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# The Water Transfers Rule: Weakening the Clean Water Act One Reasonable Interpretation at a Time

## INTRODUCTION

The quality of the nation's waters depends on the ability to regulate the introduction and movement of pollutants to those waters. In 2008, the Environmental Protection Agency (EPA) adopted the National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, which allows the introduction of pollutants from one body of water to another without a permit.<sup>1</sup> The Eleventh Circuit recently reviewed the validity of the new rule as applied to polluted agricultural runoff being pumped into Lake Okeechobee.<sup>2</sup> Though the court recognized that the rule is not consistent with the Clean Water Act's (CWA) broad purpose of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters, it determined that the rule is permissible.<sup>3</sup> Specifically, the Eleventh Circuit found that because the NPDES program fails to regulate *every* significant source of pollution, the court will not prevent the creation of further permitting exceptions.<sup>4</sup> This decision, which endorses a "unitary waters" approach to the CWA, undermines the strength of the NPDES permitting program.

## I. THE LAKE

With a surface area of 730 square miles, Florida's Lake Okeechobee is the largest lake in the southeastern United States<sup>5</sup> and the second

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

2. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009).

3. *See id.* at 1225–28.

4. *See id.* at 1226–27.

5. South Florida Water Management District (SFWMD), Lake Okeechobee, <http://www.sfwmd.gov/portal/page/portal/levelthree/lake%20okeechobee> (last visited Dec. 23, 2009) [hereinafter Lake Okeechobee].

largest lake located wholly within the continental United States.<sup>6</sup> The lake is the headwaters of the Everglades and is an essential part of the Kissimmee-Okeechobee-Everglades ecosystem, which stretches from the Kissimmee River headwaters down to the Florida Bay.<sup>7</sup>

Lake Okeechobee provides a natural habitat for a wide variety of birds, including the federally endangered Everglades snail kite, and is home to fish and other wildlife.<sup>8</sup> The lake serves as a source of drinking water for lakeside communities and as a backup source of drinking water for communities down Florida's lower east coast.<sup>9</sup> The South Florida Water Management District (SFWMD) also diverts water from the lake to meet the irrigation needs of the Everglades Agricultural Area, while the lake itself hosts boating and other recreational activities.<sup>10</sup>

Lake Okeechobee is subject to significant manmade control mechanisms and a fairly intensive management scheme. Attempts to control the perimeter of the lake date back to around 1915, when local residents and governments constructed an initial muck levee.<sup>11</sup> The U.S. Army Corps of Engineers (USACE) strengthened and expanded the levee system after hurricane-induced floodwaters killed approximately 2000 people during the 1920s.<sup>12</sup> Today, the Herbert Hoover Dike, which consists of 143 miles of levees, 19 culverts, hurricane gates, and other water control structures, completely surrounds the lake.<sup>13</sup> SFWMD and USACE artificially control all discharges into and out of Lake Okeechobee, except those from Fisheating Creek.<sup>14</sup>

Lake Okeechobee faces several serious environmental challenges, including excessive phosphorus loads caused by the urban and agricultural activities that dominate land use in the watershed.<sup>15</sup> The

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6. SFWMD, LAKE OKEECHOBEE IN REVIEW 1 (2000), available at [https://my.sfwmd.gov/portal/page/portal/pg\\_grp\\_sfwmd\\_watershed/subtabs\\_okeechobee\\_home/tab1834093/lakeokeechobeeinreview.pdf](https://my.sfwmd.gov/portal/page/portal/pg_grp_sfwmd_watershed/subtabs_okeechobee_home/tab1834093/lakeokeechobeeinreview.pdf) [hereinafter IN REVIEW].

7. SFWMD, Okeechobee Watershed Overview, [https://my.sfwmd.gov/portal/page/portal/pg\\_grp\\_sfwmd\\_watershed/pg\\_sfwmd\\_watershed\\_okeechobee](https://my.sfwmd.gov/portal/page/portal/pg_grp_sfwmd_watershed/pg_sfwmd_watershed_okeechobee) (last visited Dec. 23, 2009).

8. *Id.*

9. *Id.*

10. Lake Okeechobee, *supra* note 5; IN REVIEW, *supra* note 6, at 1.

11. U.S. ARMY CORPS OF ENG'RS, LAKE OKEECHOBEE AND THE HERBERT HOOVER DIKE: FACTS AND INFORMATION (2008), available at [http://www.saj.usace.army.mil/Divisions/Everglades/Branches/HHDProject/DOCS/HHD/HHD\\_FS\\_Facts\\_Jan2008.pdf](http://www.saj.usace.army.mil/Divisions/Everglades/Branches/HHDProject/DOCS/HHD/HHD_FS_Facts_Jan2008.pdf); U.S. Army Corps of Engineers, History of the Herbert Hoover Dike, <http://www.saj.usace.army.mil/Divisions/Everglades/Branches/HHDProject/HHD.htm> (last visited Mar. 26, 2010) [hereinafter History].

12. IN REVIEW, *supra* note 6, at 3; History, *supra* note 11.

13. History, *supra* note 11.

14. IN REVIEW, *supra* note 6, at 3.

15. SFWMD, FLA. DEP'T OF ENVTL. PROT. & FLA. DEP'T OF AGRIC. AND CONSUMER SERVS., LAKE OKEECHOBEE PROTECTION PLAN EVALUATION REPORT 1 (2007) [hereinafter PLAN].

major land uses in the drainage basins around Lake Okeechobee include beef cattle grazing to the north, sugarcane production to the south, and citrus groves to the east.<sup>16</sup> Dairy farms also drain a significant amount of phosphorous into the lake, although they account for only 1 percent of the land use area in the northern basins.<sup>17</sup>

High phosphorus loads can cause harmful algal blooms.<sup>18</sup> In recent decades, the level of phosphorus in Lake Okeechobee has led to increasingly common blue-green algal blooms with particularly large blooms covering more than 40 percent of the lake.<sup>19</sup> Algal blooms, in turn, produce “dead zones” where dissolved oxygen levels are so low that most aquatic life cannot survive.<sup>20</sup> The lake’s high phosphorus load also stimulates the growth of invasive cattail in the littoral zone and causes water turbidity that blocks the sunlight required by submerged plant beds.<sup>21</sup>

## II. THE CASE

The CWA outlaws “the discharge of any pollutant” without an NPDES permit.<sup>22</sup> In turn, “discharge of a pollutant” is defined as “any addition of any pollutant to navigable waters from any point source,”<sup>23</sup> with “navigable waters” encompassing “the waters of the United States.”<sup>24</sup> At the heart of this case is what constitutes the discharge of a pollutant. Namely, this decision turns on the permissible interpretations of an “*addition . . . to navigable waters.*”<sup>25</sup>

Runoff from sugar fields and industrial and residential areas drains into the canals south of Lake Okeechobee.<sup>26</sup> This runoff contains chemical pollutants including phosphorous, nitrogen, and un-ionized ammonia.<sup>27</sup> SFWMD operates three pump stations that move the contaminated water from these canals sixty feet uphill into Lake Okeechobee.<sup>28</sup> In 2002, Friends of the Everglades, Fisherman against

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16. *Id.* at 9.

17. *Id.*

18. EPA, Basic Information: Nitrogen and Phosphorous Pollution, <http://www.epa.gov/waterscience/criteria/nutrient/basic.htm> (last visited Feb. 17, 2010).

19. IN REVIEW, *supra* note 6, at 2.

20. EPA, *supra* note 18.

21. IN REVIEW, *supra* note 6, at 2.

22. 33 U.S.C. §§ 1311(a), 1342(a) (2006).

23. *Id.* § 1362(12).

24. *Id.* § 1362(7).

25. Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210, 1223 (11th Cir. 2009) (emphasis added).

26. *Id.* at 1214.

27. *Id.*

28. *Id.*

Destruction of the Environment, and the Miccosukee Tribe filed suit against SFWMD,<sup>29</sup> seeking an injunction to force SFWMD's executive director to get an NPDES permit before pumping this polluted water into Lake Okeechobee.<sup>30</sup> The district court held that operating the three pump stations without an NPDES permit violated the CWA and ordered the SFWMD's executive director to apply immediately for a permit.<sup>31</sup> The defendants' appeal of this decision was the first to be considered in light of a recently adopted EPA regulation that exempts "water transfers" from the NPDES permitting program.<sup>32</sup>

The EPA adopted the water transfers rule in 2008, addressing whether moving water between meaningfully distinct bodies of water always requires an NPDES permit.<sup>33</sup> The rule defines water transfers as "activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use" and exempts these transfers from NPDES permitting requirements.<sup>34</sup> In effect, the new rule codifies a unitary waters approach to NPDES.<sup>35</sup>

The unitary waters theory treats all navigable waters in the United States as a whole. Contaminants are added to these waters only once, and once they have entered navigable waters from a point source, they can no longer be "added" by transferring them to other bodies of waters.<sup>36</sup> A unitary waters approach to the language of the CWA is based on the dictionary definition of "addition," a term that is not defined by the CWA itself.<sup>37</sup> Under this definition, an "addition" necessarily increases the overall number or amount of something.<sup>38</sup> Moving pollutants from one body of water to another is therefore not an "addition" of pollutants, so long as all the waters of the United States are treated as a single unit.<sup>39</sup>

Before the *Friends of the Everglades* decision, all existing precedent rejected the unitary waters theory, favoring the interpretation that pollutants are "added" to waters at the point of entry *and* whenever they are transferred to a meaningfully distinct body of water.<sup>40</sup> However, these

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29. Defendants were joined by the U.S. Sugar Corporation and the United States on behalf of the EPA and the USACE. *Id.*

30. *Id.*

31. *Id.* at 1215.

32. *Id.* at 1218–19.

33. See National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697, 33,699 (June 13, 2008) (to be codified at 40 C.F.R. pt 122).

34. *Id.* at 33,697.

35. See *Friends of the Everglades*, 570 F.3d 1210 at 1217–19.

36. *Id.* at 1217.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 1218.

cases were decided before the EPA adopted the water transfers rule and therefore did not consider whether the unitary waters theory was entitled to *Chevron* deference.<sup>41</sup>

Under *Chevron* deference, the EPA's regulation is valid if it is a "reasonable construction of an ambiguous statute."<sup>42</sup> While agencies cannot interpret unambiguous statutes in a manner that is contrary to legislative intent, so long as there is more than one reasonable way to interpret the statute, they are free to adopt any of those reasonable interpretations.<sup>43</sup> A regulation need not be the most plausible interpretation of the statutory language to be a "reasonable" interpretation.<sup>44</sup> Additionally, a regulation can be reasonable even if it is inconsistent with past agency policy.<sup>45</sup>

The Eleventh Circuit determined that the language of the statute<sup>46</sup> on its own was ambiguous, since the word "waters," in ordinary usage, can refer to either a single body of water or to several different bodies of water.<sup>47</sup> Moreover, the court found that considering the language in the context of the remainder of the statutory scheme did not resolve the ambiguity.<sup>48</sup> While the meaning of seemingly ambiguous terms can often be derived from clear usage in similar provisions, the court found no such guidance in the CWA.<sup>49</sup> The court noted that Congress has used the term "any navigable waters" to protect individual water bodies, and interpreted the absence of the word "any" in the NPDES provision to indicate the lack of such clear intent in this case.<sup>50</sup> However, since Congress has also used the term "navigable waters" to unambiguously refer to individual bodies of water, the court decided that the missing "any" is not conclusive support for the unitary waters theory.<sup>51</sup>

Finally, when determining whether Congress had a specific intent with regard to the precise meaning of "addition . . . to navigable waters," *Chevron* analysis requires that the court examine the broader context of

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41. *Id.*

42. *Id.* at 1219.

43. *Id.*

44. *Nat'l Cable Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (stating that "*Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation").

45. *Friends of the Everglades*, 570 F.3d at 1219.

46. "[A]ny addition of any pollutant to navigable waters from any point source" constitutes a discharge of pollutant(s). 33 U.S.C. § 1362(12) (2006).

47. *Friends of the Everglades*, 570 F.3d at 1223.

48. *Id.* at 1223–25 (citing sections of the CWA and other water protection statutes).

49. *Id.* at 1224.

50. *Id.*

51. *Id.*

the statute as a whole, including its stated purpose.<sup>52</sup> When amending the CWA in the 1970s, Congress declared that “it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.”<sup>53</sup> Arguably, reading the CWA as allowing the discharge of pollutants from other bodies of water without a NPDES permit is contrary to this explicit goal.<sup>54</sup> The Friends of the Everglades argued that recognizing this exception to the permitting program would be absurd since the structure of the NPDES program is based on protecting individual bodies of water,<sup>55</sup> and the exception would allow pumping “the most loathsome navigable water in the country into the most pristine one” without a permit.<sup>56</sup>

Although the unitary waters approach frustrates the general purpose of the CWA, it is not the only CWA provision that does so.<sup>57</sup> The court cited two aspects of the CWA that “do not comport with its broad purpose of restoring and maintaining the chemical, physical, and biological integrity of the Nation’s waters.”<sup>58</sup> First, NPDES permits are not required for nonpoint source pollution, which is a significant water quality problem.<sup>59</sup> Second, the definition of “point source” excludes agricultural storm water discharges and return flows from irrigation, despite their substantial negative impact on water quality.<sup>60</sup> These exceptions led the court to conclude that the broader context of the statute in its entirety does not preclude a unitary waters approach.<sup>61</sup>

### III. THE IMPACT

The NPDES program is one of the CWA’s strongest tools for maintaining and improving the quality of our nation’s waters. The program authorizes the regulation of pollutant discharge from most point sources.<sup>62</sup> The first step in the NPDES process is to set water quality

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52. *Id.* at 1222–23.

53. 33 U.S.C. § 1251(a) (2006).

54. *Friends of the Everglades*, 570 F.3d at 1226.

55. NPDES permitting decisions are made according to the level of pollutants allowed (the “total maximum daily load”) in a body of water. These total maximum daily loads are determined separately for each body of water. 33 U.S.C. §§ 1313(d), 1342(a)(1).

56. *Friends of the Everglades*, 570 F.3d at 1226.

57. *Id.* at 1225–27.

58. *Id.* at 1226.

59. *Id.* at 1226–27.

60. *Id.* at 1227.

61. *Id.*

62. “Point source” means

any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which

standards (WQS), which are individually determined for each waterbody, according to that waterbody's designated uses.<sup>63</sup> If WQS can be met through the implementation of technology-based effluent limits, NPDES permits will be distributed according to those technology-based performance standards.<sup>64</sup> If WQS cannot be met solely through technology-based limits, the EPA or another authorized body will set total maximum daily loads (TMDLs)<sup>65</sup> for pollutants, such that staying below these limits will result in the WQS applicable to that waterbody.<sup>66</sup> The EPA or another authorized permitting body then allocates NPDES permits among polluters in accordance with the TMDLs.<sup>67</sup>

However, and as the court notes, the NPDES program does not cover pollution from nonpoint sources.<sup>68</sup> Diffuse sources of precipitation-induced runoff are the sole source of pollution for nearly half of the waters listed as "impaired" under the CWA and nonpoint sources likely contribute considerably more to pollutant loads than do point sources for the remainder of the nation's impaired waters.<sup>69</sup> As the EPA recognizes, nonpoint source pollution is thus the most significant source of water pollution in the country.<sup>70</sup> Although the CWA administers a grant program supporting nonpoint source pollution management programs,<sup>71</sup> these grants have provided insufficient incentive to meet WQS.<sup>72</sup> The goals of the CWA would therefore be better served by maintaining as broad a scope for the NPDES program as is possible, instead of limiting that scope, as the new water transfer rule does.

The Lake Okeechobee Protection Plan identifies three major environmental challenges facing Lake Okeechobee: excessive total phosphorous loads, unnaturally high and low water levels, and the rapid spread of exotic and nuisance plants.<sup>73</sup> Prior to the EPA's adoption of the

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pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14) (2006).

63. EPA, Clean Water Act Module § 10, <http://www.epa.gov/watertrain/cwa/cwa10.htm> (last visited Feb. 18, 2010) [hereinafter CWAM].

64. *Id.* § 43.

65. When an EPA-approved TMDL is not available and technology-based effluent limits are not sufficient to protect the designated uses of a waterbody, the permitting authority will establish Water Quality-Based Effluent Limits (WQBELs). WQBELs are back calculated from WQS and, like TMDLs, set effluent limits such that adherence to those limits will result in the WQS applicable to the waterbody at issue. *Id.*

66. *See id.*

67. *Id.* § 34.

68. *See supra* note 59 and accompanying text.

69. CWAM, *supra* note 63, § 28.

70. *Id.* § 52.

71. Clean Water Act § 319, 33 U.S.C. 1329(2)(h) (2006).

72. CWAM, *supra* note 63, § 29.

73. PLAN, *supra* note 15, at 4.

water transfers rule, the NPDES program could have provided an effective tool for dealing with the phosphorous problem. Since discharges into the lake are highly regulated<sup>74</sup> and fall into the point source category,<sup>75</sup> NPDES could have covered most, if not all, of the transfers into the lake. As it stands, Lake Okeechobee has been listed as impaired since 1999.<sup>76</sup> Further, the five-year average (2001–2006) phosphorous load was 634 metric tons annually (or more than 160 percent of the target load), even after the implementation of the watershed-based phosphorous reduction plan.<sup>77</sup>

The Eleventh Circuit said that, “sometimes it is helpful to strip a legal question of the contentious policy interests attached to it,” and it then put forth a hypothetical illustrating the EPA rule.<sup>78</sup> The hypothetical rule forbade “any addition of any marbles to buckets by any person.”<sup>79</sup> Considered in complete isolation, it is unclear whether a person moving two marbles from one bucket to another is in violation of this rule.<sup>80</sup> And determining the precise meaning of the “buckets and marbles” rule is not important, since the allocation of marbles among buckets is not likely to have a meaningful impact on the lives of people, plants, and animals that live in or around those buckets. Rather than being helpful, the court’s hypothetical completely obscures the ecological implications of this decision. When we are talking not marbles and buckets, but *pollutants* and *waters*, the allocation of the former among the latter will significantly impact the surrounding ecosystem in a way that argues for the interpretation of the statute in the context of its real-world effects.

*Cozette Tran-Caffee*

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74. See *supra* notes 13–14 and accompanying text.

75. See *supra* note 62.

76. FLA. DEP’T OF ENVTL. PROT., INTEGRATED WATER QUALITY ASSESSMENT FOR FLORIDA: 2008 305(B) REPORT AND 303(D) LIST UPDATE 17 (2008).

77. PLAN, *supra* note 15, at 23.

78. Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210, 1228 (11th Cir. 2009).

79. *Id.*

80. *Id.*

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