No. 10-196

In The Supreme Court of the United States

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

Petitioners,

vs.

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

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICUS CURIAE SIERRA CLUB IN SUPPORT OF PETITIONERS FRIENDS OF THE EVERGLADES, ET AL.

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STATEMENT OF INTEREST[1]

The Sierra Club is a non-profit environmental organization whose mission is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives. The Sierra Club has a long history of involvement in, and expertise concerning, the protection of our Nation's waters and the implementation of the Clean Water Act. Through testimony in Congress, comments and other advocacy in the Executive Branch, and litigation in the courts, it has pursued these interests repeatedly during the three decades since enactment of the seminal 1972 amendments that gave the Act its current structure. The Sierra Club has over 1 million members, many of whom use and rely on a wide array of waters throughout our Nation for recreation, scientific study,

[1] Pursuant to Supreme Court rule 37.6, Amicus affirms that no counsel for any party authored this brief either in whole or in part. No person other than Amicus and its counsel made any monetary contributions to its preparation for submission. Pursuant to Supreme Court rule 37.2(a) all parties have received notice of the intent to file this brief at least 10-days prior to the due date. Both the Petitioners and Respondents consented to this filing; their letters of consent are being submitted with the brief.

and protection of their health, safety, property, drinking water, and food supply.

SUMMARY OF ARGUMENT

The decision on review holds that the Clean Water Act does not protect even the most pristine water bodies from being degraded by transfer of highly polluted water from another navigable water body. It is hard to imagine an "interpretation" more at odds with the purpose of the Clean Water Act. The potential adverse effects of the EPA's rule and the Eleventh Circuit's decision below are substantial. There will be no Clean Water Act protection for transfers by which a myriad of pollutants might be dumped into a clean and healthy water body. For example, salt water might be pumped into fresh water, sediment or pollutant laden waters could be dumped into drinking water reservoirs or farm irrigation waters, and invasive and destructive species might be transferred into waters not yet infested.

Requiring permits for transfers of water from one navigable water body to another will not prevent needed transfers from being made but will serve the ends of the Clean Water Act by reducing the adverse impacts that would otherwise go unmitigated. For most transfers there will be little in the way of additional expense or delay. Where transfers are unlikely to cause any significant harm to the receiving water body, permits will be processed quickly and with little

expense. More harmful proposed transfers will receive needed scrutiny to protect the receiving waters, and the people, fish and wildlife which depend on the quality of the recipient water body.

The EPA's unitary waters rule is not entitled to *Chevron* deference. An agency's rule is only entitled to deference where it is not contrary to clear Congressional intent. The EPA's unitary waters rule flies in the face of the overriding purpose of the Clean Water Act to restore and maintain the waters of the United States. The rule leaves navigable water bodies wholly unprotected against potentially devastating transfers of pollutant laden water from another navigable water.

Chevron deference has already been denied by this Court to the Corps of Engineers on a virtually identical argument in *Rapanos v. U.S.,* 547 U.S. 715 (2006). This Court made it clear there that Congress's use of the plural "waters" in the Clean Water Act precluded any argument that "navigable waters" was a singular entity.

The EPA unitary waters rule and the Eleventh Circuit's deference accorded to it also violates separation of powers principles. The rule was not issued until after the trial court decision was rendered and was designed to change the outcome of the case. What's more, the EPA's rule was issued following several rulings by other federal courts which had rejected the unitary waters interpretation of the Clean Water Act. An administrative agency may not

alter the decision of the courts through a subsequent interpretation of the law. Doing so is an invasion of the courts' exercise of judicial power. If the EPA feels that the decision of these courts was incorrect or that the result was undesirable, it is free to petition Congress to change the law. It may not, however, overrule an Article III court.

ARGUMENT

I. Introduction

Review is sought of a decision which finds that the Clean Water Act ("CWA") does not protect even the most pristine of our Nation's water bodies from being despoiled by introduction of highly polluted water from another navigable water body. It is hard to imagine a decision more at odds with the purposes of the Clean Water Act.

The objective of the Clean Water Act was "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004). The method chosen by the legislature to protect our waters was to prohibit discharges of pollutants without a permit which could place limits on the type and quantity of pollutants that could be released into the Nation's waters. *Id.* The decision below finds that the CWA places no limits whatsoever on artificial transfer of highly polluted water from one distinct water body

to a separate and pristine water body. This ruling significantly undercuts the goals of the CWA.

The potential adverse effects of this ruling are huge and varied. For example, there would be no limitation on transfer of salt water into fresh water, sediment laden water could be dumped into drinking water reservoirs, chemically polluted waters could be dumped into farm irrigation waters and invasive species could be transferred into waters not yet infested. These scenarios are not far-fetched. As discussed briefly below, they are examples of issues that have already arisen.

Not surprisingly, as demonstrated by the District Court findings in the instant case, pollutants contained in such transfers can have direct human health impacts when the receiving water is also the local drinking water source. *Friends of the Everglades, Inc. v. South Florida Water Management District,* 2006 WL 3635465 at 18. In fact, as shown in the instant case, following backpumping events, levels of the carcinogen trihalomethane increased substantially in the drinking water of the towns using Lake Okeechobee for their drinking water supply – sometimes to levels 12 times higher than permitted by water quality standards. [Trial Tr. January 12, 2006, 135:19-136-13].

Moreover, the nature of transfers between navigable waters raises concerns that go beyond what is traditionally thought of as pollution. This is because such wholesale transfers of untreated waters raise

the specter of introduction of invasive species into the receiving water body. For example, the United States Geological Survey ("USGS") concluded that: "Interbasin transfers of untreated waters implemented via an open conveyance (e.g., canals) have a very high likelihood of establishing pathways to potentially promote biota transfers and subsequent biological invasions." *Risk and Consequence Analysis Focused on Biota Transfers Potentially Associated with Surface Water Diversions between the Missouri River and Red River Basins*, USGS, July 2005, at section 6.1, http://www.usbr.gov/gp/dkoa/biota_transfer/. While invasive species are not traditionally thought of as "pollutants" they are nonetheless regulated by the CWA. *Northwest Environmental Advocates v. U.S. EPA*, 537 F.3d 1006, 1021 (9th Cir. 2008) (ordering repeal of a 30-year-old EPA regulation that categorically exempted discharges of ballast water containing biological pollutants such as zebra mussels from National Pollutant Discharge Elimination System ("NPDES") permitting requirements). Notably, the USGS report suggests that there are various measures that can be taken to reduce the risk of opening pathways for invasive species. These range from the obvious, like treating the water, to the less obvious, such as changing the mode of conveyance of the water. *See*, *Risk and Consequence* at section 6.6 ("Interbasin transfers of treated water via a controlled and contained conveyance will present the lowest risks of biological invasion. . . ."). If no requirement for a CWA NPDES permit exists, there will be no consideration of reasonable methods to control or prevent the introduction of

potentially devastating invasive species to the receiving water body.

A good example of the propriety of requiring an NPDES permit for transfers of water from one distinct water body to another is provided by the case of *People to Save the Sheyenne River v. North Dakota Department of Health*, 697 N.W.2d 319 (N.D. 2005). Devils Lake, located in the Hudson Bay drainage basin in North Dakota, had no natural outlet and was not hydrologically connected to any other surface waters in the Hudson Bay basin. *Sheyenne*, 697 N.W.2d at 323. As a result, the lake rose and fell depending upon the amount of rainfall. Since 1993, the Devils Lake area had received above normal precipitation and the lake rose nearly 25 feet in elevation, causing flooding and destruction or relocation of numerous homes, businesses, and roads near Devils Lake. *Id.* In response, Congress directed the United States Army Corps of Engineers to design an outfall system from Devils Lake to the Sheyenne River. The Corps complied and proposed an outlet from Devils Lake that would have resulted in a 300 $ft.^3$ per second discharge into the Sheyenne River. *Id.* Because the transfer of water from Devils Lake to the Sheyenne River is a transfer from one navigable water body to another, under the EPA's Unitary Waters rule, no permit would be required. Fortunately, no such rule existed at the time and the "unitary waters" theory had been rejected by the courts. Accordingly, a CWA NPDES permit was required. *Id.* at 323-24. The result was that the residents of

the Devils Lake area obtained their permit and relief from the flooding which they suffered. At the same time, however, the harm to the Sheyenne was minimized through the permitting process. For example, the amounts and the timing of the discharges to the Sheyenne River were substantially limited as compared to the Corps proposal. Compliance with applicable water quality standards was also required, as well as biological and ecological assessments of the condition of the Sheyenne River. Additionally, monitoring was required at various points on the river in order to ensure that environmental harm was limited as much as reasonably possible. *Id.* at 324. None of this would have occurred under the Environmental Protection Agency ("EPA") unitary water rule. In short, the NPDES permitting process worked to protect the residents of the Devils Lake area from flooding, and to protect the people, fish and wildlife dependent on the Sheyenne River from the pollution and ecological harm that would have befallen them without the NPDES permit requirements. However, should EPA's unitary waters rule stand, the Sheyenne's protections will be short lived. Upon expiration of the current permit, there will no longer be any restrictions on the quantity, timing, or quality of the waters dumped into the Sheyenne River – and the River and those dependent upon it will suffer needlessly.

Moreover, it is incorrect to argue that requiring permits for transfers between distinct water bodies would unduly tax the resources of the regulators

or the regulated community. Permitting authorities process many thousands of permits as a matter of course. The time, effort, and expense associated with the review and issuance of permits depends directly upon the degree to which harm is likely to be caused by the transfer of water. Where waters of the transferring and receiving bodies are of similar quality, the review will be brief and may be accomplished by general permits with little cost or delay. On the other hand, in the cases where serious issues of water quality degradation potential exist, the additional time and expense required to ensure that environmental harm is reduced as much as reasonably practical, is appropriate to achieve the goals of the CWA. As noted in *Catskill Mtns. Chapter of Trout Unlimited v. City of New York*, 451 F.3d 77, 85-87 (2nd Cir. 2006), the NPDES process contains sufficient flexibility to assure that important inter-basin transfers may be authorized pursuant to a NPDES permit.

II. EPA's Unitary Waters Rule Is Not Entitled to *Chevron* Deference

The Eleventh Circuit reached its decision below, contrary to its predilections and the purposes of the Clean Water Act, based on its belief that a newly promulgated EPA rule required *Chevron* deference. *Friends of the Everglades, Inc. v. South Florida Water Management District,* 570 F.3d 1210, 1218 (11th Cir. 2009) (observing that all prior precedent rejected the "unitary waters" theory underlying the new

regulation and stating that absent the regulation, the court might have made it "unanimous"). The regulation in question was the same as a prior EPA "interpretation" argued in the trial court. *Friends of the Everglades, Inc. v. South Florida Water Management District,* 2006 WL 3635465, at 34 n. 51. (S.D. Fla. 2006). The rule was not, however, enacted until after the trial court had rendered its decision. *Id.* (Noting that the rule was only "proposed" when the trial court entered its judgment).

In *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), this Court held that deference must be accorded an agency's interpretation of a statute it administers unless the intent of Congress is clear or the interpretation is unreasonable. *Id.* at 842-43. However, this Court clarified that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron,* 467 U.S. at 843 n. 9. It is beyond dispute that Congress's overriding intent in enacting the CWA was to restore and maintain the Nation's waters. It is similarly indisputable that the method it chose to effectuate that goal was to place limits on the amount and quantity of pollutants that could be released to the Nation's waters. *Miccosukee Tribe of Indians*, 541 U.S. at 102. Accordingly, EPA's new rule, which directly undermines this Congressional intent to clean up the Nation's waters, must be rejected by the courts.

The EPA's "unitary waters" theory is not supported by the purpose of the statute or its plain

language. The underlying argument, that the United States has only one "navigable water" under the CWA, is foreclosed by this Court's decision in *Rapanos v. U.S.,* 547 U.S. 715 (2006). In *Rapanos*, this Court held that no *Chevron* deference was due to a similar regulation of the Corps of Engineers. There, as in the instant case, the Corps argued that the term "navigable waters" was singular in order to expand its reach to all waters in the United States. In *Rapanos*, as in the instant case, the issue was whether the agency's construction of the definition of "navigable waters" as set forth in 33 U.S.C. § 1362(7) was permissible and therefore required *Chevron* deference. The plurality opinion in the *Rapanos* case concluded that the agency's position was not even arguable because the CWA did not define "navigable waters" as "water of the United States." This Court went on to explain that:

> [T]he waters of the United States" is something else. The use of the definite article ("the") and the plural number ("waters") shows plainly that §1362(7) does not refer to water in general.

*Rapano*s, 547 U.S. at 732. While the argument of the Corps in *Rapanos* was made in an effort to expand the Corps' jurisdiction, and the argument in the instant case is made to contract the EPA's jurisdiction, neither argument passes muster because the analysis of the definition of navigable waters is the same. Congress chose to use the plural "waters." This is true whether one looks directly at the term

"navigable waters" or at the definition of navigable waters, i.e., "The waters of the United States." As this Court in *Rapanos* found, "waters" in the plural sense consists of: "'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features.'" *Id.* at 733. Consequently, as in *Rapanos*, no *Chevron* deference can be accorded to the EPA's rule here.

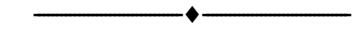
III. The EPA Rule Violates Separation of Powers Principles

The Sierra Club also supports the granting of certiorari on the separation of powers issue raised by the Miccosukee Tribe. The EPA Unitary Waters rule is nothing more than the product of this litigation. The rule was not finally issued until after the briefs were filed in the Eleventh Circuit and the EPA merely codified its previously rejected litigation position in order to change the outcome of this case. It is well known that litigation tends to harden the positions of the parties. *International Assn. of Machinists and Aerospace Workers, AFL-CIO v. National Mediation Board*, 930 F.2d 45, 49 (D.C. Cir. 1991). For this reason common sense dictates that a rule enacted to support a litigation position is suspect in itself. However, when an agency's litigation position is not only adopted to change the lower court result in the current case, but also to overrule the law as established by holdings of several federal courts, separation of powers issues are clearly implicated. While the courts may not intrude upon the rulemaking powers of the delegated agencies, so too, such agencies may not

intrude on the judicial power to say what the law is. *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 177 (1803).

The separation of powers doctrine prohibits one co-equal branch of the government from encroaching on the powers of another branch. *Loving v. United States*, 517 U.S. 748, 757 (1996). When an administrative agency steps in to alter the decision of the court through interpretation of the law, it is invading the province of the court to say what the law is. Congress has not and cannot provide the EPA, or any other executive agency, with the authority to exercise judicial power. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995). Yet, that is the effect of the EPA rule in this case. The courts have emphatically determined that the unitary waters interpretation of the CWA is erroneous. EPA seeks to overrule these judicial determinations *sub-silentio* through its rule. It has not the power to do so.

If EPA feels that the decision of the courts are incorrect or the result undesirable, it is free to petition Congress to change the law. *Sierra Club v. EPA*, 311 F.3d 853, 862 (7th Cir. 2002). It may not, however, invade the province of the judiciary in an effort to obtain a result that it had failed to attain during the course of litigation.



CONCLUSION

For the reasons set forth herein, the Sierra Club requests that this Court grant the petition for certiorari sought by the petitioners.

Respectfully submitted,

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