No. 07-13829-HH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

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

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

v.

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

CAROL WEHLE, Executive Director,
Defendant/Appellant,

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

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

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

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INTRODUCTION

Plaintiffs and their *amici* contend that an NPDES permit is required any time a pump moves polluted water from one place to another within the navigable waters of the United States, even though no pollutant is thereby added to the navigable waters. In the process, plaintiffs and their *amici* misconstrue the statutory text, improperly discount other elements of the CWA, and reveal confusion over several Supreme Court and courts of appeals decisions. They also misread this Court's decision in *Closter Farms*.[1]

Behind all of these errors is a blatant disregard of the CWA's framework for protecting the waters of the United States. Like the district court, plaintiffs trumpet the importance of the NPDES program and of the CWA's general goal to restore and maintain the Nation's waters, while ignoring the rest of the elements of the CWA. Their one-dimensional focus reflects a basic misunderstanding of Congress's careful and comprehensive scheme to achieve its goals.

Congress designed the CWA to operate as a partnership between the federal and state governments. *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101, 112 S. Ct. 1046,

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[1] As in our opening brief, Sugar Br. viii-ix, we adopt the reply arguments of the United States that EPA's longstanding interpretation of Section 402 not to reach water transfers is entitled to deference, and of Carol Wehle that the waters connected by the S-2, -3 and -4 pumps are not meaningfully distinct.

Because plaintiffs have not presented any argument on, and so have waived, their cross-appeal as to remedy, this brief is styled as and complies with the rules governing a reply brief.

1054 (1992). Closely involving the States in the regulatory process was key to maintaining their primary role—explicitly preserved in the Act—in water allocation, water-quality protection, and land- and water-resources management. 33 U.S.C. §§ 1251(b), (g) .

The NPDES permitting program, through which EPA regulates the initial release of industrial and municipal wastes into the waters of the United States, is one element in this scheme. See 33 U.S.C. § 1342. An NPDES permit (establishing "effluent limitations") is required under Section 402 of the CWA for the "discharge of any pollutant," *id.* §§ 1311, 1342(a)(1), defined under Section 502 to cover only certain releases of pollutants from point sources. The CWA also assigns to the federal government the authority to regulate dredge and fill material under the separate permitting process established in Section 404. 33 U.S.C. § 1344.

Apart from those programs, Congress largely left authority to the States to address water pollution (with federal guidance and oversight). See *Brief Amicus Curiae of the States of New Mexico, et al.*; see also THE CLEAN WATER ACT HANDBOOK 191-220 (M. Ryan ed. 2003); *Nat'l Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 166 (D.C. Cir. 1982) (States have primary responsibility over nonpoint sources of pollution, "defined by exclusion [to] includ[e] all water quality problems not subject to" the federal permitting programs). For instance, States are charged with establishing water-quality standards on a watershed-by-watershed ba-

sis and with achieving those standards. 33 U.S.C. §§ 1313(a), 1313(d)-(e), 1329(a)-(b). Through a variety of programs, States manage pollution not covered by NPDES permitting—for example because an exemption to the NPDES program applies or the source does not qualify as a point source discharge.

Congress thus created a comprehensive system to accomplish its goal of cleaning the Nation's waters. It begs the question to invoke that goal in advancing any one part of Congress's scheme over the others. And it offends Congress's decision to leave substantial authority with the States to suggest that the federal NPDES component enjoys primacy. Although plaintiffs and their *amici* express deep misgivings about the ability of States to hold their end of the bargain, Congress evidenced no such concerns. In short, Congress legislated a careful plan for achieving the goals of the CWA, and neither the importance of those goals nor the perceived utility of any one part of the CWA calls for judicially reconstructing Congress's plan, which as the United States confirms in its brief to this Court called for States to regulate water transfers under the nonpoint scheme.

ARGUMENT

I. THE CLEAN WATER ACT DOES NOT REQUIRE NPDES PERMITS FOR THE DIVERSION OF NAVIGABLE WATERS.

A. CWA Section 402's Plain Text Does Not Cover Water Transfers That Do Not Add Pollutants To The Navigable Waters.

Plaintiffs do not dispute that resolution of this appeal must begin with the language of Section 402. That provision mandates an NPDES permit for "the discharge of any pollutant," 33 U.S.C. § 1342(a)(1), which means "any addition of any pollutant to navigable waters"—defined as "the waters of the United States"—"from any point source." *Id.* §§ 1362(7), (12).

As explained in our opening brief, a pump that moves "navigable waters"—without "add[ing]" any pollutants "to the waters of the United States"—is outside the scope of Section 402. Sugar Br. 14-25. NPDES permitting is required only where a point source "adds"—or "joins"—any pollutant to the navigable waters "so as to bring about an increase (as in number [or] size)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 24 (1993). The S-2, S-3, and S-4 pumps indisputably do not introduce pollutants to the waters they move. It tortures the natural meaning of the term "addition" to say that the diversion of *already polluted* navigable waters requires a permit. Sugar Br. 15-18. Plaintiffs offer nothing in response but conclusory assertions that the term is "straight-forward" or "evident" in their favor. Friends Br. 12; FWF Br. 28.

Congress's use of the collective terms "navigable waters" and "the waters of the United States" (33 U.S.C. §§ 1362(7), (12)) demonstrates its intent to treat these waters as a unit for purposes of the NPDES program, requiring a permit only where pollutants first enter the navigable waters. Congress could easily have required a permit for any addition of pollutants to any subset of the waters. Indeed, Congress elsewhere expressly identified narrower subjects than the navigable waters of the United States so as to distinguish among parts of those waters. See, *e.g.*, 33 U.S.C. § 1312(a) ("water quality *in a specific portion of the navigable waters*"); *id.* § 1313(c)(2)(A) ("the designated uses of *the navigable waters involved*"); *id.* § 1313(d)(1)(B) ("waters *or parts thereof*") (emphases added). That Congress used the collective term for Section 402 shows that it meant "navigable waters" in the unitary sense. Sugar Br. 18-21.[2]

Some *amici* contend that "navigable waters" is a "countable" noun and consequently must refer to individual water bodies. Catskill Br. 11-12. But it is simply not true that a noun that "can take the plural form * * * must necessarily fall within the classification of countable nouns." *Id.* at 11. Ordinary English usage produces

[2] The Tribe attempts to downplay the term "navigable waters" as "simply the jurisdictional element of the statute." Tribe Br. 33. But that answers nothing about how to interpret the term, and it does not account for the fact that Congress at times referred to individual water bodies and at times the collective "navigable waters," with plainly different meanings. To the extent the Tribe is suggesting that the term "navigable waters" is not meant to be interpreted literally or given substance because it is "simply the jurisdictional element," the Tribe cites no legal support for such a proposition.

numerous counterexamples—"the winds," "the heavens," and "the skies" are just a few. None of those elements can be "counted." And, not coincidentally, they come in the environmental context where parts of our physical world that cannot be counted are so vast that we ordinarily use a plural form to speak of them. In any event, even if "waters" were a countable noun, that does not preclude one from referring to all of "the waters" in a collective, unitary sense.[3]

Other parts of the Act confirm this reading. Most notably, Congress consistently used the modifier "any" *except* in reference to "navigable waters," instead often using the definite article "the" to reinforce the aggregate, singular concept of that term. Sugar Br. 20; see 33 U.S.C. §§ 1312(a), 1313(c)(2)(A). It is not just that the word "the" is the "definite article [that] must be used when referring to a particular member of a class." Catskill Br. 9-10. Congress made clear when it was referring to an apportioned part of "the navigable waters." And it would not have been ungrammatical for Congress to have referred to "any navigable water" or "a navigable water" in Section 402 if it intended to cover additions to any water body. In these ways, Congress made clear that the NPDES program extends only to "addition[s]" of "pollutants" "to navigable waters" as a unitary body. The statutory definition of navigable waters as "the waters of the United States," another aggre-

[3] *Amici* also miss the point when they argue that the CWA defines the term "navigable waters" as used throughout the Act. Catskill Br. 12-13. While there is a single definition for that term, it is then used in different contexts throughout the CWA and with different qualifiers.

gate, collective phrase, further confirms that Congress took a unitary view of these waters. Congress's use of the article "the" confirms that "navigable waters" is meant in the collective sense in Section 402.[4]

Friends of the Everglades incorrectly contends that this reading requires "adding the phrase 'from non-navigable waters'" to the statutory definition of a discharge. Friends Br. 21. But the plain text of the statute already imposes that limitation. Simply by requiring that there be an "addition" and that it be "to navigable waters," Congress made clear that pollutants must be from non-navigable waters. Indeed, all courts agree that, for NPDES permitting to apply, the pollutants must have been added to the navigable waters from the "outside world." See, *e.g.*, *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 273 F.3d 481, 491 (2d Cir. 2001) ("*Catskill I*"), adhered to on reconsideration, 451 F.3d 77 (2006); *Gorsuch*, 693 F.2d at 175; *Nat'l Wildlife Fed'n* v. *Consumers Power*, 862 F.2d 580, 581 (6th Cir. 1988). The Tribe contends that "if Congress intended for the 'relevant receptacle' to be 'navigable waters' (*as a whole*) it would have said so." Tribe Br. 32-33. But adding the term "as a whole" would have been redundant: the use of the collective "navigable waters" and "the waters of the United

[4] *Amici* nitpick the relevance of *Renz* v. *Grey Advertising, Inc.*, 135 F.3d 217, 222 (2d Cir. 1997). Catskill Br. 10 n.2. But they ignore the portion of the *Renz* opinion quoted in our opening brief, in which the court distinguishes between the definite and indefinite articles. Sugar Br. 19. And their reference to age-old abstractions ("the sands of time" or "the man of the hour") is unrevealing. Catskill Br. 10.

States" makes the term "as a whole" unnecessary to convey that meaning in Section 402.

It is plaintiffs and their *amici* who would rewrite the statute. They repeatedly treat the term "navigable waters" as meaning "the receiving water"—a term that appears nowhere in the Act—and thereby assert that an NPDES permit is required whenever pollutants are added to any navigable water body. Tribe Br. 20; Friends Br. 12-13; FWF Br. 28; Catskill Br. 3-4, 6-7, 13-16. But Congress did not define the scope of the NPDES program in that way; it referred collectively to "navigable waters" in a unitary sense. Plaintiffs provide no justification for substituting their own preferred terms in place of Congress's language, and they do not explain how an interpretation of Section 402's text could require that "the receiving waters" be the relevant focus.

That deficiency infects the Catskill *amici's* statutory analysis. *Amici* assume that "navigable waters" means "the receiving water body." Catskill Br. 3-4, 6-7, 13-16; see also *id.* at 13 (referring to "addition" to "a separate body of water"). That misreading allows them to say that a "pollutant" is "added" when water transfers occur: because a pollutant is added to "the receiving water" or "from one body of water * * * into a separate body of water." But *amici* nowhere ground that critical shift in the text of Section 402. The fact that they must change the language in analyzing Section 402 is revealing.

The courts that have embraced plaintiffs' position have likewise failed to follow the plain language of the statute. The Second Circuit recognized that (because of the term "addition") NPDES permitting is required only for the "introduc[tion]" of pollutants to the navigable waters "from the outside world." *Catskill I*, 273 F.3d at 491. But without explanation, the court then said that "outside world" must mean "any place outside the *particular water body* to which pollutants are introduced." 273 F.3d at 491 (emphasis added); see also *Dubois* v. *United States Dep't of Agric.*, 102 F.3d 1273, 1298-99 (1st Cir. 1996) (asking whether pollutants are added to a "body of water").

Along with the EPA and the Army Corps, the D.C. and Sixth Circuits have adopted the unitary waters reading of Section 402. *Gorsuch*, 693 F.2d at 175; *Consumers Power*, 862 F.2d at 581. Plaintiffs and their *amici* try to distinguish these decisions (Friends Br. 13-15; Catskill Br. 25-28), but to no avail. Their basic claim is that these cases involved water moving within the same water body, whereas *Catskill I* involved water moving between meaningfully distinct bodies. That distinction, however, finds no basis in *Gorsuch* or *Consumers Power*. Neither court predicated its holding on that view of the facts; indeed, neither court even mentioned that the two waters involved were the same.

To the contrary, the D.C. Circuit in *Gorsuch* emphasized the difference in water quality between the reservoir and the downstream river that were connected

by the dam at issue. 693 F.2d at 161-65. The court repeatedly referred to reservoirs and rivers separately, calling them distinct "bod[ies] of navigable water." *Id.* at 175. *Amici* downplay the latter statement as the court's paraphrasing of EPA's position. Catskill Br. 26-27. But the court did not dispute EPA's characterization and ultimately deferred to EPA's view of Section 402. 693 F.2d at 175; see also *Consumers Power*, 862 F.2d at 584 (explaining that *Gorsuch* dealt with movement of water from a reservoir "into another body of water"). In *Consumers Power*, the Sixth Circuit likewise discussed the manmade storage reservoir and Lake Michigan as distinct bodies (though they all the time held "the waters of the United States"). 862 F.2d at 581-82, 589.

There is, accordingly, disagreement among the circuits on this issue. Plaintiffs and their *amici* suggest that this Court has already taken their side (Friends Br. 13-14; Catskill Br. 17-19), but that is plainly wrong. To be sure, this Court has said that "in determining whether pollutants are added to navigable waters for purposes of the CWA, the receiving body of water is the relevant body of navigable water." *Miccosukee Tribe* v. *South Florida Water Mgt. Dist.*, 280 F.3d 1364, 1368 (11th Cir. 2002). But this Court did not consider the unitary waters argument in *Miccosukee* because the parties never raised it. The focus there was on whether there had been an "addition" "*from* a point source"—whether a pump that does not introduce pollutants to the water it transfers could be a point source adding pollutants. *Id.* at

1367-68 & n.5 (emphasis in original). The Court nowhere discussed the limiting term "navigable waters." See *id.* at 1368 & n.5. On appeal, the Supreme Court declined to address the unitary waters argument precisely because this Court had not considered it. *South Florida Water Mgt. Dist.* v. *Miccosukee Tribe*, 541 U.S. 95, 109, 124 S. Ct. 1537, 1545 (2004). This Court's reference to "the receiving body of water" must therefore be taken in context: it was not aimed at resolving the issue in this case of whether "navigable waters" is meant in the unitary sense.[5]

Furthermore, this Court's *Miccosukee* decision was vacated by the Supreme Court and has no precedential effect. See *Los Angeles County* v. *Davis*, 440 U.S. 625, 634 n.6, 99 S. Ct. 1379, 1384 n.6 (1979). Because the Supreme Court specifically instructed that the unitary waters issue remained open on remand, 541 U.S. at 109, 124 S. Ct. at 1545, it is clear that any statements by this Court that might address that issue were vacated. In addition, much has changed since this Court's *Miccosukee* decision. In particular, EPA has since explained the unitary waters po-

[5] This is confirmed by the Court's reliance on *United States* v. *M.C.C. of Fla., Inc.*, 772 F.2d 1501, 1505-06 (11th Cir. 1985). See 280 F.3d at 1368 n.5. In *M.C.C.*, this Court held that the redeposit of dredged spoil constitutes an "addition" of a "pollutant." The Court did not consider the significance of the term "navigable waters" in that case: it assumed that waterbeds, the source of dredged material, would constitute the "outside world" under Section 402 and thus would not already be in "navigable waters." And the analysis in that case was limited to the unique context of dredge material. The CWA treats dredge problems differently, even creating a distinct permitting mechanism in Section 404. See 33 U.S.C. § 1344(a). For that reason, *amici* are off the mark in claiming that the CWA's references to "dredged spoil" helps their interpretation of Section 402. See Catskill Br. 15. The Supreme Court has recognized that such materials are treated differently under the CWA because of their unique nature and purposes. *Rapanos* v. *United States*, 547 U.S. 715, 744-45, 126 S. Ct. 2208, 2228 (2006).

sition in briefs to this Court and the Supreme Court, as well as in a proposed rule and formal guidance. Cf. 280 F.3d at 1367-68 & n.4. In sum, this Court's *Miccosukee* decision (and its reference to "the receiving body of water") cannot be read as having decided the issue here.

Without any support for their position in the text of Section 402, plaintiffs rely mainly on policy arguments. They emphasize the basic goal of the CWA to restore and maintain the Nation's waters and suggest that the NPDES scheme, because of its effectiveness in achieving that goal, should extend broadly. FWF Br. 29; Tribe Br. 26-27; Catskill Br. 6, 13. While the general goal of the CWA is surely relevant, it cannot supplant statutory construction. And, although the NPDES program is significant, its importance cannot lead courts to extend it beyond the limitations that Congress imposed. Not every emission from a point source triggers Section 402 permitting; only where the emission "add[s]" pollutants "to navigable waters" is a permit required. *Gorsuch*, 693 F.2d at 176 ("it does not appear that Congress wanted to apply the NPDES system wherever feasible. Had it wanted to do so, it could easily have chosen suitable language, *e.g.*, 'all pollution released through a point source'").

Plaintiffs and their *amici* lament that, under the unitary waters reading, "polluted" water from one navigable water body could be transferred (without a permit) to another body containing "pristine" water. Friends Br. 21-22; Tribe Br. 27-

28; FWF Br. 29; Catskill Br. 13-14. That is a bare policy argument, not an attempt to interpret the text of Section 402. And it is a poor policy argument because it ignores that the NPDES program already regulates the initial entrance of pollutants to the navigable waters, and further ignores all the additional elements of the CWA scheme that deal with other sources of pollution. It rests on the false premise that there will be inadequate water-quality control if the NPDES program does not apply to water transfers, pretending that the rest of Congress's comprehensive scheme to clean the Nation's waterways does not exist. Congress made sure in the NPDES program that new pollution was not entering the navigable waters through point sources, but also sought to regulate all other sources of pollution through the nonpoint-source controls in Section 304(f). Plaintiffs reveal either an ignorance of the CWA's overall framework, a dislike of the federal-state partnership that Congress entrusted with achieving the CWA's goals, or a deep distrust of the ability of the States to fulfill their nonpoint-source responsibilities. None of those is a proper basis for statutory interpretation.

Plaintiffs routinely call the unitary waters interpretation of Section 402 a "theory" and intimate that it is some grand, extra-textual concept designed to serve appellants' goals. Friends Br. 20-21, 26; Tribe Br. 27. But it is simply a plain language interpretation of Section 402 and its definitional provisions—one also es-

poused by the expert federal agencies with primary responsibility for implementing the CWA.

B. Other Parts Of The CWA Reinforce That Section 402 Does Not Cover Mere Diversions Of "Navigable Waters."

We previously explained that the CWA, read as a whole, bolsters this plain-language reading of Section 402. Sugar Br. 26-31. Congress supplemented the NPDES program (governing "point sources") with Section 304(f) of the CWA (governing primarily "nonpoint sources"), which assigns responsibility to the States "to control pollution resulting from * * * changes in the movement, flow, or circulation of any navigable waters," including changes from "flow diversion facilities." 33 U.S.C. § 1314(f). Congress further recognized in Sections 101(b) and 101(g) the primary role of States in controlling pollution and allocating water. Legislative history confirms the complementary nature of the NPDES program (requiring permits for the entrance of pollutants into the navigable waters) and the water-quality controls in the CWA.

Plaintiffs cannot (and do not) deny the relevance of these provisions or of the CWA's careful balance between federal and state power. Friends Br. 33-36, 46-47; FWF Br. 30-31; Tribe Br. 37-38. Plaintiffs instead debate strawman arguments. For instance, there is no legitimate basis on which to claim that our view "makes the CWA seem like a disjointed, fragmentary piece of legislation." Friends Br. 45. As described above, the CWA creates a comprehensive system of regulating the

Nation's waters. The NPDES program has a defined role within that system, and other water-quality programs complement it. In addition, defendants are not (as plaintiffs repeatedly suggest) arguing for an "exemption" or "exception" from the NPDES scheme by virtue of Sections 101(b), 101(g), 304(f), or any other provision of the CWA. Friends Br. 33, 38, 49; Tribe Br. 38-41; Catskill Br. 4, 8-10, 14-15. No exemption is needed because by its plain language Section 402 does not cover water transfers in the first place. The other provisions of the CWA simply confirm that reading of Section 402.

Plaintiffs downplay the significance of Sections 101(g) and 101(b). They cannot dispute, however, that those provisions preserve the primary role of States in allocating water, controlling water pollution, and regulating land- and water-use in the ways necessary to achieve clean water. Expansions of the scope of Section 402 like that sought by plaintiffs would come at the expense of State powers that Congress sought to protect.

Plaintiffs' attempts to explain away Section 304(f) are likewise unconvincing. Plaintiffs cast the issue as solely whether the pumps are point or nonpoint sources—claiming that Section 304(f) is not relevant because they are point sources. Friends Br. 36-40; Tribe Br. 35-36; Catskill Br. 15, 21. But as plaintiffs acknowledge, Section 304(f) covers both point and nonpoint sources. Friends Br. 38-39; Tribe Br. 36-37. Though the pumps are point sources, they still do not fall

within the NPDES scheme because they do not add pollutants to the navigable waters of the United States. Section 304 was promulgated precisely to deal with pollution that may travel through point sources but is not subject to the NPDES program because no "discharge" (as defined by Section 402) has occurred.

In addition, plaintiffs cannot get around the fact that Section 304(f) specifically covers "pollution resulting from * * * changes in the movement, flow, or circulation of any navigable waters," including changes from "flow diversion facilities." 33 U.S.C. § 1314(f). Friends of the Everglades butchers the text in saying that the provision addresses only changes "within the navigable water [in which] the changes are taking place." Friends Br. 41. Nothing in Section 304(f) so states. Such "interpretation" suffers from the same problem that plaintiffs have with Section 402: making up language and pretending that when Congress said "navigable waters" it really meant a particular navigable water body.

Plaintiffs and their *amici* place great emphasis (as did the district court) on the fact that certain CWA provisions implementing water-quality standards focus on individual water bodies. Tribe Br. 34-35 (pointing to 33 U.S.C. § 1313(c)(2)(A)); Catskill Br. 16-17, 23-24 (pointing to 33 U.S.C. §§ 1312 & 1313, as well as 40 C.F.R. § 131.2 & 122.45(g)(4)). But those provisions do not simply say "the navigable waters"; they refer specifically to individual water bodies or parts of the navigable waters (*e.g.*, "specific portion," the waters "involved").

Plaintiffs and their *amici* do not explain how Congress's use of *different* terms in *different* sections of the Act helps their reading of "navigable waters" in Section 402. Likewise, EPA's NPDES regulations afford "intake credits" "only if the discharger demonstrates that the intake water is drawn from the same *body of water* into which the discharge is made." 40 C.F.R. § 122.45(g)(4) (emphasis added). When Congress or the EPA wanted to distinguish among "navigable waters," they did so expressly. In sum, the CWA's various provisions bolster the plain-language, unitary waters construction of Section 402.[6]

C. The Unitary Waters Reading Of Section 402 Is Consistent With The Supreme Court's Decisions In *Miccosukee* And *Rapanos*.

Plaintiffs are wrong to suggest that the Supreme Court in *Miccosukee* effectively decided the issue in this case. FWF Br. 22-24; see also Catskill Br. 19-20. They paint the Supreme Court's holding much more broadly than is warranted, implying that the Court settled that NPDES permitting is required whenever water is transferred from one body to another meaningfully distinct body of water. The Court, in fact, specifically left consideration of the unitary waters argument for re-

[6] There is nothing incongruous at all about the unitary waters view of Section 402's scope and a focus on individual water bodies for establishing water-quality standards, permit limitations for discharges, State accountability for water quality, and for addressing intake credits. See Catskill Br. 16-17, 23-24. Requiring an NPDES permit only for the initial introduction of pollutants into "navigable waters" (viewed as a whole), and then requiring a focus on individual water bodies in implementing water-quality standards that relate to *every* source of pollution reaching a water body is a comprehensive and sensible framework. *Amici* provide no plausible basis for believing that construing Section 402 in this way would "crippl[e]" implementation of the NPDES program. *Id.* at 23.

mand. 541 U.S. at 109, 124 S. Ct. at 1545. Shockingly, *amici* ignore that fact and pretend that the only issue for remand was a trial on the "meaningfully distinct" question. Catskill Br. 19-20. In addition, FWF states that the "effect" of the Court's decision was to reject the *Gorsuch* Court's reading of Section 402. FWF Br. 22-23. But that is simply not true: the *Miccosukee* Court was focused on a narrow aspect of Section 402 ("addition" "from" a point source, see 541 U.S. at 104, 124 S. Ct. at 1543) and expressly did not consider other aspects of the provision that make clear it does not cover flow-diversion facilities ("addition" to "navigable waters").

FWF also goes much too far in characterizing the Supreme Court as not looking "favorably" on the unitary waters view. FWF Br. 23-24. Of course, the Court noted possible counterarguments to it, based on the incomplete briefing before it. 541 U.S. at 106-08. But as explained in our opening brief (and above), each of those concerns is readily answered. Sugar Br. 32-35. The Supreme Court's *Miccosukee* decision is consistent with our position here.

Plaintiffs' reliance on *Rapanos* v. *United States*, 547 U.S. 715, 126 S. Ct. 2208 (2006), is likewise misplaced. There, the question was whether man-made ditches and wetlands adjacent to them, which eventually emptied into traditional navigable waters, counted as "waters of the United States." *Id.* at 729, 126 S. Ct. at 2219. Rejecting the Army Corps' "expansive approach," the Court observed that "the navigable waters" referred not "to water in general" but to "continuously pre-

sent, fixed bodies of water" such as streams, oceans, rivers, and lakes. *Id.* at 732-33, 126 S. Ct. at 2220-21. It held that "dry channels through which water occasionally or intermittently flows" are excluded from the term "the navigable waters." *Id.* at 733, 126 S. Ct. at 2221. In reaching that conclusion, it found useful that the CWA distinguishes between navigable waters and "the channels and conduits that typically carry intermittent flows of water" "by including [the latter] in the definition of 'point source,'" such that "point source" and "navigable waters" are "distinct categories." *Id.* at 735, 126 S. Ct. at 2222-23.

That analysis is far afield from the issue presented here. The question in *Rapanos* was not about separate water bodies, but about waters versus non-waters. There is no question here that the relevant waters qualify as "navigable waters." And there is no question that the waters retain their status as "navigable waters" when they are in the pump. In addition, the focus in *Rapanos* was not on Section 402 or the applicability of the NPDES scheme to water diversion facilities. Indeed, the Court never discussed that issue. Simply put, *Rapanos* provides no help to plaintiffs' position.

II. *CLOSTER FARMS* SHOWS THAT NPDES ONLY COVERS POINT SOURCES CONVEYING POLLUTANTS ON THEIR INITIAL ENTRY TO NAVIGABLE WATERS.

This Court's decision in *Closter Farms* supports our argument that not all point sources are covered by NPDES. In *Closter Farms*, the polluting culvert

"from which excess water [was being] pumped into Lake Okeechobee, was a 'point source'" according to unchallenged trial court findings. 300 F.3d at 1296. But because "[t]he CWA specifically exempt[ed]" agricultural flows "from the definition of a point source" and plaintiffs had not proved that the culvert contained other non-exempt or non-permitted pollutants, the culvert did not require permitting. *Id.* at 1297-98. Thus, while *physically* the culvert was a point source under the Act's definition of point source, the exemption meant the pipe *legally* was not a point source requiring NPDES permitting.

This Court's focus in *Closter Farms* on the original source of the pollutants is consistent with the unitary waters reading of Section 402. But regardless of whether this Court adopts the unitary waters approach, *Closter Farms* provides a distinct basis for reversal. This Court in *Closter Farms* treated the exempt-or-permitted status of the pollutants that reached Lake Okeechobee from the culvert as a clear indicator that the culvert did not need an NPDES permit. Here as in *Closter Farms*, the plaintiffs have not shown that the transferred water contains non-exempt pollution or pollution that would not have been subject to permitting at source.

A. Agricultural Exemptions Are Determined By Water's Use, Not The Discharger's Vocation.

Plaintiffs attempt to distinguish *Closter Farms* on the basis that defendant there was a farm entitled to the agricultural exemption, while the SFWMD is not

engaged in farming and is not so entitled. But the water diversion operator's avocation was irrelevant in *Closter Farms*. Instead, this Court focused its inquiry on whether the pollutants were agricultural discharges. "The CWA requires any party that discharges pollutants from a 'point source' into navigable waters to have an NPDES permit, unless the discharges fall into an exception." 300 F.3d at 1296. It is the discharges that fall into some sort of exception, not the discharging party.

The *Closter Farms* opinion affirms that it is the type of emission, not the employment of the emitter, that determines whether a source of pollution is exempt when it states that "agricultural stormwater discharges and return flows from irrigation agriculture * * * are not considered to be point sources, [so] there is no requirement that a property owner discharging these waters have an NPDES permit." 300 F.3d at 1297. The broad term "property owner" makes clear that any emitter may release agricultural flows without a permit—not just farmers.

The mushroom cases cited by plaintiffs only further illuminate that the type of discharge is important for permitting, not who added the discharge. See *Reynolds* v. *Rick's Mushroom Serv., Inc.*, 246 F. Supp. 2d 449, 456-57 n.4 (E.D. Pa. 2003), and *United States* v. *Frezzo Bros.*, 546 F. Supp. 713, 722-23 (E.D. Pa. 1982), aff'd, 703 F.2d 62 (3d Cir. 1983). In *Frezzo Bros.*, the defendants engaged in both agricultural operations *and* composting operations. 546 F. Supp. at 721. Only the composting operations, however, discharged into navigable waters. *Id.* at

722 ("run-off from the compost systems made its way into the storm water run-off system and was permitted to be discharged into the creek").

The court found "mushroom compost production" is "not an 'agricultural activity.'" 546 F. Supp. at 723. In so finding, the district court quoted favorably a Third Circuit opinion addressing the Frezzos' operations in the context of the Fair Labor Standards Act that "[a]lthough mushroom growing is a type of farming, the production of mushroom compost is a preliminary activity which manufactures a product that is then used in farming." *Ibid.* The Frezzos were engaged in "manufacturing" fertilizer that would later be used on their agricultural operations. *Ibid.* Because the composting operations, not the agricultural operations, led to the wastewater discharges that violated the Clean Water Act, the Court found the Frezzos needed a permit for those composting operations even though it recognized the Frezzos were also farmers.

Plaintiffs contend that pollutants previously added to the navigable waters as exempted agricultural return flows or stormwater discharges are legally transformed once they pass through a pump that merely redirects the waters. But that is exactly what happened in *Closter Farms*. Navigable waters containing exempt pollution were conveyed into Lake Okeechobee through the point source culvert—but this Court held no NPDES permit was required.

The focus of *Closter Farms* is on pollutants when they enter the navigable waterways in determining the permitting requirements. That is completely consistent with the unitary waters approach that permitting is determined when pollutants enter the navigable waters, not any time they travel through a point source.

B. Plaintiffs Fail To Identify Any Non-Exempt, Non-Permitted Pollutants In The Waters Transferred By The Pumps.

As in *Closter Farms*, plaintiffs have failed to identify any non-exempt, non-permitted pollutants discharged by the SFWMD. First, Friends argues that agricultural flows that reach the canals from which water is pumped do not constitute irrigation, so they are not exempt. That argument is untenable. Second, Friends and the Tribe rely upon evidence that non-agricultural pollutants reached the canals, but fail to demonstrate that these non-agricultural pollutants were not subject to permitting upstream.

1. Pollutants in the canals fall under the agricultural exemption.

Friends suggests that if water is used not for irrigation but for other agricultural purposes, it is not exempt. According to Friends, raising or lowering the water table for frost protection, insect control, and the use of heavy equipment on the fields do not constitute "irrigation." Friends Br. 56-57. But Friends conveniently offers no definition of irrigation. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1313 (2d ed. 1941) provides an agriculture-specific definition for irrigation: "the

artificial watering of farm land by canals, ditches, flooding, etc., to supply growing crops with moisture." The Merriam-Webster Online Dictionary suggests generally, "the watering of land by artificial means to foster plant growth." http://www.merriam-webster.com/dictionary/irrigation. Under either of these definitions, the activities described by plaintiffs easily qualify as either irrigation or the temporary cessation of irrigation that is part and parcel of irrigation itself.

Friends may consider watering fields to be irrigation only when meant to quench growing plants' thirst, but dictionaries and farmers consider applying water to fields for insect control and frost protection, which benefit plant growth, to be irrigation as well.[7] Furthermore, Friends' suggestion that the cessation of irrigation for moving heavy equipment is not part of irrigation would allow farmers to begin irrigating without a permit, but then require a permit the moment irrigation stops. As a practical matter, Friends' definition would require permitting for all irrigation, thereby defeating the purpose of Congress's exemption. The right to engage in a temporary activity must by its nature include the right to cease that same activity.

[7] The Food and Agriculture Organization of the United Nations specifically recommends irrigation as a means of frost protection. 1 R.L. SNYDER & J.P. MELO-ABREU, FROST PROTECTION: FUNDAMENTALS, PRACTICE, AND ECONOMICS 18, 22-23, 35-36, 180-82 (Food and Agriculture Organization of the United Nations 2005), ftp://ftp.fao.org/docrep/fao/008/y7223e/y7223e00.pdf.

2. Plaintiffs fail to show that any other non-exempt pollutants reach the canals.

In *Closter Farms*, the district court found that all of the pollutants emitted into Lake Okeechobee from the creek were at their origination either "allowed by an NPDES permit or an exemption." 300 F.3d at 1297. This Court went further, holding that there was "insufficient evidence in the record that Closter Farms discharged any non-agricultural pollutants into Lake Okeechobee" in the first place, let alone that such pollutants lacked a permit upon entry into the navigable waters. *Id.* at 1298.

Likewise here, though plaintiffs point to the trial court's finding that urban, municipal, and industrial runoff existed in the canal water, there is no evidence that these pollutants were not permitted at their sources. Plaintiffs' briefs cite only to speculation and conjecture by the plaintiffs' expert witnesses, based on no facts and no investigation. Just as in *Closter Farms*, the plaintiffs rely upon testimony from experts that non-exempt, non-permitted discharges likely exist, but the experts do "not identify any studies or research to confirm the sources of pollutants." 300 F.3d at 1298. This sort of speculation was "insufficient evidence" in *Closter Farms* and should be insufficient here.

CONCLUSION

For the foregoing reasons and those set forth in our opening brief and the briefs of the United States and Carol Wehle, the judgment of the district court should be reversed.

Respectfully submitted.

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April 15, 2008

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I hereby certify that a true and correct copy of the foregoing document has been filed with the court and served upon the individuals listed below by first class U.S. mail and electronic service, postage prepaid, this 15th day of April, 2008.

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