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CLEAN WATER ACT

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Although the Clean Water Act was enacted 35 years ago, the authors of this article say some fundamental questions of water law remain in flux, creating significant uncertainty about current regulatory requirements and obligations. They argue that courts have been refusing to follow or to give significant weight to the explanations offered by EPA to justify decisions regarding the applicability and scope of the Clean Water Act. They say the Clean Water Act cases discussed in this article represent not only an attack on the programs and policies of EPA and the Army Corps of Engineers, but also a critique of the lack of action by Congress to address these key program issues. This article examines the specific ways in which the degree of judicial deference given to the federal government in recent Clean Water Act litigation has been declining and discusses some possible reasons for this trend.

Diminishing Deference: Recent Trends in Clean Water Act Cases

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The Environmental Protection Agency long has enjoyed judicial deference to its regulatory interpretations of the Clean Water Act. With some notable exceptions, courts generally have upheld the agency's rules and programs implementing the Clean Water Act, particularly in the significant early legal challenges to then-new federal permitting requirements and effluent treatment standards. More recently, however, courts have been refusing to follow or accord significant weight to the explanations EPA has put forward to justify certain key determinations regarding the applicability and scope of the Clean Water Act. In particular, fundamental aspects of the agency's National Pollution Discharge Elimination System (NPDES) permit and the Total Maximum Daily Load (TMDL) programs have received critical judicial treatment in recent years. In addition, the ongoing confusion over the scope of federal jurisdictional waters following the U.S. Supreme Court's 2006 decision in *Rapanos v. United States*, 126

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S. Ct. 2208, 62 ERC 1481 (2006), including the recent joint guidance published by the Corps and EPA, is presenting opportunities for courts to develop new Clean Water Act doctrines that lack consistency across jurisdictions and do not defer to the federal agencies' view of this issue.

This trend toward non-deference is particularly evident in recent court rulings regarding the applicability of NPDES permit requirements for activities such as pesticide applications, water transfers, and ballast water discharges, among others. In the past five years, courts have, over EPA's objection, required NPDES permits for the spraying of pesticides onto or near water bodies, transfers of water containing pollutants from one water body to another, and the discharge from vessels of ballast water and other incidental wastewaters. In each of these areas, EPA has had a long-standing policy of not regulating such activities under the NPDES program—policies the courts in these cases have considered and rejected. Similarly, EPA's position that the Clean Water Act authorizes the use of annual and seasonal limits under the TMDL program was wholeheartedly rejected by the U.S. Court of Appeals for the D.C. Circuit, despite a long-standing agency practice of approving total maximum daily loads measured by other than daily limits.

A similar trend is evident with wetlands regulation, where the Supreme Court has twice in five years rejected the EPA and U.S. Army Corps of Engineers' interpretation of the scope of Clean Water Act Section 404 jurisdictional waters. Indeed, one of the key problems highlighted by the wetlands cases has been the lack of a well-reasoned agency position upon which judicial deference could be based. In June, a year after *Rapanos*, EPA and the Corps issued joint guidance describing the impact of the fractured decision on their Clean Water Act authority. In the interim, however, courts have been interpreting the Clean Water Act's wetlands authority in different ways, due in large part to the lack of clarity provided by *Rapanos* and the federal agencies.

These judicial developments, which affect fundamental clean water law jurisprudence, are occurring at a time when the Clean Water Act is celebrating its 35th anniversary and the 20th year since its last major amendments. There is increased attention to water quality issues and a growing concern that the traditional tools of the Clean Water Act do not seem well-designed to tackle contemporary water quality issues. Debate is increasing over whether the current law contains enough flexibility and muscle to address 21st century water quality challenges.

The recent Clean Water Act cases discussed in this article represent not only an attack on the programs and policies of EPA and the Corps, but also a critique of the lack of action by Congress to address these key program issues. This article examines the specific ways in which the degree of judicial deference given to the federal government in recent Clean Water Act litigation has been declining, and discusses some possible reasons for this trend.

Judicial Deference to Agency Actions

The Supreme Court articulated the fundamental standard of judicial deference to federal agency actions in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 21 ERC 1049 (1984). *Chevron* stands for the principle that, if the intent of Congress is clear on the face of a statute, a court must determine whether an agency's interpretation is a reasonable and well-reasoned reflection of the articulated Congressional directive. If so, courts are to defer to the agency's determinations. If a statute is ambiguous, that is, subject to more than one reasonable interpretation on its face, then a court must determine whether the interpretation of the agency designated by Congress to implement the statute is entitled to deference by the judiciary. In doing so, the court will examine whether the agency's interpretation comports with the statutory language and purpose. If an agency's interpretation is not a reasonable interpretation or is otherwise arbitrary and capricious, a court will not defer to it and will interpret the statute using principles of statutory construction. Where *Chevron* deference is not due, an agency interpretation might still be accorded judicial respect, but only to a lesser degree and only to the extent that the agency's position is persuasive. *See, e.g., Christensen v. Harris County*, 529 U.S. 576 (2000). This is known as the ''power to persuade'' deference articulated by the Supreme Court in *Skidmore v. Swift*, 323 U.S. 134 (1944).

Role of Deference to EPA in Recent Water Cases

The discussion below is divided into two parts. The first part summarizes the recent NPDES permit, TMDL, and wetlands cases to identify the outcomes in which EPA's policy or position was challenged and the challenge prevailed. Part one also summarizes the current status of EPA's responses to these adverse court decisions. The second part discusses the possible common themes and causes for the lack of judicial deference to EPA and the Corps in these recent cases.

1. Courts Reject EPA's Position in Three Major Areas

NPDES Permit Cases

The Clean Water Act prohibits ''the discharge of any pollutant by any person'' except as authorized by the statute. Prohibited discharges are defined broadly to include ''any addition of any pollutant to navigable waters from any point source.'' EPA's NPDES permit program provides the framework for authorizing the specific circumstances in which discharges of pollutants are allowed. In early challenges to the NPDES permit program, courts upheld the agency's broad definitions of ''point source'' and ''pollutant,'' finding these interpretations fully and fairly reflect the statutory language and congressional intent to cleanup the nation's waters. As a result, point source discharges that contain pollutants presumptively are required to obtain NPDES permits. In this respect, EPA's broad reading of the scope of the Clean Water Act's prohibition on discharges of pollutants has long been an accepted hallmark of the NPDES program.

It is probably because of the success of the NPDES permit program in mitigating and eliminating the adverse effects of traditional point sources of pollution that the focus of more recent challenges to the program has been on activities the agency historically has not sought to regulate. The questions of law and policy raised in recent cases have not, until this spate of litigation, been the focus of significant EPA attention. As discussed below, the initial round of recent NPDES permit cases, which challenged the lack of a federal Clean Water Act permit requirement for various types of pesti-

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cide applications, set the judicial tone for subsequent challenges over the applicability of the NPDES permit requirement to water transfers and ballast water discharges.

Pesticide Application Cases. The first set of challenges to EPA's traditional NPDES permit exemptions arose with the pesticide application cases brought in the western United States. In *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 52 ERC 1001 (9th Cir. 2001), an irrigation district was sued for applying herbicides to irrigation canals without first obtaining an NPDES permit. EPA had a long-standing practice of not requiring NPDES permits for the application of pesticides as long as the application was made in accordance with the requirements of product labels approved under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Consistent with EPA policy, the district court in *Talent* held that an NPDES permit was not required because the application of the herbicide at issue was controlled by FIFRA and its labeling requirements. *Talent* at 529. The U.S. Court of Appeals for the Ninth Circuit reversed and remanded the case to the district court, finding that, because the Clean Water Act and FIFRA have two different purposes, regulation of the herbicide under FIFRA did not necessarily preclude the need for an NPDES permit. *Id.* at 532. A year later, in *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 118, 55 ERC 1289 (9th Cir. 2002), the Ninth Circuit held similarly that the application of a pesticide from an aircraft spraying apparatus required an NPDES permit, because the aerial application method involved a point source. *Forsgren* at 1185.

In *Talent* and *Forsgren*, the Ninth Circuit found unpersuasive EPA's reliance upon the proper application of pesticides under FIFRA as a basis for exempting such activities from NPDES permit requirements. The key factor in both cases, from the court's perspective, was that the water bodies at issue could be adversely impacted by the actual pesticide application. Because consistency with labeling requirements did not, by itself, address the concerns over possible water quality impacts, the court declined to defer to EPA's long-standing explanation of this NPDES permit exemption for FIFRA-regulated pesticide applications. This rationale also was prevalent in a more recent case, in which the Ninth Circuit found that pesticides applied to water to eliminate non-native fish species, where there were no residues or unintended effects, were not chemical wastes constituting ''pollutants'' under the Clean Water Act. Therefore, no NPDES permit was required under the circumstances present in that case. *Fairhurst v. Hagener*, 422 F. 3d 1146 (9th Cir. 2005). Other courts also have rejected EPA's practice of not requiring NPDES permits for pesticide applications, citing the lack of a clearly articulated, written EPA policy on the relationship between FIFRA-regulated pesticides and NPDES permits. The U.S. Court of Appeals for the Second Circuit in *Altman v. Town of Amherst*, 47 Fed. Appx. 62, 55 ERC 1725 (2d Cir. 2002), remanded to the district court a challenge to the town of Amherst's aerial application of mosquito control pesticides to wetlands, in part because the lower court had acted upon an incomplete record. *Id* at 66. In doing so, the Second Circuit rejected EPA's explanation for not requiring NPDES permits for such applications in wetlands, and explicitly called upon the agency to articulate a clear basis for its view that pesticides applied in compliance with FIFRA requirements on or near water bodies do not require NPDES permits. *Id*. at 67 (''Until the EPA articulates a clear interpretation of current law - among other things, whether properly used pesticides released into or over waters of the United States can trigger the requirement for NPDES permits . . . the question of whether properly used pesticides can become pollutants that violate the CWA will remain open.'').

EPA issued a final rule in November 2006, explaining its reasons for not requiring NPDES permits for certain pesticide application activities. 71 Fed. Reg. 68483, 68485 (Nov. 27, 2006). The new rule was rapidly appealed to all circuit courts of appeal by both environmental groups and industry, and now is consolidated in the U.S. Court of Appeals for the Sixth Circuit in *National Cotton Council v. EPA*, No. 06-4630 (6th Cir. Dec. 14, 2006). The partial coverage of the new rule to only certain types of pesticide application activities is under attack by both sides of this debate. (38 ER 376, 2/16/07).

Water Transfer Cases. The water transfer cases analyze whether NPDES permits are required for the movement of water between water bodies where the water contains pollutants and is being transferred for water management purposes. The issue was raised and hotly debated in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 58 ERC 1001 (2004). However, the Supreme Court declined to decide the matter in that case, finding the factual record incomplete on the issue of whether there were distinct water bodies involved in the water transfer activity being challenged. *Id*. at 112. In *Miccosukee*, the court expressed skepticism about EPA's ''unitary waters'' theory, which formed the basis of EPA's rationale that movement of water from one federally jurisdictional water body to another could never trigger NPDES permit requirements, even if the water being transferred was polluted and the receiving water was not. *Id*. at 106-109. The district court has not ruled yet in the remanded case, although another Florida federal district court case involving the Everglades has rejected EPA's position, as further discussed below.

In *Catskills Mountains Chapter of Trout Unlimited v. City of New York*, 451 F.3d 77, 62 ERC 1737 (2d Cir. 2006), a citizen suit enforcement action was brought against New York City for failing to obtain an NPDES permit for water transfer activities associated with supplying the city's drinking water. *Id.* at 79. The court reaffirmed its 2001 holding that Clean Water Act Section 402 requires a permit for interbasin water transfers if the transfer involves a discharge of pollutants from a point source. *Id.* at 79-82. The Second Circuit found EPA's interpretation of this issue unpersuasive and declined to defer to it. In particular, EPA advanced its view that a ''unitary waters'' reading of the Clean Water Act renders NPDES permits unnecessary for interbasin transfers. *Id*. at 82. This rationale was the basis for EPA's 2005 interpretive guidance on water transfers and was again most recently endorsed by the agency in its proposed rule excluding such transfers from NPDES permit requirements. 71 Fed. Reg. 62,887 (June 7, 2006). The *Catskills* court discussed and rejected EPA's interpretive guidance, citing in support of its decision to reject EPA's position, the Supreme Court's skepticism of EPA's theories in the *Miccosukee* case. (''Our rejection of this theory in *Catskills I*, however, is supported

by Miccosukee, not undermined by it . . . the Supreme Court pointed out that several provisions of the Clean Water Act seem to distinguish among water bodies that are part of the navigable waters of the United States, implying that, at least in the context of the Clean Water Act, the unitary-water theory has no place . . . Miccosukee also noted that the EPA has never endorsed the theory in any administrative documents.'')

In late 2006, EPA's position on NPDES permits and water transfers was again rejected, this time by a Florida federal district court in *Friends of the Everglades, Inc. v. S. Florida Water Management District*, 2006 U.S. Dist. LEXIS 89450, 64 ERC 1914 (S.D. Fla. 2006). In this case, environmental organizations filed a lawsuit against the South Florida Water Management District to prohibit the pumping of nutrient-laden agricultural runoff into Lake Okeechobee without an NPDES permit. *Id*. at *1-2. The district court held that an NPDES permit was required for agricultural waters back-pumped into Lake Okeechobee because the actions constituted the addition of a pollutant to a navigable water body. *Id.* at *84. The court discussed, but declined to defer to, EPA's proposed water transfer rule, finding it not merely unpersuasive but also contrary to the statute. *Id.* at *147-149. EPA's proposed water transfer rule and its current status is discussed further below; how the agency will respond to these recent court decisions remains to be seen, as EPA anticipates releasing a final water transfer rule later in 2007.

Ballast Water Case. EPA has had a long-standing NPDES exemption for discharges ''incidental to the normal operation of a vessel.'' 44 C.F.R. § 122.3(a). Such vessel discharges include ballast water, which has been widely cited as the source of invasive species issues in a variety of water bodies across the country. EPA's exemption was recently overturned in *Northwest Environmental Advocates v. EPA*, 2006 U.S. Dist. LEXIS 69476, 63 ERC 1915, (N.D. Cal. 2006). In *Northwest*, the court ruled that EPA must establish an NPDES permit program to regulate ballast water discharges from ships. In an earlier decision in 2005, the court granted the plaintiffs' motion for summary judgment, finding the Clean Water Act unambiguous in requiring NPDES permits for discharges from vessels. *Id*. at *18-19.

EPA argued in the 2005 case that there was ''overwhelming evidence of acquiescence'' by Congress to EPA's 30-year old regulation exempting such incidental discharges from ships and, thus, EPA's regulatory interpretation reflected the will of Congress now, if not on the face of the Clean Water Act itself. *Id.* at *29-30. Relying on the language of the statute, the court opined that EPA's exemption was *ultra vires*, finding that Congress had spoken directly on the issue in the Clean Water Act. The court directed EPA to develop an NPDES permit for incidental vessel discharges, including ballast water discharges. *Id.* at *26-28; *Northwest Envtl. Advocates*, 2006 U.S. Dist. LEXIS 69476, 63 ERC 1915 (N.D. Cal. 2006). In November 2006, EPA and a shipping industry coalition appealed this decision to the Ninth Circuit. *Northwest Envtl. Advocates v. EPA,* No. 06-1718, (9th Cir. Nov. 16, 2006). Several amici joined in the briefing of that appeal, most notably representatives of recreational boating which, in an unintended consequence of the decision below, would be required to obtain NPDES permits for non-ballast water discharges incidental to the normal operation of recreational vessels. Oral argument of that appeal was held in August. In the meantime, litigation over Michigan's new ballast water discharge requirements, developed in response to the absence of active federal regulation of such discharges, was largely resolved in the state's favor in *Fednav Ltd. v. Chester*, 2007 U.S. Dist. LEXIS 59639 (E.D. Mich. 2007) (161 DEN A-2, 8/21/07), which now is on appeal to the Sixth Circuit.

TMDL Cases

In *Friends of the Earth Inc. v. EPA et al.*, 446 F.3d 140 (D.C. Cir. 2006), petitioners challenged a TMDL that set pollutant load limits using seasonal and annual measures, rather than daily limits. The U.S. Court of Appeals for the District of Columbia Circuit rejected EPA's use of seasonal and annual limits, finding that ''[d]aily means daily, nothing else.'' *Id.* at 142. The court found that nothing in the TMDL provision of the Clean Water Act ''even hints at the possibility that EPA can approve total maximum 'seasonal' or 'annual' loads.'' *Id.* at 142, 144. In so holding, the D.C. Circuit expressly rejected the more contextual approach to the issue advocated by EPA and previously adopted by the Second Circuit in *Natural Resources Defense Council Inc. v. Muszynski*, 268 F.3d 91 (2d Cir. 2001). In *Muszynski*, the Second Circuit found that the use of the word ''daily'' was ''susceptible to a broader range of meanings'' than loads calculated on a daily basis, given other statutory references requiring EPA and states to account for seasonal variations and other factors in establishing TMDLs. *Id.* at 98. The Second Circuit's decision largely followed EPA's position on the issues.

Because of the split between the Second and D.C. Circuits on this issue, intervenors in the *Friends* case filed a petition for review in the Supreme Court. On Jan. 16, 2007, the court declined to grant *certiorari* to review the D.C. Circuit's 2006 decision. *D.C. Water & Sewer Auth. v. Friends of the Earth, Inc.*, 127 S. Ct. 1121, 63 ERC 2024 (2007). Notably, EPA opposed the *cert.* petition, arguing that *Friends* had limited jurisdictional reach, as it only applied in the District of Columbia, and that a resolution of the circuit split was not of national significance to the agency. EPA also argued that the decision had limited practical effect on EPA's programs for improving water quality, because the D.C. Circuit's directive would not alter EPA's existing policy and guidance for establishing actual NPDES permit terms based on TMDLs. Indeed, in new guidance written as the Supreme Court was evaluating the *cert.* petition, EPA stated its continued belief ''that the use of the word 'daily' in the term 'total maximum daily load' is not an unambiguous direction from Congress that TMDLs must be stated in the form of a uniformly applicable 24-hour load. (*Establishing TMDL 'Daily' Loads in Light of the Decision by the U.S. Court of Appeals for the D.C. Circuit in* Friends of the Earth, Inc. v. EPA, et al., *No. 05-5015 (April 25, 2006) and Implications for NPDES Permits,'' (U.S. EPA, Nov. 15, 2006) is available at http://www.epa.gov/owow/tmdl/dailyloadsguidance.html)*.

Wetlands Cases

The EPA and Corps' interpretation of the scope of federal jurisdictional waters under Section 404 of the Clean Water Act also has taken center stage in recent water law litigation. For many years, it was generally accepted that federal jurisdiction over ''navigable waters'' extended to certain hydrologic features that are

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not actually navigable in their own right. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 23 ERC 1561 (1985). While the precise scope of the jurisdiction over such features has evolved over the years, the U.S. Supreme Court brought the issue to the fore by rejecting the agencies' long-standing view that the Clean Water Act confers jurisdiction over isolated water bodies connected to interstate commerce only by the movement of migratory birds across state lines. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 51 ERC 1833 (2001) (*SWANCC*). Because *SWANCC* opened the question of whether jurisdictional waters were as broadly defined as previously articulated in joint EPA/Corps rules, expectations ran high that the agencies would address the uncertainties in a rulemaking. This did not occur. Instead, the next significant development in the wetlands area was the Supreme Court's issuance of its opinion in *Rapanos v. United States*, 126 S. Ct. 2208, 62 ERC 1481 (2006), in which the justices split 4-1-4 over the extent of Clean Water Act's jurisdictional reach over non-navigable features.

The *Rapanos* court considered whether federal jurisdiction extends to: (1) wetlands that are not directly adjacent to traditional navigable waters but are adjacent to non-navigable waters of the United States; and (2) wetlands that are close to but hydrologically isolated from waters of the United States. Unfortunately, while five justices agreed to remand the case to the trial court for further fact-finding to address these issues, they were unable to reach a majority consensus over the jurisdictional threshold to which those facts would apply. On the substantive issues, the *Rapanos* Court reached a stalemate, with four Justices tying Clean Water Act jurisdiction to the ecological and hydrological significance of non-navigable features to navigable-in-fact waters (the Scalia test), one justice basing jurisdiction on ''the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense'' (the Kennedy test), and four justices preferring to defer to the expertise of the Corps (the dissent). *Id.* at 2225-26, 2248. Not surprisingly, the court's inability to produce a majority opinion has created great confusion as the lower courts, regulatory agencies, and regulated community attempt to apply *Rapanos* to real-world activities.

In the wake of *Rapanos*, the lower courts have split into three different camps. The U.S. Court of Appeals for the First Circuit (*United States v. Johnson*, 467 F.3d 56, 63 ERC 1289 (1st Cir. 2006)), and the U.S. District Court for the Middle District of Florida (*United States v. Evans*, 2006 U.S. Dist. LEXIS 94369 (M.D. Fla. 2006)), have subscribed to the Department of Justice's approach under which both the Scalia and Kennedy tests apply to jurisdictional determinations. The U.S. Court of Appeals for the Seventh Circuit *(United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 63 ERC 1351 (7th Cir. 2006)) and Ninth Circuit (*N. California River Watch v. City of Healdsburg*, 457 F.3d 1023, 63 ERC 2089 (9th Cir. 2006) and *San Francisco BayKeeper v. Cargill Salt Division*, No. 04-17554, 2007 U.S. App. LEXIS 5442, 64 ERC 1109) (9th Cir. 2007)) have adopted only the Kennedy test as the new standard for evaluating Section 404 jurisdiction. Finally, the U.S. District Court for the Northern District of Texas (*United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 36 ERC 1376 (N.D. Tex. 2006)), having found that the justices failed to articulate any standard at all, struck out on its own and relied on pre-*Rapanos* precedent of the U.S. Court of Appeals for the Fifth Circuit to evaluate the Clean Water Act's scope. The Supreme Court recently declined to review the First Circuit's *Johnson* ruling, and thus, in accordance with that ruling, the case will proceed in the district court for further fact-finding to determine whether the cranberry fields at issue in that case are federal jurisdictional wetlands. *See Johnson v. United States*, U.S., No. 07-9 (Oct. 9, 2007).

Joint Guidance Issued. In the meantime, EPA and the Corps issued joint guidance on the subject June 5 (110 DEN A-12, 6/8/07). The agencies' joint guidance attempts to reconcile the two divergent jurisdictional tests articulated by the Supreme Court in *Rapanos*. Despite substantial differences between the two *Rapanos* tests, the guidance instructs the agencies' field offices to assert Clean Water Act jurisdiction when *either* test is met, an approach most closely in line with the *Johnson* and *Evans* cases noted above. To streamline these evaluations, the guidance creates three separate classes of waters, each of which will receive a different level of regulatory scrutiny. Because the *Rapanos* Court was unable to distill a single test for analyzing the jurisdictional status of non-navigable waters and associated wetlands, it is hardly surprising that EPA and the Corps had such a difficult time creating their joint guidance or that it took them so long to do so.

Nevertheless, because a full year passed between the *Rapanos* opinion and the agencies' joint guidance, the Corps' local offices accumulated massive backlogs of jurisdictional determinations that were awaiting instructions on how to apply the opinion in the field. At the same time, faced with the agencies' silence in the wake of *Rapanos*, federal courts across the country have found themselves in a three-way split over the appropriate interpretation of the opinion. Despite the agencies' best efforts, their new joint guidance is unlikely to resolve either of these problems.

2. Common Threads in These Cases

There are several common threads in these recent Clean Water Act court decisions that explain, in part, why EPA and the Corp's positions on these key clean water issues largely have not prevailed before the judiciary.

Expanding Scope of NPDES Program. First, the NPDES cases all involve activities that have not been traditionally regulated under the federal permit program, either because EPA saw fit to grant an explicit exemption from NPDES permit requirements (as in the ballast water case), or, because the agency never considered the activity subject to the NPDES program in the first place (as with water transfers and pesticide applications). In the latter instances, until these cases arose, the agency's practice of not requiring permits was never the subject of a rulemaking or otherwise clearly articulated in written guidance, and its practices were not previously challenged. Thus, these cases have in common an effort to enlarge the scope of the NPDES permit program to activities that the agency has historically chosen not to regulate, where that initial agency decision was made years ago and was not documented extensively or at all. While the lack of an administrative record in many of these cases explains the lack of deference to a degree, it does not provide a full basis for understanding the

courts' rejection of EPA's reasoning, as set forth in briefing documents, as essentially contrary to the Clean Water Act or otherwise unpersuasive.

EPA as a Nonparty. On a related note, EPA's participation in the pesticide and water transfer cases was not as a party defending a position reflected in a duly promulgated rulemaking, but rather, as a nonparty with a strong regulatory interest allowed by the court to weigh in on the matter. In these cases, EPA was forced to respond to the situational specifics of each case being litigated rather than setting forth in a proactive fashion a broad legal and policy framework in a rulemaking format. The unflattering commentary in the various opinions suggests the judiciary found many of EPA's positions in these cases not well considered and/or incomplete. EPA essentially acknowledged this problem in the pesticide cases, noting in its Nov. 27, 2006, final rule that the government's briefs in *Talent* and *Altman* ''reflected the government's evaluation of the law in the context of specific factual situations, and did not result from deliberative consideration through an administrative process. As such, the briefs did not represent EPA's legal position on the precise questions at issue in the [2003] Interim Guidance or in today's regulation.'' 71 Fed. Reg. 68483, 68485 (Nov. 27, 2006). This reflective statement suggests, perhaps inadvertently, that the courts in these cases were not required to provide *Chevron* deference, given the nature of how EPA's views were presented in each case.

No Judicial Deference. A third theme that cannot be ignored in the NPDES permit cases, TMDL cases, and the ballast water case is the court's finding that the unambiguous language of the Clean Water Act pointed to a clear result that, in these cases, was largely contrary to what EPA had posited the statute meant. Under the circumstances, deference to EPA's point of view was not warranted under *Chevron*.

Judicial deference in the wetlands cases presents a somewhat different picture. In these cases, and in *Rapanos* in particular, there was clear dissatisfaction by the courts regarding the agencies' failure to act, following *SWANCC*, to clarify the scope of federal wetlands jurisdiction in a rulemaking. Because the agencies had an opportunity to cure the defects in their joint rule and did not, *Chevron* deference was not appropriate. Put another way, the void left by agency inaction left no substantive position on the issues being litigated for the court to review.

Considering these themes in the pesticide cases outlined above, the courts were confronted with trying to make sense of two separate federal statutes, FIFRA and the Clean Water Act, that EPA has insisted are complementary, not overlapping. EPA's reasoning for not requiring NPDES permits for pesticide applications on or near water bodies, particularly where water quality could be negatively impacted, may or may not be legally correct, as the court hearing the appeal of the new rule may ultimately decide. To date, however, the courts largely have been unpersuaded by EPA's positions. In these cases, the courts seem troubled by the agency's articulation of how meeting the pesticide standards under FIFRA satisfies the NPDES requirements of the Clean Water Act. In particular, the courts appear concerned with the issue of pesticide residue remaining after the legally proper application of the pesticide, and dissatisfied with EPA's explanation of why this activity does not require further regulation through an NPDES permit.

A fundamental issue in the challenge to the 2006 EPA pesticides rule will be whether EPA's explanation of why it is exempting some but not all pesticide application activities will be entitled to *Chevron* or other judicial deference, and whether the reviewing court will be bothered by the agency's response to the question of potential water quality impact that other courts have found lacking in EPA's prior interpretive materials. Furthermore, given the unnaturally narrow focus of appellate briefing, it also will be important to see whether this court reaches and attempts to resolve the closely related questions of whether a pesticide constitutes a pollutant or, if a regulable pollutant residue only comes into existence at some time after the application of a pesticide, whether an NPDES permit can be required for the act of application itself.

Contrary to Clear Language. Turning to the water transfer cases, EPA's proposed water transfer rule was brushed aside by two courts as contrary to the clear language of the Clean Water Act. In the *Catskill Mountains* ruling, the court refused to give *Chevron* deference to EPA's proposed rule, which was released just a week before the court's ruling. 451 F.3d at 82. EPA contended that a ''holistic'' view of the Clean Water Act, coupled with congressional intent, demonstrated that interbasin water transfers should be regulated by the states, not EPA. *Id.* However, the Second Circuit found that this interpretation was only entitled to the ''power to persuade'' deference articulated by the Supreme Court in *Skidmore*, 323 U.S. 134 (1944). In addition, once the court reviewed EPA's arguments, it declined to defer to EPA, finding instead that EPA's Clean Water Act arguments ''simply overlook [the CWA's] plain language.'' *Catskill Mountains*, 451 F.3d at 84. Similarly, in *Friends of the Everglades*, the court did not accord EPA's views *Chevron* or other deference, because it found the Clean Water Act to be clear and expressly instructive on water transfer issues. As noted, the court was in part influenced by the Supreme Court's skepticism of the same EPA ''unitary waters'' theory argued in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). *Id.* at 68. The primary driver of the court's decision, however, was simple statutory construction. *Id.* at 72. Considering the Clean Water Act's definitions of ''discharge of a pollutant'' and ''navigable water,'' and a common dictionary definition of ''addition,'' the court concluded that NPDES permits are required for backpumping water between basins.

EPA issued an interpretive memoranda on water transfer issues in 2005, and in June 2006, proposed a rule to codify its interpretation of the Clean Water Act on this issue. 71 Fed. Reg. 62,887 (June 7, 2006). EPA's proposed rule, whether one agrees with it or not, appears to be based on an analysis that begins and ends with looking at ''the CWA as a whole.'' In contrast, the courts in the water transfer cases have first reviewed the language of Clean Water Act 402 and the question of whether, on its face, it requires NPDES permits for water transfers where pollutants are involved. EPA's proposal would expressly exclude water transfers from NPDES permit requirements if they involve the conveyance of waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal or commercial use. The

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agency's primary rationale is that the Clean Water Act contemplates state regulation of water transfers under other programs reserved to states for water allocation and use, and that expanding the NPDES program to include water transfers would be administratively impossible and thus, could not have been intended by Congress. The agency's position is not well supported by the handful of court decisions that have analyzed this issue. Thus, whatever the final rule may provide, it seems likely it will be appealed and provide another court another opportunity to evaluate EPA's thinking, this time in the context of judicial review of a rulemaking.

Unlike the pesticide and water transfer cases, the ballast water challenge was made directly against EPA for an exemption it had promulgated almost 30 years before. As such, the court hearing this challenge had to address, among other issues, EPA's argument that Congress had, by not overturning EPA's ballast water exemption, acquiesced to EPA's long-ago decision not to require an NPDES permit for incidental discharges from the normal operations of ships. This decision has been appealed to the Ninth Circuit, and among the issues to watch will be whether the appellate court will determine that the district court should have given greater deference to EPA interpretation of the statute. States affected adversely by the invasive species that ballast water discharges notoriously deliver have begun to devise laws and regulatory programs to address the water quality issues associated with ballast water/invasive species discharges in the face of EPA's long-standing NPDES exemption. Although EPA may propose an NPDES rule for ballast water discharges to comply with the court's order, the regulatory path for such discharges may, at this point, be less influenced by any future federal rulemaking process than by these state and regional initiatives. The *Fednav* case from Michigan, noted above, is instructive in this regard.

Perceived Regulatory Gaps. This leads to the final theme in this series of cases. The fundamental premise of these cases is that the Clean Water Act requires NPDES permits to regulate activities that EPA has chosen not to regulate, or has simply not regulated. The plaintiffs' apparent frustration over these perceived regulatory gaps has, in large part, been amplified rather than mollified by what EPA has had to say to the courts deciding these matters. A close read of the cases summarized here indicates that, while there are plausible *Chevron* reasons for courts resorting to their independent statutory constructions, there are also elements of plain dissatisfaction with EPA's explanations of why the NPDES permit program applies, or does not apply, to a given situation, and, in the wetlands cases, palpable frustration with the agencies' lack of initiative to resolve uncertainties over the scope of Section 404 rather than relying upon the courts to decide the matter. That courts have not found EPA's reasoning to be persuasive across these seemingly diverse areas of Clean Water Act law is a trend with important implications for water practitioners.

Conclusions and Implications

The clean water cases reviewed demonstrate multiple reasons for the decline in deference to several of EPA's and the Corps' Clean Water Act positions. The most common reason cited by the courts is that the plain language of the Clean Water Act is clear and points to a result other than the one supported by the federal government. In the wetlands area, the lack of deference is based more on the absence of a coherent federal policy rather than rejection of an articulated position. The main implication of these cases and the ongoing agency response in the various rulemakings and guidance documents discussed above is that, 35 years into the Clean Water Act, some fundamental questions of water law remain in flux, creating significant uncertainty about current regulatory requirements and obligations. How the agencies, the courts and possibly Congress respond to these uncertainties will be instructive to the regulated community facing 21st century water quality challenges.