No. 02-626

IN THE
Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA
and FRIENDS OF THE EVERGLADES, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT MICCOSUKEE TRIBE OF INDIANS OF FLORIDA

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QUESTION PRESENTED

Petitioner pumps pollutants, contained in a drainage canal which is a jurisdictional water of the United States, from a point source consisting of pumps and pipes, against natural flow, into other waters of the United States (the "Everglades Protection Area"), where the pollutants would not be added to the receiving waters without the affirmative action of the instrumentality of the pumps and pipes.

The question is whether the operation of this point source constitutes the "addition" of a pollutant within the meaning of "discharge" in the Clean Water Act.

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STATEMENT

The Clean Water Act ("CWA")[1] prohibits the "discharge of any pollutant" without a permit. 33 U.S.C. §§ 1311, 1342. The South Florida Water Management District ("Petitioner") operates the S-9 pump station, which discharges massive quantities of pollutants, withdrawn from a drainage canal, into the pristine waters of the Everglades Protection Area without a permit. The Miccosukee Tribe of Indians of Florida ("Tribe") and Friends of the Everglades sued under the CWA to require the Petitioner to obtain a permit. The Petitioner argued below that the S-9 pump station does not require a permit because the pollutants it discharges are not produced by the S-9 itself but instead are withdrawn from the already polluted drainage canal. The lower courts correctly held that Petitioner's argument is contrary to the plain language, and would defeat the express purpose, of the CWA.

A. The Regulatory Structure Of The Clean Water Act

The CWA was a major transformation in the nation's approach to water pollution. *See EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 201-09 (1976). The Act was "prompted by the conclusion of the Senate Committee on Public Works that 'the Federal water pollution control program has . . . been inadequate in every vital aspect,'" *id*. at 203, and a federally-controlled permit system based on effluent limitations was regarded as the remedy. *A Legislative History of the Water Pollution Control Act*

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1. *See* Federal Water Pollution Control Act, commonly known as the Clean Water Act, 86 Stat. 816, as amended, 33 U.S.C. § 1251 *et seq.*

Amendments of 1972, Committee on Public Works, 93rd Cong., 1st Sess. (1973), ("2 *Leg. Hist.*") at 1426.

1. *The Cooperative Federalism Of The NPDES Permit System*

The CWA "anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (quoting 33 U.S.C. § 1251(a)). The CWA establishes "a comprehensive program for controlling and abating water pollution," *Train v. City of New York*, 420 U.S. 35, 37 (1975), and declares the "national goal that the discharge of pollutants into the navigable waters be eliminated. . . ." 33 U.S.C. § 1251(a)(1).

The statute provides two sets of water quality controls. *See Arkansas*, 503 U.S. at 101. "'Effluent limitations' are promulgated by the EPA and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources." *Id.* (quoting §§ 1311 & 1314). "Water quality standards" are promulgated by the states with substantial guidance by the EPA, and "establish the desired condition of a waterway." *Id.*; 33 U.S.C. § 1313; 40 C.F.R. part 131 (2002).

"The primary means for enforcing these limitations and standards" is the National Pollutant Discharge Elimination System ("NPDES"). *Arkansas*, 503 U.S. at 101; *California*, 426 U.S. at 205; *see also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987). "An NPDES permit serves to transform generally applicable effluent limitations and other standards including those based on water quality into the obligations

(including a timetable for compliance) of the individual discharger. . . ." *California*, 426 U.S. at 205 (citing 33 U.S.C. § 1319). NPDES permits allow polluters, who obtain a permit, to discharge a specified amount of the pollutant at levels below thresholds incorporated into the permits. *See* 33 U.S.C. § 1342. The permits are designed to allow the lowest level of discharge technologically feasible. *See* 33 U.S.C. § 1311(b)(1)(A)-(C); *see also* 40 C.F.R. § 122.4(a), (d) (permits must ensure compliance with water quality requirements).

The EPA has the authority in the first instance to issue NPDES permits. *See* 33 U.S.C. § 1342(a)(1). However, consonant with its policy to recognize, preserve and protect the primary responsibilities and rights of States, to prevent, reduce and eliminate pollution, Congress provided that each State may establish and administer its own permit program if the program conforms to federal guidelines and is approved by the Administrator of the EPA. *See* 33 U.S.C. § 1342(b); *Arkansas*, 503 U.S. at 102. The EPA retains the authority to review the operation of a State's permit program, and each permit issued by a State is subject to EPA review for conformity with the guidelines and requirements of the CWA. *See California*, 426 U.S. at 208 (citing 33 U.S.C. §§ 1342(d)(1), (2) & (3)).

2. *The CWA Requires An NPDES Permit For Every Point Source Discharge Of A Pollutant (The Applicable Definitions)*

Congress clearly defined what sources of pollution would be controlled under the NPDES program. The CWA prohibits the "discharge of any pollutant" without an NPDES permit. 33 U.S.C. §§ 1311, 1342. "Discharge of a pollutant" is

defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(a).[2] The EPA regulation further clarifies "discharge of a pollutant" as including additions of pollutants into waters of the United States from "surface runoff which is collected or channelled by man; [and] discharges through pipes, sewers or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works. . . ." 40 C.F.R. § 122.2.

"Pollutant" is defined very broadly to include "dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6); 40 C.F.R. § 122.2. It was conceded below that the water which the S-9 pump station discharges contains pollutants. J. App. at 154, ¶ 72; Pet. App. at 4a-5a, 29a; *see also* District's Brief in *Miccosukee Tribe v. SFWMD*, No. 00-15703, at 8. "Navigable waters" is defined as the "waters of the United States." 33 U.S.C. § 1362(7). It was undisputed below that the Everglades Protection Area, into which the pollutants are discharged, constitute navigable waters. *Id*.; Pet. App. at 5a.

The CWA defines a "point source" as "any discernible, confined and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which

2. The CWA does not define the words "addition" or "from."

pollutants are or may be discharged." 33 U.S.C. § 1362(14). The EPA regulation identifies pipes as classic examples of point sources. *See* 40 C.F.R. § 122.2. Petitioner admitted below that the S-9 pump station is a point source, *see* District Brief in *Miccosukee Tribe v. SFWMD*, No. 00-15703 at 8, and the Eleventh Circuit accepted that undisputed fact. Pet. App. at 4a-5a ("No party disputes that the S-9 pump station and, in particular, the pipes from which water is released constitute a point source. . . .").

3. *The CWA's Interdependent Regulation Of "Point Sources" And "Nonpoint Sources"*

Point sources of pollutants include all "discrete conveyances" because they may be effectively regulated by a permit system. Accordingly, every point source discharge must have an NPDES permit. *See* 33 U.S.C. § 1342. Nonpoint sources are diffused sources of pollutants, not associated with a discrete conveyance, which are therefore more difficult to regulate through permits.[3] Nonpoint sources are generally regulated under state water quality management programs with EPA guidance. *See* 33 U.S.C. §§ 1313, 1329.

The CWA lists certain categories of activities which may cause nonpoint source pollution. *See*, *e.g.*, 33 U.S.C. §§ 1288, 1314(f), 1329. However, these activities are not excluded from point source regulation if they in fact involve discharges of pollutants from discrete conveyances. *See e.g.*, 40 C.F.R. §§ 122.2, 122.23, 122.26, 122.27. This is because under the CWA, regulatory controls of "point source" and

3. *See, e.g., League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002) (nonpoint sources are diffused sources not associated with a discrete conveyance).

"nonpoint source" pollutants work in concert to effectuate the CWA's ultimate goal of eliminating the discharge of pollutants into navigable waters of the United States.

B. The Facts Of This Case

1. *The Everglades Protection Area*

"The Everglades is an extensive and unique wetlands system consisting of millions of acres of shallow sawgrass marshes, wet prairies, aquatic sloughs, and tree islands." *See Miccosukee Tribe v. United States*, No. CIV 95-0533, 1998 WL 1805539, at *2 (S.D. Fla. Sept. 14, 1998). The area provides a home for unique wildlife such as wading birds, and threatened and endangered species such as wood storks, snail kites, bald eagles, Florida panthers and American crocodiles. *Id*. Congress has identified the Everglades as an important environmental "treasure" that "includes uniquely-important and diverse wildlife resources and recreational opportunities." Water Resources Development Act of 2000 ("WRDA 2000"), Pub. L. No. 106-541, § 602(a), 114 Stat. 2693.

The Everglades Protection Area includes WCA 3A and Everglades National Park, a 1.5 million acre International Biosphere Preserve, a World Heritage site, and a wetland of international significance that is home to numerous threatened and endangered species. *See* maps of area, Tribe's App. 1a-3a; J. App. at 147. It is also home to the Tribe.[4] *See generally* William H. Rodgers, Jr., The Miccosukee

4. The Tribe has a perpetual lease and rights to reside in, practice religious rites, and use most of WCA 3A, (where the S-9 discharges). J. App. at 157.

Indians and Environmental Law: A Confederacy of Hope, 31 Envt'l. L. Rptr. 10918 (Aug. 2001). The Everglades is an oligotrophic wetlands system that is phosphorus-limited and phosphorus-sensitive. Pet. App. at 16a; J. App. at 154. The level of phosphorus is the defining chemical characteristic of the Everglades system and the addition of phosphorus above natural levels causes an imbalance in flora and fauna. Pet. App. at 16a-17a; J. App. at 154-55.

2. *The Polluted C-11 Drainage Canal*

In the early 1900's, the Army Corps of Engineers began digging the C-11 drainage canal (the "C-11 Canal") to facilitate the draining of the western portion of Broward County, which is part of the C-11 Basin. Pet. App. at 3a. In the 1950's, the L-37 and L-33 levees were constructed to permanently separate the C-11 Basin and Canal from the Everglades Protection Area to the West. Pet. App. at 3a. The C-11 Canal and the Everglades Protection Area are thus separate bodies of United States waters. Pet. App. at 28a.

The C-11 Canal collects polluted stormwater runoff from urban, suburban, residential, commercial and agricultural nonpoint sources in the C-11 Basin. J. App. at 114-15, 168-69, 172 ¶ 18. As a result, the water in the C-11 Canal contains high levels of pollutants, such as phosphorus, and is of much lower quality than the waters in the Everglades Protection Area, where it is discharged. *Id*. at 114-15, 168-69.[5]

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5. *http://www.epa.gov/region4/water/tmdl/florida/index.htm*, pp. 1-6, 113, 148 (the South New River Canal (WID # 3277A) – known as C-11– is impaired as to nutrients, coliforms and dissolved oxygen).

3. *Petitioner's S-9 Pump Station Discharges High Quantities Of Canal Waters Containing Pollutants Into The Everglades Protection Area, Against The Natural Flow*

The S-9 pump station is comprised of three massive transmission pipes powered by huge diesel engines, J. App. at 153; Strowd Dep. at 52, 81, that lift polluted water from the C-11 Canal and discharge it, against its natural flow, into the pristine Everglades Protection Area, at the rate of 960 cubic feet per second per pipe. P. App. at 7a-8a, 17a n.5; *see also* Strowd Dep. at 50-51. The structure is owned, operated, controlled and maintained by Petitioner and connects the C-11 Canal to the L-33 and L-37 Levees. J. App. at 147; Pet. App. at 3a.

Petitioner has installed this point-source discharge facility at a far west upstream point in the C-11 Canal and has operated this structure in a way that totally disrupts the normal eastward flow of the canal. Instead of allowing the canal water to naturally move towards the east, the S-9 pump station reverses the natural flow, backpumps "against a gradient" or "against what would flow naturally the other direction, or another direction," and disposes the polluted water to the west, where it would not have flowed otherwise. Pet. App. at 7a-8a; J. App. at 67, 150, 161. It is undisputed that the water discharged from the S-9 point source contains "pollutants." Pet. App. at 4a-5a.

4. *The Devastating Impact of the Discharge of Pollutants on the Everglades Protection Area*

The discharge of pollutants from the S-9 point source has a severe adverse impact not only on the water quality but also on the flora and fauna of the Everglades. Pet. App.

at 16a-17a; J. App. at 167-68. The Tribe's expert, Dr. Ron Jones, also a leading United States government expert witness in the landmark Everglades case,[6] J. App. at 164, 165 ¶ 9, concluded that severe harm is being done to the receiving waters from the S-9 pump station and that the destruction caused by excess phosphorus in the Everglades is irreversible. J. App. at 154-56, 167-68. The backpumping from the S-9 pump station adds phosphorus at high levels to the phosphorus sensitive Everglades system. *Id*. As a result of the excess pollutants, the areas immediately surrounding the S-9 pump station are highly degraded. *Id*. Furthermore, Petitioner's massive backpumping greatly increases the velocity of the water, causes a resuspending of sediments off the bottom of the C-11 Canal, and integrates these sediments, which include phosphorus, heavy metals, pesticides and herbicides, into the water discharged into the Everglades Protection Area. J. App. at 124-25, 163; Jones Dep. at 73-78; *see also* Bechtel Dep. at 87 (pesticides have been detected at the S-9).

C. The Federal Efforts To Restore The Everglades

Because the Everglades is a national "treasure" which is "critical to the regional economy," there is a strong federal interest in its preservation. WRDA 2000, § 602(a)(1), (2). In 1988, the United States sued the Petitioner alleging that it allowed farm runoff waters, polluted with phosphorus, to be released into the Everglades thereby damaging and endangering the native plant and animal life of that wetlands system. *See United States v. South Fla. Water Mgmt. Dist.* ("*SFWMD II*"), 847 F. Supp. 1567, 1569 (S. D. Fla. 1992). The suit resulted in a 1992 Consent Decree which established

6. *See United States v. SFWMD*, 847 F. Supp. 1567 (S.D. Fla. 1992), *aff'd in part and rev'd in part*, 28 F.3d 1563 (11th Cir. 1994).

an "ambitious strategy to restore and preserve the Everglades ecosystem." *SFWMD II*, 847 F. Supp. at 1569. The Decree established "interim and long-term phosphorus concentration limits for the [Everglades] and delineates specific remedial programs designed to achieve these limits." *Id*. On April 27, 2001, the Consent Decree was modified to incorporate the Florida Everglades Forever Act of 1994 (the "EFA"), Fla. Stat. § 373.4592, which amended certain compliance deadlines regarding phosphorus reductions and required discharges to meet water quality standards by 2006. *See SFWMD II*, No. 88-1886-CIV-Hoeveler, D.E. 1623 (Omnibus Order dated April 27, 2001). Recent legislation in 2003 enacted "moderating provisions" authorizing discharges which do not meet water quality standards until 2016. Fla. Stat. § 373.4592(4)(e).[7] Moreover, this same 2003 legislation adopted a plan which does not contemplate full completion of water quality goals for the C-11 Basin until 2036.[8]

The Comprehensive Everglades Restoration Plan ("CERP"), was adopted in WRDA 2000 when Congress authorized Everglades restoration. WRDA 2000 is specifically premised upon the State achieving water quality standards as a pre-CERP condition. No provisions of WRDA 2000 changed this assumption or exempted the State from meeting water quality standards in advance of, and separate

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7. *See also* Everglades Protection Area Tributary Basins Conceptual Plan for Achieving Long-Term Water Quality Goals Final Report, Executive Summary, dated April 17, 2003 at ES-9.

8. *See* Burns & McDonell, Final Report: Everglades Protection Area Tributary Basins Long Term Plan For Achieving Water Quality Goals ("Long Term Plan") available at *http://www.sfwmd.gov /org/ erd/bsfboard/waterquality.pdf* at 6-86 (last visited Nov. 7, 2003).

from, CERP. (Restudy at H-F-17). Plans involving Everglades restoration recognize that the Everglades need protection and provide directives on water quality issues. These plans do not substitute for the point source permitting structure of the CWA. Indeed, they expressly require compliance with any applicable federal law. *See* WRDA 2000 § 601(i)(3); WRDA 1996 § 528(b)(4)(B).

D. The Proceedings Below

The trial court granted summary judgment in favor of the Tribe, finding that "undisputedly water containing pollutants is being discharged through S-9 from C-11 waters into the Everglades, the latter being a separate body of United States water with a different level of water quality."[9] The trial court found that it was not necessary that the S-9 pump station be the originator of the transferred pollutants because "there is no doubt in this case, and it is uncontested by the parties, that S-9 is discharging pollutants into the Everglades. That the pollutants are not formed solely by S-9 is immaterial in a plain reading of the Act." Pet. App. at 29a.

On appeal the Eleventh Circuit explained that "[t]he parties mainly dispute one legal issue: whether the pumping of the already polluted water constitutes an *addition* of pollutants to navigable waters *from* a point source." Pet. App. at 5a. In upholding the grant of summary judgment by the trial court, the Eleventh Circuit concluded that an addition from a point source occurred because the point source was the cause-in-fact of the release of pollutants into navigable waters. *Id*. at 8a and 8a n.8. The Eleventh Circuit agreed

9. The Petitioner's Appendix at 28a misquotes this portion of the trial court's order. *See Miccosukee Tribe v. SFWMD*, No. CIV 98-6056, 1999 WL 33494862, at *6 (S.D. Fla. Sept. 30, 1999).

with the trial court that for there to be an addition under the CWA's definition of discharge of pollutants, the S-9 pump station did not have to be the originating source of the pollutants. Pet. App. at 7a n.6.

SUMMARY OF ARGUMENT

1. The plain and unambiguous language of the CWA prohibits the "discharge of any pollutant" without an NPDES permit, and expressly defines such discharges as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §§ 1311, 1342, and 1362(12)(A). Because the Petitioner backpumps pollutants in water from the C-11 Canal into the Everglades Protection Area, the plain meaning of the clear text of the CWA requires that Petitioner obtain an NPDES permit. The S-9 pump station is admitted to be a "point source;" the pumped water is acknowledged to contain "pollutants;" and there is no dispute that the Everglades Protection Area are navigable waters. Backpumping pollutants into the Everglades Protection Area which would not otherwise appear there, is an "addition" under any common, or technical, meaning of the word. That is all this Court need consider to resolve this case. If more were needed than the plain meaning of the text, the express Congressional purpose of the CWA as stated in the statute, as reflected in its structure, and as articulated by this Court, mandates this construction of the text.

2. Petitioner and the Solicitor General essentially are requesting this Court to create nonstatutory exemptions to the CWA that are contrary to the plain meaning of its text, its purpose, its legislative history, and prior construction by the EPA and the Solicitor General himself. The Petitioner would have this Court rewrite the text of the CWA to provide that

an NPDES permit is required for "any addition of any pollutant to navigable waters from any point source, *unless the pollutant is not produced by the point source itself.*" But the text contains no such condition, and creating it would defeat the legislative purpose to "establish an all-encompassing program of water pollution regulation" in which "[*e*]*very* point source discharge is prohibited unless covered by a permit. . . ." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 318 (1981) (footnote omitted) (emphasis in original). Similarly, the Solicitor General suggests the Court rewrite the operative language of the CWA to state a permit must be obtained for "any addition of any pollutant to navigable waters from any point source, *unless the pollutant originates from some already-polluted navigable water*." Under the Solicitor General's absurd suggestion, all of the waters of the United States could be polluted from a single source of polluted water so long as that point source did no more than "convey" the polluted water from a polluted navigable source. It is difficult to imagine a rewriting of the text more at odds with the statutory purpose of controlling and ultimately eliminating all point source pollution.

3. The remaining arguments are red herrings. Section 304(f) of the CWA provides no exemption for pollutants when they are directed from nonpoint sources to a point source. The control of pollution through NPDES permits does not interfere with traditional State authority over water allocation. And finally the NPDES permitting system facilitates the partnership between the federal government and the States embodied in "our federalism," prevents inter-state disputes over water-pollution control, protects downstream States and Tribes, and imposes no burden on water management districts or the restoration of the Everglades.

ARGUMENT

I. PETITIONER'S BACKPUMPING OF POLLUTANTS FROM THE C-11 CANAL INTO THE EVERGLADES PROTECTION AREA REQUIRES A PERMIT UNDER THE CLEAN WATER ACT

Statutory construction "begin[s] with the language of the statute." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). "The inquiry ceases 'if the statutory language is unambiguous' and 'the statutory scheme is coherent and consistent.'" *Barnhart*, 534 U.S. at 450 (internal citations omitted). The text and structure of the CWA support the lower courts' conclusion that the S-9 pump station is a classic point source, featuring "pipes" and "conduits," that requires a permit before it may discharge pollutants into the Everglades Protection Area.

A. The Plain Language Of The CWA Dictates The Lower Courts' Conclusion That Petitioner's Discharges From The S-9 Pump Station Into The Higher Quality Surface Waters Of The Everglades Constitutes An Addition Of Pollutants That Requires A Permit

The plain language of the CWA prohibits the "discharge of any pollutant" without an NPDES permit. 33 U.S.C. §§ 1311, 1342. The "discharge of a pollutant" is expressly defined as "any addition of any pollutant to navigable waters

from any point source." 33 U.S.C. § 1362(12)(A). As this Court has held, the manifest intent of the CWA is:

> clearly to establish an all-encompassing program of water pollution regulation. *Every* point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals.

City of Milwaukee, 451 U.S. at 318 (emphasis in original).

In this case, there is no dispute that: 1) the S-9 pump station is a "point source;" 2) that the water discharged from the S-9 pump station contains "pollutants;" and 3) the WCA 3A (which is part of the Everglades Protection Area) constitutes "navigable waters." Pet. App. at 4a-5a; *see also* J. App. at 201. It is clear that the pumping of water containing pollutants from the S-9 into the Everglades Protection Area constitutes the "discharge" of pollutants because it adds pollutants to that body of water from a point source.

If this were not clear enough, the EPA regulatory definition of "discharge of a pollutant:"

> includes additions of pollutants into waters of the United States from: Surface runoff which is collected or channelled by man: [and] discharges through pipes . . . or other conveyances owned by a State . . . which do not lead to a treatment works . . . .

40 C.F.R. § 122.2. This regulation is directly applicable because the C-11 Canal collects and channels runoff from

the C-11 Basin that is discharged through the pipes in the Petitioner's S-9 pump station.

The Petitioner relies on undefined terms in the definition of the term "discharge of a pollutant" to argue that the discharge of pollutants from the S-9 pump station does not constitute an "addition" of pollutants to navigable waters "from" a point source. *See, e.g.*, P. B. at 19, 20. Petitioner argues that the S-9 discharges do not require permitting because the pollutants are not produced by the S-9 but instead are conveyed from the polluted C-11 Canal water. The Petitioner's construction would require the Court to add language to the statutory definition as follows: "any addition of any pollutant to navigable waters from any point source *unless the pollutant is not produced by the point source itself*."[10] The Solicitor General would rewrite the statutory definition as follows: "any addition of any pollutant to navigable waters from any point source *unless the pollutant originates in some already polluted navigable waters*". The exceptions the Petitioner and the Solicitor General would have this Court read into the CWA are contrary to its plain language and its fundamental purpose of eliminating the discharge of pollutants into navigable waters.

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10. This novel interpretation of the CWA is contrary to the position taken by the EPA in *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*, 325 F.3d 1155, 1158 (9th Cir. 2003), *cert. denied*, No. 03-257, 2003 WL 21990009 (Oct. 20, 2003). In this recently decided case, the EPA rejected the state's attempt to exempt discharges of unaltered ground water from NPDES regulation. Instead, EPA took the position that discharges of ground water into surface waters were subject to NPDES permitting requirements *even though the operators of the mines were not responsible for the presence of the pollutants in the ground water. Id*. at 1158-59 (emphasis added).

1. *The Meaning of the Word "Addition"*

Because Petitioner conceded below that the S-9 pump station was a point source, and because point sources are regulated by permits if they add pollutants to navigable waters, Petitioner is forced to invent an interpretation of the undefined term "addition" as used in the definition of the "discharge of a pollutant." However, under any reasonable interpretation of the term "addition," Petitioner "added" pollutants to the receiving waters. If not otherwise defined, words in a statute "will be interpreted, as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). The plain meaning of "addition," is "the joining or uniting" of one thing to another." Webster's Third New International Dictionary Unabridged, at 24 (1993). To "add" means to increase in number of size. *Id.* The discharge from the S-9 pump station "adds" pollutants to the Everglades Protection Area and does so at levels greatly exceeding those of the receiving waters. Indeed, without the S-9 pumps and pipes, the pollutants in the C-11 Canal would not be added to the Everglades Protection Area.

The word "addition" must also be construed in its context as part of the definition of the term "discharge of a pollutant." *See Robinson*, 519 U.S. at 342. The plain meaning of "discharge" "is to give outlet to, pour forth, emit. . . ." *See also PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 725 (1994), J. Thomas dissenting, citing Webster's Ninth New Collegiate Dictionary 360 (1991) (describing discharge as a "flowing or issuing out" or "something that is emitted"). Taken in this context, the pumping of polluted waters from the C-11 Canal and subsequent release from the S-9 pump station into protected wetlands is a pouring forth and therefore, a "discharge" or "addition" of pollutants. The fact that Petitioner may not alter

the pollutant before discharging it is irrelevant because Petitioner's intentional backpumping of water containing pollutants at levels greatly exceeding the natural level of the receiving waters, J. App. at 154-56, is "adding" pollutants into waters that would not otherwise receive them.

2. *The Meaning Of the Word "From"*

The word "from" is also not defined in the CWA but, as the Eleventh Circuit explained, the natural reading of "from" "indicate[s] the 'agent or instrumentality' or the 'cause or reason' by which the pollutants are added to navigable waters." Pet. App. at 7a n.6, citing Random House Dictionary of the English Language at 770, (2d ed. 1987). *See also* 2 William H. Rodgers, Jr., Environmental Law: Air and Water § 4.10 at 158 (1986) ("The statutory condition that a pollutant be 'added' to the stream is met if the source is the cause of the appearance of the pollutant regardless of the mechanism"). In other words, "from" refers to the discernible structure, the point, by which the pollutants are added. There is no question the pollutants were added from the S-9 pump station.

Petitioner argues that "from" indicates that the point source itself must originate or produce the pollutants. This argument is directly contrary to the text of the CWA, which defines "point source" as "any discernible, confined and discrete *conveyance*, including but not limited to any pipe . . . from which pollutants are discharged." 33 U.S.C. § 1362(14) (emphasis added). A point source is clearly defined as a "conveyor" of pollutants, not a "creator" of pollutants. Petitioner's reading of the statute is also contrary to this Court's decision in *City of Milwaukee*, which found that overflows from a city sewer system of sewage and

stormwater runoff constituted point source discharges even though neither the sewage nor the stormwater originated at or were produced by the overflow point sources. *See City of Milwaukee*, 451 U.S. at 318 n.11. If Petitioner's impermissible interpretation is accepted, it would exclude from permit requirements the very thing for which a permit is necessary — the most immediate conveyance of the pollutants entering the receiving waters.

3. *The Point Source*

Although Petitioner's concession below, that the S-9 is a "point source," P. App. at 4a-5a, requires it to make the contrived argument that the polluted waters discharged into the Everglades are not "added" "from" the point source, it is plain that Petitioner's real argument is that the S-9 is not a point source. However, the S-9 pump station fits clearly within the classic definition of point source — a pumping station that discharges from pipes. The S-9 is "discernible, confined and discrete," 33 U.S.C. § 1362(14), it is readily identifiable, comprised of several huge pipes with 10-foot heads powered by lift pumps with diesel engines and fuel storage tanks. Each pump discharges pollutants at a rate of 960 cubic feet per second. J. App. at 153-54; Strowd Dep. at 50, 52. The relevant case law supports the conclusion that the S-9 is a point source. *See City of Milwaukee*, 451 U.S. at 318 (overflows into Lake Michigan from city sewer systems which gathered both sewage and stormwater runoff "are point source discharges"); *Amigos Bravos v. EPA*, 324 F.3d 1166, 1169 (10th Cir. 2003) (point source is the "piles" at the molybdenum mine); *Headwaters, Inc. v. Talent Irrigation Dist*., 243 F.3d 526 (9th Cir. 2001) (CWA applied to discharge of herbicide); *see also* 2 W. Rodgers, Envtl. L., § 4.10 at 148.

Petitioner's concession below that the S-9 pump station is a point source does not make the S-9 a likely subject for nonpoint regulation.[11] In fact, both the pumping station (a conveyance and discrete structure) and the pipes from which it discharges, are point sources adding pollutants to the Everglades Protection Area and must be regulated as such.

Petitioner's argument that the S-9 pump station should be regulated as a nonpoint source is based on a misunderstanding of the import of the term "point source." The term does not refer to the place where the pollutant was created; it refers instead to the proximate source from which the pollutant is introduced to the destination water body. The term "point source" asks whether the pollutants can be meaningfully regulated by a permitting system. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001) (holding that "addition" occurs when pollutants are added from "any place outside the particular water body to which pollutants are introduced."). The S-9 pump station is an indentifiable and discrete conveyance and thus presents none of the difficulties that remove nonpoint sources from permit requirements.

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11. The Solicitor's argument that Petitioner is the innocent recipient of circumstances beyond its control (S. B. at 27) is contradicted by Florida statutes that describe Petitioner's responsibilities and show that Petitioner has significant statutory control over the development in the C-11 Basin. Petitioner is required by State statute to implement a regional water management plan that gives due consideration not just to flood control and water storage, but also to environmental protection. § 373.036(2)(d)(3), Fla. Stat. (2003). Petitioner has the responsibility to issue consumptive water use and construction permits, including general permits for projects, §§ 373.116 and 373.118, Florida Statutes, and may revoke a permit that is violated. § 373.243, Fla. Stat. (2003).

See Pronsolino v. Nastri, 291 F.3d 1123, 1126 (9th Cir. 2002) ("Nonpoint sources of pollution are non-discrete sources; sediment run-off from timber harvesting, for example, derives from a nonpoint source.").

B. The Lower Courts' Rulings Here Are Consistent With The Structure Of The CWA

The first principle of statutory construction is that when the meaning of the statute is plain, the judicial inquiry must end. *See Barnhart*, 534 U.S. at 450. Because the plain meaning of the CWA shows the pumping of pollutants from the S-9 constitutes the discharge of a pollutant, the inquiry should end there. Even if further inquiry were needed, this conclusion is consistent with the overall statutory scheme. *See Owasso Indep. School Dist. v. Falvo*, 534 U.S. 426, 434 (2002).

1. *The Definition Of Point Source Expressly Excludes Certain Water Transfers But Not This One*

The CWA expressly excludes from the definition of "point source" two types of water transfer: [1] water . . . injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well . . . ; and [2] agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(6) and (14). Since Congress specifically excluded these water transfers from the definition of a "point source," other water transfers must be presumed to be potential "point sources." A contrary interpretation would render superfluous the exclusion of certain water transfers. Moreover, the overall statutory scheme of the CWA is to

require permits for all point sources, and to subject those permits to federal supervision through the NPDES program. Where the CWA wanted to provide exemptions to its permit requirements, it did so specifically.

2. *Other Provisions Of The CWA Make Clear That Point Sources Need Not Originate Or Produce Pollutants*

Contrary to the Petitioner's contention that a point source must originate the pollutants they discharge, the CWA expressly regulates several types of point sources which by definition do no more than convey pollutants which do not originate in, or are not produced by, the point source. For example, point sources include publicly owned treatment works ("POTW's") which often simply filter and pass through to navigable waters pollutants originating from nonpoint sources. *See* 33 U.S.C. §§ 1311(a-b); *see, e.g., id*. § 1311(h). Under Petitioner's argument POTW's, could not be point sources because the pollutants originate from somewhere else. However, POTW's are considered typical point sources. *See* 33 U.S.C. § 1311(b)(1)(B); U.S. EPA NPDES Permit Writers' Manual, Chapter 2, p.10, Environmental Agency, Office of Wastewater Mgt., December 1996; *see also* S. B. at 22 n.6.

Similarly, the CWA requires permits for point source discharges of "storm water," 33 U.S.C. § 1342(P), which involves "runoff from diffuse sources that eventually pass through storm sewer systems and is thus subject to the NPDES permit program." *Natural Res. Def. Counsel v. EPA*, 966 F.2d 1292, 1295 (9th Cir. 1992). A municipal separate storm sewer:

> means a conveyance or system of conveyances (includes roads with drainage systems, municipal

> streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): Owned or operated by a State . . . including special districts under State law such as a sewer district, flood control district or drainage district . . . designed or used for collecting or conveying storm water . . .

40 C.F.R. § 122.26(b)(8). Stormwater obviously is not produced by the point source that discharges it. Thus, it is clear that the CWA does not require a point source to originate or produce the pollutants in order for the permit requirement to apply.[12]

Prior to 1994, Section 402(p)(1) of the CWA exempted discharges "composed entirely" of stormwater but required NPDES permits for five classes of discharges including discharges from large urban storm water collection systems (CWA § 402(p)(2)(C), 33 U.S.C. § 1342(p)(2)(C)) and discharges determined either to contribute "to a violation of a water quality standard" in the waters receiving the discharge or to represent "a significant contributor of pollutants" into the receiving water (CWA § 402(p)(2)(E), 33 U.S.C. § 1342(p)(2)(E)). Thus, even prior to 1994, Section 402(p)(2)(E) expressed a clear intent that the Administrator

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12. In fact, the C-11 Canal compares very closely, if not exactly, to a municipal separate storm sewer, because it is a "man-made channel" owned by the State "flood control or drainage district" "designed or used for collecting or conveying storm water." 40 C.F.R. § 122.26(b)(8). Under the controlling EPA regulations, the discharged water from the pipes of the S-9 pump station can be defined as "stormwater" because it consists of "stormwater runoff, . . . surface runoff and drainage." *See* 40 C.F.R. § 122.26(b)(13) (2002). Indeed, the C-11 Canal and the S-9 pump station are regulated under Florida's "Everglades Storm Water Program."

could regulate any discharge of stormwater under circumstances where the receiving water body would be impaired or its designated uses compromised. After 1994, Congress gave the EPA the authority to designate by rule additional stormwater discharges for which permits were not already required that needed to be regulated to protect water quality. Further, there is no exception for discharges of polluted storm waters that also happen to be waters of the United States and this provision is entirely consistent with EPA's definition of "discharge of a pollutant." 40 C.F.R. § 122.2. Section 402(p)(1) makes it clear that after 1994 there is no permit exemption for stormwater that is otherwise discharged through a point source. *See* 33 U.S.C. § 1342(p)(1)

C. The Holdings Of Other Lower Courts Regarding The Meaning Of "Addition," Including the "Dam Cases," Are Consistent With The Eleventh Circuit's Decision

The Eleventh Circuit and the trial court correctly found that Petitioner's discharge of pollutants from the large pipes of the S-9 pump station was not a remote "but for" cause of the pollutants reaching the Everglades Protection Area but instead it was the most immediate cause of the pollutants entering that area and as such constituted an "addition." Pet. App. at 7a-9a and n.7. This is clearly correct because the pollutants would not have entered the Everglades Protection Area without the affirmative backpumping against the flow.

Other circuit courts are consistent with the Eleventh Circuit's conclusion that moving pollutants from one body of water of the United States to another constitutes an "addition" within the meaning of the CWA. *See, e.g., Catskill,*

273 F.3d at 484 (holding that the discharges were an addition requiring NPDES permitting because under normal conditions the polluted water from the reservoirs would never reach the creek); *Dubois v. United States Dept. of Agric.*, 102 F.3d 1273, 1296 (1st Cir. 1996) (holding addition means pollutants reaching navigable waters through unnatural means); *Dague v. City of Burlington*, 935 F.2d 1343, 1354-56 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992) (holding that culvert which conveyed polluted waters from Beaver Pond to a portion of Winooski River constituted discharge of pollutants under CWA); *see also Committee to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 308-09 (9th Cir. 1993) (holding that dam was subject to permit requirement where it discharged collected surface runoff into river below), *cert. denied*, 513 U.S. 873 (1994); *Ala. Rivers Alliance v. F.E.R.C.*, 325 F.3d 290, 296 (D.C. Cir. 2003) (holding that the installation and operation of replacement turbines which released low DO water into the river at an increased rate of 900 cfs was an activity that "may result in any discharge" under Section 401(a)(1)); *Fidelity*, 325 F.3d 1160-64 (holding that discharge of unaltered groundwater into Tongue River required NPDES Permit). Lower courts view the receiving water body to be the relevant waters to which pollutants are added. *See Fidelity*, 325 F.3d at 1162 ("The requirement that the physical, biological, or chemical integrity of the water be a 'man-induced' alteration refers to the effect of the discharge on the receiving water; it does not require that the discharged water be altered by man.").

Moreover, flow-induced water quality changes, such as those caused by dams, need not be found to be point sources in order to be consistent with the Eleventh Circuit's holding. Such flow induced changes (e.g., temperature changes,

dissolved oxygen, and others) are distinct from the pollutants which are drawn into the S-9 pumps and discharged from the pipes into the Everglades Protection Area. Neither *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), nor *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988), compel a result different from the Eleventh Circuit's here. Neither case involved discharges from pipes into protected waters. Neither case involved obviously "permit worthy" structures such as the one here. After slowing or blocking water for a time, the dam in *Gorsuch* thereafter discharged the water into the same water course, where it would have gone in any event. *Gorsuch*, 693 F.2d at 165. In *Consumers Power*, a hydroelectric facility withdrew water from Lake Michigan into a man-made resevoir and generated power by letting the water from the resevoir flow through turbines and back into Lake Michigan. *Consumers Power*, 852 F.2d at 581. By contrast, the S-9 pumps interrupt the natural flow of the C-11 Canal and rapidly backpump waters containing pollutants into another body of higher quality waters into which the waters would not otherwise have reached. The decision here will likely have no effect on "dam cases" such as *Gorsuch* and *Consumers Power.*

II. THE PETITIONER AND THE SOLICITOR GENERAL ARE ASKING FOR JUDICIALLY CREATED EXEMPTIONS TO THE CWA

While purporting to make a "plain language" argument, Petitioner and the Solicitor General seek to carve out exemptions to the CWA that are not contained in the statute. Here, it is not EPA, the agency that administers the CWA, that seeks the exemptions because the agency took no position in the courts below or here. The position of the United States

is presented by the Solicitor General who is not entitled to deference under *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1986). Moreover, the exemptions urged here have no basis in the plain language of the CWA. The Solicitor's argument is also contrary to prior positions of the United States and the EPA.

A. Section 304(f) Does Not Exempt Petitioner From The NPDES Permit Requirements

Petitioner contends that Section 304(f) of the CWA identifies structures like the S-9 pump station to be nonpoint sources of pollution. P. B. at 28-32. This argument is foreclosed by Petitioner's concession below, and the inescapable fact, that the S-9 is a point source. Moreover, this argument is not supported by a plain reading of Section 304(f), which would create a new set of exemptions to the CWA, and would invalidate several longstanding EPA regulations and settled case law.

Section 304(f)(1) calls for EPA guidelines over nonpoint sources and requires procedures and methods to control pollution from certain activities. 33 U.S.C. § 1314(b)(1). Section 304(f)(2) lists numerous activities, which may result in nonpoint sources of pollution, including runoff from agricultural, silvicultural, mining, construction activities and "changes in the movement, flow, or circulation of navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." 33 U.S.C. § 1314(f)(2). Section 304(f) calls for regulation of nonpoint sources of pollution caused by these activities but it does not suggest that point sources such as pipes and other conveyances are not treated as point sources when they discharge pollutants in connection with

these activities. To the contrary, the CWA subjects these activities to the NPDES program when the pollutants from those activities are emitted from a discernable conveyance. *See, e.g.*, 40 C.F.R., §§ 122.2, 122.23, 122.24, 122.26, 122.27; *See also United States v. Earth Sciences*, 599 F.2d 368, 373 (1979) (holding that section 304(f) lists activities that "may involve discharges from both point and nonpoint sources, and those from point sources are subject to regulation"); *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984) (same); *Sierra Club v. Abston Constr. Co., Inc*., 620 F.2d 41 (5th Cir. 1980) (same).

There is no intent manifested in Section 304(f)(2) to remove the listed activities from point source regulation. Had Congress intended to exempt the activities in Section 304(f)(2) because they are listed after subpart (1), it would not have done so ambiguously by placing the exemption in a general instruction section of the statute. And the reference to "flow diversion" facility in Section 304(f)(2)(F) does not indicate an intent to remove flow diversion facilities from point source regulation but rather is one example, in many, of a structure whose construction can cause changes in the movement, flow and circulation of water. Nothing in Section 304(f)(2) exempts listed activities from point source regulation.

Labeling the S-9 pump station a flow diversion facility is also inconsistent with the undisputed facts because "flow," which suggests a "gentle or unbroken movement," Webster's Third New Int'l Dictionary at 875, and "diversion," which suggests the act of diverting from one course, *id*. at 662, do not apply to the S-9 pump station which does not divert a flow of water, but backpumps and reverses the flow with massive, not gentle, force. Petitioner misreads Section 304(f)

as establishing an impermeable line between nonpoint and point sources. The fact is that pollutants from nonpoint sources are routinely channelized or otherwise directed to point sources, where their discharge is from a point source and requires a permit.

Section 304(f) is fully consistent with the partnership created by the CWA, which requires state and federal programs to operate in concert and, with regard to point sources, simply provides supplemental regulation, as do other sections of the CWA. *See PUD No. 1*, 511 U.S. at 704 (acknowledging the CWA's supplemental regulatory requirements under 33 U.S.C. § 1313). Petitioner's argument is tantamount to a return to the pre-1972 CWA amendments that relied on States' ambient water quality system without the NPDES enforcement system; this failed system is what the CWA was enacted to correct. These old guidelines (their source is in the 1972 amendments) are the harbinger of what would become "best management practices" for various nonpoint and point sources. *See* 2 W. Rodgers, Envtl. L., § 4.22 at 324-30.

The Solicitor General's Section 304(f) argument is a departure from the position of the United States in *Earth Sciences*, 599 F.2d 368. There, the district court had agreed with a mining company's argument that inclusion of mining activities on the 304(f) list exempted pollution resulting from mining activities from point source regulation. The United States argued for reversal on appeal contending that if Congress had wanted to exclude mining activities from point source regulation, it would not have done so ambiguously "by placing the exemption in a general instruction section of the statute." *Earth Sciences*, 599 F.2d at 372. The appeals court in *Earth Sciences*, accepted the government's argument

and reversed, finding that Section 304(f) did not operate to create a set of implied exemptions and required the mining company to obtain an NPDES permit. *Id*. at 373, 376. The same reasoning holds true here.

B. The Solicitor General's "Singular Waters" Argument Is Inconsistent With The Plain Meaning Of The CWA

The Solicitor General correctly rejects Petitioner's "original source" argument on the one hand but simply offers an equally absurd interpretation of the provisions of the CWA.[13] The Solicitor General argues that the absence of the modifier "any" before "navigable waters" implies that waters of the United States should be viewed as "singular waters" — an undifferentiated "whole" for purposes of the NPDES

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13. The Solicitor General argues that the S-9 pump station discharges are not an addition from a point source because the ordinary meaning of "from" connotes a physical relationship, such as a "point or place where an actual physical movement . . . has its beginning" and the physical movement of the pollutants does not have its beginning at the S-9 pump station. S. B. at 22. Although characterized differently, this argument is the Petitioner's, and is equally inconsistent with the definitions in the CWA, which must be construed broadly. It is also inconsistent with the undisputed facts here. In the House debate on the CWA, Representative Blatnik noted that the strength of the CWA relies heavily on the broad scope of the definitions. 118 Cong. Rec. 10,206 (1972). He noted that:

> [t]o revise any of these definitions is to upset the common threat of the bill. If there is a part of this bill that can be labeled "most important," it is these definitions. To revise them in a way to limit their coverage is to severely detract from the effectiveness of the bill.

Id.

requirement. S.B. at 19. The Solicitor's theory is that the CWA regulates pollutants where they are first discharged into waters of the United States — never afterwards. This theory implies an analogy to the problem of non-point pollution where there is difficulty in regulating the source of the pollution. No such difficulty exists here because the pollutants are being discharged from a point source, against the natural flow, into waters which would not otherwise receive the pollutants.[14] The Eleventh Circuit correctly rejected the argument in a footnote. *See* Pet. App. at 8a, n.8.

EPA General Counsel also previously rejected the "singular waters" theory advanced here by the United States, noting that to use the all-encompassing definition of navigable waters "as a basis for exempting them from the permit requirements appears to fly directly in the face of clear legislative intent to the contrary." Decision of General Counsel No. 21, June 27, 1975 at 73. The First Circuit also rejected a similar argument in *Dubois* where the facts showed that the transfer of water from the Pemigewassett River to Loon Pond "would not occur naturally." *Id*. at 1297. The First Circuit took judicial notice that the Pemigewassett River was for years one of the most polluted rivers in New England and that under the "singular waters" theory the court would have to reach the same conclusion regardless of how polluted the river was or how pristine Loon Pond was. *Id*. The court concluded that Congress could not have intended such an irrational result. Indeed, the Solicitor's argument would have the absurd consequence of allowing pollution of all of the

14. Petitioner's argument that the C-11 Canal and the Everglades Protection Area are not distinct water bodies (P. B. at 46) is inconsistent with the undisputed facts of this case which show two distinct bodies of water with drastically different water quality. *See* J. App. at 150 ¶¶ 30-32, 37; *see also* Pet. App. at 8a n.8.

waters of the United States, regardless of the means of conveyance and discharge, as long as the pollutants were drawn from a polluted navigable body of water.[15]

The Solicitor General's argument confuses the jurisdictional issue of what are navigable waters, *cf. Solid Waste Agency of Northern Cook County v. U.S. Army Corps Of Engineers*, 531 U.S. 159 (2001) (considering the Corps' jurisdiction under the CWA), with the environmental issue of how separate bodies of navigable waters, containing different constituents, having different water quality, and serving different functions, can be lawfully connected or mixed. It is beyond dispute that within the vast and varied jurisdictional waters of the United States, the constituents and the quality of the waters can have extreme differences; and the pollutants contained in one navigable water body should not be used as a license to convey those pollutants to another.

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15. In a different context, other cases have rejected this argument because "pollutant" is defined to include "dredged spoil" which by definition must originate in the water body. *See Deaton v. United States*, 209 F.3d 331(4th Cir. 2000) (redeposit of excavated material from wetlands constituted an "addition" under the CWA); *Avoyeless Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923-25 (5th Cir. 1983) (redeposit of vegetation and other materials excavated from wetlands constituted an "addition" under CWA); *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985) (redeposit of spoil churned up by propellers constituted the discharge of pollutant under the CWA), vacated and remanded on other grounds, 481 U.S. 1034 (1987), *readopted in relevant part*, 848 F.2d 1133 (11th Cir. 1988); *Rybacheck v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990) (dirt and gravel extracted by gold miners and redeposited into the stream bed from which it was extracted constituted an "addition" of a pollutant under the CWA).

Neither the undisputed facts nor the applicable case law supports the Solicitor General's facile conclusion that this case involves simply transferring "navigable waters" from a water collection canal through a levee to a water conservation area. The S-9 discharge adds all sorts of pollutants, including phosphorus, at dangerously high levels for the receiving waters. The Solicitor General's argument that the pollutants here merely "pass" through the point source ignores the undisputed facts which show that the canal waters could never "pass" to the Everglades Protection Area in the course of its natural flow to the sea. S. B. at 16. Instead, a powerful pump forcibly interrupts and reverses the canal's natural easterly flow and draws water from the east, away from its natural flow, and deliberately dumps the polluted water west into the higher quality waters of the Everglades Protection Area. Worse, the Solicitor General's "singular waters" theory would do grave damage to the CWA by reading already polluted navigable waters out of the definition of "pollutant." 33 U.S.C. § 1362(b). This interpretation would sanction any number of rearrangements and redeposits of pollutants that could claim earlier introduction in navigable waters and presents the court with a radically amended definition of "discharge of a pollutant" that is certain to harm the water quality of all downstream States and Tribes.

C. Neither Sections 101(g), Nor § 202(2), Nor The "Traditional Powers Of The States" Exempt Petitioner From The NPDES Permit Requirements.

Under the guise of applying the "clear statement rule" to the CWA, and relying on *Solid Waste Agency*, 531 U.S. at 173, Petitioner argues that applying the permit requirements of the CWA here would strip the states of their traditional

powers over water management and land-use planning. P. B. at 34-35. Petitioner and the Solicitor General propose exemptions to the CWA under Section 101(g) of the CWA, 33 U.S.C. § 1251(g). They argue that Section 101(g) supports non-regulation of water management systems because regulation of water quality should not be allowed to interfere with allocation of water by the States. S. B. at 25 n.11; P. B. at 2-3. Some amici also contend that applying NPDES permitting requirements to Western water collection and distribution networks would contravene Section 101(g). These arguments misread Section 101(g).

This Court has specifically recognized the fundamental distinction between land-use regulation and allocation of water rights among users, and environmental regulation embodied in water pollution control measures. *See PUD No. 1*, 511 U.S. at 720. The latter does not abrogate proprietary rights as contemplated by Section 101(g), but merely regulates the quality of the allocated water. *Id.* Section 101(g) preserves "the authority of each State to allocate water quantity as between users; [it] does not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation." *Id.* The purpose of Section 101(g) is to ensure that the apportionment of State water *rights* between users are not subverted and any effects regarding allocation are prompted by legitimate and necessary water *quality* considerations. 3 Legislative History of the Clean Water Act of 1977, Serial No. 95-14 at 532 (Comm. Print 1978). Allocation of water, pursuant to Section 101(g), contemplates the ability of a state to establish appropriative water rights such as priority, quantity, or beneficial use. *Id.* It does not signal a significant shift in the balance of federal-state power. *Id.* To the contrary, the legislative history explicitly recognizes the historic

allocation rights associated with State land-use and planning programs and seeks instead to protect those rights as distinct from the environmental regulation of water quality for which the CWA was designed. *Id*.

Moreover, unlike *Solid Waste Agency*, where there may have been an overlap between land-use planning and environmental regulation, no such situation exists in this case. The regulations at issue do not attempt to enlarge federal jurisdiction by imposing a limitation on the use or amount of water pumped by the S-9 pump station. Rather, the permit requirement centers on regulating the quality of the polluted waters conveyed by the pumping station.

The "water allocation exemption" argument also misrepresents the function of the S-9 pump station because by no stretch of the facts, or the imagination, does the S-9 allocate quantities of water among users. The S-9 is simply disposing, not allocating.[16] Nor can the dumping be justified as "beneficial" as Petitioner would have the Court believe. P. B. at 11. Nothing in the record supports Petitioner's argument that it is "beneficial" to the Everglades Protection Area to receive polluted waters containing high levels of

16. It is not the need for water in the Everglades that flips the switch of the S-9 pump station — it is the water levels in the C-11 Basin. The switch is flipped on when the canal level reaches four feet above sea level and switched off when the water has been lowered to one foot above sea level. P. B. at 11. Petitioner is collecting, conveying, and disposing of mixed waters to the benefit of the C-11 Basin, not for the benefit of the Everglades, and in doing so it is intentionally discarding the pollutants into lands where the Tribe lives and works, impairing Tribal uses in order to protect the developments in the west.

phosphorus and other pollutants.[17] The Florida legislature has directed a distinct numeric criterion for phosphorus for the Everglades Protection Area, Section 373.4592(4)(e)(2), which is not directed for other waters such as the C-11 Canal. While the C-11 Basin may have been hydrologically connected to the Everglades Protection Area at some historic time, the C-11 Canal is man-made, dug out for drainage, and its surface waters do not flow into the upgradient receiving waters. While the C-11 Canal is a navigable water of the United States, its backpumping is not natural flow. Petitioner's backpumping, moreover, is causing long-term damage in the water quality of the receiving waters. *See, e.g.*, J. App. at 38-39, 135-36, 154-56, 164-69. The discharge of pollutants, including phosphorus at levels higher than those of the receiving waters, alters the quality of these waters and causes "pollution" as defined in the CWA. *Fidelity*, 325 F.3d at 1162 (citing *PUD No. 1*, 511 U.S. at 705). Altering the quality of the receiving waters, by backpumping polluted water into it, is not beneficial to those waters. It is also a clear example of an activity that requires an NPDES permit.

Finally, Section 101(g) directs federal agencies to develop water quality programs "in concert with" programs to manage water resources: "Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert

17. Both the State and the EPA have formally determined pursuant to Section 303(d)(1)(A) that the WCA 3A is failing to meet its designated uses. *See* 33 U.S.C. § 1313(d)(1)(A). The Section 303(d) list identifies the water quality limited segments of every Florida water body. *See Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002). Pumping massive quantities of polluted water into an already polluted section of the Everglades is irreconcilable with the CWA's requirement that pollution that impairs designated uses be eliminated.

with programs for managing water resources." If water supply transfers may be made without notice to, or review or regulation by, State NPDES permit-writers, then water management programs can override NPDES programs, contrary to Section 101(g)'s explicit directive that the two types of programs operate "in concert." *See, e.g., PUD No. 1*, 511 U.S. at 704 (explaining the distinct roles of the federal and state governments and referring to state water quality standards as providing a supplementary basis "so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.") (citing *California*, 426 U.S. at 205).

D. The Rule Of Lenity Has No Application Here

Petitioner's argument that the criminal penalties of 33 U.S.C. §§ 1319(c)(1) and (2) require the CWA to be strictly construed is mistaken. The Petitioner cites two cases in which this Court has applied the rule of lenity in "a civil setting." However, in both cases the United States government was a party seeking the civil application of a statute which had "criminal applications that carried no additional requirement of willfulness." *See, e.g., United States v. Thompson/Center Arms Company*, 504 U.S. 505, 517-18 (1992) (criminal tax statute); *Crandon v. United States*, 494 U.S. 152, 158 (1990) (criminal statute prohibiting private compensation for government employees). This civil suit was brought by private parties under the CWA, which carries criminal penalties but only if the requisite scienter requirements are met. *Compare* 33 U.S.C. § 1319(d) (strict liability for civil claims) *with* 33 U.S.C. § 1319(c) (criminal penalties for negligent or knowing violations). Thus, there is no precedent or basis for applying the rule of lenity in this context.

Even assuming the rule of lenity could apply in this civil suit, it "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." *United States v. Shabani*, 513 U.S. 10, 17 (1994). The rule could have no application here because the plain language, purpose, structure and history of the Act unambiguously show that a permit is required for the discharge of pollutants from the S-9 point source.

III. REQUIRING AN NPDES PERMIT FOR THE S-9 STRUCTURE PROMOTES FEDERALISM AND DOES NOT CREATE AN UNDUE BURDEN UPON WATER SUPPLY DISTRICTS OR EVERGLADES RESTORATION

A proper federalism balance is fully maintained by implementing the plain meaning of the CWA; and the principles of this case do not create an undue burden upon water supply districts or the Everglades restoration project.

A. The CWA's Permit Requirements in This Case Are Consistent with Principles of Federalism and Do Not Interfere with "Traditional Powers" of the States

Enforcement of the CWA's NPDES permit provisions does not raise any federalism concerns because the provisions of the statute carefully balance these two interests. *See PUD No. 1*, 511 U.S. at 704 (the CWA establishes distinct roles: EPA is required, among other things, to establish and enforce technology-based limitations on "individual discharges" into the country's navigable waters from point sources, and the states are required, subject to federal approval, to establish

comprehensive water quality standards). The permitting program provides a regulatory partnership between the state and federal government, *see Ouellette*, 479 U.S. at 490, and recognizes the important role of the states, but requires federal supervision as a result of the states' prior failures at self-regulation. *See* 118 Cong. Rec. 10,203, 10,251 (1972).

What Petitioner is requesting from this Court is to interfere with that careful balance, distort the plain meaning of the definitions and create new exemptions. Although NPDES permits contain restrictions on discharges under the provisions of the CWA, the state decides in the first instance the contents of these restrictions. *See* 33 U.S.C. § 1342(a); 40 C.F.R. § 122.44(a). Permits allow discharges and do not prevent Petitioner from continuing to develop a comprehensive plan for water management. Nothing in any of the federal acts cited by Petitioner displaces the clear requirements of the CWA. Indeed, they expressly require compliance with any applicable federal law. *See* WRDA 2000 § 601(i)(3) ("Nothing in the agreement established under this subsection shall alter or amend any existing federal or state law, or the responsibility of any party to the agreement to comply with any federal or state law."); WRDA 1996 § 528(b)(4)(B) (requiring compliance with "any applicable federal law"). Nor would a single state permit, which is not subject to EPA oversight, substitute for the NPDES permit requirements of the CWA. If an NPDES permit is required, that is the type of permit that must be obtained.

Moreover, Petitioner's exaggerated claims that this case will violate existing federalism arrangements if an NPDES permit is required for the S-9 pump station is contradicted by the fact that the major components of Everglades restoration in the Everglades Construction Project are already

under the NPDES permitting program. EPA first required Florida to obtain an NPDES permit for an Everglades restoration project in 1994 (before the State had CWA delegation). *See, e.g.*, EPA Permit No. FL0043885 (authorizing discharges from the Everglades Nutrient Removal Project to receiving waters at the L-7 canal in WCA 1). Petitioner has been applying for, and receiving Everglades NPDES permits at the very same time it is telling the courts that NPDES permits are unworkable for Everglades restoration. The Petitioner received NPDES permits for the STA (stormwater treatment areas), projects which authorize the discharge of treated waters. *See, e.g.*, NPDES Permit No. FL-0177946; (STA-2) FL-0177954 (STA-5); FL-0177962 (STA-1 west); Drew Dep. at 43-44. It would be a contradiction indeed to require NPDES permits for discharges from the storm treatment areas but to excuse them for the discharges from the S-9 pump station. Such contradiction is not found in the CWA.

B. The CWA's Permit Requirements In This Case Do Not Impose An Undue Burden Upon Water Supply Districts Or Upon The Everglades Restoration Project

A proper analysis of the legal principles supporting the NPDES permit requirement in this case demonstrates that these principles would not impose an undue burden on water supply projects or upon the Everglades restoration effort itself. Despite the doomsday scenarios of the Petitioner and amici, the burden is not significant for several reasons: (1) the common dam structures which are significant components of water-supply projects are not covered by the principles of this case; (2) structures which release or eventually allow flow in the direction of natural flow are not

covered by the principles of this case; (3) EPA can use guidance and rulemaking to clarify other areas of non-application (e.g., substances in water which are not listed as statutory pollutants may be excluded as "pollutants" by rule if not leading to "pollution" as statutorily defined); (4) the few remaining areas of NPDES application under the principles of this case present no significant problems because the burden can be eased through permitting provisions, such as general or nationwide permits and single system-wide permits, and discharges are not likely to violate water quality standards in any event due to the designated use of the receiving water body; and (5) Everglades restoration will be aided because most restoration components already are required to obtain NPDES permits and such permits provide a necessary backstop to ensure that water quality goals are achieved.

1. Petitioner and amici make the totally unsubstantiated claim that water allocation dams, not at issue here, will be covered by the principles of this case. Petitioner asserts that the EPA position in *Gorsuch* — that water quality effects of flows from a dam were not a discharge from a point source — will be overruled if the Court requires a permit for the S-9 pump station. However, as discussed previously, requiring a permit here is not at odds with *Gorsuch* or with EPA's informal position there that the dam releases were not "additions" under the CWA. This case deals with classic external pollutants, taken into the point source and discharged from it against the natural flow, so that these external pollutants would not have entered the receiving water body without the affirmative pumping of the point source. *Gorsuch* concerned temperature changes, oxidation, *etc.*, caused by the changed movement of the dammed water, which is an entirely different situation. And *Consumers Power*, another

so-called "dam case," returned the water to the same place from which it was drawn. This is likewise simply not the circumstance here.

2. The principles of this case will not require NPDES permits for the various water supply structures which store, release or eventually allow water to flow in the direction of natural flow. This is because, in order to require a permit, the point source must introduce the pollutant into navigable water from any place outside the particular water body to which pollutants are introduced. *See* Pet. App. 5a-9a; *Catskill*, 273 F.3d at 491-92. If the pollutants were naturally flowing into receiving waters in any event, then a point source is not the "instrumentality" or "cause" or "reason" of additional pollutants in the receiving waters; and the point source likewise does not affect "an increase in numbers, size, or quantity" of pollutants in the receiving waters.

3. In any event, sound statutory interpretation and the EPA administrative implementation would still prevent unnecessary permitting. For example, EPA could use its guidance and rulemaking powers to address the issues associated with discharges against natural flow of substances, which are not listed in the statutory definition of "pollutants." If a material or substance is listed in the statutory CWA definition of pollutant, 33 U.S.C. § 1362(6), of course its discharge requires a permit. But the major concern of water supply districts is with substances in water which someone might consider to be "pollutants" but which are not itemized in the statutory definition. In some, or perhaps many instances, these potential "pollutants" may not be harmful either to the contributing water or to the receiving water. While these are clearly not the facts herein, many amici have been misled nonetheless into thinking that the principles of

this case would require NPDES permits in all such circumstances but this is not a foregone conclusion.

Statutory interpretation and/or EPA rulemaking can address these issues, which are not before the Court in this case, in other ways as well. For example, EPA might determine that materials or substances not itemized as statutory pollutants need not be classified as "pollutants" if they do not result in "pollution" as statutorily defined (". . . alteration of the chemical, physical, biological, and radiological integrity of the water"). 33 U.S.C. § 1362(19). Likewise, EPA might structure rules based upon whether waters are moved within the same designated uses or water quality standards.

4. Even when an NPDES permit is required, water supply districts could still be permitted through the use of general or nationwide permits and single system-wide permits. *See, e.g.*, 40 C.F.R. 122.28, 123.25. Furthermore, permits in most instances would be readily available because releases of water from and to water supply reservoirs and the like are almost certain to meet applicable state water quality standards, which are based on preserving the designated use of the receiving water body.[18] Water moved

18. The amicus briefs from the western states assert that the vast water collection and distribution networks contain clean water and do not contribute to water quality violations but nonetheless would be required by the decision below to apply for several hundred NPDES permits, Amicus brief of the states of Colorado *et al.*, at p. 3 n.2, or perhaps even millions of permits, Brief of Amici Curiae The Nationwide Public Projects Coalition, *et al.*, at p. 9-10. Colorado, the lead state of eleven Western state amici, asserts that only 4.6 percent of its waters are designated under CWA section (Cont'd)

for water supply purposes through water supply canals and reservoirs, all of which have been designated by the state for water supply use, will almost by definition meet applicable water quality standards. This is not the case here. Instead a drainage canal, utilized for the main purpose of disposing of surface water containing high levels of pollutants, is being backpumped into the Everglades conservation areas without any controls on the quantity and type of water pollutants being discharged.

5. The claim that Everglades restoration will be impaired by the requirement for a permit here, is belied by the current application of NPDES requirements, and the issuance of NPDES permits, to many of the new Everglades restoration structures (discussed previously). In fact, NPDES permitting serves not as a hinderance but instead as a vital backstop to prevent backsliding from Everglades restoration. For example, in 2002 the S-9 pump station itself was slated for water quality clean-up by 2005. *See* Tribe's App. at 4a. But by 2003 the District had dropped this cleanup deadline (*see* Tribe's App. 5a), due to the expectation that the Florida Legislature would eliminate the 2006 deadline (which the Legislature changed to 2016 in general, and to 2036 for the C-11 Basin by approving a Long Term Plan extending C-11

(Cont'd)

303(d) because of failure to meet water quality standards. It further contends that "[t]here is no evidence that transbasin diversions/ deliveries are the cause of any of these impairments." Amicus Colorado at p. 3 n.2. If it is in fact true that the water transport systems of the Western states do not create discharges that contribute to a violation of a water quality standard in the receiving water, the affirmance of the decision below will not impose a hardship on them. Colorado and the Western amici should, therefore, have no fear of NPDES permitting.

compliance). *See* previous discussion and section 373.4592(4)(e)(2), Florida Statutes; and Long Term Plan at 6-86. If pollutants from urban development in western Broward County discharged into the Everglades Protection Area (*see* Tribe's App. at 6a, 7a) are not subjected to regulatory oversight by NPDES permit requirements, the survival of this treasured wetlands is in peril. The CWA requires a permit, and neither Petitioner nor any of the amici have provided any basis in the CWA for the judicially created exemptions they seek.

CONCLUSION

The judgment of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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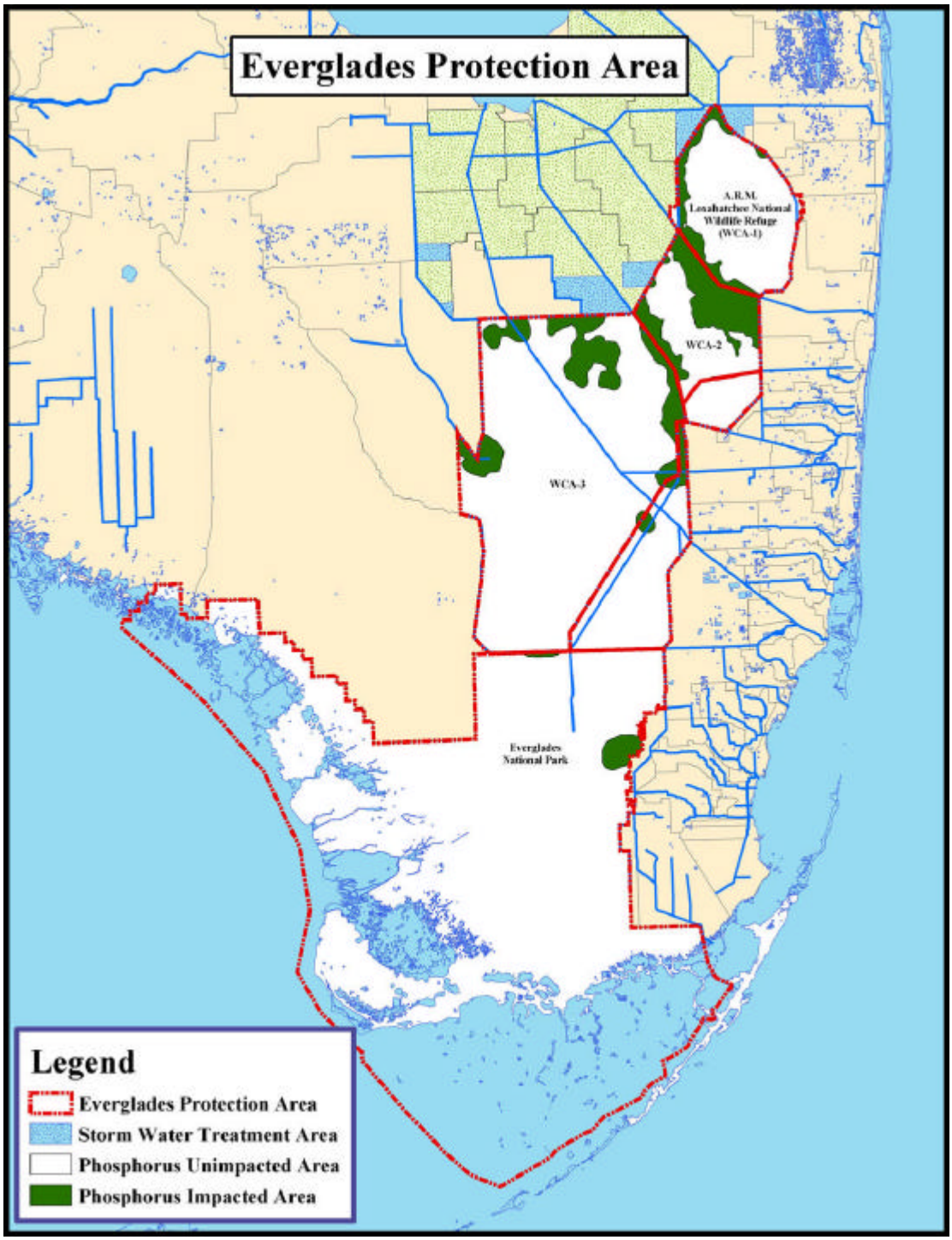
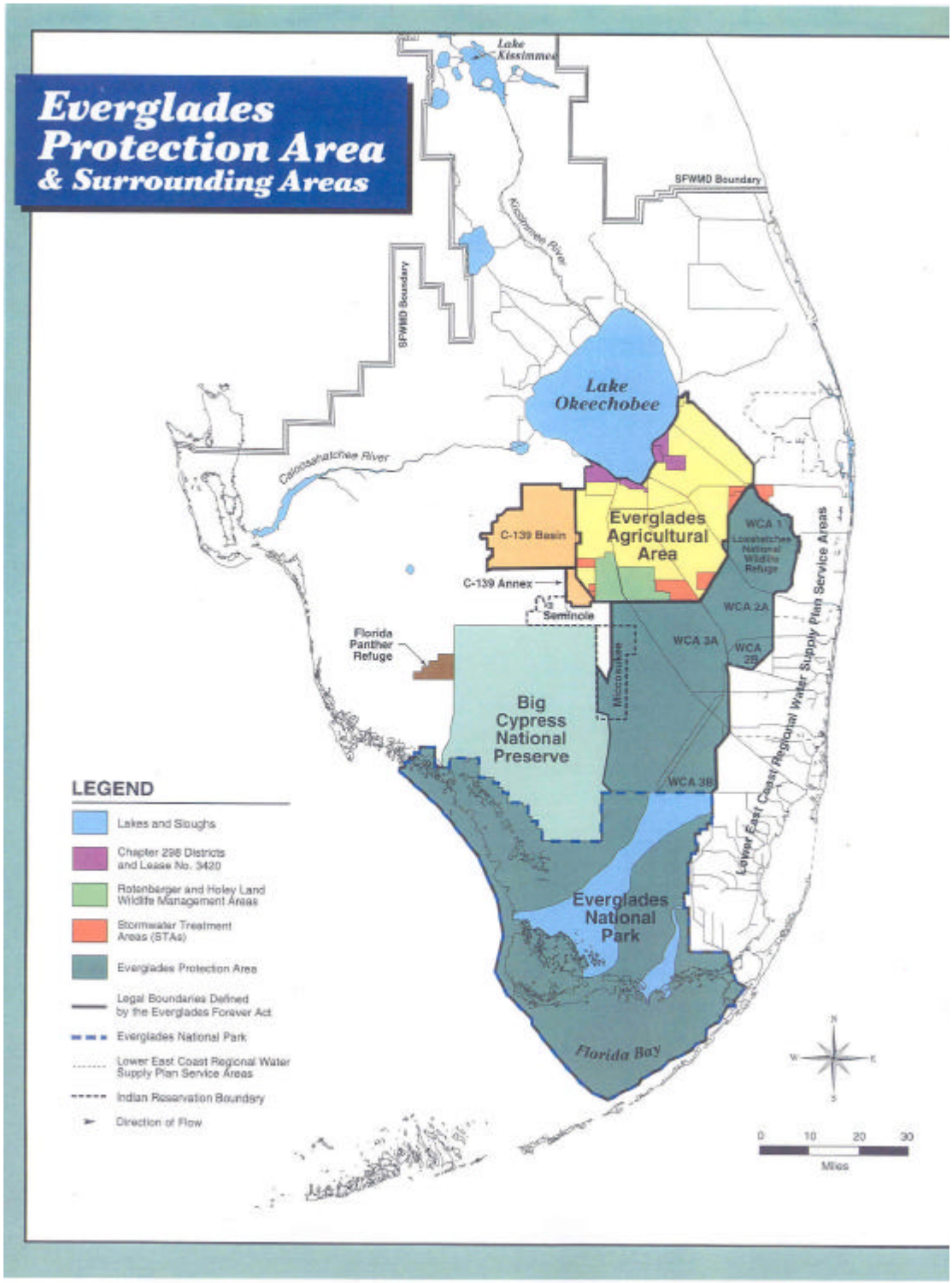
Appendix A — SFWMD Map captioned, "Everglades Protection Area," available at www.dep.state.fl.us/evergladesforever/progress/map.htm (last visited 11/12/03)



Appendix B — SFWMD Brochure entitled "Everglades Program", Map captioned, "Everglades Protection Area & Surrounding Areas"



Appendix C — SFWMD Map captioned, "Figure ES-1. Overview of the Everglades Protection Area and Tributary Basins", Burns & McDonnell, Final Report: Everglades Protection Area Tributary Basins, Conceptual Plan for Achieving Long-Term Water Quality Goals, Executive Summary, dated March 17, 2003, at ES-3, available at http://exchange.law.miami.edu/everglades/restore/FinalConceptual/finalconceptual_031703%20(3.43mb).pdf (last visited 11/12/03)

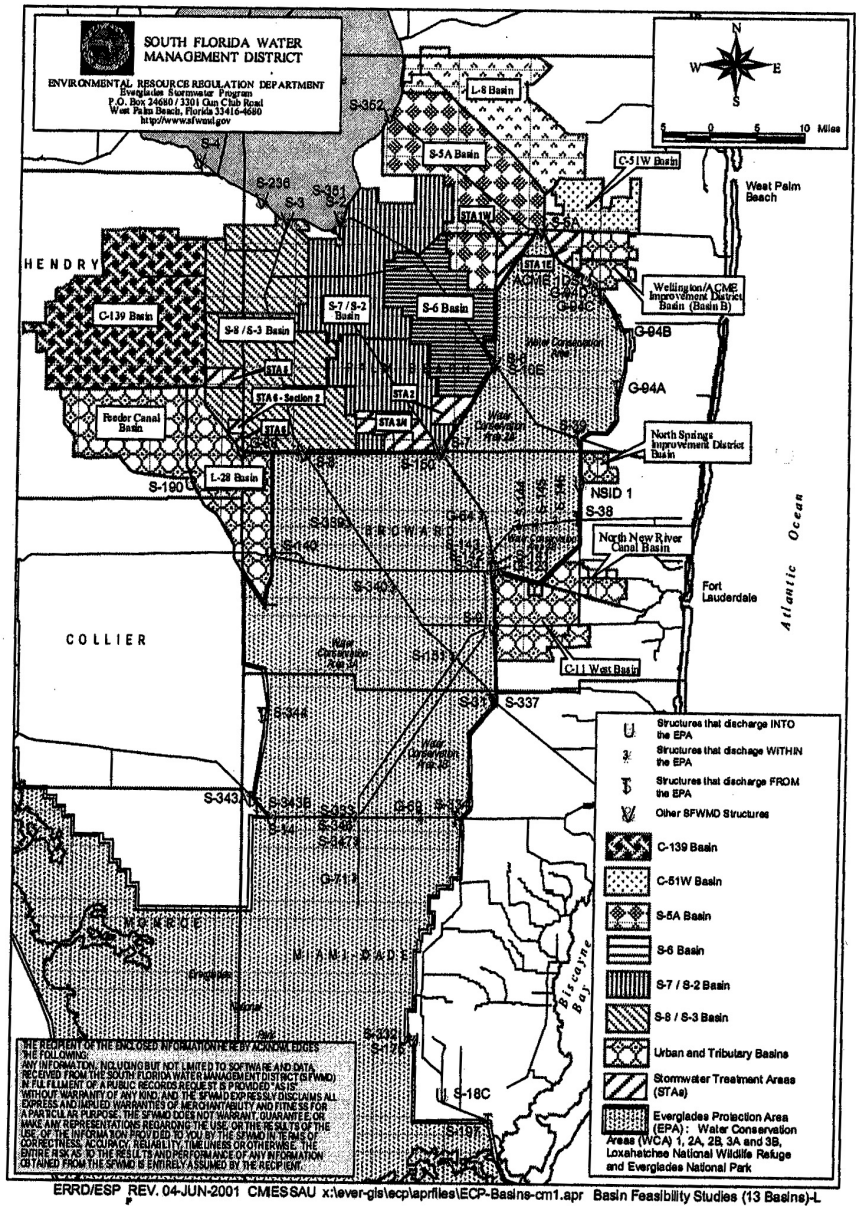
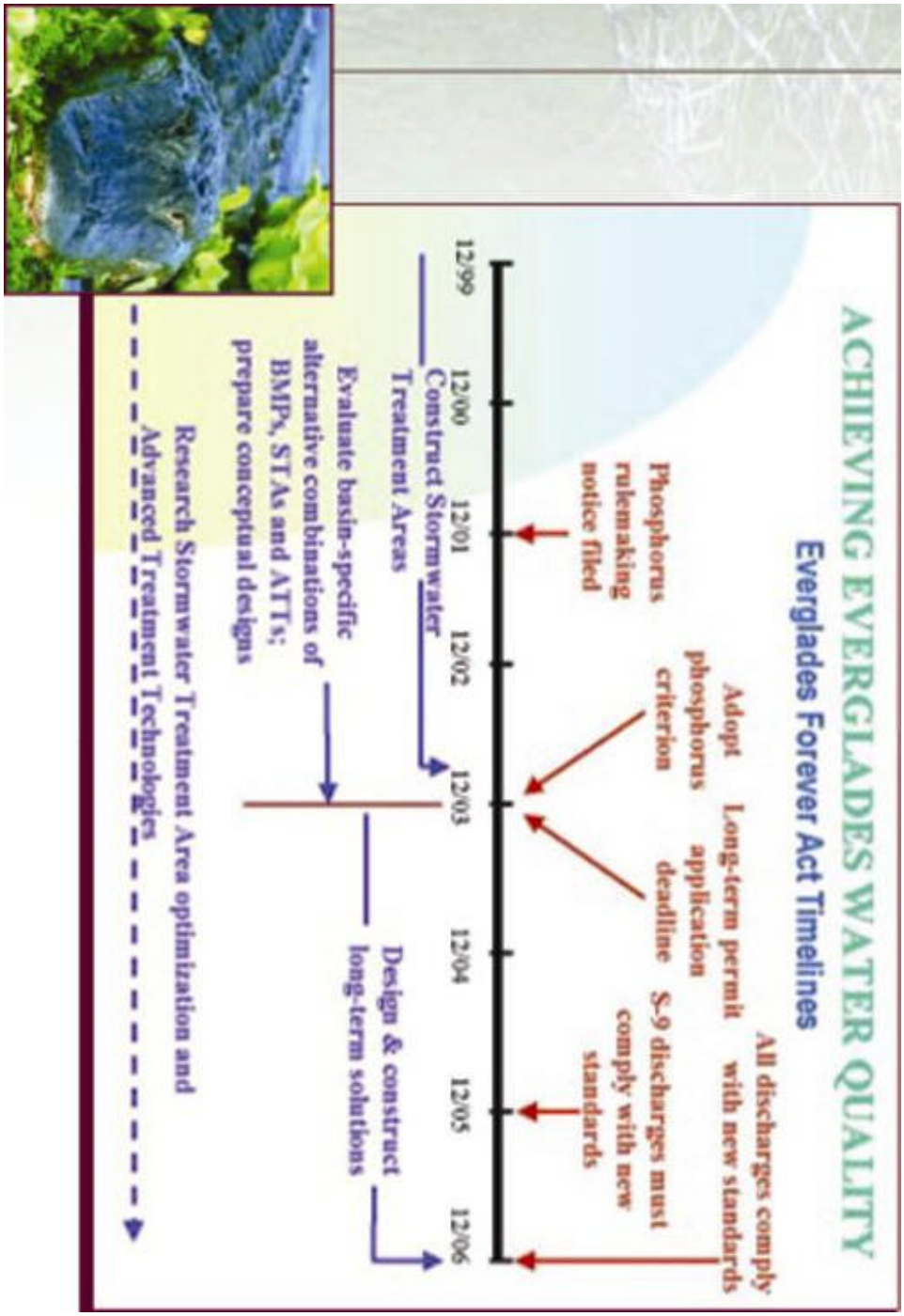


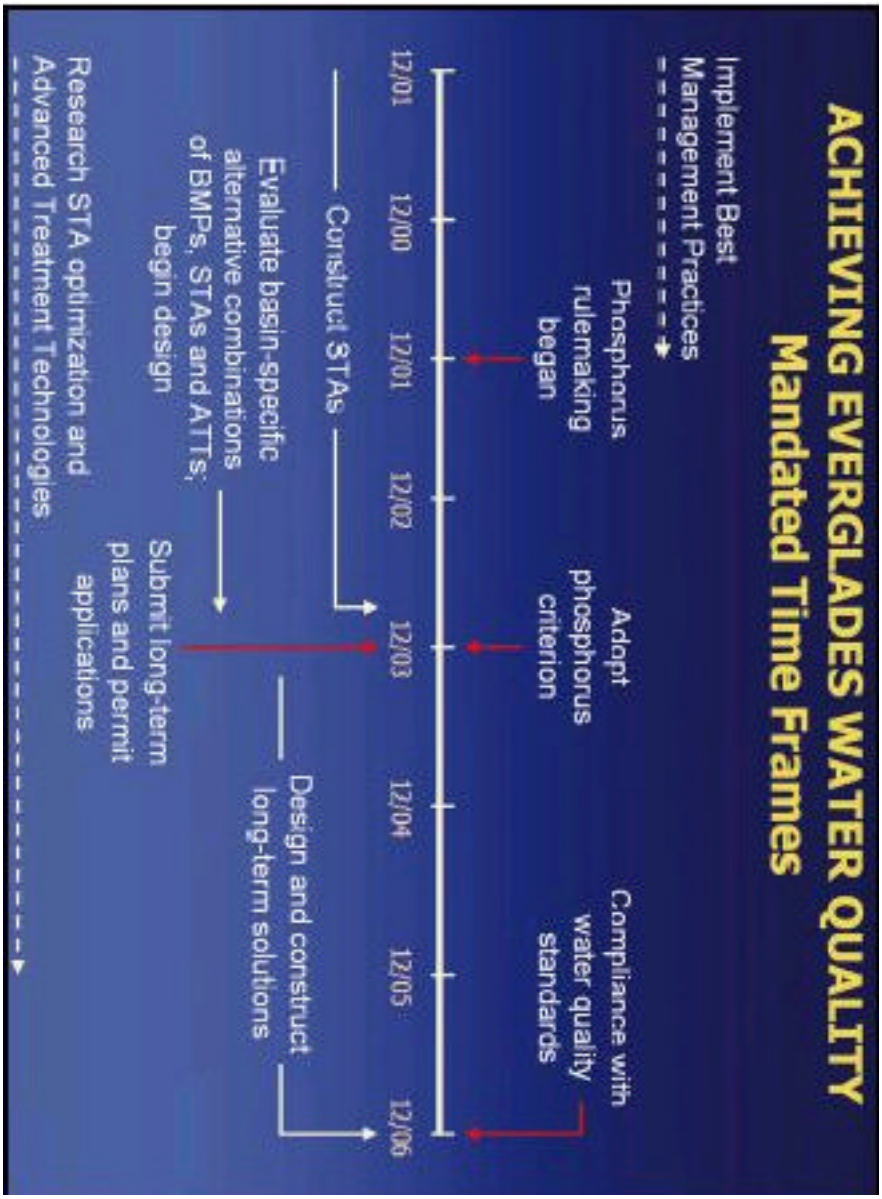
Figure ES-1. Overview of the Everglades Protection Area and Tributary Basins

(This Figure includes only SFWMD permit structures, and excludes structures operated by the USACE)

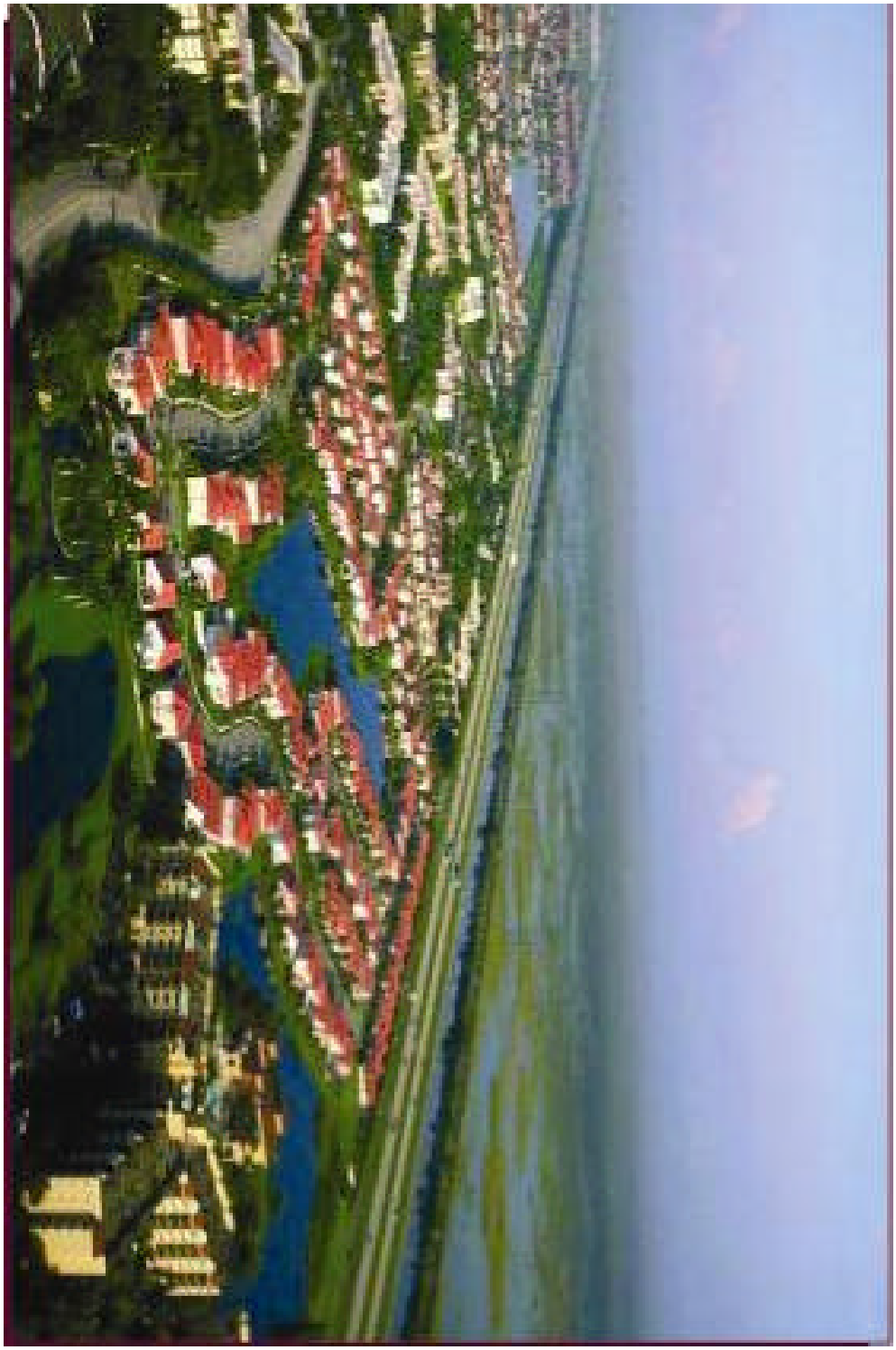
Appendix D — SFWMD 2002 Everglades Consolidated Report, Executive Summary, Chapter 8A, chart captioned, "Achieving Everglades Water Quality, Everglades Forever Act Timelines", at 24, available at www.sfwmd.gov/org/ema/everglades (last visited 11/12/03)



Appendix E — SFWMD 2003 Everglades Consolidated Report, Executive Summary, Chapter 8A, chart captioned, "Achieving Everglades Water Quality, Mandated Time Frames," at 26, available at www.sfwmd.gov/org/ema/everglades (last visited 11/12/03)



Appendix F — SFWMD 2002 Everglades Consolidated Report, Executive Summary, Chapter 8B, photograph of western Broward County, Florida, at 25, available at www.sfwmd.gov/org/ema/everglades (last visited 11/12/03)



Appendix G — SFWMD 2003 Everglades Consolidated Report, Executive Summary, Chapter 8B, photograph of western Broward County, Florida, at 28, available at www.sfwmd.gov/org/ema/everglades (last visited 11/12/03)