No. 10-196

IN THE

Supreme Court of the United States

FRIENDS OF THE EVERGLADES, FLORIDA WILDLIFE FEDERATION, AND FISHERMEN AGAINST DESTRUCTION OF THE ENVIRONMENT,
Petitioners,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT; CAROL WEHLE, EXECUTIVE DIRECTOR; UNITED STATES; UNITED STATES SUGAR CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE FLORIDA FRUIT AND VEGETABLE ASSOCIATION AND FLORIDA FARM BUREAU FEDERATION IN SUPPORT OF RESPONDENT SOUTH FLORIDA WATER MANAGEMENT DISTRICT

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF RESPONDENT SOUTH FLORIDA WATER MANAGEMENT DISTRICT

Under Rule 37 of this Court, the Florida Fruit and Vegetable Association and the Florida Farm Bureau Federation request leave to file the accompanying brief as *amici curiae* in response to the petition for writ of certiorari and in support of the request for jurisdiction. Consent for *amici* participation was sought by letter dated October 7, 2010, and was granted as communicated in letters from counsel

for Friends of the Everglades, Fisherman Against Destruction of the Environment, and the Florida Wildlife Federation (plaintiffs in the district court proceedings) on October 8, 2010 and by the United States Department of Justice on October 9, 2010. On October 13, U.S. Sugar Corporation provided written consent through counsel. On October 19, 2010, South Florida Water Management District and Miccosukee Tribe of Indians of Florida provided written consent through counsel.

The Florida Fruit and Vegetable Association (FFVA) is a nonprofit, agricultural trade organization headquartered in Orlando, Florida. Its mission is to enhance the competitive and business environment for producing and marketing fruits, vegetables, and other crops. The FFVA represents and assists its membership on a broad range of farming issues, including environmental protection, marketing, labor, food safety, and pest management. These services help Florida growers set the standard for competitively producing an abundant supply of safe, affordable fruits, vegetables, and other crops. Its members produce much of the winter vegetable crop for the United States.

The Florida Farm Bureau Federation (FFBF) represents the interests of farmers and ranchers in Florida. The FFBF is composed of 62 county farm bureaus with more than 143,400 member families. It is headquartered in Gainesville, Florida.

The National Pollutant Discharge Elimination System (NPDES) program limits the flow of pollutants into the nation's waters by requiring discharge permits from "point sources." Should such permits be required for agricultural discharges, a discharge may not occur without a permit and there is no assurance

such a permit will be granted. Agricultural discharges do not readily fit within such a category and frequently include waters from large watersheds without an ability to determine all contributions or loads to the flow. There is no assurance such a discharge will be issued a permit, thus creating uncertainty in business planning on issues such as planting of crops. The sheer cost of preparing NPDES permit applications, as well as defending them from third party judicial challenges, can impose substantial burdens on applicants. As a result of conflict among circuits and unanswered questions from the opinion of this Court in *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95 (2004), there is no definitive judicial interpretation of essential terms within the Clean Water Act (CWA). An interpretation of those terms would determine the circumstances in which public water managers, when managing the flow or diversion of water, are required to obtain discharge permits under the NPDES program.

The NPDES program regulates the addition of pollution into navigable waters by point sources. The decision below addresses the question of whether the diversion of flow from one navigable water to another is an addition of pollutants to navigable waters, as those terms are used in the CWA. As provided in EPA's current regulatory interpretation, such a transfer of waters is not an addition of pollutant to navigable waters. 40 C.F.R. § 122.3(i). In the decision below, the Eleventh Circuit applied deference to EPA's regulation as described in *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.,* 467 U.S. 837 (1984). The Eleventh Circuit noted, however, that its deference would not apply if EPA rescinded its

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

The FFVA and FFBF seek to support the position of the South Florida Water Management District (SFWMD). In proceedings below, SFWMD argued that the CWA should be interpreted so that the diversion of water, with no addition of pollutants, is not regulated under the NPDES program. That argument is consistent with EPA's present interpretation, EPA's consistent prior implementation of the CWA, and Congress' efforts to address agricultural discharges outside of the NPDES program.

If the District's position is not adopted as a definitive interpretation, and if EPA successfully rescinds its present regulation on the subject, the result would initially impose burdens and costs directly on farms, as well as state and local water managers responsible for operating dams, pumps, and other water control structures. State and local water managers will inevitably transfer those burdens and costs to farmers and ranchers who discharge upstream of the structure. Those burdens and costs would substantially impair the ability of ranchers and farmers to farm or compete in the international marketplace. For these reasons, the FFVA and FFBF seek a definitive interpretation of the CWA regarding the scope of NPDES permit requirements in cases where waters are transferred from one navigable water body to another, without a related addition of pollutants. To that end, FFVA and FFBF support SFWMD's position in response to the petition for writ of certiorari.

Respectfully submitted,

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BRIEF *AMICI CURIAE* OF THE FLORIDA FRUIT AND VEGETABLE ASSOCIATION AND FLORIDA FARM BUREAU FEDERATION IN SUPPORT OF RESPONDENT SOUTH FLORIDA WATER MANAGEMENT DISTRICT

Florida Fruit and Vegetable Association and the Florida Farm Bureau Federation respectfully submit this brief as *amici curiae*.[1]

[1] Counsel for *amici curiae* has authored this brief in whole and no other person or entity other than *amici*, its members or counsel have made a monetary contribution to the preparation or submission of the brief.

INTEREST OF *AMICI CURIAE*

The Florida Fruit and Vegetable Association (FFVA) is a nonprofit, agricultural trade organization headquartered in Orlando, Florida. Its mission is to enhance the competitive and business environment for producing and marketing fruits, vegetables, and other crops. The FFVA represents and assists its membership on a broad range of farming issues, including environmental protection, marketing, labor, food safety, and pest management. These services help Florida growers set the standard for competitively producing an abundant supply of safe, affordable fruits, vegetables and other crops. Its members produce much of the winter vegetable crop for the United States.

The Florida Farm Bureau Federation (FFBF) represents the interests of farmers and ranchers in Florida. The FFBF is composed of 62 county farm bureaus with more than 143,400 member families. It is headquartered in Gainesville, Florida.

Additional federal regulation on the management of water transfers will have a profound effect on agriculture in south Florida and the nation as a whole. In the case before the Court, a regional water management district manages the flow of water in and out of canals within the Everglades system, and thereby controls the success or failure of many farm operations in south Florida. To illustrate briefly the consequences of the dispute in this case, there are over two million dams in the United States. *Nat'l Wildlife Fed'n v. Gorsuch*, 530 F. Supp. 1291, 1313 (D. D.C. 1982), *reversed*, *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165-166 (D.C. Cir. 1982). Each manager of those dams, as well as countless other structures necessary for the transfer of water

for irrigation, public supply, and drainage purposes, may require a National Pollutant Discharge Elimination System (NPDES) permit if EPA extends the NPDES program to the regulation of water transfers.

The outcome of competition in the international market for farm products is determined by, among other things, the direct and indirect effects of environmental regulations on farm operations. The specific controversy in this case could lead to substantial, adverse effects on farm operations in south Florida. If the South Florida Water Management District (SFWMD) is required to obtain an NPDES permit in order to operate pumps and transfer water through levees, it must increase its budget to cover administrative permitting costs as well as the costs of additional wastewater treatment systems. More than likely, SFWMD and the State of Florida would recoup those costs by increasing agricultural privilege taxes, ad valorem taxes on owners within the District's boundaries, and assessments. *See* §§ 373.4592, 373.503, Fla. Stat. It is also likely that the NPDES program will require the District to acquire additional, extensive farm acreage for the construction of stormwater treatment areas. In such a case, SFWMD would likely use its eminent domain powers to take farm lands for such purposes, directly ending the operations of certain farms and ranches. Comparable results would likely arise in other agricultural operations across the nation.

For these reasons, farmers and ranchers in FFVA and the FFBF have a direct economic interest in the outcome of this case. Those organizations support SFWMD's position, which would prevent the expansion of regulation in the area of water transfers.

I. THE CLEAN WATER ACT SHOULD NOT BE INTERPRETED TO REQUIRE NPDES REGULATION OF WATER TRANSFERS.

The Clean Water Act (CWA) prohibits the discharge of pollutants by point sources, unless the discharge is authorized by a permit under the NPDES program. 33 U.S.C. § 1311(a). EPA may assume direct permitting responsibility, and may delegate that authority to state government agencies. 33 U.S.C. §§ 1342(a), (b). The State of Florida administers the NPDES program on waters within its borders.

The NPDES program originated in 1972 amendments to the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act. Pub. L. 92-500 § 402, *codified as amended* 33 U.S.C. § 1342. In broad terms, Congress selected different means of regulating point sources and nonpoint sources under the CWA. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165-166 (D.C. Cir. 1982).

Congress delegated to states the authority to address nonpoint sources through a planning process. 33 U.S.C. § 1288; *see Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d at 166. The existence of a "point source" alone, however, does not require regulation under the NPDES program. The CWA requires NPDES permits when point sources cause an addition of a pollutant to navigable waters. 33 U.S.C. §§ 1311(a), 1362(12).

Runoff from agricultural operations, like other nonpoint sources, will contribute pollutants to water diversion structures such as the pumps at issue in this case. Congress plainly intended that agricultural operations would not be regulated under the NPDES program in enacting the CWA. 33 U.S.C.

§ 1362(14) (excluding agricultural stormwater discharges and return flows from irrigated agriculture from the definition of "point sources"); S. Rep. 95-217, 95th Cong., 1st Sess. 35 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4360 (sources of agricultural runoff "regardless of the manner in which the flow was applied to the agricultural lands, and regardless of the discrete nature of the entry point, are more appropriately treated under the requirements of [CWA] section 208(b)(2)(F).") For practical purposes, the CWA provides EPA the authority to address agricultural runoff and other nonpoint sources of water pollution through separate methods. The Total Maximum Daily Load program under section 303 of the CWA requires states to regulate such sources, subject to EPA supervision. 33 U.S.C. § 1313(d); *see generally Sierra Club v. Meiburg* 296 F.3d 1021, 1025 (11th Cir. 2002) ("Because of non-point source pollution, achieving the specified water quality standard in a body of water may require more stringent limitations upon point-source discharges than would otherwise be required under the permit-issuing regime we have previously described. If the regulation of point-source discharges does not achieve the necessary level of water quality, Total Maximum Daily Loads (TMDLs) come into play.") The State of Florida has developed a detailed approach to regulating nonpoint sources, a program approved by EPA. Florida's program includes "best management practices" that reduce the introduction of pollution into navigable waters when a downstream water is deemed impaired. § 403.067(7)(c), Fla. Stat. (2008).

SFWMD may be required to apply for and obtain NPDES permits for continued operation of pumps in the Everglades system, if SFWMD's position is not adopted as a definitive interpretation under the

CWA, and if (as suggested by the Eleventh Circuit) EPA were to rescind the regulation at issue in this case. There is no suggestion that the result would alter the obligations of upstream sources of pollution. Upstream point sources would still be required to obtain an NPDES permit, and the State of Florida would continue to impose limitations on upstream nonpoint sources through the TMDL program. If SFWMD is required and able to obtain a permit, the end result is a redundant system whereby EPA would first impose limits on the original introduction of pollutants in the waterway, and then regulate the transfer of the same pollutants in the same waterway. The CWA should not be interpreted to impose such a burden and uncertainty on SFWMD or similarly situated public agencies.

II. THE DECISION OF THE ELEVENTH CIRCUIT SHOULD BE AFFIRMED BASED ON THE LANGUAGE AND CONTEXT OF STATUTORY TERMS, WHICH SUPPORT THE UNITARY WATERS THEORY.

The specific language of the CWA, as well as its overall context, lead to the conclusion that an NPDES permit is not required when water managers transfer waters from one water body to another, without adding additional pollutants to the waters. To condense the argument to its essential elements, the CWA regulates discharges of pollutants into navigable waters, not the mere discharge of waters. From the overall context of the CWA, the regulation of water transfers is more appropriately allocated to state governments. Aside from considerations of *Chevron* deference based on EPA's present regulation, the most reasonable interpretation of the CWA

would lead to the conclusion that such water transfers do not trigger permitting requirements under the CWA.

III. THE COURT SHOULD GRANT CERTIORARI IN ORDER TO PROVIDE A DEFINITIVE INTERPRETATION OF THE CLEAN WATER ACT REGARDING ITS APPLICATION TO THE MOVEMENT OF WATERS CONTAINING PREEXISTING POLLUTANTS.

In *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95 (2004), the Court left unanswered a question of compelling interest to the members of FFVA and FFBF: whether the routine transfer of water from one navigable water body to another can be deemed an addition of pollutants to navigable waters. Circuit court decisions have not led to a coherent answer to this question. One set of cases, addressing the downstream flow of water through dams, tends to support the "unitary waters" interpretation, leading to the conclusion that such a transfer is not the addition of pollutants to navigable waters. *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); *see also Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976). Other circuit court decisions have reached a contrary interpretation or have rejected the so-called "unitary waters" theory. *Catskill Mountains Ch. of Trout Unlimited, Inc. v. City of New York,* 451 F.3d 77, 83 (2d Cir. 2006); *DuBois v. U.S. Dep't of Agriculture*, 102 F.3d 1273 (1st Cir. 1996). The case before the Court conflicts with the decisions in *Catskill Mountains* and *DuBois*.

In this case, the Eleventh Circuit applied *Chevron* deference to reach the conclusion that a permit was not required for the mechanical pumping of water from canals, through levees into Lake Okeechobee. The Eleventh Circuit observed that *Chevron* deference would not apply if EPA rescinded its regulatory interpretation. The existing split of authorities as well as the unresolved merits of the "unitary waters" approach warrants consideration and clarification by this Court. For the foregoing reasons, the FFVA and the FFBF support the position that review should be granted based upon conflict among circuit court decisions. Furthermore, because the outcome of this dispute will have enormous practical consequences on agricultural interests and other water users, those organizations also support the position that review should be granted to address the merits of the unitary waters theory, the matter left unresolved by the decision in *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95 (2004).

Respectfully submitted,

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