IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 07-13829-H

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

FISHERMAN 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,
Defendant/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.

UNITED STATES' RESPONSE TO PETITIONS FOR REHEARING EN BANC AND FOR PANEL REHEARING AND/OR RECONSIDERATION

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RULE 26 CERTIFICATE OF INTERESTED PERSONS

To the best of undersigned counsel's 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 and 26.1-3, as amended.

Abbott, Greg

Albrecht, Virginia S.

Altamaha Riverkeeper

Altonaga, Honorable Cecilia, District Court Judge

American Farm Bureau Federation

American Rivers

American Water Works Association

Amron, Susan E.

Anderson, Robert T.

Animas Riverkeeper

Apalchicola Riverkeeper

Arana, Enrique D.

Arenson, Ethan

Arizona Department of Water Resources

Artau, Edward

Assateague Coastkeeper

Association of California Water Agencies

Association of Metropolitan Sewerage Agencies

Association of Metropolitan Water Agencies

Association of State Wetland Managers

Audubon Society of the Everglades

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Bedrin, Michael D.

Bennett, Jeanine

Bennett, Mark J.

Berger, Jeffrey A.

Berger Singerman, P.A.

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Bishop, Timothy S.

Black Warrior Riverkeeper

Blumenthal, Richard

Bogert, L. Michael

Brandt, John J.

Brennan, Elizabeth A.

Bronson, Charles H.

Brooks, Kelly S.

Browner, Carol M.

Bruning, John

Bryson, John

Buffalo Niagra Riverkeeper

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California Coastkeeper Alliance

Cannon, Jonathan Z.

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Catskill-Delaware Natural Water Alliance, Inc.

Catskill Mountains Chapter of Trout Unlimited, Inc.

Central Arizona Water Conservation District

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Christmas, James N.

City of New York

City of Saint Cloud, MN

City of South Bay, Florida

City of Weston, Florida

Clark, Jeffrey Bosset

Coakley, Martha

Coalition of Greater Minnesota Cities

COBB County-Marietta Water Authority of Georgia

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Council of State Governments

Cox, Michael A.

Crank, Patrick J.

Crowley, James J.

Cruden, John C.

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Dorta, Gonzalo Ramon

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Fishermen Against Destruction of the Environment, Inc.

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Florida Wildlife Federation

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National Association of Flood and Storm Water Management Agencies

National Association of Home Builders

National Audubon Society

National Conference of State Legislatures

National Congress of American Indians

National Hydropower Association

National League of Cities

National Parks Conservation Association

National Sheriffs Association

National Tribal Environmental Council

National Water Resources Association

National Wildlife Federation

Nationwide Public Projects Coalition

Native American Law Center

Native American Rights Fund

Natural Resources Defense Council

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Riedi, Claudio

Riverkeeper, Inc.

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State of Florida

State of Hawaii

State of Idaho

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State of Kentucky

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State of Massachusetts

State of Michigan

State of Missouri

State of Nebraska

State of Nevada

State of New Jersey

State of New Mexico

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State of North Carolina

State of North Dakota

State of Oklahoma

State of Pennsylvania

States of South Dakota

State of Texas

States of Utah

State of Vermont

State of Washington

State of Wyoming

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Swiger, Michael A.

Szeptycki, Leon

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Tongue & Yellowstone River Irrigation District

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Trevarthen, Susan L.

Tropical Audubon Society

Trout, Robert V.

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U.S. Army Corp. Of Engineers

U.S. Conference of Mayors

U.S. Department of Justice, Environmental and Natural Resource Division

U.S. Environmental Protection Agency

U.S. Sugar Corporation

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Western Urban Water Coalition

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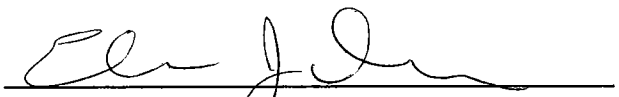

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REGULATIONS:

Plaintiffs-appellees seek rehearing and rehearing en banc from a unanimous panel decision (Judges Carnes, Dubina, and Goldberg), holding that the Clean Water Act ("CWA") is ambiguous as to whether a National Pollutant Discharge Elimination System ("NPDES") permit is required for water transfers and that EPA's final regulation providing that water transfers do not require NPDES permits is permissible and entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984). Water transfers are activities that convey or connect waters of the United States through a point source without any intervening use or alteration of the water. Plaintiffs' petitions for rehearing and rehearing en banc should be denied. The Court's decision is correct and does not conflict with any decision by the Supreme Court, this Court, or other courts of appeal.

STATEMENT

Under the Clean Water Act ("CWA"), an NPDES permit is required for the discharge of a pollutant (other than dredged or fill material) into navigable waters. *See* 33 U.S.C. §§ 1311, 1342(a)(1). The term "navigable waters" is defined to mean "the waters of the United States." 33 U.S.C. § 1362(7). The term "'discharge of a pollutant'" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A).

Plaintiffs brought this CWA citizen suit against the South Florida Water Management District ("SFWMD"), alleging that the SFWMD's operation of three

pump stations without an NPDES permit violates the CWA. These pump stations occasionally move water, primarily for flood control purposes, from manmade canals within the Everglades Agricultural Area to Lake Okeechobee, through a manmade dike. The pumping activity itself does not add pollutants to the water that is moved. This area and the water control structures are all elements of the Central and South Florida Flood Control Project, a heavily-engineered, integrated water management system within the historic Everglades area.

SFWMD and intervenor-defendants, including the United States, contended, *inter alia*, that an NPDES permit is not required for the movement of water from one water body to another (without intervening use or alteration). The district court disagreed and interpreted the CWA to require an NPDES permit for such water transfers. This Court reversed, *Friends of Everglades v. South Florida Water Management District*, 570 F.3d 1210 (11th Cir. 2009).

While this case was pending before this Court, EPA promulgated a final regulation providing that water transfers do not require an NPDES permit. *See* 73 Fed. Reg. 33,697 (June 13, 2008). This Court recognized that the regulation expressed the agency's position in a form entitled to *Chevron* deference and thus applied the familiar two-step *Chevron* analysis (*see infra* at 11 n.5). In step one, the Court concluded, based on its examination of the statutory language, context, purposes and legislative history, that the statute is ambiguous on the question of

whether water transfers are a "discharge of a pollutant," and thus require an NPDES permit, because there exist two reasonable competing interpretations of the relevant statutory language. 570 F.3d at 1221-27. In step two, the Court held that EPA's regulation providing that water transfers do not require an NPDES permit is permissible and thus controlling here. 570 F.3d at 1227.

ARGUMENT

A. Rehearing is Not Warranted Because the Panel Decision Does Not Conflict With Any Decision of the Supreme Court, this Court, or Other Courts of Appeal

1. Contrary to plaintiffs' contention (FWF Pet. 1, 7-8; Tribe Pet. 8-9), this Court's decision does not conflict with decisions of the United States Courts of Appeals for the First and Second Circuits holding that "discharge of a pollutant" encompasses water transfers. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York* ("*Catskill II*"), 451 F.3d 77 (2d Cir. 2006); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York* ("*Catskill I*"), 273 F.3d 481 (2d Cir. 2001); *Dubois v. U.S. Dep't. Of Agriculture*, 102 F.3d 1273, 1296-99 (1st Cir. 1996). There is no conflict because the First and Second Circuits did not render their decisions under the *Chevron* framework due to the absence, at the time of those decisions, of an agency interpretation in a form to which *Chevron* deference is unquestionably owed. *See Catskill I*, 273 F.3d at 490 ("If the EPA's position had been adopted in a rulemaking or other formal proceeding, [*Chevron*] deference * *

* might be appropriate"); *Catskill II*, 451 F.3d at 82, 83 n.5 (EPA's memorandum is not entitled to *Chevron* deference)[1]; *Dubois*, 102 F.3d at 1285 n. 15 (*Chevron* "does not apply * * * because we are not reviewing an agency's interpretation of the statute that it was directed to enforce").[2] As this Court states, these cases "decided only how best to construe the statutory language – not whether that language is ambiguous and

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[1] The procedural posture of *Catskill II* further distinguishes that case from the present one. In *Catskill II*, the defendant City was seeking reconsideration of the court of appeals' prior holding in *Catskill I*. The court explained that it does not modify or reconsider its decisions unless there are cogent, compelling reasons for doing so, such as a change in controlling law or newly discovered facts. *Catskill II*, 451 F.3d at 80, 86. The court found that the City did not meet this standard because it advanced only "warmed-up" versions of previously-rejected arguments. *Id.* at 82, 86. Although EPA had issued an interpretive memorandum in the interim between *Catskill I* and *Catskill II*, the City conceded, and the court held, that this memorandum was not in a form entitled to *Chevron* deference, *id.*, at 82, 83 n.5; thus, the court did not regard the memorandum as a change in controlling law that would justify reconsideration.

[2] *See also Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364, 1368 n.4 (11th Cir. 2002) (Court could "ascertain no EPA position * * * to which to give *any* deference, much less *Chevron* deference") (emphasis in original), *vacated and remanded, South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95, 106 (2004); *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. at 107 (the United States "does not identify any administrative documents in which EPA has espoused" the position that the process of transporting, impounding and releasing navigable waters does not constitute an addition of pollutants to the waters of the United States); *id.*, at 109 ("we are not aware of any reported case that examines the unitary waters argument in precisely the form that the Government now presents it"); *Friends of Everglades*, 570 F.3d at 1221 ("none of those [other] decisions addressed the issue before us").

could reasonably be construed another way," 570 F.3d at 1222.[3/] "Deciding how best to construe statutory language is not the same thing as deciding whether a particular construction is within the ballpark of reasonableness." 570 F.3d at 1221. Because this Court is the first to have occasion to consider this issue under the *Chevron* framework, the panel's decision creates no circuit split. *See* 570 F.3d at 1218, 1221,1222.

2. Plaintiffs incorrectly assert (Tribe. Pet. 7; FWF Pet. 1) that this Court's decision conflicts with the Supreme Court's decision in *South Florida Water Management District v. Miccosukee Tribe of Indians* (hereafter "*Miccosukee*"). In *Miccosukee*, the Supreme Court commented on, but expressly declined to decide, whether the statute compelled or permitted the interpretation advanced by the United States, *i.e.,* the position, based on the Act's language, structure, and long-standing administrative practice, that water transfers that merely transport navigable waters from one location, through a point source, to another location are not subject to the NPDES program. 541 U.S. at 109. Instead, the Court instructed that this argument could be raised on remand. 541 U.S. at 109, 112.

[3/] A judicial precedent cannot foreclose a contrary agency position otherwise entitled to *Chevron* deference unless the precedent holds that the statute unambiguously forecloses the agency's interpretation. *E.g., National Cable & Telecommunications Assn. v. Brand X Internet Services,* 545 U.S. 967, 982-983, (2005). The decisions of the First and Second Circuits do not so hold. And even if they did, those decisions are not binding precedent in this Circuit.

According to the Tribe, EPA's regulation conflicts with the Supreme Court's holding in *Miccosukee* that "a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'" Tr. Pet. 7 (quoting 541 U.S. at 105). The Tribe incorrectly conflates two interpretive issues that the Supreme Court rightly kept separate. The first issue was the validity of SFWMD's assertion in *Miccosukee* that a point source that does not itself add pollutants is not subject to NPDES permitting requirements because the addition is not "from any point source," 33 U.S.C. § 1362(12)(A). *See Miccosukee*, 541 U.S. at 104-105. The United States, as *amicus curiae*, disagreed with SFWMD's position and the Supreme Court rejected it, explaining that by definition the point source itself need not be the source of the pollutant. *Id.* That holding does not, however, answer the separate question discussed, but not decided, by the Court, namely whether pumping polluted water from one navigable water body to another constitutes an "'addition of any pollutants to navigable waters.'" 541 U.S. at 105-06. As the United States explained in its briefs in this case and EPA explained in the preamble to its rule, waters being moved through a water transfer do not lose their status as waters of the United States and thus pollutants moved from the donor water to the receiving water are not "added" to the waters of the United States.[4] *See* 73 Fed. Reg. at 33,705. If the

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[4] The Tribe is also incorrect (Tr. Pet. 7) in asserting that the water transfers rule

(continued...)

Tribe's view that EPA's interpretation conflicts with the Supreme Court's conclusion on the first issue resolved in *Miccosukee* were correct, it would render nonsensical the Court's explicit decision to leave the second issue in *Miccosukee* unanswered.

The Tribe also suggests (Tr. Pet. 12) that the Supreme Court affirmatively held in *Miccosukee* that permits are required for discharges from one meaningfully distinct water into another. The Court did not so hold. The Supreme Court simply recognized that the case could be decided on an alternative ground because the plaintiff Tribe conceded that if the waters at issue were not meaningfully distinct, no permit would be required and there was an unresolved dispute among the parties as to whether the waters were in fact meaningfully distinct. 541 U.S. at 109-112. The Court remanded for further development of the factual record to resolve this factual dispute. 541 U.S. at 112.

3. There is also no merit to the contention by plaintiffs Florida Wildlife Federation and Friends of the Everglades (hereafter "FWF") that this Court's decision conflicts with *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985), because the Court decided the permissibility of EPA's water transfers rule under the

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[4/](...continued)
achieves the same result as the SFWMD interpretation rejected by the Court. For example, the Supreme Court pointed out that SFWMD's interpretation was untenable because it would exclude municipal wastewater treatment plants from the NPDES program. 541 U.S. at 104-05 The water transfers rule does not have that effect.

statute without reviewing the entire rulemaking record or hearing from parties that commented on, or challenged, the regulation in petitions for review pending before this Court. FWF Pet. 14. *Fla. Power & Light Co.* does not remotely support the proposition, much less actually hold, that a court may not accord *Chevron* deference to an agency regulation unless the reviewing court has before it, and has reviewed, the agency's entire rulemaking record and heard from nonparties to the litigation. *Fla. Power & Light Co.* was a petition for review filed in a court of appeals and the question addressed by the Supreme Court was whether initial jurisdiction to review the particular type of Nuclear Regulatory Commission order was properly in the court of appeals (as both parties contended) or in the district court (as the court of appeals had *sua sponte* held). The passage on which plaintiffs rely explains that the fact finding capacity of a district court would not justify assigning initial jurisdiction to that court because a court's review of the order at issue under the standards of the Administrative Procedure Act ("APA") is based on the administrative record. *Fla. Power & Light Co.*, 470 U.S. at 743-44.

The well-settled principle that judicial review of agency action under the APA is properly based on the administrative record does not apply to the instant case because it is not an APA challenge to the rule. Rather, it is a citizen suit CWA enforcement action against state defendants, the resolution of which requires interpretation of the CWA under the *Chevron* framework. Plaintiffs cite absolutely

no authority that supports their position that in a non-APA suit, such as this one, the court may not accord *Chevron* deference to an agency regulation unless it has before it, and reviewed, the entire administrative rulemaking record or heard from nonparties. There is, however, ample authority to the contrary. As the court explained in *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434, 441 (5th Cir. 2001), under *Chevron* "[o]ur review is limited to interpreting the extent to which the regulation is consistent with the statute – a task which we are competent to perform without the administrative record." There are numerous examples where, in non-APA suits, the Supreme Court and this Court have accorded *Chevron* deference to an agency regulation without having before it the administrative rulemaking record. *E.g.*, *Yellow Transp. Inc. v. Michigan*, 537 U.S. 36, 45 (2002); *Atlantic Mut. Ins. Co. v. C.I.R.*, 523 U.S. 382, 387-391 (1998); *Smiley v. Citibank*, 517 U.S. 735, 738-746 (1996); *Russell v. North Broward Hosp.*, 346 F.3d 1335, 1344-45 (11th Cir. 2003).

In any event, plaintiffs successfully opposed the United States' motion asking this Court to stay disposition of the present case until after resolution of the petitions for review challenging the water transfers rule. In light of their opposition to the United States' request, plaintiffs should not now be heard to complain that the Court erred by deciding this case in the absence of the rulemaking record and parties to the petitions for review.

4. FWF's remaining claims of conflict are equally baseless.

a. FWF asserts (FWF Pet. 11-14) that the Court's decision conflicts with cases stating the general principle that *Chevron* step one analysis requires application of traditional tools of statutory construction, including examination of the statutory structure, purpose, and relevant legislative history. To the contrary, the Court's opinion begins with the statement of this very principle, 570 F.3d at 1223-24, and the ensuing discussion demonstrates that the Court considered and utilized all of these tools. *See* 570 F.3d at 1223 (examining statutory text), 1224-25 (examining context in which language is used, including an examination of numerous other statutory provisions), 1225-27 (examining statutory purposes), 1226 (examining legislative history). Plaintiffs' disagreement with the Court's ultimate conclusion that "'[a]fter seizing every thing from which aid can be derived we are left with an ambiguous statute,'" 570 F.3d at 1227 (quoting *United States v. Bass*, 404 U.S. 336, 347 (1971)), hardly demonstrates that the decision conflicts with cases reciting the general principle that in *Chevron* step one the court applies traditional tools of statutory construction.

b. The Court's decision is also not in conflict with cases articulating the principle of statutory construction that when a statute has explicit enumerated exceptions, additional exceptions may not be implied. FWF Pet. 10-11. The Court did not determine that the CWA subjects water transfers to the NPDES permit program and then impliedly excepts them from coverage. Rather, the Court found

that the statute was ambiguous as to whether water transfers are captured in the program in the first instance by the relevant statutory language, *i.e.*, whether water transfers constitute an "addition" of pollutants "to navigable waters."

B. The Panel Decision Is Correct

Rehearing is not warranted because the Court correctly concluded that the CWA can reasonably bear at least two differing readings and thus the Act is ambiguous as to whether a water transfer is a "discharge of a pollutant." EPA's regulation is accordingly permissible and thus controlling.

Although the Court holds that plaintiffs' reading of the statute to require NPDES permits for water transfers is a reasonable one, 570 F.3d at 1227-28, that is not enough for plaintiffs to prevail.[5] *E.g.*, *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1508 (2009) (agency's reasonable interpretation prevails even if it is not the only possible interpretation or the one deemed most reasonable by the courts); *Sierra Club v. Administrator, U.S. E.P.A.*, 496 F.3d 1182, 1186 (11th Cir. 2007) ("Under *Chevron* deference, we must accept an agency's reasonable interpretation of an

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[5] Under the two-step *Chevron* framework, a reviewing court first determines whether "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If, however, the statute is silent or ambiguous, regulations such as EPA's here, promulgated pursuant to an express delegation of legislative authority, are to be given controlling weight unless found impermissible. *See Chevron* at 843-44.

ambiguous statute, even if the agency's reading differs from what the court believes is the best statutory interpretation") (internal quotations omitted). Rather, to prevail plaintiffs must show that the statute unambiguously compels their interpretation as the *only* permissible reading. It is not, however, the only permissible reading.

The panel correctly concluded that the statutory language is ambiguous because, "'addition . . . to navigable waters,'" can reasonably be read to refer to waters in the individual sense or to waters as a unitary whole. 570 F.3d at 1223. As the Court explains, the ordinary usage of "waters" can collectively refer to several different bodies of water or refer to any one body of water. *Id.* There are other textual indications that undermine plaintiffs' claim of statutory clarity. For example, the statutory definition of "'discharge of a pollutant'" is "*any* addition of *any* pollutant to navigable waters from *any* point source." 33 U.S.C. § 1362(12). The absence of the modifier "any" before "navigable waters" in conjunction with inclusion of the article "the" in the statutory definition of "navigable waters" as "*the* waters of the United States" supports the conclusion that "navigable waters" may be viewed as a whole for purposes of the NPDES program. As this Court noted, plaintiffs' contrary reading assumes that 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 (emphasis in original). The Court rightly explains: "[I]f the meaning of language is plain, no alteration should be necessary to clarify it. The

addition or subtraction of words indicates that the unaltered language is not plain." 570 F.3d at 1224.

The Court also correctly found that the statutory structure, context, purposes, and legislative history do not resolve the textual ambiguity. 570 F.3d at 1224-1227. In their petitions, plaintiffs raise no arguments that were overlooked by the Court. They point only to contextual clues and purposes that arguably support their preferred reading, but they ignore aspects that cut the other way. For example, FWF argues (FWF Pet.12-13) that certain provisions of the CWA suggest that the Act protects individual water bodies. However, it does not necessarily follow that because certain provisions of the CWA protect water bodies on an individual basis, it must be assumed that an NPDES permit is required for water transfers. The CWA is a comprehensive statute that addresses the problem of water pollution through a multi-faceted federal-state approach. From the fact that Congress used different terminology in different parts of the CWA, it can also reasonably be inferred that Congress intended different meanings.[9] *See* 570 F.3d at 1224-25.

Plaintiffs suggest (FWF Pet. 4-6) that the Court erred by deferring to EPA's water transfers rule because the so-called unitary water reading was first advanced by

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[9] *See, e.g.*, 33 U.S.C. 1312(a) ("a specific portion of the navigable waters"); 1313(d)(1)(B) ("those waters or parts thereof"); §§ 1254(a)(3), 1314(f)(2)(F) ("any navigable waters") 33 U.S.C. §§ 1281(b), 1311(m)(2), 1311(m)(4), 1342(q)(2) ("receiving waters").

the United States (as opposed to EPA) in *Miccosukee* and then by SFWMD and the United States in this litigation. This suggestion is founded on several fundamental misconceptions.[7] The most basic is that plaintiffs forget that it is the Court's role under *Chevron* step one to determine whether a statute is ambiguous using traditional tools of statutory construction. If it is ambiguous, under *Chevron* step two, the reviewing court defers to the agency's reasonable resolution of the ambiguity. EPA's "holistic" analysis and other stated rationale for its rule, such as policy considerations, support the Court's finding of ambiguity in the statute. They do not, however, provide reason not to defer to EPA's rule. Stated differently, as the Court correctly noted, the true conflict in this case is whether the statute is ambiguous. 570 F.3d at 1219-20. From the determination that there are two competing reasonable interpretations of the statute – one that would require NPDES permits for water transfers and one that does not – it necessarily follows that EPA's rule providing that water transfers do not require NPDES permits is permissible under the statute.

"'[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency'" *See, e.g., National Cable & Telecommunications Assn.,* 545 U.S. at 981 (quoting *Smiley*, 517 U.S. at 542).

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[7] As the Supreme Court held in *Smiley*, 517 U.S. at 740-41, *Chevron* deference is properly accorded to an agency interpretation set forth in a regulation adopted in response to litigation. In that case, the Supreme Court granted *Chevron* deference to a rule adopted after, and in direct response to, the lower court decision. *Id.*

Having found that the statute is ambiguous and can support differing reasonable readings, the Court followed *Chevron* and properly deferred to EPA's reasonable, and therefore permissible, water transfers rule. The Court's decision allows EPA to retain, rescind, reconsider, or change the water transfers rule. EPA in fact intends to reconsider the rule; however, as the Court correctly concluded, unless and until EPA rescinds or changes the rule through notice and comment rulemaking (or Congress amends the Act), the current rule must be given effect. 570 F.3d at 1228. Accordingly, NPDES permits are not required for the water pumps at issue and the district court's judgment is properly reversed.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I caused copies of the foregoing United States' Response to Petitions for Rehearing and certificate of interested parties to be served upon counsel this 9th day of October 2009, by United States Mail addressed to:

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