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Water Transfers, the Clean Water Act and The Courts

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ROBERT SANER, AMWA COUNSEL

1501 M Street, NW Washington, DC 20005
Telephone: (202) 466-6550 www.ppsv.com

THE LAW

"The Wheels of Justice Grind **Slowly** but **Exceedingly Fine**……"

Early versions of this common legal maxim attributed to the Greek philosopher Sextus Empiricus (c.160-210 AD)

An Act of June 29, 1888

"The placing, **discharging** or depositing ….of refuse, dirt, ashes, cinders, mud, sand ….**in the waters** of any harbor…is strictly forbidden."

33 U.S.C. 441

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The Rivers and Harbors Act of 1899

"It shall not be lawful to throw, **discharge** or deposit….any refuse matter of any kind…into any **navigable water** of the United States."

33.U.S.C. 407

The Federal Water Pollution Control Act Amendments of 1972

(now "The Clean Water Act")

"Except as in compliance with… (an NPDES permit)…, the **discharge of any pollutant** by any person shall be unlawful."

33 U.S.C. 1311(a)

Clean Water Act Definitions

"The term '**discharge** of a pollutant' and the term '**discharge** of pollutants' each means (A) **any addition** of any pollutant **to navigable waters** from any point source…."

33 U.S.C. 1362 (12)

Clean Water Act Definitions

"The term '**navigable waters**' means the **waters** of the United States, including the territorial seas."

33 U.S.C. 1362 (7)

Clean Water Act Definitions

The term “any addition” means

?

The Courts—An Overview

- Prior to EPA's Water Transfer Rule ("WTR")
  - A "Dam" Case-1982
  - A "Pumping" Case-1996
  - The first *Catskills* Case-2001
  - The Supreme Court's Decision in *Miccosukee*-2004
  - The second *Catskills* Case--2006

The Courts—An Overview

- EPA Finalizes the WTR in 2008
- After The WTR
  - Direct Challenges to the WTR
  - ***Friends of the Everglades v. SFWMD***
    - 11th Circuit Decision--2010
    - Supreme Court Denies Cert--2012
  - ***Los Angeles County***
    - 9th Circuit Decision--2011
    - Supreme Court Reverses—2013

The Courts Pre-WTR

- The first big dam case:
  - A dam could be a point source and releases could have water quality impacts
  - Release requires a permit only if it "adds" pollutants to the downstream water
  - EPA argues no "addition" because the dam does not introduce pollutants from "**the outside world**"
  - DC Circuit Court found that to be a close question, but held that EPA was entitled to **great deference**

National Wildlife Federation v. Gorsuch, 693 F. 2d 156 (CADC 1982)

The Courts Pre-WTR

- The first big pumping case:
  - Ski resort pumps water from a pond and two streams, through snowmaking equipment, and releases it back into the pond
  - Pond and streams not connected by **natural flow** are "**distinct waters**," even though in the **same watershed**
  - But for pumping, water from one stream (polluted) would never reach the waters of the pond (pristine)
  - Ski resort is a point source and its release constitutes an "addition," even if not the original source of the pollutants

Dubois v. United States Department of Agriculture, 102 F. 3rd 1273 (CA1 1996)

The Courts Pre-WTR

The first *Catskills* case:

- NYC moves water from one DW reservoir, through a tunnel, into a creek, and into a second DW reservoir
- The movement is **against natural flow**, and the waters of the first reservoir and the creek are sufficiently different as to make them **distinct** water bodies, not the same water body
- The tunnel is a point source, and its discharge into the creek is an addition. At least as to the creek, the pollutants are coming from the outside world.

Catskill Mountains Chapter of Trout Unlimited v. City of New York, 273 F. 3rd 481 (CA2 2001)

The Courts Pre-WTR

- **The Supreme Court** weighs in but leaves some questions unanswered
- ***Miccosukee*** **is** a pumping case but the facts are very different from either *Dubois* or first *Catskills*
  - SFWMD pumps water for flood control purposes from one side of a levee to another
  - Water on one side collects from a large urban area, but the pump only moves the water about 60 feet
  - Movement is artificial, but so are the levees
  - Pump is not the original source of pollutants but does it "add" them to the water on the other side?

The Courts Pre-WTR

Miccosukee continued….

- The Court remands the case for further facts:
  - Are the waters on one side of the levees **meaningfully distinct** from those on the other side? If so, permit required.
  - Or, are they are essentially the **same waters**?
- The Court does not define "meaningfully distinct"
  - Is it hydrology that rules or environmental impact?

South Florida Water Management District v. Miccosukee Tribe of Indians et al, 541 U.S. 95 (2004)

The Courts Pre-WTR

The second *Catskills* case:

- After *Miccosukee*, and after EPA had issued interpretive guidance, but before the WTR
- 2nd Circuit reaffirms its holding in *Catskills* 1
  - Interprets *Miccosukee* as **maintaining a legal distinction between inter- and intra-basis transfers** and **disfavoring the "unitary waters" theory**
  - Finds the EPA guidance **unpersuasive** and not entitled to deference

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 451 F. 3d 77 (CA2 2006)

EPA'S Water Transfer Rule

- The **2008 WTR** changes the litigation landscape by providing this **simple exclusion** from the NPDES program:

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

40 CFR 122.3 (i)

EPA'S Water Transfer Rule cont.

- Interestingly, despite years of judicial attempts to define the term **"addition,"** the WTR does not actually define it
- But EPA's preamble to the final rule justifies the WTR as follows:

  "……the Agency concludes that water transfers….do not require NPDES permits because they do not result in the 'addition' of a pollutant."

  73 Fed. Reg. 33699, June 13, 2008

EPA'S Water Transfer Rule cont.

- Similarly, the WTR does not explicitly redefine the term "waters"
- But again, the Preamble:

" (to be a water transfer) the water must be conveyed **from one water** of the U.S. **to another water** of the U. S. Conveyances that remain **within the same water** of the U.S., therefore, do not constitute water transfers under this rule, although movements of water **within a single water body** are also not subject to NPDES permitting requirements."

73 Fed. Reg. 33699, June 13, 2008

The Courts Post-WTR

- Direct challenges to the WTR
  - EPA says judicial review of the WTR lies with the U.S. Circuit Courts of Appeal
  - Petitions for review are filed in 2008 in various Circuits and consolidated in the 11th Circuit.

Direct Challenges to the WTR cont.

- Others file in Federal District Courts, believing jurisdiction properly lies there.
- The 11th Circuit ultimately agrees, and dismisses the consolidated petitions for lack of jurisdiction.

Friends of the Everglades v. USEPA, No. 08-13652 and consolidated cases (CA11 October 26, 2012)

- 11th Circuit denied EPA's petition for rehearing *en banc*. EPA may seek review by the Supreme Court, but on jurisdiction, not the merits.

Direct Challenges to the WTR cont.

- Meanwhile, in the Federal District Courts…
- Cases filed in the Southern Districts of both Florida and New York back in 2008 were stayed while awaiting the 11th Circuit's decision.
- One (Florida) has since been withdrawn, and the stay in the other (New York) has only recently been lifted.

The Courts Post-WTR

- The 11th Circuit applies the WTR to a specific permit fight
- The trial court ruled in 2006, pre-WTR:
  - Requiring a permit for certain SFWMD **pumps** that moved waters, **against natural flow**, into Lake Okeechobee from canals south of the lake
  - Finding the canals and the lake to be **distinct waters**

The Courts Post-WTR

- The 11th Circuit reverses, post-WTR, finding that the EPA rule
  - Is **not the only** permissible interpretation of the CWA
  - Maybe **not even the best** interpretation of the CWA
  - **But is one permissible interpretation** of the CWA, and thus EPA is entitled to **deference**

Friends of the Everglades v. South Florida Water Management District, 570 F. 3d 1210 (CA11 2010)

The Courts Post-WTR

- After the 11th Circuit's reversal, the original winners, and then losers, sought review by the U.S. Supreme Court
- On November 29, 2012 the Supreme Court denied the petitions for *certiorari*, thus passing up the opportunity to:
  - Affirmatively validate the WTR, or
  - Add to what it had said in *Miccosukee* eight years earlier

The Courts Post-WTR

- Two months later, Supreme Court unanimously applies its prior holding in *Miccosukee* to different facts:
  - "…**flow** of water from an improved portion of a navigable waterway into an unimproved portion of the **very same waterway** does not qualify as a discharge of pollutants under the CWA."

Los Angeles County Flood Control District v. NRDC *et al*, 133 S. Ct. 710 (January 8, 2013)

The Courts Post-WTR

- WTR was not an issue in this case.
- *L. A. County* is arguably not a transfer case at all.
- No need to determine whether the transfer is between "meaningfully distinct" waters. More like the *Gorsuch* in-line dam case from 1982.
- But for a confused decision by 9th Circuit, *L.A. County* probably never gets to the Supreme Court.

Conclusion

- **Not done yet**--Federal District Court for the Southern District of New York will **eventually** rule on the **merits** of the WTR
- That decision will likely go the 2nd Circuit on appeal, and maybe the Supreme Court after that
- Other courts unsympathetic to the WTR will try to apply the *Miccosukee* concept of "meaningfully distinct" waters.