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On Jan. 14, the U.S. Supreme Court will hear arguments in a case critical to the interests of water suppliers, irrigation districts, mining companies, agriculture, and pesticide manufacturers. If the court affirms the decision under review, activities never before regulated by the Clean Water Act could be subject to its permitting requirements. Pollutants released into the environment by one party may become the responsibility of another, and agricultural runoff may be indirectly regulated by a statute that expressly exempts it from direct regulation. In total, the court is weighing a potentially historic expansion of the reach of the federal Clean Water Act.

South Florida Water Management District v. Miccosukee Tribe of Indians: Supreme Court Considers Extending Clean Water Act Regulation

BY RICHARD DAVIS AND BRIAN DOSTER

The case, *South Florida Water Management District v. Miccosukee Tribe of Indians*, U.S., No. 02-626, raises the question whether Clean Water Act discharge permits are required to transfer water containing pollutants between drainage basins that are not naturally connected. The U.S. Court of Appeals for the Eleventh Circuit held that pumping phosphorus-rich water from one body of water into another for flood control purposes constitutes a discharge of pollutants that requires a National Pollutant Discharge Elimination System permit under Sections 301 and 402 of the Clean Water Act. *Miccosukee Tribe of Indians of Florida v. South Florida Water Management District*, 280 F.3d 1364, 53 ERC 1929 (11th Cir. 2002); (33 ER 307, 02/8/02). At stake before the court is whether discharges are subject to Clean Water Act regulation even if the pollutants they contain are already present in waters of the United States and are merely being moved from one watershed to another.

The importance of this question becomes evident when one considers the many circumstances in which interbasin transfers occur and currently go unregulated. Suppliers of drinking water, for example, often

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move water from basins in which it is plentiful to basins in which need exceeds supply. Naturally occurring pollutants in such transferred waters could be regulated for the first time by the Clean Water Act as a result this case. Similarly, agricultural irrigation districts frequently move water from basin to basin to allow the productive use of fertile but arid lands.

The introduction of pollutants as a result of such transfers (either before or after the water is used for irrigation) could be subject to NPDES permitting if the court upholds the Eleventh Circuit in *Miccosukee*. Mineral extraction operations, as well, often redirect waters over large land areas. Where these necessary management measures result in the transfer of existing contaminants from one basin to another, they too could become the focus of Clean Water Act permitting. In each of these circumstances, treatment obligations could arise at locations and as a result of activities that never before invited the attention of the Clean Water Act.

In addition to creating new points on the map at which NPDES permits are required, a decision upholding the Eleventh Circuit's ruling also could disrupt the traditional allocation of responsibilities for pollution control. Historically, the obligation to treat pollutants has rested on the facility that creates the waste and first introduces it into waters of the United States. If the reasoning of the appellate court is upheld, however, pollutants already in jurisdictional waters will become the responsibility of any entity, public or private, that transfers them into a new watershed. Thus, nonpoint source runoff, air-deposited pollutants, pollutants emanating from sediment or introduced through the expression of groundwater—even pollutants that previously have been lawfully discharged into upstream waters—all of these pollutants will become the responsibility of a downstream ''re-discharger'' if the interbasin rule announced by the Eleventh Circuit is adopted by the Supreme Court.

The potential for economic dislocation is obvious. Imagine, for example, the uncompensated treatment costs that will be visited on public water suppliers and on the Bureau of Reclamation if their works (works originally designed simply to convey water to areas of need) are held to afford the NPDES program a convenient opportunity to exert control over pollutants discharged far upstream by others. Or imagine the disruption of the agricultural economy that would occur if newly-permitted irrigation districts sought to pass the costs of treatment back upstream to their agricultural clients.

The additional costs of compliance with the Clean Water Act will have to be absorbed somewhere—whether they are borne by those who move water from one watershed to another, passed back upstream to the sources of the pollutants, or passed forward to end-users of the water. Regardless, the movement of these costs through the nation's economy can be expected to result in changes, both foreseen and unforeseeable, that restructure economic relationships at the most fundamental level.

The court's decision of the *Miccosukee* case has the potential to extend the reach of the Clean Water Act to activities and industries historically exempt from regulation under that statute. Moreover, by its decision of the case, the court could restructure legal responsibilities and economic relationships in ways that could scarcely have been contemplated by the framers of the act. Viewed in this light, it is appropriate to delve more deeply into the legal issues and policy debates that have propelled a case born of a quirk of Everglades' geography to national prominence at the steps of the Supreme Court.

I. Case Under Review

The conduct at issue in the case before the court is the pumping of water by the South Florida Water Management District (SFWMD) in Broward County, Florida, west of Fort Lauderdale. The Eleventh Circuit held that the Clean Water Act requires that SFWMD obtain an NPDES permit to discharge already polluted water from a pump station (the S-9 pump station) that transfers the water from a canal (the C-11 canal) in a suburban area (the C-11 basin), across two levees (L-33 and L-37), and into an undeveloped water conservation area (WCA-3A) that flows into Everglades National Park. The court recognized that the pump station itself did not add any pollutants to the water, but the panel nevertheless required a permit because the transferred water contained higher pollutant concentrations than found in the receiving water. *Miccosukee*, 280 F.3d at 1366.

The three-judge panel of the Eleventh Circuit held that the transfer of water through the S-9 pump station was a ''discharge of a pollutant'' requiring a permit because the pumping resulted in the ''addition'' of pollutants to navigable waters ''from'' a point source. *Miccosukee*, 280 F.3d at 1367-69. Under Section 301 of the act, it is unlawful to discharge a pollutant into waters without an NPDES permit required under section 402.[1] 33 U.S.C. §§ 1311 and 1342. The term ''discharge of a pollutant'' is defined as ''any addition of any pollutant to navigable waters from any point source.'' 33 U.S.C. § 1362(12).

According to the *Miccosukee* opinion, the parties in the case did not dispute that the pump-station pipes were point sources or that the water discharged from the pipes contained pollutants. 280 F.3d at 1367. Thus, the key disputed issues were whether the pumping resulted in an ''addition'' of pollutants to navigable waters and whether ''from any point source'' means that the pollutant must be added to the water by the point source or need only be conveyed by the point source.

In construing the meaning of ''addition,'' the court held that the receiving water is the relevant navigable water for purposes of the analysis. 280 F.3d at 1368. Thus, the court concluded it was clear that the water transfer added pollutants to the receiving water, which was the water conservation area. *Id*. The panel rejected SFWMD's argument, based on the opinions in prior hydroelectric dam cases, that an addition of pollutants occurs only when pollutants are added to waters from the ''outside world'' insofar as this term means the air and land but not another body of water. *Id*. at 1368 n.5.

The court appeared to agree with an opinion by the Second Circuit (discussed below) that construed the ''outside world'' to include ''any place outside the particular water body to which pollutants are introduced.'' *Id*. In the Eleventh Circuit's view, this reasoning was supported by a prior opinion holding that the redeposit of soil by a boat's propeller constitutes an addition of dredged and fill material requiring a permit under Sec-

[1] A discharge of ''dredged or fill material'' requires a permit under Section 404 of the act. 33 U.S.C. § 1344(a).

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tion 404 of the act. *Id*. (citing *United States v. M.C.C. of Fla. Inc.*, 772 F.2d 1501, 1505-06 (11th Cir. 1985) *vacated on other grounds by* 481 U.S. 1034 (1987), *reinstated in relevant part on remand*, 848 F.2d 1133 (11th Cir. 1988).)

In addition, the panel held that for the addition of the 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 water. 280 F.3d at 1368. In a footnote, the court observed that ''[f]or pollutants to be from a point source, the point source does not necessarily have to be the source or origin of the pollutants.'' *Id*. at 1368 n.6. According to the court, the word ''from'' means the same thing as ''by.'' *Id*. Thus, the court reasoned that ''from a point source'' should be construed to mean that the point source is ''the 'agent or instrumentality' or 'cause or reason' by which the pollutants are added to navigable waters.'' *Id*. The panel held that the point source at issue in the case (the S-9 pumping station) was the ''cause-in-fact'' of the discharge of pollutants to the receiving water because it changed the natural flow and caused water to flow into a distinct body of water into which it would not otherwise have flowed without the pump station. *Id*. at 1368-69.

In support of this proposition, the court cited opinions by the First and Second circuits (discussed below) which held that an NPDES permit was needed to move water between two distinct bodies of water in a manner inconsistent with the natural flow. *Id*. at 1368 n.7. Surprisingly, the *Miccosukee* court applied this principle even though it acknowledged that the pumping station restored the southerly flow between now-separate waters (the C-11 Basin and WCA-3A) that were historically part of a single body of water (the Everglades) before man intervened and constructed the levees. *Id*. at 1368 n.8.

II. Divergent Case Law on the Subject

Review of *Miccosukee* presumably appealed to the Supreme Court because of a host of other circuit court cases that have considered similar issues but reached divergent conclusions. In its petition for review by the Supreme Court, SFWMD argued that the Eleventh Circuit's reasoning conflicted with several previous cases. Opinions by the District of Columbia and Sixth circuits have held that hydroelectric dams and similar structures do not require NPDES permits. In addition, an older Fourth Circuit opinion held that dischargers are not responsible for removing background pollutants that they did not add to waters. Petition for a Writ of Certiorari at 15-16. In addition, SFWMD pointed out that the Eleventh Circuit had relied on opinions in the First and Second Circuits with similar reasoning. *Id*. at 16-17.

In the early days of the Clean Water Act, the Fourth Circuit held that EPA could not require dischargers to treat their discharges for background pollutants already existing in waters. *Appalachian Power Co. v. Train*, 545 F.2d 1351, 9 ERC 1033 (4th Cir. 1976). In this case, electric power generators challenged EPA's effluent guidelines for their industry on the grounds that the standards impermissibly required that the power generators remove pollutants that had entered plants through the intake of cooling water. The court agreed and held that ''the Act prohibits only the addition of any pollutant to navigable waters from a point source'' and that ''constituents occurring naturally in waterways or occurring as a result of other industrial discharges, do not constitute an addition of pollutants by a plant through which they pass.'' *Id*. at 1377. The Fourth Circuit directed EPA to remedy the situation by modifying its regulations on intake credits. *Id*. at 1377.

A few years later, the District of Columbia Circuit issued the first of the hydroelectric dam opinions in *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 18 ERC 1105 (D.C. Cir. 1982). In this case, an environmental group sought a declaratory judgment that EPA had a duty to require dam operators to obtain NPDES permits. The court recognized that dams and water releases from dams may induce a variety of water-quality changes in reservoirs and downstream waters such as low dissolved oxygen, leaching of minerals and nutrients into the water from soils, temperature increases and decreases, sedimentation, and excessive aeration (supersaturation). The result in the case turned almost entirely on the courts holding that EPA's policy regarding dams was entitled to substantial deference. *Id*. at 166-170. Because the panel found EPA's interpretation of the statute to be permissible, the court upheld EPA's position that there was no ''addition'' of a pollutant from a point source unless the point source itself physically introduced the pollutant into water from the outside world. *Id*. at 174-75.

The dam-induced pollution described above did not qualify as an addition because this pollution merely passed through the dam from one water body to another (from the reservoir to the river downstream). *Id*. at 165, 175. In addition, the court upheld EPA's view that the water ''conditions'' caused by dams such as low dissolved oxygen, supersaturation, and cold were ''pollution'' but not the kind of substances specifically identified as ''pollutants'' in the act's definition of this term.[2] *Id*. at 171-172.

In *Gorsuch*, EPA also argued that the pollution caused by dams was ''nonpoint'' source pollution that was only regulated by states under areawide management plants prepared pursuant to Section 208 of the act. *Id*. at 165-66. EPA's position was that the point or nonpoint source character of pollution was established when the pollutant first entered navigable water and did not change when polluted water passed from one water to another. *Id*. at 175. In support of this position, EPA relied on Section 304(f) of the act. 33 U.S.C. § 1314(f). This provision requires that EPA provide

> information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from — . . . (F) 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.

33 U.S.C. § 1314(f). EPA interpreted this to mean that water quality changes caused by dams were nonpoint source pollution. The court did not consider the reference to dams in Section 304(f) to be particularly rel-

[2] ''The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water,'' 33 U.S.C. § 1362(6).

evant because some dam-induced water quality changes would be nonpoint source pollution anyway under its earlier analysis of the definition of ''pollutant.'' *Id*. at 177. The court did not specifically consider EPA's position that unregulated nonpoint source pollution could not be reclassified as point source pollution when it passed from one water into another.

A notable opinion that followed *Gorsuch* was *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 28 ERC 1572 (6th Cir. 1988). This case involved a hydroelectric power facility in Michigan that pumped water from Lake Michigan into an impoundment for storage and later released the water back into the lake to generate power. When in operation, the turbines from the facility killed fish and returned their mutilated carcasses to the lake. Relying on *Gorsuch* and the Supreme Court's standard for agency deference, the Sixth Circuit held that the facility did not add pollutants because the mutilated fish were not added from the outside world but were already present in the waters of Lake Michigan, albeit in a different form (living and whole). *Id*. at 586.

According to the opinion ''[t]o the extent that no more has been shown than that unclean water flows out of the dam, Congress clearly displayed an intention to exempt dams from the Clean Water Act.'' *Id*. at 586. The Sixth Circuit recognized that if a dam adds pollutants, such as oil or sanitary waste, to the waters passing through it, then this would be an introduction of pollutants from the outside world that would render the discharge subject to the NPDES program. *Id*. at 586. The court distinguished the Luddington, Mich., power facility from a seafood processor that had to obtain an NPDES permit to discharge fish entrails because the Luddington facility did not ever remove the fish from the water. *Id*. at 585.

In *Consumers*, the Sixth Circuit gave more weight to Section 304(f) of the act than *Gorsuch* and relied on this provision to conclude that ''Congress apparently intended that pollution problems caused by dams and other flow diversion facilities are generally to be regulated by means other than the NPDES permit program.'' *Id*. at 587. In addition, the court noted that the water that passed through the Luddington facility never lost its status as a water of the United States because this term includes man-made impoundments. *Id*. at 589.

More recently, other circuits have reached results similar to that in *Miccosukee* by declining to give deference to EPA's policies and distinguishing the facts in *Gorsuch* and *Consumers*. The First Circuit was the first to hold that an NPDES was needed for an interbasin water transfer. *DuBois v. Department of Agriculture*, 102 F.3d 1273, 43 ERC 1824 (1st Cir. 1996). In this case, the court held that the Department of Agriculture should have required a ski resort on National Forest land to obtain an NPDES permit to pump polluted water used to make snow. The resort operator moved the water from the East Branch of the Pemigewasset River, once one of the most polluted rivers in New England, into a relatively pristine pond, Loon Pond, that was at an elevation upstream of the East Branch. Although water from Loon Pond eventually flowed into the East Branch, but not vice versa, the court held that these were two distinct waters of the United States and that the upstream transfer of polluted water from one to the other was an ''addition'' under the Clean Water act that required a permit. *Id*. at 1299.

The court distinguished the dam cases on the grounds that they involved the movement of water from storage back into the same water body from whence it came. *Id*. at 1299. Because the court considered the East Branch and Loon Pond to be separate bodies of water, it held that the East Branch was a source ''external'' to Loon Pond. *Id*. at 1297. In addition, the *DuBois* court reasoned that the transferred water ceased to be a water of the United States when it left the domain of nature and became subject to private control rather than purely natural processes. *Id*. at 1297.

The Second Circuit reached a similar result in *Catskill Mountains Chapter of Trout Unlimited Inc. v. New York City*, 273 F.3d 481, 53 ERC 1392 (2d Cir. 2001). Here, the court held that the city of New York needed a permit for its long-standing practice of diverting water from one drainage basin into another in order to facilitate the supply of drinking water to city residents. *Catskill Mountains* declined to grant deference to the EPA policy followed in the hydroelectric dam cases on the grounds that intervening opinions of the Supreme Court had held that an agency policy not reflected in regulations was not entitled to the same degree of deference. *Id*. at 490 (citing *United States v. Mead*, 533 U.S. 218 (2001); *Christensen v. Harris County*, 529 U.S. 576 (2000).

Nevertheless, the court agreed with the reasoning of the dam cases that ''addition'' meant the introduction of pollutants into a navigable water from the outside world, but the Second Circuit construed the ''outside world'' to be ''any place outside the particular water body to which pollutants are introduced.'' *Id*. at 491. Thus, the court held that an ''addition'' requiring a permit had occurred when New York used the Shandaken Tunnel, a point source, to transfer water containing sediment from the Schoharie Reservoir into a distinct water body, Esophus Creek, that would not otherwise have received the flow. *Id*. at 491-92.

The court distinguished the dam cases because they involved movement of water within the same body of water and thus did not involve the addition of anything to the receiving water that was not already there.[3] *Id*. at 491-92. In addition, with respect to the meaning of ''from a point source,'' the court held that ''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.'' *Id*. at 493. This conclusion was based on the panel's strict reading of the statutory definition of point source to cover the pipe from a factory that discharged effluent rather than the factory that created the pollutant. *Id*. at 493.

Recently, after the decision in *Miccosukee*, the Ninth Circuit entered the fray by holding that the state of Montana could not exempt a company from the requirement to obtain an NPDES permit to transfer groundwater into a surface water. *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*, 325 F.3d 1155, 56 ERC 1289 (9th Cir. 2003). The defendant in this citizen suit, Fidelity Exploration, engaged in a coal bed methane extraction process that required withdrawing groundwater from underground coal seems and pumping it into a river that was used for irrigation by farmers downstream.

[3] However, the court recognized that dams altered the form of the contents of the water by ''pureeing'' some of the fish that were already there.

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The coal bed methane extraction process did not add pollutants to the groundwater, but in its natural state, this water contained suspended solids, calcium, magnesium, sodium, and several other substances that could damage the soil structure on the downstream farms. The court held that the coal bed methane water was a ''pollutant'' under the Clean Water Act because it was an ''industrial waste'' and ''produced water'' covered by the definition of ''pollutant'' in the act. *Id*. at 1160-61.

Although the Ninth Circuit did not address directly the meaning of the term ''addition,'' the Ninth Circuit cited *Miccosukee*, *Catskill Mountains*, and *DuBois* and said that the issue in *Northern Plains* was ''practically indistinguishable'' from the issues in the three previous cases. 325 F.3d at 1163. The Ninth Circuit observed that each case involved transport of water that could degrade the quality of receiving waters and had rejected the notion that discharge water could not be a pollutant simply because it was ''unaltered and transported from one body of water to another.'' *Id*.

Given this conflicting body of case law, it is not surprising, and indeed very important, that the Supreme Court agreed to review the *Miccosukee* case. The Supreme Court's opinion will hopefully reconcile these competing decisions and provide some uniformity among the circuits on a very complicated issue that has significant implications for many communities.

III. Arguments on Appeal

In its brief on appeal, the crux of SFWMD's legal argument is that Congress intended to draw a distinction between ''point source pollutants'' and ''nonpoint source pollution'' in the Clean Water Act. SFWMD Brief at 24. According to the water district, the former is regulated under the federal NPDES program whereas the latter is reserved for regulation by the states. *Id*. at 24-25. Thus, SFWMD focuses on the distinct definitions of ''pollutants'' and ''pollution'' under the act.

To define ''nonpoint'' sources, the water management district emphasizes the language in Section 304(f) and argues that this provision clearly shows congressional intent not to subject water diversion facilities such as the S-9 pump station to the NPDES program. *Id*. at 29-30, 32-33. SFWMD also makes a very powerful point about how the *Miccosukee* opinion shifts the burden for treating polluted wastewater from the original sources of the pollutants onto the water managers who must handle polluted water for beneficial purposes. *Id*. at 42-43.

SFWMD does not spend as much time parsing the meaning of the terms ''addition'' and ''from a point source'' or the distinctions between conflicting case law. The brief relies predominantly on dictionary definitions and the holdings in *Gorsuch* and *Consumers* that ''from a point source'' means a facility must be the origin of the pollutant and that an ''addition'' only occurs when a point source introduces pollutants into water from the outside world. *Id*. at 26-27. SFWMD argues that regulated point sources are limited to industrial and municipal sources that generate the waste rather than water districts that merely move the water to achieve other public goals. *Id*. at 29.

In the second prong of its argument, SFWMD takes more of a factual than legal approach, arguing based on natural history that the C-11 basin and WCA-3A are each part of a single, integrated water system and that the pump station actually restores the historic flow rather than altering the flow in the area. SFWMD Brief at 46-49. In this part of its argument, SFWMD embraces the Second Circuit's conclusion in *Catskill Mountains* that moving water around within the same body of water does not add pollutants to that water. SFWMD Brief at 46.

Even though it is not a party to the *Miccosukee* case, the friend-of-the-court brief filed by the United States may be particularly influential. The court invited the solicitor general to file a brief in response to SFWMD's petition for writ of certiorari. U.S. Brief on Merits at 2. In his brief on the merits, the solicitor general focuses more crisply than SFWMD on the particular meaning of the term ''addition.'' The heart of the argument is that the act does not require an NPDES permit to operate facilities that merely connect navigable waters or convey such waters from one location to another without adding pollutants. The solicitor general agrees with the reasoning of *Gorsuch* and *Consumers* that an addition only occurs if the point source itself physically introduces a pollutant into waters from the outside world. *Id*. at 16.

However, the United States adds an interesting spin to this argument by seeking to unify the interconnected network of waters of the United States. The United States argues that the pollutants in *Miccosukee* are already in waters of the United States and cannot therefore be added by a point source that merely conveys them to a different location in this network. *Id*. at 16. The solicitor directly confronts *Catskill* and *Dubois* and asks the court to reject the distinctions the cases draw between water bodies because it is impossible to fashion a workable test for drawing such lines. *Id*. at 20.

The United States believes the matter can be resolved from the term ''addition'' and that the court need not independently consider the meaning to the phrase ''from a point source.'' *Id*. at 21. The United States disagrees with SFWMD's argument that ''from a point source'' means that the point source must be the generator or originating source of the pollutant. Based on the usage of words such as ''conveyance'' and ''pipe'' in the definition, the solicitor general concedes that a point source need only be a structure that conveys or transports water.

Nevertheless, the United States argues that the ''cause-in-fact'' test that *Miccosukee* based on the phrase ''from a point source'' is wrong because transfers of water do not add anything to waters of the United States. *Id*. at 21-22. The United States apparently recognized the difficulty of asserting that the water conveyances in these cases are ''nonpoint'' sources and instead argues that they are ''closely associated with'' nonpoint sources, and that Congress did not intend for such pollution to be addressed by water managers but through local land use regulations that attack the problem at its source. *Id*. at 26-27.

As noted below, several additional parties have filed friend-of-the-court briefs in support of SFWMD.

IV. Significance of the Case

If the result in *Miccosukee* stands, it will have a significant impact on SFWMD's efforts to restore the Florida Everglades and even more profound implications across the country for a variety of constituencies. Interbasin transfers of water are abundant and widespread throughout the United States and particularly ubiquitous in the West. NPDES permits have never been required by EPA or by the states for this kind of

activity. The process of obtaining an NPDES permit can be time consuming, and compliance with the resulting effluent limitations often requires significant capital expenditures for treatment technologies.

The sudden imposition of these permitting requirements alone may result in increased costs and time delays that may, in some cases, force operations to cease. The NPDES program has been plagued for many years by a backlog of overdue permit renewals that will only be exacerbated by a flood of new applications for facilities that have never before required permits. As of September 2003, there were over 18,000 backlogged NPDES permits nationwide. EPA, Permit Status Reports (Sept. 2003). If the result in *Miccosukee* is affirmed, the backlog could expand by orders of magnitude.

Moreover, EPA and the states will need to develop technology-based effluent limitations appropriate for this new class of dischargers. Given the lack of control over flow-through pollutants that most water managers are empowered to exert, it is unlikely that these agencies will be able to rest comfortably upon the imposition of ''Best Management Practices'' as is the case under the stormwater program. Some form of substantive standards will need to be developed. Coupled with standard water quality-based permitting and the reinvigorated total maximum daily load (TMDL) program, it is not beyond the reach of imagination that some systems that move large volumes of water may find their new treatment obligations to be technologically impossible or cost-prohibitive.

The petitioner in the appeal to the Supreme Court, SFWMD is one of five regional water management districts in the state of Florida responsible for managing water resources in the state for various purposes, including flood control, human consumption, crop irrigation, and environmental conservation. See Fla Stat. §§ 373.016, 373.069. SFWMD manages the flow of water in an area running from Orlando to the Florida Keys and is unique among Florida's water management districts because it is the state manager of the Army Corps of Engineers Central and Southern Florida Flood Control Project. The legacy of this project is a complex system of canals, levies, water conservation basins, and water diversion structures that enabled the prosperous growth of agriculture and residential and resort communities in the area but imperiled the health of the remaining portions of the Florida Everglades.

Hundreds of existing pump stations, dams, and gates in this system could each be required to obtain an NPDES permit if the result in *Miccosukee* is upheld. The continued operation of these facilities may be in jeopardy if permits cannot be obtained quickly. According to EPA statistics, in September 2003, the Florida Department of Environmental Protection had a backlog of over 100 expired NPDES permits and was not yet meeting EPA's 90 percent goal for up-to-date permits.

SFWMD is a principal partner with several federal agencies in the Comprehensive Everglades Restoration Project. The restoration project is intended to restore the health of the Everglades while continuing to provide for the water supply needs of agriculture (notably including many large sugar growers) and the ever growing population of South Florida. This $8 billion project involves structural and operational changes to the Central and Southern Florida Flood Control Project designed to restore the quantity, quality, timing, and distribution of water across the region. This will involve construction of additional holding and treatment areas within which a significant amount of water will be moved around through point sources. The result in *Miccosukee* could significantly slow the restoration activities and in some cases derail it completely.

The treatment costs imposed on SFWMD would require a significant increase in funding for the Comprehensive Everglades Restoration Project beyond existing projections. New water diversion facilities will require NPDES permit before they can begin operation. The permitting process will create additional points of entry for stakeholders to challenge individual actions that could lead to a gradual ''death by 1,000 cuts'' to a complex, coordinated project.

More broadly, the outcome of the Supreme Court decision in *Miccosukee* could affect water managers and communities across the nation as well as businesses that depend on water supplies or contribute pollutants to waters handled by others. The importance of the case is demonstrated by the fact that, in addition to the United States, 48 other parties have joined in 13 friend-of-the-court briefs filed with the Supreme Court in support of SFWMD's position that the Eleventh Circuit decision should be reversed.

Many of those filing briefs are public water resource managers in the western United States and other areas that are in a similar position as SFWMD.[4] Another significant segment is comprised of state[5] and local governments[6] and water utilities.[7] Additional briefs were also filed by trade associations representing the agriculture,[8] residential development,[9] and electric power generation industries.[10]

The briefs of the water resource managers and state and local governments present compelling examples of the profound impact that an affirmation of *Miccosukee* would have on water resource management activities throughout the country, including both water supply and flood control. Because the location and timing of water flows and rain does not always correspond to demands on the ground, this country has built many com-

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[4] National Water Resources Association, Nationwide Public Projects Association, Western Urban Water Coalition, Association of California Water Agencies, State Water Contractors (Cal.), Florida Association of Special Districts, Metropolitan Water District of Southern California, West Valley Water District (Cal.), Wheeler Ridge-Maricopa Water Storage District (Cal.), Metropolitan Denver Water Authority, Central Arizona Water Conservation District, Cobb-County-Marietta Water Authority (Atlanta, Ga.), Lake Worth (Fla.) Drainage District.

[5] Colorado, New Mexico, Hawaii, Idaho, Nebraska, Nevada, North Dakota, South Dakota, Texas, Utah, Wyoming, Arizona Department of Water Resources, Council of State Governments, National Conference of State Legislatures, and Western Coalition of Arid States.

[6] National League of Cities, International City/County Management Association, National Association of Counties, International Municipal Lawyers Association, United States Conference of Mayors, New York City, City of Weston (Fla.),

[7] Association of Metropolitan Water Agencies, American Water Works Association, Association of Metropolitan Sewerage Agencies, National Association of Flood and Stormwater Management Agencies,

[8] American Farm Bureau Federation, Florida Farm Bureau, Florida Fruit and Vegetable Association, Florida Commissioner of Agriculture.

[9] National Association of Home Builders

[10] Utility Water Act Group and National Hydropower Association

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plex infrastructure systems, many concentrated in the West, that transfer water between basins to control flooding and to meet the essential needs of many large communities and rural areas.

These systems involve a combination of man-made and natural water courses that combine water from many different sources and carry water over mountains and watershed divides. The largest example cited by several parties is California's State Water Project which delivers over 4 million acre feet of water a year by diverting it from Sacramento-San Joaquin Delta to over 20 million people and 750,000 acres of farmland in the San Joaquin Valley, San Francisco Bay area, and Southern California.

The cities of New York, Los Angeles, San Francisco, Las Vegas, Denver, Phoenix, Albuquerque, and Salt Lake City all use water supplied through these kinds of systems. Likewise, large agricultural and ranching areas in the arid West and other areas depend on these systems. Many more systems like the State Water Project have been in place for decades and have never been required to obtain NPDES permits for their operations.

The sudden imposition of NPDES permitting requirements to these systems could cause substantial disruptions to their operations because of the time required to obtain permits and the water treatment costs required to comply with them. In some cases, these burdens may force an end to such operations altogether. Some of those filing friend-of-the-court briefs have attempted to quantify these costs, and the results are staggering. A small drainage district that covers parts of Palm Beach County within SFWMD's jurisdiction estimates its permitting and treatment costs will be $400 million and $850 million. Magnified across this country, the financial fallout from *Miccosukee* would be far greater.

Even courts that have required NPDES permits for water transfers have recognized the critical importance of these systems and have allowed them to continue operating without NPDES permits. In *Miccosukee*, the Eleventh Circuit could not issue an injunction to halt the operation of the S-9 pump station because it would have resulted in massive flooding in Broward County. 280 F.3d at 1369-71. Likewise, the lower court in *Catskill Mountains* declined to enjoin New York from operating the Shandaken Tunnel without a permit because it could have led to water supply shortages for millions of people. *Catskill Mountains Chapter of Trout Unlimited Inc. v. New York City*, 244 F. Supp. 2d 41, 54-55, 56 ERC 1556 (N.D.N.Y. 2003).

In addition to potentially having to curtail their operations, entities that operate water transfer facilities could be exposed to substantial enforcement penalties for historic operations. The decision on remand in *Catskill Mountains* imposed a $5.7 million penalty against New York City. 244 F. Supp. 2d at 54. The imposition of such a penalty for an activity that was thought for years to be lawful seems particular harsh. Some protection against liability for past operations may be available under legal doctrines requiring fair notice that particular conduct is impermissible under a regulatory scheme. See, *General Electric Co. v. EPA*, 53 F.3d 1324, 1333-34, 40 ERC 1769 (D.C. Cir. 1995). In fact, the district court in *Catskill Mountains* appeared to recognize these equitable concerns and only imposed a penalty for operation of the tunnel over a 6 month period that New York City unreasonably delayed submitting an application for an NPDES permit. 244 F. Supp. 2d at 54.

The sting of these burdens is made all the more painful by the fact that the water managers themselves are not the source of the water pollutants that they may now be required to remove. The pollutants derive from a host of urban, industrial, and agricultural activities of parties other than the water managers. These generators contribute water by both point and nonpoint source means.

A number of important industry sectors could also see significant impacts if the decision in *Miccosukee* is upheld. The agricultural groups that filed a friend-of-the-court brief are concerned about the realistic possibility that the additional treatment costs imposed on SFWMD and other water managers will be passed on to farmers and growers through increased taxes and fees. An effort might be expected to impose these treatment costs on agriculture through fees charged by the public and private irrigation districts that are particularly prevalent in the Western United States.

In their brief, the farming interests argue that these increased costs will hamper the competitiveness of U.S. agricultural commodities in global markets. In addition, the increased costs could force changes in various aspects of farming operations such as crop selection, tillage practices, and pesticide use. Each of these practices can affect the nature of pollutants in agricultural runoff. The imposition of higher fees for farming practices that cause more pollution could create incentives for farmers to move away from certain practices and products. Thus, pesticide manufacturers could see changes in demand for particular crop protection products that may have to be removed by water managers downstream because of *Miccosukee*.[11]

In addition, mining companies may be required to obtain additional permits if they engage in the type of coal bed methane extraction involved in the *Northern Plains* case or similar extraction operations that involving pumping water to the surface or between basins. In their friend-of-the-court brief, the electric power producers showed concern about a reversal of the outcome of the hydroelectric dam cases and an imposition of NPDES permit requirement on these facilities. In addition, the power producers fear that they will now need to obtain permits to discharge cooling water into separate waters from which the water was withdrawn. Residential developers could also see an impact if the requirement to obtain NPDES permits limits the amount of water available to expand communities, particularly those in warm and dry climates.

Although the *Miccosukee* decision has negative implications for many constituencies in this country, the unavoidable fact is that many interbasin water transfers result in pollution of the receiving waters that can harm downstream constituencies. Although some of the friends of the court suggest that interbasin water transfers have a negligible impact on water quality, many in effect concede that pollution of many waters results from their operations when they argue that in some cases they will be unable to procure NPDES permits be-

[11] The Ninth Circuit held that pesticide residues collected by an irrigation district are pollutants subject to regulation under the Clean Water Act. See, *Headwaters Inc. v. Talent Irrigation District*, 243 F.3d 526, 532-33, 52 ERC 1001 (9th Cir. 2001).

cause of the water quality-based discharge limitations that would be imposed.

In the *Gorsuch* and *Consumers Power* cases, there was little dispute that hydroelectric dams resulted in pollution. The courts reached the results they did in *Miccosukee*, *Catskill Mountains*, *DuBois*, and *Northern Plains* because the water transfers in those cases resulted in an identifiable degradation of the quality of the receiving waters which affected the use and enjoyment of those waters by others.

The facilities involved in each of these cases discharged pollutants that have an appearance and effect that is difficult to distinguish from discharges that are regulated in many other circumstances. There is no real distinction between the fish entrails discharged by seafood processors and those from the hydroelectric facility involved in *Consumers Power*, although the court in that case found a distinction in the fact that the fish parts were actually removed from the water before being returned by the seafood processor.

Likewise, there is no real distinction in the effect of the sediment-laden water in *Catskill Mountains* and sediment laden-water from a construction site that must obtain a stormwater NPDES permit. The phosphorus in the S-9 pumping station water is the same substance in discharges from sewage treatment plants that need NPDES permits. Thus, it did not appear to be much of a stretch from these situations for the First, Second, and Eleventh circuits to conclude that the facilities in those cases ''added'' these pollutants to the receiving waters.

As a result, there may also be constituencies and industries that benefit from the court affirming *Miccosukee*. Recreational users of aquatic resources and the tourism and sporting industries that cater to them are obvious examples. Less obvious is that members of several of the interest groups advocating reversal of *Miccosukee* could actually see some benefits. Drinking water suppliers could see reduced treatment costs and more abundant sources of supply if pollutants must be removed when water is transferred between basins. Farmers like those in the *Northern Plains* case who depend on irrigation water of a particular quality were protected by the courts' decision there to require a mining company to obtain an NPDES permit to transfer groundwater to the surface. Thus, as in most cases, the impact of this case depends greatly on the posture of viewer.

V. Policy and Allocation Questions

Because the competing considerations discussed above are each important and legitimate, the water transfer issue presents a very tricky legal and policy issue for EPA and the Supreme Court. In reviewing the law and important policy considerations discussed above, the Supreme Court will have to decide how Congress intended to allocate the costs of water pollution among various constituencies. These include fundamental questions such as whether Congress intended to regulate particular types of pollution or deferred this responsibility to the states, and whether treatment costs should be imposed on water managers and water suppliers or reserved for those who generate the pollution like industrial facilities and farmers. Because the allocation of this responsibility is ultimately a policy judgment, it is difficult to see a single ''correct'' outcome for the Supreme Court in *Miccosukee*.

Congress has made some policy decisions that may guide the court in some respects. Most significantly, Congress decided many years ago that the agriculture industry should not have to bear the burden of treating point source discharges of irrigation water from fields. The Clean Water Act contains an explicit exemption from NPDES permitting for return flows from irrigated agriculture. 33 U.S.C. § 1342(l) (''The administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.''). Based on this, the agricultural industry argues in its brief in *Miccosukee* that Congress intended to totally exempt agriculture from bearing the costs of reducing the pollution caused by their operations, either through obtaining point source permits or paying taxes to others that must remove this pollution. Thus, these groups suggest, the costs of agricultural pollution should be spread across society instead of being imposed directly on the industry.

Similarly, there are other examples of situations under the Clean Water Act where the NPDES program apparently imposes the burden of permitting and treatment on parties that do not generate the pollutants. Consider the municipal stormwater program that requires municipalities to manage stormwater runoff from residential yards, commercial areas, streets, and other areas. A similar allocation of responsibility occurs under the pretreatment program, where Publicly Owned Treatment Works must treat for the wastes of industrial users and indirect dischargers.

These examples suggest that in some cases it may be sound policy to require the removal of water pollutants at centralized points where it is most practical or technology feasible to manage them. Although this appears to shift the burden from one party to another, it may very well be the best societal solution for controlling some nonpoint source pollution that is difficult to control at the source.

The apparent reallocation of responsibility is not necessarily the case in every instance because the costs can often be passed back upstream to the generators of the pollution. For example, in the case of pretreatment, municipal authorities issue permits to their industrial users and can impose fees to ensure industrial users bear some of the burden to treat the pollutants they generate. In addition, in the case of municipal stormwater runoff, the citizens of the community that build homes and drive cars on the streets pay some of the costs for stormwater treatment through real estate and other local taxes. As argued by the agriculture industry, the same is true for water management districts like the South Florida Water Management District that are funded through property taxes.

Thus, the Supreme Court is now charged with looking at the language and legislative history of the Clean Water Act for evidence that Congress has decided these policy and allocation issues. No matter what the court decides, it is clear that the outcome of the case will have a major impact across the nation.

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