Nos. 10-196, 10-252

In the Supreme Court of the United States

FRIENDS OF THE EVERGLADES, ET AL.,

Petitioners,

v.

SOUTH FLORIDA WATER MANAGEMENT DIST., ET AL.,

Respondents.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner,

v.

SOUTH FLORIDA WATER MANAGEMENT DIST., ET AL.,

Respondents.

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

BRIEF FOR RESPONDENT UNITED STATES SUGAR CORPORATION

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QUESTION PRESENTED

The decision of the Eleventh Circuit raises questions about the meaning of a major federal environmental statute, the Clean Water Act, that warrant this Court's review because they have enormous practical importance for water managers and users throughout the Nation and because there is confusion among the courts of appeals in the wake of this Court's ruling in *South Florida Water Management District* v. *Miccosukee Tribe of Indians*, 541 U.S. 95 (2005).

The question this Court should address is whether the plain language and structure of the Clean Water Act mandate that no Section 402 permit is required for water transfers that move polluted waters of the United States but that introduce no new pollutants to navigable waters from the outside world.

RULE 29.6 STATEMENT

United States Sugar Corporation has no parent company, and no publicly held corporation owns 10% or more of its stock.

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Respondent United States Sugar Corporation respectfully requests that this Court grant certiorari to determine a question that it left open in *South Florida Water Management District* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 109 (2004) ("*Miccosukee*"): whether the plain language and structure of the Clean Water Act mandate that a Section 402 permit is not required for water transfers that move pollution within the waters of the United States but that introduce no new pollutants to navigable waters from the outside world. Although the Eleventh Circuit held that no permit is required in this case, it reached that conclusion not by reading the plain language of the Clean Water Act but by applying *Chevron* deference to a rule that the United States has now said it is revisiting. The court's application of *Chevron* to an issue properly resolved by the application of ordinary principles of statutory interpretation grants EPA discretion that Congress did not intend it to have. It creates intolerable uncertainty for water managers and users that must plan out projects many years in advance. And the varied approaches taken by other courts of appeals add to the confusion. Petitioners have nothing else right about this case, but they are correct that this Court's review of the Eleventh Circuit's ruling is warranted.

STATEMENT

1. The Clean Water Act ("CWA") balances federal and state powers, forming "a partnership" "animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992) (quoting CWA § 101(a), 33 U.S.C. § 1251(a)). Congress's express intent in the CWA is

"to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." CWA § 101(b), 33 U.S.C. § 1251(b). It is also "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 the Act. CWA § 101(g), 33 U.S.C. § 1251(g). To achieve the goals of restoration and maintenance of the Nation's waters while also preserving the States' primacy in water quality protection and land and water resource management, the Act divides regulatory authority between the State and Federal Governments based on the source of pollutants.

Of critical importance to this case, Section 402 creates a permitting system for "point sources" that add pollutants to United States waters. Specifically, Section 402 requires a National Pollution Discharge Elimination System ("NPDES") permit for the "discharge of any pollutant." 33 U.S.C. § 1342(a); see also CWA § 301(a), 33 U.S.C. § 1311(a). The Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." CWA § 502(12), 33 U.S.C. § 1362(12). "Navigable waters" in turn is defined as "the waters of the United States." CWA § 502(7), 33 U.S.C. § 1362(7). The Act leaves "addition" undefined.

Beyond Section 402 and the separate Section 404 permit scheme for the addition of dredge and fill material to navigable waters (33 U.S.C. § 1344), Congress largely left the task of addressing water pollution to the States, with federal guidance,

assistance, and oversight. See *The Clean Water Act Handbook* 191-220 (M. Ryan ed. 2003). States are responsible for establishing water quality standards (CWA § 303(a), 33 U.S.C. § 1313(a)) and achieving those standards by developing, among other things, programs to manage nonpoint sources of water pollution, such as runoff. CWA §§ 303(d), 319, 33 U.S.C. §§ 1313(d), 1329. In particular, Congress expressly contemplated that "pollution resulting from * * * changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of * * * flow diversion facilities," would be addressed under State nonpoint source programs—even though such diversions are usually point sources. CWA § 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F) (headed "Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution"). Congress recognized that pollutants should be managed at their source, and it believed that subsequent diversions of polluted water are most sensibly addressed through State water resource planning and regulations.

2. Historically, much of south Florida was part of the Everglades wetlands. Starting in the early 1900s the State began building canals to drain the wetlands and make the land suitable for cultivation and habitation. *Miccosukee*, 541 U.S. at 99. In 1948 Congress expanded the State's efforts by establishing the Central and South Florida Flood Control Project ("CSFFC Project"). That project tasked the U.S. Army Corps of Engineers to construct a comprehensive network of levees, water storage areas, pumps, and canal improvements to improve flood protection, water conservation, and drainage. *Id.* at 100. The local sponsor and day-to-day operator of the project is

respondent South Florida Water Management District ("District").

Operating within the structure designed by Congress in the CWA, Florida has combated pollution of its waterways. The Everglades Forever Act of 1994 is a comprehensive regulatory program of "best management practices" for landowners within the Everglades Agricultural Area ("EAA")—a 630,000 acre area south of Lake Okeechobee where U.S. Sugar conducts significant agricultural activities—that is designed to control the release of pollutants before they enter navigable waters. See Fla. Stat. § 373.4592. Other Florida statutes that address the improvement of water quality, in particular through control of nonpoint sources of pollution, include the Watershed Restoration Act of 1999 (*id.* § 403.067) and the Lake Okeechobee Protection Act of 2000 (*id.* § 373.4595), both of which require watershed-based approaches and implementation of best management practices to reduce nonpoint source pollution.

The District has also acquired land to be used to enhance water management and pollution control, including closing on October 12, 2010 on the purchase of some 27,000 acres of land in the EAA immediately south of Lake Okeechobee from United States Sugar Corporation. Thus, as Congress anticipated, Florida and the District have gone to great lengths to improve the quality of the State's waters and continue to do so.

3. This case concerns the S-2, S-3, and S-4 pump stations in south Florida. Constructed as part of the CSFFC Project, those stations are operated by the District in close cooperation with the U.S. Army Corps of Engineers. The pump stations lie at the southern end of the Herbert Hoover Dike that

surrounds Lake Okeechobee and have the capacity to pump water from canals in the EAA into the lake. Friends Pet. App. 75a, 84a. When operating, the pumps transfer accumulated waters, which would otherwise flood populated areas, over a distance of fewer than 60 feet. As the district court found, the pump stations do not "subjec[t] the waters to any intervening industrial, municipal or commercial use" or "introduce anything to the water as it moves through the stations." *Id.* at 85a. They do, however, transfer pollution that is already in navigable waters. *Id.* at 87a.

Although the pumps operate "[a]t most" for "a few days per year" during extreme weather events (Friends Pet. App. 108a), they are of critical importance to life in south Florida. The pump stations were constructed after thousands of Floridians died in flood events. In the district court's words, the stations "provide flood protection for the basins, communities and agricultural areas that they serve" and are "essential to maintaining the agricultural activity in the EAA." *Id.* at 88a. The pump stations also provide "the only option for flood protection for the City of Clewiston," where U.S. Sugar is based. *Ibid.* "Failure to operate the S-2, S-3, or S-4 pump stations during severe rain events would cause flooding in communities and farmlands throughout the S-2, S-3, and S-4 basins." *Id.* at 89a.

Petitioners Friends of the Everglades, Florida Wildlife Federation, and Fishermen Against Destruction of the Environment filed these actions against the District pursuant to the citizen suit provision of the CWA, 33 U.S.C. § 1365(a). An amended complaint added the District's Executive Director, respondent Carol Wehle, as a defendant. Friends Pet.

App. 57a. Plaintiffs sought an injunction requiring defendants "to obtain [an NPDES permit] before [they] could discharge water containing pollutants into Lake Okeechobee[] by means of the S-2, S-3, and S-4 pump stations." *Id.* at 54a. Petitioner Miccosukee Tribe of Indians of Florida intervened as a plaintiff. *Id.* at 56a. Respondents United States Sugar Corporation and the United States intervened as defendants. *Id.* at 55a-56a.

4. The district court stayed this case pending this Court's resolution of *Miccosukee*. Friends Pet. App. 57a. *Miccosukee* addressed a similar controversy, between many of the same parties, over a different south Florida pump station, the S-9, that likewise moves navigable waters that contain pollution but does not add pollutants to navigable waters. The Eleventh Circuit had affirmed the district court's grant of summary judgment, holding that the District must obtain an NPDES permit to operate the S-9 pump station. This Court agreed with the District that summary judgment was erroneous because there was a genuine issue of material fact as to whether the S-9 pump station transferred water between two meaningfully distinct bodies of water. This Court vacated the Eleventh Circuit's decision and remanded. 541 U.S. at 109-112.

5. This Court in *Miccosukee* flagged, but did not resolve, an argument raised by the United States as amicus in support of the District. The United States argued to this Court that the Eleventh Circuit's ruling "should be reversed for the straightforward reason that the pumping station does not 'add' pollutants to 'the waters of the United States.'" U.S. Amicus Br., No. 02-626, at 21 (Sept. 10, 2003), available at http:tinyurl.com/253yuc. "[B]y [the Act's] ex-

press terms," the United States explained, the "pumping activity does not result in 'the discharge of any pollutant' within the meaning of the [Act]," because the S-9 station "merely transports navigable waters from one location to another" without "introduc[ing] any pollutants into the waters of the United States from the outside world." *Id.* at 2, 13, 15. Any pollutants transferred in the process are "already *in* 'the waters of the United States,'" not *added to* those waters. *Id.* at 16.

The United States' argument rested squarely on "[t]he text and structure of the Clean Water Act," which it told this Court "make clear that Congress had no intention to subject ordinary water control and distribution activities" to "the NPDES permitting regime." U.S. Amicus Br., No. 02-626, at 15. The United States stressed that the relevant provisions "cannot reasonably be understood to include an activity that merely transports navigable waters." *Id.* at 16. And it criticized as "unsound" any suggestion that Section 402 applies to water transfers between "two separate bodies of water." *Id.* at 18. Had Congress "intended that the movement of one body of navigable waters into another body of navigable waters should be treated as the addition of a pollutant to navigable waters, it would have made that extraordinary intention manifest." *Id.* at 19.

In explaining why the structure of the CWA confirmed its plain language analysis, the United States pointed to Congress's "understanding that facilities that merely convey or connect navigable waters would be regulated through means other than the NPDES permitting program." U.S. Amicus Br., No. 02-626, at 25. In particular, it observed that "regional water quality problems" are "more sensibly

addressed through water resource planning and land use regulations, which attack the problem at its source." *Id.* at 27. It observed that other "federal and state legislation" apart from the CWA "frequently" apply. *Id.* at 27-28 (citing the National Environmental Policy Act, the Comprehensive Everglades Restoration Plan, and Florida's Everglades Forever Act). Given such laws, the United States recognized that "the imposition of NPDES permitting requirements" to water transfers "is unlikely to serve any useful purpose," but instead would "misdirect governmental resources toward unnecessary or duplicative processes and potentially hinder the Everglades restoration process." *Id.* at 28.

The United States' position in *Miccosukee* did not rest on deference to the EPA. The United States never cited *Chevron* or its progeny. And the word "deference" appears just twice in its brief, in footnotes. The Government stated that two favorable circuit court decisions rested "in significant part, on deference to EPA's views," but emphasized that those decisions "also follo[w] based on a straightforward reading of the Clean Water Act's text." U.S. Amicus Br., No. 02-626, at 17 n.4. The second use concerned *Congress's* deference to *State* water laws. *Id.* at 26 n.11.

As the United States explained at oral argument in *Miccosukee*, its brief adopting the position that the plain language and structure of the Act precluded a reading that subjects water transfers to NPDES permitting "reflect[ed] a consensus of a number of agencies, not only EPA, but the Department of the Interior, the Corps of Engineers, and the Department of the Army." Tr. of Oral Arg., No. 02-626, at 28-29.

6. This Court in *Miccosukee* "decline[d] to resolve" the Government's "unitary waters" argument because it was not presented to the Eleventh Circuit or to this Court in the petition for certiorari and because a remand was in order anyway. 541 U.S. at 109. The Court mentioned a few arguments for and against the Government's reading. *Id.* at 106-109. But it left the unitary waters argument "open to the parties on remand." *Id.* at 109.

The *Miccosukee* case was stayed on remand, pending resolution of this current case between essentially the same parties that raises the very argument that this Court left open. See 559 F.3d 1191, 1197-1198 (11th Cir. 2009).

7. After the decision in *Miccosukee*, the district court in this case lifted its stay and held a bench trial. Friends Pet. App. 53a. Observing that the case "rests primarily upon the proper interpretation of a few words of the CWA," the district court ruled that an NPDES permit is required for water transfers that convey pollutants among "distinct water bodies." *Id.* at 132a-133a, 170a. The district court found the Act unambiguous in that regard and declined to defer to the EPA's then-proposed rule favoring the contrary result. *Id.* at 170a. The district court also found as a matter of fact that the S-2, S-3, and S-4 pump stations transfer water from one meaningfully distinct body of water to another, thus triggering Section 402's coverage under the district court's test. *Id.* at 174a.

The district court entered an injunction requiring the District's Executive Director to apply for an

NPDES permit. Friends Pet. App. 40a.[1] Anticipating "complications in the permitting process," the court refused to impose a deadline for issuance of the permit. *Id.* at 47a.

8. As defendants' appeal was pending before the Eleventh Circuit, the EPA published a final regulation that "clarif[ied] that water transfers are not subject to regulation under the [NPDES] permitting program." National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697, 33,697, 33,699 (June 13, 2008). The preamble analyzed the Act's statutory language, structure, and legislative history, and concluded that "Congress generally did not intend to subject water transfers to the NPDES program." *Id.* at 33,701.[2]

9. The Eleventh Circuit reversed, based solely on *Chevron* deference to the EPA's final rule. The court noted that this case cleanly "turns on whether the transfer of a pollutant from one navigable body of

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[1] The district court held that the District enjoyed sovereign immunity from plaintiffs' suit and dismissed it as a party. Friends Pet. App. 50a, 52a. The District and its Executive Director nevertheless conceded that petitioners could proceed against the Executive Director under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Friends Pet. App. 43a n.2.

[2] Several parties, including petitioners, challenged the EPA's final rule. The Judicial Panel on Multidistrict Litigation directed those challenges to the Eleventh Circuit, which consolidated the challenges under *Friends of the Everglades* v. *EPA*, No. 08-13652-C (11th Cir.). The Eleventh Circuit stayed that proceeding pending its resolution of this case. District court lawsuits challenging the rule also have been stayed. See *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *EPA*, 630 F. Supp. 2d 295 (S.D.N.Y. 2009).

water to another is a 'discharge of a pollutant' within the meaning of the [CWA]." Friends Pet. App. 3a.

The Eleventh Circuit correctly observed that defendants' reading of the CWA's text is "derived from the dictionary definition of the word 'addition'" and "holds that it is not an 'addition . . . to navigable waters' to move existing pollutants from one navigable water to another." Friends Pet. App. 11a-12a. The court claimed that this "unitary waters" interpretation had been rejected by courts to have considered it. *Id.* at 12a-13a (citing *Dubois* v. *U.S. Dep't of Agric.*, 102 F.3d 1273, 1296 (1st Cir. 1996); *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 451 F.3d 77, 83 (2d Cir. 2006); *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 273 F.3d 481, 491 (2d Cir. 2001); *N. Plains Res. Council* v. *Fidelity Exploration & Dev.*, 325 F.3d 1155, 1163 (9th Cir. 2003)).

The court of appeals stated that were it simply to interpret the statute, it "might" decide against defendants. Friends Pet. App. 15a. But it determined that the EPA's final rule clarifying the statute represented an "important" "change" in the law. *Ibid.* The court held that the above-cited cases are distinguishable—none of them analyzed Section 402 under *Chevron*. *Ibid.*; *id.* at 21a-24a. The court also distinguished the cases defendants cited for support as supposedly not involving water transfers "from one body of water to a different body of water." See *id.* at 18a-21a (discussing *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)).

Having concluded that other Circuits' decisions are not precedent as to the EPA's clarifying rule, the

Eleventh Circuit turned to the parties' analysis of the Act. Plaintiffs argued that "'to navigable waters' refers to each individual water body" and that as a result, "the statute means 'any addition of any pollutant to *any* navigable waters,' even though those are not the words the statute uses." Friends Pet. App. 26a. The court criticized that reading, which would "add a fourth 'any' to the statute," because "we are not allowed to add or subtract words from a statute; we cannot rewrite it." *Id.* at 28a. "Congress knows how to use the term 'any navigable water[s]' when it wants to protect individual water bodies instead of navigable waters as a collective whole." *Id.* at 28a-29a (citing 33 U.S.C. §§ 407, 419, 512, 1254(a)(3), 1314(f)(2)(F)). "The common use by Congress of 'any navigable water' or 'any navigable waters' when it intends to protect each individual water body supports the conclusion that the use of the unmodified term 'navigable waters' * * * means the waters collectively." *Id.* at 29a.

The Eleventh Circuit did not however fully embrace defendants' reading. It suggested that the Act uses "navigable waters" at one point to refer to particular bodies of water and that defendants' interpretation "tends to undermine the goals of the NPDES program." Friends Pet. App. 30a (citing CWA § 303(c)(2), 33 U.S.C. § 1313(c)(2)); *id.* at 33a. The court also envisioned a "horrible hypothetical" involving pumping "the most loathsome navigable water in the country into the most pristine one," which it said would not "comport with the broad, general goals of the [CWA]." *Id.* at 33a. Yet the court noted that it "'interpret[s] and appl[ies] statutes, not congressional purposes'" (*ibid.*), that the "provisions of legislation reflect compromises" (*id.* at 35a), and that "the NPDES program does not even address"

"[n]on-point source pollution, chiefly runoff, [which] is widely recognized as a serious water quality program." *Id.* at 34a.

The court thus concluded that the statute was ambiguous, and that EPA's rule was reasonable and must be accorded *Chevron* deference. Friends Pet. App. 36a-37a. The court closed with a hypothetical involving marbles in a bucket in order "to strip a legal question of the contentious policy interests attached to it and think about it in the abstract." *Id.* at 37a. The court suggested that it is reasonable to conclude that a transfer of two marbles from one bucket to a nearby bucket both is, and is not, an addition "of any marbles to buckets." *Ibid.*

10. Plaintiffs petitioned for rehearing en banc. Opposing those petitions, the United States adopted a position at odds with its brief in *Miccosukee*. The Government contended that Section 402 is ambiguous and that the EPA's final rule therefore must govern. The Government also claimed it could "retain, rescind, reconsider, or change the water transfers rule," and added that the "EPA in fact intends to reconsider the rule." U.S. Response to Petitions for Rehearing En Banc at 15.

The Eleventh Circuit denied plaintiffs' petitions for rehearing en banc. Friends Pet. App. 204a. Plaintiffs timely petitioned for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

Water transfer projects are often immense in size, scope, and cost. They take years to plan and complete. Such projects—whether for flood control, irrigation, urban water supply, wetland management, or other water management tasks—are critical to state and local governments and residential, com-

mercial, industrial, and agricultural users of water alike. All those interested in water transfer projects need to know whether a Clean Water Act permit is required—with the extra expense, delay, uncertainty, and opportunities for litigation that obtaining such a permit entails. See Tr. of Oral Arg., No. 99-1178, at 18, *Solid Waste Agency of N. Cook County* v. *Army Corps of Eng'rs*, 531 U.S. 159 (2001) (administrative record for relatively simple Section 404 permit application, in permitting for seven years prior to years more of litigation, exceeded 47,000 pages).

Although the Eleventh Circuit's judgment that no permit is required in this case is correct, the court's reasoning and the government's ever-changing position fail to provide the requisite clarity for water managers and users. Adding to the uncertainty, other courts of appeals have taken different approaches, with the Second Circuit suggesting that the statute unambiguously requires permitting of water transfers.

Respondent United States Sugar Corporation's sugar cane operations depend for irrigation and flood control on the heavily engineered water management system maintained by the District and U.S. Army Corps of Engineers—including the S-2, S-3, and S-4 pumps at issue here. United States Sugar Corporation takes the unusual step of urging this Court to grant certiorari to secure a uniform rule that point sources like these pumps, which merely convey navigable waters containing pollution, do not constitute an "addition" of pollutants to navigable waters subject to the permitting requirements of Section 402.

This case is the appropriate vehicle for the Court to decide this important issue, which it left for another day in *Miccosukee*. See 541 U.S. at 109

("unitary waters" argument available on remand); *id.* at 113 (Scalia, J., concurring in part) ("leaving the Government's unitary waters theory to be considered in another case"). The issue has been fully briefed by the agency, environmental group, tribal, state water manager, and business parties, as well as by amici representing all types of stakeholders. It is squarely presented by the facts, developed after a full trial. And the question has percolated in and divided the lower courts. There is no need for further delay in resolving whether CWA Section 402 applies to water transfers like the S-2, S-3, and S-4 pumps.

I. THE ELEVENTH CIRCUIT SHOULD HAVE HELD THAT THE PLAIN LANGUAGE OF THE CWA UNAMBIGUOUSLY MANDATES THAT NO SECTION 402 PERMIT IS REQUIRED FOR WATER TRANSFERS.

The EPA concluded in its 2008 rule that water transfers from one body of water to another that contain pollution do not constitute an "addition" of pollutants within the meaning of the CWA. The EPA's interpretation is the *only* possible plain language reading of the statute. The Eleventh Circuit should have upheld the EPA's interpretation under the statute's plain meaning rather than by applying *Chevron* deference. *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council Inc.*, 467 U.S. 837 (1984). The court of appeals' erroneous ruling that the statute is ambiguous allows a new Administration to revisit the question whether permits are required for water transfers, as EPA is now doing. In fact, under the only proper reading of the Act, EPA has no such authority.

A. The CWA By Its Plain Language Requires A Section 402 Permit Only When There Is An "Addition" Of Pollutants.

Section 402 creates the National Pollution Discharge Elimination System as part of the EPA's regulatory authority to eliminate the release of industrial and municipal waste into the Nation's waters. 33 U.S.C. § 1342. An NPDES permit, which sets out "effluent limitations," is required for "the discharge of any pollutant." CWA § 301, 33 U.S.C. § 1311. "Discharge of a pollutant" is defined by the CWA as "any addition of any pollutant to navigable waters from any point source." CWA § 502(12), 33 U.S.C. § 1362(12). As the District of Columbia and Sixth Circuits explained:

> [I]t does not appear that Congress wanted to apply the NPDES program wherever feasible. Had it wanted to do so, it could easily have chosen suitable language, *e.g.*, "all pollution released through a point source." Instead, as we have seen, the NPDES system was limited to "addition" of "pollutants" "from" a point source.

Nat'l Wildlife Fed'n v. *Gorsuch*, 693 F.2d 156, 176 (D.C. Cir. 1982); see also *Nat'l Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580, 586 (6th Cir. 1988).

In *Miccosukee*, this Court held that a transfer of water containing pollutants from one body of water to another could be a "point source," but left open the question of whether such a transfer constituted an "addition" to "navigable waters." It is the position of U.S. Sugar—and was the position of the United

States in *Miccosukee*—that because the Act defines "navigable waters" as "the waters of the United States" (CWA § 502(7), 33 U.S.C. § 1362(7)), a transfer of water containing pollution from one body of water to another does not constitute an "addition" of "pollutants," because the transferred pollution never leaves "the waters of the United States."

1. There is no "addition" when pollutants are merely conveyed in "navigable waters" from one body of water to another.

Statutory interpretation must begin with "the language of the statute." *Bailey* v. *United States*, 516 U.S. 137, 144 (1995). Every clause and word of the statute should be given effect. *United States* v. *Nordic Vill.*, 503 U.S. 30, 36 (1992). And the statute must be read as a whole, "since the meaning of statutory language, plain or not, depends on context." *Conroy* v. *Aniskoff*, 507 U.S. 511, 515 (1993). In "a complicated statute like the Clean Water Act," it is particularly important for the Court to give careful reading to statutory terms since "technical definitions [were] worked out with great effort in the legislative process." *S.D. Warren Co.* v. *Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 380 (2006).

There is no dispute that the pumps in this case are "point sources" or that the canals and Lake Okeechobee, between which the pumps convey water, are "navigable waters." It is also undisputed that the number, size, and quantity of pollutants is not increased by their movement through the pumps. The question squarely presented is whether conveying water containing pollution from one navigable water to another constitutes an "addition" of pollutants to "navigable waters." The answer is "no."

Without a statutory definition, the term "addition" must be construed "in accordance with its ordinary or natural meaning." *S.D. Warren*, 547 U.S. at 376. "Addition" is the "result of adding; anything added," and to "add" is to "join, annex, or unite * * * so as to bring about an increase (as in number [or] size)." *Webster's Third New International Dictionary* 24 (1993). There is no increase in the pollutants in "navigable waters" when pollutants are transferred along with water from one body to another, because the navigable waters are defined as a whole—"the waters of the United States." Nothing has been joined to the waters of the United States that was not already in those waters. Pollutants are only "joined" or "united" with "the waters of the United States" when they first enter those waters. See *Gorsuch*, 693 F.2d at 165 (holding that NPDES applies only when a point source is the site of the pollutant's initial entry to navigable waters); *Consumers Power*, 862 F.2d at 584 (same); *United States* v. *Riverside Bayview Homes*, 474 U.S. 121, 132-133 (1985) (Congress's goal for the CWA was to control pollutants "at the source").

The United States took exactly this position in its brief to this Court on the merits in *Miccosukee*. The United States there explained that "[w]hatever pollutants the waters contain are already *in* 'the waters of the United States,' when those waters pass through" pumps, which "merely conve[y]," but do not add pollutants to those waters. U.S. Amicus Br., No. 02-626, at 16 (emphasis in original).

"[D]ischarge of a pollutant" is "a phrase made narrower," this Court has recognized, "by its specific definition requiring an 'addition' of a pollutant to the water." *S.D. Warren*, 547 U.S. at 381. "[S]omething

must be added in order to implicate" the NPDES permitting requirement. *Ibid.* The pollutants in this case, and in most water transfers, are pre-existing. They were "added" by sources upstream or are naturally occurring. Because pollutants are not increased or augmented by the pumps, Section 402 does not apply here. See *Consumers Power*, 862 F.2d at 586 (a permit is not required for "those pollutants already in the water moved and transformed by the essential operation of a * * * dam"); *Appalachian Power Co.* v. *Train*, 545 F.2d 1351, 1377 (4th Cir. 1976) ("constituents occurring naturally in the waterways or occurring as a result of other industrial discharges do not constitute an addition of pollutants by a plant through which they pass").

2. "Navigable waters" must be read as a unitary whole.

In determining whether an "addition" has occurred, the crux of the parties' dispute is whether or not the "navigable waters" must be considered as a whole, meaning all of the waters of the United States. Three different readings of the statute are before the Court. If the plain language of the statute requires reading "navigable waters" as a whole, as U.S. Sugar contends and the United States argued in *Miccosukee*, then there is no addition of pollutants when pollution already in navigable waters is conveyed from one body of water to another without intervening use, because that pollution never leaves the waters of the United States.

The environmental petitioners argue, by contrast, that a plain language reading of the statute requires reading "navigable waters" in the plural, such that the phrase is made up of numerous individual bodies of water in the United States. Under

that reading, conveying pollutants from one water body to another constitutes an "addition" because the pollutants leave one navigable water and enter another.

Finally, although the United States advocated a unitary waters reading in *Miccosukee* (see 541 U.S. at 96), it now takes the position that the statute is ambiguous and that the Court should defer under *Chevron* to the EPA's reasonable interpretation.

Given the language of Section 402, "navigable waters" cannot be considered ambiguous. It can only be read as a unitary whole. First, the modifier "any" precedes every element of Section 402 *except* for "navigable waters." The statute contemplates "*any* addition of *any* pollutant to navigable waters from *any* point source." CWA § 502(12), 33 U.S.C. § 1362(12) (emphases added). Because only "navigable waters" lacks the modifier, Congress must have intended to refer to "navigable waters" in the aggregate. See *United States* v. *Gonzalez*, 520 U.S. 1, 5 (1997) ("any" means "one or some indiscriminately of whatever kind"); *62 Cases, Etc.* v. *United States*, 340 U.S. 593, 596 (1951) (key to statutory interpretation is to look at "what Congress has written" and "neither to add nor to subtract, neither to delete nor to distort").

Second, Section 402 speaks of an addition "to navigable waters," not "to navigable water." The use of the collective word *waters* indicates a clear intent to designate all U.S. waters taken together as the receiving body by which an "addition" is judged, rather than an individual body of water.

Third, the use of the definite article "the" in defining "navigable waters" as "the waters of the

United States" confirms that "navigable waters" is a conceptual whole when determining if an addition has occurred. CWA § 502(7), 33 U.S.C. § 1362(7); see *Rapanos* v. *United States*, 547 U.S. 715, 732 (2006) (emphasizing "use of the definite article ('the') and the plural number ('waters')" in construing Section 502(7)).

By contrast, Congress did use terms dividing the "navigable waters" elsewhere in the statute, making clear that it understood navigable waters as a unitary concept that could be apportioned. See CWA § 302(a), 33 U.S.C. § 1312(a) (providing for water quality based effluent limitations on point source discharges when necessary to attain "water quality in *a specific portion of the navigable waters*"); CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A) (requiring States to establish water quality standards taking into account "the designated uses of *the navigable waters involved*"); CWA § 303(d)(1)(B), 33 U.S.C. § 1313(d)(1)(B) (referring to "waters *or parts thereof*") (all emphases added). Congress would have used this same terminology regarding parts or portions of the navigable waters in Section 402 had it intended the provision to address individual water bodies so as to apply to pollutants moved from one navigable water body to another. But it did not do so.

B. Other Statutory Provisions Confirm The Unitary Waters Reading Of The CWA.

The structure of the CWA also guides its plain language interpretation, and confirms the unitary waters reading. See *BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 186 (2004).

1. Congress left water flow management to the States in Section 304(f).

Section 304(f) "concerns nonpoint sources" of pollution. *Miccosukee*, 541 U.S. at 106. It is entitled "[i]dentification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution." 33 U.S.C. § 1314(f). Section 304(f) requires the EPA, working with state and federal agencies, to develop guidelines for nonpoint source pollution and "to control pollution resulting from * * * changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." *Ibid.* Thus, even though "flow diversion facilities" like the S-2, S-3, and S-4 pumps qualify as point sources, Congress intended the States to address movement of water through them in the States' nonpoint source programs. By delegating authority to address pollution carried through flow diversion facilities to the States, Section 304(f) makes clear that Section 402 was not meant to address water transfers.

2. Pollution and pollutants are different under the CWA.

Reading Section 402 to include water transfers also confuses the definition of "pollutant" with the definition of "pollution," even though the CWA clearly distinguishes between the two. "Pollutants" are tangible wastes that are discharged into navigable waters. CWA § 502(6), 33 U.S.C. § 1362(6). "Pollution" is more broadly defined as "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of waters." CWA § 502(19), 33 U.S.C. § 1362(19). Therefore pollutants

that are already in navigable waters are considered "pollution." The transfer of canal water into the lake by the S-2, S-3, and S-4 pumps involves the movement of pollution since it affects a change in water quality, but it should not be classified as the discharge of a pollutant since already-polluted natural water is merely being diverted. See *Gorsuch*, 693 F.2d at 172 (the "use of two different terms is presumed to be intentional"; "pollution" is not the same as a "pollutant"). Pollution is regulated by the States under Section 304(f), not by the EPA under Section 402.

Petitioner Friends suggests that the inclusion of "dredged spoil" in the definition of pollutant (CWA § 502(6), 33 U.S.C. § 1362(6)) demonstrates that Congress rejected the "unitary waters" reading. Friends Pet. 23. According to Friends, the "discharge" of dredged fill requires a Section 404 permit (33 U.S.C. § 1344), and dredged spoil "inherently comes from navigable water bodies," so a reading of the statute that pollutants transferred from one navigable water to another do not constitute the "discharge of a pollutant" would render the whole Section 404 program irrelevant. But Friends ignores that dredging, unlike a water transfer, requires removing the dredged fill material from the navigable waters. That there may be an addition to navigable waters if a pollutant like dredged spoil is taken out of navigable waters and then dumped back into them, rather than moved around within navigable waters, says nothing about whether water transfers involve an addition of pollutants.

3. Congress sought to retain the States' authority over water allocation and protection.

Water allocation and protection has historically been a State prerogative. Any interpretation of the Clean Water Act must recognize that Congress had a policy and objective of maintaining the States' important role in water management. *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 & n.10 (1991) (in construing a statute a court should adopt the sense of words that harmonizes their context while promoting the policy and objectives of the legislature). When the Act was passed, Congress intended that "the authority of each State to allocate quantities of water within its jurisdiction shall not be * * * impaired." CWA § 101(g), 33 U.S.C. § 1251(g). And it expressly stated "the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." CWA § 101(b), 33 U.S.C. § 1251(b).

Only the unitary waters reading of the statute captures the policy of cooperative federalism set out by Congress when it enacted the CWA. The CWA envisions "a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992) (quoting CWA § 101(a), 33 U.S.C. § 1251(a)). Being closer to the difficulties of local water management, the States were (and are) more capable of integrating waterway cleanup needs with local needs related to transporting, storing, and using water.

In light of Congress's goal to protect and preserve traditional State authority, and the express provision

of Section 304(f) discussed above, it is inconceivable that Congress meant to eliminate historic State management of local water resources for flood control and water supply purposes by reading a "discharge" to include water transfers. See *SWANCC*, 531 U.S. at 174 (rejecting expansive reading of CWA where it "would result in a significant impingement of the States' traditional and primary power over land and water use").

II. THIS COURT'S REVIEW IS NECESSARY TO END CONFUSION ON AN ISSUE OF GREAT NATIONAL IMPORTANCE.

The issue in this case affects the ability of States, municipalities, and local governments to manage the Nation's most precious resource—water—for urban use, agricultural irrigation, and flood control. Subject to tight budgetary constraints, local governments must be able to transport water in an efficient and cost-effective manner. Without a clear rule establishing that transfer of the Nations' waters from areas of plenty to areas of paucity does not require Section 402 permitting, additional costs, delays, uncertainty, and opportunities for litigation will hamper important projects, with adverse consequences for human health and safety and economic well-being.

A. Failure To Resolve This Dispute Will Delay Time-Sensitive Water Transfer Projects That Provide Critical Services Nationwide.

The pumps at issue here are a microcosm of the essential water services that local water transfer facilities provide. By moving excess water from canals into Lake Okeechobee, the S-4 pump provides

the city of Clewiston and its 7,000-plus citizens with their only means of flood protection. Friends Pet. App. 88a. In fact, on most occasions when the pumps operate, it is to dispose of floodwaters that "during severe rain events would cause flooding in communities and farmlands throughout" the area. *Id.* at 88a-89a.

Across the Nation, water transfers are critical to water resource management. In Colorado, for example, diversions from one water basin to another provide sixty percent of the State's population with some portion of their domestic water supplies. Br. Amici Curiae of the States of Colorado and New Mexico in Support of Petitioner in *Miccosukee*, No. 02-626, at 2-3 (Sept. 10, 2003) (hereinafter "Western States Br."). Over half of the State's irrigated farmland relies on such transfers. *Id.* at 3. Two mountain tunnels provide the City of Denver with 200,000 acre feet per year that support almost half of its water needs. *Id.* at 2. And 49 major water transport projects move an average of 550,000 acre feet of water throughout Colorado annually. *Ibid.* These projects, in addition to "several hundred" others in the State, would potentially require permits under the statutory interpretation advocated by petitioners. *Id*. at 2-3 & n.2.

One has only to consider the role of pumping stations in New Orleans to understand that delays in building modern facilities can have deadly consequences.[3] But the regulatory burden of Section 402

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[3] Much damage to New Orleans from Hurricane Katrina occurred due to the failure of local pumping stations. While the scope of Katrina meant the pumps could not prevent the flooding, had the pumps been operational, they could have

permitting would prevent or slow the building of necessary water pumping and transport facilities nationwide. And both the permitting process and the terms imposed in permits provide endless opportunities for litigation for project opponents.

The EPA already faces a growing backlog of permit renewals for facilities previously approved for Section 402 permitting. Under the Clean Water Act, Section 402 permits must be renewed at least every five years. As of December 2009, only 80% of major facilities and 84% of minor facilities held permits that were current.[4] Every year, thousands of facilities must go through the review process to have permits renewed. Adding new permitting requirements for water transfer projects that will face inherently local restraints related to local soils, precipitation levels, industrial and agricultural use, and topography will overwhelm an already overwhelmed agency that Congress never intended to regulate water transfers in the first place.[5]

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reduced the flooding duration, so as to "reduce economic damages, human suffering, and loss of life." *Volume VI – The Performance—Interior Drainage and Pumping*, in *Performance Evaluation of the New Orleans and Southeast Louisiana Hurricane Protection Systems: Final Report of the Interagency Performance Evaluation Task Force* V-28 (Mar. 26, 2007), available at https://ipet.wes.army.mil/; see also *U.S. Army Corps of Engineers New Orleans District, Pump Station Repairs and Stormproofing*, available at http://www.mvn.usace.army.mil/hps2/hps_pumps_storm.asp.

[4] See http://www.epa.gov/npdes/pubs/grade.pdf and http://www.epa.gov/npdes/pubs/grade_minor.pdf.

[5] The spring snow melt and intense thunderstorms of the Western States provide one example of the inherently local nature of water management. The sheer volume of water at these times, combined with the increased level of suspended

Water transfer projects can be enormous. The largest water transfer system in the country, California's State Water Project, delivers up to 4.7 million acre feet of water annually through the San Francisco Bay Delta "to provide supplemental water to twenty million Californians and 660,000 acres of irrigated farmland." Western States Br. at 4-5. These projects' scope necessarily means that numerous interests are affected. They serve environmental needs as well as those of agriculture, cities, and industry. The Bureau of Reclamation's Central Valley Project delivers nearly 7.3 million acre feet annually "to irrigate 2.6 million acres" and "for urban and wildlife uses." *Id.* at 5.

Because of their size, importance, and the varied interests competing for their services, large-scale water transfer projects require years of planning before they can be approved. Additional cost and delay from not knowing whether permitting is required will lead important projects to be canceled or altered in ways that prevent them from accomplishing the water management necessary to prevent towns from being flooded, wildlife from receiving needed flows, and crops from withering due to drought.

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solids in the water due to the rapid velocity of run-off, mean that any permit would likely require a diversion to spend millions of additional dollars to construct a facility simply to handle increased levels of *natural* pollutants occurring for only a few days each year when water diversions reach their peak. Western States Br. at 15-16. Subjecting such waters to treatment under Section 402 will be inordinately costly. One water transfer project in Colorado already diverts water at a rate four times larger than the capacity of the State's largest existing treatment plant. *Id.* at 16 n.14.

Continued uncertainty about which of the three positions advocated by the parties in this case is the correct reading of the CWA is intolerable in these circumstances. The Urban Land Institute estimates that needed water infrastructure will cost $10 to $20 billion per year over the next 20 years.[6] Booz Allen Hamilton suggests an even larger figure. It believes that the United States and Canada will need to invest $6.5 trillion in water infrastructure to meet expanding water demands over the next two decades and modernize obsolete systems. *A Glass Half Empty*, THE ECONOMIST, May 20, 2010. A warming planet's potential impacts on water supplies and continued population growth also require improvements in water efficiency (including its transfer). See Bryan Walsh*, Dying for a Drink*, TIME, Dec. 4, 2008. Governments poised to invest billions or even trillions of dollars in projects involving water transfers, as well as citizens and businesses like United States Sugar Corporation that are dependent on those projects, deserve to know what legal rules will control the permitting question.

B. Disarray In The Courts Of Appeals And The Changing Positions Of The Government Have Left The Law In A State Of Confusion.

Responding to petitions for rehearing en banc below, the Government stated that the EPA "intends to reconsider" its water transfer rule. U.S. Response to Petitions for Rehearing En Banc at 15. In some

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[6] *Urban Land Institute, Infrastructure 2010: Investment Imperative* 9 (2010), available at http://www.uli.org/sitecore/~/media/Documents/ResearchAndPublications/Reports/Infrastructure/IR2010.ashx.

circumstances an announcement that a rule is to be revisited might be cause for this Court to delay reaching the statutory question whether the existing rule is proper. But that is not the case here. Both the tribal and environmental petitioners and the water manager and business respondents contend that the CWA plainly mandates whether permitting is required for water transfers. If any of their arguments is correct, EPA lacks discretion as to the central issue addressed by the water transfer rule: whether such transfers require permits. The fact or content of any new rule is simply irrelevant to that inquiry.

In any event, this Court should not delay review simply because the Solicitor General speculates that a new rule might one day emerge. In fact, the Government's switches of position are a major cause of the uncertainty that bedevils water management, and they show the need for this Court to resolve whether EPA has the discretion the Eleventh Circuit afforded to it.

The United States took the position in this Court in *Miccosukee* that plain statutory language requires a "unitary waters" reading of the statute (541 U.S. at 96; U.S. Amicus Br., No. 02-626, at 25-26), switched to arguing that a "unitary waters" definition should be deferred to under *Chevron* at earlier stages of this case (*e.g.*, U.S. Response to Petitions for Rehearing En Banc at 11-15), and now plans to revisit the rule under that cloak of *Chevron* deference. In doing so it leaves thousands of projects essential to human health and economic well-being in permit limbo while it plays interpretive musical chairs.

Courts are no less confused. While the Eleventh Circuit's decision here was the first to consider EPA's final water transfer rule, it is certainly in consider-

able tension with decisions of the First and Second Circuits rendered earlier that rejected a unitary waters reading of the statute. *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York,* 273 F.3d 481 (2d Cir. 2001); *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York,* 451 F.3d 77 (2d Cir. 2006); *Dubois* v. *U.S. Dep't of Agric.*, 102 F.3d 1273, 1296 (1st Cir. 1996) ("[t]here is no basis in law or fact for the district court's 'singular entity' theory" that the bodies of water in question "are all part of 'a singular entity, the waters of the United States'").

In particular, the Second Circuit in its second *Catskill* decision had before it the EPA's 2005 interpretive memorandum on which the proposed water transfer rule was based. Nevertheless, "in honoring the [CWA's] text" the court thought the statute mandated that a permit be obtained. 451 F.3d at 84-85 ("In the end, while the City contends that nothing in the text of the CWA supports a permit requirement for inter-basis transfers of pollutants, these 'holistic' arguments about the allocation of state and federal rights, said to be rooted in the structure of the statute, simply overlook its plain language"). There is no reason to think that the Second Circuit would take a different approach if presented with a case arising after promulgation of the final rule.

A decision by this Court on the plain language of the statute would remove the confusion over an important statutory provision that affects some of the most basic services provided by State and local government: water management and allocation. It would foreordain the result of the pending rule challenge, which otherwise will be governed by the Eleventh Circuit's decision in this case, and also

guide any future revision of the rule. This certainty would allow those in charge of local water management to move forward with planning for water management needs.

In contrast, waiting for EPA to review its position and issue a new rule will only result in another decade of delay. If EPA were to change its position, that will simply lead to another rule challenge in which the same three arguments will be made and costly litigation will again occur—diverting scarce resources to litigation instead of water management and pollution control, and further postponing clarity that is needed now. The already decade-long confusion over what should be a straightforward, plain text reading of the statute should not be allowed to continue simply to allow a new shift in position by a new Administration.

Local governments need to deal with already ripe problems of managing scarce water resources to thirstier and thirstier cities, agricultural interests, ecological interests, and industry. Doing so requires the legal clarity that, now, only this Court can provide. Further delay will not refine the issue or provide a better vehicle to address it.

CONCLUSION

Certiorari should be granted and the question presented restated as set forth by United States Sugar Corporation.

Respectfully submitted.

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