IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FRIENDS OF THE EVERGLADES, et al.,	)	
Petitioners,	)	
	)	**Petition No. 08-13652**
v.	)	
	)	**consolidated with**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	**Petition Nos. 08-13653, 08-13657, 08-14247, 08-14471, 08-14921, 08-16270, 08-16283, 08-17189, and 09-10506**
Respondent,	)	

On Petition for Review of the United States Environmental Protection Agency's Final Order

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CORPORATE DISCLOSURE STATEMENT

United States Sugar Corporation has no parent company, and no publicly held corporation owns 10% or more of its stock.

CERTIFICATE OF INTERESTED PERSONS AND ENTITIES

On behalf of United States Sugar Corporation, I hereby certify that, to the best of my knowledge, the following is a complete list of persons and entities who have an interest in the outcome of this case, pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, as amended.

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STATEMENT REGARDING ORAL ARGUMENT

United States Sugar Corporation believes that oral argument may be helpful to the Court to answer any questions the Court may have about either jurisdiction or the controlling decision in *Friends of the Everglades* v. *South Florida Water Management District*, 570 F.3d 1210 (11th Cir. 2009), *reh'g en banc denied*, 605 F.3d 962 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 643 & 645 (2010).

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STATEMENT OF JURISDICTION

The Environmental Protection Agency ("EPA") published the National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule on June 13, 2008. See 73 Fed. Reg. 33,697 (June 13, 2008) ("Water Transfers Rule" or "Rule"). Petitioner Friends of the Everglades timely petitioned for review of the Water Transfers Rule on June 27, 2008. See 33 U.S.C. § 1369(b). That petition was consolidated with a number of other timely petitions for review. This Court has jurisdiction to rule on the petitions for review under Section 509 of the Clean Water Act ("CWA"), 33 U.S.C. § 1369(b).

STATEMENT OF ISSUES

1. Whether this Court may rule on the merits of the petitions where it has original jurisdiction under CWA Section 509(b), where there unquestionably is an Article III controversy, and where this Court's recent decision in *Friends of the Everglades* v. *South Florida Water Management District*, 570 F.3d 1210 (11th Cir. 2009), *reh'g en banc denied*, 605 F.3d 962 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 643 & 645 (2010), rendered the petitions for review plainly insubstantial.

2. Whether *Friends of the Everglades* v. *South Florida Water Management District*, 570 F.3d 1210, 1228 (11th Cir. 2009), in which this Court held that the Water Transfers Rule is not "'arbitrary, capricious, or manifestly contrary to the statute,'" compels denial of the petitions for review.

STATEMENT OF THE CASE

A. The Clean Water Act

The Clean Water Act ("CWA") balances federal and state powers, forming "a partnership" "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 (1992) (quoting CWA § 101(a), 33 U.S.C. § 1251(a)). Congress's express intent in the CWA is "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." CWA § 101(b), 33 U.S.C. § 1251(b). It is also "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. CWA § 101(g), 33 U.S.C. § 1251(g). To achieve the goals of restoration and maintenance of the Nation's waters while also preserving the States' primacy in water quality protection and land and water resource management, the Act divides regulatory authority between the State and Federal Governments based on the source of pollutants.

Section 402 creates a permitting system for "point sources" that add pollutants to United States waters. Specifically, Section 402 requires a National Pollution Discharge Elimination System ("NPDES") permit for the "discharge of

any pollutant." 33 U.S.C. § 1342(a); see also CWA § 301(a), 33 U.S.C. § 1311(a). The Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." CWA § 502(12), 33 U.S.C. § 1362(12). "Navigable waters" in turn is defined as "the waters of the United States." CWA § 502(7), 33 U.S.C. § 1362(7). The Act leaves "addition" undefined.

Beyond Section 402 and the separate Section 404 permit scheme for the addition of dredge and fill material to navigable waters (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 achieving those standards by developing, among other things, programs to manage nonpoint sources of water pollution, such as runoff. CWA §§ 303(d), 319, 33 U.S.C. §§ 1313(d), 1329. In particular, 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," would be addressed under State nonpoint source programs—even though such diversions are usually point sources. CWA § 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F) (headed "Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution"). Congress

recognized that pollutants should be managed at their source, and it believed that subsequent diversions of polluted water are most sensibly addressed through State water resource planning and regulations.

B. The Water Transfers Rule

On June 13, 2008, EPA promulgated the Water Transfers Rule at issue in this case. That rule codified EPA's long-held understanding that water transfers—which merely "conve[y] or connec[t] waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use"—"are not subject to regulation under the [NPDES] permitting program." 73 Fed. Reg. at 33,697. EPA determined that "taken as a whole, the statutory language and structure of the Clean Water Act indicate that Congress generally did not intend to subject water transfers to the NPDES program." *Id.* at 33,701. "Instead, Congress intended to leave primary oversight of water transfers to state authorities in cooperation with Federal authorities." *Ibid.*

EPA reasoned that water transfers "do not result in the 'addition' of a pollutant" to the waters of the United States. 73 Fed. Reg. at 33,699. "Given the broad definition of 'pollutant,' transferred (and receiving) water will always contain intrinsic pollutants, but the pollutants in transferred water are already *in* 'the waters of the United States' before, during, and after the water transfer. Thus, there is no 'addition'; nothing is being added '*to*' 'the waters of the United States'

by virtue of the water transfer, because the pollutant at issue is already part of 'the waters of the United States' to begin with." *Id.* at 33,701 (quoting United States' brief to this Court in *Friends of the Everglades* v. *South Florida Water Management District*).

EPA further stressed that "the heart of this matter is the balance Congress created between federal and State oversight of activities affecting the nation's waters." 73 Fed. Reg. at 33,701. "In light of Congress' clearly expressed policy not to unnecessarily interfere with water resource allocation and its discussion of changes in the movement, flow or circulation of any navigable waters as sources of pollutants that would not be subject to regulation under section 402, it is reasonable to interpret 'addition' as not including the mere transfer of navigable waters." *Id.* at 33,701-33,702. In addition, EPA determined that "pollution from transferred waters is more sensibly addressed through [state] water resource planning and land use regulations, which attack the problem at its source." *Id.* at 33,702.

The Agency drew additional support from the CWA's legislative history. "The legislative history makes clear that Congress generally did not intend a wholesale transfer of responsibility for water quality away from water resource agencies to the NPDES authority. Rather, Congress encouraged States to obtain approval of authority to administer the NPDES program under section 402(b) so

that the NPDES program could work in concert with water resource agencies' oversight of water management activities to ensure a 'balanced management control system.'" 73 Fed. Reg. at 33,703.

EPA concluded: "In sum, the language, structure, and legislative history of the statute all support the conclusion that Congress generally did not intend to subject water transfers to the NPDES program. Water transfers are an integral part of water resource management; they embody how States and resource agencies manage the nation's water resources and balance competing needs for water. Water transfers also physically implement State regimes for allocating water rights, many of which existed long before enactment of the Clean Water Act. Congress was aware of these regimes, and did not want to impair the ability of these agencies to carry them out. EPA's conclusion that the NPDES program does not apply to water transfers respects Congressional intent, comports with the structure of the Clean Water Act, and gives meaning to section 101(g) and 304(f) of the Act." 73 Fed. Reg. at 33,703.

A number of entities filed petitions for review of the Water Transfers Rule, which were consolidated in this Court. This Court stayed the consolidated petitions pending its ruling in *Friends of the Everglades* v. *South Florida Water Management District* ("*Friends I*").

C. This Court's Decision in *Friends I*

Shortly after EPA promulgated the Water Transfers Rule, this Court considered a citizen suit over water transfers that protect populated areas near Lake Okeechobee that otherwise would flood during extreme weather events. See *Friends of the Everglades* v. *S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009) ("*Friends I*"). Friends of the Everglades and the Florida Wildlife Federation—both petitioners here—sued the South Florida Water Management District ("SFWMD") for operating the pumping stations at issue without an NPDES permit. *Id.* at 1214. The Miccosukee Tribe of Indians of Florida—also a petitioner here—intervened in the district court as a plaintiff, and United States Sugar Corporation ("U.S. Sugar") and the United States intervened as defendants. *Ibid.* The district court held—before EPA promulgated the Rule at issue here—that SFWMD's water transfers violated Section 402 of the CWA and ordered SFWMD's director to apply for an NPDES permit. *Id.* at 1215, 1217.

After the Water Transfer Rule was promulgated, this Court reversed. The Court observed that "[u]nder its regulatory authority, the EPA has recently issued a regulation adopting a final rule specifically addressing this very question." *Id.* at 1218. Accordingly, the question facing the Court in *Friends I* was "whether we owe that EPA regulation deference under *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984)." *Id.* at 1213.

This Court held that *Chevron* deference was appropriate. It rejected the plaintiffs' argument that "'to navigable waters' refers to each individual water body" and that as a result, "the statute means 'any addition of any pollutant to *any* navigable waters,' even though those are not the words the statute uses." 570 F.3d at 1223. The Court criticized the plaintiffs' gloss, which would "add a fourth 'any' to the statute," because "we are not allowed to add or subtract words from a statute; we cannot rewrite it." *Id.* at 1224. "Congress knows how to use the term 'any navigable water[s]' when it wants to protect individual water bodies instead of navigable waters as a collective whole." *Ibid.* (citing 33 U.S.C. §§ 407, 419, 512, 1254(a)(3), 1314(f)(2)(F)). "The common use by Congress of 'any navigable water' or 'any navigable waters' when it intends to protect each individual water body supports the conclusion that the use of the unmodified term 'navigable waters' * * * means the waters collectively." *Ibid.*

The Court also rejected the defendants' argument that the statute was unambiguous. It suggested that the Act uses "navigable waters" at one point to refer to particular bodies of water and that the defendants' interpretation "tends to undermine the goals of the NPDES program." 570 F.3d at 1226 (citing CWA § 303(c)(2), 33 U.S.C. § 1313(c)(2)). The Court also envisioned a "horrible hypothetical" involving pumping "the most loathsome navigable water in the country into the most pristine one," which it said would not "comport with the

broad, general goals of the [CWA]." *Ibid.* But the Court noted that it "'interpret[s] and appl[ies] statutes, not congressional purposes'" (*ibid.*), that the "provisions of legislation reflect compromises" (*id.* at 1227), and that "the NPDES program does not even address" "[n]on-point source pollution, chiefly runoff, [which] is widely recognized as a serious water quality problem." *Id.* at 1226-27.

Having concluded that the statute was ambiguous, the Court determined that EPA's Water Transfers Rule was "a permissible construction" of the CWA. 570 F.3d at 1227. "Because the EPA's construction is one of the two readings we have found is reasonable, we cannot say that it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Id.* at 1228. The Court concluded that "[u]nless and until the EPA rescinds or Congress overrides the regulation, we must give effect to it." *Ibid.*

Plaintiffs petitioned for rehearing en banc, which this Court denied. 605 F.3d 962 (11th Cir. 2010). Plaintiffs then petitioned for a writ of certiorari, which the Supreme Court denied. 131 S. Ct. 643 & 645 (2010).

D. The Petitions for Review

The stay in this case lifted after this Court resolved *Friends I*. The petitions for review are now ripe for this Court's consideration.

SUMMARY OF THE ARGUMENT

This Court should decide the petitions for review on the merits. Jurisdiction properly lies in this Court under CWA Section 509(b)(1), and, in any event, the Court may consider the petitions without first resolving the question of statutory jurisdiction. There is undoubtedly an Article III controversy over the Water Transfers Rule, and this Court's decision in *Friends I* has rendered the petitions for review a decided issue. Under such circumstances, courts may rule on the merits, as there is nothing to be gained from a complicated jurisdictional analysis when the merits are so clear-cut and predetermined.

On the merits, the petitions for review should be denied. This Court held in *Friends I* that the Water Transfers Rule is a permissible reading of the statute and is not arbitrary, capricious, or contrary to law. This Court refused to reconsider that determination en banc, and the Supreme Court likewise refused to review this Court's decision. *Friends I* leaves no room for the petitions for review. As the State petitioners correctly recognize, this "Court is bound by that decision 'unless and until [it] is overruled en banc, or by the Supreme Court.'" Brief for State of New York *et al.*, at 23, quoting *Cohen* v. *Office Depot, Inc.*, 204 F.3d 1069, 1072 (11th Cir. 2000).

The lengthy arguments by the Miccosukee Tribe and the Friends of the Everglades petitioners that this Court should review the entire administrative

record to determine whether EPA's Rule is "arbitrary and capricious" in violation of the Administrative Procedure Act are singularly misplaced. This Court already determined in *Friends I* that the Rule is not "'arbitrary, capricious, or manifestly contrary to the statute'" (570 F.3d at 1228), and this Court is bound by that decision. Beyond that, the sort of record review that petitioners seek is unnecessary to resolve the propriety of a rule that is based on close analysis of the meaning of statutory provisions. Whether petitioners think that not requiring NPDES permits for water transfers is bad for the environment—and there is plenty of reason to believe the opposite—is simply irrelevant to the question whether EPA reasonably concluded based on statutory language and structure and legislative history that there is no "addition" to navigable waters that can trigger a permitting requirement when navigable water that already contains pollutants is diverted.

Finally, if there is error in *Friends I*, it is not that it upheld the Rule, but that it did so under *Chevron* deference to EPA rather than the plain language of the Clean Water Act. The Water Transfers Rule is *required* under a plain reading of the statute. *Chevron* deference is not necessary to deny the petitions.

ARGUMENT

I. This Court Should Issue A Decision On The Merits.

Jurisdiction properly lies in this Court under CWA Section 509(b)(1). Any other approach to jurisdiction would be unfaithful to the language and intent of the

statute and enormously wasteful of the resources of the federal judiciary and the innumerable public and private entities that have been fighting for years over water transfers. Rather than repeat EPA's compelling arguments on that score, we instead explain why this Court may summarily deny the petitions without first addressing the jurisdictional issue.

The requirement that a federal court "satisfy itself of its jurisdiction over the subject matter before it considers the merits" (*Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 583 (1999)), applies only when the jurisdictional question is of constitutional dimension—whether the court has Article III jurisdiction. See *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 92, 97 n.2 (1998) (prohibiting a court from deciding a merits "question before resolving a dispute concerning the existence of an Article III case or controversy"); *id.* at 110-111 (O'Connor & Kennedy, JJ., concurring); *Royal Siam Corp.* v. *Chertoff*, 484 F.3d 139, 144 (1st Cir. 2007) (while "Article III jurisdiction * * * may never be bypassed" under *Steel Co.*, that rule does not apply to "statutory jurisdiction").

Where, as here, the constitutional limits of federal jurisdiction are not at issue, a court may rule on the merits without resolving *statutory* jurisdiction. The Supreme Court so held in *Norton* v. *Mathews*, 427 U.S. 524 (1976), in terms precisely applicable here. In *Norton*, the jurisdiction of the Supreme Court under 28 U.S.C. § 1253 turned on whether a three-judge district court had been properly

convened to rule upon plaintiffs' demand for an injunction, a point much debated in the briefs filed with the Court. But the Supreme Court had decided the merits of the underlying issue in a companion case, *Mathews* v. *Lucas*, in which its jurisdiction was not in dispute. In those circumstances, the Supreme Court held "it unnecessary * * * to resolve the details of these difficult and perhaps close jurisdictional arguments." 427 U.S. at 530. With the "substantive questions raised on this appeal now * * * determined in *Mathews* v. *Lucas*," the merits in *Norton* were "a decided issue." *Id* at 530-531. The Court thus concluded that "there is no point in remanding to enable the merits to be considered by a court of appeals" (*id.* at 531-532):

> there is no need to decide the theoretical question of jurisdiction in this case. In the past, we similarly have reserved difficult questions of our jurisdiction when the case alternatively could be resolved on the merits in favor of the same party.

Id. at 532. Because "the merits have been rendered plainly insubstantial," the appropriate course was simply to "affirm the judgment" below without passing on jurisdiction. *Id.* at 532-533.

As the Supreme Court explained in *Steel Co.*, where "a merits issue" has been "dispositively resolved in a companion case," the merits may be tackled before jurisdiction. 523 U.S. at 98; see also *id.* at 110-111 (O'Connor & Kennedy, JJ., concurring).

Here, a recent decision of this Court compels the conclusion that the petitions for review have no merit. The merits are "plainly insubstantial" after this Court's ruling in *Friends I*. As the State petitioners acknowledge, arguments that this Court erred in *Friends I* are besides the point, because under circuit precedent the decision in *Friends I* is binding on this Court and forecloses any result on the merits other than a ruling rejecting petitioners' challenges to the rule. Brief of the State of New York *et al.*, at 23; see *Cohen* v. *Office Depot, Inc.*, 204 F.3d 1069, 1072 (11th Cir. 2000) (this Court is bound by a prior panel's decision "unless and until [it] is overruled en banc, or by the Supreme Court").

As in *Norton*, the jurisdictional issue here is statutory, not constitutional in nature. As in *Norton*, the parties hotly dispute the correct resolution of the jurisdictional issue. And as in *Norton*, "there is no point" in wasting judicial and party resources by having the district court decide an issue on which this Court has already authoritatively ruled. A denial of the petitions without addressing jurisdiction is all that is needed.

Courts of appeals have not hesitated in appropriate cases to follow this sensible approach to avoiding deciding unnecessary issues and preserving scarce resources. See, *e.g.*, *Rivera-Martinez* v. *Ashcroft*, 389 F.3d 207, 209 n.7 (1st Cir. 2004) ("where the outcome of this appeal is foreordained by circuit precedent on a merits issue, we do not need to resolve arguably 'jurisdictional' issues of the sort

presented in this appeal before proceeding to the merits"); *Center for Reproductive Law & Policy* v. *Bush*, 304 F.3d 183, 194-195 (2d Cir. 2002) (Sotomayor, J.) (refusing to rule upon "academic" standing issue when merits were "foreordained" by prior Circuit decision that brought case within *Norton* exception to *Steel Co.*); *Kauthar SDN BHD* v. *Sternberg*, 149 F.3d 659, 663 n.4 (7th Cir. 1998) (disregarding "substantial statutory standing questions raised in this appeal" because plaintiff met "the minimal Article III requirements of a case or controversy" and thus "this case does not run afoul of the concerns raised in the Supreme Court's recent decision in *Steel Company*"), abrogated on other grounds, *Morrison* v. *Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010); see also *McClendon* v. *Georgia Dep't of Community Health*, 261 F.3d 1252, 1259 (11th Cir. 2001) ("The difficulty of those Eleventh Amendment issues, coupled with the fact that the merits issues are open and shut in favor of the defendants, causes us to exercise our discretion to look around the Eleventh Amendment issues involving the state official defendants to the merits").

Petitioners' jurisdictional argument is driven by their dislike of this Court's ruling in *Friends I*. It is a form of forum shopping that, under *Norton*, this Court need not tolerate. There is no plausible reason why this Court should permit more endless litigation on petitions for review when it has already decided in *Friends I* that EPA had the discretion to issue the Water Transfer Rule and rejected the

plaintiffs' motion to rehear that question en banc, and the Supreme Court then declined to review this Court's ruling. See *Steel Co.*, 523 U.S. at 111 (Breyer, J., concurring) ("Whom does it help to have appellate judges spend their time and energy puzzling over the correct answer to an intractable jurisdictional matter, when (assuming an easy answer on the substantive merits) the same party would win or lose regardless?"). This Court should summarily deny the petitions without addressing jurisdiction.

II. The Court Should Deny The Petitions For Review.

A. This Court's Decision In *Friends I* Compels A Denial Of The Petitions For Review.

As the petitioning States recognize (at 2, 23), *Friends I* resolved the controlling question in this case. *Friends I* involved the interpretation of the same three phrases in the CWA's text, as applied to the same type of activity—water transfers that neither added to nor used the water that was moved. The issue there was whether the CWA's text required NPDES permits for transfers of water from one body to another and, if the statutory text did not answer that question, whether the EPA's interpretation in the Water Transfers Rule was a permissible construction of the statute.

This Court ruled that the statutory text was ambiguous and that the EPA's resolution of that ambiguity to allow transfers between bodies of water without requiring an NPDES permit was permissible. This Court explicitly based its

decision on the validity of the EPA's Water Transfers Rule. It noted that "[b]ecause the EPA's construction is one of the two readings we have found is reasonable, we cannot say that it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Friends I*, 570 F.3d at 1228 (quoting *Chevron*, 467 U.S. at 844). The Court thus held that since "EPA's regulation * * * is a reasonable, and therefore permissible, construction of the language * * * we must give effect to it." *Ibid.*

Friends I leaves no room for petitioners' arguments. Because there is nothing left for this Court to decide, the petitions for review should be denied.

B. Review of the Administrative Record Is Unnecessary To Resolve This Case.

The Miccosukee Tribe and Friends of the Everglades petitioners (but not the State petitioners) argue that this Court in *Friends I* did not minutely examine the administrative record, that review of the administrative record is necessary to adjudicate their contention that the Rule is arbitrary and capricious in violation of the Administrative Procedure Act, and that this Court, to resolve that claim, must now study "the entire administrative record." Miccosukee Tribe Br. 37. Even putting aside petitioners' unfounded pretense that the record is "undisputed" that not requiring NPDES permits for water transfers is bad environmental policy, and their belief that with their parochial interests they, rather than EPA, are in the best position to sort through the large number of comments to determine the best outcome, this argument has no merit.

EPA's Rule rests on its analysis—which this Court has held was reasonable—of the Clean Water Act's language, structure, and legislative history. In particular, EPA concluded that water transfers "do not require NPDES permits because they do not result in the 'addition' of a pollutant" to navigable waters. 73 Fed. Reg. at 33,699. That conclusion in no way depends on any facts in the administrative record about whether some commentators consider not requiring permits to be bad policy, but solely on a reading of the intent of Congress, arrived at using the traditional tools of statutory language, structure, and history. See *id.* at 33,700-33,703. Even were the *factual* record as one-sided as petitioners pretend, EPA's conclusion about the *legal* meaning of the statute would still be unassailable under *Chevron* and the APA.

C. The Water Transfers Rule Is Required By The Statute's Unambiguous Language.

If this Court erred in *Friends I*, it was not in upholding the Rule but in holding that *Chevron* deference was necessary to do so. As U.S. Sugar has consistently maintained, the Water Transfers Rule is the *only* permissible reading of the statute. Although this Court decided otherwise in *Friends I*, U.S. Sugar continues to believe that the statute is unambiguous.

1. The CWA By Its Plain Language Requires A Section 402 Permit Only When There Is An "Addition" Of Pollutants.

Section 402 creates NPDES as part of EPA's regulatory authority to eliminate the release of industrial and municipal waste into the Nation's waters. 33 U.S.C. § 1342. An NPDES permit, which sets out "effluent limitations," is required for "the discharge of any pollutant." CWA § 301, 33 U.S.C. § 1311. "Discharge of a pollutant" is defined by the CWA as "any addition of any pollutant to navigable waters from any point source." CWA § 502(12), 33 U.S.C. § 1362(12). As the District of Columbia and Sixth Circuits explained:

> [I]t does not appear that Congress wanted to apply the NPDES program wherever feasible. Had it wanted to do so, it could easily have chosen suitable language, e.g., "all pollution released through a point source." Instead, as we have seen, the NPDES system was limited to "addition" of "pollutants" "from" a point source.

Nat'l Wildlife Fed'n v. *Gorsuch*, 693 F.2d 156, 176 (D.C. Cir. 1982); see also *Nat'l Wildlife Fed'n* v. *Consumers Power Co*., 862 F.2d 580, 586 (6th Cir. 1988).

Because the Act defines "navigable waters" as "the waters of the United States" (CWA § 502(7), 33 U.S.C. § 1362(7)), a transfer of water containing pollution from one body of water to another does not constitute an "addition" of "pollutants," because the transferred pollution never leaves "the waters of the United States."

(a) There is no "addition" when pollutants are merely conveyed in "navigable waters" from one body of water to another.

Statutory interpretation begins with "the language of the statute." *Bailey* v. *United States*, 516 U.S. 137, 144 (1995). Every clause and word of the statute should be given effect. *United States* v. *Nordic Vill.*, 503 U.S. 30, 36 (1992). And the statute must be read as a whole "since the meaning of statutory language, plain or not, depends on context." *Conroy* v. *Aniskoff*, 507 U.S. 511, 515 (1993). In "a complicated statute like the Clean Water Act," it is particularly important for the Court to give careful reading to statutory terms since "technical definitions [were] worked out with great effort in the legislative process." *S.D. Warren Co.* v. *Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 380 (2006).

Without a statutory definition, the term "addition" must be construed "in accordance with its ordinary or natural meaning." *S.D. Warren*, 547 U.S. at 376. "Addition" is 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). There is no increase in the pollutants in "navigable waters" when pollutants are transferred along with water from one body to another, because the navigable waters are defined as a whole—"the waters of the United States." Nothing has been joined to the waters of the United States that was not already in those waters. Pollutants are only "joined" or "united" with "the waters of the United States" when they first enter those

waters. See *Gorsuch*, 693 F.2d at 165 (holding that NPDES applies only when a point source is the site of the pollutant's initial entry to navigable waters); *Consumers Power*, 862 F.2d at 584 (same); *United States* v. *Riverside Bayview Homes*, 474 U.S. 121, 132-133 (1985) (Congress's goal for the CWA was to control pollutants "at the source").

"[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." *S.D. Warren*, 547 U.S. at 381. "[S]omething must be added in order to implicate" the NPDES permitting requirement. *Ibid.* The pollutants in water transfers are pre-existing. They were "added" by sources upstream or are naturally occurring. As a result, 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").

(b) "Navigable waters" must be read as a unitary whole.

Given the language of Section 502, the term "navigable waters" cannot be considered ambiguous. It can only be read as a unitary whole. First, the modifier

"any" precedes every element of Section 502 except for "navigable waters." The statute contemplates "any addition of any pollutant to navigable waters from any point source." CWA § 502(12), 33 U.S.C. § 1362(12) (emphases added). Because only "navigable waters" lacks the modifier, Congress must have intended to refer to "navigable waters" in the aggregate. See *United States* v. *Gonzalez*, 520 U.S. 1, 5 (1997) ("any" means "one or some indiscriminately of whatever kind"); *62 Cases, Etc.* v. *United States*, 340 U.S. 593, 596 (1951) (key to statutory interpretation is to look at "what Congress has written" and "neither to add nor to subtract, neither to delete nor to distort").

Second, Section 502 speaks of an addition "to navigable waters," not "to navigable water." The use of the collective word waters indicates a clear intent to designate all U.S. waters taken together as the receiving body by which an "addition" is judged, rather than an individual body of water.

Third, the use of the definite article "the" in defining "navigable waters" as "the waters of the United States" confirms that "navigable waters" is a conceptual whole when determining if an addition has occurred. CWA § 502(7), 33 U.S.C. § 1362(7); see *Rapanos* v. *United States*, 547 U.S. 715, 732 (2006) (emphasizing "use of the definite article ('the') and the plural number ('waters')" in construing Section 502(7)).

By contrast, Congress did use terms dividing the "navigable waters" elsewhere in the statute, making clear that it understood navigable waters as a unitary concept that could be apportioned. See CWA § 302(a), 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"); CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A) (requiring States to establish water quality standards taking into account "the designated uses of the navigable waters involved"); CWA § 303(d)(1)(B), 33 U.S.C. § 1313(d)(1)(B) (referring to "waters or parts thereof") (all emphases added). Congress would have used this same terminology regarding parts or portions of the navigable waters in Section 502 had it intended the provision to address individual water bodies so as to apply to pollutants moved from one navigable water body to another. But it did not do so.

2. Other statutory provisions confirm the unitary waters reading of the CWA.

The structure of the CWA confirms the unitary waters reading. See *BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 186 (2004).

(a) Congress left water flow management to the States in Section 304(f).

Section 304(f) "concerns nonpoint sources" of pollution. *Miccosukee*, 541 U.S. at 106. It is entitled "[i]dentification and evaluation of nonpoint sources of

pollution; processes, procedures, and methods to control pollution." 33 U.S.C. § 1314(f). Section 304(f) requires the EPA, working with state and federal agencies, to develop guidelines for nonpoint source pollution and "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." *Ibid.* By delegating authority to address pollution carried through flow diversion facilities to the States, Section 304(f) makes clear that Section 402 was not meant to address water transfers.

(b) Pollution and pollutants are different under the CWA.

Reading Section 502 to include water transfers also confuses the definition of "pollutant" with the definition of "pollution," even though the CWA clearly distinguishes between the two. "Pollutants" are tangible wastes that are discharged into navigable waters. CWA § 502(6), 33 U.S.C. § 1362(6). "Pollution" is more broadly defined as "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of waters." CWA § 502(19), 33 U.S.C. § 1362(19). Therefore, pollutants that are already in navigable waters are considered "pollution." The transfer of water containing pollution involves the movement of pollution and may effect a change in water quality, but it cannot be classified as the discharge of a pollutant since already-polluted natural water is

merely being diverted. 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"). Pollution is regulated by the States under Section 304(f), not by the EPA under Section 402.

(c) Congress sought to retain the States' authority over water allocation and protection and associated land use.

Water allocation and protection has historically been a State prerogative, as have the land use decisions that are often associated with protecting water. Any interpretation of the Clean Water Act must recognize that Congress had a policy and objective of maintaining the States' important role. *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 & n.10 (1991). When the CWA was passed, Congress 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). And it expressly stated "the policy of the Congress 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." CWA § 101(b), 33 U.S.C. § 1251(b).

Only the unitary waters reading of the statute captures the policy of cooperative federalism set out by Congress when it enacted the CWA. The CWA

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 (1992) (quoting CWA § 101(a), 33 U.S.C. § 1251(a)). Being closer to the difficulties of local water management, the States were (and are) more capable of integrating waterway cleanup needs with local needs related to land use and to transporting, storing, and using water.

In light of Congress's goal to protect and preserve traditional State authority, and the express provision of Section 304(f) discussed above, it is inconceivable that Congress meant to eliminate historic State management of local water resources for flood control and water supply purposes, or interfere with their land use determinations, by reading a "discharge" to include water transfers. See *Solid Waste Agency of N. Cook County* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (rejecting expansive reading of CWA where it "would result in a significant impingement of the States' traditional and primary power over land and water use").

CONCLUSION

The petitions for review should be denied.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 6,054 words, excluding parts of the brief exempted by FRAP 32(a)(7)(B)(iii). This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared in a 14 point, proportionally spaced typeface using Microsoft Word 2007.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on this 27th day of October 2011, by United States Mail to the parties listed in the Service List below.

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