

No. 02-626

IN THE
Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS AND
FRIENDS OF THE EVERGLADES, INC.,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE*
BRIEF AND BRIEF OF *AMICUS CURIAE*
NATIONAL HYDROPOWER ASSOCIATION
IN SUPPORT OF PETITIONER**

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September 10, 2003

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**MOTION FOR LEAVE TO FILE BRIEF
*AMICUS CURIAE***

Pursuant to Supreme Court Rule 37.3, the National Hydropower Association (NHA) requests leave to file the accompanying brief as *amicus curiae* in support of Petitioner South Florida Water Management District. Written consent for amicus participation was granted by the Petitioner and Respondent Miccosukee Tribe of Indians. No response was received by Respondent Friends of the Everglades, Inc.

Respectfully submitted,

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QUESTION PRESENTED

Whether the transfer of water containing pollutants between waterbodies constitutes an "addition" of pollutants "from" a "point source" to navigable waters under the Clean Water Act, 33 U.S.C. §§ 1251-1387 (2000).

CORPORATE DISCLOSURE STATEMENT

NHA has no parent company and no stockholders that are publicly held.

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NATIONAL HYDROPOWER ASSOCIATION
IN SUPPORT OF PETITIONER**

INTERESTS OF *AMICUS CURIAE*¹

NHA is a national association representing the interests of the United States' hydropower industry. NHA represents the majority of domestic, non-federally-owned electric capacity. NHA's 120 members include public utilities, investor-owned utilities, independent power producers, equipment manufacturers, environmental and engineering consultants, and attorneys from all regions of the country.

¹ Pursuant to Rule 37.6, NHA states that no counsel for another party authored this brief, and that only NHA members made monetary contributions to its preparation and submission.

Hydropower projects are an important source of electric power, accounting for nearly ten percent of national electric production each year and more than ninety-five percent of the country's renewable energy.² Hydroelectric dams impound water in a reservoir or divert water for release through the project's turbines for the production of electricity. In addition to electricity production, the nation's hydropower projects provide numerous other benefits to the communities in which they are located, such as municipal and industrial water supply, navigation, flood control, irrigation, recreation, and fish and wildlife habitat.

Almost all non-federally-owned hydropower projects are subject to the Federal Power Act's (FPA) comprehensive regulatory scheme. Congress enacted the FPA (and its predecessor statute, the Federal Water Power Act of 1920) in order "to secure a comprehensive development of national resources." *First Iowa Hydro-Elec. Coop. v. F.P.C.*, 328 U.S. 152, 180-81 (1946). Under the FPA, the Federal Energy Regulatory Commission (FERC) has exclusive authority to issue licenses authorizing the construction, operation, and maintenance of new and existing hydroelectric projects.³ See §§ 4(e), 15, 23(b), 16 U.S.C. §§ 797(e), 808, and 817 (2000). In carrying out its statutory responsibilities, FERC is required to consider all the factors affecting the public interest in the comprehensive development of a waterway, including appropriate conditions to protect the environment. §§ 10(a)(1), 4(e), 16 U.S.C. §§ 803(a)(1), 797(e).

² Federal Energy Regulatory Commission, *Industries, Water Power-Use and Regulation of a Renewable Resource*, available at www.ferc.gov/industries/hydropower/gen-info/water-power/wp-use.asp (last updated June 13, 2003).

³ Federally operated projects, such as those operated by the Tennessee Valley Authority, Army Corps of Engineers, and the Bureau of Reclamation are not licensed by FERC.

To encourage and attract the enormous amount of capital required to develop hydropower, Congress included safeguards in the FPA to help ensure positive returns on investments. For example, FPA § 15 requires that licenses be issued on reasonable terms, including economic terms. 16 U.S.C. § 808(a)(1). Under FPA § 6, FERC is authorized to issue licenses with terms of up to fifty years and is prohibited from amending licenses, once they are accepted, without the consent of the licensee. 16 U.S.C. § 799; *Pacific Gas & Elec. Co. v. F.E.R.C.*, 720 F.2d 78, 83-84 (D.C. Cir. 1983). FPA § 28 restricts the authority to alter the terms of a license, or otherwise impair the rights of the licensee, once a license has been issued. 16 U.S.C. § 822.

In addition to the FPA, hydropower projects are now subject to the requirements of a variety of environmental statutes, such as the National Environmental Policy Act, the Fish and Wildlife Coordination Act, the Endangered Species Act, the Coastal Zone Management Act, the Federal Land Policy and Management Act, and the National Historic Preservation Act. Importantly, under FERC's regulations, most hydropower projects also are subject to § 401 of the Clean Water Act (CWA), 33 U.S.C. § 1341(a)(1) (2000). This provision requires an applicant for federal approval to conduct an activity that may result in a discharge into navigable waters to obtain a water quality certification from the state in which the discharge will occur. This certification is intended to ensure that the licensed or permitted activity will comply with, *inter alia*, a state's water quality standards. If this one-time certification is granted, FERC may issue the license subject to any terms and conditions contained in the certification. See *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 722 (1994). By contrast, hydropower dams generally are not subject to the CWA's § 402 National Pollution Discharge Elimination System (NPDES) program, which requires that any person who discharges pollutants from a point source to waters of the

United States obtain an NPDES permit. See *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982).

In this case, Petitioner South Florida Water Management District (District) operates the Central & Southern Florida Flood Control Project, a complicated network of levees, canals, water impoundment areas, water pumping stations, and other water control structures in the Florida Everglades. *Miccosukee Tribe of Indians v. South Florida Water Mgmt. Dist.*, 280 F.3d 1364, 1366 (11th Cir. 2002), *cert. granted*, 123 S. Ct. 2638 (2003); see also Flood Control Act of 1948, ch. 771, § 203, 62 Stat. 1175. As part of this complex water control system, the District uses the S-9 pumping station to convey water from one side of a levee (the C-11 Basin) to the other (the WCA-3A area). The S-9 pumping station does not add pollutants to the water that is conveyed, yet water in the C-11 Basin contains higher levels of phosphorus than the WCA-3A area.

Respondents, the Miccosukee Tribe of Indians and the Friends of the Everglades, Inc., brought a citizens suit action under the CWA, seeking to enjoin the District from operating the S-9 pump station without an NPDES permit pursuant to 33 U.S.C. § 1342. *Miccosukee*, 280 F.3d at 1366. The district court granted summary judgment in favor of the Respondents, concluding that the “pump effects an unnatural flow, transferring polluted water . . . into relatively pristine Everglades water,” and that therefore “the pump is a point source for which a NPDES permit is required.” *Miccosukee Tribe of Indians v. South Florida Water Mgmt. Dist.*, 1999 U.S. Dist. LEXIS 23306 at *22 (S.D. Fla. 1999). The United States Court of Appeals for the Eleventh Circuit affirmed. Focusing on the receiving body of water, the court concluded that “but for” the pump station, the water containing phosphorus would not enter the WCA-3A area, which the

court described as separate and distinct from the C-11 Basin. Discounting the fact that the water already contained pollutants before its transfer by the District, the court stated that "an addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants into navigable waters." *Miccossukee*, 280 F.3d at 1368.

This new legal test applied by the Eleventh Circuit, under which any point source resulting in the discharge of a pollutant, regardless of the origin of the pollutant and whether the point source adds the pollutant, could result in hydroelectric dams now being subject to NPDES requirements. This interpretation of the CWA is of particular concern because hydropower projects typically convey water containing pre-existing pollutants, but do not add any pollutants. NHA believes that the Eleventh Circuit's decision in *Miccossukee* is incorrect and should be reversed.

Requiring hydropower projects that contain point sources conveying water with pre-existing pollutants to obtain NPDES permits, now thirty years after enactment of the CWA, could create a regulatory trainwreck neither authorized nor contemplated by Congress when it passed the CWA. NPDES permits, which must be obtained every five years, could interfere with FERC-issued long-term licenses that reflect the comprehensive balancing of public interest factors, and that already contain comprehensive environmental compliance requirements designed to protect a variety of interests, including water quality (e.g., the § 401 water quality certification and terms and conditions), recreation, and fish and wildlife habitat. Interfering with this extensive regulatory and environmental scheme every five years, when the point source discharge is not itself adding any pollutant from the outside world, would further complicate an already very complex regulatory scheme for FERC-licensed hydropower projects and potentially threaten licensees' certainty of investment.

NHA, therefore, requests that the Court grant NHA's Motion to File a Brief as *Amicus Curiae*. NHA also requests that the Court reverse the Eleventh Circuit's decision, and avoid the unintended consequences of the Eleventh Circuit's adoption of a new test that could subject point source operators who do not add any pollutants from the outside world to the prohibition in the CWA.

SUMMARY OF ARGUMENT

The mere passage of pre-existing pollutants from one waterbody to another through a point source does not constitute an "addition" of a "pollutant" "from" a point source requiring an NPDES permit. The Eleventh Circuit's conclusion to the contrary, which is based on a new "but for" test, is inconsistent with the CWA's plain language and its distinction between point source and non-point source discharges.

In enacting the CWA, Congress did not intend that the NPDES permitting program would apply to all activities that contribute to pollution. The § 402 program, and its technology and water quality-based requirements, were intended to address only "end of the pipe" introductions of waste into navigable waters. Activities that change flows of surface waters were recognized as potential contributors to pollution, but were not intended to be subject to NPDES permits. Imposing such a requirement on point sources that merely convey already polluted water without adding pollutants from the outside world would inappropriately expand the scope of the NPDES program. Moreover, such activities are not conducive to regulation under the NPDES permitting regime; the presence and quantity of such pollutants, which may be man-made or naturally occurring, cannot be readily ascertained or abated in an NPDES permit.

ARGUMENT**I. THE TRANSFER OF PRE-EXISTING POLLUTANTS FROM ONE WATER BODY TO ANOTHER DOES NOT CONSTITUTE AN "ADDITION" OF A POLLUTANT "FROM" A "POINT SOURCE" TO NAVIGABLE WATERS.****A. The Clean Water Act NPDES Program.**

The CWA is designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁴ Section 301(a) of the CWA requires that any person who discharges pollutants from a point source to waters of the United States must apply for a permit under § 402 of the Act—the NPDES permitting program.⁵ See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 319 (1982); *Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 310 (1981); *E.P.A. v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 73

⁴ 33 U.S.C. §§ 1251-1387 (2000). The CWA is the title now used for the Water Pollution Control Act of 1948, which is the title Congress used in 1948. Water Pollution Control Act of 1948, ch. 758, 62 Stat. 1155. In 1965, Congress significantly amended the 1948 act with the passage of the Water Quality Act of 1965. Pub. L. No. 89-234, 79 Stat. 903. In 1970, Congress passed the Water Quality Improvement Act of 1970. Pub. L. No. 91-224, 84 Stat. 91. Congress comprehensively overhauled the program and developed § 402 by passing the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816. See *Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 310-11 (1981); *Fairview Township v. E.P.A.*, 773 F.2d 517, 519 (3d Cir. 1985). It then amended the Act in 1977. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566. In the 1987 Water Quality Act, Pub. L. No. 100-4, 101 Stat. 7, Congress again amended the Act, and demonstrated a renewed interest in water quality-based standards and in state nonpoint source controls. See *Natural Res. Def. Council v. E.P.A.*, 915 F.2d 1314, 1318 (9th Cir. 1990).

⁵ § 301(a), 33 U.S.C. § 1311(a). EPA regulations impose the permitting requirement on any person who discharges or "proposes to discharge pollutants." 40 C.F.R. § 122.21(a) (2002).

(1980); *E.P.A. v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976); *Train v. Colorado Pub. Interest Research Group Inc.*, 426 U.S. 1, 7 (1976). Permits must be obtained from either the Environmental Protection Agency (EPA) or the appropriate state permitting agency operating under an EPA-approved program.⁶ Permits under § 402 require that the discharger adhere to certain technology and water quality-based requirements, and permits are issued for a term of five years. 33 U.S.C. § 1342(b)(1)(B).

Five elements must be present for a particular activity to trigger the proscription in § 301(a), and the need for a permit under § 402. 33 U.S.C. § 1311(a). These elements principally derive from the definition of a "discharge of a pollutant." Section 502(12) of the Act defines the phrase "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source."⁷ An activity triggering § 402, therefore, must involve the (a) addition of, (b) a pollutant,⁸ (c) by a person, (d) into the waters of the United States, (e) from any point source.⁹

⁶ Pursuant to § 402(b) of the CWA, EPA may grant a state § 402 permitting authority. 33 U.S.C. § 1342(b).

⁷ 33 U.S.C. § 1362(12)(A). The definition also means "any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12)(B).

⁸ The term pollutant is broadly defined and means: "dredged spoil, solid waste, incinerator residue, 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). See *Weinberger*, 456 U.S. at 308-09 (bombs dropped during military training).

⁹ Section 502(14) defines a point source as meaning "any discernable, 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

The issue before this Court is whether the activity by the District constitutes an “addition” of a “pollutant” “from” a “point source.” The court below concluded that it did, reasoning that a discharge of a pollutant occurs when the point source simply conveys water that is already polluted and already present in the navigable waters.

B. The Eleventh Circuit’s Decision Improperly Expands the Scope of the Clean Water Act.

The court of appeals’ decision incorrectly expands the scope of the CWA to require that point source operators must now be responsible for pre-existing pollutants that pass through their systems.

The Eleventh Circuit concluded that District’s activity of collecting and pumping water with pre-existing pollutants through the S-9 station added a pollutant and, as such, requires a § 402 permit. The court’s opinion contains only a cursory analysis, opining in footnotes that its decision “is consistent with the views of the First and Second Circuits,” *Dubois v. United States Dep’t. of Agric.*, 102 F.3d 1273 (1st Cir. 1996), and *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001), respectively, as well as an older Eleventh Circuit decision involving the discharge of dredged or fill material under § 404 of the CWA. *Miccosukee*, 280 F.3d at 1368 nn.5 & 7. In a footnote, the court also simply dismissed *Gorsuch* and *Consumers Power*. *Id.* at 1367 & n.4.

The Eleventh Circuit, instead, reasoned that the “relevant inquiry is whether—but for the point source—the pollutants would have been added to the receiving body of water.” And

craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14); 40 C.F.R. § 122.2 (2002).

then, quite remarkably, the court articulated a broad standard for how this new "but for" test should be applied:

When a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed, that point source is the cause-in-fact of the discharge of pollutants. And, because the pollutants would not have entered the second body of water *but for* the change in flow caused by the point source, an addition of pollutants from a point source occurs.

Id. at 1368-69 (footnote omitted). The court then determined that, without the operation of S-9 pumping station, the polluted waters from the C-11 canal would not normally flow east into the Everglades. *Id.* at 1369. Accordingly, "the release of water caused by the S-9 pump station's operation constitutes an addition of pollutants from a point source." *Id.*

The creation of this new "but for" test for when a pollutant is "added" "from" a "point source" to "waters of the United States" ignores the plain language of the Act, as well as Congress' deliberate choice to "distinguish[]" between point source and nonpoint source discharges, giving EPA authority under the Act to regulate only the former." *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976).

Through the NPDES program, Congress did not intend that all activities that contribute to pollution be addressed with the issuance of technology-based permits. Congress' use of the phrase "discharge of a pollutant" contemplates an effort to address the manner in which "pollutants" are introduced into the receiving waters, and it is not synonymous with the term "pollution," which is a much broader term.¹⁰ Nonpoint

¹⁰ "Pollution" is more broadly defined than "pollutant" and includes "the man-made or man-induced alteration of the chemical, physical,

source pollution generally refers to "pollution that does not result from the 'discharge' or 'addition' of pollutants from a point source." *Oregon Natural Res. Council v. United States Forest Service*, 834 F.2d 842, 849 n.9 (9th Cir. 1987); see also *Oregon Natural Desert Ass'n v. Thomas*, 172 F.3d 1092, 1095 (9th Cir. 1998). Activities that may cause or contribute to pollution may well be issues that are appropriate for states to address,¹¹ but those activities are not subject to § 402.¹² Man altering changes in the normal flow of surface water is a classic example of one area where Congress understood that "pollution" might occur, yet understood that it would not be treated as the addition of a pollutant from a point source.¹³ Congress, in § 304(f), expressly provided that EPA would issue guidance on controlling nonpoint source pollution, such as "changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused

biological, and radiological integrity of water." CWA, § 502(19), 33 U.S.C. § 1362(19).

¹¹ Congress generally left the control of nonpoint source pollution with the states under § 319 of the Act. 33 U.S.C. § 1329. Indeed, Congress initially contemplated through § 208 of the CWA that states would develop area-wide plans to address pollution. 33 U.S.C. § 1288. See generally Raymond A. Sales, *Implementing Section 208: What Does it Take—A Report on Growth Management and Water Quality Planning*, 11 Urban Law 604 (1979). See also § 101(b)&(g) 33 U.S.C. §§ 1251(b)&(g) (discussing "pollution" and the role of the states).

¹² Senate Comm. On Environmental Public Works, Clean Water Act of 1977, S. Rep. No. 95-370, at 8-9 (1977), reprinted in 1977 U.S.C.C.A.N. 4326, 4334-35, and in 4 Legislative History of the Clean Water Act of 1977, a Continuation of the Legislative History of the Federal Water Pollution Control Act, at 642-43 (1978).

¹³ House Comm. On Public Works, Federal Water Pollution Control Act Amendments of 1972, H.R. Rep. No. 92-911, at 109 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3718-19, and in 1 A Legislative History of the Water Pollution Control Act Amendments of 1972, at 796 (1973).

by the construction of dams, levees, channels, causeways, or flow diversion facilities.” 33 U.S.C. § 1314(f)(F).¹⁴

The § 402 program, by contrast, was designed to ensure the use of “end-of-the-pipe” effluent limitations¹⁵ for the introduction of “wastes” from point sources, such as water treatment plants, industrial facilities, and concentrated animal feeding operations, into waters of the United States.¹⁶ The Tenth Circuit aptly noted that “[t]he touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste. . . .” *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979). *See also United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993) (the definition of point source “evokes images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways”). The Ninth Circuit, in commenting upon the general term of “pollutants”, similarly observed that the term suggests “waste material of a human or industrial process.” *Ass’n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1016 (9th Cir. 2002).

¹⁴ *See also* Environmental Protection Agency, National Water Quality Inventory: 1977 Report to Congress at 15-19 (Oct. 1978) (EPA Doc. No. 440/4-78-001) (describing pollution from dams as nonpoint source pollution).

¹⁵ The Act defines “effluent limitation” as “any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters” 33 U.S.C. § 1362(11).

¹⁶ The precursor to § 402 is § 13 of the Rivers and Harbors Appropriations Act, which sought to control the introduction of wastes into navigable waters. 33 U.S.C. § 407 (2000). *See* 33 U.S.C. § 1342(a)(4) (coordinating the Refuse Act with the new § 402 program).

Point source discharges that do not *add* pollutants (wastes) to the receiving waters from the outside world are not subject to the NPDES program, even though they may result in pollution. This is the fundamental principle that has transcended the Clean Water Act cases until *Catskill Mountains* and now the Eleventh Circuit's decision in *Miccosukee*.¹⁷ The mere conveyance of already polluted water within navigable waters does not result in the subsequent "addition" of a pollutant, even if that water is passed from one body of navigable water to another.¹⁸ The court in *Consumers Power* observed that EPA's interpretation that the pollutant must be introduced from the "outside world" is a permissible construction of the Act. *Consumers Power*, 862 F.2d at 584. See also *Appalachian Power*, 545 F.2d at 1377; *Gorsuch*, 693 F.2d at 171; *Missouri v. Dep't of the Army*, 672 F.2d 1297, 1304 (8th Cir. 1982) (dam induced pollution); *United States v. Tennessee Water Quality Control Bd.*, 717 F.2d 992, 999 (6th Cir. 1983) (same); see *Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993) (regulated point source can be found

¹⁷ The First Circuit's decision in *Dubois*, which distinguishes *Gorsuch* and *Consumers Power* (102 F.3d at 1299), does not necessarily suggest a contrary result. The case involved a ski resort's diversion of water from a polluted river, the use of that water for snow making, and then the subsequent discharge of that waste water into another waterbody. The ski resort's use of the water for snowmaking was more than mere passage of polluted water, and, as such is distinguishable. The First Circuit nevertheless erred in its reliance upon a "but for" analysis (which was ultimately employed and elaborated upon by the Eleventh Circuit in *Miccosukee*) in reaching its conclusion that an NPDES permit was required for the discharge. *Miccosukee*, 280 F.3d at 1299.

¹⁸ The Fourth Circuit, when considering the question of "intake credits," an issue neither presented in this case nor dispositive of the question here, observed that "[t]hose constituents occurring naturally in the waterways or occurring as a result of other industrial discharges, do not constitute an addition of pollutants by a plant through which they pass." *Appalachian Power*, 545 F.2d at 1377.

when the point source did not merely pass pollution from one body of navigable water into another); *see also Froebel v. Meyer*, 217 F.3d 928, 938 (7th Cir. 2000) (a regulated point source can be found where an artificial mechanism *first* introduces a pollutant); *cf. North Carolina v. F.E.R.C.*, 112 F.3d 1175, 1187 (D.C. Cir. 1997) (a withdrawal of water is not an addition for purposes of determining whether a discharge has occurred).¹⁹

The reason is simple. Pollutants that are added by the point source are amenable to end-of-the-pipe technology-based effluent limitations, and water quality-based requirements. The presence and quantity of such pollutants is readily ascertainable, because it is the point source itself that is creating or causing the pollutant to be introduced. This is not

¹⁹ The Eleventh Circuit also inappropriately relied upon *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1505-06 (11th Cir. 1985), *vacated on other grounds* 481 U.S. 1034 (1987), *reinstated in relevant part on remand*, 848 F.2d 1133 (11th Cir. 1988), a § 404 case, when reaching a different conclusion. Although NHA does not necessarily agree that cases involving the scope of regulated activities under the § 404 program are either applicable or appropriately decided, they nonetheless do not support the Eleventh Circuit's decision. *Cf., United States v. Sinclair Oil Co.*, 767 F. Supp. 200, 205 n.5 (D. Mont. 1990) (distinguishing the 404 and 402 programs). *M.C.C. of Florida*, for instance, involved the issue of whether the creation and subsequent redeposit of dredged material by tug boats (the point sources) on eel grass beds constituted an addition of dredged material triggering the CWA § 404 permitting system. This case and other § 404 cases simply indicate that § 301(a) can apply when a person affirmatively creates dredged or fill material. Dredged or fill material does not exist until it is created by a person who either removes it from somewhere or uses it as fill and then discharges it through some point source mechanism. *See Rybachek v. E.P.A.*, 904 F.2d 1276 (9th Cir. 1990) (the excavation of dirt and gravel from waterways, extraction of gold, and subsequent discharge of dirt and other non-gold material back to the same waterway constitutes an addition of a pollutant). Indeed, the § 404 cases, if anything, confirm the need for the point source to be responsible for adding or creating the "pollutant" (*e.g.*, dredged spoil).

true when the point source is simply passing along already polluted water. The presence or quantity of such “pollutants” can and does vary depending upon the actions of third parties, the climate, atmospheric deposition, land use practices, or sometimes the soils. Developing and implementing specific technology-based effluent limitations to achieve acceptable treatment levels would be untenable for activities that do not themselves create the waste or otherwise add pollutants from the outside world. These activities can neither control nor anticipate what pollutants might pass through their systems and at what levels.

Congress provided that it was the “national goal that the *discharge of pollutants* into the navigable waters be eliminated.” § 101(a)(1), 33 U.S.C. § 1251(a)(1) (emphasis added). Common sense dictates that Congress could not have contemplated that the “discharge of pollutants” would apply to activities that do not themselves create or add the pollutant from the outside world. Indeed, Congress in 1972 could not have anticipated that hydropower activities involving a point source would trigger the application of § 402, and the accompanying imposition of technology based effluent limitations by 1977 (Best Practicable Control Technology Currently Available—BPT) and 1983 (Best Available Technology Economically Achievable—BAT), where the point source is not itself responsible for adding the pollutant. Pub L. No. 92-500, § 2, 86 Stat. 816, 844-45. Even the Eleventh Circuit previously noted in a CWA case that “[o]ur jurisprudence has eschewed the rigid application of a law where doing so produces impossible, absurd, or unjust results.” *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1529 (11th Cir. 1996).

CONCLUSION

For the reasons set forth above, NHA requests that the Court grant NHA's Motion to File a Brief as *Amicus Curiae*. In addition, NHA respectfully requests that the Court reverse the Eleventh's Circuit decision in *Miccosukee* and hold that, under § 402 of the CWA, point sources that convey water containing pre-existing pollutants but do not themselves add pollutants from the outside world do not require an NPDES permit.

Respectfully submitted,

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