No. 02-626

IN THE
Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA
and FRIENDS OF THE EVERGLADES, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK, CONNECTICUT, ILLINOIS, KENTUCKY, MAINE, MASSACHUSETTS, MICHIGAN, MISSOURI, NEW JERSEY, NORTH CAROLINA, OKLAHOMA, VERMONT, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The *amici curiae* States, through their Attorneys General, respectfully urge affirmance of the court of appeals' decision in *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002), which held that the Clean Water Act (the "Act"), 33 U.S.C. §§ 1251, *et seq*., requires a permit where a "point source" conveys water containing pollutants from one distinct water body to another, even though the point source is not the original source of pollutants.

Water is diverted from its natural flow and transferred from one body to another to facilitate a variety of activities, including aquaculture, irrigation, community drainage, and coal-bed methane gas extraction. In some circumstances – the diversion of water infested with an invasive species into an uninfested water body, the drainage of polluted run-off into sensitive worksheds, and the disposal of chemical-laden ground water into surface waters, for instance – these human-induced transfers adversely affect water quality. The Eleventh Circuit and three other courts of appeal have construed the Act to provide States with an effective mechanism for ameliorating, where necessary, the consequences of such transfers. The contrary interpretation advanced by Petitioner would leave largely unregulated many transfers of lower-quality water into bodies of higher-quality water, thereby creating a significant gap in the States' authority under the Act to protect and maintain the quality of the waters within their borders.

Amici States, most with delegated enforcement authority from the United States Environmental Protection Agency ("EPA"), have a significant interest in the present case because they are tasked with protecting their citizens' health and welfare. The forty-five States with delegated authority have primary responsibility, in partnership with EPA, for enforcing the Act's cornerstone requirement that pollutants not be discharged from a point source into the "navigable waters" of the United States, except in accordance with a National Pollutant Discharge

Elimination System ("NPDES") permit. Over the past 30 years, the States have worked to implement this requirement and related provisions of the Act with the aim of assuring that each individual body of water ultimately achieves and maintains compliance with its applicable water quality standards.

To this end, States have classified each surface water body within their boundaries to establish its "designated use"; promulgated water quality criteria in conjunction with EPA that specify maximum pollutant levels for each water body within their borders; and invested tremendous resources in the scientific staff necessary to ensure that tens of thousands of NPDES permits contain pollutant limitations designed to protect and maintain the quality of the specific water body into which pollutants are discharged. The States also have assessed each water body that has not yet achieved compliance with water quality standards, and developed water pollution budgets and remedial plans to bring these bodies into compliance with applicable water quality standards. Given these extensive efforts, the *amici* States have a significant interest in assuring that their finely-tuned programs to assess, protect, and improve the water quality of each surface water body within their borders are not frustrated by a construction of the Act that constrains state authority to control, through the permitting process, the transfer of pollutants from lower-quality waters to higher-quality waters.

Furthermore, the *amici* States have a strong interest in ensuring a strong "national floor" of water quality controls through the Act's permitting requirement. These requirements, approved by EPA, prevent States from relaxing their own standards and enforcement efforts in order to gain a perceived market advantage in the siting of industrial or commercial facilities at the economic or environmental expense of other States. Moreover, because watersheds do not respect political boundaries, downstream States have a substantial interest in protecting their water bodies through the uniform processes and remedies provided by the Act against the transfer of pollutants originating in upstream States.

SUMMARY OF ARGUMENT

The Act's NPDES permit program is the primary means for protecting and improving water quality within the comprehensive regulatory regime established by Congress. This program requires EPA and delegated States to consider the impact of pollutants on a water body; review viable options that would have a lower impact; and require application of pollutant control technologies and sensible management practices, all in an effort to prevent water quality from falling below acceptable levels. The decision below applying the Act's permit requirement to the conveyance, through a point source, of water containing pollutants should be affirmed based on well-established principles of statutory interpretation. Moreover, affirmance is necessary to ensure that the Act remains a vital tool to protect and improve the Nation's waters.

1. The Act's comprehensive goals, plain language, structure, and implementing regulations demonstrate that a permit is required for the transfer of water containing pollutants from one body to another, where the receiving body would not otherwise be burdened with the additional pollutants but for transfer through the point source. The cases upon which Petitioner relies to argue that a permit is not required are inapposite, for they involve discharges of pollutants from dams, which merely recirculate water, and not, as is the case here, the artificial diversion of water from its natural course. Moreover, Petitioner's assertion that a permit is required only if the point source itself is the original source of the added pollutant is contrary to the Act's plain language and EPA regulations.

Nor do the arguments raised by Petitioner and its *amici* warrant a narrower construction of the Act. By mandating efforts to assure the quality of each individual water body, the Act and EPA regulations squarely reject the theory, advanced by the United States, that once pollutants enter one water body anywhere in the Nation, they may be conveyed through a point source to any other water body without coming within the scope

of the Act's permit requirement. Numerous water quality protection measures established by the Act that focus on water bodies in a discrete and individualized manner would be frustrated by an interpretation of the Act that treats these bodies as one unified whole.

Likewise, there is no support for the contention that point source transfers of water containing pollutants should be addressed solely through "nonpoint" source programs – *i.e.*, programs designed to control diffuse runoff not discharged through a discrete conveyance. Although the Act notes that some activities – including the activities of water diversion facilities – may be sources of nonpoint pollution, nothing in the Act dispenses with the need also to obtain an NPDES permit in connection with point source discharges that may result from these activities. In any event, nonpoint source programs and state water quality programs have – both before passage of the Act and in the over three decades since – proven largely inadequate for achieving mandated water quality standards, as evidenced by the fact that almost half of the Nation's waters remain impaired, typically from sources not controlled by NPDES permits. Similarly, state water allocation programs generally do not adequately protect water quality.

2. As a result, a rule that effectively divests delegated States (or EPA, in nondelegated States) of the authority to require NPDES permits for transfers of water containing pollutants could seriously harm water quality throughout the Nation. Salt water could be transferred into fresh water, sediment-laden water could be sent into clear drinking water reservoirs, warm waters could be pumped into cold water habitats, chemical-laden waters could be dumped into waters employed in farm and ranch irrigation, and invasive species could be transferred into waters not yet infested. It would be strikingly incongruous for the Act, given its comprehensive

scope, to place such problematic point source additions of pollutants beyond the reach of the Act's permit requirement.

3. To require EPA or delegated States to issue permits in accordance with the Act for interbasin point source transfers containing pollutants will not unduly tax the resources of regulators, as permitting authorities already issue hundreds of thousands of permits as a matter of course. Pennsylvania, for instance, has required NPDES permits for interbasin point source transfers of polluted water since 1986.

Moreover, to the extent that regulated parties may complain that the permitting process is time-consuming and costly, NPDES permits are readily available where the transferred water is of a quality that will not degrade the quality of the receiving water, which is the case in the vast majority of transfers. As the permitting authority in most circumstances, delegated States have the ability to expedite action on NPDES permits. And, where technological or cost limitations make it necessary, the NPDES program provides for "schedules of compliance" to allow for the long-term implementation of corrective measures necessary to achieve compliance, while allowing important but problematic water diversions to continue in the interim.

ARGUMENT

I. THE ACT REQUIRES AN NPDES PERMIT FOR WATER TRANSFERS THAT INTRODUCE POLLUTANTS THAT WOULD NOT HAVE ENTERED THE RECEIVING WATER BODY BUT FOR THE POINT SOURCE.

A. The Text of the Act and EPA Regulations Demonstrate That Transfers of Water Through a Point Source Are Subject to the Act's Permit Requirement.

Congress enacted the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2003). As part of the comprehensive program to implement the Act's objectives, Congress declared that "the discharge of any pollutant by any person" into navigable waters "shall be unlawful," *id.* § 1311(a), unless it is in accord with an NPDES permit (or state analog), *id.* §§ 1342(a), (b). The Act's permit program is the "primary means" for protecting and improving water quality within the "comprehensive regulatory regime" established by Congress. *Arkansas v. Oklahoma*, 503 U.S. 91, 99, 101 (1992). Whether issued by EPA or a delegated State, an NPDES permit sets forth the conditions for the discharge of pollutants consistent with various other applicable provisions of the Act, to assure that each receiving water body will achieve or continue to achieve applicable "water quality standards." *Id.* §§ 1311(b)(1)(C), 1312(a), 1313(a)-(c); 40 C.F.R. § 122.44(d)(1) (2003).

As noted, the Act requires a permit for the "discharge of a pollutant" from a "point source" into "navigable waters." *See* 33 U.S.C. §§ 1311(a); 1342(a), (b); 1362(6), (7), (12), (14); *see also* 40 C.F.R. § 122.1(b). The Act's broad

definitions of these key terms make clear that Congress intended the Act to cover water transfers like those at issue here. "[D]ischarge of a pollutant" is defined in pertinent part as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "Point source," in turn, is expansively defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.* § 1362(14). The definitions of "pollutant," *id*. § 1362(6), and "navigable waters," *id.* § 1362(7), are similarly broad.

EPA regulations, which are entitled to deference,[1] further confirm that the water transfer here – the pumping of polluted water from the C-11 Canal into Water Conservation Area 3-A – requires an NPDES permit. EPA defines "[d]ischarge of a pollutant" to include "additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works." 40 C.F.R. § 122.2. Because the contested activity here involves "surface runoff which is collected or channelled by man" and "discharges through pipes . . . or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works," a permit is required.

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1. EPA's long-standing regulation interpreting what constitutes a "discharge of a pollutant" is reasonable and entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See PUD No. 1 v. Resources Washington Dep't of Ecology*, 511 U.S. 700, 712 (1994) (holding that EPA regulation is a "reasonable interpretation" of the Act "entitled to deference").

The dam cases upon which petitioner relies (Pet. Br. 31-32) are not to the contrary. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), and *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), held that dam-induced changes to water quality fall outside the Act's permit requirement. However, discharges from dams are qualitatively different from the interbasin transfers of water at issue in more recent and relevant cases decided by the First, Second, and Eleventh Circuits, *see infra* Point II, because the former involve the mere "recirculation of water," whereas the latter involve the "artificial diver[sion] of water from its natural course." *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481, 491-92 (2d Cir. 2001). Outside the dam context, courts of appeals consistently have held that an NPDES permit is required where a point source conveys water containing pollutants from one distinct water body to another, even though the point source is not the original source of pollutants. *Miccosukee Tribe*, 280 F.3d at 1366-69; *Catskill Mts.*, 273 F.3d at 489-94; *Dubois v. United States Dep't of Agric.*, 102 F.3d 1273, 1296-99 (1st Cir. 1996).[2]

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2. If the dam context is determined to be factually indistinguishable from the facts of this case, however, it would become apparent that the dam cases were wrongly decided. Indeed, the two cases on which Petitioner relies accorded undue deference to an EPA position, stated in opinion letters and reports to Congress in the 1970s and 1980s, that no permit is required for the discharge of pollutants from dams. That position "was never formalized in a notice-and-comment rulemaking or formal adjudication under the Administrative Procedure Act." *Catskill Mts.*, 273 F.3d at 490; *see also Miccosukee Tribe*, 280 F.3d at 1368 n.4 (finding deference in *Gorsuch* and *Consumers Power* unwarranted). In any event, it is unclear whether *Gorsuch* and *Consumers Power* remain valid after *PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700, 722-23 (1994), which held that 33 U.S.C. § 1341, the Act's certification requirement (discussed *infra* Point I.B.2), applies to dam discharges.

Petitioner also argues that a permit is required only if the point source itself is the original source of the pollutant (Pet. Br. 20), but this contention turns a blind eye to the Act's and EPA's definition of "point source" as a discrete conveyance, such as a pipe or a ditch. 33 U.S.C. § 1362(14); 40 C.F.R. § 122.2. "[A] 'pipe, ditch, channel, tunnel, [or] conduit' is unlikely to have created the pollutants that it releases, but rather transports them from their original source to the destination water body." *Catskill Mts.*, 273 F.3d at 493. Petitioner's argument also is "inconsistent with [EPA's] own regulations, which define 'discharge of a pollutant' to include 'surface runoff which is collected or channelled by man.' Thus, EPA regulates the channel as a point source even though pollutants merely pass through it from land to navigable water." *Gorsuch*, 693 F.2d at 175 n.58 (citation omitted). Indeed, even the United States, one of petitioner's *amici*, rejects this theory (U.S. Br. 21-22), noting that one of the most common types of permitted facility – the sewage treatment plant – does not itself add any pollutants to the water.

B. The Act's Structural Focus on the Quality of Each Distinct Water Body Refutes the Theory That the Act Treats the "Waters of the United States" As a Unitary Whole.

By mandating efforts to assure the quality of each individual water body, the Act and EPA regulations squarely reject the theory, advanced by *amicus curiae* United States, that once pollutants enter one water body anywhere in the Nation, they may be conveyed through a point source to any other water body, without coming within the scope of the Act's permit requirement. According to the United States, the Act's use of the term "navigable waters," 33 U.S.C. § 1362(7), signals a congressional intent that "'the waters of

the United States' should be viewed as a whole for purposes of NPDES permitting requirements" (U.S. Br. 19).[3]

This argument is untenable. The Act establishes numerous water quality protection programs that operate in conjunction with the Act's permit requirement to improve or maintain water quality by protecting individual water bodies. These measures, which demonstrate that Congress intended to distinguish between discrete water bodies throughout the Nation, would be significantly undermined if the Act's fundamental permitting requirement were read to exclude the transfer of pollutants from one water body to another.

1. The establishment of designated uses, water quality criteria, and NPDES permit conditions refutes the United States' theory.

The United States' "unified water" theory flies in the face of the Act's water-body by water-body approach to assuring water quality. The Act contemplates that delegated States will make individualized determinations in classifying and designating the uses of each water body within their borders; in establishing water quality criteria applicable to each body of water; and in issuing NPDES permits to regulate and control, on a case-by-case basis, the discharge of pollutants into each such body.

The Act and EPA regulations require each State to issue "water quality standards" that consist of two major elements: (i) "the designated uses of the navigable waters involved"; and (ii) "the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.10, 131.11.

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3. Of course, whereas EPA's regulations are entitled to *Chevron* deference, *see supra* note 1, the same cannot be said of the United States' brief to this Court. *See United States v. Mead Corp.*, 533 U.S. 218, 238 n.19 (2001) (refusing to accord deference to United States' brief).

To establish the designated use (or "classification") of each body of water, States "must take into consideration the use and value" of each water body "for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation." 40 C.F.R. § 131.10(a). This is a tedious and labor-intensive process. New York, for example, has classified all of its waters in seven volumes of regulations issued by its Department of Environmental Conservation. N.Y. Comp. Codes R. & Regs., tit. 6, §§ 800.1-941.9 (2003).

Classifications vary depending on the attributes and purposes served by the water body. New York designates fresh waters, *inter alia*, "Class N" (water free of pollutants that may be enjoyed in its "natural condition"), *id*. § 701.2; "Class AA" (water that may be used as a drinking water source after simple disinfection), *id.*, § 701.5; "Class B" (water of sufficient quality to allow for contact recreation and fishing), *id.* § 701.7; and "Class D" (water that will allow for fish survival but not fish propagation), *id*. § 701.9.

Apart from designating the uses of their bodies of water, the Act also requires States to establish "water quality criteria." 33 U.S.C. § 1313(c)(2)(A). "Criteria are elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. When criteria are met, water quality will generally protect the designated use." 40 C.F.R. § 131.3(b). Depending on a water body's particular designated use, the stringency of applicable water quality criteria may vary substantially. *See, e.g.*, N.Y. Comp. Codes R. & Regs., tit. 6, § 703.5(f). With respect to

phosphorus, the pollutant of concern here, EPA has developed guidance targeted at the attributes and designated uses of particular bodies of water.[4]

After a State has designated the use and water quality criteria applicable to particular bodies of water, it may issue, on a case-by-case basis, an NPDES permit. For each discharge of a pollutant, the permit imposes limitations to prevent excursions above the state water quality standards applicable to the specific receiving water body affected by the discharge. 33 U.S.C. §§ 1342(a)(1), (2); 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1)(i). The calculation of how much of a particular pollutant the permit applicant may discharge without running afoul of water quality criteria involves a complex assessment of numerous factors, including the current concentration of the pollutant in the receiving water, human health impacts, the sensitivity of any affected species to the pollutant, and the dilution rate of the receiving water. *See* 40 C.F.R. § 122.44(d).

To abrogate the permit requirement and adopt the United States' dubious theory would be manifestly inconsistent with the Act, and deprive States of effective tools to monitor, maintain, and achieve water quality consistent with the designated use and water quality criteria applicable to each individual water body within their borders.

2. Other measures aimed at water quality standard compliance also dispel the "unified water" theory.

The Act establishes a number of additional regulatory mechanisms that further operate to ensure compliance with the different water quality standards applicable to every

4. *See* 66 Fed. Reg. 1671 (Jan. 9, 2001) (Nutrient Criteria Development; Notice of Ecoregional Nutrient Criteria).

individual water body. These mechanisms underscore the importance of Act's permit requirement, and further dispel the United States' "unified water" theory.

First, the Act requires States to assess their waters and identify each water body that has not achieved compliance with water quality standards, despite implementation of effluent limitations and thermal controls contained in NPDES permits. 33 U.S.C. §§ 1313(d)(1)(A), (B); 1315. For each non-compliant body, States must develop water pollution budgets and remedial pollutant loading allocations, known as "total maximum daily loads" ("TMDLs"), to address both piped ("point") and diffuse ("nonpoint") sources of pollutants in an effort to achieve compliance with applicable water quality standards. *Id*. §§ 1313(d)(1)(C), (D); 40 C.F.R. § 130.7. Once established, the loads assigned to point sources in the TMDL process are incorporated into NPDES permits. 40 C.F.R. § 122.44(d)(1)(vii).

Second, the Act provides that prior to undertaking any project that requires a federal license or permit and "which may result in any discharge into the navigable waters," 33 U.S.C. § 1341(a)(1), a permit applicant first must obtain a certification from the State that the project will not violate applicable state water quality standards, 40 C.F.R. § 121.2(a)(3). Like an NPDES permit, the state certification may impose conditions or limitations to ensure compliance with state water quality standards for the affected water body. 33 U.S.C. § 1341(d); *see also PUD No. 1*, 511 U.S. at 708 ("The limitations included in the certification become a condition on any federal license.").

Third, the Act and EPA regulations contain an "antidegradation policy," 33 U.S.C. § 1313(d)(4)(B), that requires States to maintain and protect the quality of those water bodies that "exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in

and on the water," 40 C.F.R. § 131.12(a)(2). Under this policy, waters that are cleaner than the criteria for the particular designated use specified must be protected at the actual higher quality, unless water degradation is necessary to support pressing economic or social needs. *Id*.; *see also PUD No.* 1, 511 U.S. at 718-19.

Together, these programs work to prevent the introduction of pollutants that may adversely affect the water quality of each individual water body, and further demonstrate the Act's water-body by water-body approach to assuring water quality. If the Court accepts the United States' view that transfers of water containing pollutants from one body to another are not subject to the technological controls, operational methodologies, or pollutant management practices encompassed by the NPDES permit process and related measures, state efforts to protect individual water bodies would be severely impaired.

C. Interbasin Point Source Discharges of Pollutants Are Not Adequately Addressed Through Nonpoint Source or Water Allocation Programs.

Despite acknowledging that the pump station here is a "point source" within the meaning of the Act, Petitioner and its *amici* nonetheless contend that the point source discharge of pollutants should be addressed either through nonpoint source programs or state water allocation programs, neither of which mandates NPDES permits. Apart from running afoul of the plain meaning of the Act – which requires a permit for the discharge of pollutants from a point source, *see* 33 U.S.C. §§ 1311(a), 1342 – this argument is flatly contradicted by the Act's structure and consistent interpretation and, if adopted, would severely impair the ability of States to protect and maintain the quality of their waters.

Relying on 33 U.S.C. § 1314(f), Petitioner and *amici* United States and City of New York assert (Pet. Br. 3; U.S. Br. 26; N.Y.C. Br. 14) that the discharge of pollutants from a point source should not be regulated through permits, but by "nonpoint" source programs – *i.e.*, programs that address diffuse runoff not discharged through a discrete conveyance. Although § 1314(f) requires EPA to provide guidance for addressing nonpoint sources of pollution resulting from activities such as agriculture, mining, construction, or "water flow diversion facilities," *id.* § 1314(f)(2)(A)-(C), (F), nowhere does it dispense with the permit requirement for point source discharges from those activities. Indeed, in an EPA enforcement action where a defendant mining company claimed that 33 U.S.C. § 1314(f) obviated the need to obtain an NPDES permit, the Tenth Circuit held that the provision does not create nonpoint source exemptions from the Act's NPDES requirement: "Mining and other categories listed in § 1314(f)(2) may involve discharges from both point and nonpoint sources, and those from point sources are subject to regulation." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979).

Petitioner's reading of 33 U.S.C. § 1314(f) would exclude, for instance, all agricultural activities from the NPDES permit process, even though the Act itself defines "pollutant" to include "agricultural wastes," 33 U.S.C. § 1362(6), and "point source" to encompass a "concentrated animal feeding operation," *id.* § 1362(14). Furthermore**,** EPA regulations expressly require an NPDES permit for point source discharges from many of the activities listed in 33 U.S.C. § 1314(f)(2), including those involving concentrated animal feeding operations, 40 C.F.R. § 122.23; mining activities, *id.* §§ 122.26(a)(1)(ii), (b)(14)(iii); and construction activities, *id*. §§ 122.26(a)(9)(i), (b)(14)(x), (b)(15)(i), 122.34(b)(4)(i). Because an activity can have both point and nonpoint attributes, this dual approach is necessary to achieve the Act's overall goals and is consonant with the Act's policy of "controlling" nonpoint pollution.

See 33 U.S.C. § 1251(a)(7) ("[I]t is the 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 this Act to be met through the control of both point and nonpoint sources of pollution.").

A simple hypothetical demonstrates how nonpoint source controls work in tandem with, rather than to the exclusion of, the Act's permit requirement. If a nonpoint source control in an upstream State fails to fully limit the discharge of pollutants into navigable waters, then as that water moves downstream to an adjacent State and passes through a point source there, the downstream State will be powerless to control the discharge of potentially harmful pollutants into each of its individual water bodies affected by or connected to the point source. Moreover, given that it is all but impossible to control through nonpoint programs some pollutants found in transferred water (like heat or natural salt content), any effort to place point source discharges beyond the Act's NPDES permit program must be rejected.

The United States further contends that nonpoint source programs should govern point source transfers of pollutants from one water body to another because "the operators of water control facilities typically are not responsible for the presence of pollutants in the waters they transport" (U.S. Br. 27). But the point source is an essential place for controlling the discharge of pollutants, regardless of whether water control facilities actually add the pollutants themselves, because the point source controls how, where, and when pollutants from lower-quality waters are added to higher-quality waters. The Act's permit requirement thus enables States, through their water control facilities, to control those pollutants where necessary to achieve the Act's goals.

Petitioner and *amici* States Colorado and New Mexico further suggest (Pet. Br. 35; Colo. Br. 6-15) that by reserving to States the authority to allocate water, the Act exempts water transfers from NPDES permitting requirements. Although 33 U.S.C. § 1251(g) vests States with the authority to "allocate quantities of water,"[5] neither that provision, nor 33 U.S.C. § 1370(2) – which provides that nothing in the Act should impair any right of the "States with respect to the waters . . . of such States," dispenses with the need to obtain an NPDES permit for interbasin transfers of water that involve the discharge of pollutants from a point source.

Indeed, this Court has held that those provisions "preserve the authority of each State to allocate water quantity as between users," but "do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation." *PUD No. 1*, 511 U.S. at 720. The primary "water pollution control" contemplated by the Act is, of course, the NPDES permitting process itself. *See Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 513 (10th Cir. 1985) ("[W]here both the state's interest in allocating water and the federal government's interest in protecting the environment are

5. Section 1251(g) provides:

> 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 by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

implicated, Congress intended an accommodation" to be "best reached" through "the individual permit process.").[6]

Finally, nonpoint source and water allocation programs have not sufficiently protected our waters, even when employed in conjunction with state water quality laws. To be sure, the simple prohibition on waste disposal touted by some *amici* as a substitute for the NPDES permit process (*see* Colo. Br. 23-26) hardly prevented the deleterious discharges at issue here, or in the water transfer cases discussed *infra* Point II. Moreover, as EPA's most recent survey has found, nearly half of the Nation's waters remain impaired, typically from sources not controlled by NPDES permits.[7] To require point source discharges of pollutants involved in water transfers to be addressed solely through nonpoint source and water allocation programs therefore will frustrate the Act's goals of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

II. A PERMIT REQUIREMENT FOR INTERBASIN TRANSFERS OF WATER INVOLVING THE ADDITION OF A POLLUTANT FROM A POINT SOURCE ENABLES STATES TO PROTECT WATER QUALITY.

The Court should affirm the Eleventh Circuit's decision to ensure that the Act continues to address serious environmental harms. The permitting process enables States to control the discharge of damaging pollutants, and thereby protect the quality of their receiving waters. If a permit is

6. In any event, the transfer of water here is not a true allocation, but rather the interbasin disposal into the Everglades of polluted collected runoff.

7. U.S. EPA, *National Water Quality Inventory: 2000 Report* (Aug. 2002 Fact Sheet) (available at http://www.epa.gov/305b/2000report/).

not required for the addition of a pollutant from a lower-quality water body to a higher-quality water body that, but for the operation of a point source, would not otherwise flow into one another, the States' primary means under the Act to control the discharge of pollutants will be weakened immeasurably.

Decisions from other courts of appeal in circumstances analogous to those presented here highlight the harm of dispensing with the permit requirement. In *Dubois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996), a ski slope sought to pump water from the East Branch of the Pemigewasset River into Loon Pond, a water body within the White Mountain National Forest. 102 F.3d at 1277-78. Loon Pond is a high-altitude water body "unusual for its relatively pristine nature;" it serves as a drinking water supply for the Town of Lincoln, New Hampshire. *Id*. at 1277. In fact, New Hampshire classified Loon Pond "as a Class A waterbody, protected by demanding water quality standards under a variety of criteria." *Id*. The East Branch, by contrast, "is a relatively unprotected Class B waterway under New Hampshire law." *Id*. at 1279. Indeed, the court took judicial notice that for years the East Branch was "one of the most polluted rivers in New England, the repository of raw sewage from factories and towns. It emitted an overwhelming odor and was known to peel paint off buildings located on its banks." *Id*. at 1297. Because East Branch water, which otherwise would not have flowed into Loon Pond but for its routing by the ski operation, *id*. at 1297, contained "bacteria, other aquatic organisms such as Giardia lambia, phosphorus, turbidity and heat," *id*. at 1278, the First Circuit held that an NPDES permit was required for the transfer, which added pollutants from a point source to a navigable water, *id*. at 1296-1299.

In *Northern Plains Resource Council v. Fidelity Exploration & Development Co.*, 325 F.3d 1155 (9th Cir.),

cert. denied, __ U.S. __, 72 U.S.L.W. 3280 (Oct. 20, 2003), a company extracted methane gas from deep underground coal seams in Montana and, in the process, drew large quantities of deep ground water to the surface. *Id*. at 1158. The company did not add any chemicals to the water before dumping it into the Tongue River. *Id*. In its "natural state," however, the water contained suspended solids, calcium, magnesium, sodium, potassium, bicarbonate, carbonate, sulfate, chloride, fluoride, aluminum, arsenic, barium, beryllium, boron, copper, lead, iron, manganese, strontium, and radium. *Id*. Further, the ground water was "salty," raising concerns by those using the Tongue River for agricultural irrigation that the salt would break down the soil structure on farms and ranches. *Id*. The court held that an NPDES permit was required under the "plain language" of the Act. *Id*. at 1160. "Were we to conclude otherwise, and hold that the massive pumping of salty, industrial waste water into protected waters does not involve discharge of a 'pollutant,' even though it would degrade the receiving waters to the detriment of farmers and ranchers, we would improperly undermine the integrity of [the Act's] prohibitions." *Id*. at 1162 (internal quotations omitted).[8]

In *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001), the Second Circuit similarly held that the transfer by tunnel of turbid, sediment-laden water from the Schoharie Reservoir to the Esopus Creek, a trout creek several miles away that empties into a reservoir which provides drinking water for New York City, requires an NPDES permit. *Id*. at 484-85, 489-94. The court reasoned that a contrary holding "would mean that movement of water from one discrete water body to another would not be an addition [within the meaning of the Act]

8. In fact, the court found that to not require a permit would pave the way for someone to pipe "the Atlantic Ocean into the Great Lakes and then argue that there is no liability under the [Act.]" *Id*. at 1163.

even if it involved a transfer of water from a water body contaminated with myriad pollutants to a pristine water body containing few or no pollutants." *Id*. at 493.[9]

The pollutant at issue here, the nutrient phosphorus, provides a common, yet potent, example of why the Act requires a permit for interbasin transfers of water like that in the present case. *See Miccosukee Tribe*, 280 F.3d at 1366. Excess phosphorus often is the result of upstream activity of sewage treatment plants, agricultural runoff, farm animal waste, urban runoff, sediments washed from construction excavations, lawn fertilizers, or poorly functioning home septic systems.[10] High levels of phosphorus in fresh water systems set off a chain-reaction of events that adversely affect water quality. Excess phosphorus overfertilizes aquatic plants and algae during warm weather,[11] leading to "algae blooms" and limited water transparency.[12] As plants and algae die off, the dead material is consumed by a massively expanding population of bacteria and other animal life. This overabundant population of bacteria consumes the dissolved oxygen in the water, creating an "anaerobic" environment uninhabitable to most fish.[13]

9. *See also Dague v. City of Burlington*, 935 F.2d 1343, 1347, 1349, 1354-55 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992) (requiring permit where leachate-polluted pond water from landfill flowed through a culvert and into a wetland).

10. National Research Council, *Watershed Management for Potable Water Supply*, at 164-65 (National Academy Press 2000) (hereafter "*NRC Report*").

11. *Id*. at 7, 163-64.

12. *Id*. at 106-07.

13. *Id*. at 163-65; *see also* U.S. EPA and U.S. Dep't of Agric., *Clean Water Action Plan: Restoring and Protecting America's Waters* (Feb. 14, 1998), at 56 ("Excessive nutrient loadings will . . . result in excessive growth of macrophytes or phytoplankton and potentially harmful algal blooms . . . , leading to oxygen declines, imbalance of aquatic species, public health risks, and a general decline of the aquatic resource.").

Further, a low-oxygen aquatic environment impairs drinking water because anaerobic water contains a type of bacteria that generates serious odor and taste problems, as well as poor water color.[14] Low levels of oxygen also cause the release of contaminants such as iron, manganese, and hydrogen sulfide from reservoir bottom sediments, which further degrade water quality.[15] Additionally, excess phosphorus encourages the growth of organisms that produce toxins which, at high levels, pose dangers to the health of humans and animals alike.[16] When water containing high levels of organic material (*i.e.*, dead algae and bacteria) is disinfected with chlorine, it creates still other chemicals, which are suspected carcinogens and have been linked to increased risks of early term miscarriages.[17]

EPA has found that phosphorus is a leading cause of water quality impairment. An EPA study released in 2002 reported that in 2000, 45% of the Nation's lake and reservoir acres that were assessed failed to meet applicable state water quality standards, and of those waters so impaired, excess levels of the nutrients phosphorus or nitrogen were to blame in 50% of the cases.[18] Since phosphorus is present in so many

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14. *NRC Report* at 106-07.

15. *Id*. at 163-64.

16. *Id*. at 107, 164.

17. *Id*. at 2, 107, 112-13, 164; *see also* 63 Fed. Reg. 69394 (Dec. 16, 1998) (citing study suggesting association between early term miscarriage and exposure to drinking water with elevated levels of the disinfection byproduct trihalomethane).

18. U.S. EPA, *National Water Quality Inventory: 2000 Report* (released September 2002), at 17-21 (available at http://www.epa.gov/305b/2000report/) (last checked Nov. 14, 2003).

waters, it is likely to be involved in human-induced interbasin water transfers. To devise an exemption from the Act's permit requirement that allows for the transfer of impaired waters to more pristine waters would contravene the unmistakable goals of the Act and seriously harm water quality, in contravention of the unmistakable goals of the Act.

III. APPLICATION OF THE ACT'S PERMIT REQUIREMENT TO INTERBASIN POINT SOURCE TRANSFERS OF WATER CONTAINING POLLUTANTS IS NOT UNDULY BURDENSOME.

To affirm the Eleventh Circuit's decision and require EPA or delegated States to issue permits for interbasin transfers of water that involve an addition of a pollutant from a point source will not unduly tax the resources or capabilities of regulators. Nor will any ensuing controls on water transfers render the human-induced movement of water unfeasible or impossible.

EPA and delegated States already issue countless permits to address discharges of pollutants in numerous circumstances. NPDES "general permits" cover hundreds of thousands of pollutant discharges from such varied activities as urbanized storm water runoff, 40 C.F.R. §§ 122.26, 122.30-122.37; sediment discharges from construction sites more than one acre in size, 40 C.F.R. §§ 122.26(a)(9)(i), (b)(14)(x), (b)(15)(i), 122.34(b)(4)(i); and concentrated animal feeding operations, 40 C.F.R. §§ 122.23. EPA and delegated States also issue tens of thousands of individual NPDES permits for industrial and sewage treatment facilities.[19] And apart from "general permits" and NPDES permits that cover

19. *See* http://www.epa.gov/compliance/planning/data (last checked Nov. 14, 2003).

specific situations, States routinely issue permit-like "certifications" with respect to federal projects involving discharges into navigable waters. *See* 33 U.S.C. § 1341(a), (d); *PUD No. 1*, 511 U.S. at 707-08. Indeed, at least one State, Pennsylvania, has issued NPDES permits since 1986 for all interbasin point source transfers of polluted water. *See Del-AWARE Unlimited, Inc. v. Pennsylvania*, 508 A.2d 348, 359 (Pa. Commw. Ct. 1986) (requiring NPDES permit for interbasin water transfer and distinguishing *Gorsuch*, a dam case, because "it dealt with water diversion within a single body of water").[20]

There is no merit to the City of New York's assertion that if upheld, the Eleventh Circuit's decision will require permits for "more than two million dams, and countless other diversion structures, across the nation" (N.Y.C. Br. 13). Whereas the City speculates that each of the 50 States would issue on average at least 40,000 additional new permits, Colorado itself suggests only that "several hundred transbasin diversions/deliveries" in that state conceivably "could require permits under the holding of *Miccosukee*" (Colo. Br. 3 n.2). Issuing the number of additional permits realistically projected by Colorado is eminently feasible, given the number of permits already issued by States, and particularly since "the permitting authority . . . may be able to issue a general permit that considerably streamlines the permitting process" (U.S. Cert. Opp. 17) in instances where the transfer of water does not adversely affect the quality of the receiving water body. It is clear, moreoever, that while New York City has "summon[ed] up a parade of horribles," "[t]he horribles that can be imagined – if they are really so horrible and ever come to pass – can readily be corrected by Congress" should the NPDES permit process as enacted truly prove unworkable in practice. *Eastern Assoc. Coal Corp. v. United Mine Workers*, 531 U.S. 57, 69 (2000) (Scalia, J., concurring).

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20. *See also* Pennsylvania Dep't of Envtl. Prot., *Policy for Permitting Surface Water Diversions* (Mar. 1, 1998) (available by searching http://www.dep.state.pa.us/eps/search/search.asp for document "362-2000-003") (last checked Nov. 14, 2003).

Further, the NPDES permitting mandated by the Eleventh Circuit's decision is consistent with fast action. Delegated States have the ability and authority to marshal resources and expedite review. Because these States are familiar with their own water quality criteria and the designated uses of the affected bodies of water, they are well-positioned to act quickly on permit applications (*see* U.S. Cert Opp. 17). Indeed, in most instances, delegated States may issue an NPDES permit based on state-developed water quality standards and – inasmuch as there are no national effluent limitations for water diversions – in keeping with state-established technical, operational, and management protocols.

Nor is it realistic to suggest, as Colorado and New Mexico do (Colo Br. 15-17), that requiring an NPDES permit for transfers of water will effectively prevent such transfers altogether. In most instances, NPDES permits are readily available where the water being transferred is of a quality that would not impair the quality of the receiving water.[21] Indeed, receiving waters frequently can accommodate or assimilate pollutants without violating water quality standards. For this reason, permits are granted in many delegated States for water transfers intended for drinking use or farm irrigation.

Even where there is a likelihood that a proposed water transfer will impair the quality of the receiving water body, the NPDES program provides EPA and delegated States with the ability to require the implementation of pollutant removal technologies, management practices, and operational

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21. Colorado, for example, notes that "[o]f its 107,403 miles of streams, only 4,964 (4.6%) are designated as 'impaired,' not meeting water quality standards or designated uses, under the Clean Water Act, 33 U.S.C. § 1313" (Colo. Br. 3 n.2).

modifications. *See* 33 U.S.C. §§ 1314(c), (e). Moreover, the Act and its underlying regulations provide for "schedules of compliance" to allow long-term implementation of corrective measures necessary to achieve compliance with applicable water quality standards, while allowing important, though problematic, water diversions to continue in the short-term. 33 U.S.C. § 1362(17); 40 C.F.R. § 122.47. Indeed, the United States has recognized that "an NPDES permit can provide considerable flexibility in any schedules for compliance" (U.S. Cert. Opp. 17). *Cf. Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 495 (2001) (Breyer, J., concurring) (noting numerous inherent flexibilities in the Clean Air Act "sufficient to avoid the extreme results that some of the industry parties fear").

There is, therefore, no basis for creating an exception to the Act's permit requirement on the ground of necessity. In fact, the Eleventh Circuit's decision to affirm that a permit is required under the circumstances but to vacate the injunction prohibiting the operation of the pump station at issue, *Miccosukee Tribe*, 280 F.3d at 1369-1371, demonstrates that the Act strikes a reasonable and appropriate balance where competing considerations are at stake. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) (courts may exercise equitable discretion to allow vital discharges that otherwise violate Federal Water Pollution Control Act to continue pending application for permit).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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