NO. 07-13829-HH

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FRIENDS OF THE EVERGLADES, INC., FLORIDA WILDLIFE FEDERATION,
Plaintiffs/Counter-Defendants/Appellees/Cross-Appellants,

FISHERMEN AGAINST THE DESTRUCTION OF THE ENVIRONMENT,
Plaintiff/Counter-Defendant/Appellee,

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
Intervenor-Plaintiff/Counter-Defendant/Appellee/Cross-Appellant,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
Defendant/Counter-Claimant/Appellant/Cross-Appellee,

CAROL WEHLE, as Executive Director of South Florida Water Management District,
Defendant/Appellant,

UNITED STATES OF AMERICA, U.S. SUGAR CORPORATION,
Intervenor-Defendants/Appellants

On Appeal from the United States District Court for the
Southern District of Florida, Case No. 02-80309-CV-CMA

REPLY BRIEF OF APPELLANT CAROL WEHLE AS EXECUTIVE DIRECTOR OF SOUTH FLORIDA WATER MANAGEMENT DISTRICT

Respectfully Submitted,

James E. Nutt
South Florida Water Management District
3301 Gun Club Road
West Palm Beach, Florida 33401
(561) 682-6253
(561) 682-6276 (fax)
jnutt@sfwmd.gov
Fl. Bar No. 874868

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I. Introduction

This Court is called upon to carefully interpret the Clean Water Act and resolve the court of appeals conflict expressly left open by the Supreme Court. *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109 (2004). The Court's musings about the government's unitary waters approach are not fairly characterized as "aspersions" or "disparaging." *See Id*. at 106 (discussion of some issues raised by the unitary waters principle). More accurately, they pose questions about un-briefed issues over which the courts of appeals are in conflict. The court then made it a point to preserve the issue for more thorough consideration at a later time. *Id*. at 109.

Plaintiffs failed to demonstrate that NPDES has any place regulating flow diversion facilities used to manage the Nation's waters for critical flood control and public water supply. By contrast, our initial brief demonstrated that the federal NPDES program was intended to prohibit waste discharges and not regulate State water management, such as water supply and flood control. While all navigable waters necessarily contain pollutants, Plaintiffs' interpretation ignores the fact that an extension of federal regulatory powers over State and local water management implicates fundamentally different sovereign rights and responsibilities than does the federal regulation of

waste discharges. On one hand, to make a federal crime out of using the Nation's waters for assimilation of industrial waste was a reasoned response to the proliferation of industrial and municipal discharge facilities endangering our Nation's waters in 1972 when the Act was adopted. On the other hand, the deliberate election of a cooperative federalism model for the Act to protect, not preempt, each States' primary rights and responsibilities over water management was an equally legitimate and important legislative judgment. Arguments for the extension of federal NPDES jurisdiction over the State's water management system ignore these important policies, distinctions and judgments, factors grounding the Clean Water Act's multifaceted structure.

We explain below that Plaintiffs' arguments and the lower court's interpretation flatly contradict the Act's intended cooperative federalism structure; misconstrue its text, multiple purposes and structure; and squarely conflict with the well reasoned position of the federal government and courts of appeals that follow the unitary principle.

II. The Lower Court Disregarded Key Constitutional And Clean Water Act Principles Of Federalism Intended To Preserve Traditional State Water Management Authorities.

The Tenth Amendment requires a clear and manifest statement of intent before Congress can be assumed to have extended federal regulatory

powers over traditional State water management activities. *See e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("It is incumbent upon the federal courts to be certain of Congress' intent before finding that Federal law overrides" the traditional federal-state balance). The lower court's failure to follow this fundamental rule was clear error. It is also remarkable given that court's pretrial concession that a "narrow view" of the Act should be taken if the District is found to be engaged in "traditional State functions." DE 527 at 16-18.

A. The District's Flow Diversion Facilities Perform Critical Functions Reserved To States Under The Tenth Amendment.

Managing land and water resources is a core police power. Fla. Stat. §373.016(3)(j)(2007); *Solid Waste Authority of N. Cook County v. U.S. Army Corps of Eng'r*, 531 U.S. 159, 174 (2001) ("SWANCC"). Those States' rights and responsibilities lie at the heart of its sovereignty. *Id*. These core powers are at their peak when dealing with critical flood control and water supply.

The pumps are an integral part of the C&SF project the elaborate infrastructure that allows water to be managed across South Florida. Record Excerpt (hereinafter "RE") Tab 636 at 26. The C&SF provides the machinery for the State's comprehensive plan to develop and manage its land and water resources. *Id* at 11. The pumps are operated by the District to

provide flood protection for the basin communities and agricultural areas that they serve. *Id*. Water management is essential to maintaining agricultural activity in the Everglades Agricultural Area. Failure to operate the pumps during rainfall events would cause extensive flooding. *Id*. at 27. They also augment water supply in the Lake. *Id.* Thus, the pumps are an integral component of the States' water management system used to allocate water for flood control, water supply and environmental purposes. *Id*. at 11**.**

The distinction noted by the lower court between water supply and flood control pumping is taken out of context and is of no consequence here. *Id*. at 25-28. It is a distinction without relevance here. Neither the Tenth Amendment nor the Clean Water Act intended to preserve only the States' authority to allocate quantities of water for water supply as opposed to flood control. *See* 33 U.S.C. 1251(b), CWA §101(b) (broad policy to preserve the States' powers over the use and development of land and water resources); s*ee also e.g*., *SWANCC*, 531 U.S. at 684 (clear statement required to regulate solid waste facility in isolated wetlands over traditional state land and water use powers). Because the Act's adoption of a cooperative federalism approach to the protection of land and water resources was not limited simply to the State's authority to supply water users, any distinction between

pumping for flood control and back pumping for water supply is wholly academic.

Trying to separate flood control from water supply pumping for NPDES purposes is also notably inconsistent. They are both transfer waters. But more importantly, the Plaintiffs and the lower court misunderstand why the District differentiates these two activities. It is merely to identify the event triggering the decision to pump at any particular time, i.e. rising water levels (flood control) as opposed to the availability of water that can be moved to storage even though flooding is not imminent (water supply). 1/25 Trial Tr. at 31 ln. 25 to 32 ln.7 & 35-36. The District makes this distinction because water supply pumping, while periodically crucial, is considered more discretionary and targeted often to longer term needs. This transfer of water can be minimized more than pumping for immediate flood protection needs. In doing so, the State has been able to achieve significant reductions in overall pumping for environmental protection. RE Tab 636 at 28 (water supply pumping has become rare). Nonetheless, both pumping activities share the same inseparable purpose of allocating surplus EAA water for reservoir storage and its potential future use. 1/20 Trial Tr. at 60-61. The pumps are inescapably integral to the District's comprehensive land and

water management and, thus, reserved to the State absent a clear statement of intent to extend federal powers.

The Plaintiffs' alternative argument that confines the term "allocate" in §101(g) to only distributions of water for "proprietary" uses is equally misplaced and academic. Once again, they and the lower court engage in a fruitless exercise that pretends the Tenth Amendment and Clean Water Act are concerned only with preserving the States' right to supply water for consumptive uses. Thus, the lower court clearly erred by requiring the Defendants to prove its "water transfers are allocative in nature" in order to "prevail on [its] federalism argument." RE Tab 636 at 78.

Plaintiffs misapprehend the policy concerns embodied in §101(g). That Section regards the State's authority not the rights of individual water users. As the Plaintiffs concede §101(g) is not concerned with how the Act's federal permitting programs "may incidentally affect individual water rights" but rather with the loss of State control over their "allocation systems." Florida Wildlife Fed'n Brief. at 30-31 quoting S. Rep. No. 95-370 (1977), reprinted in 3 Legislative History of the Clean Water Act of 1977 at 532. Of concern to the States is the control over facilities like the C&SF and similar systems nationwide that allocate water for multiple purposes far beyond public water supplies. 1/20 Trial Tr. at 72-3. These ubiquitous

functions include navigation, recreation, natural systems protection, flood control, and the prevention of salt water intrusion. *See* Initial Brief of Carol Wehle. II.B.1.b at 13; s*ee e.g.,* Senate Debate on S. 2770, reprinted in 2 Legislative History of the Water Pollution Control Act of 1972 at 485 (California expressing concern with losing control over its extensive water management system and quantities necessary to prevent salt water intrusion). It is the State's control over systems that allocate quantities of water for all land and water resource management purposes that is preserved to "each State," not just western States and not just their water users. *See*, 33 U.S.C. §1251(g), CWA §101(g).

In this case, pumps are operated to move quantities of surplus waters from the Everglades Agricultural Area to reservoir storage for purposes of flood control and water supply. Water is allocated to reservoir storage instead of being left in place (which would eliminate land uses in the area) or being immediately diverted to the ocean where any potential future use is lost.

It also does not matter that the pumps were constructed as part of a federal cost share project. Federal projects assist virtually every State with water management. Initial Brief of Carol Wehle at II.B.1.b at 13. The District is responsible for operating and maintaining most of the C&SF

Project's structures, including the subject pumps. RE Tab 636 at 12. They are operated within the parameters of mutually developed federal criteria. 1/25 Trial Tr. 35 ln2-9. Those criteria establish the normal operating range of water levels, e.g. for S-2 that range is 11.5 to 13 feet. 1/19 Trial Tr. 58. These levels are not hard and fast switches. 1/25 Trial Tr. 11-12. At 13 feet, an unacceptable risk of flooding triggers pumping. Below 13 feet the District has broad discretion to allocate water for beneficial purposes. 1/19 Trial Tr. 165-66. It operates the pumps according to the State's Interim Operations Plan (IAP) for the protection of Lake Okeechobee and water supply. Trial Tr. 1/25 at 22 ln.18 to 23 ln. 7; 1/20 Trial Tr. 127-29. Day to day operations are the decisions of the District operators. 1/20 Trial. Tr. at 122. The IAP is not part of the Federal Control Manual. Trail Tr. 1/19 at 79 ln 11-20.

The federal governments' assistance and shared interests do not diminish the fundamental State purposes and functions for which the pumps are operated. The State has broad discretion to operate the pumps for other critical purposes. Pointedly, the Plaintiffs' are not seeking to restrain the Corps or preclude flood control pumping, but rather to control through NPDES the State's discretionary operations relating to pumping for water supply and other purposes.

B. Congress Intended To Preserve Not Intrude Upon The States' Primary Responsibility For Water Management.

Congress intended a partnership between the state and federal governments to achieve their shared objectives. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). In that context, Congress fashioned the NPDES to address its intended target, the elimination of waste discharges, while leaving primary responsibility to control pollution caused by the nation's water allocation systems to the State. 33 U.S.C. §§1251(a)(1), (b)&(g), 1311 & 1342, CWA §§101(a)(1), (b) & (g), 301 & 402.

1. NPDES Is Tailored To The Specific Purpose Of Prohibiting Use Of The Navigable Waters To Assimilate Wastes.

Throughout its consideration of the Act, Congress was focused upon traditional industrial and municipal wastes. *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982). NPDES was unmistakably borne of the goal to eliminate such discharges. 33 U.S.C. §§1251(a)(1), 1311, 1342, 1362(12), CWA §§101(a)(1), 301, 402, 502(12); s*ee also* 40 C.F.R. §131.10(a) (prohibiting waste assimilation as a use for navigable waters). This specific objective, not the more sweeping goal of restoring integrity to the Nation's waters, informs the particular scope of the NPDES program and explains why the waters were not individualized for NPDES purposes. *Cf.* 33 U.S.C. §1251 (a) & (a)(1), CWA §101(a) & (a)(1).

To prevent waste discharges, Congress requires NPDES permits for "any addition of any pollutant to navigable waters." 33 U.S.C. §1362(12), CWA §502(12). The implementing agencies have long understood that pollutants are added to navigable waters at the point they are introduced and not through subsequent transfers.[1] *Gorsuch*, 693 F.2d at 175. At bottom, this definition does not convey any intention to federally regulate water transfers.

Plaintiffs' and the lower court's claim that Congress intended "the NPDES program to serve as its primary tool whenever possible" is unavailing. RE Tab 636 at 75. Had Congress wanted to apply NPDES more broadly to include State allocation systems, it easily could have chosen suitable language. *Gorsuch* 693 F.2d at 176. Instead, for purposes of §402, Congress adopted limiting language that pointedly targets waste discharges. 33 U.S.C. §1362(12), CWA §502(12). By contrast, Congress defined and used the term "discharges" without qualification to broadly address all discharges, including discharges of pollutants and of navigable waters. 33 U.S.C. §1362(12), CWA §502(12); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006) (discharges distinguished from discharge of pollutants as broader concept). Under ordinary rules of statutory

[1] This has indeed been EPA's longstanding and consistent position, despite assertions of its "ex-officials," as confirmed in Part IV at 30-31, *infra*.

construction the use of two different terms is presumed to be intentional. *Gorsuch*, 693 F. 2d at 172.

If Congress actually meant to apply NPDES as broadly as possible to protect all of the navigable waters from any harmful pollutant discharges, the exclusion of discharges to parts of the "same" water body makes no sense. Nor would agricultural discharges be excusable. See 33 U.S.C. §1362; §502. In fact, Congress limited NPDES in many ways for many policy reasons, economic and otherwise, including the goal of preserving the State's authority over water management. When "Congress fine tunes its statutory definitions, it tends to do so with a purpose in mind." *S.D. Warren*, 547 U.S. at 384.

The phrase "addition . . . to navigable waters" embodies the principle that a pollutant obtains its "point source" character at its point of introduction to the navigable waters and not through subsequent water transfers. *Gorsuch*, 693 F.2d at 165. The "addition" requirement further implements Congress' goal of controlling pollutants closest to their source. *See*, S. Rep. No. 95-370 at 8-9 (1977); 1977 Leg. Hist. Ser. No. 95-14 at 642-43. The unmistakable purpose of the "addition" test is to target the introduction of wastes from the outside world. *Gorsuch*, 693 F.2d at 175.

2. Congress Expected States To Maintain Primary Authority Over Programs That Control Flow Diversions.

Fear mongering about transfers of "polluted waters into the most pristine waters without a NPDES permit" reflects a clear misunderstanding of the Clean Water Act's comprehensive nature. *See e.g.,* Florida Wildlife Fed'n Brief at 29. Congress did not leave polluted water transfers unaddressed. The Clean Water Act provides a broad, comprehensive framework to control all sources of pollution, including any impacts of flow diversion facilities. For example, Section 208 required the States to identify problem areas and develop plans to address them. 33 U.S.C. §1288, CWA §208. Section 303 specifically created an important program to protect individual water bodies when the cessation of point source discharges is not enough. *See* 33 U.S.C. §1313(d), CWA §303(d) (States shall identify and establish Total Maximum Daily Loads ("TMDLs") for portions of the navigable water that NPDES alone is insufficient to protect); 33 U.S.C. §1313(e), CWA §303(e) (requiring a State planning process to ensure TMDLs can be accomplished).

While assuring supervised state programs would be developed, Congress further directed EPA to assist the States in developing methods to

control nonpoint source pollution caused by flow diversion facilities. 33 U.S.C. §1314(f)(2)(F), CWA §304(f)(2)(F).[2] Congress not only expected, but mandated the "[f]ederal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." 33 U.S.C. §1251(g), CWA §101(g). Under these comprehensive programs the federal and state governments are working together toward restoring all individual waters. RE Tab 636 at 39-52.

Congress also preserved State powers to supplement the Clean Water Act's programs, including the federal NPDES, with additional state programs and requirements. 33 U.S.C. §1370, CWA §510 (CWA does not preempt any States' authority to supplement the Act with even more stringent programs). The *Amicus* brief of Pennsylvania exemplifies how the States themselves can exercise their own independent authority to

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[2] Plaintiffs tortured reading of §304(f)(2)(F) ignores its legislative history:

> "If our water pollution problems are truly to be solved, we are going to have to vigorously address the problems of nonpoint sources. The Committee, therefore, expects the Administrator to be most diligent in gathering and distribution of the guidelines for the identification of nonpoint sources and the information on processes, procedures, and methods for control of pollution from such nonpoint sources as ***natural and manmade changes in the normal flow of surface and groundwaters." 1972 LEG. HIST. at 796.

supplement the federal NPDES program to address their own unique local needs and circumstances.[3] For this reason, Pennsylvania's contention that EPA's interpretation will somehow undermine it or any other State's independent authority to regulate water transfers is wholly without merit. *See* National Pollutant Discharge Elimination System (NPDES) Water Transfer Proposed Rule, 71 Fed. Reg. 32,887 (June 7, 2006)(to be codified at 40 C.F.R. pt. 122). ("Proposed Rule"). (EPA's interpretation expressly "does not effect [Pennsylvania's] prerogative" under CWA §510).

In fact, the district court in this case, fully acknowledged that the "State and federal governments have gone to great lengths to restore the system" and then proceeded to describe the numerous state and federal initiatives being undertaken under the auspices of the Clean Water Act. *See e.g.*, RE Tab 636 at 39-52. It is, therefore, beyond dispute that: 1) States have full sovereign authority to regulate water transfers; 2) The Clean Water Act created alternatives to NPDES to fully address any pollution caused by water transfers; 3) Extensive work is being done to redress pollution caused by water transfers; and 4) The federal government further plays a critical supervisory and supportive role in this scheme.

[3] In Part II.C at 20, *infra*, we explain that Pennsylvania's program is an exercise of its supplemental authority and not federally supervised.

The Plaintiffs and the district court appear motivated instead by concerns with the effectiveness of non-NPDES programs. *Id.*, at 75-76 (acknowledging alternative programs and noting question of effectiveness); and *Id.* at 53. (NPDES may do "nothing more then provide a *more* effective mechanism for ensuring [District] compliance with its current obligations when it operates the . . . pumps in the future."(emphasis supplied)) . The "effectiveness" of a legislative scheme and the choice of "mechanisms" to enforce it are purely policy considerations in the exclusive domain of the legislature and were not proper inquiries or concerns for the lower court. Courts should not reject the Act's carefully crafted cooperative federalism framework based upon their view of its effectiveness. To avoid that temptation is a principle reason for the Clear Statement Rule.

What's more, Congress candidly accepted the risks of leaving many pollution problems to the states. It recognized that State programs "may not be adequate" or that the "States may be reluctant to develop [adequate] control measures" and, therefore, there may be sometime in the "future a Federal presence can be justified and afforded." *Gorsuch*, 693 F.2d at 176, quoting S. Rep. No 370, 95th Cong. 1st Sess. 10, 1977 Leg. Hist. 635, 644. In deciding upon a cooperative federalism approach, Congress felt it was "both necessary and appropriate to make a distinction as to the kinds of

activities that are to be regulated by the Federal Government and the kinds of activities which are to be subject to some measure of local control." *Id.*

Whether the time for a "federal presence" and shift in federal-state responsibilities has come is a question for Congress. For now, the court should have respected Congress' judgment to leave primary responsibility with the States to establish comprehensive pollution controls for water management under EPA's guidance, not the NPDES program. *Id.* at 178.

C. Shifting Federal Jurisdiction Over Water Management Is A Significant Intrusion Into The State's Domain.

The Court also committed reversible error by placing the burden upon the District to show "permitting would prohibitively raise a state's costs of water distribution" in order to prevail with our "federalism concerns." R.E. Tab 636 at 80. The Tenth Amendment preserves the States sovereignty from any unintended federal encroachment upon traditionally local powers. *SWANCC, 531 U.S. at 173.* Federal jurisprudence places no burden at all upon State and local governments to prove a federal encroachment has any deleterious effects upon the local authority. It is of no consequence whether the usurpation is burdensome, benign or even beneficial. The judicial inquiry is whether Congress met its burden of clarity. *See Gregory v. Ashcroft*, 501 U.S. 452 (1991). The Clean Water Act does not manifest an

unmistakable intent to shift authority over water management from the states to the federal government.

The Plaintiffs and the lower courts' arguments that the NPDES and Water Resource Management Programs can happily "co-exist" or that federal procedures may exist to ameliorate the federal imposition are wholly misplaced. It is of no consequence that the federal NPDES program may have "flexibility" or may not "materially impair" the State's authority. R.E. Tab 636 at 80, quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77 (2nd Cir. 2006). Nor are the State's Tenth Amendment concerns satisfied by general permits, compliance schedules or any other federal process that may potentially alleviate some of the problem. It is not merely the practical effects, but rather the fundamental shift of decision-making authority over areas of traditional state responsibility to federal forums, which offends the State's sovereignty and dignity.

The lower court misapplied *PUD No. 1 v. Washington Dept. of Ecology*, in concluding that "incidental effects" upon the State's allocation decisions are "anticipated and acceptable aspects of the NPDES permitting program." RE Tab 636 at 79. citing *PUD No. 1*, 511 U.S. 700 (1994). That case addressed incidental effects upon a water user's rights. The legislative history plainly differentiates the States' interest in control of their allocation

systems. *See* Senate Debate 2770, reprinted in Legislative History, 1977 at 532. An assertion that impacts to the State interests are "incidental" or that they can be accommodated is not a defense to the Clear Statement Rule.

It is wholly incorrect to minimize problems of imposing NPDES. Leaving primary authority over water transfers and their quality impacts to the States reduced the very "federal/state friction" that is the heart of the Tenth Amendment and the Clean Water Act. *See Gorsuch*, 693 F.2d at 179, citing H.R. Rep. No. 92-911 at 96 (1971). Notably, the pollutants of concern in this case come predominantly from upstream land uses, the remedy for which "would involve land use and other controls of that kind" that were intended to be left to the States. Sen. Debate on S.2770, Leg. Hist. at 1314.

The burdens of permitting under the Act are not trivial. *Rapanos v. United States*, ___ U.S. ___, 126 S.Ct. 2208, 2214 (2006); *SWANCC*, 531 U.S. at 161 (2001) ("Permitting the [government] to claim federal jurisdiction" over State water transfers would "result in a significant impingement of the States' traditional and primary power over land and water use"). That is further reflected in the court's confusion over what type of NPDES permit could be required and significantly intrusive remedies sought below by the Plaintiffs. *See* Initial Brief of Carol Wehle at 52.

The lower court downplayed the impacts of its decision in two further mistakes. First, the lower court dismissed clear and undisputed evidence that its construction will extend federal jurisdiction to "thousands of water transfers throughout the United States" that have never been permitted under NPDES on the basis that the District "did not demonstrate . . . those activities are essentially identical" to its own. RE Tab 636 at 79, Proposed Rule, 71 Fed. Reg. at 32,888. More evidence was unnecessary. The record demonstrates the ubiquitous nature of water transfers between water bodies throughout the Nation. RE Tab 636 at 79. Plaintiffs never challenged that proposition. The extraordinary extent to which the Plaintiffs' interpretation, if accepted, will expand federal jurisdiction should not have been so lightly disregarded.

Second, after rejecting undisputed evidence of nationwide impacts, the court presumed without an iota of record support that "other states, such as Pennsylvania, subject *analogous* water transfers to NPDES permitting." RE Tab 636 at 81 (emphasis supplied). The court again imposed an improper burden upon the Defendants, claiming they "have not presented any evidence as to why the water transfers in Pennsylvania are more amenable to permitting than are the water transfers in Florida or other states." *Id.* The court, however, did not rely upon any "analogous

structures" being permitted in Pennsylvania. With sole exception of the facility in *Catskill,* the record is devoid of evidence that any other State water management facility has ever been permitted under the federal NPDES by any state, Pennsylvania included, anywhere in the country. There is nothing to distinguish.

Even Pennsylvania's amicus brief, which is not record evidence,[4] fails to identify any water transfer structures it purports to regulate through its state NPDES program. The only example noted in its brief is a nuclear plant, not at State managed flow diversion facility. *Del-AWARE Unlimited v. DEP,* 508 A.2d 348 (Pa. Commw. Ct. 1986).

Had Plaintiffs raised Pennsylvania's water transfers program at trial, the District was fully prepared to demonstrate that Pennsylvania actually does not regularly apply NPDES to water transfers, has never applied NPDES to any State water management structure, appears only to have issued a handful of state permits for undefined "water transfers," and, most importantly, that its water transfers program is really a supplemental state program allowed under §510 that has never been supervised, overseen or even reviewed by EPA or any other federal agency. 33 U.S.C. §1370, CWA

[4] *See e.g.*, Plaintiff's response to the motion of Lake Worth Drainage District for leave to file amicus brief objecting to presentation of non-record evidence that could have been provided at trial.

§510. Pennsylvania's state program does not represent the shift of federal jurisdiction sought in this lawsuit. The court's error, based upon a deficient record, however, is no grounds for remand. The question whether NPDES can "co-exist" with other State authorities is a red-herring, irrelevant to the proper constitutional analysis.

In the end, Plaintiff seek a shift of decision-making authority away from the local level to the federal agencies and courts that offends core Tenth Amendment values and undercuts the CWA's cooperative federalism scheme. To ignore this analysis was reversible error.

III. Plaintiffs' And Lower Court's Contrary Interpretive Analysis Is Circular, Inconsistent and Misapprehends Relevant Case Law.

Plaintiffs' and the lower court inconstantly apply textual and holistic interpretive principles to misconstrue the Act. On one hand, they reject Defendants' natural and ordinary reading of the prepositional phrase "to navigable waters" by warning against reliance upon a single statutory term or phrase. *E.g.*, RE Tab 636 at 73. On the other hand, they flatly rebuff EPA's "holistic" approach ostensibly because it ignores the plain meaning of the single word "addition." *Id*. at 72, citing *Catskill*, 451 F.3d at 84-85. The result of this circular reasoning is 1) an incomplete, trivialized linguistic analysis, and 2) a distorted, truncated "holistic" approach.

A. Rudimentary Linguistic Analysis Trivializes Carefully Chosen Definitions.

This case commands a careful linguistic analysis to determine the relevant "receptacle" to which the "addition" of a pollutant is prohibited for purposes of CWA §402.[5] The limiting language carefully chosen by Congress in defining the relevant receptacle should be given its full force and effect. *S.D. Warren Co.*, 547 U.S. at 381. (Congress directing careful attention to Act's definitions, particularly definition of Discharge of Pollutants). Congress well understood the lines being drawn and it was error to assume otherwise.

A fair reading of the entire text belies the lower court's contention that "it is evident that 'addition . . . to the waters of the United States' contemplates an addition from anywhere outside of the receiving water, including from another body of water." RE Tab 636 at 74. That concept is simply not embodied anywhere in the Act. Thus, neither Plaintiffs nor the lower court were able to present any textual support for the discrete treatment of transferred and receiving waters under 33 U.S.C. §1342, CWA §402.

[5] Plaintiffs continue to refer to the Unitary Waters principle as a factual position. It is not, but rather is a term used to describe our position that relevant receptacle for NPDES purposes is the Navigable Waters as a whole.

As the First Circuit agreed "there is nothing in the statute evincing a Congressional intent to distinguish between 'unrelated' water bodies and related or 'hydrologically connected' water bodies." *Dubois v. United States Dept. of Agric.*, 102 F.3d 1273, 1298 (1st Cir. 1996). There also is nothing in the statute evidencing a Congressional intent to distinguish between any waters for NPDES purposes. There is no textual basis for the judicially created, multi-factored "distinct waters' test".

To the contrary, Congress repeatedly made reference only to the whole of the waters of the United States when delineating the scope of §402. *E.g.*, 33 U.S.C. §1362, CWA §502(12) ("to navigable waters," omitting the modifier "any" that appears before each other noun); 33 U.S.C. §1362, CWA §502(7) (defining "navigable waters as 'the waters of the United States'"). For CWA §402 purposes, the Navigable Waters are consistently and only referred to as an aggregate, indiscrete whole. The "navigable waters," not "any receiving water," are the relevant receptacle. Therefore, the natural and ordinary reading of the Act reveals only the intent to prohibit additions to the navigable waters as a whole, i.e. waste discharges, not transfers between navigable water bodies.

The Plaintiffs try to avoid this plain reading by isolating the term "addition" from the qualifying prepositional phrase "to navigable waters"

and otherwise rewrite the text in ways that separates that qualifier from the verb "addition." *See e.g.*, Friends Resp. Br. at 11-12; Florida Wildlife Fed'n Br. at 3. (Pollutants discharged from . . . conveyances require NPDES permits). Through such linguistic machinations, the Plaintiffs fail to honor the ordinary and natural meaning of the entire text.

Furthermore, the "addition" requirement, even in isolation, does not support an extension of NPDES to water transfers. This was illustrated in Initial Brief of Carol Wehle by use of the analogy "to United States." Initial Brief of Carol Wehle at 39. We submitted that the movement of something within the United States, i.e. between political subdivisions, is not an addition to the United States. By analogy, the movement of navigable waters (all of which contain pollutants) between water bodies is not an addition of pollutants to the waters of the United States. The analogy may be elementary, but it is not, as the Tribe contends, nonsense. Tribe Resp. Br. at 34 n. 6. Congress expected careful linguistic analysis of the Act's definitions. *S.D. Warren,* 547 U.S. at 380.

The Court below acknowledged, but unfortunately did not address our analogy. RE Tab 636 at 60. In this appeal, only the Tribe took it on and their discussion only reinforces our point. Tribe Resp. Br, at 34 n.6. The Tribe asserts that a "prohibition against the addition of wine to *the cities* of

the United States would plainly preclude wine shipments to New York and it would be no answer to protest that the wine had been transshipped via Chicago." *Id.* (emphasis original). We agree and that is the point. To prohibit additions to a subset of a whole, the subset not the whole must be identified as the relevant receptacle. If the Tribe did not change the analogy from the whole of the United States to the subset "cities," movements between two "distinct' cities would not be implicated. Unfortunately, the lower court similarly changed the definition of pollutant discharges the same way the Tribe altered our analogy, from the whole "navigable waters" Congress selected to individual water bodies. That is reversible error.

The Tribe's misuse of our analogy also illustrates why it is immaterial that the "navigable waters" comprise of many water bodies, lakes, rivers and streams. The United States is comprised of many cities. The movement of something between two cities and resulting addition to the receiving city is, nonetheless, not an addition to the United States. The question is whether the whole or the subset was identified as the relevant receptacle to which the addition is prohibited. That Congress identified the navigable waters as a whole to be the relevant receptacle for NPDES purposes is inescapable.

Because the "navigable waters" are referenced as a whole for NPDES purposes, it is evident that Congress intended to prohibit waste disposal, i.e.

the addition of pollutants from *outside* the navigable waters, but not water management, i.e. transfers between individual navigable water bodies.

B. The Court's "Holistic" Analysis Was Distorted By Its Presumption NPDES Applies.

The purpose of taking "holistic" approaches to statutory interpretation is to ensure their construction: 1) remains harmonious with the overall structure of the Act, and 2) does not lead to absurd results. Proposed Rule, 71 Fed. Reg. at 32,889. Those purposes guided EPA to what the lower court conceded was a "very persuasive . . . well written" analysis. Oral Argument Tr. DE 728 at 168, Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfer, August 5, 2005, (EPA Guidance Memo) attached as Exhibit 1 to DE 369;.

EPA took a holistic approach in recognition that "the heart of this matter is the balance Congress created between federal and State oversight of activities affecting the nation's waters." Proposed Rule, 71 Fed. Reg. at 32,889. It considered provisions addressing the management of water resources, policy statements intending to respect the State's traditional authority over water resources and land management, and expressions of intent to preserve State interests through a cooperative federalism scheme. *Id*. EPA also considered alternative mechanisms for controlling water transfers that "more sensibly" address pollutant transfers. *Id*. at 32,891. In

the end, based upon the Act's comprehensive framework, EPA confirmed that "Congress did not intend to subject water transfers to the NPDES program." *Id*.

Plaintiffs' and lower court's "holistic" analysis differs from EPA's in subtle yet fundamental ways. This is because they each make very different assumptions regarding the plain language of the Act. EPA approached its holistic analysis open mindedly as if the plain language alone did not dictate the result. It canvassed the Act to understand its overall scheme and the role of NPDES within it.

Plaintiffs approach the overall Act from a wholly different perspective. First, they assume NPDES applies to water transfers based upon their reading of its text. Then they proceed to address select provisions individually to determine whether each alone "compels a conclusion" that NPDES cannot apply. *See e.g*., Florida Wildlife Fed'n Brief at 41. As a result, each provision is analyzed in a vacuum as if it were being asserted as an "exemption," which was never the point. That process allowed the Plaintiffs and the lower court to evade any real understanding of the policies that guided Congress to establish different roles for the federal and state government within the overall comprehensive framework of the Act.

For example, the court failed to recognize §§102(b), 208, 303, 304, 319 and 401 for providing comprehensive solutions that resolve its concern with polluted waters being moved to pristine areas. The lower court's analysis completely ignored these programs, except for §304 which was quickly discarded as not providing an express "exemption." By contrast, EPA observed §304 "demonstrates that Congress was aware that there might be pollution associated with water management activities." Proposed Rule, 71 Fed. Reg. at 32,890. In this manner, the lower court and Plaintiffs give incomplete consideration to the comprehensive nature of the Act and inferences that may fairly be drawn from its many programs.

The same problem plagued the court's consideration of the guiding policies of §§101(b)&(g) and §510 which stand together to preserve primary responsibility for traditional water management to the States. These fundamental policies inform of a cooperative federalism scheme and cautioned restraint in re-adjusting the federal-state balance. Again, the lower court misunderstood the District to be arguing for an "exemption" and placed an improper burden upon them to demonstrate its authorities would be prohibitively burdened. The Court should have instead recognized these provisions as keystones of the Act's cooperative federalism scheme and its respect for the States' rights.

Congress adopted the Acts' complex statutory and regulatory scheme of cooperative federalism that the Defendant's analysis tries to explain and within which NPDES plays an important but measured role. That is the goal of a proper holistic approach to statutory interpretation: To understand that NPDES was tailored to address a particular purpose within a much larger, comprehensive framework. That scheme was improperly overlooked when the lower court presumed NPDES applies and truncated its "holistic" analysis to engage in a fruitless review for "exemptions."

IV. Appellees Misapprehend EPA's Longstanding Water Transfers Policy And The Relevant Case Law.

Plaintiffs pretend that EPA's unitary waters theory is a novel litigating position that does not represent the consistent and longstanding practice of the federal government. That is incorrect. The agency's proposed water transfers rule explains EPA has *never* required permits for any flow diversion facility that does not introduce pollutants from outside the navigable waters. Proposed Rule, 71 Fed. Reg. 32,887. That position was established contemporaneously with the passage of the Act and has been adhered to since. *Id*. *Gorsuch*, 693 F.2d. at 167.

In fact NPDES permits have never been imposed by the federal government upon any State water transfer with the exception of the federal

court in *Catskill,* 451 F.3d. 77 (2nd Cir. 2006).[6] For thirty six years and numerous administrations none of the hundreds of thousands of flow diversions nationwide—many federally approved—have been federally permitted. EPA's proposed rule codifies the longstanding status quo. By contrast, the lower court's interpretation, that extends NPDES permitting to intra-basin water transfers, i.e. within a single watershed, is the novel expansion of NPDES beyond even *Catskill's* inter-basin test. *Id.* at 81, 83. Left unchecked, that expansion of the "distinct waters approach" will even more dramatically shift the traditional federal-state balance.

One *amicus,* an ex-EPA and Florida Department of Environmental Protection (FDEP) official, argues that EPA once took a contrary position. Browner Amicus Br. 6 & 18. Ms. Browner made that same argument as *amicus* to the Supreme Court in *Miccosukee,* 2003 WL 22793539.[7] The claim that EPA previously "reached the opposite conclusion" is singularly supported by dicta from a 1975 EPA opinion dealing with agricultural

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[6] As for Plaintiffs two other examples: *Dubois* involved a commercial facility to which EPA's water transfer policy does not apply and *Miccosukee* was vacated.

[7] In both amicus briefs Ms. Browner did not disclose her current role as Chair of the National Audubon Society and its affiliations with this case. [http://www.audubon.org/nas/board]. Audubon's staff were paid while providing extensive testimony at trial. Trial Tr. DE 731 at 13:16-19. Before the Supreme Court, Audubon joined a brief filed by Earthjustice and National Wildlife Federation, the former of which is prosecuting this matter for Florida Wildlife Federation an affiliate of the latter.

irrigation ditches. Browner Br. at 18. No example is provided where that opinion was ever used to suggest, much less to act on, permitting any State water transfer. Moreover, when Ms. Browner headed FDEP, which is responsible for permitting the District's pumps, that agency regulated them under State non-NPDES programs. RE Tab 636 at 49. (District operating under a state permit since 1983).

Ms. Browner also misrepresents the Supreme Court in *Miccosukee* "rejected" the assertion that EPA's position had been consistent. Browner Br. at 18 n.2. The Supreme Court only noted that "an *amicus* brief filed by several former EPA officials argues that the agency once reached the opposite conclusion." *Miccosukee*, 541 U.S. at 107. EPA has in fact been consistent in its longstanding interpretation of NPDES jurisdiction over flow diversions, whether they move water within or transfer it between water bodies. Proposed Rule, 71 Fed. Reg. at 32,892.

The effort to distinguish so-called "dam" cases is also misplaced. The "dam" cases applied EPA's jurisdictional test: That NPDES is triggered by the initial introduction of a pollutant into the navigable waters from the outside world and not upon any subsequent transfers. *See e.g.*, *Gorsuch*, 693 F.2d at 175. The relationship between transferred and receiving waters was irrelevant.

EPA's policy was never restricted to "dams," it just happened to be initially challenged in that context. *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988) (noting the "addition . . . to navigable waters" requirement applies "to any given set of circumstances"). In fact, there is no principled distinction between dams and any other flow diversion facilities used to manage the Nation's waters that has any relevance to EPA's jurisdictional test. *Id.* at 587. "Dams" merely exemplify flow diversions. This was clarified in EPA's Proposed Rule, 71 Fed. Reg. at 32,892.

The decisions in *Catskill* and *Dubois* did not turn upon any factual distinction between its own facilities and "dams," but rather the rejection of EPA's interpretation that pollutants must be added from the outside world. The Second Circuit altered the common understanding of the "outside world," i.e. from outside the navigable waters, to include anywhere outside a receiving water body. That is a fundamentally different test with a fundamentally different reach. These cases, therefore, squarely conflict on the law. This court should follow, or at the very least defer, to EPA's more reasoned analysis.

Plaintiffs attempt to factually distinguish the so called "dam' cases is particularly curious given their stipulation that the dike into which the

pumps are built and from which they discharge is a dam. Pretrial Stip. DE 536; RE Tab 636 at 23 (pumps are built into the Dike where it intersects the canals). EPA has consistently defined a "dam" as "any structure that impounds waters." *Consumers Power*, 862 F.2d at 590. The unmistakable purpose of the Dike and the pumps is to impound water in Lake Okeechobee. Water is moved less then 60 feet for that purpose. RE Tab 636 at 24. Moreover, the undisputed record demonstrates that the District's pumps conduct "intra-basin" movements of water between naturally interacting parts of a single basin. Trial Tr. DE 737 at 61:14. By contrast, *Catskill* involved an "inter-basin" transfer, i.e. the movement of water between bodies "utterly unrelated in any relevant sense." *Catskill v. New York*, 273 F.3d 481, 492 (2d Cir. 2001). Thus, if *Gorsuch* and *Catskill* were viewed as two reconcilable lines of cases, rather then squarely conflicting, the lower court placed this case in the wrong line.

Finally, EPA's jurisdictional test, and the principle a pollutant must be introduced to the navigable waters was not reached, much less rejected, by the Supreme Court in *Miccosukee*. The Supreme Court held only that the "definition of 'discharge of a pollutants' . . . includes within its reach point sources that do not themselves generate pollutants." *Miccosukee*, 541 U.S. at 105. It added that "a point source need not be the original source of the

pollutant; it need only convey the pollutant to 'navigable waters.'" *Id*. That explanation incorporates, not rejects, the principle that a point source must introduce the pollutants—that is "convey" it—to navigable waters, fully consistent with EPA's test accepted in *Gorsuch*. After all, the concept of "conveying" something "to" something else presupposes its introduction from the outside. The Supreme Court expressly preserved EPA's test.

Plaintiffs' "distinct waters" theory will fundamentally expand the historic scope of NPDES and alter the federal-state balance. That should not be done through specious distinctions and judicial fiat. Instead, the consistent position of EPA as applied nationally for 36 years should be honored.

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(s) James E. Nutt

Attorney for, Appellant, Carol Wehle, as Executive Director of The South Florida Water Management District

Dated: April 15th, 2008

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I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished via U.S. Mail this 15th day of April 2008, to all parties on the attached service list.

Respectfully submitted

General Counsel
Sheryl G. Wood

BY: _____
James E. Nutt (Florida Bar No. 874868)
jnutt@sfwmd.gov
So. Florida Water Management District
3301 Gun Club Road, MSC 1410
West Palm Beach, FL 33406
(561) 682-6253 / Fax (561) 682-6276

Attorneys for Carol Wehle and South Florida Water Management District

SERVICE LIST

Ellen J. Durkee, Esq.
Environment and Natural Resources Div.
Department of Justice
P.O. Box 23795, L'Enfant Plaza Station
Washington, D.C. 20026

Timothy S. Bishop, Esq.
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60603

Dexter W. Lehtinen, Esq.
Kelly Brooks, Esq.
Lehtinen, Vargas & Reidi, P.A.
7700 North Kendall Drive, Ste. 303
Miami, Florida 33156-7559

David Guest, Esq.
Monica Reimer, Esq.
P.O. Box 1329
Tallahassee, FL 32302-1329

Dione Carroll, Esq.
P.O. Box 440021
Tamiami Station
Miami, FL 33144