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

OPPOSITION OF INTERVENOR-DEFENDANT-APPELLANT UNITED STATES SUGAR CORPORATION TO PETITIONS FOR REHEARING

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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.

Other persons who have an interest in the outcome of this appeal are as follows:

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ARGUMENT

The panel properly deferred to the Environmental Protection Agency's interpretation of the Clean Water Act (CWA) set forth in EPA's final rule clarifying that water transfers are not subject to the National Pollutant Discharge Elimination System (NPDES) permitting program. The EPA's interpretation is a permissible construction of the statutory language that is due deference under *Chevron, U.S.A., Inc* v. *Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). *Chevron* deference was fully briefed to the panel and considered by the district court. Because other circuits did not have the benefit of the agency's final rule when reviewing the statutory language, the panel decision does not conflict with the decisions of any other circuit.

Petitioner Friends of the Everglades ("Friends") is wrong to suggest this case is subject to the Administrative Procedure Act (APA). The final rule relied on by the panel is not challenged in this case and no federal agency has been sued.[1] The final rule was only before the panel as supplemental authority for interpreting the CWA provisions governing the present dispute between petitioners and the South Florida Water Management District ("Water District"). Because the rule is not challenged here, the panel was not required to review the administrative record

[1] The United States is involved in the case on behalf of the EPA only as an intervenor. A rule challenge is ongoing in other proceedings that have been stayed pending the outcome here, but there is no rule challenge in the present case.

underlying the rule's promulgation. Petitioner Miccosukee Tribe of Indians of Florida (the "Tribe") similarly errs when it claims that EPA's final rule raised new issues that the parties should have been permitted to brief. All relevant issues had previously been briefed or abandoned, which is why neither the Tribe nor the panel sought supplemental briefing when the final rule was filed as supplemental authority. The Tribe cannot raise abandoned issues for en banc review.

I. *Chevron* Deference to EPA's Interpretation of "Addition * * * to Navigable Waters" Does Not Create a Circuit Split

U.S. Sugar agrees with the United States and Water District that the panel decision is a standard application of *Chevron*. Upon reviewing the text, structure, and context of the CWA, the panel held that the statutory phrase "addition * * * to navigable waters" is ambiguous. *Friends of the Everglades* v. *S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1222-27 (11th Cir. 2009). It then determined that EPA's final rule interprets the phrase in "a reasonable, and therefore permissible, construction of the language." *Id.* at 1227-28. Because the panel decision was "the first * * * to address" whether the final rule "is due *Chevron* deference," *id.* at 1218, it did not create a circuit split.

Petitioners cite a number of circuit decisions that they claim conflict with the panel (Tribe Pet. at 7-9; Friends Pet. at 6-9),[2] but those decisions predate EPA's final rule and left open whether a final rule adopting the unitary waters interpretation of the statutory language is due *Chevron* deference. *Dubois* v. *U.S. Dep't of Agriculture*, 102 F.3d 1273, 1285 n.15 (1st Cir. 1996), explicitly stated that *Chevron* "does not apply * * * because we are not reviewing an agency's interpretation of the statute that it was directed to enforce." The court in *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 273 F.3d 481, 490 (2d Cir. 2001) ("*Catskills I*"), admitted "[i]f the EPA's position had been adopted in a rulemaking or other formal proceeding, [*Chevron*-style] deference * * * might be appropriate." The Second Circuit reaffirmed that position in *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 451 F.3d 77, 86 (2d Cir. 2006) ("*Catskills II*") ("Neither the[arguments made by council] nor any intervening developments lead us to conclude that our earlier holding was reached in error or should otherwise be modified").

The panel in the present case was cognizant that "[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation * * * displaces a conflicting agency construction." *Friends of the Everglades*, 570

[2] "Pet." refers to the Petitions for Rehearing En Banc and for Panel Rehearing and/or Reconsideration filed by Friends and the Tribe. "Br." refers to the briefs filed on appeal to the panel.

F.3d at 1219 (quoting *Nat'l. Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005)). It painstakingly went through each of the decisions cited by petitioners and highlighted each opinion's explicit decision not to address *Chevron* deference, thereby permitting later agency construction to change the governing interpretation. *Id.* at 1221-22 (analyzing *Catskills I, Catskills II,* and *Dubois* before concluding that the decisions "decided only how best to construe the statutory language—not whether that language is ambiguous and could reasonably be construed another way"). Because "none of those decisions addressed * * * whether the EPA's interpretation of the statutory language is reasonable," *id.* at 1221, the panel correctly concluded that its decision did not conflict with the decisions cited by petitioners.

II. Review of the Administrative Record Underlying EPA's Final Rule is Not Appropriate in a Non-APA Case.

Relying on the Administrative Procedure Act (APA), Friends argues that the panel was required to review the administrative record underlying EPA's final rule. Friends Pet. at 13-14. But the APA does not apply to the present case because no agency action is challenged. The administrative record underlying EPA's final rule is similarly irrelevant absent a challenge to the agency action that promulgated the rule. Friends' position confuses *Chevron* deference with APA review.

The APA provides for judicial review of actions taken by federal agencies. 5 U.S.C. § 704. In reviewing agency action, a court is required to review the "whole [administrative] record" underlying the agency action "or those parts of it cited by a party." 5 U.S.C. § 706. That review ensures an agency action is not "arbitrary and capricious" by asking whether the agency considered "relevant factors" and "articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the United States, Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

A "valid APA claim" only exists, however, where there is a "challenge [to] agency action." *Fanin* v. *U.S. Dep't. of Veterans Affairs*, 572 F.3d 868, 877 (11th Cir. 2009) (internal quotation marks omitted). Where a claim does not challenge agency action, the APA does not apply. See *Comm. of Blind Vendors of Dist. of Columbia* v. *District of Columbia*, 28 F.3d 130, 134 (D.C. Cir. 1994) ("APA *would have* governed the case if the plaintiff class had challenged" a decision of the agency, but "the APA is inapplicable because no agency proceeding took place for the court to review").

The APA and its requirements do not apply here. Petitioners have not challenged agency action or even sued a federal agency. They sued the Water

District (a state entity) and its executive director to force the Water District to obtain a NPDES permit. *Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, 2006 WL 3635465, at *1-*2 (S.D. Fla. Dec. 11, 2006). None of petitioners' allegations invoke the APA.

Absent a challenge to agency action under the APA, review of the administrative record underlying promulgation of an agency regulation is not required. The administrative record and public comments to a rule do not determine whether an agency's interpretation of the statute is a permissible one, they only shed light on whether agency actions taken pursuant to the statute were reasonable. *Sierra Club* v. *U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 440 n.37 (5th Cir. 2001) ("[a]lthough the administrative record for the regulation is not before this Court, that is of no moment" since the "APA differs from *Chevron* review in that the former focuses on the reasonableness of the agency's decision-making process rather than the reasonableness of its interpretation"). Reviewing whether an agency's decision-making process that led to an action was proper requires a record of that process. That is why administrative record review is an APA requirement, 5 U.S.C. § 706, not a requirement of *Chevron*.

While *Chevron* deference often arises in the APA-context, *Chevron* cases outside of the APA are legion. These non-APA cases apply *Chevron* without

reviewing the regulation's administrative record. *See, e.g.*, *Russell* v. *N. Broward Hosp.*, 346 F.3d 1335, 1344-45 (11th Cir. 2003) (*Chevron* deference to Department of Labor regulations interpreting Family and Medical Leave Act in dispute between former employee and hospital); *Lyons* v. *Georgia-Pacific Corp. Salaried Employees Ret. Plan*, 221 F.3d 1235, 1244-49 (11th Cir. 2000) (*Chevron* deference to Treasury regulations interpreting the Employee Retirement Income Security Act in dispute between pension plan and participants); see also *Burlison* v. *McDonald's Corp.*, 455 F.3d 1242, 1246 (11th Cir. 2006) (employing EEOC regulations to interpret Age Discrimination in Employment Act); *Gonzalez-Sanchez* v. *Int'l Paper Co.*, 346 F.3d 1017, 1021 n.4 (11th Cir. 2003) (agency regulations interpreting Migrant and Seasonal Agricultural Worker Protection Act).

Smiley v. *Citibank*, 517 U.S. 735 (1996), cited by the panel, is illustrative. In *Smiley*, a credit card holder brought a class action against a national bank claiming the bank's late fees violated California law. *Id.* at 738. Responding to *Smiley* and other litigation about whether late fees were "interest" under Section 30 of the National Bank Act of 1864 (12 U.S.C. § 85), the Comptroller of the Currency interpreted "interest" in a proposed rule. *Id.* at 737, 741. A final rule was adopted after the California Supreme Court ruling in *Smiley*. *Id.* at 740. In reviewing that California Supreme Court decision, the United States Supreme Court granted *Chevron* deference to the interpretation offered by the new rule,

which had been "adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act." *Id.* at 739, 741, 744-46. The Court neither reviewed the administrative record nor public comments underlying the rule's promulgation because the rule was not challenged, but only used to interpret the statute --- just like in this case.

Applying the APA here is not authorized by the statute, 5 U.S.C. § 704 (limiting APA judicial review to review of agency action), and would improperly transform every case where a court relies on agency regulations to interpret ambiguous statutory language into an administrative law proceeding, contradicting procedures applied by the Supreme Court and 11th Circuit authorities above. But it is the APA that Friends relies upon to assert the administrative record must be reviewed. Friends Pet. at 14 (citing 5 U.S.C. § 706). Friends' authorities are irrelevant, because they involve APA challenges to agency action. *Fla. Power & Light Co.* v. *Lorion*, 470 U.S. 729, 743-44 (1985) ("task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court"); *Sierra*

Club v. *Leavitt*, 368 F.3d 1300 (11th Cir. 2004) (applying APA review *sub silentio*[3]).

APA review and *Chevron* deference are not the same thing. The final rule will be reviewed pursuant to the APA in the rule challenge that is pending in this Circuit. That is the proper forum for review of the administrative record. Resolving the rule challenge by en banc review of the proceedings here, where agency action is not in dispute, would preempt review of the rule in a court presented with actual APA claims and briefing relevant to those claims.

III. *Chevron* Deference was Addressed by the District Court and Briefed by the Parties; The Tribe May Not Raise Anew its Previously Abandoned Arguments

The tribe incorrectly asserts that it lacked the opportunity to brief an issue raised by promulgation of the final rule. Tribe Pet. at 8 n.3, 13 n.5. The question of *Chevron* deference to EPA's proposed rule was fully briefed; it is undisputed that the promulgated and final rules are essentially identical; and the issue the Tribe

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[3] In *Leavitt*, the Georgia Environmental Protection Division granted a Title V permit to a power plant for meeting the necessary air pollution requirements. 368 F.3d at 1301-02. The Sierra Club petitioned EPA to object to the permit, but EPA declined. *Id.* at 1301. Pursuant to 42 U.S.C. § 7607(b), the Sierra Club appealed EPA's agency action. *Id.* This Court reviews § 7607(b) challenges to agency action pursuant to the APA because § 7607(b) lacks its own standard of review for agency action, *Sierra Club* v. *Johnson*, 436 F.3d 1269, 1273 (11th Cir. 2006), and the APA is the default for review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

seeks to raise—whether the rule is based on the "unitary waters" theory—is one that it has waived. Because the final rule only provided additional authority for the statutory interpretation offered by the Water District and Intervenors, no additional briefing was necessary.

Statutory interpretation, *Chevron*, and the EPA rule were briefed by the parties and considered by the district court. Whether EPA's interpretation of "addition * * * to navigable waters" should be afforded *Chevron* deference featured in the United States' briefs. U.S. Brief at 21-23, 38-42; U.S. Reply at 15-18. The Tribe dedicated six pages to arguing that the "Proposed Rule of the United States is not entitled to any [*Chevron*] deference as it conflicts with the plain language of the CWA, relies on the discredited unitary waters argument and incorrectly interprets several provisions of the CWA." Tribe Br. at 44-49 ("no *Chevron* deference to an agency interpretation that is contrary to the plain meaning of the statute may be given"). The district court opinion also addressed the statutory interpretation provided by EPA's rule and *Chevron* deference. *Friends of the Everglades, Inc.*, 2006 WL 3635465, at *47-48 ("even if *Chevron* deference does apply * * * the Court * * * rejects the interpretation proposed by the EPA" and its "recently-issued Proposed Rule" because "the statute is unambiguous") (internal quotation marks omitted).

The United States did not raise new issues by filing the final rule with this Court. It filed the rule only as additional authority for the statutory interpretation argument already fully briefed to the panel and ruled on by the district court regarding whether EPA's interpretation was entitled to *Chevron* deference.[4] Because *Chevron* deference is required where an agency rule has been subjected to "formal notice and comment rulemaking," Tribe Br. at 45 n.11, the rule's finality strengthened the interpretation advocated by the United States without changing arguments or issues before the panel.

The Tribe's petition improperly seeks to raise new issues for the en banc panel to consider. The Tribe once acknowledged that, so long as the proposed rule and final rule were similar, its arguments remained the same.[5] Now, even though it does not dispute that the final rule promulgated by EPA is "nearly identical to the proposed rule," 73 Fed. Reg. 33697, 33699 (2008), the Tribe argues that it "did not

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[4] As supplemental *legal* authority to the issue of whether *Chevron* deference is appropriate here, the final rule was properly presented to this Court in a 28(j) letter. As the panel recognized, it does not "matter that the regulation was proposed and issued well after the beginning of this lawsuit." *Friends of the Everglades*, 570 F.3d at 1219 (citing *Smiley* v. *Citibank*, 517 U.S. 735, 740-41 (1996), and *United States* v. *Morton*, 467 U.S. 822, 835 n.21 (1984)).

[5] Tribe Br. at 45 n.11 ("At the time of its decision, the district court did not have a final rule before it. Notwithstanding, because the Proposed Rule (or final rule if adopted and similar) is contrary to the requirements of the unambiguous statute, the district court's decision would have to have been the same").

have an opportunity to brief arguments relating to the final [rule].” Tribe Pet. at 13 n.5, 8 n.3. In particular, the Tribe seeks to brief “whether [the final rule] adopts the unitary waters theory or some other theory.” *Id.* at 8 n.3. But it *conceded* this issue in earlier briefing when it admitted that the Proposed Rule (and thereby the “nearly identical” final rule) incorporated the “unitary waters theory”:

> The Defendants have used various methods to promote their unitary waters theory. They drafted a memorandum from EPA on the eve of summary judgment and attempted to have the court give deference to the Defendants’ litigation position. Now, they have incorporated that litigation position into a Proposed Rule.

Tribe Br. at 27 (citation omitted). The issue was conceded before the district court as well. *Friends of the Everglades*, 2006 WL 3635465, at *36 (“The parties do not dispute that, if accepted, the Proposed Rule, and the EPA’s rationale in support thereof, should result in the denial of the relief Plaintiffs seek”).

The Tribe’s concession in its brief to the panel that EPA’s regulation incorporates the unitary waters theory was strategic. It knew the Court must accept EPA’s interpretation of an EPA rule under *Auer* v. *Robbins*, 519 U.S. 452 (1997), so long as the interpretation was “not ‘plainly erroneous or inconsistent with the regulation.’” *Coeur Alaska, Inc.* v. *Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2468 (2009) (quoting *Auer*, 519 U.S. at 461). Rather than tackling *Auer*’s steep slopes, the Tribe conceded the rule’s reliance on unitary waters so it could

focus its challenge on whether the rule and EPA's interpretation warranted *Chevron* deference. The Tribe lost that argument. It cannot now convert defeat into victory by seeking to overturn the panel on an argument abandoned by earlier briefing. It is too late for the Tribe to manufacture a dispute about whether EPA's rule is based on the unitary waters theory. The Tribe's own authorities make that much clear.

In *McGinnis* v. *Ingram Equipment Co.*, 918 F.2d 1491 (11th Cir. 1990), McGinnis sued his former employer for discrimination under § 1981 of the Civil Rights Act. *Id.* at 1493. Ingram defended itself at trial by claiming no intentional discrimination against McGinnis, but failed to argue the alleged discriminatory conduct was outside the scope of § 1981. *Id.* at 1494. Four days before oral argument, the Supreme Court limited § 1981's scope in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989). *McGinnis*, 918 F.2d at 1493-95. Ingram then claimed that *Patterson* defeated some of plaintiff's claims. The *McGinnis* en banc panel decided that because Ingram had not challenged § 1981's scope before the trial court, Ingram had waived those arguments, and so *Patterson*'s impact was irrelevant.[6] *Id.* at 1495-96. The *McGinnis* decision did "not affect" "long-standing

[6] *Access Now, Inc.* v. *Southwest Airlines Co.*, 385 F.3d 1324 (11th Cir. 2004), also dealt with a party raising new arguments to the Circuit panel not raised at trial. "[W]e are unable to reach the merits of the plaintiffs' claim because, simply put,

principles" that "an appellate court should apply the law in effect at the time it renders its decision," because Ingram had presented "new arguments and issues * * * [at] a late stage of the proceedings, rather than simply new law that could be applied to arguments already developed." *Id.*[7]

Under *McGinnis*, the new arguments presented by the Tribe are waived. The Tribe has never disputed that EPA's interpretation rests upon unitary waters theory until the present en banc petition. In contrast, the United States offered EPA's final rule as new law for application to its "already developed" *Chevron* argument, raised at trial and in the briefing, that its interpretation is permissible.[8]

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they have presented this Court with a case that is wholly different from the one they brought to the district court." *Id.* at 1326.

[7] *Bothwell* v. *RMC Ewell, Inc.*, 226 F. App'x 925 (11th Cir. 2007), cited by petitioners, is in tension with this principle from *Patterson*. Given that *Bothwell* is a short, unpublished, per curiam opinion with no explanation for its ruling, it is of limited precedential value.

[8] Because the argument and the proposed regulation were already considered by the District Court, the Tribe misses the point with *Naturist Soc'y Inc.* v. *Fillyaw*, 958 F.2d 1515, 1524 (11th Cir. 1992). In *Fillyaw*, a corporation advocating a "clothing optional" lifestyle challenged Florida regulations governing the distribution of printed materials and general conduct in state parks. *Id.* at 1517-18. After the district court's final order, Florida amended the regulations. *Id.* at 1519. Because the amendments were never presented during trial, the 11th Circuit remanded for consideration by the district court. *Id.* at 1524. *Fillyaw* is inapplicable to this dispute because the district court here *already* considered EPA's rule and *rejected* its interpretation of 33 U.S.C. § 1362(12). Tribe Pet. at 3 ("[t]he district court rejected the EPA's unitary waters theory, and the proposed

If the Tribe believed the final rule raised new issues that needed briefing, it could have petitioned this Court for supplemental briefing. *United States* v. *Gray*, 260 F.3d 1267, 1282 (11th Cir. 2001) (granting motion for leave to file supplemental brief); *Holley* v. *Seminole County Sch. Dist.*, 755 F.2d 1492, 1505 n.18 (11th Cir. 1985) (same). Instead, it waited to see if the panel ruled in its favor. Given the voluminous judicial time and effort expended in this case, the panel also apparently believed additional briefing of an issue already extensively briefed to be unnecessary. Circuit Internal Operating Procedures permitted it to request supplemental briefing if such briefing were needed. 11th Cir. R. 28, I.O.P. 5.

CONCLUSION

En banc review is unnecessary and duplicative here. The panel carefully considered each of the relevant issues that petitioners would have an en banc panel review. No circuit splits were created, every issue decided was briefed, and the APA does not apply. Rehearing should be denied.

Respectfully submitted.

Regulation"). *Fillyaw* also dealt with a regulatory challenge, unlike the present case, which is not a challenge to EPA's regulation.

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CERTIFICATE OF SERVICE

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 13th day of October, 2009.

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