LAWSUITS FILED OR PENDING

SAME POT OF SOUP—BUT FOR HOW LONG? U.S. SUPREME COURT'S DENIAL OF WATER TRANSFER CASE LEAVES UNITARY WATERS ISSUE IN FLUX

Friends of the Everglades v. South Florida Water Management District, and *Miccosukee Tribe of Indians of Florida v. South Florida Water Management District*, Case Nos. 10-196 and 10-252, *Cert. Denied*, (U.S. Nov. 29, 2010).

On November 29, 2010, the U.S. Supreme Court denied a petition for *certiorari* to review the Eleventh Circuit's decision in *Friends of the Everglades v. South Florida Water Management District*, and *Miccosukee Tribe of Indians of Florida v. South Florida Water Management District*. The core disputed issue in those cases is whether water transfers between two distinct waterbodies in the Florida Everglades require Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permits. The Supreme Court's denial of *certiorari* provided no additional guidance on the issue. Even as it leaves intact the Eleventh Circuit's ruling, 570 F.3d 1210 (11th Cir. 2009), which provided that EPA's Water Transfer Rule adopting the "unitary waters" theory is a reasonable, and permissible, interpretation of CWA's mandate, and brings temporary closure to the Florida dispute, the key statutory interpretation issue that has significant implications for water projects nationwide remains unresolved, and supporters and detractors on both sides of the dispute will have to prepare for additional rounds of administrative and legal challenges.

Background: The Regulatory Scheme and Its Interpretations

The CWA broadly prohibits the "discharge of any pollutant by any person" unless authorized by statute. 33 U.S.C. § 1311. "Discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362, and such "additions" are illegal without a NPDES permit. 33 U.S.C § 1342. In June 2008, EPA, under the Bush administration, finalized a rule that exempted water transfers from NPDES permitting under the CWA. 40 C.F.R. 122.3(i) (Water Transfer Rule). Specifically, the EPA defined a water transfer as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use."

The exclusion is significant, because there are a myriad of major water projects across the nation that are essentially water transfers on a large scale. Water transfers, which move waters from one body of "navigable water" to another (through tunnels, channels, pumps, or other diversion systems) often introduce pollutants from the originating water body into the receiving body. Were it not for the Water Transfer Rule's exclusion, most, if not all, water projects in the country likely would be subject to NPDES permitting, adding another layer of regulation and costs.

At the state and local levels, environmental groups are concerned that unregulated water transfers could threaten the integrity of previously pristine waters, or that polluted water could be injected into drinking water supplies. Even before finalization of the Water Transfer Rule, environmental organizations and their allies have been bringing suit across the country to challenge water transfer projects, and to attempt to subject those transfers to NPDES permitting. Plaintiffs' primary legal argument in those cases is that when such water transfers occur, there is "addition" of pollutants to navigable waters from a point source.

EPA's defense in these instances is that the language and regulatory scheme of the CWA do not require permits for water transfers of already polluted water, because such actions do not involve an "addition" of a pollutant to navigable waters. Under this interpretation, the nation's navigable waters are viewed as a single "unitary" body, and it is not an "addition" under the CWA when pollutants are moved during water transfers from one navigable water body to another. The oft-cited analogy from the Supreme Court is that "if one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot,

one has not 'added' soup or anything else to the pot." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 110 (2004).

Friends of the Everglades, Miccosukee and *Catskill Mountains*

Prior to finalization of the Water Transfer Rule, courts ruled multiple times in favor of environmental organizations and other plaintiffs who wanted water transfers regulated under the NPDES program and EPA's unitary waters theory rejected. (*See, Catskill Mountains Ch. of Trout Unlimited, Inc. v. City of New York* (*Catskills I*), 273 F.3d 481 (2nd Cir. 2001); *Catskill Mountains Ch. of Trout Unlimited, Inc. v. City of New York* (*Catskills II*), 451 F.3d 77 (2nd Cir. 2006); *Dague v. City of Burlington*, 935 F.2d 1343 (2nd Cir. 1991); *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996); *N. Plains Res. Council v. Fidelity Exploration and Dev.*, 325 F.3d 1155 (9th Cir. 2003).)

Among those groups were two environmental organizations in Florida—Friends of the Everglades and the Fishermen Against the Destruction of the Environment—who found a sympathetic District Court when they sued the South Florida Water Management District (SFWMD) over its failure to obtain NPDES permits for water-to-water transfers. The plaintiffs alleged that SFWMD's three canal pumping stations, which moved polluted waters from canals surrounding Lake Okeechobee's shoreline into the lake, are point sources that should be regulated under the NPDES scheme before the "loathsome concoction" laden with excessive chemical contaminants should be allowed to reach the lake. The Miccosukee Tribe of Indians intervened and joined the plaintiffs, alleging that the pollution of the lake threatened its way of life. The District Court sided with the plaintiffs, ruling that the pump stations could not be operated legally under the CWA without a NPDES permit. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 2006 U.S. Dist. LEXIS 89450 (S.D. Fla., Dec. 11, 2006). There were two related cases pertaining to the same facts and issues: (1) *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 1999 U.S. Dist. LEXIS 23306 (S.D. Fla. Sept. 30, 1999); and (2) *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 2003 U.S. Dist. LEXIS 13827 (S.D. Fla., July 1, 2003). The Miccosukee tribe was granted leave to intervene in the *Friends of the Everglades* case. *See Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, 2006 U.S. Dist. LEXIS 89450 (S.D. Fla., Dec. 11, 2006).

In the Second Circuit, plaintiffs who opposed EPA's unitary waters interpretation also scored significant legal victories. Notably, in the *Catskill Mountains* cases, the Court of Appeals found that "the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a 'discharge' that demands an NPDES permit."

The Eleventh Circuit Takes a Stand, and Departs from Precedent

In 2009, when the Eleventh Circuit was called upon again to rule on the legality of water transfers without NPDES permits, the regulatory landscape had changed significantly in one respect—EPA had issued and finalized the Water Transfer Rule through formal rulemaking. As a result, the court held that in light of the ambiguity in the CWA over the definition of "addition," EPA's Water Transfer Rule and its unitary waters theory are reasonable interpretations of the CWA, and must be given effect under *Chevron* deference.

In coming to this decision, the Eleventh Circuit did not ignore the previous cases, and in fact acknowledged that its earlier decision in *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002), *vacated*, 541 U.S. 95 (2004), which concluded that the CWA "required an NPDES permit for transfers of polluted water between meaningfully distinct water bodies," mirrored the reasoning used by the Second Circuit in *Catskills. Friends of the Everglades*, 570 F.3d at 1222. However, the court distinguished itself from previous Courts of Appeals rulings on two levels.

First, the Eleventh Circuit leaned on *Chevron*, pointing out the fact that when the previous cases were decided, the agency anchored its interpretations of "discharge of a pollutant" on informal guidance documents and letters, and not formal rulemaking. Thus, the Eleventh Circuit reasoned, courts such as the Second Circuit were not bound by *Chevron* deference, and had more leeway to rule that EPA's informal opinion letter "overlooked the plain language" of the CWA when the agency sought to advance the unitary waters theory of "addition."

The Eleventh Circuit did not stop at *Chevron* def-

erence. Unlike the Second Circuit (and, for that matter, other federal courts that have ruled on the issue prior to EPA's final Water Transfer Rule), the Eleventh Circuit went to great lengths to demonstrate that *both* the unitary waters theory and its opposition (*i.e.*, navigable waters of the United States are not a single unified body) are reasonable interpretations of "addition of any pollutant to navigable waters" because statutory construction of the operative phrase left the issue ambiguous and open to agency interpretation.

The Eleventh Circuit, therefore, was able to avoid drawing itself into a direct duel with prior Courts of Appeals rulings as it had *Chevron* deference on its side. However, *Chevron* was not an avoidance tactic—its application is the corollary after the Eleventh Circuit put a stake in the ground, pronouncing that the statutory language was ambiguous and thus open to agency interpretation, unlike the Second Circuit in *Catskills*. Its dissection of the statutory language and its legal findings will undoubtedly influence other courts that will be called upon to decide the merits of the unitary waters theory.

Conclusion and Implications

The Eleventh Circuit's ruling is not controlling in other jurisdictions, but as it is the first federal Court of Appeals ruling on the issue after EPA's promulgation of the final Water Transfer Rule, it will exert influence on, and demand to be distinguished from, other pending legal challenges to the rule. However, the next time the issue is presented to a federal court, the dispute may have shifted its form again. EPA, now under the Obama administration, is reconsidering the Water Transfer Rule. Initial brief for Appellee-Respondent at 34, *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 2010 U.S. S.Ct. Briefs LEXIS 2048 (Oct. 22, 2010).

EPA has yet to announce the approach it plans to take, and formal rulemaking with public notice and comment will be, as usual, time-consuming. However, it is not unreasonable to surmise that the unitary waters theory may be rejected in favor of one that calls for more stringent regulation of water transfers. Another prolonged round of appeals, petitions for rehearing, and eventually renewed appeals to the Supreme Court would undoubtedly ensue. Supporters of the recent outcome in the Eleventh Circuit may be in for a disappointment—the court, in finding both the "unitary" and "distinct" waters theories reasonable, would necessarily have to defer to EPA if renewed formal rulemaking abandons the unitary waters theory. Other Circuits that have ruled on the issue before likely would see renewed petitions as well. As a result, confusion and uncertainty on this issue could persist, at minimum, for the foreseeable future.

If any water project manager feels relieved by the Eleventh Circuit's and the Supreme Court's decisions, that sensation is unlikely to linger. This uncertain state of affairs may hinder further development and expansion of water projects, which in turn would slow down planning efforts for water supplies, agricultural development, power generation, flood control, and environmental restoration. In an era of climate change, the cost of regulatory uncertainty may be heavy. (Felix S. Yeung, Richard Davis)