Nos. 13-6, 13-10, & 13-23

In The
Supreme Court of the United States

UNITED STATES SUGAR CORPORATION,

Petitioner,

v.

FRIENDS OF THE EVERGLADES, INC., ET AL.,

Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Petitioners,

v.

FRIENDS OF THE EVERGLADES, INC., ET AL.,

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SOUTH FLORIDA WATER MANAGEMENT DISTRICT, ET AL.,

Petitioners,

v.

FRIENDS OF THE EVERGLADES, INC., ET AL.,

Respondents.

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

BRIEF IN OPPOSITION ON BEHALF OF FRIENDS OF THE EVERGLADES, FLORIDA WILDLIFE FEDERATION, SIERRA CLUB, AND ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA

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QUESTION PRESENTED

Whether an Environmental Protection Agency administrative rule exempting a category of pollution discharges from Clean Water Act permitting is one of the actions listed in 33 U.S.C. § 1369(b)(1) requiring direct review in circuit courts rather than the district courts.

PARTIES TO THE PROCEEDING

Petitioners are the United States Environmental Protection Agency and its Administrator, United States Sugar Corporation, and the South Florida Water Management District and its Executive Director, Melissa L. Meeker.

Respondents are Friends of the Everglades, Inc., the Florida Wildlife Federation, Inc., the Sierra Club, Inc., the Environmental Confederation of Southwest Florida, Inc., the Miccosukee Tribe of Indians of Florida, the States of New York, Connecticut, Delaware, Illinois, Maine, Michigan, Minnesota, Missouri, and Washington, and the Province of Manitoba, Canada.

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, counsel for respondents Friends of the Everglades, Inc., Florida Wildlife Federation, Inc., Sierra Club, Inc., and the Environmental Confederation of Southwest Florida, Inc. certifies that these corporations have no parent companies and have never issued stock.

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OPINION BELOW

The opinion of the court of appeals is reported at 699 F.3d 1280.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 2012. Petitions for rehearing were denied on February 28, 2013. Petitions for a writ of certiorari were served by the United States Environmental Protection Agency and the South Florida Water Management District on June 28, 2013, and by United States Sugar Corporation on June 27, 2013. By order, the time for filing responses was extended until August 28, 2013 and further extended until September 11, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATEMENT

Sometimes water in a highly polluted canal or stream is conveyed into a different much cleaner water body and causes serious problems. For example, transfers from contaminated canals into lakes can trigger fish kills, cause algae outbreaks that kill fish and wildlife, or contaminate drinking water supplies. After a number of courts required Clean

Water Act ("CWA") permits[1] from entities conveying polluted water from highly polluted canals or streams into clean lakes or streams, the Environmental Protection Agency ("EPA") promulgated a rule exempting "water transfers" between distinct water bodies from Clean Water Act permitting.[2] The dispute in these certiorari petitions is whether that rule must be reviewed in district court or reviewed directly in circuit court.

The certiorari petitions grow out of an order by the Eleventh Circuit dismissing petitions for direct circuit court review of the Water Transfers Rule.[3]

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[1] Under the Act, National Pollution Discharge Elimination System permits ("NPDES" permits) are required for any "point source" that conveys pollution into waters of the United States. 33 U.S.C. § 1342. A "point source" is defined as a pipe, channel or other discrete conveyance. 33 U.S.C. § 1362(14).

[2] The Water Transfers Rule at issue exempts conveyances of water from one water body to another, and reads:

> Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.

40 C.F.R. § 122.3(i).

[3] The Water Transfers Rule was promulgated after an enforcement case where the United States District Court for the Southern District of Florida found that a permit was needed to convey polluted canal water up into a drinking water reservoir. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist*., No. 02-80309, 2006 WL 3635465 at *18 (S.D. Fla.). The rule was

(Continued on following page)

When the rule was finalized, the challengers filed "protective" petitions and sought dismissal in the circuit court asserting that it lacked original jurisdiction. The Eleventh Circuit ultimately dismissed the petitions, finding it lacked original jurisdiction under 33 U.S.C. section 1369(b)(1). Before the protective petitions were filed, rule challenges were filed in the Southern District of New York. The issues in that case have been fully briefed. *Catskill Mountains Chapter of Trout Unlimited v. EPA*, No. 08-5606 (S.D.N.Y. filed June 20, 2008) [D.E. 155, 209].[4]

THE DECISION BELOW

The Eleventh Circuit dismissed the petitions, finding that it lacked original jurisdiction under sections 1369(b)(1)(E) and (F) and also declining to exercise hypothetical jurisdiction. As to subsection (E), the court found that its plain meaning was that it applied only to effluent limitations or other

finalized while that case was on appeal and the Eleventh Circuit reversed based on the new rule, which it found to be a reasonable interpretation of the Act. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1219, 1228 (11th Cir. 2009).

[4] "D.E." refers to the district court docket entry number. When a short briefing schedule was set in the New York case, other consolidated cases that had been filed in the Southern District of Florida were dismissed and the parties to the Florida case intervened in the New York case. *Catskill Mountains Chapter of Trout Unlimited v. EPA*, No. 08-5606 (S.D.N.Y. filed June 20, 2008) [D.E. 114].

limitations imposed by four specific sections of the Act. *Friends of the Everglades, Inc. v. EPA*, 699 F.3d 1280, 1286 (11th Cir. 2012). Rather than impose such limits, the Water Transfers Rule does the opposite, by relieving polluting entities of the obligation to obtain permits that limit their pollution discharges. 699 F.3d at 1286. The court then distinguished other circuit court cases that had exercised section 1369(b)(1)(E) jurisdiction because the rules at issue in those cases had imposed limitations on polluting entities. *Id.* This conclusion was buttressed by the fact that EPA had not cited any pollution limitations sections of the Act as authority for the rule. *Id.* at 1286-87.

The Eleventh Circuit also found that the Water Transfers Rule did not fall within subsection (F), which provides for circuit court review of actions "issuing or denying any permit," because the rule neither issued nor denied an NPDES permit. *Id.* at 1287-88. Because the Water Transfers Rule relieved entities of permitting obligations, it differed from the veto of a state-issued NPDES permit at issue in *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196, 100 S. Ct. 1093, 1094 (1980). 699 F.3d at 1287-88. The court below found persuasive the extensive analysis in *Northwest Environmental Advocates v. EPA*, 537 F.3d 1006, 1016-17 (9th Cir. 2008) (no original jurisdiction over EPA categorical exemption rules; affirming district court holding that most of the vessel discharge exemption rule was *ultra vires*) and it declined to follow the cursory decision in *National Cotton Council of America v. EPA,* 553 F.3d 927, 933

(6th Cir. 2009), which exercised original jurisdiction to invalidate as *ultra vires* an EPA rule exempting pesticide spraying on the theory that the rule "related to" NPDES permitting. 699 F.3d at 1288.

Finally, the Eleventh Circuit declined to exercise "hypothetical jurisdiction" to review and uphold the Water Transfers Rule because that theory of jurisdiction had been rejected in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101-02, 118 S. Ct. 1003, 1017 (1998).[5] *See* 699 F.3d at 1288.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

This case presents a question of narrow application: whether an EPA rule exempting a category of pollution discharges from Clean Water Act NPDES ("point source") permitting requirements must be directly reviewed in circuit court instead of in district court. Only one other EPA rule could be affected by the decision for which review is sought.

The Eleventh Circuit decision properly found that the plain meaning of the Clean Water Act compelled the conclusion that it lacked original jurisdiction to

[5] An industry-intervenor had advanced the theory that the Water Transfers Rule's interpretation had previously been approved in *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1219, 1228 (11th Cir. 2009), so that the circuit court did not need subject matter jurisdiction.

review the Water Transfers Rule. The Act provides for direct circuit review of only a short list of EPA actions. EPA argued that its rule exempting a category of point source discharges qualified as an action by EPA:

> (E) in approving or promulgating any *effluent limitation* or other limitation *under* section 1311, 1312, 1316, or 1345 of this title, [or] (F) in *issuing or denying* any permit *under* section 1342 of this title, . . .

33 U.S.C. §§ 1369(b)(1)(E) & (F) (emphasis added). Those subsections, however, "extend[ ] only to certain suits challenging some agency actions." *Decker v. Nw. Envtl. Def. Ctr.,* 133 S. Ct. 1326, 1334 (2013) (rejecting industry argument that direct circuit court review is required when challenging an agency interpretation of its own rule). The Eleventh Circuit found that the Water Transfers Rule neither imposes pollution limitations nor issues nor denies a permit. Instead, it frees polluting entities from any pollution restrictions and removes water transfers from the permitting system.

The Eleventh Circuit decision does not conflict with any decision of this Court and conflicts only with *National Cotton Council of America v. EPA*, 553 F.3d 927, 940 (6th Cir. 2009). There, the Sixth Circuit summarily found original jurisdiction to review a categorical NPDES permitting exemption for pesticide spraying on the theory that the exemption rule related to NPDES permitting.

Other environmental statutes include the precise review provisions that the government submits should be read into the Clean Water Act. The Congress considered but failed to pass an amendment that would conform the review provisions of the Clean Water Act to those other statutes. This Court should deny the Solicitor General's request that the Court undertake plenary review in order, in effect, to enact that conforming statutory language that Congress has not seen fit to pass.

The Eleventh Circuit decision has little practical effect because it applies only to EPA rules that exempt categories of pollution discharges from the NPDES permit obligation. EPA's entire NPDES permitting exclusion rule contains only eight such exemptions, six of which are not subject to *ultra vires* claims because they are codifications of specific exemptions in enumerated sections of the Clean Water Act.

I. The Eleventh Circuit Decision Was Correct

Applying settled tools of statutory construction, the Eleventh Circuit examined the plain meaning of section 1369(b)(1) and correctly concluded that it lacked original jurisdiction to review the Water Transfers Rule.

The narrow question decided by the Eleventh Circuit was whether 33 U.S.C. section 1369(b)(1)(E) or (F), grants circuit courts original jurisdiction over a challenge to an EPA rule permanently exempting a

category of point source discharges from NPDES permitting requirements. If the plain text of the Act's judicial review provisions has any meaning, the answer to that question must be no.

Section 1369(b)(1)(E) cannot be read – as proposed by the government – to include permitting exemption rules on the theory that they limit the powers of permit issuers. The text does not read "any other limitation"; it reads "(E) in approving or promulgating any effluent limitation or *other limitation under section 1311, 1312, 1316, or 1345 of this title"* (emphasis added). An "effluent limitation" is defined in section 1362(11) as "any restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources." The "other limitations" language refers only to regulations issued under section 1311 (which sets out effluent limitations), section 1312 (which addresses water quality-related limits on effluent), section 1316 (which deals with national effluent reduction performance standards), or section 1345 (which imposes restrictions on disposal of sewage sludge). Indeed, EPA's explanation of the rule was that water transfers are not effluent and that they are "*not like effluent*." 73 Fed. Reg. 33,697, 33,702 (emphasis added). This inconsistency with the text of section 1369(b)(1)(E) would explain why EPA did not list sections 1311, 1312, 1316, or 1345 as legal authority for the rule. Instead, EPA relied only on its authority under sections 1342 (NPDES permits) and

1361 (authority to adopt administrative rules). 73 Fed. Reg. at 33,698.

In any event, the exemption is not a "limitation." Water transfers are point source discharges, *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105, 124 S. Ct. 1537, 1543 (2004) (water transfers are "point sources" because they "convey" pollutants into a navigable water of the United States), and exempting them from the permitting requirement is not a "limitation."

Similarly, the text of section 1369(b)(1)(F) does not allow the conclusion that a rule exempting a category of point source discharges is an action "issuing or denying any [NPDES] permit under section 1342." The Eleventh Circuit decision is consistent with this Court's decision in *Crown Simpson*, 445 U.S. at 196, 100 S. Ct. 1094-95, holding that EPA's veto of a state-issued NPDES permit had the "precise effect" of a permit denial, and therefore qualified for original circuit court review under section 1369(b)(1)(F). The precise effect of the Water Transfers Rule is that no permit will ever be issued or denied.

In support of its petition for certiorari, EPA makes a series of policy arguments that the language of sections 1369(b)(1)(E) and (F) should be construed so that rules with "national implications" or "relating to permitting generally" should be the subject of original circuit court jurisdiction. The Eleventh Circuit properly declined the invitation to remodel

section 1369(b)(1) to effectuate those policies. 699 F.3d at 1288; *see also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149 (1992) (declining to add language by implication to text of the interlocutory appeal statute, 28 U.S.C. section 1292).

Congress knows how to provide for original circuit court jurisdiction to review all generally applicable regulations implementing environmental laws. It did just that in the Clean Air Act, the Safe Drinking Water Act, and the Resource Conservation and Recovery Act. *Compare* 33 U.S.C. § 1369(b)(1) (seven discrete EPA actions under the Clean Water Act subject to direct circuit court review) *with* 42 U.S.C. § 7607(b)(1) (exclusive circuit court review of all nationally applicable regulations), 42 U.S.C. §§ 300j-7(a)(1)-(2) (exclusive circuit court review of any final action by EPA under the Safe Drinking Water Act), *and* 42 U.S.C. § 6976(1) (exclusive circuit court review of any EPA regulation implementing the Resource Conservation and Recovery Act). Where, as here, Congress includes particular language in one statute but omits it from another, the Court should "presume[ ] that Congress act[ed] intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 300 (2005).

Indeed, Congress amended section 1369(b)(1)(E) in 1987, not to provide direct appellate review of "any" limitation under the Clean Water Act (as the Solicitor General would have it), but to add one single

section to the "other limitation" list – section 405 (33 U.S.C. § 1345), which regulates sewage sludge pollution. Thus, section 1369(b)(1)(E) now reads "effluent limitation or other limitation under section 301, 302, 306, or *405*." Water Quality Act of 1987, § 406(d)(3), Pub.L. No. 100-4, 101 Stat. 7 (codified at 33 U.S.C. § 1369(b)(1)(E)) (emphasis added).[6] In so doing, Congress reaffirmed its intent that section 1369(b)(1)(E) apply only to Clean Water Act regulations issued under a discrete subset of statutory provisions.

Furthermore, Congress has previously considered the policy argument made here by the government. During the 1977 amendments to the Clean Water Act, Senator Kennedy proposed an amendment that would have revised section 1369(b)(1) by deleting the language "issuing or denying any permit under section 402 [33 U.S.C. § 1342]" and substituting "any regulation issued under sections 301[7] or 402." 123 Cong. Rec. S13534, 13598-605 (daily ed. Aug. 7, 1977), *reprinted in* 2 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977 at 13598-605 (1978) (Senate Consideration and Tabling of Amendment S. 1952).

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[6] Congress also added 33 U.S.C. section 1369(b)(1)(G), which provides for direct appellate review of EPA action "in promulgating any individual control strategy under section 304(l)" of the Act. Water Quality Act of 1987, § 308(b)(1)(2), Pub.L. No. 100-4, 101 Stat. 7.

[7] Clean Water Act section 301, 33 U.S.C. § 1311, contains provisions that are not effluent or other limitations on pollution discharges, such as rules prescribing application fees. 33 U.S.C. § 1311(o).

Thus, the amendment would have required direct review of any regulation relating to NPDES permitting instead of being restricted to issuance or denial of any permit.[8] 123 Cong. Rec. at S13598-605. The explanation for the amendment was that it was needed to make Clean Water Act regulations reviewable in the same way that they are under the Clean Air Act, the Safe Drinking Water Act, and the Resource Conservation and Recovery Act. 123 Cong. Rec. at S13598. The proposed amendment ultimately failed. 123 Cong. Rec. at S13605. It is up to the Congress, rather than this Court, to revisit that vote.

II. The Eleventh Circuit Decision Does Not Conflict With A Decision Of This Court Or Present A Circuit Conflict That Warrants This Court's Review

This Court's decision in *Crown Simpson v. Costle* held that an EPA veto was a denial of a permit for purposes of section 1369(b)(1)(F) because it had the "precise effect" of a permit denial.[9] 445 U.S. at 196. In the course of reaching its decision, the Court noted that it would be anomalous for the circuit court to have original jurisdiction when EPA denies NPDES

[8] The amendment would also have limited section 1369(b)(1) review to the District of Columbia Circuit. 123 Cong. Rec. at 13598.

[9] After the NPDES permitting program is delegated to a state, EPA can veto the state-issued permit under section 1342(d)(2). *See* 33 U.S.C. § 1342(b).

permits directly but not when the denial was through a veto of a state-issued permit. *Id.* at 196-97. No such anomalous result occurs here because under the Water Transfers Rule, no permit will ever be issued or denied.[10]

The Solicitor General argues that the Eleventh Circuit decision conflicts with the Court's decision in *E.I. du Pont de Nemours and Co. v. Train*, 430 U.S. 112, S. Ct. 965 (1977). The Solicitor General quotes a passage from that decision in which the Court identifies an absurd situation that it claims is also present here. The critical question in *du Pont* was whether EPA could set effluent limitations under section 1311 that applied to entire categories of dischargers instead of setting them for individual NPDES permits. *Id*. at 124. After finding that EPA could adopt general effluent limits, the Court then found that those effluent limits were subject to direct review under 1369(b)(1)(E). In so doing, the Court rejected the

[10] The government argues that it would be anomalous for general permits but not permit exemptions to be subject to direct review. Solicitor General Brief at pp. 15-16. This argument misapprehends the function of NPDES permits, which is to transform pollution limits into obligations imposed on the discharger. *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205, 96 S. Ct. 2022, 2025 (1976). General permits, as contrasted to individual permits, cover many dischargers but still impose limits on pollution dischargers that are judicially enforceable. *Waterkeepers Northern California v. AG Industrial Mfg., Inc.,* 375 F.3d 913, 915-16 (9th Cir. 2004) (general permit requirement to engage in pollution reduction practices is enforceable in citizen suits).

industries' argument that section 1369(b)(1)(E)'s reference to section 1311 was not intended to apply to effluent limits but only to variances. *Id.* at 127-28, 136. Such a construction, the Court observed, would produce the "perverse situation in which the court of appeals would review numerous individual actions issuing or denying [NPDES] permits" under section 1342, but would have "no power of direct review of the basic regulations governing those actions." *Id*. at 136 (bracketed material supplied).

District court review of the Water Transfers Rule produces no such absurd result. As the Eleventh Circuit observed, the Water Transfers Rule is not an effluent or other limitation under 1311, and there will never be any permits issued or denied under the rule. Where, as here, EPA categorically exempts certain discharges from any NPDES permitting requirements, there is simply no danger that the circuit courts would be inundated with challenges to individual permit decisions, but lack the power to review the basic regulations governing those individual decisions.

It is true that the Sixth Circuit decision in *Cotton Council* conflicts with the Eleventh Circuit decision, but the Sixth Circuit's reasoning is too thinly-based to provide a reason for this Court's plenary review. That court found that it had original jurisdiction to review an EPA permitting exemption rule for pesticides spraying because it related to NPDES permitting. However, the only case cited by the Sixth Circuit for the proposition that circuit courts had exercised

original jurisdiction over NPDES permit exemptions was *NRDC v. EPA*, 966 F.2d 1292, 1296-97 (9th Cir. 1992). There the parties had not specified what statutory provision gave the circuit court jurisdiction, jurisdiction was explained in a perfunctory observation that permitting exemptions concern permits, and then the court completely overlooked the fact that the case it was relying on had not actually exercised *original* jurisdiction – it had *affirmed* a district court decision invalidating categorical exemptions as *ultra vires*. *Id.* at 1295-96, 1306 (citing *NRDC v. Costle,* 568 F.2d 1369, 1372, 1377 n.5 (D.C. Cir. 1977), in which the D.C. Circuit affirmed the district court decision in *NRDC v. Train,* 396 F. Supp. 1393, 1402 (D.D.C. 1975) that invalidated the storm water exemption). The jurisdictional analysis in *Cotton Council* was cursory and for that reason should not be considered a circuit conflict of sufficient depth and portent to warrant this Court's attention.

The Solicitor General and industry-petitioners assert that the Eleventh Circuit decision conflicts with several cases where circuit courts directly reviewed NPDES permitting exemptions. All but one of those cases, however, actually imposed new or different "effluent limitation[s] or other limitation[s]" on certain point source dischargers.[11] *Conoco Phillips v. EPA*, 612 F.3d 822, 824 (5th Cir. 2010) (rule establishing

[11] The term "effluent limitation" means "any restriction" on pollution discharged from point sources and includes "schedules of compliance." 33 U.S.C. § 1362(11).

industry-wide, best available technology standards applicable to new and existing cooling water intake structures discharging thermal effluent); *Environmental Defense Center v. EPA*, 344 F.3d 832, 840 (9th Cir. 2004) (rules mandating that discharges from small municipal storm systems and small construction sites be subject to NPDES permitting requirements, thus subjecting them to effluent limitations); *American Mining Congress v. EPA*, 965 F.2d 759, 763-65 (9th Cir. 1992) (rules implementing 1987 storm water amendments and mandating NPDES permits – and thereby imposing effluent limitations – for storm water discharges from inactive coal mines); *NRDC v. EPA*, 966 F.2d 1292, 1295-96 (9th Cir. 1992) (rules implementing 1987 storm water amendments and requiring NPDES permits and setting deadlines for certain classes and categories of urban and industrial dischargers of storm water effluent); *NRDC v. EPA*, 673 F.2d 400, 404-05 (D.C. Cir. 1982) (comprehensive regulations establishing procedural and substantive permitting rules and imposing restrictions on which dischargers may take advantage of certain provisions and establishing guidance in the setting of numerical limitations in permits);[12] *NRDC v. EPA*, 656 F.2d 768,

[12] These same comprehensive permitting regulations were more fully discussed in *NRDC v. EPA*, 673 F.2d 392, 395-96, 402 n.6 (D.C. Cir. 1980). Although most of the rules in these related cases were procedural, the comprehensive rules also included substantive requirements. *See NRDC v. EPA*, 673 F.2d at 395 n.7 & 8 (citing various Federal Register notices setting out the comprehensive rules). The rules required, among other things, that all NPDES permittees comply with all conditions of a

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774, 777 (D.C. Cir. 1981) (rules imposing biological monitoring and specific toxic controls on discharges of sewage effluent, prohibiting the issuance of permits for sewage discharges that receive less than primary treatment, and precluding variances for dischargers of sewage that are currently meeting secondary treatment); and *Virginia Electric & Power Co. v. Costle*, 566 F.2d 446, 448-49 (4th Cir. 1977) (rule promulgated under 33 U.S.C. §§ 1311, 1316, and 1326 requiring consideration of technical document in establishing and applying technology-based standards and limitations for cooling intake structures).[13]

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permit, mitigate any noncompliance, implement proper operations and maintenance, and monitor and report compliance. 45 Fed. Reg. 33,290, 33,425-26 (May 19, 1980). Other provisions set schedules of compliance with permitting requirements and established guidelines for establishing and applying effluent limitations and technology-based standards. *See* 45 Fed. Reg. at 33,427, 33,512-13.

[13] The only case cited by the government that did not involve an effluent or other limitation is *NRDC v. EPA*, 526 F.3d 591 (9th Cir. 2008). There, without any analysis, the Ninth Circuit assumed jurisdiction pursuant to 33 U.S.C. § 1369(b)(1)(F) to review an EPA rule exempting storm water discharges containing sediment from oil and gas construction activities. *Id*. at 593-94, 600. The Ninth Circuit's one-sentence, drive-by jurisdictional determination cannot properly be characterized as precedent, and does not create any meaningful circuit conflict that should be addressed by this Court. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (holding that "drive-by jurisdictional rulings" in which jurisdiction is assumed without discussion or analysis "have no precedential effect").

Contrary to the Solicitor General's assertion, the Water Transfers Rule imposes no such limitation. Solicitor General's Brief at 21-22. EPA, in promulgating the Water Transfers Rule, acknowledged that point source pollution discharges from "intervening industrial, municipal, or commercial uses" have "long been subject to NPDES permitting requirements." 73 Fed. Reg. at 33,697, 33,704 n.8.

III. The Question Presented Has Little Importance Outside Of The Water Transfers Rule Case

The Eleventh Circuit decision addresses only the narrow question of original jurisdiction to review rules exempting entire categories of pollution discharges from the NPDES permit obligation. 699 F.3d at 1286-87. Of the eight categories of pollution discharges exempted in EPA's NPDES permitting exclusion rule, 40 C.F.R. section 122.3, six are enumerated statutory exemptions.[14] Those exemptions are not subject to *ultra vires* claims.

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[14] The rule exempts:

> (a) Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than as a means of transportation such as when used as an energy or mining facility, a

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storage facility or a seafood processing facility, or when secured to a storage facility or a seafood processing facility, or when secured to the bed of the ocean, contiguous zone or waters of the United States for the purpose of mineral or oil exploration or development.

(b) Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of the CWA.

(c) The introduction of sewage, industrial wastes or other pollutants into publicly owned treatment works by indirect dischargers. Plans or agreements to switch to this method of disposal in the future do not relieve dischargers of the obligation to have and comply with permits until all discharges of pollutants to waters of the United States are eliminated. (See also § 122.47(b)). This exclusion does not apply to the introduction of pollutants to privately owned treatment works or to other discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other party not leading to treatment works.

(d) Any discharge in compliance with the instructions of an On-Scene Coordinator pursuant to 40 CFR Part 300 (The National Oil and Hazardous Substances Pollution Contingency Plan) or 33 CFR § 153.10(e) (Pollution by Oil and Hazardous Substances).

(e) Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in § 122.23, discharges from concentrated aquatic animal production facilities as defined in § 122.24, discharges to aquaculture projects as defined in § 122.25, and discharges from silvicultural point sources as defined in § 122.27.

(f) Return flows from irrigated agriculture.

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The exemptions for sewage and other pollutants discharged from vessels under rule 122.3(a) are in the statutory definition of "pollutant" and in the text of the provisions for NPDES permitting. 33 U.S.C. § 1362(6)(A), 33 U.S.C. § 1342(r).[15] Section 122.3(b) exempts discharges of dredge and fill that are excluded from NPDES permitting by section 1342(a)(1). *See Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 273, 129 S. Ct. 2458, 2467 (2009). Similarly, rule 122.3(c) exempts pollution discharges into publicly owned treatment works because they do not discharge into waters of the United States and therefore fall outside the statutory definition of a pollution "discharge." 33 U.S.C. § 1362(12).

(g) Discharges into a privately owned treatment works, except as the Director may otherwise require under § 122.44(m).

(h) [Reserved by 78 Fed. Reg. 38594]

(i) Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.

[15] The section 122.3(a) exemptions, other than the vessel sewage exemption in the statutory definition of "pollutant," were invalidated as *ultra vires* in *Northwest Environmental Advocates v. EPA*, 537 F.3d 1006, 1016-17 (9th Cir. 2008) but the Code of Federal Regulations has yet to be amended to reflect that decision. In response to the Ninth Circuit's decision, the Clean Water Act was amended to add section 402(r), which exempts discharges incidental to the operation of recreational vessels. 33 U.S.C. § 1342(r).

Rules 122.3(e) and (f) are the exemptions for agricultural storm water and return flow from irrigated agriculture. Both are exemptions in the statutory definition of "point source." 33 U.S.C. § 1362(14). Section 122.3(g) recognizes that discharges into privately owned treatment works do not discharge into waters of the United States and are therefore not a pollution "discharge" as defined by section 502(12) of the Act. 33 U.S.C. § 1362(12).

Rule 122.3(i) is the Water Transfers Rule that is the subject of the litigation giving rise to the section 1369(b)(1) jurisdictional question.[16]

The only other exemption besides the Water Transfers Rule that does not codify an enumerated statutory exemption is section 122.3(d) which exempts discharges made under the direction of the emergency on-site coordinator of major oil spills under a Clean Water Act oil spill contingency plan under section 311(c)(3)(b). 33 U.S.C. § 1321(c)(3)(b).

Only rules not taken directly from specific statutory exemptions are affected by the jurisdictional question presented here. Because there is only one such existing exemption other than the Water Transfers Rule, the jurisdictional issue presented here is not important enough to warrant this Court's review.

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[16] Rule 122.3(h) was the exemption for pesticide spraying that was invalidated as *ultra vires* in *Cotton Council*, 553 F.3d at 933.

IV. The Water Transfers Rule Is Ripe For Decision In District Court

The Water Transfers Rule is currently being reviewed in the District Court for the Southern District of New York. *Catskill Mountains Chapter of Trout Unlimited v. EPA*, No. 08-5606 (S.D.N.Y. filed June 20, 2008). All briefing in that case has been completed. [D.E. 155, 209].

CONCLUSION

For these reasons, Friends of the Everglades, Florida Wildlife Federation, Sierra Club and Environmental Confederation of Southwest Florida submit that the petitions for certiorari should be denied.

Respectfully submitted,

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