

# THE WATER TRANSFERS RULE: HOW AN EPA RULE THREATENS TO UNDERMINE THE CLEAN WATER ACT

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*Water transfer is a term that describes the movement of water from an area where water is available to another area where water is scarce. This process has enabled otherwise uninhabitable lands in the western United States to support large cities and agricultural districts. In Friends of the Everglades v. South Florida Water Management District, the Eleventh Circuit upheld a rule that removed federal water quality restrictions on water transfers. This rule codified the Environmental Protection Agency (EPA) position that the National Pollution Discharge Elimination System (NPDES) requirement of the Clean Water Act (CWA) does not apply to water transfers that do not subject the water to an intervening use. The rule clarifies that a water transfer does not constitute an “addition” of a pollutant under the CWA that triggers the NPDES requirement. This is true even when the water source contains pollutants that the receiving body of water does not. In essence, the EPA’s Water Transfers Rule adopted the highly controversial unitary waters theory.*

*This Note explores the potential effects of the EPA’s Water Transfers Rule and concludes that the current rule is untenable. It discusses the importance of water transfers in the western United States and how NPDES permits can limit the movement of water to areas where water is scarce. It then discusses complex water diversions that transfer water across state lines and proffers that federal oversight is necessary to control pollution that results from water diversions. Finally, this Note argues that the Water Transfers Rule should be replaced by a general NPDES permit system that balances the EPA’s rule and an individual NPDES requirement for each water transfer.*

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## INTRODUCTION

The Environmental Protection Agency (EPA) recently promulgated a rule that is harming America’s lakes and rivers by exposing them to contamination by means of water transfer. The Water Transfers Rule<sup>1</sup> exempts certain classes of water transfers from the National Pollutant Discharge Elimination System (NPDES), which limits and monitors pollutant discharges into bodies of water in the United States.<sup>2</sup> The NPDES program has been hailed as the centerpiece of the Clean Water Act (CWA).<sup>3</sup> But the EPA’s rule significantly weakens the NPDES program because it exempts from the

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1. National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i) (2008)) [hereinafter Water Transfers Rule], *available at* <http://edocket.access.gpo.gov/2008/pdf/E8-13360.pdf>.

2. 33 U.S.C. § 1342 (2006).

3. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1225 (11th Cir. 2009).

permit requirement water transfers that move polluted water into clean water.<sup>4</sup> The Water Transfers Rule frustrates the CWA's purpose, undermines its statutory requirements, and threatens to undo its accomplishments in improved water quality.<sup>5</sup> Therefore, the EPA should replace this rule with a permit system that ensures that the Nation's waters are adequately protected.

The EPA promulgated its Water Transfers Rule in 2008 to clarify what type of water transfer triggers the NPDES requirement.<sup>6</sup> This rule exempts from the NPDES program water transfers that do not subject the water to intervening industrial, municipal, or commercial use.<sup>7</sup> This Note refers to these types of transfers as "pure water transfers." Under the EPA's rule, moving water from Point A to Point B does not require an NPDES permit unless the transferor actually introduces pollutants to the water during the transfer.<sup>8</sup> The rule mirrors the unitary waters theory.<sup>9</sup> Circuit courts have consistently rejected this theory every time it has been raised in litigation.<sup>10</sup> However, in *Friends of the Everglades v. South Florida Water Management District*, which was the first case to interpret the NPDES program after the EPA finalized its Water Transfers Rule, the Eleventh Circuit held that the rule was a reasonable interpretation of ambiguous statutory language in the CWA.<sup>11</sup> Accepting the EPA's rule, the Eleventh Circuit departed from previous circuit court holdings on the unitary waters theory. As a result, it is uncertain whether other jurisdictions will follow the Eleventh Circuit's lead in accepting the Water Transfers Rule.

The uncertain applicability of the NPDES program to pure water transfers has significant economic consequences, especially for the western United States.<sup>12</sup> In the West, states must divert massive amounts of water through a complex

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4. Water Transfers Rule, *supra* note 1, at 33,699.

5. Compare *id.* with Clean Water Act, 33 U.S.C. §§ 1251–1387 (2006).

6. Water Transfers Rule, *supra* note 1, at 33,699.

7. 40 C.F.R. § 122.3(i) (2008).

8. *See id.*

9. *See Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009). For further discussion, see *infra* Part II.C.

10. *Friends*, 570 F.3d at 1217.

11. *Id.* at 1228.

12. *See* Brief for Town of Grand Lake, Colorado et al. as Amici Curiae Supporting Petitioners at 2, *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 131 S. Ct. 643 (2010) (mem.) (No. 10-196), 2010 WL 3611704, at \*2 [hereinafter Brief for Grand Lake].

system of canals, tunnels, and ditches to meet the demands of growing cities<sup>13</sup> and agricultural regions.<sup>14</sup> Expensive diversion projects become even more costly if every point source discharging pollutants into the navigable waters must obtain an NPDES permit.<sup>15</sup> While it is important to limit the spread of pollution caused by water transfers, an over-inclusive NPDES program that requires a permit for every pollutant discharge is overly expensive.<sup>16</sup> Therefore, the EPA must find a way to strike a balance that protects water quality while limiting costs and administrative burden.

This Note examines the Water Transfers Rule, explains why it should be rejected, and concludes that a general NPDES permit system should replace the rule. Part I of this Note provides an overview of the CWA and the EPA's Water Transfers Rule. The purpose of the NPDES program and the disagreement over what constitutes an "addition" that triggers a permit is explained in Part I.A. Next, Part I.B recounts the situation that gave rise to the Water Transfers Rule and why the Eleventh Circuit accepted it. Part II introduces three reasons that the Water Transfers Rule should be rejected. Part II.A advocates that the CWA unambiguously requires NPDES permits for water transfers, and Part II.B introduces the Supreme Court's *Miccossukee* decision and argues that the Water Transfers Rule undermines the holding of that case. Next, the discussion turns to the unitary waters theory with

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13. Heidi Hande, Comment, *Is the EPA's Unitary Waters Theory All Wet?*, 6 WYO. L. REV. 401, 402 (2006).

14. *See id.* For example, a series of complex water transfer projects have transformed California's once-dry Imperial Valley into a fertile agricultural region. *Id.* Water transfers can range from relatively simple conveyances directing a small amount of water over a short distance to very complex systems routing water hundreds of miles and across state lines. Compare one municipality transferring water between nearby reservoirs with interbasin water diversions such as the *Colorado-Big Thompson Project*, N. COLO. WATER CONSERVANCY DISTRICT, [http://www.ncwcd.org/project\\_features/cbt\\_main.asp](http://www.ncwcd.org/project_features/cbt_main.asp) (last visited July 12, 2011) (purportedly "the largest transmountain water diversion project in Colorado"), and *California State Water Project and the Central Valley Project*, CAL. DEPARTMENT WATER RESOURCES, <http://www.water.ca.gov/swp/cvp.cfm> (last modified Apr. 29, 2008) ("one of the world's largest water storage and transport systems").

15. *See* Steven G. Davison, *Defining "Addition" of a Pollutant into Navigable Waters from a Point Source Under the Clean Water Act: The Questions Answered—and Those Not Answered—by South Florida Water Management District v. Miccosukee Tribe of Indians*, 16 FORDHAM ENVTL. L. REV. 1, 109 (2004).

16. *Id.* at 76–77.

Part II.C demonstrating how the theory is inconsistent with the CWA.

Part III shifts the focus toward the importance of water transfers in the West. In Part III.A, this Note reveals the negative effects that an over-inclusive NPDES program would have in the West, while Part III.B encourages some level of federal oversight to replace the Water Transfers Rule. This Note concludes that a general NPDES program is a possible solution that balances cost, administrative feasibility, and effectiveness.

## I. THE EMERGENCE OF THE WATER TRANSFERS RULE

The CWA is the principal federal law regulating water pollution in the United States.<sup>17</sup> Congress enacted the CWA in 1972 partly in response to Ohio's Cuyahoga River catching on fire and partly to rectify harm to the quality of America's lakes, rivers, and streams caused by decades of industrialization.<sup>18</sup> The law's purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>19</sup> The statute proclaimed the lofty goal of eliminating the discharge of pollutants into the navigable waters of the United States by 1985.<sup>20</sup> Although this ambitious objective was not met, the statute has slowed the pollution of the Nation's waters by regulating certain types of pollutant discharges and prohibiting discharges in toxic quantities.<sup>21</sup> Perhaps the most significant mechanism contributing to the CWA's achievements is its National Pollution Discharge Elimination System.

### A. *The NPDES Program and Defining "Addition"*

For over thirty years, America's water pollution policy has relied upon NPDES permits to limit pollutant discharges from

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17. See 33 U.S.C. § 1251 (2006).

18. See *id.*; see also Kenneth M. Murchison, *Learning from More Than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future*, 32 B.C. ENVTL. AFF. L. REV. 527, 585–86 (2005) (discussing the factors that prompted Congress to take a new approach to controlling water pollution).

19. 33 U.S.C. § 1251(a).

20. *Id.* § 1251(a)(1).

21. *Id.* § 1251(a)(7).

industrial and municipal sources.<sup>22</sup> Courts have repeatedly emphasized the importance of NPDES permits in federal water pollution control, referring to it as the “linchpin,”<sup>23</sup> “the centerpiece,”<sup>24</sup> and “the most important component of the [CWA].”<sup>25</sup> The NPDES program is the basic structure that regulates the discharge of pollutants from point sources<sup>26</sup> into the navigable waters of the United States.<sup>27</sup> NPDES limitations specify the quantity or concentration of certain pollutants that may be discharged from a point source.<sup>28</sup> A discharger is liable under the CWA if he does not comply with the NPDES permit,<sup>29</sup> which requires that the discharger meet pollutant limitations and monitoring requirements before the discharge is allowed.<sup>30</sup> The federal NPDES program is not the only layer of protection limiting pollutant discharges. The CWA also grants the states the power to issue water quality permits.<sup>31</sup> But federal NPDES permits can be used to control pollutants that are not covered by state permits. Together, state and federal permit systems are a simple and effective way to enforce pollution requirements and to identify illegal discharges.<sup>32</sup>

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22. Jeffrey M. Gaba, *Generally Illegal: NPDES General Permits Under the Clean Water Act*, 31 HARV. ENVTL. L. REV. 409, 410 (2007).

23. *United States v. Puerto Rico*, 721 F.2d 832, 834 (1st Cir. 1983).

24. *Am. Iron & Steel Inst. v. Env'tl. Prot. Agency*, 115 F.3d 979, 990 (D.C. Cir. 1997).

25. *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1294 (1st Cir. 1996).

26. A point source is “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.” 33 U.S.C. § 1362(14).

27. “The term ‘navigable waters’ means the waters of the United States, including the territorial seas.” *Id.* § 1362(7).

28. 33 U.S.C. § 1342(a)(1) (establishing the National Pollutant Discharge Elimination System). For the actual restrictions specifying the quantity or concentration of pollutants that may be discharged from a point source, see *id.* §§ 1311, 1312, 1316, 1317, 1318. For the definition of point source, see *id.* § 1362(14).

29. Gaba, *supra* note 22, at 460–61. Civil sanctions are available for inadequate permit plans. 33 U.S.C. § 1319(a)–(b). Criminal liability may be imposed for violations that include negligence and inadequately prepared plans. See *id.* § 1319(c)(1)(A).

30. 33 U.S.C. § 1342(a); see also 40 C.F.R. § 122.44 (2006) (setting criteria for “[e]stablishing limitations, standards and other permit conditions”).

31. *Id.* § 1342(b).

32. Gaba, *supra* note 22, at 412.

Before Congress passed the modern CWA, the states had established their own water quality standards.<sup>33</sup> Because the states did not have a mechanism to monitor and limit point source discharges, the government faced the Herculean task of tracing in-stream pollution back to its discharger.<sup>34</sup> Therefore, it was extremely difficult to determine the source of polluted water.<sup>35</sup> The NPDES program ameliorated this difficulty by controlling pollutant discharges from point sources.<sup>36</sup> NPDES monitoring and reporting requirements enable the government to easily and efficiently maintain water quality standards.<sup>37</sup> However, the Water Transfers Rule jeopardizes this efficiency by exempting a significant class of water transfers from the NPDES program.

It is important to understand the clarifying purpose behind the EPA's promulgation of its Water Transfers Rule. The CWA prohibits "the discharge of any pollutant" subject to a few exceptions, one of which is when an NPDES permit is obtained.<sup>38</sup> The statute defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source."<sup>39</sup> Most of these terms are also defined in the statute. "Navigable waters" is defined as "the waters of the United States."<sup>40</sup> This definition includes lakes, rivers, and streams that are navigable in fact.<sup>41</sup> The CWA defines "point source" as "any discernible, confined and discrete conveyance,

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33. *Id.* at 413–14.

34. *Id.* at 414.

35. *Id.* (citing Jeffrey M. Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act*, 36 VAND. L. REV. 1167, 1178–79 (1983)).

36. *Id.* at 410.

37. *See id.*

38. 33 U.S.C. §§ 1311(a), 1342(a)(1) (2006).

39. *Id.* § 1362(12).

40. *Id.* § 1362(7).

41. 33 U.S.C. § 1362(7) defines navigable waters of the United States. This definition includes tributaries, interstate waters, and intrastate lakes, rivers, and streams (1) used for recreational or other purposes by interstate travelers, and (2) from which shellfish or fish are collected and sold in interstate commerce. 40 C.F.R. § 112.2 (2010); *see, e.g.*, *Rapanos v. United States*, 547 U.S. 715, 730–31 (2006) (plurality opinion) (stating that the term "navigable waters" includes only relatively permanent, standing, or flowing bodies of water); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 171–74 (2001) (holding that the Corps' expansion of the definition of "navigable waters" to include intrastate waters used by migratory birds exceeded the authority granted to the Corps under the Clean Water Act); *Guidance to Identify Waters Protected by the Clean Water Act*, ENVTL. PROTECTION AGENCY, [http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters\\_guidesum.cfm](http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters_guidesum.cfm) (last updated Apr. 27, 2011).

including but not limited to any pipe, ditch, channel, tunnel, conduit, [or] well . . . from which pollutants are or may be discharged.”<sup>42</sup> The CWA, however, does not define “addition.”<sup>43</sup>

Two competing interpretations of “addition” have emerged in CWA litigation: the unitary waters theory and the traditional approach. The unitary waters theory holds that an addition occurs only when a pollutant first enters the navigable waters from a point source.<sup>44</sup> An addition does not occur when polluted water is transferred between bodies of water, no matter the distance.<sup>45</sup> The Supreme Court used a metaphor to help explain the unitary waters theory: “[I]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not ‘added’ soup or anything else to the pot.”<sup>46</sup> Because the “navigable waters” of the United States are considered one pot under this theory—rather than a number of separate pots—“[l]adling pollution from one navigable water to another does not add anything to the pot.”<sup>47</sup> Therefore, an NPDES permit is required only when a pollutant first enters the water from a point source and not when polluted water is transferred between bodies of water.<sup>48</sup>

The alternative interpretation is the traditional approach, which holds that an “addition” occurs whenever polluted water is moved from one meaningfully distinct<sup>49</sup> body of water to another.<sup>50</sup> Under this approach, an NPDES permit is necessary to discharge pollutants into Lake A and also to transfer water from Lake A to a meaningfully distinct Lake B. However, if the bodies of water are not meaningfully distinct—for example, if

42. 33 U.S.C. § 1362(14).

43. 33 U.S.C. § 1362.

44. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009).

45. *Id.*

46. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 110 (2004) (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001)).

47. *Friends*, 570 F.3d at 1217.

48. *Id.*

49. For example, canal water is meaningfully distinct from Lake Okeechobee if the evidence shows that the pollutants would not have entered the lake without the pumping. See *Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, No. 02-80309 Civ., 2006 WL 3635465, at \*48–51 (S.D. Fla. Dec. 11, 2006), *rev’d in part, appeal dismissed in part sub nom.* *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009).

50. See *Miccosukee*, 541 U.S. at 102–03. For further discussion of *Miccosukee*, see *infra* Part II.B.

one lake occasionally floods into the other—then an NPDES permit is required only for the discharge into Lake A.<sup>51</sup>

Until the *Friends of the Everglades* decision, circuit courts had always chosen the traditional approach over the unitary waters theory.<sup>52</sup> The interpretation a court adopts can have severe environmental consequences because the traditional approach protects an individual body of water from pollutants more than the unitary waters theory. The CWA already excludes nonpoint source pollution from the NPDES requirement, which the EPA has recognized as the most significant source of water pollution in the country.<sup>53</sup> Yet the Water Transfers Rule expands this exclusion by holding that water transfers “convey[ing] or connect[ing] waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use” do not require NPDES permits because they do not constitute the “addition” of a pollutant.<sup>54</sup> Because the Water Transfers Rule embraces the unitary waters theory, the EPA has opened a regulatory hole in the CWA that jeopardizes the quality of the Nation’s waters.

### B. *Accepting the EPA’s Interpretation*

The Eleventh Circuit was the first to interpret the EPA’s Water Transfers Rule after it had been finalized. Finding the statutory language of the CWA ambiguous, the court held that the EPA’s rule was a permissible construction of the ambiguous language.<sup>55</sup> While the court’s holding applies only to the

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51. See Priscillia de Muizon, Comment, “*Meaningfully Distinct*” Waters, the Unitary Waters Theory, and the Clean Water Act: *Miccosukee v. South Florida Water Management District*, 32 *ECOLOGY L.Q.* 417, 446–48 (2005).

52. For further discussion of the unitary waters theory, see *infra* Part II.C.

53. *Introduction to the Clean Water Act, Section 319: Nonpoint Source Program*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/watertrain/cwa/cwa52.htm> (last updated Sept. 12, 2008). “[M]ore than 40 percent of all impaired waters were affected solely by nonpoint sources, while only 10 percent of impairments were caused by point source discharges alone.” *Id.* Examples of nonpoint sources include agricultural and silvacultural runoff, mining activities, construction activities, and pollutant disposal in wells. See *id.*; see also 33 U.S.C. § 1314(f)(A)–(D) (2006).

54. Water Transfers Rule, *supra* note 1, at 33,699.

55. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1228 (11th Cir. 2009); see also *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984). For a regulation to be a reasonable construction of an ambiguous statute, *Chevron* deference requires that there be two or more reasonable ways to interpret the statute and that the regulation adopts one of

Eleventh Circuit, other jurisdictions may decide to follow suit. If so, the Water Transfers Rule will severely restrict what the Eleventh Circuit had previously recognized as the “centerpiece of the Clean Water Act.”<sup>56</sup>

In *Friends of the Everglades*, the plaintiffs sought to enjoin the South Florida Water Management District (SFWMD) from pumping polluted canal water into Lake Okeechobee without first obtaining an NPDES permit.<sup>57</sup> South Florida’s Lake Okeechobee is the second largest freshwater lake contained entirely within the continental United States.<sup>58</sup> With an average depth of only nine feet, Lake Okeechobee spans an area of approximately 730 square miles and is the liquid heart of the Everglades ecosystem.<sup>59</sup> Aside from its hydrological and ecological importance, it also functions as a reservoir, collecting and supplying water to the urban and agricultural regions of south Florida.<sup>60</sup> Historically, the lake’s southern shoreline flooded during the rainy season, sending a shallow sheet of water across the surrounding wetlands and toward the Florida Bay.<sup>61</sup> Several flood control and water management projects were developed to provide flood protection and ensure a stable water supply for the millions of people inhabiting the flood plain.<sup>62</sup> The water management system includes a complex arrangement of canals and pump stations. At issue in *Friends of the Everglades* were the S-2, S-3, and S-4 pump stations at the south end of the lake that pumped canal water sixty feet uphill into Lake Okeechobee.<sup>63</sup>

The pump stations are diversion facilities that change the movement, flow, and circulation of the canal water that they

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them. If the regulation is a reasonable construction of an ambiguous statute, then it is entitled to *Chevron* deference. *See id.* In *Friends of the Everglades*, the EPA promulgated its water transfers rule after it lost its case in federal district court. *See Friends*, 570 F.3d at 1218. However, it did not matter whether the regulation was proposed and issued after the beginning of a lawsuit or that it was a dramatic shift in agency policy. *Id.* at 1219.

56. *Friends*, 570 F.3d at 1225.

57. *Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, No. 02-80309 Civ., 2006 WL 3635465, at \*1 (S.D. Fla. Dec. 11, 2006), *rev’d in part, appeal dismissed in part sub nom.* *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009).

58. *Id.* at \*7.

59. *Id.*

60. *Id.* at \*8.

61. *Friends*, 570 F.3d at 1214.

62. *Id.*

63. *Id.*

control.<sup>64</sup> While operating, they do not introduce pollutants into the water.<sup>65</sup> The primary purpose of pumping is to protect the surrounding communities and agricultural areas from flooding, but pumping occasionally occurs for water supply purposes as well.<sup>66</sup> By pumping the water into the lake, SFWMD has artificially added over 400 square miles to the lake's watershed, all of which would have drained elsewhere under natural conditions.<sup>67</sup> At full capacity, the flow rate from just one pump station is comparable to the flow of a medium-sized river.<sup>68</sup> While operating at full capacity, the three pump stations can introduce large quantities of canal water and significantly alter the chemical composition of Lake Okeechobee.<sup>69</sup>

It is indisputable that introducing canal water adversely affected Lake Okeechobee.<sup>70</sup> These canals collect runoff from surrounding agricultural, industrial, and residential areas, and canal water is polluted with noxious contaminants, including nitrogen, phosphorous, un-ionized ammonia, and other chemicals.<sup>71</sup> As expected, the lake's water quality is generally better than the water quality in the surrounding canals.<sup>72</sup> But when the canal water is pumped into Lake Okeechobee, it introduces heavy metals and pesticides that would not have otherwise entered the lake.<sup>73</sup> Before pumping began, the State of Florida designated the lake as a potable water supply.<sup>74</sup> Presently, the pumping has impaired the water to such a degree that the lake can no longer meet its designated uses.<sup>75</sup>

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64. *Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, No. 02-80309 Civ., 2006 WL 3635465, at \*13 (S.D. Fla. Dec. 11, 2006), *rev'd in part, appeal dismissed in part sub nom. Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009).

65. *Id.*

66. *Id.* at \*15.

67. *Id.* at \*13.

68. *Id.* at \*14.

69. *See id.* at \*14–21.

70. *Id.* at \*15.

71. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1214 (11th Cir. 2009).

72. *Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, No. 02-80309 Civ., 2006 WL 3635465, at \*20 (S.D. Fla. Dec. 11, 2006), *rev'd in part, appeal dismissed in part sub nom. Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009).

73. *Id.* at \*17.

74. *Id.* at \*19.

75. *Id.* at \*22.

Hoping to prevent further deterioration of the lake, Friends of the Everglades (FOE), an organization of over 6,000 members seeking to preserve and protect the Everglades, filed suit against SFWMD on April 8, 2002.<sup>76</sup> The citizen suit sought to require SFWMD to obtain an NPDES permit before it could discharge polluted canal water into Lake Okeechobee via S-2, S-3, and S-4 pump stations.<sup>77</sup> After the United States Supreme Court granted certiorari in a related case, *South Florida Water Management District v. Miccosukee Tribe of Indians of Florida*, all proceedings in *Friends of the Everglades* were stayed.<sup>78</sup> Following the Supreme Court's decision in *Miccosukee*,<sup>79</sup> the Court granted SFWMD's motion to reopen the case in 2005, and a Florida district court heard the case in early 2006.<sup>80</sup>

One of the issues for the Florida district court to determine was whether an NPDES permit was required for the S-2, S-3, and S-4 pump stations to pump polluted water into Lake Okeechobee.<sup>81</sup> Intervening on behalf of SFWMD, the United States argued that NPDES permits were not necessary because the pump stations transferred water without subjecting the water to intervening industrial, municipal, or commercial use.<sup>82</sup> The United States pointed to the EPA's proposed Water

76. *Id.* at \*1.

77. *Id.* The "citizen suits" provision of the CWA established jurisdiction. 33 U.S.C. § 1365(a) (2006). Section 1365(a) provides, in part, that any citizen may commence a civil action against any person (including the United States or any governmental agency) who is alleged to be violating an effluent limitation or standard under the CWA, or against the EPA for an alleged failure to perform any act or duty under the CWA.

78. *Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, No. 02-80309 Civ., 2006 WL 3635465, at \*2 (S.D. Fla. Dec. 11, 2006), *rev'd in part, appeal dismissed in part sub nom.* *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009).

79. *See infra* Part II.B.

80. *Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, No. 02-80309 Civ., 2006 WL 3635465, at \*2 (S.D. Fla. Dec. 11, 2006), *rev'd in part, appeal dismissed in part sub nom.* *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009).

81. *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191, 1194 (11th Cir. 2009).

82. *Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, No. 02-80309 Civ., 2006 WL 3635465, at \*34 (S.D. Fla. Dec. 11, 2006), *rev'd in part, appeal dismissed in part sub nom.* *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009). The United States intervened on behalf of the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency on May 2, 2005, arguing that it

had a compelling interest in the litigation because for decades the Corps had been building a comprehensive network of levees, water storage areas, pumps and canal improvements in South Florida . . . .

Transfers Rule (it was not finalized until 2008), which would exclude pure water transfers from the NPDES program.<sup>83</sup> Because the rule was merely a proposal, the court was not required to defer to the EPA's interpretation.<sup>84</sup> Concluding that the EPA's proposed rule offered no substantive explanation to support its strained definition of "addition," the court found "that 'addition . . . to the waters of the United States' contemplates an addition from anywhere outside of the receiving water, including from another body of water."<sup>85</sup> Next, the court needed to determine whether the canals were meaningfully distinct from Lake Okeechobee.<sup>86</sup> Basing its analysis on ten factors, the court found that the canals were meaningfully distinct from the lake and held that continued pumping of canal water into Lake Okeechobee would require an NPDES permit.<sup>87</sup>

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As for the EPA, that agency administers the NPDES permitting program in conjunction with the states, including Florida, that have assumed responsibility for issuing permits within their borders under 33 U.S.C. § 1342.

*Id.* at \*2.

83. *Id.* at \*34.

84. *Id.* at \*47–48.

85. *Id.* at \*42 (alteration in original). " 'Addition' is defined as the 'joining of one thing to another.' " *Id.* (quoting WEBSTER'S THIRD INTERNATIONAL DICTIONARY UNABRIDGED 24 (1993)); see also *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 84 (2d. Cir. 2006) (finding that defendants' arguments "simply overlook [the CWA's] plain language"); *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1368 (11th Cir. 2002), *vacated sub nom. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) ("[I]n determining whether pollutants are added to navigable waters for purposes of the CWA, the receiving body of water is the relevant body of navigable water.").

86. *Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, No. 02-80309 Civ., 2006 WL 3635465, at \*32, \*48 (S.D. Fla. Dec. 11, 2006), *rev'd in part, appeal dismissed in part sub nom. Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009).

87. *Id.* at \*48–51. The factors included:

(1) [T]he waters are separated by a physical barrier (the Dike); (2) historically, water generally flowed south from the Lake (in the system's natural state); (3) today, water also generally continues to flow south; (4) there are chemical differences between the Lake and the canals; (5) there are biological differences between the Lake and the canals; (6) the canals are man-made and were cut into bedrock, while the Lake is a natural bowl-shaped water body; (7) when water enters the Lake *via* backpumping, a visible plume may be observed; (8) backpumping canal water into the Lake has a negative impact upon the Lake; (9) the waters are classified differently under the CWA (the Lake is a Class I water body and the canals are Class III water bodies); and (10) the waters that are backpumped into the

When the Eleventh Circuit heard the case on appeal in 2008, the EPA had codified its proposed Water Transfers Rule that the Florida district court had rejected. Because the EPA had not finalized its Water Transfers Rule when the district court made its findings, the Eleventh Circuit reviewed the case *de novo*.<sup>88</sup> One of the issues on appeal was the district court's requirement that SFWMD obtain an NPDES permit to continue pumping canal water into Lake Okeechobee.<sup>89</sup> While FOE contended that the water transfer triggered the NPDES requirement, SFWMD argued that the EPA's Water Transfers Rule exempted its pumping from the NPDES requirement.<sup>90</sup> The Eleventh Circuit was the first circuit court to address the statutory language "addition . . . to navigable waters" in light of the EPA's recently promulgated rule.<sup>91</sup> Therefore, it needed to determine whether the statutory language was ambiguous.<sup>92</sup>

When a case involves an agency's interpretation of a statute that the agency administers, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* is applied. *Chevron* established a two-step approach for a court to determine whether it must defer to an agency's interpretation.<sup>93</sup> If Congress expressly addressed the question at issue, then the statute is not ambiguous and the court must give effect to the intent of Congress.<sup>94</sup> If the court finds the statute to be silent or ambiguous on the question at issue, it must defer to the agency's interpretation unless the interpretation is procedurally defective, substantively capricious, or manifestly contrary to the statute.<sup>95</sup>

The Eleventh Circuit held that "addition . . . to navigable waters" was ambiguous because both FOE and the EPA offered reasonable interpretations.<sup>96</sup> Surveying the usage of "navigable

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Lake would not otherwise reach the Lake (in any significant amount, much less in the same quantities) but for the backpumping activities.

*Id.* at \*50.

88. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009).

89. *Id.* at 1216.

90. *See id.* at 1218–20.

91. *Id.* at 1218.

92. *Id.*

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

94. *Id.*

95. *Id.* at 844.

96. *Friends*, 570 F.3d at 1223.

waters” throughout the CWA and other water protection statutes, the court found that “[a]lthough Congress did use the term ‘any navigable waters’ in the Clean Water Act to protect individual water bodies, it also used the unmodified ‘navigable waters’ to mean the same thing.”<sup>97</sup>

Despite reservations about the rule’s environmental effects, the Eleventh Circuit upheld the Water Transfers Rule.<sup>98</sup> The court prefaced its decision by stating that the EPA’s construction might not be the reading the court would have reached had the question initially arisen in a judicial proceeding.<sup>99</sup> Although the court agreed that FOE’s interpretation supported the statutory purpose of the CWA, it rejected that position because the court was not authorized to “rewrite, revise, modify, or amend statutory language” while interpreting a statute.<sup>100</sup> Once the court found that the EPA’s rule was a reasonable interpretation of an ambiguous statute, it was forced to accept the Water Transfers Rule.<sup>101</sup>

To simplify the EPA’s rule, the Eleventh Circuit developed a hypothetical rule that removed the controversial environmental consequences. Its hypothetical, however, inadvertently illustrated the incompatibility between the Water Transfers Rule and the commonsense understanding of the term “addition.”<sup>102</sup> The court’s rule prohibited “any addition of any marbles to buckets by any person.”<sup>103</sup> Accordingly, the court asked: If there were two buckets, one empty and the other containing four marbles, and a person moved the marbles so that there were two marbles per bucket, have any marbles been added to the buckets?<sup>104</sup> Although FOE would argue that placing two marbles into the empty bucket is an addition, the Water Transfers Rule states that it is not because the marbles were already in one bucket.<sup>105</sup> Just as the second bucket was empty until the marbles were added, polluted water transferred into a clean body of water should constitute an

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97. *Id.* at 1225.

98. *Id.* at 1227–28.

99. *Id.*

100. *Id.* at 1224 (quoting *Nguyen v. United States*, 556 F.3d 1244, 1256 (11th Cir. 2009)).

101. *Id.* at 1228.

102. *See id.*

103. *Id.*

104. *Id.*

105. *Id.*

addition. Such a scenario should trigger the NPDES requirement.

The court's hypothetical rule also reveals the inconsistency between the Water Transfers Rule and the CWA's purpose. By permitting the transfer of polluted water without attaching federal water quality limitations, the Water Transfers Rule will undermine the progress made under the CWA. While the rule might make sense if the bodies of water are connected, it seems foolish when water is transferred from Colorado to California. Therefore, the Water Transfers Rule should be rejected and replaced with a more practical rule that maintains federal oversight of water transfers.

## II. WHY THE WATER TRANSFERS RULE SHOULD BE REJECTED

The Water Transfers Rule will facilitate the spread of polluted water across the United States by exempting pure water transfers from federal oversight. This rule undermines enforcement under the CWA and should be rejected for the following reasons: First, the CWA is unambiguous in its requirement that water transferors must obtain NPDES permits before transferring water. Thus, the Eleventh Circuit erred in finding that the statutory language was ambiguous. Second, the rule disregards the Supreme Court's requirement that water transferors must acquire NPDES permits if the water is transferred between meaningfully distinct bodies of water.<sup>106</sup> Finally, the Water Transfers Rule parallels the unitary waters theory, which perverts the common understanding of "addition" and is antipodal to the CWA.

### A. *The CWA's NPDES Requirement Is Not Ambiguous*

The Eleventh Circuit should have rejected the EPA's Water Transfers Rule because Congress intended that a water transferor obtain an NPDES permit before discharging pollutants. The statutory language reflects this intent in its unambiguous NPDES requirement for the discharge of any pollutant to navigable waters from a point source.<sup>107</sup> By

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106. See *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 112 (2004).

107. See *Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, No. 02-80309 Civ., 2006 WL 3635465, at \*36 (S.D. Fla. Dec. 11, 2006), *rev'd in part*,

focusing on “navigable waters” instead of “any addition,” however, the Eleventh Circuit found ambiguity where it does not exist. As a result, the *Friends of the Everglades* court accepted a rule that substantively changes the CWA under the pretense of clarification.

In its *Chevron* analysis, the *Friends of the Everglades* court mistakenly focused on the term “navigable waters” instead of the plain meaning of “any addition.” The two parties disagreed whether a water transfer constituted an “addition” of a pollutant, not whether the canals or the lake were “navigable waters of the United States.”<sup>108</sup> “Navigable waters” is simply a jurisdictional term identifying those bodies of water subject to federal regulation.<sup>109</sup> Other courts have found that the term “any addition” “unambiguously means that permits are required whenever there is something added to a body of ‘navigable waters’ ” from another meaningfully distinct body of water.<sup>110</sup> The Eleventh Circuit should have followed its sister circuit courts and focused its attention on whether “any addition” was ambiguous; instead, it misdirected its analysis by focusing on whether “navigable waters” meant “any navigable waters” or “navigable waters” as a whole.<sup>111</sup> By ignoring the plain meaning of the term “any addition” and focusing on “navigable waters,” the Eleventh Circuit found ambiguity where it did not exist.

The Eleventh Circuit’s misguided analysis compelled it to accept a rule that substantively changed the CWA under the guise of clarification. Not only does the Water Transfers Rule facilitate the transfer of polluted water throughout the Nation, but it also eliminates a means to fight water quality degradation.<sup>112</sup> Without the NPDES program for pure water transfers, concerned citizens can no longer sue to require

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*appeal dismissed in part sub nom.* *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009).

108. *Friends*, 570 F.3d at 1216–18.

109. See Petition for Writ of Certiorari at 18, *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 131 S. Ct. 645 (2010) (mem.) (No. 10-252), 2010 WL 3318307, at \*18; see also *Rapanos v. United States*, 547 U.S. 715, 730–31 (2006) (plurality opinion) (discussing the jurisdictional significance and scope of “navigable waters”).

110. Petition for Writ of Certiorari, *supra* note 109, at 17; see also *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001).

111. *Friends*, 570 F.3d at 1223–27.

112. See Brief for Grand Lake, *supra* note 12, at 15.

NPDES permits.<sup>113</sup> While most states have established their own permit requirements for water transfers, some have relied on NPDES permits either entirely or in part.<sup>114</sup> Pennsylvania, for example, has routinely required NPDES permits for interbasin water transfers since 1986.<sup>115</sup> Other states have required NPDES permits for transfers associated with anything from the expansion of a ski resort to the supply of drinking water.<sup>116</sup> After the EPA finalized its Water Transfers Rule, states may no longer rely upon the NPDES program in lieu of state permits to regulate pure water transfers. As a result, the EPA's rule has severely limited an important tool available to concerned citizens and states.

*B. The Water Transfers Rule Undermines Supreme Court Precedent*

The Water Transfers Rule also subverts the Supreme Court's holding that NPDES permits are required when water is transferred between meaningfully distinct bodies of water.<sup>117</sup> In *Miccossukee*, the Supreme Court held that the CWA requires an NPDES permit for the "discharge of a pollutant" from a point source into a meaningfully distinct body of water *even if* that source does not itself generate the pollutant.<sup>118</sup> But under the Water Transfers Rule, NPDES permits are required only if the point source subjects the water to "intervening industrial, municipal, or commercial use."<sup>119</sup> The Water Transfers Rule does not account for whether the bodies of water are meaningfully distinct. Therefore, the EPA's rule is inconsistent with the *Miccossukee* Court's holding.

The *Miccossukee* Court considered a question nearly identical to the one addressed by the *Friends of the Everglades* court: whether NPDES permits were necessary for SFWMD to

113. *See id.* at 17.

114. *See* ENVIRONMENTAL PROTECTION AGENCY, STATE NPDES PROGRAM AUTHORITY, available at [http://www.epa.gov/npdes/images/State\\_NPDES\\_Prog\\_Auth.pdf](http://www.epa.gov/npdes/images/State_NPDES_Prog_Auth.pdf).

115. *See* Petition for Writ of Certiorari at 14–18, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22793537, at \*14–18.

116. *See, e.g.,* Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 492–93 (2d Cir. 2001); *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1299 (1st Cir. 1996).

117. *See Miccosukee*, 541 U.S. at 105–12.

118. *Id.* at 105.

119. Water Transfers Rule, *supra* note 1, at 33,697.

pump water into Lake Okeechobee.<sup>120</sup> While the *Friends of the Everglades* court was concerned with the S-2, S-3, and S-4 pump stations, the *Miccosukee* Court dealt with the S-9 pump station.<sup>121</sup> It held that water transfers require NPDES permits only if they transferred polluted water between *meaningfully distinct* bodies of water.<sup>122</sup> Supporting its position, the Court looked to the CWA's definition of point source, "mak[ing] plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters,' which are, in turn, defined as 'the waters of the United States.'"<sup>123</sup> Unfortunately, the record was not developed enough to determine whether the canal water pumped by the S-9 station was meaningfully distinct from the lake.<sup>124</sup> Therefore, the Court did not address whether an NPDES permit is required when the bodies of water are not meaningfully distinct.<sup>125</sup> But the Water Transfers Rule has codified the same argument that the Supreme Court rejected.

Although the Court also addressed the unitary waters theory, it declined to rule on its validity because neither party raised the theory before the Eleventh Circuit or in briefing for certiorari.<sup>126</sup> Despite not ruling on the theory, the Court noted that "several NPDES provisions might be read to suggest a view contrary to the unitary waters approach."<sup>127</sup> Thus, it found that the argument that the NPDES program applies to

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120. See *Miccosukee*, 541 U.S. at 103.

121. *Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, No. 02-80309 Civ., 2006 WL 3635465, at \*33, \*37 (S.D. Fla. Dec. 11, 2006), *rev'd in part, appeal dismissed in part sub nom. Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009).

122. *Miccosukee*, 541 U.S. at 112.

123. *Id.* at 105 (citing 33 U.S.C. § 1362 (2000)).

124. *Id.* at 111.

125. *Id.*

126. *Id.* at 109.

127. *Id.* at 107. The Court continued:

For example, under the Act, a State may set individualized ambient water quality standards by taking into consideration "the designated uses of the navigable waters involved." Those water quality standards, in turn, directly affect local NPDES permits; if standard permit conditions fail to achieve the water quality goals for a given water body, the State must determine the total pollutant load that the water body can sustain and then allocate that load among the permit holders who discharge to the water body. This approach suggests that the Act protects individual water bodies as well as the "waters of the United States" as a whole.

*Id.* (citations omitted).

point sources only when a pollutant originates from that point source and not when pollutants that originated elsewhere merely pass through the point source was “untenable.”<sup>128</sup> While the *Miccosukee* Court remanded the case to the district court to determine if the waters were distinct, it hinted that an NPDES permit would be required if two bodies of water are “meaningfully distinct” and the pollutant would not enter the receiving body of water but for the point source.<sup>129</sup> Based on the *Miccosukee* Court’s unfavorable reception of the theory, it seems unlikely that the Supreme Court would favorably view a rule that parallels the unitary waters theory.

*C. The Unitary Waters Theory: An Impediment to Clean Water*

The unitary waters theory is antithetical to the very purpose of the CWA. The circuit courts have recognized this incongruity, as the theory has repeatedly struck out when raised before them.<sup>130</sup> “Even the Supreme Court has called a strike or two on the theory, stating in *Miccosukee* that ‘several NPDES provisions might be read to suggest a view contrary to the unitary waters approach.’”<sup>131</sup> Despite the theory’s poor track record, the EPA based its Water Transfers Rule on it anyway. But even if the EPA decides to recant its rule, the theory continues to be an insidious threat to the Nation’s waters. Therefore, the Supreme Court should deliver the theory’s third and final strike.

Until the EPA embraced the theory in its Water Transfers Rule, the unitary waters theory was rejected by every circuit court that had addressed it.<sup>132</sup> The Second Circuit held that “the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition

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128. *Id.* at 104–05.

129. *See id.* at 112. “After reviewing the full record, it is possible that the District Court will conclude that C-11 and WCA-3 are *not* meaningfully distinct water bodies. If it does so, then the S-9 pump station will not need an NPDES permit.” *Id.* (emphasis added).

130. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1217–18 (11th Cir. 2009).

131. *Id.* at 1218 (quoting *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 107 (2004)).

132. *See id.* at 1217.

and thus a 'discharge' that demands an NPDES permit."<sup>133</sup> In *Dubois v. U.S. Department of Agriculture*, the First Circuit declared that "[t]here is no basis in law or fact for the district court's 'singular entity' [unitary waters] theory."<sup>134</sup> The Ninth Circuit rejected a similar argument when it recognized that transporting water between water bodies *could* violate the CWA.<sup>135</sup> Even the Supreme Court in *Miccosukee* effectively dismissed it by suggesting that the CWA protects both individual water bodies and the waters of the United States as a whole.<sup>136</sup>

Yet the EPA adopted the unitary waters theory in its rule. As a result, the Water Transfers Rule has created a gaping regulatory hole that frustrates the CWA's purpose and jeopardizes the federal government's ability to ensure that water quality standards are achieved and maintained.<sup>137</sup> Congress declared that the CWA's purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>138</sup> However, both the unitary waters theory and the Water Transfers Rule are antithetical to this goal because they facilitate the spread of pollutants by severely restricting the NPDES program.

NPDES permits can play an important role in limiting the spread of nonpoint source pollution. For example, in Montana a coal bed methane extraction operation was pumping saline groundwater containing chemical constituents that EPA regulations had identified as pollutants, and discharging it into a river.<sup>139</sup> The saline groundwater degraded the river water so much that it was unfit for irrigation.<sup>140</sup> If Montana transferred

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133. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001).

134. *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1296 (1st Cir. 1996). In *Dubois*, the First Circuit needed to determine whether withdrawing water from two meaningfully distinct bodies of water for snowmaking activities and then depositing all of the water, which contained pollutants, back into one body of water required an NPDES permit. *Id.*

135. *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1163 (9th Cir. 2003).

136. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 107 (2004).

137. *See* 33 U.S.C. § 1251(a) (2006).

138. *Id.*

139. *N. Plains Res. Council*, 325 F.3d at 1157.

140. *Id.* at 1163. The groundwater had a high Sodium Absorption Ratio (SAR), which measures the water's ratio of sodium to calcium and magnesium. The SAR of the water discharged into the Tongue River was between forty to sixty times greater than the Tongue River's SAR. *Id.* at 1158. As the court noted:

that water to other rivers and lakes for mining purposes, it would pollute other bodies of water within the state. Requiring NPDES permits for pure water transfers can limit the spread of pollutants already introduced by nonpoint sources.<sup>141</sup> Exempting pure water transfers from the NPDES requirement eliminates a federal check on nonpoint source pollution.

Invalidating the unitary waters theory will enable the CWA to function as Congress intended. NPDES permits are especially powerful when pollutants are not discharged into the water but are naturally occurring instead. Under the unitary waters theory, however, federal permits are not required to transfer these pollutants.<sup>142</sup> By adopting the unitary waters theory in its Water Transfers Rule, the EPA has punctured the CWA and facilitated the spread of nonpoint source pollution through water transfers. Therefore, if presented with the opportunity, the Supreme Court should find that the unitary waters theory is an improper interpretation of the CWA.

Alternatively, mandating NPDES permits for all water transfers will produce just as absurd a result as the current Water Transfers Rule. While requiring NPDES permits for every discharge would certainly improve the quality of the Nation's "navigable waters," the cost of compliance and the administrative burden might make this impractical. Such an

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Farmers who use water from the Tongue River for irrigation are concerned with the "saltiness" and high SAR of [coal bed methane (CBM)] water because of the potential hazards these characteristics pose to soil structure. High SAR water, such as CBM water, causes soil particles to unbind and disperse, destroying soil structure and reducing or eliminating the ability of the soil to drain water. The Montana Department of Environmental Quality (MDEQ), in a Final Environmental Impact Statement analyzing coal bed methane extraction, warns that "clayey" soil, like that in the Tongue River Valley, is vulnerable to damage from high SAR water. Fidelity's soil expert concluded that "the SAR of CBM water creates a permeability hazard and precludes its use for irrigation without mixing, treatment or addition of soil amendments." The MDEQ cautioned that unregulated discharge of CBM water would cause "[s]urface water quality in some watersheds [to] be slightly to severely degraded, resulting in restricted downstream use of some waters."

*Id.* (second and third alterations in original) (citation omitted).

141. See Brief for Grand Lake, *supra* note 12, at 17–18; see also Sara Colangelo, Comment, *Transforming Water Transfers: The Evolution of Water Transfer Case Law and the NPDES Water Transfers Proposed Rule*, 35 *ECOLOGY L.Q.* 107, 140 (2008).

142. See discussion *supra* Part I.A.

over-inclusive NPDES requirement would devastate economies dependent on water transfers, especially in the West. While the NPDES program should limit and monitor the spread of pollutants, its requirement should also be cost-effective and administratively feasible. Therefore, if the Water Transfers Rule is changed, a balance must be struck between protecting the Nation's waters and promoting feasibility and efficiency.

### III. WATER TRANSFERS IN THE WEST

The economic well-being of the West is deeply interwoven with the ability to transfer water over great distances.<sup>143</sup> Generally arid, much of the West receives fewer than ten inches of precipitation per year.<sup>144</sup> This is significantly less than the thirty inches of annual precipitation necessary to sustain non-irrigated agriculture.<sup>145</sup> Yet the West also hosts both large agricultural centers and urban areas.<sup>146</sup> These farms and cities often rely on a conveyance that transfers water vast distances and through many point sources and bodies of water before the water is finally used.<sup>147</sup> Therefore, any change to the Water Transfers Rule must consider the West's heavy dependence on water transfers.<sup>148</sup>

Most of the precipitation that does fall in the West falls as snow. The water must be captured when and where the snow melts, often in mountainous areas far from the major urban and agricultural districts that depend upon the water.<sup>149</sup> “[T]he majority of the precipitation in the seven-state Colorado River basin, an area encompassing 250,000 square miles, falls as snow on land at elevations above 9,000 feet—just five percent

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143. See Colangelo, *supra* note 141, at 11; see also Jedidiah Brewer et al., *Transferring Water in the American West: 1987–2005*, 40 U. MICH. J.L. REFORM 1021, 1021–25 (2007).

144. Janet C. Neuman, *Drought Proofing Water Law*, 7 U. DENV. WATER L. REV. 92, 93 (2003).

145. Brief for Colorado et al. as Amici Curiae Supporting Respondents at 2–3, *Friends*, 570 F.3d 1210 (2009), Nos. 10-196, 10-252, 2010 WL 4232627, at \*2–3 (11th Cir. Oct. 22, 2010) [hereinafter Brief for Colorado].

146. See *id.* at 3.

147. See *infra* note 153 and accompanying text for discussion of the Colorado-Big Thompson project.

148. See Brief for City & County of Denver et al. as Amici Curiae Supporting Respondents at 1, *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 131 S. Ct. 645 (2010) (mem.) (No. 10-196), 2010 WL 4255028, at \*1 [hereinafter Brief for Denver].

149. Brief for Colorado, *supra* note 145, at 1.

of the basin's land area."<sup>150</sup> As spring arrives in the mountains, snowmelt revives the ephemeral streams that permeate the West. Thus, spring runoff in the West is the major water supply. Because this runoff can occur in remote areas far from the thirsty agricultural and urban areas, many western states have developed complex diversion projects that bring water over vast distances.<sup>151</sup> These elaborate water transfers enable many important agricultural regions to grow crops and supply water to many of the West's great cities including Albuquerque, Cheyenne, Colorado Springs, Denver, Los Angeles, Las Vegas, Phoenix, Reno, Salt Lake City, San Diego, San Francisco, Santa Fe, Seattle, and Tucson.<sup>152</sup>

But these water transfers, which are so essential to the West's economic well-being, can also harm its lakes and rivers by introducing pollutants from distant regions. While NPDES permits can limit the spread of these pollutants, each permit comes with substantial financial and administrative costs. An NPDES permit for each point source discharging pollutants would limit and monitor much of the contamination resulting from a water transfer. But complying with such a requirement might prove too costly, burdensome, or even futile for larger water diversions. Some complex diversions in the West integrate many point sources into multiple lakes and rivers.<sup>153</sup> Ensuring NPDES limitations are met at each point source discharging pollutants would result in the same transferor complying with a number of limitations that might vary significantly by point source. Furthermore, the high cost of compliance might overwhelm an individual transferor such as an agribusiness, a city, or a small town. Nevertheless, exempting pure water transfers from the NPDES program

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150. Brief for Denver, *supra* note 148, at 1–2.

151. *See id.*

152. Brief for Colorado, *supra* note 145, at 3.

153. *See* Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist., No. 02-80309 Civ., 2006 WL 3635465, at \*30 (S.D. Fla. Dec. 11, 2006), *rev'd in part, appeal dismissed in part sub nom.* Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210 (11th Cir. 2009). The Central Utah Project's Bonneville Unit includes ten reservoirs and a complex system of canals, pipelines, and tunnels to transport water from the Colorado River. The Colorado-Big Thompson Project often relies on pumps as the primary means of diverting water from the western slope of the Continental Divide to the eastern slope. This project's primary purpose is to provide irrigation water, to supply municipal water, and to generate hydroelectric power. The Fryingpan-Arkansas Project transports water through a series of conveyances and utilizes pumps in doing so. *Id.*

cannot be tolerated at a time when the West is importing more water from distant areas. Therefore, the EPA should find a balance between an over-inclusive NPDES permit requirement and the current Water Transfers Rule.

A. *The Effects of NPDES Permits on Water Transfers in the West*

Western states have increasingly turned to complex water diversions that transfer water vast distances through many point sources to solve the problem of declining water supply and increased urban demand.<sup>154</sup> Although an over-inclusive NPDES requirement might lead to cleaner water, compliance costs would be so severe that it would limit these transfers and impede the West's growth. Mandating a permit for each point source discharging pollutants might be prohibitively expensive and dissuade states from undertaking future diversion projects.

The scarcity of water in the West has forced many western states to rely on complex water diversions to import water from rural areas to regions with high urban demand.<sup>155</sup> For example, approximately 229 billion gallons of water are moved from the Upper Colorado River Basin to other basins in Colorado and other states through at least thirty-six major water diversions.<sup>156</sup> One example of such a diversion is the Bureau of Reclamation's Colorado-Big Thompson (C-BT) Project, which transports water across the Continental Divide to the more populated eastern slope.<sup>157</sup> Together, gravity and three pump stations push the water through two tunnels and nine canals and then into and out of at least seventeen different water bodies.<sup>158</sup> Treating polluted water every time it is discharged from a point source could raise the cost of treating C-BT water so much that it would exceed \$315 million,

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154. See *id.* at \*30–31; see also Laura A. Schroeder & Kendall A. Woodcock, *Turbid Waters: The Interaction Between Interbasin Transfers and the Clean Water Act*, NEV. LAW., Jan. 2011, at 12, available at <http://documents.scribd.com/s3.amazonaws.com/docs/96dbnq8r7k102qrs.pdf?t=1307941552>.

155. Water is “imported” through conveyances, or water transfers, which “may be as simple as the diversion of water from a river into an adjacent (but hydrologically separate) stream for irrigation of a nearby field, or as complex as the interstate San Juan-Chama Project, which transfers water across the Continental Divide and across the Colorado-New Mexico state line.” Brief for Colorado, *supra* note 145, at 2–3.

156. *Id.* at 2.

157. Brief for Denver, *supra* note 148, at 13.

158. *Id.*

double the cost of the project itself.<sup>159</sup> Requiring individual NPDES permits for each point source in complex water diversions such as the C-BT Project would dissuade planners from constructing future projects if compliance costs are prohibitively expensive.<sup>160</sup>

An over-inclusive NPDES program would also burden the West immensely by forcing states to monitor and treat naturally occurring pollutants. Spring runoff erodes Colorado's mineralized mountains, carrying particles of soil and sediment downstream into canals and ditches.<sup>161</sup> Treating these natural pollutants at every point source would be expensive and impractical. In order to treat the water, municipalities or states would have to construct million dollar treatment facilities.<sup>162</sup> But these "expensive treatment plants would operate for just a few weeks or months because water is usually available for transfer only during snowmelt (fifty percent of mountain stream flow occurs in just three months: May, June, and July)."<sup>163</sup> Therefore, treating spring runoff might be an inefficient use of limited state resources.

Western states must plan complex water diversion projects years in advance to meet future demand.<sup>164</sup> For example, the city of Thornton, Colorado, has estimated that full development of its Northern Project will cost roughly \$427 million in order to meet the city's water demand through the year 2031.<sup>165</sup> The uncertain future of the NPDES program might dissuade cities like Thornton from undertaking costly new water diversion projects. While the EPA's current rule exempts water transfers from NPDES requirements, future court challenges may limit or reverse this rule. Although the EPA rule reaffirms the rights of states to conduct these transfers, the fact that its underlying theory has been rejected by a number of circuit courts has left many states uncertain as to the rule's long-term viability.<sup>166</sup> Adding to this uncertainty, the EPA has been reconsidering its

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159. *Id.*

160. *See* S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 108 (2004).

161. Brief for Denver, *supra* note 148, at 11–12.

162. *See id.* at 12–13.

163. *Id.* at 13.

164. *See, e.g.,* City of Thornton v. Bijou Irrigation Co., 926 P.2d 1, 20–21 (Colo. 1996).

165. *Id.* at 21.

166. Brief for Colorado, *supra* note 145, at 5–6.

Water Transfers Rule.<sup>167</sup> If the EPA decides to keep the current rule, Congress or the courts may override the EPA's rule and require NPDES permits for water transfers. Therefore, either Congress should provide clarity by amending the CWA's NPDES requirement, or the Supreme Court should decide the validity of the unitary waters theory or the Water Transfers Rule.

*B. A World Without NPDES Permits*

While the costs of an over-inclusive NPDES program are high, an under-inclusive or non-existent program will produce more harm than good. NPDES permits are an important tool that citizens can use to limit pollutant discharges.<sup>168</sup> Section 301(a) of the CWA enables citizens to sue a discharger to force it to obtain an NPDES permit before it continues discharging pollutants.<sup>169</sup> Regrettably, the current Water Transfers Rule has eliminated the ability to bring a citizen suit for pollutant discharges from water transfers.<sup>170</sup> Under the current Water Transfers Rule, FOE would be unable to bring another suit to require NPDES permits if it discovered that other pumps were transferring pollutants into the lake, even if the Eleventh Circuit agreed that SFWMD pumps were introducing pollutants into Lake Okeechobee.<sup>171</sup> Although this rule might eliminate some vexatious lawsuits, its sweeping effect will foreclose many bona fide lawsuits as well.

Citizen suits are especially useful in the West. With a high demand and limited water supply, the West is increasingly relying on large water diversion projects that transfer water across state boundaries and through multiple point sources and water bodies.<sup>172</sup> Because these diversions are complex, state regulators may overlook the pollutant discharges into some

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167. *Id.* at 6 n.3.

168. *See* Gaba, *supra* note 22, at 418–19.

169. 33 U.S.C. § 1365(a)(1) (2006).

170. *See* Brief for Grand Lake, *supra* note 12, at 17; *see also* Gaba, *supra* note 22, at 419. Ironically, the EPA enacted its rule as a result of a citizen suit. *See* Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist., No. 02-80309 Civ., 2006 WL 3635465, at \*1 (S.D. Fla. Dec. 11, 2006), *rev'd in part, appeal dismissed in part sub nom.* Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210 (11th Cir. 2009).

171. Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210, 1214 (11th Cir. 2009).

172. *See* David Petersen, Book Note, 23 *ECOLOGY L.Q.* 788, 791–92 (1996).

lakes and rivers that are components of the diversion.<sup>173</sup> Thus, states may allow the degradation of lakes and rivers if they are components of a large water transfer. For example, water transfers from a nearby water body, Shadow Mountain Reservoir, are deteriorating the water quality in Grand Lake, Colorado.<sup>174</sup> Both Grand Lake and Shadow Mountain Reservoir function as part of the larger C-BT project.<sup>175</sup> Because the EPA's rule eliminates the need to obtain NPDES permits for these transfers, Grand Lake's citizens are deprived of an important possible remedy.

Water from Shadow Mountain Reservoir replenishes Grand Lake when lake water is transferred to the eastern slope of the Rocky Mountains.<sup>176</sup> With a maximum depth of only twenty-four feet, Shadow Mountain Reservoir is considerably warmer than Grand Lake, which is 265 feet deep.<sup>177</sup> Shadow Mountain Reservoir's warm water experiences seasonal algal blooms, excessive growth of aquatic vegetation, increased concentrations of nitrogen and phosphorous, and low concentrations of dissolved oxygen.<sup>178</sup> When this water, full of algae, chlorophyll, and dissolved solids, is pumped into Grand Lake, it seriously affects the lake's natural biological conditions.<sup>179</sup> For example, in 2007 Colorado's government advised visitors not to swim, bathe, or drink from Grand Lake and Shadow Mountain Reservoir because levels of microcyst toxin, which is produced by algal blooms, exceeded safe levels.<sup>180</sup> These blooms would not have occurred naturally in Grand Lake without the water transfers from Shadow Mountain Reservoir.<sup>181</sup> Grand Lake's water clarity has suffered as well. In late 1941, Grand Lake's water clarity was measured at 9.2 meters.<sup>182</sup> Since the introduction of Shadow Mountain

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173. See Brief for Grand Lake, *supra* note 12, at 18. Grand Lake is one component of the C-BT project. It appears that Colorado's regulators have allowed the pollution of Grand Lake because the C-BT project provides a net benefit to the state.

174. See *id.* at 4.

175. *Id.*

176. *Id.* at 5–6.

177. *Id.* at 9.

178. *Id.* at 9–10.

179. *Id.* at 10.

180. *Id.* at 12.

181. See *id.*

182. *Id.* at 11. Water clarity “is typically measured through the use of a ‘Secchi disk,’ a circular disk bearing a high-contrast pattern that is attached to a line or

water, water clarity has diminished significantly, reaching a low of 1.37 meters in 2007.<sup>183</sup> The plight of Grand Lake manifests the importance for the ability of citizen suits to require a point source to comply with NPDES permit limitations. Absent this federal remedy, concerned citizens must turn to other solutions to stop the untreated transfers that have deteriorated Grand Lake's water quality, damaged its ecosystem, and affected its tourism.<sup>184</sup>

Without NPDES permits to cover interbasin transfers, transferors must look to state law to provide certainty for environmental concerns. Although states have provisions to address issues raised by complex transfers, some states have regulatory loopholes.<sup>185</sup> Nevada, for example, does not have a provision addressing potential water quality impacts on the receiving basin.<sup>186</sup> Nevada can fill this regulation gap to reduce uncertainty, as well as the cost and impact of interbasin transfers.<sup>187</sup> However, Nevada's regulation establishing water quality limitations on the receiving basin might differ drastically from, for example, Arizona's regulation. Therefore, a complex water diversion involving both Nevada and Arizona would have to comply with two different requirements instead of one. For this reason, uniform limitations in federal permits would lower costs and benefit both the states and the environment.

#### IV. GENERAL NPDES PERMITS: A POSSIBLE SOLUTION

At least some aspect of the NPDES program should be required for water transfers, especially when complex diversions transfer water between states and through multiple point sources. Without federal oversight, discordant state laws or inadequate laws protecting the receiving water basin will be insufficient to control the spread of pollutants through water transfers. However, due to the varying magnitudes of water transfers, NPDES permits must be administered in both a practical and flexible manner. Requiring individual NPDES

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pole and then lowered into the water body. The depth at which the disc can no longer be seen is termed the 'Secchi depth.' *Id.* at 11 n.9.

183. *Id.* at 13.

184. *See id.* at 4-13.

185. *See* Schroeder & Woodcock, *supra* note 154, at 14.

186. *Id.*

187. *Id.*

permits for each point source discharging pollutants is too costly and administratively burdensome. But exempting pure water transfers from the NPDES requirement is foolish because it weakens environmental protection in exchange for relieving the EPA of a supervisory duty. Therefore, Congress or the EPA should develop a solution to the NPDES conundrum consisting of general NPDES permits that balance environmental considerations with cost and the ability of the EPA to administer and monitor these permits.

General permits covering pure water transfers offer a better alternative than the Water Transfers Rule. A general permit is a mechanism that allows the EPA to issue a single permit containing a common set of pollutant limitations and other conditions that can be applied to a large number of sources.<sup>188</sup> To be covered under the permit, eligible point sources must submit only a "Notice of Intent."<sup>189</sup> Once a source is covered under a general permit, it is authorized to discharge pollutants under the terms established by the general permit without additional government review or public participation.<sup>190</sup> Although the CWA does not expressly authorize the EPA to issue general NPDES permits, Congress has acknowledged their use for storm water discharges.<sup>191</sup> In the past, the EPA has issued hundreds of general permits for multiple uses covering thousands of point sources.<sup>192</sup> General permits are attractive for a government agency because it can issue them relatively quickly with limited paperwork and administrative burden.<sup>193</sup> For instance, the EPA can issue a general NPDES permit for all pollutant discharges into a single body of water, or it can also cover all the point sources included in a complex water diversion.<sup>194</sup> Practicality alone should convince the EPA to replace its Water Transfers Rule with a general NPDES permit system to cover water transfers. This would enable the EPA to balance its administrative resources with its duty to protect the environment.

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188. Gaba, *supra* note 22, at 419.

189. *Id.*

190. *Id.* at 411.

191. *Id.*; *see also* Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1068, 105 Stat. 1914, 2007-08 (1991). These provisions are not codified as part of the Clean Water Act.

192. Gaba, *supra* note 22, at 411.

193. Petition for Writ of Certiorari, *supra* note 109, at 16.

194. *See* Gaba, *supra* note 22, at 411.

Even though a general permit system is a better alternative to the current Water Transfers Rule, it offers fewer environmental protections than individual NPDES permits. Because general permits are developed with a broad scope, they inevitably overlook discharges that would be prohibited by an individual permit.<sup>195</sup> A general NPDES permit covering discharges into Grand Lake, for example, might not stop the natural pollutants that are devastating the lake because a general permit covering the entire C-BT project will not necessarily cover some of those pollutants. However, a general NPDES permit covering some pollutants is a better alternative than no permit. Plus, if the Water Transfers Rule were removed, citizens could once again sue to require an NPDES permit for an individual point source when a general permit is insufficient. Even though the EPA might have to supplement a general permit with individual permits, this is much less burdensome than issuing individual permits for each point source. General permits will not provide the same level of environmental protection that an individual permit for each point source would provide, but at some point we must balance concerns about water quality with practicality.

While a general permit system is a feasible option, it might violate the CWA's requirement that permits for discharges "require controls to reduce the discharge of pollutants to the maximum extent practicable."<sup>196</sup> The very nature of a general permit system could result in the EPA neglecting its responsibility to make individualized findings at each point source.<sup>197</sup> Another possible CWA violation that could result from the use of general permits is that they do not "contain express requirements for public participation in the NPDES permitting process."<sup>198</sup> In *Environmental Defense Center, Inc. v. U.S. Environmental Protection Agency*, the Ninth Circuit held that a general permitting system for storm water discharges violated both the individualized findings requirement and the public participation requirement of the CWA.<sup>199</sup> Under current law, it appears that a court will not uphold the use of general permits even when Congress has specifically acknowledged

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195. *Id.* at 433.

196. 33 U.S.C. § 1342(p)(3)(B)(iii) (2006).

197. *See* *Env'tl. Def. Ctr. v. U.S. Env'tl. Prot. Agency*, 344 F.3d 832, 859 (9th Cir. 2003).

198. *Id.* at 852.

199. *Id.*

their application. Therefore, if the EPA wishes to use general permits instead of burdensome individual permits, Congress should amend the CWA to expressly allow them.

#### CONCLUSION

The Water Transfers Rule is untenable because it significantly weakens the CWA by increasing the likelihood that water transfers will introduce pollutants into clean lakes and rivers. Furthermore, it has revitalized the unitary waters theory, which, if adopted in other jurisdictions, will impede the ability to ensure that clean water quality standards are maintained. Therefore, the Water Transfers Rule must be replaced with an approach that rejects the unitary waters theory and restores federal oversight to pure water transfers. But any solution should not require individual permits for each point source discharging pollutants because this unnecessarily burdens the EPA and imposes excessive compliance costs on the transferor. Therefore, the EPA should implement a general NPDES program as a practical solution that balances administrative, environmental, and transferor interests.

To ensure that the NPDES program adequately protects the Nation's waters, Congress must amend the CWA. First, the CWA should explicitly require an NPDES permit for each pollutant discharge from a point source involved in a pure water transfer. This would decrease the likelihood that water transfers would pollute the receiving body of water by retaining an important level of federal oversight that would supplement state water quality standards. Second, Congress should authorize general permits for the NPDES program. This would enable the EPA to replace burdensome individual permits with a practical general permit system based on regions, water basins, or point sources. No matter how Congress or the EPA replaces the Water Transfers Rule, it must balance cost and practicality while preserving the CWA's integrity.