No. 06-729

In The Supreme Court of the United States

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and JOEL A. MIELE, SR., Commissioner of Department of Environmental Protection,

Petitioners,

v.

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, LTD., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., RIVERKEEPER, INC., STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and ERIN M. CROTTY, Commissioner of the New York State Department of Environmental Conservation,

Respondents.

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

BRIEF OF *AMICI CURIAE*, NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES, SOUTH FLORIDA WATER MANAGEMENT DISTRICT AND FLORIDA ASSOCIATION OF SPECIAL DISTRICTS IN SUPPORT OF PETITIONERS

JAMES E. NUTT, ESQ.
Counsel of Record for all Amici
SOUTH FLORIDA WATER MANAGEMENT DISTRICT
3301 Gun Club Road
West Palm Beach, FL 33406
(561) 682-6253

TERRY E. LEWIS, ESQ.
FLA. ASSOC. OF SPECIAL DISTRICTS
LEWIS, LONGMAN & WALKER, P.A.
1700 Palm Beach Lakes Blvd., Ste. 1000
West Palm Beach, FL 33401
(561) 840-8020

KIRK HOWARD BETTS, ESQ.
NATIONAL ASSOC. OF FLOOD AND STORMWATER MANAGEMENT AGENCIES
BETTS & HOLT LLP
West Tower – 10th Floor
1333 H Street, NW
Washington, D.C. 20005
(202) 530-3380

QUESTION PRESENTED

The courts of appeals are divided over the statutory phrase "discharge of pollutants" and interpretive principles left unresolved in *South Florida Water Management District v. Miccosukee*, 541 U.S. 95 (2004). The Clean Water Act (CWA) carefully defines the "discharge of pollutants" to mean "any addition of any pollutant to navigable waters from any point source." What constitutes an "addition . . . to navigable waters" determines the scope of federal permitting jurisdiction and, thus, delineates federal and state roles under the Act's cooperative federalism scheme. The Second Circuit interpreted the Act contrary to the longstanding and consistent position of the United States Environmental Protection Agency – an interpretation other courts of appeals have accepted – flatly declining any deference to EPA's presently proposed rule. *Amici curiae* – various state and local agencies and others deeply involved in local water resource management nationwide – are concerned with this judicially lead, seismic shift in federal authority. It has become of critical national importance for this Court to clarify the proper CWA interpretation through the following question presented by the petition:

> Whether under the Clean Water Act it is illegal for State, regional and local agencies to transfer navigable waters without a National Pollutant Discharge Elimination System permit.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF THE *AMICI CURIAE*

Amici curiae[1] represent a consortia of state agencies, local governments and water management groups that are concerned with the Second Circuit's misinterpretation of the Clean Water Act, an interpretation that flatly contradicts the Act's plain language and the longstanding and consistent position of the United States Environmental Protection Agency. EPA National Pollutant Discharge Elimination System (NPDES) Water Transfers Proposed Rule, 71 Fed. Reg. 32,887 (proposed June 7, 2006) (to be codified at 40 C.F.R. pt. 122).

The Second Circuit's incorrect interpretive analysis shifts traditionally local rights and responsibilities to the federal government in an unprecedented expansion of federal regulatory jurisdiction over local land and water resource management in direct contravention of the Act's plain language, purposes and statutory scheme.

Long before and ever since the Clean Water Act was adopted in 1972, water resource managers, including these *Amici*, have worked to harness and allocate the Nation's waters, altering their natural movement, flow and circulation as part of each state's plan for the use, development and protection of land and water resources. Local police powers to manage and protect these vital natural resources for the public benefit are as fundamental as they are traditional. Today, extensive allocation systems, comprising over 2 million diversion facilities, connect and convey the nation's waters, often hundreds of miles, to

[1] This brief is being filed concurrently with the written consents of all parties. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief.

provide a myriad of public benefits, including land uses, water supply, and environmental protection.

Protecting and preserving the State's primary responsibilities for water resource management and for controlling pollution caused by land and water resource development is a cornerstone of the Clean Water Act's cooperative federalism model. By this statutory scheme, Congress intended to preserve rather then preempt local powers, carefully delineating a primarily supervisory role for the federal government, coupled with important, but limited, permitting jurisdiction.

The South Florida Water Management District (SFWMD) is one of five water management districts providing stewardship over Florida's public water resources. SFWMD establishes and implements the State's water policies throughout the vast Everglades ecosystem. It operates a comprehensive water management system of levees and canals designed to control and allocate waters throughout the watershed for public beneficial purposes. This allocation system was the subject of *South Florida Water Management District v. Miccosukee*, 541 U.S. 95 (2004), where the Court expressly acknowledged, yet declined to resolve, the question presented here.

The National Association of Flood and Stormwater Management Agencies (NAFSMA), established in 1979, represents more than 100 local and state flood control and stormwater management agencies. Its members are public agencies that protect lives, property and economic activity from storm and flood waters. NAFSMA is also focused upon the improvement of the health and quality of our nation's waters. Its mission is to advocate public policy, encourage technologies and conduct education programs to facilitate and enhance its member's public service.

Florida Association of Special Districts (FASD) is an association representing 89 special districts in the State of Florida, including 39 of the State's drainage districts. A large portion of the activities of drainage districts is the construction, operation and management of structures which transfer waters throughout their jurisdictions.

These *Amici*, as do all local water managers nationwide, have a strong interest in preserving the distinct roles intended by Congress for the federal and local governments – established and refined by statutory amendments and administrative practice for over 34 years of Clean Water Act development and implementation. By maintaining the proper role for each level of government, the courts can ensure that restoration and protection of the Nation's waters will proceed while respecting, preserving and protecting the primary rights and responsibilities of local governments to plan the use and development of land and water resources as Congress intended.

The problem with the Second Circuit's attempt to downplay the impacts of extending the National Pollutant Discharge Elimination System (NPDES) is not merely that it is wrong, for the expansion of federal permitting is not, as the court of appeals would have the nation believe, trivial. Federal permitting threatens to divert valuable resources from state, regional and local programs to an already backlogged federal system.[2] *Amici* remain equally concerned with the resulting shift of responsibility for pollution controls from local officials to federal decision-makers.

Whatever flexibility or discretion the NPDES program may offer – which is far less than suggested by the Second

[2] See, e.g., EPA Evaluation Report, *Efforts to Manage Backlog of Water Discharge Permits Need to be Accompanied by Program Integration*, Rpt. No. 2005-P-00018.

Circuit – local rights will inevitably be subordinated to the federal government, and in the end – due to the Act's citizen suit provisions – to the federal courts. It matters not what flexibility a permit writer may have if a local entity's traditional discretion to manage and move water, and the complex factors that play a part in the decision to do so, is transferred from those that are closest to the situation to a federal decision-maker that may or may not have a fair understanding of local needs or the willingness to consider them.

SUMMARY OF THE ARGUMENT

The Second Circuit's expansive interpretation of the NPDES program's "addition" requirement contradicts the Clean Water Act's plain language and structure, having been reached by misapplying or outright avoiding well-established interpretive rules, the critical application of which mandate a contrary construction than reached below.

Most fundamentally, the plain language of the Clean Water Act does not – as the Second Circuit pretends – plainly and unambiguously extend federal NPDES jurisdiction to regulate water transfers by local water resource agencies. Properly read, the Act's carefully crafted definitions manifest Congressional intent to limit federal NPDES jurisdiction to conveyances which add wastes to the Nation's waters. The NPDES program was never intended to control publicly-owned facilities that manage the movement of waters for public benefits.

Even if the Court does not adopt the *Amici's* plain reading – which was also advanced by the Federal Government in *Miccosukee* – it demonstrates, at bottom, that the Act does not *unambiguously* extend federal NPDES jurisdiction to public water transfers. To conclude otherwise, the Second Circuit ignored three key interpretive

doctrines designed to resolve statutory ambiguities and that should have guided the court's reasoning:

1. The Second Circuit disregarded the Clear Statement Rule which precludes the expansion of federal jurisdiction over traditionally local functions unless supported by a manifestly clear statement of Congressional intent. When Congress established a cooperative federalism model under which the State's retain primary responsibility for land and water resources, it clearly rejected a traditional preemption model. To the contrary, the Second Circuit's interpretation significantly and fundamentally shifts responsibilities from the states to the federal government, effectively expanding federal permitting jurisdiction to over tens of thousands, if not millions,[3] of water control facilities previously understood to have been the primary responsibility of local non-NPDES authorities.

2. The Second Circuit flatly declined any deference whatsoever to EPA, even after that agency clarified its longstanding and consistent position that Congress intended to leave the regulation of public water transfers to non-NPDES authorities in a formal guidance memorandum and proposed administrative rule. That failure was clear error.

3. Under the Rule of Lenity, the absence of any clear statement of Congressional intent should also have precluded expansion of the Act's federal criminal jurisdiction

[3] In 1987, EPA estimated over 2 million dams would be implicated. *Gorsuch* at 182. While the Court in *Gorsuch* hypothesized the number would be approximately 50,000. *Id.* Because NPDES extends to "any pollutant" it is not limited, as the *Gorsuch* court appears to believe, to only hydropower facilities or to those facilities that actually cause water quality problems. Regardless, a significant number of facilities will be impacted if the Second Circuit's opinion is not reversed under either view.

– of which the NPDES program is a key component – to govern state and local governments.

* * *

Left unchecked, the Second Circuit's decision will lead to a significant, unsupportable expansion of federal NPDES jurisdiction over state and local water resource management contrary to the intent of Congress and 34 years of consistent administrative practice. Any such shift in federal-state rights and responsibilities should be a product of a legislative, not judicial, process.

ARGUMENT

NPDES authorizes the Environmental Protection Agency to regulate the "discharge of any pollutants to the navigable waters." CWA §§ 301(a) & 402, 33 U.S.C. §§ 1311(a) & 1342. Congress defined the "discharge of pollutants" to mean "any addition of any pollutant to navigable waters from any point source." CWA § 502(12), 33 U.S.C. § 1362(12). This language does not, by its express terms, include transfers between navigable waters. Instead, CWA § 502(12) makes clear, in order to qualify as a "discharge of pollutants," the activity must cause an "addition" of a pollutant "to navigable waters." *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988), citing *National Wildlife Fed'n v. Gorsuch,* 693 F.2d 156, 165 (D.C. Cir. 1982).

In this case, two of the defining elements that establish federal NPDES jurisdiction are indisputably absent. There is no "addition" "to navigable waters." As explained below, the fallacy of the Second Circuit's interpretation was to ignore the natural and ordinary meaning of these carefully crafted qualifiers.

1. THE CLEAN WATER ACT DOES NOT UNAMBIGUOUSLY EXTEND FEDERAL NPDES JURISDICTION TO PUBLIC WATER TRANSFER FACILITIES.

Last term the Court urged great care when interpreting the labyrinthine definitions of the Clean Water Act:

> It should also go without saying that uncritical use of interpretive rules is especially risky in making sense of a complicated statute like the Clean Water Act, where technical definitions are worked out with great effort in the legislative process. H.R. Rep. No. 92-911, p. 125 (1972) ("[I]t is extremely important to an understanding of [§ 402] to know the definition of the various terms used and a careful reading of the definitions . . . is recommended. Of particular significant [are] the words 'discharge of pollutants' ")

S.D. Warren Co. v. Maine Bd. of Enviro. Protection, ___ U.S. ___, 126 S.Ct. 1843, 1849-50 (2006). In *S.D. Warren*, this Court relied upon the Act's carefully crafted definitions to conclude that CWA § 401, which applies to all "discharges," was considerably more broad than CWA § 402, the NPDES program, which Congress expressly limited to "discharges of a pollutant." See *S.D. Warren*, at 1847.

Failing to follow this Court's model for interpreting statutes, particularly the CWA, the Second Circuit read the term "addition" in isolation and out of context from the key qualifying prepositional phrase "to navigable waters." *Catskill*, 451 F.3d 77, 81 (2d Cir. 2006). Just as the petitioner in *S.D. Warren* tried to ignore the prepositional phrase "of pollutants," the Second Circuit disregarded the adjectival effect of the prepositional phrase "to navigable waters."

a. The Adjectival Effect Of The Preposition "To" And Its Subjective Limits The Verb "Addition."

When contemplating the ordinary and natural meaning of the phrase "addition of *A* to *B*" it is commonly understood that *A* is not already joined with *B*. The "addition of *A* to *B*" contemplates *A* being moved from outside of *B* into *B*. The phrase "addition of *A* to *B*" does not contemplate the mere movement of *A* within *B*.

By analogy, consider the phrase "addition to United States." There is no addition of *A* to the United States if *A* is simply moved from one State to another. The movement of *A* from New York to Florida may be an addition to Florida, but it would not be considered an "addition" to the whole of the "United States." To constitute an "addition . . . to United States," something must enter from outside of the United States. This principle is unaffected by the reality that the United States is not monolithic, but rather comprised of fifty meaningfully distinct States.

The ordinary and natural meaning of the phrase "addition of *A* to *B*" can be explained in other terms. The adjectival effect of incorporating the prepositional phrase "to *B*" designates the subjective, *B,* as the relevant receptacle and, therefore, contemplates some *A* being added from outside of *B*, and not the mere movement of *A* from one part of *B* to another.

What is denominated to be the receptacle defines the scope of activities that constitute an addition to it. Invoking the above analogy, the addition of *A* to United States, captures the movement of *A* from outside the United States into the United States, but not the movement of *A* within the United States. To encompass the movement of *A* between states, the receptacle must be more narrowly and specifically defined, e.g., the addition of *A* to "any

state." By instead designating the "United States" as a whole to be the relevant receiving unit, rather than "any state," the obvious intention would be to reach only those activities that move *A* from outside the United States into the United States and not those activities which merely add *A* from one state to another.

b. The Adjectival Effect Of Congress Having Chosen The Prepositional Phrase "To Navigable Waters" Excludes Water Transfers From NPDES.

Congress plainly used the prepositional phrase "to navigable waters" to qualify the noun "addition" and, thereby, designated the "navigable waters" as a whole to be the relevant receptacle for NPDES purposes. It further defined "[t]he term 'navigable waters' to mean *the* waters of the United States, including the territorial seas." CWA § 502(7), 33 U.S.C. § 1362(7) (emphasis supplied). As a result, an "addition to navigable waters" requires something to be introduced from outside the navigable waters. *Gorsuch*, 693 F.2d 156; *Consumers Power*, 862 F.2d at 588.

Congress further confirmed its intent to treat the navigable waters as a whole for NPDES purposes by omitting the modifier "any" from before the terms "navigable waters" in the definition for "discharge of a pollutant" – a modifier otherwise used to qualify every other noun in the definition and, if used, would have extended NPDES to prohibit discharges of navigable water between distinct water bodies. CWA § 502(12), 33 U.S.C. § 1362(12). The Federal Government as *amicus* in *Miccosukee* explained:

> [The CWA's] use of the modifier "any" with reference to "addition," "pollutant," and "point source" expresses Congress's understanding that the

> various types of additions, pollutants, and point sources are all within the Clean Water Act's regulatory reach. The *absence* of the modifier "any" in conjunction with "navigable waters," by contrast, signifies Congress's further understanding that "the waters of the United States" should be viewed as a whole for purposes of NPDES permitting requirements.

Brief for United States as *Amicus Curiae* in *Miccosukee*, 2003 WL 22137034 at 19.[4]

When "Congress fine-tunes its statutory definitions, it tends to do so with a purpose in mind." *S.D. Warren v. Maine Bd. Enviro. Prot.*, ___ U.S. ___ 126 S.Ct. 1843, 1852 (2006) citing *Bates v. United States*, 522 U.S. 23, 29-30, 118 S.Ct. 285, 139 L.Ed.2d 215 (1997) (if "Congress includes a particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks omitted)). Elsewhere in the Clean Water Act, when Congress intended to address individual navigable waters it proved quite capable. E.g., CWA § 302(a), 33 U.S.C. § 1312(a), ("a specific portion of the navigable waters"). Here Congress did not prohibit the addition of pollutants

[4] The Second Circuit incorrectly believed "remand [in *Miccosukee*] would be unnecessary if there were no legally significant distinction between inter- and intra-basin transfers." *Catskill II*, 451 F.3d 77, 83 (2d Cir. 2006). To the contrary, this Court noted it was the Second Circuit's distinction between water bodies that would be irrelevant under the federal government's interpretation. *Miccosukee*, 541 U.S. at 106. Remand was necessary for two reasons: 1) even under the legal standards most favorable to the respondents the earlier decisions could not stand **and** 2) to provide the lower courts an opportunity to fairly and fully evaluate the federal government's statutory interpretation. *Miccosukee*, 541 U.S. at 112.

to "waters," "receiving waters," "any navigable waters," "a specific portion," "a water body" (distinct or otherwise), or any similar language of apportionment that would have extended NPDES in the manner urged by Respondents.

Under usual rules of statutory construction, use of two different terms is presumed to be intentional. *Gorsuch* at 172, citing *Russell v. Law Enforcement Assist. Admin*., 637 F.2d 354, 356 (5th Cir. 1981). The concept of "distinct water bodies" and "receiving waters" simply does not reside in the text of CWA §§ 301, 402 or 502(12), 33 U.S.C. §§ 1311, 1342 & 1362(12). As the District of Columbia Circuit noted in *Gorsuch*:

> It does not appear that Congress wanted to apply the NPDES system wherever feasible. Had it wanted to do so, it could easily have chosen suitable language, *e.g.*, 'all pollution released through a point source.' Instead * * * the NPDES system was limited to 'addition' of 'pollutants' 'from' a point source.

693 F.2d at 176.

* * *

By changing the relevant receptacle from "navigable waters" to "water body," as a means to reach inter-basin transfers, the Second Circuit has changed the natural and ordinary meaning of the Act. The Eleventh Circuit made a similar error in *Miccosukee* when it declared the "relevant waters" to be the "receiving waters." 280 F.3d at 1368. Instead of requiring an addition to the "navigable waters," the vacated Eleventh Circuit's analysis changed the focus and expanded NPDES to include additions of pollutants to any "waters." As we have shown, these partial constructions are contrary to the natural and ordinary meaning of "addition . . . to navigable waters." Congress did not expect NPDES to protect any "receiving waters" or all individual "waters," but targeted activities which add pollutants to the

whole of the "navigable waters." Thus, the Second Circuit's construction mistakenly concludes *ipso facto* that an "addition" of a pollutant to "part of the navigable waters" is an addition to the whole of "navigable waters." It is not.

To support its "plain reading," the Second Circuit relies heavily upon the overarching purpose of the Clean Water Act, "to restore and maintain the chemical, physical and biological integrity of the nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). "Caution is always advisable in relying on a general declaration of purpose to alter the apparent meaning of a specific provision." *United States v. Plaza Health Lab., Inc.*, 3 F.3d 643, 647 (2d Cir. 1993). As noted in *Gorsuch*, the narrow interpretive question posed by this case may not be resolved merely by simple reference to this admirable goal. *Id.* (citing *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 178 (D.C. Cir. 1982) ("it is one thing for Congress to announce a grand goal, and quite another for it to mandate full implementation of that goal").

The Clean Water Act's carefully crafted definitions plainly limit the NPDES program to conveyances which discharge pollutants into the navigable waters, specifically excluding facilities used only to connect and convey navigable waters for resource management purposes. The Second Circuit's contention that the Act's "plain language" unambiguously reaches inter-basin water transfers is simply unsupportable.

2. WELL-ESTABLISHED AND FUNDAMENTAL RULES OF STATUTORY INTERPRETATION CONFIRM EPA'S STATUTORY INTERPRETATION.

The above textual analysis demonstrates, at bottom, that the NPDES program does not unambiguously extend to water transfers. A contrary conclusion led the Second Circuit to ignore three well-established interpretive rules,

each of which when properly applied confirms *Amici's* interpretation and, therefore, should guide this Court to reverse the decision below.

a. The Clear Statement Rule Prohibits The Extension Of NPDES To State And Local Water Management.

To uphold protections of the Tenth Amendment of the United States Constitution, the Clear Statement Rule of statutory interpretation provides that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991), quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). This fundamental rule of statutory construction provides that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971); see also *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947) (a federal statute does not supersede "the historic police powers of the States * * * unless that was the clear and manifest purpose of Congress"); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994). "It is incumbent upon the federal courts to be certain of Congress' intent before finding that Federal law overrides" this balance. *Gregory*, 501 U.S. at 460.

The Clean Water Act provides for a system that respects the State's concerns. *S.D. Warren*, 126 S.Ct. at 1853 citing CWA § 101(b), 33 U.S.C. § 1251(b). Indeed, the Court has applied the "clear statement rule" to determine the meaning of provisions of the Clean Water Act. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 173

(2001) ("SWANCC"). Noting, the Courts have a "particular duty to ensure that the federal-state balance is not destroyed" with respect to "traditional concern[s] of the States" such as water management and allocation. See *United States v. Lopez*, 514 U.S. 549, 580-581 (1995) (Kennedy, J., concurring). That duty is heightened in the case of the CWA because Congress made explicit its "policy . . . to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." CWA § 101(b), 33 U.S.C. § 1251(b). Congress further directed that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act. CWA § 101(g), 33 U.S.C. § 1251(g); see *SWANCC* at 174 (rather than "expressing a desire to readjust the federal-state balance" by extending jurisdiction, Congress chose to preserve state's rights over land and water resources under § 101(b)).

The States' traditional interest in water management is at its peak where the control of pollution implicates vital water supplies. Water is among each state's most basic resources. "Permitting the United States government to claim federal jurisdiction" over the transfer of water to supply the City of New York "would result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. Leaving water quality impacts from water management systems to the states "would reduce federal/state friction and would permit states to develop integrated water management plans that address both quantity and quality." *Gorsuch*, at 179, citing H.R. Rep. No. 92-911 at 96 (1972).

The burdens of federal Clean Water Act permitting are not, as the Second Circuit would have the world believe, trivial. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 161 (2001) ("Permitting the United States government to claim federal jurisdiction" over State water transfers "would result in a significant impingement of the States' traditional and primary power over land and water use"); See also, *Rapanos v. U.S.C.O.E.,* ___ U.S. ___, 126 S.Ct. 2208, 2214 (2006) (J. Scalia) ("The burden of federal regulation [under §404] is not trivial").

Far from making a "clear statement" explicitly stripping the States of their traditional powers over water management and land use planning, the CWA recognized that the state and federal governments have distinct roles to play. *PUD No. 1*, 511 U.S. at 704. Thus, at the very least, the CWA fails to manifest any clear statement that facilities such as those involved in this matter, which merely connect and convey navigable waters for public purposes, were intended to be regulated under NPDES. Under the Tenth Amendment and its Clear Statement Rule of statutory construction there is an insufficient basis to extend the federal NPDES to regulate the fundamental and primary State responsibility of managing navigable waters for public purposes.

b. Deference Should Have Been Given To The Longstanding Practice, Legal Interpretation And Proposed Rule Of The Implementing Agencies.

Multiple factors inform the extent to which a reviewing court owes deference to an agency's interpretation of a statute. *United States v. Mead*, 533 U.S. 218, 235 (2001). Courts owe "respect proportional to [the interpretation's]

power to persuade" due to its "thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight." *Id.* All of these factors heavily favor deference in this case. EPA presents in its preamble to the Proposed Rule a thorough, logical and detailed analysis reflecting their particular expertise in the subject. Proposed Rule, 71 Fed. Reg. at 32890 (June 7, 2006); *EPA Agency Interpretation on Applicability of Sec. 402 of the Clean Water Act to Water Transfers*, Aug. 5, 2005 (Legal Interpretation). In fact, no factor weighs against deference.

EPA's litigating position, Legal Interpretation and Proposed Rule are "in no sense '*post hoc* rationalizations'" but a long held and frequently reiterated view "reflect[ing] the agency's fair and considered judgment." *Auer v. Robbins*, 519 U.S. 452, 462 (1997); e.g., *Gorsuch*, 693 F.2d at 165, 167 (EPA's interpretation "was made contemporaneously with the passage of the Act, and has been consistently adhered to since").[5] This Court in *Miccosukee* invited EPA to speak by noting the absence of any administrative document where EPA has espoused its position. 541 U.S. at 107. This Court now has just that document, EPA's Proposed Rule on Water Transfers, which holistically evaluated the statute and concluded that Congress intended to leave water transfers to the CWA's non-NPDES authorities. EPA's thorough and expert analysis should not have been so lightly ignored by the Second Circuit.

[5] The Second Circuit misread this Court's opinion in *Miccosukee* believing it to have "pointed out" that EPA once had come to a conclusion opposite of its Legal Interpretation. What this Court had observed is that an amicus brief filed by "ex-EPA officials" *argued* that EPA had once been inconsistent. *Miccosukee*, 541 U.S. at 107. Tellingly absent from the record – because it does not exist – is any example where EPA acted inconsistent with its position as set forth in EPA's Proposed Rule.

Had the Second Circuit considered EPA's analysis and the overall statutory scheme, as required, it would have realized that Congress expressly provided specific non-NPDES remedies to address concerns with the movement of polluted waters into pristine waters. See, e.g., CWA §§ 319, 303(d) & 304(F)(2)(f), 33 U.S.C. §§ 1329, 1313(d) & 1314(F)(2)(f). As this Court recently reiterated, "the [Clean Water] Act does not stop at controlling the 'addition of pollutants,' but deals with 'pollution' generally, see § 1251(b), which Congress defined to mean 'the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water.' §1362(19)." *S.D. Warren,* 126 S.Ct. at 1852-53. The CWA accomplishes its purposes through a complex and comprehensive suite of programs of which NPDES is but one tool. Proper review of the entire statute also reveals, as EPA's Proposed Rule explains in detail, that "the specific statutory provisions addressing the management of water resources – coupled with the overall statutory structure – support the conclusion that Congress did not intend for water transfers to be regulated under [NPDES]." Proposed Rule, 71 Fed. Reg. at 32890 (June 7, 2006).

EPA's Proposed Rule is consistent with the longstanding interpretation of EPA as approved by the District of Columbia and Sixth Circuits in *Gorsuch,* 693 F.2d 156 (1982) and *Consumers Power,* 862 F.2d 580 (1988). Those decisions in no way turned upon the waters being naturally parts of the same water body, i.e. what the Second Circuit dubbed an "assumption of sameness." *Catskill I,* 273 F.3d at 492. An "assumption" that was not made by either Court, but rather invented by the Second Circuit. Quite to the contrary, *Gorsuch* and *Consumers Power* both identify the transferred and receiving waters as different bodies of water and discuss at length distinctions among them. As EPA puts it, a "point source must *introduce* the

pollutant into navigable water from the outside world; dam-caused pollution, in contrast, merely passes through the dam from *one body of navigable water* (the reservoir) *into another* (the downstream river)." *Gorsuch,* 693 F.2d at 165 (emphasis supplied). In fact, the interpretation accepted in *Gorsuch* and *Consumers Power* cannot be fairly distinguished on any material point.

EPA's Legal Interpretation and Proposed Rule ratify these *Amici's* interpretation of the NPDES program and underscore our understanding with EPA that Congress never intended to impose NPDES regime upon State, regional and local water managers tasked with controlling navigable waters. Were the Court not to accept outright the *Amici* and the federal government's reading of the "addition" requirement to represent its ordinary and natural meaning, the Court should nonetheless defer to the agency's official position expressed in both well reasoned official agency documents, i.e., the Legal Interpretation and the Proposed Rule. Those documents, evidencing and memorializing EPA's longstanding position and the rulemaking process were entitled to at least *Skidmore*/*Mead* deference.

c. The Clean Water Act's Severe Criminal Penalties Require It To Be Narrowly Construed.

The CWA is enforceable through criminal as well as civil penalties. Violations carry fines up to $100,000 per day and six years' imprisonment. CWA § 309(c)(2), 33 U.S.C. § 1319(c)(2). Even a negligent violation can bring heavy fines and two years in prison. *Id.* § 1319(c)(1). Under the Second Circuit's interpretation anyone managing navigable waters so as to change their natural flow and divert water into another distinct water body commits a criminal offense. The Eleventh Circuit in *Miccosukee* noted

SFWMD may be subject to criminal penalties if it failed to comply with the Clean Water Act. 280 F.3d 1364, 1371.

Criminal statutes are subject to a rule of strict construction and the rule of lenity, which require resolving doubts about a statute's meaning against the government. *Crandon v. United States*, 494 U.S. 152, 158 (1990). These rules apply in civil cases to statutory provisions, like the NPDES program, CWA § 402, that have both criminal and civil consequences. See *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality) (applying the rule of lenity to interpret a "tax statute [with] criminal applications"; the rule is one "of statutory construction[,] * * * not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation"); *id*. at 519 (Scalia and Thomas, JJ., concurring).

Because the Second Circuit's holding is hardly an "unambiguously correct" interpretation of the CWA (*United States v. Granderson*, 511 U.S. 39, 54 (1994)), and because that expansive interpretation exposes these *Amici* and countless other public water managers to criminal sanctions, the rules of lenity and strict construction require it be firmly rejected.

3. THE COURT SHOULD RESOLVE THIS MATTER THROUGH THIS CASE.

New York City is threatened with over five million dollars in fines and many more millions of dollars in compliance costs if their Petition is not granted and the Second Circuit's erroneous decision reversed. Courts in Florida have followed the Second Circuit and, incorporating many of its interpretive errors, expanded NPDES even further by finding even intra-basin transfers of water between related water bodies are subject to permitting. *Friends of the*

Everglades, Inc. v. South Florida Water Management District, Slip Op., 2006 WL 3635465 (S.D. Fla.). Other suits are pending or threatened. There is no relief in sight from EPA's rulemaking given the courts of appeals dismissive view of EPA's authority and its mistaken impression that the statutory language unambiguously supports an interpretation opposite to that of EPA's. As demonstrated by the grave concern of *Amici* throughout the nation, from many sectors of society, the Second Circuit's novel interpretation of the Clean Water Act's NPDES program should be corrected sooner rather then later.

CONCLUSION

For the above stated reasons, the Court should grant the City of New York's petition and issue a writ of certiorari to the Second Circuit to correct the injustice of that court's decision.

Respectfully submitted,

JAMES E. NUTT, ESQ.
Counsel of Record for all Amici
SOUTH FLORIDA WATER MANAGEMENT DISTRICT
3301 Gun Club Road
West Palm Beach, FL 33406
(561) 682-6253

KIRK HOWARD BETTS, ESQ.
NATIONAL ASSOC. OF FLOOD AND STORMWATER MANAGEMENT AGENCIES
BETTS & HOLT LLP
West Tower – 10th Floor
1333 H Street, NW
Washington, D.C. 20005
(202) 530-3380

TERRY E. LEWIS, ESQ.
FLA. ASSOC. OF SPECIAL DISTRICTS
LEWIS, LONGMAN & WALKER, P.A.
1700 Palm Beach Lakes Blvd., Ste. 1000
West Palm Beach, FL 33401
(561) 840-8020