

An Analysis of South Florida Water Management District v. Miccosukee

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The Miccosukee Tribe of Indians and the Friends of the Everglades (together as plaintiffs) brought a citizen suit under the Clean Water Act (“CWA”) against the South Florida Water Management District (SFWMD). The suit alleged that the Water District was violating the Clean Water Act by discharging pollutants from the S-9 pump station into Water Conservation Area 3A without a National Pollution Discharge Elimination System (“NPDES”) permit.

Under the Clean Water Act, the discharge of pollutants from a point source into navigable waters without an NPDES permit is prohibited. A point source is defined to be “any discernable, confined and discrete conveyance, including but not limited to any pipe... from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).

The S-9 is a pump station, which back pumps from the C-11 canal basin in Broward County, Florida, into the historical part of the Everglades known as Water Conservation Area 3. The water which the C-11 Canal collects and which the S-9 pump station conveys into the WCA-3A contains pollutants. This water contains higher levels of phosphorous than that naturally occurring in WCA-3A. The discharge has caused extensive damage in the Everglades, and has been ignored by EPA and the DEP as far as requiring any permitting for the discharge.

The dispute focuses mainly on one legal issue: whether the pumping of the already polluted water constitutes an addition of pollutants to navigable waters from a point source. The Water District argued that no addition of pollutants from a point source

can occur unless a point source adds pollutants to navigable waters from the outside world. Under this interpretation, when a point source conveys one navigable water into another, no addition of pollutants will occur unless the point source itself is the source of the pollutants it releases.

The district court concluded that, because the waters collected by the C-11 Canal contained pollutants and this water would not flow into WCA-3A without the operation of the S-9 pump station, S-9 added pollutants to the WCA-3A in violation of the CWA.¹ The district court further issued an injunction enjoining the Water District from operating the S-9 pump station without an NPDES permit. After the district court enjoined the operation of S-9 without a permit, the Water District brought an emergency motion for relief of the judgment. Neither the plaintiffs nor the defendants had ever intended for the injunction to be enforced, because the consequences of the injunction would have been the flooding of western Broward County and the resulting displacement of the residents there.

The Water District appealed the decision of the district court and the appellate court affirmed the district courts ruling, concluding that, 1) in determining whether pollutants are added to navigable waters for purposes of the CWA, the receiving body of water (WCA-3A) is the relevant body of navigable water, 2) pollutants were in fact being added to WCA-3A, and 3) an addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants into navigable water.

The appellate court also concluded, however, that the injunction imposed by the district court was not the appropriate remedy and amounted to an abuse of discretion, considering that the cessation of the S-9 pump would cause substantial flooding in

western Broward County which, in turn, would cause damage to and displacement of a significant number of people.

After both the Federal District Court and the Eleventh Circuit Court of Appeals found in favor of the Friends of the Everglades and the Miccosukee Indian Tribe, the United States Supreme Court granted certiorari to take the case. Despite urging from the U.S. Solicitor General to deny review, the case was heard by the Supreme Court in Washington D.C. on January 14, 2004. The Court is looking at cases from opposite coasts that challenge pollution regulations, and this case is just part of the Court's unusually in-depth review this year of environmental issues.² The Bush administration supports the water district, and wants the high court to overturn the case. *Id.*

In oral arguments, the water district once again contended that the S-9 pump does not add pollutants to navigable waters, because there can be no addition of pollutants to navigable waters when navigable waters are simply moved around. According to the water district, this practice of moving navigable waters around occurs all the time every day all around the country as public water management agencies allocate and transfer the navigable waters to serve beneficial public purposes. According to the water district, simply moving navigable waters around should not require a section 402 permit.

Justice Breyer questioned this argument extensively with a hypothetical he called the case of the filthy river problem.³ Breyer reasoned that, "what if you have one of these rivers that's so filthy that you can set fire to it, and next to it is the most pristine, beautiful trout lake ever. And so we build a little pipe and the pipe takes this filthy, absolutely disgusting water and pours it into this beautiful, pristine trout pond." *Id.*

The water district responded that this filthy river problem would never happen, because there are other provisions that protect against it, such as the CWA, which gives EPA broad powers to get a restraining order for emergency situations involving public health or welfare. The water district argued further that, even if the EPA was without any power to deal with the problem, the problem is addressed comprehensively and rigorously at the state level. In the midst of this explanation, Justice Breyer interrupted, questioning the state's role, stating, "This is a case about phosphorous being dumped into a relatively unpolluted body of water. What is the state of Florida or anybody doing to reduce the level of phosphorous that comes from this pump and gets dumped into this pure water?" Given that recent Florida legislation has substantially postponed deadlines for pollution cleanup, Justice Breyer's concerns indicate a level of uncertainty that states are adequately dealing with pollution problems.

The thrust of the water management district's argument centered on the concept of unitary water, taking the position that all of the navigable waters of the United States are unitary. This being such an extreme position, the district relied on a fallback position that the polluted water, and the unpolluted water, which the S-9 pumps to and from, were unitary waters, a single body of water, divided solely by manmade structures.

The court questioned this argument as well, stating that the problem with the unitary concept is that the function of this kind of unitary definition is a function that works against the protection of clean water, and hence runs counter to the purposes of the Clean Water Act itself.

Dealing with the issue of whether the S-9 pump adds pollutants to navigable waters, the Miccosukee tribe and Friends of the Everglades continued to hold the position

in their oral argument that a pollutant is added to a navigable water where it would not otherwise be, whenever its put somewhere where its not already there or would not naturally flow. Friends of the Everglades argued that the receiving navigable water body is the point of focus under the Clean Water Act because the act specifically provides for designating different water bodies with specific designated uses and with associated water quality standards that will protect those uses.

Justice Scalia took umbrage with this argument, stating that the Clean Water Act, as its written, states only that one shall not add pollutants to the navigable waters of the United States, and that has not happened here.⁴ Friends of the Everglades contended that if the text of the Act were to be interpreted this way, any pollutant, once in navigable waters, could be spread to any navigable water with any designated use or any different water quality. In essence, Justice Breyer's hypothetical problem of the filthy river would be a reality. With respect to the Everglades, Friends argued, Water Conservation area 3A and the C-11 basin are distinctly different bodies of water.

There was some laughter in the courtroom when one member of the court suggested looking to the book of Genesis to find a definition of 'what is the same water body', but Friends of the Everglades argued that there is EPA guidance on this question, because Section 303 of the act itself mandates that states designate different water bodies, and in the State of Florida, the State legislature has designated the Everglades protection area quite distinct from the canal, a different water quality standard and a different use for that water. So its not that the C-11 basin is water just divided. It is an artificial canal, which Friends of the Everglades argued was no more part of the Everglades protection area than Fenway Park in Boston is part of the Charles River because its built on the

landfill where the Charles River once was. Hence, with respect to the question of singular or unitary waters, the singular waters approach of the United States and the water management district eliminates the different designated uses and the ability to actually determine the effects of a permit.

Friends of the Everglades also took issue with the water management district's assertion that water pollution is being addressed comprehensively and rigorously at the state level, indicating that two years ago, the State of Florida indicated they would meet water quality standards in the S-9 by 2005, and have now eliminated any commitment to reach it by 2005, hoping that this litigation will first relieve them of the oversight of the NPDES permit on S-9, and then they will use this litigation to eliminate NPDES permits that were required from 1993 forward on other projects. These facts bring Justice Breyer's concerns to light about the states ability to adequately control pollution.

If the Supreme Court finds in favor of Friends of the Everglades and the Miccosukee Indian Tribe, it will result in the requirement that all water quality compliance be at the point where the pollutants are discharged, and it will make clear that it is the Water Management District's responsibility to get a Federal permit. According to Friends of the Everglades, this case is important locally and nationally. It is very important to the restoration of the Everglades, but it is important nationally because it will determine whether anyone can take water from one water body and discharge it into another that has higher water quality and a more protective classification than the water body being discharged from without a federal permit.

The history of this case to date contains ample support for Friends of the Everglades. More States support the tribe in their briefs saying this is essential than do

support the district and the United States. Forty-two groups, including states, cities and Indian tribes, have filed amicus briefs before the U.S. Supreme Court in support of Friends of the Everglades and the Miccosukee Tribe's position. Those groups include 14 states, two cities, four Native American coalitions, seven major national organizations, and former Environmental Protection Agency officials. Included are briefs by former EPA Administrator Carol Browner, and the National Congress of American Indians, representing over 250 member tribes.

A brief filed by New York and twelve other states indicates that states have expended much effort implementing the CWA in a manner tailored to the specific needs and circumstances of individual water bodies, including water quality standards, total maximum daily loads, and permits. An approach that allowed pollutants from one water body to be diverted to another water body with a CWA permit would treat these various and unique water bodies as if they were equivalent and interchangeable.

The fact that the Supreme Court agreed to hear the case despite opposition from the Bush administration, along with the court's unusually in-depth review of environmental issues this year, could be indicative of a new importance the court may be giving to environmental issues, but the parties aren't speculating. A decision to the case is expected in April or May of this year.

¹ *Miccosukee Tribe of Indians of Florida v. South Florida Water Management District*, 280 F. 3d 1364, 1369

² WASHINGTON (AP), CNN.com, *Supreme Court takes up air and water pollution cases*, <http://www.cnn.com/2004/LAW/01/14/scotus.pollution.ap>>(January 14, 2004).

³ 2004 WL 111643

⁴ 2004 WL 111643