

No. 07-13829-HH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FRIENDS OF THE EVERGLADES, FLORIDA WILDLIFE FEDERATION,
Plaintiffs/Counter-Defendants/Cross-Appellants,

FISHERMEN AGAINST DESTRUCTION OF THE ENVIRONMENT,
Plaintiff/Counter-Defendant,

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
Intervenor-Plaintiff/Counter-Defendant-Appellee/Cross-Appellant,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
Defendants/Counter-Claimant/Cross-Appellee,

CAROL WEHLE, Executive Director,
Defendant/Appellant/Cross-Appellee,

UNITED STATES OF AMERICA, U.S. SUGAR CORPORATION,
Intervenor-Defendants/Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF INTERVENOR-DEFENDANTS-APPELLANTS,
UNITED STATES SUGAR CORPORATION

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**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

United States Sugar Corporation certifies that it is a privately held corporation and that no publicly held corporation owns 10% or more of its stock.

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STATEMENT REGARDING ORAL ARGUMENT

The district court's conclusion that Clean Water Act Section 402 permits are required for water transfer facilities that convey navigable waters of the United States without subjecting the water to an intervening industrial, municipal, or commercial use that adds pollutants is in manifest conflict with the text and structure of the Clean Water Act, the decisions of several courts of appeals, and the considered views that the United States Environmental Protection Agency has embraced for decades. The district court's erroneous ruling is of fundamental importance to water management in Florida, to those like United States Sugar Corporation that depend upon it, and indeed to the entire economy of South Florida. It is also disruptive to complex water management systems throughout the Nation. We respectfully submit that oral argument is warranted and would be of assistance to the Court in the resolution of this appeal.

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STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

United States Sugar Corporation adopts by reference those parts of the briefs filed by co-defendants Carol Wehle and the United States of America that contend:

(i) deference is due to the United States Environmental Protection Agency's interpretation of the Clean Water Act Section 402—set forth in a proposed rule, in published guidance, and in litigation—not to require NPDES permits for water diversion facilities, like those in issue here, that convey water from one part of the navigable waters of the United States to another; and

(ii) Lake Okeechobee and the canals south of Lake Okeechobee that are connected to the Lake by the S-2, S-3, and S-4 pumps at issue here are not meaningfully distinct but form part of a single water body such that conveyance of water from one to the other cannot amount to an “addition” of pollutants to the receiving water requiring a Clean Water Act Section 402 permit.

United States Sugar Corporation further adopts by reference co-defendant Wehle's description, in her statement of facts, of the Florida regulatory scheme for maintaining and improving water quality, and of the Comprehensive Everglades Restoration Plan, an \$8 billion project to restore the quantity, quality, timing and distribution of water in Central and South Florida.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 33 U.S.C. § 1365(a). The district court entered an order setting forth findings of fact and conclusions of law on December 11, 2006 (RE Tab 636), entered an order on remedies on June 15, 2007 (RE Tab 692), and entered final judgment on June 15, 2007 (RE Tab 693).¹ United States Sugar Corporation filed a timely notice of appeal on August 13, 2007 (Dkt. 710). This appeal is from a final judgment that disposes of all parties' claims. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Section 402 of the Clean Water Act, 33 U.S.C. § 1342(a), requires a permit for the “addition” of pollutants to the navigable waters of the United States. The issues in this appeal are:

(1) Whether the district court erred as a matter of law in holding that Section 402 requires the South Florida Water Management District to obtain a permit for pump facilities that merely convey and connect navigable waters without adding to them any pollutant.

(2) Whether the district court erred because plaintiffs failed to meet their burden under *Fishermen Against the Destruction of the Environment, Inc. v. Clos-*

¹ “RE” refers to the Record Excerpts volume filed jointly by the United States, Carol Wehle, and United States Sugar Corporation.

ter Farms, Inc., 300 F.3d 1294 (11th Cir. 2002), to prove that pollutants in water conveyed by the S-2, S-3, and S-4 pumps originally entered the waters of the United States as a result of discharges that were neither permitted under Clean Water Act § 402 nor exempt from permitting.

STATEMENT OF THE CASE

This is a suit originally brought under the citizen suit provision of the Clean Water Act (“CWA”), 33 U.S.C. § 1365(a), by Friends of the Everglades (“FOE”) and Fishermen Against Destruction of the Environment (“FADE”) against the South Florida Water Management District (“SFWMD”). *Friends of the Everglades, Inc. v. South Florida Water Mgt. Dist.*, 2006 WL 3635465, at *1 (S.D. Fla. Dec. 11, 2006), RE Tab 636, at 2. Plaintiffs sought an injunction “requiring the SFWMD to obtain a National Pollution Discharge Elimination System (“NPDES”) permit under the [CWA] before the SFWMD could discharge water containing pollutants into Lake Okeechobee by means of the S-2, S-3, and S-4 pump stations.” *Ibid.* United States Sugar Corporation (“U.S. Sugar”) and the United States of America on behalf of the United States Army Corps of Engineers (“Corps”) and the United States Environmental Protection Agency (“EPA”) intervened as defendants, while the Miccosukee Tribe of Indians of Florida (“Tribe”) intervened as a plaintiff. RE Tab 636, at 2-3. The case was stayed pending the Supreme Court’s consideration of a case presenting similar issues, *South Florida Water Manage-*

ment District v. Miccosukee Tribe of Indians, 541 U.S. 95, 124 S. Ct. 1537 (2004). After the Supreme Court ruled, the district court in this case denied the parties' cross-motions for summary judgment, held a non-jury trial, and ultimately ruled for plaintiffs. See Findings of Fact and Conclusions of Law, RE Tab 636.

On June 15, 2007, the district court entered an order on remedies. RE Tab 692. The court granted plaintiffs an injunction, requiring the SFWMD to apply for an NPDES permit. Anticipating "complications in the permitting process," the court refused to impose a deadline for compliance and for the issuance of the permit. *Id.* at 5. The court also denied plaintiffs' proposed interim remedies, reasoning that given the possibility of reversal on appeal litigating the proposed remedies would be inefficient and premature. *Id.* at 6-7. U.S. Sugar, the SFWMD, and the United States each filed timely notices of appeal. Dkts. 706, 707, 710.

STATEMENT OF FACTS

I. The Statutory Scheme.

In order to eliminate "the discharge of pollutants into the navigable waters" (CWA § 101(a)(1), 33 U.S.C. § 1251(a)(1)), the Clean Water Act requires an NPDES permit for the "discharge of a pollutant," defined as "any addition of any pollutant to navigable waters from any point source." CWA §§ 402(a), 502(12), 33 U.S.C. §§ 1342(a), 1362(12). There is no dispute in this case that the canals and Lake Okeechobee, between which the pumps convey water, are "navigable wa-

ters,” which are defined in the statute as “the waters of the United States.” CWA § 502(7), 33 U.S.C. § 1362(7).

Beyond the NPDES scheme and the separate federal permit scheme for the addition to the navigable waters of dredge and fill material (CWA § 404, 33 U.S.C. § 1344), Congress largely left the task of addressing water pollution to the States, with federal guidance, assistance, and oversight. See *THE CLEAN WATER ACT HANDBOOK* 191-220 (M. Ryan ed. 2003). States are responsible for establishing water quality standards (CWA § 303(a), 33 U.S.C. § 1313(a)) and for achieving those standards, including by developing programs to manage nonpoint sources of water pollution. CWA §§ 303(d), 319, 33 U.S.C. §§ 1313(d), 1329. Congress expressly contemplated that “pollution resulting from * * * changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of * * * flow diversion facilities” like the pumps at issue here would be addressed under State nonpoint source programs. CWA § 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F) (headed “identification and evaluation of nonpoint sources of pollution”).

Florida has adopted numerous statutory and regulatory programs to combat pollution of its waterways, as described in the brief of defendant Carol Wehle. The Everglades Forever Act is a comprehensive regulatory program of “best management practices” for landowners within the Everglades Agricultural Area (“EAA”),

designed to “control the release of pollutants before they enter navigable waters.” RE Tab 636, at 44. Other Florida statutes that address the improvement of water quality, in particular through control of nonpoint sources of pollution, include the Watershed Restoration Act of 1999 and the Lake Okeechobee Protection Act of 2000, both of which require comprehensive watershed-based approaches and implementation of best management practices to reduce nonpoint source pollution. *Id.* at 46-49. Operating within the structure designed by Congress in the CWA, Florida has gone to great lengths to improve the quality of the State’s waters, including Lake Okeechobee and the EAA canals, and continues to do so.

Federal and state agencies are well aware of the need to restore the greater South Florida ecosystem—including by the reduction of phosphorus, nitrogen, and other pollutants—while also providing for the region’s water needs and for flood control. As described in the brief of Carol Wehle, the \$8 billion Comprehensive Everglades Restoration Plan (CERP)—developed at Congress’s command and with the participation of stakeholders—is now being implemented to achieve this restoration. See RE Tab 636, at 49-51.

Congress’s carefully drawn division of responsibility between the federal government and the States is central to the Clean Water Act. In two provisions in particular, Congress preserved the States’ traditional powers over water allocation and use and also the land use planning and regulation that is key to control of non-

point source pollution. First, Section 101(g) declares “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 the Act. 33 U.S.C. § 1251(g). Second, Congress expressed its intent in Section 101(b) “to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.” 33 U.S.C. § 1251(b). The Clean Water Act must be interpreted in accordance with Congress’s specific intent to preserve this federal-state balance. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-167, 173, 121 S. Ct. 675, 680, 683 (2001).

II. The S-2, S-3, and S-4 Pumps.

The SFWMD operates a comprehensive water management system of levees, canals, and flow diversion facilities designed to control and allocate waters in South Florida for flood control, water supply, and environmental purposes. RE Tab 636, at 11-12. At issue here are the S-2, S-3, and S-4 pump stations, each operated by the SFWMD in close cooperation with the United States Army Corps of Engineers. *Id.* at 12-13.

These three pumps, which were constructed by the Corps, are built into the south end of the Herbert Hoover Dike that surrounds Lake Okeechobee. They are

located where that Dike intersects canals that drain the S-2, S-3, and S-4 basins to the south. RE Tab 636, at 23. As a result, the pump stations “have the capacity to pump excess drainage into the Lake from the northern one-third of the EAA”—a 630,000 acre area south of Lake Okeechobee where U.S. Sugar conducts significant agricultural operations. *Id.* at 17, 24. When the pumps are operating they transfer excess waters from the EAA canals over a distance of less than 60 feet to the Lake without, the district court found, “subjecting the waters to any intervening industrial, municipal or commercial use” or “introduc[ing] anything to the water as it moves through the stations.” *Id.* at 24-25. Accordingly, the district court found, “[a]ll constituents in the waters transferred by the S-2, S-3, and S-4 pump stations,” which include pollution such as phosphorous, “*are already present in the waters when they enter the pumps*, either because they occur naturally or because they were introduced to the waters by some other source or land use upstream of the pump stations.” *Id.* at 25 (emphasis added).

Although the pumps operate only intermittently, they are of critical importance to every aspect of life in South Florida. The pumps are “integral components” of the broader, heavily engineered Central & Southern Florida (C&SF) Project, built after thousands of people in Florida died in flood events. RE Tab 636, at 26. The C&SF Project controls waters throughout South Florida, “moving billions of gallons of water daily” by means of some 150 water control structures—43 in-

tersecting Lake Okeechobee alone. *Id.* at 11-12 & n.13. The S-2, S-3, and S-4 pumps are operated, the district court found, to “provide flood protection for the basins, communities and agricultural areas that they service,” are “essential to maintaining agricultural activity in the EAA,” and provide “the only option for flood protection for the City of Clewiston” (where U.S. Sugar is based). *Id.* at 26. “Failure to operate the S-2, S-3, or S-4 pump stations during severe rain events,” the court found, “would cause flooding in communities and farmlands throughout the S-2, S-3, and S-4 basins.” *Id.* at 27.

III. The District Court’s Decision.

The district court acknowledged that the legal question in this case is “one of statutory construction” (RE Tab 636, at 72), and believed that the term “addition” is at the crux of that question. The district court purported to interpret that term according to its “‘ordinary and natural meaning’” of “the ‘joining one thing to another.’” *Id.* at 74. Rejecting as “strained” the responsible federal agencies’ 30-year construction of the term “addition” not to apply to water transfers, the court concluded that “it is evident that ‘addition * * * to the waters of the United States’ contemplates an addition from anywhere outside of the receiving water, including from another body of water.” *Ibid.* The court also held—contrary to the views of the expert federal and state agencies charged with implementing the CWA—that its interpretation of section 402 to apply to water transfers would best serve the

CWA's "goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters." *Ibid.* In reaching that conclusion the court refused to defer to the EPA's and Corps' interpretation of section 402 on the ground that their interpretation was contrary to "clear and unambiguous" congressional intent. *Id.* at 83-84.

The court thus concluded that "water transfers between distinct water bodies that result in the addition of a pollutant to the receiving navigable water body are subject to the NPDES permitting program." RE Tab 636, at 84. It further found that the EAA canals are "meaningfully distinct" from Lake Okeechobee, so that a permit is required for operation of the S-2, S-3, and S-4 pumps. *Id.* at 84-89.

U.S. Sugar made the independent argument below that an NPDES permit is not required for the pumps under this Court's decision in *Fishermen Against the Destruction of the Environment, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294 (11th Cir. 2002), because any pollution the pumps conveyed was already in the water and because plaintiffs had not shown such pollution to have originated from sources that were required to have but did not have appropriate permits. To the contrary, U.S. Sugar argued, the evidence showed that the pollution most likely originated from permitted point sources and from permit-exempt sources such as agricultural runoff. Despite U.S. Sugar's contention that controlling Circuit authority required that plaintiff bear the burden of showing that pollution conveyed by

the pumps originated from non-permitted, non-exempt sources, and that plaintiff had not met that burden, the district court failed to address this argument in its opinions.

STATEMENT OF THE STANDARD OF REVIEW

“The district court’s interpretation of the Clean Water Act is an issue of law that this court reviews de novo.” *Closter Farms*, 300 F.3d at 1296. The district court’s factual findings are reviewed for clear error. *Ibid*.

SUMMARY OF THE ARGUMENT

I. The district court erred as a matter of law in holding that the S-2, S-3, and S-4 pumps require a CWA Section 402 permit. The plain language of the statute makes clear that it is only the initial addition of a pollutant to the navigable waters of the United States from a point source that requires an NPDES permit, not the subsequent transfer of water containing pollution within the waters of the United States. The structure and legislative history of the CWA confirm the correctness of this “unitary waters” reading of the CWA. Because the district court misinterpreted the statute, its judgment should be reversed.

II. Alternatively, the clear law in this Circuit is that a plaintiff asserting that the operator of a water diversion facility requires a Section 402 permit bears the burden to prove that pollutants in the transferred water originated from non-permitted, non-exempt sources. Though plaintiffs had every opportunity to attempt

to satisfy that burden, on the record here they clearly failed to do so, requiring reversal.

ARGUMENT

I. THE DISTRICT COURT ERRED IN INTERPRETING CLEAN WATER ACT SECTION 402 TO REQUIRE NPDES PERMITS FOR THE TRANSFER OF NAVIGABLE WATERS.

The district court wrongly imposed federal NPDES permitting requirements on three pumps integral to Florida's land and water resource management system for the Everglades ecosystem and its central component, the Lake Okeechobee watershed. The district court's expansive interpretation of NPDES to extend to flow diversion facilities like the S-2, S-3, and S-4 pump stations, which convey navigable waters without adding any pollutants to them, flies in the face of the plain language of the Clean Water Act and fundamentally alters the statutory scheme by rendering traditionally local land and water management activities a matter for federal enforcement. Before turning to the reasons the district court's interpretation is incorrect, a brief overview of the applicability of the NPDES program is useful to provide some context. See *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 & n.10, 112 S. Ct. 570, 574 & n.10 (1991) (in construing a statute a court should adopt the sense of words that best harmonizes with their context and promotes policy and objectives of legislature).

The Clean Water Act envisions “a partnership between the States and the Federal Government, animated by a shared objective: ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’” *Arkansas v. Oklahoma*, 503 U.S. 91, 101, 112 S. Ct. 1046, 1054 (1992) (quoting 33 U.S.C. § 1251(a)). To achieve that goal while preserving the States’ primacy in water quality protection and land and water resources management, the Act divides regulatory authority between the State and federal governments based on the source of pollution. 33 U.S.C. §§ 1251(b), (g).

Section 402, which creates the NPDES system of permitting for “point sources” of pollutants, gives the EPA regulatory authority to eliminate the release of industrial and municipal wastes into the Nation’s waters. 33 U.S.C. § 1342; see *Nat’l Wildlife Fed’n v. Consumers Power*, 862 F.2d 580, 582 (6th Cir. 1988). Absent an NPDES permit establishing “effluent limitations” for the point source—defined as “any discernible, confined and discrete conveyance” (33 U.S.C. § 1362(14)—discharge of “any pollutant” from that source into the navigable waters of the United States is unlawful. *Id.* §§ 1311(a), 1311(b)(1)(A), 1342(a). “Effluent limitations” restrict the “quantities, rates, and concentrations of chemical, physical, biological, and other constituents” at the point at which they are discharged. *Id.* § 1362(11). Once an NPDES permit is issued, those “generally appli-

cable” standards become “the obligatio[n] * * * of the individual discharger.” *EPA v. California*, 426 U.S. 200, 205, 96 S. Ct. 2022, 2025 (1976).

“[D]efined by exclusion [to] includ[e] all water quality problems not subject to [the] § 402” program, regulation of nonpoint sources of pollution (such as runoff) is the primary responsibility of the States. *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 166 (D.C. Cir. 1982). “[W]ater quality standards are the basis of the ‘nonpoint source’ program,” *Consumers Power*, 862 F.2d at 588, and are promulgated by the States to “establish the desired condition of a waterway.” *Arkansas*, 503 U.S. at 101, 112 S. Ct. at 1054. While the CWA “provides no direct mechanism to control nonpoint source pollution,” *Pronsolino v. Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002), States are responsible for adopting nonpoint source management programs to address “watershed-by-watershed” concerns and to institute a “continuing planning process” to meet their water quality goals. 33 U.S.C. §§ 1313(a), (e); 1329(a)-(b); see *CLEAN WATER ACT HANDBOOK*, *supra*, at 202 (the CWA “does not give the federal government explicit authority to regulate nonpoint sources”).

Under this statutory framework, water distribution and control operations that merely redirect the flow of water are beyond the intended scope of NPDES. The Clean Water Act employs two distinct strategies to control pollution, and in endeavoring to eliminate entry of waste into the Nation’s waters prior to discharge,

Congress did not intend that a State would be required to obtain a federal permit simply to pump water from one part of its management system to another.

A. The Plain Language Of The CWA Does Not Require NPDES Permits For Mere Diversions Of “Navigable Waters”

Section 402 requires an NPDES permit for “the discharge of any pollutant.” 33 U.S.C. § 1342(a)(1). “Discharge of a pollutant” is defined as “any addition of any pollutant to navigable waters from any point source.” *Id.* § 1362(12). “The term ‘navigable waters’ means the waters of the United States, including the territorial seas.” *Id.* § 1362(7). The district court found it “evident” that the pumps at issue were covered by this statutory text. RE Tab 636, at 74. But that reading cannot be squared with the express terms of the statute, when each pump merely moves navigable water without “adding” anything whatever “to navigable waters.”²

1. Operation of the S-2, S-3, and S-4 Pumps Does Not Result in the “Addition” of Any Pollutant “to Navigable Waters”

Analysis must, as in any case of statutory interpretation, begin with the “language of the statute.” *Bailey v. United States*, 516 U.S. 137, 144, 116 S. Ct. 501, 506 (1995). Every clause and word of the statute should be given effect. *United*

² This Court has adopted the “significant nexus” test for navigable waters of the United States from Justice Kennedy’s concurrence in *Rapanos v. United States*, 126 S. Ct. 2208, 2241 (2006). See *United States v. Robison*, 2007 WL 3087419, *11 (11th Cir. Oct. 24, 2007). No party disputes that Lake Okeechobee and the canals connected to it by the S-2, S-3, and S-4 pumps are navigable waters of the United States.

States v. Nordic Village, 503 U.S. 30, 36, 112 S. Ct. 1011, 1015 (1992). There are several phrases limiting the type of “discharge” regulated by NPDES. Each of “five elements must be present” or else the activity need not be permitted: “(1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source.” *Gorsuch*, 693 F.2d at 165. Careful attention to these precise terms of “a complicated statute like the Clean Water Act” is particularly important because “technical definitions [were] worked out with great effort in the legislative process.” *S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 126 S. Ct. 1843, 1849-1850 (2006). Absent any dispute about whether the canals or the Lake were “navigable waters,” and having found that the pumped water “contain[ed] pollutants” (RE Tab 636, at 24-26), the district court focused its inquiry on the term “addition,” but failed to pay sufficient attention to the requirement that before Section 402 applies any addition of pollutants must be to “the waters of the United States.”

Undefined in the CWA, the term “addition” is to be construed “in accordance with its ordinary or natural meaning.” *S.D. Warren*, 126 S. Ct. at 1847; see also *Watson v. United States*, 2007 WL 4292111, at *3 (U.S. Dec. 10, 2007) (“With no statutory definition or definitive clue,” the meaning of a statutory term “has to turn on the language as we normally speak it”). In its primary sense, “addition” means the “result of adding; anything added,” and to “add” is to “join, annex, or unite * * * so as to bring about an increase (as in number [or] size).” WEBSTER’S

THIRD NEW INTERNATIONAL DICTIONARY 24 (1993). Contrary to the district court, however, under this ordinary usage the diversion of already polluted “navigable waters” from one location to another does not “join” “any pollutant” “to navigable waters” or bring about any “increase” in pollutants in “the waters of the United States.” The pollutants can only be “joined” or “united” with “the waters of the United States” upon first entry into those waters. *Gorsuch*, 693 F.2d at 165 (for NPDES to apply, the point source must be site of pollutant’s initial entry to navigable waters); *Consumers Power*, 862 F.2d at 584 (same).

No pollutants are introduced into the waters by the pump stations. RE Tab 636, at 24-25. Any pre-existing pollutants (such as phosphorus or nitrogen) are “added” from sources upstream or are naturally occurring. *Ibid*. Because there is no increase or augmentation of pollutants in the navigable waters from their movement through the pumps, section 402 does not apply. See *Consumers Power*, 862 F.2d at 586 (a permit is not required for “those pollutants already in the water moved and transformed by the essential operation of a * * * dam”); *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377 (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”). “[D]ischarge of a pollutant” is “a phrase made narrower,” the Supreme Court has recognized, “by its specific definition requiring an ‘addition’ of a pollutant to the

water”; “something must be added in order to implicate” the NPDES permitting requirement. *S.D. Warren*, 126 S. Ct. at 1850.

As the United States explained to the Supreme Court in its brief in the *Miccosukee* case, “[w]hatever pollutants the waters contain are already *in* ‘the waters of the United States,’ when those waters pass through” the SFWMD’s pumps; the pumps “merely conve[y]” but do not add those waters. U.S. Amicus Br., No. 02-626, at 16 (Sept. 10, 2003) (emphasis in original), *available at* <http://tinyurl.com/253yuc>. Before there is an addition of pollutants from a point source, the point source “must convey a [pollutant] *from the outside world* into ‘the waters of the United States.’” *Id.* at 14 (emphasis added); *United States v. Riverside Bayview Homes*, 474 U.S. 121, 132-133, 106 S. Ct. 255, 462 (1985) (Congress’s goal in the CWA was to control pollutants “at the source”).

This straightforward interpretation of the “addition” requirement draws support from two seminal cases on the boundaries of NPDES jurisdiction. In *Gorsuch*, the D.C. Circuit considered whether a dam’s release of polluted reservoir water into the downstream river constituted an “addition.” The court accepted EPA’s position that it did not because a “point source itself [must] physically introduc[e] a pollutant into water from the outside world.” The dam’s transfer of water did not qualify because existing pollutants were simply “passe[d] through [the point source] from one body of navigable water * * * to another.” 693 F.2d at 175. The

Sixth Circuit in *Consumers Power* likewise agreed that “the movement of pollutants already in the water is not an ‘addition’ of pollutants” to the “waters of the United States.” 862 F.2d at 581. A hydro-electric facility pumped water uphill from Lake Michigan into a manmade reservoir. When later transferred into the lake through the facility’s turbines, the water carried pollutants with it. But no “wastes [were] produced outside the waterways and hence [none were] ‘added’” through a point source so as to call for permitting under NPDES. *Id.* at 586. See also *Appalachian Power*, 545 F.2d at 1377 (a point source operator is not responsible for pre-existing pollutants). The S-2, S-3, and S-4 pumps similarly do no more than route the chemically different water of the canals to the Lake.

2. On its Face the CWA Adopts a Unitary View of Jurisdictional Waters and Regulates Only the Initial Entry of Pollutants into those Waters.

The district court thrust aside these well-established precedents. In holding that the pump facilities were subject to NPDES, the district court relied instead on a competing line of decisions which have held that permitting is required for the entry of pollutants “from the outside world,” *provided* “that ‘outside world is construed as any place outside *the particular water body* to which pollutants are introduced.” *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001) (“*Catskill I*”) (emphasis added), adhered to on reconsideration, 451 F.3d 77 (2006) (“*Catskill II*”); RE Tab 636, at 74; see also

Dubois v. United States Dep't of Agric., 102 F.3d 1273 (1st Cir. 1996). That interpretation of the statute—which introduces concepts of a “receiving water” and “particular water body” that appear nowhere in Section 402 or its definitions—is untenable.

The district court’s conclusion—also espoused in *Dubois* and *Catskill*—is flatly refuted by the plain language of the Act. In defining the reach of the discharge prohibition, Congress spoke of an addition “to navigable waters,” not “to navigable water.” The collective term “waters” signifies an intent to designate the entire system of U.S. waters, rather than any particular body of water, as the site at which an “addition” is judged. The CWA’s specific definition of “navigable waters” as “*the* waters of the United States” confirms that “navigable waters” are a conceptual whole for purposes of determining if an “addition” has occurred. 33 U.S.C. § 1362(7) (emphasis added). “Placing the article ‘the’ in front of a word connotes the singularity of the word modified. * * * In contrast, the use of the indefinite article ‘a’ implies that the modified noun is but one of several of that kind.” *Renz v. Grey Advertising, Inc.*, 135 F.3d 217, 222 (2d Cir. 1997). See *Rapanos*, 126 S. Ct. at 2220 (emphasizing “[t]he use of the definite article (‘the’) and the plural number (‘waters’)” in construing § 1362(7)); *Nordic Village*, 503 U.S. at 36, 112 S. Ct. at 1015 (each word in a statute is imbued with meaning).

Further confirming the unitary nature of the navigable waters of the United States is that fact that while the modifier “any” precedes every other element in the definition of “discharge of pollutants”—“any addition,” “any pollutant,” “any point source”—the statute conspicuously does not refer to “any” navigable waters but talks simply of “any addition of any pollutant to navigable waters.” 33 U.S.C. § 1362(12). This shows that while “additions,” “pollutants,” and “point sources” are conceived of in their various forms, “navigable waters” are viewed in the aggregate. See *United States v. Gonzales*, 520 U.S. 1, 5, 117 S. Ct. 1032, 1035 (1997) (“any” means “one or some indiscriminately of whatever kind”); *62 Cases, Etc. v. United States*, 340 U.S. 593, 596, 71 S. Ct. 515, 518 (1951) (touchstone for statutory interpretation is to look at “what Congress has written” and “neither to add nor to subtract, neither to delete nor to distort”). As the United States told the Supreme Court in *Miccossukee*, “[t]he *absence* of the modifier ‘any’ in conjunction with ‘navigable waters’ * * * signifies Congress’s * * * understanding that ‘the waters of the United States’ should be viewed as a whole for purposes of NPDES permitting requirements,” so that “[o]nce a pollutant is present in one part of ‘the waters of the United States,’ its simple conveyance to a different part”—as occurred here—is not a “discharge of a pollutant” triggering section 402. U.S. Amicus Br., No. 02-626, at 19 (emphasis original).³

³ That “*any* addition” is covered is of no moment. The “addition” must be made

If the CWA stated that a permit must be obtained for an “addition” to “any” navigable water or “body” of navigable water, that might more nearly capture the concept that each time pollutants pass from one “distinct” watercourse to another, NPDES is triggered. See RE Tab 636, at 84. Tellingly, Congress did use such language elsewhere in the statute. *E.g.*, 33 U.S.C. § 1312(a) (providing for water quality based effluent limitations on point source discharges when necessary to attain “water quality in *a specific portion of the navigable waters*”); *id.* § 1313(c)(2)(A) (requiring State to establish water quality standards taking into account “the designated uses of *the navigable waters involved*”); *id.* § 1313(d)(1)(B) (referring to “waters *or parts thereof*”) (all emphases added). These provisions show clearly that Congress understood that “the navigable waters” is a unitary concept and that further specification was necessary when it sought in the Act to refer to parts or portions of the navigable waters. Congress undoubtedly would have used this terminology of parts or portions in the definition of a discharge of a pollutant if that is what it had intended. See U.S. Amicus Br., No. 02-626, at 19 (Congress “would have defined the ‘discharge of a pollutant’ to include ‘any addition of any pollutant to [a specific portion of the] navigable waters from any point source’” had it “in-

into the navigable waters from outside of them. “The modifier ‘any’ cannot bring an activity that is never considered” an addition in the first place “within the ambit” of the NPDES. *New York v. EPA*, 443 F.3d 880, 887-888 (D.C. Cir. 2006), cert denied, 127 S. Ct. 2127 (2007).

tended that the movement of one body of navigable waters into another body of navigable waters” trigger the NPDES requirement).

Nowhere do any such terms of apportionment appear in the statute with respect to whether a discharge must be permitted. The only way to arrive at a distinction between navigable destination and source waters is “to ‘add terms or provisions’” that Congress never supplied—an exercise the district court engaged in but that it was “without authority” to do. *Cervantes-Ascencio v. INS*, 326 F.3d 83, 86 (2d Cir. 2003); see *Gorsuch*, 693 F.2d at 176 (“[I]t does not appear that Congress wanted to apply the NPDES system wherever feasible. Had it wanted to do so, it could easily have chosen suitable language”); *Conservation Law Found. v. Hannaford Bros.*, 327 F. Supp. 2d 325, 331 (D. Vt. 2004) (“Had Congress intended to mandate NPDES permits” for water transfers between individual water bodies, “it knew how to say so and would have done so”), *aff’d*, 139 F. App’x 338 (2d Cir. 2005); H.R. Rep. No. 92-911, at 125 (1972), *reprinted in* 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, Ser. No. 93-1, at 753, 796 (1973) (“LEGISLATIVE HISTORY”) (“[I]t is extremely important to an understanding of [section 402] to know the definition of the various terms used and a careful reading of the definitions * * * is recommended. Of particular significance [are] the words “discharge of pollutants”). Because Congress has “shown itself capable of including such language,” courts “must give effect to Congress’s decision

to omit [those sorts of qualifying] words” with respect to discharges to be permitted under NPDES. *Haas v. IRS*, 48 F.3d 1153, 1158 (11th Cir. 1995); see *S.D. Warren*, 126 S. Ct. 1852 (“it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion” of language in the same Act).

In an argument repeated by the district court (RE Tab 636, at 74-76), *Dubois* and *Catskill* nevertheless criticized the “singular entity” approach to “navigable waters” as being “inconsistent” with the “ordinary meaning of the word ‘addition,’” because then “movement of water from one discrete water body to another would not be an addition even if it involved a transfer of water * * * contaminated with myriad pollutants to [water that was more] pristine.” *Catskill I*, 273 F.3d at 493; accord *Catskill II*, 451 F.3d at 81; *Dubois*, 102 F.3d at 1296-1297. That is not an argument grounded in statutory language at all. Instead, it reflects the court’s naked policy choice to elevate its own conception of how to achieve the goal of clean water over the plain language that Congress used to delineate the mechanisms to achieve that goal.

The district court’s appeal to the preservation of “pristine” waters is ungrounded in the statutory text or structure and ignores the critical role that Congress gave the States in combating water pollution. It presumes that NPDES is the *only* mechanism by which CWA effectuates the protection of water quality,

whereas in fact there exist numerous other initiatives to address the professed pollution concern, such as State implementation of water quality standards and regulation of sources of pollution not covered by the NPDES program. *E.g.*, 33 U.S.C. §§ 1313(d)(1), 1288, 1329; see *supra*, pp. 4-6. Perhaps the district court so distrusts the ability of States to control pollution through nonpoint source programs that it feels the need to expand the scope of NPDES permitting, but Congress did not. To the contrary, Congress chose terms that plainly limit the scope of the NPDES program and make the States equal partners in pollution control.

Furthermore, under the district court's expansive theory the term "addition" is stripped of significance because virtually all waters contain some "pollutants" within the meaning of the CWA. *Every* transfer of water would thus become an "addition," and "navigable waters" would become "pollutants" treated on par with industrial and municipal waste. Water managers like SFWMD would be required to obtain permits under NPDES even though activities like the operation of the pumps at issue here "add" no waste product to the waters but simply transport it for the beneficial public purposes of flood control and water supply.

The district court also suggested that *Dubois* and *Catskill* should govern here because they involved "water transfers from one body of water to another," whereas *Gorsuch* and *Consumers Power* involved withdrawal and "releases * * * into the same body of water." RE Tab 636, at 69. But neither *Gorsuch* nor *Con-*

sumers Power predicated their holdings that NPDES permits need not be obtained on the transferred and receiving bodies of water being “the same.” Each, in fact, talks about the differences between the respective water bodies. See *Gorsuch*, 693 F.2d at 165 (“dam-caused pollution * * * passes through the dam from one body of navigable water (the reservoir) into another (the downstream river)”); *Consumers Power*, 862 F.2d at 581, 589 (facility moves water “between its manmade reservoir and Lake Michigan”). What is relevant, instead, is whether new pollutants are introduced into the navigable waters—which may occur irrespective of whether “the water from which the discharges came is the same as that to which they go.” *Catskill I*, 273 F.3d at 492.⁴

As the district court acknowledged, if it is “accepted” that mere diversions of navigable waters are not subject to NPDES, then given the factual record here defendants must prevail. RE Tab 636, at 64. Since the only proper reading of the statutory text is that diverting navigable waters containing pollution—without adding any pollutants to them—involves no “discharge,” ordering that SFWMD obtain permits for its pumps was error and the decision below must be reversed.

⁴ NPDES, for example, may be imposed on entities that withdraw water for “manufacturing or processing” activities and then return it to the same water body through a point source. *E.g.*, 40 C.F.R. § 122.2 (defining process wastewater).

B. The Clean Water Act, Read As A Whole, Confirms The Unitary Waters Interpretation Of Section 402.

The plain language of Section 402 and its accompanying definitions is by itself controlling here. But our interpretation is also confirmed by a holistic reading of the statute that takes into account its other provisions.

(a) Section 304(f) of the CWA, 33 U.S.C. § 1314(f), which the Supreme Court recognized “concerns nonpoint sources” (*Miccosukee*, 541 U.S. at 106, 124 S. Ct. at 1544), is entitled “[i]dentification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution.” It provides that EPA in consultation with federal and State agencies is to promulgate guidelines concerning nonpoint source pollution and methods “to control 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.” Section 304(f) thus indicates that Congress intended that the “movement” of water through “flow diversion” facilities like the S-2, S-3, and S-4 pumps should be addressed by the States through their nonpoint source programs, not by application of the Section 402 permitting program—even though flow diversion facilities would typically satisfy the statutory definition of a point source. See H.R. Rep. No. 92-911, at 109, 1 LEGISLATIVE HISTORY at 796 (“Section 304[f] addresses the problem of nonpoint sources of pollutants [such as] manmade changes in the normal flow of surface and ground wa-

ters”); *Consumers Power*, 862 F.2d at 583-584, 588 (“water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under the ‘nonpoint source’ category”).

The obvious rationale for that treatment is that Congress well understood that the mere movement of navigable water through a point source results in no “addition” of pollutants “to navigable waters” that would trigger NPDES permitting. See U.S. Amicus Br., No. 02-626, at 26 (Section 304(f) shows that “Congress clearly understood that water control facilities could have an impact on water quality, but it concluded that those water quality impacts should be addressed primarily through means other than the Section 402 permitting process”); NPDES Water Transfers Proposed Rule, 71 FED. REG. 32887, 32890 (June 7, 2006) (Section 304(f) “reflects an understanding by Congress that water movement could result in pollution, and that such pollution would be managed by States under their nonpoint source program authorities, rather than the NPDES program”).

(b) By imposing NPDES on the SFWMD’s pumping of water and improperly equating the source water in the canals with a “pollutant,” the district court ignored the CWA’s express distinction between the term “pollutant”—to which NPDES applies—and “pollution”—to which it does not. “Pollution” (the term used in Section 304 to describe the effect of flow diversion facilities) refers to “man-made or man-induced alteration of the chemical, physical, biological, and radio-

logical integrity of water.” 33 U.S.C. § 1362(19). “Pollutant” is more restrictively defined to mean “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.” *Id.* § 1362(6); see *Colautti v. Franklin*, 439 U.S. 379, 392 n.10, 99 S. Ct. 675, 684 n.10 (1979) (a “definition which declares what a term ‘means’ * * * excludes any meaning that is not stated”). Under these definitions, the movement of canal water into the Lake may be akin to pollution inasmuch as it effects a change in water quality, but it is not properly classified as the discharge of a *pollutant* when only already-polluted natural water is diverted and no tangible waste products are disposed of by the process. See *Gorsuch*, 693 F.2d at 172 (the “use of two different terms is presumed to be intentional”; “pollution” is not the same as a “pollutant”); *Association to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1016 (9th Cir. 2002) (pollutants are “waste material of a human or industrial process”). It is physical substances or “waste” of the sort produced by industrial and municipal activities which are the target of NPDES, and the SFWMD’s pumping operations introduce no such material into the waters it manages. See *United States v. Plaza Health Labs.*, 3 F.3d 643, 646 (2d Cir. 1993) (focus of CWA is industrial and municipal wastes).

(c) Congress in the Clean Water Act expressed its intention “to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” and in doing so “to plan the development and use * * * of land and water resources.” CWA § 101(b), 33 U.S.C. § 1251(b). It further intended that “the authority of each State to allocate quantities of water within its jurisdiction shall not be * * * impaired.” CWA § 101(g), 33 U.S.C. § 1251(g).

Other provisions of the statute make clear that Congress implemented these commands by, among other things, leaving with the States the authority to control nonpoint sources of pollution (which typically requires land and water use planning)—including, specifically, water diversions (which are typically essential to the allocation of quantities of water). *E.g.*, CWA §§ 304(f), 319, 33 U.S.C. §§ 1314(f), 1329. To expand the scope of the federal NPDES permitting system at the expense of State authority over nonpoint sources of pollution—precisely the effect of the district court’s decision—flies directly in the face of this express congressional intent and violates the cardinal principal that “unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.” *United States v. Bass*, 404 U.S. 336, 349, 92 S. Ct. 515, 523 (1971). See *Solid Waste Agency*, 531 U.S. at 173-174, 121 S. Ct. at 683-684 (applying this rule to the interpretation of the Clean Water Act). As the United States informed the Supreme Court in *Miccosukee*, interpreting Section 402 to reach water transfers

would “impose substantial obstacles to the operation of state water allocation systems,” and “[n]othing in the Clean Water Act’s text or history suggests that Congress intended that result.” U.S. Amicus Br., No. 02-626, at 25 n.11.

(d) The Clean Water Act lists categories of facilities that need permits, including the treatment required for each category. 33 U.S.C. § 1311(b)-(m) (effluent limitations for categories of point sources); *id.* § 1314(b), (d) (levels of treatment for industrial and municipal point sources); *id.* § 1316(b) (categories of point sources required to meet new source performance standards). That not one of those provisions addresses a State’s diversion of water for flood control, water supply, or other public purposes is telling. Consistent with its definition of a covered discharge and with Section 304(f), Congress simply did not contemplate that NPDES would apply to such facilities.

(e) Legislative history further confirms that Congress intended Section 402 to apply to the first entrance of pollutants into “the navigable waters” and for subsequent transfers to be addressed through nonpoint source and water quality programs. See S. Rep. No. 92-414, at 77 (1971), 2 LEGISLATIVE HISTORY at 1495 (Act’s aim is that “discharge of pollutants be controlled *at the source*”); *id.* at 73, 2 LEGISLATIVE HISTORY at 1491 (Congress “concentrate[d] on the control of pollutants *placed in surface waters*”); *id.* at 70, 2 LEGISLATIVE HISTORY at 1488 (goal is “to control” the discharge of pollutants “on a *source by source basis*”); H.R. Rep.

No. 92-911, at 109, 1 LEGISLATIVE HISTORY at 796 (Congress adopted Section 304(f) because it understood the need “to vigorously address the problems of non-point sources,” including “from such nonpoint sources as * * * natural and man-made changes in the normal flow of surface and ground waters”); NPDES Water Transfers Proposed Rule, 71 FED. REG. at 32891 (“the legislative history of the Act discusses water flow management activities only in the context of the nonpoint source program”) (all emphases added).

C. The *Miccosukee* Decisions Do Not Contradict This Straightforward Plain-Language Reading Of The Clean Water Act.

The district court made much of *dicta* in the Supreme Court’s *Miccosukee* decision. RE Tab 636, at 65-68. But those *dicta* did not even suggest a particular interpretation of the Clean Water Act, only posed *questions* that defendants have fully answered in this litigation. Far from “cast[ing] aspersions on the ‘unitary waters’ theory” (*id.* at 68), the Supreme Court explicitly “decline[d] to resolve” the “unitary waters argument” on the ground that “neither the District nor the Government raised the unitary waters approach” in this Court or in their certiorari papers, and made it clear that the argument would be open to the parties in the future. 541 U.S. at 109, 124 S. Ct. at 1545. The district court thus made far too much of an opinion that, on this critical issue, decided nothing.

The Supreme Court in *Miccosukee* did raise a number of questions about the unitary waters approach that were not addressed in the briefing in that case. Each issue raised by the Court is readily answered:

(1) Although Section 304(f) “does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the ‘point source’ definition” (541 U.S. at 106, 124 S. Ct. at 1544), few diversions could be achieved without the use of some device that qualifies as a point source under the Act’s broad definition—“any discernible, confined and discrete conveyance.” 33 U.S.C. § 1362(14). The very purpose of a diversion is to convey water in a different direction, usually involving some feature that confines the water in the process such as a “pipe, ditch, channel, tunnel [or] conduit.” *Ibid.* Congress would hardly have bothered to promulgate Section 304(f) to cover only diversions that do not use a point source—a virtually empty set. Section 304(f) and its legislative history show that Congress envisioned that water transfers would be dealt with by the nonsource point program. See *supra*, pp. 4, 13. Section 304(f) simply confirms the meaning that derives from plain statutory language.

(2) That certain provisions of the Clean Water Act do refer to specific portions of the navigable waters (see *supra*, p. 21) does indeed show that Congress was concerned to “protec[t] individual water bodies.” 541 U.S. at 107, 124 S. Ct. at 1544. But when Congress meant to impose an obligation with respect to specific

portions of the navigable waters—typically in connection with State water quality obligations—it plainly so stated. Section 402 and its definitions do not do so. This stark contrast in the terms Congress chose to use underlines the validity of the unitary waters approach to NPDES permitting. In determining *whether an NPDES permit is required* the question is does the point source at issue add pollutants to the navigable waters as a whole. But in determining *appropriate water quality standards and effluent limitations* the specific characteristics of a particular water body are of course to be taken into account. Those are wholly harmonious, not inconsistent approaches.

(3) That 40 C.F.R. § 122.45(g)(4) allows an “intake credit” for pollutants to an industrial user who uses polluted water and then returns it to the same waterbody, but not otherwise, is of no moment. See 541 U.S. at 107-108, 124 S. Ct. at 1544. The industrial use and then discharge of water is subject to Section 402, absent a specific exemption like the agricultural exemption. See *Dubois v. United States Dep’t of Agric.*, 102 F.3d 1273 (1st Cir. 1996); U.S. Amicus Br., No. 02-626, at 23 n.8. The “intake credit” rule merely takes pollutants that were always in the water out of the effluent limit equation. It in no way suggests that water that is conveyed, without an intervening use, falls within the NPDES program. To the contrary, other regulations make clear that point sources “which connect * * * waters of the United States and are used to convey waters of the United States” are

not discharges requiring NPDES permits. 40 C.F.R. § 122.26(b)(9) (municipal separate storm sewers).

(4) A 1975 EPA General Counsel opinion that “irrigation ditches that discharge to navigable waters require NPDES permits even if they themselves qualify as navigable waters” is not relevant to the issue here. 541 U.S. at 107, 124 S. Ct. at 1544, citing *In re Riverside Irrigation Dist.*, 1975 WL 23864 (EPA OGC June 27, 1975). To begin with, it was Congress’s view that this and similar positions taken by EPA were incorrect that led it to enact the broad exemption for agricultural discharges in 1977, making clear that irrigation return flows involve no discharge requiring federal permits. CWA § 502(14), 33 U.S.C. § 1362(14). Furthermore, EPA has expressly stated that the 1975 opinion was narrow in scope and “did not specifically address” transfers that merely convey navigable waters, and that “[t]o the extent” the opinion could be interpreted to apply more broadly to water transfers “it is superseded” by EPA’s subsequent interpretations expressly addressing those transfers. EPA, *Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers* at 2-3 n.5 (Aug. 5, 2005), available at http://www.epa.gov/ogc/documents/water_transfers.pdf.

The district court’s reliance on questions posed in the Supreme Court’s *Miccosukee* decision was therefore mistaken. The district court also relied upon this Court’s decision in *Miccosukee*, 280 F.3d 1364 (11th Cir. 2002). See RE Tab 636,

at 66, 68-69, 74. But that decision was *vacated* by the Supreme Court and so has no precedential effect. See *Los Angeles Cty. v. Davis*, 440 U.S. 625, 634 n.6, 99 S. Ct. 1379, 1384 n.6 (1979). Because the argument that all navigable waters should be “viewed unitarily” was not raised “before the Court of Appeals,” it was not addressed by this Court. 541 U.S. at 109, 124 S. Ct. at 1545. Furthermore, this Court’s decision was predicated on its inability to ascertain EPA’s views. See 280 F.3d at 1368 (“The EPA is no party to this case; we can ascertain no EPA position applicable to S-9 * * *”). Since this Court decided *Miccossukee*, the United States has filed a brief with the Supreme Court espousing the “unitary waters” interpretation of the Act; EPA and the Corps have issued formal Guidance and subsequently proposed a new Water Transfers Rule addressing facilities like those at issue here and explaining why they are not covered by Section 402; and the United States has filed briefs in this case. The analysis in a vacated opinion that did not consider the principal arguments now made by the responsible federal and State agencies and the intervenor, and that has also been overtaken by agency action, should not be considered controlling, or even persuasive.

Because the plain language and structure of the CWA mandate that NPDES requirements do not apply to water transfers, this Court should reverse the judgment below and enter judgment for defendants.

II. THIS COURT’S RULING IN *CLOSTER FARMS* CONFIRMS THAT NPDES JURISDICTION APPLIES TO SOURCES OF POLLUTANTS AND NOT DOWNSTREAM CHANGES IN FLOW, AND ALSO PROVIDES A SEPARATE GROUND FOR REVERSAL.

In *Closter Farms* this Court refused to impose a permitting obligation on a point source that did not originate any pollutants but merely conveyed pollutants that had entered the water upstream from either permitted or exempt sources. *Fishermen Against the Destruction of the Environment, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294 (11th Cir. 2002). The Court’s focus in *Closter Farms* on the source of pollutants—their point of entry into the navigable waters—strongly supports the unitary waters interpretation of the Act. Furthermore, because plaintiffs here, like plaintiffs in *Closter Farms*, failed to meet their burden of proving that the S-2, S-3, or S-4 pumps convey non-permitted, non-exempt pollutants, *Closter Farms* also shows that defendants are entitled to the judgment as a matter of law on that distinct ground, which the district court failed to address despite its presentation in the briefing.⁵

A. This Court’s *Closter Farms* Decision.

In *Closter Farms*, an environmental interest group that is also a plaintiff here, Fishermen Against the Destruction of the Environment (“FADE”), brought a

⁵ This argument was developed at length below in U.S. Sugar’s Proposed Findings of Fact and Conclusions of Law 17-28, 44-57 (filed Mar. 29, 2006), Dkt. 590. Although the district court did not address this argument, no remand is necessary because the facts that show judgment is required for defendants under *Closter Farms* were fully developed below and are apparent on the face of the record.

citizen suit against a sugar farm for discharging pollutants into Lake Okeechobee without an NPDES permit. 300 F.3d at 1296. The farm maintained a water management system that provided drainage for its agricultural land, as well as non-agricultural adjacent parcels: an airport, a wastewater treatment plant, a county park, vacant land previously occupied by a tractor retail sales operation, and a state road. *Ibid.* This system pumped excess water from the farm's irrigation canals into Lake Okeechobee via a culvert. *Ibid.*

The trial court granted plaintiff partial summary judgment, holding that the culvert was a point source, and then presided over a nonjury trial of whether non-exempt pollutants were in fact being pumped through. 2001 WL 838437 (S.D. Fla. Mar. 16, 2001). In entering judgment in favor of the defendant, the trial court found that although plaintiff had established that pollutants reached the Lake from the culvert, “no evidence has been adduced that these pollutants are not exempted by the legislature or that they are not the subject of an appropriate permit.” *Id.* at *2. Identifying five non-agricultural land uses within the area of the farm's water management system, the trial court observed that “[d]efendant established that discharges from these sources are either the subject of existing NPDES permits or are exempted from NPDES permitting” and therefore “complied with the established legislative scheme. Plaintiff has failed to establish the addition of a pollutant which would not be exempt.” *Ibid.*

This Court affirmed. In an opinion by Judge Kravitch, the Court ruled that implicit in the district court's decision were findings that "any pollutants that originated on Closter Farms fall within the agricultural exemptions to the CWA" and "any pollutants that originated elsewhere were allowed by an NPDES permit or an exemption * * *." 300 F.3d at 1297.

This Court agreed with the first of these propositions. It held that the evidence showed that *all* of the discharges from Closter Farms itself were either agricultural stormwater discharges or return flows from irrigation, both NPDES exempt. 300 F.3d at 1297-1298. It concluded that plaintiffs had produced "insufficient evidence * * * that Closter Farms discharged any non-agricultural pollutants into Lake Okeechobee," let alone that any such discharges lacked permits. *Id.* at 1298. Speculative testimony about non-agricultural discharges, not backed by "any studies or research to confirm the sources of pollutants" was insufficient to meet plaintiffs' burden. *Ibid.*

B. *Closter Farms* Conforms To The Plain Language "Unitary Waters" Interpretation Of CWA Section 402.

It is a small step from the Court's recognition in *Closter Farms* that the CWA's NPDES program regulates pollutants at their source and the *source polluter* is responsible for either obtaining a permit or ensuring that the discharge is exempt from permitting, to also recognizing the correctness of the unitary waters interpretation of the CWA, which encapsulates precisely the idea that water pollu-

tion is to be addressed at the source of the initial discharge to the navigable waters. Although the parties did not argue, and this Court did not address, the unitary waters interpretation of Section 402 in *Closter Farms*, the Court's focus on the entry of pollutants into the navigable waters supports that interpretation, and it is flatly inconsistent with plaintiffs' position here that merely transferring already polluted water (*including* when the pollution was NPDES permitted or exempt) triggers Section 402.

The central focus of the CWA's scheme for combating water pollution is on permitting the point where pollutants enter the waters of the United States and addressing nonpoint source pollution through land use measures such as best management practices. It makes no sense to shift the regulatory focus to agencies that have to manage the water, after it is polluted, for public purposes. If an upstream point source should have been permitted but was not, there are ample direct remedies, civil and criminal, to address the lack of a required permit, and no practical need to shift the regulatory scheme to a downstream inheritor of the pollution. If pollutants reached the navigable waters from runoff or other nonpoint sources, direct regulation of the land use that produced the runoff is contemplated by the Act, not indirect management of the pollution by downstream diverters of the water. Further, it makes a mockery of Congress's decision expressly to exempt certain discharges from the NPDES scheme to then saddle downstream recipients of the

exempt pollutants with an obligation to address them through NPDES effluent limits on water transfers. As the United States recently explained to the Supreme Court, “Congress recognized that the operators of water control facilities are typically not responsible for the presence of pollutants in the waters they transport,” that those pollutants come from “sources located far from those facilities and beyond control of the project operators,” and that “water quality problems associated with the South Florida ecosystem * * * reflect that reality.” U.S. Amicus Br., No. 02-626, at 27.

Thus, “Congress properly envisioned that the project operators should not be saddled with curing those regional water quality problems” through NPDES permitting. *Ibid.* This Court’s decision in *Closter Farms* comports with Congress’s determination to focus efforts to eradicate pollution on those who add pollutants to the navigable waters, not those obliged to manage already polluted water. The dramatic shift in responsibility to water managers that plaintiffs propose would be an inefficient and ineffective method of regulation. Mr. Jerry Brooks, Deputy Director of the Florida Department of Environmental Protection Division of Water Resource Management explained that the SFWMD would not be able to assure that the waters being transferred would not violate an NPDES permit if one were issued. Those reasons included the fact that upstream sources would influence the quality of the water being transferred and that some of these sources may be ex-

empt from regulation and others might be illegal and occasional, making such inputs impossible to control. Dkt. 738, Trial Tr. Jan. 25, 2006, at 146:9-149:18. Rather than pursue this fool's errand, Mr. Brooks stated that where an activity subject to NPDES permitting might discharge constituents that could be associated with downstream water quality, FDEP addresses those downstream consequences in issuing the upstream permit. *Id.* at 151:3-11. Similarly, upstream land uses may be regulated to address nonpoint source pollution. Even the Tribe's stormwater expert, Mr. Craig Maske, agreed that plaintiffs could look upstream to address pollutants he identified as passing through the S-2, S-3, or S-4 pumps. Dkt. 746, Trial Tr. Feb. 16, 2006, at 54:21-23. That is what the CWA on its face requires—not NPDES permitting of water transfers.

C. Plaintiffs Have Not Met Their Burden Under *Closter Farms* To Prove That The S-2, S-3, and S-4 Facilities Pump Non-Permitted, Non-Exempt Pollutants.

Closter Farms also provides an alternative ground for reversal. In contending that the S-2, S-3, and S-4 pump facilities require NPDES permits, plaintiffs bore the burden under *Closter Farms* of proving that pollutants that entered upstream from the pumps entered navigable waters from non-permitted, non-exempt point sources. *Closter Farms*, 300 F.3d at 1296-98; see also *Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.*, 970 F. Supp. 363, 366 (D.N.J. 1997) (“As in all citizen suits brought under the Clean Water Act, plaintiffs have

the ultimate burden in this case”). Plaintiffs utterly failed to satisfy that burden, despite having had every opportunity to attempt to do so.

The SFWMD introduced evidence at trial that the pollutants passing through the S-2, S-3, or S-4 pumps entered the navigable waters from either exempt sources or otherwise regulated sources. One principal source, the evidence shows, is agricultural stormwater and irrigation return flows, which are exempt from permitting under CWA § 402(l)(1), 33 U.S.C. § 1342(l)(1). See, *e.g.*, Dkt. 738, Trial Tr. Jan. 25, 2006, at 147:2-151:2; Dkt. 739, Trial Tr. Jan. 26, 2006, at 25:25-26:5; Dkt. 740, Trial Tr. Feb. 8, 2006, at 137:4-10.

Another source is discharges from municipal stormwater systems for Pahokee, Belle Glade, Clewiston, and South Bay, from county stormwater systems, and from roads in the area. Municipal and county stormwater systems are either required to get an NPDES stormwater permit (MS-4) or are exempt if they are below the population threshold requirement. All municipalities in the region requiring an MS-4 permit have been issued with one. The MS-4 permits also apply to the roads throughout the system. Dkt. 739, Trial Tr. Jan. 26, 2006, at 27:8-29:19; Dkt. 740, Trial Tr. Feb. 8, 2006, at 156:25-157:18.

Another source of pollution is industrial discharges, which require an NPDES permit. Dkt. 743, Trial Tr. Feb. 13, 2006, at 77:6-12; Dkt. 746, Trial Tr. Feb. 16, 2006, at 5:12-14.

Plaintiffs offered *no evidence at all* that any upstream source of pollutants that was required to have a permit did not have one. To be sure, plaintiffs' witnesses offered speculative generalities. Craig Maske testified that "my experience in stormwater permitting tells me that there are certainly many industrial activities out there [in] that area still operating without permits." Dkt. 746, Trial Tr. Feb. 16, 2006, at 14:16-15:4. Mr. Maske also testified that he "had experience of entities obtaining the permits, essentially doing the paperwork, but not doing anything to actually comply with the permits. So, certainly I know there are entities out there operating without a permit." *Id.* at 14:21-15:4. But he offered not one specific example of a non-permitted, non-exempt discharge to back up these speculative assertions. In fact, plaintiffs at no time provided *even a single concrete example of unpermitted, non-exempt discharges, or discharges that exceeded already-permitted NPDES parameters.*

Under *Closter Farms* that defect in plaintiffs' evidence is fatal to their case. See 300 F.3d at 1298 & n.2 (affirming judgment for Closter Farms because "there is insufficient evidence in the record that Closter Farms discharged any non-agricultural pollutants into Lake Okeechobee," where plaintiffs failed to "identify any studies or research to confirm the sources of pollutants" but offered only generalized testimony about the sources of pollutants). Plaintiffs have failed to meet

their evidentiary burden under *Closter Farms*, requiring reversal of the district court's erroneous judgment and entry of judgment for defendants.

CONCLUSION

The judgment of the district court should be reversed and judgment entered for the defendants.

Respectfully submitted.

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Dated: December 14, 2007

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I hereby certify that a true and correct copy of the foregoing document has been filed with the court and served upon the individuals listed below by first class U.S. mail and electronic service, postage prepaid, this 14th day of December, 2007.

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STATUTORY ADDENDUM

Pertinent Provisions of the Clean Water Act

Section 101, 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;

* * *

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(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 * * *. 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.

Section 208, 33 U.S.C. § 1288. Areawide waste treatment management

(a) Identification and designation of areas having substantial water quality control problems

For the purpose of encouraging and facilitating the development and implementation of areawide waste treatment management plans—

* * *

(2) The Governor of each State * * * shall identify each area within the State which, as a result of urban-industrial concentrations or other factors, has substantial water quality control problems. * * * [T]he Governor shall designate (A)

the boundaries of each such area and (B) a single representative organization, including elected officials from local governments or their designees, capable of developing effective areawide waste treatment management plans for such area.

* * *

(b) **Planning process**

(1)(A) Not later than one year after the date of designation of any organization under subsection (a) of this section such organization shall have in operation a continuing areawide waste treatment management planning process consistent with section 1281 of this title. Plans prepared in accordance with this process shall contain alternatives for waste treatment management, and be applicable to all wastes generated within the area involved. The initial plan prepared in accordance with such process shall be certified by the Governor and submitted to the Administrator not later than two years after the planning process is in operation.

* * *

(2) Any plan prepared under such process shall include, but not be limited to—

(A) the identification of treatment works necessary to meet the anticipated municipal and industrial waste treatment needs of the area over a twenty-year period, annually updated (including an analysis of alternative waste treatment systems), including any requirements for the acquisition of land for treatment pur-

poses; the necessary waste water collection and urban storm water runoff systems; and a program to provide the necessary financial arrangements for the development of such treatment works, and an identification of open space and recreation opportunities that can be expected to result from improved water quality, including consideration of potential use of lands associated with treatment works and increased access to water-based recreation;

(B) the establishment of construction priorities for such treatment works and time schedules for the initiation and completion of all treatment works;

(C) the establishment of a regulatory program to –

- (i) implement the waste treatment management requirements of section 1281(c) of this title,
- (ii) regulate the location, modification, and construction of any facilities within such area which may result in any discharge in such area, and
- (iii) assure that any industrial or commercial waste discharge into any treatment works in such area meet applicable pretreatment requirements;

(D) the identification of those agencies necessary to construct, operate, and maintain all facilities required by the plan and otherwise to carry out the plan;

(E) the identification of the measures necessary to carry out the plan (including financing), the period of time necessary to carry out the plan, the costs of

carrying out the plan within such time, and the economic, social and environmental impact of carrying out the plan within such time;

(F) a process to (i) identify, if appropriate, agriculturally and silviculturally related nonpoint sources of pollution, including return flows from irrigated agriculture, and their cumulative effects, runoff from manure disposal areas, and from land used for livestock and crop production, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources;

(G) a process to (i) identify, if appropriate, mine-related sources of pollution including new, current, and abandoned surface and underground mine runoff, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources;

(H) a process to (i) identify construction activity related sources of pollution, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources;

(I) a process to (i) identify, if appropriate, salt water intrusion into rivers, lakes, and estuaries resulting from reduction of fresh water flow from any cause, including irrigation, obstruction, ground water extraction, and diversion, and (ii) set forth procedures and methods to control such intrusion to the extent feasible

where such procedures and methods are otherwise a part of the waste treatment management plan;

(J) a process to control the disposition of all residual waste generated in such area which could affect water quality; and

(K) a process to control the disposal of pollutants on land or in subsurface excavation within such area to protect ground and surface water quality.

* * *

Section 301, 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.

(b) Timetable for achievement of objectives

In order to carry out the objectives of this Act there shall be achieved—

(1)(A) * * * effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title * * * .

* * *

Section 302, 33 U.S.C. § 1312. Water quality related effluent limitations

(a) Establishment

Whenever, in the judgment of the Administrator or as identified under section 1314(l) of this title, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 1311(b)(2) of this title, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

* * *

Section 303, 33 U.S.C. § 1313. Water quality standards and implementation plans

* * *

(c) Review; revised standards; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing

applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

* * *

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision

(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for

such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

* * *

Section 304, 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) guidelines 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.

* * *

Section 319, 33 U.S.C. § 1329. Nonpoint source management programs

(b) State assessment reports

(1) Contents

The Governor of each State shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval, a report which—

(A) identifies those navigable waters within the State which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirements of this chapter;

(B) identifies those categories and subcategories of nonpoint sources or, where appropriate, particular nonpoint sources which had significant pollution to

each portion of the navigable waters identified under subparagraph (A) in amounts which contribute to such portion not meeting such water quality standards or such goals and requirements;

(C) describes the process, including intergovernmental coordination and public participation, for identifying best management practices and measures to control each category and subcategory of nonpoint sources and, where appropriate, particular nonpoint sources identified under subparagraph (B) and to reduce, to the maximum extent practicable, the level of pollution resulting from such category, subcategory, or source; and

(D) identifies and describes State and local programs for controlling pollution added from nonpoint sources to, and improving the quality of, each such portion of the navigable waters, including but not limited to those programs which are receiving Federal assistance under subsection (h) and (i).

* * *

(b) State management programs

(1) In general

The Governor of each State, for that State or in combination with adjacent States, shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval a management program which such State proposes to implement in the first four fiscal years beginning after the date of submis-

sion of such management program for controlling pollution added from non-point sources to the navigable waters within the State and improving the quality of such waters.

(2) Specific contents

Each management program proposed for implementation under this subsection shall include each of the following:

(A) An identification of the best management practices and measures which will be undertaken to reduce pollutant loadings resulting from each category, subcategory, or particular nonpoint source designated under paragraph (1)(B), taking into account the impact of the practice on ground water quality.

(B) An identification of programs (including, as appropriate, nonregulatory or regulatory programs for enforcement, technical assistance, financial assistance, education, training, technology transfer, and demonstration projects) to achieve implementation of the best management practices by the categories, subcategories, and particular nonpoint sources designated under subparagraph (A).

* * *

Section 402, 33 U.S.C. § 1342. National pollutant discharge elimination system

(a) **Permits for discharge of pollutants**

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge

of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, (B) or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

* * *

(l) Limitation on permit requirement

(1) Agricultural return flows

The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

* * *

Section 502, 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 * * * .

* * *

(7) The term “navigable waters” means the waters of the United States, including the territorial seas.

* * *

(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.

* * *

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

* * *
