that as a result of all the levees, canals, basins, pumps, and water storage areas, the “improvements fundamentally altered the hydrology of the Everglades, changing the natural sheet flow of ground and surface water.”<sup>192</sup> The Court recognized that the C-11 canal keeps the area drained, and that if the S-9 pumping station were shut down, C-11 and the WCA-3A would no longer be distinct bodies of navigable water.<sup>193</sup> While the Court seems to argue that C-11 and WCA-3A are one water body, its own dicta indicates that, with enough construction and separation, two distinct water bodies could be created. Here, the water movement is against the natural flow as a result of extensive construction, and regardless of the porous soil allowing intermingling, the majority of the water flow occurs with the C-11 canal and the S-9 pump artificially pushing polluted water into the WCA-3A. Therefore, even with a strict view of the Court’s dicta, its “holding” would be inapplicable in this instance.<sup>194</sup>

## 2. *Addition in Light of Distinct Bodies of Water and “Singular Entities” Theory*

*Dubois* demonstrates that it is irrelevant whether the pollutants are preexisting when they enter the pipe, pump, or canal. What matters is the addition of pollutants to a clean body of water, not whether the pollutants are somehow added to the water by the pipe or pump. The Eleventh Circuit in *Miccosukee* recognized the same logic and applied a “but for” test to determine whether the pollutant-laden waters from the C-11 canal

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<sup>189</sup> *Miccosukee III*, 124 S. Ct. 1537, 1546 (2004).

<sup>190</sup> *Id.*

<sup>191</sup> *Miccosukee I*, 1999 WL 33494862, \*7 (S.D. Fla. 1999); *Miccosukee II*, 280 F.3d at 1368 (affirming the district court’s view that the natural flow would not allow the C-11 water to enter the WCA-3A).

<sup>192</sup> *Miccosukee III*, 124 S. Ct. at 1540.

<sup>193</sup> *Id.* at 1546.

<sup>194</sup> The Court chose not to decide the issue of whether the water bodies are two separate and distinct water bodies or whether it is all on hydrologically connected water body. Furthermore, if the Court’s view were taken, it would allow for avoidance of NPDES permitting if waters mingled through porous soils.

would have reached WCA-3A but for the S-9 pump station.<sup>195</sup> Similar to *Catskill Mountains, Miccosukee* deals with a transfer of water containing pollutants from one body of water (C-11 Canal) to another, distinct body of water (WCA-3A), mandating a NPDES permit.<sup>196</sup>

The First and Second Circuit cases seem to use the precise words of the CWA concerning *point sources* that direct polluted water from one body of water to a distinct and different body of water where pollutants would not have ended up “but for” the change in natural flow.<sup>197</sup> These cases seem consistent in interpreting the clear language of the CWA.

While the Supreme Court struck down the district court’s determination that the C-11 Canal and Basin were distinct from the WCA-3A, it did not preclude such a determination upon remand.<sup>198</sup> The Court felt further development of the factual issue would be required to make a proper determination.<sup>199</sup> Once the district court has the opportunity to properly determine whether there are distinct water bodies, in light of the facts and cases presented and the fact that the Supreme Court held the S-9 pump can be deemed a point source<sup>200</sup> if the water bodies are distinct it seems that such a determination is likely. If the C-11 canal is distinct from the WCA-3A, the “but for” determination applies because there is a transfer of polluted waters into pristine waters. Consequently, an NPDES permit would be required for that discharge.

### 3. *The S-9 Pump is Not a Dam*

In addition to the “dam” cases’ inapplicability due to the nature of the C-11 Basin, C-11 Canal, and WCA-3A being separate and distinct water bodies, the S-9 pump itself is also factually distinguishable from the “dam” cases because a water pump is not a dam. As the Sixth Circuit noted in *Catskill Mountains*:

The *Gorsuch* and *Consumers Power* decisions comport with the plain meaning of “addition,” assuming that the water from which the discharges came is the same as that to which they go. If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not “added” soup or anything else to the pot (beyond,

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<sup>195</sup> *Miccosukee II*, 280 F.3d at 1367.

<sup>196</sup> *Id.* at 1368-69.

<sup>197</sup> See Clean Water Act, 33 U.S.C. § 1362(14) (2000); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001); *Dubois v. United States Dep’t of Agric.*, 102 F.3d 1273, 1296-99 (1st Cir. 1996).

<sup>198</sup> *Miccosukee III*, 541 U.S. at 111.

<sup>199</sup> *Id.* at 112.

<sup>200</sup> *Id.* at 105-06.

perhaps, a *de minimis* quantity of airborne dust that fell into the ladle). In requiring a permit for such a “discharge,” the EPA might as easily require a permit for Niagara Falls.<sup>201</sup>

*Gorsuch* did not involve two separate and distinct bodies of water, where pollutants from one are introduced to the other. The water in that case was part of the same river water at all times.<sup>202</sup> The EPA’s ruling that the discharge of the dammed-up water was not tantamount to an “addition” of pollutants was consistent with the test employed by the Eleventh Circuit in *Miccosukee*. The D.C. Circuit in *Gorsuch* concluded that the “dam-caused pollution is unique<sup>203</sup>” and emphasized the narrowness of its decision.

The “dam” cases comport with *Miccosukee* because as in *Gorsuch*, no “addition” occurred since the polluted dam-waters stayed within the same body of water (the rivers where it would have ended up without the dam).<sup>204</sup> Here, an “addition” occurred because polluted canal waters were pumped into a *separate* body of water, WCA-3A, a place where it would not have ended up “but for” the discharge.<sup>205</sup>

Furthermore, *Consumers Power Co.* is inapplicable because the water being introduced into the water body was not recirculated and returned to the *same* body of navigable water from where it came.<sup>206</sup> No “addition” occurred in the “dam” cases because the pollutants stayed in the same body of water where it would have ended up without pumping.<sup>207</sup> In this case, the S-9 pump *must* be running for water from the C-11 Canal and C-11 Basin to end up in WCA-3A.<sup>208</sup>

Additionally, the “dam”-similar case, *Train*, does not apply because in its limited discussion of what constitutes an addition of pollutants under the Act, the Fourth Circuit confirmed that the Act is concerned with discharges of pollutants into navigable waters that did not already contain these pollutants.<sup>209</sup> Thus, it seems to specifically exclude the water

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<sup>201</sup> *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001).

<sup>202</sup> *See Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982).

<sup>203</sup> *Id.* at 183.

<sup>204</sup> *See id.* at 165-67.

<sup>205</sup> *See id.*

<sup>206</sup> *Nat’l Wildlife Fed’n v. Consumers Power Co.*, 862 F.2d 580, 585-86 (6th Cir. 1988).

<sup>207</sup> *E.g., id.* at 586.

<sup>208</sup> *See id.* at 585-86.

<sup>209</sup> *See Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1976).

recirculating “dam” cases.<sup>210</sup> Furthermore, the discharge of polluted water from the C-11 Basin into WCA-3A constitutes an “addition” under the Fourth Circuit Test in *Train*<sup>211</sup> because the navigable water (WCA-3A) did not already contain the higher levels of phosphorous and other pollutants.

#### 4. *Miccosukee and the Language of the CWA*

Congress recognized that, in order for the CWA to achieve its goals, “it is essential that [the] discharge of pollutants be controlled at the source.”<sup>212</sup> Arguably, the S-9 pump station may not be the “source” of any pollutant. Pollutants are added to the C-11 Basin and the C-11 Canal from other “sources” within the surrounding area, or they already exist in the environment. SFWMD’s operations do not increase or augment the amount of pollutants in the navigable waters. Furthermore, the definition of a point source<sup>213</sup> suggests “images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways.”<sup>214</sup>

##### a. *Is there Really an “Addition” of a Pollutant, or is the S-9 Pump Merely Conveying Already Polluted Water Within the Same Body or Water?*

If SFWMD’s interpretation of an “addition” were to apply, a perfectly engineered pipe draining pollutants from a landfill, while adding nothing to the water it conveys, could pollute a pristine body of water with impunity.

In *Dague v. City of Burlington*,<sup>215</sup> where run-off from a landfill flowed through a railroad culvert into a wetland area, the City of Burlington, Vermont, had denied that the culvert was a point source for the addition of pollutants because the pollutants were already in runoff waters before they flowed through the culvert.<sup>216</sup> In that case, the Second Circuit rejected the view that an addition only occurs when pollutants are introduced into

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<sup>210</sup> See *id.*

<sup>211</sup> See *id.*

<sup>212</sup> *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985) (quoting S. Rep. No. 92-414, at 77 (1972)); see also *Train*, 545 F.2d at 1377 (“Those constituents occurring naturally in the waterways or occurring as a result of other industrial discharges, do not constitute an addition of pollutants by a plant through which they pass.”); *Admiral Ins. Co. v. Feit Mgmt. Co.*, 321 F.3d 1326, 1329 (11th Cir. 2003) (The “ordinary and plain meaning” of “from” is “originating in” or “produced by,” not “through” or “by way of.”).

<sup>213</sup> Clean Water Act, 33 U.S.C. § 1362(14) (2000).

<sup>214</sup> *United States v. Plaza Health Labs.*, 3 F.3d 643, 646 (2d Cir. 1993).

<sup>215</sup> 935 F.2d 1343 (2d Cir. 1991), *rev’d in part*, 505 U.S. 557 (1992).

<sup>216</sup> *Id.* at 1347, 1354.

navigable waters for the first time.<sup>217</sup> Instead, the Court focused on whether the railroad culvert ultimately conveyed the pollutants into the wetlands.<sup>218</sup> The Court concluded that “the definition of ‘discharge of a pollutant’ refers to ‘any point source’ without limitation.”<sup>219</sup> In light of this definition, the Court held:

Since the city's landfill caused pollutants to enter [the] Pond, and since these pollutants were then conveyed into the rest of [a wetland] by the railroad culvert, the . . . conclusion that the city discharged pollutants into navigable waters from a point source properly applied the statute to findings [was not] erroneous.<sup>220</sup>

The *Dague* case is analogous to *Miccossukee* since, in both cases, discrete conveyances (a railroad culvert and the S-9 pump and C-11 Canal) are carrying already polluted water. As the Court in *Dague* noted, the definition of the discharge of a pollutant includes *any* point source, regardless of whether the point source itself created the pollutant.<sup>221</sup> This viewpoint comports with the Supreme Court’s determination in *Miccossukee* that the S-9 pump is a point source, regardless of the fact that the pump did not actually add the pollutants.<sup>222</sup> The Court found SFWMD’s argument “untenable” given that the definition of a point source is “a ‘discernable, confined, and discrete conveyance.’”<sup>223</sup> The Court concluded “[t]hat definition makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to ‘navigable waters,’ which are, in turn, defined as ‘the waters of the United States.’”<sup>224</sup>

By using the definition of discharge of a pollutant, the Second Circuit and the *Miccossukee* courts determined that addition of a pollutant does not rely upon whether the conveyor actually added the pollutant to the water, only that it discharged polluted water.<sup>225</sup>

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<sup>217</sup> *Id.* at 1354-55.

<sup>218</sup> *Id.* at 1355.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Miccossukee III*, 541 U.S. 95, 104-05 (2004).

<sup>223</sup> *Id.* at 105 (quoting 33 U.S.C. § 1362(14) (2000)).

<sup>224</sup> *Id.* (quoting 33 U.S.C. § 1362(7) (2000)).

<sup>225</sup> *Id.*; *Dague v. City of Burlington*, 935 F.2d 1355 (2d Cir. 1990).

b. *Can the S-9 Pumping Station be Deemed to be Pumping the Polluted Water “From” a Point Source?*

The Eleventh Circuit stated that “for 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.”<sup>226</sup> This holding was strengthened by the Second Circuit when it stated:

[A] “pipe, ditch, channel, tunnel, [or] conduit” is unlikely to have created the pollutants that it releases, but rather transports them from their original source to the destination water body. . . . The tunnel itself need not have created the pollution; it is enough that it conveys the pollutants from their original source to the navigable water.<sup>227</sup>

However, Congress has noted that “pollution resulting from . . . changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities” should be regulated under states’ non-point source programs.<sup>228</sup> But, the D.C. Circuit in *Gorsuch* observed that “[i]n [the EPA’s] view, the point or nonpoint character of pollution is established when the pollutant first enters navigable water, and does not change when the polluted water later passes through the dam from one body of navigable water . . . to another.”<sup>229</sup> Furthermore, in *Consumers Power Co.*, the Sixth Circuit noted that the EPA’s view that “there can be no addition unless a source ‘physically introduces a pollutant into water from the outside world.’”<sup>230</sup>

It is clear that SFWMD “misunderstands the import of the term ‘point source,’ which does not necessarily refer to the place where the pollutant was created but rather refers only [to] the proximate source from which the pollutant is directly introduced the destination water body.”<sup>231</sup> Under SFWMD’s view of the CWA, a multitude of cases where the point source

<sup>226</sup> *Miccosukee II*, 280 F.3d 1363, 1368 (11th Cir. 2002) (emphasis added).

<sup>227</sup> *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 493 (2d Cir. 2001).

<sup>228</sup> Clean Water Act of 2000, 33 U.S.C. § 1314(f)(F) (2000).

<sup>229</sup> *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982).

<sup>230</sup> *Nat’l Wildlife Fed’n v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988).

<sup>231</sup> *Catskill Mountains Chapter of Trout Unlimited, Inc.*, 273 F.3d at 493.

itself did not add any pollutants to the water it conveyed are suddenly erroneous.<sup>232</sup>

When looking for the origin of a pollutant, the Fourth Circuit has stressed that the origin of pollutants in CWA cases is irrelevant.<sup>233</sup> The proper focus is the discharge from one body of water into a receiving body of water.<sup>234</sup> Here, the receiving body of water, WCA-3A, rather than the water being pumped, is the relevant water under the CWA. The focus must be whether a pollutant is being discharged into WCA-3A, not whether the pollutant originates in the C-11 Basin, C-11 Canal, or the S-9 pump.

*c. Are Water Management Districts, like SFWMD, Exempt From the Requirement of Obtaining NPDES Permits?*

A clear congressional statement is required to alter the traditional federal-state balance of powers.<sup>235</sup> Here, no clear statement exists in the CWA as to whether Congress intended to subject state control of water management and movements to federal permitting. Congress only declared its intent to preserve the rights of states to plan, develop, and allocate their water resources.<sup>236</sup> While Congress gave authority to “allocate quantities of waters within [the State’s] jurisdiction” and stated that such authority cannot be superceded,<sup>237</sup> nothing that the CWA prohibits the Federal government from requiring discharges to comply with set water quality standards. The Supreme Court recognized this supposition, stating that “[s]ections 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

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<sup>232</sup> See, e.g., *id.* (reservoir water containing pollutants that was carried by a tunnel and discharged into a pristine creek); *Miccosukee II*, 280 F.3d 1364 (11th Cir. 2002) (canal carrying water polluted by agricultural, residential, and commercial source to a pump that discharges into a water conservation area); *Dubois v. United States Dep’t of Agric.*, 102 F.3d 1273 (1st Cir. 1996) (ski resort discharging already polluted river water that it used to make snow); *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1990) (culvert carrying water that was previously polluted by a neighboring landfill).

<sup>233</sup> *United States v. Law*, 979 F.2d 977, 979 (4th Cir. 1992).

<sup>234</sup> *Id.* at 979.

<sup>235</sup> *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs*, 531 U.S. 159, 173 (2001); *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991).

<sup>236</sup> Clean Water Act, 33 U.S.C. § 1251(b), (g) (2000).

<sup>237</sup> *Id.* § 1251(g); see also *id.* § 1370 (stating that nothing in the Act shall “be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States”).

users who have obtained, pursuant to state law, a water allocation.”<sup>238</sup> The legislative history of the 1977 amendment to the CWA even emphasizes that water pollution controls can be compulsory.<sup>239</sup> Furthermore, in the *Miccossukee* decision, the Supreme Court stated that, regardless of whether these sources are under state programs, they are “*not explicitly exempt . . . from the NPDES program,*” so long as the sources “fall within the ‘point source’ definition.”<sup>240</sup> Thus, SFWMD should not be exempt from NPDES permitting requirements.<sup>241</sup>

## V. POTENTIAL IMPACTS OF THE SUPREME COURT DECISION

### A. *Distinct Water Bodies*

If the district court were to decide that the C-11 canal and the WCA-3A were separate and distinct water bodies, the SFWMD would be required to get an NPDES permit. The immediate impact on the Everglades of such a permit is that funds might need to be diverted from the eight billion dollar Comprehensive Restoration Project (“CERP”).<sup>242</sup> Contra to that argument is the fact that CERP requires any water piped into the Everglades to be clean, so as not to waste the eight billion dollars.<sup>243</sup> Additionally, the Water Resources Development Act of 1996 (WRDA 1996) mandated that the restoration plan being developed must protect water quality.<sup>244</sup> In expanding the restoration, Congress, in Water Resources and Development Act of 2000 (WRDA 2000), required that

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<sup>238</sup> PUD No.1 of Jefferson County v. Washington Dep’t of Ecology, 511 U.S. 700, 720 (1994).

<sup>239</sup> *Id.* at 721 (citing 3 Legislative History of the Clean Water Act of 1977 (Committee Print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14, p. 532 (1978) (“The requirements [of the Act] may incidentally affect individual water rights. . . . It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations.”).

<sup>240</sup> *Miccossukee III*, 541 U.S. 95, 106 (2004) (emphasis added).

<sup>241</sup> Additionally, EPA regulations demand that a NPDES permit ensures compliance with water quality standards. 40 C.F.R. § 122.41(a), (d) (2004).

<sup>242</sup> William E. Gibson, *Supreme Court Hears Dispute over Water Pollution in Everglades*, SUN-SENTINAL, Jan. 15, 2004; *see also* Water Resources Development Act of 1996, Pub. L. No. 104-303, § 528(b)(1)(A)(i), 110 Stat. 3767-68 (1996).

<sup>243</sup> Gibson, *supra* note 242.

<sup>244</sup> *Id.*; Water Resources Development Act of 1996, §§ 528(b)(1)(A)(i), 528(e).

CERP include features that ensures “all applicable water quality standards and applicable water quality permitting requirements” are met.<sup>245</sup>

However, when viewing the congressional mandates in 1996 and 2000 coupled with the congressional intent behind the CWA, obtaining a NPDES permit to protect against harmful discharges is clearly in accordance with Congress’ intent. Additionally, in response to the issue of spending some of the much needed eight billion dollars, David Reiner, president of the Friends of the Everglades stated: “[i]f you stop pollution from entering the Everglades, it will get a lot cheaper to clean it.”<sup>246</sup>

Even in light of these Congressional mandates, imposing an NPDES permit requirement could wreak havoc by mandating costly, time-consuming, and burdensome bureaucratic proceedings to obtain permits; inviting litigation by anyone unhappy with the result,<sup>247</sup> exposing water agencies to huge penalties for past violations; and interfering with the states’ highly developed nonpoint source pollution programs. Congress never intended these consequences.<sup>248</sup>

Additionally, the free diversion of water from one basin to another in order to meet industrial, agricultural, and municipal needs would be at risk.<sup>249</sup> Many states, municipalities, and water management districts fear that permits will be required at nearly every point where there is a transfer

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<sup>245</sup> Water Resources Development Act of 2000, Pub. L. No. 106-541, § 601(b)(2)(A)(ii)(II), 114 Stat. 2681.

<sup>246</sup> Alex Kapulen, *Everglades Case Could Have National Implications*, LAND LETTER, Jan. 15, 2004, at WATER (internal quotations omitted). *But see* Larry Lipman, *U.S. Supreme Court Hears Everglades Pollution Case*, PALM BEACH POST, Jan. 15, 2004, at A3. South Florida Water Management District Chairman Nicolas J. Gutierrez Jr. told reporters after the hearing,

This is all about limited resources. . . . We cannot divert key resources that we are using to implement cutting-edge scientific cleanup technology that we are using to bring the Everglades back to the health that it needs to be . . . if we are forced to go out and obtain cumbersome, expensive, duplicative and nonproductive federal permits for all of the hundreds of major structures and thousands of minor structures throughout our 16-county jurisdiction.

*Id.*

<sup>247</sup> Bettina Boxall, *Water Pumping Case May Stem Flows in West*, L.A. TIMES, Dec. 22, 2003, at B5.

<sup>248</sup> *See generally* Brief for Petitioner, *Miccosukee III*, 541 U.S. 95 (2004) (No. 02-626), at 2003 WL 22137015.

<sup>249</sup> Boxall, *supra* note 247 (referring to the amicus brief filed with the Supreme Court by Colorado’s attorney general).

of water.<sup>250</sup> However, former EPA Administrator Carol Browner, along with four other former agency officials, dismissed the claim.<sup>251</sup> The Supreme Court noted that “permitting authority is necessary to protect water quality,” and in order to address the possible regulatory costs, “States and EPA could [issue] general permits to point sources associated with water distribution programs.”<sup>252</sup> The EPA has previously created such wide-ranging permit programs, and the development of another is not likely to be “apocalyptic.”<sup>253</sup>

#### B. *A Hydrologically Connected Single Entity*

If upon remand the district court holds that SFWMD is exempt from the need to obtain a NPDES permit because the C-11 and the WCA-3A are one single hydrologically connected entity, it would allow for continued pollution of the Everglades. That would mean SFWMD would be able to continue pumping in polluted water that contains four times the amount of phosphorous in WCA-3A.<sup>254</sup> As Justice Breyer summarized during oral arguments, the S-9 pumps “brings this filthy, absolutely disgusting water, and puts it into this pristine waterway.”<sup>255</sup> Also, on a national scale, such a decision would allow other water management districts and municipalities to allow cleaner water to be polluted by dirtier water.<sup>256</sup> “[A]llowing the water managers to move contaminated water from one area to another would undermine existing regulations and expose water bodies to new pollution problems.”<sup>257</sup> Such an outcome would lead to increased costs of cleaning protected area waters and would undeniably lead to increased

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<sup>250</sup> *Id.*; see also *Miccosukee III*, 541 U.S. 95, 108 (2004) (citing Brief Amici Curiae of the State of Colorado and New Mexico in support of Petitioner at \*1, *Miccosukee III*, 541 U.S. 95 (No. 02-626), at 2003 WL 22137032).

<sup>251</sup> Boxall, *supra* note 247; see also Brief of Amici Curiae Former Administrator Carol M. Browner et al. at \*3, *Miccosukee III*, 541 U.S. 95 (2004) (No. 02-626), at 2003 WL 22793539.

<sup>252</sup> *Miccosukee III*, 541 U.S. 95, 108-09 (2004). The Court also indicated that Pennsylvania interpreted the CWA to cover interbasin water transfers similar to the water transfer that occurs in *Miccosukee*. *Id.* (citing Brief of Amici Commonwealth of Pennsylvania, Department of Environmental Protection in Support of Respondents at \*2, *Miccosukee III*, 541 U.S. 95 (2004) (No. 02-626), at 2003 WL 22793537).

<sup>253</sup> Boxall, *supra* note 247 (quoting Sean Hecht, executive director of the UCLA Environmental Law Center).

<sup>254</sup> Lipman, *supra* note 246; see also Brief for Respondent at \*33, *Miccosukee III*, 541 U.S. 95 (2004) (No. 02-626), at 2003 WL 22766719 (“The S-9 discharge adds all sorts of pollutants, including phosphorus, at dangerously high levels for the receiving waters.”)

<sup>255</sup> Gibson, *supra* note 242 (quoting Justice Stephen Bryer) (quotations omitted).

<sup>256</sup> Kapulen, *supra* note 246.

<sup>257</sup> *Id.*

environmental damage. Irreparable harm would come to flora, fauna, animals, and habitats, forever altering many endangered, and even balanced, ecosystems.

## VI. CONCLUSION

In light of the CWA, it is clear that protecting the Everglades, and all of America's waters, is of the utmost importance. The Supreme Court, unequivocally, held that movement of polluted water between separate bodies of water can be viewed as an addition from a point source.<sup>258</sup> It seems clear that because of the State of Florida's and the Corps' decades long construction in the Everglades, two distinct bodies of water were created, regardless of the minimal intermingling of water due to the "extremely porous" soil.<sup>259</sup> By erecting the L-33 and L-37 levees, the flow of water was fundamentally altered<sup>260</sup> so that water from the C-11 Basin and the C-11 Canal would never reach WCA-3A. By placing the S-9 pumping station where the levees meet and pumping the polluted water into WCA-3A, SFWMD is clearly discharging a pollutant from a point source into a separate and distinct body of navigable water. Therefore, it seems that SFWMD must obtain a NPDES permit if it wishes to continue using the S-9 pump to keep residential areas of Broward County from flooding.<sup>261</sup>

While a district court decision may have a possible administrative and economic impact, the environmental benefits alone would be worth the cost. SFWMD would still be able to discharge a pollutant, but it would only need to get a NPDES permit first. Maybe the SFWMD fears a new math, one that it deems too costly in order to protect the environment and to abide by the mandates of the CWA. Is it really too much to ask that SFWMD comply with the intent and force of the Clean Water Act's NPDES permitting program? In light of the obvious benefit of the

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<sup>258</sup> *Miccosukee III*, 541 U.S. 95, 104-05 (2004); *see also* discussion *supra* Part III.C., IV.B., IV.C.

<sup>259</sup> *Miccosukee III*, 541 U.S. at 110.

<sup>260</sup> *Id.* at 100 (discussing the improvements made by the State of Florida and the Army Corps of Engineers, which "fundamentally altered the hydrology of the Everglades, *changing the natural sheet flow of ground and surface water*" (emphasis added)).

<sup>261</sup> In light of the previous decisions by the district court and the Eleventh Circuit, this author believes that on remand, the district court will once again find that the C-11 Canal/Basin and the WCA-3A are, in fact, two separate and distinct bodies of water. Consequently, the SFWMD's S-9 pump will fall under the NPDES program, thus requiring the SFWMD to obtain a permit.

Everglades, from the unique ecosystem to the home and workplace of the Miccosukee Tribe of Indians, the answer is not hard to calculate.

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