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

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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.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULES 29.6 AND 14.1 STATEMENT	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT	1
A. The Statutory And Regulatory Scheme	5
1. Basic Elements Of The Federal NPDES Program	5
2. State Regulation Of Pollution Caused By Hydrographic Modifications	6
3. Delegation Of NPDES Administration To The State	8
B. SFWMD And Its Water Control Facilities	8
C. Regulatory Oversight And Permitting Of The S-9 Pump Station	10
D. Respondents' Citizen Suit Challenge To The S-9 And The District Court's Ruling	12
E. The Eleventh Circuit's Decision	13
REASONS FOR GRANTING THE PETITION	14
I. THE COURTS OF APPEALS ARE IN CONFLICT AS TO THE APPLICABILITY OF THE NPDES PROGRAM TO THE MOVEMENT OF WATER CONTAINING PRE-EXISTING POLLUTANTS	14

TABLE OF CONTENTS – Continued

Page

A. EPA's Traditional "Addition" Test 15

B. The Eleventh Circuit's Expansive "But For" Test 16

C. The Conflict Is Deep And Should Be Immediately Resolved 17

II. THE ELEVENTH CIRCUIT ERRED IN FINDING THE MOVEMENT OF WATER TO BE AN ADDITION OF POLLUTANTS FROM A POINT SOURCE SUBJECT TO THE NPDES..... 18

A. The Plain Language Of The CWA Requires The Point Of Discharge To Be The Source From Which The Pollutants Originate 18

B. The NPDES Program Was Intended To Regulate Only Those Point Sources From Which Pollutants Originate..... 20

C. State Non-NPDES Programs Are The Appropriate Mechanism Under The CWA To Regulate State Water Management Activities 21

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..... 24

TABLE OF CONTENTS – Continued

Page

A. The Eleventh Circuit Rejected EPA's Position On Improper Grounds 26

B. Under The CWA's Statutory Scheme, Deference To The Implementing State Agencies Is Proper 27

IV. THE PETITION SHOULD BE GRANTED, NOT HELD, FOR *BORDEN RANCH V. U.S. ARMY CORPS OF ENGINEERS* 29

CONCLUSION..... 30

TABLE OF AUTHORITIES

Page

CASES:

American Meat Inst. v. EPA, 526 F.2d 442 (7th Cir. 1975)..... 25

Appalachian Power Co. v. Train, 545 F.2d 1351 (4th Cir. 1975)..... 3, 13, 15, 20

Arkansas v. Oklahoma EPA, 503 U.S. 91 (1992) 4, 5, 27

AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366 (1999) 27

Attorney's Liability Assurance Society, Inc. v. Fitzgerald, 174 F. Supp.2d 619 (W.D. Mich. 2001) 28

Bellsouth Telecommunications, Inc. v. MCI Metro Access Trans. Ser., Inc. 97 F. Supp.2d 1363 (N.D. Ga. 2000)..... 27

Borden Ranch v. United States, No. 01-1243 (2002) .. 29, 30

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2nd Cir. 2001)..... 3, 14, 16, 17

Dubois v. U.S. Dep't of Ag., 102 F.3d 1273 (1st Cir. 1996)..... 3, 13, 14, 16, 17

E.I. du Pont de Nemours and Co. v. Train, 430 U.S. 112 (1977)..... 25

Environmental Protection Agency v. California ex rel State Water Resources Control Bd., 426 U.S. 200 (1976) 22

Florida Wildlife Federation v. SFWMD, Case No. 02-80918-Civ-Middlebrooks (S.D. Fla.)..... 4

Friends of Everglades v. SFWMD, Case No. 02-80309-Civ-Middlebrooks (S.D. Fla.) 4

TABLE OF AUTHORITIES – Continued

Page

Froebel v. Meyer, 13 F. Supp.2d 843 (E.D. Wis. 1998) 29

GTE South Inc. v. Morrision, 199 F.2d 733 (4th Cir. 1999) 27

International Paper Co. v. Ouellette, 479 U.S. 481 (1987) 5, 27

Miccosukee Tribe v. South Florida Water Management District, 721 So. 2d 389 (Fla. 3d Dist. Ct. App. 1998) 12

National Wildlife Federation v. Consumers Power Company, 862 F.2d 580 (6th Cir. 1988) .....*passim*

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Owasso Independent School Dist. v. Falvo, 534 U.S. 426 (2002) 28

Perry v. Downling, 95 F.3d 231 (2d Cir. 1996) 27

P.F.Z. Properties, Inc. v. Train, 393 F. Supp. 1370 (D.C. 1975) 20

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 24, 25

Train v. NRDC, 421 U.S. 60 (1975) 25

United States v. M.C.C. of Fla., Inc., 772 F.2d 1501 (11th Cir. 1985) 30

United States v. Mead, 533 U.S. 218 (2001)..... 24, 25

United States v. South Florida Water Management District, 28 F.3d 1563 (11th Cir. 1994) 11

United States v. South Florida Water Management District, 847 F. Supp. 1567 (S.D. Fla. 1992).....11

TABLE OF AUTHORITIES – Continued

Page

United States v. South Florida Water Management District, Case No. 88-1886-Civ-Hoeveler (U.S. Dist. Ct. S.D. Fla) 11

United States v. Sinclair Oil Co., 767 F. Supp. 200 (D. Mont. 1990) 30

US West Communications Inc. v. Public Serv. Comm of Utah, 75 F. Supp.2d 1284 (D. Utah 1999) 27

STATUTES & REGULATIONS:

28 U.S.C. § 1254(1) 1

33 U.S.C. § 407 20

33 U.S.C. § 1251(a)(1) 20

33 U.S.C. § 1251(b) 5, 8, 27

33 U.S.C. § 1251(g) 5, 21

33 U.S.C. § 1288 6

33 U.S.C. § 1311 ..... 2, 18

33 U.S.C. § 1311(a) 5

33 U.S.C. § 1311(b) 22

33 U.S.C. § 1311(c) 22

33 U.S.C. § 1313(d) 5, 6, 21

33 U.S.C. § 1313(e) 5, 6, 21

33 U.S.C. § 1314(f) 19

33 U.S.C. § 1314(f)(2)(F) 7, 19, 23, 26

33 U.S.C. § 1329 ..... 5, 6, 21

33 U.S.C. § 1342 ..... 5, 29

TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. § 1342(b) 8
33 U.S.C. § 1342(d) 27
33 U.S.C. § 1344 ..... 29, 30
33 U.S.C. § 1362(6) 19
33 U.S.C. § 1362(12) 2, 5, 18
33 U.S.C. § 1362(14) 2
33 U.S.C. § 1362(16) 5
33 U.S.C. § 1362(19) 7, 19
40 C.F.R. § 122.2 5
§ 373.016, Fla. Stat. 8
§ 373.069, Fla. Stat. 8
§ 373.069(e), Fla. Stat. 8
§ 373.073, Fla. Stat. 8
§ 373.1501, Fla. Stat. 9
§ 373.1501(1)(h), Fla. Stat. 9
§ 373.1501(2), Fla. Stat. 9
§ 373.4592, Fla. Stat. 12
§ 373.4592(9)(k), Fla. Stat. 12
§ 373.4592(9)(l), Fla. Stat. 12
§ 373.4592(11), Fla. Stat. 12
§ 373.4595, Fla. Stat. 9
§ 403.0885, Fla. Stat. 8
Fla. Admin. Code, Ch. 62-620.200 5

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

EPA, *The Control of Pollution Caused by Hydrographic Modifications* (1973) 7, 19

Flood Control Act of 1948 § 203, 62 Stat. 1176 9

H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 109 (1971) 7

1 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the library of Congress), Ser. No. 93-1 7

3 Legislative History of the Clean Water Act of 1977, A Continuation of the Legislative History of the Federal Water Pollution Control Act, Ser. No. 95-14 6

National Pollutant Discharge Elimination System Memorandum of Agreement between the State of Florida and the United States Environmental Protection Agency (1995) 8

S. Rep. No. 370, 95th Cong., 1, Sess. 8-9, 1977 6

Water Resources Development Act of 1996, § 528, P.L. 104-303 9

Water Resource Development Act of 1996, § 528(b), P.L. 104-303 11

Water Resource Development Act of 1996, § 528(f), P.L. 104-303 11

Water Resource Development Act of 1996, § 528(f)(2), P.L. 104-303 11

Water Resources Development Act of 2000, Title VI, § 601, P.L 106-541 9

TABLE OF AUTHORITIES – Continued

Page

Water Resources Development Act of 2000, Title VI, § 601(b)(2)(C) 10

WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (Encycl. Ed. 1977) 6, 19

P. WEISER, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 Vand. L.Rev. 1 (Jan. 1999) 27, 28

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).

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[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 preexisting 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

(Continued on following page)

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,

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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.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-15703

D. C. Docket Nos. 98-06056-CV-WDF
& 98-06057-CV-WDF

(Filed February 1, 2002)

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
SAM POOLE,

Plaintiffs-Appellees,

versus

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Defendant-Appellant.

FRIENDS OF THE EVERGLADES,

Plaintiff-Appellee,

versus

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(Filed February 1, 2002)

Before EDMONDSON and CARNES, Circuit Judges, and MUSGRAVE[*], Judge.

EDMONDSON, Circuit Judge:

The Miccosukee Tribe of Indians ("the Tribe") and the Friends of the Everglades ("the Friends") (together "Plaintiffs") brought a citizen suit under the Clean Water Act ("CWA") against the South Florida Water Management District ("the Water District"). The suit alleges that the Water District was violating the Clean Water Act by discharging pollutants from the S-9 pump station into Water Management District 3A without a national pollution discharge elimination system ("NPDES") permit.

The parties filed cross-motions for summary judgment. The district court denied the Water District's motion, granted Plaintiffs', and enjoined the Water District from operating the S-9 pump station without an NPDES permit. The Water District appeals from the district court's order declaring unlawful the Water District's operation of the S-9 pump station without an NPDES permit and from the injunction prohibiting the same.[1]

I. BACKGROUND

The South Florida Water Management District manages the Central & Southern Florida Flood Control

[*] Honorable R. Kenton Musgrave, Judge, U.S. Court of International Trade, sitting by designation.

[1] The district court also concluded that Plaintiffs' claims against Defendant were not barred by the doctrine of sovereign immunity. The Water District has not appealed this ruling.

Project. This management is through the operation of many levees, canals and water impoundment areas. The areas now called the C-11 Basin and the Water Conservation Area-3A ("WCA-3A") were historically part of the Everglades. But, in the early 1900's, the Army Corps of Engineers began digging the C-11 Canal to facilitate the draining of the western portion of Broward County which is part of the C-11 Basin. Then, in the 1950's, the Corps constructed the L-37 and L-33 levees to create WCA-3A to the west of the C-11 Basin and completed construction of the S-9 pump station.

The C-11 Canal runs through the C-11 Basin and collects water run-off from the Basin and seepage through the levees from WCA-3A. The S-9 pump station then pumps this water through three pipes from the C-11 Canal through the L-37 and L-33 levees into WCA-3A at a rate of 960 cubic feet per second per pipe. Without the operation of the S-9 pump station, the populated western portion of Broward County would flood within days.[2]

The water which the C-11 Canal collects and which the S-9 pump station conveys into the WCA-3A contains pollutants. In particular, this water contains higher levels of phosphorus than that naturally occurring in WCA-3A. The S-9 pump station, however, adds no pollutants to the water which it conveys.

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[2] But for the construction of the L-33 and L-37 levees and the C-11 canal, water would flow as a sheet across WCA-3A and the C-11 Basin in a southerly direction. Now, because of the construction of these structures, water from the C-11 Basin generally does not flow west into the WCA-3A without the operation of S-9.

The district court concluded that, because the waters collected by the C-11 Canal contained pollutants and this water would not flow into WCA-3A without the operation of the S-9 pump station, S-9 added pollutants to the WCA-3A in violation of the CWA. On appeal, the Water District contends that the district court erred as a matter of law in concluding that S-9's conveyance of water from the C-11 Canal into the WCA-3A constituted a discharge of pollutants.

II. DISCUSSION

A. Pumping of Polluted Water

We review the district court's grant of summary judgment to Plaintiffs *de novo,* applying the same legal standard as the district court. *Hendrickson v. Ga. Power Co.,* 240 F.3d 966, 969 (11th Cir. 2001). For summary judgment to be proper, no genuine issue can exist on a material fact; and the moving party must be entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In reviewing the evidence, we must draw all reasonable, factual inferences in favor of the non-moving party. *Carriers Container Council, Inc. v. Mobile S.S. Ass'n,* 896 F.2d 1330, 1337 (11th Cir. 1990).

The Clean Water Act prohibits the discharge of pollutants from a point source into navigable waters without an NPDES permit. *See* 33 U.S.C. §§ 1311, 1342. The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." *See* 33 U.S.C. § 1362(12). No party disputes that the S-9 pump

station and, in particular, the pipes from which water is released constitute a point source[3] or that the water released by the station contains pollutants. Also, both parties agree that the C-11 Canal and the WCA-3A constitute navigable waters. The parties mainly dispute one legal issue: whether the pumping of the already polluted water constitutes an *addition* of pollutants to navigable waters *from* a point source.

Relying on a line of hydroelectric-dam cases, the Water District argues that no addition of pollutants from a point source can occur unless a point source adds pollutants to navigable waters from the outside world. See *Nat'l Wildlife Fed'n v. Gorsuch,* 693 F.2d 156, 175 (D.C.Cir.1982) (showing deference to EPA's interpretation that "[an] addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world"); *Nat'l Wildlife Fed'n v. Consumers Power Co.,* 862 F.2d 580, 584 (6th Cir. 1988) (same).[4] Under the

[3] A point source is defined to be "any discernible, confined and discrete conveyance, including but not limited to any pipe . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

[4] In *Gorsuch,* the District of Columbia Court of Appeals gave deference to the EPA's position that, because pollutants were the result of dam-induced water-quality changes, a dam did not add pollutants from the outside world and, thus, no NPDES permit was required for a dam to release the water into a downstream river. *Id.* at 174-75. In another case involving a dam and dam-induced water-quality changes, the Sixth Circuit also concluded that the EPA's position on this question should be deferred to if reasonable. *See Consumers Power,* 862 F.2d at 584. Both the Sixth and District of Columbia Circuits, in essence, gave *Chevron* deference to the EPA's position that the release of water which had been polluted by dam-related, water-quality changes and which flowed from a dam into another body of navigable water constituted no "discharge of pollutants." *But see Catskill Mountains Chapter of Trout*

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Water District's interpretation, when a point source conveys one navigable water into another, no addition of pollutants will occur unless the point source itself is the source of the pollutants which it releases. And, because S-9 does not itself introduce pollutants from the outside into the water which it conveys, the Water District contends no addition of pollutants occurs.

First, we conclude that, in determining whether pollutants are added to navigable waters for purposes of the CWA, the receiving body of water is the relevant body of navigable water. Thus, we must determine whether pollutants are being added to WCA-3A. They are.[5]

Unlimited, Inc. v. City of New York, 273 F.3d 481, 490 (2d Cir. 2001) (concluding EPA's position in *Gorsuch* and *Consumers Power* which was based on policy statements and consistent litigation positions is not entitled to *Chevron* deference); *see also Christensen v. Harris County,* 529 U.S. 576, 587, 120 S. Ct. 1655, 1662 (2000) ("[I]nterpretations contained in policy statements, agency manuals, and enforcement guidelines . . . do not warrant Chevron-style deference.").

We know of no instance in which the EPA has extended its policy on dams and dam-induced water-quality changes to facilities like the S-9 pump station. The EPA is no party to this case; we can ascertain no EPA position applicable to S-9 to which to give *any* deference, much less *Chevron* deference.

We also reject the Water District's argument that the Florida Department of Environmental Protection's decision, using the *Gorsuch* addition test, that operation of the S-9 pump does not require an NPDES permit is entitled to *Chevron* deference. A state agency's interpretation of federal law is generally not entitled to deference by the courts. *GTE South, Inc. v. Morrison,* 199 F.3d 733, 745 (4th Cir. 1999).

[5] We reject the Water District's argument that no addition of pollutants can occur unless pollutants are added from the outside world insofar as the Water District contends the outside world cannot include another body of navigable waters. *Cf. Catskill Mountains,* 273 F.3d at 491 (construing "outside world" to include "any place outside the

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Nevertheless, for an addition of a pollutants to navigable waters to require an NPDES permit, that addition of pollutants must be from a point source. And, for an addition of pollutants to be from a point source, the relevant inquiry is whether – but for the point source – the pollutants would have been added to the receiving body of water.[6] We, therefore, conclude that an addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants into navigable waters.

When a 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, that point

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particular water body to which pollutants are introduced") (emphasis added). This conclusion is also consistent with precedent concluding that a redeposit of soil which has been dredged by a boat's propellers can constitute an addition of pollutants requiring regulation by the "dredge and fill" permitting system of the CWA, 33 U.S.C. § 1344. *See United States v. M.C.C. of Fla., Inc.,* 772 F.2d 1501, 1505-06 (11th Cir. 1985), *vacated on other grounds by* 481 U.S. 1034, 107 S. Ct. 1968 (1987), *reinstated in relevant part on remand,* 848 F.2d 1133 (11th Cir. 1988).

[6] As noted above, the Water District concentrates on the fact that S-9 is not the original source of the pollutants in the water which it conveys. For pollutants to be *from* a point source, the point source does not necessarily have to be the source or origin of pollutants. "From a point source" can also indicate the "agent or instrumentality" or the "cause or reason" by which the pollutants are added to navigable waters. *See* The Random House Dictionary of the English Language 770 (2d ed. 1987) (defining "from"). We conclude that this interpretation of "from" is most apt: from = by. And no dispute exists on whether pollutants, in fact, are added to navigable waters (WCA-3A) *by* a point source (S-9) here.

source is the cause-in-fact of the discharge of pollutants.[7] And, because the pollutants would not have entered the second body of water *but for* the change in flow caused by the point source, an addition of pollutants from a point source occurs. Neither party disputes that, without the operation of the S-9 pump station, the polluted waters from the C-11 Canal would not normally flow east into the WCA-3A.[8] The S-9 pump station, therefore, is the cause-in-fact of the addition of pollutants to the WCA-3A. We,

[7] Our conclusion is consistent with the views of the First and Second Circuits. In *Dubois v. United States Department of Agriculture,* 102 F.3d 1273 (1st Cir. 1996), the First Circuit concluded that the piping of water from the polluted East Branch River for commercial use and its proposed release into the upstream Loon Lake would constitute an addition of pollutants from a point source. *Id.* at 1296-99. Then, in *Catskill Mountains,* the Second Circuit concluded that the diversion of water from a reservoir containing pollutants by tunnel into a creek for which the reservoir was not naturally a source would constitute an addition of pollutants from a point source. *Catskill Mountains,* 273 F.3d at 492. Both courts emphasized that the two bodies of water were separate and that pollutants would not enter the second body except for the point source.

[8] Both the C-11 Basin and the WCA-3A were part of the historical Everglades. Before construction of the C-11 Canal, the Levees, and the S-9 pump station, the surface and ground waters on both side of the Levees intermingled. The natural flow of the waters at that time was a southerly moving sheet of water. But for man's intervention, these waters would essentially be a single body of navigable water.

Since the completion of the L-33 and L-37 levees, water does not flow from the C-11 Canal into WCA-3A. Man has made the two bodies of water two separate and distinct bodies of water. The Water District argues that the historical hydrological connectedness of these two bodies of water (1) precludes a finding that the WCA-3A and the C-11 Canal are two distinct bodies of water, and (2) precludes a finding that the operation of the S-9 changes the "natural" flow of water between these two bodies. In the context of the circumstances of this case, we reject the Water District's argument.

therefore, conclude that the release of water caused by the S-9 pump station's operation constitutes an addition of pollutants from a point source.

B. The Injunction

Next, the Water District contends that the district court abused its discretion by enjoining the Water District from operating the S-9 pump station without an NPDES permit. The Water District argues that the court erred by not applying traditional equitable standards in its grant of the injunction. *See Weinberger v. Romero-Barcelo,* 456 U.S. 305, 320, 102 S. Ct. 1798, 1807 (1982) (prohibition against discharge of pollutants in CWA does not foreclose exercise of equitable discretion). And, according to the Water District, had the district court balanced the potential harm caused by enjoining the operation of S-9 against the harm prevented,[9] the court would have concluded that S-9 should not be enjoined from operating without an NPDES permit.

We review for an abuse of discretion the district court's decision to grant an injunction under the CWA. *Romero-Barcelo,* 456 U.S. at 320, 102 S. Ct. at 1807. In determining whether an injunction is proper, not only should a district court "balance[ ] the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction[,]" but the court "should [also] pay particular regard for the public consequences in employing the

[9] Without the operation of S-9, the western portion of Broward County would flood in only days.

extraordinary remedy of injunction." *Id.* at 312, 102 S. Ct. at 1803 (citation omitted); *see also Million Youth March, Inc. v. Safir,* 155 F.3d 124, 125 (2d Cir. 1998) ("An injunction is an exercise of a court's equitable authority, and the exercise of that authority, in the vindication of any legal protection . . . must sensitively assess all the equities of the situation, including the public interest."); *Okaw Drainage Dist. v. Nat'l Distillers & Chem. Corp.,* 882 F.2d 1241, 1248 (7th Cir. 1989) ("[A]n injunction . . . may not be granted without consideration of the equities, including the costs that the injunction is likely to impose on third parties."). Because the cessation of the S-9 pump would cause substantial flooding in western Broward County which, in turn, would cause damage to and displacement of a significant number of people,[10] we conclude that the people of Broward County have a very significant interest in whether the S-9 pump station's operation should be enjoined.

The district court's injunction prohibits the Water District from operating S-9 without an NPDES permit. If this injunction were enforced, the Water District could not continue to operate S-9 while applying for an NPDES permit.[11] And although on appeal Plaintiffs defend the

[10] Broward County is a highly populated county with a population of 1,623,081 according to the 2000 United States Census. *See* Ranking Tables for Counties: Population in 2000 and Population Change from 1990 to 2000 (PHC-T-4) (2001), *available at* http:// www.census.gov/population/cen2000/ phc-t4/tab01.pdf.

[11] In their briefs, Plaintiffs try to draw a distinction between a hypothetical injunction which enjoins the operation of S-9 and the actual injunction which enjoins the operation of S-9 without an NPDES permit. Because S-9 currently has no NPDES permit, this distinction is

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district court's injunction, Plaintiffs have repeatedly represented that they – because of the substantial flooding of Broward County which would result – do not really seek the cessation of S-9's operation. At the summary judgment motion hearing before the district court, Plaintiffs said these things:

> We would like [the Water District] to be enjoined from continuing [discharging pollutants without an NPDES permit.]
>
> *Now, I don't, in any way, propose turning off the pump. That has been discussed a couple of times here. It's sort of a frightening option, but I don't think that specifically is feasible.*
>
> However, if [the Water District] were ordered to apply and take all necessary and appropriate measures to obtain as quickly as possible the necessary permits, to actually use the permit in compliance with the law. . . .
>
> *So we are not asking that you just turn off the pump or suddenly stop every single pollutant. . . .*
>
> So, declare them in violation. Order them to get out of violation, to obtain the necessary permits, to discharge in the legal manner.

R-164 at 64-65 (emphasis added).

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one without a difference. The injunction that was entered does mandate that S-9's operation be discontinued.

After the district court enjoined the operation of S-9 without a permit, the Water District brought an emergency motion for relief from the judgment. Because of the disastrous consequences of discontinuing S-9's operation, Plaintiffs did not oppose this motion and agreed that a stay of the injunction was proper.[12] And, in response to the Water District's motion for reconsideration to the district court, Plaintiffs stated that they would agree to whatever stays were necessary for the Water District to obtain an NPDES permit for S-9. Plaintiffs, thus, appear to recognize and admit the exceedingly serious public loss that would result from enforcing the district court's injunction.

From the record before us, we cannot conclude that the district court's injunction could ever be properly enforced. Nor can we conclude that Plaintiffs have ever really intended for that injunction to be enforced. The flooding of western Broward County and the resulting displacement of the residents there do far outweigh the continued addition of low levels of phosphorus to WCA-3A without an NPDES permit. No district court faced with the record could correctly conclude otherwise.

The United States Supreme Court warns "[t]here is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the

[12] The district court originally granted a forty-day stay of the issuance of the injunction for the Water District to seek an NPDES permit for S-9. *See* R-125, R-136. The parties then filed a joint motion to extend the stay of injunctive relief pending resolution of this appeal or the receipt of an NPDES permit. The district court granted this joint motion. R-142 at 1-2.

issuing [sic] an injunction." *Truly v. Wanzer,* 46 U.S. (5 How.) 141, 142 (1847). "Once issued, an injunction may be enforced." *Hutto v. Finney,* 437 U.S. 678, 690, 98 S. Ct. 2565, 2573 (1978). So, we do not want injunctions to linger in existence when they are not right. Moreover, this "strong arm of equity," *see Truly,* 46 U.S. at 142, is debased and weakened if used to issue injunctions which cannot rightly be enforced and are actually never intended to be enforced. "The equity court . . . must always be alert in the exercise of its discretion to make sure that its decree will not be a futile and ineffective thing." *MacDougall v. Green,* 335 U.S. 281, 290, 69 S. Ct. 1, 5 (1948) (Douglas, J., dissenting). Injunctions must be taken seriously. What the courts order to be done should be done. And what should not or cannot be done must not be ordered to be done.

At the hearing leading up to the injunction, some evidence and argument pointed out that severe flooding would occur if S-9 were shut down. But, a lot of information about other points was also presented to the district court at about the same time. At the later hearing on the Water District's emergency motion for relief from judgment, the district court stated, "I was not aware that the injunction would have the dire consequences of literally opening the flood gates." R-165 at 2. It seems to us that, in the light of the district court's wrong impression of the consequences, the district court could not have correctly balanced the possible harms – especially the harm to the public – caused by the enjoinment of S-9 against the benefits when it granted its injunction. That the district court agreed to stay the injunction, when the dire consequences were brought home to the district court, does not make the injunction any less an abuse of discretion.

Instead of issuing an injunction which cannot be rightly enforced, the district court should order the Water District to obtain an NPDES permit within some reasonable period. And, if the Water District fails to comply with this order, Plaintiffs may then seek to enforce the order through the various enforcement mechanisms available under the CWA, such as fines and criminal penalties. *See* 33 U.S.C. § 1319.

For the foregoing reasons, we AFFIRM the district court's judgment that the Water District violated the Clean Water Act, VACATE the judgment awarding the injunction, and REMAND for further proceedings consistent with this opinion.

AFFIRMED in part, VACATED in part, and REMANDED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Plaintiff,

vs.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, and SAMUEL POOLE,

Defendants.
_____/

Case No. 98-6056-CIV-FERGUSON

FRIENDS OF THE EVERGLADES,

Plaintiff

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Defendant.
_____/

Case No. 98-6057-CIV FERGUSON

ORDER ON MOTION FOR SUMMARY JUDGMENT

(Filed Sep. 30, 1999)

THIS CAUSE is before the Court on the Plaintiff Miccossukee Tribe's Motion for Summary Judgment on All Counts of the Tribe's Complaint [D.E.60] and on the Defendant's Motion for Final Summary Judgment [D.E.66]. Having duly considered the motions, responses, oral argument of counsel and pertinent portions of the record, it is

ORDERED AND ADJUDGED that the plaintiff's motion for summary judgment [D.E.60] is **GRANTED**. The defendants' motion for summary judgment [D.E.66] is **DENIED**.

Factual Background

The Miccosukee Tribe of Indians of Florida (the "Tribe") is a federally-recognized Indian Tribe. For generations the Tribe and its members have resided and worked within the Florida Everglades (the "Everglades").[1] The Tribe has land interests lying within the Everglades, including a perpetual lease to most of Water Conservation Area 3A ("WC 3A"). The way of life of the Tribe and its members, including their religious, cultural, economic, and historical identity, is based upon the Everglades ecosystem and upon preservation of the Everglades in its natural state, including but not limited to the quantity and quality of the Everglades' waters.[2]

The Everglades is an oligotrophic[3] wetlands system which is phosphorus limited and sensitive. The level of phosphorus, a nutrient, is the defining chemical characteristic of the system in that the exhaustion of the available

[1] The term Everglades as used herein refers to the areas presently identified as the Florida Water Conservation Areas, including Water Conservation Area 3A, and Everglades National Park, although the Everglades ecosystem historically included a much larger area.

[2] The Tribe's religious activities include the planting and harvesting of corn on tree islands on the Everglades; its subsistence activities include "gathering of materials", hunting, and fishing; its commercial activities include frogging, airboating and other guided tours and providing recreational and tourism facilities within the Everglades.

[3] A body of water poor in plant nutrient minerals and organisms and usually rich in oxygen in all depths.

phosphorus limits the type and distribution of aquatic flora, and fauna. The addition of phosphorus above natural levels causes an imbalance in flora and fauna resulting in additional detrimental growth. Further, the Everglades has some characteristics of ultra-oligotrophic systems, which are even more phosphorus limited and phosphorus sensitive than oligotrophic systems.[4]

In the 1950's the South Florida Water Management District's ("SFWMD") S-9 pumping station ("S-9") with its three pipes,[5] located in urban Broward County, was completed. SFWMD, one of the five water management districts in Florida created by the Florida Legislature and allegedly a state agency, is charged with the operation and management of S-9. Samuel Poole ("Poole") was the executive director of SFWMD when this action commenced.[6] The Tribe alleges that S-9, is the cause of the pollutants, and has been backpumping contaminated water which contains nutrients, such as phosphorus, into the Everglades specifically into WC 3A, a jurisdictional water of the United States, without the required National

[4] The oligotrophic conditions of the Everglades were recognized by the Florida Department of Environmental Protection and the South Florida Water Management District in the 1992 Settlement Agreement and Consent decree in case number 88-1886-CIV-HOEVELER.

[5] There are three pumps at the S-9. Each one of the pumps can pump 960 cubic feet per second. There are three pipes on the west side of S-9 from which water is discharged. If the S-9 pumps are not in operation, water does not discharge from the pipes. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984).

[6] Poole is no longer the executive director of SFWMD. A suit against him in his official capacity is essentially a suit against the SFWMD. Therefore, the Court need not consider immunity against Poole separately.

Pollutant Discharge Elimination System ("NPDES")[7] permit. The Tribe alleges that the absorption of pollutants in the Everglades is causing degradation not only in the water quality but in the plant materials, soils, animal habitat and biological life, causing long term and perhaps permanent damage to the Everglades' system.

The Tribe states that much of the water released from S-9 comes from the C-11 canal which is an external source of pollutants to the Everglades, a separate body of water, and of significantly different water quality than the Everglades. In addition to the pollution into the Everglades allegedly caused by the S-9, the Army Corps of Engineers has been authorized by Congress to construct the Modified Water Deliveries project to restore water to Everglades National Park through northeastern Shark River Slough, which will result in further pollution to relatively pristine areas. The project will involve creating gaps in the L-67 Levee between WC 3A and WC 3B thus opening up relatively pristine WC 3B and the National Park Everglades to polluted water from the S-9 pump. It is alleged further that if the S-9 pump is not operating the water sits in the C-11 canal, its natural direction of flow being from west to east, and the polluted water does not flow into the Everglades and CW 3A.

SFWMD argues that the water released from S-9, although containing pollutants, is not adding pollutants to the Everglades because the water from C-11 seeps into the

[7] A NPDES permit is an operations permit issued by the EPA to waste water facilities discharging pollutants through a point source or discrete conveyance. The Tribe states that SFWMD has no pending applications for a NPDES permit.

Everglades as ground water, and both areas were part of the historical Everglades. Consequently, SFWMD continues, S-9 merely passes water between two parts of the same body of United States water and therefore does not create pollutants; that they are created by the C-11 and its adjacent land uses. For these reasons, SFWMD contends, a NPDES permit is not needed for S-9 and neither the U.S. Environmental Protection Agency nor the State of Florida Department of Environmental Regulation required one.

Standard for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A factual dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Similarly, a fact is "material" if it might affect the outcome of the suit under the governing substantive law. *Anderson,* 477 U.S. at 247.

In considering this motion for summary judgment, the Court must examine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that the defendant should prevail as a matter of law." *Id.* at 243. The movant bears the initial burden of showing the absence of a genuine issue as to any material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). In deciding whether the movant has

met this burden, the Court must view the evidence and all factual inferences in the light most favorable to the non-movant. *Miranda v. B & B Cash Grocery Store, Inc.,* 975 F.2d 1518, 1532 (11th Cir. 1992). "If reasonable minds could differ on the inferences arising from undisputed facts, summary judgment should be denied." *Id.* at 1534.

Once the initial burden is met, the non-movant must come forward with specific facts showing that there is a genuine issue for trial that precludes summary judgment. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). The evidence presented cannot consist of conclusory allegations, legal conclusions or evidence which would be inadmissable at trial. *Avirgan v. Hull,* 932 F.2d 1572, 1577 (11th Cir. 1991). Likewise, "a mere scintilla of evidence supporting a position will not suffice; there must be enough of a showing that the jury could reasonably find for the [non-movant]." *Anderson,* 477 U.S. at 252. Failure to make a showing sufficient to establish the existence of any essential element of a claim is fatal and requires the entry of summary judgment. *Celotex Corp.,* 477 U.S. at 322-323.

Issues Presented

The issues raised are: whether SFWMD is an arm or agency of the state immune from federal action by the Eleventh Amendment of the Constitution and whether there is an addition of pollutants when water containing pollutants is discharged from S-9, a disputed point source, into the Everglades therefore requiring a NPDES permit in order to operate the S-9 pump.

The Tribe moves for summary judgment on Count I and II of its complaint which allege that both the SFWMD

and Poole violated the Federal Water Pollution Control Act ("Clean Water Act") 33 U.S.C. § 1251 *et seq.* by failing to obtain a NPDES permit before transferring water between the C-11 canal and the Everglades through S-9. SFWMD and Poole have filed cross-motion for summary judgment.

The parties agree that the waters in question are navigable waters of the United States, and that the C-11 water discharged form S-9 into the Everglades is a pollutant.

Eleventh Amendment Immunity

The Eleventh Amendment grants immunity to states in federal court. *Edelman v. Jordan,* 415 U.S. 651, 662-63 (1974). It provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. 11.

The Eleventh Amendment does not extend to counties or similar municipal corporations. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 280 (1977). The states' immunity from suit specifically applies to Indian tribes. *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 775 (1991). Whether an entity is an arm or agency of the state protected by the Eleventh Amendment is a question of federal law determined with reference to applicable state law. *Magula v. Broward Gen. Med. Ctr.,* 742 F.Supp. 645, 648 (S.D. Fla. 1990); *Fouche v. Jekyll Island – State Park Auth.,* 713 F.2d 1518, 1520 (11th Cir.

1983). The Eleventh Circuit has identified the following factors for consideration in determining if an entity is an arm or agency of the state protected by the Eleventh Amendment: (1) how state law defines the entity; (2) the entity's fiscal autonomy; (3) what degree of control the state maintains over the entity; (4) where funds for the entity are derived; and (6) who is responsible for judgments against the entity. *Tuveson v. Florida Governor's Counsel on Indian Affairs, Inc.,* 734 F.2d 730, 732 (11th Cir. 1984).

Whether an entity is a state agency for the purposes of applying certain Florida statutes is a separate and independent question from whether the entity is a state agency for Eleventh Amendment purposes. *Tuveson,* 734 F.2d at 735. The United States Supreme Court emphasized that a judicial analysis should focus on the Eleventh Amendment's fundamental purposes: to prevent judgments from depleting state treasuries and to maintain the integrity retained by each state in our federal system.[8] *Hess v. Port Auth. Trans-Hudson,* 513 U.S. 30, 51 (1994). It is the burden of SFWMD to establish the immunity alleged. *Christy v. Pennsylvania Turnpike Comm'n,* 54 F.3d 1140, 1144 (3d Cir. 1995).

[8] A claim seeking prospective injunctive relief against a state officer's ongoing violation of federal law can ordinarily proceed in federal court, and is not barred by Eleventh Amendment. *Doe v. Chiles*, 136 F.3d 709, 719 (11th Cir. 1998). On that theory, arguably, this action could proceed without addressing the Eleventh Amendment issue in that the plaintiffs are not seeking damages.

1. How the State Defines SWFMD

The Florida Water Resources Act of 1972, Fla. Stat. § 373.069, which created five water management districts including the SFWMD, does not characterize SFWMD as an arm or agency of the state. Florida Statute § 189.403(6) defines SFWMD as a "special district":

> Water management district for purposes of this chapter means a special taxing district which is a regional water management district created and operated pursuant to chapter 373 or chapter 61-691, Laws of Florida, or a flood control district created and operated pursuant to chapter 252270, Laws of Florida as modified by s. 373.149.

Courts in the District are divided on the question. Those holding that SFWMD is a state agency immune from suit are *Miccosukee Tribe of Indians of Florida v. South Florida Water Management Dist.,* 980 F. Supp. 448 (S.D. Fla. 1997), *Bensch v. South Florida Water Management Dist.,* No. 95 Civ. 1202 (S.D. Fla. 1996) and *Indian Trails Water Control District v. South Florida Water Management Dist.,* No. 96 Civ. 8528 (S.D. Fla. Dec. 12, 1996). The cases reaching the opposite conclusion include *Thomas v. South Florida Water Management Dist.,* No. 96 Civ. 896 (M.D. Fla. Mar. 23, 1998) and *IT Corp. v. South Florida Water Management Dist.,* No. 97 Civ. 8872 (S.D. Fla. July 20, 1998). As the determination is a matter of fact and because the factual record may be better developed here than in previous cases, the Court will undertake an independent analysis.

Unlike a state agency SFWMD is entitled to and does levy *ad valorem* taxes. Article VII § 9 of the Florida Constitution states in relevant part:

> (a) Counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes. . . .
>
> (b) Ad valorem taxes . . . shall not be levied in excess of the following millages . . . for water management purposes for the remaining portions of the state, 1.0 mill; and for all other special districts a millage authorized by law approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation.

See also Fla. Stat. §§ 373.1962 and 373.503. Such authority to levy *ad valorem* taxes is prohibited to the State as stated in Article VII, § 1 of the Florida Constitution:

> (a) No tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. All other forms of taxation shall be preempted to the state except as provided by general law.

Contrary to SFWMD's assertion that the Florida Constitution allows it to levy *ad valorem* taxes as a "state agency" the Constitution can only be read to mean that certain "special districts", SFWMD being one of them, are allowed *ad valorem* taxing authority but not as a state agency. Of further significance is Poole's deposition testimony wherein he testifies that SFWMD is responsible for its own judgments. The record lacks evidence showing that the state would be liable for judgments against SFWMD. For these reasons the Court finds that on this factor SFWMD would not meet state law definition of an agency of the state for purposes of the Eleventh Amendment.

2. SFWMD's Fiscal Autonomy

The Florida Statutes show that SFWMD is a self-funded entity with the power to tax, to borrow to pay expenses, to issue interest bearing negotiable notes and pledge the proceeds of taxes levied. *See* Fla. Stat. §§ 373.503, 373.506, 373.5639. Section 373.501 states that the Department of Environmental Regulation "may allocate to the water management districts from funds appropriated to the department such sums as may be deemed necessary to defray the costs of administrative, regulatory, and other activities of the district." The state's discretionary authority to contribute to SFWMD's operational expenses does not establish conclusively that SFWMD is dependent on the state. Many other entities, for example, school districts, are highly funded by the state but are not considered state agencies for Eleventh Amendment purposes.

3. The States Degree of Control over SFWMD

SFWMD claims that it is controlled by the state and relies on *Fouche* and several sections of the Florida Statutes to support its assertion. Statutory controls exercised by the state over SFWMD include: (1) the Governor appoints and the Florida Senate confirms the governing board members of SFWMD, Fla. Stat. § 373.073; (2) the Governor approves the executive director after the Florida Senate has confirmed the appointment by the SFWMD's board, Fla. Stat. § 373.079(4)(a); (3) the Department of Environmental Protection "shall, to the greatest extent possible, exercise supervisory authority over all water management districts", Fla. Stat. §§ 373.026(7); (4) SFWMD is required to submit an annual budget and expense report to the Governor, Legislature and the governing body of

each county, Fla. Stat. § 373.507; (5) the state's Auditor General may, at the direction of the Governor, audit each district's accounts, Fla. Stat. § 373.589; (6) the district's annual budget may be adopted only after adequate notice to the public and public hearing, Fla. Stat. § 373.536.

There are indeed fiscal controls and limitations on authority imposed upon SFWMD by statute but none are inconsistent with legal autonomy, i.e., the power to sue and be sued. In *Fouche* the park authority had additional ties to the state that SFWMD does not have with Florida, e.g., the state was required to approve all park land sales. *Fouche,* 713 F.2d at 1521. In *Fouche* it was also pivotal that a judgment against the Park Authority would probably be paid by the state. In this case the fact that SFWMD has the power to fund itself through *ad valorem* taxation, and to borrow money and that direct financial support by the state is discretionary, leans in favor of a finding that SFWMD is not an instrumentality of state government.

4. SFWMD's Source of Funds and Responsibility for Judgements Against SFWMD

As found above SFWMD through its *ad valorem* taxation and borrowing powers is capable of an independent financial existence even though the state may voluntarily appropriate funds for its operation. On a fact not considered in other cases in the district SFWMD's executive director conceded in deposition testimony, that payment of a judgment against SFWMD would not come from the state appropriations but from *ad valorem* taxes, agricultural privilege tax or an insurer. Neither the Florida Constitution, or statutes make the state responsible for paying judgments against SFWMD and no evidence is found in the record to support the contention.

Based on consideration of the factors required by the Eleventh Circuit, this Court finds that SFWMD is not an arm or agency of the state for Eleventh Amendment purposes.

S-9 Pump as Polluting Point Source

The Clean Water Act is a comprehensive water quality statute enacted by Congress to restore and maintain the chemical, physical, and biological integrity of the nation's waters. 33 U.S.C. § 1251(a). Congress established the NPDES permit program as the primary means for enforcing effluent limitations imposed to achieve the Clean Water Act's objectives. *Weber v. Trinity Meadows Raceway, Inc.,* 1996 WL 477049 (N.D. Tex. 1996). The Clean Water Act prohibits the discharge of pollutants from a point source into navigable waters of the United States, unless a NPDES permit is issued. 33 U.S.C. § 1342; *National Wildlife Fed'n v. Consumers Power Co.,* 862 F.2d 580, 583 (6th Cir. 1988). The term "'discharge of a pollutant' and the term 'discharge of pollutants' each means (A) any addition of any pollutant to navigable waters, (B) any addition of any pollutant to the waters of a contiguous zone from any point source or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12). The definition of pollutant includes solid waste, sewage, garbage, biological materials, and wrecked or discarded equipment. 33 U.S.C. § 1362(6). Navigable waters means the waters of the United States. 33 U.S.C. § 1362(7). The term point source is defined as "any discernable, 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).

The Tribe relies on *Dubois v. United States Dept. of Agric.,* 102 F.3d 1273 (1st Cir. 1996) in support of its position. *Dubois* is persuasive authority. *Dubois* involved the use of Loon Pond[9] by a ski resort as a source of water and a repository for disposal of water for its snow making system. The ski resort used water not only from Loon Pond but from another river to make snow. In doing so pollutants were being transferred from the river into Loon Pond. The argument made and rejected in *Dubois* was that the two bodies of water were a "single entity" so there could have been no "addition" of pollutants by the transfer of water from the river to the pond. In *United States v. M.C.C. of Florida, Inc.,* 772 F.2d 1501, 1506 (11th Cir. 1985), as noted by *Dubois,* the Eleventh Circuit also rejected the "single entity" theory and found a "discharge of a pollutant" in violation of the Clean Water Act where spoil dredged by the propellers of a vessel were deposited on an adjacent sea grass bed.

In this case an addition of pollutants exists because undisputedly water containing pollutants is being discharged through S-9 from C-11 waters into the Everglades, both of which are separate bodies of United States water with a different quality levels. They are two separate bodies of water because the transfer of water or its contents from C-11 into the Everglades would not occur naturally. *Dubois,* 102 F.3d at 1297. That at one time these two bodies of water were hydrologically connected is now

[9] Loon Pond is located in the White Mountain National Forest and is classified as a Class A waterbody protected by demanding water quality standards.

irrelevant and ignores the fundamental direction of water flow factor. *Dubois,* 102 F.3d at 1298.

SFWMD and Poole contend that S-9 is not a point source because it does not create the pollutants discharged into the Everglades. They claim the C-11 canal which contains runoffs from developed lands eastern in Broward county is the pollutants' source. Under the Clean Water Act, § 1362(14), a pipe, such as the three in S-9 is a point source because it discharges pollutants. It is not necessary that the conveyance be the originator of the transferred contaminants. There is no doubt in this case, and it is uncontested by the parties, that S-9 is discharging pollutants into the Everglades. That the pollutants are not formed solely by S-9 is immaterial in a plain reading of the Act.

Conclusion

The Everglades, which includes the CW 3A and the C-11 canal, are two distinct bodies of water within the meaning of the Clean Water Act even if the waters were hydrologically connected at one time. The seepage from the C-11 canal that SFWMD refers to could not flow naturally from the C-11 canal to the CW 3A and the Everglades. The S-9 pump effects an unnatural flow, transferring polluted water from the C-11 canal through the S-9 pump into relatively pristine Everglades water. Therefore the pump is a point source for which a NPDES permit is required.

DONE AND ORDERED in Chambers at Ft. Lauderdale, Florida, this 30th day of September, 1999.

/s/ Wilkie D. Ferguson, Jr.
WILKIE D. FERGUSON, JR.
UNITED STATES DISTRICT JUDGE

copies provided:
Dione C. Carroll, Esq.
John E. Childe, Esq.
Douglas H. MacLaughlin, Esq.
Perla Sole-Calas, Esq.
Barbara A. Markham, Esq.
Ruth P. Clements, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Plaintiff,

vs.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, and SAMUEL POOLE,

Defendants.
_____/

Case No. 98-6056-CIV-FERGUSON

FRIENDS OF THE EVERGLADES,

Plaintiff,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Defendant.
_____/

Case No. 98-6057-CIV-FERGUSON

FINAL SUMMARY JUDGMENT

(Filed September 30, 1999)

IN ACCORDANCE with the Order granting plaintiff's summary judgment [D.E. 60], it is

ORDERED AND ADJUDGED that final judgment is hereby entered in favor of the plaintiff enjoining SFWMD from transferring waters from the C-11 canal through the S-9 pump into the Everglades without a NPDES permit. Any pending motions not ruled upon are

rendered moot by this final default judgment. **This case is closed.**

DONE AND ORDERED in Chambers at Ft. Lauderdale, Florida, this 30th day of September, 1999.

/s/ Wilkie D Ferguson, Jr.
WILKIE D. FERGUSON, JR.
UNITED STATES
DISTRICT JUDGE

copies provided:
Dione C. Carroll, Esq.
John E. Childe, Esq.
Douglas H. MacLaughlin, Esq.
Perla Sole-Calas, Esq.
Barbara A. Markham, Esq.
Ruth P. Clements, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-15703-CC

MICCOSUKEE TRIBE OF INDIANS
OF FLORIDA, SAM POOLE,

Plaintiffs-Appellees,

versus

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,

Defendant-Appellant.

FRIENDS OF THE EVERGLADES,

Plaintiff-Appellee,

versus

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,

Defendant-Appellant.

On Appeal from the United States District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion ___, 11th Cir., 19___, ___F.2d___).

(Filed Jun. 21, 2002)

Before: EDMONDSON, CHIEF JUDGE, CARNES, Circuit Judge and MUSGRAVE*, Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson
CHIEF JUDGE

* Honorable R. Kenton Musgrave, Judge, U.S. Court of International Trade, sitting by designation.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER AREA CODE 202
CLERK OF THE COURT 479-3011

August 29, 2002

Mr. James E. Nutt
3301 Gun Club Road
West Palm Beach, FL 33406

Re: South Florida Water Management District
v. Miccosukee Tribe of Indians, et al.
Application No. 02A183

Dear Mr. Nutt:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on August 29, 2002, extended the time to and including October 21, 2002.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Sandra Elliott Spagnolo
Assistant Clerk

NOTIFICATION LIST

Mr. James E. Nutt
3301 Gun Club Road
West Palm Beach, FL 33406

Mr. Dexter W. Lehtinen
7700 North Kendall Drive
Suite 303
Miami, FL 33156

Mr. John E. Childe
606 Pine Road
Palmyra, PA 17078

Clerk
United States Court of Appeals for
the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

33 U.S.C. § 1251 Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective. The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter –

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

* * *

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States. It is the policy of the Congress 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, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

* * *

(g) Authority of States over water. It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * *

33 U.S.C. § 1314. Information and guidelines.

* * *

(f) Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution. The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 1288 of this title, within one year after October 18, 1972 (and from time to time thereafter) information including (1) guide-

lines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from –

* * *

(F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

* * *

33 U.S.C. § 1362 Definitions

Except as otherwise specifically provided, when used in this chapter:

* * *

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . . .

* * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

* * *

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

* * *

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

40 CFR Ch. 1 (7-1-01 Edition)

§ 122.2 Definitions.

* * *

Discharge when used without qualification means the "discharge of a pollutant."

Discharge of a pollutant means:

(a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or

(b) any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other

floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger."

Fla. Stat. § 403.0885. Establishment of federally approved state National Pollutant Discharge Elimination System (NPDES) Program

(1) The Legislature finds and declares that it is in the public interest to promote effective and efficient regulation of the discharge of pollutants into waters of the state and eliminate duplication of permitting programs by the United States Environmental Protection agency under s. 402 of the Clean Water Act, Pub. L. No. 92-500, as amended, *33 U.S.C. ss. 1251* et seq, and the department under this chapter. * * *

(2) The department is empowered to establish a state NPDES program in accordance with s. 402 of the Clean Water Act, as amended. The department shall have the power and authority to assume the NPDES permitting program from the United States Environmental Protection Agency and to implement the program, including the general permitting program under *40 C.F.R. s. 122.28* and the pretreatment program under 40 C.F.R. part 403, in

accordance with s. 402(b) of the Clean Water Act, as amended, and 40 C.F.R. part 123. * * * The state NPDES permit shall be the sole permit issued by the state under this chapter regulating the discharge of pollutants or wastes into surface waters within the state for discharges covered by the United States Environmental Protection Agency approved state NPDES program. This legislative authority is intended to be sufficient to enable the department to qualify for delegation of the federal NPDES program to the state and operate such program in accordance with federal law. * * *

Fla. Admin. Code Ch. 62-620.200 Definitions

The following words and phrases when used in this chapter shall, unless the context clearly indicates otherwise, have the following meanings: . . .

(12) "Discharge of a pollutant" means any addition of any pollutant or combination of pollutants, as defined in 40 C.F.R. 122.2, to waters from any point source other than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into the waters from surface runoff which is collected or channeled by man, and discharges through pipes, sewers, or other conveyances which do not lead to a treatment works. This term does not include an addition of pollutants by any indirect discharger.

[LOGO]

Department of
Environmental Protection
Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Jeb Bush
Governor

David B. Struhs
Secretary

22 January 1999

Ms. Barbara A. Markham, General Counsel
South Florida Water Management District
3301 Gun Club Road
West Palm Beach, Florida 33406

Subject: NPDES Permit for S-9 Pump Station

Dear ~~Ms. Markham~~ Barbara:

This is in response to your letter of November 25, 1998, regarding the S-9 pumping station in Broward County. You requested that the Department provide you with an opinion as to whether the District is required under section 403.0885 of the Florida Statutes to obtain an NPDES permit for the discharge at the S-9 pump station. Upon reviewing the information that you submitted, it is the Department's position that the District is not required to obtain a permit for the S-9 structure for the following reasons.

NPDES Permit Program

The Clean Water Act (CWA) provides that the "discharge of any pollutant by any person" is unlawful. 33 U.S.C. § 1311(a). Notwithstanding this prohibition, the

CWA allows the U.S. Environmental Protection Agency (EPA) or an approved state[1] to issue a permit under the National Pollutant Discharge Elimination System (NPDES) program for the discharge of any pollutant so long as the discharge meets the requirements of the CWA. 33 U.S.C. §1342(a).

The CWA defines a "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Therefore, under the CWA, for an NPDES permit to be required, five elements must be present: (1) a pollutant; (2) must be added; (3) to navigable waters; (4) from; (5) a point source. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982).

Additionally, the Department's own rule defines the "discharge of a pollutant" in the same manner. Rule 62-620.200 of the Florida Administrative Code defines "discharge of a pollutant" as "any addition of any pollutant or combination of pollutants, as defined in 40 C.F.R. 122.2, to waters from any point source other than a vessel or other floating craft which is being used as a means of transportation." Under the Department's rules, the same five elements must be present for an NPDES permit to be required.

The S-9 pumping station does not meet all five of these elements and therefore, no NPDES permit is needed for this structure.

---

[1] As you know, EPA has approved the Department's permitting program under section 402(b) of the CWA. Therefore, permits issued by the Department are in lieu of NPDES permits issued by EPA.

"Addition of a Pollutant"

Because the Department does not have any rules defining what is meant by the phrase "addition of a pollutant," we rely on the CWA and the case law interpreting the CWA in defining what is meant by this phrase. There is a long line of case law that has interpreted this phrase to mean that there must be an addition, or an introduction, of a pollutant, and it must be from a point source. *See Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976) (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); *Gorsuch*, supra (Addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world); *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988) (There is no addition of a pollutant unless the point source discharge physically introduces a pollutant into the water from the outside world).

Based on the information submitted by you, the S-9 pumping station will not be "adding" any pollutants as that phrase is defined by the above-cited cases. There is no evidence that any oils or metals from the pump itself are entering into WCA-3A in any detectable amounts. Thus, this element of the definition is not met.

"From"

EPA's interpretation regarding this element is that ~~that~~ addition of a pollutant must occur "from" a point source and not merely through a point source. *See Gorsuch,* 693 F.2d at 175 n.58. The courts, however, have

treated this element as one requiring causation. *See Dague v. City of Burlington*, 935 F.2d 1343 (2nd Cir. 1991), *rev'd on other grounds*, 112 S.Ct. 2638 (1992) (Where the city's landfill caused pollutants to enter navigable waters, and where those pollutants were then conveyed through a railroad culvert into additional navigable waters, the culvert was a point source under the CWA rendering the city responsible under the CWA).

As you pointed out in your letter, certain pollutants are in the water in the C-11 canal that pass through the S-9 pump station and are discharged into the canal in the WCA-3A. However, the S-9 pump station is not the cause of these pollutants being in the water in the C-11. Rather, the S-9 structure is merely transferring water from one navigable water of the U.S. to another. As such, this element of the definition is not met.

"Point Source"

The term "point source" is defined by the CWA as:

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14). Rule 62-620.200(34), F.A.C., defines the term "point source" in much the same way. The CWA goes on further to define "nonpoint sources of pollution" as pollution resulting from "changes in the movement, flow,

or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." The S-9 pumping station falls within the definition of a nonpoint source of pollution, as that term is used in the CWA, rather than a point source because it is merely changing the movement and flow of a navigable water. Therefore, this element of the definition also is not met.

Additionally, the Sixth Circuit court in *Consumer Power* noted, as in *Gorsuch*, that the NPDES system stands alongside the system of controlling nonpoint sources of pollution and that "Congress apparently intended that problems caused by dams and other flow diversion facilities are generally to be regulated by means other than the NPDES permitting program. *Consumer Power*, at 587, 588. The S-9 facility is a flow diversion facility and should therefore be regulated by means other than the NPDES permitting program and it is. The Department, pursuant to section 373.4596(9)(k) and (l) of the Florida Statutes, already permits the S-9 pump station. This permit requires that the S-9 pump station discharge meet all state water quality standards no later than December 31, 2006.

Conclusion

Because all five elements of the term "discharge of pollutants" are not met, it is the Department's position that the S-9 pumping structure does not require an NPDES permit for operation.

If you have any questions regarding this determination, please contact either myself at (850) 488-9735 or Jennifer Fitzwater of my office at (850) 921-9611.

Sincerely,

/s/ F. Perry Odom
F. Perry Odom
General Counsel

FPO/jlf

Cc: Ernie Barnett, FDEP
Jerry Brooks, FDEP
Frank Nearhoof, FDEP