No. 02-626

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

SUPPLEMENTAL BRIEF

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This supplemental brief responds to the Brief for the United States as Amicus Curiae, which effectively underscores the need for this Court to grant certiorari.

The United States concedes that the Eleventh Circuit's ruling is "incorrect" (US Br. 13); that this Court will ultimately have to review the rule adopted by the court of appeals (US Br. 15 n.5); and that ensuring water quality in the Everglades is of paramount national importance. US Br. 1-7. It also acknowledges the agencies have exercised intensive oversight of the S-9 facility for 30 years, throughout which they have consistently addressed Everglades' water quality through system-wide planning and state permitting, *not* the NPDES program. *Ibid.*

At the same time, the United States stands silent on several matters raised in the Petition. It makes no mention of the second question presented, which asks why deference was not given to the agencies' longstanding and consistent practice of regulating S-9 under state, not NPDES permits. It does not challenge the agencies' interpretation, documented in FDEP's opinion letter (Pet. App. 43-48), that NPDES extends only to point sources from which pollutants originate, the core issue invoked by the Petition. It does not so much as mention the fifteen amici, joined in five briefs, and numerous letters from organizations and governmental representatives across the country (App., *infra.*, 1a-17a), which all attest to the critical national importance of the issues presented and to considerable concern with extending NPDES to traditional state and local water management.

In fact, the government largely avoids the key issues raised by the petition and amicus briefs:

1. Whether NPDES was ever intended by Congress to regulate state water control structures that add nothing to the waters (Pet. 20-21; Reply Br. 7-10);
2. Why the S-9 is not governed under §304(f)(2)(F) of the CWA, 33 U.S.C. §1314(f)(2)(F), providing for water pollution caused by levees, canals and flow diversion facilities to be addressed as non-point source under state, not NPDES guidelines (Pet. 6-7; Reply Br. 9-10);

3. Why a state's non-NPDES programs are not the preferable mechanism for regulating local water use decisions (Pet. 21-24; Reply Br. 9-10); and
4. Whether the imposition of NPDES in this case violates the careful balance struck in the CWA between federal and state rights and responsibilities. Pet. 5; 33 U.S.C. §1251(b) & (g).

The court of appeals below answered each of these questions differently than the courts of appeals in *Gorsuch* and *Consumers Power*, creating a square conflict ripe for this Court's resolution. Contrary to the government, we demonstrate below, these fundamental conflicts are legal, not factually dependent upon whether the waters involved have or ever had any hydrologic relationship to each other.

The United States seeks to discourage the Court's review with three misinformed arguments. First, the government mischaracterizes the court of appeals' error as "factual," by claiming any conflict in the case law can tidily be reconciled simply by considering the hydrologic relationships between transferred and receiving waters. Second, the government contends, without mentioning the amici and other national supporters (App., *infra.*, 1a-17a), that this case lacks nationwide import. Third, the government presents the startling, and incorrect, assumption that the "burden" of allowing the erroneous ruling to stand will be "modest." On these grounds the United States concludes that the proper scope of the CWA should be determined through fact-intensive inquiries and further litigation rather than with guidance from this Court as to the meaning of the statute. Each of these arguments is seriously misleading and should not discourage the Court from granting review.

1. According to the Solicitor General, the Eleventh Circuit's ruling turned on a factual inquiry into whether the S-9 point source and its accompanying levees and canals divide "two separate bodies of water" or a single water body. Furthermore, the government asserts the cases that we contend are in conflict – *Catskill*, *Gorsuch*, *Dubois*, *Consumers Power*, and the decision below – can all be

reconciled by reference to how each court answered this factual question. The government's argument ignores that the relevant facts in this case were *agreed*, not contested. It ignores that the Eleventh Circuit's "but for" test in no way turns on whether waters are unitary or separate. It ignores that the courts of appeals cases are deeply divided over whether the factual question identified by the government is of any legal relevance. It ignores that, in *Dubois*, the First Circuit specifically *rejected* the government's purported distinction. And it ignores that *Gorsuch* and *Consumers Powers* were *explicitly* decided on the basis that water was being transferred from one water body to another, yet no NPDES permit was required. In short, the government's "distinction" is no distinction at all, but merely confirms the rampant confusion as to the scope of the CWA's NPDES requirement.

To begin with, the Eleventh Circuit resolved no factual dispute as to the unitary nature of the waters in question or otherwise. The relevant facts are clear, were undisputed by the parties, and were acknowledged by both courts below. The parties *agreed* that the waters pumped by S-9 were "historically * * * both part of the Everglades," so that "historically * * * water flowed across both areas," and that the canal, levees, and pump station built by the Corps disrupted that flow and divided the C-11 basin from populated western Broward County. US Br. 6, 12; C.A. R. Vol. 2, Doc. 65 at 3-4. Water control projects invariably result in such changes and divisions, wherever in the country they are located, and whether designed for flood control, irrigation, drinking water supply, or otherwise. Changing the natural distribution of water is the very purpose of such projects, and in most such cases unitary water bodies are interrupted.

Moreover, the court of appeals did not deem the fact question relied on by the government to be legally relevant. The Eleventh Circuit's broad "but for" test for whether an "addition" of pollutants occurs "from" a point source depends not at all on the historic or natural relationship of the waters involved. In fact, the court expressly relied upon a prior decision requiring a permit to move pollutants within what was indisputably a *single* water body. See Pet.

App. 7a, citing *United States* v. *M.C.C. of Fla., Inc.*, 772 F.2d 1501, 1505-06 (11th Cir. 1985). Thus, no "factually intensive inquiry" into the unitary or separate nature of the transferring and receiving waters occurred below; none was considered legally relevant.

The government's attempt to reconcile the case law by reference to how each court resolved this factual question is far off the mark. Far from neatly "distinguishing between [unitary and separate water bodies] for purposes of imposing NPDES permitting requirements" (US Br. 10), the courts of appeals differ fundamentally as to whether that distinction is of legal significance. Thus, in *Dubois*, the First Circuit rejected precisely the argument made by the government here, holding categorically that

> there is nothing in the [CWA] evincing a Congressional intent to distinguish between "unrelated" water bodies and related or hydrologically connected water bodies. The CWA simply addresses "any addition of any pollutant to navigable waters from any point source."

102 F.3d at 1298. And in *Gorsuch* and *Consumers Power*, which both held an NPDES permit *not* to be required, the D.C. and Sixth Circuits described the facts as involving moving water from one distinct water body (a reservoir and impoundment, respectively) to another (a river or lake). See 693 F.2d at 175; 862 F.2d at 589. The Second Circuit in *Catskill* did indeed rest its holding that a permit was required on the finding that water was moved between separate water bodies (mischaracterizing *Gorsuch* and *Consumers Power* as involving unitary waters). 273 F.3d at 492. But that ruling merely underlines the deep conflict and confusion among the courts of appeals.

As to a critical issue arising under a major federal statute and affecting public and private water managers and users throughout the Nation, the courts of appeals are in disarray. No factual question whether particular water bodies are unitary or separate underlies or resolves that deep conflict. Rather, the courts disagree on the meaning and application of core jurisdictional terms of the statute,

such as "discharge," "addition," and "from" a point source. This Court has recently considered the meaning of key CWA terms in *SWANCC* ("navigable waters") and *Borden Ranch* ("addition"), despite the factual component always involved in deciding how such terms apply in particular circumstances. It should do so again here to resolve a deep and important conflict among the circuits.

2. The Solicitor General pretends this case has "limited" importance beyond the operation of Everglades facilities. US Br. 14. But the government does not and cannot explain why the S-9 pumps and other Everglades facilities are any different for purposes of the CWA than millions of other water control devices around the country. Nothing about the Eleventh Circuit's sweeping "but for" test is unique to Everglades facilities or their regulatory framework. Accordingly, the court of appeals relied upon *none* of the Everglades-specific legislation discussed in the government's brief. US Br. 2-6. The government fails to explain how that legislation changes the CWA analysis in any way. The opinion below plainly implicates all water control structures that divert pollutants into waters which they otherwise would not go. Already, the Ninth Circuit has adopted the Eleventh Circuit's "but for" test to hold – in the context of an energy extraction operation that diverts groundwater into surface waterways – that "transporting water" "from one water body to another" without an NPDES permit can violate the CWA. *Northern Plains Res. Council* v. *Fidelity Expl. & Dev. Co.*, 325 F.3d 1155, 1163 (9th Cir. 2003).

In asserting that this case is of limited import the Solicitor General ignores the contrary conclusions of many public and private amici, including the National League of Cities, Association of Metropolitan Sewerage Agencies, National Association of Flood and Storm Water Management Agencies, Association of Metropolitan Water Agencies, Western Coalition of Arid States, National Water Resource Association, Western Urban Water Coalition, American Farm Bureau Federation, and Pacific Legal Foundation. He also fails to mention letters from numerous state and federal officials (including seven state attorneys general and a

bipartisan group of western Senators) gravely concerned about the far reaching consequences of the ruling below and explaining the need for this Court's urgent review. App., *infra.* 1a-17a.

Nationwide, these amici and elected officials explain, water transfers that are "essential steps" in providing water for irrigation, drinking water, flood control, ecosystem and species preservation, and other uses – transfers which have heretofore been uniformly regarded as outside the scope of the NPDES scheme – will now be dependent upon the vagaries of the costly, time-consuming, and uncertain NPDES permit process and its attendant litigation, because "[t]he biochemical constituents" of different waters "are inevitably different from one another." Br. Am. Cur. of NWRA, *et al.*, 4; Br. Am. Cur. of City of N.Y., *et al.*, 8. In consequence, water managers, though they add nothing to the water they transfer, will have to "significantly modify their operations," spend huge sums on "water treatment systems," "curtail their operations," or abandon innovative programs based on water banking and transfer that are designed to optimize water utilization. NWRA Br. at 5, 13. Downstream users and groups dissatisfied with water allocations to sport fishing, endangered species, agriculture, or myriad other interests will predictably use the NPDES permitting system to reopen and try to enhance those allocations. *Id.* at 6. See also, *e.g.*, N.Y. Br. at 2 (court of appeals' decision threatens "local governments' ability to move water from one source to another to meet local water supply needs" through "millions" of structures, none of which now operate with a federal permit). Nowhere does the Solicitor General respond to these serious concerns, expressed by public water management bodies that are far better placed to discern the havoc the Eleventh Circuit's faulty interpretation of the CWA will wreak.

Even accepting the government's mistaken view that this case is somehow limited to Everglades facilities, the critical importance of the questions presented to the Everglades cannot be doubted. The government concedes that petitioner and respondent Tribe are part of the Task Force charged with coordinating Everglades restoration policies.

US Br. 5. This and other suits anticipated against Petitioner's facilities takes restoration out of the cooperative, multiparty process that Congress established under the Water Resources Development Act and puts it instead in the hands of the federal courts and the burdensome, unpredictable NPDES process, in which every NPDES application and permit can result in further litigation over the propriety of permit issuance or conditions at the behest of any party that did not get what it wanted in the political process. "Congress has authorized more than one billion dollars in initial projects under CERP" (US Br. 5) – including hundreds of millions of dollars devoted to projects specifically involving the levees, canal, and basin served by the S-9 pump (US Br. 7) – as part of a restoration plan expected to cost in excess of $8 billion over the next several decades. Absent this Court's intervention, that project, on which hinges Congress' goal of "restoring, preserving, and protecting" the Everglades for future generations (US Br. 4), will be mired in costly and time-consuming NPDES permit proceedings and ensuing litigation and appeals, without any plausible basis in the CWA or its implementing regulations and contrary to the agencies' longstanding recognition that NPDES is not an appropriate feature of the regulatory environment for Everglades restoration.

The Solicitor General asserts that the decision below "may have circumscribed consequences even with respect to the Everglades" as a result of the Eleventh Circuit's subsequent decision in *Fishermen* v. *Closter Farms*, 300 F.3d 1294 (11th Cir. 2002). US Br. 15-16. *Closter Farms* in fact underlines the pressing importance of the questions presented. Under *Closter Farms* and the instant decision, an NPDES permit is required to transfer water containing any pollutants that are non-exempt or not already permitted under NPDES at their source. On that analysis, the need for an NPDES permit depends on an intense factual and legal inquiry into the source of *all* pollutants in the transferred water and whether *each* source either qualifies under the CWA as *exempt* or is *properly permitted* under NPDES. That is precisely the inquiry being undertaken in two additional suits filed against petitioner's facilities and that will have to

be undertaken in dozens more suits as to which notices of intent to sue have been given or that otherwise are expected to follow. Pollutants make their way to the C-11 canal and other water-collection features managed by the District from an enormous variety of sources, including runoff from many agricultural sources (not just exempt irrigation returns and stormwater runoff), municipal runoff, water released from devices protecting dozens of residential and commercial developments, naturally occurring pollutants, and water arriving in countless other ways. In consequence, the approach in *Closter Farms* will result in endless, complex, and uncertain litigation that is only necessitated by the concededly "incorrect" ruling below that an NPDES permit is required in the first place. Contrary to the government's belief that *Closter Farms* will circumscribe this problem, it is the substitution of endless bickering about "the facts in each case" for the "blanket rule" mandated by the CWA that is legally erroneous and practically destructive and that warrants immediate correction by this Court. US Br. 16.

3. The government wrongly speculates the burdens imposed by the ruling below "may be relatively modest." US Br. 17. The *erroneous* imposition of *any* federal regulatory scheme upon traditionally state and local activities, especially one like the CWA that provides for severe criminal and civil penalties, should alone be enough to warrant review. And there is nothing "modest" about NPDES permitting, which involves a labyrinthine application process that includes public hearings and comments, extensive water sampling and testing, effluent limitations, strict technological standards, and the treatment of pollutants. See US EPA's NPES Permit Writers Manual <http://www.epa.gov/npdes/pubs/owm0243.pdf>; Ch. 62-620, Fla. Admin. Code. This burden is compounded by the opportunities for litigation about the propriety of a permit and compliance with its terms once it is issued. Obtaining and defending permits nowhere required by the CWA will divert resources from the Comprehensive Everglades Restoration Plan that the federal and state participants deem the preferred route for environmental restoration, and interfere with countless other water management programs across the country. That

the injunction against the operation of S-9 issued by the district court was lifted ameliorates none of the burdens of NPDES compliance, which are all the more severe because petitioner (like most public water managers) now faces the threat of criminal and civil penalties for its handling of pollutants introduced by others it does not control. See, *e.g.*, *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 244 F. Supp. 2d 41 (N.D.N.Y. 2003) (imposing $5.75 million civil fine on New York, out of a maximum possible fine exceeding $63 million, for having moved water without an NPDES permit).

Petitioner also takes no solace in the government's suggestion that general permits and compliance schedules may diminish these burdens: they do not. US Br. 17. General permits were developed to streamline the process of permitting *large numbers* of similar point sources, something the government claims will not result from this case (despite the slew of suits and notices to sue involving district facilities that followed the ruling here). See *General Permit Program Guidance, EPA Office of Water* 4 (1988). General permits still impose effluent limitations, technological standards, costly treatment, monitoring, and sampling. *Ibid.*; Sec. 62-621.100, Fla. Admin. Code. Establishing a general permit through rulemaking often takes years, to determine that the point sources are substantially similar in operation, discharge the same types of pollutants and require similar effluent limitations and monitoring. Sec. 62-620.705, Fla. Admin. Code. And general permits have become particular targets recently of administrative and judicial challenge. See, *e.g.*, *Minnesota Ctr. for Envir. Adv.* v. *Minn. Pollution Ctl. Ag.*, 660 N.W.2d 427 (Minn. App. Ct. 2003). Compliance schedules merely defer onerous obligations upon a showing that time is necessary to comply, while imposing additional annual reporting requirements. 40 C.F.R. §122.47.

The burden of NPDES permitting cannot be mollified by "replicating the standards, schedules and strategies of the existing state permit." US Br. 17. State permitting, adopted under a different regulatory scheme, provides local water managers necessary flexibility to balance competing interests. NPDES imposes a more stringent duty to meet effluent

limitations tailored to individual point sources through best available technological controls, leaving water managers unable to consider other critical environmental factors. As the Petition explains, NPDES is a poor substitute for the comprehensive watershed planning by agencies with specialized expertise the existing state permitting scheme provides. Pet. 21.

The government's myopic view that this case is somehow limited to Everglades facilities leads it to ignore the broader impact of expanding NPDES. That includes tremendous burdens on already resource-strapped regulatory agencies that will have to permit hundreds of thousands of newly regulated point sources, and on state and local water management agencies that must divert scarce resources to a permitting process that Congress never intended to apply to mere movement of water.

4. Inexplicably, the government ignores the second question presented, whether deference should have been given the federal and state implementing agencies. The government concedes the agencies' knowing acquiescence in the operation of S-9 without an NPDES permit and participation in developing the Comprehensive Everglades Restoration Plan as the preferred method of addressing water quality problems for the Everglades. US Br. i, 5-6. The government fails to acknowledge Florida DEP's express concurrence that NPDES is not required. Pet. App. 43a-48a. These longstanding agency positions are confirmed by the government's view that the decision here was incorrect. In these circumstances, deference is required to the implementing agencies' consistent interpretation of the CWA that an NPDES is not necessary. The extent to which deference is required in these circumstances warrants this Court's review. See Pet. 27-29; *AT&T Corp.* v. *Iowa Util. Bd.*, 525 U.S. at 385 n.10.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, this Court should grant certiorari, not leave the questions presented to a stream of wasteful litigation and administrative challenges.

Respectfully submitted,

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