IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 07-13829-HH

FRIENDS OF THE EVERGLADES,
FLORIDA WILDLIFE FEDERATION,
Plaintiffs, Appellees, Cross-Appellants,

FISHERMEN AGAINST DESTRUCTION OF THE ENVIRONMENT,
Plaintiff, Appellee,

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
Intervenor-Plaintiff, Appellee, Cross-Appellant,
vs.
SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
Defendant, Appellant, Cross-Appellee,

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

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

On Appeal from the United States District Court Southern District of Florida
Case No. 02-80309-CIV-ALTONAGA

PETITION FOR REHEARING EN BANC AND FOR PANEL REHEARING AND/OR RECONSIDERATION

Respectfully Submitted,

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CASE NO. 07-13829-HH

Friends of the Everglades v. South Florida Water Management District

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AND CORPORATE DISCLOSURE STATEMENT

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Burgess, Rick G.

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City of South Bay

Compagno, Michael

Cypress, Billy, Chairman of the Miccosukee Tribe

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Environmental Protection Agency

CASE NO. 07-13829-HH

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Florida Wildlife Federation

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CASE NO. 07-13829-HH

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AND CORPORATE DISCLOSURE STATEMENT

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Turnoff, Honorable William C., District Court Magistrate Judge

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STATEMENT OF COUNSEL

We express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of the Supreme Court of the United States and that consideration by the full court is necessary to secure and maintain uniformity of decision in this court: *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).

and

We express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: The panel's decision eviscerates the most important enforcement provision of the CWA, giving deference under *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984) to EPA's absurd interpretation of that provision and creates an intercircuit conflict with decisions in the First and Second Circuit Courts of Appeal.

/s/ Sonia Escobio O'Donnell

/s/ Dione Carroll

Attorneys of Record for the Miccosukee Tribe of Indians of Florida

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

RULES

STATEMENT OF THE ISSUE

ASSERTED TO MERIT EN BANC CONSIDERATION

En Banc consideration is merited in this case because the Panel opinion gives deference to an absurd interpretation of the most important enforcement provisions of the Clean Water Act ("CWA"), the National Pollutant Discharge Elimination System ("NPDES") permit provisions, and condones the discharge of pollutants into navigable waters of the United States from a point source without the required CWA permits.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

The panel decision in this case, which found that permits are not required for discharges from dirty canals into Lake Okeechobee, conflicts with Supreme Court precedent and with decisions in other circuit courts of appeal. The panel decision guts the centerpiece of the CWA, which is its permitting program, and makes the panel's decision worthy of En Banc review. Plaintiffs, Friends of the Everglades, Florida Wildlife Federation and Fisherman Against Destruction of the Environment, filed complaints alleging violations of the CWA by the South Florida Water Management District ("SFWMD"), for discharges of pollutants into Lake Okeechobee without the required NPDES permits. Docs 1, 39. The Miccosukee Tribe of Indians (the "Tribe") intervened on the side of Plaintiffs to protect its traditional tribal homeland. Doc 24.

Lake Okeechobee is a large shallow lake that remains the central feature of the Everglades ecosystem and is recognized as its liquid heart. *Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, 2006 WL 3635465, at *7 (S.D. Fla. Dec. 11, 2006). Adjacent to the Lake are a series of canals that collect water which is drained from their respective basins; this canal water contains by-products of industrial, municipal and construction activities that are conducted within the basins. *Id.* at *12. The pump stations, referred to as the S-2, S-3 and S-4, are built into the Dike around the Lake where it adjoins the canals. *Id.* at *13. Massive

quantities of polluted water are moved through the pumps and discharged into the Lake. *Id.* at *14.

While the case was under advisement by the district court, EPA proposed a regulation that excluded water transfers from the permit requirements of the CWA and defined water transfer as "an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use." Doc 610 - Pg 38; 71 Fed. Reg. 32,887 (June 7, 2006).

On December 11, 2006, the district court issued Findings of Fact and Conclusions of Law, stating that the discharges in this case required NPDES permits. *Friends*, 2006 WL 3635465, at *48. The district court rejected the EPA's unitary waters theory,[1] and the proposed Regulation, finding that the CWA was unambiguous in its requirement of a permit. *Id.* Addressing the legal question before the court as one of statutory construction, *Id.* at *41, the district court determined that the plain language of the CWA required the SFWMD to obtain permits for the operation of its pumping structures because the pump stations were

[1] The unitary waters theory "posits that all of the navigable waters of the United States constitute a single water body, such that the transfer of water from any body of water that is part of the navigable water to any other could never be an 'addition.'" *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 451 F.3d 77, 82-83 (2d Cir. 2006) (*"Catskill II"*).

"point source[s]" discharging "pollutants" into navigable waters. *Id.* The district court rejected every argument made by Appellants regarding exclusions and exemptions from the CWA, concluding that the requirement of permits for backpumping is "consistent with the CWA goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters." *Id.* at *42 (citing 33 U.S.C. § 1251(a)).

The panel in this case reversed the district court, *see* Exhibit A, *Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, 2009 WL 1545551 (11th Cir. June 4, 2009), and although it acknowledged that every court that had considered the unitary waters theory had rejected it, the panel nevertheless gave deference to the final water transfer Regulation which, according to the panel, accepted the unitary waters theory. *Id.* at *4-5, 16. The language of the final Regulation differed from the proposed regulation and defined water transfer as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 73 Fed. Reg. 33697-708 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i) (hereinafter "Regulation"). The final Regulation is currently under challenge in several federal district courts; the circuit court challenges have been consolidated in this Circuit. *Friends of the Everglades v. U.S. EPA*, case no. 08-13652-C et al. (11th Cir.).

ARGUMENT

A. The Panel Opinion Merits En Banc Review Because It Conflicts With Decisions Of The United States Supreme Court And Other Circuit Courts Of Appeal And Because It Presents An Issue Of Exceptional Importance In That It Allows Discharges Of Pollutants Into Navigable Waters Of The United States Without Obtaining Permits Required Under The Unambiguous Provisions Of The Clean Water Act

The En Banc Court should review the panel opinion, *see* attached exhibit, because the opinion significantly erodes the CWA and affords undue deference under *Chevron U.S.A. Inc. v. Natural Resource Defense Council*, 467 U.S. 837 (1984), to a Regulation that the panel concludes was based on the unitary waters theory. *Friends of the Everglades*, 2009 WL 1545551, at *4-5, 16. The panel opinion is wrong because the text, intent and structure of the CWA's Section 402 requires polluters to obtain a permit and discharge only specified amounts of pollutants. *See* 33 U.S.C. § 1342; *see Nat'l Ass'n of State Util. Consumer Advocates v. Fed. Commc'ns Comm'n*, 457 F.3d 1238, 1252 (11th Cir. 2006) (Traditional tools of statutory construction to determine Congressional intent include examination of the text of the statutes, its structure, and its stated purpose). The panel's acceptance of the Appellants' theories has devastating consequences on the NPDES permitting requirements of the CWA which, as the district court concluded, represents "the most important tool in achieving the goal of cleaning up the nation's waters." *Friends*, 2006 WL 3635465, at *42.

The district court correctly found that "in the absence of a NPDES permit, the operation of the S-2, S-3, and S-4 pump stations to backpump pollutant-containing waters from the canals in a northerly direction into Lake Okeechobee is in violation of the CWA." *Friends*, 2006 WL 3635465, at *61; 33 U.S.C. §§ 1311, 1342, 1362(12)(A). Backpumping waters that contain pollutants into the Lake is clearly an addition of pollutants to navigable waters because the Lake is meaningfully distinct from the canals. *See South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 97 (2004). The district court interpreted the clear, unambiguous language of the statute, noting correctly that "no agency interpretation, or court order for that matter, can alter the unambiguous congressional intent expressed in a statute and the Court thus rejects the interpretation proposed by the EPA." *Friends*, 2006 WL 3635465, at *48.[2]

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[2] The panel, on the other hand, has given deference to a Regulation which, under the interpretation accepted by the panel, would make substantive changes to the CWA under the guise of "clarification". In accepting this interpretation, the panel decision improperly permits the "unauthorized assumption by an agency of major policy decisions properly made by Congress." *Am. Ship Bldg. Co. v .Nat'l Labor Relations Bd.*, 380 U.S. 300, 318 (1965). *See Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n*, 390 U.S. 261, 272 (1968) (courts should not affirm administrative decisions which they are inconsistent with a statute); *Koshland v. Helvering*, 298 U.S. 441, 446-447 (1936) (a regulation cannot amend a statute's unambiguous provisions); *Smith v. Scott*, 223 F.3d 1191, 1195 (10th Cir. 2000) (an agency cannot make substantive changes to a statute in the guise of clarification) (citations omitted).

The unitary waters theory presents an absurd interpretation of several provisions of the CWA, and is inconsistent with the ordinary meaning of the word "addition" in the CWA. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 451 F.3d 77, 81 (2d Cir. 2006) ("*Catskill II*"). Contrary to all circuits that have decided the issue, the panel nevertheless concludes that the CWA was ambiguous with regard to the requirements for NPDES permits and gives deference to the final Regulation that the panel believes codified this absurd theory. *Friends of the Everglades*, 2009 WL 1545551, at *16-17.

The panel's application of the final Regulation conflicts with the Supreme Court's decision in *Miccosukee*, which found that "a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters,'" *Miccosukee*, 541 U.S. at 105. In response to public comments on the final Regulation, EPA explains that under the final Regulation, permits are only required for "pollutants introduced by the water transfer activity itself to the water being transferred," 73 Fed. Reg. 33697, 33705 (2008), and that the scope of the required NPDES permit would only be for those "added pollutants." *Id.* This is another way of saying that a permit is only required if the point source is the original source of the pollutant. In fact, EPA explains that this is exactly what it means: *"Such a permit would not require the water transfer facility to address pollutants that may have been in the donor waterbody and are being transferred."*

Id. Thus, under EPA's interpretation,[3] the final Regulation codifies precisely what the Supreme Court in *Miccosukee* found untenable. *See Miccosukee*, 541 U.S. at 105 (the definition of a point source makes clear that a point source need not be the original source of the pollutant, it need only convey the pollutant to navigable waters). The panel's deference to the final Regulation creates a conflict with *Miccosukee*. This conflict, as well as the unprecedented environmental damage that will result as a consequence of the panel's decision, makes this issue one of exceptional importance that should be reviewed En Banc.

In addition, the panel decision also conflicts with *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York,* 273 F.3d 481 ("*Catskill I*") and *Catskill II* and with *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1296 (lst Cir. 1996). In *Dubois*, 102 F.3d at 1297, the First Circuit noted that under the unitary waters theory, one of the most polluted rivers in New England would be allowed to discharge into a pond no matter how polluted the river or how pristine the pond. *Id.* The First Circuit concluded that Congress could not have intended

[3] The Tribe and the Plaintiffs were never permitted to brief the issue as to what exactly the final Regulation provides, whether it adopts the unitary waters theory or some other theory, because the United States EPA ultimately determined the timing of the final Regulation, and the United States chose to time it after briefing was complete in this case. *See, e.g., Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004) (evaluating an issue on the merits that has not been raised in the initial brief would undermine the very adversarial nature of our appellate system.).

such an irrational result. As the Second Circuit also concluded, the unitary waters theory "would lead to the absurd result that the transfer of water from a heavily polluted, even toxic, water body to one that was pristine via a point source would not constitute an 'addition' of pollutants and would not be subject to the CWA's NPDES requirement." *Catskill II*, 451 F.3d at 81 (citing *Catskill I*, 273 F.3d at 493). It is this irrational result, rejected by every court that has considered it, to which the panel gave *Chevron* deference. The Second Circuit in *Catskill I* recognized the plain meaning of 'addition' and the logical impossibility of arguing that the waters in the Reservoir and the Esopus Creek were in any sense the "same." *Catskill I*, 273 F.3d at 492. In fact, the Second Circuit in its subsequent decision in *Catskill II* rejected the unitary waters theory and every basis argued in support of the unitary waters theory, finding that nothing in the text of the CWA supports interbasin transfers of pollutants without permits. *See Catskill II*, 451 F.3d at 84-85; *see also Friends*, 2006 WL 3635465, at *48.

The panel acknowledges that the unitary waters theory has been rejected by every circuit that has considered it, including the Eleventh Circuit and the United States Supreme Court. "The unitary waters theory has a low batting average. In fact, it has struck out in every court of appeals where it has come up to the plate." *Friends of the Everglades*, 2009 WL 1545551, at *5 (citing *Catskill I*, 273 F.3d at 491 and *Catskill II*, 451 F.3d at 83)). The panel further acknowledged that "[e]ven

the Supreme Court has called a strike or two on the theory, stating in [*South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) ("the S-9")], that 'several NPDES provisions might be read to suggest a view contrary to the unitary waters approach.'" *Friends of the Everglades*, 2009 WL 1545551, at *5, (citing *Miccosukee*, 541 U.S. at 107). And further, the panel acknowledges that the Eleventh Circuit at "one time decided to reject [the unitary waters theory]." *Id.; see also Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1368 (11th Cir. 2002). The panel concludes that: "[i]n sum, all of the existing precedent and the statements in our own vacated decision are against the unitary waters theory," adding that, "[i]f nothing had changed, we might make it [the decision against the unitary waters theory] unanimous." *Id.* at *6. The unitary waters theory, and EPA's codification of that theory, is arbitrary, capricious and manifestly contrary to the CWA. *See Sierra Club v. Adm'r U.S. E.P.A.*, 496 F.3d 1182, 1186-87 (11th Cir. 2007).

Notwithstanding the acknowledged and overwhelming rejection of a theory that eviscerates the Clean Water Act, the panel concluded that the final Regulation compelled its decision that permits were not required for the S-2, S-3 and S-4 point sources. The panel incorrectly found that EPA's Regulation was entitled to deference under *Chevron* as a result of ambiguity in the CWA with regard to whether a permit was required for discharges from one meaningfully distinct

navigable water to another. *Friends of the Everglades*, 2009 WL 1545551, at *16. Clearly the panel's decision will affect numerous discharges, allowing the discharge of pollutants from polluted or even toxic canals to pristine waters, contrary to the unambiguous language of the CWA which prohibits such discharges.[4]

The panel incorrectly concludes that EPA's construction of the CWA's permit provisions is one of two reasonable readings and therefore entitled to deference. *Friends of the Everglades*, 2009 WL 1545551, at *16. The "marbles" hypothetical constructed by the panel actually supports the Tribe's position. *Id.* at 16-17. Using the panel's hypothetical, if one has four marbles in one bucket and none in the other, and one adds two of the marbles to the empty bucket, this is an addition of marbles because one has added two marbles to the empty bucket. In the panel's hypothetical, as a consequence of the addition of two marbles, a permit would be

[4] The panel asserts that the "horrible hypotheticals" of what can happen if discharges without permits are allowed to occur, do not constitute absurd results because the CWA's "lofty goals" were subject to legislative compromises. *Friends of the Everglades*, 2009 WL 1545551, at *15. The panel provides as an example that the CWA expressly exempts non-point sources from NPDES permit requirements as a legislative accommodation to certain agriculture interests. *Id.* However, the CWA requires a permit for the discharge of pollutants from "*any* point source" 33 U.S.C. § 1362(12) (emphasis added). Moreover, the panel does not identify any legitimate interest which would be promoted by allowing the point source transfer of water from a polluted or toxic water body to pristine water body without an NPDES permit.

necessary under the CWA, for adding marbles from one distinct bucket to another. *Friends of the Everglades*, 2009 WL 1545551, at *16. But under the panel's finding of deference to the unitary waters theory, a permit would not be necessary.

The panel's decision overlooks the crucial issue in *Miccosukee,* that permits are required for discharges from one meaningfully distinct water into another. *Id.* In fact, the Second Circuit's "ladle of soup" hypothetical, discussed by the Supreme Court in *Miccosukee*, shows the distinction between inter-basin and intra-basin water transfers. *See Miccosukee*, 541 U.S. at 110-11; *see also Catskill I*, 273 F.3d at 492 (stating that, if one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the *same* pot, one has not "added" soup) (emphasis added). The panel's hypothetical describes two separate buckets, and under the Supreme Court's decision in *Miccosukee*, a permit would clearly be required. Thus, the panel's analysis was fundamentally flawed and conflicts with the Supreme Court case in *Miccosukee*, *Catskill I* and *II* and *Dubois*.

The En Banc court should review the panel decision because EPA's construction of the language of the CWA was not entitled to deference. *Chen v. U.S. Atty. Gen.*, 565 F.3d 805, 809 (11th Cir. 2009) (the interpretation of a statute by an agency that administers the statute is entitled to deference only so long as it is reasonable). The panel's decision to accord *Chevron* deference to what the panel

believed was EPA's codification of the unitary waters theory[5] was an error of great magnitude because EPA's interpretation was arbitrary, capricious and manifestly contrary to the plain language and intent of the CWA, the purpose of which is to establish "an all-encompassing program of water pollution regulation" in which "[e]very point source discharge is prohibited unless covered by a permit . . . ." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 318 (1981) (footnote omitted).

CONCLUSION

The panel opinion eviscerates the permit provisions of the CWA, the most important component of the Clean Water Act, and this makes the panel's decision on the final Regulation an issue of exceptional importance. *Dubois*, 102 F.3d at 1294; *see also Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 990 (D.C. Cir. 1997) ("The centerpiece of the CWA is the NPDES permitting program."). En Banc

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[5] By allowing Appellants to submit the final Regulation as supplemental authority to the Court by way of a Rule 28(j) letter, the panel violated this Circuit's prudential rule that parties cannot raise new issues or arguments by supplemental authority. Binding the parties to the theories argued below avoids prejudice to Appellees, who did not have an opportunity to brief arguments relating to the final Regulation. *See McGinnis v. Ingram Equip. Co., Inc.*, 918 F.2d 1491, 1495-96 (11th Cir. 1990) (citing *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 768 n. 10 (5th Cir. 1976)). The panel also violated this Circuit's rule that new issues should first be reviewed by the district court. *Naturist Soc'y Inc. v. Fillway*, 958 F.2d 1515, 1524 (11th Cir. 1992) ("it would be inappropriate for this court to consider [claims] in light of the amended regulations, without district court findings of fact and conclusions of law"); *see also Bothwell v. RMC Ewell, Inc.*, 226 F. App'x 925, 926 (11th Cir. 2007).

review is also merited because the panel opinion conflicts with the decision of the Supreme Court in *Miccosukee* and presents an intercircuit conflict with decisions of other circuit courts of appeal.

Respectfully submitted this 17th day of July, 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of July, 2009 a true and correct copy of the foregoing was sent via First Class Mail to the parties listed in the Service List.

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