

Friends—and Enemies—of the Everglades: Unitary Waters in the Federal Courts

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This past November, the Supreme Court declined to hear the case *Friends of the Everglades v. South Florida Water Management District*.¹ That case was the first in which a federal appeals court accepted the “unitary waters” theory, an interpretation of the Clean Water Act that treats all bodies of water in the United States as a single body. Environmentalists oppose this interpretation because it exempts from federal permitting requirements transfers of polluted water to less polluted bodies, as long as the transferor does not add any pollutants to the transferred water. Although the Eleventh Circuit as well as other circuit courts of appeal had previously rejected the unitary waters theory, *Friends of the Everglades* deferred to a 2008 EPA regulation that endorsed the theory. This Field Report discusses the background and aftermath of the Bush administration’s adoption of the unitary waters theory. Although *Friends of the Everglades* was a troubling development, subsequent decisions have limited the damage until the regulation is hopefully repealed by the Obama administration or overruled in the courts.

I. THE CLEAN WATER ACT AND “UNITARY WATERS”

The Clean Water Act (“CWA”) provides the statutory framework for federal regulation of pollution in “the waters of the United States.”² The National Pollutant Discharge Elimination System (“NPDES”) makes it unlawful for “any person” to discharge “any pollutant” without obtaining a permit.³ The Act defines the “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.”⁴ “Navigable waters” are “the waters of the United States.”⁵ “Pollutant” is

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1. 570 F.3d 1210 (11th Cir. 2009), *cert. denied*, 131 S. Ct. 643 (2010).

2. *See, e.g.*, 33 U.S.C. §§ 1342(a), 1362(12), 1362(7) (2006).

3. 33 U.S.C. §§ 1331(a), 1342 (2006).

4. 33 U.S.C. § 1362(12) (2006).

5. 33 U.S.C. § 1362(7) (2006).

so broadly defined that it encompasses almost anything imaginable.⁶ And a “point source” is a “discernable, confined and discrete conveyance,” such as a “pipe,” “channel,” “well,” or “container.”⁷ As these definitions attest, the drafters of the CWA intended to assert broad federal authority over water pollution.⁸ However, the statute leaves “addition” undefined, and this word has been the focus of efforts to limit the reach of EPA’s NPDES permitting authority.

The unitary waters theory proposes that “the waters of the United States” constitute a single entity. Accordingly, transferring water from one body to another without adding anything to the overall “waters” would not require a NPDES permit, because the actor would not be responsible for the “addition” of any pollutants to the navigable waters. The unitary waters theory would relieve such actors from obtaining a NPDES permit even if they were transferring highly polluted water to a pristine body of water. Prior to 2009, federal courts did not favor this approach.

The First Circuit was the first to address the unitary waters theory—and summarily dismiss it—in *Dubois v. United States Department of Agriculture*.⁹ Dubois’ suit alleged that the U.S. Forest Service should have required a New Hampshire ski resort to obtain a NPDES permit for the expansion of its snowmaking system.¹⁰ The resort drew water from a pond “unusual for its relatively pristine nature” and two nearby rivers to make snow; it also used the pond to deposit all leftover water from snowmaking.¹¹ The river water that the resort added to the pond was less pristine, as it contained pollutants such as phosphorus.¹² The U.S. District Court for the District of New Hampshire held that the Forest Service did not need to require a NPDES permit because the pond and the rivers are all part of the “singular entity” of “*the* waters of the United States,” and thus there was no addition of pollutants.¹³ The First Circuit rejected what it termed the “singular entity” theory (apparently the

6. 33 U.S.C. § 1362(6) (2006) (“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.” There are exceptions, however, for discharges from military vessels and discharges from oil and gas exploration).

7. 33 U.S.C. § 1362(14) (2006).

8. *See, e.g.*, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (“In keeping with these views, Congress chose to define the waters covered by the act broadly.”).

9. 102 F.3d 1273 (1st Cir. 1996).

10. *Id.* at 1276.

11. *Id.* at 1277–78.

12. *Id.* at 1278.

13. *Id.* at 1296.

unitary waters theory had not yet acquired that name) since the three bodies of water were not naturally connected. The ski resort was adding a pollutant to the pond because it was the but-for cause of the water transfer: when “water leaves the domain of nature and is subject to private control rather than purely natural processes,” it loses its status as waters of the United States.¹⁴

The Second Circuit used similar reasoning to hold that New York City needed to obtain a NPDES permit to transfer water from one of its reservoirs in the Catskills to another via a creek used for recreational trout fishing.¹⁵ Moreover, the court refused to reconsider its *Catskills I* decision against the unitary waters theory even after an intervening EPA interpretation called its reasoning into question.¹⁶ The EPA interpretation suggested a “holistic” interpretation of the CWA that did not primarily focus on the word “addition.” Under this reading, mere transfers of water between bodies were to be regulated by the states and not the CWA.¹⁷ The Court applied *Skidmore* deference to the agency’s informal interpretation, respecting it only to the extent of its “power to persuade.”¹⁸ The Second Circuit did not find the interpretation persuasive. New York City and EPA pointed to section 101(g) of the CWA, which states that “the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired.”¹⁹ However, federal regulation of water *quality* is consistent with state authority to allocate *quantities* of water between different users.²⁰ The city assumed that regulation under the NPDES program would completely shut down this part of New York’s water supply system, but the permitting program was flexible enough to

14. *Id.* at 1297.

15. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York (Catskills I)*, 273 F.3d 481, 492 (2d Cir. 2001) (“Here, water is artificially diverted from its natural course and travels several miles from the Reservoir through Shandaken Tunnel to Esopus Creek, a body of water utterly unrelated in any relevant sense to the Schoharie Reservoir and its watershed. No one can reasonably argue that the water in the Reservoir and the Esopus are in any sense the ‘same,’ such that ‘addition’ of one to the other is a logical impossibility.”).

16. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York (Catskills II)*, 451 F.3d 77 (2d Cir. 2006).

17. *Id.* at 82.

18. *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

19. 33 U.S.C. § 1251(g) (2006).

20. *Catskills II*, 451 F.3d at 84. Furthermore, section 510 of the CWA provides that “[e]xcept as expressly provided in this chapter, nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States.” 33 U.S.C. § 1370 (2006) (emphasis added). The Supreme Court held that this provision preserves the states’ authority to allocate quantities of water between different users without proscribing federal pollution controls on water quality. *PUD No. 1 v. Wash. Dep’t of Ecology*, 511 U.S. 700, 720 (1994).

preserve state control over water quantity allocation.²¹

Before *Catskills II*, the unitary waters theory reached the Supreme Court in *South Florida Water Management District v. Miccosukee Tribe of Indians*, but the Court declined to resolve the issue.²² The case concerned the elaborate system of canals and levees built in South Florida to drain and develop land that had previously been part of the Everglades wetlands. The Water Management District maintained a higher water table in the levee-separated wetlands areas—termed “water conservation areas”—in order to conserve fresh water and preserve the natural habitat. To maintain the different water levels and prevent flooding in the developed areas to the east, the District pumped water a short distance (sixty feet) from its canals into the water conservation area.²³ The water being pumped into the conservation area contained runoff pollutants associated with residential and agricultural land use, particularly phosphorus from farming. This phosphorus runoff was disrupting the Everglades ecosystem.²⁴

The Miccosukee Tribe brought a citizen suit alleging that the District was required to obtain a NPDES permit in order to pump the polluted water behind the levees and into the Everglades. Both the district court and the Eleventh Circuit ruled for the plaintiffs. Each held that the canals and the Everglades were separate bodies of water and employed reasoning familiar from the *Dubois* and *Catskills* cases.²⁵ The Supreme Court reversed the lower courts and remanded the case because the factual question whether the canals and the water conservation area were actually separate bodies of water was still disputed, which precluded summary judgment.²⁶

In keeping with the Bush EPA’s administrative interpretation discussed in *Catskills II*, the Solicitor General submitted an amicus brief in *Miccosukee* to argue for the unitary waters theory.²⁷ The Court declined to adopt or repudiate the theory, but the majority’s discussion indicated skepticism. The opinion pointed out sections of the CWA²⁸ and NPDES regulations²⁹ that seem to contradict the theory and

21. *Catskills II*, 451 F.3d at 85.

22. 531 U.S. 95 (2004).

23. *Id.* at 99–101.

24. *Id.* at 101–02.

25. *Id.* at 103–04.

26. *Id.* at 110.

27. *Id.* at 107.

28. *Id.* (citing 33 U.S.C. § 1313(c)(2)(A), (d) (2006) (authorizing state standards for non-point source water pollution)).

29. *Id.* (citing 40 C.F.R. § 122.45(g)(4) (2010) (relieving NPDES permit holders from the responsibility to remove pollutants that are already present in the water that they use provided that

questioned the contention that the unitary waters theory comports with a longstanding EPA interpretation in light of contradictory statements of past EPA officials.³⁰

II. UNITARY WATERS RISING

The Bush administration solidly stood behind the unitary waters theory despite the theory's lack of success in the courts. In President Bush's second term, EPA built on the informal administrative interpretation discussed in *Catskills II*. In June 2008, EPA issued a final rule endorsing the unitary waters theory,³¹ which is now codified in the Code of Federal Regulations:

Discharges from a water transfer [do not require NPDES permits]. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.³²

The Water Transfers Rule discusses two circuit court decisions collectively referred to as “the dams cases” to introduce ambiguity into the interpretation of “addition” in the CWA. One, *National Wildlife Federation v. Gorsuch*, held that an “addition” occurs when “the point source itself physically introduces a pollutant into a water from the outside world.”³³ The other, *National Wildlife Federation v. Consumers Power Co.*, endorsed the D.C. Circuit's reasoning in *Gorsuch*.³⁴ The Water Transfers Rule claims that *Dubois*, the *Catskills* cases, and the lower courts in *Miccokuskee* took the rationale of the dams cases a step further with their insistence that an “addition” can be any transfer of water from one body to another distinct body.³⁵ The Rule also recycles the textual arguments addressed in *Catskills II* to support the proposition that Congress intended the states to control the regulation of water transfers.³⁶

the water is discharged back into the body from which it came)).

30. *Id.*

31. National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008) (codified at 40 C.F.R. pt. 122) [hereinafter Water Transfers Rule].

32. 40 C.F.R. § 1223(i) (2010).

33. Water Transfers Rule, 73 Fed. Reg. at 33,700 (citing Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 175 (D.C. Cir. 1982)).

34. *Id.* (citing Nat'l Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580, 584 (6th Cir. 1988)).

35. *Id.* at 33,700–01.

36. *Id.* at 33,701–03.

The Water Transfers Rule led to the first federal appellate decision upholding the unitary waters theory. *Friends of the Everglades v. South Florida Water Management District* involved the same Everglades controversy as *Miccosukee*, but the Eleventh Circuit reversed its position from that case in light of the Water Transfers Rule.³⁷ Unlike EPA's informal interpretation, which the Second Circuit easily dismissed in *Catskills II*, the Water Transfers Rule was analyzed by the Eleventh Circuit under the *Chevron* framework.³⁸ In all previous cases, courts had interpreted the statutory language "addition" of a pollutant in the CWA without an authoritative agency interpretation. Here, however, the Eleventh Circuit employed the familiar *Chevron* two-step that upholds the regulation if it is "a reasonable construction of an ambiguous statute."³⁹

The key issue in the case then became whether the meaning of an "addition" of a pollutant in the CWA is ambiguous. Curiously, the Eleventh Circuit did not find that the dams cases supported an ambiguous reading of "addition" even though the EPA had relied on them to support the unitary waters theory in the Water Transfers Rule. According to the court, prior to *Friends of the Everglades*, no federal court of appeals had approved the unitary waters theory.⁴⁰ In each of those cases, a NPDES permit was not required because the dams were not transferring water between distinct bodies but rather within the same body of water. As the court put it, *Gorsuch* and *Consumers Power* "involved water that wound up where it would have gone anyway."⁴¹ The court properly held that the dams cases stand for the proposition that an intra-body water transfer is not an "addition" of a pollutant, not the proposition that all bodies of water should be treated as part of the unitary whole of the "waters of the United States."⁴²

The court, however, did find the statute to be ambiguous. The CWA defines "discharge" as "[a]ny addition of any pollutant to navigable waters from any point source."⁴³ The Water District argued that the absence of "any" before "navigable waters" supported the unitary waters

37. 570 F.3d 1210, 1228 (11th Cir. 2009).

38. *Id.* at 1219.

39. *Id.* (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984)).

40. *Id.* at 1217. In Judge Cames' picturesque phrase, "The unitary waters theory has a low batting average. In fact, it has struck out in every court of appeals where it has come up to the plate."

41. *Id.* at 1221.

42. The courts in *Dubois*, 102 F.3d at 1299, and *Catskills II*, 451 F.3d at 81, took the same view of the dams cases.

43. 33 U.S.C. § 1362(12) (2006).

theory.⁴⁴ The Water District contended, and the court agreed that if the drafters had meant each individual body of water, they would have written “any navigable waters.” The CWA appears to use “navigable waters” and “any navigable waters” interchangeably when referring to individual bodies of water, and the court interpreted this as an ambiguity.⁴⁵ The Friends of the Everglades argued that the unitary waters theory led to an absurd result when the statute was viewed as a whole. Allowing free intermingling of polluted and pristine waters would undermine the CWA’s ambitious goals.⁴⁶ However, the court pointed to the exemption of non-point sources from NPDES permits as an example of how the text of the CWA does not always meet its lofty aspirations.⁴⁷

After concluding that the statutory text was ambiguous, the court quickly found the Water Transfers Rule to be a reasonable interpretation. The court suggested the following analogy: suppose a rule prohibits “any addition of any marbles to buckets by any person,” and there are two buckets, one with four marbles and another with no marbles. If someone moves two of the marbles to the empty bucket, it is reasonable to conclude that he has not violated the rule.⁴⁸

III. REPERCUSSIONS OF *FRIENDS OF THE EVERGLADES*

The Supreme Court denied certiorari in the *Friends of the Everglades* case in November of last year.⁴⁹ Commentators suggested that the Court did not want to address the unitary waters issue because the Obama administration’s EPA is considering repealing the Water Transfers Rule.⁵⁰ Acting Solicitor General Neal Katyal supported the Court’s decision because, he said, a review is not warranted while EPA considers revising the rule.⁵¹ The Court likely also took notice of the fact that there is not yet a circuit split on interpreting the Water Transfers Rule. The Eleventh Circuit is the only federal appellate court to address the unitary waters theory since the Water Transfers Rule was promulgated. Were another circuit—possibly the Second Circuit in the ongoing Catskills controversy—to rule that the relevant portion of the CWA is not

44. *Friends of the Everglades*, 570 F.3d at 1224.

45. *Id.* at 1224–25.

46. *Id.* at 1226.

47. *Id.* at 1226–27.

48. *Id.* at 1228.

49. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 131 S. Ct. 643 (2010).

50. Lawrence Hurley, *Supreme Court Declines to Take Fla. Water Transfer Case*, GREENWIRE (Nov. 29, 2010), <http://www.eenews.net/Greenwire/2010/11/29/3/>.

51. *Id.*

ambiguous and refuse to apply *Chevron* deference to the Water Transfers Rule, it would then be more appropriate for the Supreme Court to step in to resolve the inconsistency.⁵²

Judicial decisions that have addressed the unitary waters theory since *Friends of the Everglades* show that despite its troubling implications, there are important limits to its reach. The first limit comes from the newly restrictive definition of “the waters of the United States.” In *West Virginia Highlands Conservancy v. Huffman*, environmental groups sued the West Virginia Department of Environmental Protection (“WVDEP”), contending that the CWA required the Department to obtain NPDES permits for its discharge of wastewater from abandoned coalmines. Although West Virginia’s statutes and environmental regulations required WVDEP to treat this discharge, the environmental groups discovered that WVDEP had failed to neutralize the acidic mining wastewater before discharging it into the state’s streams.⁵³

WVDEP claimed that this activity should be excluded from the NPDES scheme under the Water Transfers Rule because pollutants were not being added to the water being discharged. In fact, the Department claimed, it was treating the water but not treating it enough.⁵⁴ The Fourth Circuit rejected this argument: the abandoned mine sites are not part of “the waters of the United States” (i.e., are not “navigable waters”), and the Water Transfers Rule only applies when pollutants are transferred from one navigable water to another.⁵⁵ The court affirmed that WVDEP had to obtain NPDES permits for discharging the waters from abandoned mines.⁵⁶

Ironically, recent Supreme Court decisions narrowing the scope of “the waters of the United States”—decisions that dismayed environmentalists when they were handed down—make this limit on the Water Transfers Rule robust.⁵⁷ In 2001, the Supreme Court invalidated the Army Corps of Engineers’ “migratory bird rule.” This rule had allowed the federal government to exercise jurisdiction over isolated wetlands, such as ponds created from abandoned quarry pits, on the theory that migratory birds

52. Commentators have urged other courts to rule that the Water Transfers Rule violates the CWA. See, e.g., Laura Murphy & Alison Stone, *No. 9: EPA’s Water Transfer Exemption Remains in Force*, VT. L. TOP TEN ENVTL. WATCH LIST 2011, http://watchlist.vermontlaw.edu/?page_id=70 (last visited Jan. 27, 2011).

53. *W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 163–64 (4th Cir. 2010).

54. *Id.* at 164, 167.

55. *Id.* at 167 (citing Water Transfers Rule, 73 Fed. Reg. at 33,699).

56. *Id.* at 161.

57. The *Huffman* decision also cites 40 C.F.R. § 122.2 (2010) in support of the narrow definition of “navigable waters,” *id.* at 167, but this regulation expresses the Supreme Court’s holdings in the wetlands cases discussed in this paragraph.

that cross state lines used such waters as habitats, thus making these isolated wetlands “navigable waters.”⁵⁸ Had the migratory bird rule still been in effect, a court unfriendly to environmental regulation might have reasoned that the abandoned West Virginia mines were also “navigable waters” and allowed the pollution to continue without a permit. The Supreme Court further narrowed the definition of “the waters of the United States” in the controversial case *Rapanos v. United States*: “the phrase ‘the waters of the United States’ includes only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes.’”⁵⁹ Though these cases limiting the scope of “navigable waters” represent defeats for environmentalists, they have paradoxically helped mitigate the damage wrought by the rise of the unitary waters theory.

The other limit on the reach of the unitary waters theory is the application of state permitting authority. The ongoing controversy over New York City’s reservoirs in the Catskill Mountains is illustrative. After *Catskills II*, New York City obtained a State Pollutant Discharge Elimination System (“SPDES”) permit for its discharge, and the project’s opponents challenged the sufficiency of the permit in New York state court. The trial court upheld the challenge to the SPDES permit.⁶⁰ Once EPA promulgated the Water Transfers Rule, the city argued that it was relieved of any duty to obtain permits for this type of activity. The intermediate appellate court, however, disagreed: the Water Transfers Rule only applies to the CWA, and New York State is free to apply a stricter standard for permits in its own environmental laws.⁶¹

IV. CONCLUSION

The major cases to consider the unitary waters theory illustrate two situations where its application presents a threat to American waters. *Dubois* exemplified the transfer of water from a body whose historic pollution predated the CWA to a pristine body that is used for drinking water.⁶² *Miccosukee* and *Friends of the Everglades* addressed the

58. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001).

59. 547 U.S. 715, 739 (2006) (plurality opinion).

60. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Sheehan*, 892 N.Y.S.2d 651, 653 (N.Y. App. Div. 2010).

61. *Id.* at 654.

62. *Dubois*, 102 F.3d at 1297 (“We can take judicial notice that the Pemigewasset River was for years one of the most polluted rivers in New England, the repository for raw sewage from factories and towns. It emitted an overwhelming odor and was known to peel the paint off buildings located on its banks.”).

transfer of non-point source pollution—the major water quality problem in the United States today—to a more pristine body via a point source.⁶³ Though the Supreme Court’s refusal to hear a challenge to the Water Transfers Rule and the possibility that EPA will soon overturn the rule currently leave these issues in limbo, both state and federal courts have limited the scope of the unitary waters theory until it can be reconsidered.

63. See *Friends of the Everglades*, 570 F.3d at 1227 (“The point is that it may seem inconsistent with the lofty goals of the Clean Water Act to leave out of the permitting process the transfer of pollutants from one navigable body of water to another, but it is no more so than to leave out all non-point sources, allowing agricultural run-offs to create a huge ‘dead zone’ in the Gulf of Mexico.”).