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/Cross-Appellee,

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

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

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

Respectfully Submitted,

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U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Friends of the Everglades, Inc., et al v. South Florida Water Management District, et al

Case No. 07-13829-HH

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellant, Carol Wehle as Executive Director of South Florida Water Management District, a governmental entity, hereby files the following complete list of persons and entities who have an interest in the outcome of this case, pursuant to Eleventh Circuit Rules 26.1 and 26.1-3, as amended

Abbott, Greg

Albrecht, Virginia S.

Altonaga, Honorable Cecilia, District Court Judge

American Farm Bureau Federation

American Rivers

American Water Works Association

Amron, Susan E.

Anderson, Robert T.

Arana, Enrique D.

Arenson, Ethan

Arizona Department of Water Resources

Artau, Edward

Association of California Water Agencies

Association of Metropolitan Sewerage Agencies

Association of Metropolitan Water Agencies

Association of State Wetland Managers

Audubon Society of the Everglades

Baur, Donald C.

Bedrin, Michael D.

Bennett, Mark J.

Berger, Jeffrey A.

Berger Singerman, P.A.

Best Best & Krieger, LLP

Bishop, Timothy S.

Blumenthal, Richard

Bogert, L. Michael

Brandt, John J.

Brennan, Elizabeth A.

Bronson, Charles H.

Brooks, Kelly S.

Browner, Carol M.

Bruning, Jon

Bulleit, Kristy A.N.

Burgess, Rick G.

Cannon, Jonathan Z.

Cardozo, Michael A.

Carroll, Dione C.

Catskill-Delaware Natural Water Alliance, Inc.

Catskill Mountains Chapter of Trout Unlimited, Inc.

Central Arizona Water Conservation District

Childe, John

Christman, James N.

City of New York

City of Saint Cloud, MN

City of South Bay, Florida

City of Weston, Florida

Clark, Jeffrey Bosset

Coakley, Martha

Coalition of Greater Minnesota Cities

COBB County-Marietta Water Authority of Georgia

Cole, Terry

Compagno, Michael J.

Cooper, Roy

Coplan, Karl S.

Corbett, Tom

Costigan, John W.

Council of State Governments

Cox, Michael A.

Crank, Patrick J.

Crowley, James J.

Cuomo, Andrew

Cumings, William C.

Cypress, Billy

Desiderio, Duane J.

Diffenderfer, Michelle

Dorta, Gonzalo Ramon

Doyle, Andrew

Dunn, Alexandra Dapolito

Durkee, Ellen

Earthjustice

Edmondson, W. A. Drew

Environmental and Natural Resources Law Clinic

Environmental Confederation of Southwest Florida

Environmental Protection Bureau

Federated Sportsmen's Clubs of Ulster County, Inc.

Fishermen Against Destruction of the Environment, Inc.

Flaherty & Hood, P.A.

Florida Association of Special Districts

Florida Farm Bureau Federation

Florida Fruit and Vegetable Association

Florida Wildlife Federation

Fox, Charles

Fox, Howard

Friends of the Everglades, Inc.

Fuller, Todd M.

Georgetown University Law Center

Gignac, James P.

Guest, David

Gunster, Yoakley & Stewart, P.A.

Hall, Brenda Lindlief

Hemming, Norman

Henderson, Whiitnie

Herum Crabtree Brown, Inc.

Holland & Knight, LLP

Hood, Christopher M.

Houtz, Gregg A.

Huff, Julia LeMense

Hungar, Thomas G.

Hunton & Williams LLP

International City/County Management Association

International Municipal Lawyers Association

Jorden Burt LLP

Kalen, Sam

Kassen, Melinda

Kempthorne, Dirk

Kightlinger, Jeffrey

Kilbourne, James C.

King, Gary

Koerner, Leonard J.

Labin, Tracy A.

Lake Worth Drainage District

Larson King, LLP

Lazarus, Richard J.

Lehtinen, Dexter

Lehtinen, Vargas and Riedi, P.A.

Lenard, Honorable Joan, District Court Judge

Lewis, Longman & Walker, P.A.

Lewis, Terry E.

Liebesman, Lawrence R.

Long, Lawrence E.

Love, Matthew A.

Madigan, Lisa

Martin, Guy R.

Masto, Catherine Cortez

Mather, Richard P.

Mayer, Brown, Rowe & Maw LLP

McKenna, Rob

Meltzer, Hilary

Metropolitan Denver Water Authority of Colorado

Metropolitan Water District of Southern California

Miccosukee Tribe of Indians of Florida

Milgram, Anne

Miller, Douglas K.

Minear, Jeffrey P.

Montano, Peggy E.

Moore, Susan A.

Morgan, Lewis & Bockius LLP

Murphy, James

National Association of Counties

National Association of Flood and Storm Water Management Agencies

National Association of Home Builders

National Audubon Society

National Conference of State Legislatures

National Congress of American Indians

National Hydropower Association

National League of Cities

National Parks Conservation Association

National Sheriffs Association

National Tribal Environmental Council

National Water Resources Association

National Wildlife Federation

Nationwide Public Projects Coalition

Native American Law Center

Native American Rights Fund

Natural Resources Defense Council

Nelson, Jean I.

Nichols, Peter D.

Nixon, Jeremiah W.

Northern Plains Resource Council, Inc.

Nutt, James

Nyhus, Steven W.

O'Donnell, Sonia Escobio

Oertel, Fernandez & Cole, P.A.

Olson, Theodore, B.

Ovelmen, Richard

Pace Environmental Litigation Clinic

Pacific Legal Foundation

Parenteau, Patrick A.

Parrish, James R.

Pennsylvania Department of Environmental Protection

Perciaepe, Robert W.

Perkins Coie, LLP

Petersen, Rafe

Plache, William S.

Potts, Julie Anna

Powers, Pyles, Sutter & Verville, P.C.

Quast, Sylvia

Quist, Danielle

Racz, Gabriel

Rademacher, John J.

Rause, Alicia L.

Reimer, Monica K.

Reiner, David

Reiner and Reiner, P.A.

Renovitch, Patricia A.

Reynolds, Motl & Sherwood

Riedi, Claudio

Riverkeeper, Inc.

Rivett, Robin L.

Rodfers, William H.

Rossbach Brennan, P.C.

Rowe, Steven G.

Rubin, Kenneth A.

Ruda, Richard

Rudolph, Maureen

Saner, Robert J.

Sansonetti, Thomas L.

Schiffer, W. Patrick

Shepard, Frank A.

Shurtleff, Mark L.

Sierra Club

Skor, Douglas L.

Sorrell, William H.

South Florida Water Management District

Spaletta, Jennifer

Spillias, Kenneth G.

State and Local Legal Center

State of Colorado

State of Connecticut

State of Florida

State of Hawaii

State of Idaho

State of Illinois

State of Kentucky

State of Maine

State of Massachusetts

State of Michigan

State of Missouri

State of Nebraska

State of Nevada

State of New Jersey

State of New Mexico

State of New York

State of North Carolina

State of North Dakota

State of Oklahoma

State of Pennsylvania

State of South Dakota

State of Texas

State of Utah

State of Vermont

State of Washington

State of Wyoming

State Water Contractors

Stenehjem, Wayne

Stroud, Nancy E.

Stumbo, Greg

Suthers, John

Swiger, Michael A.

Szeptycki, Leon

Theodore Gordon Flyfishers, Inc.

Thompson, Daniel H.

Tongue & Yellowstone River Irrigation District

Tongue River Water Users' Association

Torres, Edwin G., Magistrate Judge

Trevarthen, Susan L.

Tropical Audubon Society

Trout, Robert V.

Trout Unlimited Inc.

Trout, Witner & Freeman, P.C.

Tuholske, Jack R.

Tuholske Law Office, P.C.

Turner, Andrew J.

Turnoff, Honorable William C., District Court Magistrate Judge

United States of America

University of Washington School of Law

U.S. Attorney's Office, Southern District of Florida

U.S. Army Corp. of Engineers

U.S. Conference of Mayors

U.S. Department of Justice, Environmental & Natural Resource Division

U.S. Environmental Protection Agency

U.S. Sugar Corporation

Utility Water Act Group

Van Ness Feldman, P.C.

Vargas, Juan M.

Walker, Stephen A.

Ward, Thomas Jon

Wasden, Lawrence

Weiss Serota Helfman Pastoriza Guedes Cole & Boniske, P.A.

West Valley Water District of California

Western Coalition of Arid States

Western Urban Water Coalition

Wheeler Ridge-Maricopa Water Storage District of California

Wilkinson, Gregory K.

World Wildlife Fund

STATEMENT REGARDING ORAL ARGUMENT

This appeal raises legal issues of critical national importance that were left unresolved by the Supreme Court and have divided the courts of appeals. The district court's erroneous decision—imposing federal National Pollutant Discharge Elimination System permitting upon public works that are operated by the South Water Management District for the fundamental purposes of State water and land resource management –violates the Clean Water Act's cooperative federalism scheme, and is contrary to the Act's plain language, key policies and longstanding interpretation by the U.S. Environmental Protection Agency. Appellant Carol Wehle respectfully submits that oral argument would assist in clarifying much confusion surrounding the important questions presented.

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STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Appellant Carol Wehle, as Executive Director of the South Florida Water Management District,[1] adopts by reference and relies upon those portions of briefs filed by Appellants United States and United States Sugar Corporation that advance the following:

1. The longstanding position of the Environmental Protection Agency that the National Pollutant Discharge Elimination System (NPDES) applies only to discharges of pollutants into the navigable waters, and not to discharges of navigable waters themselves resulting from flow diversion facilities that manage the Nation's waters, which is known as the "unitary waters" view of the Clean Water Act. That interpretation is entitled to deference.

2. The lower court erred under the doctrine of *Closter Farms*[2] finding the District responsible for permitting pollutants introduced to navigable waters by upstream sources, since the plaintiff failed to demonstrate that they are either exempt from permitting or the are otherwise addressed by the Clean Water Act's regulatory scheme.

[1] Because Ms. Wehle is sued in her official capacity as Executive Director, we refer to her as the "District."
[2] *Fisherman Against Destruction of the Environment. v. Closter Farms*, 300 F.3d 1294 (11th Cir. 2002).

3. Waters managed by the District are integral components of federal public works and not intended to be treated distinctly for purposes of imposing the National Pollutant Discharge Elimination System.

4. The Supreme Court's opinion in *South Florida Water Management District v. Miccosukee Tribe of Indians*[3], preserved, and in no manner disfavored or contradicted, the "unitary waters" interpretation. The Court's reasoned dicta, on the issue raised legitimate issues that are readily resolved in favor of the "unitary waters" view.

[3] 541 U.S. 95 (2004).

STATEMENT OF JURISDICTION

Original jurisdiction is pursuant to 28 U.S.C. §1331 and the Clean Water Act, 33 U.S.C. §1365(a). This is an appeal from final judgment. This court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

The South Florida Water Management District operates an extensive system of levees, canals and other flow diversion facilities by which public waters are transferred throughout southern Florida. This appeal presents a narrow threshold question of statutory construction the Supreme Court preserved in the related *Miccosukee*[4] case:

> Whether under the Clean Water Act's scheme of cooperative federalism, Congress intended to shift primary responsibility for pollution caused by the routine transfer of navigable water for public water management purposes from traditionally State-governed planning processes to the federal National Pollutant Discharge Elimination System permitting program?

The district court extended National Pollutant Discharge Elimination System to transfers between "meaningfully distinct" bodies of water. If the Court accepts that interpretation—which it should not—it must then reach another question:

> Did Congress contemplate treating as "distinct" those navigable waters that have been specifically delineated by and incorporated into federal civil works and between which waters are expected to, and must, be transferred in order to fulfill their congressionally authorized project purposes?

[4] *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95 (2004).

STATEMENT OF THE CASE

This is a consolidated Clean Water Act citizen's suit. (CWA), 33 U.S.C. §1365(a). Plaintiffs seek a declaration that the South Florida Water Management District (District) must obtain federal National Pollutant Discharge Elimination System (NPDES) permits as well as a variety of forms of injunctive relief, including strict operational restrictions, the joining of the permitting agency and the marshalling of the permitting process.

I. Course of Proceedings.

In 2002, Friends of the Everglades (Friends) and Fishermen Against Destruction of the Environment (FADE) filed this case challenging the District's pumping operations. The Executive Director was added as a defendant under the doctrine of *Ex parte Young*[5] in anticipation of the District's Eleventh Amendment defense. Florida Wildlife Federation filed a separate suit that was consolidated. Both cases advanced the same legal theory, that NPDES permits are required to transfer public waters. The District defended the case primarily based on three sorces: 1) the views of the federal implementing agencies that Congress intended to leave regulation of water transfers to non-NPDES authorities; 2) the Tenth Amendment's "Clear Statement Rule," requiring that Congress have clearly

[5] 209 U.S. 123 (1908). Under *Young* officers of entities otherwise immune under the 11th Amendment may be sued for prospective injunctive relief.

manifest its intent before courts will find that it has intruded upon traditional state responsibilities; and 3) the District's entitlement to Eleventh Amendment immunity.

United States Sugar Corporation intervened as a defendant and the Miccosukee Tribe of Indians intervened as a plaintiff. The case was then stayed pending consideration of a related case, involving identical legal theories, that the Supreme Court accepted for certiorari review. *South Florida Water Management District v. Miccosukee*, 541 U.S. 95 (2004). The Supreme Court vacated and remanded on technical grounds, expressly declining to resolve the questions presented in this appeal. *See* 541 U.S. at 112.[6]

When this case reopened the United States intervened to defend the position it argued in *Miccosukee* that NPDES permits are not required for public water transfers. *See* Federal Government Amicus Brief, 2003 WL 22137034. The case proceeded to trial after two notable orders: 1) finding that the Court in *Miccosukee* had not resolved the questions presented. (DE 266 at 3-4) and 2) holding that, if the State is found to be engaged in traditional State functions, it would take a narrow view of the Act under Tenth Amendment principles. DE 527 at 16-18.[7]

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[6] *Miccosukee* has now been stayed pending this appeal. Friends and Miccosukee appealed. *Miccosukee v. South Florida Water Management District*, 07-12012-JJ.

[7] This admission alone is notable for its stark contrast with the lower court's ultimate position that the CWA is subject to only one view, *i.e.* that it is "unambiguous."

After extensive hearings, the lower court concluded the District's operations are critical State functions for which it is entitled to Eleventh Amendment immunity. RE Tab DE 636 at 98-105. But the court also concluded that Congress "unambiguously" imposed NPDES upon those operations—the principle ruling challenged here. *Id*. at 60-61. Finding the Act "unambiguous," the court evaded principles of agency deference and the Clear Statement Rule. *Id*. at 83-84. In 2007, the Court entered an order on remedies and final judgment, dismissing the District on Eleventh Amendment grounds, directing the Executive Director to apply for NPDES permits, and denying additional relief as "premature" "perhaps academic," and inefficient pending likely appeal and potential reversal. *Id.* at 6-7.

II. Statement of the Facts

The courts of appeals are divided over the proper scope of NPDES and interpretive principles left unresolved in *South Florida Water Management District v. Miccosukee*, 541 U.S. 95 (2004). The lower court has aligned itself with courts interpreting the Act contrary to the longstanding position of the Environmental Protection Agency and other courts of appeals that have deferred to the EPA's views. Before applying cannons of construction that reveal errors in the lower court's interpretive analysis, we describe the facts of the case in context of key water resources principles and cooperative federalism framework of the Clean Water Act.

A. The South Florida Water Management District

Carol Wehle is Executive Director of the South Florida Water Management District, one of five districts established by the State of Florida to provide stewardship over public water resources. Fla. Stat. §§373.069, 373.016. The District implements the State's water policies throughout its extensive jurisdiction, which is drawn along hydrologic boundaries, to allow a comprehensive watershed approach to manage the Everglades ecosystem. Fla. Stat. §§373.069(2)(e); 373.073, 373.016; Def. Ex. 1. Its mission is to "protect water resources of the region by balancing and improving water quality, flood control, natural systems and water supply." Trial Tr. DE 736 at 159:12-14. These are traditional and fundamental State functions that the lower court found entitled to Eleventh Amendment protections. RE Tab DE 636, Part C at 13.

B. Legal Controls Of Water Resources

The most distinctive legal feature of water is its status as a public resource that cannot be privatized in the ordinary way. Sax et al, LEGAL CONTROL OF WATER RESOURCES CASES AND MATERIALS 521 (4th Ed. 2006). "The waters of the state are among its basic resources." § 373.016, Fla. Statutes. It is used by man and nature for an extraordinary variety of competing public and private, consumptive and non-consumptive purposes, including municipal, industrial and

agricultural supplies; navigation; recreation; natural systems protection; flood control; prevention of salt water intrusion and the assimilation of industrial and municipal wastes.

Planning the development of local land and water resources is a traditional state function. §101(b), 33 U.S.C. §1251(b). The State's responsibility to manage resources is constitutional. Art. II §7 Fla. Const. Police powers to manage waters for public health, safety and welfare are well established. §373.016(3)(j), Fla. Stat.; *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908). Significantly, over the past century and a half the States, including Florida, have developed a variety of separate laws and doctrines to address water quantity and water quality issues. Sax, *supra* at 1009; Ch. 373, Fla. Stat.; *California v. United States*, 438 U.S. 645, 648 (1978). In recent decades increased public interest in waters has been generating major shifts in water policy that increasingly pit public and private claims to water against each other. *E.g.* Sax, *supra* at 16, 23. The result is a varied, evolving and increasingly contentious body of state laws governing local land and water resources. Further complicating matters, is that federal assistance in managing the Nation's natural resources is inevitable, given their shear magnitude. Thus, the past century has also been marked by increased federal involvement beyond its traditional role in protecting navigation.

The hallmark of this increased federal involvement in natural resource management has been cooperative federalism. Where Congress has extended federal authorities into the traditional State province of natural resource management, it has, rather then preempting the State's role, carefully circumscribed the federal government's function in deference to State rights. *See e.g.* §101(b), 33 U.S.C. §1251(b); *California*, 438 U.S. at 650; *New York v. United States*, 505 US 144, 166-69 (1992).

1. The First Pillar Of Water Management: Allocation Of Quantities

Waters are naturally distributed over the earth through the hydrologic cycle. Trial Tr. DE 733 at 23:1-5. They evaporate, precipitate, run off into rivers, and flow into various other water bodies, where they evaporate and the cycle repeats. *Id.* at 110:10-15. The nature of this cycle depends heavily on local conditions, which are complicated by often extreme climatic and topographic variability. *See generally*, Sax, *supra* at 8-10.

Variability of local quantities of water from region to region has been a primary factor in limiting each State's use and development of land and water resources. Sax, *supra* at 4-8, 10; *California*, 438 U.S. at 645. In many parts of the country, especially in the west, growth has been stunted by the scarcity of water. *Id.* By contrast, riparian and swamp lands predominating many eastern States often suffer too much water for sustainable development. *Sax*, *supra* at 10. Thus,

a fundamental function of water management is to move quantities of water—diverting their flows—from where they are not wanted (or needed) to where they are wanted. *Id.* at 14; Trial Tr. DE 737 at 63:2-5.

Hydrologic modifications—changes to the natural hydrologic cycle—can be used to harness the resource and move it away from lands to be developed (flood control) and, where practical, deliver it to where it can be used or stored for the future (water supply). These modifications are accomplished by flow diversion facilities capable of changing the natural movement, flow and circulation of surface and ground waters. Water managers are authorized thus to operate public works, including dams, canals, levees, reservoirs and the like. See e.g. §§373.016, 373.1501, Fla. Statutes.

a. State Water Control Projects

Early reclamation efforts in Florida illustrate the complexity of managing water quantities in the Nation's complex watersheds. In 1850 the United States granted swamp lands to several States for reclamation. Swamp Lands Act, 43 U.S.C. §982. More than 2.8 million acres of Everglades surrounding and southward of Lake Okeechobee were transferred to Florida. Comprehensive Report on Central and Southern Florida for Flood Control and Other Purposes, H.R. Doc. 80-643 at 8 (1948); Def. Ex. 205.

A drainage district was established and hundreds of miles of canals were dug to drain Florida lands. Def. Ex. 205 at 8. Four major uncontrolled canals drained Lake Okeechobee to the ocean. Trial Tr. DE 735 107:1-5. As these efforts reclaimed land, farming flourished and Florida's population soared. Def. Ex 205 at 5, 18-19.

These developments, however, seriously "altered the natural balance between water and soil." Def. Ex. 205 at 32. As muck soils over drained and dried out during drought, they were destroyed by fires and subsidence. Lowering the water table lessened ground water pressure against the ocean, allowing salt water into well fields. *Id.* at 30-36. By contrast, during wet periods, canals proved incapable of controlling flooding. Thousands lost their lives and property. *Id.* at 9, 23-24, 26. Faced with these and other types of quantity issues the States have increasingly turned to Congress for assistance. Trial Tr. DE 736 at 185:21 to 186:15; Def. Ex. 56; *California*, 438 U.S. at 649.

b. Federal Water Control Projects

The federal government's early involvement with water resources was limited largely to navigation. See e.g., Rivers and Harbors Act of 1899 §13 ("Refuse Act"), 33 U.S.C. §407. By the early 1900's, however, it became apparent that complete development of the Nation's diverse watersheds was beyond the means of the individual States. *California*, *supra* at 649. By 1902, Congress created the Federal Bureau of Reclamation to construct massive projects needed to supplement efforts by western States to reclaim agricultural lands. *Id.*. Its mission quickly grew to supporting many other water resource uses, including flood control. *Id.* at 27:2-13. By 1930, Congress expanded the traditional authorities of the Corps of Engineers to include nationwide responsibility for flood control and later water supply. *Rivers and Harbors Act of 1930*, P.L. 71-520.

Since then, Congress has authorized and funded thousands of multi-purpose projects designed to collect, transfer and store water throughout and among the States. Today, the Nation's waters are highly controlled, collected and preserved by civil works that have been built upon and between virtually every significant waterway. See e.g. Def. Ex. 280**.**

Over two million dams—including the facilities at issue in this appeal—have been constructed by federal, state and local governments. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 182 (D.C. Cir. 1982). Thousands of miles of

canals, levees and other public works collect and convey waters across vast distances and create and connect many natural and artificial water bodies. See e.g. Def. Ex. 280**.** These systems routinely transfer immense volumes between and among watersheds and water bodies, across expansive lands, and even across the continental divide. See Trial Tr. DE 737 at 26:24-25. The direction and flow of rivers have been diverted—even reversed—often causing them to flow into different bodies. *Id.* at 62:14-18. The result is an extensive infrastructure through which States manage land and water resources. See e.g. Def. Ex. 205.

c. Army Corps Of Engineer's Central And Southern Florida Project For Flood Control And Other Purposes

This case involves crucial flow diversion facilities of the U.S. Army Corps of Engineer's Central and Southern Florida Project for Flood Control and Other Purposes ("C&SF"), a multipurpose civil works project similar to the thousands of water transfer projects throughout the United States. Trial Tr. DE 737 at 61:24 to 62:6; Flood Control Act §203, 62 Stat. 1176, P.L. 858, 80th Cong., 2d Sess. The C&SF was the state and federal government's response to the problems caused by uncontrolled local drainage described in part 2.a, above. H.R. 643. Its purposes include flood control; navigation; recreation; water supply; water storage; preventing salt water intrusion; and protecting natural systems. Def. Ex. 218 at 2-1; Trial Tr. DE 733 at 150:2-23. The State designated the District to operate and maintain the C&SF. §373.1501, Fla. Stat.

Four principal technologies were adopted to achieve the goals of the C&SF: levees, storage areas, canals, and pumps. Def. Ex. 205. It has developed into a complex and highly integrated water control system comprising over 2000 miles of levees and canals, approximately 1350 square miles of Water Conservation Areas (WCAs), and over 150 major water diversion structures. RE Tab 636 at 10; Def. Ex. 1. Key features of the C&SF that are subject to this litigation include:

i. Lake Okeechobee And The Herbert Hoover Dike

Lake Okeechobee is a natural fresh water lake in central Florida bounded by the levees that comprise the Herbert Hoover Dike system. Def. Ex. 218 at 2-3. The Dike transformed Lake Okeechobee into a major multi-purpose reservoir. *Id.* at 2-2. The Dike serves as a dual-purpose dam, providing flood protection and reservoir storage. RE Tab 636 at 14-15

The Lake is the liquid heart of the watershed, collecting waters from a vast contributing area for reservoir storage and providing it for urban and agricultural uses, for prevention salt-water intrusion, and for other beneficial uses. *Id.*; Def. Ex. 205.

ii. The Everglades Agricultural Area

A major purpose of the C&SF was to provide flood protection and water supply to 1,130 square miles of reclaimed agricultural lands adjacent Lake Okeechobee, designated as the Everglades Agricultural Area or EAA. RE Tab 636

at 16-17. A network of canals, structures and levees divide the EAA to remove excess water to Lake Okeechobee and Water Conservation Areas and to deliver water from Lake Okeechobee to all of southern Florida for use during dry seasons. *Id.*; Def. Ex. 205. This system protects not just farmlands, as well as houses, cities county seats and hospitals throughout southern Florida valuing "billions and billions of dollars." Trial Tr. DE 733 at 107:5-7.

iii. S-2, S-3 And S-4 Pumping Stations

The S-2, S-3 and S-4 pump stations—to which the lower court erroneously extended NPDES jurisdiction—are flow diversion facilities used to move water from the canals in the EAA across Herbert Hoover Dike for flood control and reservoir storage. RE Tab 636 at 23. Failure to operate them during wet periods would cause catastrophic flooding. *Id.* at 105. They are also used during dry periods to further augment water supplies in Lake Okeechobee. *Id.* at 27.

The pumps add nothing to the navigable waters they manage and the District does not subject its waters to any intervening use—industrial, municipal or otherwise. RE Tab 636 at 24-5. The pumps merely transfer navigable waters less than 60 feet through the Dike as part of the State's water management program. *Id.* The pumps are never used to dispose of or assimilate wastes, and are not designed for that purpose. *Id.*; Trial Tr. DE 733 at 151:7 to 153:3.

2. The Second Pillar Of Water Management: Water Pollution And Its Control

Diversion projects contribute greatly to the Nation's welfare, allowing millions of people to live and work in swamp lands that they otherwise could not inhabit. Trial Tr. DE 733 at 62:1-8. Unfortunately, these projects have also significantly altered the integrity of the Nation's waters. *See generally.* Def. Ex. 232.

For instance, hydrographic modifications (and the land and water uses they support) have altered the quantities, timing and distribution of water available for the environment. *Id.* In addition, removal of water for consumptive use alters the chemistry of water remaining in the natural system. As noted above, over-drainage in the Everglades has caused or threatened intrusion of salt water and negatively impacted the area's soils.

Flow diversions affect water quality in significant ways as well. Water is a universal solvent, absorbing constituents as it flows over lands and through waterways.[8] RE Tab 636 at 36. Thus, changing the flow of water alters the areas to which it is exposed and the constituents it contains. Water then carries its constituents to whichever waters it may reach as it moves through a hydrologic

[8] All surface water is thus naturally impure; at the very least, it is contaminated by at the very least, such natural pollutants as phosphorous and nitrogen from natural sources. Sax, *supra* at 1010; Trial Tr. De 737 at 67:15 to 68:2. As such, every transfer inevitably moves pollutants between parts of the navigable waters.

cycle modified by the Nation's flow diversion facilities. This effect is compounded by changed uses of land in reclaimed areas, which inevitably change the types of constituents to which waters flowing over those lands are exposed.

In these ways, water quality and quantity issues are inherently intertwined. Sax, *supra* at 1009. Indeed, the second-most important cause of quality impairment in the Nation's rivers and lakes is hydrologic modification of the waterways, including the construction of dams. Sax, *supra* at 1011.

Critically, however, altered exposure is not the only cause of pollutants being introduced to the Nation's waters. For example, industrial and municipal activities over the past century have increasingly used the Nation's water to assimilate pollutants.

Congress recognized key distinctions between these very different sources of pollution—pollutant discharges versus hydrologic modifications. While hydrologic modifications share an inextricable nexus with traditionally local water management, for instance, industrial and municipal discharges do not. Consistent with this distinction, Congress gave different roles to the federal and state governments, under the Clean Water Act's cooperative federalism scheme, in different contexts. *See* Part II.A.2.b , *Infra*, at 20.

a. Early Federal Water Pollution Controls

As with water *quantity* management, water *quality* control is a traditional State responsibility. Art. II §7 Fla. Const. Federal involvement with water quality began with the Refuse Act of 1899, but was limited to industrial discharges of "refuse" that interfered with navigation. §13, 33 U.S.C. §407; Trial Tr. DE 733 at 15:15. The Refuse Act established a program to permit the discharge of refuse into the navigable waters, but specifically excluded municipal discharges. 33 U.S.C. §407. Not until 1959 was the Refuse Act extended to regulate industrial wastewater discharges. *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960).

In 1948, Congress passed the first Federal Water Pollution Control Act (FWPCA) which generally was limited to providing States technical assistance and funding treatment plants. P.L. 80-845, 62 Stat. 1155 (1948). By 1965, the FWPCA was amended to require States to adopt water quality standards, but no effective oversight or enforcement mechanism was provided. P.L. 89-234, 79 Stat. 903 (1965).

These Acts failed to protect the resource and water quality continued to decline. Gross & Dodge, Clean Water Act, ABA Basic Practice Series 7 (2005). Over half of the States did not establish—much less enforce—water quality standards. *Id.* By the 1960's rivers were burning as streams were being used to

dispose of wastes rather than support human life and health." *Id.* By 1972, that misuse of the Nation's water caught the attention of Congress.

b. The Clean Water Act: Policies, Goals And Structure Of 1972 Amendments

The 1972 amendments to the FWPCA, known as the Clean Water Act, represented a major overhaul, establishing a multifaceted approach to "restor[ing] and maintain[ing] the chemical, physical and biological integrity of the Nation's waters." §101 (a), 33 U.S.C. §1251(a). Central to the Act's structure was Congress' continued use of a cooperative federalism (rather then preemption) model, as it preserved the State's primary responsibilities to address pollution in their planning for the development and use of land and water resources. §101(b). Amendments in 1977 clarified "it is 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. §101(g), 33 U.S.C. §1251(g).

The Clean Water Act thus anticipates a partnership between states and federal governments in achieving its shared objectives. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). In fact, to a clearer extent than in the Reclamation and Water Resource Development Acts, the Clean Water Act gives broad deference to state water and land use authorities by carefully delineating and limiting the federal government's role. §101(b)&(g); 33 U.S.C. §1251(b)&(g).

To that end, Congress divided the causes and control of water pollution into two categories: (1) "point sources of pollutants" the primary responsibility for which was given to the federal government; and (2) "nonpoint sources of pollution" which were left to be addressed primarily through the States' water and land resource management programs. *Gorsuch*, 693 F.2d at 165-166. This was a crucial legislative judgment. *Miccosukee*, Federal Amicus, 2003 WL 22137034. Different regulatory programs were developed to address point and non-point sources, each with their own distinct purposes and strategies, in order to balance the Act's several policies. See *Arkansas*, 503 U.S. at 101; *PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994).

i. The Extension Of Federal Jurisdiction Over "Point Source Pollutants"

When adopting the CWA, Congress's focus was upon sources from which industrial and municipal waste entered the waters. Trial Tr. DE 733 at 147:9-14; *Gorsuch* 693 F.2d 156. The most significant change was the adoption of a direct federally enforceable prohibition against the use of navigable waters to assimilate wastes, which shifted jurisdiction over "discharges of pollutants" from the States to

the new federal Federal Environmental Protection Agency.[9] §§301 & 402, 33 U.S.C. §§1311 & 1342.

The CWA defined the term "pollution" broadly to mean "the man-made or man-induced alteration of the chemical, physical, biological . . . integrity of water" (§502(19); 33 U.S.C. §1362(19)) and it established an array of programs to address pollution generally. But the CWA defined the term *"pollutants"* more precisely to mean "dredge spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural wastes discharged into water." §502(6), 33 U.S.C. §1362(6). These pollutants have been described as waste material of a human or industrial process. *Association to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1016 (9th Cir. 2002).

Congress' position on the use of navigable waters to assimilate pollutants is made clear by "the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." §101(a)(1), 33 U.S.C. §1251(a)(1). It put federal resources behind its words, declaring "the national policy that major research and demonstration efforts be made to develop technology necessary to eliminate the

[9] The CWA created two permitting programs for pollutant discharges. Section 402 added EPA's NPDES, which is at issue here, and Section 404 adopted the Corps' jurisdiction over dredge and fill operations that originated with the Refuse Act of 1899. This brief discusses only the NPDES.

discharge of pollutants into the navigable waters." §101(a)(6) 33 U.S.C. §1251(a)(6). EPA's implementing regulations attest that "in no case shall a State adopt waste transport or waste assimilation as a designated use for any waters of the United States." 40 C.F.R. §131.10 (a). Any discharge of any pollutant without a federal permit was prohibited and became a federal crime. §301, 33 U.S.C. §1311.

Congress also recognized that "[w]ater moves in hydrologic cycles and it is essential that the discharge of pollutants be controlled at the source." S. Rep. No. 92-414 at 77, Legislative History of the History of the Water Pollution Control Act of 1972, Ser. No. 93-1 ("Leg. Hist.") at 1495, see also *Id.* at 73, Leg. Hist. at 1491 (Congress "concentrate[d] on the control of pollutants placed in surface waters"); *Id.* at 70, Leg. Hist. at 1488 (NPDES seeks "to control, on a source by source basis the discharge of pollutants into the navigable waters"). Accordingly, it "extracted from the Refuse Act the basic formula and added municipal discharges to it, so that before any material can be added to the navigable waters authorization must first be granted . . . under Section 402 [the NPDES program]." *Id.* at 76.

The NPDES applies strict technology-based standards at discharge points where pollutants are introduced to navigable waters. §402, 33 U.S.C. §1342. Pollutants obtain their "point source" character at those points of introduction where they become subject to federal NPDES jurisdiction. *Gorsuch*, 693 F.2d. at

165. The NPDES imposes strict technology standards to achieve the lowest feasible effluent limitations—i.e. restrictions upon the flow of pollutants—at each outfall. §402, 33 U.S.C. §1342. Effluent limitations are enforced by applying the "best available technology economically achievable." §301(b)(2)(A), 33 U.S.C. §1311(b)(2)(A). If the available technology means are insufficient to reach the desired water quality standards, additional "water-quality-based effluent limitations (WQBEL's) are imposed. §302, 33 U.S.C. §1312; *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002). If the WQBEL's can not be met or the receiving waters are deemed impaired the discharge is prohibited. *Id.* It is through this scheme that the NPDES program requires point-source pollutants to be removed to the greatest economically feasible extent prior to discharge. The aim of this new permitting process was plainly to prohibit continued use of navigable waters to assimilate pollutants. The federal prohibition of such use does not directly implicate the states' water resource management functions.

ii. Protecting & Preserving Primacy Of State Responsibilities For Non-Point Source Pollution

Nonpoint sources of pollution, which are "defined by exclusion" to encompass "all water quality problems not subject to" point-source regulation (*Gorsuch*, 693 F.2d at 166) are regulated under state water quality programs. §§208, 303, 319; 33 U.S.C. §§1288, 1313, 1329. As noted above, Congress defined the term "pollution" broadly to mean "the man-made or man-induced

alteration of the chemical, physical, biological . . . integrity of water" §502(19), 33 U.S.C. §1362(19). Nonpoint sources of *pollution* broadly include the panoply of land and water uses that take place within the nation's watersheds and alter the integrity of their waters.

Nonpoint source *pollutants* include any pollutants not "added" to the waters "from a point source." CWA §502(12), 33 U.S.C. §1362(12). Their source is, rather, the multitude of activities occurring upon lands and waterways over which waters flow. The point versus nonpoint source character of a pollutant is thus determined by the source of initial addition or introduction to navigable waters. *Gorsuch* 693 F.2d at 175. The *source* of the pollutant, and therefore its character as a "point" versus "nonpoint" source, does not change when the navigable water it has entered later transfers between parts of the navigable waters. *Id.* As result, flow diversion facilities have long been recognized as nonpoint sources of pollution because they discharge navigable waters without adding pollutants. *Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); see §304(f)(2)(F), 33 U.S.C. §1314(f)(2)(F); H.R. Rep. No. 92-911 (1971) (Congress categorized as "nonpoint sources" the "natural and man made changes in the normal flow of surface and ground waters"). The mere transfer of water through a flow diversion facility does not transform the non-point pollutants it inevitably contains into point source pollutants.

Unlike effluent limitations used to control pollutant discharges, the remedies for nonpoint sources of pollution necessarily implicate land and water resource planning, both up and down stream of each flow diversion facility, as well as the many uses of waters that provide for public health, safety and welfare. Thus, "Congress made a clear and precise distinction between point sources, which would be subject to direct Federal regulation, and nonpoint sources, control of which was specifically reserved to State and local governments through section 208 [State planning] process . . . judging that those matters were appropriately left to the level of government closest to the sources of the problem." S. Rep. No. 95-370 at 8-9 (1977); 1977 Leg. Hist., Ser. No. 95-14 at 642-43. As reflected in the comments of Senator Muskie, the primary sponsor of the legislation in the Senate, programs developed to deal with nonpoint sources "would involve land use and other controls of that kind." Senate Debate on S. 2770, Leg. Hist. at 1314. Land uses are widely regulated by state, not federal authorities.

By leaving diversion projects and their navigable-water discharges to non-NPDES controls, including land use planning, Congress preserved the primacy of the States' role in managing water and land resources through programs that address both *quantity* and *quality*. This policy reduces "federal/state friction" by allowing States to "continue to exercise the primary responsibility in both of these areas and thus provide a balanced management control system." *Gorsuch*, 693 F.2d

at 179, citing H.R. Rep. No. 92-911 at 96 (1971). Federal agencies are in turn directed to "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." §101(g), 33 U.S.C. §1251(g).

C. New Comprehensive Water-Quality-Based Programs Address Non-point Sources of Pollution

While limiting federal NPDES jurisdiction, Congress by no means left any non-point sources (including water transfers) unaddressed or individual waters unprotected. To the contrary, the CWA declares:

> [T]he national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of [the CWA] to be met through the control of both point and nonpoint sources of pollution.

§101(a)(7), 33 U.S.C. §1251(a)(7). More specifically, the CWA stated "the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State." §101(a)(5), 33 U.S.C. §1251(a)(5).

Though recognizing the weakness of past State water pollution efforts, Congress chose not to completely federalize water pollution control. Instead it directed states to establish their own pollution control programs under EPA oversight. *Gorsuch*, 693 F.2d at 178. It plainly intended the CWA to succeed where prior Water Pollution Control Acts failed; not by usurping State rights and

responsibility, but by ensuring they were no longer abdicated. To that end, the 1972 amendments created and improved several nonpoint source tools and provided unprecedented federal support.

For example, §208 created a new areawide planning program under which the States were required to identify areas that have substantial water quality problems (CWA §208(a)). For each area, the States were required to develop plans to control a variety of land uses, the disposition of wastes that affect water quality, and the disposal of pollutants on land or in subsurface excavations within such area to protect ground and surface water quality. 33 U.S.C. §1288(b)(2)(F)-(K).

In addition, §303, created a comprehensive new water-quality-based program to protect individual waters (the TMDL program). 33 U.S.C. §1313; *Sierra Club*, 296 F.3d 1021, 1025 (11th Cir. 2002) (good overview of TMDL program). Under the TMDL program States must designate uses for all navigable waters and establish water quality standards necessary to achieve each use. §303(a) & (c), 33 U.S.C. §1313(a)&(c). Each state must survey its waters and identify those that are not meeting standards. *Id.* For each impaired segment of navigable waters, the States must determine a Total Maximum Daily Load (TMDL) that the water can assimilate and still achieve standards. *Id.* The States must then develop basin management plans that will enable it to achieve each TMDL in coordination with water quantity programs. *Id.*

To avoid the shortcomings of prior water quality based schemes, the EPA was given a solid supervisory role. *Sierra Club,* at 1026. The EPA can step in and set water quality standards, identify impaired waters and establish TMDL's if a State fails to do on its own. In later amendments, additional research and grant programs were added to further support State nonpoint source planning. §319, 33 U.S.C. §1329. EPA also was directed specifically to develop methods to assist the States control of nonpoint source pollution caused by the Nation's flow diversion systems—the very activity at issue here. §304(f)(2)(F), 33 U.S.C. §1314(f)(2)(F).

It is through these programs—not NPDES—that Congress aimed to resolve nonpoint source pollution caused by navigable water transfers. *Gorsuch*, 693 F.2d at 175. The goal is to clean all waters and sufficiently control wastes on the lands, such that waters will cause no harm to any water bodies as they move though their modified hydrologic cycle. As plaintiffs' own experts conceded, all of the pollutants of concern here can be addressed upstream at their original source. Trial Tr. DE 746 at 54:21-23.

* * *

Congress created in the CWA a multifaceted scheme that extends far beyond the immediate focus of NPDES—industrial and municipal discharges into the navigable waters. It applies a variety of tools to achieve overall water quality while accommodating competing water and land resource needs and other policies

important to our federalist system of government. §101(a)(b)&(g). the CWA thus aggressively attacks waste disposal through strict federal permitting standards while greatly strengthening requirements for States to set and implement water quality standards to address all other causes of water pollution—*i.e.* nonpoint sources, including commonplace water diversion projects. That is the great experiment in cooperative federalism and state primacy that is the CWA.

D. Comprehensive Restoration Of The Everglades System

As contemplated by Congress, pollution caused by the C&SF project (including the S-2, 3 and 4 pumping stations), is being addressed under an array of federal and state water resource laws. Those laws provide a framework for comprehensive watershed restoration through a federal-state partnership that is increasingly integrating all resource issues—quantity and quality, land and water.

In 1999, Congress added water quality to the Corps' mission when it authorized a multi-billion dollar plan of modifications and improvements to the C&SF known at the Comprehensive Everglades Restoration Plan. Water Resource Development Act of 2000, P.L. 106-541(CERP).

CERP is part of a more massive restoration effort. RE Tab 636 at 37-52 (extensive discussion of many CWA and Congressionally supported restoration programs); see Def. Ex. 29. Under the CWA framework, the State has established water quality standards for all waters throughout the C&SF. Lake Okeechobee has

been designated impaired under §303(d), a TMDL established and basin management plans developed to achieve them. Pl. Exh. 20, Def. Exh. 28. Extensive Best Management Practices programs have been developed to address land uses throughout the contributing basins. Therefore, all waters within the C&SF Project, including those managed by the District's S-2, S-3 and S-4 pumping stations, are being restored and maintained through the full compliment of CWA approved programs. Those programs seek to comprehensively address pollutants in the C&SF system at their sources through the point and nonpoint programs described above.

Dissatisfied with the federal and state government's efforts, plaintiffs below convinced the court to abandon core principles of the CWA and judicially impose NPDES for the first time against a federally authorized public works project. The result is a seismic shift in federal regulatory focus from the upstream sources at which pollutants enter the navigable waters to downstream points where navigable waters are diverted and conveyed. That shift vitiates the cooperative federalism structure described above and is inconsistent with the legislative judgments made by Congress, as we argue below.

SUMMARY OF THE ARGUMENT

The decision to extend NPDES permitting to Public flow diversion facilities—that transfer waters without adding anything to them or subjecting them to any intervening use—is contrary to the purposes, structure and plain language of the Clean Water Act.

The CWA is a multifaceted approach to pollution. Congress created different programs for different problems. The CWA's structure is dominated by cooperative federalism principles, under which roles of the State and federal governments are carefully delineated. The aim of restoration was balanced with policies that protect and preserve the State's rights and responsibilities over natural resources management.

The extension of NPDES to water transfers vitiates the fundamental distinction between "point sources of pollutants" and "nonpoint sources of pollution" adopted by Congress to delineate the primary roles of the federal and state governments as detailed in Part II.B..2, of the Statement of Facts. It is through several non-point source programs—not NPDES—that Congress expected the State's to resolve any water quality problems arising from water transfers in concert with their water quantity planning programs and under EPA's oversight.

The NPDES focused upon the problem of industrial and municipal discharges. To that end, the CWA's carefully crafted definitions limit the NPDES

to discharges that result in the "addition" of pollutants "to the navigable waters." §502(6). Thus, NPDES is limited to conveyances that actually introduce pollutants into the navigable waters and does not reach discharges of navigable waters resulting from mere water transfers. The court ignored the plain meaning of the definitions qualifying terms.

The District's plain language reading of the CWA at bottom demonstrates the district court erred in finding the NPDES "unambiguously" reaches water transfers. The lower court's analysis was based upon an imbalanced "holistic" view and lacked any meaningful linguistic analysis. Any doubt about the District's plain reading is resolved by the Tenth Amendment's Clear Statement Rule, Rule of Lenity and principles of deference to agency views. Each of these well established rules of statutory interpretation confirm the District interpretation. Notably, the lower court's interpretation lies in direct, irreconcilable conflict with well established and reasoned precedent in the Sixth and D.C. Circuits in *Gorsuch* and *Consumers Power*.

The court also erred in finding integral components of the C&SF—the Everglades watershed—"meaningfully distinct" for NPDES purposes. The C&SF conducts intra-basin transfers that are not reached by the expansive test for federal NPDES jurisdiction accepted in *Catskill* or any other reasonable test. The lower court simply ignored the unitary nature of these waters, which must be

intermingled to fulfill the purposes for which Congress funded and constructed the C&SF.

ARGUMENT AND CITATIONS OF AUTHORITY

The district court erred when it held that "water transfers between distinct water bodies that result in the addition of a pollutant to the receiving navigable body are subject to the NPDES permitting program." That conclusion is contrary to the plain language, purposes and structure of the CWA.

A core distinction lost upon the lower court, is that the mere conveyance and "discharge of navigable waters,"—without more—is not the "discharge of pollutants" under the CWA. That is true regardless of what the discharged waters may contain and whether the water is discharged within the same water body or across the continental divide. Navigable water is discharged whenever it is transferred by the millions of flow diversion facilities used by the Nation's water managers to address quantity issues. Inevitably, pollutants move with them. But the navigable waters themselves are not a pollutant. *Cf.* §502(6) (pollutant means bi-products "discharged into waters"). Flow diversion facilities are not a source from which pollutants are introduced into navigable waters and, thus, do not fall within the ambit of §§402 & 502(12).

The lower court's application of NPDES to public flow diversion facilities will impair the States' water resource management. It improperly shifts

responsibility for the presence of pollutants in the navigable waters from a multitude of upstream sources—many of them exempt from NPDES—to the public water managers—which make no use but merely manage quantities of water. The CWA's cooperative federalism scheme is meant to treat the *importation* of pollutants *to navigable waters* by pollutant dischargers very differently from the *distribution* waters themselves (and the pollutants they inevitably contain) *among* their various parts by water managers. The former category is addressed by the NPDES, and the later should be addressed by nonpoint source controls. The lower court deviated from this careful scheme committing reversible error.

I. THE PLAIN LANGUAGE OF THE CWA CONFIRMS THE CONVEYANCE AND DISCHARGE OF NAVIGABLE WATERS FROM ONE WATER BODY TO ANOTHER IS NOT A "DISCHARGE OF POLLUTANTS" SUBJECT TO NPDES PERMITTING

The starting point interpreting the CWA is the language of the statute itself. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Recently, the Supreme Court reiterated the need for courts to use great care when construing the labyrinthine definitions of the CWA:

> It should also go without saying that uncritical use of interpretive rules is especially risky in making sense of a complicated statute like the Clean Water Act, where technical definitions are worked out with great effort in the legislative process. H.R. Rep. No. 92-911, p. 125 (1972) ("[I]t is extremely important to an understanding of [§ 402] to know the definition of the various terms used and a careful reading of

> the definitions . . . is recommended. Of particular significant [are] the words 'discharge of pollutants' ").

S.D. Warren Co. v. Maine Bd. of Enviro. Protection, 126 S.Ct. 1843, 1849-50 (2006). The specific language chosen by Congress cannot be ignored.

The goal of the NPDES, made prominent in the program's own title, is the "elimination" of pollutant discharges. §101(a)(1); §402. To that end, the CWA criminalizes the "discharge of any pollutants to the navigable waters" without an NPDES permit. §§301(a) & 402. The term "discharge of a pollutant" is carefully defined to mean "any addition of any pollutant to navigable waters from any point source." §502(12). This language does not, by its express terms, include the transfer and discharge of navigable water to which nothing is added. Instead, §502(12) makes clear that in order to qualify as the "discharge of a pollutant" a conveyance must cause an "addition" of a pollutant "to navigable waters" the lower court correctly recognized this case turns on the proper interpretation of these defining jurisdictional terms, but it erred in interpreting them. RE Tab 636 at 58.

A. "Discharges" Of Navigable Waters Are Not "Discharges of Pollutants" Into Them.

The CWA distinguishes between general "discharges" and "discharges of pollutants." Cf. e.g., §401 & 402. Under §401, applicants for Federal licenses and permits for activities that "discharge into the navigable waters" must obtain a State

Water Quality Certification. "The term 'discharge' when used without qualification includes, but is not limited to a discharge of a pollutant." §502(16). This distinction allows programs to be applied in "separate places and to separate ends." S.D. Warren v. Maine Bd. Enviro. Prot., 126 S.Ct. 1843, 1852 (2006). In S.D. Warren, the Supreme Court relied upon the Act's definitional text to conclude that § 401, which applies to all "discharges," was considerably broader than §402, the NPDES program, which Congress expressly limited to "discharges of a pollutant." See S.D. Warren, at 1847. The term "discharge" in CWA Section 401(a) may encompass the moving of navigable waters. S.D. Warren, at 1847; see also PUD No. 1, 511 U.S. at 711; Alabama Rivers Alliance v. FERC, 325 F.3d 290, 297 (D.C.Cir. 2003). A "discharge of pollutants," however, requires more then a mere discharge of navigable waters; it requires addition of a pollutant. This distinction allows programs to be applied in "separate places and to separate ends." S.D. Warren v. Maine Bd. Enviro. Prot., 126 S.Ct. 1843, 1852 (2006). Because all navigable waters contain pollutants, the lower court's interpretation vitiates the distinction between "discharges of navigable water" and "discharges of pollutants."

The Court in *S.D. Warren* recognized that when Congress intended to include "discharges of navigable waters" in the same program as "discharges of pollutants" it used the term "discharge" without qualification. But these "two

sections are not interchangeable, as they serve different purposes and use different language to reach them." *S.D. Warren*, 126 S. Ct. at 1850. Thus, flow diversion facilities that discharge navigable waters may be required to comply with §401, without being required to obtain a federal NPDES permit under §402. Such facilities discharge navigable waters, but add nothing to them within the plain meaning of §402.

B. Pollutants Are Added "To Navigable Waters" When They are Introduced From The Outside World And Not When They Are Merely Distributed Among Parts Of The Navigable Waters By Flow Diversion Facilities

The implementing agencies have long understood that pollutants are "added . . . to navigable waters" at the point they enter them---their source—and not through later transfers. *Gorsuch*, 693 F.2d 156. This distinction is clear from the natural and ordinary meaning of the prepositional phrase "to navigable waters" which Congress carefully chose to qualify the term "addition." §502(12); *S.D. Warren*, 126 S. Ct. at 1849-50. Just as the petitioner in *S.D. Warren* tried to gloss over the import of the phrase "of pollutants," limiting the term "discharge," the court below disregarded even further limitations imposed by the phrase "to navigable waters." The result is an unacceptably overbroad interpretation of federal NPDES jurisdiction.

1. The Adjectival Effect Of The Preposition "To" And Its Subjective "Navigable Waters" Limits The Verb "Addition."

The term "addition" is not defined in the CWA and, as a result, it must be construed "in accordance with its ordinary or natural meaning." *S.D. Warren* at 1847. An "addition" is generally understood to mean "the result of adding." Webster's Third New International Dictionary (2002). To "add" is to "join" or "unite" one thing to another. *Id.* Congress did not use the word "addition" in isolation; rather it deliberately qualified it by the prepositional phrase "to navigable waters."

When considering the ordinary and natural meaning of the phrase "addition of A to B" it is commonly understood that "A" will be joined with "B." One contemplates that "A" will be moved from outside of "B" into "B." The phrase "addition of A to B" does not suggest the mere movement of "A" already in "B" or among parts of "B." Thus, for there to be an "addition to B," "A" must begin outside of "B" and then be joined to "B."

As another example, consider the phrase "addition of wine to the United States." There is no "addition" of wine to the United States when wine already in the United States is moved from one State to another. Moving wine from *California* to Florida would not be considered an "addition" to the "United States." To constitute an "addition . . . to the United States," the wine must enter from

outside of the United States. This straightforward principle is unaffected by the reality that the United States is not monolithic, but rather comprises fifty meaningfully distinct States.

The ordinary and natural meaning of the phrase "addition of A to B" can alternatively be explained in more grammatical terms. The adjectival effect of incorporating the prepositional phrase "to B" designates the subjective "B," to be the relevant receptacle. As a result, it contemplates some "A" being added from outside the receptacle as a whole and not merely moved within the receptacle. To capture distributions of "A" within "B," some subset of "B" must be designated the relevant receptacle.

Thus, what is denominated the receptacle defines the universe of "movements" that constitute an "addition" to that receptacle. Invoking the "United States" analogy, by designating "the United States" to be the relevant receptacle (as opposed to any subdivision) the inescapable intention is to implicate only those activities that move wine from outside the United States into the United States—importation—and to exclude those activities which merely move it from one state to another—subsequent distribution.

2. The Prepositional Phrase "To Navigable Waters" Excludes Water Transfers From NPDES.

The CWA uses the prepositional phrase "to navigable waters" to qualify the noun "addition." In so doing, it plainly designated the "navigable waters" (as a

whole) to be the relevant receptacle for purposes of delineating federal NPDES jurisdiction. As an ordinary and natural result of that election, the phrase "addition of any pollutant to navigable waters" covers only those instances in which a pollutant is introduced from outside the navigable waters. *Gorsuch*, 693 F.2d 156; *Consumers Power*, 862 F.2d at 588. By contrast, transfers of navigable waters (along with anything they contain) between parts of the navigable waters are not covered by NPDES, but were instead left to non-NPDES authorities. *Id.*

Congress reiterated its intention to designate "navigable waters" as a whole to be the relevant receptacle when it defined that term in the aggregate: "The term 'navigable waters' means the waters of the United States, including the territorial seas." CWA §502(7), 33 U.S.C. §1362(7). In addition Congress omitted the modifier "any" from before the terms "navigable waters" in the definition for "discharge of a pollutant." That was used to qualify every other noun in the definition and, if used, would have extended NPDES to prohibit discharges of navigable water between distinct water bodies. CWA §502(12), 33 U.S.C. §1362(12). By not using the term "any, Congress made clear that it was referring to the "navigable waters" as a whole. The federal government explained as amicus in *Miccosukee*:

> [The CWA's] use of the modifier "any" with reference to "addition," "pollutant," and "point source" expresses Congress's understanding that the various types of additions, pollutants, and point sources are all within the Clean Water Act's regulatory reach. The *absence* of the

> modifier "any" in conjunction with "navigable waters," by contrast, signifies Congress's further understanding that "the waters of the United States" should be viewed as a whole for purposes of NPDES permitting requirements.

Miccosukee, Federal Government as Amicus Curiae, 2003 WL 22137034 at 194.

Had Congress wanted direct federal jurisdiction to reach the addition of any pollutants to any "distinct water body" it easily could have manifested that intent by including an appropriate modifier or by defining the receiving waters to be "any part" of the navigable waters. As the District of Columbia Circuit noted in *Gorsuch*:

> [I]t does not appear that Congress wanted to apply the NPDES system 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 * * * the NPDES system was limited to 'addition' of 'pollutants' 'from' a point source.

693 F.2d at 176. In fact, as can be seen elsewhere in the CWA, when Congress intended to address individual navigable waters or include navigable water discharges it proved quite capable. *See* §401("discharges" broader than "discharge of a pollutant"); see also §302(a), 33 U.S.C. §1312(a), ("a specific portion of the navigable waters").

The lower court should not have assumed that these clear linguistic choices were unintentional. After all, when "Congress fine-tunes its statutory definitions, it tends to do so with a purpose in mind." *S.D. Warren*, at 1852, citing *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (if "Congress includes particular

language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks omitted)). Under ordinary rules of statutory construction, use of two different terms is presumed to be intentional. *Gorsuch*, 693 F.2d. at 172. Congress chose the navigable waters, as a whole, to delineate federal NPDES jurisdiction. As our Statement of the Facts illustrates, that important legislative judgment represents a balancing of significant policies that cannot be ignored.

3. The Lower Court Erroneous Textual Analysis Improperly Focuses Upon Subsets Of The Navigable Waters

Without textual support, the court declared, "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. In that single sentence, the relevant receptacle—the place to which an "addition" is actually required—was changed from "the waters of the United States" (§502(7)) to "receiving waters" or "water body." That construction adds a judicial gloss that simply does not exist in the relevant text of the CWA. §§301, 402 & 502(12), 33 U.S.C. §§1311, 1342 & 1362(12).

Changing focus from the entirety of navigable waters to its individual components fundamentally alters the scope of NPDES. Instead of requiring an

addition to the "navigable waters," the lower court expanded the NPDES to reach water transfers. This was the same error made when a prior panel of this Court, without benefit of federal government's views that were later presented to the Supreme Court, declared that the "relevant waters" are the "receiving waters." *Miccosukee v. South Florida Water Management District*, 280 F.3d 1364, 1368 (11th Cir. 2002) *vacated by*, 541 U.S. 95. In the only other federal case ever to impose the NPDES upon public water transfers, the Second Circuit modified the CWA's plain meaning by expanding the term "outside world" far beyond its use in *Gorsuch*, to include "any place outside the particular water body to which pollutants are introduced." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York* , 451 F.3d 77, 81 (2d Cir. 2006).

These improper constructions negate the limiting effect of the qualifying preposition "to navigable waters." No language in the Act supports such parsing of the aggregate whole term "navigable waters" for §402 purposes. Congress did not create the NPDES to guard "receiving waters" or "individual waters" from water transfers, but rather to target activities that add pollutants to them. The absence of language distinguishing among "navigable waters" for NPDES purposes was hardly a lapse of syntactical precision; rather, it manifests a clear and unambiguous intent to focus NPDES upon "discharges of a pollutant" without implicating public "discharges of navigable waters." That intent is consistent with

the CWA's overall structure and its multiple policies detailed above in the Statement of Facts. The lower court should have honored the distinction between discharge of pollutants and the discharge of navigable waters.

II. WELL ESTABLISHED INTERPRETIVE RULES MANDATE THE DISTRICT'S CONSTRUCTION

At a minimum, the District's "unitary-waters" reading of §402 is a reasonable alternative, and thus, it demonstrates that the NPDES does not "unambiguously" apply to water transfers. When faced with competing interpretations, a court must consider established rules of construction such as the Clear Statement Rule and principles of deference to agency views. If the Court does not accept the District's plain reading of §402, these two doctrines should lead it to the same result.

A. The Lower Court Improperly Altered The Federal And State Balance Without The Required Clear Statement Of Congress

To enforce protections of the Tenth Amendment, the Supreme Court has enunciated a Clear Statement Rule[10] providing that "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Congress must make a

[10] Because the CWA imposes severe criminal penalties (§1319(c), the Rule of Lenity also requires the narrower reading if the Court finds two choices. *United States v.* Granderson, 511 U.S. 39, 54 (1994).

clear statement before courts will find that it has interfered with traditional state powers because "States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461. This fundamental interpretive rule dictates that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States* v. *Bass*, 404 U.S. 336, 349 (1971); see also *Rice* v. *Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947) (a federal statute does not supersede "the historic police powers of the States … unless that was clear and manifest purpose of Congress").

In this case, the lower court expressly embraced these Tenth Amendment principles in a pretrial ruling, conceding that it must take a "narrower" approach to the CWA's scope if the District is determined to be engaging in a traditional State function. DE 527 at 16-18. In the end, however, it misapplied dicta from *Miccosukee*,[11] to declare that the District could prevail on "federalism" grounds only if it proved: 1) its water transfers are "allocative in nature"; and 2) that applying NPDES would prohibitively raise "costs of water distribution." Such a myopic approach turns the CWA's cooperative federalism scheme and the Tenth Amendment on their heads.

[11] The Supreme Court noted that construing NPDES to cover water transfers could raise costs of water distribution prohibitively, such that it would violate Congress's policy in §101(g) of not interfering with water allocation.

1. Section 101(g) is Not An "Exemption"

The lower court is wrong that §101(g) is an "exemption." That Section is more simply an expression of the national policy not to interfere with the States' authority and responsibility to manage quantities of their waters—thereby minimizing federal-state friction. Indeed, §101(g) provides one of many indicia of Congressional intent not to impose NPDES upon water transfers, which supports the District's interpretation. In addition, §101(g) confirms that water management is a critical state function deserving of protection under the CWA's cooperative federalism and the Clear Statement Rule. See Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 174 (2001) ("SWANCC"). Regardless, the lower court's focus on §101(g) for its federalism test begs these interpretive principles and the real question at hand: Whether Congress actually manifested a clear intention to extend direct federal NPDES controls over public water transfers in the first place.

2. The Clean Water Act And The Tenth Amendment Protect More Than Those Activities The Lower Court Understood To Be "Allocative"

The lower court's federalism analysis was also flawed because it focused upon only consumptive use allocations. It ignored many other uses for which water is allocated and other non-allocative responsibilities of water management, which much more broadly includes comprehensive planning for land and water

resources. §101(b)&(g). By stressing in §101(g) the importance of one particular area of significant State concern—allocation authorities—Congress did not intend to exclude from preservation other State water management functions.

Critically, the Clear Statement Rule applies to *any* fundamental State function, not just resource management. The States' allocation rights are but a microcosm of the traditional rights reserved to them under the Tenth Amendment. While express policy statements, such as §101(g), provide interpretive guidance, the Tenth Amendment does not stop at protecting only those rights articulated in such pronouncements. Affirmative manifestations of intent to occupy an area of traditional State responsibility define federal jurisdiction, not policy expressions confirming Congressional intent for the federal government to stay out. Notably, the Supreme Court in *Solid Waste* applied the Clear Statement Rule to the CWA in the context of permitting a solid waste dump. *SWANCC*, 531 U.S. 159. The court below plainly erred in limiting its "federalism analysis" to the narrow context of §101(g).

The district court also erred by focusing narrowly upon only one aspect of "the authority of each State to allocate quantities of water" in §101(g)—distributions for *consumptive* uses—to the exclusion of every other interest for which waters are allocated by the States—non-consumptive uses such as land use. The CWA is plainly intended to protect general water and land management

authorities broadly. While Sen. Wallop, §101(g)'s lead sponsor, championed western prior appropriation interests, neither he nor the CWA said anything of excluding the multitude of non-consumptive land and water uses for which quantities are regularly allocated by "each state." Properly read, §101(g) broadly preserves allocation authorities, including the use of S-2, S-3 and S-3 for flood control.

3. The Clear Statement Rule Guides This Court To The Unitary Waters Approach

Obviously, flow diversions "fall within a State's legitimate legislative business, and the Clean Water Act provides for a system that respects the States concerns." *S.D. Warren*, 126 S.Ct. at 1853 citing §101(b), 33 U.S.C. 1251(b). States' interests in water management are at their peak where the control of pollution in urban and agricultural basins—as in this case—implicates both water and land use planning. §101(b). Comprehensive water management is a State priority. §373.016, Fla. Stat. Precisely because operation of the S-2, S-3 & S-4 is an exercise of the State's traditional and primary power over both land and water resources the court below found that the District is entitled to Eleventh Amendment protections. RE Tab 636 at 89. These functions go to the heart of the rights protected by the CWA's cooperative federalism and the Clear Statement Rule.

"It is incumbent upon the federal courts to be certain of Congress' intent before finding that Federal law overrides" the traditional federal-state balance. *Gregory*, 501 U.S. at 460. The courts have a "particular duty to ensure that the federal-state balance is not destroyed" with respect to "traditional concern[s] of the States" such as water management and allocation. See *United States* v. *Lopez*, 514 U.S. 549, 580, 581 (1995) (Kennedy, J., concurring). That obligation is heightened in this case, where Congress made explicit its policy to preserve the State's primary responsibilities over water and land resources. *Solid Waste*, 531 U.S. at 173. And in *Solid Waste*, the Supreme Court applied the Clear Statement Rule to the CWA, noting that Congress choose to preserve States' rights over land and water resource under §101(b)&(g), rather than "expressing a desire to readjust the federal-state balance" by extending federal jurisdiction. Id at 174.

Far from making a "clear statement" explicitly stripping the States of their traditional powers, Congress recognized that the state and federal governments have distinct roles. *PUD No. 1*, 511 U.S. at 704. That recognition makes clear that Congress "did not want to interfere any more than necessary with state water management." *Gorsuch*, 693 F.2d. at 178. The court below erred by extending the NPDES without a clear statement from Congress.

4. The Clear Statement Rule Requires No Showing Of Burdens, But Respects The Sovereignty Of Each State

The lower court required the District to demonstrate that the NPDES would "prohibitively" raise the State's "costs of water distribution." That requirement has no place as part of the Clear Statement Rule enunciated by the Supreme Court. Fundamentally, the Tenth Amendment protects States from those that would use federal jurisdiction to affect their rights and responsibilities in ways unintended by Congress. It presents questions of clarity and intent, not burdens on the States. The Rule protects the relationships between sovereigns in our federalist system of government. It is supported by principles of comity and respect for State sovereignty. States have no burden under the Clear Statement Rule to demonstrate that any repercussions, good or bad, will result from shifting federal jurisdiction over traditionally local functions.

Congress specifically recognized that leaving water-quality impacts from water management systems to the States "would reduce federal/state friction." *Gorsuch*, at 179, citing H.R. Rep. No. 92-911 at 96 (1972). That friction is at the heart of the Tenth Amendment. Approaching the water quality problems involved in the management of navigable waters through comprehensive, non-NPDES programs avoids such friction and furthers the CWA's cumulative policies. EPA Proposed Water Transfers Rule, 71 Fed. Reg. 32887 (June 7, 2006).

There can be no denying that the burdens of federal Clean Water Act permitting are not light. *Rapanos v. U.S.*, 126 S.Ct. 2208, 2214 (2006). (The

burden of federal regulation [under §404] is not trivial"); *Solid Waste*, 531 U.S. at 161 (2001) ("Permitting the United States 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"). For example, the remedies that the plaintiffs sought below, include a slew of interim operational restrictions pending the issuance of a permit (RE Tab 692 at 5) and joinder of the State's permitting agency so that the federal court can marshal that State process. Id at 7. The lower court concedes that these remedies will result in a "somewhat lengthy process . . . further evidentiary hearings, which would require . . . additional discovery . . . . to resolve highly technical arguments." *Id.* at 6. Indeed, the court conceded that "because EPA does not currently issue permits for water transfers[.] . . . it is unclear what a NPDES permit would ultimately look like (whether it would require treatment of the water, require backpumping to cease, contain a backpumping schedule, etc . . .)." RE Tab 636 at 52-3. Critically, the court observed NPDES will "provide another layer of review, a Federal review" which it speculated "may do nothing more than provide a more effective mechanism for ensuring [the District's] compliance with its current obligations." *Id.* at 29, 30.

Such coercion of the State—the shifting of decision making away from the local level to the federal agencies and courts—along with the practical problems of

transferring responsibility for pollutant treatment from upstream sources to public water managers, offends core Tenth Amendment values and undercuts the CWA's cooperative federalism scheme.

* * *

The lower court's belief that federal jurisdiction should broadly apply absent a showing that the District will be prohibited from engaging in a certain type of "allocation" activity is fundamentally flawed. Proper federalism analysis requires, at the very least, the demonstration of a clear statement extending the NPDES to public water transfers. The terms in §§101(b)&(g) reveal precisely the opposite intent. The District should not have been required to demonstrate anything more than the absence a clear statement. Instead, the court below erroneously expanded the NPDES beyond its proper scope.

B. The Court Improperly Rejected *Any D*eference to EPA

The District fully adopts the United States argument for deferring to the considered views of EPA. In light of this Court's prior decision in the related *Miccosukee* matter, though, we separately address several points. See *Miccosukee Tribe v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002), *vacated by*, 541 U.S. 95 (2004). The *Miccosukee* case involve the identical interpretive question presented in this appeal—whether the CWA imposes direct federal jurisdiction over public flow diversion facilities—being applied against

another of the District's pumping stations, the S-9. In *Miccosukee*, this Court rejected any deference to EPA or any reliance on the principles underpinning *Gorsuch* and *Consumer's Power* because it "kn[e]w of no instance in which the EPA has extended its policy on dams and dam-induced water-quality changes to facilities like the S-9 pump station to which to give *any* deference." 280 F.3d at 1368 n.4. Those omissions have been rectified through EPA's Proposed Rule and intervention into this case to clarify that under its position accepted in *Gorsuch*, no type of flow diversion structures is properly subjected to NPDES. 71 Fed. Reg. 32887.

In addition, *Gorsuch* cannot be distinguished from the holding below because the D.C. Circuit ultimately deferred to EPA. After considerable scrutiny, the D.C. Circuit found EPA's understanding that NPDES does not reach water transfers to be "reasonable." But if NPDES "unambiguously" reaches water transfers, as the lower court believed, then the EPA's position was entitled to no deference at all under *Chevron* standards. The lower court's conclusion that the Act "unambiguously" extends NPDES to water transfers squarely conflicts with *Gorsuch*.

III. THE DISTRICT COURT'S RATIONALE FOR APPLYING NPDES TO WATER TRANSFERS IS UNAVAILING

While the District presents a careful linguistic analysis in the context of the entire purposes and structure of CWA, the court relied upon a "holistic" approach.

It also assumed that approach could be reconciled with prior cases. Its approach in fact evades key language to reach a result that cannot be reconciled with the longstanding position of the EPA as accepted in *Gorsuch*.

A. The Court's "Holistic" Analysis Is Skewed By Heavy Reliance On Broad Policy And An Inflated View Of The NPDES Role

The Court defended its reading based on two propositions: 1) that a broad reading is supported by the CWA's overreaching goal, and 2) that Congress intended the NPDES to serve as the CWA's "primary tool whenever possible." RE Tab 636 at 75. Both assertions are wrong and neither explains why the district court neglected to conduct any meaningful linguistic analysis.

1. Broad Policies Do Not Define The Scope Of Specific Programs

The court contended that its reading is "consistent" with the CWA's overreaching purpose "of restoring and maintaining the chemical, physical and biological integrity of the nation's waters." RE Tab 636 at 74 citing 33 U.S.C. §1251(a). The narrow question posed by this case, however, cannot be resolved merely by simple reference to this general goal. *United States v. Plaza Health Lab., Inc.*, 3 F.3d 643, 647 (2d Cir. 1993) (citing *Gorsuch*, 693 F.2d 156, 178 (D.C. Cir. 1982) ("it is one thing for Congress to announce a grand goal, and quite another for it to mandate full implementation of that goal"). "Caution is always advisable in relying upon a general declaration of purpose to alter the apparent meaning of a

specific provision." *Plaza Health,* 3 F.3d at 647. In fact, Congress avowed purpose to minimize pollution was not unequivocal, as the CWA's specific provisions are the result of careful balancing of countervailing policies. *Id.* The CWA's overall purpose does not tell us anything about how it is to be achieved or the role of each individual program or provision.

In addition to that general caution, there are more specific indications that Congress did not want to interfere any more than necessary with state water management. *See* §101(b)&(g). The CWA's grand goal provides no guidance how to resolve this balance. To say the least, §101(a) does not require courts to construe the term "discharge of pollutants" expansively in a way that is contrary to the CWA's plain language and competing federalism goals.

2. The NPDES, However Important, Is Not Applied "Wherever Possible" But Has A Specific Role

The lower court's contention it should impose NPDES jurisdiction broadly because Congress "apparently intended" it to apply "whenever possible" is off the mark. The importance of a regulatory tool and the perceived ineffectiveness of its alternatives help the interpretive analysis no more than the general policy of restoration. While the court below relied upon an acknowledgement in *Gorsuch* that there is "some support" for the view that "Congress would have put all pollution sources under federal regulation had it been feasible" because "prior

State programs" had proven inadequate (*Gorsuch* at 175-76), the D.C. Circuit, reviewing the entire statute, actually concluded:

> "It does not appear that Congress wanted to apply the NPDES system 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.

Id. The D.C. Circuit also found that the legislative history "bolsters" its view that "[t]he division of pollution control . . . was not just a device for separating out pollution sources amenable to NPDES . . . . Rather, Congress viewed state pollution control programs under §208 as in part an "experiment" in the effectiveness of state regulation." *Id.* The Gorsuch Court found telling that Congress explained:

> Section 208 ... may not be adequate. It may be that the States will be reluctant to develop [adequate] control measures ... and it may be that some time in the future a Federal presence can be justified and afforded. But for the moment, it is 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. at 176. And there are specific examples of Congress choosing not to apply the NPDES program universally; for policy reasons it chose to exempt irrigation return flows (a major source of pollutants in this case) from NPDES program even though they were amenable to point source control. *Id.*

Rather than trying to extend NPDES "wherever possible," Congress adopted a complex statutory and regulatory scheme of cooperative federalism that implicates both federal and state administrative responsibilities and established distinct roles for the federal and state governments to achieve its goals. *PUD No. 1* 511 U.S. 700, 704 (1994). Congress made a clear and precise distinction between point and nonpoint source programs. It fine-tuned its program "in order to use them in separate places and to separate ends," leaving many sources of pollution to non-NPDES programs. *S.D. Warren*, 126 S. Ct. at 1352. The NPDES was not designed to address all "pollution" caused by all discharges, but was limited to "discharges of pollution." *Id.* In the end, Congress explicitly chose not to federalize all water pollution control. *Gorsuch*, 693 F.2d. at 178. Congress simply did not share the lower court's inflated view about how NPDES fit within the overall statutory scheme.

B. The Court Misapprehended Prior Relevant Case Law

The lower court believed that Supreme Court limited the issues in this case and that its "distinct waters" test could be reconciled with *Gorsuch* and *Consumers Power*. Neither is the case.

1. Miccosukee Is Wholly Consistent With *Gorsuch's* "Unitary Waters" View

The lower court misunderstood the Supreme Court in *Miccosukee* as rejecting the key principle articulated in *Gorsuch* that "a source must introduce a pollutant into the waters of the United States to be considered a 'point source." RE Tab 636 at 70. The Supreme Court's holding was far more narrow: that the "definition of 'discharge of a pollutants' . . . includes within its reach point sources that do not themselves *generate* pollutants." *Miccosukee,* at 105 (emphasis added). The Court stated 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—i.e. "covey" it to navigable waters, fully consistent with the District's analysis and with the longstanding views of the EPA that were accepted in *Gorsuch*. After all, the concept of "conveying" something "to" something else presupposes its introduction from the outside.

The example the Court gave to support its finding is telling. The Court pointed to waste water plants (POTW"s) in explaining that a conveyance need not *generate* pollutants but only *convey* them into the waters. POTW's, however, require NPDES permitting because they introduce pollutants from outside the navigable waters, even though the pollutants are "generated" elsewhere. Thus,

Miccouskee's legal ruling is consistent with *Gorsuch* and the District's reliance upon that case.

The District's briefing in *Miccosukee* further illustrates the point. Its opening brief, described the requirement of an "initial or original introduction" as a need for the pollutant to "originate from the point source." In its reply brief the District clarified that the aim was to describe the "point" from which the pollutants originated in the waters (i.e. point of their introduction) not the point which they originated on earth (i.e. point of their generation). Regardless, the Supreme Court narrowly rejected only the later—that a point source must itself generate the pollutant. The "introduction" or "addition' foundation of the "unitary waters" approach was expressly preserved by the Court.

The lower court also misread *Miccosukee* as having "held that the water transfer activities only required NPDES permits if they transferred water (and pollutants) from one body of water to another *meaningfully distinct* body of water." 541 U.S. at 109. The Court's statement was not so definitive or broad, but merely was a recognition there was no dispute in that case that a transfer within a body of water could not be an addition. *Id*.

Nor is it a fair characterization that the Court in *Miccosukee* "cast aspersions" upon the "unitary waters" view. RE Tab 636 at 68. The Court made good observations, albeit dicta, about issues it no doubt expected the lower court to

critically evaluate, but it did not express disfavor with this approach. As the lower court even noted, "[i]f a rule was declared only in dictum, the question remains undecided, and [the lower courts] have a constitutional duty to make [their] own determination of the answer." *Id.* at n. 54. Here the Supreme Court declared no rules. As explained in the Brief of United States Sugar Corporation, nothing in the *Miccosukee* opinion (or the Clean Water Act) is inconsistent with the District's interpretive analysis and its adherence to "unitary waters" approach.

2. The Decision Below Squarely Conflicts With *Gorsuch* And *Consumers Powers*

The court below followed *Catskill* in distinguishing *Gorsuch* and *Consumers Power* on the basis that they involved the discharge of waters into the "same water body" and not between "distinct water bodies." RE Tab 636 at 69; *Catskill* I, 273 F.3d 481, 491 (2nd Cir. 2001). Both courts assumed that *Gorsuch* involved "a dam" that merely released water into the same river whence it came.

The subject of *Gorsuch* was not "a dam." It was a challenge to EPA's nationwide practice not to regulate dams under NPDES. 693 F.2d at 161. EPA defended in *Gorsuch* its longstanding position that water quality impacts caused by flow diversion facilities, including dams, were subject to nonpoint source programs, not NPDES—particularly §208.; *see generally*, Proposed Rule 71 Fed. Reg. at 32888. EPA's policy extended over 2 million dams. 693 F.2d at 182. That includes many diversion projects that discharge waters not only within their

original basin, but across both state and basin boundaries, even across the continental divide. 71 Fed. Reg. at 32888. These "dam" systems are often responsible for "the continuous redirection of water" from outside basins. *Id.* In fact, EPA's policy upheld in *Gorsuch* includes the C&SF system at issue here, of which the subject S-2, S-3 and S-4 are critical components. *Id.* at 32889. Indeed, plaintiffs below stipulated the Herbert Hoover Dike (through which the S-2, S-3 and S-4 pump) is the dam for the Lake Okeechobee reservoir. The court's "assumption of sameness" is unsupportable.

The court in *Catskill* attributed its "assumption of sameness" to the *Gorsuch* and *Consumers Power* courts. *Catskill* I, 273 F.3d. at 492. But, *Gorsuch* expressly understood "dams" discharge from "one body of navigable water (the reservoir) into another (the downstream river)" 693 F.2d at 175. Under the factors used by the court below to distinguish the EAA's waters from the Lake, reservoirs and downsteam rivers become distinct. Nationwide, "downstream" discharges are often into different water bodies and basins. Tellingly, *Consumers Power* did not involve a "dam." That court clarified the requirement of an "addition . . . to navigable waters" applies to "any given set of circumstance." 862 F.2d at 583.

Neither *Gorsuch* nor *Consumers Power* found the relationship between transferred and receiving waters to be legally relevant. Under those cases, it is whether the conveyance is from outside the navigable waters or not that determines

the applicability of NPDES. That principle extends to any type of flow diversion facilities that discharge navigable waters without adding wastes or subjecting them to an intervening use, including the subject pumps here. Proposed Rule, at 32887. It applies whether the diversion is a short distance or across the continental divide. Distinctions between the waters moved and the receiving waters are legally irrelevant. The decision below is diametrically opposed to these principles.

IV. WATERS OF THE C&SF PROJECT ARE INTEGRALLY RELATED NOT MEANINGFULLY DISTINCT

The court in *Catskill* viewed *Gorsuch* as an "intra-basin transfer," i.e. the movement of water within a same water body. *Catskill*, 451 F.3d 77, 81, 83 (2d Cir. 2006). In contrast, *Catskill* involved "inter-basin" transfers, i.e. the movement of water between "utterly unrelated in any relevant sense." *Id.* The court found inter-basin and intra-basin transfers distinguishable and that inter-basin transfers resulted in the "addition" of pollutants to navigable waters. Under *Catskill*, the NPDES does not apply to "intra-basin" transfers, what it believed was occurring in the "dam" cases.

In this case, the waters are but two parts of the same basin, the South Florida ecosystem. WRDA 2000, P.L. 106-541 § 601(a)(5) & (h)(1). Water throughout the region naturally flows together from the Kissimmee Lakes through Lake Okeechobee to the Everglades. RE Tab 636 at 13. In their natural state, wetlands

of the EAA are navigable waters *because* of their "significant nexus" to the Lake. *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007).

The C&SF system is designed to maintain the close relationship between its integrated parts. RE Tab 636 at 11-28. Water is moved to the Lake for flood control and released later for water supply. *Id.* at 23-28. The cycling of these waters is critical not only for urban and agricultural areas, but for health of the entire Everglades system. Its undisputed unitary nature is well established by the consistent understanding of the scientific community and the consistent treatment of the waters as part of a single system by State and Federal regulators and legislatures. See Def. Ex. 29 & 205. The C&SF and District's boundaries were drawn around that hydrologic unit to manage the ecosystem as a comprehensive whole. Fla. Stat. §373.069(2)(e) WRDA 2000, P.L. 106-541 §601(a)(5) & (h)(1) (South Florida Ecosystem broadly defined to include the entire District jurisdiction).

The Florida and Federal legislatures recognized the integrated nature of the system in directing development of a Comprehensive Everglades Restoration Plan, which treats all sub-basins of the C&SF Project as critical to the South Florida Ecosystem. WRDA 1996 § 528(b)(1)(A)(i) (comprehensive plan for restoration and water supply). The Florida legislature similarly recognizes the need for comprehensive restoration of the "Everglades ecosystem." Fla. Stat. §373.4592(d).

Transfers within this system by S-2, S-3 and S-4 are intra-basin transfers that do not require permitting under the *Catskill* test. Trial Tr. DE 737 at 61:14.

The Plaintiffs seeks to avoid this reality by identifying every possible difference between the EAA and the Lake, political, land use, regulatory, operational, ecological, physical, biological and otherwise. The Second Circuit explained those factors are irrelevant to its "meaningfully distinct test"—openly acknowledging "the presence of pollutants in… intra-basin transfers" and "the nature of water quality changes wrought" by flow diversions. 451 F.3d at 83.

Certainly waters in *Gorsuch* and *Consumers Power* are no less "distinguishable" on "chemical, physical and biological" grounds then the waters involved below. Every Lake and tributary can easily be distinguished such ways. The rule from all of these cases, as acknowledged by the Supreme Court, is that an "addition . . . to navigable waters" cannot occur if water, separated by man-made structures, is merely moved among different parts of a natural basin.

Therefore, the waters managed by the C&SF project should not be treated "distinct' and factionalized for water quality control purposes, but remain managed as a whole by comprehensive water quality and quantity planning.

CONCLUSION

The Judgment of liability under the Clean Water Act should be reversed and judgment entered for defendants.

CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

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(s) James E. Nutt

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

Dated: December 14th, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished via U.S. Mail this 14th day of December, 2007, to all parties on the attached service list.

Respectfully submitted

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