
NOTE

South Florida Water Management District v. Miccosukee Tribe of Indians: The Slippery Slope to Federal Control of State Water Diversions

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INTRODUCTION

Environmental regulation in the United States operates under the system of federalism and depends upon state and federal cooperation for its effective enforcement.¹ States play a prominent role within this framework in administering and enforcing national environmental policies.² Since the inception of national water quality control, in particular, Congress has sought to balance authority between the federal and state governments.³ The Clean Water Act ("CWA"), the nation's current comprehensive water pollution control statute, continues this trend by maintaining a division of power between federal and local regulatory agencies.⁴

Significant state involvement in environmental protection is essential.⁵ States are more capable of responding to scientific development and discovery by efficiently revising their own environmental standards.⁶ States can also better assess the local economic impact of water quality and develop water quality control measures accordingly.⁷ In fact, many analysts suggest that state, rather than federal, legislation marks the future of successful environmental regulation.⁸ Nevertheless, the U.S.

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¹ Kenneth M. Murchison, *Environmental Law in Australia and the United States: A Comparative Overview*, 22 B.C. ENVTL. AFF. L. REV. 503, 540 (1995) (comparing federalist aspects of environmental law in Australia and United States); see U.S. Env'tl. Prot. Agency, Water Quality Standards Program History, <http://www.epa.gov/Region8/water/wqs/wqshistory.html> (last visited Dec. 12, 2005) [hereinafter EPA Program History].

² Murchison, *supra* note 1, at 540.

³ Water Pollution Control Act of 1948, Pub. L. No. 845, 62 Stat. 1155 (codified as amended at 33 U.S.C. §§ 1251-1376 (2004)); EPA Program History, *supra* note 1. National water pollution control was first instituted with the Water Pollution Control Act of 1948. *Id.*

⁴ See 33 U.S.C. § 1251; EPA Program History, *supra* note 1.

⁵ See EPA Program History, *supra* note 1.

⁶ *Id.*

⁷ *Id.*

⁸ Dale Bish, Note, *The Unfounded Fears of Environmental Balkanization, The Ninth Circuit's Dangerous Expansion of the Commerce Clause*, 37 U.C. DAVIS L. REV. 605, 606-08 (2003) (arguing that Ninth Circuit erred in using Commerce Clause to invalidate Arizona state environmental law); see DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* 259 (1995); Barry G. Rabe, *Power to the States: The Promise and Pitfalls of Decentralization*, in ENVIRONMENTAL POLICY: NEW DIRECTIONS FOR

Supreme Court's decision in *South Florida Water Management District v. Miccosukee Tribe of Indians* impedes the states' ability to enforce comprehensive water quality regulations that address local problems and demands.⁹

Under the CWA, Congress divided regulatory authority between state and federal governments based upon the source of the water pollution in question.¹⁰ It made this distinction by dividing all pollution discharges into two categories: point source discharges and nonpoint source discharges.¹¹ Congress allocated point source pollution regulation to the federal government and left nonpoint source regulation to the states.¹² Under the CWA's statutory framework, federalism is subject to the courts' interpretation of "point source pollution" vis-à-vis "nonpoint source pollution."¹³ Moreover, controversy surrounds the definition of a "point source" and the corresponding scope of federal regulatory authority.¹⁴

In *Miccosukee*, the Supreme Court expanded the definition of "point source pollution" to include point source discharges that do not themselves generate pollutants.¹⁵ This decision thereby increased federal regulatory oversight of water diversions traditionally controlled by states.¹⁶ The following two scenarios help to illustrate this increase in federal authority. In each case, although the local entities merely divert unaltered water to remedy local problems, *Miccosukee* renders the diversions subject to federal government regulation.

In the flood control scenario, a locally governed water resource management district constructs a complex water channeling system to

THE TWENTY-FIRST CENTURY 32 (Norman J. Vig & Michael E. Kraft eds., 2000); Robert Pear, *Shifting Power from Washington is Seen Under Bush*, N.Y. TIMES, Jan. 7, 2001, at A1.

⁹ See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 105 (2004).

¹⁰ 33 U.S.C. §§ 1341-1346 (2000); Robin Kundis Craig, *Local or National? The Increasing Federalization of Nonpoint Source Pollution Regulation*, 15 J. ENVTL. L. & LITIG. 179, 179-80 (2000) (discussing increasing federal control over nonpoint source pollution).

¹¹ See Craig, *supra* note 10, at 179-80; Sarah J. Russell, *Battle of the Titans: Federal Clean Water Act vs. States Rights*, 7 A.B.A. WATER RESOURCES COMM. NEWSL., Feb. 2004, at 9 (highlighting tension between federal and state governments regarding water quality management); cf. 33 U.S.C. §§ 1288(b)(2)(F), 1288(j)(1), 1311, 1314(f), 1329, 1362(14).

¹² See 33 U.S.C. §§ 1329, 1342; Russell, *supra* note 11, at 11.

¹³ Craig, *supra* note 10, at 179-80; cf. 33 U.S.C. §§ 1341-1346.

¹⁴ See James Boyd, *The New Face of the Clean Water Act, A Critical Review of the EPA's New TMDL Rules*, 11 DUKE ENVTL. L. & POL'Y F. 39, 63 (2000); see also *Miccosukee*, 541 U.S. at 100-05 (expanding definition of "point source discharge").

¹⁵ *Miccosukee*, 541 U.S. at 105.

¹⁶ See Boyd, *supra* note 14, at 63; cf. 33 U.S.C. §§ 1329, 1342.

prevent flooding.¹⁷ This system redirects groundwater and rainwater from urban, agricultural, and residential developments, pumping the water through a point source into an undeveloped wetland.¹⁸ Although the district does not add contaminants to the water, the rainfall absorbs contaminants before entering the canal.¹⁹ Only after employing strict water quality controls does the district pump the water into the undeveloped wetland.²⁰

Next, in the context of water supply, a locally engineered tunneling system diverts water from a mountainous region within the state, pumping the supply through a point source into the city's water storage and distribution system.²¹ The purpose of the transfer is to provide an adequate water supply for the city's inhabitants.²² Therefore, the city imposes strict water quality regulations on the transfer.²³ Though the city does not add any pollutants to the water during the transfer process, the water contains sediments from the mountain's watersheds.²⁴

In the above circumstances, the local entities do not add pollutants to the water.²⁵ Rather, they are simply diverting water to remedy local problems: flooding and an insufficient water supply.²⁶ Federal regulation in such cases is superfluous because the local entities employ their own regulations to address water quality concerns.²⁷ Under the Supreme Court's expansive definition of a "point source," however, both water transfers are nonetheless subject to federal regulation and oversight.²⁸ Such federal intrusions pose significant barriers to these water transfer solutions.²⁹ Federal permitting requirements limit the type and quantity of pollutants that dischargers may release.³⁰ Among other requirements, federal oversight entails public hearings,

¹⁷ See *Miccosukee*, 541 U.S. at 99-101.

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.*

²¹ See *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481, 484 (2d Cir. 2001).

²² See *id.*

²³ See *infra* Part III.C.

²⁴ See *Catskill Mountains*, 273 F.3d at 485.

²⁵ See *Miccosukee*, 541 U.S. at 105; *Catskill Mountains*, 273 F.3d at 484.

²⁶ See *Miccosukee*, 541 U.S. at 99-101; *Catskill Mountains*, 273 F.3d at 484.

²⁷ See *infra* Part III.C.

²⁸ See *Miccosukee*, 541 U.S. at 105; *Catskill Mountains*, 273 F.3d at 484.

²⁹ Susan Joseph-Taylor, *U.S. Supreme Court's Remand of Miccosukee Should Not Comfort Western States*, 7 A.B.A. WATER RESOURCES COMM. NEWSLETTER, May 2004, at 5.

³⁰ *Id.*

recordkeeping, and reporting.³¹ This federal intrusion is unnecessary and unwarranted.³²

This Note argues that the Supreme Court defined “point source discharges” too broadly in *Miccosukee*, thereby inappropriately expanding federal regulatory authority under the CWA.³³ Part I discusses the legal background that fuels the dispute over federal water quality regulation.³⁴ It focuses on the legal interpretations of point source discharges as well as proper federal-state cooperation under the CWA.³⁵ Part II discusses the facts, holding, and rationale of the *Miccosukee* case.³⁶ It also examines *Miccosukee*’s effects on the scope of federal water quality regulation as a whole.³⁷ Part III argues that the Supreme Court’s broad holding contradicts an express legislative intent not to interfere with state water rights and water allocation.³⁸ It demonstrates that this overbroad holding deviates from a historical and purposeful federal deference to state water law.³⁹ Finally, Part III asserts that states already adequately address water quality concerns arising from the diversion and delivery of water supplies.⁴⁰ Thus, federal regulation of such water transfers does not provide substantial environmental benefits.⁴¹

³¹ 33 U.S.C. § 1342(a)(1) (2000); Robin Kundis Craig, *Beyond SWANCC: The New Federalism and Clean Water Act Jurisdiction*, 33 ENVTL. L. 113, 118 (2003).

³² See, e.g., Brief for the United States as Amicus Curiae Supporting Petitioner at 12-15, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (No. 02-626) [hereinafter Brief for the United States] (arguing that 11th Circuit’s holding unnecessarily intrudes on state water rights).

³³ See *Miccosukee*, 541 U.S. at 105.

³⁴ See Water Pollution Control Act of 1948, Pub. L. No. 845, 62 Stat. 1155 (codified as amended at 33 U.S.C. §§ 1251-1376 (2004)); EPA Program History, *supra* note 1.

³⁵ See 33 U.S.C. §§ 1341-1346; *Concerned Area Residents for Env’t v. Southview Farm*, 34 F.3d 114, 118 (2nd Cir. 1994); *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646-49 (2nd Cir. 1993); *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1243 (10th Cir. 1979); *United States v. Earth Scis., Inc.*, 599 F.2d 368, 371 (10th Cir. 1979); Craig, *supra* note 10, at 179-80.

³⁶ *Miccosukee*, 541 U.S. at 99-112.

³⁷ *Id.*

³⁸ See 33 U.S.C. § 1251(g).

³⁹ See *California v. United States*, 438 U.S. 645, 653 (1978); Brief for Colorado et al. as Amici Curiae in Support of Petitioner at 12-15, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (No. 02-626) [hereinafter Brief for Colorado].

⁴⁰ See Craig, *supra* note 10, at 185.

⁴¹ See Brief for the United States, *supra* note 32, at 26-28.

I. BACKGROUND

In 1948, Congress adopted the Water Pollution Control Act ("WPCA"), the nation's first comprehensive legislation targeting water quality.⁴² Although the law provided for the development of cooperative state and federal programs, it limited the federal government's enforcement authority and financial assistance.⁴³ Between 1956 and the early 1970s, however, Congress passed a series of amendments to broaden the federal government's power.⁴⁴ By this time, nearly every state had already developed its own water quality standards.⁴⁵ Thus, Congress's expansion of federal authority, and the new accompanying federal regulations, resulted in a "hodgepodge" of water quality laws.⁴⁶ This patchwork of state and federal laws led to sporadic and inefficient federal and local enforcement of water pollution controls.⁴⁷

⁴² Water Pollution Control Act of 1948, Pub. L. No. 845, 62 Stat. 1155 (1948) (codified as amended at 33 U.S.C. §§ 1251-1376 (2004)); EPA Program History, *supra* note 1.

⁴³ Water Pollution Control Act; Elaine Eichlin Henniger, Note, Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.: *Congressional Ambiguity Allows EPA's Safety Valve to Remain Open*, 35 CATH. U. L. REV. 595, 600-01 (1986); EPA Program History, *supra* note 1.

⁴⁴ Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (codified as amended at 33 U.S.C. §§ 1251-1376 (2000)) (expanding federal involvement in water pollution control by regulating oil and hazardous substances for first time); Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87-88, 75 Stat. 204 (codified as amended at 33 U.S.C. §§ 1251-1376 (2000)); Federal Pollution Control Act Amendments of 1956, Pub. L. No. 84-660, 70 Stat. 498 (codified as amended at 33 U.S.C. §§ 1251-1376 (2000)); see U.S. ENVTL. PROT. AGENCY, THE CHALLENGE OF THE ENVIRONMENT: A PRIMER ON EPA'S STATUTORY AUTHORITY (1972), *available at* <http://www.epa.gov/history/topics/fwpca/05.htm> [hereinafter EPA AUTHORITY]; Henniger, *supra* note 43, at 600-01. The Water Pollution Control Act Amendments of 1956 provided for an abatement suit at the request of a state pollution control agency; where health was being endangered, the Federal government no longer had to receive the consent of all states involved. *Id.* The Water Quality Act of 1965 directed states to develop water quality standards, enforceable by the state and federal governments. *Id.* The Clean Water Restoration Act of 1966 imposed a \$100 per day fine on a polluter who failed to submit a required report. *Id.* The Water Quality Improvement Act of 1970 again expanded federal authority by establishing a state certification procedure to prevent the degradation of water below applicable standards. *Id.*

⁴⁵ Cf. Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (codified as amended at 33 U.S.C. §§ 1251-1376 (2000)); Henniger, *supra* note 43, at 601; EPA AUTHORITY, *supra* note 44.

⁴⁶ EPA v. State Water Resources Control Bd., 426 U.S. 200, 202-03 (1976); see Henniger, *supra* note 43, at 601-03; EPA AUTHORITY, *supra* note 44.

⁴⁷ *State Water Resources Control Bd.*, 426 U.S. at 202-03; EPA AUTHORITY, *supra* note 44; EPA Program History, *supra* note 1.

A. The Clean Water Act

To remedy water quality control enforcement problems and to respond to growing public concern over water pollution, Congress enacted the Federal Water Pollution Control Act ("FWCPA") Amendment of 1972.⁴⁸ The 1972 Amendment, later renamed the Clean Water Act, restructured and consolidated authority for water pollution control at the federal level.⁴⁹ With the CWA, Congress organized and increased federal involvement in water quality control.⁵⁰ Congress did not, however, intend to displace state prominence in water quality regulation.⁵¹

In fact, federalism principles lie at the heart of the CWA's statutory framework.⁵² The CWA divides regulatory authority between state and federal governments based upon the source of the water pollution.⁵³ Congress separated all pollution discharges into two categories: point source discharges and nonpoint source discharges.⁵⁴ Congress precisely defined "point source" pollution as "any discernible, confined and discrete conveyance," including pipes, ditches, and channels, "from which pollutants are or may be discharged."⁵⁵ Under the CWA, "discharge of a pollutant" refers to the "addition" of pollutants to navigable waters through a point source.⁵⁶ In contrast, Congress defined "nonpoint source" pollution as all remaining water pollution not caused by a point source.⁵⁷

⁴⁸ 33 U.S.C. §§ 1251-1376; EPA AUTHORITY, *supra* note 44; U.S. Env'tl. Prot. Agency, Laws & Regulations: Clean Water Act, <http://www.epa.gov/region5/water/cwa.htm> (last visited Nov. 20, 2005) [hereinafter EPA Laws & Regulations].

⁴⁹ 33 U.S.C. §§ 1251-1376; EPA Laws & Regulations, *supra* note 48. This amendment conferred authority for water pollution control on the Environmental Protection Agency ("EPA"). *Id.*; see 33 U.S.C. §§ 1251-1376.

⁵⁰ EPA Laws & Regulations, *supra* note 48.

⁵¹ See 33 U.S.C. § 1251(g) (expressly providing that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this [Act]. It is further the policy of Congress that nothing in this [Act] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State."); see also *id.* §§ 1341-1346 (providing permitting and licensing guidelines for water pollution prevention and control).

⁵² See 33 U.S.C. §§ 1251, 1341-1346; Craig, *supra* note 10, at 179-80.

⁵³ 33 U.S.C. §§ 1341-1346; Craig, *supra* note 10, at 179-80.

⁵⁴ 33 U.S.C. §§ 1288(b)(2)(F), 1288(j)(1), 1311, 1314(f), 1329; Russell, *supra* note 11, at 11; Craig, *supra* note 10, at 179-80.

⁵⁵ 33 U.S.C. § 1362(14).

⁵⁶ *Id.* § 1362(12)(A).

⁵⁷ *Cf. id.* § 1362(14); Craig, *supra* note 10, at 179; Russell, *supra* note 11, at 11. Nonpoint sources include return flows from irrigated agriculture and runoff from fields and crops and forest areas that are not channeled through a point source. 33 U.S.C. § 1362(14);

After separating pollution discharges based upon their sources, Congress divided regulatory authority accordingly.⁵⁸ Consistent with federalism principles, Congress left nonpoint source regulation to the states because, by definition, nonpoint sources do not come from an identifiable point.⁵⁹ Due to the near impossibility of identifying specific nonpoint source polluters, Congress was unable to develop a workable federal scheme to regulate such sources.⁶⁰ Further, Congress saw states as better able to control nonpoint source discharges because they are closer to the source.⁶¹

On the other hand, the CWA allocates authority over point source pollution to the federal government.⁶² It designates the National Pollution Discharge Elimination System ("NPDES") to regulate these point sources.⁶³ The NPDES requires dischargers to obtain federal discharge permits ("NPDES permits") before releasing pollutants from a point source into the nation's waters.⁶⁴ NPDES permits limit the type and quantity of pollutants that the discharger can release from a point source.⁶⁵ In addition, the NPDES imposes a number of requirements, including public hearings, technology-based and water quality-based effluent limitations, recordkeeping, and reporting.⁶⁶

Russell, *supra* note 11, at 11.

⁵⁸ 33 U.S.C. §§ 1329, 1341-1346; Craig, *supra* note 10, at 179-80.

⁵⁹ See *United States v. Earth Scis., Inc.*, 599 F.2d 368, 371 (10th Cir. 1979); Russell, *supra* note 11, at 11; William Madsen, Note, *Community Ass'n Restoration v. Bosma Dairy: The Expanding Definition of a Point Source Under the Clean Water Act*, 8 GREAT PLAINS NAT. RESOURCES J. 56, 61-63 (2003); cf. 33 U.S.C. §§ 1329 (setting up state nonpoint source management program); *id.* § 1362(14) (defining "nonpoint source pollution" by exclusion).

⁶⁰ *Earth Scis.*, 599 F.2d at 371; Madsen, *supra* note 59, at 61-63; see *Shanty Town Assoc. Ltd. P'ship v. EPA*, 843 F.2d 782, 789 n.10 (4th Cir. 1988) (defining "nonpoint source pollution" as "runoff from agriculture, silviculture, mining, construction, roads, urban development, and other diffuse sources").

⁶¹ Madsen, *supra* note 59, at 61-63. This is not to say that state water quality regulators do not also have a difficult time identifying nonpoint source polluters. *Id.* In contrast, Congress determined that the federal NPDES permitting requirements were not an effective mechanism to regulate such polluters. 33 U.S.C. §§ 1329, 1342; *Earth Scis.*, 599 F.2d at 371; Russell, *supra* note 11, at 11; Madsen, *supra* note 59, at 61-63.

⁶² 33 U.S.C. §§ 1329, 1342; Russell, *supra* note 11, at 11.

⁶³ Sources cited *supra* note 62.

⁶⁴ 33 U.S.C. §§ 1341-1342; EPA Program History, *supra* note 1; see also Russell, *supra* note 11, at 11 (discussing NPDES permitting process).

⁶⁵ Joseph-Taylor, *supra* note 29, at 5.

⁶⁶ 33 U.S.C. § 1342(a)(1)-(2); Craig, *supra* note 31, at 118. Under the NPDES, the EPA Administrator "may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet . . . all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title . . ." 33 U.S.C. § 1342(a)(1). As evident

B. *Characterizing a Release as a Point Source Discharge*

Federal NPDES permitting requirements only apply to point source discharges.⁶⁷ Thus, the scope of federal regulatory authority over water pollution rests largely upon the definition of a “point source.”⁶⁸ Despite the CWA’s seemingly straightforward classification, however, defining a “point source” discharge has proven less than clear.⁶⁹ Some courts insist that a broad definition of “point source” is necessary to carry out the purposes of the CWA.⁷⁰ For example, in *United States v. Earth Sciences, Inc.*, the Tenth Circuit broadly defined “point source” discharges to include any activity emitting pollution from an “identifiable point.”⁷¹ According to the court, Congress intended NPDES regulation in the broadest sense.⁷² In contrast, the Second Circuit underlined the CWA’s focus on industrial polluters in *United States v. Plaza Health Laboratories, Inc.*⁷³ The court held that a human being, although identifiable, could not be a point source of pollution and, thus, such pollution was not subject to

by the number of referenced sections, NPDES permits incorporate numerous requirements established by the CWA. *See id.* Technology-based effluent limitations impose EPA-approved restrictions on “quantities, rates, and concentrations of chemical, physical, biological, and other constituents.” Craig, *supra* note 31, at 118; *see also* 33 U.S.C. §§ 1311(b), 1362(11). Water quality-based effluent limitations set EPA-approved standards, including designated water uses, numerical or narrative water quality criteria, and an antidegradation policy to meet water quality standards. 33 U.S.C. §§ 1312(a), 1313(a), 1313(c)(2); 40 C.F.R. §§ 131.6, 131.12 (2002). Section 1316 imposes national standards of performance for new point sources. 33 U.S.C. § 1316. The NPDES sets special effluent standards for toxic pollutants. *Id.* §§ 1316-1317(a). It imposes pretreatment effluent limitations on point sources that discharge into publicly owned treatment works. *Id.* §§ 1317(a)-(b). The NPDES imposes recordkeeping and reporting requirements upon dischargers. *Id.* § 1318. Finally, for discharges into the territorial sea, the contiguous zone, or the ocean, the NPDES contains ocean discharge criteria. *Id.* § 1343.

⁶⁷ *See* Concerned Area Residents for the Env’t v. Southview Farm, 34 F.3d 114, 118 (2d Cir. 1994); Kennecott Copper Corp. v. EPA, 612 F.2d 1232, 1243 (10th Cir. 1979); *United States v. Earth Scis., Inc.*, 599 F.2d 368, 371 (10th Cir. 1979); Boyd, *supra* note 14, at 63.

⁶⁸ *See* sources cited *supra* note 67.

⁶⁹ *See* Russell, *supra* note 11, at 11.

⁷⁰ *See, e.g.,* Concerned Area Residents, 34 F.3d at 118 (indicating that term “point source discharge” is to be broadly interpreted); Dague v. City of Burlington, 935 F.2d 1343, 1355 (2d Cir. 1991) (defining culvert that transferred water from one pond to another as point source), *rev’d in part on other grounds*, 505 U.S. 557 (1992); Kennecott Copper, 612 F.2d at 1243 (noting that Congress deliberately broadly defined “point source” because not all point sources could be enumerated within CWA); *Earth Scis.*, 599 F.2d at 373 (holding that point sources should include “broadest possible definition of any identifiable conveyance”); Umatilla Waterquality Protective Ass’n v. Smith Frozen Foods, 962 F. Supp. 1312, 1320 (D. Or. 1997) (asserting that Ninth Circuit defined “point source” broadly).

⁷¹ *Earth Scis.*, 599 F.2d at 373.

⁷² *Id.*

⁷³ *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646-49 (2d Cir. 1993).

federal regulation.⁷⁴

Clearly, courts have struggled to consistently define a “point source” by looking at the nature of the source itself.⁷⁵ Federal circuit courts have reached a greater level of uniformity, however, by focusing on the receiving body of water.⁷⁶ Courts have repeatedly held that where a single body of water constitutes both the source and the receiving body, they will not characterize the release as a point source discharge.⁷⁷ For example, in *National Wildlife Federation v. Gorsuch*, the D.C. Circuit concluded that dam-induced water quality changes in the *same body of water* were not the “addition of pollutants” from a “point source.”⁷⁸ According to the court, these water quality changes constituted nonpoint pollution.⁷⁹ Because the CWA specifies that states regulate nonpoint pollution, the court held that dam-induced pollution is left to state

⁷⁴ *Id.* Here, an employee at a blood-testing laboratory discarded numerous vials containing human blood into the Hudson River. *Id.*

⁷⁵ See *Concerned Area Residents*, 34 F.3d at 118; *Plaza Health Labs.*, 3 F.3d at 646-49; *Dague*, 935 F.2d at 1344-55; *Kenecott Copper*, 612 F.2d at 1243; *Earth Scis.*, 599 F.2d at 373; *Umatilla*, 962 F. Supp. at 1320.

⁷⁶ See *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 588 (6th Cir. 1988); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 161 (D.C. Cir. 1982).

⁷⁷ See *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004); *Consumers Power Co.*, 862 F.2d at 588; *Gorsuch*, 693 F.2d at 161.

⁷⁸ *Gorsuch*, 693 F.2d at 168. The National Wildlife Federation (“NWF”) sued defendant power companies for failing to obtain a federal NPDES permit, even though the power companies themselves did not add the pollutants to the water. *Id.* at 161. The NWF reasoned that such permits were required because “dams cause a variety of interrelated water quality problems, both in reservoirs and in river water downstream from the dam.” *Id.* In particular, the NWF emphasized five significant water quality problems induced by dams. *Id.* First, the NWF asserted that water released from a reservoir, through a dam, and into downstream water may be low in dissolved oxygen. *Id.* at 161-62. Although the water gradually becomes reaerated as it flows downstream, if oxygen levels in the water are too low, fish cannot survive. *Id.* Second, certain minerals, including iron, manganese, and phosphates, become soluble in zero-oxygen water. *Id.* at 163. As a result, the compounds are released from the mud at the bottom of the reservoir and into the downstream river. *Id.* High concentrations of these minerals and nutrients can harm fish, make the water unpalatable for drinking, and foster undesirable plant growth. *Id.* Third, dams cause the temperature of downstream water to change, and those changes can be undesirable. *Id.* Some fish species can survive only in warm water, while others can survive only in cold water. *Id.* Thus, dam-induced cold water will benefit cold water fish, while harming or killing warm water fish. *Id.* Fourth, water released from dams contains less sediment than upstream water. *Id.* at 163-64. Since large reservoirs cause the water velocity to decrease, sediment tends to settle at the bottom of the reservoir and water quality is generally improved. *Id.* However, the river naturally restores its sediment equilibrium over time, causing periodic dredging of sediments that can temporarily increase sediment load in the reservoir and downstream water. *Id.* at 164. Fifth, water plunging at high velocity from the reservoir into the downstream river becomes mixed with air. *Id.* This can cause the downstream water to become excessively aerated, which can be fatal to fish. *Id.*

⁷⁹ *Id.* at 167-69; see Russell, *supra* note 11, at 11.

control.⁸⁰

Similarly, in *National Wildlife Federation v. Consumers Power Co.*, the Sixth Circuit applied the *Gorsuch* reasoning.⁸¹ The court concluded that the defendant hydroelectric facility did not “add” pollutants from the “outside world.”⁸² In that case, the defendant hydroelectric company’s water processing caused the discharge of entrained fish (live fish, dead fish, and fish remains) into Lake Michigan.⁸³ According to the court, because the fish were already in the water prior to the defendant’s processing, the hydro electric company did not add them.⁸⁴ Further, the court explicitly rejected the idea that Congress intended to require a federal NPDES permit where only a single body of water constitutes both the source and recipient of the pollution.⁸⁵

Conversely, courts consistently maintain that where dischargers release lower quality water from one body of water into another, the CWA requires federal NPDES permits.⁸⁶ In *Dubois v. United States Department of Agriculture*, for example, the court illustrated such an “outside world” discharge.⁸⁷ There, the defendant ski resort piped water from a polluted river for snowmaking purposes and disposed of the excess water in a pristine upstream lake.⁸⁸ The court characterized the

⁸⁰ 33 U.S.C. § 1329 (2000); *Gorsuch*, 693 F.2d at 167-69; Russell, *supra* note 11, at 11.

⁸¹ *Consumers Power Co.*, 862 F.2d at 581.

⁸² *See id.*

⁸³ *Id.*

⁸⁴ *Id.*; Russell, *supra* note 11, at 11.

⁸⁵ *Consumers Power Co.*, 862 F.2d at 581.

⁸⁶ *See* S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 105 (2004); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481, 490-95 (2d Cir. 2001); *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1296-97 (1st Cir. 1996).

⁸⁷ *Dubois*, 102 F.3d at 1296-97.

⁸⁸ *Id.* Loon Pond is located within the White Mountain National Forest in New Hampshire. *Id.* at 1277. As a result of its naturally low levels of phosphorus, plant growth in Loon Pond is limited. *Id.* Thus, the water maintains high clarity. *Id.* As a result of its unusually pristine nature, Loon Pond ranks in the upper 95th percentile of all lakes and ponds in northern New England. *Id.*

The defendant Loon Corp., owner of the Loon Mountain Ski Area, drew water from Loon Pond for snowmaking purposes. *Id.* at 1278. Loon Corp. also used water from the East Branch of the Pemigewasset River (“East Branch”) in its snowmaking processes. *Id.* The Pemigewasset River was for years one of the most polluted rivers in New England, the repository for raw sewage from factories and towns. *Id.* at 1297. It emitted an overwhelming odor and was known to peel the paint off buildings located on its banks. *Id.* at 1297. Water from the East Branch contains phosphorus, turbidity, heat, bacteria, and other aquatic organisms like *Giardia lamblia*. *Id.* at 1278.

The defendant’s snowmaking process was as follows: (1) water was drawn from the pristine Loon Pond and polluted East Branch, (2) it was pumped through defendant’s snowmaking system, and (3) leftover water was disposed into Loon Pond. *Id.* The leftover

disposal as a point source discharge, thereby triggering federal NPDES permitting requirements.⁸⁹

In *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, the Second Circuit also applied the “outside world” reasoning.⁹⁰ The court held that to amount to an “addition,” the point source must introduce the pollutant into navigable waters from the “outside world.”⁹¹ Furthermore, the court defined the “outside world” as “any place outside the particular water body to which pollutants are introduced.”⁹² The court concluded that a tunnel’s diversion of water supplies from one body of water (a mountain reservoir containing pollutants) to another (a creek emptying into New York City’s reservoir) constituted the addition of pollutants from a point source.⁹³ The city’s use of a tunnel therefore triggered federal NPDES permitting requirements.⁹⁴

Ultimately, attempts to define “point source” discharges have confirmed one principle: expansion of federal authority over water quality control depends on statutory interpretation by federal courts.⁹⁵ If federal courts employ a broad definition of “point source” discharges or relabel “nonpoint sources” as “point sources,” federal regulatory authority increases accordingly.⁹⁶ This expanding definition provides the backdrop against which the U.S. Supreme Court decided *South Florida Water Management v. Miccosukee Tribe of Indians*.⁹⁷

water included water that originally came from Loon Pond as well as water that originated in the East Branch. *Id.* Yearly, approximately 250,000 gallons of the polluted East Branch water was transferred into Loon Pond in this manner. *Id.*

⁸⁹ *Id.* The First Circuit considered whether the defendant’s snowmaking process constituted the requisite “addition” of pollutants to Loon Pond. *Id.* at 1296. The district court, basing its decision on the single-body-of-water theory, had previously determined that the intake water from the East Branch and the water in Loon Pond were all part of “a singular entity,” “the waters of the United States.” *Id.* Thus, it concluded that the transfer of water from East Branch into Loon Pond did not constitute an “addition” into the Pond. *Id.*

In contrast, the First Circuit held that the East Branch and Loon Pond are “two distinct waters of the United States.” *Id.* at 1297. Thus, the court reasoned that the East Branch is a source “external” to Loon Pond and the transfer of water from East Branch to Loon Pond constituted an “addition.” *Id.*

⁹⁰ *Catskill Mountains*, 273 F.3d at 491.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 493.

⁹⁴ *Id.* at 491.

⁹⁵ See Boyd, *supra* note 14, at 63.

⁹⁶ *Id.*

⁹⁷ See Christina Marie Frankino, Note, *The Ninth Circuit’s Decision in Oregon Natural Desert Association v. Dombeck: “Discharging” Responsibility for Water Pollution on Federal Lands*, 10 VILL. ENVTL. L.J. 431, 476 & n.73 (1999); see also Linda A. Malone, *The Myths and*

II. SOUTH FLORIDA WATER MANAGEMENT DISTRICT V. MICCOSUKEE TRIBE
OF INDIANS

A. Facts and Procedure

Historically, the land between South Florida's coastal hills and the Everglades constituted part of the Everglades.⁹⁸ Beginning in the early twentieth century, however, the state constructed canals to drain the wetlands and make them suitable for cultivation.⁹⁹ Unfortunately, problems arose when the canals caused the water table to lower, allowing saltwater to intrude upon coastal wells.¹⁰⁰ The canals also proved incapable of controlling flooding.¹⁰¹

To address these drainage and flood control problems, Congress established the Central and South Florida Flood Control Project ("CSFFCP") in 1948.¹⁰² The CSFFCP charged the U.S. Army Corps of Engineers ("USACE") with constructing a water management system for the Everglades.¹⁰³ The USACE built a comprehensive network of levees, canals, pumps, and water impoundment to divert water.¹⁰⁴ Further, it installed a pump station to move the water from the canal to an undeveloped wetland.¹⁰⁵ By collecting groundwater and rainwater from urban, agricultural, and residential developments, the CSFFCP served several functions, including flood protection, water conservation, and drainage.¹⁰⁶

Currently, the South Florida Water Management District ("SFWMD")

Truths that Ended the 2000 TMDL Program, 20 PACE ENVTL. L. REV. 63, 81 (2002) (indicating that expanded definitions of "point sources" result in increased federal authority at expense of state authority); Dana G. Leonard, Note, *PUD 1, Thomas, and the Future of Section 401 of the Clean Water Act*, 18 J. LAND RESOURCES & ENVTL. L. 293, 302 (1998) (discussing how "point source discharges" should be defined); Madsen, *supra* note 59, at 61-63 (highlighting different judicial interpretations of "point source discharges" under CWA).

⁹⁸ S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 99 (2004).

⁹⁹ *Miccosukee*, 541 U.S. at 100.

¹⁰⁰ *Id.* The water table is the underground level at which rock and soil begin to be saturated with water. Dep't of Natural Resources, Environmental Education for Kids, <http://www.dnr.state.wi.us/org/caer/ce/ee/earth/groundwater/wtable.htm> (last visited Nov. 21, 2005). Where the water table meets the land's surface, water begins to flow. *Id.*

¹⁰¹ *Miccosukee*, 541 U.S. at 100.

¹⁰² *Id.*; Alfred R. Light, *Miccosukee Wars in the Everglades: Settlement, Litigation, and Regulation to Restore an Ecosystem*, 13 ST. THOMAS L. REV. 729, 730 (2001).

¹⁰³ *Miccosukee*, 541 U.S. at 100; Light, *supra* note 102, at 730.

¹⁰⁴ *Miccosukee*, 541 U.S. at 100; see Light, *supra* note 102, at 730.

¹⁰⁵ *Miccosukee*, 541 U.S. at 100.

¹⁰⁶ *Id.*

operates the CSFFCP.¹⁰⁷ The SFWMD uses levees to impound the water to keep it from flowing into the ocean and to preserve the wetlands habitat.¹⁰⁸ Without such human intervention, the water would flow back to the canal and flood the basin's populated areas.¹⁰⁹ Thus, the CSFFCP fundamentally alters the hydrology of the Everglades.¹¹⁰ This pumping process ultimately divides what would otherwise be a single wetland.¹¹¹

The CSFFCP has an environmental impact on the wetland ecosystems as well.¹¹² Rain falling on the eastern side of certain levees absorbs contaminants, including phosphorus from fertilizers, before it enters and flows through the canal.¹¹³ When the pump system pushes the phosphorus-laden water across the levees, the phosphorus alters the ecosystem's balance in the undeveloped wetland.¹¹⁴ Over time, the polluted water stimulates the growth of algae and plants foreign to the Everglades.¹¹⁵

For generations, members of the Miccosukee Tribe have subsisted within the Everglades.¹¹⁶ The tribe has land interests within the Everglades, including a perpetual lease to most of the Water Conservation Area where the SFWMD pumps water.¹¹⁷ The tribe's way of life, including its religious, cultural, economic, and historical identity, relies upon preservation of the Everglades ecosystem.¹¹⁸ Thus, the tribe generally allies itself in litigation and negotiations with environmental groups, like Friends of the Everglades ("FOE"), that seek to preserve and restore the Everglades.¹¹⁹

¹⁰⁷ *Id.* at 99-100; Light, *supra* note 102, at 730; South Florida Water Mgmt. District, Canal and Structure Operations, <http://www.sfwmd.gov/site/index.php?id=13> (last visited Nov. 21, 2005) [hereinafter Canal and Structure Operations].

¹⁰⁸ *Miccosukee*, 541 U.S. at 101.

¹⁰⁹ *Id.* at 100.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 100-02.

¹¹² *Id.* at 101.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, No. 98-6056-CIV, 1999 WL 33494862, at *1 (S.D. Fla. Sept. 30, 1999), *aff'd in part and vacated in part*, 280 F.3d 1364 (11th Cir. 2002), *vacated*, *Miccosukee*, 541 U.S. 95.

¹¹⁷ *Id.*

¹¹⁸ *Id.* The Tribe's religious activities include the planting and harvesting of corn on tree islands in the Everglades. *Id.* at *1 n.2. Its subsistence activities include gathering materials, hunting, and fishing. *Id.* The Tribe's commercial activities include frogging, airboating, and other guided tours and providing recreational and tourism facilities within the Everglades. *Id.*

¹¹⁹ *Id.* at *1; Light, *supra* note 102, at 731.

The Miccosukee Tribe of Indians, joining with FOE, filed suit against the SFWMD in the United States District Court for the Southern District of Florida.¹²⁰ The tribe claimed that, under the CWA, the SFWMD's pump station constituted a point source discharge.¹²¹ It likened the pump to an "outside world" discharge that moved polluted water from the canal to the undeveloped wetland.¹²² Thus, the tribe argued that the SFWMD violated the CWA by failing to obtain an NPDES permit.¹²³ The SFWMD, however, contended that the NPDES program applies only when the pollutants originate from the point source.¹²⁴ In its view, the pump station did not "add" pollutants to the water because the pollutants originated elsewhere.¹²⁵

The district court granted the tribe's motion for summary judgment on the CWA claim.¹²⁶ The SFWMD appealed, and the Eleventh Circuit affirmed the district court's ruling.¹²⁷ Both courts determined that the pumping station did, in fact, constitute a point source discharge, for which the CWA requires NPDES permits.¹²⁸ Furthermore, although the parties did not litigate the issue, both courts based their rulings on the assumption that the canal and reservoir were two distinct bodies of water.¹²⁹ As a result, they determined that the transfer of pollutants from one body of water to another constituted the "addition of pollutants" from a "point source."¹³⁰

The SFWMD appealed to the U.S. Supreme Court.¹³¹ The Supreme Court granted certiorari to determine whether the "discharge" or "addition" of a pollutant includes point sources that do not themselves generate those pollutants.¹³²

¹²⁰ *Miccosukee*, No. 98-6056-CIV, 1999 WL 33494862, at *1.

¹²¹ *Miccosukee*, 541 U.S. at 99.

¹²² *Id.* at 102.

¹²³ *Id.*

¹²⁴ *Id.* at 104.

¹²⁵ *Id.*

¹²⁶ *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, No. 98-6056-CIV, 1999 WL 33494862, at *1 (S.D. Fla. Sept. 30, 1999), *aff'd in part and vacated in part*, 280 F.3d 1364 (11th Cir. 2002), *vacated*, *Miccosukee*, 541 U.S. 95.

¹²⁷ *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002), *vacated*, *Miccosukee*, 541 U.S. 95.

¹²⁸ *Miccosukee*, 541 U.S. at 103-04.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 104.

¹³² *Id.*

B. Holding and Rationale

The Supreme Court held that the terms “discharge of a pollutant,” for which the CWA requires an NPDES permit, include point sources that do not themselves generate pollutants.¹³³ First, the Court examined the CWA’s definition of a “point source” as a “discernible, confined, and discrete conveyance.”¹³⁴ The Court held that, under this definition, the CWA does not require a point source to be the pollutant’s original source.¹³⁵ Rather, a point source need only convey the pollutant to “navigable waters.”¹³⁶ Further, the Supreme Court insisted that this interpretation was consistent with one of the CWA’s primary goals: imposing NPDES permitting requirements on municipal wastewater treatment plants.¹³⁷

Despite defining “point sources” expansively, however, the Court did not hold SFWMD liable for failing to obtain a federal NPDES permit.¹³⁸ Rather, it determined that the lower court had inappropriately granted summary judgment and remanded the case for further consideration of factual issues.¹³⁹ The Supreme Court concluded that triable issues existed regarding whether the canal and wetland areas were meaningfully distinct bodies of water.¹⁴⁰

III. ANALYSIS

The Supreme Court’s holding in *Miccossukee* is overbroad for several reasons.¹⁴¹ First, the Court’s expansive definition of “point source” discharges could subject states’ water transfers to federal oversight even where Congress specifically exempted them from NPDES permitting requirements.¹⁴² Second, *Miccossukee*’s broad holding deviates from historical judicial and legislative deference to state water law.¹⁴³ Finally,

¹³³ *Id.* at 105.

¹³⁴ 33 U.S.C. § 1362(14) (2000) (emphasis added); *Miccossukee*, 541 U.S. at 105.

¹³⁵ *Miccossukee*, 541 U.S. at 105.

¹³⁶ *Id.*

¹³⁷ 33 U.S.C. § 1311(b)(1)(B) (establishing compliance schedule for publicly owned treatment works); *Miccossukee*, 541 U.S. at 105.

¹³⁸ *See Miccossukee*, 541 U.S. at 112.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *See infra* Part III.A-C; *cf.* 33 U.S.C. § 1251(g); Brief for Colorado, *supra* note 39, at 12-15; Brief for the United States, *supra* note 32, at 26-28.

¹⁴² *See* 33 U.S.C. § 1251(g).

¹⁴³ *See* *California v. United States*, 438 U.S. 645, 653 (1978); *see also* Brief for Colorado, *supra* note 39, at 12-15.

since state laws effectively govern water quality surrounding the diversion and delivery of water supply to inhabitants, federal oversight is superfluous.¹⁴⁴

A. *Miccosukee Diverges from the CWA's Express Exceptions of State Water Allocations from NPDES Permitting Requirements*

The Supreme Court's broad holding in *Miccosukee* conflicts with the plain language and legislative history of the CWA.¹⁴⁵ In the statute, Congress expressly articulated its intent not to abrogate state water allocation.¹⁴⁶ Further, the CWA's legislative history confirms Congress's goal of improving national water quality without interfering with state water rights.¹⁴⁷

1. The Plain Language of Section 1251(g) of the CWA

In its 1977 Amendments to the CWA, Congress enacted section 1251(g), in which it explicitly stated its intent to exclude state water transfers from the NPDES permitting process.¹⁴⁸ Congress declared that the CWA does not impair the authority of each state to allocate water quantities within its borders.¹⁴⁹ Further, Congress intended that nothing in the CWA should be construed to abrogate water rights already established by any state.¹⁵⁰

Miccosukee's broad holding, however, subjects states' mere movement of unaltered water to NPDES permitting requirements, imposing a

¹⁴⁴ See Brief for the United States, *supra* note 32, at 26-28.

¹⁴⁵ See 33 U.S.C. § 1251(g); Brief for Colorado, *supra* note 39, at 10-11 (citing H.R. REP. NO. 95-830, at 52 (1977) (Conf. Rep.), *reprinted in* 3 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, at 236 (1978)).

¹⁴⁶ See 33 U.S.C. § 1251(g).

¹⁴⁷ Brief for Colorado, *supra* note 39, at 10-11 (citing H.R. REP. NO. 95-830, at 52), *reprinted in* 3 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, *supra* note 145 at 236.

¹⁴⁸ See 33 U.S.C. § 1251(g).

¹⁴⁹ *Id.* Section 1251(g) reads:

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this [Act]. It is the further policy of Congress that nothing in this [Act] shall be construed to supersede or abrogate rights to quantities of water which have been established by any state. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

Id.

¹⁵⁰ *Id.*

bureaucratic obstacle on state proactive water management.¹⁵¹ In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, the Supreme Court maintained that land and water use decisions are traditionally and primarily state prerogatives.¹⁵² Further, the Court held that where Congressional legislation threatens to alter the traditional federal-state framework, Congress must clearly convey its intent to do so.¹⁵³ Here, the CWA lacks any clear statement that Congress intended to subject state water transfers to federal regulation and thereby alter the established federal-state framework.¹⁵⁴ Thus, *Miccosukee* deviates the Supreme Court's historical trajectory with a broad interpretation of "point source" discharges.¹⁵⁵

Finally, Congress expressly stated that where water quality concerns involve state water allocation decisions, the federal government must cooperate with the states.¹⁵⁶ Imposing federal NPDES permitting regulations on state water diversions deviates from this directive.¹⁵⁷ NPDES permitting requirements force the states to limit the type and quantity of pollutants they release from a point source.¹⁵⁸ They command the states to abide by public hearing requirements, technology-based and water quality-based effluent limitations, and recordkeeping and reporting requirements.¹⁵⁹ The federal government's imposition of strict federal guidelines and demands fails to amount to the "cooperation" the CWA proposes.¹⁶⁰

¹⁵¹ See Rosemary J. Beless, *Can the Mere Transport of Unaltered Water Violate the Clean Water Act?*, 17 UTAH B.J. 12, 16 (2004); Joseph-Taylor, *supra* note 29, at 7.

¹⁵² See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001).

¹⁵³ *Id.* The Supreme Court noted that where a statutory interpretation "alters the federal-state framework by permitting federal encroachment upon a traditional state power," Congress must clearly convey its intent. *Id.* at 173.

¹⁵⁴ 33 U.S.C. § 1251(g); see Brief for Colorado, *supra* note 39, at 5.

¹⁵⁵ See *Solid Waste Agency*, 531 U.S. at 159; Brief for Colorado, *supra* note 39, at 5.

¹⁵⁶ See 33 U.S.C. § 1251(g). Congress expressly states that "[f]ederal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." *Id.*

¹⁵⁷ See 33 U.S.C. §§ 1251(g), 1342(a)(1); Craig, *supra* note 31, at 118-19; Joseph-Taylor, *supra* note 29, at 5.

¹⁵⁸ Joseph-Taylor, *supra* note 29, at 5.

¹⁵⁹ 33 U.S.C. § 1342(a)(1); Craig, *supra* note 31, at 118-19.

¹⁶⁰ See 33 U.S.C. § 1251(g); see also Brief for Colorado, *supra* note 39, at 22-30. On the contrary, the federal government could exercise such cooperation by developing comprehensive solutions outside of the regulatory directives of the NPDES permitting program. *Id.*

2. The Legislative History of Section 1251(g) of the CWA

The legislative history of section 1251(g) of the CWA also confirms Congress's intent not to interfere with state water allocation.¹⁶¹ Congress passed section 1251(g) in direct response to suggestions that reducing water deliveries under state water law might be necessary to solve water quality problems.¹⁶² Three weeks before Senators Malcom Wallop and Gary W. Hart introduced section 1251(g), the Water Resource Council ("WRC") released the *Issue and Option Papers for the Water Resource Policy Study*.¹⁶³ Congress established the WRC in 1965 to assess regional water supply issues, among other things.¹⁶⁴ The WRC study contained proposals that threatened the integrity of state water rights by urging Congress to give states an ultimatum: states could either conform their pollution control programs to federal standards or face consequences.¹⁶⁵ Such consequences included the federal government withholding contributions to such programs or reducing state water diversions to force compliance.¹⁶⁶ Congress ultimately adopted section 1251(g) to prevent these dramatic infringements upon state water rights.¹⁶⁷ The amendment restricts the federal government from interfering with state water transfers, thus exempting them from NPDES permitting requirements.¹⁶⁸

Requiring NPDES permits for water supply deliveries *would* abrogate state water allocations.¹⁶⁹ Diverters would have to forgo the full exercise of their water rights to comply with the permit conditions.¹⁷⁰ NPDES permits place conditions and limitations on the amount of pollutants that dischargers may release into the receiving water body.¹⁷¹ In addition, the

¹⁶¹ See Brief for Colorado, *supra* note 39, at 9.

¹⁶² H.R. REP. NO. 95-830, at 52 (1977) (Conf. Rep.), reprinted in 3 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, *supra* note 145, at 236.

¹⁶³ Water Resources Policy Study; Issue and Option Papers, 42 Fed. Reg. 36,788, 36,788-36,790 (July 15, 1977).

¹⁶⁴ 42 U.S.C. §§ 1962(a), 1962(a)-1-2 (1975).

¹⁶⁵ Water Resources Policy Study; Issue and Option Papers, 42 Fed. Reg. at 36,788.

¹⁶⁶ *Id.*

¹⁶⁷ 33 U.S.C. § 1251(g) (2000). On the Senate floor, Senator Wallop explained that "[t]he . . . amendment . . . will reassure the State [sic] that it is the policy of Congress that the Clean Water Act will not be used for the purpose of interfering with State water rights systems." Brief for Colorado, *supra* note 39, at 11-12 (quoting 3 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, *supra* note 145, at 529).

¹⁶⁸ See Brief for Colorado, *supra* note 39, at 11-12.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Joseph-Taylor, *supra* note 29, at 5.

NPDES requires dischargers to await public hearings before the Environmental Protection Agency ("EPA") Administrator will issue a permit.¹⁷² The NPDES imposes technology-based and water quality-based effluent limitations upon dischargers.¹⁷³ Finally, the NPDES forces dischargers to abide by strict recordkeeping and reporting requirements.¹⁷⁴

With respect to each of these NPDES regulations, the federal government retains full enforcement authority against violators.¹⁷⁵ Thus, the NPDES subjects dischargers to extensive federal regulation and potential litigation.¹⁷⁶ To avoid liability, water diverters can only deliver an amount of water consistent with the pollutant-discharge limits their permits prescribe.¹⁷⁷ To comply with these limits, diverters will be forced to curtail water deliveries and effectively relinquish part of their state-allocated water rights.¹⁷⁸ The plain language and legislative history of the CWA do not permit such a result.¹⁷⁹

Supporters of broad federal water quality regulation argue that the NPDES's implications for state water rights are irrelevant.¹⁸⁰ They suggest that Congress overhauled the CWA in 1972 precisely because state water quality regulation had proven inadequate.¹⁸¹ These proponents of expansive federal oversight thus read the CWA to be comprehensive.¹⁸² They believe it covers *every* point source discharge of pollutants.¹⁸³ This interpretation, however, runs contrary to the plain language of the CWA and its legislative history.¹⁸⁴ As discussed above, the plain language and legislative history of section 1251(g) indicate that Congress expressly excluded state water transfers from the NPDES permitting process.¹⁸⁵ Congress would not have included this exemption

¹⁷² 33 U.S.C. § 1342(a)(1).

¹⁷³ *Id.*; Craig, *supra* note 31, at 118.

¹⁷⁴ Sources cited *supra* note 173.

¹⁷⁵ Craig, *supra* note 10, at 185.

¹⁷⁶ *Id.*

¹⁷⁷ See Brief for Colorado, *supra* note 39, at 15.

¹⁷⁸ *Id.*

¹⁷⁹ See 33 U.S.C. § 1251(g); see also Brief for Colorado, *supra* note 39, at 22-30.

¹⁸⁰ Russell, *supra* note 11, at 10.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ 33 U.S.C. § 1251(g); 3 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, *supra* note 145, at 529.

¹⁸⁵ 33 U.S.C. § 1251(g).

had it intended the CWA to be comprehensive.¹⁸⁶

B. Miccosukee Departs from a Tradition of Federal Deference to State Water Rights Law

The Supreme Court's broad holding in *Miccosukee* deviates from a historical judicial and legislative deference to state water law.¹⁸⁷ Congress has always respected state control over water rights allocation within state borders.¹⁸⁸ Similarly, Congress has expressed a continual and purposeful deference to state water reclamation law.¹⁸⁹ *Miccosukee*'s expansion of NPDES permitting requirements to cover state water diversions is thus unprecedented.¹⁹⁰

1. Congressional Deference to State Water Allocation Law

As early as 1845, the Supreme Court ruled that the "equal footing doctrine" signaled Congress's intent that state law govern water rights allocation.¹⁹¹ Under this doctrine, Congress granted the western states sovereignty over the unappropriated waters in their streams upon their admission into the Union.¹⁹² The states acquired title to the beds and

¹⁸⁶ *Id.*

¹⁸⁷ See *infra* Part III.B.1-2.

¹⁸⁸ *Kansas v. Colorado*, 206 U.S. 46, 94 (1907); *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845); see also Susan Joseph-Taylor, *Will the Miccosukee Case Federalize the Prior Appropriation Doctrine?*, 7 A.B.A. WATER RESOURCES COMM. NEWSL., Feb. 2004, at 5.

¹⁸⁹ *California v. United States*, 438 U.S. 645, 653 (1978).

¹⁹⁰ See Brief for Colorado, *supra* note 39, at 12-13.

¹⁹¹ See *Pollard*, 44 U.S. at 230; see also *Coyle v. Smith*, 221 U.S. 559, 566 (1911).

¹⁹² See *Kansas*, 206 U.S. at 93-94. In *Kansas*, Kansas argued that Congress had expressly applied English common law to both states and that the common law included the riparian system of water rights. *Id.* The Court rejected this view and held "[each state] may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State." *Id.* One factor that gave rise to this holding was the devolution of the Crown of England's title and trust over rivers, banks of navigable streams and common or public fisheries from the federal government to the sovereign people of the States. *Id.*

The equal footing doctrine provided for "a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Coyle*, U.S. at 567; see also *Fox River Paper Co. v. R.R. Comm'n of Wis.*, 274 U.S. 651, 655 (1927); Joseph-Taylor, *supra* note 188, at 5; Amy K. Kelley, *Federal Preemption and State Water Law*, 105 J. CONTEMP. WATER RES. & EDUC. 4 (1996), available at http://www.ucowr.siu.edu/updates/pdf/V105_A2.pdf; 4Lawschool.com, Article Four of the United States Constitution, <http://www.4lawschool.com/constitution/allart4.htm> (last visited Nov. 21, 2005) [hereinafter Article Four].

banks of navigable waters within their borders, enabling them to dominate the allocation of water rights.¹⁹³

Congress reaffirmed this deference to state water allocation laws by passing the Desert Land Act of 1877.¹⁹⁴ Congress passed this Act to encourage and promote economic development in the arid western United States.¹⁹⁵ The Act reserved the water of all lakes, rivers, and other sources for the public use for distribution under state law.¹⁹⁶ Furthermore, Congress repeatedly reaffirmed federal deference to state water allocation law by acceding to the western states' constitutions in their Acts of Admission to the Union.¹⁹⁷

Against this backdrop of historical deference to state water allocation law, the Supreme Court's decision in *Miccosukee* is unconvincing.¹⁹⁸ States have virtually always controlled water allocation within their borders.¹⁹⁹ The *Miccosukee* decision, however, threatens to undermine this system by requiring states to obtain federal NPDES permits and abide by their conditions.²⁰⁰ Such a result diverges from over 150 years of federal deference to state water allocation law.²⁰¹

¹⁹³ *Pollard*, 44 U.S. at 230; see *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367 (1842); *Parks v. Cooper*, 676 N.W.2d 823, 827 (S.D. 2004); Kelley, *supra* note 192. Because the beds and banks of navigable waters are held in state ownership, they are held subject to the public trust doctrine. *Parks*, 676 N.W.2d at 827. Thus, they cannot be conveyed unless doing so would promote a public purpose. *Id.*

¹⁹⁴ 43 U.S.C. § 321 (1877); Brief for Colorado, *supra* note 39, at 13.

¹⁹⁵ 43 U.S.C. § 321; U.S. Dep't of the Interior, Bureau of Land Management, Desert Land Entries, <http://www.blm.gov/nhp/landfacts/DesertLand.html> (last visited Nov. 21, 2005).

¹⁹⁶ See 43 U.S.C. § 321.

¹⁹⁷ COLO. CONST. art. XVI, §§ 5-6 ("The water of every natural stream . . . within the state . . . [is] to be the property of the public, . . . dedicated to the use of the people of the state . . ."); N.M. CONST. art. XVI, § 2 ("[T]he unappropriated water of every natural stream . . . is hereby declared to belong to the public and to be subject to appropriation for beneficial use . . ."); WYO. CONST. art. VIII, § 1 ("[T]he water of all natural streams, springs, lakes or other collections of still water . . . are hereby declared to be the property of the state.").

¹⁹⁸ See *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004).

¹⁹⁹ *Coyle v. Smith*, 221 U.S. 559, 566 (1911); *Kansas v. Colorado*, 206 U.S. 46, 94 (1907); *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845); see Joseph-Taylor, *supra* note 188, at 5.

²⁰⁰ See 33 U.S.C. §§ 1329, 1342 (2000); Brief for Colorado, *supra* note 39, at 12-22; Boyd, *supra* note 14, at 63.

²⁰¹ *Kansas*, 206 U.S. at 93-94; *Pollard*, 44 U.S. at 230; Joseph-Taylor, *supra* note 188, at 5.

2. Congressional Deference to State Water Reclamation Law

The federal government and states have a long, complex relationship regarding the reclamation of the arid West.²⁰² Throughout this relationship, however, the Supreme Court and Congress have repeatedly and purposefully deferred to state water reclamation law.²⁰³ Congress expressed this deference when it enacted the Reclamation Act of 1902.²⁰⁴ Here, Congress clearly conveyed its intent not to interfere with state laws governing the “control, appropriation, use, or distribution of water used in irrigation.”²⁰⁵ Despite Congress’s continual deference to state water law, however, *Miccosukee*’s broad holding subjects a state’s mere transfer of unaltered water to federal regulation.²⁰⁶ Thus, the holding undermines a basic principle of western water law: that the right to use state waters is a matter of state law.²⁰⁷

Supporters of federal regulation of state water supply transfers insist that the NPDES program will not interfere with state water rights.²⁰⁸ They assert that the NPDES, consistent with the federalism principles enumerated in the CWA, gives the states primary responsibility to establish and administer their own permit programs.²⁰⁹ Thus, the states can establish their own limits, subject to federal approval, that coincide

²⁰² *California v. United States*, 438 U.S. 645, 653 (1978).

²⁰³ *Id.* Here, the United States challenged California’s authority to impose conditions on the operation of New Melones Reservoir, a federal reclamation facility. *Id.* The Court rejected the United States’s arguments and concluded that section 8 of the federal Reclamation Act required the federal government “to comply with state [water] law in the control, appropriation, use, or distribution of water.” *Id.* at 675. In reaching this conclusion, the Court relied upon its earlier decisions. “[E]xcept where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters.” *Id.* at 662 (citing *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899)).

²⁰⁴ 43 U.S.C. § 383 (2004) (authorizing federal government to construct water resource development projects, but specifically providing, “[n]othing in this Act shall be construed as affecting or intended to affect or in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws”).

²⁰⁵ *Id.*

²⁰⁶ Joseph-Taylor, *supra* note 188, at 7.

²⁰⁷ *Id.*

²⁰⁸ See Brief for Respondent Miccosukee Tribe of Indians at 2, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626) [hereinafter Brief for Respondent]; Brief for Trout Unlimited, Inc. et al. as Amici Curiae at 21, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (No. 02-626) [hereinafter Brief for Trout Unlimited, Inc.]; Russell, *supra* note 11, at 10.

²⁰⁹ See Brief for Respondent, *supra* note 208, at 3; Brief for Trout Unlimited, Inc., *supra* note 208, at 2; Russell, *supra* note 11, at 10.

with their water rights.²¹⁰

This argument, however, is erroneous. Although states can acquire authority to administer state permitting programs under the NPDES, the federal government retains control of these programs.²¹¹ The federal government sets the permitting standards, reviews all state-issued permits, and retains full enforcement authority against violators.²¹² Further, the EPA monitors state program management and compliance with federal standards.²¹³ If the federal government is not content with state permit administration, it may promptly withdraw its approval.²¹⁴ Even in states with delegated permitting authority, the EPA subjects dischargers to federal regulation and litigation.²¹⁵ Thus, supporters of federal regulation of state water supply transfers mistakenly characterize NPDES permitting as wholly state rather than federally controlled.²¹⁶ In fact, federal NPDES permitting requirements intrude upon state water rights and interfere with state sovereignty.²¹⁷

C. States Already Appropriately Address Water Quality Impacts from the Diversion and Delivery of Water

State laws already protect both water quantity and quality through common law, by statute, and through state water quality programs.²¹⁸ These laws take into account uniquely local concerns, including insufficient water supply.²¹⁹ *Miccosukee's* broad interpretation of "point sources" subjects discharges previously governed by state law to federal oversight.²²⁰ Accordingly, federal imposition of NPDES permitting requirements impedes the success of local solutions to local problems

²¹⁰ See sources cited *supra* note 209.

²¹¹ Craig, *supra* note 10, at 185.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ See 33 U.S.C. § 1342(a) (2000); *United States v. City of Toledo*, 867 F. Supp. 603, 606 (1994) (indicating that EPA can institute judicial action whenever it finds violation); *United States v. City of Colorado Springs*, 455 F. Supp. 1364, 1366 (1978) (underlining EPA's authority to take unilateral action to enforce NPDES permit); Craig, *supra* note 10, at 185.

²¹⁶ See Craig, *supra* note 10, at 185.

²¹⁷ Brief for the United States, *supra* note 32, at 12-15.

²¹⁸ Brief for Colorado, *supra* note 39, at 22-26.

²¹⁹ See *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 99-100 (2004); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481, 484 (2d Cir. 2001).

²²⁰ See sources cited *supra* note 219.

without providing any substantial environmental benefits in return.²²¹

1. State Water Allocation as a Solution to Local Water Supply Problems

Federal oversight over state water allocations interferes with state solutions to local water supply problems.²²² In the arid western United States, states often move water great distances to the place of most beneficial use.²²³ Explosive population growth in western urban areas, combined with climatic issues, has caused a growing need for water.²²⁴ States have solved this resource problem by developing collaborative, market-based water transfers to meet increasing demands.²²⁵

Colorado has developed just such a water market.²²⁶ The state transfers water through the Rocky Mountains to serve the cities of Colorado's eastern plains.²²⁷ Similarly, in Nevada, the U.S. Bureau of Reclamation works with the state to transport water to the Lahontan Reservoir.²²⁸ This water primarily serves agricultural needs in the Reno-Sparks area during drought periods.²²⁹ In California, the California State Water Project and Central Valley Project foster the largest interbasin water transfers in the country.²³⁰ Through water diversion, these

²²¹ See Brief for the United States, *supra* note 32, at 26-28.

²²² *Id.*

²²³ See NATIONAL RESEARCH COUNCIL, CONFRONTING THE NATION'S WATER PROBLEMS: THE ROLE OF RESEARCH 36 (Nat'l Academies Press 2004); JOHN WESLEY POWELL, REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES (Harvard Common Press 1983) (1879) (underscoring lack of rainfall in West and unsuitability of land for agriculture absent supplemental water through irrigation); WATER AND ARID LANDS OF THE WESTERN UNITED STATES: A WORLD RESOURCES INSTITUTE BOOK (Mohamed T. El-Ashry & Diana C. Gibbons eds., Cambridge University Press 1988) [hereinafter WATER AND ARID LANDS]; Joseph-Taylor, *supra* note 188, at 8.

²²⁴ See sources cited *supra* note 223.

²²⁵ Joseph-Taylor, *supra* note 188, at 8.

²²⁶ Russell, *supra* note 11, at 14.

²²⁷ Joseph-Taylor, *supra* note 188, at 8. In Colorado and New Mexico, the San Juan-Chama Project created a transbasin diversion from the Colorado River basin to the Rio Grande basin. *Id.* The states transport water through a tunnel under the Continental Divide to the Rio Chama and then divert it to the Heron Reservoir. *Id.*

²²⁸ Joseph-Taylor, *supra* note 188, at 7; U.S. Dep't of the Interior, Bureau of Reclamation, Newlands Project Nevada, <http://www.usbr.gov/dataweb/html/newlands.html#generaldescription> (last visited Nov. 21, 2005) [hereinafter Newlands Project]. This water is diverted through a canal from the Truckee and Carson Rivers. *Id.*

²²⁹ Newlands Project, *supra* note 230.

²³⁰ Russell, *supra* note 11, at 14. The State Water Project diverts 2 to 2.5 million acre-feet per year ("AFY") for delivery to water agencies. *Id.* The Central Valley Project delivers about 7.3 million AFY to water agencies for the irrigation of 2.6 million acres and for urban

agencies distribute water to over 22 million Californians and 750,000 acres of irrigated farmland.²³¹

The economic and social well-being of the West and the nation depend on the states' ability to divert and move water resources pursuant to state law.²³² The Supreme Court's broad holding in *Miccosukee*, however, makes these vital state water supply transfers susceptible to federal control.²³³ Including sources that do not themselves generate pollutants within the scope of NPDES permitting impinges on the rights of public and private water rights holders.²³⁴ In order to avoid NPDES violations, water diverters will have to choose between limiting their diversions or treating the water.²³⁵ To treat the water, water diverters will have to expend millions of dollars to construct water treatment facilities.²³⁶ Transbasin diversions and deliveries in the West generally peak during spring snow melt when the most water is available.²³⁷ Thus, these treatment facilities will be required to treat peak diversions, which occur only a few days per year, while sitting idle the rest of the year.²³⁸ The alternative requires water diverters to curtail water deliveries, effectively forcing water diverters to relinquish some of their water rights to meet federal requirements.²³⁹ Such solutions are simply impractical and inefficient.²⁴⁰

2. State Water Quality Laws Provide Water Supply Solutions that Consider Environmental Impacts

States are well-situated to enact water quality laws that also address uniquely local concerns, including insufficient water supply.²⁴¹ In *National Wildlife Federation v. Gorsuch*, the D.C. Circuit maintained that state control over the use of water resources represents sound public

and wildlife uses. *Id.* Also, California water agencies import water supplies from other water basins (e.g., over 4.4 million AFY from the Colorado River). *Id.*

²³¹ Russell, *supra* note 11, at 14.

²³² Brief for Colorado, *supra* note 39, at 5.

²³³ Beless, *supra* note 151, at 16.

²³⁴ Joseph-Taylor, *supra* note 188, at 8.

²³⁵ Brief for Colorado, *supra* note 39, at 15.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 16.

²³⁹ *Id.*

²⁴⁰ *Id.* at 17.

²⁴¹ See *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 99-100 (2004); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481, 484 (2d Cir. 2001).

policy.²⁴² Since pollution problems are highly site-specific, the *Gorsuch* court held that water quality impacts associated with dams and diversions may not be amenable to the NPDES's nationally uniform controls.²⁴³ In fact, states have established successful water quality laws that complement their allocation of water resources and water rights.²⁴⁴

State water rights laws embrace one or both of two doctrines for the allocation of water use: (1) the prior appropriation doctrine and (2) the riparian doctrine.²⁴⁵ In prior appropriation states, water may be diverted only for "beneficial use."²⁴⁶ These states define "beneficial use" narrowly to allow conveyances that benefit the user and society in general but prevent diversions for waste disposal purposes.²⁴⁷ Under this framework, since waste disposal is not consistent with beneficial use, such disposers do not acquire the right to "use" the water.²⁴⁸ Unlike the imposition of federal NPDES permitting requirements, which *Miccosukee* contemplates, such state water rights laws address water quality without impeding state water allocation decisions.²⁴⁹

Similarly, riparian states allocate water rights only for "reasonable use" or productive purposes — not for waste disposal.²⁵⁰ For example, water rights applicants in Florida, a riparian state, must show that their proposed water use is consistent with the public interest.²⁵¹ Idaho similarly applies a "public interest test" when evaluating a water right request in order to protect water quality.²⁵² Moreover, states

²⁴² *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 182 (D.C. Cir. 1982).

²⁴³ *Gorsuch*, 693 F.2d at 182.

²⁴⁴ Brief for Colorado, *supra* note 39, at 22.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 23. The prior appropriation doctrine is generally followed in states where natural precipitation is inadequate for crop production. *Id.* at 23 n.26. Such states include Alaska, Colorado, Montana, Nebraska, New Mexico, Utah, and Wyoming. *Id.*

²⁴⁷ *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1132 n.33 (10th Cir. 2003).

²⁴⁸ See ARIZ. REV. STAT. § 45-181(1) (LexisNexis 2004) (indicating that "beneficial use" includes use for domestic, municipal, recreation, wildlife, agricultural, mining, stockwatering, and power purposes); *Atchison v. Peterson*, 87 U.S. 507, 514 (1874); *Rio Grande Silvery Minnow*, 333 F.3d at 1132 n.33; *State ex. rel. Erickson v. McLean*, 308 P.2d 983, 988 (N.M. 1957).

²⁴⁹ See ARIZ. REV. STAT. § 45-181(1); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 99-100 (2004); *Atchison*, 87 U.S. at 514; *Rio Grande Silvery Minnow*, 333 F.3d at 1132 n.33; *McLean*, 308 P.2d at 988.

²⁵⁰ Brief for Colorado, *supra* note 39, at 24. California, Kansas, Mississippi, Nebraska, North Dakota, Oregon, South Dakota, Texas, and Washington include elements of both the prior appropriations doctrine and the riparian doctrine in their water laws. *Id.* at 23 n.26.

²⁵¹ FLA. STAT. § 373.223(1) (2002).

²⁵² See *Shokal v. Dunn*, 707 P.2d 441, 448 (Idaho 1985).

appropriately regulate water quality.²⁵³ Federal imposition of NPDES permitting requirements on state water allocations, as *Miccosukee* commands, is therefore redundant.²⁵⁴

CONCLUSION

In deciding *Miccosukee*, the Supreme Court defined “point source” discharges too broadly.²⁵⁵ This decision thereby increases federal regulatory oversight of water diversions traditionally controlled by states.²⁵⁶ The Supreme Court’s broad holding deviates from a historical and purposeful federal deference to state water law.²⁵⁷ Further, the practical implications of this overbroad holding contradict Congress’s express intent not to interfere with state water rights and water allocation.²⁵⁸ States already appropriately address water quality concerns from the diversion and delivery of water supplies.²⁵⁹ Thus, federal regulation of such water transfers is unnecessary and fails to provide substantial environmental benefits.²⁶⁰

²⁵³ See FLA. STAT. § 373.223(1); *Tulkisarmute Native Cmty. Council v. Heinze*, 898 P.2d 935, 950 (Alaska 1995) (stating that Alaska may not issue permit unless doing so is in public interest, considering impacts of water appropriation on fish and game resources and public health); *Envtl. Def. Fund, Inc. v. E. Bay Mun. Util. Dist.*, 605 P.2d 1, 9 (Cal. 1980) (illustrating that California State Water Resource Control Board controls water use within state, ensuring utilization consistent with public interest, including water quality); *Shokal*, 707 P.2d at 448-49.

²⁵⁴ See FLA. STAT. § 373.223(1); *Tulkisarmute Native Cmty. Council*, 898 P.2d at 950; *Envtl. Def. Fund*, 605 P.2d at 9; *Shokal*, 707 P.2d at 448.

²⁵⁵ See *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004).

²⁵⁶ See 33 U.S.C. §§ 1329, 1342 (2000); Boyd, *supra* note 14, at 63.

²⁵⁷ See *California v. United States*, 438 U.S. 645, 653 (1978); see also Brief for Colorado, *supra* note 39, at 12-15.

²⁵⁸ See 33 U.S.C. § 1251(g).

²⁵⁹ Brief for Colorado, *supra* note 39, at 22.

²⁶⁰ See, e.g., Brief for the United States, *supra* note 32, at 26-28.