Nos. 10-196 and 10-252

In The
Supreme Court of the United States

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, CAROL WEHLE, EXECUTIVE DIRECTOR, UNITED STATES OF AMERICA, U.S. SUGAR CORPORATION,

Respondents.

And

FRIENDS OF THE EVERGLADES, ET AL.,

Petitioners,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

THE FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT, SOUTH FLORIDA WATER MANAGEMENT DISTRICT

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INTEREST OF *AMICUS CURIAE*[1]

The Florida Department of Agriculture and Consumer Services ("DACS") under § 20.14(1), Fla. Stat. (2010), is statutorily charged with the duty to "protect the agricultural and horticultural interests of the state" under § 570.07(13), Fla. Stat. (2010).[2]

The Florida Legislature has declared the production of agricultural commodities in this state to be a "large and basic industry that is important to the health and welfare of the people and to the economy of the state." § 604.001(2), Fla. Stat. (2010). The Legislature has further declared that it is important "that additional problems are not created for growers and ranchers engaged in the Florida agricultural industry by laws and regulations that cause, or tend to cause, agricultural production to become inefficient or unprofitable." § 604.001(5), Fla. Stat. (2010). Finally, under §§ 570.074-.075, Fla. Stat. (2010), the DACS has an Office of Agricultural Water Policy ("OAWP") which was created for the purpose of engaging in any matter "relating to water

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[1] Counsel for *amicus curiae* has authored this brief in whole and no other person or entity other than *amicus*, have made a monetary contribution to the preparation or submission of the brief. The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief, and those consents have been submitted to the Clerk of the Court.

[2] The head of DACS is the Commissioner of Agriculture who, pursuant to Art. IV, § 4(f) of the Florida Constitution supervises all matters pertaining to agriculture in the state.

policy affecting agriculture, application of such policies, and coordination of such matters with state and federal agencies." Agriculture is a vital part of Florida's heritage, economic foundation, and potential. Florida has more than 47,000 farms, which grow more than 280 different crops on a commercial scale with a total production value of over $7.7 billion. Agriculture's impact on Florida's economy is vast, accounting for an annual total economic impact of nearly $100 billion, and the industry supports approximately 767,000 jobs throughout the state.

The DACS's participation in this matter flows from its statutory duty to protect Florida agricultural food products and the interests of all Florida citizens involved in or affected by issues impacting the continued viability of agricultural operations in the state. DACS has a direct interest in the outcome of this case. Historically, and through the present, Florida agriculture has relied on water management systems to control water on agricultural lands. The vast majority of these systems include structures that can hold back, release or divert water. The specific interest of DACS in this case is to ensure that water management systems in Florida that protect and enhance agricultural production are not unduly disrupted.

While the Florida Everglades is the focus of these particular cases, the impact on other areas of Florida cannot be overstated. Florida is a relatively flat, high water table state. For decades before the Clean Water

Act, often at the insistence of or actually constructed by government, flood control structures have been used to manage water quantity for agriculture, flood protection and water supply.[3]

The South Florida Water Management District ("SFWMD") controls hundreds of pumps other than the S-2, S-3 and S-4 pumps in this case that would be affected by this ruling. Accordingly, resolution of the question of the applicability of the CWA to water transfers will impact the cost of producing crops throughout Florida, and nationally.

DACS actively participates in the adoption of Florida's laws and rules relating to the development and implementation of water quality standards, including nutrient standards and methods for their control. The DACS, through its Office of Agricultural Water Policy, works closely with the Florida Department of Environmental Protection ("FDEP") and other state, local, and federal agencies, as well as environmental and other public interest groups, to develop programs to address agricultural water quality issues.

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[3] Parker, Ferguson, Love, et al., Water Resources of Southeastern Florida, USGS Water Supply Paper 1255 (1955).

REASONS TO GRANT PETITION

The Supreme Court should resolve the regulation of water transfers and, based on the Clean Water Act's plain text, its policies, and its basis in cooperative federalism, adopt the EPA's current rule stating that transfers of waters for purposes of flood control, water supply and irrigation, are not subject to National Pollutant Discharge Elimination System ("NPDES") permitting as the correct interpretation of the Act.

PRELIMINARY STATEMENT

The Florida Department of Agriculture and Consumer Services herein supports the SFWMD in its acquiescence in Petitioners' Petition for a Writ of Certiorari. The Department takes this action because the uncertainty deriving from the apparent decision of EPA to revise its analysis of the applicability of the NPDES to water transfers threatens the ability of Agricultural interests in the state to plan their implementation of the Clean Water Act requirements. This applicability of the NPDES permitting requirements to water transfers has been repeatedly litigated. It appeared that the Eleventh Circuit had resolved the matter until EPA informed the Circuit Court that it intended to "revisit" the rule (40 C.F.R. § 122.3(i)) it adopted in 2008 and on which the Eleventh Circuit based its opinion.

ARGUMENT

I. Congress Did Not Intend that Transfers of Water Be Subject to NPDES Permitting.

Under the cooperative federalism structure of the Clean Water Act, the transfer of water from one water body to another has been traditionally reserved to the states.[4] As a consequence, such transfers for the purpose of flood control, water supply and irrigation have not been required to obtain NPDES permits. Most discharges that are subject to the NPDES permitting program exist to dispose of wastewater (treated or not). In those cases the pollutant content has resulted from the actions of the discharger.[5] In contrast, water transfers are designed to move water for the purpose of flood control or allocation of water supply. The transfer often may be reversed in direction when needed. The transferring party does

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[4] 33 U.S.C. § 1251(g).

[5] In *South Florida Water Management District v. Miccosukee Tribe of Indians, et al.*, 541 U.S. 95, 124 S.Ct. 1537 (2004), this Court rejected the proposition that NPDES permits are not required because the transfer of water does not add a pollutant from a point source. In its discussion the Court stated that under that interpretation, wastewater treatment plants would not be covered by the NPDES program. This conclusion ignores the fact that a wastewater treatment plant receives its influent from an isolated and dedicated waste stream. After treatment, the purpose of the discharge is to dispose of the treated water. Thus the treatment plant is "adding" a pollutant. This is very different from a transfer from one water body to another for the purpose of flood control, water supply or irrigation.

not cause or contribute any pollutant on either "side" of the transfer. Rather the transferring party is allocating water for one of the purposes mentioned above. The consequence of requiring the transferring party to obtain an NPDES permit would transfer the responsibility for treatment to a party that has no control over the quality of the water it transfers.

Historically, the Everglades system was a vast, interconnected hydrologic system. At that time, it could have been considered to be one water body.[6] Major human intervention in Everglades hydrology began in 1905. By 1927, the Everglades Drainage District, authorized by the Florida Legislature,[7] had excavated over 400 miles of canals. By 1929, droughts, floods and the deadly hurricanes of 1926 and 1928 had forced legislators to form the Okeechobee Flood Control District and to issue additional bonds to generate funding for the completion of drainage projects.[8] The drainage effort was successful in that water levels were greatly drawn down. In 1945, during a severe drought, the dry conditions led to soil subsidence and peat fires. This was followed in 1947 by 100 inches of rain that fell in the region, flooding 90% of South Florida. After enduring both the flooding and

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[6] Parker, Ferguson, Love, et al., Water Resources of Southeastern Florida, USGS Water Supply Paper 1255 (1955).

[7] Chapter 6456 Laws of Florida, Acts of 1913.

[8] F.T. Izuno, A Brief History of Water Management in the Everglades Agricultural Area, Univ. of Florida IFAS Extension Circular 815 (1989).

damage from droughts, Congress authorized the Central and South Florida Flood Control Project in 1948 to address the need to conserve water and provide flood protection.[9] All of these early projects authorized transfers of water based solely on need for flood control, water supply and irrigation. Part of the system included pumping of irrigation water from agricultural canals into Lake Okeechobee. This was the practice even before the construction of the Central and South Florida Flood Control Project.[10] The system of water conservation areas, levees, canals and pumps, has been revised a few times since then, but the basic structure remains. Today the SFWMD operates over 1000 miles of canals and hundreds of pumps to control water within its system. It is safe to say that in the construction of these projects, water quality was not considered.

Unfortunately, the problems of water quality in this massive engineered system were slow to be recognized. Not until 1973 did the state begin to investigate and address the problem of excess nutrients in Lake Okeechobee. Since then numerous studies have been made and programs implemented. These include two Lake Okeechobee Technical Advisory Committee Final Reports (1986 and 1990), which resulted in a number of actions. Reductions in phosphorus entering the lake from the north were addressed by requiring

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[9] PL 858, Title II, Flood Control Act of 1948.

[10] Parker, Ferguson, Love, et al., Water Resources of Southeastern Florida, USGS Water Supply Paper 1255 (1955).

permits for all animal feeding operations and by buying out a number of dairies. In addition, the state and federal governments began the restoration of the Kissimmee River to the north. Recent water quality improvements in the area have occurred as a result of the implementation of the Everglades Agricultural Area regulatory program (Florida Administrative Code Rule 40E-63) beginning in 1993.

A comprehensive Restudy of the Central and South Florida Flood Control Project was authorized in 1992[11] and completed in 1999. The Restudy recognized that there were multiple aspects to the Everglades system that needed to be addressed. The Restudy resulted in the Comprehensive Everglades Restoration Plan ("CERP") which received Congressional approval in 2000. That plan authorized numerous water quality projects which have been and are being implemented today.[12] The nature of these projects is primarily the construction of Stormwater Treatment Areas ("STAs") which receive and hold water flows to reduce the nutrient content prior to release of the water.

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[11] PL 102-580, § 309(1) (Water Resources Development Act of 1992).

[12] PL 106-541, § 601 (Water Resources Development act of 2000). Notably, the approved Plan is, among other things, "to ensure the protection of water quality." The projects authorized to address water quality are primarily stormwater treatment areas (STAs) designed to intercept flows and improve water quality. There is no mention of application of the NPDES program.

In the case of the Everglades system, the SFWMD, landowners, the State of Florida and the United States have all has expended considerable effort and commitment of resources over many years to address the problem of excess nutrients and other pollutants in the overall Everglades system. It is unquestioned that every further effort should be made to ensure that all parts of the Everglades meet water quality standards. Requiring an NPDES permit for water transfers, however, is the wrong solution to the problem. Requiring an NPDES permit for water transfers would not aid in the restoration effort, and could adversely affect the district's ability to move water to control floods, maintain the water supply and continue its restoration efforts.[13] There is no indication that Congress intended this result in its authorization of CERP. Although the Water Resources Development Act is aimed at authorizing specific water development projects, it nevertheless incorporates the Congressional intent for those projects and sets forth the methods for their implementation. In *Food and Drug Administration v. Brown & Williamson Tobacco Company,* 529 U.S. 120, 120 S.Ct. 1291 (2000), the court stated that "specific policy embodied in a later federal statute should control our construction of the

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[13] PL 106-541, §§ 601(h)(5)(A) and (B); (A) is a savings clause prohibiting elimination or transfer of legal sources of water, and (B) ensures maintenance of flood protection at (then) existing levels. Both of these indicate Congress' intent to ensure the maintenance of necessary water regimes as part of the CERP process.

[earlier] statute, even though it has not been expressly amended." In this case, Congressional adoption in 2000 of the methods for ensuring water quality under the CERP demonstrates Congress' intent that those methods were the means to be used to ensure water quality in the Everglades.

Congressional approval of the CERP should not be seen in isolation. The adoption of CERP without a requirement for NPDES permits for water transfers was not an oversight. With the years of study and restudy of the Everglades system, many options for water quality improvement were considered. The fact that NPDES permits were not part of the proposed solution clearly indicates that water transfers were not considered to be regulated under that provision of the Clean Water Act. Such a conclusion would apply to other water transfers wherever located. In this way, the Congressional approval of CERP indicates a basic policy interpretation applicable to water transfers generally.

II. EPA's Current Interpretation Concerning Water Transfers in its Rule Is the Appropriate Interpretation under the Text, Policy and Cooperative Federalism of the Clean Water Act.

In the case below, the Eleventh Circuit approved EPA's rule adopted in 2008,[14] finding that the transfer

[14] 40 C.F.R. § 122.3(i).

of water from one navigable water to another, if no pollutants are added to the discharge, does not require an NPDES permit. This is generally referred to as the "unitary waters" approach to such discharges. In approving the EPA interpretation, the Court specifically relied on EPA's adoption of a rule governing such transfers in 2008, giving the EPA interpretation *Chevron* deference.[15] EPA was previously denied the ability to be heard on its unitary waters interpretation by this Court in *South Florida Water Management District v. Miccosukee Tribe of Indians, et al.*, 541 U.S. 95, 124 S.Ct. 1537 (2004), because the issue had not been determined in the lower courts and EPA had no "administrative document" supporting its position.

EPA engaged in a deliberative process over the ensuing year to develop a written analysis and interpretation that was signed in August 2005, entitled "Agency Interpretation on Applicability of Section 402[16] of the Clean Water Act to Water Transfers."[17] Subsequently EPA engaged in Notice and Comment Rulemaking to promulgate a rule incorporating the interpretation. The proposed rule was published on June 7, 2006 (71 FR 32889) and became final on June

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[15] *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778 (1984).

[16] 33 U.S.C. § 1342.

[17] The document specifically refers to the *Miccosukee* case as the impetus for engaging in the analysis.

13, 2008 (73 FR 33697).[18] In that determination, EPA delves into the long standing distinction, consistently followed in practice by EPA, between water quality, as the province of EPA implemented through the NPDES program, and water quantity, which was reserved to the states. Such a lengthy and deliberative public process does not fall into the category of a "litigation strategy" as asserted by Petitioners. Rather, when faced with the complex issue of statutory interpretation, EPA used the normal analytical and rulemaking process to make its determination.

Now, EPA has introduced uncertainty into these proceedings in its statement in its response to a Petition for Rehearing En Banc. Despite its well developed position and interpretation of the CWA provisions, EPA has indicated that it is "reconsidering" its interpretation.[19] But for this indication of a change in position, DACS would be content to proceed with implementation of the Eleventh Circuit decision. However, as the Eleventh Circuit decision was expressly decided based on giving *Chevron* deference to EPA's interpretation, EPA's statement leaves the future EPA interpretation in doubt. Apparently EPA believes that the *Chevron* doctrine allows it to substantially change its interpretation at any time and without a change in circumstances. While deference has been

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[18] 40 C.F.R. § 122.3(i).

[19] Reply of EPA to The Petition for Rehearing En Banc, p. 15.

given to agencies that change their positions,[20] such a major shift in such a short time would undercut the credibility of EPA's interpretation. EPA's stated intent leaves the future uncertain. Such uncertainty undermines the ability of agricultural interests and others nationwide to plan for the future. Specifically, if EPA does reverse its position in later rulemaking, it would lead to serious disruption in implementing the CERP, and perhaps the waste of monies already expended. The CERP involves the expenditure of billions of dollars by the parties in the restoration effort.[21] Its goal is to "restore, preserve, and protect the South Florida ecosystem while providing for other water related needs of the region, including water supply and flood protection. The Plan shall be implemented to ensure the protection of water quality. . . ."[22]

Furthermore, the Eleventh Circuit decision directly conflicts with *Catskill Mts. Chap. Trout Unlimited v. New York City*, 451 F.3d 77 (2d Cir. 2006), which adopted the opposite interpretation of the

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[20] *See, e.g., Food and Drug Administration v. Brown & Williamson Tobacco Company,* 529 U.S. 120, 157, 120 S.Ct. 1291, 1313 (2000), *citing, Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 104 S.Ct. 2778 (1984).

[21] The initial WRDA legislation in 2000 authorized, among other things, ten specific projects with, at that time, a total projected cost of $1,100,918,000. PL 106-541, § 601(b)(2)(A)(i-x).

[22] PL 106-541, § 601(b)(1)(A).

Clean Water Act regarding the NPDES requirement. This conflict adds further uncertainty to the issue.

CONCLUSION

The EPA interpretation in its current rule is well founded and is the correct interpretation of the cooperative federalism at the base of the Clean Water Act. Under these circumstances DACS would have otherwise discouraged certiorari review. However, given the uncertainty concerning whether affected parties can rely on this interpretation going forward makes the resolution of this question important. DACS supports the South Florida Water Management District's acquiescence in Petitioner's Petition for Certiorari.

Respectfully Submitted,

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