No. _____

In The
Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

TIMOTHY S. BISHOP
MAYER, BROWN, ROWE & PLATT
190 South LaSalle Street
Chicago, IL 60603
(312) 701-7829

JOHN J. FUMERO
SHERYL GRIMM WOOD
SCOTT ALLEN GLAZIER
SOUTH FLORIDA WATER MANAGEMENT DISTRICT
3301 Gun Club Road
West Palm Beach, FL 33406
(561) 682-6262

JAMES EDWARD NUTT
Counsel of Record
SOUTH FLORIDA WATER MANAGEMENT DISTRICT
3301 Gun Club Road
West Palm Beach, FL 33406
(561) 682-6253

Counsel for Petitioner

QUESTIONS PRESENTED

The South Florida Water Management District (SFWMD) is the governmental agency that manages an extensive system of levees and canals throughout populous south Florida and the Everglades region. For decades it has pumped public waters to prevent catastrophic flooding and allocate water supply. For thirty years, the federal and state agencies responsible for the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) program have considered the SFWMD's movement of water to fall outside the scope of the federal NPDES permit program because nothing is "added" to the navigable waters from the pumps. The Eleventh Circuit, in conflict with decisions from other courts of appeals and without deference to the agencies, concluded that because the pumped water contains some pollutants that would not reach the receiving water "but for" the pumping, such pumping alone constitutes an "addition" of pollutants requiring an NPDES permit.

The questions presented, which are of great national importance, are:

1. Whether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an "addition" of a pollutant "from" a point source triggering the need for a National Pollutant Discharge Elimination System permit under the Clean Water Act.

2. Whether the court below should have deferred to the consistent and long-held federal and state agency position that the SFWMD's pumping does not constitute an "addition" that requires a National Pollutant Discharge Elimination System permit.

RULES 29.6 AND 14.1 STATEMENT

Petitioner, South Florida Water Management District, is a governmental entity of the State of Florida created by Section 373.069(e), Florida Statutes.

Respondents are the Miccosukee Tribe of Indians of Florida, a federally recognized Indian tribe, and the Friends of the Everglades, Inc., a non-profit Florida corporation.

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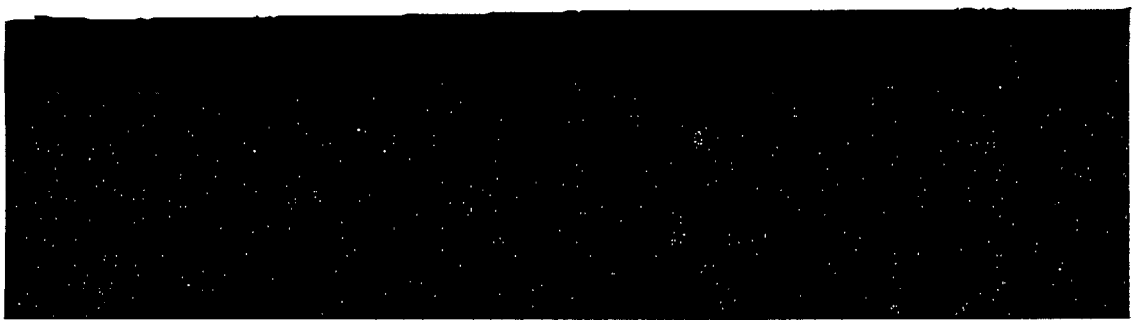

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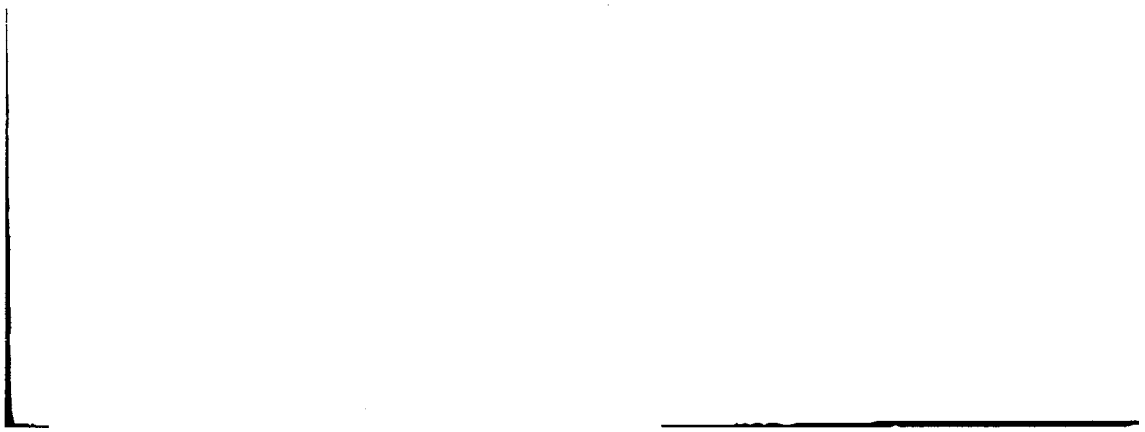

PETITION FOR WRIT OF CERTIORARI

Petitioner South Florida Water Management District (SFWMD) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 280 F.3d 1364. The opinion of the district court (App., *infra*, 15a-30a) is unofficially reported at 1999 WL 33494862 and 49 ERC 2065. The district court's final summary judgment (App., *infra*, 31a-32a) is unreported. The court of appeals order denying rehearing and rehearing en banc (App., *infra*, 33a-34a) is unreported.

JURISDICTION

The opinion of the court of appeals was entered on February 1, 2002. Petitioner's motion for rehearing and rehearing en banc was denied June 21, 2002. On August 29, 2002, Justice Kennedy extended the time for filing the petition for certiorari to and including October 21, 2002. App., *infra*, 35a-36a. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutory and regulatory provisions pertinent to this case are set forth at App., *infra*, 37a-42a.

STATEMENT

The fundamental issue in this case is whether a state water management agency may pump water, to which it adds nothing, from one side of a levee to the other without the need for a federal National Pollutant Discharge

Elimination System ("NPDES") permit or, conversely, whether the Clean Water Act ("CWA") NPDES program reaches such traditionally local water management activities. To regulate local water management under the federal program designed to eliminate waste discharges fundamentally alters the CWA's statutory scheme.

A NPDES permit is required under the CWA only for those activities that add pollutants to the navigable waters from a point source.[1] See 33 U.S.C. §§ 1311 & 1362(12). The Eleventh Circuit, despite acknowledging that SFWMD does not increase the amount of pollutants in the navigable waters, concluded that because the pumped water contains some pollutants that would not reach the receiving water "but for" the pumping, the pumping constitutes an "addition" of pollutants to the navigable waters "from" a point source and, therefore, that the SFWMD must obtain a NPDES permit under the CWA.

The Eleventh Circuit's expansive interpretation of NPDES jurisdiction increases an already sharp conflict among the courts of appeals and ignores the position of the responsible federal and state agencies that no permit is required. The District of Columbia and Sixth Circuits adopted the position of the Environmental Protection Agency ("EPA") that an "addition" "from" a point source occurs only if the point source itself physically introduces a pollutant into the water from the outside world and that the transfer of pre-existing pollutants from one water body to another is not the "addition" of a pollutant to the receiving water body "from" the point source. *National Wildlife*

[1] A "point source" is broadly defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit * * * from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). This case involves the terms "addition" and "from" used by Congress to delineate the scope of NPDES. See 33 U.S.C. § 1362(12).

Federation v. Consumers Power Company, 862 F.2d 580, 581 (6th Cir. 1988); *National Wildlife Federation v. Gorsuch, Admin.*, U.S. *Environmental Protection Agency*, 693 F.2d 156, 179 (D.C. Cir. 1982). The Fourth Circuit held that "those constituents occurring naturally in the waterway or occurring as the result of other industrial discharges do not constitute an addition of pollutants by a plant through which they pass," concluding that it is beyond EPA's authority to require a plant through which pre-existing pollutants pass to treat or reduce them. *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1975).

The First and Second Circuits, in contrast, rejected the agencies' interpretation and found an "addition" in the transfer of pre-existing pollutants between wholly separate, naturally distinct water bodies despite nothing being added to the transferred waters. *Dubois v. U.S. Dep't of Ag.*, 102 F.3d 1273 (1st Cir. 1996) and *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2nd Cir. 2001). The Eleventh Circuit in this case further expanded the NPDES to regulate the states' management of surface waters within a naturally singular water body (separated only by manmade levees) by pumps from which no pollutants originate.

The Eleventh Circuit's ruling is legally erroneous. The notion that pumping water, without adding anything to the water being pumped, constitutes the "addition" of pollutants is inconsistent with the plain language, legislative history and purposes of the CWA. The Eleventh Circuit also erred in refusing to give any deference to the reasonable and longstanding interpretation of the "addition" requirement by the responsible agencies.

Given (1) the deep divide among the circuits, (2) the Eleventh Circuit's failure to acknowledge the consistent position of the federal and state agencies that are together responsible for implementing the CWA, (3) the critical role that states play in managing water throughout the nation,

and (4) the nationwide importance of effectuating the balance intended by the CWA between federal and state regulatory programs to resolve water quality and quantity issues, it is time for this Court to address the questions presented.

It is especially appropriate and necessary to review the extension of NPDES jurisdiction in this case. So expansive is the Eleventh Circuit's ruling that it is difficult to imagine any significant state or municipal surface water management system that would not require federal permitting. Congress did not intend to federalize regulation of local water management activities when it adopted the CWA. When it set out to eliminate industrial and municipal waste discharges into the nation's waters, Congress did not envision that the states' pumping of water from one side of a levee to the other – a traditional water management activity – would require a state to obtain a federal permit for the "discharge" of "pollutants" into the navigable waters from a "point source."

The situation here is particularly urgent. The subject pump station is but one of 391 water control structures and hundreds of miles of canals and levees that make the U.S. Army Corps of Engineer's Central & Southern Florida Flood Control Project (C&SFFCP) for which the SFWMD is the local sponsor. The unfounded application of NPDES permitting to the C&SFFCP threatens to impede local control of water management and land use decisions and to divert scarce resources from a joint federal and state eight billion-dollar, multi-agency effort to re-plumb the C&SFFCP project to restore the Florida Everglades and develop south Florida's water resources. Additional notices of intent to sue now threaten unprecedented litigation against eleven more pump stations. Two additional NPDES lawsuits have been filed against other C&SFFCP water control structures. See *Friends of Everglades v. SFWMD*, Case No. 02-80309-Civ-Middlebrooks (S.D. Fla.); *Florida Wildlife Federation v. SFWMD*, Case No. 02-80918-Civ-Middlebrooks (S.D. Fla.).

A. The Statutory And Regulatory Scheme.

The CWA envisions a close regulatory partnership between the state and federal governments to restore and maintain the chemical, physical and biological integrity of the Nations' waters. *Arkansas v. Oklahoma EPA*, 503 U.S. 91, 101 (1992); *International Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987). In creating this scheme, Congress struck a careful balance among competing policies and interests. *Id.* The CWA relies heavily upon the states to maintain primary responsibility to prevent, reduce and eliminate pollution, to plan the development and use of land and water resources, and to consult with the Environmental Protection Agency. 33 U.S.C. §§ 1251(b), 1313(d) & (e), and 1329. Congress did not want to interfere any more than necessary with state water management. 33 U.S.C. § 1251(g); *Gorsuch*, 693 F.2d at 178. Thus, CWA's cooperative federalism scheme was predicated upon the value of local input and experimentation. The issue is not whether the SFWMD can avoid regulation, but rather how the participating agencies regulate the pumping induced water quality changes at issue here within the framework of the CWA.

1. Basic Elements Of The Federal NPDES Permit Program.

Section 402 of the CWA created the NPDES program, which gives EPA regulatory authority to eliminate the discharge of industrial and municipal wastes into the nation's waters. See 33 U.S.C. § 1342; *Gorsuch*, 693 F.2d at 175. Section 301(a) of the CWA generally prohibits the discharge of any effluent into a navigable body of water unless the point source has obtained a NPDES permit. 33 U.S.C. § 1311(a); *Arkansas*, 503 U.S. at 102.

A "discharge" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) & (16); 40 C.F.R. § 122.2; Fla. Admin.

Code, Ch. 62-620.200. Thus, under the statute's plain text a NPDES permit is only required where there is an "addition" of a pollutant "from" a point source. To "add" is "to join or unite so as to increase the number, size, quantity, etc." WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (Encycl. Ed. 1977).

2. State Regulation Of Pollution Caused By Hydrographic Modifications.

Congress has left the regulation of nonpoint sources up to the states under Section 319. See 33 U.S.C. § 1329. Nonpoint source pollution is broadly defined by exclusion to be those water quality problems not subject to the Section 402 NPDES program. *Gorsuch*, 693 F.2d at 166.[2] The states are directed to take steps to address nonpoint source pollution, but left to determine for themselves the nature of those steps. 33 U.S.C. §§ 1313(d) & (e) & 1329.

> In 1972, the 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 [the state] process * * * judging that those matters were appropriately left to the level of government closest to the sources of the problem.

S.Rep.No. 370, 95th Cong., 1, Sess. 8-9, 1977; reprinted 3 Legislative History of the Clean Water Act of 1977, A Continuation of the Legislature History of the Federal Water Pollution Control Act 642-43, Ser. No. 95-14; 1977 U.S. Code Cong. & Ad. News, 4326, 4334-35.

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[2] Section 208 (33 U.S.C. § 1288) referred to in *Gorsuch* and the legislative history has been in practice succeeded by Section 319 (33 U.S.C. § 1329), both establishing the mechanisms through which the states are to establish processes to regulate nonpoint source pollution.

In the nonpoint source part of the CWA, Congress explicitly contemplates that pollution[3] caused by changes to the movement, flow or circulation of any navigable water, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities, will be controlled by the states under nonpoint source procedures and methods develop with guidance from EPA. 33 U.S.C. § 1314(f)(2)(F); See EPA, *The Control of Pollution Caused by Hydrographic Modifications* (1973); *Consumers Power*, 862 F.2d at 588. The legislative history confirms that Congress intended pollution caused by changes to the flow of water to be treated under nonpoint source programs:

> The committee . . . expects [EPA] to be most diligent in gathering and distribution of the guidelines for identification of nonpoint sources and the information on processes, procedures, and methods for control of pollution from *such nonpoint sources as . . . natural and man-made changes in the normal flow of surface and ground waters*.

H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 109 (1971), reprinted 1 Legislative History of the Water Pollution Control Act Amendments of 1972 at 796 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93-1. (emphasis supplied).

[3] The term "pollution" as distinguished from a "pollutant" is more broadly defined to "mean the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." Section 502(19), 33 U.S.C. § 1362(19)

3. Delegation Of NPDES Administration To The State.

The CWA contemplates that states will implement the NPDES permit program established under Section 402 of the CWA. 33 U.S.C. § 1251(b). Section 402 establishes the NPDES permitting regime, which provides for the states to administer the NPDES permit program for discharges into navigable waters within their jurisdiction. 33 U.S.C. § 1342(b). The Florida legislature, in turn, has expressly authorized its Department of Environmental Protection ("DEP") to assume responsibility for implementing the NPDES program in Florida. § 403.0885, Fla. Stat.

Pursuant to these statutes, EPA and DEP entered into a Memorandum of Agreement by which EPA has authorized DEP to implement the federal NPDES program in Florida. See *National Pollutant Discharge Elimination System Memorandum of Agreement between the State of Florida and the United States Environmental Protection Agency* (1995). The memorandum of agreement creates a close partnership under which DEP is given primary responsibility to establish the State NPDES program priorities which are consistent with national NPDES goals and objectives with oversight by EPA. *Id.*

B. SFWMD And Its Water Control Facilities.

The SFWMD is one of five water management districts established to provide stewardship over Florida's public water resources. § 373.069, Fla. Stat. Under DEP's supervision the SFWMD's nine-member board establishes and implements the state's water policies throughout its 16 county jurisdiction from Orlando to Key West. See §§ 373.069(e), 373.073 & 373.016, Fla. Stat.

Florida's water management districts are drawn along hydrological, not political, lines to best manage water on a regional, watershed basis. § 373.069, Fla. Stat. SFWMD is responsible for the Lake Okeechobee watershed, an

immense, integrated and unique system of hydrologically connected lakes, rivers, bays and surface waters. See *Id.*; § 373.4595, Fla. Stat. Within this watershed lie populous municipalities, vast agricultural communities, and precious natural resources, including Florida's Everglades.

The watershed is managed by the U.S. Army Corps of Engineers' Central & Southern Florida Flood Control Project (C&SFFCP), for which the SFWMD is the local sponsor. § 373.1501, Fla. Stat. The C&SFFCP is a complex system of levees, canals, and flow diversion facilities used to control the movement, flow and circulation of water. The C&SFFCP was authorized by § 203 of the Flood Control Act of 1948 (62 Stat. 1176), in response to catastrophic loss of life and property following two major hurricanes in the late 1920's. Today the C&SFFCP is operated by the SFWMD, under Corps guidelines and regulatory schedules, to allocate a strained water supply and provide vital flood protection.

As local sponsor, the SFWMD is charged with implementing the federal government's ongoing comprehensive review ("Restudy") of the C&SFFCP to restore the Everglades ecosystem. § 373.1501(1)(h) & (2), Fla. Stat. The Restudy has evolved into the Comprehensive Everglades Restoration Plan ("CERP"), an eight billion-dollar joint federal and state effort to re-plumb the C&SFFCP to restore the everglades while accommodating the region's competing urban and agricultural interests. See *Water Resources Development Act of 1996 § 528, P.L. 104-303 ("WRDA '96"); WRDA 2000, Title VI, § 601 P.L. 106-541 ("WRDA '00").*

This case involves the S-9 pump station, which is one of 62 pump stations that move water through the canals and levees of the C&SFFCP. See App., *infra*, 2a. The S-9 is located at the juncture of the C-11 canal and the L-37 and L-33 levees. See *id.* at 3a. The L-37 levee extends north and the L-33 extends south from the S-9, creating an

impoundment area to the west known as Water Conservation Area 3A ("WCA 3A"). *Id.* The WCA 3A encompasses over 491,000 acres of historic Everglades. The S-9 moves water through the canal from east to west, one side of the levees to the other, to control quantities of water in the C-11 west basin. See *id.* The C-11 west basin is over 48,000 acres with a population over 135,000. As part of the Comprehensive Everglades Restoration, Congress authorized $225 million for two projects that address water quality problems resulting from the S-9 pumping, i.e., the WCA 3A/3B Levee Seepage Management project and the C-11 Impoundment and Stormwater Treatment Area. *WRDA '00*, § 601(b)(2)(C).

The SFWMD's structures, including S-9, add nothing to the waters they manage. App., *infra*, 3a. They are merely tools used to move water and determine the quantity of water in different parts of the system. Without the levee system, the managed waters would naturally flow together as a sheet across south Florida. App., *infra*, 3a n.2 & 8a n.8. The pre-existing pollutants within the managed waters are naturally occurring or were added from other sources upstream of the levees. *Id.* at 3a. The C&SFFCP is the primary water system which receives polluted waters from all other point and nonpoint sources throughout its jurisdiction. Most pollutants are received from the numerous municipalities, secondary drainage districts, and others that drain water into the larger C&SFFCP system.

C. Regulatory Oversight And Permitting Of The S-9 Pump Station.

The C&SFFCP remains one of the most scrutinized water programs in the nation due to federal and state efforts to restore the Everglades while accommodating competing urban and agricultural needs. Through both litigation and legislation, the federal and state governments have jointly developed strategies and *non-NPDES*

permit programs for those C&SFFCP structures that impact the Everglades area, including the S-9 pumping to the WCA-3A.

In 1988, the federal government sued several Florida agencies to prevent polluted water from entering Everglades National Park and Loxahatchee Refuge through the C&SFFCP. *United States v. South Florida Water Management District*, Case No. 88-1886-Civ-Hoeveler (U.S. Dist. Ct. S.D. Fla) ("USA lawsuit"). The USA lawsuit was settled in 1992 by consent decree. *United States v. SFWMD*, 847 F. Supp. 1567 (S.D. Fla. 1992), rev'd on other grounds, 28 F.3d 1563 (11th Cir. 1994). The consent decree established an ambitious strategy to restore and preserve the Everglades ecosystem. 847 F. Supp. at 1569. It required strategies designed to bring water entering the Everglades and Loxahatchee refuge into compliance with applicable water quality standards, including the development of a permitting system for discharges into waters managed by the District. *Id.* EPA and other federal agencies approved the consent decree. *Id.* at 1577.

Also in 1993, the South Florida Ecosystem Restoration Task Force ("Task Force") was created by interagency agreement between the federal agencies, including EPA and the Corps, to oversee all aspects of Everglades restoration. By 1996, the Task Force was codified and expanded to include state, local and tribal representatives. WRDA '96 § 528(f). Task Force members include SFWMD, DEP and Respondent Miccosukee Tribe. *Id.* The Task Force oversees all activities of the C&SFFCP's Restudy and is specifically directed by Congress to develop a comprehensive plan to restore, preserve and protect the Everglades and its water quality. *Id.* § 528(b). The Task Force requires EPA to oversee the efforts of DEP and the SFWMD to improve water quality within the C&SFFCP, including of course S-9 and WCA-3A. *Id.* § 528(f)(2).

In 1994, the Florida legislature adopted the Everglades Forever Act ("EFA") to implement the Consent

Decree and more broadly develop plans to resolve water quality and quantity problems facing the Everglades Ecosystem in coordination with the federal government's efforts. § 373.4592, Fla. Stat. The EFA established a state permitting system for discharges from the C&SFFCP structures, including S-9, into an Everglades Protection Area, which includes WCA-3A. The federal courts and the Task Force continue to actively monitor Florida's compliance with the USA settlement, the EFA and other federal and state laws.

The S-9 has been permitted under the EFA. § 373.4592(9)(k) & (l). The S-9 permit requires SFWMD to: 1) analyze water quality in the drainage basin for the S-9 structure, 2) systematically identify nonpoint source and point sources of pollution in the drainage basin, and 3) eliminate the nonpoint sources of pollution through the SFWMD's regulatory authority. The S-9 permit also requires schedules and strategies for the water being pumped by S-9 to meet water quality standards. Section 373.4592(11), Fla. Stat. The S-9 permit withstood prior judicial challenge by the respondents. *Miccosukee Tribe v. SFWMD*, 721 So. 2d 389 (Fla. 3d Dist. Ct. App. 1998).

Despite such intense and longstanding regulatory oversight and scrutiny by the agencies responsible for NPDES permitting, neither EPA nor DEP has ever suggested that the SFWMD's pumping activities fall within the scope of the NPDES program. To the contrary, the agencies have taken the position that the S-9 pumping does not trigger the CWA's NPDES requirements, as DEP set forth in a recent opinion letter. App., *infra*, 43a-48a.

D. Respondents' Citizen's Suit Challenge To The S-9 And The District Court's Ruling.

On January 21, 1998, respondents, Miccosukee Tribe of Indians and Friends of the Everglades, Inc., filed two separate citizen suits challenging operation of the S-9

pump station without a NPDES permit. After the suits were consolidated, the parties filed cross motions for summary judgment on the legal question whether S-9 pumping constitutes an "addition" "from" a point source for which a NPDES permit was required. The district court entered an order granting summary judgment in favor of the Tribe (App., *infra*, 15a) and enjoining the transfer of water through the S-9 pump station without a NPDES permit (App., *infra*, 31a-32a. The parties stipulated to a stay pending appeal because pumping is necessary to prevent catastrophic flooding of several municipalities in western Broward County.

The district court relied upon the First Circuit's decision in *Dubois* to hold that "it was not necessary for a conveyance to be the originator of the transferred contaminants to have an 'addition.'" The court did not even attempt to distinguish the contrary cases from the D.C., Sixth or Fourth Circuits. It was also silent as to why the position of the responsible administrative agencies was not given any consideration.

E. The Eleventh Circuit's Decision.

The Eleventh Circuit reversed the injunction, finding that the lower court did not adequately consider the public interests. It affirmed, however, the district court's finding that the S-9 required a NPDES permit.

The court flatly declined any deference to EPA and, therefore, refused to follow *Gorsuch* or *Consumers Power*. App., *infra*, 5a n.4. The court then rejected, in a footnote, SFWMD's contention that NPDES only applies to point sources from which pollutants originate. App., *infra*, 7a n.6.

The court did not even address the rule from *Appalachian Power* that a point source operator is not responsible for pre-existing pollutants, i.e., those naturally occurring in the waters or those introduced by others. Instead, it

relied upon *Dubois* and *Catskill* to declare that an "addition" "from" a point source occurs any time the point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed. App., *infra*, 7a-9a.

REASONS FOR GRANTING THE PETITION

This Court should grant review because several circuits are divided over the fundamental scope of the NPDES program. The Eleventh Circuit's decision misinterprets the "addition" requirement of the CWA, creating expansive, intrusive and overreaching federal regulatory jurisdiction over the states' traditional water management activities. The panel's decision ignores congressional intent, eviscerates the CWA's jurisdictional requirements, seriously infringes prerogatives reserved to states and local government in our system of federalism and holds the SFWMD responsible for pollutants added to the waters from other sources. The Eleventh Circuit also failed to give sufficient consideration to the longstanding views of the federal and state agencies charged with implementing the CWA to which deference is properly owed.

I. THE COURTS OF APPEAL ARE IN CONFLICT AS TO THE APPLICABILITY OF THE NPDES PROGRAM TO THE MOVEMENT OF WATER CONTAINING PRE-EXISTING POLLUTANTS.

The Circuits are sharply divided between those that have defined the terms "addition" and "from" to limit NPDES to point sources from which pollutants are added to navigable waters and those that have much more broadly defined the terms "addition" and "from" to include

any changes to the "natural flow" of water that causes polluted water to pass from one water body to another.

A. EPA's Traditional "Addition" Test.

Cases from the Fourth, District of Columbia, and Sixth Circuits have interpreted the phrase "addition of a pollutant" to mean that there must be the introduction of a pollutant and it must be from the point source. See *Appalachian Power*, 545 F.2d at 1377; *Gorsuch*, 693 F.2d at 179; *Consumers Power*, 862 F.2d at 581. Those circuits have consistently read the CWA to limit NPDES jurisdiction to only those pollutants that originate from a point source, i.e., pollutants that are physically introduced into the navigable waters from the outside world. See, e.g., *Gorsuch*, 693 F.2d at 179.

The seminal Fourth Circuit case, *Appalachian Power*, recognized that "[t]hose constituents occurring naturally in the waterways or occurring as a result of other industrial discharges, do not constitute an addition of pollutants by a plant through which they pass." 545 F.2d at 1377. In *Appalachian Power*, industry challenged EPA's chemical effluent standards because the plant was being held responsible not only for pollutants that it added to the waters, but also for those that existed prior to the water passing through the plant. The court found it contrary to the intent of the CWA, and beyond EPA's authority, to require a point source operator to be responsible for pre-existing pollutants, naturally occurring or introduced to the navigable waters by others. *Id.*

In *Gorsuch*, the District of Columbia Circuit accepted EPA's view that the point or nonpoint source character of pollution is established when the pollutants first enter a navigable water and does not change when the existing pollutants later pass from one body of navigable water to another. See 693 F.2d at 175. There a dam released polluted water from a reservoir into the downstream river.

The pollutants were added at the reservoir, not from the point source through which they passed.

The Sixth Circuit in *Consumers Power* followed *Gorsuch*, holding that the movement of pollutants already in the water was not an "addition" of pollutants to navigable waters. 862 F.2d at 581. A facility pumped water out of Lake Michigan uphill into separated impoundment areas. The waters were altered and caused pollution when later pumped from the impoundment into the lake. 862 F.2d at 581. The court agreed with *Gorsuch* and EPA that a transfer of water through a point source, that adds nothing to the waters, does not trigger the NPDES.

Thus, under the CWA's "addition" test, as long interpreted by the agencies and applied by the Circuits, the SFWMD would not be responsible for pollutants existing in the waterways before the water is passed through S-9 because the pollutants originated from other sources, i.e., they were not "added" from the point source through which the water only passed.

B. The Eleventh Circuit's Expansive "But For" Test.

In two footnotes, the Eleventh Circuit summarily dispensed with EPA's "addition" test. In the first, the court denied the responsible agencies any deference whatsoever. App., *infra*, 6a n.5. In the second footnote, the court declared that "to be *from* a point source, the point source does not necessarily have to be the source or origin of the pollutants." App., *infra*, 7a n.6. The Eleventh Circuit then held that any time a point source changes the natural flow of a body of water and "but for" that change pollutants would not have entered a second body of water, an addition of pollutants from a point source occurs. App., *infra*, 8a.

The Eleventh Circuit relied upon *Dubois* and *Catskill* in which the First and Second Circuits found an "addition"

from the transfer of pre-existing pollutants between two naturally distinct water bodies despite nothing being "added" to the waters. In *Dubois*, a ski company took water from a river, pumped it through snowmaking equipment, and released it into a lake. In *Catskill*, New York City transferred water from a reservoir, through a tunnel, and into a river that feeds another reservoir. Both conveyance systems were required to attain a NPDES permit even though neither added any pollutants to the waters they moved.[4]

C. The Conflict Is Deep And Should Be Immediately Resolved.

The Fourth, the District of Columbia and the Sixth Circuit cases cannot be distinguished and are flatly at odds with the Eleventh Circuit's holding that pumping water across a levee constitutes an "addition" for NPDES purposes. If the SFWMD were located in those circuits, it would not be required to attain a NPDES permit in the circumstances of this case. The states and landowners are entitled to consistent treatment under the CWA wherever they may be located. Water management activities that can be integrated within one state's Section 319 nonpoint source management programs should not be subjected

[4] This case is distinguishable from both *Dubois* and *Catskill* because the Eleventh Circuit applied its "but for" test to what was admittedly a naturally singular water body, separated only by man-made levees. App., *infra*, 8a n.8. *Dubois* also is distinguishable from both *Catskill* and this case because the pumped water in *Dubois* was removed from the navigable waters for a private commercial use. The waters moved by New York City and the SFWMD do not leave the public domain and cause no increase in the level of pollutants. They are not the origin of any pollutants. It is the application of NPDES to a states' water management under these circumstances that the SFWMD particularly disputes.

to different technology-based effluent standards, multi-million dollar fines and criminal penalties if conducted in another. See Part II.C, *supra*, 21.

Given this split among the circuits, confusion surrounding the appropriate scope of the NPDES program will continue and likely escalate absent the Court's immediate intervention. The scope of NPDES jurisdiction is far too important a national issue to allow this conflict to go unresolved.

II. THE ELEVENTH CIRCUIT ERRED IN FINDING THE MOVEMENT OF WATER TO BE AN ADDITION OF POLLUTANTS FROM A POINT SOURCE SUBJECT TO NPDES.

The Eleventh Circuit's expansive interpretation of the "addition" "from" requirement is incorrect. It contradicts the CWA's plain language, the purpose of the NPDES program, and Congress's intent that the CWA not impair state and local water management any more than necessary.

A. The Plain Language Of The CWA Requires The Point Of Discharge To Be The Source From Which The Pollutants Originate.

The NPDES has jurisdiction only over the "discharge of a pollutant." 33 U.S.C. § 1311. The phrases "addition of pollutants" and "from any point source" plainly limit the type of "discharge" that is subject to the federal NPDES. 33 U.S.C. § 1362(12). The District of Columbia and Sixth Circuits explained:

> It does not appear that Congress wanted to apply the NPDES program wherever feasible. Had it wanted to do so, it could easily have chosen suitable language, e.g. 'all pollution released through a point source.' Instead, as we have seen, the

> NPDES system was limited to 'addition' of 'pollutants' 'from' a point source.

Gorsuch, 693 F.2d at 176; *Consumers Power*, 862 F.2d at 586. Congress also could have employed broader concepts, such as those used by the Eleventh Circuit to encompass changes in the "natural flow" of water. Instead, Congress chose the "addition" and "from" terminology "to indicate the scope of the control requirements under the CWA." 2 Leg. Hist. 1495. To "add" is "to join or unite so as to increase the number, size, quantity, etc." WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (Encycl. Ed. 1977). The number, size or quantity of pollutants in the navigable waters are not increased from their movement through S-9.

The CWA makes an express distinction between "pollution" and "pollutants." The term "pollution" is more broadly defined to mean "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19). The term "pollutants" more particularly refers to tangible wastes that are added to the waters. *Id.* § 1362(6). Pollution caused by the movement of water, as opposed to the discharge of pollutants, is regulated by the states under nonpoint source programs. *Id.* § 1314(f)(2)(F).

In Section 304(f), 33 U.S.C. § 1314(f), Congress directed EPA to develop guidelines, to be implemented by the states' nonpoint programs, for procedures and methods to control pollution caused by changes to the movement, flow or circulation of any navigable water, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities. *Id.*; *Consumers Power*, 862 F.2d at 588. EPA has complied by issuing several guidance documents dealing with pollution caused by flow diversion facilities. See, e.g., EPA, *The Control of Pollution Caused by Hydrographic Modifications* (1973) (discussion of water quality impacts associated with levees, canals and impoundments with discussion of best management practices).

EPA naturally and plainly reads these texts as directing the NPDES to regulate those sources from which pollutants originate and are introduced into the waters and directing the states to regulate pollution caused by changes to the movement and flow with guidance from EPA. Moreover, these texts contradict the Eleventh Circuit's interpretation that a discharge for NPDES purposes occurs whenever pollutants that were added from *other sources* later *pass through* a point source from one portion of the navigable waters to another.

Congress set as the "national goal that the discharge of pollutants into the navigable waters be eliminated." 33 U.S.C. § 1251(a)(1). In this context, it is inconceivable that "discharge" meant the diversion of natural flow of water from one water body to another. Congress could not have intended to *eliminate* the management of water for flood control and water supply purposes.

B. The NPDES Program Was Intended To Regulate Only Those Point Sources From Which Pollutants Originate.

EPA's plain reading of the "addition" requirement is supported by the purposes of the NPDES program. The focus of Congress in creating the NPDES program was to eliminate the discharge of industrial and municipal waste into the nation's waters. See 33 U.S.C. § 1251(a)(1); *Gorsuch*, 693 F.2d 156, 175. Prior law required a permit only for "industrial" discharges of "refuse" into navigable waters. *Refuse Act of 1899*, 33 U.S.C. § 407. For the NPDES program, Congress broadened the definition of a "discharge" to add municipal and other waste. See, e.g., Leg. Hist. at 1415, 1494. Thus, the NPDES program was intended to regulate the entry of pollutants into the navigable waters, not to address removal or treatment of pollutants previously introduced or naturally occurring. See *Appalachian Power*, 545 F.2d at 1377; see also, *P.F.Z.*

Properties, Inc. v. Train, 393 F. Supp. 1370, 1381 (D.C. 1975). Thus, the Eleventh Circuit improperly focused upon changes to the movement of pollutants *subsequent* to their being added to the waters, instead of properly determining whether any pollutants were introduced to the waters.

Since the SFWMD has no choice but to move the state's water for flood control, water supply and environmental protection, under the Eleventh Circuit's interpretation the SFWMD becomes responsible for removing or treating every pollutant without giving consideration to its origin. As a result, water managers tasked with stewardship over the state's waters are wrongfully treated on par with industrial and municipal wastewater sources from which pollutants are discharged directly into the water.

C. State Non-NPDES Programs Are The Appropriate Mechanism Under The CWA To Regulate State Water Management Activities.

The Eleventh Circuit failed to recognize that NPDES permits are not an appropriate mechanism for regulating existing water management activities. Congress made clear its intention not to interfere any more than necessary with the state's water resource management programs, directing the federal agencies 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." 33 U.S.C. § 1251(g). It is through the state's non-NPDES programs that these Congressional policies are implemented. See 33 U.S.C. § 1329 & 1313(d) & (e) (Sections 319 & 303(d) & (e) of the CWA). The state programs are a better regulatory tool in this case.

Section 319 – Nonpoint Source Management Programs, Section 303(d) – Total Maximum Daily Load

program ("TMDL"), and Section 303(e) – Continued Planning Process (CPP) take into account the vital local considerations, including flood control, water supply and environmental protection that drive state water management programs. Collectively, these programs provide the framework through which the cumulative impact of human activities can be prevented and mitigated on a watershed basis. Through watershed management processes, federal, state, regional and local governments in partnership with landowners and businesses, can balance local water resource and environmental needs. Additionally, Section 319 requires states to establish programs to minimize nonpoint source pollution, typically through the implementation of best management practices.

The Eleventh Circuit ignored important differences between the CWA's state and local programs and NPDES permits. By targeting wastewater outflows, the NPDES program aims at achieving maximum "effluent limitations" on "point sources." *Environmental Protection Agency v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 204 (1976). Thus, NPDES discharge permits mandate the reduction of discharges to the maximum extent technology will allow. *Id.*; 33 U.S.C. § 1311(b) & (c). Those technology-based standards require compliance with water quality standards, without consideration of local water resource planning and wildlife management goals. Thus, it is illogical to apply NPDES permits to a state's water management facilities that do not contribute to the pollutants in the waters.

Unlike industrial or municipal wastewater outflows, which are continuous and of known quality, discharges from the S-9 are highly variable in timing and constituents. The S-9 also provides many public water resource management benefits. Its use varies with local circumstances, seasonal meteorological conditions, Florida's infamous cycles of rain and drought and water supply needs. Only through nonpoint programs will the state

have the flexibility to maintain the benefits of the C&SFFCP in balance with control of its detrimental effects on water quality. Attempting to apply NPDES point source permits and requirements on nonpoint source discharges is unsound scientifically and economically. Thus, as recognized in Section 304(f)(2)(F), nonpoint source programs provide a far more appropriate mechanism for regulatory oversight for water management facilities like the S-9. 33 U.S.C. § 1314(f)(2)(F).

It is inconceivable that Congress intended the Eleventh Circuit's interpretation. It is EPA's "addition" test that ensures NPDES permits properly impose the technological controls necessary to reach strict effluent limitations only upon the sources from which pollutants are introduced to the waters, and not upon the states that have to balance competing interests in managing them. Under the Eleventh Circuit's interpretation, all pollutants introduced from innumerable upstream sources into the state's waters, whether from point sources or nonpoint sources, will have to be removed or treated by the SFWMD as if they were generated by the District's activities. This is inequitable and is the reason that watershed management is needed to address such cumulative impacts. By implementing a watershed management plan, those responsible for generating and discharging nonpoint source pollution can be held accountable. The result of this case, left uncorrected, will impair these critical state water management decisions, contrary to Congress' express policy.

By requiring a NPDES permit for each subsequent transfer of water after pollutants have already been introduced, the Eleventh Circuit has fundamentally extended the scope of the NPDES program to include all state water managers and others that must move water. The Eleventh Circuit's test federalizes local water management activities that have been left to the states throughout the 30 years since the CWA was passed. If the

Eleventh Circuit is correct, hundreds of thousands of water control structures previously regulated under state programs, will be operating illegally without a NPDES permit. Without a clearer indication that is what Congress intended, the Court should reject such a result.

For these reasons, the decision to impose NPDES requirements upon the S-9 facility, an integral part of the state's local water resource management system, contradicts and substantially alters the complex balance between federal and state interests struck by the CWA.

III. THE COURT ERRED IN FAILING TO GIVE ANY CONSIDERATION, MUCH LESS DEFERENCE, TO THE CONSISTENT AND LONG-STANDING POSITION OF THE RESPONSIBLE FEDERAL AND STATE AGENCIES GIVEN THE COOPERATIVE FEDERALISM INTENDED BY THE CWA'S STATUTORY SCHEME.

The Eleventh Circuit erred by substituting its own judgment for the well-developed expert position of the responsible agencies. This Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it has been entrusted to administer." *United States v. Mead*, 533 U.S. 218, 227-28 (2001). In *Mead*, the Court clarified that judicial respect for the views of an agency extend beyond formal rules to the interpretations reflected by the agency's administrative practices. *Id.* at 226-27.

The fair measure of deference is understood to vary with circumstances. *Id.* at 228; *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). "The weight [accorded an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to

persuade, if lacking power to control." *Mead,* 533 U.S. at 228, *quoting Skidmore* at 140.

In the thirty years since the CWA was adopted, EPA has consistently adhered to the "addition" test that was approved in *Gorsuch* and *Consumers Power*. DEP's opinion letter reflects both agencies' continued use of the "addition" test and belief that under the "addition" test the S-9 is not subject to the NPDES. App., *infra*, 43a-48a.

The agencies' position has also been clearly manifest by their actions. They have long maintained extensive scrutiny of the S-9 through: 1) direct participation in the USA lawsuit and the judicial consent decree which established the Everglades protection plan; 2) membership in the multi-agency South Florida Ecosystem Restoration Task Force established by Congress; 3) the development of state permitting programs for the S-9; and 4) overseeing congressional approval of the joint federal-state Comprehensive Everglades Restoration Plan. See Statement Parts B & C, *supra,* 8-12. It is through these mechanisms that the agencies have jointly and deliberately addressed water quality issues arising from the S-9 with state programs rather than the NPDES. *Id.*

A number of factors militate in favor of greater rather than lesser deference to the agencies in this case. The persuasiveness of their position has already been discussed. Court's have recognized deference to EPA is particularly warranted since the CWA was enacted with the advice and cooperation of EPA and its predecessor agencies. See *E.I. du Pont de Nemours and Co. v. Train*, 430 U.S. 112, 134-35 (1977). The Court has consistently deferred to EPA's reasonable interpretations of the CWA, "having in mind the complexity and technical nature of the statutes and the subjects they regulate, the obscurity of the statutory language, and EPA's unique experience and expertise in dealing with the problems created by these conditions." *Id.* at 135, *quoting*, *Train v. NRDC*, 421 U.S 60, 87 (1975) and *American Meat Inst. v. EPA*, 526 F.2d

442, 450 n.16 (1975). Both EPA and DEP have critical expertise and experience in navigating the complexities of the labyrinthine CWA.

A. The Eleventh Circuit Rejected EPA's Position On Improper Grounds.

The Eleventh Circuit improperly viewed the "addition" test as limited to dams and dam-induced water-quality changes. App., *infra*, 6a fn.4. The Sixth Circuit in *Consumers Power* rejected such an argument when applying the "addition" test to transfers between impoundment areas and a lake, noting that the five elements which make up the definition of a discharge must be present in "any set of circumstances" for NPDES permitting requirements to apply. *Consumers Power*, 693 F.2d at 583. The CWA does not distinguish between dams, levees, canals, or other flow diversion facilities in recognizing the nonpoint source nature of pollution caused by their changes to the movement of water. See 33 U.S.C. § 1314(f)(2)(F). Given the rationale underlying EPA's "addition" test, it remains neither explicitly nor logically limited to dams.

The absence of an express declaration by EPA particular to the S-9 should not diminish deference under the circumstances of this case. Given the agencies' close involvement with the development of alternative permitting processes and procedures, a formal written agency action declaring that NPDES does not apply would not be expected. Here both EPA and DEP specifically reviewed the water quality changes resulting from S-9 and chose a state regulatory program as the most appropriate method to control these changes. It does not follow that the agencies, for their position to be considered by the federal courts, must affirmatively disclaim the applicability of NPDES.

B. Under The CWA's Statutory Scheme, Deference To The Implementing State Agencies Is Proper.

The CWA presents a cooperative federalism model that anticipates a partnership between the state and federal governments to restore and maintain the chemical, physical and biological integrity of the Nation's waters. See *Arkansas v. Oklahoma EPA*, 503 U.S. 91, 101 (1992); *International Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987). Under this scheme, EPA may delegate to a state authority to administer the NPDES program, providing the states with a significant role in protecting their own natural resources. *Ouellette*, at 489, citing 33 U.S.C. § 1251(b). EPA retains strong supervisory authority and control. 33 U.S.C. § 1342(d). Through such a delegation in Florida, DEP infused local concerns and interests into the policies of the CWA.

In these circumstances, the Eleventh Circuit erred when it relied on *GTE South Inc. v. Morrison*, 199 F.2d 733, 745 (4th Cir. 1999) and the general rule that state agencies are not entitled to the deference afforded a federal agency's interpretation of its own statutes under *Chevron*. This Court has noted that the question whether federal courts must defer to a state agency's interpretations of federal law remains unresolved under circumstances where Congress intended the states to play a strong role determining the policy implications of a federal regulatory scheme. See *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 385 n.10 (1999).

Several federal courts have recognized deference to a state agency is appropriate where a state agency is given authority for implementation of a joint federal-state program. See *Perry v. Downling*, 95 F.3d 231, 337-38 (2d Cir. 1996); *US West Communications Inc. v. Public Serv. Comm of Utah*, 75 F. Supp.2d 1284 (D. Utah 1999); *Bellsouth Telecommunications, Inc. v. MCI Metro Access Trans. Ser., Inc.*, 97 F. Supp.2d 1363 (N.D. Ga. 2000); see also

Attorney's Liability Assurance Society, Inc. v. Fitzgerald, 174 F. Supp.2d 619, 629 n.2 (W.D.Michigan 2001) (state interpretations of the federal Liability Risk Retention Act of 1986 might warrant deference because Congress treated the state as a federal regulator and placed faith in the states' interpretations). Commentators have encouraged the federal courts to drop their skepticism toward state agencies in light of the faith Congress has increasingly placed in them. See P. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 Vand. L.Rev. 1 (Jan. 1999).

Under the CWA, Congress placed their faith not only in the specialized knowledge of the state and administrative agencies, but also in the state's ability to infuse local concerns and experience into its policies. Congress developed a joint federal-state regulatory program, delegated authority to state agencies over the NPDES program and authorized EPA to supervise states' NPDES programs. In this case federal and state agencies both concurred that state permits are the appropriate mechanism to resolve the water quality problems arising from the S-9. App., *infra*, 43a-48a. Under these circumstances deference to both agencies is proper.

Nonetheless, the Eleventh Circuit has rejected the agencies' practices that were developed over thirty years. Its decision affects a drastic alteration of the existing allocation of responsibilities between states and the federal government concerning the regulation of water pollution. This Court has admonished against interpreting a statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation. See *Owasso Independent School Dist. v. Falvo*, 534 U.S. 426 (2002).

It is the policies reflected by the agencies' continuous well-informed practices and actions that deserved consideration and respect from the Eleventh Circuit. Because the agencies' interpretation was based upon and remains fully

consistent with the plain language of the CWA properly read in context with the overall statutory scheme and its policies, the court should have deferred to the agencies' "addition" test.

IV. THE PETITION SHOULD BE GRANTED, NOT HELD FOR *BORDEN RANCH PARTNERSHIP v. U.S. ARMY CORPS OF ENGINEERS*.

The Court has granted certiorari in *Borden Ranch v. United States*, No. 01-1243 (cert. granted 2002), to decide, among other questions:

> Does a rancher's deep plowing to enhance the soil's agricultural viability "add" a "pollutant" to a wetland, so as to constitute a regulated point source "discharge" within the meaning of Section 404 of the Clean Water Act?

A ruling in *Borden Ranch* that provides guidance to the meaning of an "addition" under the CWA would be relevant to this case since the SFWMD also contends that the "addition" requirement is not met. Nevertheless, holding this petition for *Borden Ranch* would not be appropriate. This case and *Borden Ranch* involve the scope of quite different permitting programs and very different factual situations. Whether physical alterations caused by plowing are found to be a "discharge" requiring a dredge and fill permit from the Corps under Section 404, is not likely to resolve the question in this case, whether the movement of pre-existing pollutants by a state water management agency constitutes a "discharge" requiring a NPDES permit from the state under Section 402.[5] *Borden*

[5] Lower courts note that the "addition" requirement varies in the different contexts and separate regulatory frameworks of the § 404 dredge and fill program (33 U.S.C. § 1344) and the § 402 NPDES program (33 U.S.C. § 1342). See, e.g., *Froebel v. Meyer*, 13 F. Supp.2d

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Ranch also involves a number of additional issues upon which it may be decided without any guidance on the "addition" requirement.

The issue in this petition will remain alive and in urgent need of this Court's review however this Court decides *Borden Ranch*. Because the courts are in disarray as to an important issue concerning the scope of the NPDES, which will not be settled in *Borden Ranch*, the Court is urged to grant independent review.

CONCLUSION

The petition for a writ of certiorari should be granted or, in the alternative, held for the Court's ruling in *Borden Ranch*.

Respectfully submitted,

TIMOTHY S. BISHOP
MAYER, BROWN, ROWE & PLATT
190 South LaSalle Street
Chicago, IL 60603
(312) 701-7829

JAMES EDWARD NUTT
Counsel of Record
South Florida Water Management District
3301 Gun Club Road
West Palm Beach, FL 33406
(561) 682-6253

Counsel for Petitioner

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843 (E.D. Wis. 1998); *United States v. Sinclair Oil Co.*, 767 F. Supp. 200, 205 n.5 (D. Mont. 1990). The Eleventh Circuit ignored basic distinctions between Sections 402 and 404 when it relied upon Section 404 cases to support its interpretation of an "addition." App., *infra*, at 7a n.5 (citing 33 U.S.C. § 1344 and *United States v. M.C.C. of Fla., Inc.*, 772 F.2d 1501, 1505 (11th Cir. 1985)). Such cases are inapposite.